INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

GAMA GÜÇ SISTEMLERI MÜHENDISLIK VE TAAHHÜT A.Ş.

Claimant

v.

THE REPUBLIC OF NORTH MACEDONIA

Respondent

RESPONDENT'S ANSWER

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28 February 2022

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ANSWER

1. In accordance with Article 5(1) of the 2021 ICC Rules of Arbitration (the "**ICC Rules**"), the Republic of North Macedonia ("**Respondent**" or "**Macedonia**") submits this Answer to the Request for Arbitration dated 23 November 2021 by GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. ("**Claimant**" or "**GAMA**"). Unless otherwise defined, capitalized terms in this Answer shall have the same meaning ascribed to them as in the Request for Arbitration.

I. THE PARTIES

A. CLAIMANT

2. Claimant is GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş., which (subject to further disclosures) Respondent understands is organized under the laws of the Republic of Turkey and with its registered office in the Republic of Turkey.

B. RESPONDENT

3. Respondent is the Republic of North Macedonia, a sovereign state in southeast Europe.

4. Respondent is represented in this dispute by:

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5. All correspondence to Respondent in relation to this matter should be directed to White & Case at the above addresses.

II. COMMENTS ON CERTAIN PROCEDURAL ASPECTS OF THE ARBITRATION

6. Article VII(2) of the Agreement between the Republic of Turkey and the Republic of Macedonia concerning the Reciprocal Promotion and Protection of Investments (the "**BIT**"), which provides the option to submit disputes to the ICC for arbitration, does not specify the language and seat of arbitration.

7. Respondent confirms its agreement that English be the language of the proceedings and Paris, France, be the seat of arbitration.

8. The BIT does not specify the governing law. Claimant has proposed "relevant rules of public international law."[1] While Respondent agrees that rules of public international law will be relevant to this arbitration under an investment treaty, Respondent considers that the matter shall properly be determined by the arbitral tribunal during the course of the proceedings.

9. As regards the number of arbitrators, Respondent agrees with Claimant's proposal that there shall be three arbitrators, one selected by Claimant, one selected by Respondent, and the third, who shall act as president, jointly selected by the co-arbitrators in accordance with a procedure determined by the Parties.

III. NATURE AND CIRCUMSTANCES OF THE DISPUTE

10. In this arbitration, Claimant impugns the conduct of the Macedonian courts relating to a private debt that Claimant says was owed to it by the Company for Production of Electricity and Heat TE-TO AD Skopje ("**TE-TO**").

[1] Request for Arbitration, ¶ 4.10.

11. Claimant and TE-TO, both private entities, entered into an EPC Contract for the construction of a power plant in Skopje, the capital city of North Macedonia.[2] Claimant and TE-TO subsequently entered into a Settlement Agreement for claims arising out of the construction of the power plant, under which TE-TO agreed to pay Claimant EUR 5 million.[3] Claimant does not allege that Macedonia had any involvement in either the EPC Contract or the Settlement Agreement, which were private acts of Claimant and TE-TO.

12. Respondent understands that, when TE-TO failed to pay under the Settlement Agreement, Claimant commenced debt-collection proceedings in 2012 against TE-TO to recover the alleged debt.[4] These proceedings progressed through the Macedonian courts, from the Skopje Civil Court to the Skopje Appellate Court to the Macedonian Supreme Court.[5] Claimant does not allege that Macedonia had any involvement in these proceedings other than the matter was brought and heard in its courts.

13. Before the conclusion of the debt-collection proceedings, TE-TO initiated bankruptcy proceedings and submitted a reorganization plan for the restructuring of its debts, including its debt to Claimant.[6] Following a process where the creditors reviewed TE-TO's original reorganization plan and considered objections to the plan, the bankruptcy court ordered TE-TO to amend its reorganization plan, taking into account the creditors' views and objections, including Claimant's.[7] After TE-TO submitted a revised reorganization plan and a majority of creditors (both secured and unsecured) voted in favor the proposed reorganization, the bankruptcy court approved to the plan.[8] Claimant had been outvoted by the other creditors, yet still appealed the court's decision approving the reorganization plan. The appellate court affirmed the lower court's

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2 Contract Agreement No. 4-01-4 and related supplements between GAMA, Alstom, and TE-TO (Ex. C-2).

3 Settlement Agreement to the EPC Contract dated 24 Feb. 2012 (Ex. C-4).

4 Request for Arbitration, ¶ 3.4.

5 *See* Request for Arbitration, ¶¶ 3.5-3.10.

6 TE-TO's reorganization plan dated 4 April 2018 (Ex. C-13). For a detailed summary of events in the bankruptcy proceedings, see Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) at p. 15.

7 Minutes of the hearing before the Civil Court Skopje, dated 5 June 2018 (Ex. C-18) at pp. 3, 8-9.

8 Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) at p. 2.

decision.[9] Here again, Claimant does not allege that Macedonia had any involvement in the bankruptcy proceedings other than the matter was brought and heard in its courts.

14. As a result of the approved reorganization plan, Claimant reportedly saw its (unsecured) claim against TE-TO reduced to 10% of its face value, just as was the case for all the other unsecured creditors. Claimant does not allege that it was treated differently in this respect than the other unsecured creditors in the bankruptcy.

15. Dissatisfied with the outcome of the bankruptcy process, Claimant now says that it has been expropriated and seeks to have this Tribunal review and reopen the Macedonian court proceedings and decisions. This arbitration is a misguided and impermissible effort by Claimant to use the BIT as an appellate process. Investment tribunals do not sit as a court of appeals for national courts applying domestic law. The claims should be dismissed for the reasons summarized below, among others, to be elaborated further in the course of this arbitration.

IV. SUMMARY RESPONSE TO THE CLAIMANT'S CLAIMS

16. Based on the conduct of the Macedonian courts in the debt-collection and bankruptcy proceedings, Claimant presents claims under BIT Article III (expropriation) and Article II(3) (MFN treatment).[10] For good measure, Claimant also relies on the MFN provision in the BIT to import additional substantive treaty protections, such as the standards of fair and equitable treatment, non-impairment treatment, and full protection and security.[11] In addition, Claimant alleges that Respondent committed a denial of justice, in violation of customary international law.[12]

17. Claimant has failed to state a viable claim under the BIT. As explained below, the claims arise out of a private dispute between private parties and lacks sovereign conduct (subsection A). To the extent that Claimant impugns the acts of the Macedonian judiciary, Claimant alleges nothing more than a misapplication of Macedonian law by

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9 *See* Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) (amended by Decision of the First Instance Civil Court in Skopje dated 17 July 2018 (Ex. C-16)); Decision of the Appellate Court in Skopje dated 30 Aug. 2018 (Ex. C-17).

10 Request for Arbitration, ¶¶ 3.33-3.34 (expropriation), 3.28-3.29 (MFN treatment).

11 Request for Arbitration, ¶ 3.30. *See also id.* at ¶¶ 3.31-3.32 (alleging violations of fair and equitable treatment, non-impairment treatment, and full protection and security).

12 Request for Arbitration, ¶ 3.35.

the Macedonian courts and cannot prove a denial of justice (subsection B). In any event, the Macedonian courts acted in accordance with Macedonian law (subsection C).

A. The claims arise out of a private dispute between private parties.

18. The claimant under an investment treaty bears the burden of proving that the state, acting as a sovereign, harmed the investor.[13] Claims that are based on the conduct of two private entities cannot be repackaged as treaty claims. Claimant and TE-TO, both private entities, concluded and performed a private contract for the construction of a power plant. They entered into a Settlement Agreement, providing for the payment of a sum of money. After TE-TO failed to pay, this sum became the object of subsequent debt-collection and bankruptcy proceedings. The majority of the creditors approved TE-TO's proposed bankruptcy reorganization. Respondent did not use any sovereign powers (*puissance publique*) to interfere with the contract or Claimant's claim to money owed by TE-TO under the Settlement Agreement. Unless Claimant can prove that the Macedonian judiciary acted in breach of the treaty, Claimant's treaty claims must fail for lack of sovereign conduct, as they concern a private dispute between two private entities in which Macedonia had no involvement.

B. Claimant has not alleged acts by the Macedonian courts that could meet the exacting standard for a denial of justice.

19. Claimant packages its claims as violations of various treaty protections—such as expropriation, MFN treatment, fair and equitable treatment, non-impairment treatment, and full protection and security—but its complaint relates solely to the decisions and conduct of the Macedonian courts.

20. Investment treaty tribunals recognize that, when a claim challenges solely the decisions and conduct of the judiciary, it falls to be assessed under the denial of justice standard, regardless of the label chosen by the claimant.[14] Here, Claimant has not alleged any

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[13] *See*, *e.g.*, *Gustav F. W. Hamester GmbH & Co KG v. The Republic of Ghana*, ICSID Case No. ARB/07/24, Award of 18 June 2010 at ¶ 328 ("[O]nly the State as a sovereign can be in violation of its international obligations."); *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award of 4 May 2021 at ¶ 705 (observing that the question of whether an investor has made out a treaty claim necessarily "involves considering whether the alleged treatment of an investment was an exercise of sovereign authority and violated international obligations binding on the State party to a BIT").

[14] *See*, *e.g.*, *Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt*, ICSID Case No. RB/04/13, Award of 6 Nov. 2008 at ¶ 191 ("Even though the Claimants deny that the Judgment is 'the object' of their claim . . . [t]he Judgment lies at the core of this set of acts. Therefore, the Tribunal is of the opinion that the relevant

sort of conduct that would amount to a denial of justice. Claimant disagree with the decisions of some Macedonian courts, but it is well established that errors in the findings of facts or the conclusions of law of local courts cannot give rise to a denial of justice.[15] Investment tribunals do not sit as appellate courts for the judgments of domestic courts.[16] "[A] denial of justice is engaged if and when the judiciary has rendered final and binding decisions after fundamentally unfair and biased proceedings or which misapplied the law in such an egregiously wrong way, that no honest, competent court could have possibly done so."[17]

21. The Request for Arbitration does not disclose the type of gross miscarriage of justice that could amount to a denial of justice. The Macedonian courts assumed jurisdiction over a debt-collection dispute between Claimant and TE-TO and, in unrelated bankruptcy proceedings that included consultation with the creditors, applied Macedonian law to approve TE-TO's reorganization plan, which released TE-TO from a portion of unsecured creditor claims. Although Claimant repeatedly states that the Macedonian legal proceedings were biased and unfair, it points to no evidence to support such conclusions other than the fact that it was outvoted by the creditors and lost in multiple courts. Claimant also fails to point to egregious misapplications of Macedonian law that would compel a conclusion that the courts were acting dishonestly.

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standard to trigger State responsibility for the first set of acts are the standards of denial of justice, including the requirement of exhaustion of local remedies.").

[15] *See*, *e.g.*, *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award of 6 July 2012 at ¶ 264 ("ICSID tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law. They only have to consider whether they constitute a violation of international law, and in particular whether they amount to a denial of justice.").

[16] *See*, *e.g.*, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 Apr. 2013 at ¶ 441 ("[I]nternational tribunals must refrain from playing the role of ultimate appellate courts. They cannot substitute their own application and interpretation of national law to the application by national courts. . . . The opinion of an international tribunal that it has a better understanding of national law than the national court and that the national court is in error, is not enough. . . . [A]rbitral tribunals cannot 'put themselves in the shoes of international appellate courts.'").

[17] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 Apr. 2013 at ¶ 442; *see also Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award of 30 July 2009 at ¶ 94 (explaining that proving a denial of justice based on the "[w]rongful application of law" requires an "extreme test: the error must be of a kind which 'no competent judge could reasonably have made.' Such a finding would mean that the state had not provided even a minimally adequate justice system").

C. In any event, the Macedonian courts did not misapply Macedonian law.

22. Even if Claimant could demonstrate that the Macedonian courts made errors in the debt-collection and bankruptcy proceedings, this would be no basis to engage Macedonia's responsibility under the Treaty. But Claimant cannot even make such a showing.

23. As to the debt-collection proceedings, there is no basis to Claimant's contention that the Macedonian courts wrongly assumed jurisdiction in disregard of the arbitration clause in the EPC Contract and Settlement Agreement.[18] Claimant chose to pursue collection via a summary proceeding (for the payment of uncontested debts) before a notary public. Under Macedonian law (which is directly inspired from German law in this regard), notaries public may issue payment orders that are directly enforceable if uncontested or where objections against the entry of such order is rejected by the court. As was its right, TE-TO did contest Claimant's request before the court. Under Macedonian law, once such an objection is raised, the requesting party cannot withdraw its request without the other party's consent. In absence of such consent, the court decides the case on the merits. Claimant attempted to withdraw its request after TE-TO objected, but TE-TO did not consent. Consequently, the matter remained within the jurisdiction of the Macedonian courts.

24. It may have been ill-advised for Claimant to pursue its claim via a request before a notary public. Regardless, Claimant thereby deliberately submitted to the jurisdiction of the Macedonian courts and waived its right to arbitrate the validity of its claim against TE-TO. If Claimant suffered a prejudice as a result, it should look only to itself and its counsel.

25. Likewise, the bankruptcy proceedings were regular and in accordance with Macedonian law:

a) Claimant alleges that the Macedonian courts failed to examine whether TE-TO could commence bankruptcy proceedings.[19] This is false. In the lower court proceedings, Claimant raised the objection that TE-TO could not initiate bankruptcy proceedings,[20] and the lower court addressed the conditions for

[18] Request for Arbitration, ¶ 3.6.

[19] Request for Arbitration, ¶ 3.24.

[20] Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) at p. 22.

commencing bankruptcy proceedings.[21] Both the lower court and the temporary bankruptcy trustee agreed that TE-TO met the condition of "imminent insolvency" as the basis for commencing bankruptcy proceedings.[22] The appellate court agreed with this conclusion.[23]

b) Claimant alleges procedural defects in the courts' approval of TE-TO's original and revised reorganization plan dated 4 April 2018 and 6 June 2018, respectively.[24] The court correctly applied the procedure provided in the Macedonian Bankruptcy Law, however. All creditors (including Claimant) were able to review the original plan and submit objections. Claimant states that the lower court postponed a voting session scheduled for 5 June 2018, because the original plan "had so many critical flaws . . . that it was impossible to vote on."[25] Whether or not that was the case, Claimant neglects to mention that the court held a hearing that day to hear the creditors' remarks and objections to the original plan.[26] This is hardly an example of denial of justice. The record confirms that "90.19% of the total number of creditors with confirmed claims" (including Claimant) were present at that hearing.[27] In fact, the court considered Claimant's objection to the original plan and rescheduled the voting session to 14 June 2018 so that TE-TO could amend its plan in light of the creditors' objections.[28] Critically, TE-TO's revised reorganization plan

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21 Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) at pp. 31-32 (discussing Arts. 5, 118, 215(a)-(e), 232, and 235 of the Bankruptcy Law).

22 Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) at pp. 18, 22.

23 *See* Decision of the Appellate Court in Skopje dated 30 Aug. 2018 (Ex. C-17) at p. 15.

Moreover, TE-TO initiated bankruptcy proceedings under Article 215(a)-(c) of the Bankruptcy Law. Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) at pp. 15-16. *See also id.* at p. 17 (quoting from the report of the temporary bankruptcy trustee stating, "The reorganization plan prepared by [TE-TO] is prepared in accordance with the provisions of Article 215-a to Article 215-c of the Bankruptcy Law, according to which the debtor [*i.e.*, TE-TO] is required to propose a reorganization plan in a preliminary procedure for examining the conditions for opening a bankruptcy procedure"). Article 215(a)-(c) expressly provides that a debtor may initiate bankruptcy proceedings with a reorganization plan. *See* Decision of the Appellate Court in Skopje dated 30 Aug. 2018 (Ex. C-17) at p. 7 (discussing provisions of Art. 215 of the Bankruptcy Law, specifically Art. 215, paragraph 2, which provides "a reorganization plan can be submitted . . . at the same time as the submission of a proposal for initiating a bankruptcy procedure by the debtor or the creditor . . .").

24 Request for Arbitration, ¶ 3.11.

25 Request for Arbitration, ¶ 3.18.

26 Minutes of the hearing before the Civil Court Skopje, dated 5 June 2018 (Ex. C-18).

27 Minutes of the hearing before the Civil Court Skopje, dated 5 June 2018 (Ex. C-18) at p. 3.

28 Minutes of the hearing before the Civil Court Skopje, dated 5 June 2018 (Ex. C-18) at pp. 8-9.

is the result of input from the creditors, including Claimant's objection to the original plan.

c) Claimant alleges that, under the Macedonian Bankruptcy Law, the judge should have rejected TE-TO's reorganization plan, rather than allowed TE-TO to submit a "new" plan as a "consolidated text."[29] Claimant does not point to any rule in the Macedonian Bankruptcy Law that would support its argument. The lower court specified in its decision that the consolidated text "is not a new reorganization plan, but action of remarks by the creditors . . . because the creditors at the [5 June 2018 hearing] were fully acquainted with the changes and corrections."[30]

d) Claimant alleges that, once TE-TO submitted its revised reorganization plan, the "presiding judge skipped all procedural steps and deadlines, did not make a public announcement of the submission of the reorganization plan and scheduled a vote on 14 June 2018."[31] Claimant fails to identify which procedural steps the judge allegedly skipped and references no provision in the Macedonian Bankruptcy Law to support its allegations. Claimant does not dispute that it was represented at both the 5 and 14 June 2018 hearings (and thus evidently had notice of the vote).

e) Claimant alleges that the lower court approved the revised reorganization plan without considering "the arguments set forth by unsecured creditors."[32] However, the lower court approved the revised plan on 14 June 2018 after a majority of creditors, both secured and unsecured, had voted in favor. Under the Macedonian Bankruptcy Law, a simple majority of the total amount of claims of creditors present is required for approval.[33] On 14 June 2018, 87% of the unsecured creditors were present, while creditors with 77% of the claims

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29 Request for Arbitration, ¶ 3.18.

30 Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) at pp. 23-24.

31 Request for Arbitration, ¶ 3.20.

32 Request for Arbitration, ¶ 3.23.

33 Law on Amendments to the Bankruptcy Law of 3 May 2015, Art. 3 (amending Art. 232 of the Bankruptcy Law); Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) at p. 32.

voted in favor of approving the revised plan.[34] Claimant was outvoted by other creditors, including unsecured creditors.

f) Claimant alleges that criminal charges were filed in 2019 by Macedonia's Finance Police Administration against the bankruptcy judge.[35] As Claimant is forced to acknowledge, however, the charges were dropped.[36] The Finance Police Administration referred its investigation to the Public Prosecutor's Office, which examined the matter and ultimately rejected the charges and declined to indict the judge.

26. Claimant's allegations that the Macedonian courts made procedural and substantive errors in applying Macedonian law are therefore baseless. If Claimant has evidence that TE-TO did not present accurate financial information to the court and the creditors in the bankruptcy proceedings, then its remedy is against TE-TO. Claimant had a full opportunity to present its case before the Macedonian courts, which it did, in multiple proceedings heard by different judges in different courts. To state a claim for denial of justice, Claimant must show not only that it exhausted local remedies, but also that it did so competently. That Claimant made mistakes in the local proceedings and failed to avail itself of local remedies does not warrant a do-over on the international plane.[37]

V. RELIEF SOUGHT

27. For the reasons set out above, Respondent respectfully requests the following relief:

a) Dismissal of Claimant's claims in their entirety;

b) Award of all the arbitration costs and legal costs, including interest, incurred by Respondent in connection with this arbitration; and

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[34] Decision of the First Instance Civil Court in Skopje dated 14 June 2018 (Ex. C-15) at p. 2.

[35] Request for Arbitration, ¶ 3.25.

[36] Request for Arbitration, ¶ 3.26.

[37] *See The Ambatielos Claim (Greece v. United Kingdom)*, Award of 6 Mar. 1956, vol. XXII at pp. 120-122 ("'[L]ocal remedies' include not only reference to the courts and tribunals, but also the use of the procedural facilities which municipal law makes available to litigants before such courts and tribunals."); David R. Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389 (1964) at p. 411 ("[T]he inadequacy of counsel is no ground for excusing the failure properly to exhaust local remedies.").

c) Award of such other relief as the arbitral tribunal to be constituted may consider appropriate.

VI. SERVICE OF THE ANSWER

28. In accordance with Article 5 of the ICC Rules, this Answer is submitted in electronic form to the ICC Secretariat and Claimant by email.

VII. RESERVATION OF RIGHTS

29. Respondent reserves all of its rights in this matter, including the right to amend, supplement, and modify its defense up to the date of the final award.

30. For the avoidance of doubt, where the Answer is silent on any matter or allegation raised in Claimant's Request for Arbitration, this silence shall not be deemed an acceptance by Respondent of any allegation.

Dated: 28 February 2022

Respectfully submitted on behalf of Respondent

White & Case LLP

White & Case LLP