International Chamber of Commerce (ICC)
International Court of Arbitration
ICC Arbitration No. 26696/HBH

GAMA GÜÇ SISTEMLERI MÜHENDISLIK VE TAAHHÜT A.Ş.

Claimant

– *vs* –

THE REPUBLIC OF NORTH MACEDONIA (MACEDONIA)

Respondent

STATEMENT OF CLAIM

Anže Arko
Matjaž Jan
Branko Ilić
ODI LLP
Davčna ulica 1
1000 Ljubljana, Slovenia

Gjorgji Georgievski
Ana Stojanovska
Georgievski Law Firm
Pirinska 25/1-2
1000 Skopje, Macedonia

Bora Kaya
Esra Berktaş
Gama Güç Sistemleri Mühendislik ve Taahhüt A.Ş.

COUNSEL FOR CLAIMANT

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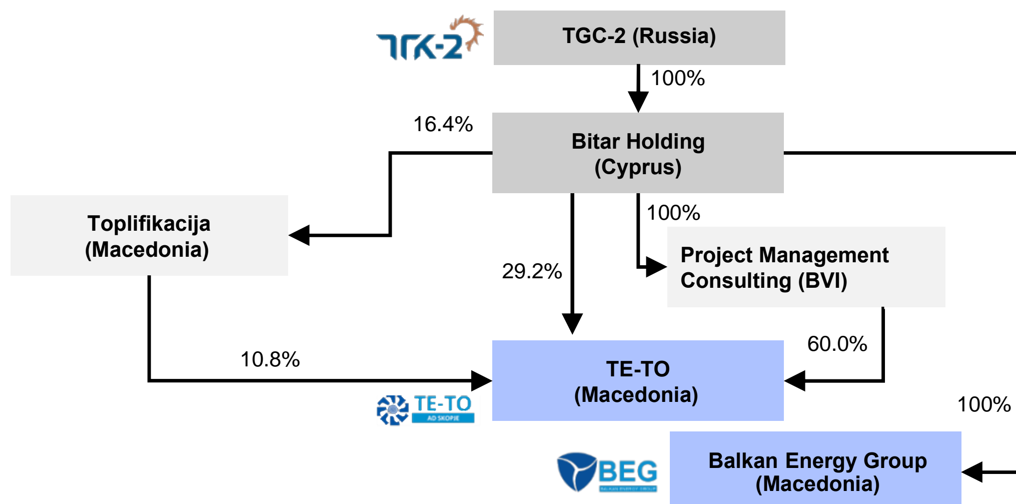
I. INTRODUCTION

1. The Republic of North Macedonia ("**Respondent**" or "**Macedonia**"), through an extraordinary series of denials of justice and unlawful acts by the Macedonian courts, has caused substantial loss and damage to GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. ("**Claimant**" or "**GAMA**") and its investment in connection with GAMA's EUR 5 million claim against TE-TO JSC Skopje, a joint stock company whose registered office is at Gazi Baba 515 Street, No. 8, 1000 Skopje, North Macedonia ("**TE-TO**").

2. TE-TO owns and operates a natural gas-fired combined cycle heat and power plant with an installed capacity of 220MW (electricity)/160MW (heat) ("**CCPP Skopje**") in Skopje, the capital of Macedonia. CCPP Skopje is the largest private-owned electricity generation plant in Macedonia, representing ~ 12% of the total installed national capacity. TE-TO is the largest importer of natural gas in Macedonia and is the principal supplier of heat to the district heating system in Skopje.

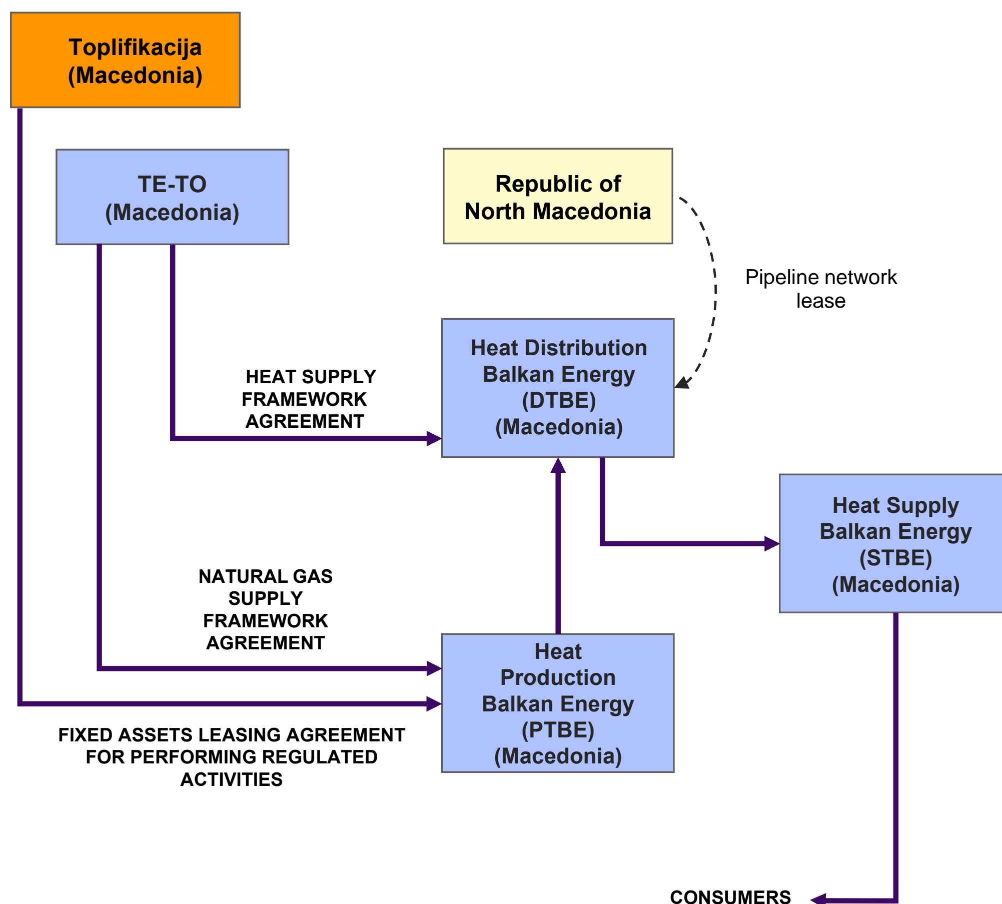
3. The majority shareholder of TE-TO is Bitar Holdings Limited, whose registered office is at Andrea Patsalidi 1, 3rd Floor, Office 301, 2362 Agios Dometios, Nicosia, Cyprus ("**Bitar Holdings**"). Bitar Holdings directly owns 29,2% and indirectly, through Project Management Consulting Limited (BVI) ("**Project Management Consulting**"), 60% of the entire share capital of TE-TO. Bitar Holdings is a wholly owned subsidiary of Territorial Generating Company No. 2 PJSC, a public joint stock company, whose registered office is at St. Pyatnitskaya, 6, Yaroslavl region, Yaroslavl 150003, Russian Federation, ("**TGC-2**").

4. TGC-2, indirectly through Bitar Holdings, exercises sole control over Balkan Energy Group JSC, whose registered office is at 515 Street, No. 8, 1000 Skopje, Macedonia ("**BEG**"), and is a minority shareholder in Toplifikacija JSC Skopje, whose registered office is at Londonska Street no. 8, 1000 Skopje, Macedonia ("**Toplifikacija**"). The corporate chart of the TGC-2 group of companies in Macedonia is set out below:



5. TGC-2 is a subsidiary of the energy colossus Sintez Group whose registered office is at 29/1 Malaya Nikitskaya Str., Moscow 121069, Russian Federation ("**Sintez Group**"), owned by Russian oligarch and former senator Leonid Lebedev.

6. TGC-2, through its subsidiaries, had a dominant position on the district heating market in Macedonia. From 2012 to 2022, BEG (through its licensed subsidiaries DTBE (heat distribution), PTBE (heat production) and STBE (heat supply)) operated the largest district heating system in Macedonia with an installed capacity of 478 MW and with a network length of 220 km, producing, distributing, and supplying heat to approximately 60,000 consumers in Skopje. BEG leased the district heating pipeline network from Macedonia and leased fixed assets from Toplifikacija. Toplifikacija, prior to BEG taking over the district heating in Skopje in 2012, had a monopoly on the district heating market in Macedonia. TE-TO was the exclusive supplier of heat to BEG.



7. The power plant CCPP Skopje, which TE-TO operates, was constructed by an international consortium comprised of GAMA, as consortium leader, and Alstom (Switzerland) Ltd. for EUR 135,8 million. Upon the construction of CCPP Skopje, TE-TO promised to pay GAMA a net sum of EUR 5 million in settlement of their mutual claims under the contract for the construction of CCPP Skopje. When TE-TO failed to pay, GAMA attempted to collect its unconditional and undisputed claim from TE-TO. Macedonia used its sovereign authority

to prevent GAMA from collecting its claim from TE-TO and finally expropriated GAMA's claim.

8. Upon TE-TO disputing GAMA's claim, the Macedonian courts illegally assumed jurisdiction over the dispute and applied Macedonian law, even though the contract for the construction of CCPP Skopje was governed by English law and contained an arbitration agreement requiring all disputes between GAMA and TE-TO to be referred to arbitration with the seat in London under the ICC Arbitration Rules. Furthermore, in the debt collection proceedings, pending for ten years now, the Macedonian courts repeatedly denied GAMA's claim by passing arbitrary and manifestly unreasonable judgments asserting that GAMA's claim is conditional.

9. In April 2018, TE-TO filed to the Macedonian courts a proposal for insolvency with a pre-negotiated reorganisation plan with Bitar Holdings and its related parties proposing a write-off of 90% of the principal claims and interest of all its unsecured creditors, including that of GAMA. TE-TO claimed that it was facing imminent insolvency due to the enforcement of the claims of its shareholders Bitar Holdings and Toplifikacija based on the repayment of loans granted to TE-TO. Indeed, shortly before TE-TO's proposal for insolvency and reorganisation, Bitar Holdings and TE-TO entered into agreements to accelerate the loans granted to TE-TO by Bitar Holdings. In manifestly arbitrary, discriminatory, and biased proceedings, the Macedonian courts unlawfully approved the write-off of 90% of GAMA's claim against TE-TO. In these proceedings, GAMA was treated the same as TE-TO's shareholders Bitar Holdings, Project Management Consulting Limited (BVI) and Toplifikacija, although, under the Macedonian law, GAMA's claim was of a higher priority than the claims of TE-TO's shareholders.

10. The writing off of the creditor's claims in TE-TO's judicial reorganisation proceedings in 2018 generated a tax debt of EUR 16 million for TE-TO, making TE-TO the largest tax debtor in Macedonia throughout 2019 and 2020. Macedonia made all attempts to rescue the recently "reorganised" TE-TO from the opening of bankruptcy by refraining from an enforced collection of the tax debt and, subsequently, by granting TE-TO unlawful state aid in the form of a nine-year deferral of the payment of the tax debt. Macedonia has not even attempted to hide this unlawful conduct but has openly made known its plans to protect TE-TO from the claims of its creditors, including that of GAMA.

11. In an e-mail dated 18 November 2019, the Spokesperson of the Macedonian Government blatantly acknowledged that Macedonia granted state aid to TE-TO to prevent the collapse of TE-TO's judicial reorganisation and its debt restructuring due to fears of a potential disruption of the supply of heat to Skopje:

> "[…] The tax liability of TE-TO AD Skopje, whose payment is deferred, is, in fact, corporate income tax, which de facto does not exist, is not generated in the company, but is created fictitiously based on written-off liabilities based on the Reorganization Plan, approved and adopted with a court decision - Decision of the First Instance Court Skopje 2 - Skopje, 3 St. - 124/18 and 160/18 from 14.06.2018.

Given the fact that currently, TE-TO JSC Skopje has financial difficulties, it is practically not able to pay such corporate income tax, which corporate income does not really exist, the eventual commencement of forced collection of that corporate income tax not only will prevent the reorganisation of the company, but it is quite certain that it will lead to the opening of bankruptcy proceedings over it and the collapse of the Reorganization Plan. In that case, the "written off liabilities" according to the Reorganization Plan will be transformed again into actual liabilities of the company to creditors and will not have profit treatment, and thus the tax liability - profit tax for 2018 based on written off liabilities, no more to exist and the state will not charge it.

On the other hand, TE-TO AD Skopje as a company whose main activity is cogeneration production of electricity and heat through thermal power plants with combined cycle and modern technology, using natural gas as the only fuel, is the largest consumer of natural gas in the Republic of North Macedonia with over 70% share in the total balance of natural gas consumption in the country. Thus, it contributes to improving the energy system and reducing air pollution, which is a strategic commitment of the country.

Also, we should not ignore the fact that TE-TO JSC is the principal supplier of heat in Skopje, but also on a national level. The collapse of the company would lead to a severe disruption of the heat supply, especially in Skopje. [...]"[1] [emphasis added]

12. In May 2018, before the approval of TE-TO's reorganisation by the Macedonian courts, Toplifikacija filed criminal charges against TE-TO, the President of the Management Board of TE-TO, Bitar Holdings and the parties who were involved in the unlawful acceleration of the loans granted by Bitar Holdings to TE-TO, based on a well-founded suspicion that the suspects have committed the criminal acts of "*Abuse of official position" and "Damaging and privileging of creditors"*.

13. In June 2019, the Finance Police Administration of the Republic of North Macedonia filed criminal charges against the parties involved in TE-TO's judicial reorganisation, including the President of the Management Board of TE-TO and the bankruptcy judge who approved the TE-TO's reorganisation and the writing off of 90% of creditor's claims based on a well-founded suspicion that the suspects have committed the criminal acts of "*False Insolvency*", "*Abuse of official position*", and "*Money laundering*".

14. Macedonia did nothing to prosecute further the suspects for the above criminal acts and eventually decided not to raise indictments by official duty on the basis that TE-TO's judicial reorganisation concerned transactions between private parties and that there was purportedly no evidence of wrongdoings amounting to criminal acts since TE-TO's reorganisation was governed by the bankruptcy law.

15. This Statement of Claim proceeds as follows: Part II contains the description of the factual background of the case, the parties and GAMA's investment. Part III contains the legal argument, including why the Tribunal has jurisdiction on the basis of the Agreement between the Republic of Turkey and the Republic of Macedonia concerning the reciprocal

[1] E-mail from Spokesperson of the Government of the Republic of North Macedonia, dated 18 November 2019 (**C-024**) [emphasis added]

promotion and protection of investments[2] (the "**Treaty**") and how Macedonia's acts violate the Treaty and customary international law. Part IV contains the damages claimed, and Part V contains the request for relief.

II. FACTUAL BACKGROUND

A. Parties

1. GAMA

16. GAMA is a joint stock company incorporated under the laws of Turkey, whose registered office is at GAMA Binası, Nergiz Sokak No: 9, Beştepe, Yenimahalle 06560 Ankara, Turkey.

17. GAMA specializes in EPC Projects (Engineering, Procurement, and Construction). In addition to the turnkey construction of power plants, GAMA is also experienced in the construction of new units to increase the capacity of existing facilities of customers and/or renovation projects of power plants. GAMA provides its customers with an uninterrupted and complete turnkey service package, structuring its operations to include engineering, procurement, construction, commissioning and warranty period services and spare part support in order to provide the most efficient service to its customers in realizing their power plant investments. GAMA, due to its flexibility and ability to serve in different cultural, social, and geographical conditions of the world, has taken its place among the leading EPC companies in the world regarding power plants.

18. GAMA has constructed 49 power plants with a total installed capacity of 30 GW in a number of countries in Europe, the Middle East, North Africa, Russia and the CIS region, including Turkey, Algeria, Bahrain, Iraq, Ireland, Jordan, Kazakhstan, Latvia, Saudi Arabia, Syria, Tunisia, and others.[3]

2. MACEDONIA

19. Respondent is Macedonia. Macedonia is a sovereign State and party to the Treaty.

20. GAMA's claims arise out of the conduct of the following state organs of Macedonia:

    (a) The Government of the Republic of Macedonia ("**Macedonian Government**").

    (b) Macedonia's civil courts. Macedonia's civil court system has jurisdiction over disputes between individuals and/or companies and bankruptcy cases.

    (c) The Public Revenue Office of the Republic of Macedonia ("**Public Revenue Office**" or "**PRO**"). The Public Revenue Office is a state organ within the Ministry of Finance of the Republic of Macedonia, which has exclusive jurisdiction to

[2] Agreement between the Republic of Turkey and the Republic of Macedonia Concerning the Reciprocal Promotion and Protection of Investments, Official Journal of the Republic of Macedonia No. 05/1997 dated 14 July 1995 (**CL-001**)

[3] Gama website, "Projects", <https://guc.gama.com.tr/en/projects/>, last accessed 27 October 2022 (**C-025**)

implement the tax policy in Macedonia, including maintaining the single tax register and tax records of taxpayers, receiving tax returns, assessing, collecting, and refunding taxes, social contributions on wages and other public levies, to carry out tax audit, and to monitor and analyse the operation of the tax system.

(d) The Commission for the Protection of Competition of the Republic of Macedonia ("**Competition Commission**"). The Competition Commission is a state organ with exclusive jurisdiction for assessing and monitoring state aid in Macedonia and enforcement of the Law on Protection of Competition. The Competition Commission is funded by the national budget of Macedonia. The president and the four members of the Competition Commission are appointed by the Parliament of the Republic of Macedonia. The Competition Commission is accountable for its work to the Parliament.

21. As explained in Section III.B below, the acts of all of the above state organs are attributable to Macedonia.

B. GAMA's investment in Macedonia

1. THE EPC CONTRACT

22. On 11 May 2007, an international consortium comprised of GAMA, as consortium leader, and Alstom (Switzerland) Ltd., both as contractor and TE-TO, as owner, entered into an engineering, procurement, and construction (EPC) Contract Agreement no. 4-01-4, as amended and restated[4] ("**EPC Contract**"), for the construction of the CCPP Skopje for EUR 135,8 million. The EPC Contract was based on the FIDIC General Conditions of Contract for EPC/Turnkey Projects (First Edition 1999) and its scope covered the construction of the CCPP Skopje on a turnkey basis, including procurement of all major equipment and other auxiliary equipment, conceptual and detailed engineering, civil and electromechanical installation works, test and commissioning works and training TE-TO's staff.

23. The EPC Contract was governed by English law[5] and provided a multi-tiered dispute resolution procedure, including international arbitration as a final resort. GAMA and TE-TO agreed that any disputes between them will be finally settled under the Rules of Arbitration of the International Chamber of Commerce ("**ICC Rules**") by three arbitrators appointed in accordance with the ICC Rules and that the seat of the arbitration shall be in London:

[4] Contract Agreement no. 4-01-4, as amended and restated, by Supplement no. 1 dated 10 July 2007, Supplement no. 2 dated 09 November 2007, Supplement no. 3 dated 17 December 2007, Supplement no. 4 dated 17 July 2008, Supplement no. 5 dated 25 September 2008, Supplement no. 6 dated 20 March 2009, Supplement no. 7 dated 15 December 2009, Supplement no. 8 dated 07 April 2011 and Supplement no. 9 and Settlement Agreement dated 24 February 2012, entered into between GAMA, ALSTOM and TE-TO (**C-002**)

[5] See (**C-002**) (Part II Particular Conditions of Contract, Sub-Clause 1.4 "Law and Language": "The Contract is governed by the laws of England")

"20.6 Arbitration

Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration.
Unless otherwise agreed by both Parties:

(a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
(b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
(c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [Law and Language].
The seat of arbitration shall be in London (U.K)."[6]

24. The arbitration agreement in the EPC Contract does not contain an express choice of law. However, under English law, the proper law of the arbitration agreement coincides with the governing law of the EPC Contract, in this case, English law.

25. Acknowledging the well-established principle of separability of arbitration agreement from the underlying contract, the UK Court of Appeal in *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638 considered that in the absence of the express choice of law governing the arbitration agreement, it is generally presumed that the law governing the contract governs the arbitration agreement as well:

"It has long been recognised that in principle the proper law of an arbitration agreement which itself forms part of a substantive contract may differ from that of the contract as a whole, but it is probably fair to start from the assumption that in the absence of any indication to the contrary, the parties intended the whole of their relationship to be governed by the same system of law. It is common for parties to make an express choice of law to govern their contract but unusual for them to make an express choice of the law to govern any arbitration agreement contained within it; and where they have not done so, the natural inference is that they intended the proper law chosen to govern the substantive contract also to govern the agreement to arbitrate." [7]

2. THE SETTLEMENT AGREEMENT

26. On 20 December 2011, GAMA and Sintez Group, acting on behalf of TE-TO, entered into a Memorandum of Understanding for the purpose of resolving the outstanding technical and commercial issues relating to the EPC Contract.[8] GAMA and Sintez Group agreed to settle the mutual outstanding commercial claims till the date of the Commercial Operation Certificate for CCPP Skopje by TE-TO paying to GAMA a net sum of EUR 5 million and that for this purpose GAMA and TE-TO will enter into a supplement to the EPC Contract, including the settlement.[9]

[6] See (**C-002)** (see Conditions of Contract for EPC/Turnkey Projects, Sub-clause 20.6. See also Part II Particular Conditions of Contract, Sub-Clause 20.6 "Arbitration": "The seat of arbitration shall be in London (U.K.).")
[7] *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638, (**CL-002**) at [11] Moore-Bick LJ.
[8] Memorandum of understanding between GAMA and Sintez Group dated 20 December 2011 (**C-026**)
[9] Memorandum of understanding between GAMA and Sintez Group dated 20 December 2011 (**C-026**), at p. 2 ("[…] the Parties negotiated and agreed to trade-off for amicable settlement of the plume and noise issues, which are

27. Subsequently, GAMA and TE-TO entered into Supplement no. 9 and Settlement Agreement to the EPC Contract dated 14 February 2012,[10] ("**Settlement Agreement**") for the purpose of settling all claims between them under the EPC Contract. GAMA and TE-TO also executed the Commercial Operation Certificate certifying that the Works are complete except for the items listed in the Punch List enclosed therein that are (a) not essential to the operation of CCPP Skopje and (b) do not impair the safe performance of CCPP Skopje and that the Works are deemed to have been taken over by the Owner with effect from 31 December 2011. [11]

28. In accordance with the Settlement Agreement,[12] TE-TO unconditionally agreed to pay GAMA a net sum of EUR 5 million by 31 March 2012 in full and final settlement and mutual release of all claims under the EPC Contract. On 30 March 2012, GAMA issued TE-TO invoice no. A028 dated 30 March 2012, amounting to EUR 5 million in accordance with the provisions of the Settlement Agreement.[13]

29. On 31 May 2012, Mr Mihail Scobioala, the President of the Managing Board of TE-TO, wrote to Mr Hakan Emek, Deputy Managing Director of GAMA, informing him that Sintez Group defined the schedule of payment of the outstanding claim of GAMA in three instalments (i) EUR 1 million in June 2012 after closing of all critical punch items, (ii) EUR 2 million in July 2012 and (iii) EUR 2 million in August 2012 upon closure of remaining minor punch items and finalising the Punch List.[14] On 1 June 2012, Mr Emek wrote to Mr Scobioala highlighting that the proposed payment schedule is not in compliance with the Settlement Agreement.[15] In his reply, Mr Scobioala confirmed that the proposed payment schedule is not conditioned with the closing of the punch items list.[16]

30. As explained below, since TE-TO did not make payment of GAMA's claim in the following months and the prior correspondence between GAMA and TE-TO did not indicate in any way that TE-TO was disputing GAMA's claim, GAMA undertook steps for the collection of its unconditional and uncontested claim.

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agreed to be of no hindrance for COC and operational licence, for a total of Euro 5.0 million, that is agreed to be paid to the Consortium for the extended duration which is not attributable to the Consortium, under a supplement to be made to the Contract, which shall include the settlement and technical documentation and agreement reached between the Parties. With this agreement the Parties confirm and accept that all disputed issues and claims whatsoever are settled till the date of COC. […]")

[10] Supplement no. 9 and Settlement Agreement to the EPC Contract entered into between GAMA and TE-TO dated 24 February 2012 ("Settlement Agreement") (**C-004**)

[11] Commercial Operation Certificate dated 14 February 2012 (**C-027**)

[12] See Settlement Agreement (**C-004**) at Clause 3 para 2 ("In full and final settlement of all claims from both Parties for any events that occurred in relation to the Works and the Contract up to the date of signing this Agreement, including but not limited to the claims listed under item 3 (i) and 3 (ii), and agreements under (iii) to (v) of Clause 3 above, the Owner, shall pay to the Contractor a net sum of Eur 5 million (five million Euros) which shall be disbursed to the Contractor latest until March 31, 2012 after submittal of the related invoice by the Contractor, which shall be issued following signing of this Agreement.")

[13] Invoice no. A028 dated 30 March 2012 (**C-005**)

[14] E-mail from Mihail Scobioala to Hakan Emek dated 31 May 2012 (**C-028**)

[15] E-mail from Hakan Emek to Mihail Scobioala dated 1 June 2012 (**C-029**)

[16] E-mail from Mihail Scobioala to Hakan Emek dated 5 June 2012 (**C-030**) ("[…] Please note that our intention is not to condition the proposed payment schedule with the closing of punch items list, and please do not consider the required schedule of closing the punch items as precondition for actual payments per Supplement No.9 […]")

3. GAMA v. TE-TO PROCEEDINGS

(a) THE TEMPORARY INJUNCTION PROCEEDINGS

31. On 30 November 2012, GAMA filed to the First Instance Civil Court Skopje ("**Civil Court Skopje**") a proposal for the issuance of an interim injunction against TE-TO, proposing to the Civil Court Skopje to issue an order freezing the amount of EUR 5 million on the bank accounts of TE-TO.[17] For the Macedonian courts to grant interim measures, the creditor must show that it has a probable claim against the debtor and that if an interim measure is not granted, there would be a risk of the debtor suspending or materially obstructing the collection of the claim by disposing of, concealing, or otherwise disposing of its assets.[18] The creditor is not required to show that there is a risk of the debtor disposing of its assets if it shows that the debtor would sustain insignificant damage from the proposed interim measure.[19]

32. Under Macedonian law, interim measures are relief that the Macedonian courts may grant to a party before the final judgment on the merits of the case, to protect the party's position or assets pending judgment. The interim measures typically take a form of an injunction restraining a party from disposing of or otherwise dealing with its assets, or from taking (or refraining from) other action necessary to ensure that a final award will be enforceable. They can also take a form of an order that specific assets are frozen, or alternatively, seized, pending the judgment, or that an amount of money is paid into court on an interim basis.[20]

33. TE-TO raised a jurisdictional objection based on the arbitration agreement in the EPC Contract and motioned for the Civil Court Skopje to declare that it has no jurisdiction to hear the proposal for the interim injunction.[21] Moreover, TE-TO argued that GAMA's proposal for an interim injunction should be denied since the payment of GAMA's claim is conditional upon GAMA completing the items listed in the Punch List.[22]

34. On 1 February 2013, the Civil Court Skopje denied TE-TO's jurisdictional objection and GAMA's proposal for the issuance of an interim injunction.[23] According to the Civil Court Skopje, GAMA failed to show that it has a claim against TE-TO. In the opinion of the Civil Court Skopje, the Settlement Agreement, the invoice issued by GAMA and TE-TO's acknowledgement of its debt to GAMA were not sufficient for GAMA to show that it has a

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[17] Proposal for the issuance of an interim injunction by GAMA dated 30 November 2012 (**C-031**)
[18] Law on Security of Claims (Official Journal of the Republic of Macedonia no. 87/2007), ("Security of Claims Law") (**C-032**), Article 33(1)
[19] See Security of Claims Law (**C-032**), Article 33(2)
[20] See Security of Claims Law (**C-032**), Article 34(1)
[21] Brief by TE-TO dated 24 December 2012 (**C-033**)
[22] See Brief by TE-TO dated 24 December 2012 (**C-033**), at p. 3
[23] Decision of the First Instance Civil Court Skopje (case file no. 2 RVRM no. 265/12) dated 1 February 2013 (**C-034**)

claim against TE-TO since GAMA did not complete the items listed in the Punch List.[24] The decision of the Civil Court Skopje was in breach of Macedonian law.[25]

35. However, the Settlement Agreement, including the overdue invoice for EUR 5 million and the prior correspondence between GAMA and TE-TO with respect to the Settlement Agreement,[26] were ample evidence to show that GAMA had a claim against TE-TO. Accordingly, GAMA appealed the decision of the Civil Court Skopje. On 14 March 2013, the Appellate court in Skopje ("**Appellate Court Skopje**") denied GAMA's appeal by stating that GAMA did not provide any evidence that would show that GAMA had a claim against TE-TO.[27] Same as the Civil Court Skopje, the Appellate Court Skopje implied that GAMA's claim is conditional on the completion of the items listed in the Punch List.

(b) THE PROCEEDINGS BEFORE THE NOTARY PUBLIC

36. On 3 December 2012, GAMA filed a proposal for the adoption of a decision for enforcement based on an authentic document against TE-TO to notary public Snezana Vidovska based on the overdue invoice for EUR 5 million.[28] GAMA filed the proposal to the notary public in accordance with the provisions for enforcement of uncontested claims under the Law on Enforcement ("**Enforcement Law**").[29]

37. The proceedings for the issuance of decisions for enforcement based on authentic documents, such as GAMA's invoice no. A028 dated 30 March 2012, were non-contentious. The amendments to the Enforcement Law in 2009,[30] granted notaries (as trustees of the courts) the jurisdiction to issue decisions for the enforcement of uncontested claims based on proposals received by creditors. This was done for the purpose of reducing the case backlog of the Macedonian courts, which were overburdened with unresolved civil disputes and thousands of lawsuits with a proposal for the issuance of a court payment order in contentious proceedings under the Law on Litigation Procedure ("**Litigation Procedure Law**").[31]

38. The Enforcement Law established the territorial jurisdiction of the notaries for the issuance of decisions for the enforcement of uncontested claims based on the address of the

[24] See Decision of the First Instance Civil Court Skopje (case file no. RVRM no. 265/12) dated 1 February 2013 (**C-034**), at pp.5-6

[25] Security of Claims Law (**C-032**), Article 33(1) and Article 33(2)

[26] See Proposal for the issuance of an interim injunction by GAMA dated 30 November 2012 (**C-031**), at pp. 1-2

[27] Decision of the Appellate Court Skopje (case file no. TSZ no. 423/13) dated 14 March 2013 (**C-035**), at p. 3 ("…Namely, in the specific case it was established from the enclosed evidence that during the proceedings the creditor did not show that it has a probable claim with any evidence, and if the provisions of the concluded settlement agreement are taken into account, which refer to the creditor's obligations, for the debtor's request to remove the deficiencies and the damaged party...")

[28] Proposal for the adoption of a decision for enforcement based on an authentic document by GAMA against TE-TO dated 3 December 2012 (**C-036**)

[29] Law on Enforcement (Official Journal of Republic of Macedonia, No. 35/2005, as amended) (**C-037**) ("Enforcement Law")

[30] Law on amendments to the Law on Enforcement (Official Journal of the Republic of Macedonia no. 83/09) (**C-038**)

[31] Law on Litigation Procedure (Official Journal of the Republic of Macedonia no. 79/2005), (**C-039**) ("Litigation Procedure Law") Articles 417-428

registered office of debtor - legal entity.[32] Debtors had the right to file an objection against a decision for enforcement within 8 days from its receipt to the notary who adopted the decision for enforcement.[33] In such cases, the notary was required to transfer the case files to the first instance court having territorial jurisdiction in the area where the notary was located for review in accordance with the provisions of the Litigation Procedure Law, which governed objections against court payment orders.[34]

39. On 4 December 2012, the notary public passed a decision for enforcement based on an authentic document ordering TE-TO to pay GAMA EUR 5 million with default interest from 1 April 2012.[35] Despite the assumed obligation under the Settlement Agreement, TE-TO objected to the decision for enforcement[36] by asserting that allegedly its obligation for payment is conditional upon GAMA's completion of the obligations set out in the Settlement Agreement and that, allegedly, it has identified hidden defects in the works on CCPP Skopje which must be rectified.

40. Therefore, under the provisions of the Enforcement Law,[37] the notary public referred the case to the Civil Court Skopje.

41. On 26 December 2012, Sintez Group delivered to GAMA a letter claiming that TE-TO was forced to postpone the payment under the Settlement Agreement due to the delay of the start of the commercial exploitation of CCPP Skopje and proposing an amicable settlement between GAMA and TE-TO. In the letter, Sintez Group claimed that TE-TO would pay EUR 5 million by 21 January 2013:

> "[…] According to the Supplement #9 and Settlement Agreement as of 14 February 2012 with reference to the Contract Agreement 4-01-4 of 1 May 2007 and its supplements, i.e. clause 3 paragraph 2 of the Supplement #9, TE-TO AD undertook to pay latest until 31 March 2012 to GAMA net sum of 5 million Euros. Because of delay of start of commercial exploitation of the electricity plant TE-TO AD due to reasons beyond control of TE-TO it was forced to postpone the remittance of 5 million Euros to GAMA, but GAMA did not fulfil its obligations under Supplement #9 as well.

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[32] See Enforcement Law (**C-037**), Article 16 a) ("The creditor shall submit a proposal for enactment of a decision allowing enforcement on the basis of an authentic document, to the notary public of his/her own choosing, located in the area where the debtor – natural person lives or stays, or the debtor – legal entity has its registered office.")

[33] See Enforcement Law (**C-037**), Article 16 d) para 1 ("The debtor may file an objection against the decision allowing enforcement on the basis of an authentic document, to the notary public that enacted the decision, within eight days from the day when the debtor received the decision.")

[34] See Enforcement Law (**C-037**), Article 16 d) para 3 ("The notary to whom a timely and admissible objection has been submitted against the decision he made, will submit the files to the basic court whose territory is the headquarters of the notary where the objection was submitted, for the implementation of a procedure regarding the objection and the adoption of a decision in accordance with the provisions of the Law on the Litigation Procedure upon an objection to a payment order.")

[35] Decision of Notary Snezana Vidovska from Skopje UPDR no. 2806/12 dated 4 December 2012 (**C-006**)

[36] Objection by TE-TO dated 13 December 2012 against the Decision of Notary Snezana Vidovska from Skopje UPDR no. 2806/12 dated 4 December 2012 (**C-040**)

[37] See Enforcement Law (**C-037**), Article 16 d) para 3 ("(3) The notary to whom a timely and admissible objection has been submitted against the decision he made, will submit the files to the basic court whose territory is the headquarters of the notary where the objection was submitted, for the implementation of a procedure regarding the objection and the adoption of a decision in accordance with the provisions of the Law on the Litigation Procedure upon an objection to a payment order.

But fortunately the start of commercial exploitation of the electricity plant is finally planned on 7 January 2013. This will provide the possibility for TE-TO AD to be able to pay the existing indebtedness to GAMA shortly. We are confident that 5 million Euros could be repaid to GAMA not later than 21 January 2013.

Thereupon taking into consideration the long-term mutually advantageous cooperation between TE-TO AD and GAMA and the lawsuit against TE-TO AD which was brought by GAMA recently it is proposed hereby TE-TO AD and GAMA to conclude an amicable settlement providing for TE-TO obligation to repay to GAMA the 5 million Euros debt before 21 January 2013. […]"[38]

42. GAMA responded to Sintez Group, reiterating that TE-TO's obligation for payment of the settlement amount is not conditioned upon the performance of GAMA's obligations and that the Settlement Agreement is itself an amicable settlement between GAMA and TE-TO.[39] On 4 January 2013, TE-TO wrote to GAMA referring to the letter of Sintez Group and inviting GAMA's representatives to a meeting in Skopje to sign an amicable settlement.[40] On 14 January 2013, GAMA wrote to TE-TO confirming that upon the payment of the settlement amount, it would discontinue the debt collection proceedings.[41] On 18 January 2013, TE-TO wrote to GAMA requesting written confirmation that GAMA would terminate all legal procedures against TE-TO upon receipt of the EUR 5 million from TE-TO.[42]

(c) THE DECISION ON JURISDICTION

43. Since TE-TO disputed GAMA's claim and the parties agreed to the arbitration on the basis of the arbitration agreement in the EPC Contract, which, moreover, was specifically relied upon also by TE-TO in the temporary injunction proceedings, where it invoked the arbitration agreement as a jurisdictional objection (see above at para. 33), on 9 May 2013, GAMA filed a brief to the Civil Court Skopje for withdrawal of its claim and requested that the Civil Court Skopje either accepts the withdrawal of the claim by GAMA under the provisions of the Enforcement Law or pursuant to the jurisdictional objection and declare that it has no jurisdiction to hear the dispute.[43]

44. On 27 May 2013, TE-TO filed a brief to the Civil Court Skopje, claiming that its consent is required under the Litigation Procedure Law, for GAMA to withdraw its claim and refused to provide its consent.[44] Subsequently, on 11 December 2013, TE-TO filed a brief[45] to the

[38] Proposal to conclude the amicable settlement by Sintez Group to GAMA dated 26 December 2012 (**C-041**)

[39] Letter by GAMA to Sintez Group dated 4 January 2013 (**C-042**), ([…] We would like to underline the fact that Supplement No. 9 and Settlement Agreement is itself an amicable settlement of open issues between TE-TO AD and the Contractor, the obligations thereunder which have not been respected to date by TE-TO AD.[…]")

[40] Letter by TE-TO to GAMA dated 4 January 2013 (**C-043**)

[41] Letter by GAMA to TE-TO ref. no. 605-LT-GPA-TTAM2481, dated 14 January 2013 (**C-044**) ("[…] With reference to our letter sent to Group of Sintez on January 4, 2013, we deem it worthwhile to remind once again that in case the Owner makes the payment of the Settlement Amount prior to the court date of January 21, 2013, we shall immediately terminate the related legal procedure. […]")

[42] Letter by TE-TO to GAMA dated 18 January 2013 (**C-045**)

[43] Brief for withdrawal of claim by GAMA dated 9 May 2013 (**C-046**)

[44] Brief for refusing consent for withdrawal of claim by TE-TO dated 27 May 2013 (**C-047**)

[45] Brief providing an expert report by TE-TO dated 11 December 2013 (**C-048**)

Civil Court Skopje claiming that its obligation for payment was conditional upon GAMA's completion of the Punch List items and enclosed an expert report by Expert Witness DOO Skopje. According to the expert report, TE-TO acknowledged its debt to GAMA, but it was not liable to pay the invoice until GAMA completes the items listed in the Punch List with a value of EUR 91,739 and removes the allegedly identified hidden defects with a value of EUR 438,474.[46]

45. At the first hearing in the case held on 19 December 2013,[47] GAMA provided to the Civil Court Skopje the arbitration agreement from the EPC Contract, the relevant correspondence between GAMA and TE-TO and the jurisdictional objection of TE-TO in the temporary injunction proceedings and objected to the Civil Court Skopje's jurisdiction based on the arbitration agreement in the EPC Contract.[48] In a subsequent written submission, TE-TO again argued that the Civil Court Skopje cannot declare that it has no jurisdiction over the dispute since a jurisdictional objection can only be raised by TE-TO, as the respondent and that GAMA cannot withdraw its claim without TE-TO's consent.[49] TE-TO referred to the provisions of the Civil Procedure Law and the provisions of the Law on Private International Law ("**Private International Law**").[50] In contrast, under the provisions of the Enforcement Law, a creditor has the right to withdraw the request for enforcement at any time without the consent of the debtor.[51]

46. At the hearing held on 7 March 2014, GAMA again reiterated that the Civil Court Skopje does not have jurisdiction over the dispute based on the arbitration agreement in the EPC Contract.[52] TE-TO once again opposed. Subsequently, the Civil Court Skopje entirely accepted the arguments set forth by TE-TO and passed a decision rejecting GAMA's jurisdictional objection and decided that the dispute was to be heard by Civil Court Skopje ("**Decision on jurisdiction**").[53]

47. On 29 April 2014, GAMA appealed against the Decision on jurisdiction to the Appellate Court Skopje.[54] On 15 December 2014, the Appellate Court Skopje denied GAMA's appeal and upheld the Decision on jurisdiction.[55] The Appellate Court Skopje fully accepted the reasoning of the Civil Court Skopje. Furthermore, the Appellate Court Skopje also found

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[46] See Brief providing an expert report by TE-TO dated 11 December 2013 (**C-048**), Expert report by Expert Witness DOO Skopje, at p. 2

[47] Minutes of the hearing before the First Instance Civil Court Skopje dated 19 December 2013 (**C-049**)

[48] Brief for raising a jurisdictional objection by GAMA dated 19 December 2013 (**C-050**)

[49] Brief by TE-TO dated 30 December 2013 (**C-051**)

[50] Law on Private International Law (Official Journal of the Republic of Macedonia no. 87/2007) (**C-052**) ("Private International Law")

[51] See Enforcement Law (**C-037**), Article 28(1) ("During the proceedings, the creditor may, without the consent of the debtor, withdraw the request for enforcement in whole or in part, except in cases where the creditor's rights are abused by withdrawing the request.")

[52] Minutes of the hearing before the First Instance Civil Court Skopje dated 7 March 2014 (**C-053**)

[53] Decision of the First Instance Civil Court Skopje No. PL1-286/13 dated 7 March 2014 (**C-007**)

[54] Appeal against the Decision of the First Instance Civil Court Skopje No. PL1-286/13 dated 7 March 2014 by GAMA dated 29 April 2014 (**C-054**)

[55] Decision of the Appellate Court Skopje TSZ-1482/14 dated 15 December 2014 (**C-008**)

that Macedonian law should be applied since the dispute was to be heard by the Macedonian courts.[56] This was in egregious breach of the Private International Law.

48. Under the Private International Law, a contract is governed by the law chosen by the parties and the validity of the choice of law is assessed from the standpoint of the chosen law.[57] In a dispute arising out of a contract governed by foreign law, the Macedonian courts must determine and apply the foreign applicable law *ex officio*.[58] The contents of foreign law may be determined in several different ways. First, information may be obtained from the Ministry of Justice.[59] Second, the parties may produce a statement on the foreign law's content issued by a competent foreign authority or institution.[60] Exceptionally, in cases where the foreign law's content cannot be determined in one of the ways described, the Macedonian courts can apply Macedonian law.[61] This provision must be applied only exceptionally, in situations where the court's attempts to determine the foreign law have failed due to reasons that are beyond its control.

49. The Civil Court Skopje never attempted to determine the contents of the English law and apply it to the dispute. On the contrary, the Civil Court Skopje and higher courts persistently applied Macedonian law, although GAMA repeatedly demanded that English law be applied as the governing law of the Settlement Agreement and the EPC Contract.[62]

50. By assuming jurisdiction over the dispute between GAMA and TE-TO, the Macedonian courts misapplied Macedonian law and extinguished the arbitration agreement and the governing law agreement in the EPC Contract. The Macedonian courts wrongfully applied the provisions of the Enforcement Law, the Civil Procedure Law, and the Private International Law and did not even consider the provisions of the Law on International Commercial Arbitration ("**Arbitration Law**").[63]

51. Under the Private International Law, there is an assumption that a respondent has provided tacit consent to the jurisdiction of the Macedonian courts if it did not set forth a jurisdictional objection in an answer to a claim or an objection against a payment order. However, this rule applies in case of an objection against a 'payment order' issued by a court and not an

[56] See Decision of the Appellate Court Skopje TSZ-1482/14 dated 15 December 2014 (**C-008**), at p. 3 ("[…] On the other hand, in this case it is the claimant who challenged the jurisdiction of the court, that is, the proposal to pass a decision to permit enforcement based on an credible document. They were aware of the circumstance that with the defendant they have agreed the jurisdiction of the international arbitration court, but they have, nevertheless, decided to have the dispute resolved before the courts in the Republic of Macedonia with the application of the Macedonian law..[…]")
[57] Private International Law (**C-052**), Article 21
[58] Private International Law (**C-052**), Articles 9 and 13
[59] Private International Law (**C-052**), Article 13(2)
[60] Private International Law (**C-052**), Article 13(3)
[61] Private International Law (**C-052**), Article 13(4)
[62] Brief by GAMA dated 19 March 2015 (**C-055**), at p. 4, see also Appeal by GAMA to the Supreme Court of the Republic of North Macedonia dated 24 December 2019 (**C-069**), at p. 5.
[63] Law on International Commercial Arbitration (Official Journal of the Republic of Macedonia, No. 39/06) (**C-056**) ("Arbitration Law")

objection against a decision for enforcement issued by a notary public.[64] A decision for enforcement of an uncontested claim by a notary public did not constitute a court payment order issued under the Litigation Procedure Law. Furthermore, the Private International Law was enacted in 2007, and the amendments to the Enforcement Law introducing the entitlement of the notaries to issue decisions for the enforcement of uncontested claims were enacted in 2009. Accordingly, the provisions of the Private International Law could not have been applied to TE-TO's objection against the decision for enforcement.

52. The Macedonian courts also misapplied the provisions of the Litigation Procedure Law. Under the Litigation Procedure Law, the court may, upon the respondent's objection against the payment order, only declare that it has no territorial jurisdiction.[65] This provision applies only to the territorial jurisdiction of the Macedonian court and not to claims that fall outside of the court's jurisdiction, for example, if the claim is covered by an arbitration agreement or a jurisdiction agreement in favour of the courts of another country. The Macedonian courts are required during the entire proceedings to verify *ex officio* that they have jurisdiction to hear the claim.[66] If a Macedonian court establishes that it has no jurisdiction, it must annul all actions and reject the claim, unless the jurisdiction depends on the respondent's consent which was granted.[67] This rule also applies to proceedings based on an objection against a court payment order.[68]

53. The interplay between the provisions of the Enforcement Law and the Litigation Procedure Law in relation to the jurisdiction of the Macedonian courts upon an objection against a decision for enforcement of uncontested claims issued by a notary public indeed raised questions in cases when the creditor and the debtor have agreed on the territorial jurisdiction of a specific court in an underlying contract. In order to remove the legal uncertainty, in 2015, the Supreme Court of the Republic of Macedonia ("**Supreme Court**"), the highest judicial authority in Macedonia, issued a conclusion that the Macedonian courts must honour the agreement between the creditor and the debtor on the territorial jurisdiction:

" The territorial jurisdiction of notaries in the proceedings for issuance of a decision based on a proposal for issuance of a decision for allowing enforcement based on an authentic document is determined in accordance with the provision of Art. 16-a of the EL, which

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[64] Private International Law (**C-052**), Article 57(2) ("It is considered that the respondent has consented to the jurisdiction of the court of the Republic of Macedonia, if he has submitted an answer to the lawsuit or an objection against the payment order or if at the preparatory hearing, i.e. when there was no such hearing at the first hearing for the main hearing, he engaged in discussing of the merits of the claims, and he did not dispute the jurisdiction").

[65] Litigation Procedure Law (**C-039**), Article 425

[66] Litigation Procedure Law (**C-039**), Article 15(1) ("During the entire proceedings, the court ex officio pays attention to whether the resolution of the dispute falls under the jurisdiction of the court and whether the resolution of the dispute falls under the jurisdiction of a court in the Republic of Macedonia.")

[67] Litigation Procedure Law (**C-039**), Article 15(3) ("When, during the proceedings, the court determines that court in the Republic of Macedonia does not have jurisdiction to resolve the dispute, it will ex officio declare itself as not having jurisdiction, cancel the actions taken in the procedure and dismiss the lawsuit, except in the cases in which the jurisdiction of court in the Republic of Macedonia depends on the consent of the defendant, and he gave his consent.")

[68] Litigation Procedure Law (**C-039**), Article 426(1) ("If, after issuing the payment order, the court declares itself to be incompetent, it will cancel the payment order and after the effectiveness of the decision on lack of jurisdiction, it will transfer the case to the competent court.")

prescribes the exclusive territorial jurisdiction of notaries according to the area where the domicile is located, i.e. the residence of the debtor - a natural person, that is, the headquarters of the debtor - the legal entity. For trial in the proceedings following an objection against a decision for allowing enforcement based on an authentic document, the court on which the parties agreed shall have territorial jurisdiction"[69] [emphasis added]

54. Despite the legislative amendments replacing decisions for enforcement with notarial payment orders and distinguishing proceedings upon an objection against a notarial payment order and court payment orders, the Macedonian courts still have divergent views on the issue of jurisdiction and whether a creditor can raise a jurisdictional objection and have been unable to agree on a uniform approach to date.[70] The Appellate court Bitola and the Appellate court Gostivar are honouring contractually agreed territorial jurisdiction upon a jurisdictional objection by either the creditor or a debtor.[71] In contrast, the Appellate court Stip deems that it has exclusive territorial jurisdiction to hear the dispute and does not accept jurisdictional objections from any party.[72] The Commercial Division of the Appellate Court Skopje has a fragmented approach due to the divergent views of the judges.[73]

55. In the opinion of the Supreme Court judges Vasil Grchhev and Nikolco Nikolovski, the courts must honour the agreed contractual jurisdiction upon an objection by either the creditor or the debtor. According to judge Nikolco Nikolovski the application of the provisions of the Civil Procedure Law relating to court payment orders by analogy should

[69] Positions and conclusion of the Civil Department of the Supreme Court of the Republic of North Macedonia for 2015 (**C-057**), item 10

[70] Minutes of joint meeting of the Supreme Court of the Republic of North Macedonia and the Appellate Courts on the topic "Harmonization of the application of laws and court practice "Operational concept and harmonization", held on 7 March 2019 (**C-058**)

[71] See Minutes of joint meeting of the Supreme Court of the Republic of North Macedonia and the Appellate Courts on the topic "Harmonization of the application of laws and court practice "Operational concept and harmonization", held on 7 March 2019 (**C-058**), at p. 3 para 5 ("[…] Thus, when the court receives the objection, and additionally an objection by the claimant, a creditor up to that moment, that due to agreed jurisdiction of another court with the opposing party, it is requesting that the case with the accompanying documents be delivered to the competent court, according to the position of the Appellate court Bitola, the competent court is the one which had been agreed between the parties.[…]") and at p. 4 para 2 ("[…] the proceedings regarding objection to the decision on issuing notary payment order, fall within the territorial jurisdiction of the court agreed by the parties, in case if they present a written agreement to the court where the notary public submitted the objection.[…]")

[72] See Minutes of joint meeting of the Supreme Court of the Republic of North Macedonia and the Appellate Courts on the topic "Harmonization of the application of laws and court practice "Operational concept and harmonization", held on 7 March 2019 (**C-058**), at p. 5 para 1 ("[…] in the proceedings upon objection against a decision on issuing notarial payment order, the court where the seat of the notary public is located, i.e. the seat of the debtor shall jurisdiction, meaning that it will not be the court agreed by the parties.[…]")

[73] See Minutes of joint meeting of the Supreme Court of the Republic of North Macedonia and the Appellate Courts on the topic "Harmonization of the application of laws and court practice "Operational concept and harmonization", held on 7 March 2019 (**C-058**), at p. 4 para 4 and page 5 para 1 ("[…] part of the judges of the Commercial Division think that the stated provision determines exclusive jurisdiction of the first instance court, which makes it impossible to apply the provision for agreed jurisdiction, because in the case of exclusive jurisdiction there is no possibility for the parties to agree upon the jurisdiction. This means that apart from the possibility for the Law on litigation procedure to stipulate exclusive jurisdiction, it may be done by other laws, in this case the Notary Public law, so, in conditions when the Notary is obliged and when it is determined where they should lodge the casefile, i.e., to which first instance court, in such case there is exclusive jurisdiction. The President of the Commercial Division said that the rest of the colleagues think that the exclusive jurisdiction is only with the notary public, and not the court, which may lead to the application of the provisions for agreed jurisdiction. […]"

be entirely excluded and the creditor is entitled to raise a jurisdictional objection after it receives the objection to the notarial payment order from the debtor:

> "[…] In his address he stated that for this legal issue, the possibility for analogue application of the provisions from article 417 to article 428 from the Law on litigation procedure, prescribed in the Chapter "Issuing a payment order", which are related to court issued payment order should be excluded. Furthermore, he mentioned that the posed open issue is connected to a situation when an objection has been filed by the claimant, who got the information that the debtor, i.e. respondent filed an objection to the notarial payment order, at the time of receipt thereof. In the opinion of the judge, from that moment on, the creditor, i.e. claimant, according to the Law on litigation procedure, has the possibility to refer to the agreed jurisdiction before the court, which should declared that it has no jurisdiction, and dispatch the case to the competent court according to the agreed jurisdiction. […]"[74] [emphasis added]

56. Judge Vasil Grchhev endorses the above view and underlines that the proceedings before the notary public and the court are two different proceedings:

> "[…] Judge Vasil Grchev from the Supreme Court of the Republic of North Macedonia joined the debate and expressed his personal opinion as regards the legal issue, which correlates to the position of the Appellate court Bitola and the Appellate court from Gostivar. Furthermore, he pointed out that this is a case of two different proceedings, one with the notary public according to the provisions of the Notary Public Law, and another, upon filing an objection, before a court according to the Law on litigation procedure, thus, the provisions from the Notary Public Law cannot suspend the provisions from the Law on litigation procedure. According to the Judge, the Notary public law has exclusive jurisdiction in filing the proposal, i.e., at the residence of the debtor, and the creditor may object to the jurisdiction after the debtor's objection to the notarial payment order. In this context, both the debtor and the creditor have the right to lodge an objection to the territorial jurisdiction. […]"[75] [emphasis added]

57. However, the Civil Court Skopje should have declared that it has no jurisdiction over the dispute between GAMA and TE-TO immediately upon becoming aware of the arbitration agreement in the EPC Contract. Indeed, not only GAMA in civil court proceedings but also TE-TO itself raised a jurisdictional objection in the temporary injunction proceedings (see para. 33 above). Under the Arbitration Law, if the parties have agreed to submit a dispute to arbitration, the court before which the same matter between the same parties was brought shall, upon the respondent's objection, declare its lack of jurisdiction, annul all actions taken in the proceedings and refuse to rule on the statement of claim, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.[76] The Settlement Agreement constitutes an integral part of the EPC Contract,

[74] See Minutes of joint meeting of the Supreme Court of the Republic of North Macedonia and the Appellate Courts on the topic "Harmonization of the application of laws and court practice "Operational concept and harmonization", held on 7 March 2019 (**C-058**), at p. 5 para 3

[75] See Minutes of joint meeting of the Supreme Court of the Republic of North Macedonia and the Appellate Courts on the topic "Harmonization of the application of laws and court practice "Operational concept and harmonization", held on 7 March 2019 (**C-058**), at p. 5 para 4

[76] See Arbitration Law (**C-056**), Article 8(1)

and thus any disputes thereunder must have been resolved by arbitration under the ICC Rules in London.[77]

58. In contradiction with its erroneous assumption of jurisdiction in civil proceedings between GAMA and TE-TO, the Civil Court Skopje observed the arbitration agreement in the EPC Contract in a separate set of proceedings, deciding upon TE-TO's counterclaim against GAMA. On 19 March 2015, TE-TO filed a counterclaim against GAMA for alleged damages of EUR 5,069,649.12 before the Civil Court Skopje and demanded this counterclaim to be joined with the proceedings for GAMA's claim against TE-TO. By a decision dated 12 June 2015, the Civil Court Skopje accepted TE-TO's proposal.[78] On 21 July 2015, GAMA appealed[79] against the decision of the Civil Court Skopje. The Appellate Court Skopje accepted GAMA's appeal and abolished the decision of the Civil Court Skopje.[80] Subsequently, on 29 September 2016, the Civil Court Skopje passed a decision for TE-TO's counterclaim to be heard in separate proceedings.[81]

59. In 2019, TE-TO's counterclaim was eventually dismissed by the Civil Court Skopje due to lack of jurisdiction based on the arbitration agreement in the EPC Contract:

> "[…] The court, upon examination of the Contract Agreement dated 11.05.2007 and the Particular Conditions of the Contract for EPC/Turnkey projects Sk/Macedonia with certified translation in Macedonian, concluded between the claimant as owner and the respondent as contractor, in particular, article 20 of the Contract found that the contracting parties determined that for every dispute not resolved amicably, the competent court shall be the Court of International Arbitration, with seat in L. UK, which shall act according to the Arbitration Rules of the International Chamber of Commerce.
>
> The statements from the counterclaim indicate that the dispute in question arises from the contractual relationship established with the Contract Agreement (EPC) dated 11.05.2007.
>
> Hence, the court, considering that in this particular case, the dispute has an international aspect, whereas, the respondent is a legal entity with seat abroad, R.T., and that there is no exclusive jurisdiction of the court in RNM, considering the fact that this is a dispute regarding contractual liability for damages, and the parties of the agreement determined that for every dispute which may arise from the agreement the competent court shall be a selected court, in the particular case, the Court for International Arbitration, with seat in L. U.K., according to the above quoted legal provisions, the court decided as it is written in the text of this decision, and declared that it has no jurisdiction, and suspended the proceedings and rejected the claim. […]"[82] [emphasis added]

60. On 15 December 2016, TE-TO motioned for the debt collection proceedings to be suspended until the effective resolution of criminal proceedings commenced by TE-TO against GAMA in September 2016.[83] GAMA opposed,[84] and the Civil Court Skopje passed

[77] See Settlement Agreement (**C-004**), at Sub-Clause 4.2 ("All other provisions of the Contract, if not superseded by the provisions of this Agreement, shall remain the same and shall apply to this Agreement.")

[78] Decision of the First Instance Civil Court Skopje No. PL1-286/13, dated 12 June 2015 (**C-059**)

[79] Appeal against the Decision of the First Instance Civil Court Skopje No. PL1-286/13, dated 12 June 2015 by GAMA dated 21 July 2015 (**C-060**)

[80] Decision of the Appellate Court Skopje no. TSZ-2796/15 dated 15 April 2016 (**C-061**)

[81] Decision of the First Instance Civil Court Skopje No. PL1-286/13, dated 29 September 2016 (**C-062**)

[82] Decision of the First Instance Civil Court Skopje No. TS-420/16 dated 23 April 2019 (**C-063**), at pp. 2-3

[83] Brief by TE-TO dated 15 December 2016 (**C-064**)

[84] Brief by GAMA dated 13 January 2017 (**C-065**)

a decision rejecting TE-TO's request.[85] TE-TO appealed, but the Appellate Court denied the appeal.[86]

(d) THE DECISION ON MERITS

61. On 4 May 2018, six years after the dispute arose, the Civil Court Skopje decided on the merits in favour of TE-TO and abolished the notary's decision for enforcement.[87] The Civil Court Skopje acknowledged GAMA's claim against TE-TO but, despite the overwhelming evidence on the unconditionality of GAMA's claim presented by GAMA during the proceedings,[88] by applying Macedonian law found that its claim is conditional on the fulfilment of the tasks in the Punch List.[89] Moreover, the Civil Court Skopje decided to disregard the Settlement Agreement as a separate agreement, since it constituted a part of the EPC Contract:

> "[…] During the decision making, the court considered Supplement No. 9 of the contract submitted by the claimant, concluded between the above stated parties, but it could not be accepted as evidence and as a separate legal act, as it is one of several other appendices of the contract, especially in a situation where the contract foresees obligations for the claimant that have not been fully or have been poorly performed. […]"[90]

62. As explained below, these court proceedings became obsolete since, in 2018, the Macedonian courts effectively expropriated GAMA's claim in separate proceedings for the judicial reorganisation of TE-TO. Even though GAMA's claim was acknowledged by TE-TO and the Macedonian courts in the judicial reorganisation proceedings[91] (see below paras. 95, 98, 108 and 114 to 120) the Macedonian courts continued to refuse to acknowledge GAMA's claim in the debt collection proceedings.

63. On 25 September 2018, GAMA appealed the judgment of the Civil Court Skopje and provided the Appellate Court Skopje with the decisions of the Macedonian courts in TE-TO's judicial reorganisation proceedings where GAMA's claim was acknowledged in its entirety.[92] Still, on 18 October 2019, the Appellate Court Skopje denied the appeal and upheld the judgment of the Civil Court Skopje.[93] The Appellate Court Skopje ignored the decisions of the Macedonian courts in TE-TO's judicial proceedings and concluded that the acknowledgement by TE-TO of the debt to GAMA does not mean that it is willing to pay the debt until GAMA completes the allegedly unfinished tasks. Furthermore, shockingly it concluded that GAMA might be ordered by the court to complete the allegedly unfinished tasks:

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[85] Decision of the First Instance Civil Court Skopje No. PL1-286/13, dated 13 February 2017 (**C-066**)
[86] Decision of the Appellate Court Skopje No.TSZ-1149/17, dated 8 February 2018 (**C-067**)
[87] Judgment of the First Instance Civil Court Skopje No. PL1-286/13, dated 4 May 2018 (**C-010**)
[88] See Brief by GAMA dated 19 March 2015 (**C-054**), pages 5-32
[89] Judgment of the First Instance Civil Court Skopje No. PL1-286/13, dated 4 May 2018 (**C-010**), at p. 10 paras 3 and 4
[90] Judgment of the First Instance Civil Court Skopje No. PL1-286/13, dated 4 May 2018 (**C-010**), at p. 9 para 3
[91] See Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), p. 83 ("The GAMA GUC's claim is not disputed and the same is encompassed with the repayment method planned for the Second class of creditors."), See also paras 95-101 and 108-109 below
[92] Appeal against the Judgment of the First Instance Civil Court Skopje by GAMA dated 25 September 2018 (**C-068**)
[93] Decision of the Appellate Court Skopje no. TSZ-2278/18, dated 18 October 2019 (**C-011**)

"[…] The claimant's appellate assertion that the defendant is obliged to pay the invoice A028 is unfounded, considering that it has been entered in the accounting records of the defendant and was included in the reorganization plan, because this action of the defendant does not mean that the defendant agrees to pay the invoice, in a situation where the claimant has not completed the obligations under Supplement no. 9, something it can complete within the envisaged reorganisation plan if it is ordered by the court with a court decision […]"[94]

64. On 24 December 2019, GAMA filed an appeal to the Supreme Court.[95] On 23 December 2020, the Supreme Court passed a judgment quashing the judgments of the Civil Court Skopje and the Appellate Court Skopje and reverted the case to retrial to the Civil Court Skopje with specific instructions.[96] In its judgment, the Supreme Court fully accepted GAMA's arguments set forth by GAMA's legal counsel during the first and second instance proceedings, i.e., that TE-TO's obligation to pay the net sum of EUR 5 million to GAMA is unconditional:

"[…] According to the Supreme Court of the Republic of North Macedonia, the allegations in the claimant's appeal that the lower courts did not provide sufficiently well-argued reasons for their decision, were founded. In deciding, the lower courts did not consider the Punch List, where in the column Deadline for the due date of the claimant's obligations, the following dates are listed: August 2012, end of June 2012, end of April 2012. These deadlines, valid for the claimant's obligations, come after the agreed payment deadline - 31.03.2012, which is the defendant's obligation. Based on this, it is unclear why the lower courts accepted that the defendant's obligation for payment is conditioned by fulfilling the claimant's obligations, which have different and later maturities. Namely, each of the obligations of the claimant and the defendant has a precisely determined and agreed maturity, evident from the content of the evidence presented by the first instance and accepted by the second instance court, and in Supplement number 9 and the settlement agreement concluded between the parties, there is no provision for their mutual conditionality regarding the fulfilment […]"[97]

65. On 23 August 2021, GAMA filed a brief to the Civil Court Skopje maintaining once again that its claim based on the Settlement Agreement is unconditional and that it has been acknowledged by TE-TO in the reorganisation proceedings and requested that the Civil Court Skopje observe the instructions of the Supreme Court during the retrial.[98] However, on 8 October 2021, the Civil Court Skopje passed a judgment again denying GAMA's claim in blatant disregard of the instructions of the Supreme Court.[99] The Civil Court Skopje completely disregarded the fact that GAMA's claim was acknowledged in TE-TO's judicial reorganisation proceedings and once again arrived at a conclusion that TE-TO's obligation for payment of the outstanding debt is conditional upon GAMA's completion of the Punch List:

[94] See Decision of the Appellate Court Skopje no. TSZ-2278/18, dated 18 October 2019 (**C-011**), at p. 7.
[95] Appeal by GAMA to the Supreme Court of the Republic of North Macedonia dated 24 December 2019 (**C-069**)
[96] Decision of the Supreme Court of the Republic of North Macedonia Rev1 no. 49/2020 dated 23 December 2020 (**C-012**)
[97] See Decision of the Supreme Court of the Republic of North Macedonia Rev1 no. 49/2020 dated 23 December 2020 (**C-012**), at p. 3 para 3 and page 4 para 1.
[98] Brief by GAMA to the Civil Court Skopje, dated 23 August 2021 (**C-070**)
[99] Judgment of the First Instance Civil Court Skopje No.50 PL1-TS-252/21 dated 8 October 2021(**C-071**),

"[…] the court, according to the guidance of the Supreme Court, decided that the claimant's claim is unfounded. The respondent did not pay the debt based on the claimant's invoice, since the plaintiff did not fulfil the assumed obligations and tasks to the defendant for the removal of the determined hidden defects of the installed equipment and systems, discovered during the operation, and the usual defects during the construction and the commissioning of the power plant.
If the claimant had fulfilled his obligations and enabled the power plant to perform the required function, as well as the gas turbine to be mounted without structural problem, the respondent would not have been late to the claimant at all, or it would have been late for a very short insignificant period in which case the respondent would not have been penalised, and it would have no basis and interest in annulment of the Supplement No. 9, with the existing content. […][100]

(e) DEVELOPMENTS SUBSEQUENT TO THE REQUEST FOR ARBITRATION

66. On 2 February 2022, GAMA appealed against the judgment of the Civil Court Skopje dated 8 October 2021, asserting, in particular, that the Civil Court Skopje did not observe the instructions by the Supreme Court and did not consider that TE-TO acknowledged GAMA's claim in its entirety in the reorganisation proceedings completed in 2018.[101]

67. On 30 June 2022, the Appellate Court Skopje passed a decision accepting GAMA's appeal and reverting the case for retrial to the Civil Court Skopje.[102] The Appellate Court Skopje found that the Civil Court Skopje made a substantive violation of the provisions of the civil procedure by failing to consider the fact that TE-TO acknowledged GAMA's claim in the judicial reorganisation proceedings:

"[…] The indicated substantiative violation of the provisions of the civil procedure results from the circumstance that the court did not consider the submission from the attorney of the claimant, Debarliev Law Firm. Dameski and Keleshoska from Skopje dated 23.08.2021, which indicates that the claim of the claimant has been acknowledged in the proceedings for the reorganisation of the respondent in which the claimant's claim was acknowledged, and it had all the rights of a bankruptcy creditor enjoyed all the rights of a bankrupt creditor hence, <u>it is unclear to this court what were the reasons for the first-instance court to pass the judgment being appealed, despite the undisputable fact that by a decision ST no. 124/18 and 160/18 dated 14.06.2018 of the First Instance Court Skopje 2 Skopje the plan for the reorganisation of the respondent was accepted and approved, as confirmed by a decision TSZ no. 1548/18 dated 30.08.2018 of the Appellate Court Skopje and the same became effective and enforceable</u>, pursuant to art. 239 paragraph 1 of the Bankruptcy Law, the effective court decision approving the reorganisation plan constitutes an enforceable deed […]"[103] [emphasis added]

68. Four years after GAMA's claim was acknowledged in TE-TO's reorganisation proceedings, the Appellate Court Skopje finally found that these proceedings had become obsolete, and,

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[100] See Judgment of the First Instance Civil Court Skopje No.50 PL1-TS-252/21 dated 8 October 2021(**C-071**), at p. 10 paras 2 and 3

[101] Appeal against the Judgment of the First Instance Civil Court Skopje No.50 PL1-TS-252/21 by GAMA dated 2 February 2022 (**C-072**)

[102] Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**)

[103] Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**), at p. 2 para 5 [emphasis added]

instead of deciding on the merits of the case, it instructed the Civil Court Skopje to remedy the substantial violation of the provisions of the civil procedure during the retrial by considering this fact:

"[…] During the retrial and decision-making, the first instance court should remedy the committed substantive violation of the provisions of the civil procedure in such a way that the court will pass a clear and understandable decision with sufficient reasons, in doing so, it should especially take into consideration the indications given by this court regarding the submission by the claimant's attorney, the Law Firm Debarliev, Dameski and Kjeleshoska from Skopje dated 23.08.2021, and the effective decision ST no. 124/18 and 160/18 dated 14.06.2018 confirmed by the decision of the Appellate Court dated 30.08.2018. In this Decision, the Appellate Court Skopje determined that the claimant is a bankruptcy creditor and has a claim in the amount of 5 million euros, and by applying Article 239 of the Law on Bankruptcy, the legal situation should be cleared up, that the claimant's claim has already been determined in another procedure and whether it is possible to decide on the same claim twice (this claim has already been decided upon once by a final decision, i.e. by the decision ST no. 124/18 and 160/18 dated 14.06.2018, confirmed by the decision of the Appellate Court Skopje dated 30.08.2018.[…]"[104] [emphasis added]

69. The proceedings are now pending a decision by the Civil Court Skopje.

4. THE WRITE-OFF OF GAMA'S CLAIM BY THE MACEDONIAN COURTS

(a) THE REORGANISATION PLAN DATED 4 APRIL 2018

70. On 26 April 2018, TE-TO filed to the bankruptcy department of the Civil Court Skopje a proposal for the commencement of bankruptcy ("**TE-TO's Proposal for reorganisation**")[105] together with a reorganisation plan dated 4 April 2018[106] ("**Reorganisation plan dated 4 April 2018**"). However, TE-TO failed to show that it was cash flow insolvent or balance sheet insolvent, as required under the Law on Bankruptcy ("**Bankruptcy Law**").[107] Under the Bankruptcy Law, a precondition for commencement of reorganisation proceedings is the insolvency of the debtor.[108] Otherwise, the proposal for reorganisation must be denied by the bankruptcy court without any recourse available to the petitioner.[109]

71. A debtor is considered cash flow insolvent if it is unable to pay its due liabilities within a period of 45 days[110] and must substantiate its insolvency by enclosing appropriate evidence to the proposal for commencement of bankruptcy proceedings.[111] The evidence enclosed to TE-TO's Proposal for reorganisation indicated that TE-TO was unable to pay

[104] Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**), at p. 2 para 7 and page 3 para 1 [emphasis added]
[105] Proposal for commencement of insolvency with reorganisation plan by TE-TO dated 26 April 2018 (**C-074**)
[106] Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**)
[107] Law on Bankruptcy (Official Journal of Republic of Macedonia, No. 34/06, as amended) (**C-075**) ("Bankruptcy Law")
[108] Bankruptcy Law (**C-075**), Article 215-v(2)
[109] Bankruptcy Law (**C-075**), Article 215-v(3) indent 4 and Article 215-v(6)
[110] Bankruptcy Law (**C-075**), Article 5(2)
[111] Bankruptcy Law (**C-075**), Article 5(4)

its liabilities for a period of 38[112] days instead of 45 days, as required by the Bankruptcy Law.

72. TE-TO was also not balance sheet insolvent. In 2017, after repaying EUR 6,43 million to bank lenders and settling an outstanding debt of EUR 4 million to its natural gas supplier, TE-TO generated profits of EUR 8,4 million.[113] Furthermore, TE-TO estimated that because of the measures that were undertaken by its management in 2016 and 2017, including the loan restructuring agreement with Landesbank Berlin AG envisaging the repayment of the loan until 2028, it will generate savings of EUR 0,5 million monthly or EUR 6,5 annually.[114] Also, TE-TO estimated that it will increase its profit by EUR 0,5 million annually by natural gas trading as, at the end of 2017, it obtained a license for this activity.[115]

73. TE-TO claimed that it was facing "*imminent insolvency*"[116] since it could not pay its debt of EUR 112 million to its majority shareholder Bitar Holdings, and its debt of EUR 28 million to its minority shareholder Toplifikacija. TE-TO enclosed evidence that Bitar Holdings and Toplifikacija have commenced enforcement proceedings against TE-TO for the recovery of their respective claims.[117] In the enforcement proceedings commenced by Bitar Holdings, the latter collected approximately EUR 3 million from TE-TO i.e., EUR 2,739,819.91 directly from TE-TO's bank accounts[118] and approximately EUR 250,000 from TE-TO's claim[119] against the largest Macedonian electricity trader Energy Delivery Solutions EDS DOO Skopje ("**EDS**"). As explained below (see paras 140-146 below), TE-TO, EDS and Gazprom were involved in anti-competitive conduct in breach of Macedonian law.

74. TE-TO claimed that the claims of Toplifikacija and Bitar Holdings were "unexpected".[120] This was a manifestly false claim that the Civil Court Skopje did not even attempt to verify. Toplifikacija and TE-TO were involved in several court disputes relating to Toplifikacija's claims against TE-TO for repayment of loans since 2012. Bitar Holding's EUR 112 million claim against TE-TO for unpaid loans originally due for repayment in 2021 became due based on agreements for the acceleration of loans entered into between TE-TO and Bitar

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[112] See Proposal for commencement of insolvency with reorganisation plan by TE-TO dated 26 April 2018 (**C-074**), pages 11-13

[113] See Reorganization Plan of TE-TO AD Skopje no. 0302-439 dated 4 April 2018 (**C-013**) at p. 5

[114] See Reorganization Plan of TE-TO AD Skopje no. 0302-439 dated 4 April 2018 (**C-013**) pages 9-11

[115] See Reorganization Plan of TE-TO AD Skopje no. 0302-439 dated 4 April 2018 (**C-013**) pages 9-11

[116] See Proposal for commencement of bankruptcy with reorganisation plan by TE-TO dated 26 April 2018 (**C-074**), at p. 1

[117] See Proposal for commencement of bankruptcy with reorganisation plan by TE-TO dated 26 April 2018 (**C-074**), at pp. 16-24

[118] Letter by Bitar Holdings to the National Bank of the Republic of North Macedonia dated 4 May 2018 (**C-076**)

[119] Request by Bitar Holdings to Enforcement Agent Vasko Blazhevski dated 14 March 2018 (**C-077**), Order for prohibition of a claim by a debtor's debtor I no. 728/18 by Enforcement Agent Vasko Blazhevski dated 22 March 2018 (**C-078**), Letter of acknowledgment of debt by Energy Delivery Solutions EDS DOO Skopje to Enforcement Agent Vasko Blazhevski, dated 23 March 2018 (**C-079**)

[120] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**) at p. 5

Holdings on 23 February 2018 ("**Loan acceleration agreements**"),[121] *i.e.* less than a month and a half before the Reorganisation plan dated 4 April 2018 was prepared by TE-TO.

75. The Loan acceleration agreements were certified by a notary public as enforceable deeds allowing Bitar Holdings to enforce its claims against all TE-TO's assets in case TE-TO defaulted. The unrealistic schedule for repayment of EUR 112 million in three monthly instalments, whereby the first instalments under each of the Loan acceleration agreements became due on 26 February 2018, manifestly showed that they were entered into to permit Bitar Holdings to enforce its claims against TE-TO for the purpose of fictitiously fabricating the reasons for TE-TO's "imminent insolvency". The Loan acceleration agreements were null and void both under the Bankruptcy Law, as acknowledged by the Civil Court Skopje (see para 118 below).

76. As a general rule, on commencement of bankruptcy, any transactions entered into by the debtor and its creditors that prevent the equitable settlement of the creditors' claims, or that provide preferential treatment to certain creditors, can be challenged by the bankruptcy trustee or any of the debtor's creditors.[122] Any transactions on the basis of which a creditor has settled its claim or received security for its claim can be challenged if the creditor had no right to demand settlement of its claim or to receive security or had no right to demand settlement of its claim or to receive security in that way and at that particular moment in time. The suspect period for challenging is 90 days before filing the proposal for the commencement of bankruptcy if the debtor was insolvent, or the creditor had actual knowledge that the transaction was detrimental to the other creditors.[123] There is an assumption that the debtor's related parties had actual knowledge that the transaction was detrimental to the other creditors.[124]

77. The Loan acceleration agreements were also null and void under the Law on Trading Companies ("**Companies Law**").[125] The Loan acceleration agreements must have been approved as an interested party transaction by Toplifikacija. Any transaction between a company and a shareholder who owns 20% or more of the shares or who controls the company is an interested party transaction which requires the approval by a majority vote of all shareholders who do not have an interest in the transaction if the transaction exceeds 2% of the accounting value of the company's assets.[126] Otherwise, the transaction is null

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[121] Agreement for regulating of rights and obligations with an enforcement clause between TE-TO and Bitar Holdings ODU no. 78/18 dated 23 February 2018 (**C-080**), Agreement for regulating of rights and obligations with an enforcement clause between TE-TO and Bitar Holdings ODU no. 79/18 dated 23 February 2018 (**C-081**), Agreement for regulating of rights and obligations with an enforcement clause between TE-TO and Bitar Holdings ODU no. 83/18 dated 23 February 2018 (**C-082**), Agreement for regulating of rights and obligations with an enforcement clause between TE-TO and Bitar Holdings ODU no. 85/18 dated 23 February 2018 (**C-083**)

[122] Bankruptcy Law (**C-075**), Article 172(1)

[123] Bankruptcy Law (**C-075**), Article 174(1)

[124] Bankruptcy Law (**C-075**), Article 174(2)

[125] Law on Trading Companies (Official Journal of the Republic of Macedonia 28/2004, as amended) (**C-084**) ("Companies Law"), Articles 457-560

[126] Companies Law (**C-084**), Articles 457(1), 460(1) and (3)

and void.[127] On 31 December 2017, the accounting value of TE-TO's fixed assets amounted to EUR 167.3 million and the Loan acceleration agreements were used to accelerate EUR 112 million, well above the 2% threshold. Furthermore, failure to obtain the requisite approval when entering into a transaction with an interested party or entering into such a transaction with disproportionate rights and duties or where the value of the transaction is not determined in accordance with the market conditions is a criminal act under Macedonian law.[128]

78. Importantly, but for "unexpected" claims of shareholders, TE-TO was in a sustainable financial position, as TE-TO itself recognized in the proposed reorganization plan:

> "If the extraordinary arisen situation is excluded due to unexpected claims from the creditors-shareholders, in essence the company is in a sustainable financial position and can continue to operate and settle its obligations to the banks, the gas supplier, the companies with which it has contracts for the supply of materials and maintenance, as well to charge its claims from the delivery and heat." [129]

79. On 25 April 2018, Toplifikacija commenced court action against TE-TO and Bitar Holdings for annulling the Loan acceleration agreements[130] and, on 29 May 2018, filed criminal charges against TE-TO, the President of TE-TO's Management Board, Bitar Holdings and the parties who were involved in the unlawful acceleration of the loans granted by Bitar Holdings to TE-TO based on a well-founded suspicion that the suspects have committed the criminal acts of "*Abuse of official position" and "Damaging and privileging of creditors"*.[131] The Civil Court Skopje was made aware of these proceedings by Toplifikacija but nevertheless continued with the proceedings.[132] As explained below, the Public Prosecution refused to raise indictments against all the parties involved in the Loan acceleration agreements and TE-TO's reorganisation.

80. Apart from TE-TO's failure to show that the conditions for commencement of bankruptcy proceedings were met, as explained below, the Reorganisation plan dated 4 April 2018 was incomplete and in material breach of the Bankruptcy Law. This warranted rejection of TE-TO's Proposal for reorganisation by the Civil Court Skopje.[133] However, instead of rejecting TE-TO's Proposal for reorganisation, as required under the Bankruptcy Law, on 26 April 2018, the Civil Court Skopje, acting *ex officio*, adopted a decision for security

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[127] Companies Law (**C-084**), Article 460(6) ("An interested party transaction implemented in contradiction with the provisions of this section of the Law shall be null and void.")

[128] Criminal Code (Official Journal of the Republic of Macedonia no. 37/96, as amended), (**C-085**), Article 275-g(1) ("A responsible person in a legal entity, who knowingly enters into an agreement as an interested party contrary to the legal regulations for concluding such an agreement or the interests of the legal entity, or an agreement that accepts an obvious disproportion between mutual benefits and actions and the value of the transaction is not determined according to the market conditions, and thereby will cause significant property damage for the legal entity or for third parties, or obtain significant property benefit for the legal entity or for third parties, shall be punished by imprisonment from six months to three years and a fine")

[129] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), p. 84.

[130] Claim by Toplifikacija against TE-TO and Bitar Holdings dated 25 April 2018 (**C-086**)

[131] Criminal charges by Toplifikacija dated 29 May 2018 (**C-087**)

[132] Brief by Toplifikacija to the Civil Court Skopje, dated 27 April 2018 (**C-088**)

[133] See Expert Report on Bankruptcy Law, ¶ 20-35 (**CE-01**), ¶ 22-30

measures prejudicing that TE-TO will meet the conditions for commencing bankruptcy and that the Reorganisation plan dated 4 April is favourable for TE-TO's creditors:

"[…] the court irrefutably determined that the financial status and the assets of the debtor would significantly deteriorate and if the procedure for enforcement continues before the competent enforcement agents, relating to the collection of the claims by the pledge creditors, as well as the collection of the claims of other creditors stated above, it would provide for preventing the procedure for carrying out the proposed Reorganization Plan by the Debtor, envisaging more favourable plan for settling all creditors covered by the plan, thus causing damage while continuing the initiated procedures at the detriment of all creditors[…]"[134] [emphasis added]

81. The security measures ordered by the Civil Court Skopje were in breach of the Bankruptcy Law. In judicial reorganisation proceedings, the Macedonian courts are limited to issuing security measures for a stay of enforcement against a debtor and appointing an interim bankruptcy trustee with specific tasks relating to the reorganisation plan.[135] In contrast, the Civil Court Skopje's security measures included a general prohibition on disposal of TE-TO's assets, including the prohibition of TE-TO's management from taking any legal action for disposal, creating encumbrances or entering into contracts unfavourable for creditors, stay of enforcement and a prohibition for making payments except in TE-TO's ordinary course of business.

82. By the decision ordering security measures, the Civil Court Skopje appointed Mr Marinko Sazdovski as TE-TO's interim bankruptcy trustee in egregious breach of the Bankruptcy Law.[136] Mr Sazdovski was proposed by TE-TO to supervise the implementation of the Reorganisation plan dated 4 April 2018 for a monthly fee of approximately EUR 700 during the period of the implementation of the Reorganisation plan dated 4 April 2018.[137] Hence, Mr Sazdovski had an obvious conflict of interest to be appointed as TE-TO's interim bankruptcy trustee since he was to receive approximately EUR 100,000 in professional fees for the supervision of the implementation of the Reorganisation plan dated 4 April 2018, if approved by the Civil Court Skopje.

83. Mr Sazdovski's appointment was made in clear contradiction to the rules for independency and conflict of interests under the Code of Ethics of Bankruptcy Trustees ("**Code of Trustees**").[138] The Code of Trustees is an integral part of the Bankruptcy Law and requires bankruptcy trustees, before accepting an appointment, to examine whether there is any business–financial relationship with the debtor or its related parties that might influence his/her actions and decision-making and disclose to the court the existence of any such circumstances.[139] Additionally, bankruptcy trustees must avoid conflict of interest, including

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[134] Decision of the Civil Court Skopje for security measures dated 26 April 2018 (**C-089**), at pp. 2-3

[135] See Expert Report on Bankruptcy Law, 41 - 44 ¶ (**CE-01**), ¶ 30-32

[136] See Decision of the Civil Court Skopje for security measures dated 26 April 2018 (**C-089**), at p. 1

[137] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), at p. 20

[138] Code of Ethics of Bankruptcy Trustees (Official Journal of the Republic of Macedonia no. 119/2006) (**C-090**) ("Code of Trustees")

[139] Code of Trustees (**C-090**), Section 4. "Independency in the work" para 3 ("Before accepting the appointment, the bankruptcy trustee is obliged to examine whether there are any business-financial ties with the bankrupt debtor

any situations which, in the eyes of a 'conscientious businessman', reasonably appear as a conflict of interest and, in case of the existence of such circumstances, request from the court to be discharged as soon as practicable.[140]

84. Furthermore, it is all but certain that the Civil Court Skopje did not appoint Mr Sazdovski on a random electronic basis from the bankruptcy trustees who have specialist knowledge of reorganisation plans as required under the Bankruptcy Law.[141] As explained below, the Civil Court Skopje appointed Mr Sazdovski again as TE-TO's interim bankruptcy trustee by a subsequent decision.

85. On 30 April 2018, the Civil Court Skopje sent a letter to TE-TO requesting it within 8 days to supplement TE-TO's Proposal for reorganisation by providing evidence that TE-TO had met the conditions for the commencement of bankruptcy proceedings or, alternatively, that TE-TO is facing imminent insolvency.[142] In the letter, the Civil Court Skopje acknowledged that TE-TO failed to show that it had met the conditions for the commencement of the bankruptcy.[143] Nevertheless, the Civil Court Skopje prejudiced that the conditions for the commencement of bankruptcy proceedings would be met when TE-TO would correct its proposal and requested TE-TO to either provide proof of imminent insolvency or to provide proof that its bank accounts are blocked for more than 45 days:

> "[…] Considering that on 27.04. 2018, it is evident from the confirmations from the commercial banks that the bank accounts of the debtor are blocked for 38 days and in the meantime, until you correct the proposal according to the deadline in the letter, the debtor's accounts would be blocked for more than 45 days please provide a confirmation from the Central Registrar of the Republic of Macedonia that the debtor is insolvent for proving the conditions from Article 5 of the BL.[…]"[144] [emphasis added]

86. The Civil Court also acknowledged that the Reorganisation plan dated 4 April 2018 was incomplete and in material breach of the Bankruptcy Law. TE-TO had also failed to enclose a decision by its management board approving the reorganisation, the audited annual financial statements for 2017 and evidence on the process for the preparation of the plan, including details of notices to its creditors, the availability of information to creditors and the course of negotiations. Nevertheless, the Civil Court Skopje requested TE-TO to supplement the Reorganisation plan dated 4 April 2018 by enclosing the missing evidence and provided very specific and detailed guidance to TE-TO for amendments to the Reorganisation plan dated 4 April 2018 and its enclosures:

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or with other persons related to the bankrupt debtor that could represent an obstacle, i.e. influence the actions and decision-making of the bankruptcy trustee, as well as for the existence of circumstances that represent a legal obstacle to being appointed as a bankruptcy trustee and to notify the court.")

[140] Code of Trustees (**C-090**), Section 6. "Conflict of interest", paras 1,2 and 4

[141] Bankruptcy Law (**C-075**), Article 215-d(2)

[142] Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**)

[143] See Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**), at p. 1 para 1 ("Please correct the proposal by providing proof that the conditions for commencement of bankruptcy over the debtor are met pursuant to Article 5 of the BL"

[144] Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**)

"[…] 5. On page 11 in item 1.5 in the section where it is stated that by this plan the creditors shall be settled, "partially or fully" should clearly state in which amount the creditors would be settled, given that the plan further states full settlement of creditors.

6. On page 11 below -the sentence "This is valid only if the judgment refers to contracts or legal obligations that existed before coming into force of the reorganization plan" is to be deleted because it is in breach of the provisions of the BL.

7. On page 13, the plan should contain or in the introductory part measures for utilisation of additional sources or other types of contributions, loans or investments, as needed and if necessary for the interests and protection of the creditors and for successful plan for the reorganization of the debtor…

[…]

9 In the reorganization plan the order of settlement of creditors does not include the third class of creditors, the due date of the claims of the third class of creditors to be set out and clearly to state that the second class of claims are ranked lower and shall be settled last.

[…]

12. The plan does not contain a table of recognized claims by assertion by the debtor and disputed claims, since on page 2.1 3, it is set out that for the claim GAMA GUC - for this debt there are court proceedings, if you acknowledge the claim it shall be determined, otherwise it shall be in in the table for disputed claims […]."[145]

87. The Civil Court Skopje also specifically requested the qualifications set out in the extraordinary audit report enclosed to the Reorganisation plan dated 4 April 2018 to be removed:

"[…] 13. In the audit report from the audit company Macedonia Audit DOO Skopje the auditor to supplement the finding and opinion in which in a clear way will state what he has determined and not with assumptions 'potentially or it is assumed' […]"

88. The above clearly indicates that the Civil Court Skopje was acting with explicit bias in relation to TE-TO in particular by providing guidance and instructions on how to ensure compliance of a manifestly unlawful reorganisation plan. This is also evident from the fact that the Civil Court, instead of issuing a decision ordering TE-TO to supplement and correct the Reorganisation plan dated 4 April 2018, it sent TE-TO a letter with guidance and instructions, in egregious breach of the Bankruptcy Law. Under the Bankruptcy Law, courts are required to issue a decision ordering a petitioner to make corrections to a reorganisation plan. to the extent that the plan contains minor deficiencies and technical errors which can be removed.[146]

89. Still, TE-TO failed to comply with the instruction of the Civil Court Skopje. On 2 May 2018, TE-TO delivered the additional documents requested to the Civil Court Skopje, but it did not provide an amended version of the Reorganisation plan dated 4 April 2018.[147] Instead, TE-TO set out the proposed amendments requested by the Civil Court Skopje in its brief.

[145] See Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**), at pp. 1-3

[146] Bankruptcy Law (**C-075**), Article 215-v(4)

[147] Brief by TE-TO to the Civil Court Skopje dated 2 May 2018 (**C-092**)

Moreover, TE-TO did not remove the wording in breach of the Bankruptcy Law explicitly requested by the Civil Court Skopje.[148] Nonetheless, immediately upon receipt of the brief, the Civil Court Skopje decided to initiate a preliminary procedure against TE-TO to determine the conditions for commencement of bankruptcy and reorganisation and again unlawfully appointed Mr Sazdovski as an interim bankruptcy trustee.[149] On 7 May 2018, the Civil Court Skopje published an announcement in the Official Journal of the Republic of North Macedonia, *inter alia*:

(a) inviting all creditors to review and submit their remarks to the Reorganisation plan dated 4 April 2018 within 15 days from the day of the publication of the announcement, pursuant to Article 215(d)(4) of the Bankruptcy Law; and

(b) scheduled a hearing on 5 June for a vote on the Reorganisation plan dated 4 April 2018[150]

90. The proposed amendments to the Reorganisation plan dated 4 April 2018 by TE-TO did not render the Reorganisation plan dated 4 April 2018 in compliance with the Bankruptcy Law. It remained manifestly unfair, biased, and in breach of the key safeguards of reorganization under the Bankruptcy Law – the liquidation test and the absolute priority rule.

91. The "liquidation test" protects individual creditors. This safeguard applies to any creditor and states that no creditor should receive less, under a reorganization, than what they would have received in the liquidation of the debtor's estate.[151] This safeguard is embedded in the Bankruptcy Law as a fundamental protection against the expropriation of creditor rights.

92. Absolute priority protects the interests of classes of creditors. While the liquidation test operates as individual protection for any creditor, the absolute priority rule is designed as a class protection measure. The absolute priority rule avoids that a distribution can be made to creditors with lower priority claims if creditors with higher priority claims are not paid in full.[152] It prevents a reorganization plan from being crammed down on unsecured creditors unless shareholders, who are junior in priority to unsecured creditors, receive no distributions.

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[148] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), at p. 39 ("This is valid only if the judgment refers to contracts or legal obligations that existed before coming into force of the reorganization plan")

[149] Decision by the First Instance Civil Court Skopje dated 2 May 2018 (**C-093**)

[150] Announcement by the Civil Court Skopje dated 2 May 2018 published in the Official Journal of the Republic of North Macedonia dated 7 May 2018 (**C-094**)

[151] Rulebook for Professional Standards for Bankruptcy Proceedings (Official Journal of the Republic of Macedonia no. 119/2006) (**C-095**), ("Professional Standards for Bankruptcy") Appendix no. 5, Section 2. "Standards" at 2 ("…The reorganization plan must satisfy the condition that with its application none of the creditors will receive less than what they could reasonably expect from the procedure of liquidation of the assets of the bankrupt debtor.")

[152] Bankruptcy Law (**C-075**), Article 116(2) ("The claims of the bankruptcy creditors from a lower payment order can be settled only after the claims of the creditors from the previous (higher) payment order have been fully settled. Claims of bankruptcy creditors from the same payment order are settled in proportion to the size of the claims.")

93. TE-TO claimed that in the case of liquidation of CCPP Skopje, the proceeds of the sale would be sufficient only for a partial settlement of the claims of secured creditors and that the unsecured creditors and the shareholders would receive nothing.[153] TE-TO also claimed that CCPP Skopje would be sold at the price of scrap metal.[154] This was an unsubstantiated claim since TE-TO did not enclose to the Reorganisation plan dated 4 April 2018 valuation of CCPP Skopje to show the amount that the creditors would have received in case of liquidation of CCPP Skopje, as required by the Bankruptcy Law.[155] Moreover, all the auditor's reports of TE-TO enclosed to the Reorganisation plan dated 4 April 2018, contained qualified opinions as the auditors were unable to obtain sufficient appropriate audit evidence with respect to the accounting value of CCPP Skopje.[156] This shows that in the Reorganisation plan dated 4 April 2018, TE-TO has substantially underestimated the value of CCPP Skopje and its ability to settle the claims of its creditors.

94. On 31 December 2017, the accounting value of TE-TO's fixed assets amounted to EUR 167.3 million, and the Reorganization plan dated 4 April 2018 envisaged settlement of the creditors in the first two classes in the amount of EUR 69.1 million, or together with the third class, a total amount of EUR 70.9 million. This shows that the creditors in the second class (except for TE-TO's shareholders) would have received substantially more in case of the liquidation of CCPP Skopje than under the Reorganisation plan dated 4 April 2018.

95. In the Reorganisation plan dated 4 April 2018, TE-TO classified its creditors into three classes and proposed a write-off of 90% of the claims and interest and suspension of the payment of the residual amount of the claims for ten years of only the unsecured creditors in the second class. The absolute majority of the voting rights in the second class was held by Bitar Holdings, while the absolute majority in the third class was held by TE-TO Gas Trade DOOEL Skopje, a wholly owned subsidiary of TE-TO,[157] as shown in the table below.

Creditors' class			**Proposed amendment of debt**
First class - Secured creditors			**No amendment**
No.	**Name of creditor**	**Amount of claim**	**Percent in class**
1.	Landesbank Berlin AG	EUR 51,4 million	95,86%
2.	Komercijalna Banka AD Skopje	EUR 2,2 million	4,14%

[153] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), at p. 12
[154] See Reorganization Plan of TE-TO AD Skopje no. 030 - 439 dated 4 April 2018 (**C-013**), at p. 35
[155] Professional Standards for Bankruptcy (**C-095**), Section 2. "Standards" at 2 ("…Also, the Reorganization Plan must, in an unquestionable way, show the possibilities of the creditors for their favourable settlement in the reorganization procedure, in relation to the settlement by liquidation of the assets of the bankrupt debtor…")
[156] Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), pp. 307, 347, 385, 417
[157] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), at p. 5

Second class - Unsecured creditors with claims based on loans and investments which are not important for the daily operation of TE-TO and whose claims were related to the construction of the CCPP Skopje			**Write-off of 90% of claims and interest and suspension of payment of the residual amount for ten years until 2028**
No.	**Name of creditor**	**Amount of claim**	**Percent in class**
1.	Bitar Holdings	EUR 112 million	67,33%
2.	Toplifikacija	EUR 28 million	16,83%
3.	Project Management Consulting	EUR 8,8 million	5,30%
4.	Kardicor Investments Limited	EUR 8,7 million	5,19%
5.	Sintez Green Energy	EUR 3,9 million	2,35%
6.	GAMA	EUR 5 million	3,00%
Third class - Unsecured creditors whose claims were related to the daily operation of TE-TO			**No amendment**
No.	**Name of creditor**	**Amount of claim**	**Percent in class**
1.	TE-TO Gas Trade DOOEL Skopje	EUR 929,764	53%
2.	BEG	EUR 276,447	16%
3.	Public Revenue Office	EUR 258,255	15%
4.	Triglav Insurance	EUR 107,478	6%
5.	Balkan Energy Security	EUR 69,659	4%
6.	GA-MA AD Skopje	EUR 69,516	4%
7.	Monting Energetika Skopje	EUR 9,049	1%
8.	Other creditors	EUR 49,587	0%

96. Under Macedonian law, unsecured creditors' claims are ranked into higher and lower priority categories.[158] According to absolute priority, unsecured creditors' claims in the lower priority category can be settled only after full settlement of the claims in the higher priority category, while unsecured creditors' claims with the same priority are settled proportionally to the value of their relevant claim.[159] The priority categories for unsecured creditors' claims are as follows:

Higher priority claims[160]	
1.	Employees' salaries and mandatory health and social insurance contributions for the last three months before the commencement of the bankruptcy proceedings, personal injury claims under health and safety at work regulations, and unused annual leave compensation for the current calendar year.
2.	All other claims which are not included in the lower priority claims
Lower priority claims (ranked from highest to lowest)[161]	
1.	Interest on creditors' claims which became due on the date of commencement of the bankruptcy proceedings
2.	Costs of creditors arising out of or in connection with their participation in the bankruptcy proceedings
3.	Criminal or misdemeanour fines
4.	Claims of creditors arising out of agreements at an undervalue
5.	Claims for the repayment of loans or other equity claims of the debtor’s shareholders.

97. Claims for repayment of loans or other equity claims by a debtor’s shareholders are claims of the lowest priority. According to absolute priority, it is impossible to impose prejudice on unsecured creditors to allow shareholders to preserve an interest in a distressed company. Due to the obvious conflict of interest, TE-TO's shareholders should have been either denied the right to vote or included in a separate shareholders class as residual creditors.

98. As an unsecured creditor with a higher priority claim, GAMA was included in the second class of creditors in the Reorganisation plan dated 4 April 2018, which included TE-TO’s shareholders with claims for the repayment of loans of the lowest priority. Moreover, GAMA’s claim was acknowledged without the default interest of approximately EUR 3 million as of the invoice's due date up to 1 March 2018.[162] In contrast, the interest on the

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[158] Bankruptcy Law (**C-075**), Article 116(1)
[159] Bankruptcy Law (**C-075**), Article 116(2)
[160] Bankruptcy Law (**C-075**), Article 117
[161] Bankruptcy Law (**C-075**), Article 118
[162] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), at p. 16

claims of TE-TO's shareholders and related parties was fully acknowledged. Hence, GAMA was discriminated against in relation to TE-TO's shareholders and the unsecured creditors in the third class. TE-TO's shareholders were privileged since, instead of being denied the right to vote or included in a separate class, they were included in the second class of unsecured creditors together with GAMA.

99. In accordance with the normal ranking of liquidation priorities under Macedonian law, GAMA belonged to the third class of creditors, comprised of TE-TO's unsecured creditors with higher priority claims, which were to be settled in full.[163] If GAMA would have been included in the third class of creditors, even without the acknowledgment of the default interest on its claim of EUR 3 million, it would have had an absolute majority of the voting rights in the third class and decisive influence on the outcome of the voting on the Reorganisation plan dated 4 April 2018, as illustrated in the sample table below:

Third class - Unsecured creditors			**No amendment**
No.	**Name of creditor**	**Amount of claim**	**Percent in class**
1.	GAMA	EUR 5 million	73,85%
2.	TE-TO Gas Trade DOOEL Skopje	EUR 929,764	13,73%
3.	BEG	EUR 276,447	4%
4.	Public Revenue Office	EUR 258,255	3,81%
5.	Triglav Insurance	EUR 107,478	1,58%
6.	Balkan Energy Security	EUR 69,659	1,02%
7.	GA-MA AD Skopje	EUR 69,516	1,02%
8.	Monting Energetika Skopje	EUR 9,049	0,13%
9.	Other creditors	EUR 49,587	0,73%

100. The Reorganisation plan dated 4 April 2018 envisaged a period of implementation of 12 years whereby in the first ten years as of 2018, TE-TO would settle the claims of secured creditors and the claims of the unsecured creditors would be settled thereafter. This was an egregious breach of the Bankruptcy Law. Under the Bankruptcy Law, the deadline for implementation of a reorganisation plan cannot be longer than five years, except, *inter alia,*

[163] Bankruptcy Law (**C-075**), Article 117

in the case when the measures for the implementation of the plan relate to a contemplated repayment of claims in instalments, change of maturity periods, interest rates or other terms and conditions of a loan, credit or similar claim or security instruments.[164]

101. Since GAMA's claim and that of other unsecured creditors were not based on granted loans, credit, or similar claims, but were commercial claims the deadline for implementation of the Reorganisation plan dated 4 April 2018 could not have been longer than five years.

102. The Reorganisation plan dated 4 April 2018 envisaged a substantial write-off of unsecured creditors' claims of EUR 150 million, but the financial projections did not include the corporate income tax liability of EUR 15 million that will be incurred by TE-TO as a result of the write-off.[165] Under Macedonian law,[166] companies are subject to corporate income tax at a flat rate of 10%. The tax base for corporate income tax is the profit realised for the current year, as determined according to the applicable accounting standards, adjusted for non-deductible expenses incurred during the fiscal year.[167] Impairment and write-off of receivables is a non-deductible expense,[168] and must be included in the tax base to determine the amount of corporate income tax.

103. Also, companies are required to pay monthly corporate income tax advance payments. The monthly corporate income tax advance payments amount to 1/12 (one-twelfth) of the amount of the corporate income tax obligation for the previous year, increased by the index of cumulative retail price growth as determined by the State Statistical Bureau of the Republic of North Macedonia.[169] The monthly payments are payable within 15 days of the end of each month during the current year.[170]

104. GAMA,[171] Toplifikacija[172] and Komercijalna Banka[173] objected to the unlawful and discriminative Reorganisation plan dated 4 April 2018. In response to GAMA's objection, TE-TO maintained that the creditors' classes were formed correctly but nevertheless proposed amendments to the Reorganisation plan dated 4 April 2018 by removal of the third class of creditors and classifying all unsecured creditors into a single class:

"[…] However, respecting the principles of equitable collective settlement of creditors, and in order not to imply that some creditors are placed in a more favourable position in relation to others, we propose that all unsecured creditors be included in a single one second class.

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[164] Bankruptcy Law (**C-075**), Article 215-b(2) indent 11

[165] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), at pp. 27-33

[166] Law on Corporate Income Tax (Official Journal of the Republic of Macedonia no. 112/14, as amended) (**C-096**) ("CIT Law")

[167] See CIT Law (**C-096**), Article 7(2) and 8

[168] See CIT Law (**C-096**), Article 9(1) para 1, item 17 ("…permanent write-off of outstanding claims, except permanent write-off of outstanding claims on the basis of compulsory social security contributions…").

[169] See CIT Law (**C-096**), Article 40(1)

[170] See CIT Law (**C-096**), Article 40(2)

[171] Brief by GAMA to the Civil Court Skopje dated 22 May 2018 with objections and remarks to the Reorganisation plan dated 4 April 2018 (**C-097**)

[172] Brief by Toplifikacija to the Civil Court Skopje dated 21 May 2018 with comments to the Reorganisation plan dated 4 April 2018 (**C-098**)

[173] Brief by Komercijalna Banka AD Skopje to the Civil Court Skopje dated 21 May 2018 with remarks to the Reorganisation plan dated 4 April 2018 (**C-099**)

With that, we propose an amendment to the Reorganization Plan by determining two classes of creditors:
1. Secured Creditors
2. Unsecured creditors
The third class is abolished. […]"[174]

105. TE-TO never incorporated these amendments in the Reorganisation plan dated 4 April 2018, but it merely proposed them in its brief to the Civil Court Skopje.[175]

106. On the hearing for voting upon the plan held on 5 June 2018, TE-TO acknowledged that the Reorganisation plan dated 4 April 2018 must be amended with respect to the creditors' classes and the way of payment of their claims and requested the judge to allow it to submit a consolidated version.[176] The judge acknowledged that the creditor's remarks are substantial and that there are no conditions for voting and ordered TE-TO to submit a revised and consolidated version of the Reorganisation plan dated 4 April 2018 within 3 days and postponed the hearing for the voting on the reorganisation plan on 14 June 2018.[177]

107. After allowing TE-TO two rounds of revisions to the Reorganisation plan dated 4 April 2018, which were never incorporated into a single document by TE-TO, the judge allowed TE-TO to submit a new reorganisation plan, in egregious breach of the Bankruptcy Law.[178] At this stage of the proceedings, the judge could not have allowed TE-TO to make changes to the creditors' classes and the way of the payment of the claims, as the Bankruptcy Law allows the judge to order changes to reorganisation plans only in the initial stages of the proceedings and if these changes relate to minor deficiencies or technical errors in the plan.[179]

(b) THE REORGANISATION PLAN DATED 6 JUNE 2018

108. On 6 June 2018, TE-TO filed a new reorganisation plan named a consolidated text of the Reorganisation Plan ("**Reorganisation plan dated 6 June 2018**").[180] The Reorganisation plan dated 6 June 2018, this time, classified creditors into two different classes as follows:[181]

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[174] Brief by TE-TO to the Civil Court Skopje in response to GAMA's objections and remarks, dated 30 May 2018 (**C-100**), at p. 3
[175] See Brief by TE-TO to the Civil Court Skopje in response to GAMA's objections and remarks, dated 30 May 2018 (**C-100**), pages 4-10
[176] Minutes of the hearing before the Civil Court Skopje, dated 5 June 2018 (**C-017**), at p. 9 ("[…] As it is necessary to prepare a consolidated version that will accurately specify the changes in the reorganisation plan after the new classification of creditors, I propose that the Court orders the debtor to prepare a consolidated version as soon as possible which is to be communicated to all creditors. […]")
[177] Minutes of the hearing before the Civil Court Skopje, dated 5 June 2018 (**C-017**), at p. 9
[178] See Expert Report on Bankruptcy Law, 53 – 61 ¶ (**CE-01**), ¶
[179] See Expert Report on Bankruptcy Law, 62 – 65, ¶ (**CE-01**), ¶
[180] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**)
[181] See Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), at page 23 and 31-37.

Creditors' class			Proposed amendment of debt
First class - Secured creditors			**No amendment**
No.	**Name of creditor**	**Amount of claim**	**Percent in class**
1.	Landesbank Berlin AG	EUR 51,4 million	95,86%
2.	Komercijalna Banka AD Skopje	EUR 2,2 million	4,14%
Second class - Unsecured creditors			**Write-off of 90% of claims and interest and suspension of payment of the residual amount for ten years until 2028**
No.	**Name of creditor**	**Amount of claim**	**Percent in class**
1.	Bitar Holdings	EUR 112 million	66.61%
2.	Toplifikacija	EUR 28 million	16.65%
3.	Project Management Consulting	EUR 8,8 million	5.24%
4.	Kardicor Investments Limited	EUR 8,7 million	5.13%
5.	Sintez Green Energy	EUR 3,9 million	2.33%
6.	GAMA	EUR 5 million	2.97%
7.	TE-TO Gas Trade	EUR 929,764	0.56%
8.	BEG	EUR 276,447	0.17%
9.	Public Revenue Office	EUR 258,254	0.15%
10.	Triglav Insurance	EUR 107,477	0.06%

11.	Balkan Energy Security	EUR 69,658	0.04%
12.	GA-MA AD Skopje	EUR 69,516	0.04%
13.	Monting Energetika Skopje	EUR 9,049	0,01%
14.	Other creditors	EUR 49,587	0%

109. The Reorganisation plan dated 6 June 2018 envisaged a write-off of 90% of the claims of all unsecured creditors of TE-TO (including GAMA's claim) and the default interest on the claims.[182] Even unsecured creditors whose claims in the Reorganisation plan dated 4 April 2018 were to be settled 100% would now receive only 10% of their claims without interest after 2028. The Reorganisation plan dated 6 June 2018 was an entirely new reorganisation plan that was provided in this stage of the reorganisation proceedings in egregious breach of the Bankruptcy Law.[183] Moreover, it contained the same fundamental defects as the Reorganisation plan dated 4 April 2018.[184]

110. On 12 June 2018, GAMA objected to the Reorganisation plan dated 6 June 2018 by pointing out that the Reorganisation plan dated 6 June 2018 is unlawful in relation to, inter alia, the unlawful formation of the creditors' classes, the unlawful deadline for implementation, unlawful disregard of GAMA's accrued interests on the claim and the breach of the procedural rules for providing a new reorganisation plan at this stage of the proceedings.[185] The Civil Court Skopje nevertheless decided to hold a hearing for a creditors' vote on the Reorganisation plan dated 6 June 2018.

(c) THE APPROVAL BY THE MACEDONIAN COURTS

111. At the hearing held on 14 June 2018, proceedings, Toplifikacija and GAMA motioned[186] the judge to be recused due to doubts about her impartiality, since TE-TO and its shareholders and related parties received preferential treatment throughout the proceedings in breach of the Bankruptcy Law:

> "[…] The doubt about the impartiality of the Court comes from the fact that after a proposal to open bankruptcy proceedings has been initiated, <u>the debtor was allowed to amend the submitted reorganization plan, which actually is a new reorganization plan and the acceptance by the Court of formation of classes in contradiction with the Bankruptcy Law, especially relating to the opportunity that the Court provides to persons connected to the bankruptcy debtor. More precisely, its shareholders and members, as well as creditors of lower settlement rank, are placed in a creditor class of a higher settlement rank that raises doubts as to the purpose of the Bankruptcy Law, which is to collectively settle and protect</u>

[182] See Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 0302 - 685 dated 07 June 2018 (**C-014**), at pp. 25-26

[183] See Expert Report on Bankruptcy Law, 66 - 67 ¶ (**CE-01**)

[184] See Expert Report on Bankruptcy Law, 68 - 69 ¶ (**CE-01**)

[185] Brief by GAMA to the Civil Court Skopje dated 12 June 2018 with objections and remarks to the Reorganisation plan dated 6 June 2018 (**C-101**)

the interests of the creditors, not of the bankruptcy debtor and its connected persons. The unlawfulness of the reorganization plan, which the Court refuses to reject despite the explicit legal obligation to do so, results from the fact that the so-called consolidated version of the reorganization plan, was submitted to the court on 6.6.2018 which is contrary to the provisions of art. 215 paragraph 2, item 1, which clearly states that the plan is to be submitted together with the proposal, not later. The so-called consolidated version does not contain the substantial elements required by the BL. More precisely, the bankruptcy debtor attempts to introduce statements from majority creditors in which they accept the reorganization plan which they have negotiated and has been offered to them and has been filed together with the proposal, however, it fails to propose statements of acceptance of the new plan, i.e. of the so-called consolidated version. At the same time, the Court violated the BL, particularly by the fact that despite the submission of a new reorganization plan containing new classes and a new manner of compensation of creditors with unsecured claims, it failed to publish an announcement for the new plan, failed to call all creditors, and failed to ask for remarks on the plan […]"[187] [emphasis added]

112. The judge adjourned the hearing for an hour, returned to the courtroom, and said that the motions for recusal of a judge by Toplifikacija and GAMA have been denied; and allowed the creditors to vote on the Reorganisation plan dated 6 June 2018.[188] A written decision for rejection of the motion for recusal was never served to GAMA. A decision for rejection of the motions for recusal by the Deputy President of the Civil Court Skopje dated 14 June 2018 was later deposited in the case files.[189] The statement provided by the judge to the Deputy President of the Civil Court Skopje, however, shows that the decision was not made during the adjournment of the hearing but after the creditor's vote and after the judge had already approved the Reorganisation plan dated 6 June 2018, in egregious breach of Macedonian law:

"[…] Pursuant to Article 235 paragraph 2 of the BL, the decision to approve the reorganization plan contains the enforceable part of the plan that the creditors accepted. In the specific case, the Court determined that the debtor entirely acted according to the order of the Court and the provided consolidated text plan for reorganization, contains all the elements provided for in article 215 - b paragraph 1 of the mentioned law, which are mandatory for the preparation of the plan, and after the conducted voting procedure and determination that the conditions of Article 5 of the BL have been met it passed a decision. Everything stated in the allegations for recusal refers to the procedural part and if the parties - the creditors - believed that there was a violation, those are arguments for the higher court. She believes that the proceedings were carried out in accordance with the Law on bankruptcy and in handling the case acted independently and impartially and there is no reason for recusal provided for in Article 64 of the LCP. […]"[190] [emphasis added]

113. Under Macedonian law, if a party submits a request for recusal of a judge, the judge must immediately adjourn the proceedings until a decision on the request for recusal is made, and if the request is based on doubts of impartiality, the judge may only undertake actions

[187] Minutes of the hearing before the Civil Court Skopje, dated 14 June 2018 (**C-102**), pp. 4 and 5

[188] Minutes of the hearing before the Civil Court Skopje, dated 14 June 2018 (**C-102**), at p. 5

[189] Decision for rejection of the request of recusal by the Deputy President of the Civil Court Skopje, dated 14 June 2018 (**C-134**)

[190] Decision for rejection of the request of recusal by the Deputy President of the Civil Court Skopje, dated 14 June 2018, at p. 4 (**C-103**)

for which there is a risk for delay.[191] TE-TO's reorganisation proceedings commenced on 2 May 2018[192] and, under the Bankruptcy Law, the hearing for a vote on the reorganisation could have taken place by 2 July 2018 at the latest.[193] Hence, there was no risk of delay, and the judge must have adjourned the proceedings until a decision on the motions for her recusal was made. Instead, the judge decided to continue with the proceedings, absent a decision on the motions for recusal, under the pretence that she was following the rules of procedure. The judge could have decided to continue with the proceedings if she genuinely believed that there were no reasons for doubts of her impartiality and independence and that the motions for recusal were set forth for obstruction and delay of the proceedings.[194] However this was not the case and, as explained below, the judge continued with the proceedings and allowed a vote on the Reorganisation plan dated 6 June 2018.

114. After the resumption of the hearing, Bitar Holdings and TE-TO's related parties, which were – together with the accrued interests on their claims, which were denied to GAMA - the creditors of 77,45% of the total debt of TE-TO in the class of unsecured creditors, outvoted all other creditors who voted against the plan, including GAMA. The Civil Court Skopje subsequently approved the Reorganisation plan dated 6 June 2018 with a decision of 14 June 2018, as amended by a decision of 17 July 2018 of the Civil Court Skopje.[195] As a result, 90% of claims of unsecured creditors of TE-TO, including GAMA's claim of EUR 4.5 million and the accrued default interest thereof, was written off, and the payment of the remaining 10% of claims of unsecured creditors, including GAMA's remaining claim of EUR 500,000 was postponed to 2028.

115. The decision of 14 June 2018 is indefensible under the provisions of the Bankruptcy Law and reveals that GAMA was discriminated in relation to TE-TO's shareholders. Shockingly, the Civil Court Skopje exempted itself of any liability for oversight of the reorganisation proceedings and reasoned that they are not a part of the bankruptcy proceedings:

> "[…] Therefore, <u>this procedure is out of bankruptcy procedure and is carried out according to strictly defined provisions that do not apply and cannot be applied for bankruptcy and liquidation procedure as well as for reorganization of the debtor in a classic bankruptcy procedure</u>. This pre-bankruptcy procedure that is implemented is a relatively new procedure and it should be regulated by a special law, but not by the Bankruptcy Law in order not to leave space for identification and interference of two different procedures which provide reorganization of the debtor. […]"[196] [emphasis added]

[191] Civil Procedure Law (**<u>C-039</u>**), Article 68(1) ("When a judge or lay judge, the president of the council, a member of the council or the president of the court, learns that a request has been submitted for his recusal, he is obliged to stop the work on the relevant case immediately, and if it is an exemption from Article 64 point 6 of this law, until the decision on the request is made, it can take only those actions for which there is a risk of delay.")

[192] See Decision by the First Instance Civil Court Skopje dated 2 May 2018 (**<u>C-093</u>**)

[193] Bankruptcy Law (**<u>C-075</u>**), Article 215-g(1)

[194] Civil Procedure Law (**<u>C-039</u>**), Article 68(2) ("As an exception to paragraph (1) of this article, the individual judge or the president of the council may, with a decision against which a separate appeal is not allowed, decide to continue with the work if he considers that the request for exemption is clearly presented for the sake of obstructing the court when taking certain actions, that is, for the purpose of delaying the procedure.")

[195] Decision of 14 June 2018 of the First Instance Civil Court Skopje, as amended by decision of the First Instance Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 17 July 2018 (**<u>C-015</u>**)

[196] Decision of 14 June 2018 of the First Instance Civil Court Skopje, as amended by decision of the First Instance Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 17 July 2018 (**<u>C-015</u>**), at p. 35 para 1

116. The Civil Court endorsed the change of the number of the creditors' classes by TE-TO by acknowledging that this was done due to GAMA's claim of higher priority:

> "[…] Furthermore, the Court, from the inspection of the consolidated text of the reorganization plan determined that the debtor made all the corrections in it that were instructed to the debtor as per the decision of the minutes of 05.06.2018 on the remarks of the creditors, which refer to the remarks, so now the remark regarding the creditor GAMA GUC is accepted in the reorganization plan that it is a first-priority creditor, but belongs to the class of unsecured creditor and that there is court dispute for this claim with the debtor, so the classes are changed and two classes are suggested, which are classes of secured and unsecured creditors and the manner in which they are settled with creditors.[…]"[197] [emphasis added]

117. Concerning the formation of the creditors' classes, the Civil Court Skopje acknowledged that the claims of TE-TO's shareholders are of lower priority and that under the Bankruptcy Law all creditors from the same class must be treated equally, but in contradiction with these findings still approved the Reorganisation plan dated 6 June 2018:

> "[…] The court found that the request of this creditor to pay 100% of the claim together with the interest upon a judgment of the Supreme Court of the Republic of Macedonia is unfounded because the creditor is a shareholder of the debtor and bases the claim on a loan to the debtor, which is a claim in accordance with the legal provisions of Article -118 paragraph 1 item 5 of the Law on Bankruptcy and it is a claim of the second payment order. On the other hand, according to the provisions of the Bankruptcy Law, it is prohibited for a certain creditor to be treated differently from other creditors of the same class. […]"[198] [emphasis added]

118. The Civil Court Skopje acknowledged that the acceleration of the EUR 112 million claims of Bitar Holdings against TE-TO is null and void since they were concluded within 90 days before the submission of the proposal, but shockingly found that this was in the best interest of TE-TO and the creditors:

> "[…] the reorganization plan includes the creditor Bitter Holding Limited and whose request for payment was not due because the creditor withdrew the proposal for forced execution from the executor and that the agreements are null and void, because the court unquestionably found that the agreements in question are null and void, concluded in the period of 90 days before the submission of the proposal for opening a bankruptcy procedure with a reorganization plan because the proposal was submitted on 24.04.2018 and the agreements were concluded in March 2018 and recorded in the debtor's book, however the creditor has a claim on the basis of a loan which is due for collection, which the debtor does not dispute and this creditor is not in a privileged position from the other creditors, even more so that even if those agreements are not null and void, only a more favourable way of settling the obligation was arranged, which is more favourable for the debtor and the other creditors.[…]"[199] [emphasis added]

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[197] Decision of 14 June 2018 of the First Instance Civil Court Skopje, as amended by decision of the First Instance Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 17 July 2018 (**C-015**), at p. 24 para 6

[198] Decision of 14 June 2018 of the First Instance Civil Court Skopje, as amended by decision of the First Instance Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 17 July 2018 (**C-015**), at p. 25 para 4

[199] Decision of 14 June 2018 of the First Instance Civil Court Skopje, as amended by decision of the First Instance Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 17 July 2018 (**C-015**), at p. 25 para 5

119. Furthermore, the Civil Court Skopje reasoned that even if the claims of Bitar Holdings were not accelerated, they would have become due upon the submission of TE-TO's proposal for reorganisation since they are not disputed by TE-TO:

> "[…] On the other hand, even if the claim was not due, all claims become due with the submission of the plan prepared by the debtor because the debtor does not dispute that claim and it is recorded in the debtor's accounting documentation, which is confirmed by the temporary Bankruptcy Trustee. […]"[200]

120. GAMA appealed this decision,[201] but the Decision of 14 June 2018 was upheld by a decision of 30 August 2018 of the Appellate Court Skopje,[202] rejecting the appeals of GAMA, Toplifikacija and Komercijalna Banka without any further recourse available to the affected creditors. The Appellate Court Skopje fully supported the reasoning set forth by the Civil Court Skopje and endorsed the procedural defects in the reorganisation proceedings. The Appellate Court Skopje entirely failed to address GAMA's arguments that the Reorganisation plan dated 6 June 2018 was in breach of provisions of the Bankruptcy Law regarding the ranking of creditors, that Loan acceleration agreements are null and void and that the period of implementation of the plan manifestly exceeds statutory defined period of five years, instead concluding in one paragraph that the Civil Court Skopje provided enough reasons for a decision:

> "This court estimated the other complaint allegations of the creditors, but it decided they were irrelevant and with no influence for different decision and did not have any influence and could not have any influence on the legality of the decision that is the subject of the appeal in terms of proper application of the substantial rights, while on the other hand those allegations are accentuated during the procedure as well, they were estimated by the First Instance Court and the court provided enough explained reasons that this court completely agrees with and accepts them."[203]

121. Instead of addressing crucial deficiencies in reorganisation proceedings, the Appellate Court Skopje merely considered that corrections of the original reorganisation plan, resulting in Reorganisation plan dated 6 June 2018, were permitted by the law and non-reviewable, because the majority of creditors voted for the adoption of the plan.[204] The Appellate Court failed to state reasons and upheld manifestly illegal reorganisation of TE-TO in breach of the Bankruptcy Law.[205]

122. In 2019, the Finance Police Administration of the Republic of North Macedonia ("**Finance Police**") filed criminal charges against (i) Mr Vadim Mihailov, the President of the Management Board of TE-TO, (ii) Mrs Sashka Trajkovska, the bankruptcy judge who approved the Reorganisation Plan; (iii) Mrs Snezana Sardzovska, the notary who certified

[200] Decision of 14 June 2018 of the First Instance Civil Court Skopje, as amended by decision of the First Instance Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 17 July 2018 (**C-015**), at p. 26 para 1

[201] Appeal by GAMA dated 25 June 2018 against the Decision of 14 June 2018 of the First Instance Civil Court Skopje, as amended by decision of the First Instance Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 17 July 2018 (**C-104**)

[202] Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**)

[203] Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**), p. 15.

[204] Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**), p. 12.

[205] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 70–71, 76–83.

the annexes to the loan agreements and the Loan acceleration agreements entered into between Bitar Holdings and TE-TO and (iv) Mr Nikola Arsovski, the attorney at law who prepared the annexes to these loan agreements and the Loan acceleration agreements, which provided grounds for the purported insolvency of TE-TO.[206] The criminal charges were based on a well-founded suspicion of the Finance Police that the accused had committed the criminal acts of "*False Bankruptcy*", "*Abuse of official position*", and "*Money laundering*".

123. Representatives of the Finance Police, on several occasions, issued statements on the reasons for filing the criminal charges. Mr Arafat Muaremi, then director of the Finance Police, stated that the acceleration of the loans by Bitar Holdings and TE-TO was unlawful since Mr Vadim Mihailov, without requisite corporate approvals, entered into the Loan acceleration agreements knowing that TE-TO would be unable to repay the loans and thus creating the reasons for commencement of bankruptcy over TE-TO.[207] Mrs Daniela Velkovska from the Finance Police further clarified the reasons for filing the criminal charges against the defendants for the criminal acts of "*False Bankruptcy*", "*Abuse of official position*":

> "[…] criminal charges were filed against V.M., President of the Managing Board of Te-To, who during 2018, without a decision of the Managing Board, the Supervisory Board or the Shareholders' Meeting, without authorisation concluded annexes to loan agreements, notarial agreements and submitted a request for the opening of bankruptcy proceedings with a plan for the reorganization of Te-To. The second defendant S.T., a competent bankruptcy judge, without determining the limitation in the Statute of the first defendant V.M., adopted the proposal of the first defendant to open bankruptcy proceedings, while the third defendant S.S., a notary, did not determine the limitation in the Statute to the first reported V.M., she certified annexes to contracts and notarized contracts. With these incriminated behaviours, the defendants made it possible for Te-To to acquire unlawful pecuniary benefit through bankruptcy and inability to pay the obligations following a final court judgment, thus causing damage to shareholder creditor Toplifikacija AD in the amount of 721,683,587 denars. […]"[208]

124. Mrs Daniela Velkovska also clarified the reasons for the criminal charges for the criminal act of *Money laundering*":

> "[…] due to the existence of financial transactions to Te-To, in the amount of 7 billion 264 million 250 thousand denars, which originate from criminal events for which investigations are being conducted by the Russian Federation, and have been invested in the construction of a production process for the production of electricity, there is a well-founded suspicion that the crime of money laundering has been committed. […]"[209]

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[206] Announcement to media of the Finance Police Administration of the Republic of North Macedonia no. 0306 – 1902/1 dated 21 June 2019 (**C-019**)

[207] Prizma.mk article (22 August 2019), "How was the investigation for 750,000 euros of the International Union", <https://prizma.mk/kako-se-odvivala-istragata-za-750-000-evra-na-megunarodniot-sojuz/>, last accessed 22 November 2022 (**C-105**)

[208] Radio Free Europe article (26 June 2019), "From the suspicion of a false bankruptcy of _Te-To_ to the laundering of Russian money in Macedonia", <https://www.slobodnaevropa.mk/a/од-сомнеж-за-лажен-стечај-на-те-то-до-перење-руски-пари-во-македонија/30021375.html>, last accessed 22 November 2022 (**C-106**)

[209] Radio Free Europe article (26 June 2019), "From the suspicion of a false bankruptcy of Te-To to the laundering of Russian money in Macedonia", <https://www.slobodnaevropa.mk/a/од-сомнеж-за-лажен-стечај-на-те-то-до-перење-руски-пари-во-македонија/30021375.html>, last accessed 22 November 2022 (**C-106**)

125. Indeed, the Russian authorities have been investigating the management of TGC-2 since 2013, and in September 2016, the Russian Ministry of Internal Affairs for the Tver Region filed criminal charges against the management of TGC-2 and Leonid Lebedev, owner of Sintez Group, over alleged embezzlement of $220 million from TGC-2.[210] During the investigations, the Russian authorities identified a number of suspicious transactions between TGC-2 and TE-TO, Bitar Holdings, Project Management Consulting, BEG and its subsidiaries, Sintez Green and Kardicor Investments.[211]

126. In July 2019, the Basic Public Prosecutor's Office for the Prosecution of Organized Crime and Corruption decided to separate the proceedings with regard to the criminal charges submitted by the Finance Police by assigning the case with respect to the criminal acts of "*False Bankruptcy*" and "*Abuse of official position*" to the Basic Public Prosecutor's Office Skopje and issued an order for the preliminary collection of reports to the Finance Police to obtain the necessary material evidence as confirmation of the allegations with respect to the criminal act "*Money laundering*".[212]

127. In September 2020, the Public Prosecution decided not to raise indictments against the suspects ex officio, despite the overwhelming evidence of wrongdoings in the actions relating to TE-TO's reorganisation process. The Public Prosecution reasoned that TE-TO's judicial reorganisation concerned transactions between private parties and that there is no evidence of wrongdoings amounting to criminal acts since TE-TO's reorganisation was purportedly in accordance with the Bankruptcy law.[213]

5. MACEDONIA'S UNLAWFUL STATE AID TO TE-TO

128. As a result of its debt restructuring and the write-off of 90% of the claims of its unsecured creditors in 2018, including that of GAMA, TE-TO incurred a corporate income tax debt of approximately EUR 16 million. Furthermore, TE-TO was required to pay monthly corporate income tax advance payments of approximately EUR 1,3 million within 15 days from the end of each calendar month starting from March 2019 to March 2020. As explained above, both the Reorganisation plan dated 4 April 2018 and the Reorganisation plan dated 6 June 2018 did not include tax projections with respect to these tax liabilities. TE-TO was unable to pay the corporate income tax within the statutory deadline of 15 April 2019[214] and the monthly corporate income tax advance payments within 15 days of the end of each month.

[210] Vedomosti article (21 September 2016), "Ex-senator Leonid Lebedev became a defendant in a criminal case" <https://www.vedomosti.ru/business/articles/2016/09/22/658022-leonid-lebedev>, last accessed 22 November 2022 (**C-107**)

[211] Request related to criminal investigation by the Russian Ministry of Internal Affairs for the TVER Region to INTERPOL, dated 12 March 2015 (**C-108**), p. 4-5

[212] MKD.mk article (30 July 2019), "PPO in the case of TE-TO with criminal charges for money laundering, false bankruptcy and abuse of official duty", <https://www.mkd.mk/makedonija/sudstvo/ojo-vo-sluchajot-so-te-to-so-krivichni-prijavi-za-perenje-pari-lazhen-stechaj-i>, last accessed 22 November 2022 (**C-109**)

[213] Public Prosecution Office announcement (29 September 2020), "Four criminal charges rejected relating to TE-TO's dealings", <https://jorm.gov.mk/otfrleni-chetiri-krivichni-prijavi-vo-vrska-so-raboteneto-na-te-to/>, last accessed 22 November 2022 (**C-110**)

[214] See CIT Law (**C-096**), Article 39(1)

Hence, TE-TO became the largest tax debtor in Macedonia and remained throughout 2019 and 2020.[215]

129. The Public Revenue Office did not take any actions against TE-TO for enforced collection of the tax debt. Under Macedonian law, the Public Revenue Office is entitled to commence proceedings for enforced collection of an overdue tax debt if it has previously demanded the tax debtor to settle the tax debt and if at least one week has lapsed from the date of the request.[216] However, the Public Revenue Office refrained from commencing proceedings for enforced collection against the largest tax debtor in Macedonia throughout 2019, 2010 and 2021, notwithstanding the unlawful granting of State aid by the Macedonian government, described below.

130. If the Public Revenue Office would have commenced proceedings for enforced collection of the tax debt against TE-TO, this would have triggered the collapse of TE-TO's reorganisation and immediate opening of bankruptcy proceedings over TE-TO. In such case, TE-TO's debt restructuring would be annulled and TE-TO would have been required to settle the claims of GAMA in full, as acknowledged by the Macedonian Government.[217]

131. Moreover, the Public Revenue Office collected its claim from TE-TO, which should have been written off for 90% and repaid after 12 years. In both the Reorganisation plan dated 4 April 2018 and the Reorganisation plan dated 6 June 2018, TE-TO set out that it has a debt to the Public Revenue Office of MKD 16,011,762 (approximately EUR 250,000).[218] However, this was not the case. In letters to the State Attorney, the Public Revenue Office disclosed that TE-TO voluntarily settled its claim during the judicial reorganisation proceedings[219] and requested the Civil Court Skopje to amend the decision approving the Reorganisation plan dated 6 June 2018:

> "[…] From the documents submitted after several written and telephone contacts with the State Attorney and the bankruptcy trustee, it was determined that the situation expressed in the Decision of the Basic Court Skopje 2 Skopje 3ST-124/18 and 160/18 of 14/06/2018, in which the PRO appears as a creditor in the bankruptcy proceedings against the debtor TE-TO AD Skopje does not correspond to the factual situation. <u>Namely, the situation expressed in the accepted reorganization plan is a situation with a cut-off date of 01/03/2018 later underwent changes, based on voluntary actions taken on the part of the</u>

[215] List no. 10/2019 dated 10 October 2019 of tax debtors in North Macedonia by the Public Revenue Office (**C-111**), List no. 11/2019 dated 8 November 2019 of tax debtors in North Macedonia by the Public Revenue Office (**C-112**), List no. 01/2020 dated 10 January 2020 of tax debtors in North Macedonia by the Public Revenue Office (**C-113**), 4. List no. 02/2020 dated 17 February 2020 of tax debtors in North Macedonia by the Public Revenue Office (**C-114**), 5. List no. 03/2020 dated 10 March 2020 of tax debtors in North Macedonia by the Public Revenue Office (**C-115**)

[216] Law on Tax Procedure (Official Journal of the Republic of Macedonia no. 13/06, as amended) ("Tax Procedure Law") (**C-116**), Article 126(1)

[217] See E-mail from Spokesperson of the Government of the Republic of North Macedonia, dated 18 November 2019 (**C-024**)

[218] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), at p. 14, and Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 0302 - 685 dated 07 June 2018 (**C-014**), at p. 29

[219] Letter by the Public Attorney's Office to the Civil Court Skopje dated 4 November 2019 (**C-117**) and Letter by the Public Attorney's Office to the Civil Court Skopje dated 24 December 2019 (**C-118**)

debtor, the petitioner of the bankruptcy procedure and the petitioner of the reorganization plan.

The PRO Directorate for large taxpayers with letter no. 27-3236/10 dated 01/10/2018, addressed to the State Attorney, informed him about the current situation and asked him, as a legal representative, to take all legal actions to correct the situation shown in the Decision of the Basic Court Skopje 2 Skopje ZST-124/18 and 160/18 dated 06/14/2018. […]"[220] [emphasis added]

(a) IN BREACH OF MACEDONIAN LAW

132. On 24 September 2019, the Macedonian Government decided to request TE-TO to provide an elaborate, containing detail on TE-TO's participation in the overall electricity and heat in Macedonia, environmental issues relating to its production of electricity and heat and the economic benefit of TE-TO's operations for Macedonia, in particular with respect to the income for Macedonia, retention of employees and consequences in case TE-TO would discontinue its operations.[221] Furthermore, the Macedonian Government decided to notify the Competition Commission of the planned individual State aid to be granted to TE-TO.

133. On 14 October 2019, the General Secretariat of the Macedonian Government submitted to the Competition Commission a notification for the planned granting of individual State aid to TE-TO in relation to its corporate income tax debt. On 16 October 2019, the Competition Commission authorised the State aid to be granted to TE-TO in the form of deferral of the obligation for payment of the corporate income tax of EUR 16 million and interest on that amount up to October 2019 of approximately EUR 700,00 for nine years.[222]

134. The Competition Commission authorised the granting of the State aid since it would be granted "*to promote the execution of an important project of significant economic interest for the Republic of Macedonia",*[223] under Macedonian law.[224] The Competition Commission authorised the individual State aid to TE-TO, although there was no governmental decree in place that would prescribe the specific conditions and procedure for granting of this type of State aid, as required by Macedonian law.[225] Moreover, under Macedonian law, the payment of tax debt can be deferred for a period of up to 36 months,[226] subject to the tax debtor providing a guarantee for 100% of the tax debt either in the form of a mortgage on real properties, pledge on tangible assets, an irrevocable bank guarantee or a guarantee

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[220] See Letter by the Public Attorney's Office to the Civil Court Skopje dated 24 December 2019 (**C-118**), at p. 3
[221] Minutes of the 155th session of the Government dated 24 September 2019 (**C-119**), at p. 22
[222] Decision for approval of state aid to TE-TO of the Commission for the Protection of Competition UP No. 10-81 dated 16 October 2019 (**C-120**)
[223] See Decision for approval of state aid to TE-TO of the Commission for the Protection of Competition UP No. 10-81 dated 16 October 2019 (**C-120**), at p. 1
[224] Law on State Aid Control (Official Journal of the Republic of Macedonia" no. 145/2010) (**C-121**), ("State Aid Law"), Article 8(2) item b) ("aid to remedy disturbances in the national economy or to promote the execution of projects of significant economic interest for the Republic of Macedonia")
[225] State Aid Law (**C-121**), Article 8(3) item b) ("The Government of the Republic of Macedonia, upon the proposal of the Commission for the Protection of Competition, prescribes the conditions and procedure for awarding the state aid from paragraph (2) of this article.")
[226] See Tax Procedure Law (**C-116**), Article 111-g(2)

by a third party.[227] The Macedonian Government did not request TE-TO to provide a guarantee in any form as security for its obligation to pay the corporate income tax.

135. On 22 October 2019, the Macedonian Government approved the text of the agreement for granting State aid to TE-TO and requested the Competition Commission to provide a proposal – decree to the Government within 30 days.[228] The Macedonian Government has not adopted such a decree to date. Despite that there was no decree in place, on 28 October 2019, the Macedonian Government and TE-TO entered into an Agreement for Granting of State Aid no. 08-2909/12 ("**State Aid Agreement**"). The State Aid Agreement was signed on behalf of the Macedonian Government by Mr Zoran Zaev, Prime Minister of Macedonia from 2017 to 2022.[229]

136. Prime Minister Zoran Zaev, previously mayor of the city of Strumica has been accused and found guilty on corruption charges in 2008. Soon after, however, Zaev was pardoned by the then-President Branko Crvenkovski.[230] In 2015, Zoran Zaev was once again charged on the accounts of corruption during the time when he was a mayor of Strumica for allegedly soliciting a bribe of EUR 200,000 by a Strumica businessman in a deal regarding purchase and legalization of building land but was acquitted in 2018.[231]

137. In an e-mail dated 18 November 2019, the Spokesperson of the Macedonian Government blatantly acknowledged that Macedonia granted state aid to TE-TO to prevent the collapse of TE-TO's reorganisation and its debt restructuring and to prevent potential disruption to the supply of heat to Skopje:

> "[…] Given the fact that currently, TE-TO JSC Skopje has financial difficulties, it is practically not able to pay such corporate income tax, which corporate income does not really exist, the eventual commencement of forced collection of that corporate income tax not only will prevent the reorganization of the company, but it is quite certain that it will lead to the opening of bankruptcy proceedings over it and the collapse of the Reorganization Plan. In that case, the "written off liabilities" according to the Reorganization Plan will be transformed again into actual liabilities of the company to creditors and will not have profit treatment, and thus the tax liability - profit tax for 2018 based on written off liabilities, no more to exist and the state will not charge it. […]"
>
> "[…] Also, we should not ignore the fact that TE-TO AD is the main supplier of heat in Skopje, but also within the country. The collapse of the company would lead to a severe disruption of the heat supply, especially in Skopje […]"[232]

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[227] Tax Procedure Law (**C-116**), Article 111-v(1)

[228] Minutes of the 160th session of the Government dated 22 October 2019 (**C-123**), at p. 19 ("[…] At the same time, the Government instructs the Commission for Protection of Competition to act upon the Law on State Aid Control, and to submit, as per paragraph 3 of Article 8, the respective draft-decree to the Government, within 30 days.[…]")

[229] Vlada.mk, "President of the Government of the Republic of North Macedonia 2017-2022" https://vlada.mk/node/27488?ln=en-gb, last accessed 16 November 2022 (**C-123**)

[230] Decision for pardoning by President Branko Crvenkovski no. 07-674 dated 2 August 2018 (**C-124**)

[231] Balkan Insight article (21 May 2018), "Macedonia Court Acquits Zaev of Bribery Charge", https://balkaninsight.com/2018/05/21/macedonian-pm-acquitted-in-bribery-case-05-21-2018/, last accessed 16 November 2022 (**C-125**)

[232] E-mail from Spokesperson of the Government of the Republic of North Macedonia, dated 18 November 2019 (**C-024**)

138. The Spokesperson of the Macedonian Government also claimed that TE-TO is not the only company that has received State aid. Indeed, Macedonia has granted State aid to many companies. However, TE-TO is the only Macedonian company which received State aid in the form of a deferral of the payment of corporate income tax debt for the purpose "*to promote the execution of an important project of significant economic interest for the Republic of Macedonia"*.[233]

139. On 15 November 2019, the General Secretariat of the Macedonian Government submitted to the Competition Commission another notification for the planned granting of individual State aid to TE-TO in relation to its obligation to pay monthly corporate income tax advance payments. On 29 November 2019, the Competition Commission authorised additional State aid to TE-TO in the form of the deferral of the monthly corporate income advance payments for 2019 in the amount of approximately EUR 14,5 million up to 2020 and their subsequent extinguishment.[234] On 3 December 2019, the Macedonian Government approved the text of the annex to the State Aid Agreement to be entered into between the Macedonian Government and TE-TO with respect to the granting of state aid in relation to the monthly corporate income tax advance payments.[235]

140. The Macedonian Government granted TE-TO State aid, in egregious breach of Macedonian law, at a time when TE-TO's president of the managing board, the bankruptcy judge who approved TE-TO's reorganisation, the attorney who prepared the Loan acceleration agreements and the notary public who certified them as enforceable deeds, were investigated by the Public Prosecution for the criminal acts of "*False Bankruptcy*", "*Abuse of official position*", and "*Money laundering*". Furthermore, at that time, a member of the Macedonian government was Mr Kocho Angjushev, the Vice Prime Minister in charge of Economy Matters and Coordination of Economy Resorts. Mr Kocho Angjushev was the owner of the largest electricity trading company in Macedonia EDS up to June 2018 when he sold it to Greek Public Power Corporation S.A.[236] As explained below, EDS was involved into anti-competitive arrangements with TE-TO and Gazprom.

141. In April 2018, TE-TO disclosed that it was conditioned by Gazprom to purchase natural gas from intermediary companies outside of Macedonia and to sell the electricity through local traders to an end customer designated by Gazprom based on the principle of semi tolling indexed on one regional energy exchange.[237] TE-TO also disclosed that in the second half of 2017, it convinced Gazprom not to be conditioned to sell all the generated electricity to a company in its group through a local trader, in exchange for natural gas:

> "[…] in the same period, TE-TO JSC abandoned the semi-tolling: model of cooperation with the natural gas supplier in which TE-TO JSC was conditioned to sell all produced electricity to an end buyer – a company from the group of supplier of natural gas through the local traders. This step was made with the strong: support of foreign shareholders who

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[233] [TO BE ADDED]

[234] Decision of the Commission for the Protection of Competition UP No. 10-81 dated 29 November 2019 (**C-126**)

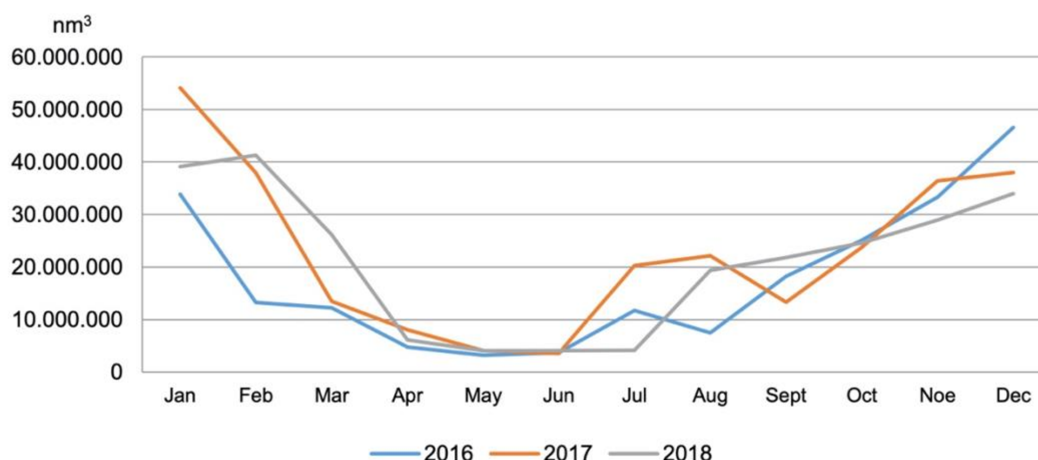
[235] Minutes of the 168th session of the Government of the Republic of North Macedonia dated 3 December 2019 (**C-127**)

[236] Share Transfer Agreement with Compensation between Kocho Angjushev and Public Power Corporation S.A. dated 13 June 2018 (**C-129**)

[237] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), at p. 8

managed to get from the natural gas supplier - the Gazprom Group, to give up the requirement to take over electricity from TE-TO JSC in exchange for supplying natural gas, while not increased the price of natural gas. This success achieved at the end of 2017 brought a significant benefit to TE-TO JSC in the form of direct savings of more than 0.2 million euros per month. Even more significant is the obtained freedom for TE-TO JSC to trade on various stock exchanges, with different partners, in accordance with the most favorable commercial conditions. […].[238]

142. The Macedonian gas market is fully dependent on imports from Gazprom via the TransBalkan Pipeline, which passes through Ukraine, Romania, and Bulgaria.[239] The natural gas consumption in Macedonia is highest when TE-TO is operating at full capacity in order to provide heat to the district heating system operated by BEG:[240]



Monthly transmission of natural gas on national level in 2016, 2017 and 2018

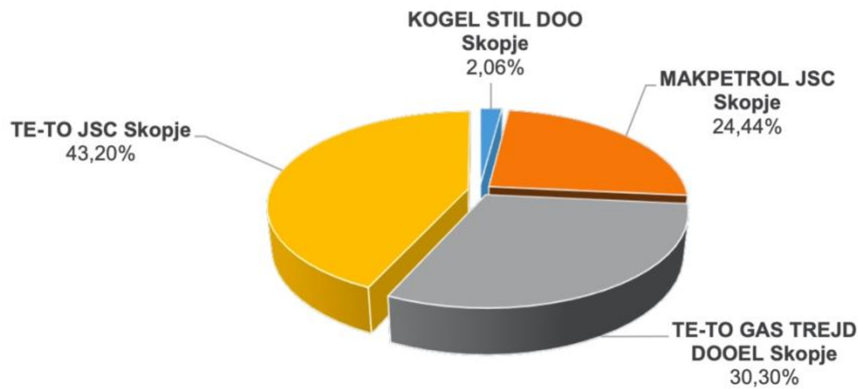
143. TE-TO is the largest importer of natural gas in Macedonia which in 2018 had a dominant market share of 73,5% on the Macedonian wholesale natural gas market:[241]

[238] See Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013**), at p. 10

[239] Annual Report of the Energy Regulatory Commission of the Republic of North Macedonia for 2018 (**C-129**), at p. 43

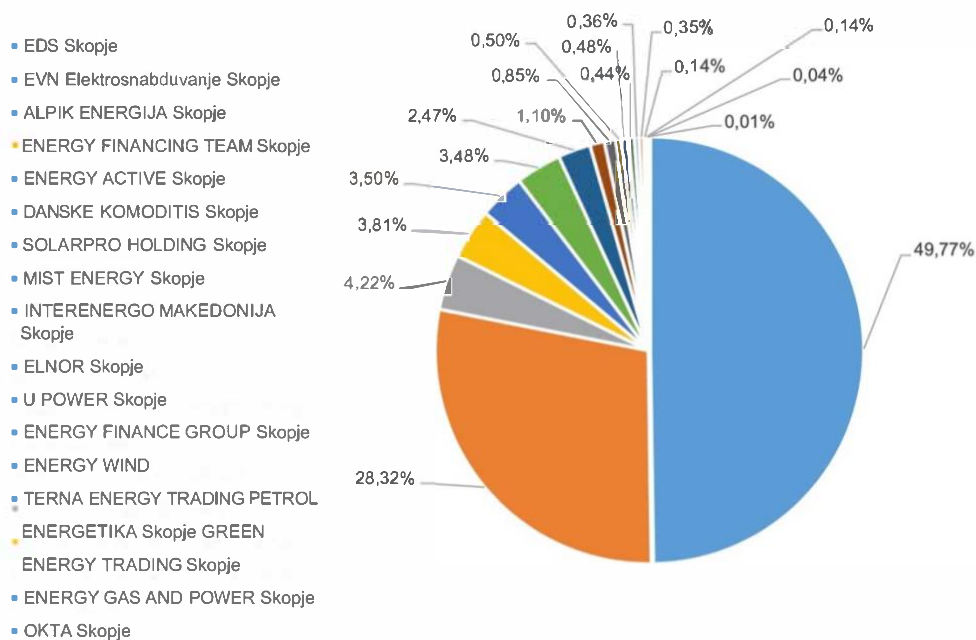
[240] Annual Report of the Energy Regulatory Commission of the Republic of North Macedonia for 2018 (**C-129**), at p. 46

[241] Annual Report of the Energy Regulatory Commission of the Republic of North Macedonia for 2018 (**C-129**), at p. 47



Market share of traders/suppliers at the wholesale natural gas market in 2018

144. The local trader to which TE-TO was referring was EDS. TE-TO and EDS have entered into a series of electricity trading agreements with TE-TO since 2014.[242] In 2018, EDS had a dominant position on the free electricity market:[243]



Market share of suppliers and traders at the free electricity market in 2018

145. Under Macedonian law, agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction, or distortion of competition in the Macedonian market are prohibited and are automatically (per se) null and void[244]. This applies to both written and oral agreements,

[242] Annual report of TE-TO for 2014 (**C-130**), at p. 20 See also Individual Electricity Sale Agreement dated 18 December 2017 (**C-131**) Individual Electricity Sale Agreement dated 17 January 2018 (**C-132**)
[243] Annual Report of the Energy Regulatory Commission of the Republic of North Macedonia for 2018 (**C-129**), at p. 27
[244] Law on Protection of Competition (Official Journal of the Republic of Macedonia no. 145/2010, as amended) **C-133**), Article 7(1) and (2)

non-binding arrangements and other types of informal collusion. In this context, it is not necessary that the agreements or practices are implemented or have any effect on the market if they were intended to have an anti-competitive effect. Similarly, it does not matter if the agreement or practice was entered into with innocent intent if its effect is anti-competitive. Furthermore, Macedonian law imposes criminal liability and imprisonment from one to ten years on the legal representatives (natural persons) of an undertaking that enter into restrictive agreements or are involved in agreements or practices resulting in the generation of substantial profits or causing substantial damage.[245]

146. Despite TE-TO's disclosures and the subsequent media reports on the restrictive agreements entered between TE-TO, EDS and Gazprom,[246] the Competition Commission, as the competent regulatory authority in Macedonia with regard to restrictive agreements and practices, did nothing to investigate.

147. In February 2020, Mrs Gordana Dimitrievska Kochovska, the then Additional Deputy Minister of Finance of the Republic of North Macedonia, voiced her concerns and suspicions of wrongdoing in relation to the State aid granted to TE-TO by the Macedonian Government and raised the following questions:

> "[…] 1. How is it allowed to postpone the collection of profit tax for 9 years, if we know that the collection of taxes becomes time-barred in 10 years, while there is a considerable danger of its obsolescence and actual collection.
>
> 2. How does the state protect the collection of the tax as budget revenue, if it does not provide for any security or guarantee in case of default?! The text of the contract does not provide for any security, pledge, mortgage or similar.
>
> 3. If the tax was due in the month of March 2019, why was the tax not enforced until the state aid agreement was concluded? Why is this firm that is competitive in the market privileged?
>
> 4. Why is the Decision on the granting of state aid not published in the Official Gazette despite the obligation according to the Government's Rules of Procedure, and why is it hidden from the public eye, when with this decision it is decided not to collect a tax, which essentially implies the disposal of citizens' money. Shouldn't the citizens be informed how the Government has decided to dispose of their funds?!
>
> 5. Why is state aid given to a company that has already been approved for a reorganization plan so that it can continue its work normally and for which the debts to other creditors have already been written off.
>
> 6. Why didn't JSC TE-TO take a loan from commercial banks, like every company, in order to overcome the liquidity problem?

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[245] Criminal Code (Official Journal of the Republic of Macedonia no. 37/96, as amended), (**C-085**), Article 283(1) ("A responsible person in a legal entity who will enter into an agreement or participate in the conclusion of an agreement, decision or concerted conduct, prohibited by law, which aims to prevent, limit or distort competition, and therefore the legal entity will acquire property benefit on a large scale or will cause damage on a large scale, shall be punished with imprisonment from one to ten years.")

[246] Lider article (9 December 2019) "PART ONE: Zaev and Angjushev part of a crime worth 200 million euros - together with the Russians!", <https://lider.com.mk/ekonomija/prv-del-zaev-i-angjushev-del-od-kriminal-vreden-200-milioni-evra-zaedno-so-rusi/>, last accessed 16 November 2022 (**C-134**)

7. And finally, if the Government saw justification in such procedures, why did it not delay the payment of the debt in accordance with the Tax Procedure Law, where the payment of the tax debt can be postponed for a certain period in a lump sum or in instalments, but not more than 36 monthly instalments, or maybe, all this "deferral of tax collection" is tax pardon [....]"[247]

148. The Macedonian Government never responded to the above questions. In the meantime. TE-TO praised the Macedonian Government for granting State aid to TE-TO in order to preserve TE-TO's reorganisation and claimed that it made a good deal for Macedonia:

"[…] In fact, with the reorganization plan, the state received an unplanned claim from TE-TO of an additional 16 million euros, not because of the business activity of TE-TO, but because of the write-off of the shareholders' investments in the company. In that way, the state made a good deal for itself, because it retained the business venture of TE-TO and ensured continuous annual inflows from TE-TO, to the state of 6-8 million euros, as well as an additional 16 million euros gift from TE-TO to the state, which TE-TO will pay after 9 years […]"[248]

149. The State aid was unlawful, but the Macedonian Government made every effort to sustain it. In a disclosure made by TE-TO in its annual financial statements, in 2020, in a meeting between Mr Zoran Zaev, then Prime Minister of the Republic of North Macedonia and signatory of the State Aid Agreement, and then acting general director of TGC-2, Mrs Nadezhda Pinigina, Mr Zoran Zaev highlighted that the Macedonian Government is willing to do absolutely anything that might be required, including legislative changes, in order to sustain the State aid granted to TE-TO:

"[…] At the meeting, Mr Zaev emphasized the Government's position that the company TE-TO is of great importance to the Republic of North Macedonia and that the Government will do everything in their power to help TE-TO JSC so that the company may continue to exist and further contribute to the Macedonian economy. Regarding the debt of TE-TO JSC in relation to unpaid corporate income tax for 2018, Mr Zaev pointed out that this issue was regulated by the Agreement and the Annex, which are valid and in force, and they are already being implemented by the PRO by not implementing the debt collection. There are ambiguities in the law regarding the manner of implementation of the Agreement and the Annex and their reflection in the accounting records of the PRO. The Prime Minister undertook to discuss this issue after the appointment of the Director of the PRO, and to find an appropriate solution with the PRO in accordance with the existing regulation, and if necessary, through intervention in the laws. […]"[249] [emphasis added]

150. Mrs Nadezhda Pinigina stepped down from the position of general director of TGC-2 in February 2021 when she was arrested in Russia under the accusation of abuse of official

[247] MKD.mk article (7 February 2020) "Dimitrieska Kochoska - There is a suspicion of crime in the TE-TO case", < https://www.mkd.mk/makedonija/sudstvo/dimitrieska-kochoska-ima-somnevanje-za-kriminal-vo-sluchajot-te-to>, last accessed 10 November 2022 (**C-135**)

[248] Vecer press article (9 February 2020), "TE-TO: With the state aid, the government made a good deal for itself", https://www.vecer.press/те-то-со-државната-помош-власта-направ/, last accessed 10 November 2022 (**C-136**)

[249] Annual financial statements of TE-TO for the year ended on 31 December 2021 (**C-137**), at pp. 12-13

powers and large-scale tax evasion. In October 2021, she pleaded guilty for the committed crimes and compensated the Russian federal budget for damages of RUB 50 million.[250]

151. On 27 November 2020, the State Commission for the Prevention of Corruption of the Republic of North Macedonia ("**Anticorruption Commission**") enacted a decision establishing that the State aid granted to TE-TO was unlawful and that the State Aid Agreement should be terminated.[251] Prior to making the decision, the Anticorruption Commission held a meeting with Mr Zoran Zaev who acknowledged that the procedure for granting of State aid to TE-TO was in breach of Macedonian law and that the State Aid Agreement would be terminated.[252] Mr Zoran Zaev also said that the Macedonian Government refrained from making legislative amendments in order to sustain the State aid granted to TE-TO, for "principled reasons".

152. On 1 December 2020, the Macedonian Government decided to unilaterally terminate the State Aid Agreement (as amended).[253] Immediately thereafter, the Competition Commission annulled[254] its decisions for authorising the State aid to TE-TO since it found that due to the termination of the State Aid Agreement, their implementation is not possible.

153. In March and April 2021, TE-TO paid its outstanding corporate income tax debt for 2018 to the Public Revenue Office by utilising its own funds and by obtaining external financing – loan from Komercijalna Banka in the amount of EUR 10 million.[255]

(b) IN BREACH OF THE TREATY ESTABLISHING ENERGY COMMUNITY

154. Macedonia is a party to the Treaty establishing Energy Community ("**TEC**") that was signed in October 2005 in Athens and entered into force in July 2006.[256] Under the TEC,[257] Macedonia is required to implement the acquis communautaire, including competition law.[258] Macedonia is under an obligation to introduce, to the extent the trade of network energy between the parties to the TEC may be affected, rules prohibiting cartels, abuses of a dominant position, and rules prohibiting State aid. Macedonia is also obliged to ensure efficient implementation of its obligations under the TEC, including efficient enforcement.[259]

[250] "Former Head of TGC-2 Nadezhda Pinigina Pleaded Guilty and Released Under House Arrest." Portal About Energy in Russia and in the World, 19 Oct. 2021, Экс-глава ТГК-2 Надежда Пинигина признала вину и отпущена под домашний арест (peretok.ru) (**C-138**),

[251] Non-confidential version of the Decision of the State Commission for the Prevention of Corruption no. 12-120/33 dated 27 November 2020 (**C-139)**, at pp. 1 and 3

[252] See Decision of the State Commission for the Prevention of Corruption no. 12-120/33 dated 27 November 2020 (**C-020**), at p. 3

[253] Minutes of the 25th session of the Government of the Republic of North Macedonia dated 1 December 2020 (**C-140**)

[254] Decision of the Commission for the Protection of Competition UP No. 10-106 dated 5 January 2021 (**C-141**) and Decision of the Commission for the Protection of Competition UP No. 10-106 dated 5 January 2021 (**C-142**)

[255] Annual financial statements of TE-TO for the year ended on 31 December 2021 (**C-137**), at pp. 12-13

[256] Council Decision 2006/500/EC of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty (**CL-003**) ("TEC")

[257] TEC, Articles 5, 6, and 11

[258] TEC (**CL-003**), Annex 1

[259] TEC (**CL-003**), Article 6

Public undertakings, including undertakings providing services of general economic interest, must also comply with these rules.[260]

155. The TEC prohibits any public aid, which distorts or threatens to distort competition by favouring certain undertakings or certain energy resources,[261] in violation of Article 107 of the Treaty on the Functioning of the European Union ("**TFEU**"). Any practices contrary to the TEC must be assessed based on criteria arising from the application of the rules of Article 107 of the TFEU.[262]

156. Article 107 of the TFEU prohibits the provision of advantages, in any form, by national public authorities to undertakings on a selective basis. Hence, prohibited State aid exists if four cumulative conditions are fulfilled.[263] First, the measure must confer an advantage on its recipients that relieves them from charges that are normally borne by undertakings. Second, the advantage must be granted by the state or through state resources. Third, the advantage conferred must be selective in that it favours "certain undertakings or the production of certain goods". Fourth, the measure must affect competition and trade between Member States. In the State aid assessment, the most crucial factor is selectivity.[264]

157. By granting TE-TO State aid in the form of a nine-year deferral of the payment of the corporate income tax debt and the deferral and subsequent extinguishment of the corporate income tax monthly advance payments without calculating interest, Macedonia acted in breach of the TEC. The point of reference for Macedonia when assessing the compatibility of environmental and energy aid with the functioning of the TEC is Article 107 of the TFEU.

158. A measure by which the public authorities grant certain undertakings a favourable tax treatment which places them in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 107(1) of the TFEU.[265] As a rule, fiscal measures of a general nature that apply to all undertakings without distinction fall within the remit of the Member States' fiscal autonomy and cannot constitute State aid, since they do not selectively advantage certain undertakings over others. By contrast, fiscal measures that misapply national tax law and this results in a lower amount of tax or discriminate

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[260] TEC (**CL-003**), Article 19
[261] TEC (**CL-003**), Article 18(1)(c)
[262] TEC (**CL-003**), Article 18(2)
[263] *See* Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union, C/2016/2946, OJ C 262/1, para. 5 (19 July 2016), available at https://eur-lex.europa.eu/legal-content/EN/TXT/ PDF/?uri=CELEX:52016XC0719(05)&from=EN, last accessed 27 October 2022) ("Commission Notice on the notion of State aid (2016)"). (**CL-004**),
[264] *See*, e.g. PT: ECJ, 6 Sept. 2006, Case C-88/03, *Portuguese Republic v. Commission of the European Communities* (**CL-005**), ¶ 54
[265] Case C-105/14 Taricco and Others EU:C:2015:555 (**CL-006**), ¶ 61; Case C-6/12 P Oy EU:C:2013:525 (**CL-007**), ¶ 18; Joined Cases C-106/09 P and C-107/09 P Commission and Spain v Government of Gibraltar and United Kingdom (**CL-008**), ¶ 72-73; Joined Cases C-78/08 to C-80/08 Paint Graphos and Others EU:C:2009:417 (**CL-009**), ¶ 46; and Case C-387/92 Banco Exterior de España EU:C:1994:100 (**CL-010**), ¶ 14.

between taxpayers in a similar factual and legal situation constitute, in principle, State aid.[266]

159. Furthermore, under the European Commission's Energy and Environmental State aid Guidelines, aid for district heating and district cooling and cogeneration of heat and electricity will only be considered compatible with the internal market if granted for investment, including upgrades, to high-efficient CHP and energy-efficient district heating and district cooling.[267]

III. ARGUMENT

A. The Tribunal has jurisdiction over GAMA's claim

160. GAMA satisfies the Treaty's procedural and jurisdictional requirements. To establish the Tribunal's jurisdiction, GAMA must show that:

(a) It is a Turkish investor;

(b) It has made an investment in Macedonia;

(c) It satisfied the procedural conditions set out in Article VII(1) and (2) of the Treaty; and

(d) Its claims fall within the scope of a dispute-settlement clause in Article VII(1) of the Treaty

161. As explained in the following paragraphs, GAMA satisfies each of these elements. Thus, the Tribunal has jurisdiction over GAMA's claims.

1. GAMA IS A TURKISH INVESTOR

162. Article I(2)(b) of the Treaty defines an investor, in relevant part, as:

"For the purpose of this Agreement;
[…]
2.The term investor "investor" means:
[…]
b) corporations, firms or business associations incorporated or constituted under the law in force of either of the Parties and having their headquarters in the territory of that Party."

163. GAMA is a joint stock company incorporated under the laws of the Republic of Turkey and with headquarters in Ankara, Turkey. Therefore, GAMA is a protected investor under the Treaty.

[266] Commission Notice on the notion of State aid (2016) (**CL-004**), ¶ 174

[267] See Communication from the Commission Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01) (**CL-011**), ¶¶ 139-141

2. GAMA MADE A PROTECTED INVESTMENT IN MACEDONIA UNDER THE TREATY

164. Article I(1) of the Treaty provides a broad definition of what constitutes an investment protected by the Treaty:

> "For the purpose of this Agreement;
> 1. The term 'investment', in conformity with the hosting Party's laws and regulations, shall include every kind of asset in particular, but not exclusively:
> (a) shares, stocks or any other form of participation in companies,
> (b) returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment,
> (c) movable and immovable property, as well as any other rights in rem such as mortgages, liens, pledges and any other similar rights,
> (d) copyrights, industrial and intellectual property rights such as patents, licenses, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights,
> (e) business concessions conferred by law or by contract, including concessions to search for, cultivate, extract or exploit natural resources on the territory of each Party as defined hereafter."

165. Article I(5) of the Treaty provides that "[*a]ny change in the form of an investment, does not affect its character as an investment.*"

166. GAMA was involved in the construction of the CCPP Skopje based on the EPC Contract with a total value of EUR 135,8 million. The EPC Contract involved significant contribution in terms of construction operations, know-how, equipment, and qualified personnel over 5 years. [268] The outstanding claim of GAMA under the EPC Contract, which was subject to treatment in breach of the Treaty and customary international law, is part of the entire investment operation and a claim for money under the Treaty. [269] Additionally, the right to arbitration under the EPC Contract, which forms part of GAMA's rights under the EPC Contract and was extinguished through the acts of the Macedonian courts, constitutes a right to legitimate performance having a financial value related to an investment.[270]

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[268] GAMA Holding, 220 MW Skopje Combined Cycle Power Plant, https://holding.gama.com.tr/en/projects/gama-power/220-mw-skopje-combined-cycle-cogeneration-power-plant/ (**C-003**)

[269] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008 (**CL-012**), ¶¶ 184-185; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶¶ 80-82

[270] *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007 (**CL-014**), ¶ 110 (considering that the "entire operation" including the underlying "Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration" was an investment under Article 25 of the ICSID Convention."); *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (**CL-015**), ¶ 117 ("At this juncture, the Tribunal observes that the right to arbitration is a distinct 'investment' within the meaning of the BIT because Article I(2)(a)(ii) defines an investment inter alia as 'claims to […] any other rights to legitimate performance having financial value related to an investment'. The right to arbitration could hardly be considered as something other than a "right […] to legitimate performance having financial value related to an investment".) *Ibid.*, ¶ 96 ("Before turning to the analysis having led to this conclusion, the Tribunal wishes to emphasize that an investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing. […]")

167. Therefore, GAMA is a protected investor that has made a protected investment within Macedonia, as defined in the Treaty.

3. GAMA HAS SATISFIED THE PROCEDURAL CONDITIONS UNDER THE TREATY

168. Article VII(2) of the Treaty grants GAMA the option of submitting his dispute in connection with his investment to arbitration pursuant to the ICC Rules, if the dispute cannot be settled through negotiations within six months following the date of the written notification of the dispute to the Respondent:

> "1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle these disputes by consultations and negotiations in good faith.
> 2. If these disputes cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:
> (a) the International Center for settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other states",
> (b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL),
> (c) the Court of Arbitration of the Paris International Chamber of Commerce,
> (d) the courts of justice of the hosting Party that is a party to the dispute. However, the investor who has brought the dispute before the said courts can only apply to one of the dispute settlement procedures under (a), (b) or (c) of this Article, if a final award has not been rendered within one year.
> 3. The arbitration awards shall be final and binding for all parties in dispute. Each Party commits itself to execute the award according to its national law."

169. The requirement of the six-month waiting period for amicable settlement of a dispute pursuant to Article VII(1) of the Treaty has been met.

170. GAMA attempted on several occasions, to no avail, to settle the dispute amicably with Macedonia, including by way of letters sent to the Macedonian Government on 11 November 2019 and 22 January 2020.

171. On 11 November 2019,[271] GAMA delivered a Notice of Dispute to Macedonia under the Treaty. On 25 November 2019, GAMA's legal counsel received a letter from the Chief of the Cabinet of the Prime Minister of the Republic of North Macedonia underlining that the Cabinet has carefully reviewed the Notice of Dispute and that they have forwarded it to H.E. Mr Kocho Angjushev, Vice Prime Minister in charge of Economy Matters and Coordination of Economy Resorts.[272] Following this letter, however, Macedonia did not display any intention to engage in discussions towards an amicable settlement of the dispute.

[271] Notice of Dispute dated 11 November 2019 (**C-021**)

[272] Letter from the Chief of the Cabinet of the Prime Minister of the Republic of North Macedonia dated (**C-022**)

172. On 22 January 2020,[273] GAMA sent another letter to Macedonia in reference to the Notice of Dispute reiterating its consent to submit the present dispute to arbitration, but Macedonia never replied.

173. Macedonia, therefore, failed to engage in consultations and negotiations to settle the dispute amicably within six months as of the date it has been notified about the dispute.

174. In its Request for Arbitration, GAMA accepted the offer to arbitrate contained in Article VII(2)(c) of the Treaty, pursuant to the ICC Rules. GAMA has not submitted the dispute to any other dispute settlement method, provided in Article VII(2(a)-(b) or VII(2)(d). The debt collection proceedings at the Civil Court Skopje (see paras 66 to 69 above), which are, after 10 years, still pending a decision by the Civil Court Skopje, are obsolete and constitute part of the factual matrix on the basis of which GAMA pursues its claims pursuant to the Treaty.

175. Accordingly, this dispute is validly submitted to arbitration under the ICC Rules and the Tribunal has jurisdiction to hear and decide upon claims arising from the breach of the Treaty and customary international law.

4. THE TRIBUNAL HAS JURISDICTION OVER GAMA'S CLAIMS UNDER THE TREATY AND CUSTOMARY INTERNATIONAL LAW

176. A dispute settlement clause in Article VII(1) of the Treaty refers generally to "*[d]isputes between one of the Parties and an investor of the other Party, in connection with his investment"* and does not limit the scope of investor's claims.

177. GAMA can validly seek Respondent's responsibility for Treaty breaches, including the breach of the national and most-favoured-nation (***MFN***) treatment on the basis of Article II(3) and the obligation to protect GAMA's investment against illegal expropriation on the basis of Article III of the Treaty.

178. This broad form of the dispute settlement clause also allows GAMA to advance claims seeking Macedonia's responsibility for acts in breach of customary international law.

179. Case law and doctrine confirm that customary international law may form an independent basis for claims in investment arbitration. Tribunal in *Cambodia Power Company v Cambodia* found "*the wording of […] arbitration clause […] itself wide enough to cover claims based on customary international law.*"[274] Tribunal in *Emmis International Holding v Hungary* considered that the dispute-settlement clause in the Hungary-Netherlands BIT,

[273] Letter in reference to the Notice of dispute of 11 November 2019 dated 22 January 2020 (**C-023**)

[274] *Cambodia Power Company v. Kingdom of Cambodia and Electricité du Cambodge*, ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011 (**CL-016**), ¶ 336. Ibid., ¶ 337 ("This broad form of arbitration clause (which appears, albeit with slightly different wording, in each of the agreements) would allow the Parties to articulate claims on the basis of any remedies available in law or equity, including customary international law (as long as these are claims that could be said to arise out of or be in connection with each agreement).")

limiting investor's claims to expropriation, was wide enough to cover expropriation claims under the customary international law as well.[275] Dr Kate Parlett confirms:

"Where an arbitration clause is cast in broad terms, covering any dispute relating to the investment or any dispute between the investor and the host State, then it is arguable that the parties have consented to arbitrate claims based on customary international law. […] Provided that the consent to arbitration in a treaty is broad enough to encompass claims based on customary international law, then these claims, in principle, could be within the treaty tribunal's jurisdiction."[276]

180. Tribunal, therefore, has jurisdiction to decide upon claims arising from the breach of the Treaty and customary international law.

B. Liability of Macedonia for the acts of its state organs

181. Macedonia breached its obligations under the Treaty and customary international law through the acts of the Macedonian courts, the Macedonian Government, the Public Revenue Office and the Competition Commission.

182. In its Answer, Respondent emphasises that GAMA's claim against TE-TO, resulting in local litigation proceedings and reorganisation proceedings over TE-TO at the Civil Court Skopje, concerned private parties.[277] However, this is legally irrelevant to the assessment of the Respondent's liability for the breach of its obligations under the Treaty.[278]

183. The dispute between TE-TO and GAMA has been adjudicated by the Macedonian courts, and TE-TO's reorganisation and debt restructuring has been approved by the Macedonian civil courts. It is acts of the Macedonian judiciary that breached Macedonia's international obligations under the Treaty and customary international law. Macedonia additionally interfered in the reorganisation proceedings through the acts of its executive organs, such

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[275] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), 11 March 2013 (**CL-017**), ¶¶ 82, 84

[276] K Parlett, Claims under Customary International Law in ICSID Arbitration (2016) 31(2) ICSID Review 434 (**CL-018**), pp. 454-455. *See* also, B. Demirkol, Non-treaty Claims in Investment Treaty Arbitration, Leiden Journal of International Law (2018), 31 (**CL-019**), p. 61 ("There is no ground to categorically reject the possibility that investors may bring non-IIA claims in investment treaty arbitration.") and p. 63 ("Another major category of dispute settlement provisions records broader consent compared to the provisions under other categories. IIAs incorporating such consent allow the settlement of any dispute relating to investment in investment arbitration. In that case, the investment tribunal's jurisdiction would extend beyond the claims based on investment treaty undertakings.")

[277] Respondent's Answer, ¶¶ 10-12, 18

[278] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Decision on Jurisdiction, 13 September 2007(**CL-020**), ¶¶ 101-102 ("The Respondent has argued that the Government of the Kyrgyz Republic is not a party to the dispute, which it characterises as a private dispute between Sistem and Ak-Keme, […] The Tribunal does not accept this submission. It is well established in ICSID case law that the fact that a particular action or omission may constitute a breach of contract cannot preclude the possibility that it may also constitute a breach of a BIT provision. In this case Sistem is claiming that the Kyrgyz Republic failed in its duty under the BIT to protect Sistem's investment. That clearly makes the Kyrgyz Republic, represented by its Government, a party to this dispute.")

as the Macedonian Government, the Public Revenue Office and the Competition Commission.

184. The acts of the Macedonian state organs are attributable to Respondent under Article 4 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "***ILC Articles***"), which provides that *"[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government."* [279]

185. GAMA is not requesting that the Tribunal acts as an appellate court or find that the decisions of the Macedonian courts breached Macedonian law, as implied by Respondent in its Answer.[280] GAMA asserts that acts of Macedonia's state organs breached Macedonia's international obligations under the Treaty and customary international law. Indeed, Macedonia also accepts in its Answer that GAMA's Treaty claims are reviewable under the Treaty if they concern the acts of the Macedonian judiciary in breach of the Treaty.[281]

186. Investment arbitration case law, including legal authorities cited by Respondent in its Answer, [282] confirms that the Tribunal may review the decisions of the courts both, under treaty standards of protection and denial of justice.[283]

187. GAMA will, in turn, address Macedonia's acts on the basis of treaty standards and denial of justice under customary international law.

[279] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) (**CL-021**)

[280] Respondent's Answer, ¶ 15

[281] Respondent's Answer, ¶ 18 ("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".)

[282] Respondent's Answer, notes 16 and 17 (referring to *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013)

[283] *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 132 (**CL-015**) (where the tribunal ruled that a judgment of the Jordanian Court of Cassation violated the bilateral investment treaty without finding a denial of justice); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2,* Award, 31 October 2012, ¶¶ 474-480 (**CL-022**), ¶¶ 474-480, 521-521 (where the tribunal found that an interim order of the Supreme Court breached the FET standard in the form of a due process violation and constituted expropriation, although a denial of justice was not pleaded); *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023**), ¶¶ 405-406, 412 (where the tribunal found that a series of decisions issued by the Ukrainian courts invalidating the investor's shareholding in a local company violated the FET standard); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 181 (finding expropriation of the investment through acts of Bangladeshi courts, differentiating it from a denial of justice)

C. Expropriation of GAMA's investment

188. Article III of the Treaty protects GAMA's investment against the illegal expropriation:

> "1. Investments shall not be expropriated, nationalised or subject, directly or indirectly, to-measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II of this Agreement.
>
> 2. Compensation shall be equivalent to the market value of the expropriated investment before the expropriatory action was taken or became known. Compensation shall be paid without unreasonable delay and be freely transferable as described in paragraph 2 Article IV.
>
> 3. Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Party treatment no less favourable than that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses."

189. The expropriation of GAMA's investment in breach of Article III of the Treaty occurred through the combined effects of the:

(a) unreasonably protracted debt collection proceedings between GAMA and TE-TO before the Macedonian courts in excess of 10 years, which are still pending, concerning a simple recovery of GAMA's claim under the straight-forward Settlement Agreement and which are tainted by serious procedural irregularities, including wrongful assumption of jurisdiction and wrongful application of Macedonian substantive law in disregard of both, the arbitration and the governing law clause in the EPC Contract and persistently denying GAMA's claim despite its acknowledgement by the Macedonian courts in TE-TO's reorganisation proceedings;

(b) the cram down by the Macedonian courts of a manifestly unlawful reorganisation plan on GAMA, by providing preferential treatment to TE-TO's shareholders over GAMA in blatant disregard of the fundamental principles of the Bankruptcy Law, resulting in the denying default interest on GAMA's claim, taking 90% of GAMA's principal claim and suspension of the payment of the remaining 10% for a period that exceeds more than twice the maximum permitted statutory deadline for the implementation of the reorganisation under the Bankruptcy Law;

(c) the granting of unlawful State aid to TE-TO by the Macedonian Government, in egregious breach of Macedonian law, for the sole purpose of preventing the collapse of TE-TO's reorganization and the re-opening of bankruptcy proceedings where GAMA and other unsecured creditors would be entitled to 100% of their claims.

190. Case law confirms that decisions of local courts can amount to expropriation, entailing liability of the state under the international law. Tribunal in *Saipem v Bangladesh* found

expropriation by Bangladeshi courts of investor's residual contractual rights under the investment as crystallized in the ICC award, which was nullified by the Bangladeshi Supreme Court.[284] Tribunal considered that a showing of judicial expropriation does not require a denial of justice:

"The Tribunal agrees in substance with Saipem's analysis. Saipem's case is one of expropriation […]. While the Tribunal concurs with the parties that expropriation by the courts presupposes that the courts' intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice."[285]

191. Tribunal in *Rumeli v Kazakhstan* confirmed that acts of judiciary may amount to expropriation: "*[w]hereas most cases of* expropriation *result from action by the executive or legislative arm of a State, a taking by the judicial arm of the State may also amount to an expropriation*." [286] Other case law is in accord.[287]

192. The above applies also to the taking in the context of bankruptcy proceedings or suspension of payments. Tribunal in *Dan Cake v Hungary* considered that the acts of the Hungarian bankruptcy court "*had the effect of depriving [the investor] of the ownership of its investment, and can therefore be considered to be measures 'having the equivalent effect' to an expropriation, even if it has not been established that they constitute an expropriation stricto sensu*." [288] Tribunal in *Deutsche Bank v Sri Lanka* considered that suspension by Sri Lankan Supreme Court and the Central Bank, of payments owed to an investor under the commercial contract, amounted to an expropriation of investor's claim to money under the relevant treaty. [289]

193. The developments described above took place step by step and with each aggravating the situation of GAMA. Each of the events assessed in isolation, constitute an expropriation of GAMA's investment. Also, all these acts together constitute a creeping expropriation of GAMA's investment through a composite act in the sense of Article 15 of the ILC Articles.[290]

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[284] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 122 ("In its Decision on Jurisdiction, the Tribunal has already held that the right to arbitrate and the rights determined by the Award are capable in theory of being expropriated."), ¶ 129 ("In respect of the taking, the actions of the Bangladeshi courts do not constitute an instance of direct expropriation, but rather of "measures having similar effects" within the meaning of Article 5(2) of the BIT. Such actions resulted in substantially depriving Saipem of the benefit of the ICC Award. This is plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is "a nullity". Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.")

[285] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009, (**CL-024**), ¶ 181

[286] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (**CL-025**), ¶ 702

[287] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 (**CL-059**), ¶ 118; *OAO "Tatneft" v. Ukraine, PCA Case No. 2008-8*, Award on the Merits, 29 July 2014 (**CL-023**), ¶ 461

[288] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 78

[289] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 (**CL-022**), ¶¶ 520-521

[290] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023**), ¶ 462 ("To the extent that a judicial decision forms an integral part of a chain of acts that, taken together, might qualify as a composite act and result in a wrong inflicted on the affected individual, such acts can justify a finding of liability under Article 15(1) of the Articles even if each of such acts individually might not be sufficient for that finding of

194. The final result of these acts taken together was that in reorganisation proceedings, GAMA was deprived of interest on its principal claim, its principal claim was lowered to 10%, and its repayment was suspended for more than ten years, well beyond the permitted statutory deadline of five years under the Bankruptcy Law. GAMA was substantially, irreversibly and permanently deprived of the economic value of its investment. The taking of GAMA's investment is illegal and does not comply with the requirements set forth by Article III(1) of the Treaty.

1. LACK OF DUE PROCESS AND DISCRIMINATION

195. The expropriation requires a compliance with due process and must be free from arbitrariness. The International Court of Justice (ICJ) defined arbitrariness as "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*". [291]

196. The taking of GAMA's claim to money is intertwined with substantial procedural irregularities and arbitrary acts of Macedonian courts, including extinguishment of GAMA's right to arbitration against TE-TO, wrongful application of substantive law, extreme misapplication of the law, excessive duration of proceedings before the Macedonian courts of 10 years and approving reorganisation plan of TE-TO in a seriously inadequate and shocking departure from the Bankruptcy Law.

197. The following actions of Respondent's state organs constitute a violation of required due process of law under both, the Macedonian and international law, as detailed below:

(a) The failure of the Macedonian courts to observe the arbitration clause in the EPC Contract and to decline the jurisdiction over the dispute between GAMA and TE-TO, constituted an abuse of rights and violation of the New York Convention, both of which were considered relevant to find an expropriation in *Saipem v Bangladesh* case.[292] The Macedonian courts failed to observe Article II of the New York Convention, which is binding upon Macedonia and Turkey, requiring Macedonian courts to "*recognize an agreement in writing under which the parties undertake to submit to arbitration*", and to "*refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed*". The disregard of the arbitration clause in the EPC Contract was also in breach of the provisions of the Macedonian law (see above at paras 50 to 57) and in disregard of the fact that TE-TO itself relied on the arbitration agreement in interim injunction proceedings at the same court (see above at para. 33). These acts resulted in the permanent and unlawful taking of Claimant's right to arbitration, as part of Claimant's rights under the EPC Contract.

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wrongful conduct."); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (**CL-025**), ¶¶ 684, 708; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007(**CL-027**), ¶ 263

[291] *Elettronica Sicula S.p.A. (ELSI)*,) (United States of America v. Italy,), Judgment, 20 July 1989 ICJ 15 (**CL-028**), ¶ 128; *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146

[292] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶¶ 161, 167

(b) The Macedonian courts failed to apply the contractually agreed English law to the merits of the dispute. The EPC Contract in Sub-Clause 1.4 of Particular Conditions of Contract provides: "*The Contract is governed by the laws of England*". Pursuant to Macedonian law, the Macedonian courts should have *ex officio* applied English law to the merits of the dispute (see above paras. 48 to 49). Instead, the Civil Court Skopje arbitrarily chose to apply the Macedonian law, which was endorsed by the higher instance courts, thereby overriding the consent of the parties to the EPC Contract to apply English law without any plausible argumentation. GAMA objected on several occasions to the application of the Macedonian law, but to no avail (see para. 49 above). These acts resulted in a taking of GAMA's contractual right to English law as a governing law of its contractual relationship with TE-TO.

(c) The failure of the Civil Court Skopje and the Appellate Court Skopje to consider GAMA's claim under the straight-forward Settlement Agreement as unconditional and disregard the fact that GAMA's claim was acknowledged by the same courts in TE-TO's reorganisation proceedings amount to a breach of due process and denial of justice (see Section III.221.E below). Even after the Supreme Court on 23 December 2020, eight years after GAMA commenced debt collection proceedings, found that the Civil Court Skopje and the Appellate Court Skopje wrongfully found that GAMA's claim was conditional on the fulfilment of the tasks in the Punch List, a condition not found in the Settlement Agreement, and referred the case back to the Civil Court Skopje, the latter ignored instructions of the Supreme Court and again denied GAMA's claim (see paras. 61 to 68 above). After more than nine years since GAMA filed for the enforcement of its claim at the Notary Public, the Appellate Court Skopje acknowledged violations of the Macedonian civil procedure and contradictory decisions of the same court with respect to the treatment of GAMA's claim in breach of the finality rule (see para 67 above). The case is still pending a decision by the Civil Court Skopje despite that it is now obsolete.

(d) The excessive duration of debt collection court proceedings to adjudicate a non-complex dispute for more than 10 years until the pursuit of GAMA's claim became obsolete due to TE-TO's reorganisation, as confirmed by the Macedonian courts in a separate set of proceedings, constitute a breach of GAMA's right to a trial within reasonable time and due process under the Macedonian law, Treaty and customary international law (see Sections III.221.E, III.287.H and III.293.I below). Case law in the context of expropriation claims confirms that "*the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard*."[293] The effect of the Macedonian civil courts' delays in dealing with GAMA's claim against TE-TO permanently deprived GAMA of the possibility to obtain the repayment of its claim against TE-TO.

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[293] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (**CL-029**), ¶ 435

(e) The acts of the Macedonian courts, which crammed down TE-TO's reorganization plan in a shocking departure from Macedonian law, resulting in the denying default interest on GAMA's claim, writing-off of 90% of GAMA's claim against TE-TO, unlawfully privileging TE-TO's shareholders and arbitrarily suspending the payment of 10% of GAMA's claim for 12 years, well beyond the permitted statutory deadline of five years under the Bankruptcy Law (see Section II.69.4 above), constitute a permanent and irreversible taking of GAMA's claim for money. Expert report of Mr Kostovski attests to numerous fatal deficiencies committed by the Civil Court Skopje in the proceedings leading to the approval of the Reorganisation Plan dated 6 June 2018. Specifically:

(i) the Civil Court Skopje should have rejected TE-TO's Proposal for reorganisation, since conditions for commencement of bankruptcy proceedings were not met, the plan was incomplete and in material breach of the Bankruptcy Law;[294]
(ii) instead of rejecting TE-TO's Proposal for reorganisation, the Civil Court Skopje adopted a decision for security measures[295] and appointed the bankruptcy trustee in breach of the Bankruptcy Law; [296]
(iii) instead of rejecting TE-TO's Proposal for reorganisation, the Civil Court Skopje allowed on several occasions TE-TO to substantively correct its Proposal for reorganisation, in breach of the Bankruptcy Law;[297]
(iv) the Civil Court Skopje failed to assess that TE-TO's account was blocked due to actions of TE-TO's shareholders based on loans and the Loan acceleration agreements, [298] which were null and void, as the court itself subsequently confirmed (see para. 118 above), and whether these claims of a lower payment priority could constitute grounds for insolvency;
(v) both, the Reorganisation plan dated 4 April 2018 and Reorganisation plan dated 6 June 2018, violated fundamental principles on the priority of creditors under the Bankruptcy Law. Shareholders' claims, which are of the lowest ranking order, were unlawfully included in the same class with higher ranking order creditors, such as GAMA. Shareholders should have been either denied the right to vote or included in a separate shareholders class as residual creditors.[299] Civil Court Skopje's failure to observe priority rules under the Bankruptcy Law resulted in preferential treatment of shareholders and unlawfully enabled them to outvote all other unsecured creditors,[300] including GAMA, which – without considering voting rights of TE-TO's shareholders – would have otherwise had the decisive influence on the outcome of the voting (see para. 99 above);
(vi) the deadline for implementation of the reorganisation plan and repayment of the remaining 10% of GAMA's claim was in breach of the Bankruptcy

[294] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 12, 19-39
[295] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 41 - 45
[296] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 46 - 47
[297] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 49 - 50, 53, 61-65, 67-69
[298] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 51
[299] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 70 – 71, 76 – 83
[300] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 70, 78 - 79

Law, which provide for five years as the maximum period of implementation with respect to claims, such as GAMA's.[301]

The Civil Court Skopje and the Appellate Court Skopje, in breach of Claimant's due process rights and right to a fair trial, as part of required due process,[302] disregarded GAMA's objections, and failed to address these crucial deficiencies in reorganisation proceedings (see paras. 104 to 121 above).

(f) unlawful interference by the Macedonian Government, the Public Revenue Office and the Competition Commission in order to prevent the collapse of TE-TO's reorganization and its insolvency (see Section II.127.5 above), wherein claims of unsecured creditors, including GAMA's, would have been paid in its entirety (see paras 93 to 94 above)[303]

198. Case law confirms the relevance of due process and non-arbitrary treatment in local reorganization proceedings in establishing the liability for treaty breaches. Tribunal in *Petrobart v The Kyrgyz Republic* considered that "*as a Contracting Party to the Treaty the Republic was under an obligation to carry out […] reorganisation [of a debtor company owing money to the investor] in a way which showed due respect for investors such as Petrobart*".[304] Tribunal in *Dan Cake v Hungary* in the context of a denial of justice claim considered that acts of the Hungarian bankruptcy court met the test of an arbitrary treatment from *ELSI* case of "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*."[305] This test has been met also in the present case.

199. In addition to taking of GAMA's claim in breach of due process, Macedonia failed to act *"in a non-discriminatory manner*" and in accordance with "*the general principles of treatment provided for in Article II of this Agreement*", referred to in Treaty's expropriation clause.

200. Article II of the Treaty, *inter alia*, obliges Macedonia to accord to GAMA's investment treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country. As will be explained in Section III.206.D below, the decisions of the Macedonian courts, which approved the write-off of 90% of the GAMA's principal claim and accrued interest in favour of TE-TO, treated GAMA less favourably in comparison to Macedonian or foreign parties and treatment of their investments in TE-TO's reorganisation proceedings.

201. Macedonia's expropriation of GAMA's investment was discriminatory and therefore inconsistent with the general principles of treatment provided for in Article II of the Treaty.

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[301] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 72-74

[302] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (**CL-029**), ¶ 435

[303] Expert Report on Bankruptcy Law, ¶ 86

[304] *Petrobart Limited v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**), ¶ 411.

[305] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146

2. NO PROMPT, ADEQUATE AND EFFECTIVE COMPENSATION

202. Macedonia has provided no compensation to GAMA (let alone prompt, adequate and effective compensation) in respect of the expropriation of the GAMA's investment. On the contrary, the inevitable consequence of the taking of the GAMA's investment has been the taking of a claim for money under the Settlement Agreement.

3. NO PUBLIC PURPOSE

203. Bankruptcy proceedings in general are within the state's lawful regulatory power. However, the public purpose element requires not only that the State identify a public policy goal, but also demonstrate that the expropriatory measure was indeed adopted to pursue such a goal.[306]

204. The main purpose of any insolvency or reorganization proceedings is protection of creditors. In the specific circumstances of this case, the reorganisation proceedings did not serve any such purpose, but were fraudulently instrumentalized by TE-TO's shareholders and fully endorsed by the Macedonian courts in manifest breach of the Bankruptcy Law, in a discriminatory-manner and in disregard of due process of law.

205. The reorganisation of TE-TO was not necessary. As explained above at paras 71 to 78, TE-TO did not meet conditions for insolvency,[307] which was based on shareholders claims under null and void Loan acceleration agreements (see above at para. 118). Indeed, the purpose and legality of TE-TO's reorganisation proceedings have been questioned both, by aggrieved creditors, public and Macedonia's state organs (see paras. 122 to 127, 147 and 151 above).

206. For these reasons, Macedonia's acts constitute an expropriation of GAMA's investment, contrary to Article III of the Treaty, for which the Respondent must pay compensation.

D. Macedonia breached its obligation to provide GAMA's investment MFN and national treatment

207. Article II(3) of the Treaty requires Macedonia to accord to GAMA's investment treatment no less favourable than that accorded in similar situations to investments of its investors (the "***national treatment***" clause) or to investments of investors of any third country (the "***MFN***" clause):

> "Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable."

[306] Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4, Award, 15 April 2016 (**CL-031**), ¶ 296; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006 (**CL-029**), ¶ 432

[307] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 12, 19

208. Macedonia has breached Article II(3) of the Treaty by providing GAMA and its investment treatment that is less favourable than the treatment it has accorded to investments of comparable investors, both Macedonian and of third countries. Specifically, decisions of Macedonian courts, which approved the write-off of 90% of the GAMA's claim and accrued interest in favour of TE-TO, treated GAMA less favourably in comparison to foreign and domestic creditors of TE-TO, which have been treated better than GAMA in TE-TO's reorganisation proceedings.

209. The relevant test to find a breach of the national or MFN treatment is a different treatment of entities in similar situations without reasonable justification.[308] Investors are protected against *de jure* and *de facto* discrimination without a need to establish discriminatory intent on the part of the host State.[309] Indeed, the fact that the investor is subject to the same legal framework as other investors does not exonerate the state from applying such a legal framework in a non-discriminatory way, as acknowledged by *Bayindir v. Pakistan* tribunal:

> "The mere fact that Bayindir had always been subject to exactly the same legal and regulatory framework as everybody else in Pakistan does not necessarily mean that it was actually treated in the same way as local (or third countries) investors."[310]

210. The host State's obligation to provide national treatment and MFN treatment apply also to liquidation and bankruptcy proceedings, as acknowledged by *Mondev v USA* Tribunal:

> "[…] Issues of orderly liquidation and the settlement of claims may still arise and require "fair and equitable treatment", "full protection and security" and the avoidance of invidious discrimination. A provision that in a receivership local shareholders were to be given preference to shareholders from other NAFTA States would be a plain violation of Article 1102(2) [national treatment]."[311]

211. The "*equitable treatment of similarly situated creditors*" is generally accepted to be one of the key public policy objectives of any insolvency regime, as recognized by the UNCITRAL Legislative Guide on Insolvency Law:

> "The objective of equitable treatment is based on the notion that, in collective proceedings, creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests." [312]

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[308] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (**CL-032**), ¶¶ 389-390, 399

[309] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, (**CL-027**), ¶ 321 ("The Tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.")

[310] *Bayindir Insaat Turizm Ticaret ve Sanayi AŞ v. Islamic Republic of Pakistan*, *(I)*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005 (**CL-034**), ¶ 206

[311] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 81

[312] UNCITRAL Legislative Guide on Insolvency Law, Parts One and Two (2004) (**CL-033**), p. 11 (¶ 7)

1. GAMA WAS TREATED LESS FAVOURABLE THAN TE-TO'S FOREIGN AND LOCAL SHAREHOLDERS

212. As explained in para. 108 above, under the Reorganisation Plan dated 6 June 2018, creditors were classified into two different classes of secured and unsecured creditors, without differentiating between unsecured creditors with higher and lower priority claims:

Creditors' class			**Proposed amendment of debt**
First class - Secured creditors			**No amendment**
No.	**Name of creditor**	**Amount of claim**	**Percent in class**
1.	Landesbank Berlin AG	EUR 51,4 million	95,86%
2.	Komercijalna Banka AD Skopje	EUR 2,2 million	4,14%
Second class - Unsecured creditors			**Write-off of 90% of claims and interest and suspension of payment of the residual amount for ten years until 2028**
No.	**Name of creditor**	**Amount of claim**	**Percent in class**
3.	Bitar Holdings	EUR 112 million	66.61%
4.	Toplifikacija	EUR 28 million	16.65%
5.	Project Management Consulting	EUR 8,8 million	5.24%
6.	Kardicor Investments Limited	EUR 8,7 million	5.13%
7.	Sintez Green Energy	EUR 3,9 million	2.33%
8.	GAMA	EUR 5 million	2.97%
9.	TE-TO Gas Trade	EUR 929,764	0.56%

10.	BEG	EUR 276,447	0.17%
11.	Public Revenue Office	EUR 258,254	0.15%
12.	Triglav Insurance	EUR 107,477	0.06%
13.	Balkan Energy Security	EUR 69,658	0.04%
14.	GA-MA AD Skopje	EUR 69,516	0.04%
15.	Monting Energetika Skopje	EUR 9,049	0,01%
16.	Other creditors	EUR 49,587	0%

213. Both, shareholders of TE-TO and GAMA, are unsecured creditors with claims against TE-TO. They were listed in the same class of unsecured creditors under the Reorganisation Plan dated 6 June 2018 and were considered by the Macedonian courts to be in a "*similar situation".* As will be explained below, the Macedonian courts unlawfully and without any reasonable justification privileged TE-TO's shareholders in comparison to other unsecured creditors, such as GAMA.

214. **First**, the inclusion of TE-TO's shareholders in the class of unsecured creditors with higher priority claims, such as GAMA, was unlawful under the Bankruptcy Law, materially deteriorated GAMA's position and illegally privileged TE-TO's shareholders as

a) foreign investors from Cyprus (Bitar Holdings), British Virgin Islands (Project Management Consulting) and, indirectly, Russia (TGC-2)[313] (see also chart above at para. 4) and

b) local investor from Macedonia (Toplifikacija)

and their claims against TE-TO, in comparison to GAMA and its claim against TE-TO.

215. According to the Bankruptcy Law, shareholders' claims are claims of a lower payment rank, which can be settled only after the settlement of claims of all other unsecured creditors, and which should not participate in reorganisation proceedings within the class of other unsecured creditors.[314] Under the Bankruptcy Law, TE-TO's shareholders should have been listed in a separate class of unsecured creditors.[315] Should TE-TO's shareholders been correctly listed in a separate class of unsecured creditors of lower ranking than other

[313] TE-TO's foreign shareholders could be considered as protected investors under the relevant investment protection treaties, concluded by Macedonia, such as Macedonia-Russia BIT and the Energy Charter Treaty. *See*, Agreement between the Government of the Republic of Macedonia and the Government of the Russian Federation on the promotion and mutual protection of investments, dated 21 October 1997 (**CL-035**), Article 1(1) and 1(2)(B); The Energy Charter Treaty, dated 17 December, 1994 (**CL-036**), Article 1(7)(a)(ii) and 1(6)
[314] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 70 – 71, 76 – 83
[315] Expert Report on Bankruptcy Law, ¶¶ 70, 81

unsecured creditors, as required under the Bankruptcy Law, GAMA, as the unsecured creditor with the highest claim amongst all other unsecured creditors with higher ranked claims, would have otherwise had the decisive influence on the outcome of the voting to prevent the reorganisation of TE-TO (see above at para. 99) and thereby obtain the repayment of its claim in full.

216. Moreover, GAMA was additionally discriminated against TE-TO's shareholders and other unsecured creditors through the arbitrary denial of cca. EUR 3 mio default interest on GAMA's claim at the time of the Proposal for reorganisation[316] (see above para. 98), which – if correctly taken into account for the calculation of voting rights – would have additionally enhanced the percentage of GAMA's voting rights in comparison to other unsecured creditors from the same class.

217. **Second**, the Civil Court Skopje suspended the repayment of the remaining 10% of GAMA's claim for 12 years, while under the Bankruptcy Law, the maximum permitted deadline for the implementation of the reorganization plan with respect to claims which are not based on loans, such as GAMA's, could have been at most five years,[317] as Mr Kostovski confirms.[318] In doing so, the Civil Court Skopje arbitrarily applied the 12 years suspension period, which is applicable only to claims based on loans, such as TE-TO's shareholders claims against TE-TO. In doing so, the Civil Court Skopje again privileged TE-TO's shareholders, which should have been repaid only after the repayment of GAMA's claim and other unsecured creditors.

2. APPLICATION OF SUBSTANTIVE GUARANTEES FROM OTHER TREATIES BY VIRTUE OF THE MFN CLAUSE

218. It is well established and has been repeatedly affirmed in case law that an MFN clause, such as the one contained in Article II(3) of the Treaty, entitles a claimant's investment to benefit from substantive guarantees contained in other investment protection treaties concluded by Macedonia.[319]

219. The term "*treatment*" in an MFN clause covers all substantive protections granted by Macedonia to other foreign investors, except for matters relating to customs unions, regional economic organisations and taxation pursuant to Article II(5) of the Treaty, which

[316] See also Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), pp. 35 – 37 (showing that reorganisation plan did not include GAMA's accrued interests, as opposed to other unsecured creditors)

[317] Bankruptcy Law (**C-075**), Article 215-b(2) indent 13

[318] Expert Report on Bankruptcy Law, ¶¶ 72-74

[319] *See,* e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan* ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005 (**CL-034**), ¶¶ 231-232; *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (**CL-015**), ¶ 125 and note 16; *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶¶ 11.2.1-11.2.9.; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (**CL-038**), ¶ 104; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (**CL-025**), ¶ 575

are of no relevance in the present context. Therefore, on the basis of *expressio unius est exclusio alterius*, the MFN clause extends to all matters not expressly excluded.[320]

220. The MFN provision in the Treaty therefore entitles GAMA to rely upon the substantive protections accorded to the investments of third State nationals under other Macedonia's treaties currently in force, including the duty

(a) to accord fair and equitable treatment (e.g., pursuant to Article 3(1) of the Lithuania-Macedonia BIT,[321] Article 3(1) of the Austria-Macedonia BIT[322] and Article 2(2) of the Slovakia-Macedonia BIT[323]);

(b) to accord full protection and security (e.g. pursuant to Article 3(1) of the Lithuania-Macedonia BIT and Article 3(1) of the Austria-Macedonia BIT),

(c) not to impair by arbitrary, unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments (e.g., pursuant to Article 3(2) of the Lithuania-Macedonia BIT and Article 3(2) of the Spain-Macedonia BIT[324]) and

(d) to provide effective means of asserting claims and enforcing rights with respect to investments (e.g. pursuant to Article 3(3) of the Kuwait-Macedonia BIT).

221. GAMA will address Macedonia's breaches of these standards in Sections below.

E. Macedonia breached its obligation to provide GAMA's investment Fair and Equitable Treatment

222. The MFN provision in the Treaty entitles GAMA to rely upon the substantive protections accorded to the investments of third State nationals under other Macedonia's BITs currently in force, including the duty to accord fair and equitable treatment (***FET***) pursuant to Article 3(1) of the Lithuania-Macedonia BIT,[325] Article 3(1) of the Austria-Macedonia BIT[326] and Article 2(2) of the Slovakia-Macedonia BIT[327] (see Section III.206.D above).

[320] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (**CL-038**), ¶ 104 ("The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the Croatia BIT is in consonance with this purpose. The Tribunal is further convinced of this conclusion by the fact that the exclusions in the MFN clause relate to tax treatment and regional cooperation, matters alien to the BIT but that, because of the general nature of the MFN clause, the Contracting Parties considered it prudent to exclude. A contrario sensu, other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause.")

[321] Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments dated 7 March 2011 (**CL-039**)

[322] Agreement between the Republic of Austria and the Republic of Macedonia on the Promotion and Protection of Investments dated 28 March 2001 (**CL-040**)

[323] Agreement between the Slovak Republic and the Republic of Macedonia on the Promotion and Reciprocal Protection of Investments dated 25 June 2009 (**CL-041**)

[324] Agreement between the Macedonian Government and the Spanish Government on the Promotion and Reciprocal Protection of Investments dated 20 June 2005 (**CL-042**)

[325] Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments dated 7 March 2011 (**CL-039**)

[326] Agreement between the Republic of Austria and the Republic of Macedonia on the Promotion and Protection of Investments dated 28 March 2001 (**CL-040**)

[327] Agreement between the Slovak Republic and the Republic of Macedonia on the Promotion and Reciprocal Protection of Investments dated 25 June 2009 (**CL-041**)

223. Article 3(1) of the Lithuania-Macedonia BIT, for example, provides:

"Each Contracting Party shall at all times ensure fair and equitable treatment of the investments made by investors of the other Contracting Party as well as their full security and protection."

224. Article 2(2) of the Slovakia-Macedonia BIT provides:

"Investments made by investors of either 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 operation, management, maintenance, use, enjoyment or disposal of investments in its territory by investors of the other Contracting Party."

225. Similarly, Article 3(1) of the Austria-Macedonia BIT provides:

"Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security."

226. Moreover, in the preamble of the Treaty, Turkey and Macedonia *"[a]gre[ed] that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources*."[328] As case law confirms, this is relevant for the interpretation of the MFN clause in its context and in the light of the Treaty's object and purpose pursuant to Article 31(1) of the Vienna Convention on the Law of the Treaties,[329] and further supports that the MFN clause in the Treaty allows GAMA to invoke FET guarantee from other treaties, concluded by Macedonia.

227. While each of the acts described below constitutes a violation of FET on its own, Respondent also breached the FET standard through the combined effects of the acts described below, constituting a composite act pursuant to Article 15 of the ILC Articles.[330]

1. CIVIL COURT PROCEEDINGS

228. As explained above at paras 43 to 59, the Macedonian courts wrongfully assumed jurisdiction over the dispute between GAMA and TE-TO and wrongfully applied Macedonian law, instead of English law, in contradiction with the EPC contract. Further,

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[328] Agreement between the Republic of Turkey and the Republic of Macedonia Concerning the Reciprocal Promotion and Protection of Investments, Official Journal of the Republic of Macedonia No. 05/1997 dated 14 July 1995 (**CL-001**), 4th indent

[329] *Bayindir Insaat Turizm Ticaret veVe Sanayi AŞA.S. v. Islamic Republic of Pakistan*, *(I),* ICSID Case No. ARB/03/29, Award, 27 August 2009 (**CL-032**), ¶ 155 ("[…] Indeed, even though it does not establish an operative obligation, the preamble is relevant for the interpretation of the MFN clause in its context and in the light of the Treaty's object and purpose pursuant to Article 31(1) of the VCLT."); *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (**CL-015**), ¶ 125 ("[…] In the words of the Preamble to the Treaty, Jordan and Turkey agreed 'that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.' The extinguishment of the Claimant's right to arbitration by the Jordanian courts thus violated both the letter and the spirit of the Turkey-Jordan BIT.")

[330] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023**), ¶ 462 ("To the extent that a judicial decision forms an integral part of a chain of acts that, taken together, might qualify as a composite act and result in a wrong inflicted on the affected individual, such acts can justify a finding of liability under Article 15(1) of the Articles even if each of such acts individually might not be sufficient for that finding of wrongful conduct.")

the Macedonian courts also egregiously misapplied the Macedonian law (if applicable, *quod non*) and facts to the dispute.

229. **First**, Macedonia breached the FET standard by extinguishing GAMA's right to arbitration under the EPC Contract and the Settlement Agreement.

230. The right to arbitration was an integral part of the EPC Contract. GAMA did not submit to the jurisdiction of the Macedonian courts, as Respondent tries to portray it in its Answer.[331]

231. By virtue of Article II of the New York Convention, Macedonia's courts are required to "*recognize an agreement in writing under which the parties undertake to submit to arbitration*", and in such circumstances, "*when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, […] at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*" The arbitration agreement in the EPC Contract is not "*null and void, inoperative or incapable of being performed*" and neither was this alleged at any point in proceedings at the Civil Court Skopje. GAMA had a legitimate expectation that Macedonian courts would observe the arbitration clause in the EPC Contract and apply the New York Convention properly and in accordance with international standards.

232. As explained above at paras. 50 to 57, Macedonian courts were obliged to observe the arbitration clause in the EPC Contract under the Macedonian Arbitration Law as well.[332] However, instead of applying the Arbitration Law, the Macedonian courts wrongfully applied provisions of the Private International Law and the Civil Procedure Law, which, moreover, apply to objections against "payment orders" and not against decisions for enforcement issued by a notary public, and on that basis considered TE-TO's omission to raise a jurisdictional objection in an objection against the notary public decision as its consent to the jurisdiction of the Macedonian courts (paras. 51 to 52 above). Based on the Arbitration Law, Civil Court Skopje should have declared that it has no jurisdiction once it become aware of the arbitration clause upon objections of both parties.[333] Indeed, not only GAMA in civil court proceedings, but also TE-TO itself raised a jurisdictional objection in related temporary injunction proceedings at Civil Court Skopje (see para. 33 above), which clearly evidences that both parties objected to the jurisdiction of Macedonian courts and which the Macedonian courts failed to consider.

233. It is generally accepted that the FET standard comprises the obligation to, *inter alia*, grant due process, to act transparently, to refrain from taking arbitrary or discriminatory measures, or from frustrating the investor's legitimate expectations with respect to the legal framework affecting the investment.[334] Tribunal in *Tecmed v Mexico* considered that FET standard requires from the host State *inter alia* "*to use the legal instruments that govern*

[331] Respondent's Answer, ¶¶ 23-24
[332] See Arbitration Law (**C-056**)
[333] See Arbitration Law (**C-056**), Article 8
[334] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I),* ICSID Case No. ARB/03/29, Award, 27 August 2009, ¶ 178 (**CL-032**); Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, 29 July 2008, (**CL-025**), ¶ 609

the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."[335] Guarantees in domestic legislation have been recognized by tribunals to give rise to legitimate expectations, protected by the FET standard.[336] A stable legal and business environment is an essential element of the FET treatment, recognized also by Macedonia and Turkey in 4th indent of the Preamble to the Treaty "*agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment.*"[337]

234. GAMA legitimately expected that should the dispute with TE-TO ever progress to the Macedonian courts, the latter would observe its obligations under the New York Convention and the Macedonian law and refer parties to the contractually-agreed arbitration. In failing to do so, the Macedonian courts breached GAMA's legitimate expectations in breach of the FET guarantee, which applies by virtue of the MFN clause.

235. The disregard of the arbitration clause also amounts to the breach of due process and denial of justice, as part of the FET. The right to arbitration has been considered by investment arbitration tribunals as an asset under the investment protection treaties and its extinguishment through judicial or executive acts a breach of the FET standard. Tribunal in *ATA v Jordan* held:

"The right to arbitration was an integral part of the Contract and, as noted earlier in this Award, constituted an "asset" under the Treaty. In the words of the Preamble to the Treaty, Jordan and Turkey agreed "that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources." The extinguishment of the Claimant's right to arbitration by the Jordanian courts thus violated both the letter and the spirit of the Turkey-Jordan BIT."[338]

236. Similarly, Tribunals in *Saipem v Bangladesh* and *White v. India* considered that commercial arbitral award constituted part of the original investment by investor, "*as a crystalisation of its rights under the underlying contract*," and subject to BIT protection.[339]

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[335] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (**CL-032**), ¶ 154. *See* also MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004, (**CL-038**), ¶¶ 114-115; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (**CL-025**), ¶ 609 ("The parties rightly agree that the fair and equitable treatment standard encompasses inter alia the following concrete principles: - the State must act in a transparent manner; - the State is obliged to act in good faith; - the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process; - the State must respect procedural propriety and due process. The case law also confirms that to comply with the standard, the State must respect the investor's reasonable and legitimate expectations.")

[336] *National Grid PLC v. The Argentine Republic*, Award, 3 November 2008 (**CL-044**), ¶¶ 84, ¶ 178; CMS Gas Transmission Company v. Argentina
, ICSID Case No ARB/01/8, Award, 12 May 2005 (**CL-045**), ¶¶ 133., 275, 281

[337] *See* also, CMS Gas Transmission Company v. Argentina, ICSID Case No ARB/01/8, Award, 12 May 2005 (**CL-045**), ¶ 274 ("The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable 'to maintain a stable framework for investments and maximum effective use of economic resources.' There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.")

[338] *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (**CL-015**), ¶ 125. *Ibid.*, ¶ 126

[339] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶ 7.6.10; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶¶ 110, 122, 128

237. **Second**, Macedonia through acts of its courts also breached the FET standard in that they applied the wrong substantive law.

238. The EPC Contract and the Settlement Agreement provided not only for an international arbitration, but also provided for English law as a governing law. Yet, the Macedonian courts failed to observe the contractual choice of law by parties, which they should *ex officio* pursuant to the Private International Law (see paras 48 to 49 above) and instead applied Macedonian law. The reasoning of the Appellate Court Skopje that Macedonian law should be applied since the Macedonian courts have a jurisdiction over the dispute[340] (see para 47 above) is shocking and fails to meet any domestic and international standard of due process, prohibition of arbitrary treatment and denial of justice.

239. This case, therefore, does not relate solely to the extreme misapplication of the law, amounting to a denial of justice as part of the FET standard, but to a failure of the Macedonian courts to apply the correct substantive law altogether. Based on tests developed in investment arbitration case law, the behaviour of the Macedonian courts "*shock[ed], or at least surpris[ed] a sense of judicial property*"[341] and was "*clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment*."[342] The behaviour of the Macedonian courts also breached GAMA's legitimate expectations, as part of the FET, that Macedonia's courts would observe the Macedonian law and respect the contractually agreed choice of foreign law and thereby "*use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments".*[343]

240. **Third**, the same attributes of shocking, arbitrary, clearly improper and discreditable behaviour in breach of the FET standard, must be attributed to decisions of the Macedonian courts to deny GAMA's claim under the Settlement Agreement. One of the reasons for protracted proceeding, addressed below, was the Civil Court Skopje's persistent and erroneous stance that GAMA's claim against TE-TO was conditioned on the fulfilment of other GAMA's obligations under the EPC Contract.

241. Such a legal position was not only arbitrary and contrary to the wording of the Settlement Agreement, as was - after six years of proceedings - acknowledged for the first time by the

[340] Decision of the Appellate Court Skopje TSZ-1482/14 dated 15 December 2014 (**C-008**), at p. 3 ("[…] On the other hand, in this case it is the claimant who challenged the jurisdiction of the court, that is, the proposal to pass a decision to permit enforcement based on an credible document. They were aware of the circumstance that with the defendant they have agreed the jurisdiction of the international arbitration court, but they have, nevertheless, decided to have the dispute resolved before the courts in the Republic of Macedonia with the application of the Macedonian law..[…]")

[341] *Elettronica Sicula S.p.A. (ELSI)*,) (United States of America v. Italy,), Judgment, 20 July 1989 ICJ 15 (**CL-028**), ¶ 128; Dan Cake S.A. v. Hungary, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146

[342] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 127 ("In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.")

[343] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (**CL-032**), ¶ 154. *See* also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (**CL-038**), ¶¶ 114-115

Supreme Court in 2019[344] (see para. 64 above), but was also in manifest contradiction with the fact that GAMA's claim was acknowledged by (i) TE-TO itself,[345] and (ii) by the Macedonian courts in TE-TO's reorganisation proceedings.[346] While the Supreme Court quashed previous decisions of the lower instance courts, although failing to address at all Claimant's argument that its claim was recognised in TE-TO's reorganisation proceedings,[347] and referred the case back to the Civil Court Skopje with an instruction that the court considers that there is no mutual conditionality of GAMA's and TE-TO's claims,[348] the Civil Court Skopje still ignored instruction of the Supreme Court and on 8 October 2021 again denied GAMA's claim based on purported conditionality of a claim. At the same time, the Civil Court Skopje completely disregarded the acknowledgement of GAMA's claim in TE-TO's judicial reorganisation proceedings (see para 65 above). On 30 June 2022, the Appellate Court Skopje found that the Civil Court Skopje made a substantive violation of the provisions of the civil procedure by failing to consider the fact that GAMA's claim was acknowledged in the judicial reorganisation proceedings over TE-TO and referred the case back to the Civil Court Skopje.

242. It is generally accepted that the claim for denial of justice presupposes prior exhaustion of local remedies. However, this precondition is not required when this would be evidently futile or unreasonable, including when the claim relates to excessive delays in judicial proceedings, as is the case here (see next Section below),[349] or when the proceedings became obsolete, as is the case here, considering that GAMA's claim was acknowledged and written-off in separate reorganisation proceedings at the same court.

243. **Fourth**, the acts of the Macedonian courts breached the FET standard through their contradictory handling of GAMA's claim against TE-TO. Several tribunals have found that inconsistent action of several branches of the host State can constitute a breach of FET.[350] *MTD v. Chile* tribunal held that the State "*has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is"* and *"need[ed] to be considered by the Tribunal as an unit"* in that respect.[351]

244. Once GAMA brought to the Civil Court Skopje, the Appellate Court Skopje and the Supreme Court's attention (see paras. 63 to 66 above) that its claim against TE-TO was already recognized by the same court in approving the reorganisation plan, this should

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[344] Decision of the Supreme Court of the Republic of North Macedonia Rev1 no. 49/2020 dated 23 December 2020 (**C-012**), at p. 3

[345] Letter of acknowledgment of debt from TE-TO to GAMA dated 17 March 2015 (**C-009**)

[346] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), p. 83 ("The GAMA GUC's claim is not disputed and the same is encompassed with the repayment method planned for the Second class of creditors.")

[347] Appeal by GAMA to the Supreme Court of the Republic of North Macedonia dated 24 December 2019 (**C-069**), p. 4

[348] Decision of the Supreme Court of the Republic of North Macedonia Rev1 no. 49/2020 dated 23 December 2020 (**C-012**), at p. 3

[349] Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II), PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018 (**CL-046**), ¶ 7.152 (referring also to the same position of Tribunal in *Jan de Nul v Egypt* case)

[350] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004 (**CL-038**), paras¶¶ 165-167; *PSEG Global Incorporated and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi v. Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007 (**CL-047**), ¶¶ 173, 248-249

[351] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004 (**CL-038**), ¶ 165

have led the court to uphold GAMA's claim in its entirety. Instead, four years after GAMA's claim was acknowledged in TE-TO's reorganisation proceedings and ten years after GAMA filed for the enforcement of its claim at the notary public, the proceedings are still pending.

2. EXCESSIVE DURATION OF CIVIL COURT PROCEEDINGS

245. At the time of the submission of this Statement of Claim, the proceedings at the Civil Court Skopje have been pending for 10 years.

246. As described in more detail above, on 3 December 2012, GAMA filed a request for payment of its claim against TE-TO at the Notary Public. On 4 December 2022, the Notary Public passed a decision ordering TE-TO to pay GAMA EUR 5 million with default interest. Following TE-TO's objection against the Notary Public's decision, the case was referred to the Civil Court Skopje.

247. Leaving aside the fact that the Civil Court Skopje wrongfully assumed jurisdiction and wrongfully applied Macedonian law as substantive law, the adjudication of the dispute was supposed to be simple. The dispute concerned the payment of the claim under the straight-forward Settlement Agreement. TE-TO has already explicitly acknowledged its debt to GAMA through a Letter of Acknowledgement of Debt and, in 2018, in judicial reorganization proceedings at the same court.

248. Nevertheless, it took almost six years for the Civil Court Skopje to render a judgment on the merits on 4 May 2018, abolishing the notary's decision on enforcement. It took an additional year for the Appellate Court Skopje to confirm the judgment of the Civil Court Skopje on 18 October 2019. Following the Supreme Court's judgment on 23 December 2020, which quashed judgments of the Civil Court Skopje and the Appellate Court Skopje, the case was referred back to the Civil Court Skopje. Yet, contrary to instructions of the Supreme Court, on 8 October 2021 the Civil Court Skopje again denied GAMA's claim. On 30 June 2022, the Appellate Court Skopje again quashed the judgment of the lower court and reverted the case back to the Civil Court Skopje, where the case is currently pending.

249. It is well accepted that excessive duration of court proceedings may constitute a breach of the FET standard and effective means of asserting claims and enforcing right standard:

(a) in *Pey Casado v Chile*, Tribunal considered that a period of seven years until a first instance decision by local courts amounted to a denial of justice;[352]

(a) In *White Industries v India*, Tribunal considered the Indian judicial system's inability to deal with investor's claim in over nine years a breach of the effective means of asserting claims and enforcing rights;[353]

(b) In *El Oro Mining and Railway Co.227*, the Great Britain and Mexico Claims Commission found that the passage of nine years without a hearing an award, constituted a denial of justice and that "*[e]ven those cases of the very highest*

[352] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, *(I)*, ICSID Case No. ARB/98/2, Award, 8 May 2008 (**CL-048**), ¶ 659.

[353] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶ 11.4.19.

importance and of a most complicated character can well be decided within such an excessively long time ";[354]

(c) In *Chevron v Ecuador*, Tribunal considered a delay in court proceedings of 13 to 15 years as a breach of the effective means of asserting claims and enforcing rights standard; [355]

250. Case law of the European Court of Human Rights ("***ECtHR***") likewise confirms that an excessive length of court proceedings amounts to a violation of the right to a fair trial contained in Article 6(1) of the European Convention on Human Rights ("***ECHR***"), which is binding upon both, the Republic of North Macedonia and the Republic of Turkey.[356] For example:

(a) in *Zorc v. Slovenia*, ECtHR found that a period of seven years and six months amounted to an excessive length of proceedings and constituted a breach of Article 6(1) of the ECHR.[357]

(b) in *Pakom Sloboda Dooel v. The Fomer Yugoslav Republic of Macedonia*, ECtHR found that court enforcement proceedings lasting nine years and seventeen days for three court levels were excessive in length and in breach of Article 6(1) of the ECHR;[358]

(c) in *Delić v. Bosnia and Herzegovina*, ECtHR found that providing a judgment more than seven years after the case was referred to the court was manifestly excessive and in breach of Article 6(1) of the ECHR[359]

251. Investment arbitration case law developed other relevant criteria to assess whether excessive duration of proceedings could be justified under treaty standards, such as the complexity of the dispute, the significance of interest at stake and the behaviour of litigants and courts themselves.[360] None of these justify the judicial delay of over 10 years in the case at hand. The case between GAMA and TE-TO was not complex, and the delay of proceedings could only be attributed to the behaviour of the Macedonian courts, not GAMA.

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[354] *El Oro Mining and Railway Company (Ltd.*) *(Great Britain*) *v. United Mexican States*, Award, 18 June 1931, RIAA (1931), Volume V, pp. 191-199 (**CL-049**), ¶ p. 198, ¶ 9.

[355] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I*), PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 (**CL-050**), ¶ 270.

[356] *See* for the List of the contracting parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, publicly available information on the website of the European Court of Human Rights: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005

[357] *Zorc v. Slovenia*, Application No. 2792/02, Judgment of the ECtHR, dated 2 November 2006 (**CL-051**), ¶¶ 34, 38

[358] *Pakom Sloboda Dooel v. The Fomer Yugoslav Republic of Macedonia,* Application No. 33262/03, ECtHR, Judgment of the ECtHR, dated 21 January 2010 (**CL-052**), ¶¶ 23-29

[359] *Delić v. Bosnia and Herzegovina* Application No. 59181/18, ECtHR, Judgment of the ECtHR, dated 2 March 2021 (**CL-053**), ¶¶ 16-21

[360] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶ 10.4.10. Similar criteria were developed in the jurisprudence of the European Court of Human Rights. *See*, European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights (31 August 2022), at ¶ 493 ("The reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and in accordance with the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute."), publicly available at: https://www.echr.coe.int/documents/guide_art_6_eng.pdf

252. The breach is further aggravated by the fact that due to unreasonably protracted proceedings and reorganisation of TE-TO, which took place in the meantime in a separate set of proceedings at the Civil Court Skopje, GAMA permanently lost 90% of its claim for money under the Settlement Agreement and can only hope to recover the remaining 10% after the year 2028.

253. It is generally accepted that a claim for denial of justice requires a prior exhaustion of local remedies. However, this precondition is not required when this would be evidently futile or unreasonable, including when the claim relates to excessive delays in judicial proceedings,[361] such as in this case.

254. The excessive duration of proceedings constitutes a denial of justice, as a breach of the FET standard. The excessive duration of proceedings also constitute a breach of the effective means of asserting claims and enforcing rights standard from Article 3(3) of the Kuwait-Macedonia BIT, which apply by virtue of the MFN provision in Article II(3) of the Treaty (see Section III.287.H below).

3. REORGANIZATION OF TE-TO PROCEEDINGS

255. The reorganisation of TE-TO was only possible because the Macedonian courts committed shocking decisions to the benefit of TE-TO's shareholders, based on the fictitious maturity of shareholder's claims against TE-TO and in egregious breach of the Macedonian law and the Treaty. As a result of these acts, the Macedonian courts deprived GAMA to obtain the repayment of 90% or €4.5 million of its claim and accrued interest, while the remaining 10% or €500,000 would be repaid only after 12 years, well beyond the permitted five years statutory deadline for suspension of payments under the Bankruptcy Law.

256. The treatment accorded to GAMA by the Macedonian courts was in breach of Macedonia's obligation to accord to GAMA's investment fair and equitable treatment.

257. **First**, the acts described constitute a breach of due process, arbitrary and discriminatory treatment of GAMA and its investment, as elements of the FET breach.[362]

258. The main purpose of bankruptcy law in any country, including Macedonia, is to protect creditors' interests. In case of bankruptcy of a company, creditors enjoy priority over shareholders, which means that their claims against the company will be repaid before the remaining assets, if any, are distributed to shareholders. National laws define precise rules on the ranking and order of creditors (e.g., secured, unsecured creditors), ensuring equality of creditors in the same class. One of the key objectives of any insolvency regime, as recognized by the UNCITRAL Legislative Guide on Insolvency Law, is the "*equitable treatment of similarly situated creditors*", which means that "*in collective proceedings,*

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[361] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II)*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018 (**CL-046**), ¶ 7.152 (referring also to the same position of Tribunal in *Jan de Nul v Egypt* case)

[362] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I),* ICSID Case No. ARB/03/29, Award, 27 August 2009 (**CL-032**), ¶ 178; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (**CL-025**), ¶ 609

creditors with similar legal rights should be treated fairly, receiving a distribution on their claim in accordance with their relative ranking and interests."[363] Another key objective is "*clear rules for ranking of priority claims*".[364] With respect to reorganization proceeding specifically, the general rule is that "*whatever form of plan, scheme or arrangement is agreed, the creditors will eventually receive more than if the debtor were to be liquidated.*"[365]

259. The same basic principles of the "liquidation test" and the "absolute priority rule" apply also in the Macedonian legal system (see paras. 91 and 92 above).

260. As Mr. Kostovski attests in his Expert opinion, TE-TO's reorganisation proceedings involved numerous critical flaws in breach of the basic rules of the Bankruptcy Law, which privileged TE-TO and its shareholders, completely reversed the ranking order of creditors to the detriment of GAMA and resulted in taking of GAMA's claim to money in breach of the Bankruptcy Law.

261. Mr Kostovski found that the Civil Court Skopje should have rejected TE-TO's Proposal for reorganisation, because conditions for commencement of bankruptcy proceedings were not met, the plan was incomplete and in material breach of the Bankruptcy Law,[366] but instead the court unlawfully allowed TE-TO to correct its proposal for reorganisation in breach of the Bankruptcy Law.[367] The Civil Court Skopje also failed to assess that TE-TO's account was blocked due to actions of TE-TO's shareholders of a lower ranking order, based on the Loan acceleration agreements.[368] Moreover, the approved reorganisation plan violated the fundamental principles on the ranking of creditors under the Bankruptcy Law. Shareholders' claims, which are of the lowest ranking order, were included in the same class with higher ranking order creditors, such as GAMA. Shareholders should have been either denied the right to vote or included in a separate shareholders class as residual creditors.[369] The Civil Court Skopje's failure to observe priority rules under the Bankruptcy Law resulted in preferential treatment of shareholders and unlawfully enabled them to outvote all other unsecured creditors, including GAMA.[370] GAMA would have the decisive influence on the outcome of the voting, if the normal ranking of liquidation priorities under Macedonian law would have been respected (see para. 99 above). Moreover, the approved reorganization plan arbitrarily denied of cca. 3 mio EUR default interest on GAMA's claim at the time of the Proposal for reorganisation[371] (see above para. 97), which – if correctly taken into account for the calculation of voting rights – would have additionally enhanced the percentage of GAMA's voting rights in comparison to other unsecured creditors from the same class. Mr Kostovski also confirmed that the 12 years deadline for implementation of the reorganisation plan and repayment of the remaining 10% of GAMA's

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[363] UNCITRAL Legislative Guide on Insolvency Law, Part One and Two (2004) (**CL-033**), p. 11 (¶ 7)
[364] UNCITRAL Legislative Guide on Insolvency Law, Part One and Two (2004) (**CL-033)**, p. 13 (¶ 13)
[365] UNCITRAL Legislative Guide on Insolvency Law, Part One and Two (2004) (**CL-033)**, p. 28 (¶ 25)
[366] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 12, 19-40
[367] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 49 - 50, 53, 61-65, 67-69
[368] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 51
[369] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 70 – 71, 76 – 83
[370] Expert Report on Bankruptcy Law (**CE-01**), ¶ 79
[371] See also Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), pp. 35 – 37 (showing that reorganisation plan did not include GAMA's accrued interests, as opposed to other unsecured creditors)

claim was in breach of the Bankruptcy Law, which provide for five years as the maximum period of implementation with respect to claims, such as GAMA's.[372]

262. GAMA objected on these grounds to the Reorganisation plan dated 6 June 2018 and based on legitimate doubts about judge's impartiality, requested recusal of the judge. The request for recusal of a judge was denied without GAMA being ever served with the decision and in breach of the Macedonian Civil Procedure Law, requiring the judge to cease with activities upon the submission of the request for recusal (see paras. 111 to 112 above). In a decision approving the Reorganisation plan dated 6 June 2018,[373] the Civil Court Skopje disregarded all GAMA's objections. The Decision of the Civil Court Skopje is intertwined with a series of manifestly wrong, contradictory and insufficient reasons:

(a) the court acknowledged that claims of TE-TO's shareholders are of lower priority and that under the Bankruptcy Law all creditors from the same class must be treated equally, but in contradiction with these findings still approved the reorganisation plan in disregard of priorities of creditors;

(b) acknowledged that the acceleration of the EUR 112 million claims of Bitar Holdings against TE-TO is null and void since they were concluded within 90 days before the submission of the proposal, but shockingly found that reorganization was in the best interest of TE-TO and the creditors;

(c) failed to at all address GAMA's argument that the 12 years period of the implementation of the reorganisation plan exceeds the maximum five year period for the implementation, applicable to GAMA's claim under the Bankruptcy Law (see paras. 111 to 119 above).

263. GAMA exhausted available local remedies in bankruptcy proceedings, but to no avail (see para. 120 above). Instead of addressing crucial deficiencies in reorganisation proceedings, the Appellate Court Skopje merely considered that corrections of the original reorganisation plan were permitted by the law, because the majority of creditors voted for the adoption of the plan, and in one paragraph without any substantive reasoning considered that other GAMA's complaints, including the breach of priority rules, nullity of the Loan acceleration agreement and illegal implementation period in excess of five years "*were irrelevant and with no influence for different decision.*"[374]

264. These acts do not meet the required FET standard. In the context of local reorganization proceedings, tribunal in *Petrobart v The Kyrgyz Republic* considered that "*as a Contracting Party to the Treaty the Republic was under an obligation to carry out […] reorganisation [of a debtor company owing money to the investor] in a way which showed due respect for investors such as Petrobart*".[375] Tribunal found a violation of the FET standard from the Energy Charter Treaty on the basis of the transfer of assets from the debtor company to other entities "*to the detriment of […] creditors, including Petrobart"* and on the basis of the

[372] Expert Report on Bankruptcy Law (**CE-01**), ¶¶ 72-74
[373] Decision of the First Instance Civil Court Skopje dated 14 June 2018 (**C-015**) as amended by decision of the First Instance Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 17 July 2018 (**C-016**)
[374] Decision of the Appellate Court Skopje (Case file TZS-1548/18), dated 30 August 2018 (**C-017**), pp. 12, 15
[375] *Petrobart Limited v. The Kyrgyz Republic (II*), SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**), ¶ 411

state intervention in parallel court proceedings instituted by Petrobart to obtain the repayment of its claim against debtor company.[376]

265. **Second**, the acts described above also constitute the denial of justice as part of the FET standard.

266. Tribunal in *Dan Cake v Hungary* found a denial of justice, as part of the FET standard from the Portugal-Hungary BIT, due to acts of the Hungarian bankruptcy court in liquidation proceedings against the investor's local subsidiary. Tribunal recognized that the interference by Hungarian bankruptcy courts in breach of the Hungarian bankruptcy law, which "*shock[ed] a sense of juridical propriety*",[377] interfered with the process of the debt settlement, preventing the composition agreement with creditors and thereby the survival of Claimant's investment. Decisions of the Macedonian courts shock a sense of judicial propriety.

267. **Third**, as explained above at Section III.206.D, the unjustified discrimination in the treatment of GAMA's claim in TE-TO's reorganisation proceedings in comparison to the treatment of claims by other foreign and local unsecured creditors in TE-TO's reorganisation constitutes the breach of the MFN clause and national treatment, required by Article II(3) of the Treaty. The unjustified discrimination of GAMA at the same time amounts to the breach of the required FET standard.

268. Moreover, as explained above at para.131, TE-TO voluntarily settled its claim against PRO during the judicial reorganisation proceedings and PRO requested the Civil Court Skopje to amend the decision approving the Reorganisation plan dated 6 June 2018[378] (see above at para. 131). GAMA and PRO, as unsecured creditors with claims against TE-TO, were in "*similar situation*". The repayment of PRO's claim in its entirety was on better terms than under the approved Reorganisation Plan and constitutes unjustified discriminatory treatment of GAMA and its claim, compared to PRO as an unsecured creditor from the same class of creditors.

269. The acts of the Macedonian courts assessed on their own constitute a violation of the FET. In addition, the correlation between the acts of the Civil Court Skopje and third parties and state organs further supports the breach of the FET. Case law confirms that "*collusion between the State judicial authorities, and the local party-in-interest can amount to a denial of justice*", as well as "*collusion among branches of government can result in a denial of justice.*"[379]

270. As described above, the Civil Court Skopje failed to consider that conditions for reorganisation of TE-TO were not met and that proposed reorganisation resulted from acts

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[376] *Petrobart Limited v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**) ¶ 420
[377] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146
[378] Letter by the Public Attorney's Office to the Civil Court Skopje dated 4 November 2019 (**C-118**) and Letter by the Public Attorney's Office to the Civil Court Skopje dated 24 December 2019 (**C-119**)
[379] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (**CL-025**), ¶¶ 625-626

of TE-TO's shareholders, which through the unlawful acceleration of loan repayments attempted to fulfil the conditions for TE-TO's insolvency just two months before the initiation of reorganisation proceedings. Indeed, while the Civil Court Skopje found that the Loan acceleration agreements were null and void, the Civil Court Skopje failed to reject the reorganisation plan with the incomprehensible reasoning that reorganisation was in the best interest of TE-TO and its creditors (see para. 118 above).

271. Further, the failure of the Macedonian courts to establish that TE-TO had failed to foresee tax liabilities from the write off of the unsecured creditors' claims in the amount of EUR 16 million, was remedied through the acts of the Public Revenue Office, the Competition Commission and the Macedonian Government in breach of Macedonian law and Macedonia's international obligations. But for the unlawful State aid, TE-TO would be put in insolvency. In insolvency proceedings, GAMA's claim would rank higher than claims of TE-TO's shareholders and related parties based on priority rules in the Bankruptcy Law and would have received substantially more than in reorganisation proceedings (see above at paras. 93 to 94 and Mr Kostovski's Expert opinion[380]), which in any event were not required.

F. Macedonia's breach of the full protection and security standard

272. The acts described above also constitute a breach of the Macedonia's duty to accord full protection and security ("**FPS**") accorded to other foreign investors on the basis of treaties, concluded by Macedonia with third states, which apply by virtue of the MFN clause in Article II(3) of the Treaty also to GAMA's investment.

273. Article 3(1) of the Lithuania-Macedonia BIT provides:

"Each Contracting Party shall at all times ensure fair and equitable treatment of the investments made by investors of the other Contracting Party as well as their full security and protection."

274. Similarly, Article 3(1) of the Austria-Macedonia BIT provides:

"Each Contracting Party shall accord to investments by investors of the other Contracting Party fair and equitable treatment and full and constant protection and security."

275. The FPS standard requires the provision of legal security, which involves "*a State's guarantee of stability in a secure environment, both physical, commercial and legal*."[381]

276. Case law demonstrates that excessive judicial delays, extreme misapplication of the law by courts or state intervention in the repayment of claims could amount to the breach of the FPS standard. In *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, the tribunal reasoned that the FPS standard '*could arguably cover a situation in which there has been*

[380] Expert Report on Bankruptcy Law (**CE-01**), ¶ 86

[381] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**CL-054**), ¶ 729; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, (**CL-027**), ¶ 303

a demonstrated miscarriage of justice.'[382] Tribunal in *CSOB v Slovakia* considered that that respondent's denial of CSOB's right to receive payment on a loan effectively guaranteed by the Slovak Republic "*would deprive CSOB from any meaningful protection for its loan and thus breach the Slovak Republic's commitment to let CSOB enjoy 'full protection and security'".*[383] In the *ELSI* case, the ICJ considered whether the delay of an appeal decision by Italian courts of more than 18 months could be a violation of the FPS standard.[384]

277. Several tribunals also found that the breach of the FET automatically entails the breach of the FPS.[385]

278. The acts described in Section III.221.E above as a breach of the FET standard also constitute the breach of the FPS obligation. Specifically, the excessive and inexcusable duration of proceedings at the Macedonian Civil Court of over 10 years to adjudicate a simple dispute arising from the Settlement Agreement and "*clearly improper and discreditable*" decisions "*which shock[], or at least surprise[] a sense of judicial propriety*" of:

(a) the Macedonian courts in failing to decline jurisdiction over the dispute between GAMA and TE-TO on the basis of the arbitration agreement in the EPC Contract, to apply contractually agreed English law and to consider GAMA's claims against TE-TO as unconditional;

(b) the Macedonian courts, approving TE-TO's reorganization plan in a shocking departure from the Macedonian Bankruptcy Law, resulting in the writing-off of 90% of GAMA's claim against TE-TO, unlawfully privileging TE-TO's shareholders and arbitrarily suspending the payment of 10% of GAMA's claim for 12 years, well beyond the permitted statutory deadline of five years under the Bankruptcy Law;

(c) illegal interference in TE-TO's reorganization by the Macedonian government, the Public Revenue Office and the Competition Commission in order to prevent the collapse of TE-TO's illegal reorganization plan and its insolvency, wherein claims of unsecured creditors, including GAMA's, would have ranked above shareholder's claims and would have been paid in its entirety,

constitute, each on its own and collectively, the breach of the FPS obligation from Article 3(1) of the Lithuania-Macedonia BIT and Article 3(1) of the Austria-Macedonia BIT, which are owed to GAMA by virtue of the MFN clause in Article II(3) of the Treaty.

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[382] *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No V 064/2008, Partial Award on Jurisdiction and Liability, 2 September 20102009 (**CL-055**), ¶ 246; *See* also *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶¶ 152-153 (examining the immunity of public officials against legal action on the basis of the FPS standard)

[383] *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Award, 29 December 2004 (**CL-056**), ¶ 170

[384] *Case concerning Elettronica Sicula S.p.A. (ELSI*) *(United States of America v. Italy*), Judgment, 20 July 1989, ICJ Reports (1989), p 15 (**CL-028**), ¶¶ 109--111

[385] *Azurix Corp. v. The Argentine Republic (I*), ICSID Case No. ARB/01/12, Award, 14 July 2006 (**CL-057**), ¶ 408 (endorsing the position of *Occidental v. Ecuador* tribunal)

G. Arbitrary, unreasonable and discriminatory measures

279. The acts described in Sections III.206.D and III.221.E above as a breach of the national and MFN treatment and breach of the FET standard also constitute the breach of Macedonia's duty not to impair by arbitrary, unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investment accorded to other foreign investors on the basis of treaties, concluded by Macedonia with third states, which apply by virtue of the MFN clause in Article II(3) of the Treaty also to GAMA's investment.

280. Article 3(2) of the Lithuania-Macedonia BIT provides:

"*Neither Contracting Party shall impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments made by investors of the other Contracting Party.*"

281. Similarly, Article 3(2) of the Spain-Macedonia BIT provides:

"*Each Contracting Party shall protect, within its territory, investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and should it so happen, liquidation of such investments. […]*"

282. The acts of the Macedonian courts, the Macedonian Government, the Public Revenue Office and the Competition Commission, constitute arbitrary treatment of GAMA's investment.

283. The International Court of Justice in *ELSI* case defined arbitrariness as "*not so much something opposed to a rule of law, as something opposed to the rule of law. […] It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety […].*"[386]

284. As demonstrated above in Section III.221.E, this test has been frequently used to review the conduct of judicial organs. For example, Tribunal in *Dan Cake v Hungary* considered that Hungarian bankruptcy courts interfered with the process of the debt settlement in breach of the Hungarian bankruptcy law through acts that "*shock[ed] a sense of juridical propriety*" in breach of the FET standard from the Portugal Hungary BIT.[387]

285. Respondent's acts constitute arbitrary treatment of GAMA's investment through "*clearly improper and discreditable*"[388] decisions "*which shock[], or at least surprise[] a sense of judicial propriety*" of:

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[386] *Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America v. Italy*), Judgment, 20 July 1989 (**CL-028**), ¶ 128
[387] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146
[388] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 127

(a) the Macedonian courts in failing to decline jurisdiction over the dispute between GAMA and TE-TO on the basis of the arbitration agreement in the EPC Contract, to apply contractually agreed English law and to consider GAMA's claims against TE-TO as unconditional;

(b) the Macedonian courts, approving TE-TO's reorganization plan in a shocking departure from the Macedonian Bankruptcy Law, resulting in the writing-off of 90% of GAMA's claim against TE-TO, unlawfully privileging TE-TO's shareholders and arbitrarily suspending the payment of 10% of GAMA's claim for 12 years, well beyond the permitted statutory deadline of five years under the Bankruptcy Law;

286. As explained above at Section III.206.D, the unjustified discrimination in the treatment of GAMA's claim in TE-TO's reorganisation proceedings in comparison to treatment of claims by other unsecured creditors, i.e. foreign and local shareholders of TE-TO, as well as compared to treatment received by foreign and local investors in similar reorganisation proceedings in North Macedonia, constitutes the breach of the MFN clause and national treatment, required by Article II(3) of the Treaty. Moreover, as explained above at para. 131, the repayment of PRO's claim during the judicial reorganisation proceedings on better terms than under the approved Reorganisation Plan constitutes unjustified discriminatory treatment of GAMA and its claim, compared to PRO as an unsecured creditor from the same class of creditors.

287. The unjustified discrimination of GAMA at the same time amounts to the breach of Respondent's duty not to discriminate GAMA's investment on the basis of Article 3(2) of the Lithuania-Macedonia BIT and Article 3(2) of the Spain-Macedonia BIT, which are owed to GAMA and its investment by virtue of the MFN clause in Article II(3) of the Treaty.

H. Macedonia's breach of the effective means standard

288. The MFN provision in Article II(3) of the Treaty also entitles GAMA to rely upon the duty, undertaken by Respondent, to provide effective means of asserting claims and enforcing rights with respect to investments pursuant to Article 3(3) of the Kuwait-Macedonia BIT.[389]

289. Article 3(3) of the Kuwait-Macedonia provides:

> "Each Contracting State shall provide effective means of asserting claims and enforcing rights with respect to investments. Each contracting state shall ensure to investors of the other Contracting State, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to mandate 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."

[389] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶¶ 11.2.1.-11.2.9 (where tribunal considered that the MFN clause in Australia-India BIT could incorporate the effective means of asserting claims and enforcing rights from India-Kuwait BIT)

290. Tribunals in *White Industries v. India* and *Chevron v. Ecuador* considered the effective means standard as *lex specialis* and a distinct, potentially less demanding test in comparison to the denial of justice in customary international law.[390] The issue of whether or not "*effective means*" have been provided by the host State is to be measured against an objective, international standard. The standard requires both that the host State establish a proper system of laws and institutions and that those systems work effectively in any given case.[391]

291. The Macedonian courts did not provide to GAMA effective means to assert its claims. Macedonian courts failed to guarantee to GAMA the effective means of asserting claims and enforcing rights, through the (i) extinguishment of GAMA's right to arbitration; (ii) application of Macedonian law instead of contractually agreed English law, (iii) excessive duration of proceedings of over 10 years, (iv) the arbitrary treatment of GAMA and breach of GAMA's due process rights in civil court proceedings and in reorganisation proceedings against TE-TO.

292. Tribunals in *White Industries v. India* and *Chevron v. Ecuador* found a breach of the effective means standard due to judicial delays. In *White Industries v India*, Tribunal considered the Indian judicial system's inability to deal with investor's claim in over nine years a breach of the effective means standard.[392] In *Chevron v Ecuador*, Tribunal considered a delay in court proceedings of 13 to 15 years as a breach of the standard.[393]

293. As discussed above at Section III.221.E, other factors employed by tribunals to assess the excessive duration of proceedings, such as the complexity of the dispute, significance of interests at stake, behaviour of litigants and courts, cannot provide any justification for a delay of more than 10 years at the Macedonian courts, even less so because GAMA's claim against TE-TO was acknowledged by TE-TO and confirmed by the Macedonian courts the separate set of proceedings. In the words of *Chevron v Ecuador* Tribunal:

"*The Tribunal considers that neither the complexity of the cases, nor the Claimants' behavior justify this delay. These cases involve very significant sums of money, but are in essence straightforward contractual disputes. At most, these cases may be considered cases of average complexity […] The cases, however, cannot be considered so complex as to justify many years of delay in deciding them.* "[394]

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[390] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶ 11.3.2; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 (**CL-050**), ¶¶ 242, 244, 275

[391] White Industries Australia Limited v. The Republic of India, Final Award, 30 November 2011 (**CL-037**), ¶ 11.3.2.; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010, (**CL-050**), ¶ 247

[392] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶ 11.4.19

[393] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 (**CL-050**), ¶ 270.

[394] *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010 (**CL-050**), ¶ 254.

I. Macedonia's denial of justice under the customary international law

294. The actions of Macedonia's state organs described above at Section III.221.E also constitute the breach of the customary international law, encompassing the prohibition of the denial of justice.[395]

295. Denial of justice under the customary international law is neither broader nor narrower than protection for denial of justice under the FET standard, as summarized by *Chevron v Ecuador II* Tribunal:

> "There is a consistent line of awards over many years, amounting to a jurisprudence constante, deciding that a denial of justice in violation of customary international law will also amount to a breach of an FET standard in a treaty: Azinian (1999), Mondev (2002), Waste Management (No 2) (2004), International Thunderbird (2006), Jan de Nul (2008), Rumeli (2008), Pey Casado (2008), AMTO (2008), Al-Bahloul (2010), Liman Caspian (2010), Frontier (2010), Roussalis (2011), Oostergete I (2012), Swisslion (2012), and Flughafen Zurich (2014). However, ordinarily, the protection for denial of justice under an FET standard in a treaty (such standard providing the international minimum standard for fair and equitable treatment of an alien) is neither broader nor narrower than protection for denial of justice under customary international law: Iberdrola (2012). Conversely, apart from denial of justice, an FET standard in a treaty (even limited to fair and equitable treatment under international customary law) provides a broader protection to a covered investor than does denial of justice under customary international law: Vivendi (2007)."[396]

296. As to the merits, the legal test is whether any shock or surprise to an impartial tribunal occasioned by decisions of Macedonian courts in civil and judicial reorganisation proceedings leads, on reflection, to justified concerns as to the judicial propriety of these decisions, as left materially uncorrected and unremedied within Macedonia's own legal system.[397]

297. For these reasons, Macedonia's acts constituting a denial of justice as part of the FET standard (see above Section III.221.E), amount also to the breach of the customary international law.

298. Specifically,

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[395] *See* also *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of July 29, 2008 (**CL-025**), ¶ 651: "[T]he duty not to deny justice arises from customary international law and can also be considered to fall within the scope of treaty provisions provided for 'fair and equitable treatment.")

[396] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II,* PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018 (**CL-046**), ¶ 8.24

[397] *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II,* PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018 (**CL-046**), ¶ 8.26 ("In the Tribunal's view, as to the merits, the legal test is whether any shock or surprise to an impartial tribunal occasioned by the Lago Agrio Judgment, with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts, leads, on reflection, to justified concerns as to the judicial propriety of the Lago Agrio Judgment, as left materially uncorrected or unremedied within the Respondent's own legal system.")

(a) *clearly improper and discreditable*" [398] decisions "*which shock[], or at least surprise[] a sense of judicial propriety*", [399] of the Macedonian courts in failing to decline jurisdiction over the dispute between GAMA and TE-TO on the basis of the arbitration agreement in the EPC Contract, to apply contractually-agreed English law instead of Macedonian law and to consider GAMA's claims against TE-TO as unconditional, in contradiction to the Settlement Agreement and in disregard of TE-TO's acknowledgment of debt and confirmation of GAMA's claim by the Civil Court Skopje in TE-TO's reorganisation proceedings;

(b) unreasonable and inexcusable duration of proceedings at the Macedonian courts to adjudicate a simple contractual dispute for more than 10 years,

(c) *clearly improper and discreditable*" decisions "*which shock[], or at least surprise[] a sense of judicial propriety*" of the Macedonian courts, approving TE-TO's reorganization plan in a shocking departure from the Macedonian Bankruptcy Law, resulting in the writing-off of 90% of GAMA's claim against TE-TO, denying default interest on GAMA's claim, unlawfully privileging TE-TO's shareholders and arbitrarily suspending the payment of 10% of GAMA's claim for 12 years, well beyond the permitted statutory deadline of five years under the Bankruptcy Law;

(d) *illegal* interference in TE-TO's reorganization by the Macedonian Government, the Public Revenue Office and the Competition Commission to prevent the collapse of TE-TO's reorganization and its insolvency, wherein claims of other unsecured creditors, including GAMA's, would have been paid in its entirety,

constitute each independently and in combination, a denial of justice by Respondent under the customary international law.

IV. DAMAGES

299. GAMA requests the payment of compensation for damages suffered by GAMA as a result of the breaches of the Treaty and customary international law by the Respondent.

300. Under Article 28 of the ILC Articles, the international responsibility of a State which is entailed by an internationally wrongful act involves the legal consequences set out in Part II of the ILC Articles. These include, under Article 32, an obligation to make "*full reparation for the injury caused by the internationally wrongful act*." Injury is defined as including "*any damage, whether material or moral, caused by the internationally wrongful act*." Article 34 provides for a compensation as one of the forms of reparation.

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[398] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 127 ("In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.")

[399] *Elettronica Sicula S.p.A. (ELSI)*, United States of America v. Italy, 1989 ICJ 15 (**CL-028**) (para.), ¶ 128); Dan Cake S.A. v. Hungary, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146

301. Under Article 36(2), compensation is to cover "*any financially assessable damage including the loss of profits insofar as it is established*.". This is well-established also in the case law following the *Chorzów Factory* approach:

> "[t]he essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral Tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[400]

302. The compensation for the expropriation of GAMA's investment is also required under Article III(2) of the Treaty.

303. GAMA's claim against TE-TO on the basis of the Settlement Agreement is not in dispute. Indeed, it was expressly recognized by TE-TO and confirmed by the Macedonian courts in reorganisation proceedings. But for the conduct of the Macedonian courts and other state organs, GAMA would have obtained the repayment of the full amount of its claim against TE-TO, arising from the construction of the CCPP Skopje.

304. GAMA's total damages are currently estimated at **EUR 5 million,** with accrued interests, due to breaches of the Treaty and customary international law by Macedonia **and EUR 11,959.00** as legal representation costs GAMA has incurred so far because of the legal proceedings through which Macedonia unlawfully interfered with the GAMA's investment.[401] Claimant will provide a specific quantification of its fees and costs incurred in legal proceedings at Macedonian courts, as well as accrued interests, at a subsequent stage of these proceedings when it is necessary for the Tribunal's quantification of damages.

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[400] *Factory at Chorzów* (F.R.G.*Germany* v. Pol.), *Poland*), Judgment dated 13 September 1928, 1928 P.C.I.J. (ser. A.) No. 17 (**CL-058**), at p. 47 (Sept. 13)

[401] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶¶ 14.3.4-14.3.6 (where Tribunal awarded the claimant the legal fees that it had incurred over the course of the litigation in the respondent-State's courts, reasoning that "had India not failed to provide [the claimant] with 'effective means' of asserting its claims […] [the claimant] would […] not have incurred the costs which it has incurred in pursuing litigation through the Indian courts.")

V. REQUEST FOR RELIEF

305. For these reasons, GAMA respectfully requests the Arbitral Tribunal to issue an award:

(a) declaring that Respondent breached its obligations under the Treaty and customary international law;

(b) ordering Respondent to compensate in full GAMA for the damages and losses suffered as a result of Respondent's breaches under the Treaty and customary international law, currently estimated to be in the amount of EUR 5 million with interest at one monthly rate of EURIBOR for euros for each semi-annual period based on the rate applicable on the last day of the semi-annual period preceding the current semi-annual period, increased for 10% from 1 April 2012, and EUR 11,959.00;

(c) ordering Respondent to pay any further applicable interest on any amount awarded until Respondent complies with such award, and

(d) ordering Respondent to pay all arbitration costs, including but not limited to compensation for all arbitrators', experts' & witnesses' fees and costs, legal representation fees and expenses, ICC Secretariat's fees and costs, and other administrative costs such as costs related with the hearing etc. incurred by GAMA in connection with the present dispute.

* * *

Respectfully submitted,

ODI LLP

By:

Mr Anže Arko

Mr Matjaž Jan

Mr Branko Ilić

Davčna ulica 1, 1000 Ljubljana

Slovenia

T: +386 (0) 590 86600

anze.arko@odilaw.com

matjaz.jan@odilaw.com

branko.ilic@odilaw.com

Georgievski Law Firm Skopje

By: ____________________

Mr Gjorgji Georgievski

Ms Ana Stojanovska

Pirinska 25/1-2, 1000 Skopje

Macedonia

T: +389 (0) 231 31 286

gjorgji.georgievski@odilaw.com

ana.stojanovska@odilaw.com

Claimant's In-House Counsel

By:

Mr Bora Kaya

Ms Esra Berktaş

T: (90-312) 248 43 00

F: (90-312) 248 43 01

bora.kaya@gama.com.tr

esra.berktas@gama.com.tr

Counsel for Claimant

Gama Güç Sistemleri Mühendislik ve Taahhüt A.Ş.