INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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# CERTIFICATE

**AHRON G. FRENKEL**

**v.**

**REPUBLIC OF CROATIA**

**(ICSID CASE NO. ARB/20/49)**

I hereby certify that the attached document is a true copy of the Tribunal's Award dated January 29, 2025, and the Dissenting Opinion of Prof. Stanimir Alexandrov.

Martina Polasek
Secretary-General

Washington, D.C., January 29, 2025

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**AHRON G. FRENKEL**

Claimant

and

**REPUBLIC OF CROATIA**

Respondent

**ICSID Case No. ARB/20/49**

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# AWARD

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***Members of the Tribunal***
Prof. Mónica Pinto, President
Prof. Stanimir A. Alexandrov, Arbitrator
Prof. Zachary Douglas KC, Arbitrator

***Secretary of the Tribunal***
Ms. Anna Holloway

*Date of dispatch to the Parties:* 29 January 2025

## REPRESENTATION OF THE PARTIES

*Representing Ahron G. Frenkel*:

Mr. Marc Joory
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Mr. Elliot Duplan
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*Representing the Republic of Croatia*:

Ms. Snježana Frković, Deputy General State Attorney
Ms. Danica Damjanović, Deputy General State Attorney
Ms. Kosjenka Krapać, Deputy Municipal State Attorney seconded to the State Attorney's Office
Republic of Croatia State Attorney's Office
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Mr. Charles Claypoole
Ms. Shreya Ramesh
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Hanefeld Rechtsanwälte
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20457 Hamburg
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## TABLE OF ABBREVIATIONS/DEFINED TERMS

| | |
|---|---|
| Arbitration Rules | ICSID Rules of Procedure for Arbitration Proceedings as of 10 April 2006 |
| BIT or Treaty | Agreement between the Government of the Republic of Croatia and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments, which entered into force on 18 July 2003 |
| C-[#] | Claimant's Exhibit |
| C's 16 February 2024 Submission, or C's First Submission | Claimant's submission on the impact of the *Elitech* Award on the present arbitration dated 16 February 2024 |
| C's 11 March 2024 Submission, or C's Second Submission | Claimant's comments on the Respondent's 16 February 2024 Submission dated 11 March 2024 |
| C's Cost Submission | Claimant's submission on costs dated 12 July 2024 |
| C's Memorial | Claimant's Memorial on the Merits dated 17 December 2021 |
| CL-[#] | Claimant's Legal Authority |
| *Elitech* | Elitech B.V., claimant in the *Elitech* Arbitration |
| *Elitech* Arbitration | Arbitration proceedings in *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia* (ICSID Case No. ARB/17/32) |
| *Elitech* Award | *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia* (ICSID Case No. ARB/17/32), Award dated 23 May 2023 |
| Hearing | Hearing on the Effect of *Elitech* Award held on 12 June 2024 |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965 |

| | |
|---|---|
| ICSID or the Centre | International Centre for Settlement of Investment Disputes |
| Project Companies | Elitech and Razvoj Golf |
| R-[#] | Respondent's Exhibit |
| R's 16 February 2024 Submission, or R's First Submission | Respondent's submission on the impact of the *Elitech* Award on the present arbitration dated 16 February 2024 |
| R's 11 March 2024 Submission, or R's Second Submission | Respondent's comments on the Claimant's 16 February 2024 Submission dated 11 March 2024 |
| R's Cost Submission | Respondent's submission on costs dated 12 July 2024 |
| Razvoj Golf | Razvoj Golf d.o.o., claimant in the *Elitech* Arbitration and wholly-owned Croatian subsidiary of Elitech |
| Request for Bifurcation | Respondent's Notice of Intended Objections and Request for Bifurcation filed on 28 January 2022 |
| RL-[#] | Respondent's Legal Authority |
| Transcript, [page:line] ([speaker]) | Transcript of the Hearing |
| Tribunal | Arbitral tribunal constituted on 21 July 2021 |

# I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Government of the Republic of Croatia and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments, which entered into force on 18 July 2003 (the "**BIT**" or "**Treaty**")[1] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The claimant is Mr. Ahron G. Frenkel ("**Mr. Frenkel**" or the "**Claimant**"), an individual having the nationality of the State of Israel ("**Israel**").

3. The respondent is the Republic of Croatia ("**Croatia**" or the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to the Claimant's endeavours to construct a golf course, hotel and associated amenities on Mt. Srđ in Dalmatia, Croatia, and the Claimant's allegations regarding the treatment by Croatia of the Claimant's alleged investment.

6. This Award deals with the impact of the "***Elitech* Arbitration**"[2] in the current proceedings initiated by Mr. Ahron G Frenkel against the Republic of Croatia, ICSID Case No. ARB/20/49.

## A. PROCEDURAL HISTORY

7. On 9 November 2020, ICSID received a request for arbitration of the same date from Mr. Frenkel against Croatia (the "**Request for Arbitration**"), together with Exhibits C-0001 through C-0011 and Legal Authorities CL-0001 through CL-0006.

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[1] Agreement between the Government of the Republic of Croatia and the Government of the State of Israel for the Reciprocal Promotion and Protection of Investments, which entered into force on 18 July 2003 ("**BIT**"), Exhibit **CL-0001**.

[2] *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/17/32.

8. On 16 November 2020, the ICSID Secretary-General registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

9. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.

10. On 17 March 2021, following his appointment by the Claimant, Professor Stanimir A. Alexandrov, a national of the Republic of Bulgaria, accepted his appointment as arbitrator.

11. On 11 May 2021, following his appointment by the Respondent, Professor Zachary Douglas KC, a national of the Commonwealth of Australia and the Swiss Confederation, accepted his appointment as arbitrator.

12. On 21 July 2021, following her appointment by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention, Professor Mónica Pinto, a national of the Argentine Republic, accepted her appointment.

13. Later on 21 July 2021, the ICSID Secretary-General, in accordance with Rule 6(1) of the 2006 ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Anna Holloway, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Tribunal.

14. On 31 August 2021, with the consent of the parties, Ms. Magdalena Bulit Goñi was appointed as Assistant to the President of the Tribunal.

15. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 6 September 2021 by video conference. The following persons attended:

| | |
|---|---|
| *Tribunal*: | |
| Prof. Mónica Pinto | President |
| Prof. Stanimir A. Alexandrov | Arbitrator |
| Prof. Zachary Douglas KC | Arbitrator |
| *ICSID Secretariat*: | |
| Ms. Anna Holloway | Secretary of the Tribunal |
| *Assistant to the President*: | |
| Ms. Magdalena Bulit Goñi | |
| *For the Claimant*: | |
| Counsel | |
| Mr. Noah Rubins KC | Freshfields Bruckhaus Deringer |
| Mr. Yuri Mantilla | Freshfields Bruckhaus Deringer |
| Mr. Gabriel Fusea | Freshfields Bruckhaus Deringer |
| Ms. Katherine Khan | Freshfields Bruckhaus Deringer |
| Party Representatives | |
| Mr. Mariusz Breś | |
| Mr. Ivan Kusalić | |
| *For the Respondent*: | |
| Counsel | |
| Dr. Sebastian Seelmann-Eggebert | Hanefeld Rechtsanwälte |
| Mr. Charles Claypoole | Latham & Watkins LLP |
| Ms. Shreya Ramesh | Latham & Watkins LLP |
| Ms. Lisa Hoops | Latham & Watkins LLP |

16. Following the first session, on 14 September 2021, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Paris, French Republic. Procedural Order No. 1 also sets out a proposed schedule for the merits phase of the proceedings.

17. In accordance with Procedural Order No. 1, on 17 December 2021, the Claimant filed a Memorial on the Merits (the "**Claimant's Memorial**"), together with Exhibits C-0012 through C-0257, Legal Authorities CL-0007 through CL-0095, Witness Statements of

Mr. Frenkel, Mr. Ivan Kusalić, and Mr. Stjepan Mesic, and an Expert Report of FTI (with Appendices 1 through 11 and Exhibits FTI-0001 through FTI-0188).

18. On 19 January 2022, the Respondent filed a request to suspend the proceedings on the basis that this case is in substance identical to the proceedings in the *Elitech* Arbitration. The Respondent noted that the proceedings in *Elitech* were almost complete, the issuance of an award was imminent, and the contents of that award would affect the preliminary objections that the Respondent intended to file in the present case. The Respondent, therefore, requested the suspension of the current proceedings until the *Elitech* award was rendered. The Respondent further requested an extension to file a request for bifurcation. Later on 19 January 2022, the Tribunal invited the Claimant to submit observations on both requests. On 20 January 2022, the Claimant submitted his observations on the deadline extension request and noted that he would need until 28 January 2022 to submit his views on the Respondent's request to suspend the proceedings.

19. On 21 January 2022, the Tribunal granted the Respondent until 28 January 2022 to file its request for bifurcation and confirmed its agreement for the Claimant to file his observations on the request to suspend the proceedings on that same date.

20. On 28 January 2022, the Respondent filed its Notice of Intended Objections and Request for Bifurcation, together with Exhibits R-0001 through R-0004 and Legal Authorities RL-0001 through RL-0041 (the "**Request for Bifurcation**"). In its Request, the Respondent "object[ed] to the Tribunal's jurisdiction and/or the admissibility of the Claimant's claims on four grounds."

21. Also on 28 January 2022, the Claimant filed observations on the Respondent's 19 January 2022 request to suspend the proceedings, together with Legal Authorities CL-0096 through CL-0101.

22. On 31 January 2022, the Tribunal invited the Respondent to comment on the Claimant's observations of 28 January 2022.

23. On 4 February 2022, the Claimant notified the Tribunal that the Parties were unable to reach an agreement regarding the procedural timetable to address the Request for

Bifurcation; the Claimant specifically maintained that rebuttal submissions were unnecessary. The Respondent submitted its responsive comments on the same date. Also on that date, the Tribunal set the procedural calendar for the pleadings on the Request for Bifurcation taking into account the Parties' positions.

24. On 7 February 2022, the Respondent filed a response to the Claimant's observations of 28 January 2022 on the request to suspend the proceedings, together with Exhibits R-0005 through R-0007 and Legal Authority RL-0042. Following receipt of the response, the Tribunal invited the Claimant to submit any final comments, which he did on 14 February 2022.

25. On 25 February 2022, ICSID notified the Tribunal and the Parties that Ms. Aïssatou Diop, ICSID Legal Counsel, would serve as the Secretary of the Tribunal during Ms. Holloway's extended leave.

26. Also on 25 February 2022, the Claimant filed observations on the Request for Bifurcation, together with Legal Authorities CL-0102 through CL-0137.

27. On 4 March 2022, the Respondent filed a reply on the Request for Bifurcation, together with Exhibits R-0008 through R-0011 and Legal Authorities RL-0043 through RL-0060.

28. On 7 March 2022, the Tribunal issued Procedural Order No. 2, denying the Respondent's 19 January 2022 request to suspend the proceeding. The Tribunal noted, however, that this decision did "not exclude the possibility for the Tribunal to consider the issue again at a later stage."

29. On 11 March 2022, the Claimant filed a rejoinder on the Request for Bifurcation, together with Legal Authorities CL-0138 through CL-0145.

30. On 26 April 2022, the Tribunal issued its Decision on the Respondent's Request for Bifurcation (the "**Decision on Bifurcation**"). The Tribunal decided that, in light of the Parties' "common position" that the substance of the *Elitech* Arbitration is identical to the present proceeding, it would be "prudent to have access to the award to be rendered in the *Elitech* case." The Tribunal found that it would be "inefficient to compel the Parties to

elaborate their positions … now given that they will need to evaluate the impact of the award in the *Elitech* case on the current arbitration." The Tribunal, therefore, did not order a formal suspension of the proceeding, but nonetheless decided to wait for the *Elitech* award before proceeding further. The Tribunal ordered the Parties to inform the Tribunal once the *Elitech* award was rendered and to submit their respective submissions on the impact of the award on the present proceedings within 60 days of the dispatch of the award.

31. On 9 May 2022, the Tribunal re-issued the Decision on Bifurcation, correcting clerical/formatting issues within the document.

32. On 28 September 2022, the Claimant filed a request for provisional measures pertaining to certain actions said to have been taken by the Respondent in relation to Razvoj Golf (the "**Interim Relief Request**"), together with Exhibits C-0258 through C-0275 and Legal Authorities CL-0146 through CL-0164.

33. On 1 October 2022, the Tribunal invited the Respondent to submit observations on the Interim Relief Request. On the same date, Respondent requested an extension of the date set by the Tribunal to "enable the Respondent properly investigate and brief the Tribunal on the facts underlying the Claimant's [Request]." On 3 October 2022, the Tribunal approved the request for extension.

34. On 20 October 2022, ICSID notified the Tribunal and the Parties that Ms. Anna Holloway, ICSID Senior Legal Counsel, would resume her role as Secretary of the Tribunal.

35. On 21 October 2022, the Respondent filed observations on the Interim Relief Request, together with Exhibits R-0012 through R-0029 and Legal Authorities RL-0061 through RL-0086.

36. On 24 October 2022, the Tribunal invited the Parties to exchange a second round of submissions on the Interim Relief Request and set a briefing schedule. On 28 October 2022, the Claimant informed the Tribunal that the Parties had agreed to extend the deadlines set by the Tribunal. The Tribunal approved these on 29 October 2022.

37. On 1 November 2022, the Claimant filed a response to the Respondent's observations of 21 October 2022, together with Exhibits C-0276 through C-0290 and Legal Authorities CL-0165 through CL-0172.

38. On 11 November 2022, the Respondent filed further observations on the Interim Relief Request, together with Exhibits R-0030 through R-0032 and Legal Authorities RL-0087 through RL-0091.

39. On 28 November 2022, the Tribunal issued Procedural Order No. 3 dismissing the Interim Relief Request. The Tribunal concluded that there were insufficient grounds for granting the interim relief noting that the Claimant had not adequately shown "urgency" or the "imminent aggravation of the dispute."

40. On 25 May 2023, the Respondent informed the Tribunal that the tribunal in *Elitech* had rendered an award on 23 May 2022 (the "***Elitech* Award**")[3] and requested a short extension for the Parties' comments as ordered by the Tribunal in its Decision on Bifurcation. The Tribunal approved the requested extension on the same date.

41. On 12 July 2023, the Respondent notified the Tribunal of the Parties' agreement to extend the deadline for the Parties' submissions on the impact of *Elitech* Award. The Tribunal approved the extension on 13 July 2023. On 19 September 2023, the Parties requested a further extension, which was granted by the Tribunal on 21 September 2023.

42. On 16 November 2023, the Claimant informed the Tribunal that he had retained new counsel to represent him in the arbitration and requested a further extension to file the Parties' submissions on the impact of *Elitech* Award. On the same date, the Tribunal invited the Respondent's comments on the extension request, which it submitted on 17 November 2023. Therein, the Respondent first objected "very strongly to Mr. Frenkel's decision to change counsel;" and second, objected to the requested extension, noting that

[3] *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/17/32, Award, 23 May 2023 ("***Elitech* Award**"), Exhibit **C-0291**.

the submission should be of limited scope and, therefore, a three-month extension was "clearly excessive." The Respondent, however, proposed a one-month extension.

43. On 20 November 2023, the Claimant responded to the Respondent's comments of 17 November 2023, noting that the Respondent's objection to Mr. Frenkel's decision to change his counsel was "ill-founded" as the Claimant has the "right to freely choose counsel." The Claimant further stated that a three-month extension was needed for new counsel to "review and study" the facts of the case and the procedural history. Finally, the Claimant noted that the Respondent had previously requested a suspension of the proceedings pending the *Elitech* Award and, therefore, the Respondent did not consider the case "to be of any particular urgency and would certainly not suffer any prejudice" as a result of a three-month extension.

44. Later on 20 November 2023, the Respondent stated that it did not have a further response to the Claimant's "unsolicited" submission.

45. Following the Parties' exchanges, on 20 November 2023, the Tribunal granted the Claimant's requested three-month extension.

46. On 16 February 2024, each Party simultaneously filed its respective submissions on the impact of the *Elitech* Award on the present arbitration (the "**Claimant's 16 February 2024 Submission**," or the "**Claimant's First Submission**;" and the "**Respondent's 16 February 2024 Submission**," or the "**Respondent's First Submission**"). The Claimant also filed Exhibits C-0291 through C-0305 (including the *Elitech* Award as Exhibit C-0291) and Legal Authorities CL-0173 through CL-0192 and the Respondent filed Exhibits R-0033 and R-0034 and Legal Authorities RL-0092 through RL-0123.

47. On 19 February 2024, the Tribunal invited the Parties to submit brief comments on the other Party's submission. On 23 February 2024, the Claimant requested a short extension, noting the Respondent's agreement to the request; the Tribunal approved the extension on 26 February 2024.

48. On 11 March 2024, the Parties simultaneously submitted their respective comments on the other Party's submission of 16 February 2024 (the "**Claimant's 11 March 2024**

**Submission**," or the "**Claimant's Second Submission**;" and the "**Respondent's 11 March 2024 Submission**," or the "**Respondent's Second Submission**"). The Claimant also filed Legal Authorities CL-0193 through CL-0201 and the Respondent filed Exhibits R-0035 through R-0044 and Legal Authorities RL-0124 through RL-0129.

49. On 15 March 2024, the Tribunal inquired with the Parties regarding their availability for a one-day hearing on the issue of the impact of *Elitech* Award on these proceedings. On 18 March 2024, the Claimant provided his availability for a hearing and also sought clarification on the scope of the hearing, *i.e.*, if it was "limited to the impact of *Elitech* Award or … will [it] encompass also Croatia's request for dismissal on jurisdictional and/or admissibility grounds" as put forth by the Respondent in its Request for Bifurcation.

50. On 29 March 2024, the Tribunal provided further availability for a hearing and confirmed that the scope would be limited to the impact of *Elitech* Award on these proceedings, including addressing the Respondent's arguments on "jurisdiction and admissibility only as they relate to the *Elitech* Award." On 2 April 2024, the Respondent confirmed its availability for a hearing, and, on 3 April 2024, the Claimant also confirmed his availability.

51. On 20 May 2024, the Tribunal issued Procedural Order No. 4 concerning the organization of the upcoming hearing.

52. On 5 June 2024, the Claimant requested leave to submit new documents into the record. On the same date, the Tribunal invited Respondent's comments on the request. On 7 June 2024, the Respondent submitted its objection to the Claimant's request arguing that the request was belated, the documents were "irrelevant and immaterial to the issues to be determined at the Hearing," and introduction of those documents would cause prejudice to the Respondent.

53. On 10 June 2024, the Tribunal rejected the Claimant's 5 June 2024 request, noting that there was no reason for the Claimant to wait so long to submit those documents into the record and such late submission would be prejudicial to the Respondent.

54. A hearing on the impact of the *Elitech* Award on these proceedings was held on 12 June 2024 by video conference (the "**Hearing**"). The following persons were present at the Hearing:

*Tribunal*:

| | |
|---|---|
| Prof. Mónica Pinto | President |
| Prof. Stanimir A. Alexandrov | Arbitrator |
| Prof. Zachary Douglas KC | Arbitrator |

*ICSID Secretariat*:

| | |
|---|---|
| Ms. Anna Holloway | Secretary of the Tribunal |

*For the Claimant*:

| | |
|---|---|
| Counsel | |
| Dr. Mathieu Granges | Python Avocats |
| Mr. Marc Joory | Python Avocats |
| Dr. Homayoon Arfazadeh | Python Avocats |
| Ms. Shauna Canale | Python Avocats |
| Mr. Elliott Duplan | Python Avocats |
| Party Representatives | |
| Mr. Ahron G. Frenkel | |
| Mr. Mariusz Breś | |

*For the Respondent*:

| | |
|---|---|
| Counsel | |
| Mr. Charles Claypoole | Latham & Watkins LLP |
| Dr. Sebastian Seelmann-Eggebert | Hanefeld Rechtsanwälte |
| Ms. Shreya Ramesh | Latham & Watkins LLP |
| Party Representatives | |
| Ms. Snježana Frković | State Attorney's Office, Republic of Croatia |
| Ms. Danica Damjanović | State Attorney's Office, Republic of Croatia |
| Ms. Kosjenka Krapać | State Attorney's Office, Republic of Croatia |
| Ms. Željka Šaškor | State Attorney's Office, Republic of Croatia |
| Ms. Zvjezdana Verk | State Attorney's Office, Republic of Croatia |
| Ms. Jadranka Osrečak | State Attorney's Office, Republic of Croatia |
| Ms. Tanja Šušak | State Attorney's Office, Republic of Croatia |
| Ms. Sanja Dumbović-Gajić | State Attorney's Office, Republic of Croatia |
| Ms. Ružica Grbavac Galić | State Attorney's Office, Republic of Croatia |
| Mr. Jozo Jurčević | State Attorney's Office, Republic of Croatia |

*Court Reporter*:

Ms. Marjorie Peters

*Interpreters*:

Mr. Mladen Stanicic
Ms. Nuša Torbica
Ms. Vlatka Mott

55. On 18 June 2024, ICSID informed the Parties that the President's Assistant, Ms. Magdalena Bulit Goñi, had resigned.

56. On 12 July 2024, the Parties simultaneously filed their submissions on costs (the **Claimant's Cost Submission**" and "**Respondent's Costs Submission**").

57. The proceedings were closed on 29 January 2025.

## II. FACTUAL BACKGROUND

58. The Claimant presents the factual background to the dispute in the following terms in its Request for Arbitration:

> *This dispute arises from Mr Frenkel's investment in a golf course and hotel and associated amenities atop Mt Srđ in Dalmatia, Croatia (the Golf Park or the Project). Starting in 1999, Croatia invited foreign investment in the golf sector. As a result of Croatia's inducements to invest, and on the back of representations made at the highest levels of government that the Project would be protected, Mr Frenkel effected a substantial investment in the development of the Golf Park. The Project was to be the first of its kind in the region, boosting Croatia's burgeoning tourism sector and bringing hundreds of millions of dollars in profits.*
>
> *Croatia subsequently obstructed the implementation of the Golf Park. The Project was opposed by nationalist and populist political parties, affiliated lobbying groups, and ultimately by senior officials within the Croatian government. A number of measures were taken against Mr. Frenkel, his companies, and the Golf Park, including the revocation of lawfully obtained permits and approvals, the refusal to process what should have been routine administrative applications, the refusal to appeal decisions granting Project land to a third party, and arbitrary court decisions issued under the shadow of political interference. These measures, taken together, have destroyed the Project's value and prospects.*[4]

[4] Request for Arbitration, paras. 2-3.

59. In his Memorial, the Claimant submits that:

> *Croatia induced the Claimant to invest with specific and unequivocal promises of support. What it delivered was the opposite: an investment environment that was arbitrary, opaque, unpredictable, and discriminatory. When one branch of the government showed favor to the Project, another attacked it. Croatia strangled the Claimant's investment with bureaucracy and provided no effective means of recourse. By the end of 2017, the actions of the Croatian State at central, county, and city level had destroyed the Project as a matter of economic and practical reality. The Treaty and international law require compensation for these losses, and the Claimant now seeks full reparation for his losses.*[5]

60. Mr. Frenkel and his companies raised their grievances against Croatia before this ICSID Case No. ARB/20/49 had commenced. In fact, in his Request for Arbitration, the Claimant explains:

> *The Project Companies notified Croatia of their intent to submit a dispute to arbitration (the Elitech Arbitration) on 17 February 2017. The Elitech Arbitration commenced on 25 August 2017 when the Project Companies filed their Request for Arbitration under the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Croatia and the Kingdom of the Netherlands (the* ***Croatia-Netherlands BIT***[6]*).*[7]

61. According to Mr. Frenkel, as a result of the issuance of the *Slovak Republic v. Achmea BV* judgment by the Court of Justice of the European Union, and the reliance placed on that decision by the Respondent in support of one of the jurisdictional objections raised in the *Elitech* Arbitration, he was advised that such a jurisdictional objection (and "the related question of enforcement within the EU") would "be excluded from discussion were he the claimant." He explains that he tried to substitute himself for Elitech B.V. ("**Elitech**"), and its wholly-owned Croatian subsidiary, Razvoj Golf d.o.o. ("**Razvoj Golf**"), the claimants

[5] C's Memorial, para. 8.

[6] Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Croatia and the Kingdom of the Netherlands, which entered in force on 1 June 1999 ("**Croatia-Netherlands BIT**"), Exhibit **CL-0184**.

[7] Request for Arbitration, para. 8.

in the *Elitech* Arbitration (the "**Project Companies**") but he alleges that was not possible due to Croatia's opposition.[8]

62. Moreover, on 5 May 2020, both Croatia and the Netherlands signed the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, which records Croatia's agreement with the Netherlands *(inter alia*) to terminate the Croatia-Netherlands BIT. According to Mr. Frenkel, "Croatia's assent to the Termination Agreement indicates that it will never willingly pay any compensation to the Project Companies ordered by the Tribunal in the *Elitech* Arbitration."[9] Having failed to receive Croatia's agreement to substitute himself for his companies in the *Elitech* Arbitration once again, "Mr. Frenkel has thus been compelled to launch the present arbitration, the substance of which is identical to the *Elitech* Arbitration."[10]

63. The Respondent challenges the jurisdiction of this Tribunal and/or the admissibility of the claims from the outset on the grounds that "the Claimant is prosecuting the same dispute in the parallel *Elitech* Arbitration."[11] Croatia underlines that the Claimant has admitted that "the substance of [the present arbitration] is identical to the *Elitech* Arbitration."[12]

64. In its Decision on Bifurcation, the Tribunal noted the statements by the Parties according to which "the substance [of the present arbitration] is identical to the *Elitech* arbitration."[13] In light of this common position, the Tribunal stated that it

> *consider*[ed] *that it would be prudent to have access to the award to be rendered in the Elitech case – Elitech B.V. and Razvoj Golf D.O.O. v Republic of Croatia (ICSID Case No. ARB/17/32) – before ruling on the Respondent's preliminary objections and/or before the Parties engage in further briefing on the merits of this case. The Tribunal consider*[ed] *that it would be inefficient to compel the Parties to elaborate their positions further now given that they will*

[8] Request for Arbitration, paras. 7, 9; *Slowakische Republik v. Achmea BV*, CJEU Case C-284/16, Judgment, 6 March 2018, Exhibit **CL-0003.**

[9] Request for Arbitration, para. 10.

[10] Request for Arbitration, para. 11.

[11] Request for Bifurcation, para. 5.

[12] Request for Bifurcation, para. 6; Request for Arbitration, para. 11.

[13] Decision on Bifurcation, para. 20, referencing Request for Bifurcation, para. 6 and Request for Arbitration, para. 11.

> *need to evaluate the impact of the award in the Elitech case on the current arbitration.*[14]

## III. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

65. As regards the issues dealt with at the Hearing, the Respondent has requested, in its 16 February 2024 submission, the following relief:

> *For all the foregoing reasons, the Respondent respectfully requests that the Tribunal:*
>
> *a. decline jurisdiction over the Claimant's claims in this arbitration or, alternatively, declare them inadmissible;*
>
> *b. in the event the Tribunal requires any further submissions from the parties, bifurcate these proceedings and determine the Respondent's objections to jurisdiction and/or admissibility that are based on the Elitech Award in a preliminary phase, and provide for a timetable for such bifurcated proceeding; and*
>
> *c. order the Claimant to bear the costs of this arbitration, including all fees and expenses of ICSID and the Tribunal as well as the Respondent's costs (including but not limited to its legal fees and expenses), with interest, payable forthwith.*[15]

66. In its 11 March 2024 submission, the Respondent confirmed its request for relief as follows:

> *The Respondent accordingly maintains its request for the reliefs sought at paragraph 106 of the Respondent's* [16 February 2024] *Submission. In addition, the Respondent requests the Tribunal to dismiss the Claimant's request for leave to file a "supplementary Statement of Claim updating its Memorial and amending its monetary prayers for relief of 17 December 2021."*[16]

[14] Decision on Bifurcation, para. 78.

[15] R's 16 February 2024 Submission, para. 106.

[16] R's 11 March 2024 Submission, para. 67.

67. For his part, the Claimant has requested, in his 16 February 2024 submission, the following relief:

> *On the basis of the foregoing, the Claimant respectfully requests the Tribunal to:*
>
> *1. RESUME the present proceedings;*
>
> *2. DISMISS Croatia's application for bifurcation in full;*
>
> *3. GRANT Claimant leave to file a supplementary Statement of Claim updating its Memorial and amending its monetary prayers for relief of 17 December 2021; and*
>
> *4. SCHEDULE a Case Management Hearing.*[17]

68. In his 11 March 2024 submission, the Claimant confirmed his request for relief as follows:

> *On the basis of the foregoing, the Claimant persists in its Prayers of relief stated in his Submission of 16 Februa*[r]*y 2024 at para. 104 and 105, and in the unlikely event that the Arbitral Tribunal decides to render an Award on jurisdiction or admissibility, Claimant hereby expressly requests that an oral hearing be held prior to rendering any such award.*[18]

## IV. JURISDICTION AND ADMISSIBILITY

69. In its Decision on Bifurcation, the Tribunal decided to await the issuance of the *Elitech* Award before requesting further pleadings from the Parties and anticipated granting to the Parties "an opportunity to comment upon the impact of the award in the *Elitech* case upon the present case" thereafter.[19] The Tribunal requested "submissions on all the impacts of the award in case ARB/17/32 [*i.e.*, the *Elitech* Award] on the current case."[20]

70. The *Elitech* Award was rendered on 23 May 2023. On 29 March 2024, the Tribunal confirmed that the scope of the hearing that followed the Parties' submissions on that issue

[17] C's 16 February 2024 Submission, para. 104.

[18] C's 11 March 2024 Submission, para. 55.

[19] Decision on Bifurcation, para. 79.

[20] Decision on Bifurcation, para. 96(b).

was limited to only the impact of the *Elitech* Award on these proceedings, including addressing the Respondent's arguments on "jurisdiction and admissibility only as they relate to the *Elitech* Award."[21] The majority of the Tribunal ("**the Majority**") has determined that the Respondent's objection to the admissibility of the claims by reference to the *Elitech* Award should be upheld and this Award is limited to an assessment of this objection. This objection was originally pleaded as an objection to parallel proceedings ("**Respondent's Objection**") and as one of the four objections that the Respondent had sought to have bifurcated from the merits of the dispute (albeit that the Respondent has updated the grounds of its Objection following the issuance of the *Elitech* Award).

71. For the reasons that will be given in Section IV.B of this Award, the Majority considers that the Respondent's Objection relates to admissibility of the claims rather than jurisdiction. That raises the question whether the Tribunal can be satisfied that it has sufficient jurisdiction to render a decision on an objection to the admissibility of the claims at this stage.

72. The Respondent previously raised three other objections for which it had initially sought bifurcation: (1) the Claimant has failed to demonstrate that he made an investment in Croatia for the purposes of Article 25 of the ICSID Convention or Article 1(1) of the Treaty; (2) the alleged investment was tainted by corruption; and (3) the Tribunal has no jurisdiction over the umbrella clause claims.[22]

73. The Respondent's third objection relates to a particular claim of the Claimant rather than the whole dispute and, even if it were to be accepted, it would not deprive the Tribunal of jurisdiction to determine the objection relating to parallel proceedings. The Respondent's second objection is, in the eyes of the Majority, an objection relating to admissibility rather than jurisdiction and thus also cannot affect the Tribunal's jurisdiction. The Respondent's first objection is potentially relevant to the Tribunal's jurisdiction but the Tribunal will assume, *pro tem* and in the Claimant's favour, that it has made a covered investment, which is reasonable given that the *Elitech* tribunal came to that conclusion after an exhaustive

[21] Email from the Secretary of the Tribunal the Parties dated 29 March 2024.

[22] *See* Request for Bifurcation, Section II.

analysis of the evidential record.[23] Finally, in the Majority of the Tribunal's estimation, the Respondent would be estopped from simultaneously invoking the preclusive effect of the *Elitech* Award in respect of issues decided against the claimants in the *Elitech* Arbitration, and at the same time denying the preclusive effect of the *Elitech* tribunal's finding on the existence of a covered investment.

## A. THE PARTIES' POSITIONS ON THE PARALLEL PROCEEDINGS OBJECTION

### (1) The Respondent's Position

74. The Respondent states that the *Elitech* Award is final and binding on the Parties because neither a request for interpretation nor a request for annulment has been submitted.[24] At the same time, Croatia recalls that, in the Decision on Bifurcation in the present case, the Tribunal had taken note of the statements by the Parties according to which "the substance [of the present arbitration] is identical to that of the *Elitech* Arbitration."[25] Finally, the Respondent submits, the Claimant's attempt to re-litigate these claims in a second arbitration is an abuse of process.[26]

75. In its Second Submission, the Respondent highlights what it characterizes as the "opportunistic nature of the Claimant's insistence on continuing this arbitration despite the *Elitech* Award."[27] At the Hearing, Counsel for the Respondent reiterated this point, stressing that "it appears that the Claimant's attempt to invoke new facts is merely an attempt to create an artificial basis to relitigate a dispute that was decided by the *Elitech* tribunal, and that, we submit, is improper and abusive."[28]

76. The Respondent's main contention is that the *Elitech* Award is *res judicata* and has a preclusive and conclusive effect on the Claimant's identical claims in these proceedings. The Respondent consequently submits that the Claimant's claims in these proceedings should be dismissed for lack of jurisdiction and/or as inadmissible. In the alternative, the

[23] *Elitech* Award, Exhibit **C-0291**, paras. 253 *et seq*.
[24] R's 16 February 2024 Submission, para. 2.
[25] R's 16 February 2024 Submission, para. 4 and fn. 5, citing Decision on Bifurcation, para. 94.
[26] R's 16 February 2024 Submission, para. 6.
[27] R's 11 March 2024 Submission, para. 2.
[28] Transcript, 52:13-17 (Mr. Claypoole).

Respondent submits that the Claimant is precluded by the doctrine of issue estoppel from re-litigating the matters distinctly put in issue before and finally determined by the *Elitech* tribunal.[29] Finally, the Respondent asserts that the Claimant's pursuit of its claim through these proceedings is abusive.[30] The Respondent's specific arguments on these points are summarized below.

### *a. Res judicata*

77. In its First Submission, the Respondent argues that the Claimant's claims are barred by the doctrine of *res judicata*, a general principle of international law, widely applied in international arbitration. It finds support for its argument in caselaw including Judge Anzilotti's dissenting opinion in the *Chorzów Factory Case*, the decision in the *Trail Smelter Case*, as well as jurisprudence of the Permanent Court of International Justice ("**PCIJ**"), the International Court of Justice ("**ICJ**") and other international tribunals.[31]

78. Croatia argues that the claims in this proceeding satisfy the triple identity test, namely, that the claims have the same parties as in *Elitech (personae*), involve the same object/seek the same relief (*petitum*), and invoke the same cause of action/legal grounds (*causa petendi*). These requirements are set out in the Dissenting Opinion by Judge Anzilotti in the *Chorzów Factory Case*[32] as well as in many arbitration awards.[33]

#### **(i) Identity of *personae***

79. First, the Respondent submits that there is identity of *personae* between the Claimant in the present case and the *Elitech* claimants. The test requires that a party to the subsequent

[29] R's 16 February 2024 Submission, para. 29.

[30] R's 16 February 2024 Submission, paras. 87 *et seq*.

[31] R's 16 February 2024 Submission, paras. 31-35, referencing, *inter alia*, *The Factory at Chorzów*, Interpretation of Judgments Nos. 7 and 8, Permanent Court of International Justice, Dissenting Opinion of Judge Anzilotti, 16 December 1927 ("***Chorzów* Dissenting Opinion**"), Exhibit **RL-0098**, p. 23 and *Trail Smelter Case*, Award, 16 April 1938, Exhibit **RL-0099**, p. 1941.

[32] R's 16 February 2024 Submission, para. 36; *Chorzów* Dissenting Opinion, Exhibit **RL-0098**, p. 23.

[33] R's 16 February 2024 Submission, para. 37; *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014 ("***Apotex III***"), Exhibit **RL-0112**, para. 7.13; *China Navigation Co. Ltd (Great Britain) v. United States of America (Newchwang Case),* British-US Claims Tribunal, Award, 9 December 1921 ("*Newchwang*"), Exhibit **RL-0113**, p. 65 ("It is a well-established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue.").

proceedings should either be a party to the prior decision or share a privy of interest with a party to the prior decision, as required by arbitral jurisprudence.[34]

80. In regard to the second of these possibilities, the Respondent explains that numerous arbitral tribunals and commentators have confirmed that entities within a corporate chain, such as majority shareholders and subsidiaries of corporate entities, are privies of one another for purposes of *res judicata*.[35] Following the reasoning of the *Ampal* tribunal, the Respondent explains:

> *The privity of interest between shareholders and an investment company is the basis upon which shareholders with a different nationality than that of an investment company pursue direct claims against the host state under an investment treaty for a loss sustained by the investment company's investment. The necessary corollary, recognised by the Ampal tribunal, is that the investor or shareholder must be treated as a privy of the investment company for the purposes of res judicata, failing which the investor would be able, wrongly, to take advantage of the same investment treaty, by benefiting from a successful claim by their investment company, while avoiding the burden of being bound by any adverse findings arising out of a claim on the same facts.*[36]

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[34] R's 16 February 2024 Submission, para.40; *Ampal-American Israel Corp. and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017 ("***Ampal v. Egypt***"), Exhibit **RL-0107**, para. 261; C. McLachlan, L. Shore and M. Weiniger, "Chapter 4: Parallel Proceedings," in *International Investment Arbitration* (2017), Exhibit **RL-0115**, para. 4.189.

[35] R's 16 February 2024 Submission, para. 41, citing, for example, *Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017 ("***Orascom v. Algeria***"), Exhibit **RL-0026**, para. 546; *Ampal v. Egypt*, Exhibit **RL-0107**, para. 261; *Apotex III*, Exhibit **RL-0112**, para. 7.40; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, ("***Grynberg v. Grenada***"), Exhibit **RL-0116**, para. 7.1.5; C. McLachlan, L. Shore and M. Weiniger, "Chapter 4: Parallel Proceedings," in *International Investment Arbitration* (2017), Exhibit **RL-0115**, para. 4.189; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), 20 March 2017, Exhibit **RL-0121**, para. 167.

[36] R's 16 February 2024 Submission, para. 42, citing *Ampal v. Egypt*, Exhibit **RL-0107**, para. 260:

> *One of the consequences of that is that the investor/shareholder is treated as a privy to the investment company for the purposes of the rule of res judicata. Otherwise the investor/shareholder would be able to approbate and reprobate from the same investment treaty. He would take the benefit of an extended right of direct action—looking through the investment company at the economic effect of the host State's actions directly upon his shareholding—which would not found the basis of a claim under customary international law. But he would not bear the burden of being bound by any finding arising out of a claim by the investment company itself on the same facts.*

81. The Respondent contends that the reasoning set out in the decisions on which it relies applies in the present context. Even though the claimants in the *Elitech* Arbitration are distinct legal entities, the Claimant's claims in this arbitration rest entirely on (i) the Claimant's assertion that he owns a 100% shareholding in Elitech and Razvoj Golf, and, by extension, (ii) the (alleged) investments the Claimant owns "through the Project Companies."[37] Moreover, in the *Elitech* Arbitration, "the Claimant testified that he was the sole beneficial owner of the *Elitech* claimants."[38]

82. The Respondent contends that there are numerous other factors which confirm that the Claimant is a privy of the *Elitech* claimants, including because the Claimant had full conduct of the prosecution of the *Elitech* Arbitration, was represented in the *Elitech* Arbitration by the same counsel (Freshfields) who commenced this arbitration, and was one of two main witnesses who testified on behalf of the *Elitech* claimants.[39]

83. The Respondent also contends that "[l]ike the *Grynberg* and *Apotex* claimants, the Claimant's claims in these proceedings derive from the alleged diminution in the value of the Claimant's shares following the purported harm suffered by the *Elitech* claimants as a result of the Respondent's allegedly unlawful conduct."[40] Croatia concludes that "[i]n light of the above, it is clear that the Claimant is a privy of Elitech and Razvoj Golf and must be bound by the *Elitech* tribunal's determination of the issues in dispute in that arbitration."[41]

#### (ii) *Petitum* / object of claims

84. Second, the Respondent submits that the *petitum* or object of the *Elitech* claimants' claims and the Claimant's claims in this arbitration are identical. Croatia says that in the cooling-off period prior to commencing this arbitration, the Claimant repeatedly proposed that he would substitute himself for the *Elitech* claimants in the *Elitech* Arbitration. It is therefore

[37] R's 16 February 2024 Submission, paras. 45-46. As to the "(alleged)," it should be noted that the Respondent also challenged this Tribunal's jurisdiction on the grounds that Mr. Frenkel does not have a protected investment: *see above*, paragraph 69.

[38] R's 16 February 2024 Submission, para. 48; *Elitech* Arbitration, Hearing Transcript, Day 1: 4 October 2022, Exhibit **R-0034**, p. 173, lines 7-12.

[39] R's 16 February 2024 Submission, para. 49.

[40] R's 16 February 2024 Submission, para. 50.

[41] R's 16 February 2024 Submission, para. 51.

evident that the Claimant himself considered that the object or relief sought in the *Elitech* Arbitration is identical to the relief he would seek in these proceedings.[42] Moreover, "as the comparison at Exhibit R-0001 shows, the Memorial submitted by the Claimant is a near-verbatim copy of the *Elitech* claimants' Memorial (save for minor differences which arise because the Claimant's claim derives from the *Elitech* claimants and is based on the same protections contained in a different treaty), and the claims made in these proceedings are substantively identical to the *Elitech* claimants' claims."[43] (Exhibit R-0001 is a compare-view document prepared in Word, comparing the text of the memorials in each of the two proceedings.)

#### (iii) *Causa petendi* / legal grounds

85. Third, the Respondent submits that the *causa petendi* or legal grounds advanced in the *Elitech* Arbitration and the present proceedings are identical: "Although the *Elitech* arbitration was brought under the Croatia-Netherlands BIT and the present arbitration has been brought under the Croatia-Israel BIT, the treaty provisions relied on by the *Elitech* claimants and Claimant in the two bilateral investment treaties contain substantively identical legal protections."[44]

86. Specifically, the Respondent explains that the Memorials in both proceedings are almost identical so that "it can make no relevant difference that the substantively identical protections are contained in two bilateral instruments rather than in one multilateral treaty."[45] Also, "[a] comparison of the provisions of the Croatia-Netherlands BIT and the Croatia-Israel BIT containing investment treaty standards relating to fair and equitable treatment, the most-favoured nation treatment and expropriation confirms that the protections available to the *Elitech* claimants and the Claimant are substantively identical."[46]

[42] R's 16 February 2024 Submission, para. 53.
[43] R's 16 February 2024 Submission, para. 54.
[44] R's 16 February 2024 Submission, para. 60.
[45] R's 16 February 2024 Submission, para. 60.
[46] R's 16 February 2024 Submission, para. 61.

### (iv) Effect of satisfaction of triple identity test

87. The Respondent, then, concludes that, with the triple identity test satisfied, the *Elitech* award is conclusive and preclusive of the Claimant's claims in this arbitration. Croatia continues saying that the "findings of fact and legal reasoning based on which the *Elitech* tribunal dismissed the claims in that arbitration are therefore necessary to give meaning and effect to the operative part of the *Elitech* Award. […] Accordingly, the Respondent submits that paragraph 690 of the *Elitech* Award, together with the *Elitech* tribunal's underlying factual findings and reasoning, constitute *res judicata* and precludes the Claimant from pursuing this arbitration."[47] Croatia also explains why the additional considerations for *res judicata* identified by the International Law Association are also satisfied here (because the *Elitech* Award is now final and binding and the two proceedings derive from the same legal order).[48]

88. In its Second Submission, Croatia challenges the Claimant's arguments against the triple identity in the instant case. Putting aside the Claimant's arguments on the lack of identity regarding *personae*, which the Respondent confronts with a long explanation of acts performed by Mr. Frenkel in the litigation initiated by *Elitech*, Croatia alleges that "the reliefs sought by the Claimant and the *Elitech* claimants are identical […]. The Claimant does not specifically address the identical nature of the reliefs sought in the two proceedings (i.e., the second prong of the triple identity test), save to aver that the relief sought in the present arbitration is based on (i) different legal grounds and (ii) a different factual setting." The Respondent submits that "the Claimant's request to amend his Memorial and the quantum of damages claimed appears to be a transparent attempt to avoid the obvious conclusion that in both cases the respective claimants are requesting damages based on the value of the same project."[49]

[47] R's 16 February 2024 Submission, paras. 67-68.

[48] R's 16 February 2024 Submission, paras. 69-70; International Law Association, Resolution No. 1/2006, Annex 2, "Recommendations on Res Judicata and Arbitration," Recommendation No. 3, 4 June 2006, Exhibit **RL-0117**.

[49] R's 11 March 2024 Submission, para. 21.

### *b. Estoppel*

89. The Respondent also advances an argument grounded in estoppel.

90. In its First Submission, the Respondent submits that the "principle of issue estoppel is a general principle of law that precludes the Claimant from relitigating findings concerning a right, question or fact that was distinctly put in issue and determined by the *Elitech* tribunal."[50] To that end, the Respondent quotes *Grynberg v. Grenada*, in which the tribunal relied on a US Supreme Court judgment, *Southern Pacific Railroad Co. v. United States*, in stating:

> *As the United States Supreme Court says in Southern Pacific Railroad Co v United States, 168U.S.1, 48-49 (1897), "**The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established** so long as the judgment in the first suit remains unmodified." **Here, Respondent does not seek to argue that the Prior Tribunal determined the Treaty questions that Claimants now raise, but rather that its findings on a series of rights, questions and fact, bind this Tribunal** and that these findings must apply in the assessment of whether Claimants['] present Treaty claims are "manifestly without legal merit."*[51]

91. The Respondent points out that the *Grynberg* tribunal applied the test articulated in *Southern Pacific Railroad Co v. United States*; it considered whether a question concerning a right, question or fact was, in a prior proceeding: (a) distinctly put in issue; (b) actually decided by a court or tribunal; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal. According to the Respondent, the

[50] R's 16 February 2024 Submission, paras. 71-73 (subheading), and 73, citing *Company General of the Orinoco Case*, French-Venezuelan Mixed Claims Commission, Award, 31 July 1905 ("***Orinoco***"), Exhibit **RL-0118**, pp. 276-278; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, 10 May 1988 ("***Amco v. Indonesia***"), Exhibit **RL-0096**, para. 30; *Grynberg v. Grenada*, Exhibit **RL-0116**, paras. 4.6.5-4.6.6, 7.1.2.

[51] R's 16 February 2024 Submission, para. 75, citing *Grynberg v. Grenada*, Exhibit **RL-0116**, para. 7.1.3 [emphasis added by the Respondent].

*Grynberg* tribunal dismissed the claims in that case on the basis that it could not revisit the findings of fact and law that were necessary to the determination of, and determined in, the prior arbitration.[52]

92. The Respondent underlines that the *Grynberg* tribunal was clear that the doctrine of collateral (or issue) estoppel does not require the parties in the two proceedings to be identical: on the contrary, in the *Grynberg* tribunal's view, requiring that would be to confuse claim preclusion with issue preclusion.[53]

93. Croatia submits that the three requirements to apply the doctrine of issue estoppel are satisfied in the present case because "each of the questions in dispute in these proceedings (a) were distinctly put in issue in the *Elitech* arbitration, (b) were decided by the *Elitech* tribunal, and (c) the resolution of those questions was necessary to resolving the claims before the *Elitech* tribunal."[54]

94. As to the first point, that the questions in issue in these proceedings were each distinctly put in issue before the *Elitech* tribunal, the Respondent states:

> *In summary, the Elitech tribunal was asked to determine whether the Respondent breached its treaty obligations by:*
>
> *a. failing to accord to the Claimant's investments fair and equitable treatment;*
>
> *b. failing to provide effective means of asserting claims and enforcing rights with respect to the Claimant's investments;*
>
> *c. failing to observe the obligations entered into with regard to the Claimant's investments; and*
>
> *d. unlawfully expropriating the Claimant's investments.*[55]

[52] R's 16 February 2024 Submission, para. 77.
[53] R's 16 February 2024 Submission, para. 78.
[54] R's 16 February 2024 Submission, para. 79.
[55] R's 16 February 2024 Submission, paras. 80-81.

95. As to the second and third points, the Respondent argues that "the *Elitech* tribunal comprehensively analysed the evidentiary record, made findings of fact (including on Croatian law) with respect to each of the questions and issues before it[…] [and] determined and disposed of each of the questions before it" and these questions "were at the heart" of the *Elitech* Arbitration and "their resolution was necessary to the disposal of the claims brought" therein.[56]

96. The Respondent concludes that "[i]n light of the above, the *Elitech* tribunal's findings of fact and law and its decisions with respect to the questions that were distinctly in issue in that case, are binding on the *Elitech* claimants, and the Claimant is consequently estopped from relitigating these claims in this arbitration."[57]

97. In its Second Submission, the Respondent explains that the Claimant's Submission is focused on distinguishing the parties, the treaties and the subject matter of the two claims; in the Respondent's view, the Claimant does not address the fact that the issues, rights and facts in question have been conclusively determined in *Elitech* Award. Accordingly, Croatia says that the Claimant does not engage with the preclusive effect of the doctrine of issue (or collateral) estoppel at all; rather, the Claimant contests, with misguided reliance on *Caratube v. Kazakhstan*, that issue estoppel is a general principle of international law applicable to these proceedings.[58] The Respondent analyses the relevant paragraph of *Caratube* to reach the opposite conclusion.[59]

#### c. The Claimant's pursuit of his claims is abusive

98. Finally, the Respondent argues that the Claimant's pursuit of his claims in this arbitration is abusive and, for that reason also, the Tribunal should decline jurisdiction over the Claimant's claims in this arbitration or, alternatively, declare them inadmissible.[60]

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[56] R's 16 February 2024 Submission, paras. 83-85.

[57] R's 16 February 2024 Submission, para. 86.

[58] R's 11 March 2024 Submission, para. 53.

[59] R's 11 March 2024 Submission, para. 55, citing *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017 ("***Caratube v. Kazakhstan***"), Exhibit **RL-0007**, paras. 460-464.

[60] R's 16 February 2024 Submission, paras. 87, 106.

99. In its First Submission, Croatia recalls that Article 8 of the Croatia-Israel BIT is a fork-in-the-road clause which gives the choice to the investor, who in this instance decided to initiate an ICSID arbitration. Also, Article 26 of the ICSID Convention – which provides that "[c]onsent of the parties to arbitration under the Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy…" – precludes the Claimant from pursuing the same remedies under another arbitration. Relying on *Orascom v. Algeria* (which the Respondent says considered and intentionally departed from the rationale in *CME v. Czech Republic* and *Lauder v. Czech Republic* on which the Claimant relies), the Respondent contends that the Claimant's pursuit of the same claims in this proceeding amounts to an abusive use of the investment treaty system and, accordingly, should not be allowed.[61]

100. In its Second Submission, the Respondent states that the Claimant's denial that his claim is abusive is premised on the misconceived bases that (i) the claim is based on "new facts and events," and (ii) the Respondent refused to consolidate the *Elitech* Arbitration and the present arbitration. Neither argument is valid, Croatia says.[62]

101. Regarding the latter of these arguments, the Respondent contends that "the Respondent refused the Claimant's request for consolidation because it was belatedly made after written pleadings had closed in the *Elitech* arbitration. Consolidation at that stage would have caused significant disruption to the procedural timetable."[63]

102. Regarding the first argument, that the claim was allegedly based on new facts and legal issues, the Respondent argues that this is plainly wrong. Both the factual and the legal issues in dispute are effectively the same as between the two arbitrations. The case before this Tribunal is the one the Claimant has set out in his Memorial, which for all relevant purposes is identical to the Memorial in the *Elitech* Arbitration.[64] Croatia also contends that the Claimant has not pointed to any relevant new facts that were not in the *Elitech*

[61] R's 16 February 2024 Submission, paras. 87-102, referencing, *inter alia*, *Orascom v. Algeria*, Exhibit **RL-0026**, para. 547.

[62] R's 11 March 2024 Submission, para. 58.

[63] R's 11 March 2024 Submission, para. 60.

[64] R's 11 March 2024 Submission, para. 3.

record, which give rise to a new cause of action that could justify this second claim.[65] In its view:

> *The allegedly "new facts" that the Claimant seeks to introduce are not in fact new, and do not alter the analysis. The proceeding in the Elitech arbitration was declared closed on 12 April 2023. Any facts predating that declaration could have been, and were, introduced in the Elitech arbitration. The only exception is the dismissal on 18 January 2024 of Razvoj Golf's claims against the City of Dubrovnik alleged in a domestic arbitration brought under the arbitration clause in the Concession Agreement and pursuant to the Rules of Arbitration of the Permanent Commercial Court of the Croatian Chamber of Economy.*[66]

103. Croatia says that the Claimant's premise of an evolving case is irrelevant because the case pending before this Tribunal is the one the Claimant has presented with his Memorial. That case is identical with the one that the *Elitech* tribunal dismissed.[67]

104. Croatia insists that the Claimant himself admitted on 25 February 2022, *i.e.*, well after these developments unfolded, that "the *Elitech* and present arbitration relate essentially to the same subject matter." The Claimant's re-characterization now of the amendment of the General Urban Plan as "new" and as a material development is, Croatia argues, "a transparently disingenuous attempt to manufacture a new claim to overcome the *Elitech* tribunal's conclusive and preclusive disposal of this dispute."[68]

105. Moreover, the Respondent stresses that in any event, on the Claimant's own case, "[b]y the end of 2017, the actions of the Croatian State at central, county, and city level had destroyed the Project as a matter of economic and practical reality." Croatia points to the inconsistency of claiming new facts when the Claimant values his investment as at 30 December 2017.[69]

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[65] R's 11 March 2024 Submission, para. 59.
[66] R's 11 March 2024 Submission, para. 4.
[67] R's 11 March 2024 Submission, para. 23.
[68] R's 11 March 2024 Submission, para. 26.
[69] R's 11 March 2024 Submission, para. 28.

106. Croatia also says that "the Claimant essentially argues that the *Elitech* Award is wrong." It points to the fact that there is no appeal in ICSID investment arbitration and argues therefore that this Tribunal is not a court of appeal with authority to review the *Elitech* Award. Croatia also points to the fact that the *Elitech* claimants took no step to seek to interpret, revise or annul that award. Croatia contends that "[i]t is precisely this sort of abusive conduct that the concepts of *res judicata* and issue estoppel are designed to prevent."[70]

107. The Respondent insists that "[t]he Claimant's attempt to treat this Tribunal as an appeal forum to challenge the findings of the *Elitech* Award only confirms that his claim falls squarely within the scope of *res judicata*" and it concludes that the "*Elitech* Award is final and binding, as the *Elitech* claimants and the Claimant have accepted."[71]

**(2) The Claimant's Position**

108. The Claimant contends that "[i]n the *Elitech* Award, the Arbitral Tribunal found jurisdiction over all but one of Elitech's claims and erroneously concluded that the Respondent did not breach the Netherlands-Croatia BIT." The Claimant insists that Mr. Frenkel has a legitimate right to continue litigating for a number of different reasons, including the lack of triple identity and the existence of "new facts and events (*nova*) that were not taken into account – not at all or not sufficiently – by the *Elitech* Tribunal and the *Elitech* Award."[72]

109. In his Second Submission, the Claimant maintains the same position. The Claimant says that "the implementation of the Project has become impossible due to – new – acts and omissions of the Croatian authorities" (and then sets forth these new facts). The Claimant stresses that the *Elitech* tribunal did not consider or rule upon the violation of the "effective means" standard with regard to facts and events that occurred even prior to 2020.[73]

[70] R's 11 March 2024 Submission, para. 5.
[71] R's 11 March 2024 Submission, para. 30.
[72] C's 16 February 2024 Submission, para. 3.
[73] C's 11 March 2024 Submission, paras. 7-8.

110. The Claimant's specific arguments are summarized in the subsections below.

### *a. Res judicata*

111. The Claimant explains that the *Elitech* award has no *res judicata* effect because the parties and the BIT are different. He also contends that he "relies on new facts and [that] his amended prayers for reliefs shall differ from those raised by Elitech and Razvoj Golf in terms of both type of damage (re. sink costs) and quantum."[74] In other words, the Claimant challenges Respondent's statements on each aspect of triple identity.

#### **(i) Parties not identical**

112. The Claimant submits that the parties to the *Elitech* Arbitration and the present proceedings are different because each has its own distinct legal personality. Mr. Frenkel is a natural person of Israeli nationality while Elitech and Razvoj Golf are juridical persons incorporated in the Netherlands and Croatia and the fact that Mr. Frenkel "indirectly owned the *Elitech* claimants is irrelevant for assessing the formal identity of the parties for the purposes of *res judicata*."[75] The Claimant seeks support for his views from the jurisprudence of *CME v. Czech Republic* and *Lauder v. Czech Republic*, according to which the shareholder and the company have separate legal existence.[76]

113. The Claimant also contends that while some BITs attempt to regulate parallel proceedings, Croatia did not do so in either of the treaties at hand here.[77] In respect of the jurisprudence that prevents shareholders from re-litigating the same issues in separate arbitration proceedings – mainly the jurisprudence invoked by the Respondent[78] – the Claimant alleges that this is not based on *res judicata* but on collateral estoppel, a common law doctrine inapplicable here.[79] In any case, the Claimant submits that if the possible preclusive impact of *Elitech* Award is to be examined, it should be analysed with regard to

[74] C's 16 February 2024 Submission, para. 4.

[75] C's 16 February 2024 Submission, para. 11.

[76] C's 16 February 2024 Submission, para. 12, quoting *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003 ("***CME v. Czech Republic***"), Exhibit **CL-0079**, paras. 435-436.

[77] C's 16 February 2024 Submission, para. 13.

[78] *See Grynberg v. Grenada*, Exhibit **CL-0181**, paras 7.1.5-7.1.7; *Apotex III*, Exhibit **CL-0182**, paras. 7.38-7.40.

[79] C's 16 February 2024 Submission, para. 14.

each issue separately (not at the level of admissibility of the entire claim). Finally, relying on academic writing, the Claimant stresses that *res judicata* can only apply in investment treaty arbitration where the parties are "formally identical[:] […] the interests of a company and its shareholders cannot at all times be regarded as 'indissociable or indivisible.'"[80]

**(ii) Not same legal grounds**

114. The Claimant also contends that the triple identity test fails because of a lack of the same legal grounds as between the cases: "the two arbitrations were brought under different legal grounds, namely the Netherlands-Croatia Treaty on the one hand and the Israel-Croatia Treaty on the other hand." In this regard, the Claimant argues that the fact that the protection of the two BITs could be similar is irrelevant because each is a distinct source of international law for *res judicata* purposes.[81] The Claimant relies in this regard on *CME v. Czech Republic*, in which the tribunal rejected the respondent's *res judicata* claim because of "slight differences in language" in the two treaties involved.[82] The Claimant argues that the analysis in this case is easier as there are actually material differences in the scope of protection as between the two treaties and puts forward as an example the MFN clause in both treaties.[83] The Claimant argues that Mr. Frenkel has not had "his day in court" and that he deserves adjudication on the effective means protection (available only in this proceeding in light of the broader language of the MFN clause in the Croatia-Israel BIT) and on issues not decided by the *Elitech* tribunal because of that tribunal's finding of a lack of jurisdiction (*i.e.*, the umbrella clause claims). Finally, on this point, the Claimant argues that there are new facts – among them a Decision issued on 18 January 2024 by the Permanent Arbitration Court at the Croatian Chamber of Economy in Zagreb (the "**Zagreb Award**") – that deserve consideration by this Tribunal and that cannot be precluded by *res judicata*.[84]

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[80] C's 16 February 2024 Submission, paras. 17-19, citing H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013) (excerpt), Exhibit **CL-0183**, paras. 6.117-6.118.

[81] C's 16 February 2024 Submission, para. 20.

[82] C's 16 February 2024 Submission, para. 21, citing *CME v. Czech Republic*, Exhibit **CL-0079**, paras. 200, 433.

[83] C's 16 February 2024 Submission, paras. 22-23.

[84] C's 16 February 2024 Submission, paras. 24-27, referring to, *inter alia*, *Razvoj Golf Ltd. v. City of Dubrovnik*, Croation Chamber of Economy Permanent Arbitration Court, Decision, 18 January 2024 ("**Zagreb Award**"), Exhibit **C-0300**.

### (iii) Different cause of action and / or subject matter

115. The Claimant submits that the triple identity test also fails because the cause of action and/or subject matter is not the same as between the two proceedings. The Claimant alleges that "[e]vents taking place after a first decision has been rendered necessarily constitute a new cause of action, and claims based on such events cannot be precluded by the principle of *res judicata.*"[85] The Claimant alleges that, here, the *Elitech* Award is manifestly flawed; it argues to that end that the *Elitech* tribunal "misunderstood and therefore misjudged several facts of the *Elitech* case," and that there are new facts that were not addressed at all or sufficiently by that tribunal. The Claimant concludes from this that the relief sought in this proceeding was based on "a factual setting that is significantly different" from that in the *Elitech* Award.[86]

### (iv) *Elitech* Award based on factual errors and / or contradicted by newly discovered facts

116. As noted above, the Claimant invokes allegations of factual errors by the *Elitech* tribunal, as well as new facts not considered by that tribunal, in the context of its arguments about both legal grounds and cause of actions.[87] In this regard:

a. The Claimant contends that the *Elitech* Award is manifestly flawed with respect to key facts and cannot possibly produce a preclusive effect on key issues at stake in the present arbitration. The Claimant submits that "[w]ith Croatia's express refusal to consolidate the proceedings, it falls on this Tribunal to review the merits of Mr. Frenkel's claims anew."[88] The Claimant points to different parts of the *Elitech* Award and insists that the award's conclusions are false in several regards and as such cannot bind this Tribunal. The Claimant elaborates on how this allegedly manifested with respect to four of the arguments made in the *Elitech* Arbitration: that (a) the *Elitech* claimants could not begin construction or obtain any

[85] C's 16 February 2024 Submission, para. 28, quoting H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (2013) (excerpt), Exhibit **CL-0183**, para. 6.123.

[86] C's 16 February 2024 Submission, paras. 29-30.

[87] *See above*, paragraphs 111-112.

[88] C's 16 February 2024 Submission, para. 39; *see also* para. 6.

construction permits, (b) the EIS process was arbitrary and marked with inconsistency, (c) Croatia breached the Concession Agreement, (d) there was abundant evidence to establish legitimate expectations.[89]

b. Finally, the Claimant insists that there are new facts underlying the dispute and supporting Claimant's relief. The Claimant characterizes these facts as follows:

- "[F]acts that occurred after the initiation of the Elitech arbitration in 2016 and were thus not – or not sufficiently – taken into account by the Elitech Award;" and

- "[F]acts that occurred either after the parties had filed their main submissions in the Elitech case or after the issuance of the Elitech Award."[90]

117. That Claimant states that he "shall present the relevant new facts supporting [his] case in due course and during the next stages of these arbitration proceedings."[91]

### (v) The Claimant's conclusion on *res judicata*

118. The Claimant concludes that the "findings of the *Elitech* Award have no *res judicata* or preclusive effect on the present case and should not have an impact on the Tribunal's adjudication of Mr. Frenkel's claims. Those findings should neither influence nor constrain the exercise of the Tribunal's judgment and exercise of discretion over Mr. Frenkel's claims in any manner, be it on jurisdiction, admissibility or the merits."[92] The Claimant also stresses that *res judicata* was not recommended in the circumstance of a non-party who was in control of a party bound by the determination of issues in another proceeding by the International Law Association's Report on *Res Judicata*.[93]

[89] C's 16 February 2024 Submission, paras. 39-99.

[90] C's 16 February 2024 Submission, para. 100.

[91] C's 16 February 2024 Submission, para. 101.

[92] C's 16 February 2024 Submission, para. 102.

[93] C's 16 February 2024 Submission, para. 16, citing F. De Ly and A. Sheppard, "ILA Final Report on Res Judicata and Arbitration," in 25(1) Arbitration International, Exhibit **CL-0176**, paras. 49, 59. (The Tribunal notes that the

### b. No collateral estoppel

119. The Claimant submits that, as held in *Caratube v. Kazakhstan*, collateral estoppel is not an international law principle.[94]

### c. No abuse

120. The Claimant also insists that there is no abuse of the arbitration treaty system. The Claimant argues that the parallel proceedings "[were] a situation of Croatia's own doing."[95] The Claimant further stresses that "abuse of right should all the more be excluded when the claims in the second proceedings are based on new facts and events, and key findings of fact in the prior proceedings are to a large extent incomplete and/or erroneous, as is the case for the *Elitech* Award" and relies on *CME v. Czech Republic* and *Lauder v. Czech Republic*, alleging, *mutatis mutandis*, that as the Respondent refused consolidation in *Elitech*, it has to bear the consequences of its behaviour which indicates that it accepted that this Tribunal is the one to hear the case.[96]

### d. Positions taken in Second Submission / at Hearing

121. In the Second Submission, the Claimant reviews all the issues and statements made in the First Submission.[97] Additionally, the Claimant alleges that the Respondent's summary of the *Elitech* award is inaccurate.[98]

122. At the Hearing, Counsel for the Claimant also advanced the argument that the Respondent had failed to argue *res judicata* when the arbitration was first initiated and submitted that the Tribunal's decision on the Respondent's request for the suspension of the proceedings (Procedural Order No. 2 dated 7 March 2022) and the Tribunal's Decision on Bifurcation

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Claimant erroneously invokes the International Law Commission in the text of its submission, whereas it is the International Law Association ("ILA"), and not the International Law Commission ("ILC"), that published the report in question, as is clear from the Claimant's own footnote 21).

[94] C's 16 February 2024 Submission, para. 15, referring to *Caratube v. Kazakhstan*, Exhibit **RL-0007**, para. 459.

[95] C's 16 February 2024 Submission, para. 5.

[96] C's 16 February 2024 Submission, paras. 34-38, citing, *inter alia*, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, Exhibit **CL-0139**, para. 412.

[97] C's 11 March 2024 Submission, paras. 21-54.

[98] C's 11 March 2024 Submission, para. 20.

(dated 26 April 2022) "necessarily dismissed, in an anticipatory fashion[,] the *res judicata* argument."[99]

## B. THE TRIBUNAL'S ANALYSIS

### (1) Introduction

123. The Tribunal notes at the outset that neither Party has taken a firm position on whether the Respondent's Objection relates to the Tribunal's jurisdiction or the admissibility of the Claimant's claims.[100] The Majority considers that the Objection is not directed to its jurisdiction because the existence of the Tribunal's adjudicative power is not brought into question by the Objection. The Objection instead relates to the admissibility of the Claimant's claims. A decision that a claim is inadmissible is a decision that the claim is legally defective on a basis that does not require a full assessment of the merits of that claim by reference to the evidentiary record. One example is when a claim is time-barred: there is no question that the court or tribunal has the adjudicative power to make a binding determination of whether the claim is defective because it is outside the relevant temporal limit (it is not, in other words, an issue relating to the jurisdiction of the court or tribunal). A decision rendered by the court or tribunal to the effect that the claim is time-barred will thus be *res judicata* even though the claim has been dismissed without a full examination of the merits.

124. The same considerations apply to an objection that a claimant is precluded from advancing a claim because it has already been conclusively determined by another court or tribunal (*res judicata*) or because it would be an abuse of process to do so. Like the prescription of claims, if a claim is precluded by virtue of *res judicata* or abuse of process then the claim is legally defective, but that defect can be determined on a preliminary basis without a full examination of the merits of the claims by reference to the evidentiary record. They are, in other words, grounds for rendering the claims inadmissible.

[99] Transcript, 90:7–93:9 (Dr. Arfazadeh).

[100] *See e.g.,* C's 16 February 2024 Submission, para. 32, C's 11 March 2024 Submission, para. 9, R's 16 February 2024 Submission, para. 7, and R's 11 March 2024 submission, para. 6.

125. The Tribunal will first address *res judicata* and then abuse of process to the extent necessary.

**(2) *Res judicata***

126. The status of the doctrine of *res judicata* as an applicable rule of law in these proceedings is not contested in this case. And nor could it be. The doctrine of *res judicata*, which was an established part of Roman law, is a ubiquitous feature of the laws on civil procedure in national legal systems and has been applied by a vast number of international courts and tribunals either as a rule of customary international law or as a general principle of law.[101]

127. What is contested in this case is the proper scope of the doctrine. The rival positions can be reduced to the single fundamental question of whether form or substance should guide the application of *res judicata*.

128. If the test for the identity of claims focuses on the substance of the relationship between the claims presented in two parallel proceedings, then the reasons for applying *res judicata* to the majority of the claims in the present case are overwhelming. Both Parties have expressly conceded that the "the substance [of the present arbitration] is identical to that of the *Elitech* Arbitration."[102] The Claimant in this case, moreover, has never disputed that he has complete ownership and control over the claimants in the *Elitech* Arbitration; indeed, at one point he had proposed to substitute himself for those claimants.[103] There has been

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[101] Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003), pp. 245-246. After referring to the relevant State practice, the decisions of courts and tribunals and the writings of publicists, the author concludes:

> *All of these are strong indications that the two conditions required for conferring the status of an international custom upon the res judicata rule—extensive and consistent practice over time and opinio juris—have been satisfied. An alternative approach, advanced by some notable jurists, for establishing the legally binding status of the res judicata rule has been to characterise it as a general principle of law. In fact, this possibility had been mentioned by the drafters of the PCIJ Statute, who gave the res judicata rule as an example of what may constitute a "general principle of law" under Article 38 of the PCIJ Statute.* […] *In any event, either by virtue of custom or general principle of law, the res judicata rule should be regarded as a binding rule of law.*

The Tribunal notes that this treatise is not on the record. This reference, along with references to other treatises or cases not on the record elsewhere in this Award, is made in accordance with the well-established principle of *iura nova curia* in respect of international law as the applicable law.

[102] Decision on Bifurcation, para. 78, quoting Request for Bifurcation, para. 6 and Request for Arbitration, para. 11.

[103] Request for Arbitration, paras. 7, 11.

no attempt by the Claimant, moreover, to distinguish the substance of the investment protection obligations in play in the *Elitech* Arbitration under the Croatia-Netherlands BIT from those that form the basis of the claims under the Croatia-Israel BIT save in relation to the MFN clause, which will be considered later in this Award. Finally, the relief that was sought in the *Elitech* Arbitration is virtually identical to the relief claimed in this case[104] and, once again, the Claimant has not submitted otherwise.

129. There is no doubt that a significant number of the claims in this case are substantially the same as those that were advanced in the *Elitech* Arbitration and ultimately rejected by the tribunal in the *Elitech* Award. If common sense is to play a role in the application of *res judicata*, as it must, then it is illuminating to ask a very practical question: would the Claimant in this case be pursuing this arbitration if his wholly-owned company in the *Elitech* Arbitration had prevailed on the merits in those proceedings? The answer can only be "of course not." This present arbitration is a second attempt to obtain a favourable award in respect of the same claims relating to the same factual matrix.

130. The alternative approach is formalism. The legal instrument providing jurisdiction and the investment protection obligations in this case is the Croatia-Israel BIT, whereas in the *Elitech* Arbitration it was the Croatia-Netherlands BIT. The Claimant is this case is Mr. Frenkel, whereas the claimant in the *Elitech* Arbitration was his wholly-owned company (and wholly-owned subsidiary of that company). These are indeed formal differences but, in the estimation of the Majority, they cannot possibly have purchase on the doctrine of *res judicata* because otherwise it would be rendered a dead letter and be impotent to serve its purpose in a system for the administration of justice.

131. Justice Potter Stewart of the US Supreme Court provided a concise summary of the distinction between *res judicata* and collateral or issue estoppel as well as the objectives underlying these principles:

> *The federal courts have traditionally adhered to the related doctrines of res judicata* [(claim preclusion)] *and collateral estoppel* [(issue preclusion)]. *Under res judicata, a final judgment*

[104] *Elitech* Award, Exhibit **C-0291**, para. 216 (quoting the relief sought by the *Elitech* claimants in that proceeding); C's Memorial, para. 425.

> *on the merits of an action precludes the parties* [...] *from re-litigating issues that were or could have been raised in that action.* […] *Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first cause.* […] *As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication*.[105]

132. If it were possible to evade the application of *res judicata* simply by invoking the investment protection obligations in a different investment treaty to advance claims based on the same factual matrix that were previously adjudicated under another investment treaty then the objectives served by the doctrine—"[to] relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"—would become illusory. Investments are often held within a group of companies with different nationalities. If it were permissible for each member of the group to rely on its indirect ownership of the investment to bring its own claim under each applicable investment treaty in relation to the same alleged prejudice, then the respondent State would be unconscionably burdened with the cost of defending multiple proceedings and dealing with inconsistent decisions relating to the same underlying dispute. The principle of *non bis in idem* would be effectively suspended for investment treaty arbitration and it is difficult to imagine that States envisaged that outcome when they entered into investment treaties against the background of general international law. Long before the advent of the modern investment treaty, Professor Bin Cheng was able to surmise, based upon an extensive survey of international precedents: "There seems little, if indeed any question as to *res judicata* being a general principle of law or as to its applicability in international judicial proceedings."[106]

133. There are some precedents in favour of formalism in investment law and the apogee of this approach came early in the development of the jurisprudence. This was the award in *CME*

[105] *Allen v. McCurry*, 449 U.S. 90 (1980) (available at: https://supreme.justia.com/cases/federal/us/449/90/), p. 94 [internal citations omitted].

[106] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) (excerpt), Exhibit **RL-0095**, p. 336.

*v. Czech Republic*, which is the principal authority invoked by the Claimant in this case. This award has been sharply criticised in the literature and has not been followed in subsequent decisions.

134. The *CME* tribunal stated that: "The two arbitrations are based on differing bilateral investment treaties, which grant comparable investment protection, which, however, is not identical. […] Because the two bilateral investment treaties create rights that are not in all respects exactly the same, different claims are necessarily formulated."[107] At no point did the *CME* tribunal undertake an analysis of how the "rights" were different. Instead, for the *CME* tribunal, the mere fact that they were encapsulated in different treaties meant that "different claims are necessarily formulated."

135. Professor Campbell McLachlan KC commented on this aspect of the *CME* award in the following terms:

> [T]*he mere fact that the rules appear in different treaties should not per se result in the same forms of legal protection being treated as different. Although each may owe its binding force to a different legal obligation, both obligations operate upon the same plane of public international law. In the same way, a claim in tort made in a French court has its origin within French law, from which it derives its obligatory force. But this does not of itself deprive a defendant of the opportunity of raising a plea of litispendence should in substance the same claim be raised before an English court, even though the basis for the legal obligation might in that case be English rather than French law.*[108]

136. More recently, the tribunal in *Orascom v. Algeria* reflected upon the developments since *CME* as follows:

> *It is true that tribunals in the past have adopted different approaches in relation to constellations that may show some similarities with the present case. In particular, the tribunals in CME v. Czech Republic and Lauder v. Czech Republic allowed the claims under different investment treaties to proceed, despite the fact that both sets of proceedings were based on the same facts and sought reparation for the same harm. The tribunals then reached*

[107] *CME v. Czech Republic*, Exhibit **CL-0079**, paras. 432-433.

[108] C. McLachlan, *Lis Pendens in International Litigation* (2009), paras. 288-289.

> *contradicting outcomes, which was one of the reasons for which these decisions attracted wide criticism. This said, these cases should be placed in the context of their procedural history, in which the respondent had refused several offers to consolidate or otherwise coordinate proceedings. Moreover, it cannot be denied that in the fifteen years that have followed those cases, the investment treaty jurisprudence has evolved, including on the application of the principle of abuse of rights (or abuse of process), as was recalled above. The resort to such principle has allowed tribunals to apply investment treaties in such a manner as to avoid consequences unforeseen by their drafters and at odds with the very purposes underlying the conclusion of those treaties*.[109]

137. The Majority agrees with these reflections on the *CME* award.

138. The Majority will address in detail the Respondent's assertion that the Claimant is precluded from prosecuting the same claims in parallel proceedings. To that end, as a normative framework, the Respondent advances arguments on the grounds of *res judicata* and collateral or issue estoppel.

### (3) *Res judicata* and issue estoppel as applicable to the present proceeding

139. As indicated in paragraph 74 above, the Respondent argues that the Claimant's claims are barred by the doctrine of *res judicata,* a general principle of international law widely applied in international arbitration. The Respondent finds support from Judge Anzilotti's Dissenting Opinion in the *Chorzów Factory Case*, the decision in the *Trail Smelter Case*, as well as jurisprudence by the PCIJ, the ICJ and other international tribunals.[110] Croatia argues that the claims in these proceedings satisfy the triple identity test, namely, the same parties, the same relief and the same cause of action. These requirements are set out in the Dissenting Opinion by Judge Anzilotti in the *Chorzów Factory Case*[111] as well as in many arbitration awards.[112]

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[109] *Orascom v. Algeria*, Exhibit **RL-0026**, para. 547.

[110] R's 16 February 2024 Submission, paras. 31-35.

[111] R's 16 February 2024 Submission, para. 36; *Chorzów* Dissenting Opinion, Exhibit **RL-0098**, p. 23.

[112] R's 16 February 2024 Submission, para. 37; *Apotex III*, Exhibit **RL-0112**, para. 7.13; *Newchwang*, Exhibit **RL-0113**, p. 65 ("It is a well-established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue.").

140. The Tribunal agrees that *res judicata* is a general principle of law, according to Article 38.1.c of the Statute of the International Court of Justice, as held by the *Amco v. Indonesia* tribunal.[113] As an international tribunal whose jurisdiction is founded upon a treaty and whose mandate is to adjudicate claims founded upon international obligations, there is no doubt that general principles of law in the sense of Article 38.1.c. of the ICJ Statute are applicable to issues relating to the admissibility of claims in this case, whether through Article 42 of the ICSID Convention or by an implicit choice of law rule.

141. In his Dissenting Opinion in the *Chorzów Factory Case* (1927), Judge Anzilotti identifies the three elements of *res judicata*: *personae, petitum,* and *causa petendi*.[114] Judge Anzilotti refers to Article 59 of the Statute of the International Court of Justice, "which determines the material limits of *res judicata* when stating that 'the decision of the Court has no binding force except between the [p]arties and in respect of that particular case.'"[115]

142. The proposition that *res judicata* applies in international investment arbitration has been generally accepted. In *Mobil v. Canada*, the tribunal held that "[i]n the context of investor-State arbitration, the requirement that, for *res judicata* to apply in respect of a particular issue, that issue must actually have been decided by the prior court or tribunal was expressly affirmed in *Amco v. Indonesia*, *Grynberg*, *Waste Management* and *Apotex III*."[116]

143. Likewise, the tribunal in *Grynberg v. Grenada* deals with the same phenomenon but under the label of collateral estoppel, which is generally included as part of *res judicata,* a legal argument that the Respondent advances subsidiarily. In fact, the *Grynberg* tribunal tries to clarify the distinction between issue preclusion and claim preclusion: as noted above, the *Grynberg* tribunal was clear that the doctrine of collateral (or issue) estoppel does not require the parties in the two proceedings to be identical: on the contrary, in the *Grynberg*

[113] *Amco v. Indonesia*, Exhibit **RL-0096**, para. 26.

[114] *Chorzów* Dissenting Opinion, Exhibit **RL-0098**, p. 23.

[115] *Chorzów* Dissenting Opinion, Exhibit **RL-0098**, p. 23.

[116] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, Exhibit **CL-0175**, para. 193.

tribunal's view, requiring that would be to confuse claim preclusion with issue preclusion.[117]

144. The Claimant submits that collateral estoppel is not an international law principle according to the jurisprudence of *Caratube v. Kazakhstan*.[118] However, as shown by the Respondent in its Second Submission, the *Caratube* tribunal accepts the possibility of collateral estoppel when it states that "there may be room for applying the doctrine of collateral estoppel in investment arbitration," relying on *Apotex III* and its caselaw analysis.[119]

145. The *Amco v. Indonesia* tribunal chaired by Dame Rosalyn Higgins refers to Professor W. Michael Reisman's Legal Opinion filed by Indonesia in that arbitration.[120] That Opinion cites the holding in the *Orinoco Steamship Company Case* (1910) that

> *every matter and point distinctly in issue in said cause, and which was directly passed upon and determined in said decree, and which was its ground and basis, is concluded by said judgment, and the claimants themselves and the claimant Government in their behalf are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree.*[121]

146. The tribunal in *Grynberg v. Grenada* accepted that

> [u]*nder that doctrine* [of collateral estoppel] *a question may not be re-litigated if, in a prior proceeding: (a) it was put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.*
>
> *Collateral estoppel, it is said, is well established as a general principle of law applicable in international courts and tribunals being a species of res judicata.*[122]

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[117] *See above*, paragraph 89.

[118] C's 16 February 2024 Submission, para. 15; *Caratube v. Kazakhstan*, Exhibit **RL-0007**, para. 459.

[119] *Caratube v. Kazakhstan*, Exhibit **RL-0007**, paras. 460-464.

[120] *Amco v. Indonesia*, Exhibit **RL-0096**, paras. 28-30.

[121] *Orinoco*, Exhibit **RL-0118**, p. 276.

[122] *Grynberg v. Grenada*, Exhibit **RL-0116**, paras. 4.6.4-4.6.5.

147. The *Apotex III* tribunal held that "where there is a question regarding the extent of a prior decision or award's *res judicata* effect, international tribunals regularly look to the prior tribunal's reasons and indeed also to the parties' arguments, in order to determine the scope of what was finally decided in that earlier proceeding."[123] It also took note that "[t]he ICJ nonetheless held under Article 60 [of the ICJ Statute] that the 'scope of the operative part of a judgment of the Court is necessarily bound up with the scope of the dispute before the Court.'"[124]

148. Based upon the foregoing caselaw, the Majority considers that *res judicata* applies when the triple identity is satisfied, and that collateral estoppel or issue preclusion operates when a competent jurisdiction has determined a given issue which was necessary for the resolution of a case before it.

**(4) The claims advanced by the Claimant in these proceedings**

149. The Claimant has advanced four claims in this arbitration:

a. a claim for a breach of the fair and equitable standard of treatment in Article 2(2) of the Treaty;[125]

b. a claim for breach of the effective means standard, which is said to be applicable by importing, via the MFN clause in Articles 3(1) and 3(2) of the Treaty, Article 4(5) of the Croatia-Kuwait BIT;[126]

c. a claim for breach of the umbrella clause, which is said to be applicable by importing, via the MFN clause in Articles 3(1) and 3(2) of the Treaty, Article 3(3) of the Croatia-Kuwait BIT;[127] and

[123] *Apotex III*, Exhibit **RL-0112**, para. 7.30.

[124] *Apotex III*, Exhibit **RL-0112**, para. 7.32, citing *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, International Court of Justice, Judgment on the Request for Interpretation, 11 November 2013, paras. 34, 101.

[125] C's Memorial, paras. 274-320.

[126] C's Memorial, paras. 321-331.

[127] C's Memorial, paras. 332-342.

d. a claim for breach of the expropriation provision in Article 5 of the Treaty.[128]

150. The Tribunal will first assess which, if any, of these claims are precluded by *res judicata* (cause of action estoppel).

### (5) The triple identity test for *res judicata*

151. Both Parties agree that in theory the triple identity test for *res judicata* requires identity of the parties, the object (*petitum*) and the grounds (*causa petendi*).

152. The *Elitech* Award was issued on 23 May 2023 and no action has been taken to challenge it, so that it is now final and binding.[129] The Tribunal will now assess whether the triple identity test has been satisfied in relation to the claims advanced in this arbitration.

#### a. Identity of the parties

153. The Parties agree that there should be identity *in personae*, but they disagree on the scope of that requirement. The Respondent submits that the "first prong of the triple identity test requires that a party to the subsequent proceedings should either be a party to the prior decision or share a privity of interest with a party to the prior decision."[130] To that end, the Respondent relies on the *dictum* of the *Ampal v. Egypt* tribunal in the sense that "the doctrine of *res judicata* applies not simply to the parties themselves, but also to those who are in privity of interest with them."[131] Croatia asserts that "[n]umerous arbitral tribunals and commentators have confirmed that entities within a corporate chain, such as majority shareholders and subsidiaries of corporate entities, are privies of one another for purposes of *res judicata.*"[132]

154. The Respondent alleges:

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[128] C's Memorial, paras. 343-358.

[129] See ICSID Website, "Case Details" for *Elitech B.V. and Razvoj Golf D.O.O. v. Republic of Croatia* (ICSID Case No. ARB/17/32) (available at: https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/17/32, last accessed on 4 December 2024).

[130] R's 16 February 2024 Submission, para. 40.

[131] R's 16 February 2024 Submission, para. 40, citing *Ampal v. Egypt*, Exhibit **RL-0107**, para. 261.

[132] R's 16 February 2024 Submission, para. 41.

> *The privity of interest between shareholders and an investment company is the basis upon which shareholders with a different nationality than that of an investment company pursue direct claims against the host state under an investment treaty for a loss sustained by the investment company's investment. The necessary corollary, recognised by the Ampal tribunal, is that the investor or shareholder must be treated as a privy of the investment company for the purposes of res judicata, failing which the investor would be able, wrongly, to take advantage of the same investment treaty, by benefiting from a successful claim by their investment company, while avoiding the burden of being bound by any adverse findings arising out of a claim on the same facts.*[133]

155. The Respondent contends that the same approach was followed by the *Grynberg v. Grenada* tribunal. It states, "In that dispute, the first arbitration was brought by the investment company, RSM Production Corporation, while the second arbitration was brought by the investment company's three shareholders (who wholly owned the company)."[134] Croatia alleges that the *Apotex III* tribunal also endorsed the same approach.[135]

156. The Claimant's submission is that where there are two distinct legal personalities, the identity in *personae* requirement is not met. The Claimant seeks support from the *CME v. Czech Republic* decision, where the tribunal stated:

> *Only in exceptional cases, in particular in competition law, have tribunals or law courts accepted a concept of a "single economic entity", which allows discounting of the separate legal existences of the shareholder and the company, mostly, to allow the joining of a parent of a subsidiary to an arbitration. Also a "company group" theory is not generally accepted in international arbitration (although promoted by prominent authorities) and there are no precedents of which this Tribunal is aware for its general acceptance. In this arbitration the situation is even less compelling. Mr. Lauder, although apparently controlling CME Media Ltd., the Claimant's ultimate parent company, is not the majority shareholder of the company and the cause of action in each proceeding was based on different bilateral investment treaties. This*

[133] R's 16 February 2024 Submission, para. 42.

[134] R's 16 February 2024 Submission, para. 43, referring to *Grynberg v. Grenada*, Exhibit **RL-0116**, paras. 7.1.5-7.1.7.

[135] R's 16 February 2024 Submission, para. 44, citing *Apotex III*, Exhibit **RL-0112**, para. 7.40.

> *conclusion accords with established international law (Barcelona Traction Case (Belgium v. Spain) Second Phase, I.C.J. Rep.1970, 3, 48-50, §§95-100, Holiday Inns S.A. et al. v. Morocco, in P. Lalive, The First World Bank Arbitration - Some Legal Problems, I ICSID Reports 645, 664, (1993)).*[136]

157. At the Hearing, Counsel for the Respondent underlined the differences between the *CME* and *Lauder* cases and the instant case. In fact, he recalled that Mr. Lauder was an indirect and minority shareholder – by contrast, Mr. Frenkel is the 100% owner of the Project Companies – and also that the UNCITRAL arbitrations Mr. Lauder instituted were based in London and Stockholm, while here the two cases are both ICSID Convention arbitrations.[137]

158. Notwithstanding his reliance on *CME* and *Lauder*, the Claimant acknowledges that "[i]ndeed, a few arbitral tribunals have found that a subsidiary and a majority shareholder are precluded from re-litigating the same issues in separate arbitration proceedings;" however, the Claimant argues, "these decisions were not based on the international law principle of *res judicata* [but] […] on the common law doctrine of collateral estoppel, precluding identical claims brought by a company and its shareholders in separate proceedings."[138] The Claimant cites *Grynberg v. Grenada* and *Apotex III*, which the Majority analysed above.[139]

159. As noted at the outset, the Majority considers that it is imperative to focus on the substance of the relationship between the parties in the two proceedings. The notion of privity of interest encapsulates this approach because it directs us to whether the parties in question have the same substantive interest in the two proceedings and whether the parties can be said to have participated in the preparation and conduct of each proceeding. It also reflects the basic requirements of justice and fairness because if indirect ownership over an investment through a shareholding is deemed to be sufficient standing for the prosecution

[136] C's 16 February 2024 Submission, para. 12, referring to *CME v. Czech Republic*, Exhibit **CL-0079**, para. 436.

[137] Transcript, 58:5–61:2 (Dr. Seelman-Eggebert).

[138] C's 16 February 2024 Submission, para. 14.

[139] *See above*, para. 143.

of an investment treaty claim, then it must follow that the indirect owners as a class have privity of interest in respect of claims relating to that same investment.

160. The claimants in *Elitech* were two juridical persons – Elitech B.V. and Razvoj Golf d.o.o. Elitech B.V. is a legal entity incorporated in the Netherlands and Razvoj Golf is its fully owned Croatian subsidiary. The Claimant in the present proceeding is Mr. Ahron G. Frenkel, a national of the State of Israel, who has accepted that he is the 100% shareholder and indirect owner of Elitech B.V. and Razvoj Golf d.o.o. (respectively) and controls both entities.

161. In his Request for Arbitration in this proceeding, the Claimant states:

> *The dispute arises from Mr Frenkel's investment in a golf course and a hotel and associated amenities atop Mt. Srđ in Dalmatia, Croatia* […]*;*[140]
>
> *Mr Frenkel wholly owns and controls Elitech B.V. (Elitech), a company incorporated in the Netherlands, and its wholly-owned Croatian subsidiary, Razvoj Golf d.o.o. (Razvoj Golf, together with Elitech, the Project Companies). The Project Companies are the core entities through which Mr Frenkel advanced the Project and acquired the assets comprising it;*[141]

and:

> *In the interest of procedural economy, Mr Frenkel reiterated his proposal to substitute for the Project Companies in the Elitech Arbitration on 26 May 2020.*[142]

162. The *Elitech* tribunal accepted the claimants' position in those proceedings that they are part of a group of companies of which Mr. Frenkel is the ultimate owner.[143] If the claimants in

[140] Request for Arbitration, para. 2.

[141] Request for Arbitration, para. 7.

[142] Request for Arbitration, para. 11. This statement is confirmed by the Respondent in its Request for Bifurcation, para. 11: "As the Claimant has emphasised, during the cooling-off period under Article 8(2) of the Treaty he repeatedly proposed to substitute for the *Elitech* Claimants in the *Elitech* Arbitration. The Claimant thereby acknowledged that the present dispute is identical to the one in *Elitech*, that the nominal claimants and treaties in the *Elitech* Arbitration are interchangeable and that they are of no significance to the substance of the Claimant's dispute."

[143] *Elitech* Award, Exhibit **C-0291**, para. 261.

the *Elitech* Arbitration had been successful in their claim for compensation, then the benefit of that award of compensation would have flowed through to Mr. Frenkel given his complete ownership and control of the group of companies in question.

163. Mr. Frenkel gave witness evidence in the *Elitech* Arbitration and testified that the entire project was conceived and progressed either directly by him or under his supervision by lawyers and other professionals whom he himself had hired.[144] He is mentioned on 89 separate occasions in the *Elitech* Award. Mr. Frenkel attended the hearing in the *Elitech* Arbitration, and it may be assumed that, as the 100% shareholder of the first claimant, which in turn is the 100% shareholder of the second claimant, he had ultimate control over the conduct of those proceedings through his counsel, Freshfields Bruckhaus Deringer, which was the same counsel instructed by Mr. Frenkel in the present proceedings until 16 November 2023.

164. Therefore, in the light of the Claimant's own evidence and submissions, as well as the other evidence on record, the Majority has no doubt that there is privity of interest between Mr. Frenkel (the Claimant in this case), on the one hand, and Elitech B.V. and Razvoj Golf d.o.o. (the claimants in the *Elitech* Arbitration), on the other. The requirement of identity of parties is therefore satisfied.

#### b. Identity of *causa petendi* or grounds

165. Croatia contends that "[a]lthough the *Elitech* arbitration was brought under the Croatia-Netherlands BIT and the present arbitration has been brought under the Croatia-Israel BIT, the treaty provisions relied on by the *Elitech* claimants and Claimant in the two bilateral investment treaties contain substantively identical legal protections.[145]

[144] *Elitech* Arbitration, Witness Statement of Mr. Ahron Frenkel, 11 October 2018, Exhibit **R-0036**, paras. 7, 11-16, 23, 25, 29, 30, 32-34, 36-41, 44, 46.

[145] R's 16 February 2024 Submission, para. 60.

166. The Claimant alleges that the BITs are different and the fact that the protection by the two BITs could be similar is irrelevant because each is a distinct source of international law for *res judicata* purposes.[146]

167. The Majority considers that the mere fact that the investment protection obligations appear in different bilateral investment treaties does not lead *per se* to the conclusion that the legal grounds are different. Form would be allowed to triumph over substance if that were the case. What is required is an analysis of the substance of the claims advanced in this arbitration as compared with those that were determined conclusively in the *Elitech* Award. The Majority does not consider it pertinent to analyse whether each and every factual assertion underlying the claims in this case was raised and disposed of by the tribunal in the *Elitech* Award; it will suffice to group together the principal elements of the claims and consider whether these elements have been conclusively determined by the *Elitech* tribunal.

### (i) Fair and equitable treatment

168. The Claimant's fair and equitable treatment claim is founded upon Article 2(2) of the BIT, which reads:

> *Investments made by investors of each Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party*.[147]

169. The FET obligation relied upon by the claimants in the *Elitech* Arbitration under the Croatia-Netherlands BIT reads:

> *Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal*

[146] C's 16 February 2024 Submission, para. 20.

[147] BIT, Exhibit **CL-0001**, Article 2(2).

*thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.*[148]

170. The Claimant in the present case has not asserted that there is a material difference in respect of the protection offered by these two FET obligations, and it is clear from the express language used in each treaty that they are identical in substance.

171. The first element of the Claimant's claim, as developed in his Memorial in these proceedings, was a breach of legitimate expectations based upon promises embodied in the 1999 Program (Croatia's initiative for the development of golf course tourism) and the 1999 Conclusion (the formal adoption of the 1999 Program), the 2001, 2003 and 2005 Resolutions (resolutions related to the construction of golf course tourism projects)[149] and the Spatial Plan issued by the Dubrovnik-Neretva County and other instruments of this local authority[150] and reinforced by representations by high ranking officials in 2005 and 2006 in particular.[151]

172. The *Elitech* tribunal considered these alleged sources for legitimate expectations in paragraphs 533 to 562 of its Award and concluded that "the Claimants have not demonstrated that the Respondent made the requisite assurances or representations that the central Government would step in and resolve any difficulties encountered by the Golf Park Project at the local level so as to generate legitimate expectations under the FET provision of the BIT."[152]

173. The Claimant further contends that Croatia's promise to sell or rent the Project Land to Mr. Frenkel was memorialized in certain decisions and agreements.[153] Furthermore, he argues, "In March 2009, the City of Dubrovnik also entered into the Concession Agreement with Razvoj Golf for the reconstruction and development of the Mt Srđ Fort."[154]

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[148] Croatia-Netherlands BIT, Exhibit **CL-0184**, Article 3(1).

[149] C's Memorial, para. 284.

[150] C's Memorial, para. 286.

[151] C's Memorial, para. 287-288.

[152] *Elitech* Award, Exhibit **C-0291**, para. 562.

[153] C's Memorial, para. 290.

[154] C's Memorial, para. 290.

174. The *Elitech* tribunal considered these further alleged sources for legitimate expectations and concluded:

> [T]*he record does not establish to the Tribunal's satisfaction that the Respondent gave assurances that the Church or anyone else would not file a restitution claim or that such a claim would necessarily be dismissed. That being said, the Claimant suffered no harm, because in 2014 the Respondent reimbursed the advance paid by Razvoj Golf Dubrovnik under the 2009 Purchase Agreement with interest. More importantly, in 2015, Razvoj Golf purchased the same Project land from the Church at a lower price.*[155]

175. The Claimant further asserts that was a breach of legitimate expectations relating to the delays in adopting the urban development plan ("**UPU**").[156] The *Elitech* tribunal dealt with these allegations in paragraphs 571 to 576 of its Award and found that the *Elitech* claimants were in fact responsible for a large part of the delay.[157]

176. Next, the Claimant maintains that the environmental impact study ("**EIS**") process breached its legitimate expectations under the FET standard.[158] This is dealt with by the *Elitech* tribunal in paragraphs 591 to 599 of its Award, where the tribunal concluded:

> *In sum, albeit with some delay caused by legal challenges initiated by organizations over which the Respondent had no control, the EIS was approved in four years, which enabled the Claimants to apply for further permits. On a review of the totality of circumstances, the Tribunal does not regard the conduct of the authorities during the EIS procedure as amounting to a violation of the Claimants' legitimate expectations and thus a FET breach.*[159]

177. The Claimant then criticises the steps taken by the Croatian authorities to amend the County Spatial Plan to remove the Project in 2019 as a breach of his legitimate expectations.[160] The *Elitech* tribunal considered this allegation in paragraphs 600 to 604 of

[155] *Elitech* Award, Exhibit **C-0291**, para. 569.
[156] C's Memorial, paras. 304-305.
[157] *Elitech* Award, Exhibit **C-0291**, para. 573.
[158] C's Memorial, paras. 306-311.
[159] *Elitech* Award, Exhibit **C-0291**, para. 599.
[160] C's Memorial, para. 312.

its Award and noted first that the *Elitech* claimants' quantification of damages ended on 31 December 2017 and hence this 2019 measure could not have caused damage to their investment.[161] Furthermore, it stated: "[T]he Tribunal is of the view that the amendment of the County Spatial Plan did not affect the Golf Park Project, as the Claimants held a location permit since December 2017 and could have carried out construction works in accordance with its terms."[162]

178. The Claimant advances a distinct claim that Croatia's measures also breached Article 2(2) of the Treaty because there were "unreasonable and discriminatory."[163] The Claimant cites to the circumstances surrounding the Spatial Council Guidelines,[164] the infrastructure agreement with the City,[165] and the construction permits,[166] in support of this claim. Each of these elements was considered by the *Elitech* tribunal at paragraphs 606 to 616 of the *Elitech* Award and the claim was rejected in respect of each.

179. Finally, the Claimant asserts a breach of the FET standard on the grounds that the Project was the target of xenophobic attacks driven by a nationalist agenda.[167] The *Elitech* tribunal dealt with this allegation at paragraphs 617 to 620 of its Award. It concluded that "the Claimants have not presented sufficient evidence that the Croatian authorities took actions to prevent the Gold Park Project from coming to fruition based on a xenophobic agenda."[168]

180. This analysis demonstrates that the legal and factual grounds for the FET claim in the *Elitech* Arbitration and in the present arbitration are in substance identical and that the principal elements of the present claim were raised in the *Elitech* Arbitration and were disposed of conclusively by the *Elitech* tribunal on the merits. The Majority thus concludes that the *causa petendi* are the same for the FET claim.

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[161] *Elitech* Award, Exhibit **C-0291**, para. 602.
[162] *Elitech* Award, Exhibit **C-0291**, para. 603.
[163] C's Memorial, paras. 313-320.
[164] C's Memorial, para. 315.
[165] C's Memorial, para. 316.
[166] C's Memorial, para. 318.
[167] C's Memorial, paras. 299-300.
[168] *Elitech* Award, Exhibit **C-0291**, para. 620.

### (ii) Effective means claim

181. The Claimant's effective means claim is founded upon Article 3(5) of the Croatia-Kuwait BIT, which is said to be imported via the MFN clause in Articles 3(1) and 3(2) of the Croatia-Israel BIT.[169] Article 3(5) of the Croatia-Kuwait BIT reads:

> *Each Contracting State recognizes that in order to maintain a favourable environment for investments in its territory by investors of the other Contracting State, it shall provide effective means of asserting claims and enforcing rights with respect to investments. Each Contracting State shall ensure to investors of the Contracting State access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice who qualify under applicable laws and regulations for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.*[170]

182. The claimants in the *Elitech* Arbitration relied upon precisely the same obligation in Article 3(5) of the Croatia-Kuwait BIT (save that it was said to be imported through the MFN clause in Article 3(2) of the Croatia-Netherlands BIT).[171]

183. The Claimant's claim in this case asserts a failure to provide effective means to defend its interest in relation to three elements: the EIS Decision; the UPU procedure; and the 2012 Decisions of the State Administrative Office.[172] Those same elements were raised by the claimants in the *Elitech* Arbitration.[173]

184. The *Elitech* tribunal rejected the claimants' effective means claim by deciding that the effective means provision from the Croatia-Kuwait BIT could not be imported through the MFN clause in Article 3(2) of the Croatia-Netherlands BIT (the basic treaty). This decision rested upon the specific language of Article 3(2) of that treaty, which was held to preclude

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[169] C's Memorial, para. 321-322.

[170] Agreement between the Republic of Croatia and the State of Kuwait for the Promotion and Reciprocal Protection of Investments, which entered into force on 2 July 1998 ("**Croatia-Kuwait BIT**"), Exhibit **CL-0004**, Article 3(5).

[171] *Elitech* Award, Exhibit **C-0291**, paras. 622-624.

[172] C's Memorial, paras. 327-331.

[173] *Elitech* Award, Exhibit **C-0291**, paras. 627-632.

the possibility of importing an effective means standard. Article 3 of the Croatia-Netherlands BIT reads, in relevant part:

> *(1) Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical security and protection.*
>
> *(2) More particularly, each Contracting Party shall accord to such investments treatment which in any case shall not be less favourable than that accorded either to investments of its own nationals or to investments of nationals of any third State, whichever is more favourable to the national concerned.*[174]

185. The *Elitech* tribunal found that the terms "more particularly" limit the scope of the MFN provision in Article 3(2) to the "topics" addressed in Article 3(1), which do not include "effective means."[175]

186. In the present case, the Claimant relies upon the MFN provision in Articles 3(1) and 3(2) of the Croatia-Israel BIT, which do not contain the same language as in the Croatia-Netherlands BIT. Article 3 of the Croatia-Israel BIT provides:

> *1. Neither Contracting Party shall, in its territory, subject investments or returns of investors of the other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.*
>
> *2. Neither Contracting Party shall, in its territory, subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favorable than that which it accords to its own investors or to investors of any third State.*[176]

[174] Croatia-Netherlands BIT, Exhibit **CL-0184**, Articles 3(1)-(2).

[175] *Elitech* Award, paras. 650-652.

[176] BIT, Exhibit **CL-0001**, Article 3.

187. It follows that the dismissal of the claimants' claim in the *Elitech* Arbitration by reason of the specific treaty language found in the MFN clause in Article 3(2) of the Croatia-Netherlands BIT cannot be *res judicata* in relation to the different treaty language found in Articles 3(1) and 3(2) of the Croatia-Israel BIT. These MFN obligations are, in other words, substantively different. This does not mean that the present Tribunal has prejudged the question of whether it is even permissible to import investment protection obligations from third treaties into the basic treaty via an MFN clause; it simply means that the *Elitech* tribunal rejected the claim on a legal basis that is not relevant in the present proceedings given the different treaty language at issue. The Tribunal will consider whether it would be an abuse of process for the Claimant to attempt to prosecute an effective means claim anew in these proceedings separately at a later stage of this Award (see below at Section IV.B(7)).

#### (iii) Umbrella clause

188. The claimants in the *Elitech* Arbitration advanced a claim under the umbrella clause in Article 3(4) of the Netherlands-Croatia BIT, which reads:

> *Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.*[177]

189. In the present case, the Claimant is relying upon the MFN clause in Articles 3(1) and 3(2) of the Treaty to invoke the umbrella clause in Article 3(3) of the Croatia-Kuwait BIT, which reads:

> *Each Contracting State shall observe any obligation or undertaking it may have entered into with regard to investments in its territory by investors of the other Contracting State.*[178]

190. Assuming, *arguendo*, that the Claimant would be permitted to import the umbrella clause in Article 3(3) of the Croatia-Kuwait BIT through the MFN clause of the Treaty, it has not

[177] Croatia-Netherlands BIT, Exhibit **CL-0184**, Article 3(4); *Elitech* Award, Exhibit **C-0291**, para. 390.
[178] C's Memorial, para. 333; Croatia-Kuwait BIT, Exhibit **CL-0004**, Article 3(3).

been suggested by the Claimant that there is a substantial difference in the level of protection provided under each umbrella clause, and indeed they are virtually identical.

191. The Claimant has pleaded in this proceeding four separate elements to its umbrella clause claim. The first three elements correspond to the three separate contracts that it says Croatia "refused to honour."[179] The first is the Concession Agreement of 25 March 2009 between the City of Dubrovnik and Razvoj Golf, pursuant to which the latter agreed to reconstruct the Fort.[180] The second is the Purchase Agreement of 24 June 2009 between the Government of Croatia and Razvoj Golf Dubrovnik d.o.o., by which the former sold certain land plots to the latter.[181] The third is the Preliminary Agreement of 12 May 2010 between the Government of Croatia and Razvoj Golf Dubrovnik d.o.o., by which the former granted leasehold and building rights on State-owned land.[182]

192. The claimants in the *Elitech* Arbitration raised precisely the same claims under the same contracts.[183]

193. The *Elitech* tribunal interpreted the scope of the umbrella clause in accordance with the Vienna Convention rules, relied upon the decision in *Burlington v. Ecuador*, and concluded that a non-signatory to a contract cannot enforce contractual obligations unless that is permitted under the law applicable to the contracts (Croatian law), which it was not.[184] The *Elitech* tribunal thus held that the claimants, as they were not parties to the Purchase Agreement or the Preliminary Agreement, could not enforce the obligations thereunder on the basis of the umbrella clause:

> *The Tribunal thus concludes that the Claimants cannot invoke the BIT's umbrella clause to bring claims against the Respondent*

[179] C's Memorial, para. 337.

[180] C's Memorial, para. 338; Concession Agreement between the City of Dubrovnik and Razvoj Golf, 25 March 2009, Exhibit **C-0086**.

[181] C's Memorial, para. 339; Sale and Purchase Agreement between the Republic of Croatia and Razvoj Golf Dubrovnik d.o.o., 24 June 2009, Exhibit **C-0099**.

[182] C's Memorial, para. 340; Preliminary Agreement between the Republic of Croatia and Razvoj Golf Dubrovnik d.o.o., 12 May 2010, Exhibit **C-0107**.

[183] *Elitech* Award, Exhibit **C-0291**, para. 389.

[184] *Elitech* Award, Exhibit **C-0291**, paras. 395-397, citing *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, Exhibit **RL-0005**, paras. 214-215.

> *arising out of the 2009 Purchase Agreement or the 2010 Preliminary Agreement.*[185]

194. A few paragraphs later in the Award, the *Elitech* tribunal characterises that decision as relating to its jurisdiction:

> *In short, the Tribunal lacks jurisdiction over the umbrella clause claims arising out of the 2009 Purchase Agreement and the 2010 Preliminary Agreement. It does, however, have jurisdiction over Razvoj Golf's umbrella clause claims in respect of the Concession Agreement.*[186]

195. Despite the *Elitech* tribunal's characterisation, there is no doubt that the *Elitech* tribunal's decision in this regard was a dismissal on the merits: the tribunal interpreted the substantive scope of the umbrella clause and concluded that the claimants could not enforce the obligations under the Purchase Agreement and the Preliminary Agreement through the umbrella clause because they were not parties to the contracts in question. There was no issue of whether the *Elitech* tribunal had the adjudicative authority to rule on an umbrella clause claim in general or whether it had adjudicative power over the claimants in that case. Such matters would have properly been characterised as relating to the tribunal's jurisdiction.

196. In relation to the Concession Agreement, the *Elitech* tribunal concluded that the parties to that agreement were parties in the *Elitech* Arbitration, but that Croatia did not breach that agreement and hence the umbrella clause claim failed on that basis.[187]

197. The fourth element of the umbrella clause claim pleaded by the Claimant in this case is a series of alleged representations by Croatian officials, which he alleges were not honoured for the purposes of the umbrella clause.[188] These alleged representations are set out in paragraphs 341 to 342 of the Claimant's Memorial, which are copied verbatim from

[185] *Elitech* Award, Exhibit **C-0291**, para. 399.
[186] *Elitech* Award, Exhibit **C-0291**, para. 402.
[187] *Elitech* Award, Exhibit **C-0291**, paras. 660-667.
[188] C's Memorial, paras. 341-342.

paragraphs 327 to 328 of the claimants' memorial in *Elitech*.[189] The *Elitech* tribunal, referring to this passage of the claimants' memorial, stated:

> *The Tribunal notes that it has already reviewed the alleged representations by Croatian officials cited by the Claimants in the context of legitimate expectations and concluded that they did not contain the assurances claimed. As a result, the question of a breach of the umbrella clause based on a violation of those assurances does not arise.*[190]

198. According to the *Elitech* tribunal's own characterisation of its decisions in relation to the umbrella clause claim in the *Elitech* Arbitration, it disposed of the claim relating to the Concession Agreement (finding there was no breach of that Agreement) and the series of alleged representations by Croatian officials (finding that no such representations had been made). These are also findings on the merits. The Majority thus concludes that the *causa petendi* for those claims are the same as for the identical claims in the present arbitration.

199. In relation to the two remaining umbrella clause claims pertaining to the Purchase Agreement and the Preliminary Agreement, as noted above the *Elitech* tribunal purported to dismiss these on a jurisdictional basis even though the grounds that were given clearly related to the merits of the claims. It will be recalled that the tribunal interpreted the substantive scope of the umbrella clause and concluded that the claimants could not enforce the obligations under the Purchase Agreement and the Preliminary Agreement through the umbrella clause because they were not parties to the contracts in question. It is for the present Tribunal to analyse the existing *Elitech* Award and characterise its various elements for the purpose of applying the *res judicata* doctrine; it is not bound by the *Elitech* tribunal's characterisation of its own decision as relating to jurisdiction in respect of these two claims. In the same way, an arbitral tribunal could not render its award immune from review on jurisdictional grounds simply by characterising its decision as pertaining exclusively to the merits.

[189] *Elitech* Arbitration, Claimants' Memorial, 12 October 2018, Exhibit **C-0292**, paras. 327-328.
[190] *Elitech* Award, Exhibit **C-0291**, para. 666.

200. The Majority thus concludes that the *causa petendi* for the umbrella clause claims under the Purchase Agreement and the Preliminary Agreement are the same as for the identical claims in the present arbitration. In the alternative, as will be discussed in Section IV.B(7) of this Award, it would be an abuse of process for the Claimant to resubmit these claims in the present arbitration for determination.

#### (iv) Expropriation

201. The claimants in *Elitech* founded their expropriation claim on Article 6 of the Croatia-Netherlands BIT, which reads:

> *Neither Contracting Party shall take any measures depriving, directly or indirectly, nationals of the other Contracting Party of their investments unless the following conditions are complied with:*
>
> *a) the measures are taken in the public interest and under due process of law;*
>
> *b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party which takes such measures may have given;*
>
> *c) the measures are taken against just compensation. Such compensation shall represent the genuine value of the investments affected, shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.*[191]

202. The Claimant in this case relies on Article 5 of the Croatia-Israel BIT, which reads:

> *Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter: "expropriation") in the territory of the other Contracting Party, except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against*

[191] *Elitech* Award, Exhibit **C-0291**, para. 668; Croatia-Netherlands BIT, **CL-0184**, Article 6.

> *prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation of before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at the applicable rate provided by law of that Contracting Party until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The investors affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment, in accordance with the principles set out in this paragraph.*[192]

203. The Claimant in these proceedings has not contended that there is any material difference in the scope of the protection afforded under these two provisions.[193]

204. The Claimant in this arbitration pleads that the following measures, cumulatively, amount to the expropriation of its investment in Croatia:

> *(a) The refusal of Ms Šuica to send the draft UPU for public discussion in 2008 for no other reason than her desire for re-election.*
>
> *(b) The issuance of the Spatial Council Guidelines in June 2010, which were unfounded in substance imbued with the objective of undermining Golf Park, as planned, and in any event targeted only at Golf Park.*
>
> *(c) The First and Second Tentative Opinions that, which, relying on the bogus Spatial Council Guidelines, were the vehicle of the County government to block the adoption of the UPU.*
>
> *(d) The Ministry of Environment and Construction's refusal to resolve the conflicting views of the county and city with regard to the UPU process in 2010-2011, combined with there being no other recourse under Croatian law for the Claimant to resolve this issue.*

[192] C's Memorial, para. 343; BIT, **CL-0001**, Article 5.

[193] C's 16 February 2024 Submission, paras. 20-25.

> *(e) Croatia's express representation that the State-owned land conveyed under the Purchase and Preliminary Agreements was free of any encumbrances, coupled with the grant of restitution of the land in 2015, notwithstanding the Church's failure to comply with procedural and substantive requirements of the Compensation Act.*
>
> *(f) The City of Dubrovnik's failure to construct necessary municipal infrastructure for the Project pursuant to the Concession Agreement.*
>
> *(g) The Ministry of Environment's failure to appear in the EIS Proceedings. As defendant in those proceedings, the Ministry (led by an anti-Project Most-affiliate) was naturally tasked with defending the very EIS it had properly issued to the Claimant before. This omission resulted in the EIS Decision, which invalidated the necessary EIS for the Project.*
>
> *(h) The Location Permit Decision issued by the Administrative Court on 10 February 2017, definitively invalidating the Location Permit, which was necessary to obtaining construction permits for commencing the Project.*[194]

205. This list of alleged expropriatory measures is copied verbatim from the claimants' memorial in *Elitech*[195] and is also reproduced in the *Elitech* Award.[196] The *Elitech* tribunal concluded that there was no expropriation in the circumstances:

> *The record does not show that the Croatian authorities destroyed the value of the Golf Park Project or that the Claimants lost control over the Golf Park Project. As mentioned previously, the Claimants completed all necessary steps in order to start construction works on the Golf Park Project: they acquired the Golf Park Project land; the UPU was adopted on 9 August 2013; the EIS was approved on 25 October 2017; the Construction Permit was issued on 23 December 2015 and the Location Permit on 21 December 2017. Once the Location Permit had been re-issued at the end of 2017, the Claimants were in possession of all relevant approvals and authorizations to proceed with the construction works on the Golf Park. Nothing impeded the development of the Golf Park Project.*

[194] C's Memorial, para. 350.

[195] *Elitech* Arbitration, Claimants' Memorial, 12 October 2018, Exhibit **C-0292**, para. 335.

[196] *Elitech* Award, Exhibit **C-0291**, para. 672.

> *Yet, the Claimants did not start construction and instead seem to have decided not to pursue the Golf Park Project any further.*
>
> *On this basis, the Tribunal concludes that the Respondent did not expropriate the Claimants' investments.*[197]

206. The Majority finds that the legal grounds for the expropriation claim in the *Elitech* Arbitration and in the present arbitration are in substance identical and that the principal elements of the present claim were raised in the *Elitech* Arbitration and were disposed of conclusively by the *Elitech* tribunal on the merits. The Majority thus concludes that the *causa petendi* are the same for the expropriation claim.

### c. Identity of *petitum* or object or relief sought

207. The Respondent submits:

> *The Claimant conflates the petitum (or object/relief) prong of the test with the causa petendi (or legal grounds), so as to avoid addressing the largely identical reliefs sought in the two proceedings (i.e., related to the value of the Claimant's / the Elitech claimants' alleged investment in the Golf Park Project). Indeed, the Claimant's request to amend his Memorial and the quantum of damages claimed appears to be a transparent attempt to avoid the obvious conclusion that in both cases the respective claimants are requesting damages based on the value of the same project.*[198]

208. The Respondent recalls that "[i]n the cooling-off period prior to commencing this arbitration, the Claimant repeatedly proposed that he would substitute himself for the *Elitech* claimants in the *Elitech* arbitration. It is therefore evident that the Claimant himself considered that the object or relief sought in the *Elitech* arbitration is identical to the relief he would seek in these proceedings."[199] Furthermore, the Respondent alleges that the Claimant's Memorial in this proceeding "is a near-verbatim-copy of the *Elitech* claimant's Memorial."[200]

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[197] *Elitech* Award, Exhibit **C-0291**, paras. 679-680.

[198] R's 11 March 2024 Submission, para. 21.

[199] R's 16 February 2024, para. 53.

[200] R's 16 February 2024, para. 54.

209. The Claimant does not deal with identity of subject-matter specifically because he argues that "Mr Frenkel relies on new facts and his amended prayers for reliefs shall differ from those raised by Elitech and Razvoj Golf."[201]

210. The Tribunal will assess the identity of *petitum* or object/relief sought by reference to the Claimant's Memorial in these proceedings and the *Elitech* Award.

211. The request for relief by the claimants in the *Elitech* Arbitration reads:

> *On the basis of the foregoing the Claimants respectfully request that the Tribunal:*
>
> *(a) REJECT Croatia's objections to jurisdiction and admissibility in their entirety;*
>
> *(b) DECLARE that it has jurisdiction over the Claimants' claims and that the Claimants' claims are admissible;*
>
> *(c) DECLARE that:*
>
> *(i) Croatia has violated Article 3(1) of the Treaty by failing to accord to the Claimants' investments fair and equitable treatment;*
>
> *(ii) Croatia has violated Article 3(2) of the Treaty by failing to provide effective means of asserting claims and enforcing rights with respect to the Claimants' investments;*
>
> *(iii) Croatia has violated Article 3(4) of the Treaty by failing to observe its obligations entered into with regard to the Claimants' investments; and*
>
> *(iv) Croatia has violated Article 6 of the Treaty by expropriating the Claimants' investments;*
>
> *(d) OREDER Croatia to compensate the Claimants for their breaches of the Treaty in the amount of not less than €281.3 million;*
>
> *(e) ORDER Croatia to pay pre-and post-Award interest based on the 12-month Euribor rate plus a spread of 2%, compounding*

[201] C's 16 February 2024 Submission, para. 4.

*annually, accruing from 31 December 2017 until payment is made in full;*

*(f) ORDER Croatia to pay all of the costs and expenses of this arbitration, including the Claimants' reasonable legal and expert fees and the fees and expenses of the Tribunal; and*

*(g) AWARD such other relief as the Tribunal deems appropriate.*[202]

212. The Request for Relief submitted by the Claimant in his Memorial in this arbitration reads:

*On the basis of the foregoing, the Claimant respectfully requests that the Tribunal:*

*(a) DECLARE that:*

*(i) Croatia has violated Article 2(2) of the Treaty by failing to accord to the Claimant's investments fair and equitable treatment;*

*(ii) Croatia has violated Article 3 of the Treaty by failing to provide effective means of asserting claims and enforcing rights with respect to the Claimant's investments and by failing to observe its obligations entered into with regard to the Claimant's investments; and*

*(iii) Croatia has violated Article 5 of the Treaty by expropriating the Claimant's investments.*

*(b) ORDER Croatia to compensate the Claimant fully for his losses resulting from Croatia's breaches of the Treaty and international law, in the amount of not less than €225.1 million.*

*(c) ORDER Croatia to pay pre-and post-award interest based on the 12-month Euribor rate plus a spread of 4.2%, compounding annually, until payment is made in full.*

[202] *Elitech* Award, Exhibit **C-0291**, para. 216, quoting *Elitech* Arbitration, Claimants' Rejoinder on Jurisdiction, 20 April 2020, para. 68.

> *(d) DECLARE that the award of damages and interest shall be made net of applicable Croatian taxes and that Croatia may not deduct taxes in respect of its payment.*
>
> *(e) ORDER such other relief as the Tribunal deems appropriate.*
>
> *(f) ORDER Croatia to pay all of the costs and expenses of this arbitration, including the Claimant's reasonable legal and expert fees and the fees and expenses of the Tribunal.*[203]

213. It is clear to the Majority that the *petitum*—the subject-matter and the relief sought—is in substance identical as a straightforward comparison of these prayers for relief reveal. The difference between the total damages claimed in the *Elitech* Arbitration (€281.3 million) and this arbitration (€225.1 million) is explained by the Respondent on the basis of facts that came to light during the *Elitech* Arbitration that had an impact on the calculation of fair market value, such as the residual value of the land that the *Elitech* claimants still own.[204] The Claimant did not address this discrepancy. In any case, it is clear in respect of the assessment of damages, full compensation is sought in both proceedings and all that has changed is that certain revisions have been made by the Claimant in this arbitration to reflect the alleged market value of the investment at the critical date more accurately.

214. The important consideration for the Majority is that the Claimant is seeking damages for exactly the same alleged prejudice caused by exactly the same alleged measures attributable to Croatia as was advanced in the *Elitech* Arbitration. It is also relevant to note that the Claimant does not deal with the relief sought in the two proceedings in his submissions on the impact of the *Elitech* Award.

215. The Majority concludes that there is an identity of the *petitum*.

#### d. Conclusion on *res judicata*

216. The Majority finds that the triple identity test for *res judicata* is met for all the claims advanced by the Claimant in this arbitration with the exception of the effective means claim

[203] C's Memorial, para. 425.

[204] R's 11 March 2024 Submission, para. 21.

(which, as noted above, relies on the application of the Treaty's MFN clause, such that the *Elitech* tribunal's decisions regarding the effect of the differently-worded MFN clause in the Croatia-Netherlands BIT cannot have any *res judicata* effect). It remains to consider the new evidence relied upon by the Claimant and the effective means claim under the rubric of abuse of process (as well as the alternative basis for declining to hear two of the umbrella clause claims referred to earlier in this Award).

### (6) Allegations that the *Elitech* Tribunal made errors in its assessment of the evidence

217. The Majority's conclusion on *res judicata* entails that any ruling made by the *Elitech* tribunal on substantive matters in respect of the relevant claims is final and binding in respect of the same claims in this arbitration. It is, therefore, not open to the Claimant in these proceedings to seek to reopen the *Elitech* tribunal's assessment of the evidence and its conclusions relating to factual and legal matters on the basis of that assessment. The Claimant has sought to do so in its pleadings on the impact of the *Elitech* Award.

218. In his Second Submission, the Claimant alleges that "new facts and evidence as they stand in 2024" were "not considered – or not sufficiently considered – by the *Elitech* Award." He states that this includes: (1) the City of Dubrovnik's failure to provide the needed infrastructure; (2) the impossibility to obtain construction permits caused by the local authorities; (3) the cancellation of the Concession Agreement; and (4) "other obstructive actions and behavior exhibited by the Croatian authorities since 2020 and not taken into account – or not sufficiently so – by the *Elitech* Award."[205] Mr. Frenkel elaborates on these assertions later in his Second Submission but there describes these matters not as "new facts" but rather as "disputed issues" that "have not been fully examined and decided – or even entirely ignored – by the *Elitech* Arbitral Tribunal."[206]

219. At the Hearing, the Claimant again referenced "[f]acts and events that were not taken into account – not at all or not sufficiently – by the *Elitech* tribunal and the *Elitech* Award and

[205] C's 11 March 2024 Submission, para. 7. (The Claimant also adds to its list the alleged failure of the *Elitech* tribunal to examine and decide the effective means claim, which this Tribunal has already addressed in Section IV.B(7)b above.)

[206] C's 11 March 2024 Submission, paras. 13-18.

which have evolved" and categorized these as facts relating to "A. The issuance of construction permits; B. The issuance of location permits; C. [The termination of the] Concession Agreement […]."[207]

220. As the following analysis demonstrates, the Claimant's allegations really amount to a challenge to the substantive findings of the *Elitech* tribunal. What the Claimant seeks to impugn is the *Elitech* tribunal's assessment of the evidential record and the weight that it accorded parts of that record.

221. The first supposedly "new fact" or "disputed matter" that the Claimant alleges is that "the breaches and termination of the Concession Agreement has neither been fully examined and fully decided by the *Elitech* Award."[208]

222. The Claimant elaborates on its arguments regarding the alleged breaches and the termination and the supposed failures of the *Elitech* tribunal as follows:

a. Under the Concession Agreement, the City committed to relocate a communication tower which had been installed in the middle of Fort Imperial (but failed to do this) and, while "[t]he issue has been mentioned in the *Elitech* Award, […] no conclusions were drawn or decisions made regarding Claimant's breach of its commitment in this respect."[209]

b. Mr. Frenkel challenged the termination of the Concession Agreement in the *Elitech* proceeding, but "the issue was not examined on the merits and no decision was made on the validity of its termination" by the *Elitech* tribunal.[210]

c. The City of Dubrovnik had an obligation to build an access road that it did not fulfil; the *Elitech* tribunal held only that "[i]t is undisputed that the Respondent did not build the access road or the infrastructure" but did "not draw[ ] [from this] the

[207] C's Opening Presentation, slides 7-10. *See also* C's 16 February 2024 Submission, para. 3; C's 11 March 2024 Submission, Section II and para. 19.

[208] C's 11 March 2024 Submission, para. 15.

[209] C's 11 March 2024 Submission, para. 15.

[210] C's 11 March 2024 Submission, para. 15.

appropriate conclusions of […] breach" of the Concession Agreement.[211] The Claimant alleges that even if the City only had a "best efforts" obligation (which he does not think to be the case), it did not show any effort; Mr. Frenkel considers the *Elitech* Award to be "contradictory" in this regard.[212]

223. The *Elitech* tribunal did in fact make conclusions on these issues but they were adverse to the Claimant's position. The *Elitech* tribunal noted that both Parties had reciprocal obligations under the Concession Agreement, namely, the City had to build the access road and infrastructure and to relocate the tower and "[i]n exchange," Razvoj Golf had committed to reconstruct Fort Imperial.[213] It then determined that neither Party had fulfilled its obligations under the Concession Agreement and concluded that

> [c]*ontrary to what the Claimants contend, however, these omissions do not amount to breaches of the Concession Agreement.* […] [T]*he City's obligation was merely to expend best efforts as opposed to providing a certain result*[…] [and] *the constructions works depended on Razvoj Golf's progress in fulfilling its own obligations under the Agreement. The Claimants have not explained why the City should have fulfilled this obligation when Razvoj Golf was in default on its own obligations.*[214]

224. As for the complaint regarding the validity of the termination of the Concession Agreement (which took place on or about 4 June 2020), this is put forward in paragraph 242 of Mr. Frenkel's Memorial in this Arbitration. The *Elitech* claimants could not have addressed this event in their principal written submissions in the *Elitech* Arbitration, which were filed on 12 October 2018 and 8 October 2019. Nonetheless, the *Elitech* claimants sought the leave of the *Elitech* tribunal in October 2020 to introduce evidence with respect to the termination of the Concession Agreement, and were granted permission to do so, with the Respondent's consent, in November 2020.[215] The record shows that the *Elitech* claimants represented that there was no need for written submissions on these documents, and that

[211] C's 11 March 2024 Submission, para. 15.

[212] C's 11 March 2024 Submission, para. 15.

[213] *Elitech* Award, Exhibit **C-0291**, para. 660.

[214] *Elitech* Award, Exhibit **C-0291**, para. 663.

[215] *See* R's 11 March 2024 Submission, fn. 30, and *Elitech* Award, Exhibit **C-0291**, paras. 197-200.

they could be addressed at the October 2021 hearing.[216] It is thus clear that this issue was put before the *Elitech* tribunal and that the *Elitech* claimants had the opportunity to make submissions in respect thereof. The *Elitech* tribunal referred to the termination of the Concession Agreement in its analysis of the umbrella clause claim.[217]

225. The second "new fact" or "fact and event not taken (sufficiently) into account" that the Claimant alleges is that, because the City did not carry out its duties regarding construction of the relevant infrastructure, "Claimant cannot apply for the construction permit and/or initiate the construction works of the main structures of the Golf Project of Mount Srđ."[218] Mr. Frenkel says that the *Elitech* tribunal "failed to understand" the intent of the Infrastructure Agreement that was to be concluded with the City and therefore "ignored completely the consequences of the non-signature of an Infrastructure Agreement."[219]

226. Once more, contrary to the Claimant's arguments, the *Elitech* tribunal dealt with these matters in paragraphs 611 and 612 of its Award. There, the *Elitech* tribunal described how the negotiations for the signature of the Infrastructure Agreement evolved, it set out the disagreements that arose because of the demands put forward by both parties (Mr. Franković on behalf of the City and Ms. Brenko on behalf of Razvoj Golf) and concluded that "[a]s a result, the City and Razvoj Golf ended up being unable to agree on the contractual terms and the Infrastructure Agreement was not signed. In this context, the Majority cannot attribute the negotiations' failure solely to the Respondent and it certainly does not amount to a breach of the FET provision."[220]

227. The third "new fact" or "disputed matter" alleged by the Claimant is that he is not, and never was, "in possession of all relevant approvals and authorizations to proceed with the construction works" as the *Elitech* tribunal had found.[221] Mr. Frenkel alleges that "Respondent's failures regarding the infrastructure and persistant [*sic*] refusal to act in

[216] *See* R's 11 March 2024 Submission, fn. 30, and *Elitech* Award, Exhibit **C-0291**, para. 201.
[217] *Elitech* Award, Exhibit **C-0291**, para. 661.
[218] C's 11 March 2024 Submission, para. 16.
[219] C's 11 March 2024 Submission, para. 17.
[220] *Elitech* Award, Exhibit **C-0291**, paras. 611-612.
[221] C's 11 March 2024 Submission, para. 18, citing *Elitech* Award, Exhibit **C-0291**, paras 422, 427.

2024, have resulted in the definitive failure of the Project and the loss of Claimant's investment."[222]

228. In its Award, the *Elitech* tribunal found that even if the Respondent did not build the access road or the infrastructure, or relocate the communication tower, those omissions did not amount to breaches of the Concession Agreement because the Respondent's obligation was merely to undertake best efforts as opposed to providing a certain result.[223] It moreover made a finding, on the facts, that the *Elitech c*laimants had the necessary authorizations to proceed with construction.[224]

229. The Tribunal has carefully read and analysed the Claimant's contentions on these alleged "new facts" or "disputed matters" that were "not [sufficiently] considered." Again, the Majority finds that the Claimant has not identified "new facts" that were not put before the *Elitech* tribunal but rather has recycled allegations that it had made in the *Elitech* Arbitration and that were considered and dealt with by the *Elitech* tribunal. The *Elitech* Award is *res judicata* in respect of those allegations. The present Tribunal cannot act as a court of appeal in respect of issues that the Claimant now considers have been wrongly decided by the *Elitech* tribunal.[225]

230. The Claimant has, nonetheless, identified two genuine "new facts" that were not put before the *Elitech* tribunal: the Zagreb Award rendered on 18 January 2024[226] and the 11 February 2019 decision denying the reconstruction permit for the Fort Imperial.[227] The Tribunal will deal with these two items in Section IV.B(8) of this Award.

[222] C's 11 March 2024 Submission, para. 18.

[223] *Elitech* Award, Exhibit **C-0291**, para. 663.

[224] *Elitech* Award, Exhibit **C-0291**, para. 679.

[225] *See* R's 16 February Submission, para. 26.

[226] Zagreb Award, Exhibit **C-0300**.

[227] Administrative Department for the Issuance and Implementation of Documents for Spatial Planning and Construction, Decision, 11 February 2019, Exhibit **C-0299**.

### (7) Abuse of process

231. The doctrine of abuse of process has been identified as a general principle of law by numerous international courts and tribunals as well as writers.[228] As a doctrine focused on procedural rights, it has a better claim to being a general principle of law than the broader doctrine of abuse of right, which is not recognised by some major legal systems (such as the English common law). Professor Robert Kolb notes that the principles relating to abuse of process are particularly well-established in the fields of human rights, investment law and the law of the sea.[229]

232. In the context of investment treaty arbitration, the tribunal in *Orascom v. Algeria* articulated the rationale for the doctrine in the same context that arises in the present proceedings (albeit that the tribunal used the term of abuse of right rather than abuse of process):

> [A]*n investor who controls several entities in a vertical chain of companies may commit an abuse if it seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state. It goes without saying that structuring an investment through several layers of corporate entities in different states is not illegitimate. Indeed, the structure may well pursue legitimate corporate, tax, or pre-dispute BIT nationality planning purposes. In the field of investment treaties, the existence of a vertical corporate chain and of treaty protection covering "indirect" investments implies that several entities in the chain may claim treaty protection, especially where a host state has entered into several investment treaties. In other words, several corporate entities in the chain may be in a position to bring an arbitration against the host state in relation to the same investment. This possibility, however, does not mean that the host state has accepted to be sued multiple times by various entities under the same control that are part of the vertical chain in relation to the same investment, the same measures and the same harm.*

[228] *See* R. Kolb, "General Principles of Law" in A. Zimmerman et al. (eds.), *The Statute of the International Court of Justice* (2019), p. 998 (and the extensive authorities listed therein).

[229] R. Kolb, "General Principles of Law" in A. Zimmerman et al. (eds.), *The Statute of the International Court of Justice* (2019), pp. 1000-1001.

> *In the Tribunal's opinion, this conclusion derives from the purpose of investment treaties, which is to promote the economic development of the host state and to protect the investments made by foreigners that are expected to contribute to such development. If the protection is sought at one level of the vertical chain, and in particular at the first level of foreign shareholding, that purpose is fulfilled. The purpose is not served by allowing other entities in the vertical chain controlled by the same shareholder to seek protection for the same harm inflicted on the investment. Quite to the contrary, such additional protection would give rise to a risk of multiple recoveries and conflicting decisions, not to speak of the waste of resources that multiple proceedings involve. The occurrence of such risks would conflict with the promotion of economic development in circumstances where the protection of the investment is already triggered. Thus, where multiple treaties offer entities in a vertical chain similar procedural rights of access to an arbitral forum and comparable substantive guarantees, the initiation of multiple proceedings to recover for essentially the same economic harm would entail the exercise of rights for purposes that are alien to those for which these rights were established.*[230]

233. A single dispute should be adjudicated by a single competent forum. This avoids the prospect of inconsistent decisions in respect of the same issues, prevents the unnecessary deployment of judicial resources to adjudicate different manifestations of the same underlying dispute, and averts the hardship caused to the respondent party in having to defend itself in multiple proceedings. These concerns are reflected in the analysis of the *Orascom* tribunal set out above. A corollary of this principle is that a claimant must bring its whole case to the competent forum: it cannot withhold certain claims, evidence or arguments from that forum and then later seek to introduce those elements in fresh proceedings by asserting that the resulting judgement or award is not *res judicata* in respect thereof. In common law jurisdictions, this corresponds to the rule in *Henderson v. Henderson*:

> *Where a given matter becomes subject to litigation in* […] *a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which*

[230] *Orascom v. Algeria*, Exhibit **RL-0026**, paras. 542-543.

> *was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.*[231]

In civil law jurisdictions, it is sometimes subsumed within the doctrine of *res judicata*, or alternatively part of the concept of abuse of rights.

234. Having set out the general principles underlying the doctrine of abuse of process, the Majority will now consider three possible applications of that doctrine to the present case in relation to (i) certain claims under the umbrella clause, (ii) the effective means claim and (iii) the new evidence and facts cited by the Claimant in this arbitration.

### a. The umbrella clause claims

235. The Majority has concluded that the two umbrella clause claims advanced by the claimants in *Elitech* in relation to the Purchase Agreement and the Preliminary Agreement have been rejected by the *Elitech* tribunal on the merits, even though it characterised that decision as relating to its jurisdiction.[232] But even if the dismissal of those claims were properly considered to be for want of jurisdiction, the Majority would have concluded that it would be an abuse of process to resubmit the same claims to this Tribunal in these proceedings given the findings that were made by the *Elitech* tribunal following a comprehensive analysis of those claims. It has not been suggested by the Claimant that there is any substantive difference in the protection afforded by the umbrella clauses in each of these proceedings and the formulation of the claims are identical as between the two sets of proceedings. There is, therefore, no legitimate reason for the Claimant to seek to relitigate the same umbrella clause claim for a second time before this Tribunal.

### b. Effective means claim

236. The circumstances pertaining to the dismissal of the effective means claim in the *Elitech* Arbitration and the distinguishing feature of the claim in the present case have already been considered in the section dealing with *res judicata*.[233] The Majority concluded that the *causa petendi* were not identical in view of the difference in the language of the MFN

[231] *Henderson v. Henderson* [1843-1860] All E.R. Rep. 378.

[232] *See above*, paragraphs 190-192, 196.

[233] *See above*, paragraphs 183-184.

clauses in each treaty, through which the effective means standard was said to be incorporated.

237. In this case, like in *Orascom v. Algeria*, the ultimate beneficial owner of the investment—Mr. Frenkel, the Claimant in this arbitration—holds the investment in Croatia through a vertical chain of companies. By virtue of that holding structure, the different indirect owners of the investment had at least two avenues to bring investment treaty claims: either on the basis of the Netherlands-Croatia BIT or the Israel-Croatia BIT. Those indirect owners initially elected to proceed with their claims under the Netherlands-Croatia BIT and that resulted in the *Elitech* Award.

238. The fact that the controlling individual or entity within a group of companies can often elect between different routes to investment treaty arbitration is a significant privilege and it can be assumed that such election is made after an assessment of which of those routes is the most advantageous from the perspective of the claimant investor. So long as the applicable investment treaties recognise the standing of indirect owners, and the holding structure for the investment was created before any dispute arose or was foreseeable, the claimant investor cannot be faulted for making such an assessment and acting accordingly.

239. The question now confronting this Tribunal is whether, having first elected to bring an effective means claim under the Netherlands-Croatia BIT, the Claimant, who is in privity of interest with the claimants in *Elitech*, can now advance the same claim under the Israel-Croatia BIT on the basis that the MFN clauses, through which the effective means standard is said to be incorporated, are different in the respective treaties. More specifically, the Claimant in this case submits that the obstacle presented by the specific wording of the MFN clause in the Netherlands-Croatia BIT, which the *Elitech* tribunal considered was fatal to the incorporation of the effective means standard in that arbitration, is absent from the MFN clause in the Israel-Croatia BIT.

240. If the answer to this question were to be given in the affirmative, then it would be open to claimants within the same group of companies with indirect ownership over the same investment to bring successive treaty claims complaining about the same prejudice on the basis that the second, third or fourth investment treaty relied upon has obligations that are

different in scope such that the first award rendered cannot be *res judicata* in respect of the second, and so on. Given that the claimants, or the controlling entity of the claimants, is in the driver's seat in terms of which investment treaty should be elected to pursue the first set of claims, justice and fairness requires that such election must have preclusive effects for a second set of claims advanced on the basis of a different investment treaty. The Majority considers that the doctrine of abuse of process intervenes in these circumstances to prevent a claimant from raising a treaty claim based upon the same factual matrix and cause of action in circumstances where the first claimant, in privity of interest with the second claimant, has already advanced that claim by relying on a different investment treaty.

241. The Majority concludes that it would be an abuse of process to allow the Claimant in the present case to advance an effective means claim based upon the same factual matrix as was submitted to the *Elitech* tribunal and conclusively determined in that arbitration, notwithstanding the difference in the language of the MFN clauses through which the effective means standard was said to be incorporated into the basic treaty.

242. Although it is unnecessary to go further into the merits of the effective means claim, the Majority records that the Respondent has submitted that the claim was in fact rendered moot by developments that occurred during the pendency of the *Elitech* Arbitration.[234]

243. The Respondent states that the claimants' decision in *Elitech* to initiate the arbitration was prompted "by two decisions of the Administrative Court of *Split* dated September 2016 and February 2017" and that "[t]hose decisions invalidated the decision on the environmental impact study for the project, and on the back of that decision, invalidated the location of project -- the location permit for the project."[235]

244. This explanation was confirmed by the Claimant in his First Submission, where he stated:

> *As exposed in more detail below, the Elitech arbitration was introduced in 2017, following the invalidation of the 2016 EIS Decision by the Administrative Court on 2 September 2016 and the*

[234] Transcript, 45:5-8 (Mr. Claypoole).

[235] Transcript, 45:12-19 (Mr. Claypoole).

> *cancellation of the Location Permit on 10 February 2017, but prior to their "tactical" revival by Croatia on 25 October 2017 with respect to the EIS Decision and on 21 December 2017 regarding the reissued Location Permit, and the facts underlying the case have continued to evolve up until today.*[236]

245. At the Hearing, Counsel for the Respondent explained the evolution of the effective means claim in the *Elitech* Arbitration:

> *But it was those court decisions that were the focus of the effective means claim, and it soon became clear that the Elitech Claimants were premature in impugning these court decisions in the ICSID arbitration. And that is because, as we pointed out, shortly afterwards, in October 2017, the Ministry of Environmental Protection issued a new decision on the re-issued environmental impact study, and the Ministry of Construction subsequently, in December 2017, re-issued a location permit. So both those decisions were favorable to Razvoj Golf.*
>
> *Now, the legal challenges had been initiated by various nongovernmental organizations, and those NGOs -- the NGOs that had challenged the original decisions then filed new legal challenges objecting to the re-issued decisions, but those challenges were rejected by the Croatian courts.*
>
> *And if you look at the Elitech Claimants' submissions as set out in their Request for Arbitration and Memorial, you will see that the Claimants alleged that the Croatian legal system provided Razvoj Golf with no recourse against the EIS decision or location permit decision, and they seemed to assume that the legal challenges by these NGOs would succeed, but that was all wrong. In fact, the NGOs' challenges were rejected.*
>
> *So on 22nd of February, 2019, the administrative court in Split rejected the challenge to the subsequent decision on the environmental impact study. The NGOs appealed that decision, but that appeal was rejected in February 2020.*

[236] C's 16 February 2024 Submission, para. 6; *see also* para. 68: "It should also be reminded that *Elitech* Claimants introduced the *Elitech* arbitration on 25 August 2017 following invalidation of the EIS Decision of 2 September 2016 which, by way of consequence, had caused the cancellation of the Location Permit on 10 February 2017, and that the revival of both on 25 October 2017 and 21 December 2017 by Croatia was primarily destined to undermine Claimants' case in the arbitration after having derailed the whole investment project on the field."

> *So by the time the Elitech tribunal had to decide this issue, the factual basis of the main prong of the Elitech Claimants*[']*effective means claim had fallen away, and that remains the case to date.*
>
> *Their objections regarding the Croatian court system were no longer tenable since the court's subsequent court decisions were actually in their favor.*[237]

246. Counsel for the Respondent continued:

> *On the back of that, the Claimant's allegations regarding the conduct of the Croatian courts which form the basis of their effective means claim became effectively unarguable, given that Razvoj Golf had ended up prevailing in that litigation.*
>
> *And in any event, the Elitech tribunal considered and dismissed on the merits the objections regarding the court decisions in the context of other treaty standards; notably in the context of the FET standard, you'll see extracts on the screen, and the expropriation standard.*
>
> *So the Claimant's allegations related to the Croatian court decisions were, in any event, addressed by the Elitech tribunal.*[238]

247. At the Hearing, Counsel for the Claimant elaborated on his effective means claim but did not challenge the Respondent's submission to the effect that it had become moot and that, in any case, the substance of the allegations had been raised and decided in the context of the claim for breach of the FET standard.[239]

#### c. Conclusion on abuse of process

248. The Majority concludes that it would be an abuse of process to allow the Claimant in the present case to advance an effective means claim based upon the same factual matrix as was submitted to the *Elitech* tribunal and conclusively determined in that arbitration, notwithstanding the difference in the language of the MFN clauses through which the effective means standard was said to be incorporated into the basic treaty. Furthermore, in

[237] Transcript, 46:11–48:8 (Mr. Claypoole).

[238] Transcript, 48:9–49:1 (Mr. Claypoole).

[239] Transcript, 133:3-12 (Dr. Granges); Transcript, 134:11–135:15 (Dr. Arfazadeh).

the alternative to the earlier analysis of *res judicata* and the umbrella clause claim, the majority concludes that it would be an abuse of process to advance the same claim again in these proceedings given the conclusions reached by the *Elitech* tribunal in respect of that claim.

**(8) New evidence or facts**

249. As previously indicated, the Claimant has identified two new facts in its submissions. These are the Zagreb Award rendered on 18 January 2024 and the 11 February 2019 decision denying the reconstruction permit for the Fort Imperial.[240]

250. The *Elitech* proceedings were declared closed on 12 April 2023.[241] It follows that the 11 February 2019 decision denying the reconstruction permit for the Fort Imperial could and should have been brought to the attention of the *Elitec*h tribunal if the claimants had thought it to be relevant. In these circumstances, the Majority considers that the Claimant is estopped by the application of *res judicata* from raising that decision in these proceedings or, alternatively, it would be an abuse of process to invoke this "new fact" as a justification for the re-adjudication of claims already decided by the *Elitech* tribunal given that the *Elitech* claimants had an opportunity to raise this decision in the *Elitech* proceedings. It should also be noted that the Claimant's Memorial in the present case was filed on 17 December 2021. There does not appear to be any mention of the 11 February 2019 decision in that submission, which does suggest that it is peripheral at best to the Claimant's case.

251. The Zagreb Award was rendered on 18 January 2024, after the closure of the *Elitech* proceedings and after the *Elitech* Award was issued on 23 May 2023.

252. It is the Majority's present understanding that the Zagreb Award cannot conceivably form the basis of a new claim but rather could only constitute new evidence in relation to claims that have already been decided by the *Elitech* tribunal (and which were resubmitted in this

[240] C's 16 February 2024 Submission, para. 101; C's 11 March 2024 Submission, para. 9; Zagreb Award, Exhibit **C-0300**; Administrative Department for the Issuance and Implementation of Documents for Spatial Planning and Construction, Decision, 11 February 2019, Exhibit **C-0299**.

[241] Letter from the Secretary of the Tribunal to the *Elitech* claimants and the Respondent, 12 April 2023, Exhibit **R-0035**; *Elitech* Award, Exhibit **C-0291**, para. 215.

case). This is because both in the *Elitech* Arbitration and in the present proceedings, it was the Claimant's position that "[b]y the end of 2017, the actions of the Croatian State at central, county, and city level had destroyed the Project as a matter of economic and practical reality."[242] In other words, the Claimant has pleaded a complete loss of his investment by the end of 2017 and indeed has fixed the valuation date in his Memorial at 31 December 2017.[243] It thus follows that, on his own case, anything occurring from 2018 onwards could have no impact on his investment, which "as a matter of economic and practical reality" had ceased to exist.

253. If the Claimant considers that the Zagreb Award constitutes important new evidence in relation to claims that have already been decided by the *Elitech* tribunal, then the proper course to take would have been for the *Elitech* claimants to seek the revision of the *Elitech* Award on the basis of Article 51 of the ICSID Convention. To the Majority's knowledge, no such application has been made to date.

254. Alternatively, the Claimant has not, to date, sought to supplement his Memorial in these proceedings with a new claim relating to the Zagreb Award. It is clear that, were it to do so, the Claimant would have to advance a very different case from that which he has already pleaded in light of his case theory that there was a total loss of his investment in 2017. The Majority does not consider that it would be just or convenient to retain jurisdiction in this case purely to cater for the possibility that the Claimant may wish to supplement his claims with a claim relating to the Zagreb Award. The Tribunal recognises, however, that in the event that the Claimant seeks to advance such a claim in the future before a different tribunal, then this Award would not preclude him from doing so as no decision has been taken in respect of what, at this stage, is a purely hypothetical claim.

### (9) The Claimant's Attempt to Consolidate these Proceedings with the *Elitech* Arbitration

255. The Parties have joined issue on the relevance of the fact that the Claimant proposed the consolidation of these proceedings into the *Elitech* Arbitration and the Respondent's

[242] C's Memorial, para. 8; *see also* paras. 137, 204, 355-356.

[243] C's Memorial, paras. 378-379.

refusal of that proposal. The circumstances were the following. Towards the end of the written phase of the *Elitech* proceedings, in December 2019, Mr. Frenkel proposed to Croatia that his new claims advanced in a Request for Arbitration filed under the Israel-Croatia BIT be adjudicated by the *Elitech* tribunal. Croatia refused on the basis that such consolidation would have seriously disrupted the procedural timetable in the *Elitech* Arbitration and would have necessitated the vacation of the Hearing (then scheduled to take place four months later). Following the postponement of the Hearing, Mr. Frenkel reiterated his proposal in May 2020, and it was again refused by Croatia. When the issue arose again for discussion in January 2021, Croatia instead proposed that the same tribunal in the *Elitech* Arbitration be appointed to adjudicate the new claims advanced by Mr. Frenkel. Mr. Frenkel refused.[244]

256. The Majority considers that it was perfectly reasonable for Croatia to have rejected Mr. Frenkel's proposal for consolidation given the advanced stage of the *Elitech* Arbitration when that proposal was made: consolidating would have resulted in significant wasted costs and substantial delay. Moreover, the purported rationale for Mr. Frenkel's decision to commence fresh proceedings under the Israel-Croatia BIT was that the *Elitech* tribunal might decline its jurisdiction on the basis of *Achmea*.[245] That rationale was also expressly stated in Mr. Frenkel's Request for Arbitration in the present proceedings.[246] It is a justification that proved to be without a foundation: the *Elitech* tribunal rejected Croatia's jurisdictional objection based on *Achmea*.[247] If that were the true rationale for Mr. Frenkel's filing of this arbitration, then logically he would have terminated these proceedings upon receipt of the *Elitech* Award given its rejection of this jurisdictional objection. Instead, Mr. Frenkel continued to pursue this arbitration to relitigate the same

[244] *See Elitech* Award, Exhibit **C-0291**, paras. 187-206; Letter from Freshfields Bruckhaus Deringer to Croatia, 6 December 2019, Exhibit **C-0008**; Letter from Latham & Watkins to Freshfields Bruckhaus Deringer, 20 December 2019, Exhibit **C-0009**; Letter from Freshfields Bruckhaus Deringer to Latham & Watkins, 26 May 2020, Exhibit **C-0010**; Letter from Latham & Watkins to Freshfields Bruckhaus Deringer, 2 June 2020, Exhibit **C-0011**; Letter from Latham & Watkins to Freshfields, 2 December 2020, **Exhibit R-0003**, p. 2; Letter from Freshfields Bruckhaus Deringer to Latham & Watkins, 3 January 2021, Exhibit **R-0005**; Letter from the State Attorney's Office of the Republic of Croatia to Freshfields Bruckhaus Deringer, 13 January 2021, Exhibit **R-0006**; Letter from Freshfields Bruckhaus Deringer to the State Attorney's Office of the Republic of Croatia, 26 February 2021, Exhibit **R-0007**.

[245] *See* Letter from Freshfields Bruckhaus Deringer to Croatia, 6 December 2019, Exhibit **C-0008**.

[246] Request for Arbitration, para. 9.

[247] *Elitech* Award, Exhibit **C-0291**, para. 365.

claims that were disposed of by the *Elitech* tribunal on the merits. The majority has found that Mr. Frenkel is precluded from doing so based on the doctrines of *res judicata* and abuse of process.

257. Finally, Mr. Frenkel's position on the significance of his consolidation proposal presupposes that he had an unfettered right to bring a second arbitration in respect of the same claims that his privies had already submitted for adjudication to the *Elitech* tribunal and that Croatia should be faulted for refusing to accommodate the pursuit of that right. That position rests upon a false premise. No such unfettered right is conferred upon a claimant by an investment treaty, the provisions of which must be interpreted and applied against the background of general principles of law such as *res judicata* and abuse of process.

### (10) The Majority's Comments on the Dissenting Opinion

258. The majority will now briefly address the main points raised in the Dissenting Opinion.

259. *First*, the Dissenter attributes significant weight to the "silence" of the BITs on the application of the principle of *res judicata* and abuse of process and suggests that "[i]f the parties to an investment treaty intended to rule out parallel proceedings, they could do so explicitly, which is not the case here."[248] States negotiate and conclude investment treaties against the background of general international law and, in the words of Judge Verzijl, "[e]very international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way."[249] There is no doubt that *res judicata* and abuse of process are general principles of international law and they must be applied if the circumstances warrant it whether or not they are expressly mentioned in the text of the investment treaty. The BIT in this case is also silent on the power of this Tribunal to award compensatory damages, whereas some investment treaties make this power explicit. Should we accept an *a contrario* argument that we do not have the power to award compensatory damages for a breach of the BIT in this case? Or is it more plausible that the general law on state

[248] Dissenting Opinion, para. 6.

[249] Verzijl P, *Georges Pinson Case* (1927-8) AD No. 292.

responsibility supplements the express provisions of the BIT? The "silence" of the treaty text is too often used as a rhetorical device to justify an unprincipled result in investment arbitration.

260. *Second*, in the context of *res judicata*, the Dissenter maintains that any conclusion on whether there are differences in the protections afforded by the different BITs "requires that the Tribunal be fully briefed on the facts and the law."[250] If that were correct, then *res judicata* would be rendered a dead letter for its very purpose is to prevent a full and complete examination of the merits of the claims. *Res judicata* must, by definition, be adjudicated at a preliminary phase of the proceedings and this is precisely what has happened in this case. To take another analogous example, it would be rather strange to insist that a full merits hearing is required to determine whether a claim is time-barred under a statute of limitations. The Dissenter then asserts that "the Majority has deprived the Claimant of the opportunity to fully present its case"[251] in circumstances where the very rationale of the doctrine of *res judicata*, when it applies, is precisely to remove that opportunity.

261. *Third*, the Dissenter seeks to discount entirely the submissions that the parties actually did make on the identity of the claims in the two proceedings in a distinct written phase and hearing dedicated to this very question on the basis that "there is no doubt that the parties' submissions on the impact of the *Elitech* award cannot, and do not claim to present their full cases on the facts and the law."[252] Again, if the doctrine of *res judicata* could only apply after the full examination of the merits of the claims, then it would serve no purpose. The majority recalls that it is the common position of the parties in this case that "the substance [of the present arbitration] is identical to the *Elitech* arbitration."[253] Neither party has sought to distinguish the substance of the claims in the present case from those advanced in the *Elitech* arbitration in this preliminary phase of the proceedings addressing "the impact of the *Elitech* Award" save in the limited instances in which the Majority has

[250] Dissenting Opinion, para. 8.

[251] Dissenting Opinion, para. 8.

[252] Dissenting Opinion, para. 8.

[253] Decision on Bifurcation, para. 20, referencing Request for Bifurcation, para. 6 and Request for Arbitration, para. 11.

addressed at length in its reasons. To assert that no conclusions on these matters can be reached without proceeding to a final award on the merits of the claims is to deny the existence of the principle of *res judicata*.

262. *Fourth*, in relation to what the Dissenter categorises as "facts and measures not addressed by the *Elitech* Award (primarily because they occurred after the award was issued or after the proceedings as closed),"[254] there is only one such "fact and measure," as the Dissenter appears to accept, which is the Zagreb Award rendered on 18 January 2024. The Dissenter is mistaken that the Majority concludes that this new fact or measure cannot alone constitute a breach: the Majority makes no ruling on a claim that has not even been advanced at this stage and expressly states that it would be open to the Claimant to present a claim based upon the Zagreb Award in the future before a different tribunal should it wish to do so. The Majority simply noted that as part of its reasons for not retaining jurisdiction to adjudicate a hypothetical claim that its "present understanding [is] that the Zagreb Award cannot conceivably form the basis of a new claim but rather could only constitute new evidence in relation to claims that have already been decided by the *Elitech* tribunal" and, if indeed the latter, the proper remedy would be to seek the revision of the *Elitech* Award on the basis of Article 51 of the ICSID Convention. That is not the same as ruling on the (hypothetical) claim itself. The Majority explained that if such a claim were advanced, it would require a radically different case theory because the Claimant pleaded a complete loss of his investment by the end of 2017 and indeed has fixed the valuation date in his Memorial at 31 December 2017[255] – some five years before the Zagreb Award was issued. The Dissenter speculates that "it cannot be ruled out that Respondent caused the investment's 'death by a thousand cuts' and that the new facts / new measures constituted the last, *i.e.*, the deadly cuts."[256] But on the Claimant's own case its investment was dead by December 2017 after which time a further cut would have made no difference. If the Claimant wishes to reformulate its entire case theory and replead his claim in the manner suggested by the Dissenter, then it is free to do so but that would amount to starting

[254] Dissenting Opinion, para. 10.
[255] C's Memorial, paras. 378-379.
[256] Dissenting Opinion, para. 10.

anew rather than submitting a virtual carbon copy of his pleadings in *Elitech* (which is what he has done in this case) and the Claimant would no doubt have to grapple with pleas of issue estoppel based on the *Elitech* Award. The Majority considers that it would place an unfair burden on the Respondent to retain jurisdiction just to cater for this hypothetical possibility.

263. *Fifth,* for the reasons explained by the Majority, there is unlikely to be a more compelling case for the application of *res judicata* than this one given that both parties agree that this dispute is in substance identical to the one submitted to the *Elitech* tribunal. Although the Dissenter omits to sketch out the circumstances in which he considers the doctrine of *res judicata* should apply, it is clear from his analysis that he would demand the formal identity of the parties and the formal identity of the treaties invoked (i.e., Elitech would have to bring the same claims again under the same Netherlands-Croatia BIT for *res judicata* to apply). That situation is never likely to arise in practice. Although the Dissenter recognises that the "the principles of *res judicata* and collateral estoppel play an important role in ensuring the efficiency and consistency of jurisprudence,"[257] his approach would deprive them of any meaningful role at all.

264. The Majority, like many other international courts and tribunals, has simply prioritised substance over form in its application of *res judicata* as a general principle of international law. The Dissenter goes as far to say that this amounts to a violation of the Claimant's fundamental rights: "the Majority has denied Claimant access to justice and thus violated his due process rights."[258] One is left with the unescapable impression that the Dissenter considers that *any* realistic application of *res judicata* will *ipso facto* deny access to justice and violate due process rights and that his dissent amounts to a wholesale rejection of the principle of *res judicata* in practice. The fact that he suggests that an adverse costs award is an adequate remedy for the inefficiency and wasted resources that would result from the multiplicity of proceedings[259] goes in the same direction: if that were correct, then there would be no need for *res judicata*. The fact that the principle of *res judicata* is recognised

[257] Dissenting Opinion, para. 14.
[258] Dissenting Opinion, para. 13.
[259] Dissenting Opinion, para. 15.

universally, including in national systems like England where adverse costs awards are standard practice in civil litigation, suggests otherwise.

265. *Sixth*, and addressing now abuse of process, the Dissenter first complains that "the Majority [did] not explain why the doctrine of abuse of process applies to claims that are not *res judicata*"[260] but then in the next paragraph criticises the explanation that the Majority does give as "unavailing" because it is not applicable to the facts of this case.[261] The section of the Majority's reasoning under scrutiny here is the general introduction to the doctrine of abuse of process and not its application to the facts of this case, which follows in the subsequent sections. The strawman erected by the Dissenter can be left in peace.

266. *Seventh*, and now addressing the Majority's actual reasoning on abuse of process on the facts of the case, the Dissenter once again places decisive weight on the silence of the investment treaties: "[T]here is nothing in the BITs at issue here and in the *Elitech* case that suggests that a choice to submit claims under one BIT or another depending on the nationality of an investor up or down the ownership chain is preclusive."[262] The fact that an investment treaty typically does not expressly regulate parallel proceedings before tribunals constituted under other treaties does not translate into a principle that anything goes. The Dissenter disagrees with the Majority's view that it should not be "open to claimants 'within the same group of companies with indirect ownership over the same investment to bring successive treaty claims complaining about the same prejudice on the basis that the second, third or fourth investment treaty relied upon has obligations that are different in scope'" such that the first award rendered cannot be *res judicata* in respect of the second, and so on. For the Dissenter, if the obligations are "different in scope" (a phrase he underlined twice)[263] then it must be open to claimants within the same group of companies to bring successive claims under those different obligations.

267. The following scenario illustrates why this must be wrong as a general principle. Suppose the first claimant in the group of companies brings a claim for expropriation (only) under

[260] Dissenting Opinion, para. 19.
[261] Dissenting Opinion, para. 20.
[262] Dissenting Opinion, para. 22.
[263] Dissenting Opinion, paras. 23 and 24.

the first treaty, then the second claimant in the group brings a claim for breach of the fair and equitable treatment standard (only) under the second treaty, then the third claimant in the group brings a claim for a breach of the full protection and security standard (only) under the third treaty, and so on, in circumstances where each claim relates to exactly the same measure and alleged prejudice and where it was open to the first claimant to bring all those claims before the first tribunal. The majority considers that this would be an abuse of process even though the doctrine of *res judicata* may not necessarily preclude the second and third claims given that the causes of action are different. That scenario is perhaps unlikely, but it is nonetheless important for testing the justification for having a distinct doctrine of abuse of process that is broader in scope than *res judicata* (the Majority understands that the Dissenter would not consider that this would be an abuse of process).

268. If the more likely scenario of different treaties with different formulations of the investment protection obligations is considered, the Majority considers once again that substance must prevail over form and the relevant inquiry must be whether the substance of the claim has been submitted to another forum regardless of the precise formulation of the obligation in question. It is well known that there is substantial overlap in the protection afforded by investment treaty obligations, and it cannot be right that claimants can simply invoke formal differences to justify successive proceedings under different treaties when the substance of their claims has already been adjudicated. For instance, the Dissenter argues that it should be open to the Claimant's privies to bring one claim based upon the "unreasonable, disproportionate or bad faith" aspect of the FET standard before the *Elitech* tribunal, and then, in subsequent proceedings, another claim based on the "separate prohibition" of "unreasonable or discriminatory measures" before this Tribunal.[264] But neither party before this Tribunal has sought to argue that the FET standard does not encompass a prohibition against "unreasonable or discriminatory measures" and the two investment treaties at issue both expressly refer to "unreasonable or discriminatory measures" in their provisions encapsulating the FET standard.

[264] Dissenting Opinion, para. 9.

269. The Claimant has been given ample opportunity in this case both in writing and at an oral hearing to explain why the substance of his claims are different in these proceedings as compared with those adjudicated by the *Elitech* tribunal. The fact, for instance, that the Claimant did not challenge the Respondent's submission that the effective means claim was rendered moot during the course of the *Elitech* proceedings and was adjudicated in substance by the *Elitech* tribunal in the context of the fair and equitable treatment claim cannot simply be ignored as the Dissenter appears to suggest.[265]

270. *Eighth*, and finally in relation to abuse of process, the Dissenter introduces new authorities for the proposition that abuse of process requires proof of bad faith[266] and then castigates the Majority for having concluded that the Claimant acted in bad faith[267] when the Majority (i) never made such a finding and (ii) rejects the proposition that abuse of process requires proof of any subjective bad faith.

271. The doctrine of abuse of process applies when certain objective factors are present. For instance, the doctrine has been applied where an investment is restructured to attract investment treaty protection at a time when a dispute with the host State had arisen or was foreseeable. No finding of subjective bad faith has been required. Likewise, it has been applied, in the words of the *Orascom* tribunal, where "an investor who controls several entities in a vertical chain of companies … seeks to impugn the same host state measures and claims for the same harm at various levels of the chain in reliance on several investment treaties concluded by the host state."[268] There is not a trace of a requirement of subjective bad faith in that decision either.

272. A requirement of subjective bad faith would take the doctrine of abuse of process out of circulation for all practical purposes because a party's motivations behind its litigation strategy are likely to be recorded in communications with legal counsel and thus attract privilege and be immune from disclosure. In other words, such motivations would be impossible to prove one way or another. The Dissenter's complaint that the Majority has

[265] Dissenting Opinion, para. 25.
[266] Dissenting Opinion, fn. 9.
[267] Dissenting Opinion, paras 27-33.
[268] *Orascom v. Algeria*, Exhibit **RL-0026**, para. 542.

not demonstrated that the "Claimant was driven by some hidden motive"[269] is thus inapposite: the test for abuse of process does not depend upon a futile search for hidden motives.

273. The Majority has thus applied the doctrine of abuse of process based upon the objective criteria that it has set out in its reasoning. It has made no finding on the subjective motivation of the Claimant in pursuing this arbitration. In contrast, the Dissenter is prepared to make a conclusive finding that the "Claimant acted in good faith when he initiated this arbitration and when he proposed the consolidation of the two arbitrations"[270] and claims on that basis that "[t]hese circumstances are very different from the circumstances of the *Orascom* case."[271] This is puzzling for two reasons: first, there is no evidence on the record that would allow this Tribunal to assess the subjective intentions of the Claimant when he initiated this arbitration and proposed consolidation; and, second, both the Majority and the *Orascom* tribunal agree that abuse of process doctrine does not depend on evidence of bad faith on the part of the claimant. The circumstances of the *Orascom* case do not appear to be materially different at all in this respect and the Dissenter has not shared his reasons for thinking otherwise.

## V. COSTS

### A. THE RESPONDENT'S COST SUBMISSION

274. In its submission on costs, the Respondent argues that the Claimant should bear the total arbitration costs incurred by the Respondent, including legal fees and expenses totalling €1,109,679.14, broken down as follows: €335,000 corresponding to the Respondent's costs for arbitration and €774,679.14 corresponding to the legal fees, costs and expenses incurred by the Respondent towards defending the Claimant's claim.[272] It also requests interest on

[269] Dissenting Opinion, para. 31.
[270] Dissenting Opinion, para. 32.
[271] Dissenting Opinion, para. 32.
[272] R's Cost Submission, paras. 31-32.

its costs, "from the date that such costs were incurred until the date of payment."[273] No specific interest rate is requested.

275. The Respondent submits:

> [T]*here are compelling reasons why the Tribunal should order the Claimant to pay the entirety of (i) the costs of the arbitration, and (ii) the legal fees, costs and other expenses incurred by the Respondent in defending this claim to date.*
>
> […] [T]*he Respondent has incurred increased and wasted costs as a result of the Claimant's abusive attempt to relitigate the issues determined by the Elitech tribunal and his conduct in the course of these proceedings. Having already once successfully defended the Claimant's unmeritorious claims in the Elitech arbitration, the Respondent should not have to bear the costs of preparing a second defence.*[274]

## B. THE CLAIMANT'S COST SUBMISSION

276. In his submission on costs, the Claimant submits that the Respondent should bear all the costs and expenses of these proceedings, including the Claimant's legal fees and expenses totalling €1,205,789.15, broken down as follows: €266,040.55 for "procedural costs," €554,647.98 for Freshfields' fees, €75,817.62 for FTI Consulting's fees and €309,283 for Python's fees.[275]

277. The Claimant submits that the Respondent should bear these costs with interest at a rate of 5% per annum from the date of the award.[276]

## C. THE TRIBUNAL'S DECISION ON COSTS

278. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how*

[273] R's Cost Submission, para. 33.

[274] R's Cost Submission, paras. 16-17.

[275] C's Cost Submission, para. 4.

[276] C's Cost Submission, para. 6.

> *and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

279. This provision, together with ICSID Arbitration Rule 47(1)(j), gives the Tribunal discretion to allocate all costs of the proceeding, including attorney's fees and other costs, between the Parties as it deems appropriate.

280. The Majority finds that the principle that costs follow event should be applied here. Accordingly, the Majority considers that the Respondent has succeeded on the grounds it advanced in this arbitration. The Claimant has presented substantively the same dispute for adjudication that was previously submitted to the *Elitech* tribunal. Once the *Elitech* Award had been rendered and was averse to the Claimant's position, the Claimant sought to have those claims relitigated *de novo* and/or challenge the *Elitech* tribunal's findings on issues of fact and law. The Majority has found that such a course of conduct was precluded by the doctrine of *res judicata* and/or was an abuse of process.

281. The costs of the arbitration, including the fees and expenses of the Tribunal and the Assistant to the President of the Tribunal and ICSID's administrative fees and direct expenses, amount to (in USD):

| | |
|---|---|
| Arbitrators' fees and expenses | |
| Prof. Mónica Pinto | USD 79,500.00 |
| Prof. Stanimir Alexandrov | USD 83,150.00 |
| Prof. Zachary Douglas | USD 91,937.50 |
| Ms. Magdalena Bulit Goñi's fees and expenses | USD 27,392.50 |
| ICSID's administrative fees | USD 230,000.00 |
| Direct expenses | USD 12,248.20 |
| **Total** | **USD 524,228.20** |

282. Accordingly, the Majority orders the Claimant to bear all costs of the proceeding, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses as

well as Respondent's legal fees, costs and expenses, which the Majority considers to be reasonable given that they are marginally less than those claimed by the Claimant. However, the Respondent's request for interest from the date that its costs were incurred is denied. The Respondent failed to articulate a legal basis on which the Tribunal may pre- and post-award interest on costs, or to propose an appropriate interest rate or basis on which the Tribunal could determine such rate. Given this, the Tribunal makes no order as to interest.

## VI. AWARD

283. For the reasons set forth above, the Tribunal, by majority:[277]

(1) DECLARES that the Respondent's objection that the Claimant is precluded from prosecuting the same claims as were finally adjudicated by the *Elitech* tribunal on the grounds of *res judicata* and/or abuse of process is upheld;

(2) DECLARES that the Claimant's claims in this arbitration are therefore inadmissible;

(3) ORDERS the Claimant to bear all the costs of the proceeding, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses as well as Respondent's legal fees, costs and expenses and shall thus pay to the Respondent USD 262,114.10 and €1,109,679.14; and

(4) DISMISSES all other claims and requests.

[277] One Member of the Tribunal has dissented in full from the Award. The dissenting opinion is attached to this Award.

Prof. Stanimir Alexandrov
Arbitrator
(*subject to the attached dissenting opinion*)
Date: 22 January 2025

Prof. Zachary Douglas KC
Arbitrator

Date: 28 January 2025

Prof. Mónica Pinto
President of the Tribunal

Date: 28 January 2025

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**AHRON G. FRENKEL**

Claimant

and

**REPUBLIC OF CROATIA**

Respondent

**ICSID Case No. ARB/20/49**

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# DISSENTING OPINION

Stanimir A. Alexandrov

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22 January 2025

1. This case is a good example of why the principle of *res judicata* must be applied in the context of investor-state arbitration with a high degree of caution, particularly where, as here, the parties and the applicable treaties are not identical. As pointed out by Meg Kinnear, then the Secretary-General of ICSID, "[v]ery similar cases can be argued very differently and must be decided on the record presented to the tribunal." She added that "each case is based on an individual treaty with varying textual provisions and negotiated in varying contexts that can be outcome-determinative."[1] The doctrine of abuse of rights or abuse of process must be applied with even greater caution. As the tribunal in *Jak Sukyas v. Romania* observed, the doctrine of abuse of rights "is subject to a high threshold and is therefore extremely rarely applied in practice."[2]

## I. RES JUDICATA

2. With respect, I disagree with my colleagues (the "Majority") on the application of the principles of *res judicata* and collateral estoppel to this case, for several reasons.

3. **First**, there is no identity of parties. There is no question that the claimants in the *Elitech* case and Claimant here are different parties. The Majority has ruled that they are in privity and, therefore, *res judicata* applies. I believe this conclusion is erroneous.

4. *One*, a shareholder, including a 100% controlling shareholder, is distinct from the entities below and may have different interests.[3] Numerous cases have addressed the question whether shareholders, including 100% controlling shareholders, can submit claims on behalf of the underlying company for harm inflicted on that company, or whether they can only pursue claims for harm to the value of their shares. Whether or not one subscribes to the view that shareholders can only pursue the latter, so-called derivative or "reflective loss" claims, that view has been embraced by a number of tribunals. It is thus incorrect to

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[1] Meg Kinnear, ARSIWA, ISDS, and the process of developing an investor–State jurisprudence, *ICSID Reports*, vol. 20, p. 9 (2022); DOI: https://doi.org/10.1017/ixd.2021.47

[2] *Jak Sukyas v. Romania*, UNCITRAL, PCA Case No. 2020-53, Partial Award on Jurisdiction, 6 November 2024, para. 404. *See also Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador,* UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 143.

[3] The circumstances of entities or individuals higher up the ownership chain are different from those of entities or individuals at the same level of corporate ownership (such as two partners in a joint venture) who in certain circumstances may have the same interests and may have incurred the same harm as a result of measures directed against the underlying company.

conclude that Claimant here and the *Elitech* claimants have identical interests and, therefore, are in privity without a detailed analysis of the harm and the damages asserted in each case and without addressing the case law supporting the proposition that the claims of shareholders are distinct from the claims of the underlying company or companies.

5. Moreover, the vast majority of investment treaties, including the two BITs at issue here, are silent on whether the submission of "direct loss" claims under one treaty and "reflective loss" claims under another treaty trigger the application of *res judicata* or constitute an abuse of process. The absence of such provisions in most investment treaties was recognized by the UNCITRAL Working Group on the possible reform of investor-State dispute settlement, which invited States to consider "clear criteria on which reflective loss claim[s] will be regarded as abusive" thus encouraging investors to "agree on a single forum for the resolution of their claims."[4] In the absence of such "clear criteria" on whether "reflective loss" claims trigger the application of *res judicata* or constitute an abuse of process, a more detailed analysis of the merits of those claims, and the alleged harm involved, is required.

6. <u>*Two*</u>, the application of the principle of *res judicata* here, and in most other cases in investor-State arbitration, arises in the context of the so-called parallel proceedings. But parallel proceedings are not prohibited by most investment treaties, including the BITs at issue here. On the contrary, most investment treaties allow investors to submit claims if they "own or control, directly or indirectly" the investment. [5] There is no restriction that an indirect owner can submit a claim only if another owner, whether direct or indirect, has not done so. If the parties to an investment treaty intended to rule out parallel proceedings, they could do so explicitly, which is not the case here.

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[4] United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), Note by the Secretariat on "Possible reform of investor-State dispute settlement (ISDS) Shareholder claims and reflective loss", Doc. A/CN.9/WG.III/WP.170, 9 August 2019, para. 30.

[5] The Croatia-Israel BIT is silent on indirect ownership or control – it does not include the phrase "directly or indirectly" (the Croatia-Netherlands BIT does). The prevailing trend in investor-state jurisprudence, however, is that a treaty that is silent on indirect ownership does not prohibit claims by investors who own or control the investment indirectly.

7. **Second**, the applicable BITs are different. The Majority has concluded that the wording is substantially similar or identical and, therefore, there is an identity of the cause of action. This conclusion is incorrect for the reasons discussed below.

8. *One*, the fact remains that the applicable legal instruments are different. The Majority assumes that the protections in both instruments are the same based on a *prima facie* textual analysis. This is insufficient and, therefore, flawed. Whether there are differences between the protections in the two instruments, and whether those differences are material or immaterial, can only be determined after a detailed legal analysis and an application of the relevant instrument to the facts of the specific case. In other words, such a determination requires that the Tribunal be fully briefed on the facts and the law. By making the determination at this stage, the Majority has deprived Claimant of the opportunity to fully present its case. While the Majority refers to Claimant's arguments and seeks to identify admissions that purportedly support the Majority's analysis, there is no doubt that the parties' submissions on the impact of the *Elitech* award cannot, and do not, claim to present their full cases on the facts and the law.

9. *Two*, the Majority "considers that the mere fact that the investment protection obligations appear in different bilateral investment treaties does not lead *per se* to the conclusion that the legal grounds are different." (Award, para. 167). But the Majority itself admits that at least some of the protections differ as between the two BITs. For example:

- The *Elitech* tribunal dismissed the "effective means" claim because it concluded that the scope of the MFN clause in the Croatia-Netherlands BIT did not allow the importation of a substantive protection (*i.e.*, the "effective means" protection) from another BIT. The Majority admits that the MFN provision in the Croatia-Israel BIT applicable here does not contain the same language as the MFN provision in the Croatia-Netherlands BIT applicable in *Elitech*, and that the two MFN obligations are "substantively different." (Award, para. 187). The Majority further admits that that "the dismissal of the claimants' claim in the *Elitech* Arbitration by reason of the specific treaty language found in the MFN clause … of the Croatia-Netherlands BIT cannot be *res judicata* in relation to the different treaty language found in …

the Croatia-Israel BIT." (Award, para. 187). Thus, the Majority is compelled to conclude that "the *causa petendi* [are] not identical in view of the difference in the language of the MFN clauses in each treaty, through which the effective means standard was said to be incorporated." (Award, para. 236). Conveniently, however, the Majority proceeds to dismiss the "effective means" claim based on an abuse of process. It remains unclear how the submission of a claim based on different treaty language, a claim that – as the Majority itself has determined – is not *res judicata*, can constitute an abuse of process.

- The *Elitech* tribunal found that it did not have jurisdiction over some of the *Elitech* claimants' umbrella clause claims. It stated: "[T]he Tribunal lacks jurisdiction over the umbrella clause claims arising out of the 2009 Purchase Agreement and the 2010 Preliminary Agreement."[6] It is evident that a claim that was not adjudicated for lack of jurisdiction cannot give rise to the application of *res judicata*. The Majority is fully aware of that, of course, but attempts to avoid the problem by asserting that the *Elitech* tribunal made a mistake. According to the Majority, "[d]espite the *Elitech* tribunal's characterisation, there is no doubt that the *Elitech* tribunal's decision in this regard was a dismissal on the merits[.]" (Award, para. 195). The Majority states further: "In relation to the … umbrella clause claims pertaining to the Purchase Agreement and the Preliminary Agreement … the *Elitech* tribunal purported to dismiss these on a jurisdictional basis even though the grounds that were given clearly related to the merits of the claims." (Award, para. 199). Those statements raise three points: (i) The *Elitech* tribunal dismissed some of the umbrella clause claims for lack of jurisdiction. Whether or not the Majority agrees or disagrees with this conclusion is irrelevant. According to the *Elitech* tribunal itself, it did not decide the claims on the merits. (ii) None of the parties in this case has advanced an argument that the *Elitech* tribunal committed the error imputed to it by the Majority. On the contrary, the parties agree that the *Elitech* tribunal declined to adjudicate those claims for lack of jurisdiction.[7] The Majority comes

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6 *Elitech* Award, para. 402.

7 Respondent states in its Submission, at para. 19: "As noted in paragraph 10 above, the *Elitech* tribunal declined jurisdiction with respect to claims arising from the Preliminary Agreement and the Purchase Agreement given that neither of the *Elitech* claimants were party to those agreements." (Emphasis added)

up with this argument *sua sponte* giving the parties no opportunity to address it. (iii) The mere fact that the Majority disagrees with at least one legal conclusion of the *Elitech* tribunal demonstrates that the two tribunals can reach different conclusions on similar issues of law, which undermines the argument that the principle of *res judicata* applies. To apply *res judicata* here, the Majority has to "correct" the reasoning and conclusions of the *Elitech* tribunal.

- The *Elitech* claimants advanced a claim for violation of the FET standard in the Croatia-Netherlands BIT. The *Elitech* tribunal considered whether certain of Respondent's acts were "arbitrary, unreasonable, disproportionate or bad faith" as a "component of FET."[8] Claimant in this proceeding has advanced a distinct claim that Respondent's measures also breached the separate prohibition against "unreasonable or discriminatory" measures in the Croatia-Israel BIT. That claim is separate and distinct from his claims for breach of the FET standard. The Majority admits that this is "a distinct claim" but concludes that it is precluded by *res judicata* because the "elements" of that claim were considered and rejected by the *Elitech* tribunal. (Award, para. 178). Thus, the Majority equates an element of the FET standard prohibiting "arbitrary, unreasonable, disproportionate or bad faith" conduct with a separate protection against "unreasonable or discriminatory" measures. This is incorrect as a matter of law. First, the wording "arbitrary, unreasonable, disproportionate or bad faith" is obviously different from "unreasonable or discriminatory." Attributing to both phrases the same meaning is contrary to the rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties ("VCLT"). Second, under the Majority's logic, the FET standard in one BIT includes an "element" prohibiting "unreasonable or discriminatory" measures and, therefore, the separate protection against "unreasonable or discriminatory" measures in another BIT has the exact same meaning and is entirely superfluous – a conclusion which is also contrary to the VCLT rules of interpretation.

[8] *Elitech* Award, para. 605.

10. **Third**, Claimant has alleged the existence of new facts and new measures, *i.e.*, facts and measures not addressed by the *Elitech* award (primarily because they occurred after the award was issued or after the proceeding was closed). The Majority concludes that those new facts/measures alone cannot constitute a breach of the BIT. For example, the Majority states that the 2024 Zagreb Award "cannot conceivably form the basis of a new claim but rather could only constitute new evidence in relation to claims that have already been decided by the *Elitech* tribunal[.]" (Award, para. 252). I disagree. It cannot be ruled out that the new facts / new measures represent "the straw that broke the camel's back," *i.e.*, that they are the most recent elements of a conduct or a series of acts that, taken together, breached the BIT. To use a different metaphor, it cannot be ruled out that Respondent caused the investment's "death by a thousand cuts" and that the new facts / new measures constituted the last, *i.e.*, the deadly cuts. This can only be established after a full briefing on the merits, which would include the review of all facts and measures and the application of the Croatia-Israel BIT to them.

11. Moreover, the Majority itself admits that the 2024 Zagreb Award can give rise to a new claim. As noted above, it states first that the 2024 Zagreb Award "cannot conceivably form the basis of a new claim" (Award, para. 252). Just two paragraphs later, however, the Majority states the exact opposite: that it is open to Claimant to advance a claim relating to the Zagreb Award "in the future before a different tribunal" and admits that Claimant would not be precluded from advancing such a claim "as no decision has been taken in respect of" that claim. (Award, para. 254). The Majority cannot explain why this future "different tribunal" cannot be this Tribunal.

12. **Fourth**, the broad application of the principles of *res judicata* and collateral estoppel, *e.g.*, when the parties and the cause of action are not the same, as is the case here, may lead to additional problems of procedural fairness. In circumstances where two parallel cases were brought before two separate tribunals, those tribunals may compete with one another so that the first to render an award would determine the outcome of both cases and the second, bound by *res judicata*, would play no role. Conversely, one tribunal may suspend proceedings to defer to the other tribunal. Such choices may be driven by the status and timing of each proceeding but may also be arbitrary.

13. For the reasons above, I believe that the Majority has denied Claimant access to justice and thus violated his due process rights.

14. In reaching this conclusion, I am aware that the principles of *res judicata* and collateral estoppel play an important role in ensuring the efficiency and consistency of jurisprudence. I also agree that the credibility of the investor-state dispute resolution system depends on the consistency of the results, as has been confirmed by numerous tribunals. Had this Tribunal proceeded to the merits of the case, I would have taken the view that the Tribunal should extend a high degree of deference to the relevant conclusions of the *Elitech* tribunal absent compelling reasons to reach a different outcome. Concerns about consistency, however, should not override due process rights and access to justice.

15. As to the risk of inefficiency and waste of resources that might result from Claimant's claims in this arbitration, there is a remedy – a cost award. Claimant is represented by able counsel and must have been advised that this Tribunal may reach conclusions similar or identical to those of the *Elitech* tribunal, and that there is a risk of an adverse cost award. By pursuing his claims in this arbitration, Claimant has willingly taken that risk.

## II. ABUSE OF PROCESS

16. I also disagree with the Majority's analysis and conclusion that Claimant's initiation of the present case constitutes an abuse of process.

17. **First**, the Majority asks "a very practical question: would the Claimant in this case be pursuing this arbitration if his wholly-owned company in the *Elitech* Arbitration had prevailed on the merits in those proceedings?" The Majority immediately provides its answer: "The answer can only be 'of course not.'" (Award, para. 129). I do not believe that the answer is that obvious. It is unclear what "prevailing on the merits" means. Some claims may be successful, and some may fail. The methodology, calculations and quantum of damages may vary. There are too many possible outcomes captured by the notion of "prevailing on the merits." To predict what this Claimant would have done had the outcome of the *Elitech* case been different is a tall order.

18. Assuming that the Majority's question is whether Claimant would have initiated this arbitration if all of the *Elitech* claimants' claims had been granted and if they had received the quantum of compensation they had asked for, the answer may still be different from "of course not." The Majority admits (Award, para. 129) that "a significant number of the claims in this case are substantially the same as those" in the *Elitech* Arbitration – "a significant number" but not all of them. Thus, even if all of the claims of the *Elitech* claimants had been granted, it would have been open to Claimant to pursue those claims that are not "substantially the same" as the claims in the *Elitech* Arbitration. And even if Claimant decided not to pursue this arbitration because all of the *Elitech* claimants' claims had been granted, this would prove nothing. It would not demonstrate the identity of the claims; rather, it would mean simply that the upstream owner is satisfied with the compensation received by the entity he owns and controls – a matter of a cost-benefit analysis.

19. **Second**, the Majority states (Award, para. 233): "A single dispute should be adjudicated by a single competent forum. This avoids the prospect of inconsistent decisions in respect of the same issues, prevents the unnecessary deployment of judicial resources to adjudicate different manifestations of the same underlying dispute, and averts the hardship caused to the respondent party in having to defend itself in multiple proceedings." The Majority does not explain why those same goals are not achieved here by the application of *res judicata* and why the doctrine of abuse of process must be introduced. Moreover, the Majority does not explain why the doctrine of abuse of process applies to claims that are not *res judicata*.

20. The explanation that the Majority attempts to provide is as follows: "A corollary of this principle is that a claimant must bring its whole case to the competent forum: it cannot withhold certain claims, evidence or arguments from that forum and then later seek to introduce those elements in fresh proceedings by asserting that the resulting judgement or award is not *res judicata* in respect thereof." (Award. para. 233). This explanation is unavailing. There is no evidence and no allegation in this case that Clamant withheld "certain claims, evidence or arguments" from the *Elitech* tribunal for the purpose of introducing them later, in this proceeding. Indeed, the Majority does not refer to any "claims, evidence or arguments" that Claimant allegedly withheld from the *Elitech* tribunal

for the sake of supporting its argument in the present case that the *Elitech* award is not *res judicata*. Nor has Respondent ever made such an argument.

21. **Third**, the Majority accepts that "the controlling individual or entity within a group of companies can often elect between different routes to investment treaty arbitration," but characterizes it as "a significant privilege." (Award, para. 238). I disagree with that characterization: this is as much of a "privilege" as any other treaty protection enjoyed by investors under investment treaties, whether procedural or substantive. The Majority then accepts that "[s]o long as the applicable investment treaties recognise the standing of indirect owners … the claimant investor cannot be faulted for making such an assessment and acting accordingly." (Award, para. 238). According to the Majority, however, the choice between a claim by the direct or the indirect owner is a choice akin to the choice under the "fork-in-the-road" provision, *i.e.*, that the choice has "preclusive effects." (Award, para. 240).

22. But there is nothing in the BITs at issue here and in the *Elitech* case that suggests that a choice to submit claims under one BIT or another depending on the nationality of an investor up or down the ownership chain is preclusive. Treaty drafters know how to draft "fork-in-the-road" type provisions that allow choices but render the choice, once made, preclusive. There is nothing in the applicable BIT here that supports the Majority's view.

23. The Majority frames the question as follows: whether "having first elected to bring an effective means claim under the Netherlands-Croatia BIT, the Claimant, who is in privity of interest with the claimants in *Elitech*, can now advance the same claim under the Israel-Croatia BIT on the basis that the MFN clauses, through which the effective means standard is said to be incorporated, are different in the respective treaties." (Award, para. 239). The Majority's answer follows immediately (Award, para. 240): This cannot be the case because otherwise it would be open to claimants "within the same group of companies with indirect ownership over the same investment to bring successive treaty claims complaining about the same prejudice on the basis that the second, third or fourth investment treaty relied upon has obligations that are different in scope" (emphasis added).

24. Why investors "within the same group of companies" should not be allowed to submit claims under different legal instruments that contain legal obligations, which are "different in scope," remains unclear. The Majority's answer is particularly puzzling given that here, as accepted by the Majority: (i) some of the applicable treaty provisions are different; (ii) a previous tribunal has not resolved certain claims on the merits, whether because it found it had no jurisdiction or for other reasons, and (iii) new relevant facts or acts are alleged.

25. The Majority's explanation is unpersuasive and flawed. With respect to the "effective means" claims, for example, the Majority agrees with Respondent's statements that (i) those claims have been rendered moot; and (ii) those claims were addressed by the *Elitech* tribunal in the context of the FET standard. Regarding (i), the Majority simply adopts Respondent's statement without any further analysis, with the explanation that Claimant did not oppose it. Regarding (ii), the fact that a claim was "addressed" under one standard (FET) does not mean that it was resolved under a different standard ("effective means"). To accept such a proposition would equate the FET standard with the "effective means" standard.

26. As to the new evidence and new facts, the Majority blames the *Elitech* claimants for not seeking to reopen the *Elitech* proceedings by applying for a revision of the *Elitech* award. The Majority does not explain why the choice to submit claims relating to what the Majority admits are new acts and facts to one forum as opposed to another available forum constitutes an abuse of process, particularly where those new acts / facts may give rise to new claims under a different legal instrument.

27. **Fourth**, there are specific circumstances in this case that preclude the application of the abuse of process doctrine. Claimant has explained that he initiated this proceeding because he was advised of the risk that the *Elitech* tribunal might decline jurisdiction on the basis of the "intra-EU objection." (RFA, para. 9). Claimant also explained that "Croatia repeatedly refused the Claimant's good faith offer to consolidate this arbitration with the *Elitech* arbitration." (Claimant's Submission, para. 38. *See also* RFA, para. 9). Claimant's good faith offers to Croatia to consolidate the two arbitrations provide sufficient evidence that Claimant did not engage in an abuse of process.

28. Nevertheless, the Majority insists on its conclusions of an abuse of process by Claimant. *One*, the Majority states that "it was perfectly reasonable for Croatia to have rejected Mr. Frenkel's proposal for consolidation given the advanced stage of the *Elitech* Arbitration when that proposal was made[.]" (Award, para. 256). Whether or not that statement is correct, it is entirely irrelevant. That it may have been reasonable for Respondent to reject Claimant's proposal does not mean that the proposal itself was unreasonable, or that it was not a genuine proposal, or that Claimant made the proposal in bad faith.

29. *Two*, the Majority states that Claimant's proposal was based on the premise that he had "an unfettered right to bring a second arbitration" and that "Croatia should be faulted for refusing to accommodate the pursuit of that right." (Award, para. 257). This too is irrelevant. The relevant point is not whether Croatia was at fault in rejecting Claimant's proposal. The relevant point is that Claimant made the proposal in good faith. There is no evidence, and Respondent has not even made an assertion, that Claimant made that proposal to manufacture an argument in support of its position on the non-application of the doctrines of *res judicata* and abuse of process.

30. *Finally* on this point, the Majority insists that if Claimant commenced the proceedings under the Israel-Croatia BIT because "the *Elitech* tribunal might decline its jurisdiction on the basis of *Achmea*[,]" then, once the *Elitech* tribunal rendered its award rejecting Croatia's jurisdictional objection based on *Achmea,* Claimant should have terminated these proceedings. (Award, para. 256). Because Claimant did not do so, the Majority questions whether the *Achmea* objection was "the true rationale for Mr. Frenkel's filing of this arbitration[.]" (Award, para. 256).

31. Again, there is no evidence that the *Elitech* tribunal's possible adverse finding on jurisdiction based on the *Achmea* objection was not the genuine motivation for Claimant's initiation of this arbitration. The Majority points to none. Respondent has not made any such allegation. The Majority is drawing inferences out of nothing. Once Claimant became aware of the findings and conclusions of the *Elitech* award, it was open to Claimant to consider whether his own claims, which included new facts and measures, might be resolved differently under a different legal instrument that contained legal obligations of a

different scope. Thus, Claimant's decision to pursue this arbitration even though the *Elitech* tribunal did not grant Respondent's *Achmea* objection is not evidence that Claimant was driven by some hidden motive (different from his stated concern that the *Elitech* tribunal might grant the *Achmea* objection) at the time he initiated this arbitration.

32. In sum, Claimant acted in good faith when he initiated this arbitration and when he proposed the consolidation of the two arbitrations. In such circumstances, there is no justification for a finding of an abuse of process.[9] These circumstances are very different from the circumstances of the *Orascom* case, on which both Respondent and the Majority heavily rely.

33. Moreover, neither the ICSID Convention nor the two applicable BITs incorporate procedures (or indeed requirements) for the consolidation in a single proceeding of all stakeholders potentially affected by the outcome of a dispute. In the absence of such procedures, and in light of the genuine concerns about the possible success of Respondent's *Achmea* objection in the *Elitech* case, it is wrong to conclude that Claimant acted in bad faith in initiating the present arbitration or that Claimant acted in bad faith when, having seen the *Elitech* award, he decided against withdrawing his claims in the present arbitration.

34. For all the above reasons, I also disagree with the Majority's decision on costs.

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[9] As the *Gosling* tribunal concluded, "[t]he abuse of rights doctrine is based on bad faith"; when there is no evidence of bad faith, there is no abuse of process. *Thomas Gosling, Property Partnerships Development Managers (UK) Limited, Property Partnerships Developments (Mauritius) Ltd., Property Partnerships Holdings (Mauritius) Ltd. And TG Investments Ltd. v Republic of Mauritius*, ICSID Case No. ARB/16/32, Award, February 18, 2020, para. 165. *See also Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador,* UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para. 143 ("Any right leads normally and automatically to a claim for its holder. It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim. The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process." (Emphasis added)).

Prof. Stanimir Alexandrov
Arbitrator

**Date**: 22 January 2025