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

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. _Two_, 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 <u>not</u> *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

[6] *Elitech* Award, para. 402.

[7] Respondent states in its Submission, at para. 19: "As noted in paragraph 10 above, the *Elitech* tribunal <u>declined jurisdiction</u> 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.

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[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 <u>all</u> 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. <u>**Second**</u>, 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 <u>that are different in scope</u>" (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 "<u>different in scope</u>," 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. **<u>Fourth</u>**, 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.

[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. <u>The high threshold also results from the seriousness of a charge of bad faith amounting to abuse of process</u>." (Emphasis added)).

Prof. Stanimir Alexandrov
Arbitrator

Date: 22 January 2025