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

CLAIMANT'S REPLY MEMORIAL

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This Reply is submitted by GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. ("**Claimant**" or "**GAMA**") in response to the Republic of North Macedonia's ("**Respondent**" or "**Macedonia**") Statement of Defence dated 4 April 2023 (the "**Statement of Defence**") and pursuant to the Tribunal's Procedural Order No. 1 dated 28 July 2022.

I. INTRODUCTION

1. At the centre of this arbitration are the decisions of the Macedonian courts that can only be described as shocking, arbitrary and profoundly unjust. GAMA set out in its Statement of Claim the numerous grave failures of the Macedonian courts in the debt enforcement proceedings between GAMA and TE-TO and in TE-TO's judicial reorganisation. GAMA also provided a detailed account of how Macedonia unlawfully prevented the collapse of TE TO's manifestly unlawful judicial reorganisation to the detriment of GAMA.

2. Macedonia seeks to dismiss GAMA's claims by mischaracterizing them as mere dissatisfaction with an ordinary commercial risk of TE-TO defaulting on its payment obligation and declaring bankruptcy. The situation here is far from ordinary. The Macedonian courts unlawfully assumed jurisdiction over GAMA's dispute with TE-TO, disregarded the contractually agreed English law, ignored GAMA's evidence on law and facts, and, after 11 years, are still adjudicating GAMA's claim in debt enforcement proceedings which are obsolete since 2018, when GAMA's claim was fully acknowledged and written-off by the same courts in TE-TO's unlawful judicial reorganisation. TE-TO's judicial reorganization was fraudulently instrumentalized by TE-TO's shareholders and fully endorsed by the Macedonian courts, which privileged shareholders to the detriment of GAMA, in breach of the fundamental principles of the Macedonian bankruptcy law. The Macedonian courts failed to provide GAMA protection, as required under the Treaty and customary international law.

3. The Macedonian bankruptcy law is a creditors' law. Shareholders of an insolvent company are last in line, summarized in the principle that "*equity is wiped out first*". This is also true in case a company is financed by shareholders' loans. Shareholders' loans are subordinated to the claims of all other creditors. Subordinating shareholder loans relates to core characteristics of what a shareholder is and is not. A shareholder decides on the course of the company and is entitled to the profits because he provides risk-bearing capital and is, thereby a residual claim holder. The shareholder makes an investment with a view of capitalizing on the upward potential of the company. A shareholder is, therefore, the last in line in case of failure. The principles of the Macedonian bankruptcy law call for the expropriation of shareholders' claims for the benefit of unsecured creditors. On insolvency, the primacy of shareholders is replaced by that of creditors. If a company defaults on payment obligations, its unsecured creditors become entitled to seize and sell its assets. At this point, the creditors, in a meaningful sense, become the owners of the company.

4. The above principles also apply to a pre-insolvency reorganisation which is – at the end of the day – a formal insolvency procedure overseen by the court. Despite Macedonia's disagreement in this arbitration, it has acknowledged that this is, in fact, true. In a remarkable turn of events, in February 2023, Macedonia proposed to the Macedonian

Parliament a new insolvency law ("**Proposed Insolvency Law**").[1] The Proposed Insolvency Law merely confirms Macedonia's position on the purpose of pre-insolvency reorganisation - financial restructuring of a debtor, which allows its shareholders to retain equity equal to the value of the assets they would have received if bankruptcy proceedings had been opened, more favourable conditions for the settlement of creditors' claims compared to liquidation of the debtor's assets, by observing the liquidation priorities, and preserving of the debtor's going concern.[2] The Macedonian courts approved TE-TO's reorganization in manifest breach of these principles which are a part of Macedonia's current insolvency legislative framework.

5. As part of a broader picture, TE-TO's reorganization was a calculated effort to shield a Russian cartel[3] entrenched within the Macedonian energy sector. The collusion between Gazprom, the exclusive supplier of natural gas to Macedonia, TE-TO, the country's largest consumer of natural gas and the main supplier of district heating and EDS, an electricity trader owned by then Deputy Prime Minister Mr Kocho Angjushev, has been conspicuously overlooked by Macedonia.[4] That Macedonia never investigated this apparent collusion comes as no surprise since Macedonia has a significant incentive not to break up this cartel. Macedonia's district heating is dependent on imports of natural gas from Gazprom[5] and TE-TO's operations.[6]

6. If Gazprom were to disrupt the supply of natural gas or if TE-TO were to stop operating, the district heating in Macedonia would be compromised. Indeed, Macedonia is "*particularly vulnerable to interruption from the Ukraine as these [this] countries [country] are [is] 100% reliant on Russian gas*".[7] In 2017, Macedonia assessed that in light of the "*political difficulties between Russia and the Ukraine, another disruption in natural gas supplies is possible*" and that "[*o]nly the development of alternative cross-border connections and gas storage facilities will improve the security of gas supply*."[8] U.S.

[1] Minutes from the 122nd session of the Macedonian Government dated 1 February 2023 (**C-150**)
[2] Proposal for Law on Insolvency dated February 2022 (**C-151**) ("Proposed Insolvency Law"), Article 3
[3] See Law on Protection of Competition (**C-133 Resubmitted**), Article 5(1) indent 11 defining cartels as agreements and decisions and/or concerted practices between two or more undertakings aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition, especially through fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets, bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other undertakings-competitors to the cartel participants")
[4] Statement of Claim, ¶¶ 141-146
[5] Statista, Which European Countries Depend on Russian Gas? (**C-152**)
[6] *See* Annual Report of the Energy Regulatory Commission of the Republic of North Macedonia for 2018 (**C-129**), p.18 ("[…] ESM JSC Skopje is the dominant domestic electricity producer with a 78,45% share in the domestic generation, next is TE-TO JSC Skopje with 13,16% share") [emphasis added]; *see also* p. 48 ("TE-TO JSC Skopje dominated wholesale natural gas market in 2018 with 43,20% market share, followed by their daughter company TE-TO Gas Trade with 30,30%")
[7] Macedonian Ministry of Economy, Statement on Security of Energy Supply (July 2017) (**C-153**), p.58
[8] Macedonian Ministry of Economy, Statement on Security of Energy Supply (July 2017) (**C-153**), p. 59. *Ibid.*, p. 61 ("the district heating customers would be threatened if supplies to the CHP [Combined Heat and Power] and heating plants were cut off. As these plants take 80% of the current supply, the situation would soon be critical")

Ambassador to Macedonia, HE Angela Aggeler, has expressed concerns about the energy dependence of Macedonia on Russia.[9]

7. TE-TO plays a significant role in the energy sector in Macedonia. In 2022, the Macedonian Government included TE-TO in the list of companies of special importance.[10] In 2019, Macedonia acknowledged that TE-TO is "*the main supplier of heat in Skopje, but also within the country*"[11] and is "*in the process of reorganization and is of particular interest to the economy*".[12] In the words of former Prime Minister of Macedonia Mr Zoran Zaev: "*TE-TO is of great importance to the Republic of North Macedonia and 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.*"[13] [emphasis added] Indeed, Macedonia went to great lengths to help TE-TO to continue to exist and operate, particularly by the manifestly unlawful interference in TE-TO's reorganization.

8. One need only look at the decisions issued by the Civil Court Skopje and the Appellate Court Skopje in the debt enforcement proceedings between GAMA and TE-TO and TE-TO's judicial reorganisation to see those courts' bias towards TE-TO and its shareholders, almost certainly proceeding from corruption. This does not mean that GAMA must allege or prove corruption in order to establish breach of the Treaty or denial of justice under the customary international law – it is sufficient that the decisions of the Macedonian courts are clearly improper and discreditable from the standpoint of the international law. GAMA asserts that this is the case here.

9. However, circumstantial evidence,[14] should also be taken into account in considering the factual matrix of the impugned decisions by the Macedonian courts.

10. As a general background, Macedonia's judicial system has been criticized due to lack of efficacy and independence: "[*d]ue process rights remain compromised by corruption and patronage within the justice system, which has a low level of public confidence*."[15] The U.S. State Department has highlighted that: *"[t]he government did not always respect judicial independence and impartiality. Instances of judicial misconduct, undue political and business pressure on judges, protracted justice, as well as inadequate funding and staffing of the judiciary continued to hamper court effectiveness and affected public confidence in*

[9] U.S. Ambassador Angela Aggeler's Interview with Kapital dated 10 July 2023 (**C-154**) ("[e]nergy independence and security are critical issues across the globe, and Russia's brutal and illegal invasion of Ukraine has sharply highlighted that need. In the short-term, I hope the country makes every effort to secure natural gas that doesn't come from Gazprom and complete the interconnector with Greece.")

[10] Decision Supplementing the Decision Identifying Commercial Companies of Special Importance for Operation in a Crisis Situation by the Macedonian Government dated 4 October 2022 (**C-155**)

[11] E-mail from the Spokesperson of the Macedonian Government, dated 18 November 2019 (**C-024**), p. 1

[12] E-mail from the Spokesperson of the Macedonian Government, dated 18 November 2019 (**C-024**), p. 2

[13] Annual financial statements of TE-TO for the year ended on 31 December 2019 (**C-149**), p. 14 [emphasis added)

[14] *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt,* ICSID Case No. ARB/14/4, Award, 31 August 2018 (**CL-067**), ¶ 7.52 ("As has long been recognised, corruption is rarely proven by direct cogent evidence; but, rather, it usually depends upon an accumulation of circumstantial evidence. Circumstantial evidence of corruption is as good as direct evidence in proving corruption.")

[15] North Macedonia: Freedom in the World 2019 Country Report by Freedom House. (**C-156**)

the rule of law."[16] A recent assessment of the Macedonian judiciary revealed that "*almost half of the judges have experienced some attempts of influence from their colleagues or judges of higher rank (court president or judge of a higher court), while more than one-third of judges have experienced attempts of influence from the executive branch of power or representatives of political parties*."[17] [emphasis added]

11. Macedonia acknowledges that corruption is a significant problem in Macedonia. The President of Macedonia, Mr Stevo Pendarovski, has highlighted that: *"[t]he biggest problem in our country is grand corruption.*"[18] A recent corruption assessment of the Macedonian Public Prosecution Office revealed that "*36% of public prosecutors experienced attempts of influence from members of the executive branch of power, and 29% from representatives of political parties*", suggesting that "*like judges, public prosecutors remain vulnerable to political influence and the insufficient division of power between the executive and judicial branches*."[19]

12. Strikingly, Macedonia says very little about the criminal investigation by the Financial Police and the Public Prosecution Office of TE-TO's judicial reorganisation.[20] Macedonia has also given no evidentiary showing with respect to criminal investigation in TE-TO's reorganization.[21] Where, it might be asked, is the evidence collected in the investigation by the Financial Police and the Public Prosecution Office, and where are the findings of those investigations? It is implausible to argue that they have no factual or legal relevance to the present arbitration.

13. Macedonia's refusal to produce documents relating to the investigation by the Financial Police and the Public Prosecution Office, which were halted three years ago, and insistence on confidentiality above and beyond the regime under Macedonian law (which

[16] US Department of State "2022 Country Report on Human Rights Practices: North Macedonia" (**C-157**), p. 7

[17] OSCE Mission to Skopje, "Corruption Risk Assessment of the Judiciary In North Macedonia" (June 2023) (**C-158**), p. 37. *See* also U.S. Ambassador Angela Aggeler's Interview with Kapital dated 10 July 2023 (**C-154**) ("[w]hen it comes to progress in the judiciary, we are disappointed. Over the past thirty years, we have invested half a billion dollars in law enforcement and good governance programs, but we are not seeing the improvements and reforms we expected from such a significant investment".)

[18] Transparency International – Macedonia (2021), "Grand Corruption and Tailor-made Laws in Republic of North Macedonia", (**C-159**) p. 19 ("In all these years, there has been no conviction for a high-level official or other person involved in grand corruption. Those in power always look to the past and do not pay attention to what is happening today. But even in those cases there is no effective conviction or the sentences are very low.") Transparency International has given Macedonia a corruption score of 37 out of 100 in 2018 (any score under 50 is considered to be very poor). *See* Transparency International Corruption Perception Index 2018 (**C-160**). *See* also Transparency International Corruption Perception Index 2017 (**C-161**)

[19] OSCE Mission to Skopje, "Corruption Risk Assessment of the Judiciary in North Macedonia" (June 2023) (**C-158**), p. 31 [emphasis added]. *See* also USAID Citizens Against Corruption Factsheet dated 19 April 2023 (**C-162**)

[20] Statement of Defence, ¶¶ 76

[21] C. Partasides, *Proving Corruption in International Arbitration* (**CL-068**), ¶¶ 63-66 ("once a certain prima facie threshold of evidence is reached by the party alleging illegality, which may not in and of itself be enough to discharge the standard of proof, it should not be adequate – given the nature of the allegation – for the defendant to sit back and not contribute to the evidentiary exchange on the issue [...] plausible evidence of corruption, offered by the party alleging illegality, should require an adequate evidentiary showing by the party denying the allegation.")

limits disclosure of information on pending proceedings),[22] shows Macedonia's great sensitivity on this subject. It is a reasonable inference that Macedonia would have produced these documents were it not in possession of evidence that it would prefer not to see the light of day.

14. The rejection by the Public Prosecution Office of the Financial Police's criminal complaints against those involved in TE-TO's judicial reorganization is also deeply troubling. Their explanation—that "*the procedure for opening and implementing bankruptcy is regulated by a special law, which represents Lex specialis, and from the analysis of the evidence and the legal regulation, it appears that proceeding according to this law in the specific case also does not constitute a basis for criminal prosecution*"[23] — is, at best, an oversimplification of a complex legal issue and, at worst, a failure of the Macedonian justice system. To contend that bankruptcy regulations being governed by a distinct law absolve those potentially engaged in acts of abuse of power or fraudulent bankruptcy is fundamentally flawed. The Public Prosecution Office's decision has shielded those involved from scrutiny.

15. The words of the former director of the Financial Police, Mr Arafat Muaremi, are alarming. His unambiguous declaration that TE-TO's bankruptcy proceedings "*did not adhere to the respective rules*"[24] is not merely an observation of a retired police chief. It is a clarion call for attention to what may be a grave miscarriage of justice. By stating, "[*b]y law, we must cooperate with [Public Prosecution Office for Organised Crime and Corruption], <u>but for certain large, high stake cases, the prosecution has no interest in cooperating with us</u>. Such are, for example, the investigations for FFM, MRT, <u>TE-TO</u>*"[25] [emphasis added], Mr. Muaremi doesn't just lay bare a failure of the process. When the law enforcement bodies responsible for prosecuting organised crime and corruption are at odds, the potential for justice to be served diminishes.

16. TE-TO's unlawful judicial reorganisation was on the brink of collapse because it had failed to anticipate income tax liabilities of EUR 30 million resulting from the 'haircut' of unsecured creditors' claims of EUR 150 million. In an effort to save TE-TO's restructuring, Macedonia avoided collecting the tax debt and illegally allowed TE-TO to delay the payment. This was done during ongoing investigations by the Financial Police and Public Prosecution Office. Even the then Deputy of Minister of Finance of Macedonia acknowledged the unlawful actions of the Macedonian Government.[26] Macedonia argues that there is nothing wrong

[22] Prof. Dr. Gordan Kalajdziev et al, Commentary on the Law of Criminal Procedure (2018) (**<u>C-147</u>**), pp. 2-3 ("Bearing in mind that this is a phase of the procedure, in which information and evidence are still being collected, their disclosure can frustrate the procedure and therefore there is also the stated legal obligation that all actions in the pre-investigation procedure taken by the public prosecutor and the police are considered a secret.")

[23] Public Prosecution Office announcement (29 September 2020), "Four criminal charges rejected relating to TE-TO's dealings" (**<u>C-110 Resubmitted</u>**)

[24] See Prizma.mk article (22 August 2019), "How was the investigation for 750,000 euros of the International Union", November 2022 (**<u>C-105</u>**)

[25] 24 Vesti Article (3 August 2022), "Muaremi announced criminal charges against prosecutors Ruskovska, Trajcheva and Josifovska" (**<u>C-148</u>**)

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

with Macedonia providing financial assistance to TE-TO as a "*struggling local business*". Macedonia's argument is flawed. TE-TO's "*struggles*" were the result of the Macedonian courts' approval of its massive debt restructuring a year earlier. This is fatal to all of Macedonia's arguments that TE-TO's judicial reorganisation was conducted in accordance with Macedonian law. One might ask what type of judicial reorganisation would not account for a tax debt of EUR 30 million, and which courts would approve such reorganisation?

17. Rather than addressing the evidence of criminal wrongdoings in TE-TO's judicial reorganisation and its relevance to the present case, Macedonia's defence is mainly limited to arguing that GAMA's claims purportedly amount to an impermissible appeal of the decisions of the Macedonian courts, which may be reviewed only under the exceptionally demanding test of a denial of justice, and that GAMA purportedly failed to meet this test and to show any loss. Each of these points is wrong for the reasons outlined below.

18. GAMA has been subjected to both fundamentally flawed procedures and manifestly improper and discreditable decisions. Even under Macedonia's heightened bar to review decisions of Macedonian state organs, these decisions constitute a denial of justice in breach of the customary international law and reached the required unlawfulness to constitute a breach of the Treaty standards, discussed below.

II. MACEDONIA MISSTATES THE STANDARD OF REVIEW OF JUDICIAL CONDUCT

19. Macedonia devotes introductory paragraphs of its legal argument on the breach of the Treaty, arguing that the role of this Tribunal is not to serve as a court of appeal for national courts.[27] This is not in dispute,[28] and does not in any way absolve Macedonia of its liability under the Treaty and customary international law.

20. It is also not contested that acts of the Macedonian judiciary and other state organs are reviewable under the Treaty and customary international law.[29] Indeed, parties to the Treaty did not exclude any organ of the State from the obligations undertaken under the Treaty. The courts may breach the parties' obligations, as may any other organ of the State.

21. However, Macedonia subjects the conduct of its organs to a heightened standard of review. Macedonia argues that decisions of the state's judiciary (i) enjoy a "*presumption of legality*", (ii) could only be reviewed under the denial of justice standard, which is (iii) exceptionally demanding.

22. Macedonia mischaracterizes the required standard of review of judicial conduct under the Treaty and customary international law. Macedonia's insistence on the heightened standard of review of judicial conduct is further inapposite in this case, which does not concern only judicial conduct, but also the conduct of other state organs, *i.e.* the

[27] Statement of Defence, ¶ 126 *et seq.*
[28] Statement of Claim, ¶ 185
[29] Statement of Claim, ¶ 185, Statement of Defence ¶ 128 (limiting the Tribunal's review of Macedonia's judicial decisions to cases of denial of justice).

Macedonian Government, the Public Revenue Office and the Competition Commission, which cannot be divorced from the acts of the judiciary.

A. THERE IS NO PRESUMPTION OF LEGALITY OF JUDICIAL CONDUCT

23. Contrary to what Macedonia suggests,[30] there is no automatic "*presumption of legality*" of judicial conduct. The tribunal in *Arif v. Moldova* explained that such presumption is obsolete:

> "International law has evolved in recent decades and the previous conviction as expressed in the Chattin award that acts of the judiciary had to be judged with more 'delicacy' and circumspection than acts committed by other branches of government, is obsolete."[31]

24. Similarly, the tribunal in *Tatneft v. Ukraine* considered that deference to decisions of national courts is not automatic:

> "The Tribunal accordingly has followed an approach in which the merits of the various decisions have in fact been examined in order to determine whether they can be considered as fully compliant with the BIT standards of protection, a test which in some respects has been successful but in others not. Deference is thus not automatic and certainly does not require that extreme forms of misconduct, such as egregiousness, be found to establish that breaches have occurred as a consequence of those decisions. Moreover, the process as a whole must also be taken into account for reaching a determination on whether manifest injustice has occurred in the end. In light of this broader perspective, deference cannot stand in the way of safeguarding treaty standards of protection, and where total deprivation of the Claimant's capital contributions and of its corresponding shares and rights has been the result of the process, deference in no way precludes a finding of liability."[32] [emphasis added]

[30] Statement of Defence, ¶¶ 127-128

[31] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (**RL-069**), ¶ 439.

[32] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023**), ¶ 480. *See* also *ibid.*, ¶ 475 ("[i]n the ambit of FET, deference is further limited by a variety of considerations arising from equitableness and reasonableness. In this sense a decision can be inequitable and unreasonable without rising to levels as dramatically wrong as those just mentioned, and still eventually engage liability for the breach of the FET standard."). *Ibid.*, ¶ 479 ("This Tribunal, having examined the various court decisions complained of and the arguments on which they are based, is not at ease with an unrestricted application of the standard of deference. Some aspects of such decisions can be considered reasonably tenable, but these are rather exceptional. For the most part, the explanation given by the courts in support of their findings have not been convincing and appear rather as an endorsement of the Prosecutor's arguments, not unrelated to those of the interests behind such arguments. This does not necessarily mean that bad faith might have intervened, at least not in all cases, but it certainly requires that the standard of deference be appropriately qualified.")

25. Other case law,[33] including legal authorities cited by Macedonia, [34] confirm that there is no unlimited deference to local court's judgments, when deficiencies in procedure or substance make them unacceptable from the viewpoint of international law.

B. JUDICIAL CONDUCT IS REVIEWABLE INDEPENDENTLY OF A DENIAL OF JUSTICE

26. In its Statement of Claim, GAMA cited a line of case law confirming that tribunals regularly reviewed judicial conduct under different treaty standards and independently of the prohibition of a denial of justice.[35] Macedonia's statement that GAMA provided no authority for that[36] is thus false.

27. The only response Macedonia has on substance is that these cases are not persuasive, because tribunals purportedly framed their analysis of the judicial conduct in terms of a denial of justice or because cases involved the participation of other organs in the wrongful conduct.[37] Macedonia mischaracterizes these cases.

28. Tribunals considered the judicial conduct in breach of the FET or expropriation provisions without limiting it to instances of a denial of justice, which in some cases was not even pleaded or covered by the relevant treaty:

    a) In *Arif v Moldova*, the tribunal considered that "*as a matter of principle […] court decisions can engage a State's responsibility, including for unlawful expropriation,*

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[33] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 ("Karkey") (**CL-069**), ¶ 550 ("In particular, an international tribunal may decide not to defer to an arbitrary judicial decision which is, as such, incompatible with international law."); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (**CL-070**), ¶ 359 ("While the Tribunal agrees that domestic courts must be given deference in the application of domestic law, this does not mean that their decisions are immune from scrutiny at the international level. As noted by the tribunal in Sistem, court decisions may deprive investors of their property rights 'just as surely as if the State had expropriated [them] by decree.'") [emphasis added]

[34] *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (3 July 2008) (**RL-037**) ¶ 106 ("the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice.") [emphasis added]; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, 23 April 2012 (**RL-063**), ¶ 291 ("In this context [of substantive denial of justice], the task of the Tribunal is to determine if the outcome of the bankruptcy proceedings is discreditable and offensive to judicial propriety."); *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014 (**RL-077**), ¶ 583 ("Turning to the Constitutional Court's decision, the fact that the Court has spoken on Law 42's constitutionality does not of course preclude this Tribunal from exercising its jurisdiction under the Treaty to consider the international lawfulness of Law 42. But in applying international law, the Tribunal does not act as a court of appeal on questions of Ecuadorian law […] At the same time, under well-established principles of international law, as codified in Article 3 of the ILC Articles on State Responsibility, the fact that a law has been declared constitutional by the local courts, even by the highest court of the land, is not dispositive of whether it was in conformity with international law.")

[35] Statement of Claim, ¶¶ 186, 190-192 (referring to *Arif v. Moldova*, *ATA Construction v Jordan*, *Deutsche Bank v. Sri Lanka*, *Tatneft v. Ukraine*, *Saipem v. Bangladesh*, *Rumeli v Kazakhstan, Sistem v. Kyrgyz Republic*)

[36] Statement of Defence, ¶ 137 *et seq*

[37] Statement of Defence, ¶ 139 *et seq.* (arguing that the judicial conduct triggers state's liability only in cases of a denial of justice) and ¶ 225 (arguing the same in the context of a "judicial expropriation" claim)

without there being any requirement to exhaust local remedies."[38] [emphasis added] Tribunal analyzed whether the alleged misapplication of Moldovan law by local courts amounted to the expropriation and found that it did not, because (i) there was no evidence of collusion between courts and investor's competitors, (ii) denial of justice or (iii) other evidence that would show that the Moldovan judiciary has not applied Moldovan law legitimately and in good faith.[39] Dismissal of the expropriation claim was therefore not limited to the absence of a denial of justice. Tribunal also distinguished between the denial of justice and FET standard[40] and found the breach of the FET independently of the denial of justice due to the inconsistent action between the regulatory authority and Moldovan courts.[41]

b) In *Deutsche Bank v. Sri Lanka*, the disputed measure consisted of an order of the Supreme Court of Sri Lanka, suspending payments owed to an investor under the commercial contract. Tribunal found a breach of the respondent's FET obligation and expropriation under the Germany-Sri Lanka BIT.[42] While Macedonia claims that the case "*was a textbook example of a denial of justice*",[43] a denial of justice was not pleaded and not even mentioned by the tribunal. Tribunal found the breach of the FET obligation in the form of a due process violation, independently of treaty breaches committed by other non-judicial state organs.[44] The tribunal also found illegal expropriation through the acts of the Supreme Court and the Central Bank, which "*reinforced and later extended and made permanent the interference begun by the Supreme Court".*[45] This finding was mandated by the facts of the case and the tribunal nowhere conditioned the success of the expropriation claim with the interference of non-judicial actors.

c) In *Saipem v. Bangladesh,* the tribunal held Bangladesh liable for the expropriation of residual contractual rights through acts of the Bangladeshi judiciary. The case did not involve the conduct of non-judicial state organs. The tribunal did not assess the conduct of judiciary against the denial of justice standard, because its jurisdiction was restricted to expropriation claims, and neither did claimant present its case on the basis

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[38] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (**RL-069**), ¶ 347

[39] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (**RL-069**), ¶¶ 415, 420

[40] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (**RL-069**), ¶ 433 ("It is true that many of the terms to describe one or the other sphere of international rights and obligations (denial of justice or fair and equitable treatment) - such as 'arbitrariness', 'discrimination', 'unfairness' or 'bias' - are used interchangeably. This semantic overlap might contribute to certain confusion. It does not imply, however, that both standards and principles have merged into one and that the prerequisites as well as the consequences of a claim for denial of justice and for the violation of a treaty standard of fair and equitable treatment have become identical. Both types of claims are based in international law, there is certainly and inevitably a continuous "cross-pollination" between the two, but they remain distinct and specific.") [emphasis added]. *See* also, ibid., ¶ 429

[41] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (**RL-069**), ¶ 547

[42] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2,* Award, 31 October 2012, (**CL-022**), ¶¶ 474-480, 521-521

[43] Statement of Defence, ¶ 139(b)

[44] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2,* Award, 31 October 2012, (**CL-022**), ¶ 478

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

of a denial of justice. [46] The tribunal noted that while "*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.*"[47] [emphasis added]

d) In *ATA Construction v. Jordan,* the tribunal ruled that a judgment of the Jordanian Court of Cassation, which retroactively applied the new arbitration law, violated the bilateral investment treaty, without finding a denial of justice.[48] Tribunal considered the acts of the Jordanian Court of Appeal and Court of Cassation independently of the denial of justice claim, which the tribunal had previously dismissed for lack of jurisdiction *ratione temporis*.[49] The finding of the treaty breach was not premised on conduct of non-judicial state organs.[50]

e) In *Tatneft v. Ukraine*, the tribunal dismissed the denial of justice claim and ultimately assessed the decisions of the Ukrainian domestic courts against the broader FET standard: "*in this case there are no sufficient reasons to justify a finding of denial of justice. However, it is quite evident that the fair and equitable treatment standard has been compromised by a number of court actions*."[51] The tribunal also explained that "*a decision can be inequitable and unreasonable without rising to levels as dramatically wrong as those just mentioned, and still eventually engage liability for the breach of the FET standard*."[52] Tribunal made these observations independently of the fact that judicial intervention was a "*part of a complex network of acts*".

f) In *Sistem v. Kyrgyz Republic,* the tribunal held that claimant's interest in a hotel was expropriated by the Kyrgz courts without any discussion of denial of justice.[53] The tribunal considered that "*it is well established that the abrogation of contractual rights by a State, in the circumstances which obtained in this case, is tantamount to an*

[46] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 121.

[47] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 181. The tribunal also noted that in contrast with the claims of denial of justice, claimant was not required to exhaust local remedies as a substantive requirement of a finding of expropriation by a court.

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

[49] *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (**CL-015**), ¶¶ 95, 108

[50] *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (**CL-015**), ¶ 117 ("This particular right was not annulled with the enactment of the new Jordanian Arbitration Law (which took place before the entry into force of the BIT) but upon the decision of the Jordanian Court of Cassation."). *Ibid.*, ¶ 125 ("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.")

[51] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023**), ¶ 481 ("The Tribunal has concluded above that in this case there are no sufficient reasons to justify a finding of denial of justice. However, it is quite evident that the fair and equitable treatment standard has been compromised by a number of court actions.")

[52] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023**), ¶ 475

[53] *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

expropriation of property by that State."[54] The tribunal considered that conditions for lawful expropriation were not met, because no compensation had been paid.[55] Contrary to what Macedonia alleges,[56] the finding of expropriation rested exclusively on the conduct of courts and not on actions of any other state organs.

g) In *Rumeli v Kazkhstan*, the tribunal denied a claim for a denial of justice in breach of the FET,[57] but considered that acts of Kazakh Courts, which ordered a compulsory sale of claimant's shares in local company for an excessively low price, as an expropriation in breach of the Kazakhstan-Turkey BIT. The tribunal considered that "*[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*."[58] The tribunal considered whether the decision of the Kazakh Supreme Court was "*in accordance with due process of law*", which the tribunal found it was, but found illegal expropriation because the valuation of the taken shares was manifestly inadequate.[59] Macedonia refers to the tribunal's finding of "*improper collusion*" between the state-controlled investment committee and claimant's competitor.[60] However, the finding of expropriation did not rest on collusion of these entities *with* Kazakh's courts.[61] Rather, the final decision of the Supreme Court was seen as a final act of creeping expropriation, instigated by non-judicial actor's, including private parties (other shareholders in local company), which bears a resemblance with the present case.[62]

[54] *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. The tribunal's finding centred on Kyrgyz courts' reversal of the determination of joint venture's bankruptcy and invalidation of the subsequent share purchase contract, which were the legal basis for claimant's rights in the hotel (ibid., ¶¶ 105-107, 117)

[55] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 (**CL-059**), ¶ 119

[56] Statement of Defence, ¶ 225(e).

[57] *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**), ¶ 619

[58] *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

[59] *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**), ¶ 706.

[60] Statement of Defence, ¶ 225(c). Referring to *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**), ¶ 707 ("the court process which resulted in the expropriation of Claimant's shares was brought about through improper collusion between the State, acting through the Investment Committee, and [the claimant's competitor] Telcom Invest.").

[61] *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**), ¶¶ 709, 715 (The tribunal expressly dismissed claimant's argument of conspiracy between the competitor, investment committee and courts.)

[62] *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**), ¶ 708 ("In summary, the conclusion of the Tribunal is that this was a case of 'creeping' expropriation, instigated by the decision of the Investment Committee which was then collusively and improperly communicated to Telcom Invest and its shareholders before Claimants were made aware of it, and which proceeded via a series of court decisions, culminating in the final decision of the Presidium of the Supreme Court.")

h) In *Dan Cake v Hungary*, the tribunal found that acts of the Hungarian bankruptcy court breached the FET standard in the form of a denial of justice.[63] Claimant in that case did not plead breach of other treaty standards, except for the breach of the prohibition from discriminatory measures.[64] However, the tribunal had no problem to conclude that acts of the bankruptcy court *"could 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*" in order to uphold its jurisdiction over claims.[65] The fact that the tribunal took this position in its decision on jurisdiction, as Macedonia points out, does not diminish its relevance.

29. Other authorities confirm that the review of judicial conduct is not limited to instances of a denial of justice only:

a) the tribunal in *Infinito Gold v Costa Rica* explained that *"[…] there is no principled reason to limit the State's responsibility for judicial decisions to instances of denial of justice. Holding otherwise would mean that part of the State's activity would not trigger liability even though it would be contrary to the standards protected under the investment treaty.* […] *judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice.*"[66] [emphasis added]

b) the tribunal in *Karkey v Pakistan* considered that "*there is no need that such deficiencies [which are unacceptable from the viewpoint of international law] amount to a denial of justice which […] is only one of the possible breaches of international law to be taken into consideration*".[67] The tribunal did not find it necessary to make formal pronouncements on the additional claims based on the FET standard and found that the Supreme Court's judgment was arbitrary and amounted to an expropriation of the investor's contractual rights.[68]

c) the Iran-US Claims Tribunal found the order of the Iranian court, which prohibited claimant's counterparty to make rent payments, expropriatory, noting that that "*it is well*

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

[64] Statement of Defence, note 520. *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 81 ("However, when one reads the arguments which Claimant develops in its Reply, it appears that neither expropriation nor full protection and security are mentioned, and that the particular acts of which Dan Cake complains are characterised as being in breach only of the BIT's provisions on fair and equitable treatment (Article 3.1) and unfair or discriminatory measures (Article 3.2).")

[65] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶¶ 77-78. This was relevant because claims for expropriations were not subject to mandatory recourse to local courts under the relevant treaty.

[66] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (**CL-070**), ¶ 359. See also ibid., ¶ 361 ("*denial of justice is only one of the ways in which judicial decisions may breach the BIT. Even if a decision does not amount to a denial of justice, it may violate other treaty standards (such as FET or expropriation), provided the requirements for these breaches are met*.") [emphasis added]

[67] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**CL-069**), ¶ 550.

[68] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, (**CL-069**), ¶¶ 645, 648, 657

established in international law that the decision of a court in fact depriving an owner of the use of his property may amount to an expropriation of such property [...]."[69]

d) the tribunal in *Standard Chartered Bank v Tanzania* considered that *"it does not follow that judicial expropriation could only occur if there is denial of justice*"[70] and held Tanzania liable for expropriation in breach of the underlying investment contract due to a judicial order, which had allowed a transfer of shares to another shareholder in a local company in disregard of investor's liens over shares. The tribunal considered that the judge "*recklessly*" and "*most injudiciously decided to 'take judicial notice' of the illicit and fictitious sale*" of pledged shares from one shareholder to another.[71]

30. Case law cited by Macedonia includes cases where tribunals reviewed judicial conduct outside the denial of justice standard. The tribunal in *Swisslion v Macedonia* accepted that a State could be responsible for an expropriation through acts of judiciary.[72] The tribunal ultimately rejected the expropriation claim because – adopting a similar test as the tribunal in *Saipem v Bangladesh* – "*there was no illegality on the part of the courts*".[73] In *Vöcklinghaus v. Czech Republic*, the tribunal reviewed judicial conduct separately under both, a denial of justice standard and the FET standard, assessing with respect to the latter whether the application of the laws of the Czech Republic by the court breached investor's legitimate expectations or whether it was arbitrary or discriminatory.[74] The tribunal in *İçkale İnşaat v. Turkmenistan* examined whether a Turkmenistan's Supreme Court decision, preventing all of the claimant's machinery and equipment being removed from Turkmenistan, had gone beyond what was necessary to recover contractual penalties and whether it was "*excessive and as such expropriatory*".[75]

31. Scholars, including the ones relied by Macedonia, confirm that the review of a judicial conduct is not limited to instances of a denial of justice.[76] Aniruddha Rajput accepts that

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[69] *Oil Field of Texas, Inc. v. Iran and the National Iranian Oil Company*, IUSCT Case No. 43, Award, 8 October 1986 (1986/III) (**CL-071**), ¶¶ 42-43

[70] *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019 (**CL-072**), ¶ 279

[71] *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019 (**CL-072**), ¶ 380.

[72] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedoni*a, ICSID Case No. ARB/09/16, Award, 6 July 2012, (**RL-065**), ¶ 310

[73] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedoni*a, ICSID Case No. ARB/09/16, Award, 6 July 2012, (**RL-065**), ¶¶ 313-314

[74] *Peter Franz Vöcklinghaus v. Czech Republic*, Final Award, 19 September 2011, (**RL-060**) ¶¶ 201-204 (review of the judicial conduct under the FET standard), ¶¶ 205-209 (review of the judicial conduct under the denial of justice standard).

[75] *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016) (**RL-087**) ¶ 375 ("[…] Consequently, the Tribunal finds that that the Claimant has failed to prove that the Supreme Court's directive was excessive and as such expropriatory.")

[76] H. Gharavi, Discord Over Judicial Expropriation, ICSID Review, Vol. 33, No. 2 (2018) (**CL-073**), p. 355 ("[t]he acts or measures of the judiciary can [...] be found in violation of the FET standard irrespective of a finding of a denial of justice."); Eduardo Jiménez de Aréchaga, International Responsibility, 159 RECUEIL DES COURS 267 (1978) (**RL-012**), pp. 278-279 (distinguishing between three different situations that may give rise to the responsibility of the State for acts of judicial authorities, i.e. when decisions are incompatible with a rule of international law; in cases of a denial of justice and when the state is liable for a decision contrary to the municipal law)

actions of the courts in insolvency proceedings could result in various treaty breaches, including the breaches of FET, full protection and security (***FPS***), most-favoured-nation (***MFN***) and national treatment (***NT***) standards, and does not limit such claims only to a denial of justice.[77]

C. MACEDONIA WRONGLY IMPOSES AN EXCESSIVELY HIGH THRESHOLD

32. Even if the judicial conduct could entail state's liability only in instances of the denial of justice (*quod non*), this does not require an elevated standard of "*exceptionally outrageous" or* "*monstrously grave*" conduct of the judicial system as a whole, as Macedonia argues.[78]

33. **First**, modern case law confirms that that the customary international law on denial of justice evolved beyond the *Chattin* or *Neer* like standards. As *Mondev* tribunal put it, *"[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious*,"[79] emphasizing that the development of investment protection treaties influenced the content of rules governing the treatment of foreign investment and concluding that "*it would be surprising if this practice and the vast number of provisions it reflects were to be interpreted as meaning no more than the Neer Tribunal (in a very different context) meant in 1927*."[80]

34. The tribunal in *Tatneft v Ukraine* similarly noted that a denial of justice under the international minimum standard has not been frozen in the time and has evolved since the *Neer* case in the 1920s, so that that it is not necessarily different from the protection under modern investment protection treaties.[81] The tribunal explained that "a *decision can be*

[77] A. Rajput, Cross-Border Insolvency and Public International Law, 19 ROMANIAN J. OF INT'L LAW 7 (2018) (**RL-103**), pp. 23-24 (considering that a discriminatory treatment of creditors by the courts would amount to state's liability for the violation of the MFN and NT), p. 16 (considering that forcing of a settlement on the foreign investor "would amount to coercion and harassment, a basis to claim breach of the fair and equitable treatment standard"), p. 18 (discussing a liberal view of tribunals deciding on FPS claims and finding that "any decision of the judiciary regarding insolvency proceedings and action undertaken by the authorities of the host state in enforcement of those actions could arguably amount to violation of full protection and security")

[78] Statement of Defence, ¶¶ 5, 140-141 and ¶ 203 (arguing that GAMA purportedly failed to meet the test of the "*exceptionally outrageous or monstrously grave*" conduct).

[79] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 115.

[80] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 117; *See* also *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award 20 September 2021) (**RL-113**), ¶ 255 ("The Mondev tribunal was correct in stating that the facts in Neer were centred on a State's alleged failure to carry out an effective police investigation into a foreigner's murder, and are not apposite when discussing treatment of aliens under the FET standard. As the Azurix tribunal found: 'the traditional Neer formula ... reflects the traditional, and not necessarily the contemporary, definition of the customary minimum standard, at least in certain non-investment fields' ")

[81] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023**), ¶ 392 (""[i]n spite of the fact that findings of 'egregious' conduct and similar high standards of review have been often associated with the operation of the international minimum standard and denial of justice thereunder, it is today accepted that customary law has evolved with time in this respect and that its own standard of protection is not necessarily different from the widespread treaty protection available at present.") *See* also *ibid*., ¶ 360 ("This Tribunal must note that both decisions [Chevron v Ecuador ad White Industries v. India] corroborate to an extent the proposition that the customary law denial of justice test has not remained unchanged since first formulated and that the current understanding that customary law has evolved so as to become more closely identified with the applicable treaty standards is the prevalent approach.") [emphasis added]

inequitable and unreasonable without rising to levels as dramatically wrong as those just mentioned [egregiousness, manifest injustice, lack of due process, offending judicial propriety, arbitrariness, bad faith and clear and malicious application of the law]*, and still eventually engage liability for the breach of the FET standard*."[82] [emphasis added]

35. Case law confirms that a denial of justice may occur through procedural shortcomings or as a result of the substance of a court decision.[83] GAMA accepts tests articulated in several cases, such as in *Mondev v. United States* or *Dan Cake v Hungary*, which considered that a "*clearly improper and discreditable*" decision by a national court, "*which shocks, or at least surprises, a sense of judicial propriety*", serves as compelling evidence that a foreign investor has suffered a denial of justice.[84] The test is "*whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome*."[85] Claimant also accepts the finding of the tribunal in *Tatneft v Ukraine* that "*different standards of review might apply in relation to different types of wrong*", such as with respect to an excessive judicial delay.[86]

36. **Second,** the standard of review of judicial conduct needs to be further qualified. It is well established that a State cannot rely on its internal law to justify an internationally wrongful act.[87] The tribunal in Infinito *Gold v Costa Rica* held:

> "In the words of the Azinian tribunal, "[w]hat must be shown is that the court decision itself constitutes a violation of the treaty." This can happen if the court misapplies domestic law, but also when it applies domestic law correctly, if it leads to a result that is incompatible with international law. In the latter case, it could be said that it is the underlying law which breaches the treaty. However, if the court is the first State organ to apply that law to the investor, it is the court decision which perpetrates the breach of the treaty."[88] [emphasis added]

37. The ICJ in ELSI case similarly observed that *"[e]ven had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation*

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[82] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023**), ¶ 475.

[83] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (**RL-039**), ¶ 195: *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (**RL-069**), ¶ 262; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, 23 April 2012 (**RL-063)**, ¶ 275, 291; *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146

[84] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 127; See also *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, (**RL-039**), ¶ 207 (determining in the context of a substantive denial of justice whether the judgment of the Egyptian court was "*improper and discreditable*"); *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146

[85] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 127

[86] *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023**), ¶ 478 (noting that less deferential review of judicial decisions should apply to a finding of an undue delay).

[87] ILC Articles on Responsibility of States for Internationally Wrongful Acts, Article 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."); *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, (**CL-015**), ¶ 122 ("In this regard, the Tribunal recalls the general rule according to which a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law.")

[88] *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (**CL-070**), ¶ 360

of the FCN Treaty." [89] The tribunal in *Arif v Moldova* considered that *"at the international level, the State has a unitary nature, and a contradiction in the actions of the State cannot be resolved on the international plane by reference to its internal legal order*."[90] [emphasis added]

38. Therefore, even if acts of Macedonian organs in debt enforcement proceedings or TE-TO's reorganization were in accordance with the Macedonian law (*quod non*), this would not *ipso facto* absolve Macedonia of liability under the Treaty and customary international law.

39. **Third**, Macedonia is wrong that claims for denial of justice are subject to a higher evidentiary standard than other claims grounded in international law.[91] Claims for a denial of justice are subject to the same "*balance of probabilities*" standard of proof that applies to any other claim under international law.

40. International arbitral tribunals generally require a claimant to satisfy a "*balance of probabilities*" or preponderance of the evidence standard of proof. As the tribunal in *Fuchs v. Republic of Georgia* explained, the "*balance of probabilities*" standard of proof has been applied to the "*vast majority*" of investor-State claims.[92] Tribunals have applied this standard of proof also in cases involving review of judicial conduct. For instance:

    a) in *Tokios Tokelés v. Ukraine*, the tribunal applied a "*balance of probabilities*" standard of proof to a claim involving allegations of wrongdoing by Ukrainian judges and other high-level governmental officials;[93]

    b) in *Saipem S.p.A. v. The People's Republic of Bangladesh*, both parties agreed that a "*balance of probabilities*" standard of proof was applicable to claims arising out of the conduct of Bangladeshi courts and the tribunal did not impose a higher standard;[94]

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[89] *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**), ¶ 73 ("Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.") [emphasis added]

[90] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (**RL-069**), ¶ 547(c) ("[…] However, at the international level, the State has a unitary nature, and a contradiction in the actions of the State cannot be resolved on the international plane by reference to its internal legal order. It is well established that a State cannot rely on its internal law to justify an internationally wrongful act.") [emphasis added]

[91] Statement of Defence, ¶ 146 (referring to an "*elevated standard of proof*", requiring *"[c]onvincing evidence*")

[92] *Ioannis Kardassopoulos & Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 (**CL-074**), ¶ 229 (""The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities.")

[93] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, dated 26 July 2007 (**CL-075**), ¶ 124 ("[…] It surely cannot be the case that evidentiary requirements can be heightened purely on the grounds of deference or comity or otherwise. And if it is said that this is an example of the common-sense principle that an inherently unlikely allegation requires stronger than usual supporting evidence before it is accepted, contemporary experience shows how unrealistic it can be to assume that important persons will not behave badly. We make no assumptions of this kind, one way or the other, in the present case, and shall approach the issues on the basis that in order to prove its case on the existence and causal relevance of a nayizd the Claimant must show that its assertion is more likely than not to be true.")

[94] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 114

c) In *Chevron v Ecuador II*, the tribunal, reviewing the conduct of Ecuadorian courts, noted that *"the balance of probabilities remains the standard of proof*"[95]

41. The awards that Macedonia cites in support of its assertion that a claim for denial of justice is subject to a "*clear and convincing evidence*" standard are based on the case law that is obsolete (*Chattin* decided in 1927, *El Oro Mining* decided in 1931), relying on an antiquated rule of presumption of compliance with international law to the decisions of national courts (see above at ¶¶ 23-25), or they actually referred to the required standard of review, and not to the standard of proof.[96]

42. Finally, an evaluation of the threshold to find a judicial conduct in breach of international obligations is factually driven. As observed by the *Saluka v. Czech Republic* tribunal, *"[t]o the extent that the case law reveals different formulations of the relevant thresholds, an in-depth analysis may well demonstrate that they could be explained by the contextual and factual differences of the cases to which the standards have been applied*."[97] As will be explained, the facts of the underlying case support the finding of Macedonia's liability for the judicial conduct under any of the standards discussed above.

III. GAMA HAS SUFFERED A DENIAL OF JUSTICE

43. Macedonia subjected GAMA to a denial of justice in breach of both, the customary international law,[98] and as part of the Treaty standards discussed below.

44. GAMA will not repeat its description of the proceedings provided in the Statement of Claim,[99] but in the following section, it will offer clarification of specific points raised by Macedonia, including addressing the inaccuracies and misrepresentations in Macedonia's description.

A. GAMA HAS EXHAUSTED LOCAL LEGAL REMEDIES

45. GAMA exhausted legal remedies in TE-TO's reorganization proceedings, which are at the heart of the case, and Macedonia does not take issue with that.

46. With respect to debt enforcement proceedings, however, Macedonia argues that GAMA "*recommenced collection proceedings against TE-TO*", qualifying it as a "*remarkable turn of events*".[100] There is nothing remarkable about that. GAMA has not recommenced any

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[95] *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**), ¶ 8.42

[96] *EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020 (**RL-106**), ¶¶ 472-473

[97] *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, (**RL-029**) ¶ 291. See also *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 118 ("[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.").

[98] Statement of Claim, ¶¶ 176-180, 294-298

[99] Statement of Claim, ¶¶ 22-159

[100] Statement of Defence, ¶ 149 *et seq.* and ¶ 213

proceedings against TE-TO but is stuck in these proceedings for the 11th year. GAMA cannot even withdraw its claim in debt enforcement proceedings without TE-TO's consent, as held by the Civil Court Skopje.[101] It cannot be GAMA's fault if the Macedonian judiciary failed to adjudicate a dispute within 11 years, in complete disregard of the acknowledgement of the same claim in 2018 by the same Civil Court Skopje in TE-TO's judicial reorganization proceedings.

47. GAMA explained in its Statement of Claim why further exhaustion of local remedies in debt enforcement proceedings would be evidently futile in this case.[102] The debt enforcement proceedings became obsolete in 2018 when the Macedonian courts adopted a final and enforceable decision writing off 90% of GAMA's claim in the reorganization of TE-TO and unlawfully suspending the repayment of the remaining 10% beyond 2028. In the words of the Appellate Court Skopje, which belatedly, after four years when it was first seized by the matter, realized that GAMA's claim was confirmed in TE-TO's reorganization: "*it is completely unclear for what reasons the first-instance court* [in debt enforcement proceedings] *passed the appealed judgment in the event of an indisputable fact that the reorganization plan was accepted and approved by decision* [in TE-TO's reorganization]."[103]

48. On the other hand, the Civil Court Skopje in its decision approving TE-TO's reorganization plan, arbitrarily added an extra layer of uncertainty with respect to GAMA's residual 10% claim - although the claim was acknowledged in full and the repayment of 10% suspended beyond 2028, the court contradictorily stated that GAMA's 10% of the claim is still "*uncertain*" and will be settled if it succeeds in the debt enforcement proceedings (see below at ¶¶ 97-99). Although such treatment of GAMA's residual 10% of the claim is unlawful, the legal uncertainty created by the court forces GAMA to continue the proceedings against TE-TO in order not to lose entitlement to its residual claim.

49. In sum, whatever the outcome on the merits in the debt enforcement case, GAMA's claim (90%) with default interests will remain written-off and the repayment of the remaining 10% will remain suspended. Macedonia's argument on the purported lack of exhaustion of local remedies fails on that basis alone. The sole benefit that GAMA can reasonably hope to obtain from the pending debt enforcement proceedings after its claim was written-off in TE-TO's reorganization in 2018, is the award of legal costs. This has no effect on the merits of GAMA's claims in this arbitration and may be relevant only for the calculation of damages (see below at ¶¶ 376-378).

B. DEBT ENFORCEMENT PROCEEDINGS

1. THE MACEDONIAN COURTS UNLAWFULLY ASSUMED JURISDICTION

50. Macedonia assails GAMA for not trying to resolve the dispute with TE-TO "*in accordance with the EPC Contract's dispute resolution provisions by referring it to a DAB or*

[101] Statement of Claim, ¶¶ 44-47
[102] Statement of Claim, ¶¶ 62, 68, 242
[103] Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**), p. 2

arbitration".[104] Macedonia's argument falls flat. The Settlement Agreement constitutes a "*full and final resolution and amicable settlement of all claims and disputes in connection with the Works and the [EPC] Contract*"[105] under which TE-TO agreed to pay GAMA a settlement amount[106] of EUR 5 million "*in full and final settlement of all claims from both Parties for any events that occurred in relation to the Works and the [EPC] Contract up to the date of signing this Agreement*[…]".[107] Since TE-TO was not disputing its payment obligation[108] until it objected against the decision for enforcement issued by the notary public,[109] there was nothing that would prompt GAMA to take actions in accordance with the EPC Contract's dispute resolution provisions.

51. Once GAMA became aware that there was a dispute indeed, GAMA attempted to discontinue the proceedings[110] and subsequently objected to the jurisdiction of the Civil Court Skopje based on the arbitration clause of the EPC Contract.[111]

52. Macedonia accuses GAMA of objecting to the Civil Court Skopje's jurisdiction based on the arbitration clause in the EPC Contract "*despite having taken the opposite position a year earlier*"[112] when, according to Macedonia, allegedly "*GAMA adopted the view in reply that the arbitration agreement was not applicable*".[113] This is false. In the temporary injunction proceedings, GAMA submitted that "*according to Article 9 of the Law on International Commercial Arbitration of the Republic of Macedonia, it is allowed for one of the parties to submit a proposal for the imposing of a provisional measure to the court before or during the [a]rbitration procedure, which is also provided for in Article 28 paragraph 2 from the Rules of the International Chamber of Commerce*" and that the Civil Court Skopje "*has subject-matter and territorial jurisdiction to act on the proposal [for temporary injunction]*"[114] Indeed, the Law on Commercial Arbitration[115] and the ICC Rules of Arbitration (2012) explicitly allow for a party to apply to any competent judicial authority for interim or conservatory measures and such application "*shall not be deemed to be an*

[104] Statement of Defence ¶ 31

[105] See Settlement Agreement (**C-004**) at Clause 3 para 1

[106] Macedonia incorrectly uses the term "*contract price*" in relation to GAMA's claim of EUR 5 million which is a claim under the Settlement Agreement

[107] *See* Settlement Agreement (**C-004**) at Clause 3 para 2

[108] *See* E-mail from Mr Mihail Scobioala to Mr 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 […]"); *see* also E-mail from Mr Mihail Scobioala to Mr Hakan Emek dated 31 May 2012 (**C-028**), E-mail from Mr Hakan Emek to Mr Mihail Scobioala dated 1 June 2012 (**C-029**)

[109] *See* 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**)

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

[111] *See* Minutes of the hearing before the First Instance Civil Court Skopje dated 19 December 2013 (**C-049**); see also Brief for raising a jurisdictional objection by GAMA dated 19 December 2013 (**C-050**)

[112] Statement of Defence ¶ 46

[113] Statement of Defence ¶ 34

[114] Decision of the Civil Court Skopje (case file no. 2 RVRM no. 265/12) dated 1 February 2013 (**C-034**), p.4

[115] Law on International Commercial Arbitration (**C-56**), Article 9 ("It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.")

infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal."[116]

53. Contrary to what Macedonia suggests,[117] both GAMA and TE-TO never waived their rights to arbitrate. In the temporary injunction proceedings, TE-TO objected against the jurisdiction of the Civil Court Skopje based on the arbitration clause of the EPC Contract.[118] In the debt enforcement proceedings, GAMA objected to the Civil Court Skopje's jurisdiction and made the court aware, to no avail, of the fact that TE-TO had objected to the court's jurisdiction in the temporary injunction proceedings: "*[i]n that procedure the debtor Te-To submitted the translation of the Arbitration Clause 20.6 of the Contract and made reference to the absolute court incompetence for resolution of disputes in front of a Court in the Republic of Macedonia*."[119]

54. Even if the Macedonian courts applied Macedonian law correctly (which they did not),[120] they misapplied the New York Convention, which is a part of Macedonian domestic law. Under Macedonia's Constitution, "*the international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law*"[121] and under the Macedonian Law on Courts "*[i]f the court deems that the application of the law in a particular case is contrary to the provisions of an international agreement ratified in accordance with the Constitution, it shall apply the provisions of the international agreement, provided that they may be directly applied.*"[122] Under the New York Convention, the Macedonian 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*

[116] ICC Rules for Arbitration (2012) (**C-163**), Article 28 para 2 ("Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.") [emphasis added]

[117] Statement of Defence ¶ 50 (Macedonia argues that *"[t]the decision of the Basic Court [on jurisdiction], upheld by the Court of Appeal, is hardly extraordinary. Courts around the world recognize that a party may waive its right to arbitrate by commencing or participating in judicial proceedings*" and that "*GAMA provides no support for its argument that a situation where a defendant objects to a notary-issued payment order in court should be treated differently from a situation where a defendant objects to a court-issued payment order in court*.")

[118] See Brief by TE-TO dated 24 December 2012 (**C-033**), p. 3

[119] *See* Minutes of the hearing before the Civil Court Skopje dated 19 December 2013 (**C-049**) [emphasis added]; *see also* Brief for raising a jurisdictional objection by GAMA dated 19 December 2013 (**C-050**)

[120] Statement of Claim, ¶¶ 50-57; *see also* Positions and Conclusion of the Civil Department of the Supreme Court of the Republic of North Macedonia for 2015 (**C-057**) and 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**), pp 3-6

[121] Constitution of the Republic of North Macedonia (**C-164**), Article 118

[122] Macedonian Law on Courts (**C-165**), Article 18(4)

the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[123]

55. The mandatory character of the referral to arbitration by a court pursuant to the New York Convention is an internationally uniform rule.[124] The underlying principle that the parties to an arbitration agreement are required to honour their undertaking to submit to arbitration any dispute covered by their arbitration agreement is given effect by the mandatory requirement on national courts to refer the parties to arbitration when presented with a valid arbitration agreement. It follows that national courts are prohibited from hearing the merits of such disputes. If neither party alleges the existence of an arbitration agreement, the court will not ex officio refer the parties to arbitration but rather will, as a result, uphold its own jurisdiction.[125] As explained above, this was not the case here.

56. Macedonia's defence that the assumption of jurisdiction by Macedonian courts was purportedly a result of GAMA's ill-advised decisions, is therefore false. The tribunal in *Saipem v Bangladesh* dismissed respondent's argument that through procedural choice of Dhaka as the seat of the arbitration, Saipem had accepted the risk of interference by local courts. Tribunal noted that such "*submission obviously implies that the courts exercise their jurisdiction to the ends for which it is created and do not abuse their powers*", [126] and found that the court's intervention in arbitration was abusive. Similarly, GAMA expected that should the case ever progress to Macedonian courts, these would act as legally required: decline jurisdiction and refer parties to the arbitration.

57. A disregard of the arbitration clause by Macedonian courts amounts to a denial of justice to GAMA. As one of Macedonia's legal authorities confirm, "*an illegitimate assertion of jurisdiction would also result into denial of justice.*"[127]

2. THE MACEDONIAN COURTS UNLAWFULLY DISREGARDED ENGLISH LAW

58. The Appellate Court Skopje, in deciding to uphold jurisdiction over GAMA's claim, at the same time considered that GAMA had chosen Macedonian law. [128] This is a fundamentally flawed conclusion, which conflates jurisdiction with governing law. This error reveals also a deeper issue - the absence of GAMA's consent for the application of Macedonian law.

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[123] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York), (**CL-076**) Art. II(3)

[124] *Albert Jan van den Berg,* "New York Convention of 1958 Annotated List of Topics" (**CL-077**) ¶ 218

[125] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (**CL-078**) ¶ 67

[126] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 187.

[127] A. Rajput, Cross-Border Insolvency and Public International Law, 19 Romanian J. of Int'l Law 7 (2018) (**RL-103**), p. 13.

[128] Decision of the Appellate Court Skopje TSZ-1482/14 dated 15 December 2014 (**C-008**), p.3 (""[t]hey [GAMA] were aware of the circumstance that with the defendant [TE-TO] they have agreed the jurisdiction of the international arbitration court […] have, nevertheless, decided to have the dispute resolved before the courts in the Republic of Macedonia with the application of the Macedonian law.")

59. Macedonia defends itself by stating that GAMA did not adduce any evidence about the contents of English law and did not articulate how the Settlement Agreement should be interpreted under English law.[129] Macedonia also says that "*the Macedonian courts could reasonably assume that English law would not change the interpretation of the Settlement Agreement*."[130] Macedonia's argument is contrary to essential legal principles and raises an immediate question: how could the Macedonian courts legitimately assume that the application of English law would not influence the interpretation of the Settlement Agreement, without first undertaking a comprehensive analysis of English law itself?

60. The failure of the Civil Court Skopje to determine the contents of English law was not simply an oversight, but a breach of Macedonian law, which mandates such determination *ex officio*. [131] As accurately expounded by Dr. Toni Deskoski, a distinguished Professor of Private International Law, Macedonian law can only be applied in exceptional circumstances, and after the court has exhausted all means to determine the content of the foreign law:

> "The Macedonian PIL [Private International Law] Act... [provides] an option for reverting to the lex fori... 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." [132] [emphasis added]

61. Although the application of English law was a duty of Macedonian courts, GAMA nevertheless repeatedly filed requests for the application of the English law, which were summarily ignored by the Macedonian courts.[133] In any case, considering the finality of the Appellate Court Skopje's decision to apply Macedonian law in 2014,[134] presenting evidence pertaining to English law became a futile exercise.

62. Contrary to what Macedonia suggests,[135] GAMA was also not required to submit evidence on the content of English law in the appeal to the Supreme Court, although GAMA did raise the failure of the lower court to apply English law.[136] Under Macedonian law, if a party is dissatisfied with an effective judgment, it can file an appeal to the Supreme Court on two accounts - either due to a significant violation of the Litigation Procedure Law or erroneous implementation of substantive law.[137] However, the Supreme Court's jurisdiction is confined to the verification of whether the lower courts have rightly chosen and enforced the substantive law while being unable to ascertain the substance of foreign law

[129] Statement of Defence ¶ 106
[130] Statement of Defence ¶ 210
[131] Statement of Claim, ¶¶ 47-49
[132] T. Deskoski, "The New Macedonian Private International Law Act of 2007". *Volume X 2008: Volume X (2008)*, (2009) (**C-166**) p. 444
[133] *See e.g.* Brief by GAMA to the Civil Court Skopje, dated 19 December 2013 (**C-50**); Minutes of hearing before the Civil Court Skopje, dated 7 March 2014 (**C-53**); Brief by GAMA to the Civil Court Skopje, dated 19 March 2015 (**C-55**); Brief by GAMA to the Appellate Court Skopje, dated 25 September 2018 (**C-68**); Brief by GAMA to the Supreme Court, dated 24 December 2019 (**C-69**); Brief by GAMA to the Civil Court Skopje, dated 23 August 2021 (**C-70**); Brief by GAMA to the Appellate Court Skopje, dated 2 February 2022 (**C-72**).
[134] Decision of the Appellate Court Skopje TSZ-1482/14 dated 15 December 2014 (**C-008**)
[135] Statement of Defense ¶¶ 6, 106
[136] Brief by GAMA to the Supreme Court, dated 24 December 2019 (**C-69**), p. 5
[137] Law on Litigation Procedure (Official Journal of the Republic of Macedonia no. 79/2005), (**C-039 Resubmitted**) ("Litigation Procedure Law") Article 375

independently. Only the trial courts, in collaboration with the Macedonian Ministry of Justice, could have done this.

63. In light of these circumstances, GAMA raised significant violations of the Litigation Procedure Law and the erroneous choice and application of Macedonian substantive law.[138] However, the Supreme Court *failed to address at all* GAMA's complaints on the wrongful choice of the Macedonian law instead of the English law by lower courts. Instead, the Supreme Court remanded the case to the Civil Court Skopje by specifically stating that by "*applying the substantive law of the Law on Obligations, the courts will have to assess the deadlines set in the agreement, in which each of the parties must fulfil their obligations, as well as to consider whether and why there is a conditionality or mutual dependence in their fulfilment*."[139] [emphasis added]

64. The flagrant disregard for the governing law of the Settlement Agreement and ignorance of GAMA's argument on that point at several judicial levels constitute an egregious violation of Macedonian law and calls into question the integrity of the judicial process itself. The decisions of Macedonian courts, ignoring the contractual choice of English law as a governing law, "*shock[]* [and] *surprise[] a sense of judicial property"*[140], were "*clearly improper and discreditable*",[141] breached GAMA's right to be heard and as such amount to denial of justice.

3. THE MACEDONIAN COURTS UNLAWFULLY DENIED GAMA'S CLAIM

(a) WRONGFUL APPLICATION OF THE LAW ON OBLIGATIONS

65. Even assuming that the Macedonian courts were correct in applying Macedonian law (which they decidedly were not), the denial of GAMA's claim remains unfounded. GAMA argued that even under the umbrella of Macedonian law, "*the Second instance court incorrectly applied article 111, paragraph 1 from the Law on obligations as the basis for simultaneous and conditioned fulfillment of the obligations of both the plaintiff [GAMA] and defendant [TE-TO].*"[142]

66. Article 111(1) of the Law on Obligations provides: "*In bilateral agreements, none of the parties shall be obliged to fulfill their obligation if the other party fails to do so, or if they are*

[138] Appeal by GAMA to the Supreme Court of the Republic of North Macedonia dated 24 December 2019 (**C-069**), p. 5.

[139] Decision of the Supreme Court of the Republic of North Macedonia Rev1 no. 49/2020 dated 23 December 2020 (**C-012**), p. 4 [emphasis added]

[140] *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

[141] *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.")

[142] Appeal by GAMA to the Supreme Court of the Republic of North Macedonia dated 24 December 2019 (**C-069**), p. 5.

not prepared to fulfill it at the same time, except if otherwise is agreed or established by law, or if other arises from the nature of the matter." [143]

67. GAMA argued that "*the parties [GAMA and TE-TO] unambiguously and explicitly agreed on 'other', i.e., terms of payment of EUR 5.000.000, and that is 31.03.2012 and none of the provisions stipulates that payment is conditioned with the fulfillment of obligations by the plaintiff [GAMA] according to the List of assignments [Punch List]*." [144]

68. However, the Civil Court Skopje and the Appellate Court Skopje have continuously leaned on this very provision from the Law on Obligations to deny GAMA's claim against TE-TO. This is a manifest misapplication of the law. The plain language of Article 111(1) of the Law on Obligations, as applied to the Settlement Agreement, indicates that GAMA's obligation to complete the Punch List items was conditional on TE-TO's obligation to pay the settlement amount - not the other way around. This erroneous interpretation by the Macedonian courts of a clear contractual term represents a stark deviation from legal norms.

(b) GAMA'S CLAIM WAS UNCONDITIONAL

69. Macedonia seems to argue that the Macedonian courts correctly established that GAMA's claim against TE-TO was conditional on the completion of the Punch List items and TE-TO's claims for latent defects.[145] Macedonia's argument is misconceived. Macedonia cannot escape the fact that GAMA's claim was acknowledged by TE-TO prior to,[146] during the debt enforcement proceedings[147] and in TE-TO's judicial reorganisation.[148]

70. Under the Settlement Agreement, TE-TO's payment obligation was not contingent on GAMA's obligations to complete the Punch List items but rather GAMA's obligations in this respect were conditional on TE-TO's payment of the settlement amount.[149] This was acknowledged by TE-TO's management by declaring that TE-TO's "*intention is not to condition the proposed payment schedule with the closing of punch items list*" and that

[143] Macedonian Law on Obligations (**R-005**) Art. 111(1)

[144] Appeal by GAMA to the Supreme Court of the Republic of North Macedonia dated 24 December 2019 (**C-069**), p. 5.

[145] Statement of Defence ¶ 24, 26, 29, 103-105

[146] *See* E-mail from Mr Mihail Scobioala to Mr 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 […]"); see also E-mail from Mr Mihail Scobioala to Mr Hakan Emek dated 31 May 2012 (**C-028**), E-mail from Mr Hakan Emek to Mr Mihail Scobioala dated 1 June 2012 (**C-029**)

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

[148] *See* Reorganization Plan of TE-TO AD Skopje no. 0302 - 439 dated 4 April 2018 (**C-013 Resubmitted**), p. 16

[149] 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.") [emphasis added]

GAMA should "*not consider the required schedule of closing the punch items as precondition for actual payments per Supplement No.9*."[150]

71. The unconditionality of GAMA's claim was acknowledged also by the Supreme Court. Macedonia argues that the Supreme Court did not fully accept GAMA's arguments.[151] However, the Supreme Court found that *"the lower courts did not consider the Punch List, where in the column Deadline for the due date of the claimant's [GAMA's] obligations, the following dates are listed: August 2012, end of June 2012, end of April 2012. These deadlines, valid for the claimant's [GAMA's] obligations, come after the agreed payment deadline - 31.03.2012, which is the defendant's [TE-TO's] obligation.*"[152] Furthermore, the Supreme Court underlined that: "*each of the obligations of the claimant [GAMA] and the defendant [TE-TO] 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 the Supplement number 9 and the settlement agreement concluded between the parties, there is no provision for their mutual conditionality regarding the fulfilment*."[153] [emphasis added]

72. Additionally, Macedonian courts also failed to adhere to the legal opinion by the Supreme Court dated 23 February 2015, which limited the review of claims in debt enforcement proceedings to the "*facts in the refuted part of the decision* [allowing enforcement]*, but within the framework of the request contained in the decision allowing execution [enforcement]*".[154] GAMA relied on this opinion in its appeal against the joinder of TE-TO's counterclaim for latent defects, arguing on the basis of this opinion that "*if a counterclaim is submitted with the complaint, the court may not deliberate on it in the complaint procedure, but in a separate procedure*,"[155] which the Appellate Court Skopje, deciding on the joinder, accepted and directed the lower court to separate TE-TO's counter-claim proceedings from GAMA's proceedings against TE-TO.[156]

73. The decisions of the Macedonian courts in GAMA's debt enforcement proceedings were in conflict with the opinion of the Supreme Court that the review is limited to the facts of the refuted part of the decision. Both the Civil Court Skopje and the Appellate Court Skopje opted not to follow this guidance, but entertained TE-TO's claims for Punch List items and latent defects and denied GAMA's claim, relying on the purported conditionality of GAMA's claim.

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[150] E-mail from Mihail Scobioala to Hakan Emek dated 5 June 2012 (**C-030**)

[151] Statement of Defence ¶ 116

[152] Statement of Claim, ¶ 64; *see also* Decision of the Supreme Court of the Republic of North Macedonia Rev1 no. 49/2020 dated 23 December 2020 (**C-012**), pp. 3-4.

[153] Decision of the Supreme Court of the Republic of North Macedonia Rev1 no. 49/2020 dated 23 December 2020 (**C-012**), p. 4 [emphasis added]

[154] Legal Opinion of the Macedonian Supreme Court dated 23 February 2015 (**C-167**)

[155] 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**), p. 2 (GAMA citing the opinion of the Supreme Court)

[156] Statement of Defence ¶ 52; 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**); Decision of the Appellate Court Skopje no. TSZ-2796/15 dated 15 April 2016 (**C-061**); Decision of the First Instance Civil Court Skopje No. PL1-286/13, dated 29 September 2016 (**C-062**)

74. Even if one were to accept Macedonia's suggestion that GAMA's claim was conditional upon the completion of the Punch List items and the resolution of alleged latent defects in CCPP Skopje (which it was not), it still doesn't follow that GAMA's claim should have been denied its claim in its entirety. TE-TO's evidence establishes a critical fact: "[*t]he total value of the above tasks uncompleted by the Claimant [GAMA] and the value of the latent defects amounts to EUR 530,086.00*."[157] GAMA argued that even if the alleged liability of GAMA in the amount of EUR 530,086 were valid (*quod non*), it would only partially impact GAMA's claim, leaving the significant part of the claim in the amount of EUR 4,470,014 as valid and founded.[158]

75. Indeed, in December 2020, the Supreme Court explicitly stated that the lower courts must "*take into account the general principles of conscientiousness and honesty of the Law on Obligations, from the aspect of the insignificance of the non-fulfilment of one's obligation and the possibility for reduction of the other party's claim for that amount, seen as a whole obligation legal relationship*."[159] However, in the repeated proceedings, just as in initial proceedings, the Civil Court Skopje again entirely failed to consider the significant imbalance between the purported GAMA's obligation and its claim against TE-TO,[160] and so did the Appellate Court Skopje, which eventually set aside the decision of the lower court for unrelated reasons, *i.e.* the acknowledgment of GAMA's claim in TE-TO's reorganization.[161]

(c) TE-TO'S OWN EXPERT ACKNOWLEDGED GAMA'S CLAIM

76. Macedonia accuses GAMA of "*failing to introduce expert evidence to rebut the evidence of TE-TO's expert in determining whether GAMA had fulfilled its obligations under the Settlement Agreement."*[162] Macedonia's argument misses the mark. The question that must be addressed is not a vague inquiry into what specific type of expert evidence might have been required from GAMA to substantiate its claim based on the Settlement Agreement. One needs to focus on the evidence that already substantiated GAMA's claim against TE-TO concerning the settlement amount, stemming directly from the Settlement Agreement.

77. TE-TO's own expert witness inadvertently strengthens GAMA's position by acknowledging that TE-TO had recorded "*in its accounting records its liability to the Claimant [GAMA] on grounds of the relevant invoice number A 028 in the amount of EUR 5,000,000.00 under Supplement no. 9 and Settlement Agreement*."[163] This admission is more than a mere

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[157] *See* Brief providing an expert report by TE-TO dated 11 December 2013 (**C-048**) enclosing Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-48**) p.2 [3]

[158] See Appeal against the Judgment of the First Instance Civil Court Skopje by GAMA dated 25 September 2018 (**C-068**), p. 6

[159] Decision of the Supreme Court of the Republic of North Macedonia Rev1 no. 49/2020 dated 23 December 2020 (**C-012**), p. 4 [emphasis added]

[160] Judgment of the First Instance Civil Court Skopje No.50 PL1-TS-252/21 dated 8 October 2021(**C-071**), C-072

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

[162] Statement of Defence, ¶ 201 f)

[163] *See* Brief providing an expert report by TE-TO dated 11 December 2013 (**C-048**) enclosing Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-048**) p.4 [5]

detail – it's a clear and unequivocal acknowledgement of the debt owed by TE-TO. Rather than dwelling on theoretical possibilities and hypothetical scenarios, the Macedonian courts should have recognized the weight of this acknowledgement. To debate the nature of expert evidence required in this context would be to overlook the concrete evidence that already exists.

(d) TE-TO FAILED TO SUBSTANTIATE CLAIMS AGAINST GAMA

78. Macedonia states that *"[i]n November 2013, an expert, appointed by TE-TO to review the status of the Plant, found that all 14 defects that had been identified in 2012 remained unresolved, and that six Punch List items were outstanding*."[164] This is a misleading statement. TE-TO did not appoint an expert to "*review the status of the Plant*". TE-TO appointed Mr Goran Markovski, an accounting expert who issued his opinion by relying on a *"[s]tatus [r]eport, composed by the Respondent [TE-TO], stat[ing] in detail all uncompleted tasks that were the obligation of the Claimant [GAMA].*"[165] TE-TO failed to provide any proof to substantiate the existence and value of any incomplete tasks or unresolved latent defects within CCPP Skopje, such as insights from qualified civil engineers. The absence of such critical evidence is a significant gap.

79. Macedonia acknowledges that Mr Markovski is an "*economic expert*" and "*prepared his report in that capacity*"[166]. Mr Markovski, relying exclusively on TE-TO's status report, found that "*Claimant [GAMA] failed to meet the obligations and tasks undertaken in relation with the Respondent [TE-TO] in terms of removal of the identified latent defects of the equipment installed and the systems, which were detected during their exploitation or during the commissioning of the plant*"[167] and that "[*t]he total value of the above tasks uncompleted by the Claimant [GAMA] and the value of the latent defects amounts to EUR 530,086.00*."[168]

80. Mr Markovski, however, concluded that since "*the basic condition of the Supplement no. 9 and Settlement Agreement – removal of the shortcomings by the Claimant [GAMA] – was not met, the Respondent [TE-TO] is still not under the obligation to execute the payment of the invoice that is the subject of this dispute*."[169] Mr. Markovski's opinion is fundamentally flawed and raises serious concerns regarding his objectivity. He based his conclusions solely on information furnished by TE-TO, without seeking or considering independent verification to assess the completion status of the Punch List items or the underlying latent defects. This reliance on one-sided information not only raises questions about his impartiality but also severely undermines the credibility of his findings. Furthermore, Mr

[164] Statement of Defence ¶ 30
[165] *See* Brief providing an expert report by TE-TO dated 11 December 2013 (**C-048**) enclosing Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-048**) p. 2 [3]
[166] Statement of Defence ¶ 103
[167] *See* Brief providing an expert report by TE-TO dated 11 December 2013 (**C-048**) enclosing Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-048**) p.4 [3]
[168] *See* Brief providing an expert report by TE-TO dated 11 December 2013 (**C-048**) enclosing Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-048**) p.2 [3]
[169] *See* Brief providing an expert report by TE-TO dated 11 December 2013 (**C-048**) enclosing Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-048**) p.4 [3]

Markovski's attempt to interpret the Settlement Agreement and the (un)conditionality of GAMA's claim is highly questionable because he was not called upon to interpret the Settlement Agreement – this was a task for the Macedonian courts.

81. Consequently, the expert report from Mr Markovski cannot be viewed as a reliable document and the Macedonian court's reliance on Mr Markovski's report was misguided and unjustified.

82. The above issue is exacerbated by the fact that the Macedonian courts ignored GAMA's evidence. The Civil Court Skopje shockingly decided to disregard the Settlement Agreement by a flawed reasoning that "[…] *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 [GAMA] that have not been fully or have been poorly performed*."[170]

83. The decisions of Macedonian courts described above, involve serious misapplication of the Macedonian law with respect to the application of Article 111(1) of the Law on Obligations, disregard of the Supreme Court's instructions on the significant imbalance between the purported GAMA's obligation against TE-TO and its claim against it, and – through ignorance of GAMA's arguments and evidence - infringement of GAMA's due process rights.

84. The denial of GAMA's *entire* claim, even on the assumption of the alleged liability of GAMA against TE-TO in the amount of EUR 530,086 (*quod non*), was inexplicable and arbitrary,[171] and amount to manifest misapplication of Macedonian substantive law.

4. THE MACEDONIAN COURTS DENIED GAMA'S CLAIM AFTER IT HAD BEEN ACKNOWLEDGED IN TE-TO'S JUDICIAL REORGANISATION

85. The stance adopted by the Appellate Court Skopje regarding GAMA's claim after it had been written off in TE-TO's judicial reorganization is deeply flawed.

86. At first, the Appellate Court Skopje in debt enforcement proceedings inexplicably denied GAMA's claim, asserting that despite the inclusion of GAMA's claim in TE-TO's accounting records and in the final and enforceable reorganization plan, TE-TO was not bound to

[170] Judgment of the First Instance Civil Court Skopje No. PL1-286/13, dated 4 May 2018 (**C-010**), p. 9

[171] *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶¶ 1032-1033 ("An internationally protected principle of administration of justice is that judicial decisions must be grounded on an assessment of the relevant facts and applicable law, and that the ratio decidendi must be sufficiently motivated on those grounds. De Visscher noticed that a decision that has an 'extreme defectiveness of its reasoning' may lead to the conclusion that a denial of justice has been committed.)" *See* also *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**CL-069**), ¶ 555 ("To say that a void agreement must be rescinded is a contradiction in terms and is irrational. Such a fundamental inconsistency in the Judgment must raise a serious question as to whether the Tribunal is bound to treat it as a definitive statement of the legal status of Karkey's RPP according to Pakistan law.")

make a payment. [172] The court reached that decision without citing *any* legal basis and in direct contradiction with the final and enforceable reorganization plan.

87. GAMA raised the issue in the appeal to the Supreme Court,[173] which in December 2020 upheld GAMA's appeal, but entirely failed to address the confirmation of GAMA's claim in TE-TO's reorganization proceedings.[174] In a renewed first instance proceedings, the Civil Court Skopje, despite GAMA's arguments,[175] completely ignored the fact that GAMA's claim was recognized in TE-TO's reorganization and in October 2021 issued a judgment again denying GAMA's claim, without devoting *any* sentence on the recognition of claim in TE-TO's reorganization.[176]

88. GAMA appealed and in 2022, the Appellate Court Skopje, predominantly constituted of the very same judges than in previous appeal proceedings (and also in reorganization appeal proceedings),[177] suddenly expressed confusion as to why GAMA's claim had been denied by the Civil Court Skopje. The Appellate Court Skopje highlighted that "*the plaintiff's* [GAMA's] *claim was recognized in the respondent's* [TE-TO's] *reorganization proceedings in which the plaintiff's* [GAMA's] *claim was recognized, and he enjoyed all the rights of a bankruptcy creditor*" and that "*it is completely unclear for what reasons the first-instance court passed the appealed judgment*".[178] However, instead of taking a decision on the issue itself, the court remanded the case to the Civil Court Skopje, instructing it to clarify the issue by pondering "*whether it is possible to decide on the same claim twice*".[179] This remarkable shift in perspective from the Appellate Court Skopje, besides being self-contradictory and contrary to basic tenets of a legal framework discussed below, adds another layer of ambiguity to GAMA's situation.

[172] Statement of Claim, ¶ 63; *see also* Decision of the Appellate Court Skopje no. TSZ-2278/18, dated 18 October 2019 (**C-011**), p. 7. (""[…]The claimant's [GAMA's] appellate assertion that the defendant [TE-TO] is obliged to pay the invoice A028 is unfounded, considering that it has been entered in the accounting records of the defendant [TE-TO] and was included in the reorganization plan, because this action of the defendant [TE-TO] does not mean that the defendant [TE-TO] agrees to pay the invoice, in a situation where the claimant [GAMA] 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.")

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

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

[175] Brief by GAMA to the Civil Court Skopje, dated 23 August 2021 (**C-070**), p. 2

[176] Judgment of the First Instance Civil Court Skopje No.50 PL1-TS-252/21 dated 8 October 2021(**C-071**)

[177] Two of the three appellate judges, Ms. Dukovska and Ms. Georgieva, sat as appeal judges in several appeal proceedings involving GAMA and TE-TO, spanning from 2013 onwards. They decided on GAMA's appeals against the decisions of the Civil Court Skopje regarding: (i) GAMA's proposal for the issuance of an interim injunction, (ii) the decision on jurisdiction and governing law in debt collection proceedings, (iii) joinder of debt collection proceedings with TE-TO's counterclaim, (iv) decision approving TE TO's reorganization, (v) first decision on the merits in debt collection proceedings, denying GAMA's claim and (vi) second decision on the merits in debt collection proceedings, denying GAMA's claim.

[178] See Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**), p. 2

[179] See Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**), pp. 2-3

89. Under Macedonian law, the decisions of the courts, provided they are effective and enforceable, stand as incontrovertible and legally binding.[180] They remain unchallenged and can only be altered or revoked by a court in a process established by law.[181] The disconcerting reality is that the Macedonian courts' decisions to deny GAMA's claim, [182] taken subsequent to the write-off of its claim in TE-TO's judicial reorganisation, run in flagrant violation of the very Macedonian law they are mandated to uphold. The situation is further exacerbated by the Appellate Court Skopje's order upon remand to the Civil Court Skopje to determine "*whether it is possible to decide on the same claim twice*". This instruction, far from fulfilling the court's responsibility to acknowledge GAMA's claim as a result of an effective and enforceable judgment, is an abdication of its duty. No honest or competent court could ask such a question.

90. Macedonia's argument that the Appellate Court Skopje remedied the situation with respect to GAMA's claim[183] is therefore flawed. In reality, the action taken by the Appellate Court Skopje was to prompt the Civil Court Skopje to unravel a non-existent quandary. Given that GAMA's claim has already been acknowledged by a final and enforceable decision, it stands beyond the purview of further adjudication by the Macedonian courts.

91. The decisions of the Macedonian courts in debt enforcement proceedings to ignore a *res judicata* effect of the recognition of GAMA's claim in TE-TO's reorganization proceedings, are in manifest breach of the Macedonian law, "*shock[]* [and] *surprise[] a sense of judicial property"*[184], were "*clearly improper and discreditable*",[185] and as such amount to denial of justice.

5. THE DEBT ENFORCEMENT PROCEEDINGS WERE EXCESSIVELY DELAYED

92. Macedonia argues that *"[e]ven with respect to delay as a cause of futility, GAMA would have to establish that the delay in court proceedings was already so excessive as to amount to a Treaty breach on its own*"[186] The excessive delay in the court proceedings does indeed amount to a Treaty breach in itself. The fact that since 2012 they are still pending even though GAMA's claim has been written off in TE-TO's judicial reorganization by those very same courts in 2018, is sufficient evidence.

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[180] Law on Courts (**C-165**), Article 13(2) ("The legally valid court decision shall have undisputed legal effect.") [emphasis added]; Law on Courts (**C-165**), Article 13(5) ("Everyone shall be obliged to obey the legally valid and enforceable court decision under threat of legal sanctions.")

[181] Law on Courts (**C-165**), Article 13(3) ("The court decision may only be amended or abolished by a competent court in a procedure prescribed by law")

[182] See Decision of the Appellate Court Skopje no. TSZ-2278/18, dated 18 October 2019 (**C-011**), Judgment of the First Instance Civil Court Skopje No.50 PL1-TS-252/21 dated 8 October 2021 (**C-071**)

[183] Statement of Defence ¶ 263

[184] *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

[185] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 127

[186] Statement of Defence ¶ 214

93. The appropriate measure for assessing this delay is rooted in the 2015 amendments to the Law on Litigation Procedure, concerning adjudicating objections against the equivalent of notarial decisions for enforcement or 'notarial payment orders'.[187] According to these amendments, Macedonian trial courts must decide the merits of such an objection within six months of receipt, and appeal courts must decide on an appeal within 30 days.[188]

94. This is in stark contrast with the present situation, where the first judgment on the merits was rendered in 2018,[189] *i.e.* only after 6 years after the start of the proceedings in 2012, and is after 11 years still pending. The excessive duration of proceedings is also comparable with excessive delays, amounting to a denial of justice and breach of the FET and effective means standards in comparable investment arbitration cases.[190]

95. Macedonia also argues that the duration of the debt enforcement proceedings was dictated by the litigation choices of GAMA.[191] This is wrong. The excessive delays were primarily the result of the Macedonian courts' decisions discussed above. The Macedonian courts had a clear and defined task - to adjudicate whether to uphold or reject the notary's order directing TE-TO to pay GAMA's claim. This should have been a relatively straightforward process, guided by the Supreme Court's framework[192] (see above at ¶ 72), which required them to answer one question: did GAMA have a valid claim against TE-TO? The Macedonian courts not only failed in this task but did so even after GAMA's claim was recognized in TE-TO's judicial proceedings. This is not merely a procedural delay, it's a failure of justice.

6. THE MACEDONIAN COURTS FORCED GAMA TO LITIGATE WITH TE-TO

96. Macedonia accuses GAMA of actively litigating in the Macedonian courts and that in "*[j]anuary this year, GAMA filed (on remand) new proceedings in Macedonia seeking to enforce its payment claim against TE-TO*"[193]. The same issue reappears at paragraph 124 of the Statement of Defence, where Macedonia states that "*after filing its Statement of Claim in this arbitration – GAMA filed another written submission[s] in the Basic Court, restarting proceedings in pursuit of its EUR 5 million claim against TE-TO*" and that "[*t]hese proceedings remain pending*." These statements are misleading. As explained above, GAMA did not restart these proceedings by its submissions, but is simply stuck in these proceedings for the 11th year. In any event, debt enforcement proceedings are obsolete

[187] Law on Supplementing and Amending the Law on Litigation Procedure (**C-168**)
[188] Law on Supplementing and Amending the Law on Litigation Procedure (**C-168**), Article 42 introducing Article 428-v ("(1) The procedure following an objection to the decision to issue a notarial payment order before the first-instance court must be completed within six months from the day of receipt of the case in court. (2) The second-instance court is obliged to make a decision following an appeal filed against the decision of the first-instance court within 30 days."
[189] Judgment of the First Instance Civil Court Skopje No. PL1-286/13, dated 4 May 2018 (**C-010**)
[190] SoC, ¶¶ 249-250 (referring to *Pey Casado v Chile, White Industries v India, El Oro Mining and Railway Co.227, Chevron v Ecuador* and case law of the European Court of the Human Rights).
[191] Statement of Defence ¶ 264
[192] Legal Opinion of the Macedonian Supreme Court dated 23 February 2015 (**C-167**)
[193] Statement of Defence ¶ 6

since 2018, when GAMA's claim was acknowledged and written-off in TE-TO's judicial proceedings.

97. At the same time and although obsolete, GAMA is paradoxically also forced to continue debt enforcement proceedings based on unlawful actions of the Macedonian courts in TE-TO's reorganization. In the decision of the Civil Court Skopje approving TE-TO's judicial reorganisation, the court found that:

"In terms of the creditor's [GAMA's] claim, a court proceeding is in progress and until the lawsuit is over, its status is uncertain and indisputable according to the law the creditors from the same payment lines are settled the same but this claim shall be settled when the procedure is final, if the period for payment of these claims comes and the court procedure is not completed, the debtor [TE-TO] in accordance with the law has an obligation to keep a reservation and to continue with the realization of the plan and in the end the debtor's shareholders are settled."[194] [emphasis added]

98. On the one hand, the Macedonian courts *fully* confirmed GAMA's claim and approved the write-off of 90% of its claim in TE-TO's judicial organisation, but on the other hand, they have ordered GAMA to continue to litigate to receive the entitlement to the remaining 10%. As Mr. Kostovski attests, this was unlawful and contradictory.[195]

99. The decision of the Civil Court Skopje in TE-TO's reorganization "*shock[] […] a sense of judicial property*".[196] The discrepancy between the final and enforceable operative part of the decision, acknowledging in full GAMA's claim and ordering the repayment of GAMA's residual 10% of the claim after 2028, while at the same time in the reasoning of the decision directing GAMA to litigate the claim, cannot be justified by any valid legal reason.[197]

C. TE-TO'S JUDICIAL REORGANISATION

100. Macedonia argues that in TE-TO's judicial reorganisation, "*the bankruptcy judge was asked to interpret and apply the applicable provisions of the Bankruptcy Law with little or*

[194] Decision of the Civil Court Skopje (Case file no. 3 ST-124/18 and 160/18), dated 14 June 2018 (**C-015**), p. 32
[195] Second Kostovski Opinion ("Second Kostovski Opinion") (**CE-02**), ¶¶ 93-94
[196] *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
[197] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**CL-069**), ¶ 555 ("To say that a void agreement must be rescinded is a contradiction in terms and is irrational. Such a fundamental inconsistency in the Judgment must raise a serious question as to whether the Tribunal is bound to treat it as a definitive statement of the legal status of Karkey's RPP according to Pakistan law."); *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶¶ 1032-1033 ("An internationally protected principle of administration of justice is that judicial decisions must be grounded on an assessment of the relevant facts and applicable law, and that the ratio decidendi must be sufficiently motivated on those grounds. De Visscher noticed that a decision that has an 'extreme defectiveness of its reasoning' may lead to the conclusion that a denial of justice has been committed. Citing to the Barcelona Traction pleadings, Paulsson notes that judicial bad faith that amounts to denial of justice may occur when '[…] one can no longer explain the sentence rendered by any factual consideration or by any valid legal reason' "); *Ibid.,* ¶ 1035 (finding by reference to *Flughafen v Venezuela* that illogical or inconsistent explanations amount to denial of justice)

no precedent."[198] However, Macedonia cannot exploit an alleged lack of clarity in the law or practice to the disadvantage of a foreign investor or escape its international obligations.[199]

101. In addition, the bankruptcy judge is a seasoned judge who, at that time, served as the Head of the Bankruptcy and Liquidation Department at the Civil Court Skopje.[200] She was no novice to the intricate complexities of bankruptcy proceedings. It is deeply perplexing that the bankruptcy judge acted in complete disregard of the fundamental principles of the Bankruptcy Law.

102. Macedonia's argument also misapprehends the fundamental characteristics of a civil law system like Macedonia. In Macedonia, there is no binding precedent system, which is a feature of common law jurisdictions. In Macedonia, legal rules and principles are derived from codified laws, international treaties and decisions of the ECtHR.[201] To assert that the absence of precedent would diminish the bankruptcy judge's capacity to render a lawful decision overlooks the very essence of a civil law approach. The bankruptcy judge's task was to engage in a careful interpretation of the Bankruptcy Law itself, guided by its text, purpose, and the broader principles of justice and equity. That was not the case here.

1. MACEDONIA HAS ACKNOWLEDGED THAT TE-TO'S REORGANISATION WAS UNLAWFUL

103. In February 2023, the Macedonian Government proposed to the Macedonian Parliament[202] the Proposed Insolvency Law[203] seeking to clarify the existing pre-insolvency reorganisation rules and incorporating certain solutions from the Law on Out-of-Court Settlement[204] in the pre-insolvency reorganisation proceedings.[205] The Proposed Insolvency Law clarifies the purpose of pre-insolvency reorganisation as:

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[198] Statement of Defence ¶ 152

[199] *Occidental Exploration & Production Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, dated 1 July 2004 (**CL-079**), ¶ 163 (finding arbitrariness based on "confusion and lack of clarity" in interpretation of Ecuadorian tax code where Ecuador sought to deny VAT refunds to claimant on the basis of a new interpretation of the relevant legal provisions).

[200] Annual Schedule for the Work of the Basic Court Skopje II – Skopje for 2018 (**C-169**), p.5 ("[…] judge Sashka Trajkovska is appointed as the president of the bankruptcy and liquidation department.")

[201] See Constitution of the Republic of North Macedonia (**C-164**), Article 98 ("Judiciary power is exercised by courts. Courts are autonomous and independent. Courts judge on the basis of the Constitution and laws and international agreements ratified in accordance with the Constitution. There is one form of organization for the judiciary. Emergency courts are prohibited. The types of courts, their spheres of competence, their establishment, abrogation, organization and composition, as well as the procedure they follow are regulated by a law adopted by a majority vote of two-thirds of the total number of Representatives").; *see also* Law on Courts (**C-165**), Article 2(1) ("The courts shall rule and establish their decisions on the basis of the Constitution, laws and international agreements ratified in accordance with the Constitution.") and Article 18(5) ("In the particular cases, the court shall directly apply the final and enforceable decisions of the European Court of Human Rights, the International Criminal Court, or another court, the jurisdiction of which is recognized by the Republic of Macedonia.")

[202] Minutes from the 122nd session of the Macedonian Government dated 1 February 2023 (**C-150**)

[203] Proposed Law on Insolvency (**C-151**)

[204] Law on Out-of-Court Settlement (**C-170**)

[205] Draft Report on the Assessment of the Impact of Regulation by the Ministry of Economy dated 11 February 2021 (**C-171**), p. 6 see also Initial Regulation Impact Assessment for amendments to the Law on Bankruptcy (2013) (**C-172**), p. 2 ("By introducing the possibility of submitting a pre-developed reorganization plan together with the

"[…] financial restructuring of the debtor's enterprise which will allow:

1) existing shareholders of the debtor to retain a share in the share capital, corresponding to the value of the remaining assets they would have received if bankruptcy proceedings had been opened;

2) more favourable conditions for creditors for the settlement of their claims, compared to what they would receive if bankruptcy proceedings were opened, considering the priority of claims;

3) the continuation of the debtor's venture, that is, the profitable part of that venture."[206] [emphases added]

104. As Mr Kostovski highlights,[207] the purpose of the pre-insolvency proceedings in the Proposed Insolvency law is consistent with the principles of "*absolute priority*" set out in the Bankruptcy Law and the "*liquidation test*" set out in the Rulebook for Professional Standards on the Bankruptcy Proceedings ("**Bankruptcy Standards**"),[208] which applied also to TE-TO's reorganization proceedings. Mr Kostovski considers that the explicit definition is introduced to prevent arbitrary interpretation by the Macedonian courts,[209] as had indeed occurred in TE-TO's reorganization.

105. In the Proposed Insolvency Law, Macedonia has also addressed other substantive and procedural issues concerning pre-insolvency reorganisations.[210]

106. Macedonia proposes an obligation of the debtor to prove that the reorganisation would be more favourable for unsecured creditors than liquidation of its assets by enclosing a valuation of its assets to the reorganisation plan. [211] Macedonia also proposes creditors to be classified into specific categories, including those with rights to separate settlement, creditors from a lower payment order, and debtor's employees. [212] Furthermore, affiliates and persons related to the debtor[213] are explicitly excluded from voting on the reorganisation plan and the bankruptcy is required to ensure this by *ex officio* duty.[214] The bankruptcy judge is also required *ex officio* duty to examine whether the reorganization plan is a more favourable option compared to liquidation of the assets of the debtor. Even if creditors approve the reorganisation plan, the bankruptcy judge may refuse to approve if it is deemed unfavourable, thereby halting the pre-bankruptcy reorganization procedure.

petition for opening bankruptcy proceedings, opportunities are created for debtors facing financial difficulties to agree with their creditors to rehabilitate their situation and thereby avoid the bankruptcy proceedings altogether. At the same time, debtors would continue to carry out their activity, but now reorganized and under the supervision of the creditors.

[206] Proposed Law on Insolvency (**C-151**), Article 3

[207] Second Kostovski Opinion (**CE-02**), ¶ 16

[208] Rulebook for Professional Standards for Bankruptcy Proceedings (Official Journal of the Republic of Macedonia no. 119/2006) (**C-095 Resubmitted**), ("**Bankruptcy Standards**")

[209] Second Kostovski Opinion (**CE-02**), ¶ 15

[210] Second Kostovski Opinion (**CE-02**), ¶¶ 14-23

[211] Second Kostovski Opinion (**CE-02**), ¶ 18

[212] Second Kostovski Opinion (**CE-02**), ¶¶ 21

[213] Law on Trading Companies (Official Journal of the Republic of Macedonia 28/2004, as amended) (**C-084 Resubmitted**), Art. 491-499

[214] Second Kostovski Opinion (**CE-02**), ¶¶ 22

Macedonia also proposes that the written-off claims of creditors in pre-insolvency reorganisation to be recognised as tax-deductible expenses.[215]

107. Macedonia's clarifications in the Proposed Law on Insolvency are the response to the manifest failures of its courts to uphold the fundamental principles of the Bankruptcy Law in TE-TO's judicial reorganization.

2. THE BANKRUPTCY JUDGE UNLAWFULLY ACCEPTED TE-TO'S PROPOSAL FOR REORGANISATION

108. Macedonia argues that TE-TO qualified for reorganisation on 24 April 2018 since the Reorganization Proposal was made on the basis *"that [TE-TO] was facing 'imminent insolvency', rather than actual insolvency*".[216] Macedonia's argument is misconceived. TE-TO did not enclose to its proposal evidence that it was facing either actual or imminent insolvency.[217] This was acknowledged by the bankruptcy judge who explicitly requested TE-TO to rectify its proposal by furnishing evidence that "*the Court would use to determine the future insolvency by furnishing a report on the economic and financial standing, signed by the managing body of the debtor, including a statement verified by a notary public or a finding and opinion of an expert.*"[218] Hence, the bankruptcy judge was required to reject TE-TO's proposal without right to an appeal.[219]

109. But the bankruptcy judge had already made up her mind that the Reorganisation plan dated 4 April 2018 was a "*more favourable plan for settling all creditors covered by the plan*"[220] and did not reject TE-TO's proposal. Instead, she wrote TE-TO a letter requesting that TE-TO provides evidence that it is facing actual or imminent insolvency.[221] The letter from the bankruptcy judge does not spell out the exact consequences if the corrections are not made within the 8-day period. It merely mentions that the court shall proceed in accordance with article 215-a of the Bankruptcy Law:

> "The Court orders you to submit the motion, evidence and the corrected reorganization plan of the debtor to the court within a period of 8 days upon the day of receipt of the present instructions so as to enable the court to act on your motion in accordance with the Bankruptcy Law, and in the contrary the court shall proceed in accordance with article 215-a of the Bankruptcy Law."[222] [emphasis added]

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[215] Proposed Law on Insolvency (**C-151**), Article 65(5) ("For the amount of the realized income from written off liabilities in accordance with the approved reorganization plan, the tax base for paying the profit tax is reduced")
[216] Statement of Defence ¶ 155
[217] Second Kostovski Opinion (**CE-02**) ¶ 25; *see also* First Expert Opinion of Kostovski ("**First Kostovski Opinion**") (**CE-01**), ¶¶ 49-50
[218] *See* Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**), p. 1 (point 2). See also point 1 (("You shall be required, immediately upon receiving this instruction 1.To further elaborate the motion and to submit evidence that the conditions to initiate bankruptcy proceedings against the debtor under article 5 of the Bankruptcy Law have been met.") [emphasis added]
[219] First Kostovski Opinion (**CE-01**), ¶¶ 16-19
[220] Decision of the Civil Court Skopje for security measures dated 26 April 2018 (**C-089**), pp. 2-3
[221] See Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**), p. 1
[222] See Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**), p. 3

110. However, Article 215-a of the Bankruptcy Law[223] does not prescribe the actions that a court may take if a petitioner fails to remedy a defective reorganization plan. This is prescribed in Article 215-v(3) of the Bankruptcy Law, which imposes an *ex officio* duty on the bankruptcy judge to reject TE-TO's proposal for opening bankruptcy proceedings and proposal for reorganization, *inter alia*, if the conditions for opening of bankruptcy are not met,[224] or the reorganisation plan is not in compliance with the Bankruptcy Law.[225]

111. Macedonia acknowledges that the pretext for TE-TO's proposal for reorganisation was the enforcement of the EUR 112 million claims by Bitar Holdings[226] but says that GAMA does not suggest that these "*shareholder loans were fraudulent or otherwise illegitimate*".[227] Macedonia's argument is false.[228] Macedonia's own state organs investigated the legality of the shareholders' loans granted to TE-TO and suggested that they were the proceeds of money laundering due to the "*existence of financial transactions towards the reported legal entity Te–To AD–Skopje in the amount of Denar 7,964,250,000,00 [approximately EUR 129 million], stemming from criminal and legal events for which there is an ongoing criminal investigation in the Russian Federation*".[229] Indeed, a decision of a Russian court[230] reveals that a plethora of offshore companies owned by Leonid Lebedev[231] assigned and reassigned claims between themselves, leading to the assignment of debt of USD 218 million to TE-TO in 2015:

> "On 17.04.2013, TGC-2, Kardikor [Investments Limited] and TE-TO entered into a debt transfer and obligation novation agreement of a special form, under the terms of which Kardikor's debt (under the termination agreement dated 01.03.2012 on termination of the share purchase agreement dated 23.06.2011 - RUB 3,232,590,831 and agreement dated 06.11.2011 on termination of the claim assignment agreement dated 04.10.2010 – RUB 3,553,471,110.49) was transferred to TE-TO as follows in the amount of RUB 6,963,544,462.70 [USD 218 million]. Under the terms of the debt transfer agreement TE-TO undertook to repay its debt to TGC-2 not later than 01.04.2014 in the fixed amount of RUB 6,963,544,462.70 [approximately USD 218 million] without any interest accrual, and TE-TO 'obligation will be terminated by entering into a deferral agreement and providing TE-TO with the property complex belonging to it, including such property as the right of long-term lease of land, CHPP building, auxiliary facilities and other related property." [232] [emphasis added]

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[223] See Bankruptcy Law (**C-075**), Article 215-a

[224] First Kostovski Opinion (**CE-01**), ¶¶ 15-20

[225] First Kostovski Opinion (**CE-01**), ¶¶ 21-39

[226] Statement of Defence ¶ 156-158

[227] Statement of Defence ¶ 160

[228] *See* Statement of Claim, ¶¶ 75-78, 204-205, 270

[229] *See* Announcement to media of the Finance Police Administration of the Republic of North Macedonia no. 0306 – 1902/1 dated 21 June 2019 (**C-019**); *see also* 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" (**C-106**) 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

[230] *Jamica Limited (Cyprus) and Medvezhonok Holdings Limited (Cyprus) v. A.Y. Korolev and others,* Decision of the Second Arbitration Court of Appeal of the Kirov Region dated 20 January 2016 (A82-13348/2013) (**C-173**)

[231] *See* 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; *see also* Vedomosti article (21 September 2016), "Ex-senator Leonid Lebedev became a defendant in a criminal case" (**C-107**)

[232] *Jamica Limited (Cyprus) and Medvezhonok Holdings Limited (Cyprus) v. A.Y. Korolev and others,* Decision of the Second Arbitration Court of Appeal of the Kirov Region dated 20 January 2016 (A82-13348/2013) (**C-173**)

112. Before the acceleration of shareholder's loans, the great majority of debt (91%) was projected until 2028 and GAMA's claim was the only significant outstanding debt. [233] The inexplicable disposition of TE-TO's EUR 112 million indebtedness to Bitar Holdings, including why this debt was part of the amount so easily written off in TE-TO's judicial reorganization, raises serious and unresolved questions.

113. GAMA finds itself in a position where the full details of this transaction remain obscured. Given that the Public Prosecution Office for Organised Crime and Corruption has inexplicably opted not to pursue an investigation into this matter, [234] and considering Leonid Lebedev's previous questionable dealings,[235] GAMA considers that the shareholders' loans were fraudulent. Macedonia's failure to adequately investigate a situation of such financial magnitude not only undermines the credibility of the reorganization but also calls into question the integrity of the process.

3. THE BANKRUPTCY JUDGE UNLAWFULLY APPOINTED THE INTERIM BANKRUPTCY TRUSTEE OF TE-TO

114. Macedonia concedes that Mr Marinko Sazdovski was not appointed by the bankruptcy judge as an interim bankruptcy trustee of TE-TO through the electronic selection process and that he lacks specialist knowledge in reorganisation.[236] In an attempt to justify this, Macedonia argues that Mr Sazdovski, while not electronically selected, "*is on the list of authorized bankruptcy trustees from which an electronic process would draw names*" and Mr Petrov knows him as "*an experienced, long-term bankruptcy trustee with extensive practical experience and has led and continues to lead bankruptcy proceedings on a*

[233] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), p. 64 ("According to the last Summary List obtained from the records of the Company TE-TO JSC, the total liabilities towards creditors are determined in the amount of MKD 1,236,602,133.00 as short-term liabilities and MKD 12,412,221,028.00 long-term liabilities projected until 2028."). *Ibid.*, p. 82 ("[…] at the moment in addition to the debts to the banks that are regularly repaid and the debts to shareholders that are subordinated under the loan agreements with the banks, TE-TO JSC has only one more significant outstanding debt of 5 million EUR to the company contractor for the construction of the plan GAMA")

[234] *See* Public Prosecution Office announcement (29 September 2020), "Four criminal charges rejected relating to TE-TO's dealings" (**C-110 Resubmitted**)

[235] Companies owned by Leonid Lebedev appear to operate through a consistent pattern of obfuscation. They often cheat legal cash sources using fronts and intermediaries, allowing money to be siphoned off while concealing the beneficial owner. In Greece, for example, Lebedev's companies in the natural gas sector have reportedly engaged in practices such as receiving loans from offshore entities that are then written off, creating non-transparent structures, utilizing straw men, and maintaining close relationships with the Greek Government. See To Vima Article (2 July 2019), "To Vima reveals close ties of Russian oligarch Lebedev with government" (**C-174**) (emphasis added) (""The first, named Windows International Hellas SA, was established in Greece as a subsidiary of the Luxembourg company Windows International SA in November, 2015. […] The parent Windows company in Luxembourg, as corporate documents in the possession of To Vima indicate, beyond the Greek subsidiary also had a subsidiary called Believe Finance, which had received over 38mn euros in loans from at least six offshore companies, most of which were based in the British Virgin Islands. […] The largest chunk of the loans, approximately 34mn euros, appears to have been written off in 2017, when Windows International submitted an application to Greece's Regulatory Authority for Energy (RAE) for a permit to construct a natural gas pipeline connecting Thessaloniki with North Macedonia.") [emphasis added]

[236] Statement of Defence ¶ 166

significant scale."[237] However, this justification falls significantly short of what is legally required.

115. The bankruptcy judge's failure to adhere to the electronic selection process, [238] especially given that Mr Sazdovski was TE-TO's proposed supervisor for its reorganization, raises serious concerns.[239] Macedonia contends that GAMA's concerns do not relate to Mr Sazdovski's qualifications or his actions and decisions as an interim bankruptcy trustee. [240] Indeed, GAMA's principal grievance is with the bankruptcy judge, whose appointment of Mr Sazdovski in direct violation of the Bankruptcy Law has cast a shadow over the entire process. This breach, further compounded by the evident conflict of interest in allowing Mr Sazdovski a role in TE-TO's judicial reorganization and by his actions, calls into question the integrity of the proceedings.[241]

116. Mr Kostovski's highlighted Mr Sazdovski's several critical failures during and after TE-TO's judicial proceedings that had profound implications for the entire process. [242] On 4 June 4 2018, a critical juncture in the proceedings, the day before the hearing to vote on the Reorganization plan dated 4 April 2018, Mr Sazdovski submitted a report to the Civil Court Skopje on the economic-financial status of TE-TO, advocating for the adoption of the Reorganization plan dated 4 April 2018. [243] However, this report was manifestly incomplete - it failed to contain a parallel overview of the estimated settlement of the creditors in a liquidation scenario versus reorganization in accordance with the priority of the creditor's claims. [244]

117. Moreover, Mr Sazdovski's treatment of the voting rights of the creditors was handled improperly. [245] Mr. Sazdovski also endorsed the change in the creditors' classes proposed by TE-TO, [246] a change that had not yet been approved by the bankruptcy judge. [247] During the hearing, Mr Sazdovski reiterated that TE-TO's "*reorganization plan initially contained three creditor classes, but following the creditors' remarks submitted within the deadline prescribed by law, the debtor responded to those remarks by filing motions with the court whereby the creditors are to be allocated in two classes - secured and unsecured claims*."[248]

[237] Statement of Defence ¶ 166

[238] Bankruptcy Law (**C-075**) Article ; *see also* Rulebook on the Manner of Selection of A Bankruptcy Trustee under the Electronic Selection Method (**C-175**)

[239] Second Kostovski Opinion (**CE-02**), ¶ 46-52

[240] Statement of Defence ¶ 166

[241] Second Kostovski Opinion (**CE-02**), ¶¶ 47-50

[242] Second Kostovski Opinion (**CE-02**), ¶¶ 54-59

[243] Report on the economic-financial status of TE-TO by Mr Sazdovski dated 4 June 2018 (**C-176**), p. 20

[244] Second Kostovski Opinion (**CE-02**), ¶ 54

[245] Second Kostovski Opinion (**CE-02**), ¶ 55

[246] See Brief by TE-TO to the Civil Court Skopje in response to GAMA's objections and remarks, dated 30 May 2018 (**C-100**), p. 3

[247] Minutes of the hearing before the Civil Court Skopje, dated 5 June 2018 (**C-018**), p.11-12

[248] Minutes of the hearing before the Civil Court Skopje, dated 5 June 2018 (**C-018**), p.5

118. Macedonia's assertion that it is normal for Mr Sazdovski to be compensated for his work, referencing the Rulebook on the Award and Compensation of Bankruptcy Trustees,[249] overlooks a critical distinction. It's essential to differentiate between Mr Sazdovski's entitlement to compensation for serving as an interim bankruptcy trustee of TE-TO and his entitlement to compensation for overseeing TE-TO's judicial reorganization. While the former is governed by the referenced Rulebook, the latter arises from negotiations and agreements specific to his role in the reorganization, presumably agreed between Mr Sazdovski and TE-TO. The reason this differentiation is so pivotal is that it creates a situation ripe for a potential conflict of interest. Since Mr Sazdovski's compensation for supervising TE-TO's reorganization was contingent upon the approval of TE-TO's judicial reorganization, it would naturally align his interests with those of TE-TO, not with the impartial execution of his duties for the protection of TE-TO's creditors.

119. Macedonia contends that the security measures ordered by the bankruptcy judge were compliant with the Bankruptcy Law. [250] This assertion falls short of addressing the core issue. Even assuming that the security measures were lawful (which were not),[251] Macedonia fails to recognize the profound implications of the bankruptcy judge's order. By entrusting the interim bankruptcy trustee with the power to "*protect the property of the Debtor with all appropriate assets, to give consent to the management bodies of the Debtor until adoption of a decision on opening bankruptcy proceedings and conclusion for the purpose of implementing reorganization plan so as to avoid alienation of the property*," [252] the judge essentially handed control over TE-TO to the very person slated to supervise its reorganization.

120. To any discerning observer, let alone to a "*conscious businessman*," [253] this situation raises deep and justifiable concerns. It shakes confidence in the impartiality and unbiased conduct of Mr Sazdovski, [254] thereby casting a shadow over the validity of the entire proceedings. The issue here transcends procedural integrity - it's about ensuring a process that is just, equitable, and devoid of even the mere appearance of impropriety or favouritism.

4. THE BANKRUPTCY JUDGE UNLAWFULLY ALLOWED TE-TO TO AMEND THE REORGANISATION PLAN DATED 4 APRIL 2018

121. Macedonia argues that the bankruptcy judge acted in accordance with the Bankruptcy Law when she requested TE-TO to correct the Reorganisation plan dated 4 April 2018 by a letter[255] and that GAMA does not explain why the directions in the bankruptcy judge's letter reveal that the bankruptcy judge was "*acting with explicit bias*" in relation to TE-TO.[256]

[249] Statement of Defence ¶ 167
[250] Statement of Defence ¶¶ 161-164
[251] Second Kostovski Opinion (**CE-02**), ¶¶ 39-45
[252] *See* Decision of the Civil Court Skopje for security measures dated 26 April 2018 (**C-089**), p. 1
[253] Code of Ethics of Bankruptcy Trustees (**C-090**), Section 6. "Conflict of interest", paras 1,2 and 4
[254] Code of Ethics of Bankruptcy Trustees (**C-090**), Section 2. "Basic Principles of Action", para 1 indent 2 ("impartial acting when conducting the bankruptcy proceedings without any prejudices, personal interests and biased views.")
[255] Statement of Defence ¶ 169-174
[256] Statement of Defence ¶ 174

122. Macedonia's arguments are misconceived. Despite the bankruptcy judge's apparent dissatisfaction with TE-TO's fulfilment of the conditions for opening bankruptcy proceedings,[257] her subsequent actions show an inconsistency that is difficult to reconcile:

a) The judge did not reject TE-TO's proposal for reorganization, although TE-TO failed to provide evidence that TE-TO was actually insolvent or facing imminent insolvency; (see above at ¶¶ 108-109)

b) On 26 April 2018, the judge took steps that indicate a leaning towards TE-TO's interests:

(i) ordering security measures by citing the Reorganisation plan dated 4 April 2018 as a "*more favourable plan for settling all creditors covered by the plan*"[258] and appointing Mr Sazdovski as an interim bankruptcy trustee; (see above at ¶¶ 114-120)

(ii) depositing the Reorganisation plan dated 4 April 2018 in the bankruptcy file;[259] and

(iii) requesting TE-TO to make corrections to the Reorganisation plan dated 4 April 2018 through an informal letter rather than issuing a formal decision.[260]

123. Macedonia argues that Article 215-v(4) of the Bankruptcy Law does not support GAMA's argument[261] since it "*does not say that the bankruptcy judge shall order the correction only of "minor" deficiencies*."[262] On the contrary, the plain language of Article 215-v(4) of the Bankruptcy Law intertwines deficiencies with technical mistakes suggesting that any such deficiencies must be minor: [263]

"In cases when the prepared plan for reorganization contains deficiencies and technical mistakes which can be corrected, the bankruptcy judge shall order the bankruptcy debtor with a decision to complete the plan within eight days."

124. Macedonia admits that the judge acted wrongly in using of a letter instead of a formal decision, as required under the Bankruptcy Law, [264] but qualifies it as merely "*elevating form over substance*".[265] Mr Kostovski emphasizes that in his extensive experience, he has never encountered a situation where bankruptcy judges engaged in such informal written

[257] *See* Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**), p. 1
[258] See Decision of the Civil Court Skopje for security measures dated 26 April 2018 (**C-089**), p. 3
[259] See Decision of the Civil Court Skopje for security measures dated 26 April 2018 (**C-089**), pp. 2-3
[260] See Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**)
[261] Statement of Defence ¶ 170
[262] Statement of Defence ¶ 171
[263] Bankruptcy Law (**C-075**), Article 215-v(4)
[264] Bankruptcy Law (**C-075**), Article 11(1) ("Decisions in the bankruptcy procedure shall be adopted in a form of a decision and conclusion.") and Article 215-v(4) ("In cases when the prepared plan for reorganization contains deficiencies and technical mistakes which can be corrected, the bankruptcy judge shall order the bankruptcy debtor with a decision to complete the plan within eight days.")
[265] Statement of Defence ¶ 172

correspondence with parties, providing specific instructions on amending a reorganization plan.[266]

125. Macedonia's dismissal of GAMA's serious concerns about the guidance provided by the bankruptcy judge to TE-TO[267] is equally troubling. By characterizing these concerns as insignificant, Macedonia overlooks that, for example, the judge's recommendation to TE-TO to include a provision for undefined future external financing[268] is not only contrary to the Bankruptcy Standards,[269] but does also not align with the neutral and impartial role a bankruptcy judge must maintain. What motivation or justification would lead the judge to make this type of specific recommendation to TE-TO regarding the financing of the implementation of its reorganisation? These actions are not isolated procedural missteps, but form a pattern that raises serious and legitimate concerns about the impartiality of the bankruptcy judge.

126. Macedonia argues that the bankruptcy judge acted lawfully when it allowed TE-TO to change the Reorganisation plan dated 4 April 2018 for a second time based on comments from TE-TO's creditors.[270] As explained below, Macedonia's arguments are misconceived.

127. Macedonia's defence of the bankruptcy judge's decision to hold a hearing for remarks from TE-TO's creditors, instead of a hearing for voting on the Reorganisation plan dated 4 April 2018, [271] is flawed. As Mr. Kostovski articulates, the bankruptcy judge had the authority to schedule a separate hearing to explore specific concerns regarding the Reorganisation plan dated 4 April 2018, yet she chose not to exercise this option. [272] On the other hand, as Mr. Kostovski attests, she could not have considered creditors' written objections at a hearing scheduled for deciding on a proposal and reorganization plan. [273] Her decision to conduct a hearing to entertain the creditors' remarks on the Reorganisation plan dated 4 April 2018, rather than scheduling a separate hearing pursuant to Article 215-g(6) of the Bankruptcy Law, [274] signifies a deliberate disregard for the specific provisions of the Bankruptcy Law.

128. Macedonia says that "*the 5 June 2018 hearing was consistent with the basic objective of the Prepackaged Bankruptcy procedure to facilitate negotiations between the debtor and its creditors. It is in any event unclear how GAMA was prejudiced by having its comments on the proposed Reorganization Plan considered and discussed at the hearing*."[275] On the contrary, in a pre-packaged bankruptcy procedure the debtor and its creditors must finalize negotiations on the proposed reorganization well before the debtor files a petition to the court. Also, the hearing was not held to review the remarks by TE-TO's creditors, as

[266] Second Kostovski Opinion (**CE-02**), ¶ 28
[267] Statement of Defence ¶ 173-174
[268] See Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**), p. 2 para 7
[269] Second Kostovski Opinion (**CE-02**), ¶¶ 84-85
[270] Statement of Defence ¶ 175-185
[271] Statement of Defence ¶ 177-180
[272] Second Kostovski Opinion (**CE-02**), ¶ 67
[273] Second Kostovski Opinion (**CE-02**), ¶¶ 67-68
[274] Bankruptcy Law (**C-075**), Article 215-g(6)
[275] Statement of Defence ¶ 180

Macedonia suggests, but rather to provide TE-TO with another opportunity to change its flawed Reorganization plan dated 4 April 2018. The last-minute change in course, as Mr Kostovski suggests, indicates that the bankruptcy judge likely decided to hold this hearing to pave the way for TE-TO to modify the Reorganisation plan dated 4 April 2018.[276] Indeed, in the hearing the bankruptcy judge approved TE-TO's request to provide an amended version of the Reorganization plan dated 4 April 2018.

129. Macedonia's contention that "*a debtor is free to determine the classes of creditors in a Prepackaged Bankruptcy procedure, subject to the creditors' approval of that classification through their vote on the reorganization plan*"[277] is not only erroneous but also paradoxical. This reasoning creates a catch-22 situation where creditors are expected to vote on a reorganization plan without having been appropriately classified into separate classes according to Bankruptcy Law. As Mr Kostovski clarifies, the debtor's classification must align with the principles of subordination of claims, and the bankruptcy judge is entrusted with the crucial responsibility of ensuring that the classes of creditors are correctly formed.[278] That was not the case here.

130. The sequence of events surrounding the bankruptcy judge's actions further clouds the integrity of the process. After acknowledging that TE-TO's shareholders' claims were of the lowest rank and specifically directing TE-TO to include this in the Reorganisation plan dated 4 April 2018, [279] the judge inexplicably allowed TE-TO to merge shareholders and unsecured creditors with higher priority claims into one class.[280] Macedonia argues that "*it is unclear how GAMA was prejudiced by having the bankruptcy judge allow TE-TO to modify the proposed Reorganization Plan in the manner that GAMA itself had urged*."[281] Macedonia's argument is misleading. In its objection against the Reorganisation plan dated 4 April 2018, GAMA asserted that:

> "[…] the Creditor GAMA Guc, in no case should be grouped in the Second Class, but it should be in the Third Class as an unsecured creditor with a claim essential to the business venture of TE - TO AD, with the right to 100% settlement of principal and interest, as well as all other suppliers of goods and services, that is, unsecured creditors, and in such a situation the Second Class should consist only of creditors who are shareholders and-or related parties with the Debtor whose claims arise from loans, that is, creditors of a lower payment ranking."[282] [emphasis added]

131. The bankruptcy judge's decision to permit the unlawful second change of the Reorganisation plan dated 4 April 2018, based not on GAMA's request but on TE-TO's, reveals a profound compromise in the integrity of the proceedings to the clear disadvantage of GAMA. The sequence of events shows that both TE-TO and the bankruptcy judge recognized that GAMA did not fit into the second class of unsecured creditors with claims based on loans and investments. Rather than properly reclassifying

[276] Second Kostovski Opinion (**CE-02**), ¶ 68
[277] Statement of Defence ¶ 182
[278] Second Kostovski Opinion (**CE-02**), ¶ 98
[279] Second Kostovski Opinion (**CE-02**), ¶ 101
[280] Minutes of the hearing before the Civil Court Skopje, dated 5 June 2018 (**C-018**), pp.11-12
[281] Statement of Defence ¶ 182
[282] *See* 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**), p. 3

GAMA into the third class of creditors with unsecured claims tied to TE-TO's current operational business, TE-TO chose to merge the third class into the second. This was not a simple reclassification of creditors but a deliberate alteration undermining the basic principles of the Bankruptcy Law.

5. GAMA'S REQUEST FOR RECUSAL OF THE JUDGE WAS UNLAWFULLY DENIED

132. As explained, GAMA requested a recusal of a bankruptcy judge.[283] The decision by the Deputy President of the Civil Court Skopje to reject the motion[284] was purportedly taken within one hour since the bankruptcy judge adjourned the hearing on 14 June 2018. This is implausible.

133. In its decision, the Deputy President stated that:

> *"*[…] Judge Sashka Trajkovska submitted a written statement in which she stated that the creditor's attorney submitted the request for exemption prior to the start of the hearing on 14.06.2018, and the reasons given were based on the judge's bias in handling the case and the personal relationship of the judge towards some from creditors who have unsecured claims in the proceedings*."*[285]

and cited her statement:

> "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."[286] [emphases added]

134. Mr Kostovski, as a former judge himself, confirms that the Deputy President's actions, including reviewing the requests for recusal,[287] scrutinizing the case files, taking a statement from the bankruptcy judge, and then reaching a decision, all within the span of just one hour, represent an improbable feat.[288] Moreover, the bankruptcy judge's written statement, cited by the Deputy President, refers to creditors' vote and the approval of the reorganisation plan, which should have taken place only after the Deputy President was supposed to decide upon the request for recusal. This can only mean that the Deputy President decided on the request for recusal only after the hearing took place.

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[283] Statement of Claim, ¶¶ 112, 262

[284] Decision for rejection of the request of recusal by the Deputy President of the Civil Court Skopje, dated 14 June 2018 (**C-103 Resubmitted**)

[285] *See* Decision for rejection of the request of recusal by the Deputy President of the Civil Court Skopje, dated 14 June 2018 (**C-134**), p. 2 [emphasis added]

[286] See Decision for rejection of the request of recusal by the Deputy President of the Civil Court Skopje, dated 14 June 2018 (**C-134**), p. 4 [emphasis added]

[287] Request for recusal of the bankruptcy judge by GAMA dated 14 June 2018 (**C-177**)

[288] Second Kostovski Opinion (**CE-02**), ¶ 63-65

135. Macedonia admits that a "*record*" of the written decision, rejecting the recusal motion, was issued only after the hearing,[289] but claims that the Deputy President nevertheless decided upon the recusal motion during the one-hour adjournment and that the "*record [of the Deputy President of the Civil Court Skopje] merely provides a description of the events at the 14 June 2018 hearing, which was apparently provided after the end of the hearing and before the record was prepared*." [290] Macedonia's argument defies common sense and logic. If the bankruptcy judge's statement was, in fact, provided after the conclusion of the 14 June 2018 hearing, the Deputy President could not have decided on the request during the recess, as she would not have had the necessary statement from the bankruptcy judge at that time. Moreover, this would imply that the decision on the recusal motion during the one-hour adjournment was taken on the basis of different reasons, than was the written decision, which refers – as grounds for refusal of the motion – to the statement of the judge that creditors voted for the plan.

136. In an attempt to downplay these inconsistencies, Macedonia states that "*motions for recusal are a commonplace stalling tactic in bankruptcy proceedings in Macedonia*".[291] Even if this was true, this was not so in GAMA's case. GAMA had serious reasons to doubt the impartiality of the judge[292] and Macedonia's defence cannot justify the unlawful handling of the recusal motion.

137. The decision for rejection of the request for the recusal of the bankruptcy judge is inexplicable and cast serious doubts on the legality of the process. It is "*clearly improper and discreditable*"[293] and "*shocks, or at least surprises a sense of judicial property,*"[294] and as such amount to denial of justice.

6. TE-TO'S REORGANISATION PLANS WERE UNLAWFUL

(a) THE PLANS DID NOT ANTICIPATE TAX LIABILITIES OF EUR 30 MILLION

138. Macedonia's assertion that TE-TO's unexpected income tax liability resulting from debt restructuring, and the calculation of EBITDA in the Reorganization plan dated 6 June 2018, were consistent with the Bankruptcy Law, [295] defies not only logic but the essential principles of reorganisation.

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[289] Statement of Defence, ¶ 184
[290] Statement of Defence ¶ 184
[291] Statement of Defence, ¶ 86
[292] Statement of Claim, ¶ 122
[293] *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.")
[294] *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
[295] Statement of Defence ¶ 189

139. By disregarding that EBITDA captures profitability before considering debt, income taxes, and non-cash expenses, the oversight in both reorganisation plans is not merely a mistake - it represents a fundamental flaw of the proposed debt restructuring. Any restructuring plan that overlooks income tax consequences in its cash flow projections reveals a lack of foresight leading to a gross underestimation of financial obligations and undermining the very viability of the plan. In other words, the cash flow projections presented by TE-TO were manifestly incorrect.[296]

140. The gravity of this failure resonates through every aspect of Macedonia's defence, fatally undercutting the argument that TE-TO's judicial reorganization complied with Macedonian law. TE-TO's inability to foresee income tax liabilities in both reorganisation plans marks a fundamental flaw that renders the plans unimplementable. Yet, astonishingly, the Macedonian courts gave their approval to the Reorganisation plan dated 6 June 2018.[297] The acceptance of such a compromised and unimplementable plan speaks to a grave failure in oversight and judgment by the Macedonian courts.

(b) THE PLANS DID NOT SHOW THAT REORGANISATION IS MORE FAVOURABLE FOR CREDITORS THAN LIQUIDATION

141. As explained in the Statement of Claim, TE-TO's reorganization plans failed to meet the "*liquidation test*", i.e. that no creditor should receive less, under a reorganization, than what they would have received in the liquidation of the debtor's estate. [298] In response, Macedonia argues that "*GAMA has not shown that the Rulebook for Professional Standards* [which encapsulates the liquidation test] *applies to reorganization plans prepared by debtors such as TE-TO instead of by professional trustees*."[299] Macedonia's argument is misconceived.

142. First, the Macedonian courts themselves confirmed that the liquidation test is applicable to the reorganization proceedings by stating that "[*t]he reorganization is in the interest of the creditors, because it leads to the successful settlement of their claims to a greater extent than they would receive with the* [regular] *bankruptcy of the bankruptcy debtor*".[300]

143. Second, Macedonia's own expert points to the Bankruptcy Standards in connection with the obligations of bankruptcy trustees for oversight of the execution of a reorganization plan.[301]

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[296] Reorganization Plan dated 4 April 2018 (**C-13**) p. 33

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

[298] Statement of Claim, ¶¶ 90-99, 303

[299] Statement of Defence ¶ 191 a)

[300] See Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**), p. 17 [emphasis added]

[301] Petrov ¶ 84

144. As Mr Kostovski points out, the Bankruptcy Standards indeed apply to reorganization plans prepared by debtors, [302] and they impose an obligation on the bankruptcy trustee to ensure that the plan is consistent with them. [303] The Bankruptcy Standards required TE-TO to show *"the creditors' possibilities for their favourable settlement in the procedure for reorganization, compared to the settling by cashing in the assets of the bankruptcy debtor*" and its plan to *"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*."[304]

145. That was not the case here. GAMA was deprived of the fundamental protection under the Bankruptcy Law.

146. As Mr Kostovski observes, even if one were to take the accounting value of TE-TO's assets as the reference point (instead of fair market value), GAMA's position in a liquidation scenario would not just be better - it would be unarguably so. [305] The logic behind the argument is clear and compelling - in a liquidation scenario, TE-TO's shareholders, who held claims of EUR 148.8 million, [306] would find themselves last in the priority line. [307] This has profound implications for GAMA's position. GAMA would not have been better off in a liquidation scenario only if TE-TO's assets were to be sold at a drastic discount, specifically below 33% of their accounting value.[308] This scenario seems unlikely and far from the usual course of business, especially considering the assets and potential market value of a company like TE-TO.[309] In the Macedonian market where energy is in high demand,[310] and TE-TO enjoys a strong position in this market,[311] the likelihood of such a drastic reduction in asset value appears minimal. Therefore, Macedonia's assertion that GAMA would have been in a less favourable position in a liquidation scenario does not hold water (see also Section X A.2 below).

147. TE-TO's profitability is a testament to the market value of CCPP Skopje. With assets valued at MKD 9,687,838,000 (approximately EUR 156.5 million) as of 31 December 2021, and

[302] Second Kostovski Opinion (**CE-02**), ¶¶ 77-82
[303] Second Kostovski Opinion (**CE-02**), ¶ 80
[304] Bankruptcy Standards (**C-095 Resubmitted**), Appendix no. 5, Section 2. "Standards" at 2
[305] Second Kostovski Opinion (**CE-02**), ¶¶ 105-114
[306] Reorganization Plan dated 4 April 2018 (**C-13**) p. 8 (setting out the indebtedness of TE-TO to Bitar Holdings of EUR 112 million, EUR 8,8 to Project Management Consulting and EUR 28 million to Toplifikacija on 1 March 2018).
[307] Second Kostovski Opinion (**CE-02**), ¶ 110, Petrov ¶¶151-155
[308] Second Kostovski Opinion (**CE-02**), ¶¶ 111-113
[309] Report on the Significance of TE-TO AD Skopje for the Republic of North Macedonia from Economic, Energy, and Environmental Aspects dated 27 September 2019 (**C-178**),
[310] *See* Annual Report of the Energy Regulatory Commission of the Republic of North Macedonia for 2018 (**C-129**), p.20 ("The domestic electricity generation in 2018 supplied 69,02% of the total electricity demand of the country, while 30,98% of the electricity needs were supplied through imports.") [emphasis added]
[311] *See* Annual Report of the Energy Regulatory Commission of the Republic of North Macedonia for 2018 (**C-129**), p.18 ("[…] ESM JSC Skopje is the dominant domestic electricity producer with a 78,45% share in the domestic generation, next is TE-TO JSC Skopje with 13,16% share") [emphasis added]; *see also* p. 48 ("TE-TO JSC Skopje dominated wholesale natural gas market in 2018 with 43,20% market share, followed by their daughter company TE-TO Gas Trade with 30,30%") and p. 60 ("The combined thermal energy and electricity producer TE-TO JSC Skopje is connected to the distribution grid of Distribucija na Toplina BE DOOEL Skopje with installed thermal power of 160 MW, as an unregulated thermal energy producer.")

the market value of its plant, property, and equipment alone reaching MKD 9,363,589,000 (approximately EUR 152.1 million), the figures only tell part of the story.[312] Independent valuators in 2020 assessed the net value of TE-TO's property, plant, and equipment.[313] But these numbers do not reflect CCPP Skopje's actual worth since they didn't consider CCPP Skopje as a "going concern" – a power plant expected to operate and generate profits. The actual market value of CCPP Skopje, if considered as a going concern, would likely dwarf the given figures. A snapshot of TE-TO's financial trajectory unveils the potential market value of TE-TO. Since 2017, TE-TO's profits have been on a steady upward climb, from EUR 8.4 million[314] to EUR 20.6 million in 2021,[315] after making a substantial payment of EUR 7.1 million to the Public Revenue Office.[316]

148. Considering the valuation of CCPP Skopje as a going concern in 2014 at USD 263 million,[317] it's evident that CCPP Skopje's market value is significantly higher. But even if one would assume that the market value of CCPP Skopje was MKD 9,363,589,000 (approximately EUR 152.1 million) from 2018 to 2021, GAMA would have been nevertheless better off in a liquidation scenario. It is implausible that CCPP Skopje would be liquidated at a significant discount keeping in mind its strategic position in the Macedonian energy market.[318]

149. Macedonia's contention that GAMA has not substantiated its claim of being better off in a liquidation scenario[319] is therefore false.

(c) THE PLANS INCORRECTLY FORMED CREDITORS' CLASSES

150. Macedonia's stance in this arbitration that the absolute priority rule does not apply in pre-insolvency proceedings[320] because of Article 215-b of the Bankruptcy Law, which does not explicitly delineate the criteria for creditor classification and rather grants the debtor latitude to propose classifications "*subject to approval of the creditors*,"[321] presents a grave misunderstanding of the principles of the Bankruptcy Law. This argument fails to recognize

[312] Annual financial statements for TE-TO for the year ended on 31 December 2021 (**C-137**), p. 27
[313] Annual financial statements for TE-TO for the year ended on 31 December 2021 (**C-137**), p. 27 ("In 2020, the management engaged independent appraisers (experts in the energy field at the European level), who issued a report on the net present value of the assets.")
[314] See Reorganization Plan of TE-TO AD Skopje no. 0302-439 dated 4 April 2018 (**C-013 Resubmitted**) at p. 5
[315] Annual financial statements for TE-TO for the year ended on 31 December 2021 (**C-137**), p.47 ("Thus, after the excellent 2020 with a net profit of 12.1 million euros, the even more successful 2021 followed with a net profit of 20.6 million euros")
[316] Annual financial statements for TE-TO for the year ended on 31 December 2021 (**C-137**), p.47 ("-the termination of the state aid agreement by the Government of the Republic of North Macedonia, which caused the necessity to pay the profit tax for the year 2018, arising as a result of the write-off of claims in bankruptcy proceedings in the amount of 17.1 million euros with calculated interests for late payment")
[317] Russia Beyond article (31 May 2004), "Macedonian thermal power plant: from the Russians to the Chinese" ("The value of the thermal power plant is estimated at 9.6 billion rubles ($263 million))" (**C-179**)
[318] Report on the Significance of TE-TO AD Skopje for the Republic of North Macedonia from Economic, Energy, and Environmental Aspects dated 27 September 2019 (**C-178**)
[319] Statement of Defence ¶ 191 a)
[320] Statement of Defence ¶ 192-196
[321] Statement of Defence ¶ 193

that the debtor is confined by the absolute priority rule when classifying its creditors.[322] Far from granting the debtor unlimited discretion, this classification must meet with the court's *ex officio* approval, ensuring that the debtor does not subvert the hierarchy embedded in the absolute priority rule.

151. To propose otherwise – that a debtor in pre-insolvency proceedings might wield unchecked power to prioritize the interests of its shareholders (as TE-TO did) over those of its creditors – would represent not only a fundamental violation of the Bankruptcy Law but fraud. This was also acknowledged by the bankruptcy judge, which explicitly requested TE-TO to make a correction in the Reorganisation plan dated 4 April 2018 in order to "*clearly […] state that the second class of claims are ranked lower and shall be settled last*", [323] but ultimately ignored this in a decision approving TE-TO's reorganization. Moreover, even in her decision approving the reorganization, the bankruptcy judge in the reasoning part considered that GAMA "*is a first-priority creditor*"[324] and that the claim of a shareholder "*is a second-order creditor and in the group of the last ones to be settled*",[325] and yet approved the reorganisation plan, which completely altered priorities to the detriment of unsecured creditors, such as GAMA.

(d) THE PLANS DID NOT SHOW GENUINE NEGOTIATIONS WITH CREDITORS

152. Macedonia argues that the Reorganisation plan dated 4 April 2018 describes the course of the negotiations between TE-TO and its creditors.[326] This is not the case. As Mr Kostovski explains, there were not and could not have been genuine negotiations between TE-TO and its majority shareholder.[327]

(e) THE TERM FOR IMPLEMENTATION OF THE PLANS EXCEEDED THE STATUTORY LIMIT

153. The imposition of a 12-year suspension period on GAMA's claim stands as a striking and clear violation of Article 215-b(1)(2) of the Bankruptcy Law. This article distinctly sets a five-year maximum deadline for the implementation of a reorganization plan concerning claims not based on loans, such as GAMA's. Mr. Kostovski, affirms this understanding, confirming that the 12-year deadline on GAMA's claim directly contradicts Article 215-b(1)(2) indent 13 of the Bankruptcy Law. [328]

154. Macedonia's offered interpretation of this provision[329] is not just legally questionable, but logically flawed. If one were to follow Macedonia's reasoning, an exceptional deadline

[322] Second Kostovski Opinion (**CE-02**), ¶¶ 96-101
[323] See Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**), pp. 2 [emphasis added]
[324] 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**), p. 21, para 3
[325] 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**), p. 30, para 2
[326] Statement of Defence ¶ 188
[327] Second Kostovski Opinion (**CE-02**), ¶¶ 86-87
[328] Second Kostovski Opinion (**CE-02**), ¶¶ 102-104
[329] Statement of Defence, ¶¶ 197-199

would apply universally to all claims, rendering the exception in the provision meaningless. This would not only contradict the specific language of the Bankruptcy Law but would also undermine the very purpose of having defined exceptions.

155. In the meantime. Macedonia has taken actions which further aggravate GAMA's claim. Macedonia has enacted amendments to the Law on Obligations, effective as of 20 July 2023.[330] This change has retroactively shortened the statute of limitations for enforcement of claims based on court decisions from 10 years to just 5 years.[331] Such an unexpected shift has profound implications for GAMA, whose residual claim of EUR 500,000 against TE-TO, based on the Reorganisation plan dated 6 June 2018, now faces an imminent deadline. On 30 August 2023, GAMA's claim will become time barred. This unilateral action by Macedonia serves not only to undermine the fundamental principles of fairness and justice but also threatens to cause immediate and irreparable harm to GAMA's interests.

156. In Macedonia's own words, "*a retroactive application of a law is a hallmark of denial of justice*."[332]

7. THE MACEDONIAN COURTS UNLAWFULLY APPROVED TE-TO'S REORGANISATION

157. The decision of the Civil Court Skopje approving TE-TO's reorganisation plan subverted the basic principles of the Bankruptcy law. As explained above and as Mr. Kostovski confirms, the decisions of Macedonian courts rest on fundamental legal errors and multiple breaches of GAMA's due process rights. This includes:

a) giving TE-TO the opportunity on several occasions to substantially correct the Reorganization plan dated 4 April 2018 in breach of the Bankruptcy law[333]

b) failing to investigate adequate evidence of negotiations with creditors[334]

[330] Law on Amendments and Supplements to the Law on Obligations (**C-180**)

[331] Law on Amendments and Supplements to the Law on Obligations (**C180**), Article 2 amending Article 368 of the Law on Obligations ("(1) All claims that have been established by an effective court decision or by a decision of another competent authority or by settlement before a court or before another competent authority shall become time-barred in five years, from the moment of their enforceability, as well as the claims for which in accordance with the law provides for a shorter statute of limitations.
(2) All recurrent claims, which result from decisions or settlements provided for in paragraph (1) of this article and are due in the future, shall become time-barred within the period provided for by the statute of limitations of recurrent claims.
(3) The statute of limitations of a final court decision or by a decision of another competent authority, or by settlement before a court or before another competent authority, shall be interrupted by submitting a request for enforcement before a competent enforcement agent, whereupon the statute of limitations begins to run again, which in the enforcement proceedings lasts for ten years from the moment of the submitted request for enforcement."); see also Article 4 ("The commenced proceedings for the collection of claims provided for in Article 2 of this law will be completed in accordance with this law.")

[332] Statement of Defence ¶ 139(d)

[333] Second Kostovski Opinion (**CE-02**), ¶¶ 24-30

[334] Second Kostovski Opinion (**CE-02**), ¶ 31

c) listing GAMA in the same class of creditors with shareholders, although GAMA's claim should have been ranked higher than shareholder's claims[335]

d) failing to acknowledge and include GAMA's interests in the calculation of GAMA's claim, while the court acknowledged the interest of other creditors, which were thus illegally privileged and obtained a higher percentage of voting rights[336]

e) listing in the third class of creditors the PRO with its claim of 260,000 EUR, although it was not existing anymore at that time, which additionally affected the determination of the voting rights[337]

f) applying 12-year deadline on GAMA's claim in breach of the Bankruptcy Law[338]

g) failing to ensure that the proposed reorganization meets the "*liquidation test*"[339] (see also above at ¶¶ 104,141-149)

h) considering the residual 10% of GAMA's claim as disputed, although it was at the same time acknowledged in full and 90% of the claim written-off[340]

158. The reasoning of the Civil Court Skopje is also contradictory. On several occasions the court recognized that TE-TO's shareholders should have been subordinated to unsecured creditors, but ultimately ignored its own findings:

a) in its letter to TE-TO, requesting TE-TO to supplement its proposal for reorganisation, the Civil Court Skopje ordered TE-TO: "*the due date of the claims of the third class* [at the time of the proposal comprising all unsecured creditors] *of creditors to be set out and clearly to state that the second class of claims* [comprising shareholders and related parties, together with GAMA] *are ranked lower and shall be settled last"* [341] [emphasis added]

b) in its Decision of 14 June 2018, the Civil Court Skopje accepted the submission of GAMA "*that it is a first-priority creditor",* [342] belonging to the class of unsecured creditors and considered that the claim of a shareholder "*is a second-order creditor and in the group of the last ones to be settled*"[343], and that "*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*

[335] Second Kostovski Opinion (**CE-02**), ¶¶ 36, 96-101
[336] Second Kostovski Opinion (**CE-02**), ¶ 34
[337] Second Kostovski Opinion (**CE-02**), ¶ 35
[338] Second Kostovski Opinion (**CE-02**), ¶¶ 102-104
[339] Second Kostovski Opinion (**CE-02**), ¶¶ 78-80
[340] Second Kostovski Opinion (**CE-02**), ¶¶ 32-33
[341] Letter by the Civil Court Skopje to TE-TO, dated 30 April 2018 (**C-091**) p. 2 (point 9)
[342] 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**), p. 21, para 3
[343] 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**), p. 30, para 2

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. [344]

159. GAMA raised contradictions and manifest misapplication of the Bankruptcy Law in its appeal.[345] However, the Appellate Court Skopje[346] failed to devote *any sentence* on the following of GAMA's critical complaints that:

a) classification of unsecured creditors was contrary to the Bankruptcy Law

b) the decision of the Civil Court Skopje contains contradictory reasoning, because it recognizes that GAMA is a first-priority unsecured creditor to be repaid before shareholders, but approves the reorganisation plan contrary to these findings

c) TE-TO was unlawfully allowed to submit a "consolidated" version of the reorganisation plan

d) shareholders' loans were unlawfully accelerated[347]

160. Macedonia replies that the Appellate Court Skopje summarized GAMA's grounds for appeal.[348] But summarizing arguments (which in any event was incomplete[349]), does not absolve the court from the duty to provide reasons for dismissing such arguments.

161. The Appellate Court, far from investigating whether the Reorganization plan dated 6 June 2018 complied with the Bankruptcy Law, declared that it "*has no legal opportunity to assess the correctness and content of the submitted reorganization plan*."[350] This abdication of responsibility is shocking. Moreover, the Appellate Court deferred entirely to the bankruptcy judge's assessment of the reorganization plan's legality, by stating that "*only if the [b]ankruptcy [j]udge estimates that the reorganization plan is contrary to law or contains essential deficiencies which must be removed, there is a legal possibility to reject it with a decision against which an appeal is not allowed*."[351] In doing so, the Appellate Court Skopje neglected its duty to exercise independent judgment. The assertion that only the

[344] 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**), p. 21, para. 8
[345] 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**)
[346] Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**)
[347] 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**)
[348] Statement of DefenceSoD ¶ 93, note 195
[349] Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**) (the Appellate Court Skopje omitted any summary of GAMA's arguments (i) on priority of unsecured creditors and contradictory reasoning of the lower court in relation thereto, (ii) unlawful acceleration of shareholders' loans; (iii) that GAMA's comments on the new "consolidated" reorganisation plan, which GAMA submitted on 13 June 2018, were not considered by the court)
[350] See Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**), p. 14
[351] See Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**), p. 12

bankruptcy judge has the legal authority to reject the plan exposes a startling gap in accountability within the legal system.

162. The Appellate Court Skopje's lack of attention to the substantive arguments concerning the categorization of the creditors further illustrates this neglect. The court merely observed that "*the creditors are divided into two classes, namely the class of secured creditors and the class of creditors with unsecured claims, and it is not disputed that in each class a majority of votes is secured*."[352] Although specifically raised by GAMA in its appeal, the court entirely ignored the significance of these distinctions.

163. The reluctance of the Appellate Court Skopje is in contrast with representations of the bankruptcy judge, who following the request for her recusal, defended her actions by pointing to the very fact that parties have a possibility of the appeal against the decision approving the reorganization plan "*all allegations refer to procedural matters which the court considers are unfounded and the stated violations that the parties [GAMA and Toplifikacija] consider to have been committed are unfounded. The aforementioned does not represent biased conduct by the judge and it can be the subject of appeal allegations in an appeal procedure*."[353]

164. Finally, excerpts from the Appellate Court Skopje's decision, cited by Macedonia,[354] confirm the flawed reasoning of the Appellate Court Skopje. While articulating the benefits of reorganization under the "*liquidation test*", stating that "[*t]he reorganization is in the interest of the creditors, because it leads to the successful settlement of their claims to a greater extent than they would receive with the [regular] bankruptcy of the bankruptcy debtor*",[355] the court manifestly omitted a thorough evaluation of the actual plan. A proper assessment would have revealed the lack of an independent valuation of TE-TO's assets to determine whether its creditors would fare better in a liquidation scenario.[356]

165. The decisions of the Macedonian courts are arbitrary in privileging shareholders in breach of the priority of creditors and the "*liquidation tes*t". The tribunal in *Gramercy v Peru* found that a decree, regulating the repayment of bondholders and listing the investor (creditor) in the last category of repayment in contradiction with the ranking of creditors envisaged under the previous constitutional court's order, without "*any explanation*" for the change of creditors' priorities, as arbitrary.[357] Tribunal found that this measure, *inter alia*, "*create[d] an arbitrary and unjust regime, the sole purpose of which appears to be to minimize the*

[352] See Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**), p. 17
[353] See Decision for rejection of the request of recusal by the Deputy President of the Civil Court Skopje, dated 14 June 2018 (**C-134**), pp. 3-4 [emphasis added]
[354] Statement of Defence ¶ 90
[355] See Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**), p. 17 [emphasis added]
[356] Second Kostovski Opinion (**CE-02**), ¶¶ 77-82; *see also* First Kostovski Opinion (**CE-01**) ¶ 21-23
[357] *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶¶ 944 – 951, 984.

amounts payable by the Republic to the holders of [bonds], including (and in particular) Gramercy."[358]

166. In the words of the tribunal *in Dan Cake v Hungary*, which found a denial of justice in the context of Hungarian insolvency proceedings, the acts of the Macedonian courts deprived the claimant "*of the chance – whether great or small"* [359] to obtain the repayment of its claim, as required by the Bankruptcy law.

167. Failure to address GAMA's critical arguments in TE-TO's reorganization proceedings (see above at ¶¶ 159-160) also amount to a breach of GAMA's due process rights and on itself amount to a denial of justice.

168. The decisions of the Macedonian courts also contain fundamental inconsistencies, such as (i) confirming the subordination of shareholders, but approving the reorganisation plan to the benefit of shareholders, (ii) confirming the importance of the "*liquidation te*st", but failing to ensure its respect, (iii) disregarding GAMA's default interest, but acknowledging default interests of other creditors, (iv) applying the 12 years suspension to all claims of unsecured creditors, although such a deadline was meant to be an exception applicable only to shareholders' claims (v) considering the residual 10% of GAMA's claim as disputed, although it was at the same time acknowledged in full.

169. These fundamental inconsistencies manifest extreme defectiveness of reasons and as such amount to a denial of justice.[360] In the words of the tribunal in *Gramercy v Peru*:

> "An internationally protected principle of administration of justice is that judicial decisions must be grounded on an assessment of the relevant facts and applicable law, and that the ratio decidendi must be sufficiently motivated on those grounds.
>
> De Visscher noticed that a decision that has an 'extreme defectiveness of its reasoning' may lead to the conclusion that a denial of justice has been committed. Citing to the Barcelona Traction pleadings, Paulsson notes that judicial bad faith that amounts to denial of justice may occur when '[…] one can no longer explain the sentence rendered by any factual consideration or by any valid legal reason' "[361]

170. The decisions of the Macedonian courts also lack reasoning on several critical points (see above at ¶¶ 159-160) The tribunal in *Arif v Moldova* found that decisions of Moldovan judiciary did not breach fair and equitable treatment through a denial of justice because,

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[358] *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶ 986.

[359] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 145

[360] *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶ 1035 (referring to *Flughafen v Venezuela* that illogical or inconsistent explanations amount to denial of justice)

[361] *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶¶ 1032-1033. *See* also *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**CL-069**), ¶ 555 ("To say that a void agreement must be rescinded is a contradiction in terms and is irrational. Such a fundamental inconsistency in the Judgment must raise a serious question as to whether the Tribunal is bound to treat it as a definitive statement of the legal status of Karkey's RPP according to Pakistan law.")

inter alia, *"[t]he decisions are carefully drafted and can be followed in their reasoning from A to Z."*[362] As shown above, this is significantly different from our case, which is intertwined with non-existing or contradictory reasoning.

171. In sum, the whole process of TE-TO's reorganization and its outcome were antithetical to the normal expectations of the operation of the judicial process. Decisions of the Macedonian courts "*shock[]* [and] *surprise[] a sense of judicial property"*[363] and were "*clearly improper and discreditable*",[364] so as to constitute a denial of justice.

D. MACEDONIA PREVENTED (RE)OPENING OF BANKRUPTCY OF TE-TO

172. The following section covers acts of Macedonian executive branch, which took place after the judicial conduct discussed above.

173. As explained in Statement of Claim, in order to rescue the recently reorganised TE-TO from the opening of bankruptcy, the Public Revenue Office (***PRO***) refrained from the collection of TE-TO's tax debt and the Macedonian Government subsequently granted TE-TO unlawful state aid in the form of a deferral of the payment of the tax debt,[365] which was eventually considered as unlawful by the Anticorruption Commission.[366]

174. Macedonia's assertion that GAMA's arguments about the enforcement of the tax debt leading to TE-TO's judicial reorganization's collapse are "*unsupported, speculative, and implausible on its face*" [367] are in stark contrast with Macedonia's own statements. Macedonia itself had acknowledged that the "*forced collection of that profit tax* [would] *not only prevent the reorganization of the company* [TE-TO]*, but it is quite certain that it will lead to the opening of bankruptcy proceedings over it* [TE-TO] *and the collapse of the Reorganization Plan*." [368] GAMA's position reflects a reality that Macedonia itself recognized.

175. Macedonia also acknowledged that "*the 'written off liabilities' according to the Reorganization Plan will be transformed again into actual liabilities of the company* [TE-TO] *to creditors and will not have profit treatment, and thus the tax liability - profit tax for 2018*

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[362] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (RL-069), ¶ 435. *See* also TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Award (19 December 2013) (**RL-073**) ¶ 458 ("Based on such principles, the Arbitral Tribunal considers that a willful disregard of the fundamental principles upon which the regulatory framework is based […] as well as a total lack of reasoning, would constitute a breach of the minimum standard.")

[363] *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

[364] *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.")

[365] Statement of Claim, ¶¶ 128-140, 147-153

[366] Statement of Claim, ¶ 151

[367] Statement of Defence ¶ 98

[368] E-mail from the Spokesperson of the Macedonian Government, dated 18 November 2019 (**C-024**), p. 1

based on written off liabilities, no more to exist and the state [Macedonia] *will not charge it*."[369]

176. Macedonia's concerns were indeed justified since, in accordance with the Bankruptcy Law, the reopening of bankruptcy proceedings over TE-TO would invalidate TE-TO's judicial reorganisation:

"When a new bankruptcy procedure has been commenced over the debtor's assets prior [to] the complete implementation of the plan for reorganization, the postponed deadlines for payment, or the percentage of payments of the claims determined in the unsuccessful plan for reorganization will no longer be binding on any of the creditors in the bankruptcy procedure."[370] [emphasis added]

177. Macedonia speculates that *"[t]he fact that TE-TO was able to borrow funds to pay its tax debt in 2021 shows that TE-TO likely would have been able to do so earlier, had this been necessary*".[371] However, TE-TO's actions do not support the claim that it could have borrowed funds earlier. Rather, TE-TO sought assistance from the Macedonian Government. If TE-TO was able to borrow the necessary funds at an earlier stage, the question arises as to why it would have sought governmental intervention instead. This decision indicates that TE-TO was unable in securing funds independently. The necessity to turn to the Macedonian Government and the publicly voiced concern of the Government on the risk of TE-TO's bankruptcy but for the Macedonian Government's intervention,[372] show that borrowing funds was not an option for TE-TO at the time.

178. Macedonia's argument presents another significant flaw that cannot be ignored. If TE-TO had anticipated the tax liabilities during its reorganization, it would never have found itself needing to request a tax debt deferral from the Macedonian Government, nor would it have had to borrow funds to settle this debt. If one takes a closer look at the numbers, the situation becomes even more interesting. TE-TO managed to pay a hefty sum of EUR 17.1 million to PRO, with its own funds of EUR 7.1 million and a loan of EUR 10 million.[373] What this demonstrates is that TE-TO had the capacity to provide more favourable terms for settling the claims of its unsecured creditors with higher priority claims in its reorganisation. The amount paid by TE-TO to PRO is slightly below EUR 18,7 million - the total value of the claims of all such creditors, including GAMA with EUR 5 million, Kardikor Investments Limited at EUR 8.7 million, Sintez Green Energy demanding EUR 3.9 million, and other unsecured creditors at EUR 1.5 million.[374]

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[369] *Ibid*.

[370] Bankruptcy Law, Article 240(2)

[371] Statement of Defence ¶ 98

[372] See E-mail from the Spokesperson of the Macedonian Government, dated 18 November 2019 (**C-024**)

[373] Annual financial statements of TE-TO for the year ended on 31 December 2021 (**C-137**), pp. 12-13 ("In 2021, the profit tax resulting from the Reorganization Plan and the write-off of liabilities in 2018 has been fully paid to the IRS [PRO] with own funds in the amount of MKD 214,207,946.00 as principal debt and MKD 227,408,345.00 as interest, and the remaining amount is secured through a loan from Komercijalna Banka in the amount of MKD 615,000,000.00.")

[374] *See* Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), pp. 15-16 showing TE-TO's indebtedness to GAMA, Kardikor Investments Limited, Sintez Green Energy and other unsecured creditors.

1. MACEDONIA REFRAINED FROM ENFORCING THE TAX DEBT AGAINST TE-TO

179. Instead of enforcing the tax debt of MKD 1,489,193,975 (approximately EUR 24 million) owed by TE-TO as of 22 October 2019,[375] PRO advised the Macedonian Government on how to defer the tax debt.[376] PRO advised the Government that the deferral should refer to "*the amount of overdue tax liabilities as of 22 October 2019 and the amount of accrued interest thereon*" and, "*the outstanding liabilities arising from the submitted DD-DB 2018 (2018 Profit Tax-Tax Balance Sheet)*"[377] in the amount of MKD 2,644,288,525 (approximately EUR 42,3 million).[378]

180. On 28 October 2019, the Macedonian Government entered into the State Aid Agreement with TE-TO ("**State Aid Agreement**")[379] for a deferral of TE-TO's tax debt of EUR 15,6 million.[380] PRO advised the Macedonian Government that the State Aid Agreement does not include all tax liabilities of TE-TO, more specifically, the "*due monthly tax advance payments regarding its profit tax, which result from its 2018 Tax Balance Sheet, interest thereon and outstanding liabilities based on monthly profit tax advance payments for the months of October, November, December and January 2020*"[381] and proposed that the Government should reach a decision by to include "*all [TE-TO's] obligations arising from the 2018 Tax Balance Sheet*."[382]

181. On 6 December 2019, the Macedonian Government and TE-TO entered into an Annex to the State Aid Agreement[383] for the deferral of the monthly tax advance payments for 2019 of MKD 889,174,390 (approximately EUR 14,5 million) until the day of submission of the corporate income tax return for 2019 and 2020, when this debt would be extinguished, and deferral of the interest therein of MKD 60,690,622 (approximately EUR 1 million) until 28

[375] Opinion by the Public Revenue Office no. 28-3845-4 dated 22 October (**C-181**); *see also* Supplement to the Opinion by the Public Revenue no. 28-3845-5 dated 22 October 2019

[376] See Opinion by the Public Revenue Office no. 28-3845-4 dated 22 October (**C-181**), Supplement to the Opinion by the Public Revenue no. 28-3845-5 dated 22 October 2019 (**C-182**), Supplement to the Opinion by the Public Revenue Office no. 28-3845-6 dated 25 October 2019 (**C-183**), Notification by the Public Revenue Office, no. 28-3845-7 dated 04 November 2019 (**C-184**)

[377] Opinion by the Public Revenue Office no. 28-3845-4 dated 22 October (**C-181**), p. 1

[378] See Opinion by the Public Revenue Office no. 28-3845-4 dated 22 October (**C-181**), p. 2; *see also* Supplement to the Opinion by the Public Revenue no. 28-3845-5 dated 22 October 2019

[379] State Aid Agreement between the Macedonian Government and TE-TO dated 28 October 2019 (**C-185**) ("State Aid Agreement")

[380] State Aid Agreement (**C-185**), Article 1 ("[…]postponement of the due date of the Beneficiary's [TE-TO's] liability to pay its public tax in the total amount of 872,741,363 denars, of which 829,207,946 denars is the principal debt based on profit tax for the year 2018 and the amount of 43,533,417 denars – interest calculated on the principal debt, counted as from the due date thereof, 15 April 2019, to 7 October 2019, as per the Notification thereon by the Ministry of Finance – Public Revenue Office, Large Taxpayers Office, Debt Collection Department, No. 28-3845/3 dated 7 October 2019, delivered to the Government of the Republic of North Macedonia, regarding a period of nine years, counted as from the date of entering into this Agreement, which, in terms of Article 5 of the Law on State Aid Control is a reduced income of the State calculated in the total amount of 962,197,347 denars or 15,645,485 euros – the interest calculated on the amount of 872,741,363 denars for the period of 9 years specified")

[381] Notification by the Public Revenue Office, no. 28-3845-7 dated 04 November 2019 (**C-184**), p. 1

[382] Notification by the Public Revenue Office, no. 28-3845-7 dated 04 November 2019 (**C-184**), p. 2

[383] Annex to the State Aid Agreement between the Macedonian Government and TE-TO dated 6 December 2019 (**C-186**)

October 2028.[384] In other words, apart from the deferral of TE-TO's tax debt for 2018 of EUR 15,6 million, the Government relieved TE-TO of the obligation to pay its corporate income tax advance payments for 2019 of 14,5 million and deferred the interest thereon of EUR 1 million. These decisions provided significant financial relief to TE-TO. By deferring the tax debt for 2018 and relieving TE-TO of its obligation to pay advance payments for 2019, the Government effectively lessened TE-TO's immediate financial burden.

182. The State Aid Agreement, later amended by the Annex, was supposed to be a solution to TE-TO's significant tax debt. However, it proved to be inoperative[385], and the monthly corporate income tax advance payments and interests accrued, leading to a point where TE-TO owed the PRO MKD 1,844,053,368 (approximately EUR 30 million) based on corporate income tax.[386] What's compelling about this situation is not merely the escalating amount of debt, which was the largest in the country at that time, but the decision-making that followed. Despite the substantial sum owed and the inoperative State Aid Agreement, the PRO refrained from taking any enforcement actions and merely sent TE-TO letters of warning for its liabilities for monthly advance payments.[387] The rationale for this restraint was clear – the enforcement of the tax debt would *"not only will prevent the reorganization of the company [TE-TO], but it is quite certain that it will lead to the opening of bankruptcy proceedings over it [TE-TO] and the collapse of the Reorganization Plan*."[388].

183. On one hand, PRO was faced with significant uncollected debt and a legal and fiscal responsibility to pursue it. On the other hand, they were acutely aware that taking steps to enforce that debt could lead to the reopening of TE-TO's bankruptcy proceedings.

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[384] Annex to the State Aid Agreement between the Macedonian Government and TE-TO dated 6 December 2019 (**C-186**), Article 1

[385] See Annual financial statements of TE-TO for the year ended on 31 December 2019 (**C-149**), p. 13 ("The Public Revenue Office, until the day of preparation of the Reports, has not implemented the Agreement for granting state aid no. 08-2909/12 of 28.10.2019 and the Annex to the Agreement for granting state aid no. 08-2909/21 of 06.12.2019 and has not issued a Decision to defer the tax liability for the income tax for 2018, the monthly tax advances for 2019 resulting from the tax balance for 2018, as well as the calculated interest."); *see also* 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**), p. 3 ("Thus, this [State Aid] Agreement is not operational after a whole year since the signing, while TE-TO AD is still treated as a debtor")

[386] Analytical card for corporate income tax for TE-TO from 1 January 2018 to 19 May 2023 issued by the Public Revenue Office (**C-187**), p. 5

[387] Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for February 2019 dated 27 March 2019 (**C-188**), Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for March 2019 dated 23 April 2019 (**C-189**), Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for April and May 2019 dated 25 June 2019 (**C-190**), Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for June 2019 dated 19 June 2019 (**C-191**), Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for July 2019 dated 21 August 2019 (**C-192**), Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for August 2019 dated 18 September 2019 (**C-193**), Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for September 2019 dated 21 October 2019 (**C-194**), Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for October 2019 dated 20 November 2019 (**C-195**), Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for December 2019 dated 21 January 2020 (**C-196**)

[388] E-mail from the Spokesperson of the Macedonian Government, dated 18 November 2019 (**C-024**), p. 1

2. MACEDONIA UNLAWFULLY AUTHORISED THE TAX DEBT DEFERRAL TO TE-TO

184. Respondent says very little of the unlawful authorisation of the tax debt deferral by the Commission for the Protection of Competition ("**Competition Commission**"). The documents produced by Macedonia show that initially, the Macedonian Government requested from the Competition Commission authorisation of State aid to TE-TO in the form of a tax debt deferral of the income tax debt for 2018 plus applicable interest of "*914,201,760 denars or 14,865,089 euros […] for a 9-year period (from 22 October 2019 to 22 October 2028).*" [389] Subsequently, the Macedonian Government requested from the Competition Commission authorisation of State aid to TE-TO in the form of tax debt deferral of the monthly tax advance payments in the amount of 889,174,390 denars (approximately EUR 14,5 million) for a year and the applicable interest of MKD 60,690,622 (approximately EUR 1 million) until 28 October 2028.[390]

185. The Macedonian Government was aware that there was no governmental decree in place that would prescribe the specific conditions for granting this type of State aid but nevertheless requested the Competition Commission to authorise the State aid on that basis.[391] The Competition Commission authorised the State aid (tax debt deferral)[392] in blatant disregard of the existing rules for granting State aid for rescuing and restructuring undertakings in difficulty.[393] Recently "reorganised" TE-TO was not eligible for rescue aid which could have been comprised only out loans (or guarantees of loans) for a period of up to six months for the purpose of keeping the company alive until a restructuring or a bankruptcy plan is prepared and approved by the Competition Commission.[394]

186. The Macedonian Government ordered the Competition Commission to draft a decree prescribing the conditions for authorising the state aid (which it had already authorised) on its session for approval of the State Aid Agreement: "[*a*]*t the same time, the Government instructs the Commission for Protection of Competition to act upon the Law on State Aid*

[389] Notification on Planned Grant of State Aid by the Macedonian Government no. No. 45-7232/2 dated 10 October 2019 (**C-197**)

[390] Notification on Planned Grant of State Aid by the Macedonian Government no. No. *50-9096/2* dated 15 November 2019 (**C-198**)

[391] See Minutes of the 160th session of the Government dated 22 October 2019 (**C-123**), p. 3 ("[…] 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. […]") *see also* 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.")

[392] See Decision of the Commission for the Protection of Competition UP No. 10-81 dated 16 October 2019 (**C-120**) and Decision of the Commission for the Protection of Competition UP No. 10-81 dated 29 November 2019 (**C-126**)

[393] Decree on the Conditions and Procedure for Granting State Aid for Rescuing and Restructuring Undertakings in Difficulty (**C-199**)

[394] Decree on the Conditions and Procedure for Granting State Aid for Rescuing and Restructuring Undertakings in Difficulty (**C-199**), Article 3 ("Rescue aid is by nature temporary assistance granted based on serious social and/or regional difficulties and as a rule it is acceptable for a period of up to 6 months. Its purpose is to keep an undertaking in difficulty afloat for the time needed to work out a restructuring or bankruptcy plan and for the length of time the Commission for the Protection of Commission needs to be able to reach a decision on that plan. This aid is limited to loans or guarantees of loans")

Control, and to submit, as per paragraph 3 of Article 8, the respective draft-decree to the Government, within 30 days."[395]

187. No such decree was ever adopted. The tax debt deferral was terminated by the Macedonian Government,[396] following the findings of the Anticorruption Commission.[397]

188. Finally, Macedonia's response to the allegations of restrictive agreements and practices involving Gazprom, TE-TO, and EDS[398] is misguided. Macedonia argues that GAMA has failed to provide "*elaboration or concrete evidence*" against EDS and questions the relevance of such matters to the present case. [399] GAMA's charges unveil a pattern of favouritism and disregard for local laws and international treaties applicable to Macedonia's energy sector. The collusion between these companies is a background element in understanding the dynamics at play.

189. Gazprom, as the exclusive supplier of natural gas to Macedonia, TE-TO, as the primary supplier of district heating, and EDS, an influential electricity trader owned by then Deputy Prime Minister Mr. Kocho Angjushev, together form an entangled web of interests and influence. The accusations point to a broader scheme where, on the one hand, Macedonia granted TE-TO state aid in blatant violation of its own laws[400] and international treaties, [401] while on the other hand, it turned a blind eye to the cartel's existence. The competence to authorise State aid and to investigate restrictive agreements and practices —including cartels—is the domain of the Competition Commission,[402] which conspicuously failed to act. As explained above, Macedonia has a significant incentive not to break up this cartel.

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[395] Minutes of the 160th session of the Government dated 22 October 2019 (**C-123**), p. 3 *see also* 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.")

[396] *See* Minutes of the 25th session of the Government of the Republic of North Macedonia dated 1 December 2020 (**C-140**), p. 6

[397] *See* 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)**, p. 3 ("[…] it was indicated to the President of the Government [Mr Zoran Zaev] that, according to the State [Anticorruption] Commission, the granted state aid incorrectly consists of extending the maturity of the tax debt, which TE-TO has towards the Republic of North Macedonia by pointing out the weaknesses of the Agreement, due to which, the State [Anticorruption] Commission assessed that this Agreement[s] is not in line with the existing legal regulations, thus being not operational, i.e. the competent bodies have no grounds and manner of implementing it due to which it should be amicabl[y] terminated.") [emphasis added]

[398] Statement of Claim, ¶¶ 141-146

[399] Statement of Defence ¶ 100

[400] *See* Law on Protection of Competition (Official Journal of the Republic of Macedonia no. 145/2010, as amended) (**C-133 Resubmitted**), Article 7(1) and Article 7(2); *see also* Criminal Code (Official Journal of the Republic of Macedonia no. 37/96, as amended), (**C-085**), Article 283(1)

[401] *See* Council Decision 2006/500/EC of 29 May 2006 on the conclusion by the European Community of the Energy Community Treaty (**CL-003**) ("**TEC**") Article 18(1) and Article 18(2); *see also* TEC ANNEX III

[402] See Law on Protection of Competition (**C-133 Resubmitted)**, Article 28(1) ("The Commission for Protection of Competition shall control the application of the provisions of this Law, the Law on State Aid and the by-laws adopted based on these Laws, it shall monitor and analyze the conditions on the market to the extent necessary for the development of free and efficient competition, conduct administrative procedures and adopt decisions in administrative procedures in accordance with the provisions of this Law and the Law on State Aid.") Contrary to

190. Macedonia also says that GAMA speculates that various high-ranking officials (including the then Prime Minister and Deputy Prime Minister) conspired with TE-TO and other officials to grant the company a tax deferral to avoid the certain collapse of TE-TO's judicial reorganisation.[403] Indeed, what has been presented here accurately reflects GAMA's stance. GAMA asserts that the series of these actions were not coincidental but part of a larger scheme to grant TE-TO a tax deferral. This was a carefully orchestrated manoeuvre to circumvent the collapse of TE-TO's judicial reorganisation.

IV. MACEDONIA EXPROPRIATED GAMA'S INVESTMENT

191. Article III of the Treaty does not exclude any measures taken by any organ of a contracting party. The defining feature of the measures is their effect, not the identity of the state organ. Acts of the judiciary are therefore not excluded from being treated as expropriatory in character. Macedonia's attempt to limit the review of expropriatory conduct only to the Macedonian Government's tax deferral,[404] must therefore fail.

A. JUDICIAL CONDUCT CAN CONSTITUTE ILLEGAL EXPROPRIATION

192. Case law discussed in more detail above at II.B., such as *Saipem v. Bangladesh*, *Rumeli v. Kazakhstan, Deutsche Bank v. Sri Lanka, Sistem v. Kyrgyz Republic, Arif v Moldova, Karkey v Pakistan, Oil Field of Texas v Iran, Infinito Gold v. Costa Rica, Standard Chartered Bank v Tanzania* confirm that a judicial conduct may constitute an expropriation in breach of relevant treaties without applying a threshold tantamount to a denial of justice.[405] As H. Gharavi noted, "*the majority of the doctrine and case law appears to have gotten it right based on the arguments and legal authorities exchanged as of this date: judicial expropriation is independent from and is governed by different standards than denial of justice*."[406]

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what Macedonia suggests at ¶ 101 of its Statement of Defence, the Anticorruption Commission's mandate is limited to the Law on Prevention of Corruption and Conflicts of Interests, and it does not encompass the Macedonian Law on State Aid Control.

[403] Statement of Defence ¶¶ 102

[404] Statement of Defence, ¶¶ 216, 226

[405] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009, (**CL-024**), ¶ 181; *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**), ¶¶ 702-704; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 (**CL-022**), ¶¶ 520-521; *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; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (**RL-069**), ¶¶ 347, 415; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**CL-069**), ¶ 550, ¶¶ 645, 648; *Oil Field of Texas, Inc. v. Iran and the National Iranian Oil Company*, IUSCT Case No. 43, Award, 8 October 1986 (1986/III) (**CL-071**), ¶¶ 42-43; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (**CL-070**), ¶¶ 361, 701; *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019 (**CL-072**), ¶ 279

[406] H. Gharavi, Discord Over Judicial Expropriation, ICSID Review, Vol. 33, No. 2 (2018) (**CL-073**), p. 356

193. Macedonia itself cites case law confirming that a judicial conduct can amount to "*judicial expropriation*".[407] While in some of these cases tribunals required a showing of a denial of justice in order for the claimant to succeed with expropriation claims, none of these cases excluded the possibility of bringing an expropriation claim for takings of property through a judicial conduct:

a) the tribunal in *Loewen v United States* did not exclude the review of domestic judicial proceedings under the expropriation standard, but considered that Loewen's expropriation claim "*can succeed*", if a denial of justice is shown;[408]

b) the tribunal in *Lion Mexico v Mexico* accepted the possibility of judicial expropriation, but required a finding of judicial conduct amounting to a denial of justice;[409]

c) the ICJ in the *Barcelona Traction* case did not decide upon Belgium's claim of expropriation and is therefore not a persuasive authority on this point;[410]

d) In *Vöcklinghaus v. Czech Republic*, the tribunal reviewed a judicial conduct separately under the FET standard and under a denial of justice standard,[411] which it also applied to claimant's expropriation case;[412]

e) the tribunal in *MNSS v Montenegro* considered that a court's decisions could amount to a direct expropriation in case the denial of justice is found.[413]

f) the tribunal in *Azinian v Mexico* did not consider a denial of justice as the only ground to challenge a judicial decision under the international law[414] and such a reading of the award has been criticized in the legal doctrine. [415] The tribunal cited the President of the ICJ, which distinguished between three different situations giving rise to a liability

[407] Statement of Defence, ¶¶ 217-222

[408] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 (**RL-024**), ¶ 141. *See* ibid., 156 (considering that exhaustion of local remedies requirement applies also to the expropriation claim).

[409] *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021 (**RL-113**), ¶ 188

[410] Statement of Defence, ¶ 218. Macedonia refers to Judge Tanaka's separate opinion, which assessed the merits of the claim under the denial of justice. On the other hand, Judge Fitzmaurice in his Separate Opinion characterized the acts during the bankruptcy proceedings as a "*disguised expropriation*". *See* Barcelona Traction, Light and Power Company Limited (Belg. v. Spain), Separate Opinion of Judge Sir Gerald Fitzmaurice, 1970 I.C.J. Rep. 64 (Feb. 5) (**CL-080**), ¶ 71

[411] *Peter Franz Vöcklinghaus v. Czech Republic*, Final Award, 19 September 2011, (**RL-060**) ¶¶ 201-204 (review of judicial conduct under the FET standard), ¶¶ 205 (review of the judicial conduct under the denial of justice standard).

[412] Statement of Defence, ¶ 219, referring to *Peter Franz Vöcklinghaus v. Czech Republic*, Final Award, 19 September 2011, (**RL-060**) ¶ 205.

[413] Statement of Defence, ¶ 220, referring to *MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, 4 May 2016 (**RL-090**), ¶ 370

[414] Statement of Defence, ¶ 221

[415] H. Gharavi, Discord Over Judicial Expropriation, ICSID Review, Vol. 33, No. 2 (2018) (**CL-073**), p. 350 (referring to Azinian and finding that "[n]owhere in the Award could the Tribunal be found to have made such a categoric statement that denial of justice is the only ground to challenge a national court's decision under international law.")

of states for the judicial conduct, a denial of justice being only one of them.[416] In any event, the expropriation claim was dismissed because claimants did not raise any complaints against the Mexican courts, but rather against the local city council.[417]

g) the tribunal in *Manolium v. Belarus* confirmed that the "[*t]aking of property through a judicial process can indeed give rise to an expropriation"* and accepted the possibility of a "*judicial expropriation*". [418] The tribunal also inquired whether "*a judicial expropriation could be found independently of a denial of justice*"[419] and on the facts of the case dismissed the claim.

194. Other legal authorities, cited by Macedonia, likewise show that tribunals reviewed judicial conduct against the standard of expropriation.[420] Macedonia cites to Zachary Douglas in support of its position that judicial conduct should only be reviewed under the denial of justice standard and cannot amount to a judicial expropriation,[421] but his view has been criticized.[422]

195. Macedonia therefore does not seem to dispute the possibility of "*judicial expropriation*", as developed under the case law it cites, but seems to require that the required illegality of judicial action amounts to a denial of justice. However, the applicable legal instrument in the present case, the Treaty, does not subject a judicial expropriation to different or stricter norms than legislative or executive expropriation. This is confirmed by case law cited above at Section II.B. and also by doctrine: "*Elevating the standard for judicial expropriation to the level of the denial of justice standard or applying to judicial expropriation a threshold that is different from the threshold for expropriation through the executive or legislative branches of the State risks leading to […] absurd results*."[423]

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[416] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, (**RL-015**), ¶ 98 ("True enough, an international tribunal called upon to rule on a Government's compliance with an international treaty is not paralysed by the fact that the national courts have approved the relevant conduct of public officials. As a former President of the International Court of Justice put it: '[…] The responsibility of the State for acts of judicial authorities may result from three different types of judicial decision. The first is a decision of a municipal court clearly incompatible with a rule of international law. The second is what it known traditionally as a 'denial of justice.' The third occurs when, in certain exceptional and well-defined circumstances, a State is responsible for a judicial decision contrary to municipal law.' ")

[417] *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999, (**RL-015**), ¶ 100

[418] *OOO Manolium Processing v. The Republic of Belarus*, PCA Case No. 2018-06, Final Award, 22 June 2021 (**RL-112**), ¶ 591

[419] *OOO Manolium Processing v. The Republic of Belarus*, PCA Case No. 2018-06, Final Award, 22 June 2021 (**RL-112**), ¶ 593

[420] *EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020 (**RL-106**), ¶ 513 (considering whether the decision of the Riga District Court declaring the termination of the land lease agreements constitute an expropriation); *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, (**RL-097**), ¶ 707 ("As a general matter, this Tribunal takes the view that it is not excluded that judicial action may, in certain situations, amount to expropriation.");

[421] Statement of Defence, ¶ 223

[422] H. Gharavi, Discord Over Judicial Expropriation, ICSID Review, Vol. 33, No. 2 (2018) (**CL-073**), p. 351 ("[Z. Douglas'] perspective is isolated and not substantiated by any legal authority. The author in fact himself flags at the very outset of his paper that what he generally proposes is rather novel.")

[423] H. Gharavi, Discord Over Judicial Expropriation, ICSID Review, Vol. 33, No. 2 (2018) (**CL-073**), p. 354

196. GAMA, therefore, submits that no showing of a denial of justice is required to establish a judicial expropriation in breach of the Treaty. Even if such a standard applied to judicial expropriation (*quod non*), the conduct of Macedonian courts would still meet the test as well, as described above at Section III.C.

B. MACEDONIA'S ACTS CONSTITUTE ILLEGAL EXPROPRIATION

1. THE EXISTENCE OF AN EXPROPRIATION

197. The first step in assessing the existence of an expropriation is to identify the assets expropriated.[424] In its Statement of Claim, GAMA identified:

(i) a contractual right against TE-TO, which was taken through acts of Macedonian state organs, *i.e.* GAMA's claim against TE-TO to pay 5 million EUR under the Settlement Agreement, as part of the EPC Contract, and default interests on the principal claim;[425] and

(ii) contractual rights to have its claim against TE-TO resolved in the ICC arbitration, pursuant to the arbitration clause in the EPC Contract and with the application of the English law.[426]

198. The existence of GAMA's claim to money is not in dispute. GAMA's claim against TE-TO was acknowledged by TE-TO[427] and was in TE-TO's reorganization confirmed (and written-off) by the final and enforceable judgment of the Civil Court Skopje as an executive document.[428] The existence of GAMA's contractual rights under the EPC Contract to international arbitration and the English law as a governing law is also not in dispute.

199. The second step is to identify the expropriatory conduct and its effects.[429] GAMA identified acts of the Macedonian courts in debt enforcement proceedings and in TE-TO's reorganization proceedings, as well as acts of the Macedonian Government with respect

[424] *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**), ¶ 443

[425] Statement of Claim, ¶¶ 194, 197(d)-(e).

[426] Statement of Claim, ¶¶ 194, 197(a)-(b).

[427] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), pp. 15-16 and 35-36 (showing a list of TE-TO's creditors, including GAMA), 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, Letter of acknowledgment of debt from TE-TO to GAMA, dated 17 March 2015 (**C-009**).

[428] Statement of Claim, ¶¶ 108-109, 114, 120; Statement of Defence, ¶¶ 58, 69. 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**), pp. 3, 5 (showing a list of TE-TO's creditors, including GAMA) and pp. 2, 33 (confirming that the approved reorganization plan has the status of an executive document); Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**) (upholding the decision of the Civil Court Skopje on TE-TO's reorganization).

[429] *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**), ¶ 443

to the tax deferral, as constituting a "*taking*" of GAMA's contractual rights identified above.[430]

200. The taking of GAMA's right to arbitration and the application of the English law was completed by the jurisdictional decision of the Appellate Court Skopje in debt enforcement proceedings, denying GAMA's appeal and upholding the first-instance decision on jurisdiction and governing law.[431]

201. Once the Macedonian courts illegally assumed jurisdiction over the dispute, GAMA became embroiled in the litigation before Macedonian courts, which is now pending in excess of 11 years, and which has been intertwined with several manifestly unjust decisions discussed above, effectively depriving GAMA of its claim against TE-TO.[432] The taking was directly and irreversibly completed by the 2018 Decision of the Appellate Court Skopje in TE-TO's reorganization proceedings, [433] which confirmed the writing-off of 90% of GAMA's claim to money with default interests and suspension of the repayment of the remaining 10% of the claim after year 2028.

202. The taking of GAMA's claim to money was subsequently maintained through the Macedonian government's tax deferral granted to TE-TO through the following acts and omissions of Macedonia's state organs: (i) the refusal of the Public Revenue Office, without any legal basis, to enforce TE-TO's tax debt, and (ii) the decision of the Macedonian Government and the Competition Commission to provide TE-TO State-Aid in the form of a tax deferral, which the Anticorruption Commission established was illegal. Acting in this way, without a legal basis, Macedonian government ensured that TE-TO's unlawful reorganization, including the taking of GAMA's claim, survived.[434]

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[430] Statement of Claim, ¶¶ 194, 197

[431] Statement of Claim, ¶ 47. Decision of the Appellate Court Skopje TSZ-1482/14 dated 15 December 2014 (**C-008**)

[432] *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 ("In general, 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. If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law" rings hollow. And that is exactly what the Tribunal finds in the present case."); *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 183 ("It is undisputed that Saipem had already litigated the issue of the arbitral misconduct for more than two and a half years in front of different courts in Bangladesh before being served with the decision revoking the power of the ICC Tribunal. It can thus be held to have exerted reasonable local remedies, having spent considerable time and money seeking to obtain redress without success although the allegation of misconduct was clearly ill-founded. Requiring it to do more and file appeals would amount to holding it to "improbable" remedies. This is even more true knowing that Saipem's case was precisely that the local courts should never have become involved in the dispute, since the parties had entrusted the ICC Court of Arbitration with the power to revoke the arbitrators' authority.")

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

[434] *Compare*, *e.g. Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2,* Award, 31 October 2012, (**CL-022**), ¶ 521 ("The Central Bank simply reinforced and later extended and made permanent the interference begun by the Supreme Court."); *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award, 11 October 2019 (**CL-072**), ¶ 380 ("[The Government of Tanzania] through its agencies, as stated above, further aided and abetted the improper release of the Escrow Account, disregarding the legitimate interest of IPTL and SCB HK [claimant] as successor lender and assignee, by enabling [the other shareholder] to receive the full release of the monies and assets in the Escrow

203. All these acts resulted in a substantial, irreversible and permanent deprivation of the economic value of GAMA's investment. GAMA permanently lost 90% of the principal claim against TE-TO with default interests, which was written-off.[435]

204. The repayment of the residual 10% of GAMA's claim, which was suspended to over 10 years in breach of the Macedonian law, constitutes an expropriation of GAMA's claim to money as well. Case law confirms that temporary measures can have an effect equivalent to expropriation, if their length and impact on the investment are sufficiently important.[436] This is also the case with the remaining 10% of GAMA's claim, considering the excessive and unlawful duration of suspension. Moreover, the possibility of repayment of the residual part of GAMA's claim was definitely taken away through recent amendments to the Macedonian Law on Obligations, which entered into force on 20 July 2023, and which reduced the statute of limitations for enforcement of claims based on court decisions from 10 years to 5 years (see above at ¶ 155). This means that after 30 August 2023,[437] GAMA's residual claim of EUR 500,000 against TE-TO based on the reorganisation plan will become time-barred.

205. As a third step, there is no dispute that acts in question were made in Macedonia's exercise of its sovereign powers.[438] However, the judicial conduct in manifest contradiction with a domestic law, resulting in denial of justice, including a discriminatory and arbitrary treatment of the investor, cannot be considered as a legitimate exercise of "*police power*"[439]

Account thereby depriving IPTL and SCB HK of the right to properly exercise their rights of control and economic benefits of their investment. Such acts are clear acts of expropriation expressly prohibited […].")

[435] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 (**CL-022**), ¶ 521 ("[…] the coordinated actions of the Supreme Court and the Central Bank prevented Deutsche Bank from receiving payment under the Hedging Agreement. They deprived Deutsche Bank of the economic value of the latter.")

[436] *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Merits), 13 November 2000, (**CL-081**), ¶ 283 ("An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary."); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (**CL-082**), ¶ 99 (considering that a temporary expropriation of a hotel for a year qualified as a treaty breach given the measure's duration and impact on the investment); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**CL-069**), ¶ 650 (considering that a release of one of investor's seized vessel's pursuant to tribunal's order "*has to be considered when assessing the damages resulting of the expropriation and not in order to assess the extent of the expropriation when it took place*."); *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 (**RL-061**), ¶ 67 ("emphasizing that "the right to enforcement is an essential component of the property rights themselves, and not a wholly distinct right")

[437] Considering that the approval of TE-TO's reorganisation plan became final on 30 August 2018. See Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**)

[438] *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**), ¶ 444

[439] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**CL-069**), ¶ 649 ("Such deprivation cannot be considered as a legitimate regulatory taking as it stems from the arbitrary 30 March 2012 Judgment."); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2,* Award, 31 October 2012 (**CL-022**), ¶ 523 ("the actions by the Supreme Court and the Central Bank were not legitimate regulatory actions. They involved excess of powers and improper motive as well as serious breaches of due process, transparency and indeed a lack of good faith.")

or considered to be in a public purpose[440] and Macedonia does not argue that. If this was so, judicial decisions could never amount to a wrongful taking of property, no matter how wrongful they were; a position uniformly rejected by case law, which frequently held states liable for an expropriation through judicial conduct (see above at II.B. and ¶ 192).

206. GAMA accepts the test developed in *Saipem* that what matters for the purposes of establishing a judicial expropriation is to show the "*illegality*" of the judicial conduct.[441] As discussed above in Section III.C., debt enforcement proceedings and TE-TO's reorganization proceedings were manifestly flawed, both as a matter of procedure and substance, and clearly reached the required "*illegality*" of judicial conduct. They also amount to denial of justice, the standard advocated by Macedonia. Even if Macedonian courts correctly applied domestic law (which is not the case), Macedonia would remain liable for the conduct of its courts, which leads to a result that is incompatible with international law,[442] *i.e.* arbitrary and discriminatory treatment of GAMA and its claim to money (see below at V.,VI.B and VIII).

207. With respect to the tax deferral and State-Aid to TE-TO, it is not disputed that the Public Revenue Office had no legal basis to refrain from the enforcement of the tax debt and that Macedonia itself recognized State-Aid as unlawful following the findings of the Anticorruption Commission.[443] The tax deferral and State-Aid could, therefore, not be considered as a legitimate exercise of "*police power*", nor does Macedonia claim so.

208. Macedonia also wrongly argues that a "*speculative chain of causation*" with respect to the tax deferral purportedly fails to establish the expropriatoy act at all.[444] However, what matters to establish the expropriatory conduct is a proof of substantial interference with rights,[445] and not the proof of exact economic loss and damage. The tribunal in *Deutsche Bank v Sri Lanka* explained:

> "In the Tribunal's view, the absence of economic loss or damage is in the first place a matter of causation and quantum - rather than a necessary prerequisite in the cause of action of expropriation itself. Therefore, the suffering of substantive and quantifiable

[440] Statement of Claim, ¶¶ 203-205

[441] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009, (**CL-024**), ¶¶ 134, 181

[442] H. Gharavi, Discord Over Judicial Expropriation, ICSID Review, Vol. 33, No. 2 (2018) (**CL-073**), pp. 356-357 ("Under international law, judicial expropriation could consist of: […] Substantive violations of (or failure to apply) international law, including proportionality, but also disregard of local law or both. In the event of disregard of local law, it must be manifest, hence the same sensitivity and the de facto high standards of the judicial expropriation. Otherwise, if international law is violated, it does not matter if the judicial decision does not violate local law, as an act of the judiciary may be consistent with local law but be in violation of international law.") [emphasis added]; *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 173 ("While the decision of the Supreme Court may appear understandable under domestic law, the fact remains that under international law it is flawed.")

[443] Statement of Claim, ¶¶ 151-152

[444] Statement of Defence, ¶¶ 230-232

[445] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 (**CL-022**), ¶ 504

economic loss by the investor is not a precondition for the finding of an expropriation under Article 4(2) of the Treaty."[446]

209. GAMA has already proven that the taking of its claim through judicial conduct constitutes a significant interference and substantial, irreversible and permanent deprivation of the economic value of GAMA's claim to money. In the words of the *Deutsche Bank v Sri Lanka,* which similarly had to assess consecutive actions of the judiciary and the executive branch, the subsequent tax deferral "*reinforced and later extended and made permanent the interference begun by the […] court.*"[447]

210. The prevention of TE-TO's bankruptcy through the unlawful tax deferral preserved the unlawful reorganization scheme and deprived GAMA of its chance to obtain the repayment of its claim on much better terms in TE-TO's bankruptcy, than in reorganization. But for the tax deferral, TE-TO's reorganization would have collapsed, GAMA's claim would have been revived, and TE-TO would have entered bankruptcy.[448] Macedonia itself recognized this scenario.[449] It is also not in dispute that in TE-TO's bankruptcy, GAMA's claim would have ranked above claims of shareholders.[450] The relevant question is whether GAMA's claim would have been repaid in full or on better terms in TE-TO's bankruptcy, than in reorganization dictated by shareholders

211. The record confirms so and this will be addressed in more detail in section below at X.A.2. Mr Kostovski confirms that even in the pessimistic scenario of the sale of the plant for 60% or 50% of the accounting value, GAMA and other unsecured creditors would have been repaid in full.[451] The tribunal in *Petrobart v Kyrgyzstan* considered "*if there had been a bankruptcy in which the transferred and leased assets had been available to satisfy the creditors, Petrobart would have been able to obtain payment for a substantial part of its claim for delivered gas*. "[452] Similar analysis applies to the present case.

2. CONDITIONS FROM ARTICLE III(1) OF THE TREATY ARE NOT MET

212. The last step is the analysis of the conditions specified in Article III(1) of the Treaty, the absence of which show that the expropriation of GAMA's claim was illegal: (i) the lack of a public purpose, (ii) discrimination, (iii) the absence of payment of prompt, adequate and

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[446] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 (**CL-022**), ¶ 505

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

[448] Statement of Claim, ¶ 130. Second Kostovski Opinion (**CE-02**), ¶ 105

[449] E-mail from Spokesperson of the Government of the Republic of North Macedonia dated 18 November 2019 (**C-24 Resubmitted**) ("[…] the eventual approach to forced collection of that profit 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.")

[450] Second Kostovski Opinion (**CE-02**), ¶ 110**;** Petrov, ¶¶ 151-155

[451] Second Kostovski Opinion (**CE-02**), ¶ 111

[452] *Petrobart Limited v. The Kyrgyz Republic (II*), SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**), ¶ 466 (pp. 83-84 of the original award)

effective compensation, and (iv) a breach of "*due process of law and the general principles of treatment provided for in Article II of this Agreement*."[453]

213. In its Statement of Claim, GAMA explained why the lack of these elements amount to illegal expropriation.[454]

214. Macedonian courts treated GAMA less favourably in comparison to Macedonian or foreign investors and treatment of their investments in TE-TO's reorganisation proceedings (see below at V.), and the taking of GAMA's claim was in breach of due process (see above at III.C.5 and 7) The approval of TE-TO's reorganization also defeated basic policy goals of reorganization (see below at VI.D.4).

3. THE EXISTENCE OF A CREEPING EXPROPRIATION

215. The acts described above also constitute a creeping expropriation of GAMA's claim to money through a composite act in the sense of Article 15 of the ILC Articles.

216. The process of taking of GAMA's claim to money commenced through the illegal assumption of jurisdiction over GAMA's claim in debt enforcement proceedings, leading to excessively long proceedings, which are pending for more than 11 years and which completely frustrated the recovery GAMA's claim against TE-TO. In 2018, the process culminated in the direct, permanent and irreversible taking of GAMA's claim in TE-TO's reorganization, approved by Macedonian courts in manifest breach of the Bankruptcy Law. In order to prevent the opening of the bankruptcy proceedings against TE-TO, the Public Revenue Office, the Government and the Competition Commission decided to grant to TE-TO a tax deferral, which extended the taking of GAMA's claim, begun by Macedonian courts.

217. As explained in the Statement of Claim, all these acts can be seen as a network of closely related facts, which taken collectively, amount to a creeping illegal expropriation in breach of Article III(1) of the Treaty.[455]

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[453] *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**), ¶ 446

[454] Statement of Claim, ¶¶ 195-206

[455] Statement of Claim ¶¶ 193-194 and case law cited therein. *See* also *Biwater Gauff (Tanzania*) *Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**CL-054**), ¶ 489 (the tribunal held that several actions complained of by Tanzania had the 'cumulative' effect of breaching the expropriation provision of the treaty) *Ibid.*, ¶ 455 ("In terms of what might qualify as 'expropriation', the Arbitral Tribunal accepts BGT's submission that it must consider the Republic's conduct both in terms of the effect of individual, isolated, acts complained of, as well as in terms of the cumulative effect of a series of individual and connected acts, in so far as such a cumulative effect might be to deprive the investor in whole or in material part of the use or economic benefit of its assets. As was stated, for example, in Tradex v. Albania :'While the [...] Award has come to the conclusion that none of the single decisions and events alleged by Tradex to constitute an expropriation can indeed be qualified by the Tribunal as expropriation, it might still be possible that, and the Tribunal, therefore, has to examine and evaluate hereafter whether the combination of the decisions and events can be qualified as expropriation of Tradex's foreign investment in a long, step-by-step process by Albania.' ")

V. MACEDONIA DISCRIMINATED GAMA

218. Macedonia has breached Article II(3) of the Treaty by providing GAMA and its investment treatment that is less favourable than the treatment Macedonia has accorded in TE-TO's reorganization to TE-TO's shareholders, other unsecured creditors and their investments.[456]

219. Both parties agree on the applicable test to find a breach of the national treatment or MFN treatment in Article II(3) of the Treaty: (i) the existence of entities in similar situations; (ii) differential treatment; (iii) the absence of a reasonable justification for such a treatment.[457]

220. Conversely, it is generally accepted that the right not to be discriminated is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different.[458]

A. REVERSAL OF CREDITORS' RANKING TO GAMA'S DETRIMENT

221. GAMA does not dispute that there was a rational justification for treating *secured* creditors differently than unsecured creditors, such as GAMA. As Macedonia points out, [459] one of the very purposes of the security held by secured creditors is to ensure better treatment than to unsecured creditors in bankruptcy. A differential treatment of secured and unsecured creditors was backed by a rational justification, enshrined in the Bankruptcy Law.

222. The situation is significantly different with respect to Macedonia's treatment of unsecured creditors, such as GAMA. As explained below, the treatment of GAMA meets the test to find a breach of the national and the MFN treatment from Article II(3) of the Treaty.

223. Both, GAMA and TE-TO's shareholders, had claims against TE-TO, arising from the construction of the CCCP Skopje. TE-TO's shareholders from Cyprus (Bitar Holdings), British Virgin Islands (Project Management Consulting) and Macedonia (Toplifikacija) provided loans to TE-TO for the construction of the CCCP. Like GAMA, they can be therefore considered as "*investors*" and their claims to TE-TO as "*investments*" for the purposes of Article II(3) of the Treaty.[460]

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[456] Statement of Claim, ¶ 207 *et seq.*

[457] Statement of Claim, ¶ 209; Statement of Defence, ¶ 236

[458] R. Jennings, A. Watts (eds.), Oppenheim's International Law, 9th ed. (Longman, 1992), Vol. I (**CL-083**), p. 378 ("While everything depends on the particular circumstances of each case, discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way."); *Eweida and others v. the United Kingdom*, Application N. 48420/10, ECtHR, Judgment of the ECtHR, dated 27 May 2013 (**CL-084**), ¶¶ 87-88; *Thlimmenos v. Greece*, Application No. 34369/97, Judgment of the ECtHR, dated 6 April 2000 (**CL-085**), ¶ 44

[459] Statement of Defence, ¶ 238

[460] Statement of Claim, ¶ 214

224. Macedonian courts treated GAMA and TE-TO's shareholders to be in a similar situation, as unsecured creditors from the same class, for the purposes of the voting and repayment of their claims in TE-TO's reorganization. However, as explained above at III.C.6 c) and III.C.7, the Macedonian courts should have treated GAMA and TE-TO's shareholders differently. In not doing so, Macedonian courts unlawfully privileged shareholders at the expense of TE-TO's unsecured creditors, including GAMA.

225. As Mr. Kostovski confirms, under the Bankruptcy Law, TE-TO's shareholders should have been considered lower priority claims, listed in a separate class of unsecured creditors for the purposes of voting and repayment under the plan.[461] Mr. Kostovski also confirms that the debtor has no discretion to change rules on the priority of claims.[462]

226. However, shareholders of TE-TO and GAMA were put in the same class in disregard of the basic insolvency rules, entailing a subordination of shareholders and defeating the very purpose of the reorganization, which is that no creditor should receive less, under a reorganization, than what they would have received in the liquidation ("*liquidation test*").[463] Should TE-TO's shareholders have been correctly listed in a separate class of lower-ranking unsecured creditors, GAMA would have had the decisive influence on the outcome of the voting to prevent the proposed reorganisation of TE-TO[464] and would have obtained a full repayment of its claim in ensuing TE-TO's bankruptcy, whereas TE-TO's shareholders' would have been settled last[465] (see section III.C.6 b) and c)).

227. Even the Civil Court Skopje, on several occasions, recognized that TE-TO's shareholders should have been subordinated to unsecured creditors, such as GAMA, but inexplicably ignored its own findings (see above at ¶ 158). And although GAMA raised these contradictions and manifest misapplication of the Bankruptcy Law, the Appellate Court Skopje entirely ignored the matter.[466]

228. Moreover, even if the classification of creditors was in accordance with the Macedonian law (*quod non*), as Macedonia claims, this would not absolve Macedonia of its liability for a discrimination under the Treaty. Macedonia cannot rely on its internal law to justify an internationally wrongful act (see above at ¶¶ 36-38).[467] What matters is the existence of the conditions to establish a discrimination. The relevant test is whether Macedonia has shown that there was a "*rational justification*" to enable shareholders of a debtor to have the same weight of a vote and be repaid their claims on the same terms as unsecured creditors, to the detriment of the latter? There is no such rational justification. This would

[461] First Kostovski Opinion (**CE-01**), ¶¶ 79-81; Second Kostovski Opinion (**CE-02**), ¶¶ 36, 97
[462] Second Kostovski Opinion (**CE-02**), ¶ 98
[463] Statement of Claim, ¶¶ 90-91, 259. Second Kostovski Opinion (**CE-02**), ¶ 98
[464] Statement of Claim, ¶ 99, 215
[465] Second Kostovski Opinion (**CE-02**), ¶¶ 105, 111-114
[466] Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**)
[467] ILC Articles on Responsibility of States for Internationally Wrongful Acts, Article 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.")

defeat the "*liquidation test*",[468] accepted by Macedonian courts themselves,[469] and would be contrary to the basic principles of the company law, as enshrined in the Bankruptcy Law (see below at VI.D.4).

229. Macedonia is also wrong to limit discrimination by courts in breach of the national and MFN treatment clause to instances of a denial of justice.[470] The national treatment and MFN treatment in Article II(3) of the Treaty are contingent standards; they define the required treatment *by reference to the treatment accorded to other investments* and are not qualified by the existence of the breach of non-contingent standards (e.g. FET or denial of justice as part of it). *Manchester Securities v Poland*, cited by Macedonia, confirms that discrimination may rise to a denial of justice,[471] but it nowhere states conversely that a denial of justice is required to show discrimination. The tribunal considered that Polish courts discriminated between investor's mortgage compared to the mortgage of the state-owned bank *as one of the elements to find a denial of justice* in breach of the FET.[472]

230. Indeed, Aniruddha Rajput, cited by Macedonia, confirms the important role of the national and MFN treatment in the context of insolvency proceedings, independently of his analysis of a denial of justice:

> "If the shareholders, creditors or the company under liquidation is treated in a discriminatory manner as compared to the others similarly placed, then the State and the courts of that State which discriminate would be responsible for the violation of MFN and NT."[473]

B. DENIAL OF GAMA'S DEFAULT INTERESTS ON THE CLAIM

231. GAMA was discriminated against TE-TO's shareholders and other unsecured creditors also through the discriminatory denial of cca. EUR 3 million default interest on GAMA's claim at the time of the TE-TO's proposal for reorganisation.[474]

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[468] Second Kostovski Opinion (**CE-02**), ¶ 98 (explaining that a failure to respect priority of creditors defeats the goal of the reorganization to provide a more favourable settlement of creditors than in bankruptcy)

[469] Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**), p. 17

[470] Statement of Defence, ¶ 241 (""[t]he reorganization is in the interest of the creditors, because it leads to the successful settlement of their claims to a greater extent than they would receive with the [regular] bankruptcy of the bankruptcy debtor")

[471] *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018, (**RL-102**), ¶ 406 ("The Tribunal observes that other obligations respecting the treatment of investments under Article II of the BIT, such as protection of investments against discrimination or arbitrary measures, are part of FET and may rise to a denial of justice.").

[472] *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018, (**RL-102**), ¶¶ 448-468, 497-499. Respondent cites in note 565 also expert opinion of Christopher Greenwood in *Loewen Group v. USA* (**RL-024**) and his treatise *State Responsibility For The Decisions Of National Courts (***RL-027**), but none of them contain a support for Respondent's position that a denial of justice is required to prove a breach of the national treatment / MFN.

[473] A. Rajput, Cross-Border Insolvency and Public International Law, 19 ROMANIAN J. OF INT'L LAW 7 (2018) (**RL-103**), pp. 23-24

[474] Statement of Claim, ¶¶ 98, 216

232. Macedonia admits that the Reorganization Plan included the interests on principal claims of all creditors, except of GAMA.[475] Macedonia then wrongly argues that this is purportedly irrelevant to the treatment of creditors under the Reorganization Plan, because the plan in any event envisaged a full write-off of all interest of all creditors.

233. But such a reasoning does not answer GAMA's complaint: if GAMA's default interest were taken into account for the calculation of voting rights (as they were in the case of other creditors), or if the court should have disregarded the interests on claims of all other creditors as well, not only GAMA's (which Macedonia argues should be the case under the Bankruptcy Law[476]), this would have additionally enhanced the percentage of GAMA's voting rights in comparison to other unsecured creditors from the same class and would have additionally given GAMA a decisive influence to prevent the reorganisation of TE-TO.[477] Mr. Kostovski confirms that omission of GAMA's interests from the reorganisation plan resulted in wrongful determination of GAMA's voting rights.[478] There is no justification, let alone reasonable justification, for such a different treatment of GAMA's voting rights, as opposed to other unsecured creditors, including shareholders.

C. SUSPENSION OF THE REPAYMENT OF GAMA'S CLAIM

234. The Civil Court Skopje also discriminated GAMA through the application of 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 claims of GAMA and other unsecured creditors.[479]

235. Macedonia provided no argument on this prong of the discrimination claim in its Statement of Defence and dealt with this in its argument on denial of justice. As explained above at III.C.6. and e), the application of the 12 years suspension period to GAMA's claim was in manifest breach of Article 215-b(1)(2) of the Bankruptcy Law, which sets five years as the maximum deadline for the implementation of the reorganization plan with respect to claims, which are not based on loans, such as GAMA's. Mr. Kostovski confirms that imposing a 12 years deadline on GAMA's claim was contrary to Article 215-b (1) 2) indent 13 of the Bankruptcy Law.[480]

236. A reading of this provision, offered by Macedonia,[481] is legally untenable. Under Macedonia's interpretation, an exceptional deadline of 12 years would apply to all claims,

[475] Statement of Defence, ¶ 240. *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)
[476] Statement of Defence, ¶ 196 (referring to Article 136 of the Bankruptcy Law for the proposition that unsecured claims shall not include interest)
[477] Second Kostovski Opinion (**CE-02**), ¶ 110
[478] Second Kostovski Opinion (**CE-02**), ¶ 34 ("GAMA is the only second class creditor in the Reorganization Plan that has not been granted statutory penalty interest on its claim, and as a result, has had its voting rights incorrectly determined.")
[479] Statement of Claim, ¶ 217
[480] Second Kostovski Opinion (**CE-02**), ¶¶ 102-104
[481] Statement of Defence, ¶¶ 197-199

making the exception under the provision devoid of any substance. For the purposes of the discrimination claim, Macedonia fails to provide any rational justification for a treatment of GAMA's claim in breach of the maximum deadline provision under the Bankruptcy Law, or any reasonable explanation, why GAMA's claim should be on the same footing with repayment of shareholder's claims arising from loans.

D. APPLICATION OF SUBSTANTIVE GUARANTEES FROM OTHER TREATIES

237. By virtue of the MFN provision in Article II(3) GAMA can rely on the substantive protections accorded to the investments of third state nationals under other Macedonia's investment protection treaties currently in force.

238. In its Statement of Defence, Macedonia disagrees and points to the presumably restrictive wording of the MFN clause.[482] However, contrary to what Macedonia alleges, the wording "*treatment*" and "*in similar situations*" in Article II(3) of the Treaty does not exclude the application of better legal treatment of GAMA's investment on the basis of other investment protection treaties concluded by Macedonia with third states.

239. **First**, the ordinary meaning of the term "*treatment accorded*" in Article III(2) encompasses not only treatment that has in fact been accorded but also treatment that is legally required to be accorded. This has been qualified as a an "*uncontroversial proposition in international investment law, as well as general international law*".[483] International Law Commission (***ILC***) in its Commentary on 1978 Draft Articles on MFN Clauses, which enshrine customary international law rules concerning the interpretation of MFN clauses,[484] explained:

"[…] the fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the third State has not availed itself of the benefits which are due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligation under the clause."[485] [emphases added]

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[482] Statement of Defence, ¶ 244 *et seq.*

[483] *1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020 (**CL-086**), ¶ 252

[484] Stephan W. Schill, MFN Clauses As Bilateral Commitments To Multilateralism – A Reply To Simon Batifort And J. Benton Heath (2018) (**CL-087**), pp. 10-11 ("with respect to their core provisions on the functioning, effect, and interpretation of MFN clauses, the Draft Articles enshrine what must be considered customary international law rules concerning the interpretation of MFN clauses contained in any international treaty").

[485] ILC, Draft Articles on most-favoured-nation clauses with commentaries 1978 (YBILC 1978, vol. II (Part Two)), Commentary to Article 5, (**CL-088**), ¶ 6. *See* also Stephan W. Schill, MFN Clauses As Bilateral Commitments To Multilateralism – A Reply To Simon Batifort And J. Benton Heath (2018) (**CL-087**), p. ("[…] it is equally irrelevant whether the third state, or its nationals, have in fact availed themselves of the benefit in question, or whether they have only been given the right or possibility to avail themselves of it. In either case, the beneficiary state, or its nationals, can invoke the better treatment through the MFN clause in the basic treaty. For the context of IIAs this means that MFN clauses allow covered investors to rely on better substantive standards of treatment granted in the host state's third-country IIAs, unless the clause's wording suggests otherwise, and to do so independently of whether a concrete third-country investor has actually benefitted from the better treatment in question or not.") [emphasis added]

240. Macedonia is therefore wrong in arguing that the mere existence of a different obligation in another treaty cannot show an actual discriminatory "*treatment*".[486] Neither does the case law it cites on this point proves otherwise; claimants in cited cases did not rely on substantive guarantees from the respondent state's third treaties and the tribunals nowhere precluded such a possibility.[487]

241. **Second**, the reference to "*similar situations*" is not limited to an identification of an actual investment by an actual investor that has received more-favourable treatment in actual fact,[488] which GAMA has in any event done with respect to other creditors in TE-TO's reorganisation, receiving better treatment than GAMA in TE-TO's reorganization (see above at V.A.B.C.). It also requires an inquiry on what kind of substantive protections under Macedonia's third investment protection treaties would be available to third (actual or potential) investors and their investments in a position as GAMA.

242. Professor Stephan W. Schill confirms that a reference to similar situations should not be read to prevent investors from relying on better protection under third-party BITs:

> "MFN clauses—in particular those that refer simply to "better" treatment or "all" treatment, but possibly also those applying to "treatment related to the management, maintenance, use, or disposal of investment" with or without a qualifier clarifying that investors must be "in similar situations"—can faithfully be interpreted as allowing covered investors to rely on better substantive standards of treatment granted in one of the host state's third-country IIAs."[489] [emphasis added]

243. Similarly, Professor Patrick Dumberry reviewed identically worded MFN clauses in Turkish BITs and concluded that "*[a]ll of the Turkish BITs examined contain wide-scope MFN clauses that do not exclude their application to FET protection."*[490]

244. Such a reading of words "*in similar situations*" is in accord with the *ejusdem generis* rule: substantive guarantees can be imported from a third-party treaty provided that such a third

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[486] Statement of Defence, ¶¶ 244-245

[487] Statement of Defence, note 574 referring to *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) (**RL- 058**) ¶ 343 (Claimant in that case alleged discriminatory treatment because Ukrainian courts purportedly invalidated only Claimant's contract with the bankrupt debtor, but not other contracts (¶¶ 65, 335). However, the Tribunal found there were no such contracts and therefore the comparison could not be made (¶ 343)); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award (Redacted) (12 January 2011)* (**RL-055**) ¶¶ 169-172 (focusing its analysis on the discriminatory application of US measures to other firms engaged in the wholesale distribution of cigarettes in US).

[488] *1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020 (**CL-086**), ¶ 255 (interpreting an identical MFN clause and disagreeing that there would be a requirement to show an actual investment by an actual investor that has actually received more-favourable treatment)

[489] Stephan W. Schill, MFN Clauses As Bilateral Commitments To Multilateralism – A Reply To Simon Batifort And J. Benton Heath (2018) (**CL-087**), pp. 9-10. *See* also International Law Commission, Final Report of the Study Group on the Most-Favored-Nation Clause, UN DOC. A/70/10, Annex (2015) (**RL-085**) ¶ 72 ("The question arises whether in fact the inclusion of the qualification of "in like circumstances" adds anything to an MFN clause. Under the ejusdem generis principle a claim to MFN can in any event only be applied in respect of the same subject matter and in respect of those in the same relationship with the comparator.)

[490] Patrick Dumberry, The Importation of the FET Standard through MFN Clauses: An Empirical Study of BITs, ICSID Review, (2016) (**CL-089**), p. 18

treaty has a common subject-matter with the base treaty, containing the MFN clause. It is uncontroversial that provisions in Macedonia's third BITs share a common subject matter with the Treaty, *i.e.* the promotion and protection of investments, and GAMA can rely on them pursuant to the *ejusdem generis* rule.

245. Macedonia does not dispute that investors protected under Macedonia's BITs with Lithuania, Austria, Slovakia, Spain or Kuwait,[491] could avail themselves of additional substantive protections than these contained in the Treaty and available to GAMA.

246. **Third**, this interpretation is also confirmed by the context of the MFN provision and Treaty's object and purpose pursuant to Article 31(1) of the VCLT. The extension of substantive legal protection to Turkish investors in Macedonia on the basis of the MFN clause is in accord with the Treaty's purpose of the "*encouragement and reciprocal protection of investments*".[492] The preamble of the Treaty further refers to Turkey's and Macedonia's agreement *"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*,"[493] which additionally supports that the MFN clause in the Treaty allows GAMA to invoke FET guarantee from other treaties, concluded by Macedonia.[494]

247. Parties to the Treaty also carefully defined limits to MFN by attaching to it the exceptions expressly stated in Article II(5). These exceptions should preclude the implication of further exceptions. Macedonia labels the application of the rule *expressio unius est exclusio alterius* as "*interpretative gymnastics*".[495] However, a line of case law confirms that this principle is one of the established methods of the treaty interpretation, including the MFN clauses.[496]

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[491] Statement of Claim, ¶ 220

[492] 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**), 5th indent

[493] 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

[494] Statement of Claim, ¶ 226, referring to *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; *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (CL-015), ¶ 125

[495] Statement of Defence, ¶ 250

[496] *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**), ¶ 157 ("The ordinary meaning of the words used in Article II(2) together with the limitations provided in Article II(4) show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries."); *1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020 (**CL-086**), ¶ 255 (considering that the list of exceptions to the MFN clause confirms that the MFN clause is not limited only to *de facto* discrimination); *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶ 11.2.7 ("Moreover, there is no express carve-out or limitation to Article 4(5), and nothing in the Article (or any provision of the BIT) would require the result contended for by India."); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006 (**CL-090**), ¶ 56;

248. **Fourth**, GAMA in its Statement of Claim also cited several decisions,[497] where tribunals had to interpret identical or similarly worded MFN clauses, such as the one contained in Article II(3) of the Treaty. In each of these cases tribunals allowed claimants to rely on substantive guarantees from other investment protection treaties. Macedonia's argument that these cases are inapposite[498] fails:

a) in *Bayindir v Pakistan*, the tribunal had to interpret MFN clause in the Pakistan-Turkey BIT, which like Article II(3) of the Treaty refers to treatment of investments in "*similar situations*". The tribunal's finding that claimant could rely on the Pakistan's FET obligation contained in other Pakistan's BITs was made for the purposes of establishing jurisdiction and reconfirmed in the award on the merits.[499] Macedonia complains that the Tribunal "*paid only lip-services*" to VCLT rules on treaty interpretation.[500] However, the tribunal properly applied VCLT rules, including the analysis of the ordinary meaning of the MFN provision, its limitations, context, treaty's object and case law[501] and still did not read into the MFN clause limitations that Macedonia would like to impose in the present case.

b) in *ATA Construction v. Jordan,* the tribunal had to interpret MFN clause in the Jordan-Turkey BIT, which has a reference to treatment of investments in "*similar situations*". The tribunal considered that the investor could rely on substantive obligations found in third BITs concluded by Jordan. Macedonia complains that the tribunals' reasoning is scarce,[502] but this does not diminish the unanimous finding of the established panel that "*by virtue of [the MFN clause], the Respondent has assumed the obligation to accord to the Claimant's investment fair and equitable treatment (see the UK-Jordan BIT) and treatment no less favourable than that required by international law (see the Spain-Jordan BIT).*"[503]

National Grid PLC v. The Argentine Republic, Decision on Jurisdiction, 20 June 2006 (**CL-091**), ¶ 82; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 5 October 2007 (**CL-092**),¶135

[497] *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

[498] Statement of Defence, ¶ 249

[499] *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**), ¶¶ 153-160.

[500] Statement of Defence, note 587

[501] *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**), ¶ 157 (Tribunal concluded that "the ordinary meaning of the words used in Article II(2) [the MFN clause] together with the limitations provided in Article II(4) show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries". The Tribunal added that such a reading was "supported by the preamble's insistence on FET".)

[502] Statement of Defence, ¶ 249(c)

[503] *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

c) in *Rumeli v Kazkhstan* the tribunal also applied the MFN clause in the Kazakhstan-Turkey BIT with reference to the treatment of investments in "*similar situations*". Macedonia emphasizes that parties in that case agreed on the application of the MFN for reliance on respondent's obligations assumed in the Kazakhstan's BIT with third states. [504] However, the case is instructive, because it shows the understanding of the similarly-worded provision by a third state. If such an interpretation was not legally possible (as Macedonia alleges), Kazakhstan and the tribunal, following the *iura novit curia* rule, would not have accepted it.

d) the fact that tribunals in *White Industries v. India and MTD v. Chile,* had to interpret differently-worded MFN clauses should not lower their interpretative value for the present case, as Macedonia alleges.[505] The tribunal in *White Industries v. India* distinguished between the use of an MFN clause to obtain the benefit of a dispute resolution clause and the right to rely on more favourable substantive provisions in another treaty, and found with respect to the latter that "*it achieves exactly the result which the parties intended by the incorporation in the BIT of an MFN clause*".[506] Both tribunals also declined to read into the relevant provisions exceptions, which were not expressly set out. [507]

249. Other tribunals have also allowed claims in which an investor has invoked an MFN clause to access more favourable substantive protections found in another treaty.[508]

250. **Fifth**, case law cited by Macedonia in support of its restrictive interpretation of the MFN clause is not persuasive.

251. The tribunal in *Hochtief v Argentina* had to decide upon the MFN clause in order to avoid the 18-month litigation period under the Argentina-Germany BIT and not to apply substantive guarantees from other treaties, and both parties in that case agreed that MFN clause applied to substantive rights.[509]

252. Decisions in *Muhammet v. Turkmenistan* and *İçkale İnşaat v. Turkmenistan*[510] wrongly limited the application of MFN clause only to comparisons of actual investors and actual treatment, which is not supported by the ordinary meaning of the terms "*treatment*", "*similar situation*", the rule of *ejusdem generis* and is contrary to the existing law interpreting

[504] Statement of Defence, ¶ 249(d)
[505] Statement of Defence, ¶ 249(a)
[506] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶ 11.2.4.
[507] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶¶ 11.2.7. and 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
[508] For example, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (**RL-069**), ¶ 396; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award, 15 December 2014 (**CL-093**), ¶¶ 540 – 555 (where the Tribunal also did not view the MFN clause's reference to treatment of investors in the "*same economic activity*" as imposing a limitation on the scope of application of the MFN clause)
[509] *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011 (**RL-061**), ¶ 56 (noting that respondent considered that MFN provision applied only to 'substantive' rights, but not to the dispute settlement provisions).
[510] Referred to by Macedonia at Statement of Defence, ¶¶ 246-247

identical or similarly worded MFN clauses, as explained above. Indeed, *İçkale İnşaat v. Turkmenistan* has been criticized in case law and was considered in doctrine as "*highly problematic*".[511]

253. Indeed, the tribunal in *Guris v Syria*, interpreting the Syria-Turkey BIT, which contains the same MFN provision as in the present case, considered the *İçkale* decision "*inapposite*" for the following reasons:

> "- First, the natural reading of the "similar situations" test in Article III(2) is that it requires a showing of likeness; that is to say, that an investment of an investor of a third State, positioned in like circumstances as an investment under the Treaty, would be entitled to or has received more-favourable treatment. This analysis is of course unremarkable and consistent with the eiusdem generis principle, addressed below. It calls for an assessment of similarities and dissimilarities between investors or investments, in order to identify whether differential treatment would be warranted as a matter of international law. It is an altogether different matter to say that there is a further requirement of identifying an actual investment by an actual investor that has received more-favourable treatment in actual fact.
>
> - Secondly, it is difficult to endorse a reading that would allow the States Parties altogether to defeat their Article III(2) MFN obligations by failing in fact to accord to third-State nationals the treatment to which they are legally entitled. That would be antithetical to the core idea of MFN treatment.
>
> - Finally, it is difficult to see why, by virtue of Article III(4)(a), the States Parties would have agreed that Article III(2) is to have 'no effect in relation to... customs unions, regional economic organization or similar international agreements' if the latter Article only covered de facto discrimination."[512]

VI. MACEDONIA FAILED TO PROVIDE FET TREATMENT TO GAMA

254. As explained in the Statement of Claim, GAMA is by virtue of the MFN clause in the Treaty entitled to the fair and equitable treatment (***FET***) pursuant to Article 3(1) of the Lithuania-Macedonia BIT,[513] Article 3(1) of the Austria-Macedonia BIT[514] and Article 2(2) of the Slovakia-Macedonia BIT. [515]

255. The review of the judicial conduct against the FET obligation is not limited only to instances of a denial of justice (see Section II.B). Even if this was so (*quod non*), Macedonia's acts would qualify as a denial of justice in breach of the FET as well (see Section III.C).

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[511] Stephan W. Schill, MFN Clauses As Bilateral Commitments To Multilateralism – A Reply To Simon Batifort And J. Benton Heath (2018) (**CL-087**), p. 21. For his analysis of the errors in a decision *see ibid*., pp. 18-21

[512] (*1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020 (**CL-086**), ¶ 255

[513] 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**)

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

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

256. It is well established that the FET standard includes, *inter alia*, protection against (i) arbitrary, discriminatory, unreasonable or inconsistent measures; (ii) denial of justice; (iii) breach of due process; (iv) frustrating the investor's legitimate expectations with respect to the legal framework affecting the investment.[516] While some of these elements could be considered as part of a denial of justice claim, they could also constitute a breach of the FET standard on its own.[517]

A. DISREGARD OF THE ARBITRATION AND THE GOVERNING LAW CLAUSE

257. Macedonian courts through the unlawful assumption of jurisdiction and the application of the Macedonian law disregarded the arbitration and the governing clause under the EPC Contract and the Settlement Agreement. This amounts to the arbitrary treatment and denial of justice (see above at Section III.B.1) and at the same constitutes a breach of the FET standard.

258. Macedonian courts also breached GAMA's legitimate expectations that they would honour the arbitration clause on the basis of the Arbitration Law and the New York Convention, which is binding upon Macedonia. On the basis of the legal framework in place at the time when it invested, GAMA had a reasonable and legitimate expectation that it would be able to invoke the arbitration and governing law clauses in the EPC Contract, considered as one of the vital elements to protect its investment under the contract with the overall value of EUR 135,8 million.[518]

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[516] *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; *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014 (**CL-023)**, ¶ 394; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012 (**CL-022**), ¶ 420; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (**CL-070**), ¶¶ 353, 355; *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006 (**RL-029**), ¶ 307

[517] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (**RL-069**), ¶¶ 432-433 and *ibid*., ¶ 547(b)-(c); *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017 (**CL-094**), ¶ 223 ("[…] there are distinctions to be made between conduct that may amount to a denial (or gross denial) of justice and other conduct that may also be sufficiently egregious and shocking, such as manifest arbitrariness or blatant unfairness. It is also apparent, in the Tribunal's view, that concepts of manifest arbitrariness and blatant unfairness are capable, as a matter of hypothesis, of attaching to the conduct or decisions of courts. It follows, in the Tribunal's view, that a claimed breach of the customary international law minimum standard of treatment requirement of NAFTA Article 1105(1) may be properly a basis for a claim under NAFTA Article 1105 notwithstanding that it is not cast in denial of justice terms.") [emphasis added]; *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (**CL-070**), ¶ 359 ("judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice.")

[518] Statement of Claim, ¶ 22. Several tribunals acknowledged the importance of arbitration in investment-related contracts for the purposes of international claims. *See* e.g. *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010 (**CL-015**), ¶ 126 ("It follows that in concluding the Arbitration Agreement, the parties agreed and expected to preclude the submission of potential disputes under the Contract to the Jordanian State courts, where Jordan would have been both litigant and judge. Thus, it was vital to provide for arbitration as the neutral mechanism for the settlement of disputes."); *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009 (**CL-014**), ¶ 159 ("For all these reasons, the Tribunal considers that the Bangladeshi courts abused their supervisory jurisdiction over the

259. Guarantees in legislative framework can give rise to legitimate expectations,[519] including with respect to the expected enforcement of provisions by courts.[520] This must *a fortiori* apply to the legal framework governing the international arbitration, which is generally perceived by foreign investors in Macedonia and elsewhere as an assurance that courts will not interfere in investors' right to have disputes resolved in international arbitration at neutral seats. Both, the Arbitration Law[521] and the succession of Macedonia to the New York Convention,[522] predate the EPC Contract (2007) and the Settlement Agreement (2012), including the arbitration clause. The legal framework guaranteeing the effectiveness and validity of the arbitration agreements therefore existed before GAMA invested in Macedonia and by including the arbitration clause in the EPC Contract, GAMA relied on that framework.

260. Contrary to what Macedonia suggests, GAMA did not *choose* the Macedonian judicial system to recover its claim against TE-TO. GAMA filed a proposal to enforce debt against TE-TO *at the notary public*. Until that moment, there was no dispute between GAMA and TE-TO about the Settlement Agreement that could be referred to the arbitration at all (see above at ¶ 50).

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arbitration process.") *Ibid.*, ¶ 165 ("the Tribunal understands that Bangladesh does not dispute being bound by the New York Convention. The fact that the latter may not be applicable in domestic courts as a matter of national law Is Irrelevant. Indeed, a breach of the Convention would still engage Bangladesh's international responsibility.")

[519] Statement of Claim, ¶ 233 citing to *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. *See* also, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010 (**CL-095**), ¶ 203 ("When an investor undertakes an investment, a host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State. The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed."); *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019 (**CL-096**), ¶ 1368 ("But legal expectations can also be created in some cases by the State's general legislative and regulatory framework: an investor may make an investment in reasonable reliance upon the stability of that framework, so that in certain circumstances a reform of the framework may breach the investor's legitimate expectations."); *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum, 19 February 2019 (**CL-097**), ¶ 388

[520] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (**RL-069**), ¶ 547(b)-(d) (breaching of investor's legitimate expectations of a secure legal framework through judicial acts); *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (**CL-098**), ¶ 267 ("On a general level, Claimant could expect a regulatory system for the broadcasting industry which was to be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions."); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021 (**CL-070**), ¶ 359 ("In the same vein, judicial decisions that are arbitrary, unfair or contradict an investor's legitimate expectations may also breach the FET standard even if they do not rise to the level of a denial of justice.")

[521] Arbitration Law was adopted in 2006, published in the Official Journal of the Republic of Macedonia, No. 39/06) (**C-056**)

[522] Macedonia succeeded to the New York Convention in 1994. *See* list of contracting states available here: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2

261. The fact that GAMA applied for an interim injunction at the Macedonian courts, as Macedonia notes,[523] did not affect GAMA's right to resort to arbitration, as this clearly follows the Macedonian Arbitration Law.[524]

262. On the other hand, Macedonian courts acted inconsistently and in breach of the FET standard in disregarding the following facts: (i) TE-TO itself invoked the arbitration clause in temporary injunction proceedings at the Civil Court Skopje,[525] and (ii) the Civil Court Skopje dismissed TE-TO's counterclaim due to lack of jurisdiction based on the arbitration agreement in the EPC Contract.[526] It is well established that the inconsistent action of state organs can amount to the breach of the FET. [527]

263. GAMA also legitimately expected that should the dispute ever progress to arbitration or Macedonian courts, they would apply English law as a governing law of the EPC Contract.

264. Macedonia complains that GAMA never articulated arguments on the English law, but this is irrelevant:

(a) Macedonia does not deny that it was a *duty* of Macedonian courts to apply and determine English law *ex officio*, *i.e.* no action from parties was required (but GAMA did raise the English law issue on several occasions – see also above at Section III.B.2); and

(b) the Appellate Court Skopje in confirming the jurisdiction over the case at the same time decided, to GAMA's surprise and without citing *any* legal grounds, to apply the Macedonian law, obviously conflating the jurisdiction and the governing law as one and the same thing.[528] After this point the decision to apply Macedonian law

[523] Statement of Defence, ¶ 259.

[524] Law on International Commercial Arbitration (Official Journal of the Republic of Macedonia, No. 39/06) (**C-056**), Article 9 ("It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.")

[525] See above at ¶ 53

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

[527] In addition to cases cited in Statement of Claim, ¶ 243, see also *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013 (**RL-069**), ¶ 547(b) ("There is a direct inconsistency between the attitudes of different organs of the State to the investment. The Airport State Enterprise and the State Administration of Civil Aviation endorsed and encouraged the investment in the airport premises, while the courts found the same investment to be illegal. This type of direct inconsistency in itself amounts to a breach of the fair and equitable treatment standard."). *Ibid.*, ¶ 547(c) (""However, at the international level, the State has a unitary nature, and a contradiction in the actions of the State cannot be resolved on the international plane by reference to its internal legal order. It is well established that a State cannot rely on its internal law to justify an internationally wrongful act.") [emphasis added]; *Etrak İnşaat Taahut ve Ticaret Anonim Sirketi v. The State of Libya*, ICC Case No. 22236/ZF/AYZ, Final Award, 22 July 2019 (**CL-099**), ¶ 349 ("In sum, the Arbitral Tribunal finds that Respondent has acted arbitrarily and inconsistently, in a manner that violates the fair and equitable treatment standard.") [emphasis added]

[528] See Decision of the Appellate Court Skopje TSZ-1482/14 dated 15 December 2014 (**C-008**), 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..[…]")

became final and any GAMA's argument on the content of the English law was in vain.

265. Therefore, GAMA never consented to have its dispute decided in application of the Macedonian law, as Macedonia falsely suggests. Instead, Macedonian courts arbitrarily decided to do so. This on itself is enough is to sustain the breach of GAMA's legitimate expectations, arbitrary treatment and denial of justice in breach of the FET standard, which apply by virtue of the MFN clause.

B. DEBT COLLECTION PROCEEDINGS AFTER THE ILLEGAL ASSUMPTION OF JURISDICTION

266. As explained above at ¶¶, the decisions of the Macedonian courts in debt enforcement proceedings "*shock[]* [and] *surprise[] a sense of judicial property",*[529] were "*clearly improper and discreditable*",[530] and as such amount to denial of justice also in breach of the required FET obligation.

267. Moreover, the contradictory handling of GAMA's claim by Macedonian courts, represent also an inconsistent action of state organs in breach of the FET.

268. The Civil Court Skopje persistently denied GAMA's claim on the basis of purported conditionality but ignored that GAMA's claim against TE-TO was acknowledged by TE-TO itself and by the Macedonian courts in TE-TO's reorganisation proceedings.[531]

269. Macedonia replies that this was remedied by the decision of the Appellate Court Skopje of 30 June 2022.[532] In this decision the Appellate Court Skopje recognized that "*it is completely unclear for what reasons the first-instance court passed the appealed judgment in the event of an indisputable fact that the reorganization plan was accepted and approved by decision* [in TE-TO's reorganization]".[533]

270. However, it took four years for the Appellate Court to reach this decision, after it was first seized with the matter in 2018 upon GAMA's appeal raising the very same issue, which the Appellate Court Skopje (predominantly constituted with the very same judges as in the reorganization appeal proceedings) rejected with the incomprehensible reasoning that confirmation of the claim in reorganization proceedings purportedly does not mean that

[529] *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

[530] *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.")

[531] Statement of Claim, ¶¶ 240-241, 243-244

[532] Statement of Defence, ¶ 263

[533] Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**), p. 2

TE-TO agrees to pay.[534] GAMA appealed to the Supreme Court,[535] which in December 2020 upheld GAMA's appeal, but also entirely failed to address the confirmation of GAMA's claim in TE-TO's reorganization proceedings.[536] In a renewed first instance proceedings, the Civil Court Skopje, despite GAMA's arguments, completely ignored the fact that GAMA's claim was recognized in TE-TO's reorganization and in October 2021 issued a judgment again denying GAMA's claim, without devoting *any* sentence on the recognition of claim in TE-TO's reorganization.[537] GAMA appealed and on 30 June 2022 the Appellate Court Skopje, again predominantly constituted of the very same judges than previous appeal proceedings, four years after it has been first seized of the matter in 2018, finally acknowledged that that GAMA's claim was recognized in TE-TO's reorganization.[538] However, instead of closing the straight-forward matter definitely by itself, the appellate court returned the case into a retrial, instructing the lower court to consider "*whether it is possible to decide on the same claim twice*".[539]

271. Macedonia's argument that the Appellate Court Skopje remedied a situation, is therefore false. Notwithstanding the final and enforceable decision of the Civil Court Skopje, acknowledging *in full* GAMA's claim in TE-TO's reorganization, GAMA continues to face an uncertain situation in enforcement debt proceedings, where the Civil Court Skopje after 11 years of proceedings is tasked to decide whether the final decision of the same court is binding on it.

272. In addition to inconsistent action in breach of the FET, the contradictorily handling of GAMA's claim is not grounded on *any* legal reasons, is contrary to the institute of *res judicata* under the Macedonian law, and represents the arbitrary treatment of GAMA's claim to money in breach of the FET[540] (see also above at III.B.4).

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[534] Statement of Claim, ¶ 63. Decision of the Appellate Court Skopje no. TSZ-2278/18, dated 18 October 2019 (**C-011**), p. 7 ("The claimant's complained allegation that the defendant is obliged to pay the invoice A028 is unfounded, given that it 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 reorganization plan if it is ordered by the court with a court decision.") *See* also Appeal against the Judgment of the First Instance Civil Court Skopje by GAMA dated 25 September 2018 (**C-068**)

[535] Appeal by GAMA to the Supreme Court of the Republic of North Macedonia dated 24 December 2019 (**C-069**)

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

[537] Judgment of the First Instance Civil Court Skopje No.50 PL1-TS-252/21 dated 8 October 2021(**C-071**). For arguments of GAMA on the recognition of its claim against TE-TO in reorganization proceedings, see Brief by GAMA to the Civil Court Skopje, dated 23 August 2021 (**C-070**)

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

[539] See Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**), pp. 2-3

[540] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**CL-069**), ¶ 554 ("it is reasonable to expect that a Judgment having such serious consequences for those concerned would have defined with some particularity the evidential and legal basis on which each of them, considered separately, was liable to suffer such consequences. The Supreme Court's Judgment does nothing of that sort. In the opinion of the Tribunal, this makes its decision arbitrary."). *Ibid.*, ¶ 555 ("Third, the Court declared all RPP contracts to be both 'void ab initio' and 'rescinded forthwith', even though such holdings are mutually inconsistent. […] To say that a void agreement must be rescinded is a contradiction in terms and is irrational. […]"); *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶ 1035

C. EXCESSIVE DURATION OF DEBT ENFORCEMENT PROCEEDINGS

273. As explained above at Section III.B.5, the acts of Macedonian courts constitute a denial of justice due to excessive duration of proceedings. The duration of debt enforcement proceedings was not, as Macedonia alleges, in any respect dictated by the litigation choices of GAMA. It was driven solely by acts of Macedonian courts, which took a 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.

274. It is false, as Macedonia claims,[541] that duration of 9.5 years "*to hold 11 proceedings*" cannot be described as "*excessive*." In any event, there were no 11 proceedings to recover GAMA's claim against TE-TO, but:

(i) debt enforcement proceedings, which are since 2012 still pending for the third time at the first-instance level;

(ii) interim injunction proceedings, which were closed since March 2013[542] and could not have affected the duration of debt enforcement proceedings; and

(iii) TE-TO's counter-claim proceedings, following TE-TO's counter-claim filed in 2015, which were separated from debt enforcement proceedings in 2016,[543] which could not have significantly affected the duration of debt enforcement proceedings and could not be attributed to GAMA.

275. Debt collection proceedings are therefore pending for the 11th year, although GAMA's claim was confirmed with the final and enforceable judgment in TE-TO's reorganization 5 years ago in 2018. As explained above at ¶ 93, this also deviates from standards of the envisaged duration of proceedings under the Macedonian law and is a clear example of excessive duration of proceedings, comparable to cases where tribunals found the breach of the FET and the effective means of asserting claims and enforcing rights standards due to a judicial delay.[544]

D. TE-TO'S REORGANIZATION PROCEEDINGS

1. MANIFEST MISAPPLICATION OF THE LAW AND PROCEDURE

276. As explained in more detail above at Section III.C, the conduct of the Civil Court Skopje and the Appellate Court Skopje in TE-TO's reorganization proceedings amount to a denial of justice. The applicable standard can be summarized:

"The judicial proceedings would have to be conducted fairly. If there is bias in favour of or against any of the parties to insolvency proceedings such as the promoters, shareholders,

[541] Statement of Defence, ¶ 264
[542] Statement of Claim, ¶ 34
[543] Statement of Claim, ¶ 58
[544] Statement of Claim, ¶¶ 249-250

the company or the debtors, it would constitute denial of justice. If there is a manifestly unjust and unfair application of insolvency laws, that would amount to denial of justice."[545]

277. The denial of justice at the same time entails a breach of the FET obligation, owed to GAMA by virtue of the MFN clause.[546]

278. TE-TO's reorganization, which privileged shareholders over unsecured creditors, unlawfully affected GAMA's voting rights and prevented the repayment of its claim against TE-TO on better terms than in insolvency, as required under the "*liquidation test*". The tribunal in *Dan Cake v Hungary* considered that the imposition of changes in composition agreement by the bankruptcy court, which affected investor's rights to participate in the composition hearing, was in breach of the FET standard.[547] The tribunal in *Gramercy v Peru* qualified as arbitrary a decree, which contrary to the envisaged legal regime changed the ranking of creditors so to minimize the amounts payable to them.[548] The tribunal in *Petrobart v The Kyrgyz Republic* considered that the government's interference in the reorganisation of the local debtor diminished investor's chances to recover its debt, in breach of the FET obligation.[549] Similar reasoning applies to the present case.

279. The Macedonian courts also failed to afford GAMA a due process in breach of the FET obligation. As explained above at ¶¶ 159-164, the Appellate Court Skopje failed to address critical arguments of GAMA regarding the wrongful classification of unsecured creditors and related contradictory reasoning of the lower court, that TE-TO was unlawfully allowed to submit a "consolidated" version of the reorganisation plan and that shareholders' loans were unlawfully accelerated.[550]

280. The decisions of Macedonian courts are also intertwined with irrational and contradictory holdings, such as (i) confirming the subordination of shareholders, but approving the reorganisation plan to the benefit of shareholders (ii) confirming the importance of the "*liquidation te*st", but failing to respect it (iii) disregarding GAMA's default interest, but acknowledging default interests of other creditors, (iv) applying the 12 years suspension to all claims of unsecured creditors, although such a deadline was meant to be an exception applicable only to shareholders' claims (v) considering the residual 10% of GAMA's claim as disputed, although it was at the same time acknowledged in full (see above at ¶¶ 97-99).

[545] A. Rajput, Cross-Border Insolvency and Public International Law, 19 ROMANIAN J. OF INT'L LAW 7 (2018) (**RL-103**), p. 13.
[546] Statement of Claim, ¶ 257 *et seq*.
[547] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**CL-026**), ¶ 146
[548] *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶¶ 944 – 951, 984-986.
[549] *Petrobart Limited v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**), ¶¶ 411, 420 (pp. 74-76 of the original award)
[550] Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**)

281. The contradictory and irrational holdings of the Macedonian courts constitute arbitrary treatment of GAMA and its claim to money[551] in breach of the FET standard.

2. UNLAWFUL DECISION ON RECUSAL OF A JUDGE

282. GAMA also has legitimate doubts about the impartiality of judges involved in TE-TO's reorganization. For the reasons set above at Section III.C.5, the motion for a recusal was subject to the process, which is "*clearly improper and discreditable*"[552] and "*shocks, or at least surprises a sense of judicial property*,"[553] and as such amount to denial of justice in breach of the FET obligation.

283. After GAMA requested a recusal of a bankruptcy judge, the Deputy President of the Civil Court Skopje rejected the motion.[554] The decision was purportedly taken within one hour since the bankruptcy judge adjourned the hearing, As explained, this is improbable and is also contradicted by the record. As a former judge himself, Mr. Kostovski considers that the decision on GAMA's request for a recusal of the bankruptcy judge was contrary to the Bankruptcy Law.[555]

3. DISCRIMINATORY TREATMENT OF GAMA

284. As explained above at Section V.A-C, the acts of Macedonian courts in reorganisation proceedings also amount to a discriminatory treatment of GAMA and its claim to money in comparison to TE-TO's shareholders with respect to their (i) ranking and repayment, (ii) recognition of default interests and (iii) period of suspension of the payment of the remaining 10% of the claim. The discriminatory treatment at the same time amounts to the breach of the FET standard.

4. THE MEASURES WERE UNREASONABLE

285. The measures adopted by Macedonian courts were also unreasonable and as such in breach of the FET standard. The standard of "*reasonableness*" requires a showing that the State's conduct bears a reasonable relationship to some rational policy.[556] In addition, "*it is also necessary that, in the implementation of that policy, the state's acts have been*

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[551] *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017 (**CL-069**), ¶¶ 555, 645; *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶¶ 1032-1035 (citing to *Flughafen v Venezuela* that illogical or inconsistent explanations in judgments amount to a denial of justice)

[552] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 127

[553] *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

[554] Decision for rejection of the request of recusal by the Deputy President of the Civil Court Skopje, dated 14 June 2018 (**C-103 Resubmitted**)

[555] Second Kostovski Opinion (**CE-02**), ¶¶ 64-65

[556] *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006 (**RL-029**), ¶ 460

appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors."[557]

286. The decisions of the Macedonian courts in TE-TO's reorganization bear no reasonable relationship to a rational policy, which underlines the Bankruptcy Law.

287. **First**, one aspect of the legal personality is the concept of entity shielding, which gives creditors priority to the company's assets over shareholders and over personal creditors of shareholders. This a characteristic feature of all advanced corporate law systems:

"*Entity shielding involves two relatively distinct rules of law. The first is a rule establishing priority for access to company assets. Entity creditors have priority claims over entity assets. The claims of entity creditors to company assets come before the claims of shareholders (or their personal creditors). The rule makes company assets automatically available to back up the company's contractual commitments. Creditors' priority helps make the company's contractual commitments credible.*

A second legal rule providing entity shielding gives liquidation protection to the entity. It avoids partial or complete liquidation of the company by preventing shareholders (or their personal creditors) from withdrawing their share of firm assets at will. […]

Company shareholders benefit from limited liability: their exposure to losses is normally limited to the amount of their investment in their shares. Company creditors have a priority claim over corporate assets: in the event of entity insolvency, company creditors must be fully paid out before shareholders can recover any of their investment."[558] [emphases added]

288. Following these principles, the Bankruptcy Law aims to protect interests of debtor's creditors.[559] This applies to both, the (pre-bankruptcy) reorganisation and to the bankruptcy proceedings.[560] Creditors are protected according to their priorities in ranking,[561] which enshrines the priority rule. The goal of reorganisation proceedings, more specifically, is

[557] *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (**RL-072**), ¶ 525; *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015 (**RL-084**), ¶ 179 ("Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.")

[558] D. Gaukrodger, Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law, OECD Working Papers on International Investment, 2014/02 (OECD 2014), pp. 14-15.

[559] Second Kostovski Opinion (**CE-02**), ¶ 9

[560] Bankruptcy Law (**C-075**), Article 3 ("(1) Bankruptcy procedure aims to achieve a collective settlement of the creditors of the bankruptcy debtor (hereinafter referred to as "debtor") through sales and cashing in the debtor's assets and distribution of the collected revenues (income) to the creditors, or by arranging a special contract for settlement of claims established with the plan for reorganization intended to sustain the debtor's business venture (hereinafter referred to as: "enterprise") (2) The settlement of the claims may also be conducted through reorganization even before commencement of the Bankruptcy procedure, under the conditions stipulated with this Law.") *Ibid*., Article 2, point 66 (" 'Bankruptcy procedure' shall be the collective procedure conducted by the court authorized for reorganization or liquidation of the debtor.")

[561] Bankruptcy Law (C-075), Articles 116-118 (defining claims of higher and lower payment ranks), Article 219(1) ("The plan for reorganization contains (enforcing part): […] 2) the amount of the monetary assets or the assets which shall serve for completion or partial settling according to the payment order, including the secured and unsecured creditors, as well as the procedure for settling of the claims and the temporal dynamics of their payment (settlement)."); Second Kostovski Opinion (**CE-02**), ¶¶ 97-101

that no creditor should receive less under a reorganization, than what they would have received in the liquidation of the debtor[562] (see also above at Section III.C.6.b)). In all instances, shareholders should be repaid last.

289. The Civil Court Skopje and the Appellate Court Skopje manifestly failed to bring this policy into operation. Macedonian courts allowed TE-TO to negotiate its reorganisation plan with its shareholders and related parties, in breach of creditors' priorities, outvote all other unsecured creditors including GAMA and secured itself a repayment on better terms, than allowed to shareholders under the Bankruptcy Law either in reorganization or in bankruptcy, to the detriment of GAMA and other unsecured creditors.

290. **Second**, in order to preserve TE-TO's illegal reorganisation, the Public Revenue Office (PRO) refrained from commencing proceedings for enforced collection against TE-TO prior to, during the tax debt deferral approved by the Government and after the termination of the tax debt deferral.[563] PRO had no legal basis to do so, not even during the tax debt deferral approved by the Government, because the tax debt deferral was inoperative (see above at Section III.B.2.). Without any legal basis to do so, PRO did not follow any rational policy in refraining from the tax collection, neither did it at any moment claim so. On the other hand, the Government granted a short-lived State Aid in the form of the deferral, which was publicly questioned by the Ministry of the Finance,[564] was never (legally) operational due to the lack of the operative decrees,[565] and has been finally invalidated as illegal by the Anticorruption Commission.[566] Such acts cannot be justified by any rational policy. They preserved TE-TO's illegal reorganisation and the impairment of GAMA's claim to money, which would have been together with other unsecured creditors repaid in full, if PRO acted according to the law.

291. The tribunal in *Gramercy v Peru* held that a legislative decree on repayment of holders of Peruvian agrarian bonds, which without any explanation classified investor in the last repayment class in deviation to rankings originally envisaged by the preceding constitutional court decision, as "*unmoored to any rational standard* [and] *can only be considered arbitrary*."[567] This is also the case with TE-TO's reorganization and treatment of GAMA's claim to money within it.

E. MACEDONIA BREACHED THE FET OBLIGATION THROUGH THE COMPOSITE ACT

292. Macedonia breached the FET obligation through the combined effects of the acts described above, constituting a composite act pursuant to Article 15 of the ILC Articles.

[562] Statement of Claim, ¶ 91. *See* also Second Kostovski Opinion (**CE-02**), ¶ 98
[563] Statement of Claim, ¶ 129
[564] Statement of Claim, ¶ 147
[565] Statement of Claim, ¶ 135
[566] Statement of Claim, ¶ 151
[567] *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 (**RL-114**), ¶ 951. See also *ibid.*, ¶¶ 947-950

293. Case law confirms that states will be liable for the series of judicial and/or executive measures, which taken together amounted to a breach of the FET standard. [568]

294. The tribunal in *Petrobart v The Kyrgyz Republic* considered that the reorganization of the local debtor, which was disadvantageous to creditor and investor Petrobart, "*should be viewed in combination with other measures which also affected Petrobart*".[569] This included the stay by the court of the debt enforcement proceedings until the local debtor became insolvent, as a result of which the enforcement of the claim against the debtor was no longer possible. The tribunal considered that the Kyrgyz Republic failed to guarantee Petrobart the required treatment under the FET standard in two respects: (i) by implementing the reorganization of the local debtor to the detriment of debtor's creditors, including Petrobart; and (ii) by staying stay of execution of a judgment to the detriment of Petrobart, until debtor became insolvent.[570]

295. Once Macedonian courts in debt enforcement proceedings wrongfully assumed jurisdiction and applied Macedonian law to the case, they failed to deliver justice in a reasonable period of time. Debt collection proceedings have been pending for an excessive period of time since 2012. However, they became obsolete in 2018, when GAMA's claim was fully confirmed and written-off in TE-TO's reorganization proceedings, commenced on the basis of fraudulent acceleration of loans by TE-TO's shareholders. Debt collection proceedings and reorganization proceedings were intertwined with manifestly flawed decisions on procedure and substance described above, resulting in permanent taking of GAMA's claim to money. TE-TO's unlawful reorganization was preserved through acts and omissions of PRO, the Government and the Competition Commission, which without valid legal basis provided TE-TO with deferral of tax debt, which, if enforced, would have put TE-TO in bankruptcy, where GAMA's claim would have been repaid on significantly better terms than

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[568] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012 (**RL-065**), ¶ 275 ("In the Tribunal's view, there was a series of measures that collectively amount to a composite act in breach of the fair and equitable treatment standard."); *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.") *Ibid.*, ¶ 466 ("In light of these elements of certainty the Tribunal is convinced that the role of judicial decisions in this case forms an integral part of acts of greater complexity, which evidences the existence of composite acts. The precise composition of each series of acts is difficult to establish, but again here is where their consideration as a whole leads inevitably to a finding on the existence of conduct, which in isolation might not be enough to engage liability, but in the aggregate is."); *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic,* LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008 (**CL-100**), ¶ 91 ("While normally acts will take place at a given point in time independently of their continuing effects, and they might at that point be wrongful or not, it is conceivable also that there might be situations in which each act considered in isolation will not result in a breach of a treaty obligation, but if considered as a part of a series of acts leading in the same direction they could result in a breach at the end of the process of aggregation […] This is what normally will happen in situations in which creeping or indirect expropriation is found, and could also be the case with a denial of justice as a result of undue delays in judging a case by a municipal court.")

[569] *Petrobart Limited v. The Kyrgyz Republic (II*), SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**), ¶¶ 412-413 (p. 75 of the original award)

[570] *Petrobart Limited v. The Kyrgyz Republic (II*), SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**), ¶ 420 (p. 76 of the original award)

in TE-TO's reorganization. The series of acts taken together irreversibly impaired GAMA's claim to money and constitute a composite breach of the FET obligation.

VII. MACEDONIA FAILED TO PROVIDE FPS TREATMENT TO GAMA

296. The acts of Macedonia's state organs described above are also in breach of the FPS obligation from Article 3(1) of the Lithuania-Macedonia BIT and Article 3(1) of the Austria-Macedonia BIT, which apply to GAMA's investment by virtue of the MFN clause in Article II(3) of the Treaty.

297. Case law cited by GAMA in its Statement of Claim confirms that the FPS standard extends to the legal security and stable legal framework[571] and other case law is in accord.[572]

298. Macedonia, however, argues that a "*dominant*" view is different*, i.e.* limiting FPS to physical protection of investments. GAMA disagrees.

299. Macedonia cites to *UAB v. Latvia*, which indeed limited application of the FPS to the physical integrity of the investment, but "*note[d] that certain decisions have held that the standard did not protect only the physical integrity of the investment, but had a broader scope*."[573] The tribunal in *Saluka v Czech Republic*, another of Macedonia's authorities, noted practice of other tribunals, but did not find it necessary to decide on the scope of the clause,[574] because it considered that the complained suspension of trading in shares of claimant's investment was justifiable on regulatory grounds and thus would not violate the standard in any event.[575]

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[571] Statement of Claim, ¶¶ 275-276, referring to *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; *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; *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Award, 29 December 2004 (**CL-056**), ¶ 170; *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

[572] *Azurix Corp. v. The Argentine Republic (I*), ICSID Case No. ARB/01/12, Award, 14 July 2006 (**CL-057**), ¶ 408 ("The cases referred to above [*Occidental v. Ecuador, Wena Hotels v. Egypt*], show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view); *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, 13 September 2001 (**CL-101**), ¶ 613; *National Grid PLC v. The Argentine Republic*, Award, 3 November 2008 (**CL-044**), ¶ 187; *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012 (**RL-064**), ¶ 281

[573] *UAB E energija v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal, 22 December 2017; (**RL-095**), ¶ 840. Kenneth Vandevelde, another of Macedonia's authorities, also points to the divergence in case law. *See* Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy, And Interpretation (2010) (**RL-053**), p. 244 ("Other tribunals have held that the standard does apply to nonphysical harms, in light of the absence of a textual limitation to physical harms.")

[574] *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006 (**RL-029**), ¶ 484

[575] *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006 (**RL-029**), ¶ 490

300. Macedonia also takes an issue with the legal authorities cited by GAMA:

a) Macedonia points to the treaty language in *Siemens v. Argentina*, where the FPS clause explicitly provided for a "*legal"* security. However, the fact that FPS standards in Lithuania-Macedonia BIT and the Austria-Macedonia BIT have no such qualification, but require a "*full*" security is not decisive, as the case law extending FPS obligation on the basis of similarly-worded FPS clauses shows.[576] Moreover, the treaty language of the Macedonia-Lithuania BIT and Macedonia-Austria BIT has no limitation to "*physical*" protection and security, which in contrast can be found in certain investment protection treaties,[577] and which additionally confirms that invoked FPS obligations could cover legal security as well.[578]

b) the fact that *CSOB v. Slovak Republic* and *Biwater Gauff v. Tanzania* cases did not relate to judicial conduct, as Macedonia points out,[579] was not in any respect decisive for tribunals in deciding to extend the FPS obligation to legal security.

c) the tribunal in *Mondev v USA* considered a hypothetical scenario where the immunity of public officials against legal action could arise to a breach of the FPS.[580] *Mondev* Tribunal also considered that *"[i]ssues 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*."[581] [emphasis added] The Tribunal did not read into the FPS obligation any limitation to protection from "*physical*" harm. The fact that the claim was eventually decided against the denial of justice standard under Article 1105(1) of the NAFTA Treaty, which refers to FET and FPS standards, does not diminish these findings.

d) The ICJ in *ELSI* case had to apply the FPS standard from the Italy-US FCN Treaty [582] to a claim of the delay in the administrative proceedings. While the ICJ considered that

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[576] *Biwater Gauff (Tanzania*) *Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**CL-054**), ¶ 729 ("The Arbitral Tribunal adheres to the Azurix holding that when the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments."); *Azurix Corp. v. The Argentine Republic (I*), ICSID Case No. ARB/01/12, Award, 14 July 2006 (**CL-057**), ¶ 408

[577] E.g. Netherlands-Romania BIT (1994) (**CL-102**), Article 3. *See* also Canada-EU CETA (2016), Article, 8.10.(5), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5380/download and EU - Singapore Investment Protection Agreement (2018), Article, 2.4.(5), available at : https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download

[578] *National Grid PLC v. The Argentine Republic*, Award, 3 November 2008 (**CL-044**), ¶ 187

[579] Statement of Defence, ¶ 271(b)

[580] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 (**CL-013**), ¶ 152.

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

[582] *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**), ¶ 103 (Referring to the relevant text of the FCN Treaty: "The nationals of each High Contracting Party shall receive, within the territories of the other High Contracting Party, the most constant

the FPS standard had to conform to the minimum international standard, the ICJ still applied the FPS obligation.[583] The ICJ's finding that a claim of a "denial of procedural justice" was exaggerated referred to the USA claim, which was not grounded on the relevant provision of the FCN Treaty.[584]

301. As shown above, the judicial conduct of Macedonian courts involved extreme misapplication of the Macedonian law to GAMA's detriment both, in debt enforcement and reorganization proceedings, which also qualifies as a breach of the FPS obligation.

302. Macedonia is also wrong in arguing that state intervention through a tax deferral had no causal connection to GAMA's inability to collect from TE-TO. To the contrary, but for deferral, which had no legal basis, and state-aid, which was subsequently considered as illegal by Macedonian organs itself, TE-TO's reorganization plan would have collapsed and GAMA's claim would have been repaid in full or on significantly more favourable terms than under the reorganization plan (see below at Section X.A.2.).

303. GAMA accepts that the breach of the FET entails also the breach of the FPS. However, in the context of the FPS obligation more specifically, measures must also be capable of protecting the covered investment against adverse action by private persons.[585] Macedonian courts failed to protect GAMA against manifestly abusive and illegal manufacture of TE-TO's reorganization by TE-TO's shareholders at the expense of unsecured creditors, including GAMA – a result, which is against the spirit and letter of the Bankruptcy Law and the whole purpose of debtor's reorganization.

VIII. MACEDONIA ACTED ARBITRARY AND DISCRIMINATORILY

304. Tribunals have held that the FET and the non-impairment standards are different[586] and considered the existence of arbitrary, discriminatory or unreasonable standard both in the context of the FET and the non-impairment standard.[587]

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protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law. […]")

[583] *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**), ¶ 111 ("The primary standard laid down by Article V is 'the full protection and security required by international law', in short the 'protection and security' must conform to the minimum international standard.")

[584] *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**), ¶ 110 ("Counsel for the Applicant has referred to this delay as "a denial of the level of procedural justice accorded by international law". Its claim in this respect is however not founded on the rules of customary international law concerning denial of justice, nor on the text of the FCN Treaty (Article V, paragraph 4) which provides for access to justice.")

[585] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**CL-054**), ¶ 730 (noting that FPS standard sanctions state's failure to prevent actions by third parties and also extends to actions by organs and representatives of the State itself); *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, 13 September 2001 (**CL-101**), ¶ 613

[586] *Eg Duke Energy Electroquil Partners and Electroquil SA v* Ecuador, ICSID Case No ARB/04/19, Award, 18 August 2008 (**RL-038**), ¶ 377

[587] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**CL-054**), ¶¶ 602, 691-710; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Arbitral Tribunal, PCA,

305. For this reason GAMA maintains its claim, but it accepts that the finding of an arbitrary, discriminatory or unreasonable treatment as part of treaty standards and denial of justice discussed above would also entail a breach of the non-impairment standards from Article 3(2) of the Lithuania-Macedonia BIT and Article 3(2) of the Spain-Macedonia BIT, which apply by virtue of the MFN clause in Article II(3) of the Treaty.

306. GAMA has established a breach of the non-impairment clause:

a) Macedonia has impaired the enjoyment and disposal of GAMA's investment through the excessively long and manifestly wrongful debt enforcement proceedings, followed by the permanent write-off and suspension of GAMA's claim in TE-TO's reorganization, which was conserved though illegal tax deferral granted to TE-TO[588] (see above at Section IV.B.1)

b) Macedonia has done so through arbitrary, unreasonable and discriminatory measures (see above at Section III.C.,V.A.-C.,VI,D.4)

307. Additionally, in its Statement of Claim, GAMA explained that the repayment of PRO's claim during the judicial reorganisation proceedings on better terms than under the approved reorganisation plan constitutes an unjustified discriminatory treatment of GAMA and its claim, as compared to PRO as an unsecured creditor from the same class of creditors.[589]

308. Macedonia argues that GAMA was not discriminated, because PRO asked the bankruptcy judge to take corrective measures and delete PRO from the list of creditors.[590] However, this does not change the fact that TE-TO prioritized repayment of PRO over GAMA, which was overlooked by the Macedonian courts and constitute a discriminatory treatment of GAMA and its claim to money. The central issue here is not whether PRO took a corrective action, but rather the deliberate and unequal treatment of creditors in TE-TO's judicial reorganisation approved by the Macedonian courts.

IX. MACEDONIA HAS BREACHED ITS OBLIGATION TO PROVIDE EFFECTIVE MEANS OF ASSERTING CLAIMS AND ENFORCING RIGHTS

309. The acts of Macedonian state organs described above are also in breach of Macedonia's obligation to provide effective means of asserting claims and enforcing rights with respect to investments under Article 3(3) of the Kuwait-Macedonia BIT, [591] which applies by virtue of the MFN clause in Article II(3) of the Treaty.

Partial Award, 17 March 2006 (**RL-029**), ¶¶ 309, 314-347 (reviewing a discriminatory treatment as part of the FET), 464-467 (considering discriminatory treatment also in breach of the non-impairment clause).

[588] *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Arbitral Tribunal, PCA, Partial Award, 17 March 2006 (**RL-029**), ¶ 458 (" 'Impairment' means, according to its ordinary meaning (Article 31 of the Vienna Convention on the Law of Treaties), any negative impact or effect caused by 'measures' taken by the Czech Republic.")

[589] Statement of Claim, ¶¶ 131, 286

[590] Statement of Defence, ¶ 281

[591] Macedonia-Kuwait BIT (**RL-040**), Art. 3(3) (""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

310. GAMA cited to case law, which confirms that the effective means clause requires both an effective legal system and that this works effectively in a particular case.[592]

311. Macedonia attempts to limit the application of the effective means standard only to a provision of a general effective framework for the enforcement of rights, not to individual cases.[593] Case law cited by Macedonia, however, concerned different legal situations or actually supports the application of the standard to judicial conduct in individual cases:

a) in *Amto v Ukraine,* the tribunal had to interpret the effective means clause from the ECT, which requires the host state to "*ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights*".[594] [emphasis added] Based on this provision, which is arguably more limited than Article 3(3) of the Kuwait-Macedonia BIT, investor in that case complained about the inadequacy of the Ukrainian bankruptcy law[595] and not its application by courts, which it pursued separately under the FET and the denial of justice claim. Tribunal's finding is therefore specific to the wording of the ECT and the way how the investor framed its claim. In any event, case law shows that the ECT effective means clause could apply also to state's interference in individual cases.[596]

b) in *Gavazzi v Romania*, as Macedonia notes, the tribunal in the context of the analysis of the effective means claim also reviewed whether a denial of justice took place in concrete legal proceedings.[597]

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.")

[592] Statement of Claim, ¶ 290, citing to *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. Additionally, *see* also *Mercuria Energy Group Limited v. Republic of Poland (II)*, SCC Case No. 2019/126, Final Award, 29 December 2022 (**CL-103**), ¶ 764 ("This Tribunal notes that a standard described in broad terms of 'efficiency' and 'adequacy' does not translate into a custom-fit rule as long as it is entirely detached from the legal system's effects on an individual case.")

[593] Statement of Defence, ¶ 283.

[594] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (**RL-036**), ¶ 73 (citing the relevant provision from Article 10(12) ECT: "Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.")

[595] *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008 (**RL-036**), ¶ 85 ("The Claimant also submits that the bankruptcy legislation in the Ukraine is clearly inadequate and does not live up to the standard required by international law.")

[596] *Petrobart Limited v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**), ¶ 424 (p. 77 of the original award) (considering the letter from the executive branch asking for a stay of execution of a local judgment as a breach of the ECT's effective means clause)

[597] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility and Liability, 21 April 2015 (**RL-083**), ¶ 286(c) ("[…] Therefore the Respondent is not liable for breach of Article 2(5) of the BIT and Claimants' claims in this regard (including denial of justice) are dismissed.")

c) in *Duke Energy v Ecuador*, the tribunal considered that *"[w]hat is at issue and must be reviewed by the Tribunal is how these mechanisms performed*", [598] and went on to consider whether the standard was breached by state organs through their acts in local arbitration.[599]

312. Therefore, the mere existence of laws capable of protecting investors' rights is not enough; instead, those laws must consistently be enforced by a State's judicial system in an effective manner. The imperative "*shall provide*" makes clear that the obligation to provide the effective means standard cannot be satisfied by a state simply avoiding misconduct in the context of a particular case. The tribunals have considered undue delay in the resolution of a dispute as a violation of the effective means clause. It can also not be seriously disputed that a party is deprived of the effective access to a court, if the court disregards its critical legal submissions, or if the laws are applied by courts in a way to make the rights embodied in laws ineffective.

313. Macedonia suggests that the effective means standard overlaps with a prohibition of a denial of justice. However, Tribunals frequently considered these standards as *lex specialis* and different from a denial of justice,[600] and the effective means clause subject to a less demanding test, as compared to denial of justice.[601]

314. As explained below, Macedonia failed to provide GAMA effective means to assert and enforce its claims against TE-TO.

315. **First**, Macedonian courts illegally extinguished GAMA's right to the ICC arbitration and to have its dispute with TE-TO decided pursuant to the English law, as guaranteed under the EPC Contract and the Settlement Agreement. Taking away a contractually agreed arbitration, designed precisely to have an effective dispute settlement process, constitutes

[598] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (**RL-038**), ¶ 392

[599] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (**RL-038**), ¶¶ 393 *et seq*.

[600] *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 ("Article II(7), however, appears in the BIT as an independent, specific treaty obligation and does not make any explicit reference to denial of justice or customary international law. The Tribunal thus finds that Article II(7), setting out an 'effective means' standard, constitutes a *lex specialis* and not a mere restatement of the law on denial of justice."); *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶ 11.3.2(a) (citing to *Chevron I*); *Mercuria Energy Group Limited v. Republic of Poland (II),* SCC Case No. 2019/126, Final Award, 29 December 2022 (**CL-103**), ¶ 758 ("First, the Tribunal considers that the effective means standard under the ECT is formulated as a separate obligation of the host state and must be treated as such. Neither the fact that some other international investment treaties do not contain such separate standard, nor the fact that some other legal standards, such as the denial of justice or fair and equitable treatment, may be interpreted to create some overlap in investment protection is sufficient to override the clear language of the ECT. Any other interpretation would, in the Tribunal's view, undermine the effet utile of Article 10(12) of the ECT.")

[601] Statement of Claim, ¶ 290, citing to *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**), ¶ 244. *See* also, Mercuria Energy Group Limited v. Republic of Poland (II), SCC Case No. 2019/126, Final Award, 29 December 2022, ¶ 759 (concurring with *Chevron v Ecuador* Tribunal that a distinct and potentially less-demanding test is applicable under this provision as compared to denial of justice under customary international law.)

a failure to provide GAMA effective means of asserting claims with respect to its investment. Leaving aside the wrongful application of the substantive law, it is beyond any doubt that GAMA's dispute under the Settlement Agreement would have been decided significantly faster in the ICC arbitration, which as a default rule provides six months as a time limit to issue an award[602] and in any event takes around two years in average,[603] than it has been in Macedonia's court proceedings, which are since 2012 still pending.

316. **Second**, the excessive duration of the debt enforcement proceedings against TE-TO, which are pending for 11 years now, likewise constitute a breach of the effective means clause. The delay is comparable to similar cases, where tribunals considered a delay spanning from 9 to 15 years, as a violation of the effective means clause.[604] The reason for the excessive duration of proceedings cannot be imputed to GAMA or justified by the complexity of the case (see above Section III.B.5.), even less so because since 2018 there can be no dispute between GAMA and TE-TO at all, considering that TE-TO acknowledged and the Macedonian courts confirmed (and wrote-off) GAMA's claim against TE-TO in reorganization proceedings.

317. **Third,** the debt enforcement proceedings are intertwined with numerous critical flaws and inconsistencies, which were also a cause for the excessive delay. Most critically, once GAMA's claim was confirmed by the Civil Court Skopje in TE-TO's reorganization in June 2018,[605] and subsequently by the Appellate Court Skopje in August 2018,[606] GAMA brought this to the attention of the court in debt enforcement proceedings.[607] However, the Appellate Court Skopje, although predominantly constituted of the very same judges than in reorganization appeal proceedings, in October 2019 dismissed GAMA's appeal on the basis of the incomprehensible reasoning that confirmation of the claim in reorganization proceedings purportedly does not mean that TE-TO agrees to pay.[608] GAMA appealed to

[602] ICC Rules, Article 31(1), counting from the signing of the Terms of Reference. Same time limit applied also under previous versions of the Rules in 2012 and 2017.

[603] *See* e.g. ICC Dispute Resolution 2020 Statistics, p. 19 ("The average duration of proceedings in cases that reached a final award in 2020 was 26 months, and is calculated on the basis of all said cases, including those where the proceedings were suspended by the parties for any length of time. The median duration of proceedings was 22 months.). Report available at: https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/

[604] *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**), ¶ 250 ("For any 'means' of asserting claims or enforcing rights to be effective, it must not be subject to indefinite or undue delay.") *Ibid.* ¶ 270 (considering a delay in court proceedings of 13 to 15 years as a breach of the effective means clause); *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶¶11.3.2.(d) and 11.4.19 (considering a delay of over 9 years as a breach of the effective means standard); *Mercuria Energy Group Limited v. Republic of Poland (II)*, SCC Case No. 2019/126, Final Award, 29 December 2022 (**CL-103**), ¶¶ 811-813 ("considering that three rounds of administrative court proceedings spanning over 12 years and the failure of administrative authorities to enforce administrative court judgments was in breach of the effective means clause)

[605] 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**)

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

[607] Appeal against the Judgment of the First Instance Civil Court Skopje by GAMA dated 25 September 2018 (**C-068**)

[608] Decision of the Appellate Court Skopje no. TSZ-2278/18, dated 18 October 2019 (**C-011**) ("The claimant's complained allegation that the defendant is obliged to pay the invoice A028 is unfounded, given that it entered in

the Supreme Court,[609] which in December 2020 upheld GAMA's appeal, but also entirely failed to address the confirmation of GAMA's claim in TE-TO's reorganization proceedings.[610] In a renewed first instance proceedings, the Civil Court Skopje, despite GAMA's arguments, completely ignored the fact that GAMA's claim was recognized in TE-TO's reorganization and in October 2021 issued a judgment again denying GAMA's claim, without devoting *any* sentence on the recognition of claim in TE-TO's reorganization.[611] GAMA appealed and on 30 June 2022 the Appellate Court Skopje, again predominantly constituted of the same judges than in reorganization and previous debt appeal proceedings, four years after it has been first seized of the matter in 2018, finally acknowledged that "*it is completely unclear for what reasons the first-instance court passed the appealed judgment*", considering that GAMA's claim was recognized in TE-TO's reorganization[612] and, instead of taking a decision on the issue itself, returned the case into a retrial with an instruction to the lower court to verify "*whether it is possible to decide on the same claim twice*".[613]

318. The ignorance by several court levels of the recognition of the claim in TE-TO's reorganization and a *volte face* of the appeal judges, who (i) in TE-TO's reorganization fully and with the effects of judicial finality confirmed GAMA's claim against TE-TO, (ii) in debt enforcement proceedings without any tenable reasoning considered that GAMA's claim remain disputed, (iii) four years later took the position that GAMA's claim was confirmed by the final and enforceable decision in TE-TO's reorganization, but ambiguously instructing the lower court to consider whether it is bound by the decision of the same court,[614] is far from any effective and fair handling of a process and deprived GAMA of effective means to assert and enforce its rights against TE-TO.

319. **Fourth,** Macedonian courts failed to apply the Bankruptcy Law in a manner, which would have provided unsecured creditors with the effective enforcement of their claims against TE-TO. The Bankruptcy Law ensures a system of collective enforcement of rights of creditors against insolvent debtors through bankruptcy or reorganization proceedings.[615] As explained above, the repayment of creditors under the Bankruptcy Law rests on the absolute priority rule and the liquidation test. Macedonian courts completely subverted the purpose of the Bankruptcy Law by allowing TE-TOs' reorganization to the benefit of shareholders, at the expense of unsecured creditors, including GAMA. Instead of conducting reorganization proceedings to achieve the purpose of the Bankruptcy Law, the

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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 reorganization plan if it is ordered by the court with a court decision.")

[609] Appeal by GAMA to the Supreme Court of the Republic of North Macedonia dated 24 December 2019 (**C-069**)

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

[611] Judgment of the First Instance Civil Court Skopje No.50 PL1-TS-252/21 dated 8 October 2021(**C-071**). For arguments of GAMA on the recognition of its claim against TE-TO in reorganization proceedings, see Brief by GAMA to the Civil Court Skopje, dated 23 August 2021 (**C-070**)

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

[613] See Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**), pp. 2-3

[614] See Decision of the Appellate Court Skopje no. TSZ 862/22 dated 30 June 2022 (**C-073**), pp. 2-3

[615] Bankruptcy Law (**C-075**), Article 3.

end result illegally privileged shareholders over unsecured creditors, and prevented GAMA from enforcing its claim against TE-TO under the terms of the Bankruptcy Law. If the Bankruptcy Law was observed and TE-TO not let by courts into the reorganization under the terms dictated by shareholders, GAMA could have obtained the full repayment of its claim against TE-TO. Preventing this to happen amounts to a taking of GAMA's right to have its claim against TE-TO effectively enforced under the terms of the law and to Macedonia's failure to provide GAMA effective means of enforcing its rights against TE-TO.

320. **Fifth**, Macedonia breached the effective means standard through the acts of: (i) PRO, which *without any legal basis* refrained from the collection of the tax debt from TE-TO,[616] and (ii) the Macedonian Government and the Competition Commission, which granted and authorized State Aid to TE-TO in the form of the corporate income tax payment deferral,[617] considered as unlawful by the Anticorruption Commission.[618] But for the illegal deferral of payment of TE-TO's tax debt, TE-TO's reorganization would have collapsed, TE-TO would have entered the bankruptcy, wherein GAMA's claim would have been fully repaid (see Section X.A.2.). State intervention, which stays or prevents the collection of claims against debtor, amount to a breach of the effective means standard as well.[619] The omissions of PRO and the illegal intervention in TE-TO's reorganization by the Macedonian Government and the Competition Commission's, prevented GAMA and other unsecured creditors to obtain in TE-TO's bankruptcy the full repayment of their claims, outside the illegal framework designed by TE-TO's shareholders and Macedonian courts.

X. GAMA IS ENTITLED TO COMPENSATION

321. Pursuant to Article 31(1) of the ILC Articles on State Responsibility Macedonia has an obligation to make full reparation for the injury caused to GAMA by its violation of the Treaty and customary international law.

A. MACEDONIA CAUSED GAMA'S LOSS

322. The cause of GAMA's loss, entitling GAMA to a compensation under the Treaty and customary international law, were acts of Macedonia's state organs.

[616] Statement of Claim, ¶¶ 129-130

[617] Statement of Claim, ¶¶ 133-135, 139 and above at Section III.D.

[618] Statement of Claim, ¶ 151

[619] *Petrobart Limited v. The Kyrgyz Republic (II)*, SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**), ¶ 424 (p. 77 of the original award) ("The Arbitral Tribunal considers that the Vice Prime Minister's letter to the Chairman of the Bishkek Court, which gave support for a stay of execution of the judgment of 25 December 1998, violated - in addition to Article 10(1) of the Treaty - the Kyrgyz Republic's obligation under Article 10(12) of the Treaty to ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments.")

1. MACEDONIA'S ACTS ARE THE LEGALLY RELEVANT CAUSE OF GAMA'S LOSS

323. Throughout its Statement of Defence, Macedonia erroneously repeats that the cause of GAMA's loss was purportedly TE-TO's failure to pay.[620] This argument is flawed.

324. After TE-TO resisted payment of GAMA's claim and the case proceeded to the Civil Court Skopje, Macedonian courts as state organs had a duty to act in accordance with obligations undertaken by Macedonia under the Treaty and customary international law. Likewise, after TE-TO on fraudulently fabricated grounds filed for its reorganization, it was the duty of Macedonian courts to provide GAMA in TE-TO's reorganization a treatment in accordance with the Treaty and customary international law. Macedonia failed to do so. Both sets of proceedings were manifestly unfair, discriminatory to GAMA and in breach of Macedonia's obligations under the Treaty and customary international law. The same applies to a subsequent interference of the government to prevent the collapse of TE-TO's reorganization.

325. Case law concerning similar treaty claims, as pursued by GAMA in this arbitration, has consistently recognized that acts in breach of treaty standards constitute a direct or proximate cause for the loss of an investor, even when contested sovereign acts concerned an adjudication of disputes between private parties.

326. The tribunal in *Saipem v Bangladesh*, in circumstances where Bangladeshi courts upon the application of the investor's opponent in commercial arbitration unlawfully revoked the authority of the arbitral tribunal, considered:

> "[i]t cannot seriously be challenged that the actions of the Bangladeshi courts are the direct cause of the expropriation at issue. Hence, the Tribunal considers that there is a sufficient causative link between the loss assessed above and the breach of Article 5.1 of the BIT by Bangladesh. The same applies to the interest claim."[621]

327. In *Petrobart v The Kyrgyz Republic*, similarly like in the present case, a local debtor refused to pay invoices for delivered goods and subsequently entered into reorganization. The tribunal considered that government's interference in the reorganisation resulted in breach of the FET standard and caused a loss to the investor.[622] The fact that a commercial dispute preceded investment arbitration was of no relevance.

328. In *Gavazzi v Romania*, the tribunal held Romania liable for a breach of the Italy-Romania BIT due to the failure of the state privatization agency to comply with its contractual obligation to restructure debts of the local company, which caused company's insolvency and loss of funds that claimants had invested into it.[623] Similarly to the present case, Romania layed blame for the insolvency on the investors' mismanagement of the

[620] Statement of Defence, ¶¶ 286, 292

[621] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 214.

[622] *Petrobart Limited v. The Kyrgyz Republic (II*), SCC Case No. 126/2003, Award, 29 March 2005 (**CL-030**), ¶¶ 420, 465-466 (pp. 76, 83-84 of the original award)

[623] *Marco Gavazzi and Stefano Gavazzi v. Romania,* ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability 21 April 2015 (**RL-083**), ¶¶ 205-207

company. The tribunal found that by not carrying out the promised rescheduling and waivers, Romania infringed claimants' legitimate expectations in breach of the FET standard,[624] and expropriated the investment.[625]

329. The tribunal in *Chevron v Ecuador* found that a judicial delay amounted to a breach of the effective means of asserting claims and enforcing rights standard under the Ecuador-USA BIT, causing loss to investor, although the underlying dispute concerned contractual claims between the investor and the government.[626]

330. Similarly, the tribunal in *White Industries v India* considered that acts of Indian judiciary, which failed to decide upon investor's challenge against a setting aside of a commercial arbitral award within more than five years, as a legally relevant cause for investor's loss.[627]

331. Even in cases, where the injury was caused by concurrent actions of a state and a private party (which is not the case here), the international practice does not support the reduction of the state's duty of reparation. [628]

332. Macedonia's reasoning that *"[w]hatever Macedonia's acts or omissions were after TE-TO's failure to pay, they are not the proximate cause [because] the damage was already done*"[629] is therefore legally untenable. Under such reasoning, which erroneously attributes a cause of GAMA's loss to TE-TO's actions, none of judicial acts deciding upon disputes between private parties or settlement of claims in insolvency could ever be tested against treaty standards and international law. Respondent state could simply assert that a cause of a loss was a preceding private dispute and debtor's financial problems, and not state's adjudication of such a dispute - no matter how wrongful and delayed that was under the international law. Such a reasoning is manifestly flawed and contradicted by the case law cited above.

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[624] *Marco Gavazzi and Stefano Gavazzi v. Romania,* ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability 21 April 2015 (**RL-083**), ¶ 207

[625] *Marco Gavazzi and Stefano Gavazzi v. Romania,* ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability 21 April 2015 (**RL-083**), ¶¶ 236, 240

[626] *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**), ¶¶ 262, 374-375, 546

[627] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, ¶¶ 14.3.4. – 14.3.5

[628] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, (**CL-104**), p. 93 ("Although, in such cases, the injury in question was effectively caused by a combination of factors, only one of which is to be ascribed to the responsible State, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault. […] Such a result should follow a fortiori in cases where the concurrent cause is not the act of another State (which might be held separately responsible) but of private individuals […]") [emphasis added]; *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, 13 September 2001 (**CL-101**), ¶ 580 (dismissing respondent's objection that the harm to claimant's investment resulted from acts of a private individual, finding by reference to the ILC Articles that "*the State is not absolved because of the participation of other tortfeasors in the infliction of the injury*"); *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award (Excerpts), 18 April 2017 (**CL-105**), ¶ 269 ("In international law, where a State has caused damage by a breach of its international obligations, and where the claimant has shown that its losses are sufficiently and reasonably linked to the State's breach, causation is held to have been established. Other possible concurrent events that are not attributable to the State are irrelevant; such events do not diminish the State's responsibility, nor do they reduce the amount of compensation for damages due.")

[629] Statement of Defence, ¶ 292

333. The three cases that Macedonia cites[630] in support of its argument are also not on point:

a) In *ELSI*, the factual matrix was reverse than in the present case.[631] US shareholders in the financially distressed Italian subsidiary attempted to carry out the orderly liquidation, but this was prevented through the requisition of the subsidiary by Italian authorities. The ICJ considered that even before the requisition, shareholders could not have been considered to "*control or manage*" the company under the FCN Treaty because of company's insolvency, and could not have executed the envisaged orderly liquidation.[632] Unlike in *ELSI* (i) TE-TO's deteriorating financial condition was not a result of normal business operations, but was fabricated by shareholders through transactions acknowledged as null by Macedonian courts; (ii) TE-TO's reorganization was confirmed by courts in manifest disregard of the Bankruptcy Law, subverting the essential function of the Bankruptcy Law to protect interests of creditors, privileging shareholders. [633]

b) in *Blusun v Italy*, the tribunal's finding that claimant's project failed due to financing problems and not because of the alleged legal instability in breach of the ECT, was premised on several elements, including that claimant underestimated the risk of not obtaining required authorizations and that a failure to obtain the financing did not result from "*political risk concerns*", but rather a reluctance of funders to finance the project.[634] These facts are significantly different from the case at hand, which revolves around unlawful interference of Macedonian state organs in reorganisation of GAMA's debtor.

c) In *Biwater Gauff v. Tanzania,* the tribunal found that Tanzania breached the relevant treaty through a series of unlawful interferences with claimant's contractual rights, but found that at the time of treaty violations investor's contractual rights "*were of no*

[630] Statement of Defence, ¶¶ 293 *et seq.*

[631] The tribunal in *Lemire v Ukraine* dismissed as irrelevant a similar reference to *ELSI* case for purposes of the causality analysis considering that the cited passage did not discuss the causation analysis with respect to damages, but rather whether the facts amounted to a violation of the treaty. See *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award 28 March 2011 (**RL-057**), ¶ 214 ("Although the judgment refers to a "causal connection", what the Chamber is actually doing is analysing whether the facts (basically, the requisition) constitute a violation of the Treaty (and not, whether the violation had caused damages to the aggrieved). The question under discussion is not the issue of causation with regard to damages, and the conclusions reached have no significant bearing for the present Award.")

[632] *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**), ¶ 101

[633] One of the reasons why the ICJ considered that the possibility of orderly liquidation envisaged by ELSI's management was uncertain, was also "*a potential inequality among creditors*". *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**), ¶ 89

[634] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award 27 December 2016, (**RL-93**) ¶¶ 385-386, 388-389

value".[635] This is different from our case, where GAMA's claim had value, was recognized in full by a final and enforceable decision in TE-TO's reorganization and could have been repaid, but for the unlawful write-off by the Macedonian courts.

334. Macedonia does not mention cases, which are factually more on point. Tribunals in *Dan Cake v Hungary* or *Petrobart v Kyrgyz Republic* found no difficulty in finding state's liability under relevant treaties in circumstances where investors held claims in financially distressed private companies, which states failed to restructure in respect of their international obligations. The tribunal in *Dan Cake v Hungary* was of the view that a denial of justice was made out, despite the fact that the tribunal could not be sure if the claimant would have been successful at the composition hearing; it was enough that the court's decision deprived the claimant "*of the chance – whether great or small – to avoid the sale of its assets and its disappearance as a legal person*."[636]

335. There is also no settled view that GAMA should have showed that a "*dominant*" cause of the loss was a breach of the Treaty, as Macedonia contends.[637] The commentary to the ILC Articles explains that "[*t]he notion of a sufficient causal link, which is not too remote, is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, <u>but without the addition of any particular qualifying phrase</u>*."[638]

336. The tribunal in *Lemire v Ukraine* considered that "[*i]f it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other*."[639] The tribunal considered that this should be proven by a standard of *probability*[640] and found that had Ukrainian state organs decided tenders in a fair and equitable manner, Claimant would have won the disputed frequencies, and awarded claimant compensation.[641]

337. Similar analysis applies to the present case, as will be explained in the following section.

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[635] *Biwater Gauff (Tanzania*) *Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (**<u>CL-054</u>**), ¶¶ 799-800

[636] *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015 (**<u>CL-026</u>**), ¶ 145. *See* ibid., ¶ 142 ("It is impossible, at this stage, for the Tribunal to determine whether a composition agreement would have been reached if a composition hearing had been convened. However, one thing is certain: whatever the chance of a successful composition hearing, it was destroyed by the Bankruptcy Court's decision to refuse to convene a hearing within 60 days, as required by the law.")

[637] Statement of Defence, ¶¶ 288, 292

[638] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 (2008), (**<u>CL-104</u>**), p. 93, at 10 [emphasis added]

[639] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award 28 March 2011 (**<u>RL-057</u>**), ¶ 169

[640] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award 28 March 2011 (**<u>RL-057</u>**), ¶ 169 ("Given the characteristics of the Ukrainian process for the awarding of licences, it is impossible to establish, with total certainty, how specific tenders would have been awarded if the National Council had not violated the FET standard. <u>The best that the Tribunal can expect Claimant to prove is that through a line of natural sequences it is probable - and not simply possible - that Gala would have been awarded the frequencies under tender</u>.") [emphasis added]

[641] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award 28 March 2011 (**<u>RL-057</u>**), ¶¶ 191, 202

2. CAUSATION ANALYSIS

(a) LOSS AS A RESULT OF TE-TO'S UNLAWFUL REORGANIZATION

338. **First**, had the Civil Court Skopje and the Appellate Court Skopje acted in accordance with the treatment required under the Treaty and customary international law and

(a) rejected TE-TO's proposal for reorganisation, because it was contrary to the Bankruptcy Law; or

(b) excluded TE-TO's shareholders, as lower ranking unsecured creditors from the second class of unsecured creditors comprising GAMA, and ensured equal treatment with respect to accrued interests of creditors, which would give GAMA a decisive majority of the voting rights in the class of unsecured creditors and a decisive influence on the outcome of the voting[642] (see Section III.C),

the proposed TE-TO's reorganization plan would not have been adopted.

339. If the proposed reorganization plan was not adopted, TE-TO would have entered into a classical bankruptcy procedure with the liquidation (sale) of property, as explained by TE-TO in the Reorganization Plan,[643] and confirmed by both, Macedonia's legal expert Mr. Petrov,[644] and GAMA's legal expert Mr. Kostovski.[645] In 2019, the Macedonian Government likewise confirmed that the collapse of the reorganization plan would lead to TE-TO's bankruptcy.[646]

340. **Second**, the record clearly confirms that in TE-TO's bankruptcy, GAMA would have entirely recovered its claim against TE-TO.

341. As shown in the Reorganisation plan dated 6 June 2018, [647] on 1 March 2018, the total indebtedness of TE-TO to shareholders and creditors was as follows:

- Landesbank Berlin AG (LBB) 51.4 million EUR
- Komercijalna Banka AD Skopje (KB) 2.2 million EUR
- Bitar Holdings Limited 112.0 million EUR

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[642] Statement of Claim, ¶¶ 99, 261

[643] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), p. 31 (“(“[i]f the Plan is not adopted, TE-TO JSC will enter into a classical bankruptcy procedure”)

[644] Legal Opinion of Aco Petrov dated 4 April 2023, ¶ 168 (“The evidence thus submitted indicates that if the Reorganization Plan of TE-TO was not approved, bankruptcy proceedings would have been opened against TE-TO.”)

[645] Second Kostovski Opinion (**CE-02**), ¶ 105

[646] Statement of Claim, ¶ 137. E-mail from Spokesperson of the Government of the Republic of North Macedonia, dated 18 November 2019 (**C-024**) (“"[…] 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.”)

[647] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), pp. 15-16, 30-31

- Project Management Consulting 8.8 million EUR
- Kardicor Investments Limited 8.7 million EUR
- Toplifikacija JSc Skopje 28.0 million EUR
- Sintez Green Energy 3.9 million EUR
- GAMA 5.0 million EUR
- Liabilities to third parties 1.5 million EUR

342. The great majority of TE-TO's total debt (cca 73% or 161.4 million EUR)[648] was held by TE-TO's shareholders and related parties. Bitar Holding's loans on itself represented more than 50% of the total debt.

343. As both, Mr. Kostovski and Mr. Petrov confirm, in case of bankruptcy proceedings, TE-TO's shareholders would rank lower than TE-TO's unsecured creditors, such as GAMA, and would be repaid only after the settlement of claims of all other unsecured creditors, as provided in Articles 116-118 of the Bankruptcy Law.[649]

344. Mr Kostovski explains that as of 1 March 2018, the accounting value of TE-TO's assets amounted to 10,742,489,910 denars (approximately 174 million euros) and the total claims of TE-TO's secured Creditors amounted to 3,299,261,285 denars (approximately 53.5 million euros).[650] Mr. Kostovski also confirms that the accounting value of TE-TO's assets, which is below the market value, significantly exceeds the cumulative sum of claims of secured and unsecured creditors, considering that shareholders in bankruptcy would have been repaid the last.[651]

345. Mr. Kostovski calculates that after the repayment of secured claims and even in the pessimistic scenarios of the sale of the plant in TE-TO's bankruptcy for:

(a) 60% or 50% of the accounting value, GAMA and other unsecured creditors would have been repaid in full;[652]

(b) 40% of the accounting value, GAMA and other unsecured creditors would have been repaid 73% of their claims;[653]

(c) 33% of the accounting value, GAMA and other unsecured creditors would have been repaid 18% of their claims[654]

346. Therefore, under any of these scenarios and based on the accounting value alone, GAMA would have been repaid on much better terms than in TE-TO's reorganization.

[648] Out of total 221.5 million EUR.
[649] Second Kostovski Opinion (**CE-02**), ¶ 110; Petrov's Opinion, ¶¶ 151-155
[650] Second Kostovski Opinion (**CE-02**), ¶ 111
[651] Second Kostovski Opinion (**CE-02**), ¶ 111
[652] Second Kostovski Opinion (**CE-02**), ¶ 111
[653] Second Kostovski Opinion (**CE-02**), ¶ 112
[654] Second Kostovski Opinion (**CE-02**), ¶ 112

347. TE-TO's representations in the reorganisation plan that the liquidation of property through the bankruptcy procedure would allow only partial settlement of the secured creditors,[655] and that the reorganisation purportedly provide a maximum collection of creditors' claims,[656] was unsupported and manifestly wrong on the basis of the accounting value alone.

348. **Third**, but for the unlawful state aid and the refusal of the Public Revenue Office to enforce TE-TO's tax debt in breach of the Treaty and customary international law, TE-TO's reorganization would have collapsed and TE-TO would be put in bankruptcy. This has been expressly acknowledged by the Spokesperson of the Macedonian Government when justifying a state aid to TE-TO.[657]

349. Macedonia does not dispute that the enforcement of the tax debt would have led to TE-TO's bankruptcy. Instead, Macedonia argues that TE-TO could have avoided bankruptcy by borrowing funds from third parties to repay its tax debt, as it did in 2021 after the State Aid was considered as unlawful by the Anticorruption Commission.[658] As explained above at ¶¶ 177-178, this is an unsupported speculation, contradicted by facts. Before 2021, TE-TO did *not* take any loan to repay the tax debt, not even in the period of pending tax debt before the unlawful state-aid by the Macedonian Government.

350. As explained above, in TE-TO's bankruptcy GAMA would have entirely recovered its claim against TE-TO, because the value of TE -TO's assets significantly exceeded the value of debt owed to secured and unsecured creditors, which would have priority over shareholder's claims. This holds true also in years 2019 to 2020, where PRO refrained from enforcing TE-TO's tax debt.

351. TE-TO's profitability is a testament to the market value of CCPP Skopje. With assets valued at MKD 9,687,838,000 (approximately EUR 156.5 million) as of 31 December 2021, and the market value of its plant, property, and equipment alone reaching MKD 9,363,589,000 (approximately EUR 152.1 million), the figures only tell part of the story. [659] Independent

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[655] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), pp. 24-25 ("If there is a cashing of property through the activation of mortgages and pledges, or in bankruptcy procedure, only the secured creditors will be settled incomplete. This is due to the fact the interest on construction such plants that are currently uncompetitive on the market is very small and, accordingly, the value of the equipment that can be subject to the vouching is far lower than the claims of secured creditors. […] On the other hand, the Reorganizatoin plan provides maximum collection of creditors according to the actual financial possibilities of TE-TO AD.")

[656] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), p. 11

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

[658] Statement of Defence, ¶¶ 98, 232

[659] Annual financial statements for TE-TO for the year ended on 31 December 2021 (**C-137**), p. 27

valuators in 2020 assessed the net value of TE-TO's property, plant, and equipment.[660] But these numbers do not reflect CCPP Skopje's actual worth since they didn't consider CCPP Skopje as a "going concern" – a power plant expected to operate and generate profits. The actual market value of CCPP Skopje, if considered as a going concern, would likely dwarf the given figures. A snapshot of TE-TO's financial trajectory unveils the potential market value of TE-TO. Since 2017, TE-TO's profits have been on a steady upward climb, from EUR 8.4 million[661] to EUR 20.6 million in 2021, [662] after making a substantial payment of EUR 7.1 million to the Public Revenue Office.[663]

352. Considering the valuation of CCPP Skopje as a going concern in 2014 at USD 263 million,[664] it's evident that CCPP Skopje's market value is significantly higher. But even if one would assume that the market value of CCPP Skopje was MKD 9,363,589,000 (approximately EUR 152.1 million) from 2018 to 2021, GAMA would have been nevertheless better off in a liquidation scenario. It is implausible that CCPP Skopje would be liquidated at a significant discount keeping in mind its strategic position in the Macedonian energy market.[665]

353. Finally, Macedonia's argument on the purported uncertainty in liquidation of TE-TO's property[666] is not on point. Mr. Kostovski considered that even under most pessimistic scenarios of repayment based on the sale of the property ranging from 33% to 60% of the accounting value, GAMA would have been repaid on better terms that in TE-TO's reorganization.

354. In any event, and even if the monetary result of the realization of the property in bankruptcy would have been uncertain (*quod non*), this would not prevent the Tribunal from valuating damages in this case. Case law confirms that "*less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss*".[667]

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[660] Annual financial statements for TE-TO for the year ended on 31 December 2021 (**C-137**), p. 27 ("In 2020, the management engaged independent appraisers (experts in the energy field at the European level), who issued a report on the net present value of the assets.")

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

[662] Annual financial statements for TE-TO for the year ended on 31 December 2021 (**C-137**), p.47 ("Thus, after the excellent 2020 with a net profit of 12.1 million euros, the even more successful 2021 followed with a net profit of 20.6 million euros")

[663] Annual financial statements for TE-TO for the year ended on 31 December 2021 (**C-137**), p.47 ("-the termination of the state aid agreement by the Government of the Republic of North Macedonia, which caused the necessity to pay the profit tax for the year 2018, arising as a result of the write-off of claims in bankruptcy proceedings in the amount of 17.1 million euros with calculated interests for late payment")

[664] Russia Beyond article (31 May 2004), "Macedonian thermal power plant: from the Russians to the Chinese" ("The value of the thermal power plant is estimated at 9.6 billion rubles ($263 million))" (**C-179**)

[665] Report on the Significance of TE-TO AD Skopje for the Republic of North Macedonia from Economic, Energy, and Environmental Aspects dated 27 September 2019 (**C-178**),

[666] Statement of Defence, ¶ 291

[667] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award 28 March 2011 (**RL-057**), ¶ 246. *Ibid.*, ¶ 248 ("Valuation is not an exact science. The Tribunal has no crystal ball and cannot claim to know what would have happened under a hypothesis of no breach; the best any tribunal can do is to make an informed and

355. Tribunals frequently awarded compensation in the insolvency context, even where the exact quantification of loss was not possible. The tribunal in *Petrobart v Kyrgyzystan*, in the circumstances where local bankruptcy proceedings against local debtor involved creditors of different priorities, with creditor Petrobart ranking in the third class of priority and many of the claims by other creditors still disputed in local proceedings, could not establish the total amount of well–founded claims against debtor.[668] In order to determine to what extent Petrobart's claim against KGM would have been repaid in a hypothetical bankruptcy scenario, the tribunal made *"a more general assessment of these matters based on probabilities and reasonable appreciations"* and determined damages at 75% of Petrobart's justified claims against local debtor.[669]

356. In *Gavazzi v Romania*, Tribunal agreed that the difficulty in quantification of the monetary damages "*provides no justification in refusing any compensation to an innocent party.*"[670] In circumstances, where breaches of the underlying treaty consisted of Romania's failure to reschedule debt of a local insolvent company that investor had bought,[671] tribunal awarded damages based on amounts invested by claimant in local insolvent company.[672]

357. The tribunal in *Manchester Securities v Poland*, cited by Macedonia, considered that the harm suffered by the claimant as a result of the denial of justice was a reduction in its rank amongst other creditors of the local company – falling from second place (below the state-owned bank's mortgage) to merely one amongst many unsecured creditors of the insolvent property developer.[673] The tribunal considered that investor's damages were the amounts that it would not receive in the domestic insolvency process as a result of its reduction in ranking.[674]

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conscientious evaluation, taking into account all the relevant circumstances of the case, not unlike that made by anyone who assesses the value of a business on the basis of its likely future earnings.")

[668] *Petrobart Limited v Kyrgyzstan*, SCC Case No 126/2003, Award of March 29, 2005 (**CL-030**), ¶¶ 461-466 (pp. 83-84 of the original award)

[669] *Petrobart Limited v Kyrgyzstan*, SCC Case No 126/2003, Award of March 29, 2005(**CL-030**), ¶ 466 (p. 84 of the original award) ("The Arbitral Tribunal estimates that, if there had been a bankruptcy in which the transferred and leased assets had been available to satisfy the creditors, Petrobart would have been able to obtain payment for a substantial part of its claim for delivered gas. It cannot be established with precision what share of the claim would have been satisfied, and in this respect the Arbitral Tribunal must therefore make a general assessment, based on its appreciation of the situation as a whole. The Arbitral Tribunal, in making such an assessment, finds that the Kyrgyz Republic, as responsible for the transfer and lease of KGM's assets, shall compensate Petrobart for damage which the Arbitral Tribunal estimates at 75% of its justified claims against KGM")

[670] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award (Excerpts) (**CL-105**), 18 April 2017, ¶ 121. *See* also *ibid*., ¶ 124

[671] *Marco Gavazzi and Stefano Gavazzi v. Romania,* ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability 21 April 2015 (**RL-083**), ¶¶ 207, 236, 240

[672] *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award (Excerpts), 18 April 2017 (**CL-105**), ¶ 232 (in that case price paid for shares in local company and a loss of opportunity, estimated at 50% of invested costs)

[673] *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018, (**RL-102**), ¶ 505

[674] *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award, 7 December 2018, (**RL-102**), ¶¶ 504-505, 507, 518 ("the Tribunal estimates that, but for the invalidation of the [REDACTED] Mortgage, the Claimant would have received the proceeds of the sale of the [REDACTED] Property around 27 June 2014 […]")

(b) LOSS AS A RESULT OF THE FLAWED DEBT ENFORCEMENT PROCEEDINGS

358. The final and proximate cause of GAMA's loss is Macedonia's breach of the Treaty and customary international law in TE-TO's reorganization proceedings. This on itself establishes Macedonia's liability to compensate GAMA.

359. However, had the Macedonian Courts acted in accordance with the treatment required under the Treaty and customary international law in debt enforcement proceedings and after having unlawfully assumed jurisdiction and applying Macedonian law, decided upon GAMA's claim without (a) an excessive delay and (b) manifest misapplication of Macedonian procedural and substantive law, GAMA would have obtained a court decision upholding its claim against TE-TO significantly before the acknowledgment and writing-off of its claim in TE-TO's reorganization in 2018.

360. Indeed, before the unlawful and "*unexpected*" acceleration of TE-TO's shareholders' loans in 2018, TE-TO was in a sustainable financial position,[675] the great majority of debt (91%) was projected until 2028 and GAMA's claim was the only significant outstanding debt. [676]

361. Similar analysis was employed by the tribunal in *White Industries v India*, deciding upon investor's claim for the breach of the effective means standards due to the excessive delay:

> "[i]n the present case, had India not failed to provide White with 'effective means' of asserting its claims, the Indian courts ought by now to have determined the Award to be enforceable in India.
>
> Had this occurred, White would:
>
> (a) have received the sums due to it under the Award, including interest;
> (b) not have incurred the costs which it has incurred in pursuing litigation through the Indian courts;
> (c) not have incurred the costs which it has incurred in attempting to settle the dispute with India; and
> (d) not have incurred the costs in bringing this arbitration."[677] [emphasis added]

362. The tribunal in *Chevron v Ecuador*, in order to review what would have been the result but for the treaty breach due to the excessive duration of proceedings, "*stepped into the shoes*" of Ecuadorian courts to analyse "*how a competent, fair, and impartial Ecuadorian court would have resolved [investor's] claims*" [678] and concluded with respect to several cases

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[675] Statement of Claim, ¶ 78

[676] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), p. 64 ("According to the last Summary List obtained from the records of the Company TE-TO JSC, the total liabilities towards creditors are determined in the amount of MKD 1,236,602,133.00 as short-term liabilities and MKD 12,412,221,028.00 long-term liabilities projected until 2028."). *Ibid.*, p. 82 ("[…] at the moment in addition to the debts to the banks that are regularly repaid and the debts to shareholders that are subordinated under the loan agreements with the banks, TE-TO JSC has only one more significant outstanding debt of 5 million EUR to the company contractor for the construction of the plan GAMA")

[677] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, ¶¶ 14.3.4. – 14.3.5

[678] *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**), ¶ 375 ("[…] the Tribunal must ask itself how a competent, fair, and impartial Ecuadorian court would have resolved TexPet's claims. The Tribunal must step into

before the Ecuadorian courts that an honest, independent and impartial Ecuadorian judge would have ruled in investor's favour.[679] Same reasoning applies to GAMA's claim in debt enforcement proceedings – if the Macedonian law was properly and timely applied, the honest, independent and impartial Macedonian judge would have upheld GAMA's claim against TE-TO.

B. AMOUNT OF GAMA'S COMPENSATION

363. Under Article 36(2) of the ILC Articles, the compensation shall cover any financially assessable damage.

1. PRINCIPAL CLAIM

364. Where treaty claims arose from acts of states in local court proceedings, tribunals generally awarded a sum corresponding to the value of the claim in local proceedings. The tribunal in *Chevron v Ecuador* explained;

> "When conceiving of the wrong as the failure of the Ecuadorian courts to adjudge TexPet's claims as presented to them, the starting point for the Tribunal's analysis must be TexPet's damages claims as they were presented before these courts. [680]

365. The tribunal in *Petrobart Limited v Kyrgyzstan* awarded to investor a compensation corresponding to 75% of the amount of investor's claim against local bankrupt debtor, as recognized in the local judgment, the repayment of which was prevented through acts of the Kyrgyz Republic in the reorganization of the debtor.[681]

366. The tribunal in *Saipem v Bangladesh* awarded the claimant the amounts, which would have been payable under the commercial arbitral award, but for the expropriation of investor's right to arbitrate by Bangladeshi courts:

> "the expropriation of the right to arbitrate the dispute in Bangladesh under the ICC Arbitration Rules corresponds to the value of the award rendered without the undue intervention of the court of Bangladesh."[682]

367. Similarly, the tribunal in *White Industries v India* awarded the claimant the amounts payable under the commercial arbitral award, the enforcement of which was prevented through acts of Indian courts in breach of the effective means standard from India-Australia BIT. [683]

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the shoes and mindset of an Ecuadorian judge and come to a conclusion about what the proper outcome of the cases should have been.")

[679] *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**), ¶ 454, 472, 490.

[680] *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**), ¶ 546

[681] *Petrobart Limited v Kyrgyzstan*, SCC Case No 126/2003, Award of March 29, 2005 (**CL-030**), ¶¶ 455, 459, 466 (pp. 82-84 of the original award)

[682] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award 30 June 2009 (**CL-024**), ¶ 204

[683] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶ 14.3.6

368. The tribunal in *Deutsche Bank v Sri Lanka* considered that investor "*suffered a loss amounting to the sum that it would have received pursuant to the Hedging Agreement if there had not been breaches of the Treaty*."[684]

369. GAMA's claim against TE-TO was entirely acknowledged by TE-TO[685] and was in TE-TO's reorganization confirmed and 90% written-off by the final and enforceable judgment of the Civil Court Skopje.[686] While Macedonia's breaches of the Treaty and customary international law occurred over several judicial instances and extensive period of time, the taking of GAMA's claim to money became final and irreversible on 30 August 2018, when the Appellate Court Skopje confirmed TE-TO's reorganization.[687] The remaining 10% of the acknowledged GAMA's claim, the payment of which was unlawfully suspended to 2028 and 2029, likewise amounts to a taking of claim in breach of the Treaty (see above at ¶ 204).

370. As explained in the preceding section, had the Macedonian state organs acted in accordance with the treatment required under the Treaty and customary international law, GAMA would have recovered its claim against TE-TO in full. GAMA is therefore entitled to compensation in the amount of 5 million EUR with accrued interests and legal costs, as specified below.

2. INTERESTS

371. On 4 December 2012, following GAMA's proposal for the enforcement based on a due invoice to TE-TO, [688] the notary public passed an enforcement decision ordering TE-TO to pay GAMA EUR 5 million with default interest from 1 April 2012, *i.e.* in the amount of EURIBOR's one-month rate for Euros, which for each semi-annual period was valid on the last day of the semi-annual period preceding the current semi-annual period, increased by

[684] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lank*a, ICSID Case No. ARB/09/2, Award, 31 October 2012 (**CL-022**), ¶ 572

[685] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), pp. 15-16 and 35-36 (showing a list of TE-TO's creditors, including GAMA), 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, Letter of acknowledgment of debt from TE-TO to GAMA, dated 17 March 2015 (**C-009**).

[686] Statement of Claim, ¶¶ 108-109, 114, 120; Statement of Defence, ¶¶ 58, 69. See 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**), pp. 3, 5 (showing a list of TE-TO's creditors, including GAMA) and pp. 2, 33 (confirming that the approved reorganization plan has the status of an executive document); Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**) (upholding the decision of the Civil Court Skopje on TE-TO's reorganization).

[687] *Similarly*, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021 (**RL-113**), ¶ 631 ("Mexico's denial of justice occurred over several judicial instances and an extensive period of time; but the origin of the denial of justice can be pinpointed to the Cancellation Judgment issued by the Juez de lo Mercantil, and the subsequent cancellation of the Mortgages by the Public Registries. There is also no doubt that such cancellation was a harmful act: it caused the extinction of the Mortgages and stripped Claimant's Loans of the collateral which guaranteed repayment. It thus is appropriate that the impairment of the investment be calculated as of the date of cancellation of each Mortgage.")

[688] 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**)

10 percentage points.[689] The calculation of the default interest on GAMA's claim by the notary public is consistent with Article 266-a(2) of the Macedonian Law on Obligations:

> When the monetary obligation is expressed or determined in a foreign currency, the penalty interest rate is determined for each half-year and that is in the amount of one-month Euribor rate for euros that was valid on the last day of the half-year preceding the current half-year, increased by ten percentage points in trade contracts and contracts between traders and persons under public law, i.e. increased by eight percentage points in contracts in which at least one person is not a trader (legal penal interest). [emphasis added][690]

372. The notary public's decision was subject to TE-TO's objection in debt enforcement proceedings, which became obsolete with TE-TO's reorganization where GAMA's claim and accrued interests were written-off. But for the acts of Macedonia's state organs, GAMA's claim would have been enforced against TE-TO for the principal of EUR 5 million with default interests from 1 April 2012.

373. Case law confirms that when the breach of the treaty arises from a wrongful treatment of investor's claim in local proceedings, tribunals awarded interests as sought in local judicial or arbitration proceedings. [691]

374. Macedonia's argument that it is purportedly unreasonable for GAMA to claim interest from 1 April 2012, because Macedonian courts had not even been seized of any matter regarding that case and could not have breached the Treaty,[692] is wrong. GAMA is entitled to be compensated for all of the damages that it suffered as a result of Macedonia's violations of the Treaty and international law.[693] Had Macedonian state organs acted in accordance with the Treaty and customary international law, GAMA would have been awarded interests since 1 April 2012 until the full repayment of its claim.[694] Because Macedonian state organs failed to comply with its obligations under the Treaty and

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

[690] Macedonian Law on Obligations (**R-5)** Article 266-a(2)

[691] *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**), ¶ 549 ("As to the rate of interest to be applied during the period governed by domestic law, the Tribunal finds that this should be the New York Prime Rate [used by TexPet in local proceedings]. When conceiving of the wrong as the failure of the Ecuadorian courts to adjudge TexPet's claims as presented to them, the Claimants' damages should be assessed as they were claimed in those courts."); *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009 (**CL-024**), ¶ 211 ("The Tribunal does not need Saipem's calculations since the ICC Tribunal has already awarded interest at a rate of 3,375% per annum from 7 June 1993."); *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶¶ 14.3.5.-14.3.6

[692] Statement of Defence, ¶ 302

[693] *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**), ¶ 551 ("In regard to the assessment of damages, the Tribunal is guided by the principle that the Claimants must be made whole; they must receive an award that compensates for what they lost as a result of the Respondent's breach of Article II(7) of the BIT. To calculate the damage suffered by the Claimants, the Tribunal starts from the principal sums that an honest, impartial, and independent Ecuadorian judge would have found owing in each of TexPet's cases, plus what they would have found as simple interest.")

[694] Second Kostovski Opinion (**CE-02**), ¶ 109

customary international law, GAMA is entitled to claim for accrued interests until the award in this arbitration and after the award, until full payment.[695]

375. In its Statement of Claim, GAMA provided enough data for quantification of interests: principal, interest rate, and date from which interests are accruing. GAMA provides herewith the calculation of interests accrued until 30 May 2018[696] - the day of the potential opening of the bankruptcy proceedings over TE-TO if it were not for the unlawful actions by the Macedonian courts and until 19 July 2023.[697] Should the Tribunal require a calculation as of the day at a later stage, Claimant will provide so.

3. LEGAL FEES AND COSTS INCURRED IN CONNECTION WITH THE PROCEEDINGS BEFORE THE MACEDONIAN COURTS

376. GAMA is also entitled to recover legal fees and costs it incurred in connection with the debt enforcement proceedings through which Macedonia unlawfully interfered with GAMA's investment in Macedonia. [698]

377. GAMA has incurred costs of EUR 15,189.00 for legal representation in the Macedonian legal proceedings. These costs continue to be incurred because debt enforcement proceedings are still pending. As explained, the pendency of debt enforcement proceedings is exclusively a result of Macedonia's acts in breach of the Treaty, including an impermissible judicial delay, and GAMA is entitled to compensation of these costs.

378. Because these costs continue being accrued, GAMA can only provide a calculation of these costs at a later stage when they are determined. In the unlikely event that GAMA is granted to recover these legal costs from TE-TO in obsolete debt enforcement proceedings, GAMA undertakes to inform the Tribunal accordingly.

4. NO RISK OF DOUBLE RECOVERY

379. Macedonia's concern regarding the possibility of GAMA's double recovery is not on point.[699]

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[695] (*1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic*, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020 (**CL-086**), ¶ 367 ("[…] interest is an integral component of the notion of compensation, both in terms of Article 4 of the Syria-Italy BIT and under general international law. Interest therefore arose from 1 April 2012, as part of the Respondent's duty to "offer adequate compensation"; it continued after the Respondent rejected this duty in the course of these proceedings, thereby breaching the Treaty; and will continue to apply until the date of final and full payment by the Respondent."). *Ibid.*, ¶ 371

[696] Calculation of the statutory default interest on GAMA's claim from 1 April 2012 to 30 May 2018 (**C-200**)

[697] Calculation of the statutory default interest on GAMA's claim from 1 April 2012 to 19 July 2023 (**C-201**)

[698] *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011 (**CL-037**), ¶¶ 14.3.4-14.3.6; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012, (**CL-106**) ¶ 392 ("The Tribunal has concluded that Respondent's act caused Claimants' insolvency, and, therefore, Respondent is responsible for compensating Claimants for the resulting harm, including with respect to the payment of insolvency costs")

[699] Statement of Defence, ¶¶ 299 – 300

380. First, GAMA is not, as Macedonia contends, *"(again) seeking*" the recovery of debt against TE-TO before Macedonian courts.[700] As explained above at Section III.A, GAMA has not recommenced any proceedings against TE-TO, but is simply stuck in these proceedings for the 11th year and cannot withdraw its claim without TE-TO's consent. It cannot be GAMA's fault if Macedonian judiciary failed to adjudicate a dispute within 11 years, even less so considering the fact that GAMA's claim has been since 2018 fully acknowledged by the same Civil Court Skopje in TE-TO's reorganization proceedings.[701]

381. Even if GAMA would after 11 years prevail against TE-TO in debt enforcement proceedings, this would not result in recovery of GAMA's claim. Macedonian courts in TE'TO's reorganization permanently wrote-off 90% of GAMA's claim (EUR 4.5 million) with accrued interest and suspended the payment of the remaining 10% of the principal (EUR 500,000) for a period of more than 12 years. There is no risk of double recovery with respect to the 90% of the claimed principal (EUR 4.5 million) and accrued interest. As confirmed in the Reorganisation Plan:

> "If any of the creditors receives a claim based on a final and enforceable verdict, adopted after the day of entry into force of the reorganization plan, that claim will be settled in the same way and under the same conditions as the claims of the other creditors of their class."[702]

382. There is also no risk of double recovery with respect to the remaining 10% of GAMA's claim, the payment of which was unlawfully suspended to 2028 and 2029. The chance of GAMA being able to collect the remaining part of its claim from TE-TO has been annihilated due to the amendments made to the Macedonian Law on Obligations which entered into force on 20 July 2023. The amendments, which apply retroactively, have shortened the statute of limitations for enforcing court decisions related to claims from 10 years to 5 years. As a result, after 30 August 2023, GAMA's outstanding claim of EUR 500,000 against TE-TO based on the Reorganization plan dated 6 June 2018, will become time-barred[703] (see also above at ¶ 155).

383. In any event, in the event of an arbitral award in its favour resulting in the award of the full amount sought in this arbitration (including interests and legal costs), GAMA undertakes that it will not further pursue the recovery of legal costs against TE-TO. The Tribunal may include a suitable order to this effect in its award.

384. Finally, Macedonia's argument that GAMA should have discounted its claim for the amount of expenses that GAMA allegedly would have incurred in performing its obligations under the Settlement Agreement, is flawed. The Civil Court Skopje, endorsing the Reorganisation plan dated 6 June 2018, fully confirmed GAMA's claim against TE-TO and did not condition

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[700] Statement of Defence, ¶ 299

[701] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2,* Award, 31 October 2012 (**CL-022**), ¶ 562 ("Once the damage issue is reached, the State may not say to the investor that it does not have any damage because it can still sue on the basis of the contract.")

[702] Consolidated version of the Reorganization Plan of TE-TO AD Skopje no. 030 - 702 dated 07 June 2018 (**C-014**), pp. 23, 91.

[703] Considering that the approval of TE-TO's reorganisation plan became final on 30 August 2018. *See* Decision of the Appellate Court Skopje (Case file TSZ-1548/18), dated 30 August 2018 (**C-017**)

it. Even if there were any GAMA's outstanding obligations under the Settlement Agreement (*quod non*), they cannot be in dispute in this arbitration. The payment of compensation for the acts of Macedonia in breach of the Treaty and customary international law is in no way related to such expenses.

XI. REQUEST FOR RELIEF

385. For these reasons, GAMA respectfully requests the Arbitral Tribunal to issue an award:

(a) the Republic of North Macedonia has breached Article II(3) of the Treaty;

(b) the Republic of North Macedonia has breached Article II(3) of the Treaty in conjunction with

(i) Article 3(1) of the Lithuania-Macedonia BIT, Article 3(1) of the Austria-Macedonia BIT and Article 2(2) of the Slovakia-Macedonia BIT, by failing to accord fair and equitable treatment to GAMA's investment;

(ii) Article 3(1) of the Lithuania-Macedonia BIT and Article 3(1) of the Austria-Macedonia BIT, by failing to provide full protection and security to GAMA's investment;

(iii) Article 3(2) of the Lithuania-Macedonia BIT and Article 3(2) of the Spain-Macedonia BIT, by impairing through arbitrary, unreasonable and discriminatory measures the management, maintenance, use, enjoyment or disposal of GAMA's investment;

(iv) Article 3(3) of the Kuwait-Macedonia BIT, by failing to provide effective means of asserting claims and enforcing rights to GAMA's investment;

(c) the Republic of North Macedonia has breached Article III(1) of the Treaty;

(d) the Republic of North Macedonia has committed a denial of justice in breach of the customary international law;

(e) the Republic of North Macedonia shall pay to GAMA for the damages suffered as a result of the Republic of North Macedonia's breaches under the Treaty and customary international law 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, until payment under this award is made, and EUR 15,189.00;

(f) the Republic of North Macedonia shall 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.

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Respectfully submitted,

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