INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş.

Claimant

v.

The Republic of North Macedonia

Respondent

RESPONDENT'S REJOINDER

11 December 2023

WHITE & CASE LLP

Counsel for Respondent

TABLE OF CONTENTS

Page

I. OVERVIEW 1

II. GAMA'S INFLAMMATORY ALLEGATIONS OF STATE AND JUDICIAL CORRUPTION ARE UNSUPPORTED AND DESERVING OF SANCTIONS 3

III. GAMA STILL CANNOT SHOW THAT IT WAS DENIED JUSTICE BY THE MACEDONIAN COURTS 10

A. GAMA's alleged mistreatment by Macedonia's courts must be assessed under the denial of justice standard 11

1. GAMA fails to engage with the authorities and rationale supporting the denial of justice rule 11

2. The cases cited by GAMA do not support its position in this arbitration 14

3. GAMA misstates the high standard for proving a denial of justice 17

B. GAMA's complaints about the Payment Dispute proceedings are unfounded and, in any event, fall far short of a denial of justice 23

1. The Macedonian courts properly assumed jurisdiction over the Payment Dispute, without objection by GAMA or TE-TO 23

2. The Macedonian courts decided the payment dispute under Macedonian law because GAMA pled its case under Macedonian law, not English law 27

3. The Macedonian courts correctly rejected GAMA's contractual and factual arguments 30

4. The Macedonian courts ultimately accepted GAMA's argument that TE-TO's debt was recognized in the reorganization plan 37

5. GAMA is not "forced" to continue the Payment Dispute litigation, but has chosen to do so 40

6. GAMA's claim of excessive delay in the Payment Dispute proceedings is unfounded 42

C. GAMA's complaints about TE-TO's bankruptcy proceedings are unfounded and, in any case, fall far short of a denial of justice 46

1. The TE-TO bankruptcy proceeded under the 2013 Prepackaged Bankruptcy regime, and GAMA's effort to supplement that regime is to no avail 47

TABLE OF CONTENTS

Page

(a) The 2023 draft insolvency bill did not govern the TE-TO bankruptcy and, if anything, shows that the courts' reading of the 2013 legislation was plausible 47

(b) The so-called "fundamental principles of the Bankruptcy Law" invoked by GAMA are unsubstantiated and play no role in a Prepackaged Bankruptcy 48

(c) The Professional Standards for Bankruptcy Trustees have no application to the preparation by the debtor of a prepackaged reorganization plan 49

2. TE-TO's reorganization plans complied with Macedonian law governing Prepackaged Bankruptcies 53

(a) TE-TO qualified for bankruptcy proceedings even without its debt to Bitar Holdings 53

(b) The bankruptcy judge was authorized to approve TE-TO's choice to create two classes of creditors 54

(c) There is no evidence that the shareholder loans were "fraudulent" 56

(d) The Reorganization Plan was not required to include a contingent tax liability to account for the write-off of unsecured claims 58

(e) The Reorganization Plan was not required to meet the "liquidation test" 59

(f) The deadline for repayment complies with the Bankruptcy Law 62

3. The bankruptcy judge acted in accordance with Macedonian law 64

(a) The bankruptcy judge properly required TE-TO to provide additional information 64

(b) The bankruptcy judge was not prohibited from holding a single hearing to receive comments from the creditors and decide on the proposal and plan 66

(c) TE-TO did not need to finalize negotiations with its creditors before submitting its reorganization proposal 67

(d) The bankruptcy judge lawfully appointed the interim bankruptcy trustee 68

(e) The bankruptcy judge lawfully ordered Security Measures 69

4. The bankruptcy judge was independent and impartial 70

TABLE OF CONTENTS

Page

(a) The bankruptcy judge's request for information does not disclose bias 70

(b) GAMA's dilatory motion to recuse the bankruptcy judge was properly decided....71

5. The Court of Appeal considered and dismissed GAMA's complaints against the decision to approve the Final Reorganization Plan 73

6. GAMA's new allegations regarding the Bankruptcy Trustee are unfounded and, in any event, not attributable to Macedonia....75

IV. GAMA STILL CANNOT SHOW THAT MACEDONIA'S TEMPORARY TAX DEFERRAL AGREEMENT WITH TE-TO BREACHED THE TREATY....81

V. GAMA STILL CANNOT SHOW THAT MACEDONIA EXPROPRIATED ITS RIGHT TO PAYMENT UNDER THE EPC CONTRACT....85

A. There can be no judicial expropriation without a denial of justice or the participation of non-judicial State organs in the expropriation 85

B. GAMA still cannot show that TE-TO's temporary tax deferral amounts to an expropriation 93

C. In any event, GAMA's expropriation claim fails because its payment claim against TE-TO was recognized and will be paid in accordance with the Final Reorganization Plan....94

VI. GAMA STILL CANNOT SHOW THAT MACEDONIA TREATED IT LESS FAVORABLY THAN MACEDONIAN NATIONALS OR NATIONALS OF THIRD STATES....96

VII. GAMA STILL CANNOT SHOW THAT THE TREATY'S MFN CLAUSE ALLOWS IMPORTING ADDITIONAL STANDARDS OF TREATMENT OR THAT MACEDONIA BREACHED THOSE STANDARDS....99

A. GAMA cannot use the MFN clause in Article II(3) of the Treaty to invoke additional standards of treatment from Macedonia's other BITs 100

1. The ordinary meaning of Article II(3) of the Treaty contemplates actual differential treatment of investments, not the mere possibility of differential treatment 100

2. The context of Article II(3) of the Treaty does not support interpreting this provision as a tool to import investment protections from other Macedonian BITs....107

3. The decisions of other investment treaty tribunals contradict or do not support GAMA's reading of Article II(3)....109

TABLE OF CONTENTS

Page

B. Macedonia in any event did not breach the additional standards of treatment that GAMA invokes 112

1. Macedonia afforded GAMA's investment fair and equitable treatment 113

(a) Where an investor claims that domestic courts breached the fair and equitable treatment standard, the investor must prove a denial of justice 113

(b) Laws of general application do not create legitimate expectations that are protected under the FET standard 115

(c) In any event, Macedonia afforded GAMA fair and equitable treatment 118

2. Macedonia did not impair GAMA's investment by arbitrary, unreasonable, or discriminatory measures 124

3. Macedonia afforded GAMA full protection and security 124

4. Macedonia afforded GAMA effective means of asserting its claims and enforcing its rights 128

VIII. GAMA STILL FAILS TO SHOW THAT IT IS ENTITLED TO ANY COMPENSATION 132

A. GAMA's alleged loss was caused by TE-TO's failure to pay, not by anything that Macedonia did or did not do 132

1. International law requires GAMA to meet a high standard to prove causation in fact and in law 134

2. Macedonia did not cause GAMA's purported loss in TE-TO's reorganization 137

3. Macedonia's alleged BIT breaches did not cause GAMA's loss in the Payment Dispute proceedings 141

B. GAMA has still not proven the quantum of loss it claims 144

IX. REQUEST FOR RELIEF 150

* * *

1. In accordance with the agreed procedural schedule, the Republic of North Macedonia ("**Macedonia**" or "**Respondent**") submits its Rejoinder in response to the Reply filed by GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. ("**GAMA**" or "**Claimant**") on 10 August 2023 ("**Reply**") in ICC Arbitration No. 26696/HBH, commenced under the Agreement between the Republic of Turkey and the Republic of Macedonia Concerning the Reciprocal Promotion and Protection of Investments dated 14 July 1995 (the "**BIT**" or "**Treaty**").

I. OVERVIEW

2. GAMA, a disappointed bankruptcy creditor, seeks to pass off its private payment dispute with TE-TO, the bankruptcy debtor, as a treaty claim. Macedonia demonstrated in the Statement of Defence that the myriad complaints that GAMA levied about minute aspects of the payment claim and bankruptcy proceedings were unfounded and in any case fell far short of a denial of justice under international law.

3. GAMA accepts (as it must) that this Tribunal does not sit as a supranational appellate court on matters of Macedonian law. Yet GAMA's Reply rehashes the same unfounded complaints under Macedonian law. For good measure, GAMA now alleges that its lack of success in the Macedonian courts must have been the result of a corrupt conspiracy. GAMA says that the Macedonian courts exhibited "bias towards TE-TO and its shareholders, almost certainly proceeding from corruption."[1] Not only does GAMA make this grave accusation without a shred of evidence, but its conspiracy narrative falls under its own weight. If GAMA is to be believed, no fewer than 27 judges, prosecutors and other public officials colluded to frustrate its efforts to collect from TE-TO. This is not serious.

4. GAMA met little success in the Macedonian courts because its legal positions were wrong or advanced incompetently (or both). GAMA says that its arguments in the TE-TO bankruptcy proceedings are supported by a draft bill (introduced earlier this year) to amend the Macedonian Bankruptcy Law under which those proceedings were conducted.

[1] Reply ¶ 8.

The draft bill has yet to be enacted into law. But, more fundamentally, if Macedonian law needs to be amended to support GAMA's case, then it is plain that the courts that decided against GAMA under the existing Bankruptcy Law acted within the bounds of their discretion. And they did so with limited guidance. GAMA does not dispute that the novel prepackaged bankruptcy regime under which the proceedings were conducted had been used only twice before the TE-TO bankruptcy.

5. The crux of GAMA's complaint about the bankruptcy is that its (unsecured) claim was placed in the same category as certain loans extended by TE-TO's shareholders. GAMA says that shareholders ought to be last in line, per the maxim "equity is wiped out first." While it is uncontroversial that equity comes last in bankruptcy, there is nothing aberrant in shareholder loans ranking *pari-passu* with other unsecured creditors. There is no automatic subordination of shareholder loans in jurisdictions as diverse as the United States, France and England & Wales. Macedonia is no different.

6. GAMA's complaints about the payment claim proceedings are just as misguided. GAMA commenced expedited proceedings under Macedonian law to enforce its claim against TE-TO, but claims to have been surprised that the Macedonian courts did not refer it to arbitration when it later changed its mind and sought to withdraw these proceedings (over TE-TO's objections). GAMA also assails the Macedonian courts for not applying English law to the Settlement Agreement, but at no point provided the courts with any evidence of English law or articulated how the Settlement Agreement ought to be interpreted under English law. GAMA says that the courts should have figured it out. Blaming the court is no excuse for poor lawyering. Not in Macedonia, not anywhere.

7. GAMA newly complains about the duration of the Macedonian court proceedings. GAMA notes that it has been almost 11 years since it first was in court to collect against TE-TO, but that is hardly remarkable considering the voluminous docket: GAMA and TE-TO commenced no less than 12 proceedings. And the Macedonian courts have been diligent. In contrast to the denial of justice cases that GAMA references (where many years passed without any judicial action), each one of these proceedings has resulted in a

final decision. The one exception is the appeal – its seventh in the payment claim proceedings – that GAMA lodged this year after the filing of its Reply. GAMA may be disappointed with the outcome of the administration of justice, but it cannot credibly allege a lack of due process or access to justice. GAMA has had its case heard six times in the Basic Court, five times in the Court of Appeal and once in the Supreme Court.

8. GAMA observes that TE-TO was important to Macedonia as one of the largest utilities in the countries, and that the Government pledged to help it survive. That may be true and may indeed explain the Government's willingness to temporarily grant TE-TO an income tax deferral, but it is hardly remarkable. Governments around the world support systemically important businesses.

9. In any event, even if GAMA could prove a Treaty breach, it still has not shown (and cannot show) that it would have been better off if TE-TO (whose book value was deeply negative) had been forced into liquidation and its assets sold off. Causation must be proven with facts, not speculation or wishful thinking.

10. GAMA's case is manufactured and should never have been brought. The claims should be dismissed and costs awarded.

11. This Rejoinder is accompanied by:

a) the Second Expert Opinion of Aco Petrov dated 11 December 2023 ("Petrov II"). Mr. Petrov is a leading bankruptcy practitioner and trustee in Macedonia, and opines on certain matters of Macedonian bankruptcy law and procedure;

b) 79 factual exhibits numbered R-18 to R-97; and

c) 52 legal authorities numbered RL-115 to RL-167.

II. GAMA'S INFLAMMATORY ALLEGATIONS OF STATE AND JUDICIAL CORRUPTION ARE UNSUPPORTED AND DESERVING OF SANCTIONS

12. In its Statement of Defence, Macedonia observed that GAMA offered no concrete evidence to support its position that various Macedonian high-ranking officials (including

the then Prime Minister and Deputy Prime Minister) conspired with TE-TO and multiple other officials to grant the company a tax deferral to avoid the certain collapse of a Reorganization Plan that had been (presumably corruptly) approved by several levels of judges and the wide majority of TE-TO's creditors.[2]

13. GAMA doubles down on these allegations in its Reply. GAMA confirms that the above "accurately reflects GAMA's stance" and says "these actions were not coincidental but part of a larger scheme" that was "a carefully orchestrated maneuver to circumvent the collapse of TE-TO's judicial reorganization."[3] GAMA then heightens its rhetoric, alleging "collusion"[4] among an "entangled web of interests and influence" involving Gazprom, TE-TO, EDS, and the Deputy Prime Minister, and that Macedonia "turned a blind eye to the cartel's existence."[5]

14. These rash accusations should not have been made. GAMA still fails to offer any concrete evidence of collusion, conspiracy, or a scheme. Seemingly in recognition of this, GAMA asserts that concrete evidence is not necessary since "circumstantial evidence should be taken into account."[6] At best, GAMA's "circumstantial evidence" paints a picture of various entities with aligned interest in maintaining TE-TO's capacity to provide heat and electricity in Macedonia.[7] That is neither a conspiracy nor a basis to question the integrity of those involved.

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2 Statement of Defence ¶ 102.

3 Reply ¶ 190.

4 Reply ¶ 188.

5 Reply ¶ 189. GAMA says in particular that Macedonia turned a blind eye to the granting of a tax deferral to TE-TO (the "State aid"). But Macedonia did the opposite. As Macedonia explained in its Statement of Defence and below, rather than turning a blind eye, the Macedonian State Commission for Prevention of Corruption investigated a complaint from Toplifikacija about the tax deferral, and terminated it. *See* Statement of Defence ¶ 96; *infra* § IV.

6 Reply ¶ 9.

7 Reply ¶¶ 5-7. ("Gazprom [is] the exclusive supplier of natural gas to Macedonia"; "TE-TO [is] the country's largest consumer of natural gas and the main supplier of district heating"; "EDC [is] an electricity trader owned by then Deputy Prime Minister Mr. Kocho Angjushev"; "If Gazprom were to disrupt the supply of natural gas or it TE-TO were to stop operating, the district heating in Macedonia would be compromised"; "[PM] Zoran Zaev [said] '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.'").

15. Corruption is a weighty charge, and it should not be made lightly. Tribunals have explained that "especially in the context of the judiciary," corruption is a serious allegation that is difficult to prove.[8] The tribunal in *Chemtura v. Canada* observed that "the standard of proof for allegations of bad faith or disingenuous behaviour is a demanding one."[9] The tribunal in *Rompetrol v. Romania* observed that "serious allegations of sustained and coordinated misconduct" required "sufficient weight of positive evidence … as opposed to pure probability or circumstantial inference."[10]

16. Yet after asserting this "scheme" (without offering proof), GAMA makes the leap to alleging a biased and corrupt judiciary:

> 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**.[11]

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[8] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 2010) (Excerpted) ("***Liman v. Kazakhstan***") (**RL-48**) ¶¶ 422, 424 ("The Tribunal emphasizes that corruption is a serious allegation, especially in the context of the judiciary. The Tribunal notes that both Parties agree that the standard of proof in this respect is a high one . . .. It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, Claimants have to prove corruption."); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSIC Case No. ARB/13/1, Award (22 August 2017) ("***Karkey v. Pakistan***") (**CL-69**) ¶ 492 ("The Tribunal finds that the seriousness of the accusation of corruption in the present case, including the fact that it involves officials at the highest level of the Pakistani Government at the time, requires clear and convincing evidence. There is indeed a large consensus among international tribunals regarding the need for a high standard of proof of corruption.")(emphasis added); *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Award (23 April 2012) ("***Oostergetel v. Slovak Republic***") (**RL-63**) ¶ 303 ("Mere insinuations cannot meet the burden of proof [for allegations of corruption].")

[9] *Crompton (Chemtura) Corp. v. Government of Canada*, UNCITRAL, Award (2 August 2010) (**RL-137)** ¶ 137 (emphasis added). *See also 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-32**) ¶ 223 ("[T]he standard for proving a conspiracy involving a bad faith component is a demanding one.").

[10] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013) (**RL-140**) at ¶ 182. *See also 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) ("***Rumeli v. Kazahkstan***") (**CL-25**) ¶ 709 ("an allegation such as this must, if it is to be supported only by circumstantial evidence, be proved by evidence which leads clearly and convincingly to the inference that a conspiracy has occurred.").

[11] Reply ¶ 8.

17. As detailed below, the reasoned decisions of the Macedonian courts offer no hint of bias or corruption, let alone expose behavior that meets this high standard.[12] To the contrary, GAMA's relative success before Macedonian courts proves it enjoyed a meaningful opportunity to be heard. GAMA prevailed in overturning the joinder of TE-TO's counterclaim,[13] dismissing that counterclaim on the merits,[14] convincing the Supreme Court to remand,[15] quashing revocation of the Payment Order,[16] and convincing the Basic Court that its payment claim must be recognized since TE-TO did so in its reorganization plan.[17]

18. Despite its measure of success with the Macedonian judiciary (or perhaps because of it), GAMA asks the Tribunal to look at how *other litigants* may have fared before Macedonian judges. GAMA relies on third-party reports about Macedonia,[18] including a U.S. State Department opinion that "[t]he government did not always respect judicial independence and impartiality"[19] and an OSCE assessment which found "more than one-third of judges have experienced attempts of influence from the executive branch."[20] Yet GAMA ignores other reports, such as a 2022 European Union screening report on Macedonia's application for accession to the EU.[21] That report found "the judiciary has demonstrated its commitment to protect its integrity and independence," Macedonia has "strengthened judicial independence," and "North Macedonia has continued to make

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12 *See infra* § III.B-C.

13 Decision of the Court of Appeal, dated 16 June 2016 (**C-61**).

14 Decision of the Basic Court, dated 23 April 2019 (**C-63**).

15 Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**).

16 Decision of the Court of Appeal, dated 30 June 2022 (**C-73**).

17 Decision of the Basic Court, dated 13 April 2023 (**R-18**).

18 Reply ¶¶ 10-11.

19 Reply ¶ 10; U.S. Department of State, "North Macedonia 2002 Human Rights Report" (**C-157**) at 7 (emphasis added).

20 Reply ¶ 10; Organization for Security and Co-operation in Europe, "Corruption Risk Assessment of the Judiciary in North Macedonia" (**C-158**) at 31 (emphasis added).

21 European Commission, North Macedonia 2022 Report, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (**R-19**).

progress in investigating, prosecuting and trying corruption cases, including for high-level corruption cases."[22]

19. Even if only GAMA's preferred evidence is considered, GAMA is left with allegations about the entire Macedonian judiciary untethered to GAMA's particular litigation. That cannot serve as the basis for a finding about Macedonia's treatment of GAMA's investment. Evidence about the judiciary as a whole can amount to proof of corruption only if it establishes that the specific acts alleged actually happened. In particular, investment tribunals have repeatedly cautioned against relying on general country reports to support claims of improper conduct.[23] As held by the tribunal in *Swisslion v. Macedonia*, which considered and rejected claimant's denial of justice claim against the Macedonian judiciary:

> [Claimant] failed to discharge its burden of proof to show that the courts failed to meet international law's requirements for the conduct of a civil proceeding … other than general evidence relating to the alleged lack of independence of the Macedonian courts not shown to be related to the facts of the present case, there was no evidence of a lack of judicial independence or other judicial misconduct in the litigation that Swisslion sought to impugn ….[24]

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[22] European Commission, North Macedonia 2022 Report, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (**R-19**) at 20. *See also* at 16 ("North Macedonia has achieved some level of preparation / is moderately prepared to apply the EU acquis and European standards in this area. Overall, it has made some progress, including through strengthened judicial independence. Implementation of the judicial strategy reached its final stage and a new strategy is being prepared…. The State Commission for the Prevention of Corruption continues to carry out its mandate proactively.").

[23] *See, e.g. Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013) (**RL-141**) ¶ 8.1.10 (requiring "probative evidence that goes to the specificity of the issue in dispute," and thus rejecting "broad statements and third party studies/reports, to the effect that the Turkmen judiciary lacks independence, and that the Turkmen authorities would have had a particular aversion to Turkish investors."); *Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23*, Award, 8 April 2013 ("***Arif v. Moldova***") (**RL-69**) ¶¶ 296, 415 (rejecting the claimant's arguments on corruption and collusion among Moldovan local authorities, the claimant's competitors and the Moldovan judiciary, and noting that the claimants "ha[d] not made specific claims of corruption against the Moldovan judiciary, other than noting the content of reports published by international organizations."); *Oostergetel v. Slovak Republic* (**RL-63**) ¶¶ 302-303 (the tribunal rejected the claimants' conspiracy allegations, which were based on reports produced by the Slovak government, the EU and the United States referring to accounts of bribery within the Slovak Government. The tribunal found that "[w]hile such general reports are to be taken very seriously as a matter of policy, they cannot substitute for evidence of a treaty breach in a specific instance.").

[24] *Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award (6 July 2012) ("***Swisslion v. Macedonia***") (**RL-65**) ¶ 268.

20. GAMA also contends that the Public Prosecution's explanation for dismissing complaints regarding alleged irregularities in the TE-TO bankruptcy proceedings is "at best, an oversimplification of a complex legal issue and, at worst, a failure of the Macedonian justice system."[25] That explanation, made in a media release, may have (unsurprisingly) simplified the legal issue, but that does not show a failure of the justice system. GAMA assails the Public Prosecutor's explanation for its decision not to press charges under bankruptcy regulations as "shield[ing] those involved from scrutiny."[26] But that ignores the rest of the media release in which the Prosecutor explains that it had "previously" made a separate decision to dismiss charges for money laundering under Article 273 of the Criminal Code.[27] That decision did not shield the defendants from scrutiny; it followed from scrutiny.

21. GAMA stokes intrigue regarding the whereabouts of evidence from the criminal investigation into TE-TO's judicial reorganization by the Financial Police and the Public Prosecution Office.[28] GAMA speculates that Macedonia did not produce that evidence in this arbitration because it would prefer that the evidence not to "see the light of day."[29] But Respondent has explained that Macedonia's executive organs do not have access to documents in the possession of the Prosecutor and the Police, as their actions during preliminary investigations, before formal charges are laid, are secret under Macedonian law.[30]

22. GAMA also relies on the "observation of a retired police chief", Arafat Muaremi, that "TE-TO's bankruptcy proceedings 'did not adhere to the respective rules.'"[31] GAMA's assertion that this is "a clarion call for attention to what may be a grave miscarriage of justice" is more desperate speculation. Mr. Muaremi has no known expertise in

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25 Reply ¶ 14; Public Prosecutor's Office announcement, dated 29 September 2020 (**C-110 Resubmitted**).

26 Reply ¶ 14.

27 Reply ¶ 14; Public Prosecutor's Office announcement, dated 29 September 2020 (**C-110 Resubmitted**).

28 Reply ¶ 12.

29 Reply ¶ 13.

30 *See* Procedural Order No. 2, Respondent's Objections to Claimant's Document Request No. 1 (**R-20**); Letter from Respondent to Tribunal, dated 30 November 2023 at 2 (**R-21**).

31 Reply ¶ 15.

Macedonia's novel Prepackaged Bankruptcy provisions; whereas experienced judges at multiple levels of the Macedonian justice system, the bankruptcy trustee, the public prosecutor, and Mr. Petrov have all affirmed that these provisions were applied in conformity with Macedonian law.[32] GAMA also relies on Mr. Muaremi's claim that the prosecution was not interested in cooperating with the financial police, but as explained, the prosecutors responded to the financial police's charges by conducting an investigation and eventually by dismissing the claim.[33]

23. In the end, GAMA's allegation of a grand conspiracy collapses under its own weight. GAMA implicates no fewer than 27 Macedonian officials for purportedly acting improperly and colluding in carrying out their duty as judge, notary, bailiff, trustee, General Secretary of the Government, Director of the Public Revenue Office, President of the Competition Commission, Deputy Prime Minister, and Prime Minister, without providing any credible evidence that they have done so.[34] These allegations should never have been made and ought to be censured by an award of costs.

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[32] Petrov II § III. GAMA also relies on Mr. Muaremi's claim that the prosecution was not interested in cooperating with the financial police, but as explained, the prosecutors responded to the financial police's charges by conducted an investigation and eventually dismissed the claim (*see* Statement of Defence ¶ 76).

[33] *See infra* ¶ 114. Tribunals have recognized that a lack of prosecution is evidence that corruption has not occurred. *See, e.g. Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, (27 August 2019) ("***Glencore v. Colombia***") **(CL-96)** (Rejecting claimant's corruption allegations and stating: "[t]he Tribunal's conclusion is confirmed by the fact that the Colombian criminal prosecutor and the Colombian criminal courts, which have a much higher capacity for investigation than this Arbitral Tribunal, have not initiated an investigation into the alleged corrupt practices surrounding the Eighth Amendment either in tempore insuspecto or even after the start of this arbitration.").

[34] The 27 individuals are:

- Sashka Trajkovska (Judge), Elizabeta Dukovska (Judge), and Rozalinda Ristevska (Judge) (*see* Statement of Claim ¶¶ 114-119 (Decision of the First Instance Civil Court Skopje, dated 14 June 2018 (**C-15**));
- Zorica Babunovska (Judge) and Marinko Sazdovski (Interim Bankruptcy Trustee) (*see* Statement of Claim ¶¶ 65, 82 (Decision of the Civil Court Skopje, dated 26 April 2018 (**C-89**));
- Snezhana Bajlozova (Judge) (*see* Statement of Claim ¶ 47 (Judgement of the First Instance Civil Court in Skopje, dated 15 December 2014 (**C-8**)),
- Jetmire Ajdini Bosnjaku (Judge) (*see* Statement of Claim ¶ 67 (Decision of the Appellate Court Skopje, dated 30 June 2022 (**C-73**));
- Suzana Donchevska (Judge) (*see* Statement of Claim ¶ 65 (First Instance Civil Court in Skopje, dated 8 October 2021 (**C-71**));

III. GAMA STILL CANNOT SHOW THAT IT WAS DENIED JUSTICE BY THE MACEDONIAN COURTS

24. As demonstrated below, GAMA's alleged mistreatment by Macedonia's courts must be assessed under the denial of justice standard (**Section III.A**). GAMA's complaints about the Payment Dispute proceedings are unfounded and, in any event, fall far short of a denial of justice (**Section III.B**). Likewise, GAMA's complaints about TE-TO's bankruptcy proceedings are unfounded and, in any case, fall far short of a denial of justice (**Section III.C**). As the *Liman* tribunal observed, "a court decision can be

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- Roza Georgieva (Judge) and Rozalinda Krstevska (Judge) (*see* Statement of Claim ¶ 63 (Decision of the Appellate Court in Skopje, dated 18 October 2019, (**C-11**));
- Sonja Kochovska (Judge) (*see* Statement of Claim ¶ 34 (Decision of the First Instance Civil Court Skopje, dated 1 February 2013 (**C-34**));
- Isamedin Limani (Judge), Mirjana Radevska Stefkova (Judge), Stojanche Ribarev (Judge), Snezhana Georgievska Zekirija (Judge) (see Statement of Claim ¶ 64, 241 (Decision of the Supreme Court of the Republic of North Macedonia, dated 23 December 2020 (**C-12**));
- Sofija Spasova Medarska (Judge) (*see* Statement of Claim ¶ 59 (Decision of the First Instance Civil Court in Skopje, dated 23 April 2019 (**C-63**));
- Sashka Trajkovska (Judge) (*see* Statement of Claim/Reply ¶ 89 (Decision by the First Instance Civil Court Skopje dated 2 May 2018 (**C-93**));
- Vladimir Stojanovski (Judge), (*see* Statement of Claim ¶ 64 (Decision of the Supreme Court of the Republic of North Macedonia, dated 23 December 2020 (**C-12**));
- Elisaveta Zafirovska (Judge) (*see* Statement of Claim ¶ 46 (Decision of the First Instance Civil Court in Skopje, dated 7 March 2014 (**C-7**));
- Bekir Zulfiu (Judge) (*see* Statement of Claim ¶ 35 (Decision of the Appellate Court Skopje, dated 14 March 2013 (C-35));
- General Secretary of the Government, (*see* Statement of Claim ¶ 139);
- Zoran Zaev (Prime Minister) (*see* Reply ¶ 7);
- Kocho Angjushev (Deputy Prime Minister), (*see* Statement of Claim ¶ 140);
- Vasko Blazevski (Enforcement Bailiff) (*see* Statement of Claim ¶ 73, footnote 119 (Request by Bitar Holdings to Enforcement Agent Vasko Blazhevski dated 14 March 2018 (**C-77**));
- Snezhana Sardzovska (Notary Public) (*see* Statement of Claim ¶ 122 (Announcement to media of the Finance Police Administration of the Republic of North Macedonia no. 0306 1902/1 dated 21 June 2019 (**C-19**));
- Angelina Lukarevska (Manager of the Public Revenue Office) (*see* Reply ¶ 182 (Letter of warning by the Public Revenue Office, dated 27 March 2019 (**C-188**));
- Vladimir Naumovski (President of the Competition Commission) (*see* Statement of Claim ¶ 133 (Decision for approval of state aid to TE-TO, dated 16 October 2019 (**C-120**)).

incorrect in terms of domestic law but still be irreproachable from the perspective of international law."[35]

A. GAMA'S ALLEGED MISTREATMENT BY MACEDONIA'S COURTS MUST BE ASSESSED UNDER THE DENIAL OF JUSTICE STANDARD

1. GAMA fails to engage with the authorities and rationale supporting the denial of justice rule

25. Macedonia demonstrated in its Statement of Defense that, under international law, GAMA's claims of mistreatment by the Macedonian courts must be assessed against the denial of justice standard.[36] As explained by the tribunal in *Jan de Nul*, where the actions of the judiciary "lie[] at the core" of the impugned State acts, "the relevant standards to trigger State responsibility … are the standards of denial of justice …."[37] A long line of cases and commentary supports this position.[38]

26. GAMA's Reply not only ignores many of the authorities cited by Respondent,[39] but it also altogether fails to engage with the rationale behind the rule that the conduct of

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[35] *Liman v. Kazakhstan* (**RL-48**) ¶ 326. *See also* Statement of Defence ¶¶ 127, 140.

[36] Statement of Defence ¶¶ 129-136.

[37] *Jan de Nul N.V. and Dredging Int'l N.V. v. Arab Republic of Egypt*, ICSID Case No. RB/04/13, Award (6 November 2008) ("***Jan de Nul v. Egypt***") **(RL-39)** ¶ 191.

[38] *See* Statement of Defence ¶¶ 130-136 and authorities cited there.

[39] GAMA ignores the following authorities or does not dispute that they support Respondent's position: *OOO Manolium Processing v. Republic of Belarus*, PCA Case No. 2018-06, Final Award [Redacted] (22 June 2021) (**RL-112**) ¶ 591 (finding that for "judicial decisions [to] violate the FET standard" they "must result from denial of justice"); *IC Power Asia Development v. Republic of Guatemala*, PCA Case No. 2019-43, Final Award (7 October 2020) ("***IC Power v. Guatemala***") (**RL-108**) ¶¶ 594, 587 (where the tribunal rejected an FET claim about judicial conduct because actions of the court "could only amount to a Treaty breach under the paradigm of denial of justice."); *David Aven v. The Republic of Costa Rica*, UNCITRAL, Final Award (18 September 2018) (**RL-101**) ¶ 357 ("[T]he claimant investor alleging the breach of the obligation to afford fair and equitable treatment has the burden of proof to show denial of justice," insofar as claims relate to alleged acts of the State's judiciary); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (10 March 2015) (**RL-81**) ¶ 491 ("The obligation of FET can be violated … by means of judicial actions that affect the investor if they involve a denial of justice"); *Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 October 2012) (**RL-66**) ¶ 280 ("It is only in a situation where those proceedings would '[offend] a sense of judicial propriety' that it would be open to the Tribunal to find that those proceedings did not meet international standards."); *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010) **(RL-52)** ¶ 7.1.11 ("BIT tribunals do not reopen the municipal law decisions of competent fora, absent a denial of justice"); *Jan de Nul v. Egypt* **(RL-39)** ¶ 191 ("the Tribunal is of the opinion that the relevant standards to trigger State responsibility for the first set of acts are the standards of denial of justice, including the requirement of exhaustion of local remedies …"); *Limited Liability Company Amto v. Ukraine*, SCC Arb. No.

domestic courts must be assessed under the denial of justice standard. GAMA has no answer to the following.

27. First, the principle of judicial independence calls for deference to the conduct of domestic courts and, accordingly, for that conduct to be assessed against the high standard of denial of justice. The force of this argument has long been recognized in international law.[40] It has also been endorsed in modern investment treaty jurisprudence. As the tribunal in *Gramercy Funds v. Peru* recently explained:

> The demanding [denial of justice] standard stems from the internationally recognized principle of judicial independence; if the States' judiciary systems are independent and impartial, their decisions when administering justice within their borders must be accorded high deference, and must enjoy a presumption of legality.[41]

080/2005, Final Award (26 March 2008) ("***Amto v. Ukraine***") **(RL-36)** ¶ 78 ("[T]reatment of an investor by national courts should be examined ... to determine whether or not there has been a denial of justice."); *The Case of the S.S. "Lotus"*, Judgment No. 9, PCIJ Reports Series A No. 9 (7 September 1927) **(RL-2)** at 24 (the Permanent Court of International Justice observed that an error of a judicial authority "can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises.")

40 *See, e.g.*, J.L. BRIERLY, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed. 1963) **(RL-6)** at 287 ("[T]he misconduct must be extremely gross. The justification of this strictness is that the independence of courts is an accepted canon of decent government, and the law therefore does not lightly hold a state responsible for their faults."); EDWIN M. BORCHARD, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* 330 (The Banks Law Publishing Co. 1919) **(RL-3)** at 335 (Explaining that a state is not liable for the acts of its judicial authorities unless there has been some "flagrant or notorious injustice or denial of justice" sanctioned by the court of last resort.).

41 *Gramercy Funds Management and Gramercy Peru Holdings LLC v. The Republic of Peru*, UNCITRAL Final Award (6 December 2022) ("***Gramercy Funds v. Peru***") (**RL-114**) ¶ 1020. Regarding the international recognition of the principle of judicial independence referred to in *Gramercy v. Peru*, *see Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, 1970 ICJ 3, Separate Opinion of Judge Tanaka (5 February 1970) **(RL-8)** at 155 ("The independence of the judiciary, therefore, despite the existence of differences in degree between various legal systems, may be considered as a universally recognized principle in most of the municipal and international legal systems of the world. It may be admitted to be a 'general principle of law recognized by civilized nations' (Article 38, paragraph 1(c), of the Statute).").

GAMA assails the independence and impartiality of Macedonia's judiciary as a whole, without offering any evidence of a purported lack of independence in the court proceedings involving GAMA. *See* Reply ¶¶ 10-13. As explained above, investment treaty tribunals have found that such generalized attacks on a country's judiciary cannot serve as the basis for upholding investment treaty claims about alleged judicial misconduct in a particular proceeding. *See supra* § II.

28. Second, the relative competencies of domestic courts and international tribunals is a further basis for deference.[42] It is undisputed (and indisputable) that, as further discussed below, international tribunals are not courts of appeal for decisions rendered by domestic courts.[43] In this case, the Macedonian judiciary is best placed to interpret and administer Macedonian laws.[44]

29. Third, due deference to local court proceedings under the denial of justice standard is justified in light of the adversarial process, which gives litigants (including foreign investors) an opportunity to submit arguments and evidence, as well as the rationality of the decision-making process. As observed by Professor Douglas, it is the "rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process, that sets adjudication apart from other institutions of social ordering within the State" and justifies a distinct treatment under the denial of justice standard.[45]

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[42] *See, e.g., Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability (12 September 2014) **(RL-77)** ¶ 583 ("The Tribunal must recognize the allocation of competencies between adjudicatory bodies at the national and international levels. An international tribunal cannot second-guess the court's interpretation and application of local law.") (emphasis added); *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, 1970 ICJ 3, Separate Opinion of Judge Tanaka (5 February 1970) **(RL-8)** at 158 (explaining that erroneous decisions of municipal law cannot constitute a denial of justice because the interpretation of municipal law "does not belong to the realm of international law … An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs."); *Mamidoil Jetoil Greek Petroleum Products Société Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015) (**RL-145**) ¶ 764 ("The Tribunal is not a super-appellate court. It has no competence to muse over the question of whether the majority of the Albanian Supreme Court was right when it overturned a decision of a first instance court, whether the first instance court had better reasoning or whether dissenters within the Supreme Court had the better reasoning.") (emphasis added).

[43] *See infra* § III.A.3; Statement of Defence ¶ 126-128.

[44] This is particularly so given that many of GAMA's claims involve attempts to relitigate novel issues of Macedonian bankruptcy law as determined by a Macedonian judge who GAMA describes as "a seasoned judge who, at that time, served as the Head of the Bankruptcy and Liquidation Department at the Civil Court Skopje" and who "was no novice to the intricate complexities of bankruptcy proceedings." Reply ¶ 101. *See also* Aniruddha Rajput, *Cross-Border Insolvency and Public International Law*, 19 ROMANIAN J. OF INT'L LAW 7 (2018) **(RL-103)** at 2 ("The very nature of insolvency, it has been argued, influences nations to legislate for it in a matter that takes into account and reflects the nations' historical, social, political and cultural needs.").

[45] Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) INT'L & COMP. L.Q. 28 (2014) **(RL-80)** at 876. *See also Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, 1970 ICJ 3, Separate Opinion of Judge Tanaka (5 February 1970) **(RL-8)** at 154-155 (stating that what distinguishes the judiciary from other organs of government is the "social significance of the judiciary for the settlement of conflicts of vital interest as an impartial third party and, on the

30. Fourth, the proper functioning of domestic courts would be undermined if their interpretation and application of domestic law were under constant threat of second-guessing and sanctions from international tribunals. As the tribunal in *Loewen* observed, "[t]oo great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage … the integrity of the domestic judicial system."[46]

2. The cases cited by GAMA do not support its position in this arbitration

31. GAMA does not engage with the substance of any of the above. The most that GAMA says is that other investment treaty tribunals have "considered the judicial conduct in breach of the FET or expropriation provisions without limiting it to instances of a denial of justice."[47] But as demonstrated in Sections V (on expropriation) and VII.B.1 (on FET)

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other hand, from the extremely scientific and technical nature of judicial questions, the solution of which requires the most highly conscientious activities of specially educated and trained experts.' (Article 38, paragraph 1(c), of the Statute).").

[46] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB (AF)/98/3 Award (26 June 2003) ("***Loewen Group v. United States***") (**RL-24**) at ¶ 242. *See also Arif v. Moldova* **(RL-69)** ¶ 440 (endorsing this statement by the tribunal in *Loewen*).

[47] Reply ¶ 28. GAMA also argues that "scholars … confirm that the review of a judicial conduct [*sic*] is not limited to instances of a denial of justice." *See* Reply ¶ 31, referring to commentary by Aniruddha Rajput, Hamid Gharavi, and former ICJ President Eduardo Jiménez de Aréchaga. These commentaries do not help GAMA.

Mr. Rajput affirms that "State responsibility for judicial actions is best captured by denial of justice: a well-established standard in customary international law." Aniruddha Rajput, Cross-Border Insolvency and Public International Law, 19 ROMANIAN J. OF INT'L L. 7 (2018) **(RL-103)** at 23.

Mr. Gharavi's article says that "[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," citing to an unpublished award in *Aktau Petrol Ticaret AS v Republic of Kazakhstan*, where Mr. Gharavi was counsel to the claimant. Hamid Gharavi, Discord Over Judicial Expropriation, ICSID Review, Vol. 33, No. 2 (2018) **(CL-73)** at 355. Such reliance on an unpublished award illustrates the lack of support for Mr. Gharavi's position. Moreover, the *Aktau* award is uninstructive because, according to Mr. Gharavi, the tribunal did not decide if there could be an FET breach independently of a denial of justice (rather, Kazakhstan apparently "conceded" the point), and the tribunal found an FET breach based on acts of Kazakhstan's executive, not the courts. *Id.* at 351, 355.

Mr. Jiménez de Aréchaga affirms the high standard for finding that a domestic court's breach of domestic law amounts to a breach of international law. He proposes that "judicial decision contrary to municipal law" attract international liability only if three, cumulative "exceptional" circumstances are present: "(a) the decision must constitute a flagrant and inexcusable violation of municipal law, (b) it must be a decision of a Court of last resort, all remedies available having been exhausted; (c) a subjective factor of bad faith and discriminatory intention on the part of the courts must have been present." Eduardo Jiménez de Aréchaga, International Responsibility, 159 RECUEIL DES COURS 267 (1978) (**RL-12**) at 281 (emphasis added). These conditions are consistent with the denial of justice standard itself. *See also* 281 ("As a rule, a State does not incur

below, the cases on which GAMA relies do not establish that the court conduct should be assessed against anything but the denial of justice standard. Rather, the cases fall into one or both of two categories: cases where a tribunal applied the denial of justice standard in substance, even if it was not labelled as such, and cases where discreditable non-judicial conduct was intertwined with judicial conduct to cause the wrong.[48]

32. The only case cited by GAMA that does not fit into at least one of these categories is *Infinito Gold v. Costa Rica*.[49] This case does not assist GAMA. First, the tribunal unanimously dismissed the claimant's claims of misconduct by the Costa Rican courts so the case provides only limited guidance as to what conduct might breach the treaty.[50] Second, only a majority of the *Infinito Gold* tribunal endorsed the position on denial of justice on which GAMA relies, while the dissenting arbitrator, Professor Stern, affirmed that the conduct of the judiciary must be assessed against the denial of justice standard. Professor Stern explained that:

> [t]he problem … with the majority's position is that it can authorize an international tribunal to review fully a national court decision and therefore to act, in fact, as a court of appeal, which is unanimously considered as beyond its powers, as even recognized by this Tribunal, in its Decision on Jurisdiction, where it is stated that 'it is not its role to act as a court of appeal with respect to decisions of domestic courts' … A review of courts' decisions by an international arbitral tribunal, with the same standard of FET as the one used for a review of legislative or administrative decisions, opens the door to international arbitral tribunals playing the role of courts of appeal, which is unanimously considered as not entering into their function.[51]

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responsibility towards aliens for judgments of its courts which are merely erroneous. No State can guarantee to private individuals, be they foreigners or its own nationals, that its courts are infallible… Everybody agrees that an error on the part of a judge is not enough to involve a State's responsibility.").

48 *See infra* §§ V and VII.B.1. *See also* Statement of Defence ¶¶ 139, 225.

49 Reply ¶ 29(a), citing *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021) ("***Infinito Gold v. Costa Rica***") (**CL-70**) ¶¶ 359, 361.

50 *Infinito Gold v. Costa Rica* (**CL-70**) ¶¶ 552, 457, 489, 494, 629, 718.

51 *See Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Separate Opinion on Jurisdiction and on the Merits of Professor Brigitte Stern (26 May 2021) (**RL-161)** ¶¶ 107, 109. *See also* ¶ 99 (noting her "strong disagreement with the analysis of the role of denial of justice" by the majority), ¶109 ("Last but not the least, if any violation by a court of an FET standard less demanding than a denial of justice were admitted, the

33. The decision of the majority in *Infinito Gold* does not help GAMA for two other reasons. First, the majority reasoned that it could assess the Costa Rican courts' conduct outside the context of a denial of justice due to the "autonomous" FET standard in the Canada-Costa Rica BIT, whereas the majority confirmed that under customary international law judicial conduct had to be assessed against the denial of justice standard.[52] Here, GAMA has accepted that "[d]enial of justice under the customary international law is neither broader nor narrower than protection for denial of justice under the FET standard" in the Macedonian BITs that GAMA invokes.[53] Second, the *Infinito Gold* tribunal unanimously rejected the claimant's judicial expropriation claim on the basis that the claimant had failed to show that the Costa Rican judiciary had made decisions "in bad faith," which is consistent with the denial of justice standard.[54]

34. In any event, as shown above, there are good reasons for the position that court conduct can engage a State's international responsibility only if it amounts to a denial of justice. The tribunal in *Gramercy v. Peru* recently reaffirmed this position in a decision issued after *Infinito Gold*.[55]

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denial of justice would become useless and the concept of denial of justice would no longer have any effet utile.")

[52] *Infinito Gold v. Costa Rica* (**CL-70**) ¶¶ 331-350 (basing its finding of an autonomous FET standard on the reference to "principles of international law" in the Canada-Costa Rica BIT, which provides under Article II(2)(a) that "[e]ach Contracting Party shall accord investments of the other Contracting Party: (a) fair and equitable treatment in accordance with principles of international law…"); ¶ 357 ("Costa Rica and Canada essentially argue that, absent a denial of justice, judicial decisions interpreting domestic law cannot breach international law, and that 'claims of arbitrariness or unfairness in the context of judicial decisions must be viewed through the lens of denial of justice.' The Tribunal agrees that this is the case under customary international law.").

[53] *See* Reply ¶ 295 (stating that "[d]enial of justice under the customary international law is neither broader nor narrower than protection for denial of justice under the FET standard," and endorsing the *Chevron v Ecuador (II)* tribunal's statement that "ordinarily, the protection for denial of justice under an FET standard in a treaty (such standard providing the international minimum standard for fair and equitable treatment of an alien) is neither broader nor narrower than protection for denial of justice under customary international law.").

[54] *Infinito Gold v Costa Rica* (**CL-70**) ¶ 718 ("Had this decision been rendered in bad faith, in order to deprive Industrias Infinito of a validly held concession, it would have been open to the Tribunal to assess whether it was expropriatory.").

[55] *See Gramercy Funds v. Peru* (**RL-114**) ¶ 1204 ("[T]he primary cause of action established in the Treaty to challenge a judicial measure is denial of justice … a conclusion that a domestic Court caused a wrongful expropriation (in conjunction with the legislative or executive branches) requires a prior finding of denial of justice."); ¶ 1020 ("The demanding standard stems from the internationally recognized principle of judicial independence; if the States' judiciary systems are independent and impartial, their decisions when

3. GAMA misstates the high standard for proving a denial of justice

35. Macedonia showed in its Statement of Defence that the denial of justice standard is "a demanding one."[56] This is so for the reasons discussed in the previous sections, including the well-established principle that international tribunals are not courts of appeal that review the decisions of domestic courts for errors of fact or law.[57] Judge Tanaka illustrated as much in his separate opinion in the *Barcelona Traction* case, which involved a denial of justice claim based on purported violations of Spanish bankruptcy law and erroneous fact findings by Spanish courts:

> These questions which are concerned with the interpretation of the positive law of a State and which are of a technical nature, cannot in themselves involve an important element which constitutes a denial of justice. Questions of the kind mentioned above may constitute at least "erroneous or unjust judgment" but cannot come within the scope of a charge of denial of justice.
>
> The same can be said concerning the validity of the bankruptcy judgment from the viewpoint of the existence or non-existence of a cessation of payments or a state of insolvency. Even if any error in fact-finding or in the interpretation and application of provisions concerning bankruptcy exists, it would not constitute in itself a denial of justice.[58]

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administering justice within their borders must be accorded high deference, and must enjoy a presumption of legality.").

56 Statement of Defence ¶ 140, quoting *Chevron v. Ecuador (II)* (**CL-46)** ¶ 8.36.

57 Statement of Defence ¶¶ 126-128.

58 *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, 1970 ICJ 3, Separate Opinion of Judge Tanaka (5 February 1970) (**RL-8**) at 158 ("A judgment of a municipal court which gives rise to the responsibility of a State by a denial of justice does have an international character when, for instance, a court, having occasion to apply some rule of international law, gives an incorrect interpretation of that law or applies a rule of domestic law which is itself contrary to international law. Apart from such exceptionally serious cases, erroneous and unjust decisions of a court, in general, must be excluded from the concept of a denial of justice.") (internal citations omitted.) *See also* Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, (Cambridge University Press 2006) (**RL-32**) at 172 ("International law and municipal law belong to different spheres … for the determination of the existence of an unlawful act in international law, it may be said, therefore, that municipal law as such is wholly irrelevant.")

36. In its Reply, GAMA says that this well-established principle "is not in dispute,"[59] and that "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.'"[60]

37. GAMA thus appears to accept the high threshold for establishing a denial of justice claim, but then goes on to argue that "Macedonia wrongly imposes an excessively high threshold."[61] GAMA makes three arguments, addressed below.[62]

38. First, GAMA argues that "modern case law confirms that the customary international law on denial of justice evolved beyond the *Chattin* or *Neer* like standards."[63] However,

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[59] Reply ¶ 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. This is not in dispute.").

[60] Reply ¶ 35. The *Chevron v. Ecuador (II)* tribunal confirmed that *Mondev* articulates a high standard for establishing a denial of justice. *See Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador II*, PCA Case No. 2009-23, Second Partial Award on Track II (30 August 2018) (***"Chevron v. Ecuador II"***) **(CL-46)** ¶ 8.40 (citing *Mondev v. USA* and stating "[t]he Tribunal emphasizes that the legal test for denial of justice requires the claimant to prove objectively that the impugned judgment was 'clearly improper and discreditable', with the failure by the 'national system as a whole to satisfy minimum standards.' There have been many shocks and surprises caused by court judgments in legal history, but without much more, amounting to discreditable improprieties and the failure of the whole national system, such judgments do not amount to a denial of justice."). *See also Liman v. Kazakhstan* **(RL-48)** ¶¶ 347-349.

[61] Reply § C.

[62] GAMA also argues that "an evaluation of the threshold to find a judicial conduct in breach of international obligations is factually driven." Reply ¶ 42. However, the notion of denial of justice is objective and does not vary depending on the facts of each case. GAMA's argument to the contrary is unsupported by the authority it cites, *Saluka v. Czech Republic*, where the parties disagreed on whether the FET clause in NAFTA Article 1105(1) was synonymous with the minimum standard of treatment under customary international law. *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award (17 March 2006) **(RL-29)** ¶¶ 291, 288. The tribunal did not address the threshold for establishing a denial of justice and did not hold that the threshold varies depending on the facts of each case. *Id.* ¶ 291.

[63] Reply ¶¶ 32-35. GAMA cites *Mondev v. USA* and *Tatneft v. Ukraine*, neither of which helps GAMA. The *Mondev* tribunal distinguished denial of justice claims from other FET claims and reaffirmed the high threshold for establishing the former. *See Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (**CL-13**) ¶ 126 ("As noted already, in applying the international minimum standard, it is vital to distinguish the different factual and legal contexts presented for decision. It is one thing to deal with unremedied acts of the local constabulary and another to second-guess the reasoned decisions of the highest courts of a State."), ¶ 127 (endorsing the standard in *ELSI* – "a willful disregard of due process of law, … which shocks, or at least surprises, a sense of judicial propriety" – as "useful also in the context of denial of justice …"). In *Tatneft*, the tribunal compared the "international minimum standard" of

recent authorities clarify that the standard for establishing a denial of justice remains high, not least because investment treaty tribunals must not act as international appellate courts.[64] For example, the tribunal in *Liman v. Kazakhstan* held:

> The Tribunal emphasizes that an international arbitration tribunal is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts. The Tribunal stresses that **the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law**.[65]

39. In *EBO Invest v. Latvia*, the claimants made a denial of justice claim on the basis that, among other things, a Latvian court had acted both as first instance and appellate court in the same proceedings.[66] The tribunal rejected the claims and underlined the high threshold for denial of justice claims:

> **[A] very high threshold is required** to be met in order for an investor to prevail on a claim for denial of justice, whether in respect of an alleged failure to provide administrative or judicial due process … [I]t is **uncontroversial**, as stated by Judge Greenwood in the *Loewen v. USA* case, that an international tribunal is not to act as a court of appeal or to review the findings

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treatment with the FET standard in the Ukraine - Russia BIT. *OAO "Tatneft" v. Ukraine*, PCA Case No. 2008-8, Award on the Merits dated 29 July 2014 ("***Tatneft v. Ukraine***") (**CL-23)** ¶ 475. It did not postulate a low standard for denial of justice claims. On the contrary, the *Tatneft* tribunal "readily accept[ed]" the "generally accepted position" that "international tribunals ought to be deferential to domestic courts," and confirmed that "there is broad agreement in considering that mere errors of fact or law on the part of the domestic courts do not breach the standard of denial of justice." *Id.* ¶¶ 352, 475.

64 *See Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Final Award (22 February 2021) (**RL-160**) ¶ 210, 213, quoting *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (**RL-43**) ¶ 94 ("The general rule is that 'mere error in the interpretation of the national law does not per se involve responsibility.' Wrongful application of the law may nonetheless provide 'elements of proof of a denial of justice.' But that requires an extreme test: the error must be of a kind which no competent judge could reasonably have made. Such a finding would mean that the state had not provided even a minimally adequate justice system."). The *Agility* tribunal went on to explain that "[t]his high standard of what constitutes a denial of justice is in line with the fact that an international arbitration tribunal is *not* an appellate court and does not function to correct errors of domestic law." *See Agility v. Iraq* (**RL-160**) ¶ 215 (emphasis in original.) It followed that "the Claimant must show that Respondent had not provided a minimally adequate justice system in order to satisfy the high threshold for a claim for denial of justice." *Id.* ¶ 216.

65 *Liman v. Kazakhstan* **(RL-48)** ¶ 274.

66 *Staur Eiendom AS EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020) **(*"EBO Invest and others v. Latvia"*) (RL-106)** ¶¶ 355-382.

> of a national court, but rather must find that the administration of justice was "scandalously irregular" or, as has been stated by others, involves "a particularly serious shortcoming" and "egregious conduct" that shocks, or [as in *ELSI*] at least surprises, a sense of judicial propriety.[67]

40. Other recent cases are to the same effect.[68]

41. In addition to its general argument that the denial of justice standard has evolved, GAMA argues in particular that the presumption of legality of domestic court decisions "is obsolete" and "antiquated."[69] GAMA relies on *Arif v. Moldova* and *Tatneft v. Ukraine*, but neither decision says anything about the presumption of legality.[70] The *Tatneft* tribunal suggested that deference to domestic courts is "not automatic,"[71] which is a long shot from saying, as GAMA does, that the presumption of legality is "obsolete."[72] On the

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[67] *EBO Invest and others v. Latvia* **(RL-106)** ¶ 472-473 (emphasis added).

[68] *See e.g., Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award (20 September 2021) ("***Lion v. Mexico***") **(RL-113)** ¶ 299 ("[D]enial of justice requires a finding of an improper and egregious procedural conduct by the local courts (whether intentional or not), which does not meet the basic internationally accepted standards of administration of justice and due process, and which shocks or surprises the sense of judicial propriety."); *IC Power v. Guatemala* **(RL-108)** ¶ 580 ("[I]nternational law sets a particularly high threshold for the conduct of the judiciary to constitute an international delict"); *Oostergetel v. Slovak Republic* **(RL-63)** ¶ 273 (deciding that that the standard for denial of justice (as part of the FET standard) was "a demanding one. To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards."); *Chevron v. Ecuador II* **(CL-46)** ¶ 8.37 ("As a former ICJ judge once wrote: if all that a judge does is to make a mistake, i.e. to arrive at a wrong conclusion of law or fact, the State is not responsible. The only thing that can establish a denial of justice so far as a judgment is concerned is an affirmative answer, duly supported by evidence, to some such question as 'Was the court guilty of bias, fraud, dishonesty, lack of impartiality, or gross incompetence?' … [B]ona fide error does not entail responsibility."), citing G.G. Fitzmaurice, *The Meaning of the Term 'Denial of Justice,* 13 BRITISH YEARBOOK OF INT'L L. 93, 1932 at 112-113 (**CL-301**)); *Peter Franz Vöcklinghaus v. Czech Republic*, UNCITRAL, Final Award (19 September 2011) ("***Vöcklinghaus v. Czech Republic***") **(RL-60)** ¶ 205 ("[M]ere judicial error, even if it results in serious injustice, does not amount to a denial of justice in the context of a Treaty claim.").

[69] Reply ¶¶ 23, 41.

[70] Reply ¶¶ 23-24. The *Arif* tribunal affirmed the high threshold for establishing a denial of justice. *See Arif v. Moldova* **(RL-69)** ¶ 443 ("In other words, as long as the judicial system is not tested as a whole, the fair and equitable treatment standard is not violated via a denial of justice."); ¶ 445 ("[T]he State can be held responsible for an unfair and inequitable treatment of a foreign indirect investor if and when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions.") (emphasis added).

[71] *Tatneft v. Ukraine* (**CL-23)** ¶ 480.

[72] GAMA refers to other cases that purportedly "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

contrary, the *Tatneft* tribunal "readily accept[ed]" the "generally accepted position" that "international tribunals ought to be deferential to domestic courts."[73] Many investment treaty tribunals, including in recent decisions, have affirmed the presumption of legality in favor of domestic court decisions.[74]

42. Second, GAMA argues that "the standard of review of judicial conduct needs to be further qualified" in light of the principle that "a State cannot rely on its internal law to

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international law." Reply ¶ 25. This is a straw man argument. Macedonia does not argue that domestic court decisions should enjoy "unlimited deference." Rather, such decisions enjoy a presumption of legality and deference that can be overcome when the high threshold for establishing a denial of justice is met.

[73] *Tatneft v. Ukraine* (**CL-23)** ¶ 475. Moreover, *Tatneft* involved circumstances where judicial and non-judicial conduct together contributed to a treaty breach, including the use of force and occupation of the claimants' refinery based on orders of the Ukrainian Minister of the Interior. *Id.* ¶ 396. The tribunal found these facts to be "inseparable from the discussion of the judicial decisions that intervened" to dispossess the claimants of their investment, all of which were part of a "complex network of acts that led one way or another to the court's determinations. Such acts include a role of the Respondent's government in their genesis and development." *Id.* ¶ 397, 465.

[74] *See, e.g., Gramercy v. Peru* **(RL-114)** ¶ 1020 ("The demanding standard stems from the internationally recognized principle of judicial independence; if the States' judiciary systems are independent and impartial, their decisions when administering justice within their borders must be accorded high deference, and must enjoy a presumption of legality.") (emphasis added); *Lion v. Mexico* **(RL-113)** ¶ 369 (affirming "the presumption…that municipal Courts have acted properly unless Claimant proves otherwise[.]"); *Eli Lilly and Co. v. Government of Canada*, Final Award (16 March 2017) **(CL-94)** ¶ 22 ("[C]ourts are given] a greater presumption of regularity than legislative or administrative acts."); *Chevron v. Ecuador (II)* **(CL-46)** ¶ 8.41 ("A claimant's legal burden of proof is … not lightly discharged, given that a national legal system will benefit from the general evidential principle known by the Latin maxim as *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. It presumes (subject to rebuttal) that the court or courts have acted properly.") (emphasis added) and ¶ 8.42 (observing that the denial of justice standard adopts a presumption that the "courts have acted properly" and, accordingly, the courts are "permitted a margin of appreciation before the threshold of a denial of justice can be met."); D.P. O'Connell, INTERNATIONAL LAW (2nd ed.,Stevens & Sons, 1970) **(RL-120)** at 948 ("When one comes to examine failure of the courts themselves 'palpable deviation' from the accepted standards of judicial practice are not so readily ascertained. For one thing, there is a presumption in favour of the judicial process. For another, defects in procedure may be of significance only internally, and not work an international injustice. For a third, wide discretion must be allowed a court in the reception and rejection of evidence, in adjournment, and in admission of documents, and it cannot be said that deviations even from the municipal law rules of evidence are deviations from an international standard … Bad faith and not judicial error seems to be the heart of the matter, and bad faith may be indicated by an unreasonable departure from the rules of evidence and procedure."). Investment treaty tribunals have cited this commentary by Professor O'Connell with approval. *See Chevron v. Ecuador (II)* (**CL-46**) ¶ 8.41; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* ICSID Case No. ARB(AF)/98/3, Opinion of Christopher Greenwood, Q. C. (**RL-125**) ¶ 14. *See also Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 November 2014) **(RL-142)** ¶ 637 ("[I]t is necessary to make a series of clarifications in order to prevent the denial of justice from degenerating into an ordinary appeal instance, which appellants misuse to attempt to review judgments with which they simply disagree. In this task, the starting point must be the principle that all acts emanating from a State enjoy a presumption of legality, and it is the party alleging denial of justice who bears the burden of proving it.") (translation of Spanish original)(emphasis added.)

justify an internationally wrongful act."[75] That argument is beside the point, because GAMA does not allege that any provisions of Macedonian law at issue in this arbitration violate the Turkey-Macedonia BIT. The thrust of GAMA's claim is that the Macedonian courts misapplied governing Macedonian law.

43. Third, GAMA contends that "[c]laims 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."[76] However, GAMA ignores recent authorities affirming that "an elevated standard of proof is required for finding a denial of justice due to the gravity of a charge which condemns the State's judicial system as such,"[77] and requiring "evidence of the most convincing nature" to meet this elevated standard of proof.[78]

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[75] Reply ¶ 36.

[76] Reply ¶¶ 39-41. GAMA refers to *Chevron v. Ecuador (II)*, where the tribunal applied the balance of probabilities standard to a denial of justice claim. *See* Reply ¶ 40(c), citing *Chevron v. Ecuador (II)* (**CL-46)**, ¶ 8.42. GAMA ignores that tribunal's holding that domestic courts benefit from a presumption that they have acted properly and that the claimant's burden of proof is "not lightly discharged." *See id.* ¶ 8.41 ("A claimant's legal burden of proof is … not lightly discharged, given that a national legal system will benefit from the general evidential principle known by the Latin maxim as *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*. It presumes (subject to rebuttal) that the court or courts have acted properly. This general principle subsumes a second principle, namely that a court is permitted a margin of appreciation before the threshold of a denial of justice can be met. Nonetheless, the balance of probabilities remains the standard of proof, with the claimant bearing the overall legal burden of proof."). The other cases that GAMA cites in favor of applying the balance of probabilities standard to this case are inapposite. In *Tokios Tokelés v. Ukraine*, the tribunal assessed the conduct of non-judicial State agencies that allegedly brought baseless legal actions against claimants (which the Ukrainian courts dismissed), and the conduct of State agencies in pressuring courts to adopt decisions supposedly contrary to facts and law, in retaliation against a publication about an Ukrainian opposition politician. *See* Reply ¶ 40(a), citing *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007 (**CL-75**) ¶ 84. No comparable factual allegations are at issue in this arbitration. In *Saipem v Bangladesh*, the tribunal accepted the balance of probability standard in circumstances where the respondent did not dispute the standard and the tribunal was thus not called upon to decide the issue. *See* Reply ¶ 40(b), citing *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (30 June 2009) ("***Saipem v. Bangladesh***") (**CL-24**) ¶ 114.

[77] *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016) ("***Philip Morris v Uruguay"***) **(RL-92)** ¶ 499.

[78] *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30 November 2011) ("***White Industries v. India***") (**CL-37**) ¶ 10.4.8 ("It is clear that this is a stringent standard, and that international tribunals are slow to make a finding that a State is liable for the international delict of denial of justice. As the Great Britain-Mexico Claims Commission put it: 'It is obvious that such a grave reproach can only be directed against a judicial authority upon evidence of the most convincing nature'," quoting *El Oro Mining Railway Company (Great Britain) v. Mexico*, V RIAA ¶¶ 191, 198 (Great Britain-Mexico Claims Commission, Decision No. 55, 18 June 1931).). *See also Gramercy v. Peru* (**RL-114**) ¶ 1072 ("[The claimants' allegations] have not been sufficiently established by convincing evidence, and thus, Claimants have not met the high standard of proof required to find that the Republic engaged in denial of justice.") (emphasis added).

44. In sum, GAMA's arguments do not detract from the demanding standard for establishing denial of justice claims. GAMA's allegations of misconduct by the Macedonian courts do not come close to meeting this standard, as shown below.

B. GAMA'S COMPLAINTS ABOUT THE PAYMENT DISPUTE PROCEEDINGS ARE UNFOUNDED AND, IN ANY EVENT, FALL FAR SHORT OF A DENIAL OF JUSTICE

45. GAMA maintains its complaints about the court proceedings that arose from its application for a Payment Order against TE-TO. As explained below, there is no basis under Macedonian law for these complaints. The courts properly assumed jurisdiction over a case that GAMA chose to bring, applied the (Macedonian) law that GAMA pled, afforded repeated opportunities for GAMA to appeal (sometimes successfully), and did so without delay. None of this speaks a whisper of a denial of justice.

1. The Macedonian courts properly assumed jurisdiction over the Payment Dispute, without objection by GAMA or TE-TO

46. Macedonia explained in its Statement of Defence that GAMA had submitted its payment dispute with TE-TO to the jurisdiction of the Macedonian courts by availing itself of the expedited payment dispute procedure under Macedonian law.[79] In doing so, GAMA waived its right to object to the Macedonian courts' jurisdiction based on the arbitration clause.[80]

47. In its Reply, GAMA maintains that it "never waived [its] rights to arbitrate."[81] According to GAMA, there was no reason to invoke the dispute resolution provisions of the EPC Contract because "TE-TO was not disputing its payment obligation" at the time.[82] That is not serious. If TE-TO was "not disputing its payment obligation," it

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79 Statement of Defence ¶¶ 49-50.

80 Statement of Defence ¶ 50.

81 Reply ¶ 53.

82 Reply ¶ 50.

would have paid GAMA. It did not, and GAMA had to take steps to compel it to pay. That amounts to a payment dispute and GAMA cannot pretend otherwise.[83]

48. Macedonia previously explained that, three days before applying for a Payment Order, GAMA also applied for a judicial injunction to block TE-TO's accounts and argued in that context that the arbitration clause of the EPC Contract was inapplicable.[84] In its Reply, GAMA says that its application for an injunction relied on the Law on International Commercial Arbitration (which allows a court to issue provisional measures before arbitration).[85] That was not all that GAMA said in its application, however. GAMA also argued that it had no dispute with TE-TO (that GAMA and TE-TO had "reached an amicable solution for all disputed issues") and thus that the dispute resolution provisions (including the arbitration clause) under the EPC Contract were inapplicable.[86] Having taken that position, GAMA cannot seriously claim to have been surprised that the Macedonian courts assumed jurisdiction.

49. GAMA also accuses the Macedonian courts of having misapplied the New York Convention.[87] According to GAMA, the New York Convention required the Macedonian courts to refer the parties to arbitration.[88] GAMA says that the New York Convention establishes a "mandatory requirement" to refer to arbitration disputes subject to a valid arbitration agreement and that national courts are "prohibited from hearing the merits of such disputes."[89] That overstates the Convention's requirements. Article II(3) of the

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83 GAMA's own account of the facts describes how the dispute arose *before* GAMA applied for the Payment Order: TE-TO's debt was payable no later than 31 March 2012, and when TE-TO failed to pay GAMA "warned [TE-TO] on several occasions and called it to fulfill the payment obligation" (GAMA's Application for Provisional Measures, dated 30 November 2012 (**C-31**) at 2). TE-TO's continuing refusal to pay, and GAMA's failure to close out punch list items and remedy latent defects in its works, further underscore that a dispute had arisen (Statement of Defense ¶¶ 26, 29).

84 Statement of Defence ¶ 34; Decision of the Basic Court, dated 1 February 2013 (**C-34**) at 3-4.

85 Reply ¶ 52; Statement of Defence ¶ 34; Decision of the Basic Court, dated 1 February 2013 (**C-34**) at 3-4.

86 Statement of Defence ¶ 34; Decision of the Basic Court, dated 1 February 2013 (**C-34**) at 3-4. Macedonia explained that GAMA also relied on the Macedonian Law on International Commercial Arbitration which allows a court to issue provisional measures before or during arbitration. *Id* at 3-4.

87 Reply ¶ 54.

88 Reply ¶¶ 54-56.

89 Reply ¶ 55.

Convention makes clear that it is only "at the request of one of the parties" that the court is required to refer an "action" to arbitration:[90]

> The court of a Contracting State, **when seized of an action** in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, **at the request of one of the parties**, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

50. Thus, contrary to GAMA's position, the Basic Court was not required under the New York Convention to refer the parties to arbitration when TE-TO objected to its jurisdiction over GAMA's injunction application.[91] The court was not seized of an "action,"[92] and the New York Convention says nothing about interim measures. In any event, even if the Court had ignored the Convention in this respect (which it did not), it would have done so at GAMA's request, and GAMA would hardly have a basis to complain. And, while the Macedonian courts were subsequently seized of an "action" (when TE-TO objected to the Payment Order and Notary Snezana Vidovska referred the matter to the Basic Court),[93] neither TE-TO nor GAMA requested at that point that the court refer the matter to arbitration. In its objection to the Payment Order, TE-TO did not request that the Basic Court refer the parties to arbitration,[94] and instead accepted the Basic Court's jurisdiction under Article 57 of the Law on Private International Law.[95] For its part, GAMA did nothing for four months.[96] When it finally responded, it did not request that the Basic Court refer the parties to arbitration.[97]

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90 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**CL-76**) Article II(3) (emphasis added).

91 Reply ¶¶ 53-54.

92 Statement of Defence ¶ 35; Decision of the Basic Court, dated 1 February 2013 (**C-34**).

93 Statement of Defence ¶ 40.

94 Objection to Payment Order, dated 13 December 2012 (**C-40**).

95 Macedonia explained that under Article 57 of the Law on Private International Law, a defendant consents to the jurisdiction of the court if it objects to a payment order (irrespective of whether that payment order was issued by a notary or a court). *See* Statement of Defence ¶ 50; Macedonian Law on Private International Law (**C-52**) Article 57. GAMA does not dispute this point in Reply. *See* Reply ¶ 53, footnote 117 (GAMA quotes from Macedonia's Statement of Defence ¶ 50 yet does not disagree).

96 Statement of Defence ¶ 43.

97 Statement of Defence ¶ 43; GAMA's submission to withdraw its claim, dated 9 May 2013 (**C-46**).

51. GAMA does not (and cannot) dispute that, as Macedonia showed in its Statement of Defence, municipal courts under the New York Convention regularly recognize that parties to an action may waive explicitly or implicitly their right to arbitration by commencing or participating in judicial proceedings.[98] The UNCITRAL Secretariat's guide on the New York Convention (referenced by GAMA) confirms this:

> [T]he relevant case law [on the Article II(3)] suggests the word 'inoperative' covers situations where the arbitration agreement has become inapplicable to the parties or their dispute … [including] in circumstances where parties had waived their right to arbitrate by initiating judicial proceedings.

52. As Professor van den Berg confirms, under the New York Convention "a court can refer to arbitration only if one of the parties so requests."[99] GAMA cannot re-write the history of its own procedural choices before the Macedonian courts, or re-draft the Convention such that the courts would be required to refer the parties to arbitration *without* a request from the parties.

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98 Statement of Defence, footnote 90, citing *Gabbanelli Accordions & Imps., L.L.C. v. Ditta Gabbanelli Ubaldo Di Elio Gabbanelli*, 575 F.3d 693, 695 (7th Cir. 2009) (**RL-45**) ("parties to an arbitration agreement can always waive the agreement and decide to duke out their dispute in court"); *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022) (**RL-11**) at 7 (directing the Court of Appeals on remand to consider whether the party seeking to stay the litigation and compel arbitration "knowingly relinquish[ed] the right to arbitration by acting inconsistent with that right."); David St John Sutton, Judith Gill, Matthew Gearing, RUSSEL ON ARBITRATION (24th ed. 2015) (**RL-68**) at 7-028 ("By serving a defence or taking other steps in the proceedings that answer the substantive claim a party submits to the jurisdiction of the court in respect of the claim and will not thereafter be able to obtain a stay requiring the other party to pursue his claim, if at all, by arbitration. In other words, by accepting the court's jurisdiction to hear the substantive case he is treated as electing to have the matter dealt with by the court rather than insisting on his contractual right to arbitrate.")

99 Albert Jan van den Berg, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (**R-121**) at 138 ("a court can refer to arbitration only if one of the parties so requests. If a court is faced with a contract containing an arbitral clause falling under the New York Convention, but none of the parties objects to the competence of the court on that basis of that clause, the court may not refer the parties to arbitration on its own motion." And "if a party does not invoke the arbitration agreement, the court will retain competence to hear the case."). *See also Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) (**CL-78**) ¶ 67 ("as arbitration, by definition, is premised on consent, the parties are always at liberty to waive their prior agreement to arbitrate. If neither party alleges the existence of an arbitration agreement, the court will not *ex offcio* refer the parties to arbitration but rather will, as a result, uphold its own jurisdiction.").

2. The Macedonian courts decided the payment dispute under Macedonian law because GAMA pled its case under Macedonian law, not English law

53. Macedonia explained in its Statement of Defence that, while the EPC Contract includes an English law clause, in the Macedonian court proceedings GAMA failed to adduce any evidence on the content of English law or make any submissions about whether (and how) English law would affect the interpretation of the Settlement Agreement.[100] During its entire time in Macedonian courts, GAMA made only Macedonian law arguments.[101] It was only two years after the Payment Dispute proceedings had begun that GAMA first raised the issue of English law (and it did so again without providing evidence of that law or articulating any argument under that law).[102]

54. Macedonia further explained that, in this context, its courts could reasonably have assumed that the interpretation of the Settlement Agreement would not differ under English law.[103] In fact, even in this arbitration, GAMA has yet to offer any articulation as to how the interpretation of the Settlement Agreement would differ under English law.

55. GAMA contends in its Reply that "the application of English law was a duty of Macedonian courts."[104] GAMA references Professor Toni Deskoski (described by GAMA as "a distinguished Professor or Private International Law") for the proposition that "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."[105] This is

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100 Statement of Defence ¶¶ 17, 106, 117, 122, 210; EPC Contract, dated 11 May 2007 (**C-2**) Particular Conditions, Sub-Clause 1.4.

101 Statement of Defence ¶ 210.

102 Statement of Claim ¶¶ 49, 62; Brief by GAMA dated 19 March 2015 (**C-55**) at 4.

103 Statement of Defence ¶ 210.

104 Reply ¶ 61. GAMA also contends that the appellate court conflated jurisdiction with governing law when it observed that GAMA and TE-TO "decided to have the [Payment Dispute] resolved before the courts in the Republic of Macedonia with the application of Macedonian Law." *See* Reply ¶ 58. That is wrong. The court upheld the *jurisdiction* of the Macedonian courts by applying Article 57 of the Law on International Private Law to the fact that TE-TO objected to the Payment Order and considering that GAMA had "failed to challenge the jurisdiction of the court" (as explained above). *See* Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**) at 3; Macedonian Law on Private International Law (**C-52**) Article 57. The issue of *applicable law* was not before the court because GAMA did not raise it.

105 Reply ¶ 60.

misleading. In the full passage that GAMA references, Professor Deskoski sets out the methods to determine the content of foreign law after the court determines that foreign law applies:

> The Macedonian PIL Act has maintained the rule allowing courts to determine and apply the foreign applicable law ex officio. **The contents of the foreign law may be determined in several different ways**. First, information may be obtained from the Ministry of Justice. Second, the parties may also produce a statement on the foreign law's content issued by a competent foreign authority or institution. Finally, the PIL Act introduces a new solution that offers an option for reverting to the *lex fori*. This applies in cases where the foreign law's content cannot be determined in one of the manners described above. Needless to say, 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.[106]

56. Professor Deskoski explains elsewhere that the parties have autonomy to choose the law applicable to their contract and that the choice can be explicit or implicit.[107] That choice can be made (or altered) at any time. As Professor Deskoski explains:

> The parties can agreeably change their contractual position, so there is no reason why this should not be possible by choosing the applicable law after the conclusion of the contract. It is even conceivable that **the governing law could be chosen even after the dispute has arisen**, thus facilitating the task of the court, i.e. arbitration. …[108]

57. In sum, given that both GAMA and TE-TO chose to plead Macedonian law, and neither party chose to adduce evidence of English law, the Macedonian courts could reasonably

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[106] Toni Deskoski, "The New Macedonian Private International Law Act of 2007" Volume X (2008) (**C-166**) at 444.

[107] Toni Deskoski, "The New Macedonian Private International Law Act of 2007" Volume X (2008) (**C-166**) at 449 ("A choice of law by the parties can be made either explicitly or implicitly. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or by other circumstances."); Law on Public International Law (**R-1**) Article 21 ("(1) The law chosen by the contracting parties is the governing law for a contract, unless otherwise determined by this law or an international treaty (2) The will of the parties for the chosen law may be expressed explicitly or derive from the provisions of the contract or from other circumstances (3) The parties can determine the governing law for the entire contract or only for one of its parts."); *see also* Judgment of the Basic Court in Prilep, ПЈП1-ТС-64/13 PL1-TS-64/13, dated 24 October 2013 (**R-23**) (the Court applied Article 21(1) and (2) where there was no explicit choice of law, explaining that the "[p]arties will on the choice of the applicable law may be express or may derive from the provisions of the contract or from other circumstances.").

[108] Toni Deskoski, PRIVATE INTERNATIONAL LAW (2011) (**R-91**) Section 3.1.2.4.

conclude that the parties elected to have their dispute resolved in accordance with Macedonian law.

58. GAMA also says in its Reply that the Supreme Court failed to address its complaints about the applicable law and instead directed the lower courts to apply the Macedonian Law on Obligations.[109] No part of the Supreme Court's order would have precluded GAMA from presenting evidence on English law on remand in the Basic Court (or would have prohibited the Basic Court from taking that evidence into account), however. GAMA, once again, simply chose not to.

59. In any event, even if the Macedonian courts had determined *ex officio* to apply English law, they would still have had reason "for reverting to the *lex fori*." As neither GAMA nor TE-TO adduced evidence of English law or made arguments about how it should be applied to the Settlement Agreement,[110] the courts would have faced a vacuum. In its Reply, GAMA seeks to place that burden on the Macedonian courts by asking: "how could the Macedonian courts legitimately assume that the application of English law would not influence the interpretation of the Settlement Agreement, without having undertaken a comprehensive analysis of English law itself?"[111] But it is unwarranted to presume that the courts should have (i) interpreted the parties reliance on Macedonian law and failure to adduce evidence of any other law to mean that they intended for English law to apply, (ii) researched (and obtained Macedonian translations) of the relevant English statutes and court decisions, and (iii) interpreted and applied English law to the Settlement Agreement without the assistance of counsel (and in the face of counsel's choice to rely on Macedonian law).[112]

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109 Reply ¶ 63.

110 Statement of Defence ¶¶ 17, 106, 117, 122, 210.

111 Reply ¶ 59.

112 Dr. Deskoski does say that "information **may** be obtained from the Ministry of Justice," not that obtaining that information about foreign law is mandatory. *See* Toni Deskoski, "The New Macedonian Private International Law Act of 2007" Volume X 2008: Volume X (2008) (**C-166**) at 444.

60. Poor lawyering is not absolved by blaming the court (and is no basis for a denial of justice claim).[113] If GAMA thought that English law would have made a difference to the outcome (a showing that GAMA has not tried to make even in this arbitration), it was incumbent upon it and its counsel to raise the matter in the local proceedings.

3. The Macedonian courts correctly rejected GAMA's contractual and factual arguments

61. Macedonia previously explained that GAMA's complaint boils down to a disagreement over the Macedonian courts' interpretation of its Settlement Agreement with TE-TO. According to GAMA, under the Settlement Agreement, properly interpreted, TE-TO's obligation to pay was not conditional upon GAMA first resolving the latent defects that had been identified in the Plant and closing items on the Punch List.[114] TE-TO took the opposite position.[115] Both parties made submissions on the correct interpretation,[116] and the courts considered those submissions and the evidence before rendering decisions.[117] On 4 May 2018, the Basic Court found that GAMA's entitlement to payment under the Settlement Agreement was subject to conditions that had not been satisfied.[118]

62. In its Reply, GAMA repeats its argument that TE-TO's obligation to pay was unconditional.[119] GAMA now goes further, however. It says, for the first time in its Reply, 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."[120] GAMA

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113 As the tribunal in *Amto v. Ukraine* put it: "The investor that fails to exercise his rights within a legal system, or exercises its rights unwisely, cannot pass his own responsibility for the outcome to the administration of justice, and from there to the host State in international law." *Amto v. Ukraine* (**RL-36**) ¶ 76.

114 Statement of Defence ¶ 211; *see e.g.,* GAMA submissions to the Court of Appeal, dated 25 September 2018 (**C-68**) at 2-4.

115 Statement of Defence ¶ 211.

116 Statement of Defence ¶ 211.

117 Statement of Defence ¶ 211.

118 Statement of Defence ¶ 105; Decision of the Basic Court, dated 4 May 2018 (**C-10**). This decision was upheld on appeal (Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**)), quashed by the Supreme Court (Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**)), re-confirmed by the Basic Court (Decision of the Basic Court, dated 8 October 2021 (**C-71**)), and quashed by the Court of Appeal (Decision of the Court of Appeal Skopje, dated 2 February 2022 (**C-72**)).

119 Statement of Claim ¶ 197(c); Reply ¶¶ 69-75.

120 Reply ¶ 68.

did not make that argument before the Macedonian courts, and offers no more than a bare assertion here. Yet, on that basis, GAMA contends that the Macedonian courts' decisions were a "manifest misapplication" of Article 111(1) of the Law on Obligations (which incorporate the *exceptio non-adimpleti contractus* and excuses a contracting party from performing its obligations if the other party "does not perform or is not ready to perform the obligation simultaneously, except where otherwise agreed, provided by law or indicated by the nature of the transaction").[121]

63. There was no "manifest misapplication" of the law. The Macedonian courts did their job: they reviewed the evidence (including the Settlement Agreement and correspondence between the parties), considered arguments from both sides (including during 16 hearings,[122] related submissions from GAMA and TE-TO,[123] and the unopposed report of

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[121] Reply ¶ 68; Law on Obligations (**R-5**) Article 111(1) ("When a contract is bilateral neither party is obliged to perform the obligation if the other party does not perform or is not ready to perform the obligation simultaneously, except where otherwise agreed, provided by law or indicated by the nature of the transaction.").

[122] Payment Order, dated 4 December 2012 (**C-6**), Decision of Basic Court, dated 1 February 2013 (**C-34**), Decision of the Court of Appeal, dated 14 March 2013 (**C-35**), Decision of Basic Court, dated 7 March 2014 (**C-7**), Decision of the Court of Appeal, dated 15 December 2014 (**C-8**), Decision of the Basic Court, dated 12 June 2015 (**C-59**), Decision of the Court of Appeal Skopje, dated 16 June 2016 (**C-61**), Decision of the Basic Court, dated 4 May 2018 (**C-10**), Decision of the Basic Court, dated 29 September 2016 (**C-62**), Decision of the Basic Court, dated 23 April 2019 (**C-63**), Decision of the Court of Appeal, dated 18 October 2019 (**C-11**), Decision of Macedonian Supreme Court , dated 23 December 2020 (**C-12**), Decision of Basic Court, dated 8 October 2021 (**C-71**), Decision of the Court of Appeal, dated 30 June 2022 (**C-73**), Decision of the Basic Court, dated 13 April 2023 (**R-18**), GAMAs appeal, dated 4 October 2023 (**R-25**).

See also Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 7 April 2023 **(R-88)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 31 January 2023 **(R-86)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, 13 December 2022 (**R-85)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 1 October 2021 **(R-80)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 1 September 2021 **(R-79)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 9 June 2021 **(R-78)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 17 April 2018 **(R-55)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 13 April 2018 **(R-54)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 13 February 2017 **(R-47)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 23 December 2016 **(R-45)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 29 September 2016 **(R-43)**; Minutes of Basic Court Hearing in Payment Dispute proceedings, dated 19 March 2015 **(R-38)**; Decision of the Basic Court in Payment Dispute proceedings, dated 13 April 2023 **(R-18)**; Decision of the Basic Court in Payment Dispute proceedings, dated 24 October 2013 **(R-23)**; Minutes of Basic Court Hearing, dated 19 December 2012 **(R-31);** Decision by Basic Civil Court Skopje in Payment Dispute proceedings, dated 2 May 2014 (**R-32**); Decision by Appellate Court Skopje TSZ-1482-14 in Payment Dispute proceedings, dated December 2014 **(R-35)**; Decision by Basic Civil Court Skopje in Payment Dispute proceedings, dated 19 March 2015 **(R-37)**; Decision by Appellate Court Skopje in Payment Dispute proceedings, dated 15 April 2016 **(R-41)**; Decision by Basic Civil Court Skopje in Payment Dispute proceedings, dated 13 April 2018 **(R-52)**.

[123] *See e.g.* GAMA's appeal, dated 4 October 2023 (**R-25**); GAMA's request to introduce new evidence, dated 14 November 2023 (**R-24**); GAMA's appeal in Payment Dispute proceedings, dated 4 October 2023 (**R-25**); Brief

TE-TO's expert Goran Markovski[124]), and reached their conclusion. In its recent April 2023 decision, which GAMA says was served on it only after the filing of its Reply on 27 September 2023, the Basic Court summarized the factual basis for these findings:

> In Article 2 of the Agreement concluded between the plaintiff as a contractor and the defendant as an owner, it is stated that the plaintiff Gama Guch is responsible for all hidden deficiencies and defects of the equipment and systems perceived during the performance or commissioning of the same, while in Article 3 the obligation of the plaintiff to carry out the removal of construction defects according to the agreed List of Tasks and Revised List of Tasks.
>
> …
>
> The debt due to the sued Invoice from the defendant to the plaintiff was not paid due to unfulfilled tasks by the plaintiff, which he had as an obligation under the contract …
>
> …
>
> [T]he defendant TE-TO in its accounting records showed an obligation to the plaintiff for the invoice in question for EUR 5,000,000 based on Annex No. 9 and Settlement Agreement.
>
> From the Settlement Agreement, the court determined that the plaintiff is responsible for all the deficiencies in the Power Plant and his obligation is to remove them following the List of Tasks, as well as the defendant's obligation stated in Article 3 of Annex No. 9, which arose as a result of late fulfillment.

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by GAMA in Payment Dispute proceedings, dated 14 May 2014 (R-33); Appeal by GAMA in Payment Dispute proceedings, dated 21 July 2015 (**R-39**); Answer to appeal by GAMA in Payment Dispute proceedings, dated 13 April 2017 (**R-49**); Brief by GAMA in Payment Dispute proceedings, dated 27 April 2017 (**R-50**); Brief by GAMA in Payment Dispute proceedings, dated 6 February 2018 (**R-51**); Brief by GAMA in Payment Dispute proceedings, dated 7 April 2023 (**R-87**); Brief by GAMA in Payment Dispute proceedings, dated 22 February 2022 (**R-81**); Brief by GAMA in Payment Dispute proceedings, dated 28 September 2018 (**R-63**); Answer to appeal by TE-TO in Payment Dispute proceedings, dated 7 September 2015 (**R-40**); Answer to appeal by TE-TO, dated 15 May 2014 (R-34); Brief by TE-TO in Payment Dispute proceedings, dated 29 September 2016, (**R-42**); Brief by TE-TO in Payment Dispute proceedings, dated 7 February 2017 (**R-46**); Brief by TE-TO in Payment Dispute proceedings, dated 17 November 2016 (**R-44**); Appeal by TE-TO in Payment Dispute proceedings, dated 5 April 2017 (**R-48**); Brief by TE-TO in Payment Dispute proceedings, dated 2 June 2021 (**R-77**); Brief by TE-TO in Payment Dispute proceedings, dated 15 December 2018 (**R-65**); Brief by TE-TO in Payment Dispute proceedings, dated 7 December 2022 (**R-84**); Answer to appeal by TE-TO in Payment Dispute proceedings, dated 5 October 2018 (**R-64)**; Answer to appeal by TE-TO in Payment Dispute proceedings, dated 4 February 2020 (**R-68**); Answer to appeal by TE-TO in Payment Dispute proceedings, dated 24 February 2022 (**R-82**); GAMA's appeal, dated 4 October 2023 (**R-25**).

[124] Statement of Defence ¶ 112; Expert report of Goran Markovski, dated November 2013 (**C-48**).

…

> [T]he defendant listed in detail uncompleted tasks that the plaintiff had as an obligation.
>
> From the List of Tasks, the court determined that the obligations of the plaintiff were known and the same arose from the primary Agreement concluded between the parties, and not from Annex No. 9 and the Agreement.
>
> From the same evidence, it was also determined that the terms that apply to the fulfillment of the obligations by the plaintiff, most of them are due immediately. [125]

64. On that factual foundation, the Macedonian courts correctly applied Article 111 in determining that TE-TO's obligation to pay was conditional upon GAMA performing first (and not the reverse).[126] The Macedonian courts were not required, under that Article or on any other basis, to find that GAMA ought to be paid before it had completed the work. Legal systems all over the world recognize that one party's failure to perform gives rise to remedies available to the other party, including the possibility of withholding its own performance.[127]

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[125] GAMA's request to introduce new evidence, dated 14 November 2023 (**R-24)** at 2; Decision of the Basic Court, dated 13 April 2023 (**R-18**) at 8. The Basic Court similarly found on 23 December 2020: "The evidence showed also that the deadlines valid for the obligations by [GAMA] that most of the matured immediately [upon execution of the Settlement Agreement]" (Decision of the Basic Court, dated 23 December 2020 (**C-71**) at 9-10).

[126] *See* Decision of the Basic Court, dated 4 May 2018 (**C-10**) at 8-10 ("When deciding, the judge considered the provision of Article 111 paragraph 1 of Law on Obligations" and "In terms of the provision cited in this way … the defendant is not obliged to fulfil the obligation to the claimant … given that the claimant has not fulfilled his obligation under the contract").

[127] *See, e.g.*, G. H. Treitel, REMEDIES FOR BREACH OF CONTRACT (1988) (**R-95**) at 245 ("One of the most effective remedies of the aggrieved party is simply to refuse to perform his own part of the contract … Effect is given to such refusal by the defence known in civil law systems as the *exception non adimpleti contractus*"); Kiril Chavdar and Kimo Chavdar, LAW ON OBLIGATIONS: COMMENTARIES, EXPLANATIONS, COURT PRACTICE AND SUBJECT REGISTER (2012) (**R-92**), Part II ("If one party demands the fulfillment of an obligation, and has not fulfilled the obligation itself, then the other party can file an objection for non-fulfillment of the obligation (*exceptio non adimpleti contractus*)."); Andrew Hutchison, "Reciprocity in Contract Law", 3 STELLENBOSCH L. REV (2013) (**R-93**) ("Most bilateral contracts will involve an element of exchange between the parties, with one performance being given in return for another. In such a state of affairs, performance (or at least the tender of performance) by one party becomes conditional upon the right of the other party to receive counter-performance. Since performance by one party is conditional upon performance by the other, this entails a concomitant right to withhold performance should counter-performance not be given or at least tendered.").

65. GAMA additionally argues that "the Civil Court Skopje again entirely failed to consider the significant imbalance between the purported GAMA's obligation and its claim against TE-TO."[128] To support that assertion, GAMA quotes the Supreme Court's guidance on remand that "the courts shall also take into account the general principles of conscientiousness [good faith] 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."[129]

66. Macedonian law, like other civil law systems, recognizes an overriding principle of good faith.[130] Good faith may prevent a party from withholding performance in the face of a trivial breach, but GAMA's breach was anything but trivial.[131] The Basic Court noted the estimated cost of meeting (at least some of) GAMA's obligations (EUR 530,086), and observed that TE-TO had asked GAMA in writing to meet those obligations, but GAMA "failed to do so."[132] Because GAMA's breach was not trivial, there was no basis for the good faith principle to prevent TE-TO from withholding its performance until GAMA had performed its obligations.

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[128] Reply ¶ 75.

[129] Reply ¶ 75; Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**) at 4.

[130] Law on Obligations (**R-5**) Article 5 ("In creating the obligatory relations and the exercising of the rights and obligations arising from the obligatory relations the parties shall be obliged to conform to the principle of good faith and honesty.").

[131] *See, e.g.*, G. H. Treitel, REMEDIES FOR BREACH OF CONTRACT (1988) (**R-95**) at 302 ("Civil law systems restrict the operation of the *exceptio non adimpleti contractus* by insisting that a party cannot rely on the defence where to do so would be contrary to good faith. This restriction on the scope of the exceptio is most commonly illustrated by cases of partial or defective performance in which one party's default does not cause serious prejudice to the other"), at 303 ("In German law, the general principle with regard to seriousness of default is stated in CC § 320 par. 2 that where one party has performed in part the other cannot refuse to perform if to do so would be contrary to good faith, having regard in particular to the relatively slight or trivial nature (*Geringfügigkeit*) of the default"), and at 304 ("Austrian law regards the exceptio as available in principle in all cases of defective performance, unless the defect is so trivial that reliance on the exception would be an abuse of rights"); Allan Farnsworth, FARNSWORTH ON CONTRACTS 2, 4th ed., (2018) (**R-96**) § 8.16 ("It is in society's interest to accord each party to a contract reasonable security for the protection of that party's justified expectations. But it is not in society's interest to permit a party to abuse this protection by using an insignificant breach as a pretext for evading its contractual obligations.").

[132] Decision of the Basic Court, dated 8 October 2021 (**C-71**) at 10, 12.

67. GAMA proceeds to challenge the factual findings of the Macedonian courts and says that TE-TO had acknowledged its claim as unconditional:[133]

a) GAMA points (again) to a June 2012 email from Mikhail Scobioala at TE-TO to Hakan Emek at GAMA in which Mr. Scobioala stated "our intention is not to condition the proposed payment schedule with the closing of the punch items list, and please do not consider the required schedule of closing the punch items as precondition for actual payments."[134] This email (which came four months after the execution of the Settlement Agreement) was part of an exchange arising out of GAMA's failure to comply with its obligations under the Settlement Agreement and apparently as the parties were seeking a way forward.[135] There is nothing extraordinary in the Macedonian courts giving little weight to this type of evidence.

b) GAMA also points to a March 2015 audit confirmation letter.[136] This letter was sent to GAMA at the request of TE-TO's auditors, KPMG, to seek confirmation of a EUR 5 million payable balance listed in TE-TO's accounts. The letter says nothing about whether the balance payable had pre-conditions associated with payment or was unconditional.[137] Nor does GAMA say that this letter was adduced as evidence before the Macedonian courts. If it was not, GAMA cannot now blame Macedonian courts for not considering it.

68. In its Reply, GAMA also says that "GAMA's claim was acknowledged by the Supreme Court,"[138] which (according to GAMA) found that "the lower courts did not consider the Punch List, where … [three specific deadlines], valid for [GAMA's] obligations, come

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133 Reply ¶ 69.

134 Reply ¶¶ 69-70, footnote 146; Email from M Scobioala (TE-TO) to H Emek (GAMA) sent 5 June 2012 (**C-30**); Statement of Claim ¶ 29, footnote 16; Statement of Defence ¶ 28, footnote 39.

135 Email from M Scobioala (TE-TO) to H Emek (GAMA) sent 31 May 2012 (**C-28**); Email from H Emek (GAMA) to M Scobioala (TE-TO) to sent 5 June 2012 (**C-29**); Email from M Scobioala (TE-TO) to H Emek (GAMA) sent 5 June 2012 (**C-30**).

136 Reply ¶ 69, footnote 147; Letter from TE-TO to GAMA, dated 17 March 2015 (**C-9**).

137 Letter from TE-TO to GAMA, dated 17 March 2015 (**C-9**).

138 Reply ¶ 71.

after the agreed payment deadline – 31.03.2012"[139] and that that "there is no provision for their mutual conditionality regarding the fulfilment."[140] GAMA leaves out the directives from the Supreme Court to the lower court that directly followed:

> In the retrial, the first instance court shall take into account the assessments of this court, and in that sense remove the material violation of the procedure in line with the above stated explanation, in order to be able to apply the substantive law properly and to pronounce a clear and understandable decision suitable for examination. In 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.**[141]

69. The Supreme Court thus returned the matter for reconsideration by the court of first instance and invite the lower court to weigh the evidence. Doing so does not bind the lower court with respect to earlier findings of fact (or even with respect to the limited scope of the Supreme Court's comments on some of the Punch List items).[142] Rather, the Supreme Court asked the Basic Court to "consider whether and why there is a conditionality."[143] In this regard, the Punch List (which was before the Macedonian

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139 Reply ¶ 71; Decision of the Supreme Court, dated 23 December 2020 (**C-12**) at 4.

140 Reply ¶ 71; Decision of the Supreme Court, dated 23 December 2020 (**C-12**) at 4.

141 Decision of the Supreme Court, dated 23 December 2020 (**C-12**) at 4.

142 The Law on Civil Procedure (**R-36**) Art. 386 provides that lower courts are bound by the "legal understanding" of appellate courts on remand: "The court to which the case is returned for a retrial is bound to that case by the legal understanding on the basis of which the determination of the revision court is based, by which the challenged second-instance judgment was annulled, i.e., by which the second-instance and first-instance judgments were annulled." No similar provision applies to the facts. Rather, Art. 8 of the Law on Civil Procedure (**R-36**) guides lower courts in determining the facts: "Which facts will be taken as proved is decided by the court on its persuasion based on a conscientious and careful assessment of each piece of evidence separately and all the pieces of evidence together, as well as based on the results of the overall procedure."

143 Decision of the Supreme Court, dated 23 December 2020 (**C-12**) at 4. GAMA also argues in its Reply that the Macedonian courts "failed to adhere" to guidance from the Department of Civil Affairs at the Supreme Court (Reply ¶ 72). That guidance states: "The Court shall, after the objection is submitted, act and review on the facts in the refuted part of the decision, but within the framework of the request contained in the decision allowing the execution" (Guidance from the Department of Civil Affairs, dated 23 February 2015 (**C-167**)). GAMA says that "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" (Reply ¶ 73). This is impossible to follow. The guidance is directed at the Supreme Court, not the lower courts. Even if that guidance applied to the lower courts, it cannot mean that on remand the lower courts were barred from considering any facts beyond the select few identified by the Supreme Court. And in any event, GAMA does not say that it raised this guidance before the Supreme

courts and which GAMA disclosed in this arbitration only during document production) shows that roughly 60 items had completion due dates *before* 31 March 2012 (the date of payment by TE-TO of the EUR 5 million) and 17 of those had an "asap" deadline.[144] Thus, based on the Punch List itself, the Basic Court had a basis to conclude that some (if not all) of GAMA's obligations ought to be performed before payment by TE-TO.

70. Finally, GAMA also says that the Macedonian courts shouldn't have concluded that GAMA had breached the settlement agreement because TE-TO had "failed to substantiate its claims against GAMA"[145] and the 2013 expert opinion of Mr. Markovski submitted by TE-TO to the Basic Court lacked "independent verification" from "qualified civil engineers" and relied on documents provided by TE-TO.[146] But if GAMA took issue with Mr. Markovski's report, it could and should have submitted its own expert evidence to the Basic Court.[147] The fact that it did not shows that GAMA either did not dispute that evidence or again was poorly represented. In any event, no specialized engineering skill was required to establish what GAMA does not deny: it had not closed out the Punch List items and latent defects remained.

4. The Macedonian courts ultimately accepted GAMA's argument that TE-TO's debt was recognized in the reorganization plan

71. Macedonia explained in its Statement of Defence that, in September 2018, GAMA relied on the fact that its claim had been recognized in TE-TO's Final Reorganization Plan to

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Court (or the lower courts) in the Payment Dispute and cannot now ask the Tribunal to second-guess decisions of Macedonian courts based on arguments that GAMA failed to make.

144 Final Punch Items List, dated 11 February 2012 (**R-29**), final column.

145 Reply ¶¶ 78-84.

146 Reply ¶¶ 78, 80. Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-48**). GAMA also contends that Mr. Markovski's evidence strengthens GAMA's position because it noted that TE-TO had recorded a EUR 5 million payable to GAMA in its books (Reply ¶ 77). But the payable in TE-TO's accounts was recorded "on the grounds of supplement No. 9 and the settlement agreement" (a fact that Mr. Markovski included in his report), such that it could reasonably be regarded as conditional (Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-48**) at 7). *See also* Decision of the Court of Appeal, dated 18 October 2019 (**C-11**) at 7 (that TE-TO entered its obligation to GAMA in the accounting records "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").

147 Statement of Defence ¶ 105.

appeal the Basic Court's annulment of the Payment Order.[148] The appellate court dismissed the appeal, but that dismissal was then quashed by the Macedonian Supreme Court.[149] On remand, the Basic Court again revoked the Payment Order, and GAMA appealed once more, arguing in part that TE-TO cannot deny its debt to GAMA after recognizing it in the Final Reorganization Plan.[150] The appellate court allowed the appeal and remanded to the Basic Court with instructions "to take into consideration" that GAMA "is a bankruptcy creditor and has a claim in the amount of 5 million euros" in the Final Reorganization Plan.[151]

72. In its Reply, GAMA repeats its complaint that the Macedonian courts denied GAMA's claim even after it had been included in the approved reorganization plan (which GAMA says was inconsistent).[152] But any inconsistency was remedied by the Supreme Court and the appellate court's instructions on remand to the Basic Court.[153] The Basic Court followed those instructions. In its 13 April 2023 decision (which GAMA says it received only after its Reply), the Court said:

> In the retrial, the higher court indicates that the court should take into account … that the plaintiff is a bankrupt creditor for a claim of EUR 5,000,000.00 …
>
> …
>
> In the specific case, the creditor, now the plaintiff, the claim in the amount of [EUR] 5,000,000.00 has been established and recognized as a creditor of the first paid order, and belongs to the second class with unsecured claims.
>
> In that context, in a situation where the plaintiff's claim that is the subject of a claim has already been determined in another procedure, the court

148 Statement of Defence ¶ 110; GAMA appeal, date 25 September 2018 (**C-68**) at 5.

149 Statement of Defence ¶¶ 111, 114; Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**); Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**).

150 Statement of Defence ¶ 122; GAMA appeal, dated 2 February 2022 (**C-72**) at 5, 6.

151 Statement of Defence ¶ 123; Decision of the Court of Appeal Skopje, dated 30 June 2022 (**C-73**) at 2.

152 Reply ¶¶ 85-91.

153 Statement of Defense ¶ 123; Decision of the Court of Appeal Skopje, dated 30 June 2022 (**C-73**) at 2-3.

> cannot decide on the same claim that has already been decided once with a final decision[154]

73. After confirming the security of GAMA's claim in TE-TO's reorganization, the Basic Court annulled the Payment Order, reasoning that GAMA's Payment Dispute lawsuit was then "pointless" as GAMA would recover under TE-TO's Final Reorganization Plan "as a single binding act for all persons of debt-creditor relations."[155]

74. The Basic Court thus got to the conclusion that GAMA was urging. The fact that reaching this conclusion required appeals and remands is not remarkable and cannot constitute a denial of justice. Under international law, it is only the unremedied systemic failure of the judicial system that may give rise to a denial of justice.[156]

75. Finally, GAMA says that the appellate court – "predominantly constituted of the very same judges [as] in previous appeal proceedings (and also in reorganization appeal proceedings)"[157] – "suddenly expressed confusion as to why GAMA's claim had been denied by the Civil Court Skopje" when it had been recognized in TE-TO's reorganization proceedings, thus exhibiting a "remarkable shift in perspective."[158] Taken at its highest, GAMA is concerned that the appellate court changed its mind.[159] This is

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154 Decision of the Basic Court, dated 13 April 2023 (**R-18**) at 8-9.

155 Decision of the Basic Court, dated 13 April 2023 (**R-18**) at 1, 9. *See infra* ¶¶ 77-79.

156 *See, e.g., Jan de Nul v. Egypt* **(RL-39)** ¶ 255 ("[T]he respondent State must be put in a position to redress the wrongdoings of its judiciary. In other words, it cannot be held liable unless 'the system as a whole has been tested and the initial delict remained uncorrected.'"); Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (CAMBRIDGE UNIVERSITY PRESS 2005) (**RL-28**) at 125.

157 Reply ¶ 88. GAMA says that "Ms. Dukovska and Ms. Georgieva, sat as appeal judges in several appeal proceedings involving GAMA and TE-TO." *See* Reply ¶ 88, footnote 177. But those two judges did not sit on the final appellate court, the Supreme Court. *See* Decision of the Supreme Court, dated 23 December 2020 (**C-12**).

158 Reply ¶ 88.

159 Reply ¶ 88. GAMA also says "[t]he 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." *See* Reply ¶ 89. But the appellate court provided a framework for the Basic Court to reconsider the question. Remanding a specific question with instructions to the lower court cannot be a "flagrant abdication of its duty."

hardly remarkable given that GAMA pled the two appeals differently,[160] and the second appeal came after a Supreme Court decision.[161] In any event, the fact that a court may be reversed or change opinion has no relevance to the denial of justice inquiry. As Macedonia explained in its Statement of Defence, it is only once the judicial process has been exhausted (and the courts been given a chance to correct themselves) that a State can be held responsible for a breach of international law.[162]

5. GAMA is not "forced" to continue the Payment Dispute litigation, but has chosen to do so

76. Macedonia showed in its Statement of Defence that for GAMA to have suffered a denial of justice it must have exhausted local remedies.[163] Yet after filing its Statement of Claim, GAMA recommenced Payment Dispute litigation.[164]

77. In its Reply, GAMA asserts that it is "simply stuck" in the Payment Dispute proceedings, "forced" to continue against its wishes in order to maintain its claim in the TE-TO reorganization.[165] According to GAMA, its agency was removed by the 14 June 2018 decision of the Basic Court which approved TE-TO's reorganization.[166] Claimants'

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160 *See* GAMA appeal, dated 25 September 2018 (**C-68**) (focusing on the argument that the "court wrongfully and without grounds established that Addendum 9 and the Settlement Agreement prescribe conditions for payment" with only a brief mention of TE-TO's reorganization plan); GAMA submissions to the Court of Appeal Skopje, dated 2 February 2022 (**C-72**) (arguing that "the claim of the plaintiff has been recognized in the procedure for reorganization of the defendant … which would not have been the case if the claim was disputed.").

161 GAMA submissions to the Court of Appeal Skopje, dated 2 February 2022 (**C-72**) (arguing "the first instance court failed to act upon the instructions of the Supreme Court … as of 23.12.2020"); Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**).

162 Statement of Defence ¶ 144; *Loewen Group v. United States* (**RL-24**) ¶ 151 ("A court decision which can be challenged through the judicial process does not amount to a denial of justice."); ¶ 154 ("No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system."). *See also* International Law Commission (Crawford), Second Report on State Responsibility, UN Doc. A/CN.4/498 (1999) (**RL-16**) ¶ 75 ("An aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not itself amount to an unlawful act.").

163 Statement of Defence ¶¶ 144-148.

164 Statement of Defence ¶ 149; GAMA submission to the Basic Court, dated 31 January 2023 (**R-12**).

165 Reply ¶ 96-97.

166 Reply ¶ 97.

interpretation cannot be sustained. The Court did not tie GAMA's hands, as is evident from the passage relied upon by GAMA, properly translated:

> In terms of the creditor's claim, a court proceeding is in progress and **until the lawsuit is over, its status is uncertain**, and indisputably 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 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.[167]

78. The Court thus explained that (i) the outcome of the Payment Dispute proceedings is unclear only until it "is over"; (ii) GAMA's claim in bankruptcy will be settled when the Payment Dispute procedure "is final"; and, (iii) if the date for payment of GAMA's claim in bankruptcy arrives before the Payment Dispute proceedings are final, then TE-TO must establish a reserve to pay GAMA. Mr. Petrov confirms that this passage aligns with the Bankruptcy Law.[168] It does not place any obligation on GAMA to continue litigation.

79. The Basic Court confirmed this understanding in its most recent decision.[169] On 13 April 2023, the Court explained that Reorganization Plan now governs GAMA's claim and the Payment Dispute proceedings are now "pointless."[170]

80. The Macedonian courts have thus confirmed that GAMA is not "forced" to continue the Payment Dispute litigation. It is GAMA that insists on pursuing that litigation. Contrary to its description of the Payment Dispute proceedings as "obsolete," GAMA filed another appeal in these proceedings on 4 October 2023 (after the filing of its Reply).[171] GAMA now argues that "[i]t has been erroneously and incompletely determined that the claim of the plaintiff subject to this procedure is identical to the … Decision [that] approved a plan

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167 Decision of the Basic Court, dated 14 June 2018 (**C-15 Respondent's Translation**) at 32.

168 Petrov II ¶ 102.

169 Decision of the Basic Court, dated 13 April 2023 (**R-18**).

170 Decision of the Basic Court, dated 13 April 2023 (**R-18**) at 9 ("Considering that the plaintiff's claim subject to the procedure was determined in another procedure, the plaintiff's [Payment Dispute] lawsuit is pointless.").

171 GAMA's appeal, dated 4 October 2023 (**R-18**).

for reorganization of [GAMA]."[172] In its appeal, GAMA says that its Payment Dispute claim "is not only a claim for the principal debt, but also a legal penalty interest," whereas under "the Reorganization Plan, [GAMA] has not established a claim on the basis of legal penalty interest."[173]

81. GAMA is trying to have its cake and eat it too. After appealing (twice) on the basis that its claim for EUR 5 million must be recognized in the Payment Dispute proceedings because TE-TO had "formally recognized the claim of GAMA in the amount of EUR 5.000.000 in the Plan for reorganization," GAMA now says that these claims are not "identical."[174] Yet TE-TO's Reorganization Plan has always explicitly excluded statutory interest. That cannot be a surprise to GAMA. And, by successfully arguing that the claims are the same, it cannot now pick and choose the (different) elements from each claim that most suit it.

6. GAMA's claim of excessive delay in the Payment Dispute proceedings is unfounded

82. Macedonia showed in its Statement of Defense that, over the past ten years, GAMA engaged the Macedonian courts in ten proceedings related to the Payment Dispute (plus an appeal of TE-TO's Reorganization Plan).[175] That number has now grown to 12. The table below lists the 12 proceedings initiated by GAMA, and two proceedings initiated by TE-TO, that collectively account for the duration of the Payment Dispute proceedings:

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172 GAMA's appeal, dated 4 October 2023 (**R-25**) at 4.

173 GAMA's appeal, dated 4 October 2023 (**R-25**) at 4.

174 GAMA's appeal, dated 4 October 2023 (**R-25**) at 4.

175 Statement of Defence ¶ 205. The ten Payment Dispute proceedings initiated by GAMA, plus GAMA's appeal of the Basic Court's approval of the Reorganization Plan, are: Payment Order, dated 4 December 2012 (**C-6**); Decision of Basic Court, dated 1 February 2013 (**C-34**); Decision of the Court of Appeal, dated 14 March 2013 (**C-35**); Decision of Basic Court, dated 7 March 2014 (**C-7**); Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**); Decision of the Court of Appeal Skopje, dated 16 June 2016 (**C-61**); Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**); Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**); Decision of Macedonian Supreme Court, dated 23 December 2020 (**C-12**); Decision of Basic Court, dated 8 October 2021 (**C-71**); Decision of the Court of Appeal Skopje, dated 30 June 2022 (**C-73**).

Proceeding	Court	Decision
GAMA: Payment Order application[176]	Notary	4 Dec. 2012
GAMA: Injunction application[177]	Basic Court	1 Feb. 2013
GAMA: Appeal re injunction[178]	Court of Appeal	14 Mar. 2013
GAMA: Withdrawal application[179]	Basic Court	7 Mar. 2014
GAMA: Appeal re withdrawal[180]	Court of Appeal	15 Dec. 2014
TE-TO: Counterclaim and joinder[181]	Basic Court	12 Jun. 2015
GAMA: Appeal re joinder of Counterclaim[182]	Court of Appeal	16 Jun. 2016
TE-TO: Objection to Payment Order[183]	Basic Court	4 May 2018
GAMA: Appeal re Payment Order[184]	Court of Appeal	18 Oct. 2019
GAMA: Appeal re Payment Order[185]	Supreme Court	23 Dec. 2020
GAMA: Re-filed claim re Payment Order[186]	Basic Court	8 Oct. 2021
GAMA: Appeal re Payment Order[187]	Court of Appeal	30 Jun. 2022
GAMA: Re-filed claim re Payment Order[188]	Basic Court	13 Apr. 2023
GAMA: Appeal re Payment Order[189]	Court of Appeal	pending

[176] Payment Order, dated 4 December 2012 (**C-6**).

[177] Decision of Basic Court, dated 1 February 2013 (**C-34**).

[178] Decision of the Court of Appeal, dated 14 March 2013 (**C-35**).

[179] Decision of Basic Court, dated 7 March 2014 (**C-7**).

[180] Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**).

[181] Decision of the Basic Court, dated 12 June 2015 (**C-59**).

[182] Decision of the Court of Appeal Skopje, dated 16 June 2016 (**C-61**).

[183] Decision of the Basic Court, dated 4 May 2018 (**C-10**).

[184] Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**).

[185] Decision of Macedonian Supreme Court, dated 23 December 2020 (**C-12**).

[186] Decision of Basic Court, dated 8 October 2021 (**C-71**).

[187] Decision of the Court of Appeal Skopje, dated 30 June 2022 (**C-73**).

[188] Decision of the Basic Court, dated 13 April 2023 (**R-18**).

83. Each of these proceeding was started by GAMA or TE-TO; not by Macedonia,[190] and each has resulted in a final decision (with the exception of the last appeal commenced on 4 October 2023). As Macedonia explained, its discharge of this judicial docket in roughly ten years cannot reasonably be described as exhibiting delay, let alone an "excessive" delay that might point to a denial of justice.[191] GAMA offers no expert (or other) evidence that the duration of these proceedings was excessive by Macedonian standards. And the investment treaty cases relied on by GAMA involve years passing without any judicial decision.[192]

84. In its Reply, GAMA now says that "the appropriate measure for assessing this delay" is found in a 2015 amendment to the Law on Litigation Procedure, which sets timelines for deciding on objections to notarial orders (six months) and appeals to such decisions (30 days).[193] GAMA argues that the Payment Dispute proceedings were in "stark contrast" to those statutory timelines,[194] but there is nothing to contrast. The 2015 amendments were not in force on 13 December 2012 when TE-TO objected to the Payment Order and proceedings were commenced.[195] Nor were they in force on 29 April 2014 when GAMA appealed on grounds that the Basic Court had lost jurisdiction when GAMA sought to withdraw its application for the Payment Order.[196]

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189 GAMA's appeal, dated 4 October 2023 (**R-25**).

190 Statement of Defence ¶ 206. In GAMA's Introduction of New Evidence submission, it recognizes that "TE-TO's actions precipitated the [legal] costs incurred in the Debt Enforcement Proceedings." *See* Claimant's Introduction of New Evidence (14 November 2023) ¶ 13. That recognition is irreconcilable with its position that responsibility for the duration of these proceedings rests entirely with Macedonia.

191 Statement of Defence ¶ 206.

192 *See Victor Pey Casado and President Allende Foundation v. Republic of Chile (I)*, ICSID Case No. ARB/98/2, Award (8 May 2008) (**CL-48**) (the first instance decision on the merits remained unresolved for seven years); *White Industries v. India* (**CL-37**) (the Supreme Court waited over five years to set a date for an appeal); *El Oro Mining and Railway Co.* (**CL-49**) (nine years passed without "any action whatever"); *Chevron v. Ecuador (II)* **(CL-46)** (the claimant's seven pending cases lingered for 13 to 15 years, and six of the seven cases had never seen a decision.).

193 Reply ¶ 93; Law on Supplementing and Amending the Law on Litigation Procedure (**C-168**), Article 428-v.

194 Reply ¶ 94.

195 Reply ¶ 93; TE-TO objection to Payment Order, dated 13 Dec. 2012 (**C-40**).

196 Decision of the Court of Appeal, dated 15 December 2014 (**C-8**).

85. In any event, Macedonia cannot be called to account for GAMA's own delays between proceedings. Those delays were substantial. GAMA alone spent at least 3 years (36 months) contemplating its next steps:

a) **4 months** deciding to withdraw its payment order claim against TE-TO[197] (a decision that caused a further 19 months of delay[198]);

b) **4 months** waiting to appeal the Basic Court's annulment of the Payment Order;[199]

c) **8 months** considering whether to re-start ligation after the Supreme Court decision;[200]

d) **8 months** deciding to appeal the Basic Court's decision regarding conditionality of the Settlement Agreement;[201]

e) **6 months** waiting to file with the Basic Court after succeeding at the Court of Appeal;[202]

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[197] On 9 May 2013, four months after it applied to the Basic Court to enforce the Payment Order, GAMA reversed course and sought to withdraw its payment claim (GAMA's submission to withdraw its claim, dated 9 May 2013 (**C-46**)).

[198] GAMA applied to withdraw its claim on 9 May 2013 (GAMA's submission to withdraw its claim, dated 9 May 2013 (**C-46**)); TE-TO objected on 27 May 2013 (TE-TO's objection to withdrawal of GAMA's claim, dated 27 May 2013 (**C-47)**); the Basic Court heard GAMA's application on 19 December 2013 (Minutes of hearing before Basic Court, dated 19 December 2013 (**C-49**)); GAMA appealed on 29 April 2014 (GAMA submission to the Court of Appeal Skopje, dated 29 April 2014 (**C-54**)); the Court of Appeal dismissed the appeal on 15 December 2014 (Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**)).

[199] On 4 May 2018, the Basic Court annulled the Payment order (Decision of the Basic Court, dated 4 May 2018 (**C-10**); on 25 September 2018, GAMA appealed (GAMA appeal, dated 25 September 2018 (**C-68**)).

[200] On 23 December 2020, the Supreme Court quashed the decision of the Court of Appeal (Decision of the Macedonia Supreme Court, dated 23 December 2020 (**C-12)**); on 23 August 2021, GAMA filed its claim in the Basic Court (GAMA brief filed with the Basic Court, dated 23 August 2021 (**C-70**)).

[201] On 8 October 2021 the Basic Court found the Settlement Agreement to be conditional (Decision of the Basic Court, dated 8 October 2021 (**C-71**)); on 2 February 2022, GAMA appealed (GAMA submissions to the Court of Appeal Skopje, dated 2 February 2022 (**C-72**)).

[202] On 30 June 2022, the Court of Appeal confirmed GAMA's claim (Decision of the Court of Appeal Skopje, dated 30 June 2022 (**C-73**)); on 31 January 2023, GAMA recommenced proceedings in the Basic Court (GAMA submission to the Basic Court, dated 31 January 2023 (**R-12**)).

f) **6 months** contemplating an appeal of the Basic Court decision that agreed with GAMA about the "same claim" having been recognized in TE-TO's reorganization.[203]

86. In these circumstances, GAMA has no basis to complain about the pace of the Macedonian judicial proceedings.

87. In sum, none of GAMA's criticisms of the Macedonian courts' conduct in the Payment Dispute proceedings, whether taken individually or as a whole, comes anywhere close to establishing a denial of justice under the Treaty. Even taking GAMA's assertions at their highest, they amount to nothing more than a complaint that the Macedonian courts misapplied Macedonian law or reached the wrong conclusions. But this Tribunal is not an appellate court. It is not tasked with reviewing the substantive correctness of domestic court decisions, as mere "judicial error, even if it results in serious injustice, does not amount to a denial of justice in the context of a Treaty claim."[204] Thus, the premise of GAMA's denial of justice claim remains fundamentally flawed, and the claim must be rejected.

C. GAMA'S COMPLAINTS ABOUT TE-TO'S BANKRUPTCY PROCEEDINGS ARE UNFOUNDED AND, IN ANY CASE, FALL FAR SHORT OF A DENIAL OF JUSTICE

88. In its Reply, GAMA repeats the Macedonian law arguments that it made unsuccessfully before the Macedonian courts and then again in its Statement of Claim.[205] Even if this Tribunal had jurisdiction (and were equipped) to entertain these arguments, the Macedonian courts cannot be said to have been incorrect. The bankruptcy judge that approved the Final Reorganization Plan agreed by 82.38% of TE-TO's creditors, and the Court of Appeal that upheld that approval, faithfully interpreted and applied Macedonian law throughout TE-TO's judicial restructuring.

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[203] On 13 April 2023, the Basic Court found GAMA's Payment Dispute lawsuit "pointless" (Decision of the Basic Court, dated 13 April 2023 (**R-18)**); on 4 October 2023 GAMA appealed to the Appellant Court Skopje (GAMA's appeal, dated 4 October 2023 (**R-25**)).

[204] *Vöcklinghaus v. Czech Republic* (**RL-60)** ¶ 205.

[205] Reply § III.B.

1. The TE-TO bankruptcy proceeded under the 2013 Prepackaged Bankruptcy regime, and GAMA's effort to supplement that regime is to no avail

89. Macedonia previously explained that the TE-TO bankruptcy proceedings proceeded under a new and separate bankruptcy regime, adopted in 2013 by the Macedonian legislature, to allow so-called "prepackaged" or "prepack" bankruptcies ("**Prepackaged Bankruptcy**").[206] This bankruptcy regime allows a debtor in a financially difficult situation to ward off a regular bankruptcy (and potential liquidation) by preparing a restructuring plan itself and submitting it to a vote of the creditors. TE-TO was only the third debtor to avail itself of this novel (to Macedonia) procedure.[207]

90. GAMA does not dispute that the TE-TO bankruptcy was conducted under that novel legal regime under the Bankruptcy Law, but seeks to skirt its provisions by invoking three extraneous sources outside the Bankruptcy Law. These efforts are to no avail.

(a) The 2023 draft insolvency bill did not govern the TE-TO bankruptcy and, if anything, shows that the courts' reading of the 2013 legislation was plausible

91. The first extraneous source that GAMA references is a legislative bill introduced for parliamentary debate in February 2023 (the "**Proposed Insolvency Bill**").[208] GAMA says that this bill addresses several of the issues that arose in the TE-TO bankruptcy, including the priority of creditors and the value they would receive as compared to regular bankruptcy proceedings.[209]

92. GAMA asserts that the Proposed Insolvency Bill is a "response to the manifest failures of its court to uphold the fundamental principles of the Bankruptcy Law in TE-TO's judicial reorganization"[210] and "seek[s] to clarify the existing pre-insolvency reorganization."[211]

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206 Statement of Defence ¶ 63; Petrov I ¶ 43; Law on Bankruptcy (**R-10**), Articles 215-a to 215-e.

207 Statement of Defence ¶ 64.

208 Reply ¶¶ 4, 103; Proposed Insolvency Bill (**C-151**).

209 Reply ¶¶ 103-104.

210 Reply ¶ 107.

211 Reply ¶ 103.

Mr. Kostovski goes further, opining that the Bill is intended to "explicitly regulate both the procedural and substantive law issues of the pre-bankruptcy reorganization in order to not leave any room for courts' arbitrary interpretation."[212]

93. That is empty speculation. Neither GAMA nor Mr. Kostovski offers any evidence that links the bill to TE-TO's reorganization. But even if the bill were a response to TE-TO's reorganization, it would merely show that the courts' interpretation of the Bankruptcy Law during the TE-TO reorganization was plausible and sustainable on the face of the statute (as otherwise no amendment of that statute would be required). If there was indeed scope for competing interpretation of the statute, then the bankruptcy judge – whom GAMA recognizes was a "seasoned judge" and former "Head of the Bankruptcy and Liquidation Department at the Civil Court Skopje"[213] – and the Court of Appeal were well positioned to do so, and this Tribunal is not equipped (and has no jurisdiction) to second-guess them.[214]

94. In any event, the Proposed Insolvency Bill is just a bill. It is not (and may never be) law. Nor was it law (or even a bill) when TE-TO submitted its Reorganization Plan and the Macedonian courts considered that Plan and GAMA's challenges to it. If the bill does become law, that law will not have retroactive effect.[215]

(b) The so-called "fundamental principles of the Bankruptcy Law" invoked by GAMA are unsubstantiated and play no role in a Prepackaged Bankruptcy

95. The second extraneous source of norms that GAMA references are "the fundamental principles of the Bankruptcy Law," for which GAMA says the bankruptcy judge showed "complete disregard."[216]

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212 Kostovski II ¶ 15.

213 Reply ¶ 101.

214 *See supra* § III.A.1.

215 Petrov II ¶ 19.

216 Reply ¶ 101.

96. GAMA offers no support for these alleged principles. Nor does GAMA explain on what basis these alleged principles would override the explicit provisions governing the Prepackaged Bankruptcy regime. Even if these alleged "principles" could inform (or could be distilled from) regular bankruptcy provisions, which GAMA has not shown, there is no basis to conclude that they have any relevance to a Prepackaged Bankruptcy. As Mr. Petrov explains, Prepackaged Bankruptcy is fundamentally different to a regular bankruptcy.[217] There is nothing in the Bankruptcy Law, for example, that permits unsecured creditors to "seize and sell [the] assets" of a company that has defaulted on payment obligations. To the contrary, the Prepackaged Bankruptcy provisions allow the debtor to employ its assets.[218] They allow the debtor, not the unsecured creditors, to propose arrangements for the full or partial settlement of its debts, and to place those proposals before creditors for their approval.[219]

(c) The Professional Standards for Bankruptcy Trustees have no application to the preparation by the debtor of a prepackaged reorganization plan

97. The third extraneous source of norms that GAMA references is the Rulebook on the Professional Standards on Bankruptcy Proceedings, which standards GAMA says also "apply to reorganization plans prepared by debtors."[220] Mr. Kostovski opines that those Professional Standards "applied also to TE-TO's reorganization proceedings"[221] and "impose an obligation on the bankruptcy trustee to ensure that the plan is consistent with them."[222]

98. Mr. Kostovski is mistaken. As a threshold matter, the Professional Standards apply to the professionals they regulate, *i.e.* professional bankruptcy trustees.[223] The Professional Standards do not extend to acts of those who are not professional bankruptcy trustees. In

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217 Petrov I ¶¶ 47-49; Petrov II ¶ 8-9.

218 Macedonian Law on Bankruptcy (**R-10**) Article 215(3)(1).

219 Macedonian Law on Bankruptcy (**R-10**) Article 215-b(1)(2).

220 Reply ¶¶ 104, 144.

221 Reply ¶ 104.

222 Reply ¶ 144.

223 Petrov II ¶ 12.

particular, the Standards do not extend to actions carried out by a debtor in a Prepackaged Bankruptcy, including the debtor's preparation of the reorganization plan, or by the courts.[224]

99. The content of the Standards confirms their inapplicability. The Rulebook consists of eight Standards.[225] GAMA relies on three.[226] As Mr. Petrov explains, not all these standards apply to Prepackaged Bankruptcy proceedings.[227]

(i) Professional Standard for a Trustee's Plan

100. GAMA references the "Professional Standard on the Minimum Data Which the Plan for Reorganization Submitted by the Bankruptcy Trustee Should Contain" (the "**Professional Standard for a Trustee's Plan**") and says that that standard required TE-TO's Reorganization Plan to show that "none of the creditors will receive less than what they could reasonably expect from the procedure of liquidation."[228]

101. The Professional Standard for a Trustee's Plan applies only to plans submitted by a bankruptcy trustee in a regular bankruptcy proceeding.[229] Its title confirms this ("Submitted by the Bankruptcy Trustee"), as does its introduction: "The standard closely

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224 Petrov II ¶ 12.

225 Rulebook on the Professional Standards of the Bankruptcy Procedure (**C-95 Resubmitted**). The Standards are: (1) "Professional Standard for Cash Management and Management of Bank Accounts" at 2-6; (2) "Professional Standard on the Inventory of the Assets of the Bankruptcy Debtor, Complying List of Creditors and Initial Balance in Bankruptcy" at 7-14; (3) "Professional Standard for Compiling the Report of the Bankruptcy Trustee for the Reporting Session of the Assembly of Creditors" at 15-18; (4) "Professional Standard on the Minimum Data Which the Plan for Reorganization Submitted by the Bankruptcy Trustee Should Contain" at 19-23; (5) "Professional Standard for Supervision [of] the Implementation of the Plan for Reorganization" at 24-27; (6) "Professional Standard on the Form for the Final Report of the Bankruptcy Administrators for the Performed Payments" at 28-32; (7) "Professional Standard on the Manner for Keeping and Storing Documentation" at 33-37; (8) "Professional Standard on the [Form] for Monthly Report" at 38-40.

226 Reply ¶ 143-144, Kostovski II ¶ 54.

227 Petrov II ¶¶ 12-17.

228 Reply ¶144, quoting Rulebook on the Professional Standards of the Bankruptcy Procedure (C-95 Resubmitted), "Professional Standard on the Minimum Data Which the Plan for Reorganization Submitted by the Bankruptcy Trustee Should Contain" (the "Professional Standard for a Trustee's Plan") at 20, Standard 2(2).

229 Petrov II ¶ 13.

regulates the information which [is] important for the creditors, which [is] prepared by the bankruptcy trustees within the Plan for reorganization."[230]

102. Prepackaged Bankruptcy plans are prepared and submitted by the debtor, not by a bankruptcy trustee.[231] Mr. Kostovski nonetheless seeks to stretch the standard's applicability by pointing to a heading before the final paragraph.[232] That paragraph addresses a situation in which "the reorganization plan is not submitted by the bankruptcy trustee, but by other authorized proposers" and the bankruptcy trustee is required to "determine to what extent that plan meets the content prescribed" and to give instructions "to make appropriate changes."[233] But that paragraph cannot apply to a Prepackaged Bankruptcy. In a Prepackaged Bankruptcy, the (interim) bankruptcy trustee is not appointed until *after* the plan has been prepared and approved by the creditors and the court.[234]

(ii) Professional Standard for Report to Reporting Meeting

103. GAMA next references the "Professional Standards on Compiling the Report of the Bankruptcy Trustee for the Reporting Session of the Assembly of Creditors" (the "**Professional Standard for Report to Reporting Meeting**"). Mr. Kostovski says that the interim bankruptcy trustee's report on the economic and financial situation of TE-TO failed to include "a parallel overview of the anticipated settlement of creditors in both a procedure of closing the business venture and reorganization" as required under that standard.[235]

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230 Rulebook on the Professional Standards of the Bankruptcy Procedure (**C-95 Resubmitted**), Professional Standard for a Trustee's Plan at 19, Standard 1.

231 Macedonian Law on Bankruptcy (**R-10**) Article 215-a(1).

232 Kostovski II ¶ 77, footnote 178; Rulebook on the Professional Standards of the Bankruptcy Procedure (**C-95 Resubmitted**), Professional Standard for a Trustee's Plan at 22 (the heading reads: "Adequate application of this standard when other person who are actively authorized to submit the plan appear as the party submitting the reorganization plan.").

233 Rulebook on the Professional Standards of the Bankruptcy Procedure (**C-95 Resubmitted**), Professional Standard for a Trustee's Plan at 22-23.

234 Petrov II ¶ 11.

235 Kostovski II ¶ 54 (emphasis omitted).

104. That standard is inapplicable to a Prepackaged Bankruptcy because there is no "reporting meeting" of the assembly of creditors in Prepackaged Bankruptcy proceedings.[236] The reporting meeting (*i.e.* a meeting held shortly after the opening a regular bankruptcy proceeding, during which creditors decide whether the debtor will be liquidated or reorganized) occurs only in regular bankruptcy proceedings.[237]

(iii) Professional Standard for Implementation

105. In the context of arguing that TE-TO's reorganization plan must include a comparison to liquidation, GAMA references that Mr. Petrov mentioned in his first opinion the "Professional Standard for Supervision [of] the Implementation of the Plan for Reorganization" (the "**Professional Standard for Implementation**").[238] That is a red herring. The Professional Standard for Implementation addresses the implementation of a reorganization plan, not the content of that plan.[239] Mr. Petrov mentioned it only as support for his point that licensed bankruptcy trustees are appointed as independent professionals.[240]

106. As explained below, to the extent that the Professional Standards for Implementation apply to the interim bankruptcy manager, he met those standards.[241]

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[236] Petrov II ¶ 13. This Standard would not apply by analogy either. Mr. Petrov explains that the purpose and content of a report to a reporting meeting differ from those of a report for a hearing on a Prepackaged Bankruptcy plan. *See* ¶ 13.

[237] Petrov I ¶ 30. As Mr. Petrov explains, the report prepared by the interim bankruptcy trustee in a Prepackaged Bankruptcy is submitted for a hearing on the preliminary bankruptcy plan; not for reporting meeting of the assembly of creditors (Petrov II ¶ 13).

[238] Reply ¶ 143; Petrov I ¶ 84.

[239] Rulebook on the Professional Standards of the Bankruptcy Procedure (**C-95 Resubmitted**) at 24-25 "Professional Standard for Implementation".

[240] Petrov I ¶ 84.

[241] *See infra* ¶168.

2. TE-TO's reorganization plans complied with Macedonian law governing Prepackaged Bankruptcies

(a) TE-TO qualified for bankruptcy proceedings even without its debt to Bitar Holdings

107. In the Statement of Defence, Macedonia explained that TE-TO had an outstanding debt to one of its shareholders (Bitar Holdings) of EUR 112 million. Bitar obtained an enforcement order for payments of EUR 48.4 million of that loan (the Bitar Payments) against TE-TO and had its accounts blocked, but another creditor (Toplifikacija, which also obtained an enforcement order against TE-TO) applied for an injunction to prohibit Bitar from collecting.[242] Bitar withdrew its enforcement order, leaving its total loan of EUR 112 million outstanding.[243]

108. In its Reply, GAMA says that "Macedonia acknowledges that the pretext for TE-TO's proposal for reorganisation was the enforcement of the EUR 112 million claims by Bitar Holdings."[244] That is wrong. Macedonia did not acknowledge any "pretext." Rather, Macedonia explained that "shareholder loans and the claims in connection with those loans were an integral part of TE-TO's total indebtedness and any assessment of whether TE-TO qualified for Prepacked Bankruptcy."[245]

109. In any event, and as Macedonia also explained, the Basic Court found that TE-TO's bank accounts had been blocked by various creditors in addition to Bitar Holdings (including others such as Toplifikacija[246]) for more than 45 days, sufficient to start bankruptcy proceedings.[247] TE-TO's ability to proceed with Prepackaged Bankruptcy thus did not depend on enforcement of the EUR 112 million claim by Bitar Holdings.

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242 Statement of Defence ¶ 60.

243 Statement of Defence ¶¶ 61, 85; Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 25.

244 Reply ¶ 111.

245 Statement of Defence ¶ 160.

246 Statement of Defence ¶ 85.

247 Statement of Defence ¶ 78; Minutes of the Basic Court hearing, held 5 June 2018 (**C-18**) at 8; Macedonian Law on Bankruptcy (**R-10**) Article 5(2).

(b) The bankruptcy judge was authorized to approve TE-TO's choice to create two classes of creditors

110. In its Statement of Defence, Macedonia explained that the Bankruptcy Law allows the debtor in a Prepackaged Bankruptcy to determine the classes of creditors.[248] The Bankruptcy Law provides that the preliminary reorganization plan should contain a "[l]ist of creditors with a division of classes of creditors and criteria on the basis of which the classes are formed."[249] In his *Commentary on the Law of Bankruptcy*, Mr. Kostovski confirms that:[250]

> the legislator provides the opportunity for the formation of classes of creditors, just as during the voting on the proposed plan submitted in bankruptcy proceedings. **The formation of classes is possible, but not mandatory. The classes of creditors** who will vote according to the prepared plan for reorganization **are proposed by the debtor.**

111. Macedonia also explained that a debtor's freedom to determine the classes of creditors in a Prepackaged Bankruptcy departs from the restrictive provisions applicable to a regular bankruptcy.[251] In a regular bankruptcy, Article 220 of the Bankruptcy Law prescribes classes for creditors "with a right to separate settlement and creditors of higher payment rank" and allows "other creditors [to] organize themselves in groups according to their interests."[252] But Article 220 does not apply to a Prepackaged Bankruptcy.[253] Nor does its complementary provision, Article 118, which sets out a hierarchy for settling "lower payment ranks" in regular bankruptcies.[254]

112. TE-TO's First Reorganization Plan classified its creditors into three classes: (i) secured creditors and banks, (ii) unsecured creditors with loans, and (iii) unsecured creditors with

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248 Statement of Defence ¶ 182.

249 Petrov I ¶ 141; Macedonian Law on Bankruptcy (**R-10**) Article 215-b(1)(2).

250 Dejan Kostovski, Komentar za zakonot za stechaj (Commentary of the Law on Bankruptcy), Skopje, 2014 (**R-8**) at 4 (emphasis added); Petrov I ¶ 142.

251 Statement of Defence ¶ 193.

252 Macedonian Law on Bankruptcy (**R-10**) Article 220.

253 Macedonian Law on Bankruptcy (**R-10**) Article 215-d(6).

254 Statement of Defence ¶ 193; Petrov I ¶¶ 149-158; Macedonian Law on Bankruptcy (**R-10**) Article 118.

claims based on operational business with TE-TO.[255] GAMA raised a concern about the proposed classification of creditors.[256] In response, TE-TO modified its plan such that only two classes appear in the Final Reorganization Plan: (i) secured creditors and banks, and (ii) unsecured creditors.[257]

113. In its Reply, GAMA rejects the debtor's freedom to determine the classes of creditors as "paradoxical" because "creditors are expected to vote on a reorganization plan without having been appropriately classified into separate classes according to [the] Bankruptcy Law."[258] There is nothing paradoxical. The creditors *are* classified according to the Bankruptcy Law – Article Art. 215-b(1)(2) – after which creditors vote in those classes.

114. The crux of GAMA's complaint is that it was fundamentally wrong for the Reorganization Plan to group (unsecured) shareholders loans in the same class as the claims of other unsecured creditors. According to GAMA, doing so was "in disregard of the basic insolvency rules, entailing subordination of shareholders."[259] If shareholders' equity is typically wiped out before the claims of creditors in bankruptcy, there is no overriding principle that the loans extended by shareholders (as opposed to their equity contributions) ought to be subordinated to the claims of other creditors. In multiple jurisdictions, there is no automatic subordination of shareholders loans.[260] In fact, there are sound policy reasons not to provide for subordination.[261]

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255 Statement of Defence ¶ 68.

256 Statement of Defence ¶ 73(b).

257 Statement of Defence ¶ 74.

258 Reply ¶ 129. GAMA also relies on a passage from the bankruptcy judge's 30 April 2018 request to TE-TO: "The reorganization plan, in the section on the sequence of settlement of the creditors, fails to include creditors of the third class; the maturity date of the claim for the creditors of the third class should be stated, and it should be stated that the claims of the second class are claims of a lower settlement rank and shall be settled last." (Request for information from the Basic Court, dated 30 April 2018 **(C-91)** at 2). GAMA says that this passage shows that the bankruptcy judge "acknowledged" that providing a debtor with "unchecked power to prioritize the interests of its shareholders" would violate the Bankruptcy Law and amount to "fraud" (Reply ¶ 151). That is fatuity. The bankruptcy judge did not acknowledge fraud (or even the potential for it). She asked TE-TO to correct the Reorganization Plan because TE-TO did not list its third class of creditors (as defined by TE-TO) in the sequence of settlement section.

259 Reply ¶ 226.

260 *See, e.g.*, R.J. de Weijs & M Good, *Shareholders'and creditors' entitlements on insolvency: who wins where?*, 30 BUTTERWORTHS J. OF INT'L BANKING AND FINANCIAL L. 642 (**RL-71**) ("[U]nder US law, there is no per se

(c) There is no evidence that the shareholder loans were "fraudulent"

115. Macedonia clarified in its Statement of Defence that the May 2018 criminal complaint filed by Toplifikacija against Bitar, TE-TO and various individuals, was a step that any individual or company may take under Macedonian law without providing evidence of wrongdoing.[262] The public prosecutor oversaw a preliminary investigation into the complaint, as required under Macedonian criminal procedures.[263] In June 2019, the Financial Police filed charges with the public prosecutor against the bankruptcy judge and two individuals named in Toplifikacija's complaint.[264] The charges were dismissed as "not constitute[ing] a basis for criminal prosecution" in September 2020.[265]

116. In its Reply, GAMA asserts that, since the prosecutor "opted not to pursue an investigation into this matter, and considering Leonid Lebedev's previous questionable dealings, GAMA considers that the shareholders' loans were fraudulent."[266] That is nonsense. That the prosecutor dismissed the charges suggests that there was no basis to pursue them. As for the accusation of "previous questionable dealings" by Mr.

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subordination, but only subordination in cases of inequitable conduct by the shareholder-claimant."); Suzzanne Uhland et al., Insolvency Litigation, Lexology GTDT – Law Business Research (2021) (**RL-26**) at 36 (explaining that under English law shareholder claims may be subordinated by agreement); Rūta Lazauskaitė & O. Petroševičienė, *The doctrine of subordination of shareholder loans as safeguard of creditors' rights and its development in Lithuania*, 2 INT'L J. OF DEVELOPMENT AND SUSTAINABILITY 1798, 1808 (2013) (**RL-22**) (explaining that there is no automatic subordination of shareholder loans in France, Estonia, and Lithuania).

261 *See, e.g.*, Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 UNIV CHICAGO LAW REV 499 (1975) (**RL-89**) at 500 ("Parent corporations are sometimes the most efficient lenders to their affiliates because the enterprise relationship may enable the parent to evaluate the risk of a default at a lower cost than an outsider would have to incur. A rule that places heavier liabilities on a parent lender than on an outside lender might thus distort the comparative advantages of these two sources of credit."); Martin Gelter, *The Subordination of Shareholder Loans in Bankruptcy*, 26 INT'L REV LAW & ECON 478 (2006) (**RL-90**) at 500 ("The analysis of the incentive effects of subordination or recharacterization of shareholder loans shows that there is a potential danger of preventing either efficient or inefficient rescue attempts."); Damien Nyer, *Withholding Performance for Breach in International Transactions: An Exercise in Equations, Proportions or Coercion?*, 18 PACE INT'L REV 29 (2006) (**R-97**).

262 Statement of Defence ¶ 75.

263 Statement of Defence ¶ 75; Law on Criminal Procedure (**R-11**) Article 283.

264 Statement of Defence ¶ 76; Financial Police Office announcement, dated 21 June 2019 (**C-19**).

265 Statement of Defence ¶ 76; Public Prosecutor's dismissal of criminal charges (C-110); Public Prosecutor's dismissal of criminal charges (C-110 MK) (date of 29 September 2020 is shown on Macedonian original).

266 Reply ¶ 113.

Lebedev,[267] these are not within Respondent's knowledge, but the evidence that GAMA digs up is far from compelling. GAMA references:

a) a 2016 Russian appellate court decision involving shareholder complaints about transactions of TGC-2 (a company within the Sintez Group), including a debt assignment to TE-TO in 2013.[268] GAMA failed to mention that the court dismissed those complaints. It upheld the first instance decision that approval of these transactions by the TGC-2 directors did not amount to "dishonesty and unreasonableness."[269]

b) a 2016 Russian news story announcing that a minority shareholder of TGK-2 had complained to authorities that TGK-2 had failed to pay dividends, prompting a criminal investigation in which Mr. Lebedev was a defendant.[270] Nothing in that story relates to TE-TO or Macedonia. And, of course, news of an investigation does not establish that Mr. Lebedev (or anyone in the Sintez Group) committed an offence or even acted improperly. The story put the investigation in perspective: "Statements by minority shareholders to law enforcement agencies are a common and effective way of putting pressure on an owner who does not pay dividends."[271]

c) a 2015 letter from the Russian Ministry of Interior to the Russian National Central Bureau requesting information in support of an investigation concerning "abuse of powers" and "nonperformance of monetary obligations" by the management of TGC-2 and its subsidiary, TKS.[272] The letter alleges that management was acting

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267 Reply ¶ 113.

268 *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 ("***Cyprus v. A.Y. Korolev***") (**C-173**) at 9.

269 *Cyprus v. A.Y. Korolev* (**C-173**) at 18.

270 *Ex-Senator Leonid Lebedev Became a Defendant in a Criminal Case*, VEDOMOSTI, 21 September 2016 (**C-107**).

271 *Ex-Senator Leonid Lebedev Became a Defendant in a Criminal Case*, VEDOMOSTI, 21 September 2016 (**C-107**) at 3.

272 Letter from N.A. Matveev (Ministry of Interior) to Captain of National Central Bureau, dated 12 March 2015 (**C-108**) at 1, 5.

in the "interest" of Mr. Lebedev.[273] Again, nothing in that story relates to TE-TO or Macedonia. No outcome of the investigation is offered either, and GAMA does not explain whether any prosecutions, dismissals, or convictions followed.

d) a 2019 Greek news story that companies owned by Mr. Lebedev "reportedly have received from offshore companies loans that have been written off, have created structures without transparency, have used straw men, and have enjoyed close ties with the [Greek] coalition government."[274] Again, nothing in that story relates to TE-TO or Macedonia. Relying on this story, GAMA nonetheless concludes that Mr. Lebedev's companies "appear to operate through a consistent pattern of obfuscation" and "often cheat legal cash sources."[275] That exaggerates what the untested news story might support, even with respect to companies in Greece.

117. None of this comes close to proving that TE-TO's shareholder loans were "fraudulent." Nor has GAMA shown that the bankruptcy judge, Ms. Sashka Trajkovska, should have excluded the shareholder loans from TE-TO's Reorganization Plan on grounds that they were "fraudulent" (or for any other reason).

(d) The Reorganization Plan was not required to include a contingent tax liability to account for the write-off of unsecured claims

118. Macedonia clarified in its Statement of Defence that, while the financial projections in TE-TO's Reorganization Plan did not include a contingent liability for income tax arising from a write-off of unsecured creditors' claims, GAMA did not (and could not) point to a requirement in the Bankruptcy Law that it should have.[276]

119. GAMA does not dispute this in its Reply, but asserts instead that TE-TO's financial projections were "manifestly incorrect" and, as a result, the approval of the plan by the

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[273] Letter from N.A. Matveev (Ministry of Interior) to Captain of National Central Bureau, dated 12 March 2015 (**C-108**) at 5.

[274] Haris Karanikas, *To Vima Reveals Close Ties of Russian Oligarch Lebedev with Government*, TO VIMA, 2 July 2019 (**C-174**) (emphasis added).

[275] Reply ¶ 113, footnote 235.

[276] Statement of Defence ¶ 189.

Macedonian courts was "a grave failure in oversight and judgement."[277] If the financial projections were "manifestly incorrect," then surely GAMA and the other creditors that opposed the plan would have raised the matter in their objections. The fact that they did not speaks volumes.

120. In any event, not including something that isn't required hardly makes the projections "manifestly incorrect" or provides a basis for rejecting the plan. Moreover, as Mr. Petrov explains, since the Bankruptcy Law does not specify the tax treatment of write-offs in Prepacked Bankruptcies (or how the tax effect of write-offs should be addressed in the financial projection section of reorganization plans), there was no basis for the court to compel a particular treatment.[278]

(e) The Reorganization Plan was not required to meet the "liquidation test"

121. Macedonia demonstrated in its Statement of Defence that it's the Reorganization Plan was not required to meet the "liquidation test" set out in the Professional Standard for a Trustee's Plan (*i.e.*, "that with the implementation of the reorganization plan none of the creditors shall receive less that what might reasonably be expected to be received in the procedure of liquidation of the assets of the bankrupt debtor") because GAMA has not shown that the Rulebook applies.[279]

122. In its Reply, GAMA refers to Mr. Kostovski's opinion that the Professional Standard for a Trustee's Plan applies to a reorganization plan in a Prepackaged Bankruptcy (and thus the "liquidation test" is required).[280] It does not, as explained above.[281]

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[277] Reply ¶¶ 139-140.

[278] Petrov II ¶ 116. The Proposed Insolvency Bill includes an offset that neutralizes the tax effect of write-offs: "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" (Proposed Insolvency Bill (**C-151**) Article 65(5)). This suggests that the tax treatment of the write-offs in the TE-TO bankruptcy was unexpected and is seen by the legislator as problematic.

[279] Statement of Defence ¶ 191(a); Rulebook on the Professional Standards of the Bankruptcy Procedure (**C-95 Resubmitted**) at 20.

[280] Reply ¶ 144; Kostovski II ¶¶ 77-82.

[281] *See supra* § III.C.1(c).

123. GAMA also insists that "the liquidation test is applicable to the reorganization proceedings" because, in its 2018 decision upholding the plan, the Court of Appeal said: "The 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."[282] GAMA reads too much into that passage. The court did not state that the Reorganization Plan (which it had just upheld) was required to show that claims would be settled "to a greater extent." It only said that restructuring was a benefit. The court put it thus:

> Reorganization is a new form of rehabilitation of the bankruptcy debtor. Reorganization is also the most adequate form of protection of the legal and economic interests of the bankruptcy creditors. This achieves multiple benefits for all other entities to which the reorganization plan refers. It is, above all, beneficial for the bankruptcy debtor because its realization removes the cause of bankruptcy. The 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 bankruptcy of the bankruptcy debtor. Undoubtedly, the employees of the bankruptcy debtor also benefit, as well as the social community. This is due to the fact that the legal personality of the bankruptcy debtor is preserved and the continuation of business activities is ensured. The reorganization can be realized in both the pre-bankruptcy and the bankruptcy procedure. In case the bankruptcy debtor decides for reorganization in the pre-bankruptcy procedure, as it is in this case, it shall be the fastest and most efficient way for its economic recovery.[283]

124. In any event, even if the Reorganization Plan had been required to pass the "liquidation test," GAMA has not shown that TE-TO's creditors would have been better off in a liquidation scenario (such that the Reorganization Plan would have failed the liquidation test). Macedonia previously explained that GAMA compared apples and oranges, namely, the accounting value of TE-TO's fixed assets (EUR 167.3 million) with the creditor claims as written off in the First Reorganization Plan (EUR 70.9 million). In doing so, GAMA (i) failed to assess the value that would likely be realized on liquidation of the fixed assets and (ii) ignored that creditors on liquidation would be entitled to their

[282] Reply ¶ 142; Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 17.

[283] Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 17.

full claims (EUR 176 million) rather than the written-down amounts in the First Reorganization Plan.[284]

125. In its Reply, GAMA maintains that creditors would have been better off in a liquidation scenario unless "TE-TO's assets were to be sold at a drastic discount, specifically below 33% of their accounting value" (of approximately EUR 174 million).[285] GAMA says that scenario "seems unlikely" and contrasts it with what it says was the value of the Plant as a going concern (US$ 263 million), and with the market value of TE-TO's property, plant, and equipment (approximately EUR 152 million), before concluding that it "is implausible that [the Plant] would be liquidated at a significant discount keeping in mind its strategic position in the Macedonian energy market."[286]

126. This is pure speculation. Second, Bankruptcy sales are fire sales. Liquidation would not yield "33% of [TE-TO's 2018] accounting value [of its assets]" as assumed by GAMA. As Mr. Petrov explains, recovery during liquidation "rarely exceeds 30% of market value."[287] GAMA provides no independent valuation of TE-TO's market value.[288] Nor does GAMA offer a basis to conclude, as it does, that TE-TO might be sold as a going concern (let alone an expert assessment of its value in such a sale).[289]

127. Even if TE-TO's accounting value of its assets were to approximate its market value, liquidation would not result in any funds available to unsecured creditors, including

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284 Statement of Defence ¶ 233.

285 Reply ¶ 146; Kostovski II ¶¶ 110-114.

286 Reply ¶¶ 146-148.

287 Petrov II ¶ 125.

288 GAMA says separately that the "market value" of TE-TO's property, plant, and equipment is EUR 152 million (Reply ¶ 147). But that figure is not the market value; it is the book value as recorded in TE-TO's 2021 financial statements (Reply ¶ 147, footnote 313; Financial statements for TE-TO, dated 31 December 2021 (**C-137**) at 27). Those financial statements, prepared more than three years after the Final Reorganization Plan was approved, capture the results of implementing TE-TO's Reorganization Plan. They say nothing about the state of affairs in 2018, let alone the market value in 2018.

289 Petrov II ¶¶ 121-127. GAMA's statement that "the valuation of CCPP Skopje as a going concern in 2014 [was] USD 263 million" (Reply ¶ 148) relies on a 31 May 2014 article in *Russia Beyond* that provides no source for its statement that "The value of the thermal power plant is estimated at 9.6 billion rubles ($263 million)." Vladimir Dzaguto, *Macedonian thermal power plant: from the Russians to the Chinese*, RUSSIA BEYOND (**C-179**) at 1.

GAMA, as Mr. Petrov shows.[290] In fact, TE-TO might not have had enough even to pay its secured creditors.[291]

(f) The deadline for repayment complies with the Bankruptcy Law

128. In the Statement of Defence, Macedonia pointed out that Article 21-b(1)(2) of the Bankruptcy Law (which sets a default five-year timeline for payment of creditors in a Prepackaged Bankruptcy) includes exceptions.[292]

129. In its Reply, GAMA acknowledges these exceptions, but says that Macedonia's interpretation is "logically flawed" because it would make the exceptions "apply universally to all claims, rendering the exception[s] in the provision meaningless."[293] That over-states the scope of the exceptions. Article 215-b(1)(2) provides:

> Deadline for implementation of the plan for reorganization which cannot be longer than five years, **except in cases when the measures for realization of the plan for reorganization refer to** the foreseen repayment of claims in installments, **change of maturity dates**, interest rates **or other conditions of** the loan, credit or **other claim** or security instruments, the repayment period of the credit or the loan taken during the duration of the preliminary procedure or in accordance with the plan for reorganization, as well as the maturity dates of the issued debt securities.[294]

130. Mr. Petrov explains that the exceptions do not always apply, because not all "measures for realization of the plan" refer to "conditions" of the "loan, credit or other claim." In any event, the risk of creditors voting against an unreasonably long repayment period places constraints on the exceptions.[295] Mr. Petrov explains the latitude in establishing the term of repayment is consistent with the freedom of a debtor in a Prepacked

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[290] Petrov II ¶ 126.

[291] The 1 March 2018 accounting value of TE-TO's assets (MKD 10.7 billion) x 30% = MKD 3.2 billion. Secured claims from Komercijalna Banka and Landes Banka Berlin totaled MKD 3.3 billion.

[292] Statement of Defence ¶ 198.

[293] Reply ¶ 154.

[294] Macedonian Law on Bankruptcy (**R-10**) Article 215-b(1)(2).

[295] Petrov II ¶ 115.

Bankruptcy to tailor a plan that it expects will meet with creditor approval and allow the business to continue.[296]

131. GAMA raises another new argument in its Reply. It says that "Macedonia has enacted amendments to the Law on Obligations" that have "retroactively shortened the statute of limitations for enforcement claims based on court decisions from 10 years to just 5 years."[297] On that basis, GAMA asserts that its claim in TE-TO's bankruptcy became time barred on 30 August 2023, five years after the 30 August 2018 the decision of the appellate court that upheld approval of TE-TO's Final Reorganization Plan.

132. GAMA's interpretation is plainly wrong. Under its interpretation, the limitation period expired before payment under the Final Reorganization Plan is due (in 2028-2029). This is non-sense. The limitation period starts to run once a payment comes due, not from the date of a court decision. The amended provision in the Law on Obligations is clear:

> **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.[298]

133. In any event, in its April 2023 decision, the Basic Court has put GAMA's fears to rest. It explained that since GAMA's claim has been accepted under TE-TO's Final Reorganization Plan, "there is no possibility for the principal of the claim to become time-barred."[299]

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296 Petrov II ¶ 115.

297 Reply ¶ 155.

298 Law on Amendments and Supplements to the Law on Obligations (**C-180**) Article 2 (amending Article 368(1)).

299 Decision of the Basic Court, dated 13 April 2023 (**R-18**) at 10.

3. The bankruptcy judge acted in accordance with Macedonian law

(a) The bankruptcy judge properly required TE-TO to provide additional information

134. Macedonia explained in the Statement of Defence that TE-TO met the conditions for opening a Prepackaged Bankruptcy procedure because it faced imminent insolvency.[300] TE-TO's Reorganization Proposal stated that TE-TO "cannot fulfill its existing monetary obligations" and that creditors have "blocked [TE-TO's] transaction account."[301] TE-TO's Reorganization Plan (which was submitted along with its Reorganization Proposal) set out supporting evidence, including: (i) a narrative of the financial operating results that led to the imminent insolvency, (ii) a summary and breakdown of TE-TO's debts, (iii) copies of audited financial statements for 2012-2017, and (iv) an extraordinary audit report through 1 March 2018.[302]

135. Macedonia also explained that Article 215-v(4) of the Bankruptcy Law allows the bankruptcy judge to order the debtor to "complete the plan" if the plan "contains deficiencies and technical mistakes which can be corrected."[303] When the bankruptcy judge asked TE-TO to "further elaborate" and submit evidence that TE-TO met the conditions for opening a bankruptcy procedure (*i.e.* to show that TE-TO faced imminent insolvency), TE-TO responded with a "[r]eport on the economic and financial standing [of TE-TO], signed by the President of the Managing Board of TE-TO AD, including a statement verified by a notary public."[304]

136. In its Reply, GAMA alleges three deficiencies in the bankruptcy judge's request for additional information.

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300 Statement of Defence ¶¶ 66, 155. Macedonia also explained that imminent insolvency is recognized under Article 5(1) of the Bankruptcy Law as a basis to prepare a reorganization proposal for Prepacked Bankruptcy (Statement of Defence ¶ 155; Macedonian Law on Bankruptcy (**R-10**) Article5(1); Petrov I ¶¶ 14-16, 50).

301 Statement of Defence ¶ 66; Reorganization Proposal (**C-74**) at 1.

302 Statement of Defence ¶ 155; Reorganization Plan, dated April 2018 (**C-13**) at 6-8, 20-26, 215-460, 482-522.

303 Petrov I ¶ 58; Macedonian Law on Bankruptcy (**R-10**) Article 215-v(4).

304 Statement of Defence ¶ 72; TE-TO additional information, dated 2 May 2018 (**C-92**) at 2.

137. First, GAMA repeats the uncontested point that the bankruptcy judge should have issued a formal decision to request additional information from TE-TO rather than send a letter.[305] But GAMA offers no response to Macedonia's argument that GAMA is "elevating form over substance."[306] Mr. Kostovski repeats that sending a letter was irregular, but does not dispute Mr. Petrov's explanation that the letter contained all the elements that a formal order would include.[307] It is difficult to understand what turns on this point.

138. Second, GAMA insists that the "bankruptcy judge was required to reject TE-TO's proposal" because TE-TO "did not enclose to its proposal evidence that it was facing either actual or imminent insolvency."[308] GAMA is wrong. TE-TO *did* submit evidence. That evidence (outlined above) was included in its Reorganization Plan which was submitted "along with its Proposal."[309] Even if TE-TO had not submitted evidence, Article 215-v(3) did not require the bankruptcy judge to reject the proposal on that basis. Rather, it required the bankruptcy judge to reject the proposal if the judge "[d]etermines that the conditions for opening a bankruptcy procedure are not met."[310] Nothing prevented the judge from requiring the debtor to provide additional information in order to make that determination, as the bankruptcy judge did.[311]

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305 Reply ¶ 124.

306 Statement of Defence ¶ 172; Reply ¶ 124.

307 Kostovski II ¶ 28; Statement of Defence ¶ 172; Petrov I ¶ 58; Petrov II ¶¶ 24-25; Letter from Civil Court to TE-TO dated 30 April 2018 (**C-91**).

308 Reply ¶ 108. GAMA also says that when the bankruptcy judge wrote to TE-TO to request additional information, she erred by referring to Article 215-a of the Bankruptcy Law rather than Article 215-v(3) (Reply ¶¶ 109-110). But Article 215-a provides that where a "reorganization procedure" proceeds in which a "plan for reorganization" is submitted together with the "proposal," then the reorganization procedure shall be conducted under the laws regulating the procedure. Article 215(v)(3) is one of the laws "regulating the conduct of this procedure." In any event, GAMA has not (and cannot) show that a mistaken citation operates to nullify the judge's request.

309 Statement of Defence ¶ 62; Reorganization Plan, dated April 2018 (**C-13**) at 6-8, 20-26, 215-460, 482-522.

310 Macedonian Law on Bankruptcy (**R-10**) Articles 215-v(3).

311 Statement of Defence ¶ 72; Request for information from Basic Court, dated 30 April 2018 (**C-91**).

139. Third, GAMA says that only "minor" corrections can be made and that the bankruptcy judge invited TE-TO to make corrections that were allegedly more than minor.[312] GAMA asserts that Article 215-v(4) "intertwines deficiencies with technical mistakes suggesting that any such deficiencies must be minor."[313] That reading is unsupported by the text of that provision:

> In cases when the prepared plan for reorganization contains **deficiencies and technical mistakes which can be corrected**, the bankruptcy judge shall order with determination the bankruptcy debtor to complete the plan within eight days.[314]

140. The word "minor" does not appear in Article 215-v(4). Nor is there any "intertwining." The phrase "deficiencies and technical mistakes" identifies two distinct categories (separated by the word "and"). Whether or not both categories are modified by the phrase "which can be corrected" is of no moment in this case. The "deficiency" identified by the bankruptcy judge (a shortage of evidence relevant to whether the standards for opening bankruptcy proceedings had been met) could be corrected by TE-TO submitting additional evidence within eight days, which TE-TO did.

(b) The bankruptcy judge was not prohibited from holding a single hearing to receive comments from the creditors and decide on the proposal and plan

141. Macedonia explained in its Statement of Defence that the bankruptcy judge properly entertained objections from creditors at the 5 June 2018 hearing.[315] Article 215-g(7) of the Bankruptcy Law allows the judge to hold a hearing, together with creditors, to review issues regarding the reorganization plan; while Article 215-g(1) requires a hearing for deciding on the proposal and voting on the plan.[316] Macedonia explained that nothing in either provision prohibits holding a single hearing to accomplish both objectives.[317]

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312 Reply ¶ 123.

313 Reply ¶ 123.

314 Macedonian Law on Bankruptcy (**R-10**) Article 215-v(4).

315 Statement of Defence ¶ 179.

316 Statement of Defence ¶¶ 178-179.

317 Statement of Defence ¶ 179.

142. GAMA does not provide a meaningful response. In its Reply, GAMA repeats its view that the bankruptcy manager "chose not to" hold a hearing under Article 215-g(7) despite her evidently doing exactly that on 5 June 2018.[318] Mr. Kostovski "disagree[s]" that holding a single hearing is not "expressly prohibit[ed]," but points to no provision in the Bankruptcy Law or elsewhere where that prohibition is found.[319] As Mr. Petrov reiterates, Article 215-g(7) is permissive ("the bankruptcy judge may schedule a hearing") which allows the bankruptcy judge to hold either a separate hearing to consider comments from creditors or to do so together with the Article 215-g(1) hearing.[320]

(c) TE-TO did not need to finalize negotiations with its creditors before submitting its reorganization proposal

143. In the Statement of Defence, Macedonia described the process by which TE-TO's Reorganization Plan was shared with the creditors, written comments were submitted by the creditors, and an exchange of views took place during the 5 June 2018 hearing.[321] Macedonia explained that this process was "consistent with the basic objective of the Prepackaged Bankruptcy procedure to facilitate negotiations between the debtor and its creditors."[322]

144. GAMA says in its Reply that "the debtor and its creditors must finalize negotiations on the proposed reorganization well before the debtor files a petition to the court."[323] GAMA offers no authority for this proposition. Mr. Petrov confirms that there is none.[324] While a debtor may wish to ensure that its proposed reorganization plan has support amongst creditors (and thus discuss the matter with them) before filing for a Prepackaged Bankruptcy, there is no requirement under the Bankruptcy Law that it does so.

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318 Reply ¶ 127.

319 Kostovski II ¶ 68.

320 Petrov II ¶ 75.

321 Statement of Defence ¶ 180.

322 Statement of Defence ¶ 180.

323 Reply ¶ 128.

324 Petrov II ¶ 30.

(d) The bankruptcy judge lawfully appointed the interim bankruptcy trustee

145. In the Statement of Defence, Macedonia recounted how the bankruptcy judge directly appointed Marinko Sazdovski as interim bankruptcy trustee of TE-TO.[325] Mr. Sazdovski was "an experienced, long-term bankruptcy trustee with extensive practical experience."[326] While Mr. Sazdovski was not appointed through the electronic selection process, as required under Article 215-g(2) of the Bankruptcy Law, there was not (and still is not) a roster of trustees qualified for Prepackaged Bankruptcy proceedings that would allow operation of the electronic selection process.[327]

146. GAMA does not seriously engage with any of this in its Reply. GAMA repeats its view that Mr. Sazdovski's appointment without use of the electronic selection process "raises serious concerns" and claims that this is especially so because TE-TO had proposed Mr. Sazdovski to supervise the implementation of its Reorganization Plan.[328] But GAMA points to no prohibition on the appointment of an interim bankruptcy trustee proposed by the debtor.

147. GAMA also repeats its charge that Mr. Sazdovski's remuneration of EUR 700 per month somehow created a conflict of interest and ran afoul of the Code of Ethics of Bankruptcy Trustees.[329] It did neither. Not only is accepting remuneration as a trustee not precluded as a conflict under the Code of Ethics, but the Code specifically permits such payment[330] (and GAMA does not deny that Mr. Sazdovski's remuneration falls within the range

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325 Statement of Defence ¶ 161.

326 Statement of Defence ¶ 166; Petrov I ¶ 80.

327 Statement of Defence ¶ 166.

328 Reply ¶ 115; Kostovski II ¶ 47.

329 Reply ¶ 118.

330 Petrov II ¶ 58; Code of Ethics for Bankruptcy Trustees (**C-90**) Article 6(5) ("The bankruptcy trustee may not agree to nor accept any kind of remuneration or gain any other benefit for the tasks and duties he/she performs as a bankruptcy trustee, except the remuneration he/she receives for the tasks and duties and the reimbursement for the operating costs approved by the court.").

recommended by the Ministry of Economy).[331] It is also normal in Macedonia (and elsewhere) for a trustee's compensation to flow from the debtor's funds.[332]

148. GAMA draws a distinction 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."[333] According to GAMA, a situation "ripe for potential conflict of interest" was created, because "Mr. Sazdovski's compensation for supervising TE-TO's reorganization was contingent upon the approval of TE-TO's judicial reorganization."[334] This misconstrues the role of Mr. Sazdovski. He was not appointed until after the plan for reorganization was submitted to the court and the creditors for approval. He did not prepare the plan and he had no role in persuading the creditors to accept it.[335] Seen in the proper light, the alleged conflict of interest vanishes.

(e) The bankruptcy judge lawfully ordered Security Measures

149. Macedonia explained in its Statement of Defence that the bankruptcy judge ordered Security Measures, including a temporary ban on the disposal of TE-TO's assets.[336] She did so in accordance with Articles 215-g(2) and 58(3) of the Bankruptcy Law. Those provisions allowed her to order Security Measures on 26 April 2018 before approving the Final Reorganization Plan on 14 June 2018.[337]

150. In its Reply, GAMA maintains its view that the Security Measures were unlawful, now on grounds that TE-TO "must have [first] submitted an orderly proposal" which GAMA

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331 Statement of Defence ¶ 167.

332 Reply ¶ 118; Petrov II ¶ 60; *See e.g.*, U.S Bankruptcy Law Manual (**R-27**) § 4:11 ("The trustee in a Chapter 7 or 11 case … like all other professionals who are paid out of estate assets, must be paid in compliance with Bankruptcy Rule 2016." (emphasis added); USCS Federal Rules of Bankruptcy and Procedure, Rule 2016 (a) (**R-28**) ("An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application …") (emphasis added)).

333 Reply ¶ 118.

334 Reply ¶ 118.

335 Petrov II ¶ 11.

336 Statement of Defence ¶ 161.

337 Statement of Defence ¶ 162.

says TE-TO did not do.[338] As a threshold matter, GAMA does not explain how, as a creditor in the bankruptcy, it was prejudiced by a measure aimed at preserving the debtor's assets. Regardless, GAMA is wrong. As Macedonia explained, TE-TO did submit an "orderly" proposal.[339]

151. GAMA also says that by "entrusting the interim bankruptcy trustee with the power to 'protect the property of the Debtor' … the judge essentially handed control over TE-TO to the very person slated to supervise its reorganization."[340] But there is nothing surprising about this arrangement. Protecting the debtor's assets is part of supervising reorganization.[341]

4. The bankruptcy judge was independent and impartial

152. In its Statement of Defence, Macedonia showed that GAMA had no basis to claim that the bankruptcy judge was "acting with explicit bias."[342] GAMA nevertheless reiterates this claim in its Reply. GAMA alleges "a pattern that raises serious and legitimate concerns about the impartiality of the bankruptcy judge."[343] There is no basis for GAMA's renewed allegations.

(a) The bankruptcy judge's request for information does not disclose bias

153. According to GAMA, the bankruptcy judge exhibited partiality when she requested that TE-TO provide additional information and through her "recommendation to TE-TO to include a provision for undefined future external financing."[344]

154. The bankruptcy judge's request for information was proper, as explained above.[345] It was made in support of her statutory requirement to determine whether the conditions for

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338 Reply ¶ 119; Kostovski II ¶¶ 39-41.

339 Statement of Defence ¶ 62; *see supra* § III.C.3(c).

340 Reply ¶ 119.

341 Petrov II ¶ 66.

342 Statement of Defence ¶¶ 173-174.

343 Reply ¶ 125.

344 Reply ¶ 125; Letter from the Civil Court to TE-TO dated 30 April 2018 (**C-91**) at 2.

opening a bankruptcy procedure were met.[346] Seeking information to meet that statutory duty hardly raises "serious and legitimate concerns about impartiality."

155. As to her recommendation that TE-TO include information about future financing in its Reorganization Plan, that recommendation was articulated as follows:[347]

> On its page 13, or in the Introduction section, the plan should include measures, in particular, engagement of additional sources of funding or other type of contributions, loans or investments if necessary, in the interest of protecting the creditors and ensuring the success of the reorganization plan of the debtor.

156. Mr. Kostovski says that this recommendation was "contrary to the [Professional] Bankruptcy Standards [on Reorganization Plans]."[348] But those Standards do not apply to a Prepackaged Bankruptcy and do not apply to the bankruptcy judge, as explained above.[349] And the legislation that *does* apply requires the reorganization plan to state "[m]easures and means for realization of the plan," the "monetary amounts or assets that will be used for full or partial settlement," and "[f]inancial projections."[350] Understood in light of the applicable rules, the bankruptcy judge's recommendation reveals diligence, not "partiality."

(b) GAMA's dilatory motion to recuse the bankruptcy judge was properly decided

157. Macedonia explained in its Statement of Defence that a motion brought by GAMA and Toplifikacija to recuse the bankruptcy judge on grounds of bias was properly heard and decided by the Deputy President of the Basic Court.[351] While the written record of the Deputy President's decision, and the written statement from the bankruptcy judge, were

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345 *See supra* ¶ 143.

346 Macedonian Law on Bankruptcy (**R-10**) Article 215-v(3).

347 Letter from the Civil Court to TE-TO dated 30 April 2018 (**C-91**) at 2.

348 Reply ¶ 125; Kostovski II ¶¶ 84-85.

349 *See supra* § III.C.1; Petrov II ¶¶ 12-17.

350 Macedonian Law on Bankruptcy (**R-10**) Article 215-b(2).

351 Statement of Defence ¶¶ 183-184; GAMA's motion for recusal of bankruptcy judge, dated 14 June 2018 (**R-61**).

prepared after the 14 June 2018 hearing during which GAMA's motion was brought, the Deputy President's decision was made in an hour-long recess during the hearing.[352] Moreover, Mr. Petrov explained that "in Macedonia, it is common practice for parties (debtors and creditors alike) to file unfounded requests for recusal for the sole purpose of delaying the proceedings."[353]

158. GAMA reiterates in its Reply that the denial of its motion to recuse was "inexplicable and cast[s] serious doubt on the legality of the process."[354] GAMA reasons that, if the bankruptcy judge's statement was written after the hearing, then the Deputy President "would not have had the necessary statement from the bankruptcy judge" when he made his decision.[355] But that assumes, without support, that the bankruptcy judge did not provide an oral statement to (or even speak with) the Deputy President during the adjournment.

159. Mr. Kostovski says that "it is practically impossible for the Deputy President … to review the requests for recusal, review the case files, take a statement from the bankruptcy judge and decide upon the requests for recusal within a period of one hour."[356] It would not be impossible, however, if there was little to review. The decision reveals that GAMA failed to support its allegations of bias: "the petitioners did not submit any evidence of any connection with any creditor, nor was it indicated with which creditor the bankruptcy judge was connected and acted in their favor."[357] Mr. Petrov explains that given the paucity of material before the Deputy President, an hour-long recess was enough to decide on the motion.[358]

160. These common sense explanations are ignored by GAMA. It insists instead on a position that assumes the bankruptcy judge lied during the 14 June 2018 hearing when she

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352 Statement of Defence ¶¶ 183-184.

353 Petrov I ¶ 91.

354 Reply ¶ 137.

355 Reply ¶ 135.

356 Kostovski II ¶¶ 63-64.

357 Written Decision on motion for recusal, adopted 14 June 2018 (**C-103**) at 4.

358 Petrov II ¶ 70.

explained that the motion had been rejected by the Deputy President.[359] There is more. GAMA also says that "the decision on the recusal motion … was taken on the basis of different reasons, than was the written decision," suggesting that dishonesty spread to the Deputy President and to the court's written record. These aspersions should not have been made. The obvious explanation is that GAMA's motion for the recusal was so deficient that the Deputy President dismissed it easily.

5. The Court of Appeal considered and dismissed GAMA's complaints against the decision to approve the Final Reorganization Plan

161. In its Statement of Defence, Macedonia chronicled that, on 25 June 2018, GAMA appealed the bankruptcy judge's 14 June 2018 decision to approve the Final Reorganization Plan, and that on 30 August 2018, the Court of Appeal dismissed GAMA's appeal.[360] The Court confirmed that TE-TO's reorganization proposal "is not a classic proposal for opening a bankruptcy procedure, but a proposal for opening a bankruptcy procedure with a plan for reorganization of the debtor, submitted in terms of the provision of Article 215-a from the Bankruptcy Law."[361] Based on the Prepackaged Bankruptcy legislation, the Court of Appeal held that it was for the creditors to decide whether to accept TE-TO's reorganization proposal (and thus "whether the debtor's business venture shall be liquidated or the debtor will continue").[362]

162. GAMA says in its Reply that the Court of Appeal "failed to devote *any* sentence" to GAMA's complaints about (i) the classification of the creditors, (i) GAMA's assertion that the bankruptcy judge recognized GAMA as a first-priority unsecured creditor, (iii)

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359 Statement of Defence ¶ 184.

360 Statement of Defence ¶¶ 89-90. *See also* Brief by Ilirika Fund Management in TE-TO's Bankruptcy proceedings, dated 13 June 2018 (**R-60**); Brief by the Association for the Protection of Stockholders in TE-TO's Bankruptcy proceedings, dated 4 December 2020 (**R-72**); Brief by Toplifikacija in TE-TO's Bankruptcy proceedings, dated 8 June 2018 (**R-58**); Brief by Toplifikacija in TE-TO's Bankruptcy proceedings, dated 12 June 2018 (**R59**); Brief by the Association of Toplifikacija's Stockholders in TE-TO's Bankruptcy proceedings, dated 15 November 2019 (**R-67**); Brief by the Association for the Protection of Stockholders in TE-TO's Bankruptcy proceedings, dated 24 February 2020 (**R-70**); GAMA's request for inspection of case files, dated 15 September 2018 **(R-62)**; Second Brief by TE-TO in TE-TO's Bankruptcy proceedings, dated 29 May 2018 **(R-56)**; Brief by TE-TO in TE-TO's Bankruptcy proceedings, dated 4 June 2018 **(R-57)**.

361 Statement of Defence ¶ 90; Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 15.

362 Statement of Defence ¶ 92; Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 15.

the submission of a "consolidated" version of the reorganization plan, and (iv) the acceleration of shareholder loans.[363]

163. GAMA is incorrect. The Court addressed complaints (i) and (ii) by finding that the Prepackaged Bankruptcy legislation governs TE-TO's proposal.[364] GAMA's complaint (iii) is simply wrong. GAMA stated in its appellant brief that "the bankruptcy judge undisputedly accepted that the appellant is a creditor of first order of payment (page 21, paragraph 3 of the Decision),"[365] but she did not. In the paragraph that GAMA mentioned, the bankruptcy judge was reciting GAMA's view. She explained that creditors' remarks about GAMA – that "it is a first-order creditor, but belongs in the class of unsecured creditors" – were accepted into the Final Reorganization Plan and that "the classes are changed and two classes are suggested."[366] The Court of Appeal is not required to address every argument raised by an appellant (if doing so is unnecessary to resolve the appeal), especially if the superfluous argument rests on a misleading statement of fact.

164. GAMA did not appeal complaint (4), *i.e.*, that "shareholders' loans were unlawfully accelerated."[367] The closest GAMA came to advancing this ground of appeal was its submission that since the "sudden maturity and collection of the debt of Bitar" was withdrawn, "the circumstances due to which [TE-TO] refers to 'future insolvency' were removed."[368] But the Court of Appeal *did* address that argument, finding that "the First Instance Court determined correctly that the legal conditions were met to open bankruptcy proceedings"[369]

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363 Reply ¶ 159.

364 Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 15.

365 Appeal by GAMA, dated 25 June 2018 (**C-104**) at 4.

366 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 21.

367 Reply ¶ 159(d).

368 GAMA appeal dated 25 June 2018 (**C-104**) at 2.

369 Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 15.

165. GAMA also complains that the Court of Appeal failed to assess whether TE-TO's creditors "would fare better in a liquidation scenario."[370] As explained, there is no such requirement in Prepackaged Bankruptcy proceedings.[371]

166. GAMA also says in its Reply that the Court of Appeal "neglected its duty to exercise independent judgment" and "deferred entirely to the bankruptcy judge's assessment of the reorganization plan's legality."[372] That is a distortion. GAMA relies on the Court's statement that it "has no legal opportunity to assess the correctness and content of the submitted reorganization plan."[373] That sentence concludes a paragraph in which the Court explained that the "submitted plan" (*i.e.*, the First Reorganization Plan) was corrected and a "consolidated reorganization plan" (*i.e.*, the Final Reorganization Plan) was approved by a vote of the creditors.[374] At that point, the First Reorganization Plan had been replaced, so the Court of Appeal correctly observed that it had no legal basis to assess it. The Court then assessed the "correctness and content" of the Final Reorganization Plan.[375]

6. GAMA's new allegations regarding the Bankruptcy Trustee are unfounded and, in any event, not attributable to Macedonia

167. In its Reply, for the first time, GAMA questions the actions of the Bankruptcy Trustee, Mr. Sazdovski, asserting "several critical failures"[376] GAMA had apparently overlooked these alleged "critical failures" until Macedonia pointed out in the Statement of Defence that nothing turned on Mr. Sazdovski's appointment (which GAMA claims was not

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370 Reply ¶ 164.

371 *See supra* § III.C.1.

372 Reply ¶ 161.

373 Reply ¶ 161. GAMA also relies on the Court's statement that "only if the Bankruptcy Judge 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." That statement was part of the Court's explanation of the role of the first instance court, as set out under the Bankruptcy Law, in reviewing a proposal for Prepackaged Bankruptcy (Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 10-12). It was not an assertion of the Court of Appeal's incompetence to review the decision of the first instance court or the correctness of the reorganization plan, as GAMA claims.

374 Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 12.

375 Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 12-15.

376 Reply ¶ 116.

regular) as GAMA was not challenging any of his actions in the Statement of Claim.[377] The alleged "critical failures" are transparent afterthoughts. According to GAMA:

a) Mr. Sazdovski submitted a report on the financial status of TE-TO that was "manifestly incomplete" because it did not contain the estimated settlement of creditors in a liquidation scenario.[378] GAMA's complaint rests on the applicability of the Professional Standard for Report to Reporting Meeting.[379] But, as explained above, those standards have no role in a Prepacked Bankruptcy procedure.[380]

b) Mr. Sazdovski handled voting rights improperly by not recognizing that the Reorganization Plan included a claim by the PRO that had been settled, and by failing to calculate statutory default interest.[381] The portion of the PRO claim that was later settled (EUR 260,000) amounted to roughly 0.002% of the votes, an amount incapable of altering voting rights materially.[382] As to interest, Article 136 of the Bankruptcy Law provides that unsecured claims shall not include interest, as Macedonia pointed out in the Statement of Defence, and GAMA offers no authority to the contrary.[383]

c) Mr. Sazdovski wrongly "endorsed the change in the creditors' classes proposed by TE-TO" (in his Report on the financial situation of TE-TO) before the bankruptcy judge had approved that change.[384] This distorts Mr. Sazdovski's

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[377] Statement of Defence ¶ 166 ("GAMA does not take issue with [Mr. Sazdovski's] qualifications, and in fact does not take issue with any of his actions and decisions as interim bankruptcy trustee.").

[378] Reply ¶ 116; Kostovski II ¶ 54.

[379] Reply ¶ 116, footnote 244; Kostovski II ¶ 54.

[380] *See supra* § III.C.1.(c).

[381] Reply ¶ 117, footnote 245; Kostovski II ¶ 55.

[382] Reorganization Plan (**C-13**) at 14; Petrov II ¶ 126; EUR 260,000 / total claims of EUR 13,648,824,725 = 0.000019.

[383] Statement of Defence ¶ 196; Macedonian Law on Bankruptcy (**R-10**) Article 136(3).

[384] Reply ¶ 117; Kostovski II ¶ 56. Mr. Kostovski also says that by submitting his report only one day before the 4 June 2018 hearing, Mr. Sazdovski "prevent[ed] the creditors from reviewing its contents prior to the hearing." Kostovski II ¶ 56. But the Final Reorganization Plan was not a new plan. It was updated from the First Reorganization Plan prepared in April 2018. And, as Mr. Petrov explains, the bankruptcy judge has discretion

report. He did not "endorse" the change proposed by TE-TO. He described it: "In the reorganization plan submitted by the debtor, the creditors … were divided into two classes."[385]

168. Mr. Kostovski opines that Mr. Sazdovski failed to comply with the Professional Standards on Implementation because he did not inform the bankruptcy judge and the creditors of a "material change to the situation foreseen by the [Final] Reorganization Plan" (*i.e.*, TE-TO's liability for profit tax).[386] Mr. Kostovski's assertion rests on speculation. He says that "[b]ased on the documents that I have reviewed, I conclude that Marinko Sazdovski did not take any of the actions prescribed."[387] Yet the only document he points to is a PRO record of the tax.[388] That document says nothing about what Mr. Sazdovski did (or did not do) in response to the tax liability. And Mr. Kostovski ignores other documents on the record indicating that creditors *had* been informed about the tax liability (*e.g.* Toplifikacija's objection to deferral of the tax liability).[389]

169. In any case, even if Mr. Sazdovski had acted other than fully in accordance with his duties and obligations (he did not), Macedonia would bear no responsibility for his conduct because the actions of a bankruptcy trustees is a private commercial agent and his actions are not attributable to the State under international law.

170. The rules of attribution under international law are codified in the International Law Commission's ("**ILC**") Articles on Responsibility of States for Internationally Wrongful Acts.[390] Under Article 4, the conduct of "State organs" is attributable to the State. Article

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to schedule the hearing in light of "the complexity of the material to be considered, the appropriate schedule of the parties' representatives, as well as the urgency of the issues discussed." *See* Petrov II ¶¶ 85-87.

385 Report on the Economic and Financial Situation of the Debtor, dated 4 June 2016 (**C-176**) at 14.

386 Kostovski II ¶¶ 57-59.

387 Kostovski II ¶ 59.

388 Kostovski II ¶ 59, footnote 142.

389 Decision of the State Commission for Prevention of Corruption, dated 7 December 2020 (**C-139**) at 2.

390 International Law Commission, Draft Articles on "Responsibility of States for Internationally Wrongful Acts with commentaries" (2001) (**RL-19**) at 11, 13, 18. These rules are generally recognized and applied in arbitral practice. These rules are generally recognized and applied in arbitral practice. *See e.g Flemingo v. Poland* (**RL-149**) ("The ILC Articles have thus been systematically applied, inter alia, to decide whether acts of

5 provides that the conduct of a person that is not an organ of the state, but which is empowered to exercise elements of governmental authority and acts in such capacity towards the claimant, may be attributable to the State. If neither Article 4 nor Article 5 applies, a person's conduct will only be attributable to the State under Article 8 if the specific conduct in question was carried out under the instruction, direction, or control of the State.

171. A bankruptcy trustee under Macedonian law is neither an organ of the State nor empowered to exercise element of governmental authority. As explained by Mr. Petrov – who is the immediate past President of the Chamber of Bankruptcy Trustees – under Macedonian law, the bankruptcy trustee performs a private commercial activity and is "independent from the state" and "not an authority of the state":[391]

> When offering the professional services and performing the activities, they are related to a private legal entity and no state control is performed regarding the activities of the private legal entity facing bankruptcy. The temporary bankruptcy trustee, as well as the bankruptcy trustee, do not act in the name and on behalf of the state, but take care of the debtor's property and protection of the rights of the creditors to whom they are accountable for their work.[392]

172. The bankruptcy trustee is not a government employee, does not receive compensation from the state, and is merely licensed by the Minister of the Economy.[393] The bankruptcy trustee is subject to commercial law and must be organized in one of the corporate forms prescribed by the Law on Commercial Companies and registered in a commercial register.[394] The trustee is compensated out of the proceeds of the bankruptcy estate and is personally liable for the damage that he may cause to the debtor, the creditors and any

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corporations or entities, committed towards a foreign investor or its investment, could be attributed to the host State …").

391 Petrov II ¶¶ 61-68.

392 Petrov II ¶ 61. *See* Petrov I ¶¶ 7-10 (describing background as President of President of the Chamber of Bankruptcy Trustees from 2007 to 2022 and one of the first six bankruptcy trustees of the Republic of North Macedonia who acquired the title of authorized bankruptcy trustee, and experience as a trustee in over 180 bankruptcy proceedings including a bankruptcy proceeding with a Plan for reorganization).

393 Petrov II ¶¶ 61-62.

394 Petrov II ¶ 62.

interested parties.[395] Their duties, including protecting the property of the debtor through appropriate means, giving consent to the management bodies of the debtor, and examining whether the debtor has assets that can be opened and are sufficient for the implementation of the bankruptcy procedure do not involve the exercise of public authority.[396]

173. Multiple investment treaty tribunals have concluded in similar circumstances that the conduct of bankruptcy trustees (or their equivalent) is not attributable to the respondent State. For example, the claims in *Plama v. Bulgaria* arose out of the bankruptcy proceedings of Nova Plama, a Bulgarian company owned by the claimant. The claimant asserted irregularities in the appointment of Nova Plama's bankruptcy trustees (referred to as "syndics" under Bulgarian law) and that the syndics had taken a series of measures that harmed Nova Plama.[397] The claimant further argued that, "[t]ogether with other violations, the syndics' actions amount[ed] to an indirect expropriation" of its investment.[398] The tribunal rejected these arguments explaining that, under Bulgarian law, "syndics in bankruptcy proceedings … are not instruments or organs of the State for whose acts the State is responsible" and considered that the acts of bankruptcy trustee did not fall under ILC Article 8, therefore concluding that "the acts of the syndics, if they were wrongful … are not attributable to Respondent."[399]

174. In *Vöcklinghaus v. Czech Republic*, the claimant argued that the Czech Republic was responsible for "court-reviewed acts of bankruptcy trustees" and that bankruptcy trustees were "public bodies '*sui generis*'" under Czech law.[400] The tribunal dismissed this argument under both ILC Articles 4 and 5. The tribunal found that "a bankruptcy trustee [under Czech law] does not represent, and is independent of, the Czech Republic and . . .

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395 Petrov II ¶ 60; Macedonian Law on Bankruptcy (**R-10**) Article 26 (Liability for Incurred Damage), Article 37 (Reward and Reimbursement of expenses of the bankruptcy trustee).

396 Petrov II ¶ 66; Macedonian Law on Bankruptcy (**R-10**) Article 33.

397 *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008) ("***Plama v. Bulgaria***") (**RL-132**) ¶¶ 69, 230, 229.

398 *Plama v. Bulgaria* (**RL-132**) ¶ 229.

399 *Plama v. Bulgaria* (**RL-132**) ¶¶ 252-253.

400 *Vöcklinghaus v. Czech Republic* (**RL-60**) ¶¶ 23, 185.

the trustee has an independent position in the bankruptcy process."[401] The tribunal emphasized that the trustee had personal liability for their actions and is not compensated by the State.[402] The tribunal also stated that the bankruptcy trustee "does not exercise governmental functions or sit within the governmental hierarchy" and that the trustee's "acts are akin to commercial acts of managers or accountants of private corporations."[403]

175. Likewise, in *Oostergetel v. Slovak Republic*, the claimants asserted that the bankruptcy proceedings of the Slovak company in which they had invested had been "conducted in an illegitimate manner"[404] and that the "provisional trustee and bankruptcy trustee appointed by the [Slovak] Judiciary [had] abus[ed] their role and serve[d] the interests of" a company allegedly connected to the Slovak "financial mafia."[405] The *Oostergetel* tribunal held that the acts of the bankruptcy trustees were not attributable to Slovakia. It first concluded that bankruptcy trustees are not State organs.[406] The tribunal emphasized that bankruptcy trustees are independent from the State and are personally liable for damages that result from any breach of their duties.[407] It reasoned that, under Slovak law, the acts of the bankruptcy trustees "cannot be said to be carried out in the exercise of governmental authority, nor on the instructions, or under the direction or control of the State."[408]

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401 *Vöcklinghaus v. Czech Republic* (**RL-60**) ¶ 188.

402 *Vöcklinghaus v. Czech Republic* (**RL-60**) ¶ 188 ("Pursuant to S.8 of the Act, the Trustee has personal liability for her actions (for which she must carry insurance… There is no requirement that she should be a government employee and, indeed, her remuneration is not in the form of a state salary, but is derived from the proceeds of sale of the assets.").

403 *Vöcklinghaus v. Czech Republic* ¶ 188. *See also* ¶ 189 (concluding that the trustee's acts were not attributable to the Czech Republic under Article 5 because the claimant failed to "demonstrate that a domestic law in the Czech Republic specifically authorised a bankruptcy trustee to undertake public functions" or that the disputed act arose out of a delegated governmental function.).

404 *Oostergetel v. Slovak Republic* (**RL-63)** ¶ 88.

405 *Oostergetel v. Slovak Republic* (**RL-63**) ¶ 94.

406 *Oostergetel v. Slovak Republic* (**RL-63**) ¶ 155 ("The Arbitral Tribunal is satisfied that under Slovak law, provisional and bankruptcy trustees are not State organs for whose acts the State is responsible according to Article 4 of the ILC Articles.").

407 *Oostergetel v. Slovak Republic* (**RL-63**) ¶¶ 157-158 ("[U]nder Slovak bankruptcy law, the bankruptcy trustee, not the State, is liable for damage inflicted on the parties to the bankruptcy proceedings or on third parties as a result of a breach of duties."),

408 *Oostergetel v. Slovak Republic* (**RL-63**) ¶ 157.

176. Other cases are to similar effect.[409] In other words, even if the actions of Mr. Sazdovski were objectionable (which they are not), they are not attributable to the State.

177. All told, GAMA's complaints about the conduct of the Macedonian courts in TE-TO's bankruptcy proceedings fall well short of establishing a denial of justice. Much like GAMA's gripes about the Payment Dispute proceedings, its criticisms of the bankruptcy proceedings boil down to an argument that the Macedonian courts made mistakes and reach the wrong conclusions. But "[i]nternational tribunals are not instances of appeal, and judicial errors in the misinterpretation or misapplication of municipal law do not engage the State's international responsibility for denial of justice."[410] Even taking GAMA's allegations at their highest, they do not prove the kind of "willful disregard of due process of law … which shocks, or at least surprises, a sense of judicial property" that is required to establish a denial of justice.[411] Its claim therefore fails.

IV. GAMA STILL CANNOT SHOW THAT MACEDONIA'S TEMPORARY TAX DEFERRAL AGREEMENT WITH TE-TO BREACHED THE TREATY

178. Macedonia explained in its Statement of Defence that when TE-TO faced an unanticipated income tax liability after its reorganization, it submitted a proposal for State aid to postpone that liability.[412] Macedonia agreed to grant this State aid in the form of a tax deferral based on Article 8(2)(g) of the Law on State Aid and entered an agreement with TE-TO on 28 October 2019 on this basis.[413] When Toplifikacija

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409 *See, e.g., MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016) ("***MNSS v. Montenegro***") (**RL-90**) ¶¶ 314, 316. The case involved allegations of misconduct by an administrator appointed in bankruptcy proceedings concerning the claimant's investment in a steel production company. Relying on *Plama* and *Oostergetel* as well as ILC Article 8, the *MNSS* tribunal held that the bankruptcy administrator was a representative of the debtor, and, therefore, Montenegro was not responsible for the administrator's conduct during the bankruptcy proceedings. The tribunal ruled that "[n]one of the acts in relation to the bankruptcy proceedings complained of by the Claimants may be attributed to the Respondent," and further explained that this conclusion was "in line with the concept of the bankruptcy administrator in most European civil law systems and supported by investment treaty tribunals." *See* ¶ 151.

410 *Gramercy Funds v. Peru* (**RL-114)** ¶ 1020.

411 *Mondev v. United States* (**CL-13)** ¶ 127 (citing *ELSI* (**CL-28)** ¶ 128).

412 Statement of Defence ¶¶ 94-95.

413 Statement of Defence ¶ 95. Macedonian Law on State Aid Control **(R-2)** (Article 8(2): "The granting of state aid can be allowed if it is about…(g) other state aid granted on the basis of the act from paragraph (3) of this article." Article 8(3) "The Government of Macedonia, on the proposal of the Commission for the Protection of Competition, prescribes the conditions and procedure for awarding state aid from paragraph (2) of this

complained about the tax deferral to the Macedonian State Commission for Prevention of Corruption, the Commission investigated. During this investigation, the President of the Government of Macedonia informed the Commission that the "Agreement for Granting State Aid [to TE-TO] should be annulled-terminated due to the lack of legal regulations and bylaws."[414] The Commission concluded that the State aid should be terminated because the implementing decree under Article 8(2)(g) that "would determine the conditions and the procedure for granting state aid" had not yet been adopted.[415] The Macedonian Government duly terminated the State aid agreement with TE-TO on 1 December 2020.[416]

179. In its Reply, GAMA ignores that the Macedonian Government, with the full support of the President, terminated the State aid agreement. GAMA alleges that high-ranking officials and TE-TO "conspired to grant the company a tax deferral," in a "carefully orchestrated maneuver to circumvent the collapse of TE-TO's judicial reorganization."[417] GAMA's allegations are baseless.

180. First, GAMA says that when the Macedonian Government authorized the State aid for TE-TO it "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 authorize the State aid on that basis."[418] But the Government instructed the Commission for the Protection of Competition

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Article.") State Aid Agreement between the Macedonian Government and TE-TO (28 October 2019) **(C-185)** (providing for deferral of 2018 tax liability)**.** *See also* Annex to the State Aid Agreement between the Macedonian Government and TE-TO (6 December 2019) **(C-186)** (providing for deferral of monthly advance tax payments for 2019.).

414 Statement of Defence ¶ 99; Decision of the State Commission for Prevention of Corruption, dated 7 December 2020 (**C-139**) at 3.

415 Statement of Defence ¶ 96; Decision of the State Commission for Prevention of Corruption (7 December 2020) **(C-139)** at 3 ("the process of granting state aid was carried out in default of adopted decrees – bylaws, which would determine the conditions and the procedure for granting state aid … and which … should have been adopted by the Government"; "the Government believes that this Agreement for Granting State Aid should be annulled-terminated due to the lack of legal regulations and bylaws – decrees, which will precisely and more closely elaborate this matter.").

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

417 Reply ¶ 190.

418 Reply ¶ 185.

("**Competition Commission**") to draft such a decree *before* it entered into the agreement with TE-TO.[419] The steps the Government took reflects nothing but its unremarkable efforts to lawfully exercise its sovereign prerogative to grant State aid to a struggling energy company.[420]

181. Second, GAMA claims that the Competition Commission authorized the tax deferral in "blatant disregard" of the rules, because under Article 3 of the law on State Aid for Rescuing and Restructuring Undertakings in Difficulty, "TE-TO was not eligible for rescue aid which could only have been comprised of loans[.]"[421] GAMA omits that under Article 4 of the same legislation, "restructuring aid can be in various forms such as debt write-offs, tax relief[.]"[422] In any event, these rules did not apply: the Competition Commission approved of the State aid not on the basis that it was "aid for rescue and restricting of companies in difficulty" under Article 8(2)(v) of the State aid Law, but on

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[419] When the Government decided to offer TE-TO state aid it "at the same time" properly instructed the Competition Commission, in accordance with the Law on State Aid, to draft a decree prescribing these conditions and procedure for awarding the state aid "within 30 days." *See* Minutes of the 160th session of the Government (22 October 2019) (**C-123**) at 3. After issuing this instruction, the Government entered into the agreement with TE-TO for State aid. *See* State Aid Agreement between the Macedonian Government and TE-TO dated 28 October 2019 (**C-185**). The formalization of this agreement was subject to the Competition Authorities' decree: "in accordance with Article 8 para. 2 item [g] of the law on state aid of control, granting thereof shall be allowed." *See* State Aid Agreement between the Macedonian Government and TE-TO dated 28 October 2019 (**C-185**) Article 4.

[420] *See* Statement of Defence ¶¶ 7, 96. 99. On the important role of State aid in the energy market, *see* Herrera Anchustegui, Ignacio and Bergqvist, Christian, *The Role of State Aid Law in Energy* in Handbook of Energy Law, Soliman Hunter, T, Herrera Anchustegui, I, Crossley, P, Álvarez, G (eds), Routledge (2019) (**R-73**), p. 1 (explaining that "State aid rules are an integral component of energy regulation" and that "[t]heir importance for the energy sector is pivotal" because "[e]nergy markets tend to be characterized by market failures that market forces alone do not fully address."). On the importance of energy security to security see North Atlantic Treaty Organization (NATO), Energy Security, NATO Topics (2023) (**R-75**) at 3 ("Energy security plays an important role in the common security of NATO Allies. The disruption of energy supply could affect security within the societies of NATO member and partner countries, and have an impact on NATO's military operations.") Macedonia started its Membership Action Plan to join NATO in 1999 and formally became a member in March 2020.

[421] Reply ¶ 185; Decree on the Conditions and Procedure for Granting State Aid for Rescuing and Restructuring Undertakings in Difficulty **(C-199)**.

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

the basis that it was "aid for the implementation of projects of significant economic interest to Macedonia," which falls under Article 8(2)(b). [423]

182. Third, GAMA contends that the State aid agreement "was supposed to be a solution to TE-TO's significant tax debt, however it proved to be inoperative," and notes that the PRO sent TE-TO a letter for payment of past-due taxes after the agreement had been signed.[424] Indeed, the State aid was never formalized. Although the Competition Commission approved the State aid agreement because it fell within one of the categories of permitted State aid ("aid for the implementation of projects of significant economic interest to Macedonia"), it did not issue the necessary decrees to award State aid under Article 8(3).[425] The PRO therefore continued to pursue TE-TO for tax payments.[426] When the State Commission for Prevention of Corruption investigated the issue it decided that the legal procedures needed to grant state aid to TE-TO were not in place.[427] The President agreed and the Government terminated the agreement, and TE-TO took out

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[423] *See* Decision of the Commission for the Protection of Competition UP No. 10-81 dated 16 October 2019 **(C-120)** at 1, and Decision of the Commission for the Protection of Competition UP No. 10-81 dated 29 November 2019 **(C-126)** at 1; Macedonian Law on State Aid Control **(R-2)**.

[424] *See* Reply ¶ 182. GAMA criticizes the PRO for not enforcing the tax debt before the Government agreed to the State aid agreement or in the year after the agreement was officially terminated, saying that that "the rational for this restraint was clear" and citing an e-mail from a spokesperson of the Government stating that '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.'" *See* Reply ¶ 182. As explained, that prediction turned out to be unfounded. *See* Statement of Defence ¶ 232. As for the PRO's alleged tax enforcement failure GAMA ignores that the PRO had 10 years to collect taxes from TE-TO under Macedonian law. *See* Opinion by the Public Revenue Office no. 28-3845-4 dated 22 October (**C-181**) at 2 ("[A]ccording to Article 122-a of the Tax Procedure Law, the Public Revenue Office has a legal obligation to carry out tax collection within ten years as from the end of the year in which the tax … become[s] due for payment[.]"); Tax Procedure Law Article 122-a (**R-94**.). Once the Government signed the nine-year State aid agreement with TE-TO, the PRO naturally did not start action to collect these taxes while the State aid was pending formalization. *See* State Aid Agreement between the Macedonian Government and TE-TO dated 28 October 2019 (**C-185**) Article 3 ("Contracting Parties agree that after the expiration of the agreed period of 9 years, counted from the date of entry into this agreement, the Beneficiary shall immediately settle its tax liability[.]"). After the Government terminated the agreement, TE-TO promptly paid its tax bill.

[425] Decision of the Commission for the Protection of Competition UP No. 10-81 dated 16 October 2019 **(C-120) at 1,** and Decision of the Commission for the Protection of Competition UP No. 10-81 dated 29 November 2019 **(C-126)** at 1; Macedonian Law on State Aid Control **(R-2)**.

[426] Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for October 2019 (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 (21 January 2020) **(C-196)**.

[427] Decision of the State Commission for Prevention of Corruption (7 December 2020) **(C-139)** at 3.

a loan to pay its bill.[428] An "inoperative" short-lived agreement to grant State aid to TE-TO hardly reflects a "carefully orchestrated maneuver to circumvent the collapse of TE-TO's judicial reorganization" let alone conduct amounting to a breach of the Treaty, as GAMA alleges.

V. GAMA STILL CANNOT SHOW THAT MACEDONIA EXPROPRIATED ITS RIGHT TO PAYMENT UNDER THE EPC CONTRACT

183. GAMA continues to claim that the Macedonian courts expropriated its rights under the EPC Contract and Settlement Agreement.[429] But as shown in the Statement of Defence and below, there can be no judicial expropriation without a denial of justice or the participation of non-judicial State organs in the expropriation (**Section V.A**). The deferral of TE-TO's 2018 income tax payment remains the only non-judicial conduct about which GAMA complains, and GAMA still cannot establish that this deferral amounts to an expropriation (**Section V.B**). In any event, GAMA's expropriation claim fails because its payment claim against TE-TO was recognized and will be paid in accordance with the Final Reorganization Plan (**Section V.C**).

A. THERE CAN BE NO JUDICIAL EXPROPRIATION WITHOUT A DENIAL OF JUSTICE OR THE PARTICIPATION OF NON-JUDICIAL STATE ORGANS IN THE EXPROPRIATION

184. In its Statement of Defense, Macedonia cited a long line of cases demonstrating that international law does not recognize a concept of judicial expropriation independent of a denial of justice.[430]

185. Although GAMA's Reply acknowledges that "in some of these cases [cited by Macedonia] tribunals required a showing of a denial of justice in order for the claimant to succeed with expropriation claims,"[431] GAMA qualifies that acknowledgment by adding that "none of these cases excluded the possibility of bringing an expropriation claim for

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[428] Minutes of the 25th session of the Government of the Republic of North Macedonia (1 December 2020) **(C-140)** at 6.

[429] *See* Reply § IV.

[430] Statement of Defence ¶¶ 217-224.

[431] Reply ¶ 193.

takings of property through a judicial conduct."[432] However, by requiring a showing of a denial of justice, the cases cited by Macedonia necessarily "excluded the possibility" of establishing a judicial expropriation without such a denial of justice. This is evident from GAMA's own descriptions of these cases, notably the following:

a) In *Loewen v. United States*, the tribunal "considered that Loewen's expropriation claim 'can succeed', if a denial of justice is shown."[433]

b) In *Lion v. Mexico*, the tribunal "accepted the possibility of a judicial expropriation but required a finding of … a denial of justice."[434]

c) In *MNSS v. Montenegro*, the tribunal "considered that a court's decision could amount to a direct expropriation in case the denial of justice is found."[435]

186. GAMA's attempts to distinguish other cases cited by Respondent fare no better.[436]

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[432] Reply ¶ 193 (emphasis added).

[433] Reply ¶ 194(a) (emphasis added).

[434] Reply ¶ 194(b) (emphasis added).

[435] Reply ¶ 194(e) (emphasis added).

[436] GAMA says that "[t]he tribunal in *Swisslion v Macedonia* accepted that a State could be responsible for an expropriation through acts of judiciary." Reply ¶ 30. GAMA ignores the *Swisslion* tribunal's holding that "ICSID tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law. They only have to consider whether they constitute a violation of international law, and in particular whether they amount to a denial of justice." *Swisslion v. Macedonia* (**RL-65**) ¶ 264 (emphasis added).

GAMA contends that the tribunal in *İçkale İnşaat v. Turkmenistan* considered if a court decision was "excessive and as such expropriatory." Reply ¶ 30. GAMA ignores the tribunal's holding that "any claim arising out of the alleged inadequacy of the local legal system would have to be pursued as a denial of justice claim." *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016) ("***İçkale v. Turkmenistan***") (**RL-87**) ¶ 260.

GAMA says that the tribunal in *Azinian v. Mexico* "did not consider a denial of justice as the only ground to challenge a judicial decision under international law." Reply ¶ 193(f). However, the *Azinian* tribunal ruled that showing that the "Mexican courts were wrong" would not be enough to establish liability under the NAFTA, and that "the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end." *Robert Azinian, Kenneth Davitian & Ellen Baca v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999) ("***Azinian v. Mexico***") (**RL-15**) ¶ 99. A pretence of form is a form of a denial of justice. *See* Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (CAMBRIDGE UNIVERSITY PRESS 2005) (**RL-28**) at 81. *See also* Campbell McLachlan, et al., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017) ("**CAMPBELL MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION**") (**RL-96**) ¶ 7.147 ("Where the investor has exhausted local remedies, and his claim has been held invalid a matter of domestic law, he must establish that he was subject to a denial of justice in the judicial

187. Respondent showed in its Statement of Defence that the cases on which GAMA relies to establish that judicial conduct can be expropriatory without a denial of justice do not support that position. Rather, these cases fall into one or both of two categories: (i) cases where a tribunal applied the denial of justice standard in substance, even if it was not labelled as such, and (ii) cases where the conduct of non-judicial State organs was intertwined with judicial conduct.[437] GAMA's Reply revisits these cases without addressing this categorization:

a) GAMA says that in *Arif v. Moldova* the "[d]ismissal of the expropriation claim was … not limited to the absence of a denial of justice."[438] However, the tribunal dismissed the claim on the grounds that "the Moldovan courts [had not] acted in denial of justice in any way," there was no evidence "that the Moldovan judiciary has not applied Moldovan law legitimately and in good faith," and there was no evidence of collusion (which presumes bad faith) between the courts and the claimant's competitors.[439] This shows that the tribunal applied the denial of justice standard either explicitly or implicitly (i.e., without labeling it as such) to dismiss the claimant's expropriation claim.[440] Separately, the *Arif* tribunal found an FET breach based on the conduct of non-judicial State organs.[441]

b) GAMA asserts that in *Deutsche Bank v. Sri Lanka*, "the [expropriation] finding was mandated by the facts of the case and the tribunal nowhere conditioned the

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system in order to prevail in his claim. This important point was established in one of the earliest claims under this head under NAFTA: *Azinian v. Mexico*.") (emphasis added).

437 Statement of Defence ¶ 225.

438 Reply ¶ 28 (a). *Arif v. Moldova* (**RL-69**) ¶¶ 312, 396, 415 (The claimant alleged that certain court decisions annulling a tender constituted a denial of justice and separately an expropriation. The tribunal characterized the claimant's expropriation claim as asserting that "the actual misapplication of Moldovan law by the courts amounts to expropriation.").

439 *Arif v. Moldova* (**RL-69**) ¶¶ 415-416 (emphasis added).

440 *See also* Statement of Defence ¶ 139(a).

441 *Arif v. Moldova* (**RL-69**) ¶ 556. *See also* Statement of Defence ¶ 139(a). As for *Rumeli v Kazakhstan* (**CL-25**), another case cited in GAMA's Statement of Defence, GAMA now acknowledges that the tribunal's expropriation finding was based on the conduct of a combination of judicial and non-judicial actors. Reply ¶ 28(g) ("[T]he final decision of the Supreme Court was seen as a final act of creeping expropriation, instigated by non-judicial actor's ….."). Moreover, the *Rumeli v. Kazakhstan* tribunal held that the "decisions of the various Kazakh Courts which have been reviewed above were wrong procedurally or substantially, or were so egregiously wrong as to be inexplicable other than by a denial of justice." ¶ 619.

success of the expropriation claim with the interference of non-judicial actors."[442] But the facts that mandated the expropriation finding involved a combination of judicial and non-judicial acts, including conduct of the Sri Lankan Central Bank.[443]

c) GAMA relies on the observation of the tribunal in *Saipem v. Bangladesh* that although "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."[444] GAMA ignores that, when assessing the wrongful conduct of the Bangladeshi courts (which bears no resemblance to the facts of this case), the *Saipem* tribunal formulated its findings in the language of a denial of justice, even if it did not use that label.[445]

d) GAMA asserts that in *Sistem v. Kyrgyz Republic* "the findings of expropriation rested exclusively on the conduct of the courts and not on actions of any other state organs."[446] On the contrary, the *Sistem* tribunal held that the claimant's investment had been expropriated through the armed takeover of the claimant's hotel and the State's failure to take steps to return the hotel to the claimant, as

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442 Reply ¶ 28(b).

443 *See* Statement of Defence ¶¶ 139(b), 225(d); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) ("***Deutsche Bank v. Sri Lanka***") (**CL-22**) ¶ 523 ("[T]he 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. It was the Central Bank which encouraged Deutsche Bank to enter hedging agreements with CPC in the first place and which continued to monitor the conclusion of such transactions.").

444 Reply ¶ 28(c), quoting *Saipem v. Bangladesh* (**CL-24**) ¶ 181 (emphasis added).

445 *See* Statement of Defence ¶¶ 139(c), n. 417, 225(a). This case also involved a textbook example of a denial of justice – actions taken by the courts to deliberately thwart the investor's ability to enforce its award. *See Saipem v. Bangladesh* (**CL-24**) ¶ 155, 159-161, 167-169, 182-183, 187 (the tribunal found the judicial actions at issue to have been "grossly unfair," "abusive", and an "abuse of right," while observing that the "Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which is instituted" and that the claimant had effectively exhausted local remedies. The tribunal thus formulated its findings in the language of denial of justice.).

446 Reply ¶ 28(f).

well as the Kyrgyz courts' subsequent abrogation of a share purchase agreement under which the claimant had acquired the hotel.[447]

e) GAMA says that, in its decision on jurisdiction, the tribunal in *Dan Cake v. Hungary* "had no problem to conclude that acts of the Hungarian bankruptcy court 'could be considered to be measures 'having equivalent effect' to an expropriation.'"[448] GAMA fails to engage with the fact that the claimant in *Dan Cake* dropped its judicial expropriation claim when the case proceeded to the merits, so the tribunal never considered in what circumstances judicial conduct may amount to an expropriation.[449] On the merits, the *Dan Cake* tribunal held that the acts of the Hungarian courts breached the FET standard in "the form of a denial of justice."[450]

188. In its Reply, GAMA cites additional cases that it says "confirm that the review of judicial conduct is not limited to instances of a denial of justice only."[451] But these additional cases fall into the same two categories outlined above and, therefore, do not help GAMA:[452]

a) In *Karkey v. Pakistan*, the tribunal held that the Pakistani Supreme Court's decision to void a contract under which the claimant had procured and rented equipment to a Pakistani electric utility was expropriatory.[453] The Supreme Court case was instigated by a member of the Pakistani parliament, who successfully lobbied the Chief Justice of the Supreme Court to initiate *sua sponte* proceedings

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447 *See Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/, Award (9 September 2009) (**CL-59**) ¶¶ 118, 128 (observing that the claimant had lost control of the hotel "as a matter of fact" before losing his legal interest "as a matter of law"). *See also* Statement of Defence ¶ 225(e).

448 Reply ¶ 28(h).

449 Statement of Defence ¶ 225(b).

450 *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (24 August 2015) ("***Dan Cake v. Hungary***") (**CL-26**) ¶ 146.

451 Reply ¶ 29.

452 The only exception is *Infinito Gold*, which does not assist GAMA for other reasons, as discussed above. *See supra* § III.A.2.

453 *Karkey v. Pakistan* (**CL-69**) ¶ 648.

against the claimant, which resulted in a judgment that was not susceptible to appeal and that (as the *Karkey* tribunal emphasized) was criticized by the Pakistani government itself as containing a "misreading of the facts" and "errors on the face of the record," and as being "not in accordance with the principles of natural justice."[454] The Supreme Court assumed an inordinately activist role in the case, "guiding investigations," directing government agencies to pursue criminal proceedings against the Claimant, and ordering arrests and attachments of assets, which conduct elicited a complaint from Pakistan's National Accountability Board.[455] Thus, *Karkey* involved the participation of non-judicial State actors combined with an extraordinary example of a court overstepping the bounds of ordinary judicial conduct.

b) In *Oil Field of Texas v. Iran*, the Iran-US Claims Tribunal found that an Iranian court order that stopped the claimant's counterparty from making rent payments and returning certain equipment to the claimant was an expropriation.[456] The Iranian court never summoned the claimant to appear in court, never served the claimant with documents, and never informed the claimant about the court order, thus denying the claimant any judicial remedy.[457] The Iran-US Claims Tribunal confirmed that, "[i]n these circumstances, and taking into account the Claimant's impossibility to challenge the Court order in Iran, there was a taking of the [equipment] for which the Government is responsible."[458] This is a textbook example of a denial of justice.[459]

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454 *Karkey. v. Pakistan* (**CL-69**) ¶¶ 105, 557.

455 *Karkey v. Pakistan* (**CL-69**) ¶¶ 142, 145, 147. *See also* ¶ 560 ("Last but not least, the Tribunal notes that the Supreme Court played an active part in several of the acts attributable to Pakistan and that are presented by Karkey as a general pattern of breaches.").

456 Reply ¶ 29(c); *Oil Field of Texas, Inc. v. Iran and the National Iranian Oil Company*, IUSCT Case No. 43, Award (8 October 1986) ("***Oil Field of Texas, Inc. v. Iran***") (**CL-71**) ¶¶ 42-43.

457 *Oil Field of Texas, Inc. v. Iran* (**CL-71**) ¶ 41.

458 *Id.* ¶ 45. In paragraph 42 of its decision, the Iran-US Claims Tribunal's suggested that "[i]t is well established in international law that the decision of a court in fact depriving an owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court." This is an overstatement. The Tribunal cited as support the French-Italian Conciliation Commission in its Decisions Nos. 136, 171 and 196 of June 25, 1952, July 6, 1954, and Dec. 7, 1955, 13 Rep. Int'l Arb. Awards 389 (1964) (**RL-**

c) In *Standard Chartered Bank v. Tanzania*, the tribunal held that there could be no judicial expropriation "simply because judicial decisions were taken in error or may be considered aberrant," which is consistent with requiring a denial of justice to find that a court decision amounts to an expropriation.[460] The tribunal observed that "judicial decisions that permit the actions or inactions of other branches of the State and which deprive the investor of its property or property rights, can still amount to expropriation," which is an entirely different matter from judicial decisions amounting to an expropriation in and of themselves (without "permitting" the misconduct of other State organs).[461]

189. In sum, a court decision depriving an investor of property does not in and of itself amount to an expropriation. Something more is required – namely, a denial of justice or the participation of non-judicial State organs in the expropriation – as otherwise "[e]very

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118), concerning a dispute over Italian property in Tunisia. The case did not involve an expropriation under customary international law, but rather a judicial requisition of property in direct violation of the terms of the peace treaty between France and Italy. On that basis, the Commission concluded (unremarkably) that the court decisions could engage France's international responsibility. *Id*. at 438 ("The judgment rendered by the judicial branch is an emanation of an organ of the State much like the law promulgated by the legislative branch, or the decision taken by the executive branch. The non-observance of an international rule on the part of a court triggers international responsibility of the collective entity of which the tribunal is an organ even if the tribunal has applied a domestic rule that conforms to international law … Either the French courts ordered the liquidations in conformity with internal French law, but in violation of the Treaty, and France is responsible for the legislative act contrary to its international obligations, or the French courts ordered the liquidations in violation of internal French law and the Treaty, and France is responsible for the judiciary act contrary to its international obligations.") (translation of the French original).

459 Commenting on the decision, Judge Greenwood observed that "[i]t is clear, therefore, that the Tribunal considered that, if there had been a means by which the Claimant could have challenged the decision of the Islamic court within the Iranian judicial system, the decision of the Islamic court would not have amounted to a violation of international law." *See* Christopher Greenwood, State Responsibility For The Decisions Of National Courts, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS (M. Fitzmaurice & D. Sarooshi, eds. 2004) (**RL-27**) at 65.

460 *Standard Chartered Bank* (*Hong Kong*) *Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Award (11 October 2019) ("***Standard Chartered Bank v. Tanzania***") (**CL-72**) ¶ 279.

461 *Standard Chartered Bank v. Tanzania* (**CL-72**) ¶ 279.

judicial decision would be expropriatory for the losing party,"[462] and the notion of judicial expropriation would become an end run around the denial of justice standard.[463]

190. The ICJ recently confirmed this position in *Certain Iranian Assets*. The ICJ held that a finding of judicial expropriation requires proof of a judicial decision causing deprivation of property and an additional element of illegality, in the form of either a denial of justice or a combination of judicial conduct and unlawful non-judicial conduct:

> The Court considers that a judicial decision ordering the attachment and execution of property or interests in property does not per se constitute a taking or expropriation of that property. **A specific element of illegality related to that decision is required** to turn it into a compensable expropriation. Such an element of illegality is present, in certain situations, **when a deprivation of property results from a denial of**

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

[463] While asserting that its argument on judicial expropriation is supported by "doctrine," GAMA cites to only one article, published by Hamid Gharavi. *See* Reply ¶ 195, citing H. Gharavi, *Discord Over Judicial Expropriation*, ICSID Review, Vol. 33, No. 2 (2018) (**CL-73**). Mr. Gharavi says that "the majority of the doctrine and case law" takes the view that "judicial expropriation is independent from and is governed by different standards than denial of justice," but he offers only four cases in support of that statement: *Rumeli v. Kazakhstan* (**CL-25**), *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID* Case No. ARB/08/02 (**CL-15**), *Saipem v. Bangladesh* (**CL-24**), and *Oil Field of Texas v. Iran* (**CL-71**). *Id.* at 356. As shown in paragraph 119 below, none of these cases supports the notion of judicial expropriation independently of a denial of justice or the participation of non-judicial State organs. Moreover, Mr. Gharavi ultimately proposes an elevated threshold for finding a judicial expropriation: "[J]udicial expropriation could consist of: - A violation of due process which is similar to the standard of procedural denial of justice and which entails the same sensitivities and risk of offending the judiciary of a sovereign State; - 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."). *Id.* at 357 (emphasis added). In any event, Mr. Gharavi represents a minority view that goes against the weight of commentary. *See, e.g.*, Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) INT'L & COMP. L.Q. 28 (2014) (**RL-80**) at 29 ("Acts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial of justice and not for any other form of delictual responsibility towards nationals"); Aniruddha Rajput, *Cross-Border Insolvency and Public International Law*, 19 ROMANIAN J. OF INT'L LAW 7 (2018) (**RL-103**) at 24, 23 ("Although some tribunals have devised the concept of judicial expropriation, there are doubts about its validity. Every judicial decision would be expropriatory for the losing party. That is a harsh standard. State responsibility for judicial actions is best captured by denial of justice: a well-established standard in customary international law.").

GAMA says that Professor Douglas's views on judicial expropriation "have been criticized" and refers to only one such criticism, by Mr. Gharavi. Reply ¶ 194, citing H. Gharavi, *Discord Over Judicial Expropriation*, ICSID Review, Vol. 33, No. 2 (2018) (**CL-73**) at 351. Professor Douglas's writings on expropriation and denial of justice have been endorsed by States in non-disputing party submissions. *See, e.g.*, *The Renco Group, Inc. v. Republic of Peru*, PCA Case No. 2019-46, Submission of the United States of America (7 June 2022) (**RL-165**) at 20, 22; *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Submission of the Government of Canada, (24 August 2021) **(RL-165)** at 16.

> **justice**, or when a judicial organ applies legislative or executive measures that infringe international law and thereby causes a deprivation of property.[464]

191. The ICJ's judgement is an authoritative pronouncement of what is required under international law to prove an expropriation involving the conduct of domestic courts.[465]

192. Because GAMA cannot establish a denial of justice by the Macedonian courts, as shown in Section V above, GAMA also cannot establish that the Macedonian courts' conduct was expropriatory.

B. GAMA STILL CANNOT SHOW THAT TE-TO'S TEMPORARY TAX DEFERRAL AMOUNTS TO AN EXPROPRIATION

193. The PRO's temporary tax deferral of TE-TO's income tax payment for fiscal year 2018 was and remains the only non-judicial conduct that, according to GAMA, constitutes an unlawful expropriation of its rights under the EPC Contract.[466] Macedonia showed in its Statement of Defence that the expropriation claim fails because GAMA cannot establish how the tax deferral supposedly resulted in the taking of its investment.[467]

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464 *Certain Iranian Assets* (*Islamic Republic of Iran v. United States of America*), ICJ Judgment (30 March 2023) (**RL-166**) ¶ 184 (emphasis added).

465 ICJ Judge Thomas Buergenthal, Lawmaking by the ICJ And Other International Courts, "International Law as Law at the International Court of Justice," American Society of International Law Proceedings 103 (2009) (**RL-133**) at 404 ("[W]hen it comes to determining what the relevant international law rule is, a decision by the ICJ will today, in general, be treated by the international community as the most authoritative statement on the subject and accepted as the law. Note, for example, how closely the International Law Commission followed the jurisprudence of the Court in drafting its Articles on State Responsibility and how frequently this jurisprudence is invoked as law … in decisions of international arbitral tribunals, probably more so than the traditional sources of international law – particularly custom and general principles – that have not been authenticated or validated by an ICJ judgment ... The existence of a functioning international judicial system with the ICJ at its informal apex, increasingly transforms these decisions, as a practical matter, into directly applicable law."); ICJ Judge Hisashi Owada, The Changing Docket of the International Court of Justice and the Significance of the Change Going Forward, "International Law as Law at the International Court of Justice," American Society of International Law Proceedings 103 (2009) (**RL-133**) at 402-403 ("[I]nternational courts operating at present in different fields are carefully reading each other's decisions and coming to a largely common understanding of the law applicable in various fields. In this picture, the ICJ occupies a special place as … the only universal international judiciary with general jurisdiction over issues of international law. The authority of the ICJ as the court of general jurisdiction that pronounces on issues of international law grounded on a comprehensive perspective of the law stands out as of primordial significance.").

466 Statement of Claim ¶ 189(c); Reply ¶ 199.

467 Statement of Defence ¶¶ 226-233.

194. In its Reply, GAMA says that "what matters to establish the expropriatory conduct is a proof of substantial interference with rights, and not the proof of exact economic loss and damage."[468] This is unresponsive to Macedonia's submission that GAMA failed to prove how the tax deferral amounts to a taking of GAMA's investment, irrespective the amount of damages allegedly caused. The Reply does not cure this failure of proof. Rather, GAMA repeats its allegations that, first, "[b]ut 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," and, second, "GAMA's claim would have been repaid in full or on better terms in TE-TO's bankruptcy, than in reorganization …."[469]

195. Both of these allegations are speculative and contradicted by the evidence, as demonstrated above in response to GAMA's denial of justice claim, where GAMA makes the same allegations. When the tax deferral was terminated in November 2020, a little over a year after it was instituted, TE-TO settled its tax bill by borrowing funds from a bank.[470] GAMA has not shown that TE-TO could not have borrowed funds a year earlier, in October 2019, when the tax deferral was granted. And even if TE-TO's reorganization would have "collapsed" but for the tax deferral, GAMA still cannot show that it would have been better off in bankruptcy. Mr. Petrov explains that it is highly unlikely that unsecured creditors, including GAMA, would have recovered anything if TE-TO had gone into bankruptcy.[471]

C. IN ANY EVENT, GAMA'S EXPROPRIATION CLAIM FAILS BECAUSE ITS PAYMENT CLAIM AGAINST TE-TO WAS RECOGNIZED AND WILL BE PAID IN ACCORDANCE WITH THE FINAL REORGANIZATION PLAN

196. GAMA's expropriation claim in any event fails because GAMA has not been deprived of its investment, *i.e.*, its rights under the EPC Contract to receive payment from TE-TO.[472]

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468 Reply ¶ 208.

469 Reply ¶ 210-211, relying on Kostovski II (**CE-02**) ¶ 111.

470 *See* Annual financial statements of TE-TO for the year ended on 31 December 2021 **(C-137)** at 12-13; Statement of Defence ¶ 232.

471 *See* Petrov II ¶ 126.

472 Reply ¶ 203 ("All these acts [of the Macedonian courts] 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.").

GAMA has retained those rights under the Final Reorganization Plan, subject to the same 90% write-off as the claims of TE-TO's other unsecured creditors.[473]

197. *Petrobart v. Kyrgyzstan* is instructive in this respect. A Kyrgyz court held a State-owned gas company, KGM, liable to pay the claimant, Petrobart, under a contract for the sale of gas condensate.[474] Before Petrobart could collect the amount owed to it, the Kyrgyz State transferred the majority of KGM's assets to other State-owned entities, KGM entered bankruptcy, and Petrobart was included in the list of creditors to be satisfied.[475] Even though Petrobart recovered no part of its claim in the bankruptcy, the *Petrobart* tribunal rejected Petrobart's claim that its rights under the contract with KGM had been expropriated, because "Petrobart's claims against KGM remained and gave rise to demands in KGM's bankruptcy."[476]

198. The same applies here. GAMA' right to payment from TE-TO has not been expropriated because that right was recognized in the Final Reorganization Plan and will be satisfied in accordance with that plan.[477]

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[473] GAMA argues that the judicial acts that allegedly resulted in the expropriation of GAMA's investment included the "taking of GAMA's right to arbitration and the application of the English law [under the EPC Contract] …." Reply ¶ 200. Neither of these rights was taken from GAMA. As shown above, GAMA waived recourse to arbitration by resorting to the Macedonian courts, and GAMA failed to plead English law in the Macedonian courts, accepting the application of Macedonian law instead. *See supra* § III.B.1.

[474] *Petrobart Ltd. v. The Kyrgyz Republic (II)* (SCC Case No. 126/2003) ("***Petrobart v. Kyrgyz Republic***") (**CL-30**) at 60.

[475] *Petrobart v. Kyrgyz Republic* (**CL-30**) at 60, 74-75, 83.

[476] *Petrobart v. Kyrgyz Republic* (**CL-30**) at 77 ("It is clear that there was no formal expropriation of Petrobart's investment. Nor does it appear that the measures taken by the Kyrgyz Government and state authorities, although they had negative effects for Petrobart, were directed specifically against Petrobart's investment or had the aim of transferring economic values from Petrobart to the Kyrgyz Republic. Petrobart's claims against KGM remained and gave rise to demands in KGM's bankruptcy. The Arbitral Tribunal considers that the measures taken by the Kyrgyz Republic, while disregarding Petrobart's legitimate interests as an investor, did not attain the level of de facto expropriation."); at 83-84 (indicating that Petrobart did not recover anything in KGM's bankruptcy proceedings.).

[477] GAMA acknowledges that an expropriation requires proof of a permanent, as opposed to temporary, deprivation of property. Reply ¶ 204. Under the Final Reorganization Plan, TE-TO will satisfy its creditors, including GAMA, over a 12-year period. *See* Statement of Defence ¶ 199. GAMA argues that this period amounts to a *de facto* permanent deprivation of property. But long repayment periods are nothing unusual in reorganizations and bankruptcies. As shown above, the repayment period in the Final Reorganization Plan was set in accordance with Macedonian law. *See* Petrov II ¶ 114. Such periods cannot be deemed permanent. The four authorities on which GAMA relies do not say otherwise. *See* Reply ¶ 204, footnote 436, citing *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Merits) (13 November 2000) **(CL-81)**, ¶ 283; *Wena Hotels*

VI. GAMA STILL CANNOT SHOW THAT MACEDONIA TREATED IT LESS FAVORABLY THAN MACEDONIAN NATIONALS OR NATIONALS OF THIRD STATES

199. Macedonia showed in its Statement of Defence that GAMA's MFN and national treatment claims under Article II(3) of the Treaty fail because the Macedonian courts did not treat GAMA's payment claim against TE-TO less favorably than the claims of TE-TO's other unsecured creditors, shareholders, or related parties, much less did the courts deny justice to GAMA.[478]

200. In its Reply, GAMA maintains its claim that Macedonia breached Article II(3) "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."[479]

201. There is no dispute on the general elements that GAMA must prove to establish an MFN and national treatment claim, namely that: (i) the investment of a Macedonian investor or a third-State investor was in a "similar situation" to GAMA's investment, (ii) Macedonia accorded these other investments more favorable treatment than GAMA's investment, and (iii) there is no rational justification for this difference in treatment.[480] But GAMA flips those elements on their head, arguing that "it is generally accepted that the right not

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Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (8 December 2000) **(CL-82)** ¶ 99; *Karkey. v. Pakistan* **(CL-69)** ¶ 650; *Hochtief Aktiengesellschaft v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) ("***Hochtief v. Argentine Republic")*** **(RL-61)** ¶ 67. None of those cases is comparable to this case, as none of them concerned bankruptcy proceedings or the extension of time periods for the payment of money to the claimant.

GAMA also repeats its argument that, due to an amendment to the Macedonian Law on Obligations, its entitlement to receive payment from GAMA is time-barred after 30 August 2023. But as explained, GAMA's assertion that its claim is time-barred is baseless. The amendment to the Law on Obligations does not apply retroactively and in any event the Basic Court explained that since GAMA's claim has been accepted under TE-TO's Final Reorganization Plan, "there is no possibility for the principal of the claim to become time-barred." Decision of the Basic Court, dated 13 April 2023 (**R-18**) at 10; *supra* § III.C.2(f).

478 Statement of Defence ¶¶ 237-241.

479 Reply ¶ 218.

480 *See* Reply ¶ 219; Statement of Defence ¶¶ 234-236, citing, *inter alia*, *İçkale v. Turkmenistan* (**RL-87**) ("[T]he legal effect of the MFN clause, properly interpreted, is to prohibit discriminatory treatment of investments of investors of a State party (the home State) in the territory of the other State (the host State) when compared with the treatment accorded by the host State to investments of investors of any third State. However, this obligation exists only insofar as the investments of the investors of the home State and those of the investors of the third State can be said to be in 'a similar situation.'").

to be discriminated is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different."[481] GAMA does not cite a single investment treaty case or commentary in support of its argument, which shows that this is far from a "generally accepted" position.[482]

202. Even taking this discrimination test at face value, GAMA cannot satisfy it on the facts. GAMA complains that the "Macedonian courts should have treated GAMA and TE-TO's shareholders differently" because they were situated differently, and that the courts failed to do so by "treat[ing] GAMA and TE-TO's shareholders to be in a similar situation, as unsecured creditors from the same class."[483] GAMA's complaint is unfounded for two reasons. First, while it is not disputed that a company's shareholders *qua* shareholders are differently situated than the company's creditors, GAMA was not differently situated than TE-TO's shareholders that provided loans to the company, as both GAMA and the shareholder-creditors were unsecured creditors.[484] Second, TE-TO availed itself of a Prepackaged Bankruptcy procedure that allowed it to freely determine the classes of creditors in its Final Reorganization Plan.[485] Thus, it cannot be said that Macedonia treated shareholders and other unsecured creditors the same (or differently) – TE-TO did (or did not). Nor can it be said that the Macedonian courts treated shareholders and unsecured creditors the same (or differently) by approving the Final Reorganization Plan, because approval merely confirmed that the plan satisfied the Macedonian law

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481 Reply ¶ 220.

482 GAMA cites a public international law treatise that suggests in passing that "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." Reply ¶ 220, footnote 458, citing R. Jennings, A. Watts (eds.), OPPENHEIM'S INTERNATIONAL LAW, 9TH ED. (Longman, 1992), Vol. I **(CL-83)**. GAMA also cites two cases of the European Court on Human Rights, where the Court made a similar general suggestion. *See id.*, citing *Eweida and others v. the United Kingdom*, Application N. 48420/10, ECtHR, Judgment of the ECtHR, dated 27 May 2013 **(CL-84)**; *Thlimmenos v. Greece*, Application No. 34369/97, Judgment of the ECtHR, dated 6 April 2000 **(CL-85)**. None of this establishes that the kind of scenario described by GAMA (treating differently situated persons the same) is a form of discrimination that violates the MFN treatment or national treatment standards.

483 Reply ¶ 224.

484 Petrov I ¶ 140.

485 *See* Statement of Defence ¶ 68; *supra* § III.C.2.(b).

requirements applicable to Prepackaged Bankruptcies, which, as noted, empower TE-TO to establish classes of creditors.[486]

203. GAMA also alleges that "GAMA was discriminated against [as compared to] TE-TO's shareholders and other unsecured creditors … through the discriminatory denial of approximately EUR 3 million default interest on GAMA's claim at the time of the TE-TO's proposal for reorganisation."[487] However, interest applied only once the amount owed by TE-TO to GAMA had become due, and TE-TO disputed that this amount had become due.[488] Accordingly, TE-TO rightly "recognized only the principal amount of GAMA's claim in the reorganization plan, while the default interest remained disputed between the two parties."[489]

204. Further, GAMA asserts that "[t]he Civil Court Skopje … discriminated GAMA through the application of the 12 years suspension period [to TE-TO's payment to GAMA], which is applicable only to claims based on loans, such as TE-TO's shareholders' claims against TE-TO," and that, "[i]n 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."[490] But as explained above, the Bankruptcy Law provision that limits repayment periods to five years includes exceptions that apply not only to loans but also to "conditions of … other claim" instruments.[491] All of TE-TO's unsecured creditors were treated the same in this respect. As for GAMA's argument that TE-TO's shareholders should have been repaid after other unsecured creditors, Macedonia's Prepackaged Bankruptcy procedures allow a debtor to determine classes of creditors.[492]

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[486] *See supra* § III.C.2.(b).

[487] Reply ¶ 231.

[488] Petrov II ¶ 34.

[489] Petrov II ¶ 34.

[490] Reply ¶ 234.

[491] *See supra* § III.C.2(f); Statement of Defence ¶ 198.

[492] *See supra* § III.C.2(b).

205. In any event, GAMA's MFN and national treatment claims fail because the Macedonian courts' conduct comes nowhere close to a denial of justice, which must be proven where an investor alleges discriminatory treatment by domestic courts.[493] GAMA argues in its Reply that "Macedonia is … wrong to limit discrimination by courts in breach of the national and MFN treatment clause to instances of denial of justice."[494] The Reply cites a single commentary in support of this argument, which suggests that discrimination by courts may be a breach of the MFN or national treatment standards but does not suggest that the threshold for finding such discrimination should be any lower than for a denial of justice.[495] On the contrary, the author observes that "State responsibility for judicial actions is best captured by denial of justice: a well-established standard in customary international law."[496]

VII. GAMA STILL CANNOT SHOW THAT THE TREATY'S MFN CLAUSE ALLOWS IMPORTING ADDITIONAL STANDARDS OF TREATMENT OR THAT MACEDONIA BREACHED THOSE STANDARDS

206. As demonstrated below, GAMA cannot use the MFN clause in Article II(3) of the Treaty to invoke additional standards of treatment from Macedonia's other BITs (**Section VII.A**). Macedonia in any event did not breach the additional standards of treatment that GAMA invokes (**Section VII.B**).

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493 *See* Statement of Defence ¶ 241.

494 Reply ¶ 229.

495 Reply ¶ 230, quoting Aniruddha Rajput, *Cross-Border Insolvency and Public International Law*, 19 ROMANIAN J. OF INT'L L. 7 (2018) **(RL-103)** at 23. GAMA says that commentary by Judge Greenwood and his expert opinion in *Loewen Group v. USA*, cited by Macedonia in its Statement of Defence, do not "contain a support for Respondent's position that a denial of justice is required to prove a breach of the national treatment/MFN." *See* Reply footnote 472. This ignores Judge Greenwood's statement that "[i]f there is to be a cause of action at all [arising out of the actions of the local courts] it can only be denial of justice, arising either because the respondent State denies the alien access to the courts or because those courts behave in a way which is discriminatory or manifestly contrary to international standards of behaviour." *See* Christopher Greenwood, *State Responsibility For The Decisions of National Courts, in* ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS (M. Fitzmaurice & D. Sarooshi eds. 2004) **(RL-27)** at 60 (emphasis added).

496 *See* Aniruddha Rajput, *Cross-Border Insolvency and Public International Law*, 19 ROMANIAN J. OF INT'L LAW 7 (2018) **(RL-103)** at 23.

A. GAMA CANNOT USE THE MFN CLAUSE IN ARTICLE II(3) OF THE TREATY TO INVOKE ADDITIONAL STANDARDS OF TREATMENT FROM MACEDONIA'S OTHER BITS

207. Macedonia's Statement of Defence showed that the MFN clause in Article II(3) of the Treaty does not, as GAMA argues, allow investment protections from Macedonia's other BITs to be imported into the Treaty.[497] GAMA maintains in its Reply that "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 Macedonian BITs.[498]

208. As demonstrated below, GAMA's claim fails because the ordinary meaning of Article II(3) of the Treaty contemplates actual differential treatment of investments, not the mere possibility of differential treatment. The context of Article II(3) of the Treaty does not support interpreting this provision as a tool to import investment protections from other BITs. And the decisions of other investment treaty tribunals contradict or do not support GAMA's reading of Article II(3).

1. The ordinary meaning of Article II(3) of the Treaty contemplates actual differential treatment of investments, not the mere possibility of differential treatment

209. Article II(3) of the Treaty provides:

> Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.[499]

210. Macedonia has shown that the phrase "treatment … accorded in similar situations to investments of [other] investors" contemplates actual differential treatment of

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497 Statement of Defence ¶¶ 244-247.

498 Reply ¶ 237; Statement of Claim ¶ 220 (relying on the FET clause under the Lithuania-Macedonia BIT, the Austria-Macedonia BIT, and the Slovakia-Macedonia BIT, the obligation to accord FPS under the Lithuania-Macedonia BIT and the Spain-Macedonia BIT, the obligation not to impair by arbitrary, unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments under the Lithuania-Macedonia BIT and the Spain-Macedonia BIT, and the Effective Means clause under the Kuwait-Macedonia BIT.).

499 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 (14 July 1995) ("**Turkey – Macedonia BIT**") (**CL-1**). *See also* Statement of Defence ¶ 244.

investments and not merely the possibility of differential treatment, such as the availability of standards of protection under Macedonia's other investment treaties that are not available in the Treaty.[500] This reading of Article II(3) is supported by decisions of investment treaty tribunals that interpreted similar or identical MFN clauses as requiring actual differential treatment.[501]

211. In its Reply, GAMA contends that "the ordinary meaning of the term 'treatment accorded' in [Article II(3)] encompasses not only treatment that has in fact been accorded but also treatment that is legally required to be accorded."[502] But Article II(3) does not refer to treatment "that is legally required to be" accorded; it refers to treatment "accorded in similar situations" to investments of Macedonian or third-State investors. As explained, the ordinary meaning of those words refers to treatment actually accorded in similar situations to an actual investment of another investor, not treatment that *may* be accorded to *possible* investments of other investors in a *hypothetical* situation. Had this been the intention of the contracting parties to the Treaty, they would have adopted different wording, such as "treatment *that may be* accorded" to investments of other investors.[503]

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500 *See* Statement of Defence ¶ 244.

501 *See* Statement of Defence ¶¶ 246-247, citing *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award (4 May 2021) ("***Muhammet v. Turkmenistan***") (**RL-111**) ¶ 780; *İçkale v. Turkmenistan* **(RL-87)** ¶¶ 328-329. Investment treaty tribunals have cautioned that the starting point of any MFN analysis must be the language of the applicable treaty. *See* Statement of Defence ¶¶ 244-245, citing *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award (2 July 2018) (**RL-97)** ¶ 289; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009) (**RL-41**) ¶ 196; *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009- 11, Partial Award (23 May 2011) (**RL-59**) ¶ 116.

502 Reply ¶ 239.

503 Statement of Defence ¶ 244. In this context, UNCTAD has highlighted the risk of investors using MFN clauses to cherry-pick treaty protections from different investment treaties concluded by the host State. *See* United Nations Conference on Trade and Development, UNCTAD's Reform Package for the International Investment Regime (2018) (**RL-155**) at 35 ("Application of MFN clauses in this way can result in investors 'cherry picking' the most advantageous clauses from different treaties concluded by the host State, thereby potentially undermining individual treaty bargains and sidelining the base treaty. For example, treaty commitments may clash, or hard-won concessions in a negotiation (e.g. on flexibility in performance requirements) may be undone through the application of a broadly worded MFN clause, as interpreted by arbitral tribunals."). UNCTAD suggested several solutions for States to address these risks, one of which is to draft MFN clauses more narrowly, such as clauses "requir[ing] comparison of investors/investments that are 'in like circumstances,'" which "can go some way in safeguarding the [State's] right to regulate …" *Id.* at 36. This is the approach that Macedonia and Turkey adopted by requiring a comparison of investments of investors "in similar situations."

212. GAMA also argues that "the reference to '<u>similar situations</u>' [in Article II(3) of the Treaty] is not limited to an identification of an actual investment by an actual investor that has received more-favourable treatment in actual fact."[504] GAMA relies on commentary by Professor Schill, who proposes a policy-oriented reading of MFN clauses as "multilateralization devices."[505] Other commentators have disagreed with Professor Schill on this issue and, more broadly, with similar commentary that seeks to interpret MFN clauses based on presumptions regarding their intended effect.[506]

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[504] Reply ¶ 241 (emphasis added).

[505] Professor Schill describes his "multilateralism" argument in the article on which GAMA relies. *See* Stephan W. Schill, *MFN Clauses As Bilateral Commitments To Multilateralism – A Reply To Simon Batifort And J. Benton Heath* (2018) (**CL-87**) at 5.

GAMA also relies on an article by Professor Dumberry, who, upon reviewing MFN clauses in Turkish BITs that are identical to Article II(3) of the Treaty, concluded that "[a]ll of the Turkish BITs examined contain wide-scope MFN clauses that do not exclude their application to [importing] FET protection [from other treaties]." Reply ¶ 243, quoting Patrick Dumberry, *The Importation of the FET Standard through MFN Clauses: An Empirical Study of BITs*, ICSID Review (2016) **(CL-89)** at 18. But the question is not whether an MFN clause expressly excludes the importation of FET protection from another treaty. The question is whether an MFN clause can in good faith be interpreted as allowing such importation, bearing in mind the material consequences for the State parties to the treaty containing the MFN clause. In fact, Professor Dumberry endorses UNCTAD's observation "that '[t]reaty practice suggests that countries that have not included an FET obligation or a reference to it into their treaty have done so purposefully to avoid being exposed to this standard of protection,'" and he accepts that "the fact that one specific treaty does not contain such a [FET] clause should not be considered to be a drafting 'mistake' … It should be considered to be intentional." *Id.* at 14. He also accepts that "[i]f the omission of a FET clause in a BIT should be considered to be deliberate and intentional, it should be presumed logically that it was also the parties' intention not to see this standard find application through the use of the MFN clause." *Id.* In light of all of this, an MFN clause cannot in good faith be interpreted as a tool to import an FET provision into a treaty that deliberately omits such a provision, unless the MFN clause provides otherwise.

[506] For commentary disagreeing with Professor Schill, *see, e.g.*, Facundo Pérez-Aznar, *The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements*, 20 J. INT'L ECON L. 777 (2017) (**RL-153**) at 1 ("Schill confuses the legal effects of MFN clauses with a policy consideration (multilateralization) and misreads the interpretive background that must be considered when applying MFN clauses. Schill also mistakes multilateralization via arbitral interpretations of MFN clauses for true multilateralism, which is the product of states working together in multilateral for a … I am skeptical of Schill's endorsement of the use of (multilateralizing) 'presumptions.' Rather than conventional wisdom or presumptions, an interpreter should apply 'rules of international law.'"). For commentary critiquing interpretations of MFN clauses based on presumptions or policy, *see, e.g.*, Tomoko Ishikawa, *Interpreting the Most-Favoured-Nation Clause in Investment Treaty Arbitration*, in *Rethinking International Law and Justice* (**RL-144**) at 127, 130 (Charles Sampford, Spencer Zifcak & Derya Aydin Okur eds., 2015) (challenging "the widely accepted position that an MFN clause, unless accompanied by explicit reservations and exceptions, generally allows the 'incorporation' of more favourable substantive provisions in third-party treaties" and arguing that "the interpretation of an MFN clause should be guided by established rules of treaty interpretation, <u>rather than policy considerations regarding the function of 'MFN obligations in general'</u>") (emphasis added); Arnold Duncan McNair, *The Law of Treaties* (**RL-115**) at 285 ("[T]here is no such thing as the most-favoured-nation clause: every treaty requires independent examination … There are of course many forms of this clause, so that any attempt to generalize as to the meaning and effect of the most-favoured-nation clause must be

213. Article II(3) of the Treaty must be interpreted not based on policy but in accordance with the ordinary meaning of its terms. Investment treaty tribunals that interpreted the ordinary meaning of MFN clauses identical to Article II(3) rightly concluded that such clauses require proof of actual differential treatment of actual investments. The tribunal in *İçkale İnşaat v. Turkmenistan*, for example, held that the only way to give effect to the words "in similar situations" is to require a "comparative, fact-based analysis" of investments in like circumstances.[507] The tribunal explained that "given the limitation of the scope of application of the MFN clause to 'similar situations,' it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties between a State party and a third State, as to do so would deny any meaning to the terms 'similar situations.'"[508] The tribunal in *Muhammet Çap v. Turkmenistan* came to the same conclusion when interpreting an identical MFN clause.[509]

214. Further, there is an inherent contradiction in GAMA's position on the phrase "in similar situations" in Article II(3) of the Treaty. On the one hand, GAMA accepts that one of the

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accepted with caution."); Endre Ustor, *Most-Favoured-Nation Clause*, in 3 ENCYCLOPEDIA OF PUB. INT'L L. 468 (1997) (**RL-119**) (quoting Lord McNair approvingly.); Christopher Greenwood, *Reflections on 'Most Favoured Nation' Clauses in Bilateral Investment Treaties*, in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION (D. Caron, S. Chill, A. Smutney, & E. Triantafilou eds.2015) (**RL-143**) at 558 ("It is difficult to see how [a unified legal regime regarding the effects of MFN clauses in BITs] can be reconciled with fundamental principles of international law. Each BIT is a separate legal instrument, negotiated between two states who are free to conclude whatever bargain they choose ... not all MFN clauses use the same language."); Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873, 907-908, 910 (2017) (**RL-152**) (observing that "[f]or too long, arbitral tribunals have simply assumed that [the importation of standards of treatment] was permitted under the MFN clause at issue, or have paid only limited attention to the treaty text. This debate will be best served if we bracket, for the time being, presumption about the essential nature and function of MFN clauses in this respect, and turn instead to the specific terms of the treaties in which these clauses appear … [O]ne critical element for further examination will be the requirement that the investor be 'in like circumstances' or 'in similar situations' with a suitable comparator.").

[507] *İçkale İnşaat v. Turkmenistan* (**RL-87**) ¶ 327.

[508] *İçkale İnşaat v. Turkmenistan* (**RL-87**) ¶ 329. *See also* ¶ 332 ("When including the terms 'similar situations' in Article II(2) of the BIT, the State parties must be considered to have agreed to restrict the scope of the MFN clause so as to cover discriminatory treatment between investments of investors of one of the State parties and those of investors of third States, insofar as such investments may be said to be in a factually similar situation.")

[509] *Muhammet v. Turkmenistan* (**RL-111**) ¶ 784 ("[T]he Tribunal considers that the words 'similar situations' indicate the State parties' intention to restrict the scope of the MFN clause to apply only to discriminatory treatment between investments of investors of one of the State parties and investors of third States, insofar as such investments may be said to be in a factually similar situation. This required that the actual measures taken by the host State is directed towards investments of actual investors that are in a similar situation, and to prove that such measure had the effect of treating one less favourably than the other.").

basic elements for establishing an MFN claim is "the existence of entities in similar situations."[510] On the other hand, GAMA argues that when it comes to using the MFN clause to import investment protections from other BITs, this basic element of an MFN claim need not be satisfied (*i.e.*, GAMA does not need to prove "the existence of entities in similar situations"). GAMA does not and cannot reconcile these positions.[511] There is no basis in Article II(3) for requiring proof of actual discrimination between actual investments for some MFN claims but not others.[512]

215. GAMA refers to the ILC's commentary on the Draft Articles on Most-Favored-Nation Clauses from 1978, which says that "favourable treatment may also consist in the conclusion or existence of an agreement between the granting state and the third state to which the latter is entitled to certain benefits," even if "the third State has not availed

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[510] Reply ¶ 219.

[511] In its Statement of Defence, Macedonia cited three cases where tribunals rejected MFN claims that were based on the mere possibility of differential treatment of investments in like circumstances. *See* Statement of Defence ¶ 244, footnote 574, citing *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) (**RL-58)** ¶ 343; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Final Award (21 May 2013) ("***Convial Callao v. Peru***") (**RL-70)** ¶ 667; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (Redacted) (12 January 2011) (**RL-55)** ¶¶ 169-172. GAMA's Reply fails to address *Convial Callao v. Peru*, where the tribunal dismissed an MFN claim because the claimant had failed to establish the existence of like circumstances between the claimants' concession and the concession of an allegedly favored third party. *See Convial Callao v. Peru* (**RL-70**) ¶¶ 639-640. The tribunal "agree[d] with the decision in the *Parkerings v. Lithuania* case, in which the violation of the MFN clause will only take place if 'the existence of a different treatment accorded to another foreign investor in a similar situation' is verified." *See id.* ¶ 666 (Spanish translation of English original). *See also Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) (**RL-34**) ¶ 369 ("The essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation. Therefore, a comparison is necessary with an investor in like circumstances."). GAMA dismisses *GEA Group* and *Grand River* on the basis that the "claimants in [the] cited cases did not rely on substantive guarantees from the respondent state's third treaties and the tribunals nowhere precluded such a possibility." Reply ¶ 240. GAMA does not deny that all three cases cited by Respondent support the proposition that there can be no MFN violation based on the mere possibility of differential treatment. GAMA does not give any reason (and there is none) why that principle should not apply to MFN claims that are based on the mere possibility of differential treatment of investments due to protections that are available in BITs with third States.

[512] *See* Facundo Pérez-Aznar, *The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements*, 20 J. INT'L ECON. L. 777 (2017) at 790-791 (distinguishing between two MFN "scenarios" (i.e., "first, making a claim for relief for an alleged breach of the MFN clause and, secondly, allowing the benefit of higher standards of protection provided for in other treaties"), and observing that "[t]here is … no basis for applying MFN clauses differently in these two scenarios. Whatever the treatment an investor invokes under the MFN clause, it cannot escape the application of all the elements of the clause and ultimately the determination of whether or not there has been a breach of the provision.").

itself of the benefits which are due to it under the agreement …."[513] But this statement does not apply to all MFN clauses in all treaties. The ILC's commentary acknowledges that the scope of application of MFN clauses depends on their terms.[514] As noted above, Article II(3) of the Treaty provides that the "treatment" in question must actually be "accorded in similar situations" to other investments, which is irreconcilable with applying the MFN obligation to a hypothetical investment that might benefit from BIT protections that are not found the Treaty.[515]

216. Finally, GAMA contends that its "reading of [the] words 'in similar situations' [in Article II(3) of the Treaty] is in accord with the *ejusdem generis* rule," which, according to GAMA, provides that "substantive guarantees can be imported from a third-party treaty provided that such a third treaty has a common subject-matter with the base treaty,

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[513] Reply ¶ 239, citing International Law Commission, *Draft Articles on most-favoured-nation clauses with commentaries 1978* (YBILC 1978, vol. II, Part Two) (**CL-88**) at 23.

[514] International Law Commission, *Draft Articles on most-favoured-nation clauses with commentaries 1978* (YBILC 1978, vol. II, Part Two) (**CL-88**) ¶ 6 at 23 ("If, as is the usual case, the clause itself does not provide otherwise, the clause begins to operate, i.e. a claim can be raised under the clause if the third State (or persons or things in the same relationship with the third State as are the persons or things mentioned in the clause with the beneficiary State) has actually been extended the favours that constitute the treatment.") (emphasis added). It is well established that the scope of MFN clauses depends on their terms. *See* Statement of Defence ¶ 244, footnote 572. In any event, it is questionable whether the ILC's 1978 commentary on MFN clauses, in the context of MFN treatment granted by one State to another, applies with equal force to investment treaties under which States extend MFN treatment to foreign investors. States have clarified in recent treaties that the word "treatment" in MFN clauses was never intended to apply to protections under other investment treaties. *See e.g.*, Canada-European Union Comprehensive Economic and Trade Agreement ("**CETA**") (2016) (**RL-147**) Art. 8.7 ("For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment," and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.") (Emphasis added).

[515] Macedonia's interpretation of Article II(3) is also supported by the ILC's 2015 Final Report on the Most-Favored-Nation clause. The Final Report acknowledges that each MFN clause must be interpreted on its own terms. See International Law Commission, *Final Report of the Study Group on the Most-Favored- Nation Clause*, U.N. Doc. A/70/10, Annex (2015) (**RL-85**) ("**ILC Report 2015**") ¶¶ 145-147. The ILC Report 2015 identifies six distinct types of MFN clauses, the fifth type being those guaranteeing treatment no less favorable than that enjoyed by "investors or investments that are 'in like circumstances' or 'in similar situations' to investors or investments with which a comparison is being made." *Id.* ¶ 64. The Final ILC Report observes that MFN provisions containing the words "in similar situations" "seem to place some limitation upon which investors or investments can claim the benefit of an MFN provision – suggesting perhaps that only those investors or investments that are 'in like circumstances' with those of the comparator treaty can do so." *Id.* ¶¶ 64, 69, 71. The ILC prepared its 2015 Report to "survey developments and provide commentary on MFN provisions" in order to "deal with the nature of MFN clauses and how they are currently being utilized in treaties and applied," bearing in mind that the use of MFN clauses developed significantly since the ILC's 1978 commentary on the Draft Articles on Most-Favoured-Nation Clauses commentaries from 1978. *Id.* ¶¶ 1, 34.

containing the MFN clause."[516] GAMA argues that this rule is satisfied here, as "provisions in Macedonia's third BITs share a common subject matter with the Treaty, i.e. the promotion and protection of investments …."[517] GAMA misconstrues the *ejusdem generis* principle. As the tribunal in *Doutremepuich v. Mauritius* observed, *ejusdem generis* "is a generally recognized principle which operates as a limit to the application of MFN clauses" by "prevent[ing] a State, via the application of the MFN clause, from seeing its obligations extended to matters it did not contemplate."[518] GAMA's unorthodox reading of the *ejusdem generis* has been rejected by both tribunals and commentators.[519]

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[516] Reply ¶ 244.

[517] Reply ¶ 244.

[518] *Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius*, PCA Case No. 2018-37, Award on Jurisdiction (23 August 2019) (**RL-158**) ¶¶ 216-217 (emphasis added). *See also* Facundo Pérez-Aznar, *The Use of Most-Favoured-Nation Clauses to Import Substantive Treaty Provisions in International Investment Agreements*, 20 J. INT'L ECON. L. 777 (2017) (**RL-153**) at 19 ("[I]t is not the function of MFN clauses to import a provision into the base treaty, that is not otherwise included, in order to impose a wholly new obligation on contracting States."). The rationale behind this is that MFN clauses do not create new obligations not contemplated in them. *See* ILC, *Draft Articles on most-favoured-nation clauses with commentaries 1978* (YBILC 1978, vol. II, Part Two) (**CL-88**) at 30 ("[T]he [*ejusdem generis*] rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken."); Article 9(1) ("Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause."). *Id.* at 30 ("The essence of the rule is that the beneficiaries of a most-favoured-nation clause cannot claim from a granting State advantage of a kind other than that stipulated in the [MFN] clause.").

[519] *See, e.g., Muhammet. v. Turkmenistan* (**RL-111**) ¶¶ 786-787 ("[T]he Tribunal also disagrees with Claimants' contention … that the *ejusdem generis* principle allows a claimant to import substantive guarantees from a third-party treaty, provided that treaty has a 'common subject-matter' with the basic treaty in which the MFN clause is contained. The *ejusdem generis* principle refers to the sameness of the subject matter of the MFN clauses and the other substantial provisions in a treaty, not only of the treaties in which the provisions are contained"); Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873, 907-908, 910 (2017) (**RL-152**) at 896 ("As originally formulated, the *ejusdem generis* principle … is not satisfied simply by noting that the third-party treaty is of the same kind as the basic treaty … [T]he principle of ejusdem generis focuses on whether the benefit invoked is of the same kind as that contemplated in the MFN clause. Applied in this way, the ejusdem generis principle directs the interpreter not to the broad purposes of the basic and target treaties, but rather to the specific terms of the MFN clause at issue.").

2. The context of Article II(3) of the Treaty does not support interpreting this provision as a tool to import investment protections from other Macedonian BITs

217. In its Reply, GAMA argues for the first time that its "interpretation [of Article II(3)] is also confirmed by the context of the MFN provision and [the] Treaty's object and purpose pursuant to Article 31(1) of the VCLT."[520] GAMA contends that "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,'" and that the preamble's statement that "fair and equitable treatment of investment is desirable" "additionally supports that the MFN clause in the Treaty allows GAMA to invoke FET guarantee from other treaties."[521]

218. GAMA is reading words and concepts into the Treaty's preamble that are not there. The preamble does not refer to MFN treatment, let alone the notion of importing investment protections from other treaties into the Treaty. Nothing about the general reference to the "encouragement and reciprocal protection of investments" justifies transforming Article II(3) into a tool for cherry-picking standards of protections from Macedonia's and Turkey's other investment treaties.[522]

219. The preamble's statement that "fair and equitable treatment of investment is desirable"[523] does not help GAMA either. On the contrary, the reference to FET confirms that Macedonia and Turkey considered this standard of treatment when negotiating the Treaty, yet they agreed not to include it in the Treaty's operative provisions. This omission was a deliberate choice, which is reinforced by the fact that Macedonia and

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[520] Reply ¶ 246.

[521] Reply ¶ 246. *See* Turkey-Macedonia BIT (**CL-1**) Preamble ("[T]hat fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.").

[522] Moreover, as observed by the tribunal in *İçkale İnşaat v. Turkmenistan*, "[i]t is well-established in international law, including in the jurisprudence of investment treaty tribunals, that preambles to treaties are not an operative part of the treaty and do not create binding legal obligations which are capable of giving rise to a distinct cause of action." *İçkale İnşaat v. Turkmenistan* (**RL-87**) ¶ 337. *See also Muhammet v. Turkmenistan* (**RL-111**) ¶ 792 ("The preamble of the BIT does not assist Claimants' contentions. The purpose of the preamble of treaties is to provide context for interpreting the ordinary meaning of the terms of the treaty. It is not to create binding legal rights and obligations which have not been included in the treaty, and to impose those rights on the parties.").

[523] See Turkey-Macedonia BIT (**CL-1**) Preamble.

Turkey each included FET provisions in prior treaties that they concluded with other States.[524] The deliberate omission of an FET provision would be rendered meaningless if the MFN clause in Article II(3) could be used to import FET provisions from other investment treaties into the Treaty.[525]

220. GAMA also repeats its argument that Article II(5) of the Treaty sets out the only exclusions that are applicable to the standards of protections in Articles II(1)-(4) of the Treaty, including the MFN clause in Article II(3), and that the importation of other investment protections via the MFN clause must be deemed allowed because it is not excluded by Article II(5).[526] Macedonia explained in its Statement of Defence that this is asking too much of the interpretive principle *expressio unis est exclusio alterius*.[527] As observed by the tribunal in *Muhammet v. Turkmenistan* with respect to an identical exclusion clause, "[t]he fact that specific substantive protections have not been expressly excluded in [the exclusion clause] does not mean that they can therefore be incorporated via the MFN provision."[528] GAMA's Reply fails to engage with Macedonia's submissions and the authority cited in support.

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524 *See, e.g.*, Finland - Turkey BIT (1993) (**RL-123**); Argentina - Turkey BIT (1992) (**RL-122**); Macedonia-Croatia BIT (1994) (**RL-124**).

525 *See also* UNCTAD, Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II: A Sequel (2012) (**RL-67**) at 20 ("Treaty practice suggests that countries that have not included an FET obligation or a reference to it into their treaty have done so purposefully to avoid being exposed to this standard of protection"); Christopher Greenwood, *Most Favoured Nations Clauses in BITS – What is Their Real Purpose (and Their Real Effect)?* (3rd Annual EFILA Lecture), in Mistelis & Lavranos, *European Investment Law and Arbitration Review*, VOLUME 3 343, 347 (2018) (**RL-154**) (observing that if an MFN clause in a primary treaty without an FET provision could be used to import an FET provision from other BITs, "then the two States [to the primary treaty] had wasted their time in carefully negotiating away the draft FET clause …. Does such a conclusion reflect the intentions of the parties to the primary treaty? If you look at a BIT as an agreement between the two countries and ask yourself what those countries intended, … it is a little difficult to jump to the conclusion that they intended the exact opposite of what they had spent several weeks discussing.").

526 See Reply ¶ 247. *See also* Statement of Claim ¶ 219.

527 See Statement of Defence ¶ 250.

528 *Muhammet v. Turkmenistan* (**RL-111**) ¶ 791 ("The Tribunal is also not persuaded by the argument that since the substantive protections Claimants seek to import are not explicitly excluded from the application of the BIT by Article II(4) BIT, they can be imported by using the MFN provisions. This argument is of no merit. Article II(4) BIT simply confirms that the provisions of Article II 'have no effect' on agreements relating to customs unions, regional economic organizations or similar international agreements, as well as taxation. The fact that specific substantive protections have not been expressly excluded in Article II(4) does not mean that they can therefore be incorporated via the MFN provision.") *See also İçkale İnşaat v. Turkmenistan* (**RL-87**) ¶ 330 (disagreeing

3. The decisions of other investment treaty tribunals contradict or do not support GAMA's reading of Article II(3)

221. Macedonia showed in its Statement of Defence that the investment treaty cases cited by GAMA do not support the importation of additional investment protections via Article II(3) of the Treaty, because they either concerned broader MFN clauses or lacked any substantive analysis of the MFN clause at issue.[529] In its Reply, GAMA seeks to defend its reliance on those cases:[530]

a) GAMA says that the tribunal in *Bayindir v. Pakistan* "properly applied the VCLT rules" in interpreting the MFN clause in the Pakistan-Turkey BIT, which refers to treatment in "similar situations."[531] However, GAMA does not dispute that the *Bayindir* tribunal failed to consider the meaning and effect of the phrase "similar situations." The lack of analysis of this material phrase (in a comparatively early investment treaty case) has been highlighted in commentary.[532]

b) GAMA does not dispute that the *ATA Construction* tribunal's discussion and decision on the MFN clause was limited to a footnote that lacked any

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with Claimants argument that "substantive protections, which are not expressly excluded from the scope of the MFN clause in Article II(4) of the BIT, should be considered to be within in its scope," and finding that "Article II(4) of the BIT merely confirms that the provisions of Article II do not have any effect on any agreements relating to customs unions or taxation.").

529 Statement of Defence ¶ 225.

530 Reply ¶ 248.

531 Reply ¶ 248(a).

532 *See also* Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 AM. J. INT'L L. 873, 907-908, 910 (2017) (**RL-152**) at 892-893 ("The [*Bayindir v Pakistan*] tribunal asserted, without discussion, that the 'ordinary meaning of the words' of the MFN clause 'show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment.' … Although the tribunal referred to the 'ordinary meaning' of the text, it did not attempt to follow the kind of textual analysis that it applied to the claimant's disparate-treatment claim. For example, the tribunal made no visible effort to apply the 'in similar situations' element of the MFN clause in the context of the incorporation claim, which the tribunal had elsewhere deemed a 'necessary requirement' that entailed a 'fact specific' inquiry. Instead, the tribunal appeared to turn to the text only to satisfy itself that there was no express language excluding the possibility of importation. Thus, the tribunal appears to have presumed that the MFN clause was intended to permit importation in the first place.") (Emphasis added). Batifort and Heath also note that the *Bayindir* tribunal's failure to consider the words "similar situations" when allowing the claimants to import FET protection into the Pakistan-Turkey BIT is at odds with its approach to claimant's MFN disparate treatment claim based on Pakistan's treatment of other contractors where it gave effect to this language. *Id.* at 893.

reasoning.[533] Such an unreasoned footnote provides no meaningful guidance on the interpretation of Article II(3) of the Treaty.

c) GAMA acknowledges that in *Rumeli v. Kazakhstan* the parties agreed, for the purpose of the tribunal's decision on jurisdiction, that the MFN clause in the Kazakhstan-Turkey BIT allowed standards of protections to be imported from other Kazakh investment treaties.[534] The *Rumeli* tribunal therefore did not consider the meaning and effect of the MFN clause in the BIT and provided no interpretative guidance for subsequent tribunals, including this Tribunal.

d) GAMA accepts that "the tribunals in *White Industries* and *MTD v. Chile*[] had to interpret differently-worded MFN clauses" that, unlike Article II(3) of the Treaty, did not limit MFN treatment to investments "in similar situations."[535] GAMA says that this "should not lower the[] interpretative value [of *White Industries* and *MTD*] for the present case,"[536] but that cannot be right. The phrase "in similar situations" in Article II(3) of the Treaty is indisputably material to the scope of that provision and cannot be read out. Cases such as *White Industries* and *MTD*, which applied MFN provisions that lack this material language, cannot tell this Tribunal how to interpret Article II(3).[537]

222. Further, GAMA dismisses the cases cited by Macedonia in support of its interpretation of Article II(3), notably *İçkale İnşaat v. Turkmenistan* and *Muhammet v. Turkmenistan*, where the tribunals rejected the claimants' attempts to import investment protections from third-State treaties into the basic treaty based on MFN clauses that are identical to

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533 Reply ¶ 248(b).

534 Reply ¶ 248(c).

535 Reply ¶ 248(d).

536 Reply ¶ 248(d).

537 GAMA cites two other cases in which tribunals have allowed the application of more favorable substantive protections found in other treaties through an MFN clause. *See* Reply ¶ 249, footnote 508, citing *Arif v. Moldova* (**RL-69)**; *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final Award (15 December 2014) (**CL-93)**. Those cases are inapposite because the MFN clauses at issue in were materially different from Article II(3) of the Treaty, in that they did not include the words "accord treatment" or "in similar situations."

Article II(3).[538] The thrust of GAMA's response is that the tribunals in *İçkale İnşaat* and *Muhammet* are "wrong," and that the majority of the tribunal in *Güris v. Syria*, which disagreed with the *İçkale İnşaat* tribunal's decision on MFN, got it right.[539]

223. The majority of the tribunal *Güris* opined that (i) "[t]he natural, ordinary meaning of the terms 'treatment accorded' in Article III(2)" of the Turkey-Syrian BIT, which is identical to Article II(3) of the Turkey-Macedonia BIT, "encompasses not only treatment that has in fact been accorded but also treatment that is legally required to be accorded," and (ii) "[s]uch a requirement may arise from investment treaties between the host State and third States."[540] As noted, this position fails to give effect to the words "in similar situations." Although the majority acknowledged that "the natural reading of the 'similar situation test' … 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 then held that the "similar situation test" did not require "identifying an actual investment by an actual investor that has received more-favourable treatment in actual fact."[541] This renders the words "in similar situations" virtually meaningless.[542]

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538 *See* Reply ¶ 252; Statement of Defence ¶¶ 246-247. GAMA also takes issue with Macedonia's reliance on *Hochtief v Argentina* because the tribunal in that case "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." Reply ¶ 251 This fails to address the proposition for which Macedonia cited *Hochtief*, namely the tribunal's finding that the word "treatment" in an MFN clause does not refer to "treatment legally required to be accorded" (as GAMA argues), unless the MFN clause provides otherwise. *See* Statement of Defence ¶ 245, citing *See* Statement of Defence ¶ 245, citing *Hochtief v. Argentine Republic* (**RL-61**) ¶ 81 ("[I]t cannot be assumed that Argentina and German[y] intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. The MFN clause stipulates a standard of treatment and defines it according to the treatment of third parties. The reference is to a standard of treatment accorded to third parties, not to the extent of the legal rights of third parties.") (Emphasis added).

539 Reply ¶¶ 252-253, citing (*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) ("***Güris v. Syria***") (**CL-86**).

540 *Güuris v. Syria* (**CL-86**) ¶ 252.

541 *Güris v. Syria* (**CL-86**) ¶ 255 (emphasis added.)

542 The *Güris* tribunal also expressed the view that 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." *Güris v. Syria* (**CL-86**) ¶ 255. This kind of reverse-engineered interpretation of an MFN clause –

224. The dissenting arbitrator, Professor Nassib G. Ziadé, disagreed with the majority's reasoning on MFN. Professor Ziadé (i) endorsed the view expressed in the ILC's 2015 report on MFN clauses, namely that the words "in similar situations" that are included in some MFN clauses "seem to place some limitation upon which investors or investments can claim the benefit of an MFN provision – suggesting perhaps that only those investors or investments that are 'in like circumstances' with those of the comparator treaty can do so"; (ii) noted that all three NAFTA States have taken the position "that the expression 'in like circumstances' should be given meaning and required a fact-based comparison with an investor from a third state"; and (iii) cited *İçkale v. Turkmenistan* (discussed above) with approval.[543] Professor Ziadé concluded that:

> Article III(2), which includes the words 'in similar situations,' must be interpreted as having a narrower effect than an MFN provision that does not contain such wording. The majority's expansive interpretation of the MFN provisions which goes as far as granting investors additional rights to which they are not entitled may end up seriously undermining the intention of the BIT drafters.[544]

225. In light of all of the above, Article II(3) of the Treaty cannot in good faith be interpreted as a tool to import investment protections from Macedonia's other BITs into the Treaty. The Tribunal therefore lacks jurisdiction to decide alleged breaches of investment protections in Macedonia's BITs with Austria, Kuwait, Lithuania, Slovakia, and Spain.

B. MACEDONIA IN ANY EVENT DID NOT BREACH THE ADDITIONAL STANDARDS OF TREATMENT THAT GAMA INVOKES

226. GAMA relies on the MFN clause in Article II(3) of the Treaty to invoke a laundry list of additional investment protections from Macedonia's BITs with Austria, Kuwait,

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starting with the presumed effect of the clause and then finding an interpretation that produces that effect –is inconsistent with the rules of treaty interpretation under the VCLT. *See also supra* § VII.A.1.

543 *Güris v. Syria*, ICC Case No. 21845/ZF/AYZ, Partial Dissenting Opinion of Nassib G. Ziadé (31 August 2020) (**RL-159**) ¶¶ 21-23.

544 *Güris v Syria*, ICC Case No. 21845/ZF/AYZ, Partial Dissenting Opinion of Nassib G. Ziadé (31 August 2020) (**RL-159**) ¶ 25.

Lithuania, Slovakia, and Spain into the Treaty.[545] Even if these protections were to be read into the Treaty, GAMA still cannot prove that Macedonia breached them.

1. Macedonia afforded GAMA's investment fair and equitable treatment

(a) Where an investor claims that domestic courts breached the fair and equitable treatment standard, the investor must prove a denial of justice

227. Macedonia has shown that where an investor's FET claim is based on alleged misconduct of domestic courts, the investor must prove a denial of justice.[546]

228. In its Reply, GAMA recognizes that some of the cases cited in its Statement of Claim in support of its FET claim assessed claims of judicial misconduct against the denial of justice standard.[547] GAMA insists that other cases show that "the review of judicial conduct against the FET obligation is not limited only to instances of a denial of justice,"[548] but the cases on which GAMA relies do not support that proposition. As Macedonia explained in its Statement of Defence, in each of those cases the tribunal either applied the denial of justice standard in substance, even if it was not labelled as such, or non-judicial conduct contributed to the FET breach (or both).[549] GAMA's Reply does not show otherwise:

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[545] *See* Reply ¶¶ 237, 255, 296, 304, 309.

[546] *See* Statement of Defence ¶¶ 130-139. *See also* Campbell McLachlan, et al., INTERNATIONAL INVESTMENT ARBITRATION (**RL-96**) ¶ 7.356 ("When applied to the *judicial function* of the host State, the [FET] standard provides a protection against denials of justice, being a failure to accord due process to the investor. This protection is concerned with the procedures applied by the host State court, and not with the substantive outcome of host state law. To constitute an international wrong sufficient to attract the protection of the [FET] treaty standard, the denial of justice must constitute a serious systemic breakdown of the host State's adjudicatory process.") (Emphasis in original). GAMA relies on the FET clause in 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. *See* Reply ¶ 254.

[547] *See* Reply ¶ 28(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."), citing *Dan Cake v. Hungary* (**CL-26**); Reply ¶ 28(g) ("In *Rumeli v Khazakstan* , the tribunal denied a claim for a denial of justice in breach of the FET."), citing *Rumeli v Kazakhstan* (**CL-25**).

[548] Reply ¶ 255.

[549] Statement of Defence ¶ 139. The sole exception is the decision of the majority in *Infinito Gold v. Costa Rica* (**CL-70**), a case where the claimant's FET claim failed. *See supra* § III.A.2.

a) In *Arif v. Moldova*, the tribunal held that the conduct of judicial and non-judicial State organs that together amounted to an FET breach.[550] GAMA says that the tribunal in *Arif* "distinguished between the denial of justice and FET standard" but goes on to acknowledge that the FET breach was based on the "inconsistent action between the regulatory authority and Moldovan courts,"[551] i.e., a combination of judicial and non-judicial conduct.

b) GAMA says that in *Deutsche Bank v. Sri Lanka* "a denial of justice was not pleaded and not even mentioned by the Tribunal."[552] However, the *Deutsche Bank* tribunal held that a court decision that was issued "for political reasons" on instructions of the Sri Lanka's government violated the FET standard, which is a textbook example of a denial of justice even if the tribunal did not express its decision in those terms.[553]

c) In *Tatneft v. Ukraine*, the tribunal held that Ukraine had breached the FET standard based on a combination of judicial and non-judicial conduct.[554] GAMA quotes the tribunal's conclusion that although "there are no sufficient reasons to justify a finding of denial of justice … it is quite evident that the fair and equitable treatment standard has been compromised by a number of court actions."[555] However, those court actions were influenced and tainted by the wrongdoing of non-judicial State organs. The *Tatneft* tribunal held that "the judicial intervention

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550 Statement of Defence ¶ 139(a).

551 Reply ¶ 28(a).

552 Reply ¶ 28(b). GAMA also ignores that even when considering Claimant's FET claim, the tribunal adopted the stringent FET standard as expressed in *Waste Management II*, which includes among its elements denial of justice. *See Deutsche Bank v. Sri Lanka* (**CL-22)** ¶ 420 ("[T]he Tribunal notes that the standard has been rightly - although not exhaustively - defined in the Waste Management II case …"), referring to *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**RL-25**) ¶ 98.

553 *See* Statement of Defence ¶ 139(b), citing *Deutsche Bank v. Sri Lanka* (**CL-22**) ¶ 479 ("The Tribunal also relies on the public statements made subsequently by Chief Justice Silva who presided over the hearing. In those public statements the Chief Justice confirmed that the decision was issued for political reasons ... The Chief Justice further recognized that internationally, Sri Lanka had no defence to present in the arbitration proceedings, that it was a difficult fight.").

554 Statement of Defence ¶ 139(e).

555 Reply ¶ 28(e), quoting *Tatneft v. Ukraine* (**CL-23**) ¶ 481.

was not given in isolation but was a part of the complex network of acts that led one way or another to the courts' determinations. Such acts include a role of the Respondent's government in their genesis and development."[556] This is consistent with Macedonia's position that court conduct cannot amount to an FET breach absent a denial of justice or the participation of non-judicial State organs in the breach.[557]

229. GAMA's Reply cites an additional authority not cited in the Statement of Claim, *Vöcklinghaus v. Czech Republic*, where the tribunal purportedly "reviewed judicial conduct separately under both, a denial of justice standard and the FET standard."[558] But *Vöcklinghaus* falls into the category of cases where tribunals applied the denial of justice standard in substance, even if they did not use that label. The *Vöcklinghaus* tribunal rejected the claimant's claim of arbitrary treatment by a local court given that there was no evidence of "bad faith, a willful disregard for due process or an extreme insufficiency of action."[559] These elements are consistent with what is required to establish a denial of justice.

(b) Laws of general application do not create legitimate expectations that are protected under the FET standard

230. GAMA's legitimate expectations claim boils down to an argument that it legitimately expected that Macedonia would comply with its own law, and that this expectation was frustrated (in breach of the FET standard) when the Macedonian courts allegedly misapplied Macedonian law.[560]

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[556] *Tatneft v. Ukraine* **(CL-23)** ¶ 465 (emphasis added). The tribunal also explained that its discussion of the offending judicial decisions was "inseparable" from consideration of the physical enforcement of that decision by the Ministry of the interior's troops to enforce decisions of the judiciary. See *id.* ¶¶ 396-397.

[557] In any event, the *Tatneft* tribunal adopted a high threshold for establishing an FET breach, namely whether the relevant court decisions were "manifestly unfair and unreasonable." *Tatneft v. Ukraine* **(CL-23)** ¶ 405 (emphasis added).

[558] Reply ¶ 30.

[559] *Vöcklinghaus v. Czech Republic* (**RL-60**) ¶ 204.

[560] Statement of Claim ¶¶ 234, 239, 259, 260; Reply ¶ 258.

231. Macedonia showed in its Statement of Defence that a legitimate expectations claim requires proof of a specific representation from the State to induce an investment, as well as reasonable reliance on such a specific representation. Laws of general application, by contrast, do not create legitimate expectations that are protected under the FET standard.[561] GAMA's legitimate expectations claim fails at this threshold issue.

232. In its Reply, GAMA argues that "[g]uarantees in legislative framework can give rise to legitimate expectations" and cites to handful of investment treaty cases.[562] These cases are inapposite, however, because they involved circumstances where the State had enacted a legal regime specifically to induce investments (*e.g.*, an incentive regime for investments in renewable energy), the claimant relied on that regime when making its investment, and the State then materially changed the regime. In *Cube Infrastructure v. Spain*, for example, the tribunal held that:

> At least in the case of a **highly-regulated industry, and provided that the representations are sufficiently clear and unequivocal**, it is enough that a regulatory regime be established with the **overt aim of attracting investments** by holding out to potential investors the prospect that the investments will be subject to a set of specific regulatory principles that will, as a matter of deliberate policy, be maintained in force for a finite length of time. **Such regimes are plainly intended to create expectations** upon which investors will rely and to the extent that those expectations are objectively reasonable, they give rise to legitimate expectations when investments are in fact made in reliance upon them.[563]

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561 Statement of Defence ¶ 259.

562 Reply ¶ 259, citing *National Grid PLC v. The Argentine Republic*, UNCITRAL, Award (3 November 2008) **(CL-44)**; *CMS Gas Transmission Company v. Argentina*, ICSID Case No ARB/01/8, Award, (12 May 2005) **(CL-45)**; *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) ("***Suez v. Argentine Republic***") **(CL-95)**; *Glencore v. Colombia* (**CL-96**); *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) ("***Cube Infrastructure v. Spain***") **(CL-97**).

563 *Cube Infrastructure v. Spain* (**CL-97**) ¶ 388. See also *National Grid PLC v. The Argentine Republic*, Award (3 November 2008) (**CL-44**) ¶¶ 84, 177-178 (considering "the investor's expectations under the Regulatory Framework governing the newly privatized electricity transmission services, as presented to foreign investors at the time of the privatization and as subsequently modified by Argentine law," finding that "the Respondent solicited the investments in the power sector internationally," and holding that the claimant had protected legitimate expectations where it had "relied on the key elements of the Regulatory Framework (subsequently dismantled by the Measures)."); *CMS Gas Transmission Company v. Argentina*, ICSID Case No ARB/01/8,

233. None of those circumstances are present here, and GAMA has cited not a single case where an investment treaty tribunal found that laws of general application (that were not designed to induce investments) could give rise to legitimate expectations, let alone cases where such expectations were frustrated because domestic court misapplied the law.

234. GAMA also ignores the cases and commentary cited in Macedonia's Statement of Defence, which show that laws of general application do not create legitimate expectations.[564] As the tribunal in *TECO v. Guatemala* observed, "[i]t is clear …that any investor has the expectation that the relevant applicable legal framework will not be disregarded or applied in an arbitrary manner. However, that kind of expectation is irrelevant to the assessment of whether a State should be held liable for the arbitrary conduct of one of its organs."[565]

Award (12 May 2005) **(CL-45**) ¶¶ 128, 133, 275, 281 (finding that the claimant had received a guarantee to have its gas tariff calculated in US dollars by virtue of a legal framework including "the public tender offer, the Gas Decree, the Information Memorandum issued in 1992 in conjunction with the initial public tender offer, and Clause 9.2 of the License [granted to claimant]," and that the State breached the claimant's legitimate expectations when it revoked this guarantee and "did in fact entirely transform and alter the legal and business environment."); *Suez v. Argentine Republic* (**CL-95**) ¶¶ 207-208, 212 (finding that Argentina created legitimate expectations in the claimants who had been granted a water concession, based on, among other things "the elaborate legal framework which the [respondent] designed and enacted," through which it "deliberately and actively sought to create those expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed to revitalize and expand the [respondent]'s water and sewage system," and concluding that there could be a breach of legitimate expectations where there has been a "subsequent, sudden change in the laws."). In *Glencore v. Colombia*, the claimant's legitimate expectations claim was not based on general laws but on an investor-State contract. *See Glencore v. Colombia* (**CL-96**) ¶ 1368. The tribunal suggested in *dicta* that "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." *Id.* ¶ 1368 (emphasis added). The tribunal did not specify in what cases a general legislative and regulatory framework could give rise to legitimate expectations, and in any event observed that only a reform of that framework (not a purported misapplication by domestic courts) could frustrate such expectations.

564 *See* Statement of Defence ¶ 259, citing UNCTAD, Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II: A Sequel (2012) (**RL-67)** at 69; *William Ralph Clayton et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (***"Clayton v. Canada")*** (**RL-82) ¶** 589; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013) ("***TECO v. Guatemala***") (**RL-73) ¶** 621; *Gavrilovic et al. v. Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018) (**RL-99) ¶** 956; *Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. Poland*, PCA Case No. 2014-31, Final Award (16 February 2017) (**RL-94) ¶** 240; *See also* Campbell McLachlan, et al., INTERNATIONAL INVESTMENT ARBITRATION (**RL-96**) ¶ 7.184.

565 *Teco v. Guatemala* (**RL-73**) ¶ 621. *See also Philip Morris v Uruguay* (**RL-92**) ¶ 426 ("Provisions of general legislation applicable to a plurality of persons or of category of persons do not create legitimate expectations.").

235. GAMA's legitimate expectation claim rests on laws of general application, namely, Macedonia's Arbitration Law and the New York Convention.[566] The claim thus fails at the threshold issue of establishing expectations that are protected under the FET standard.

(c) In any event, Macedonia afforded GAMA fair and equitable treatment

236. Leaving aside the many legal obstacles to GAMA's FET claim, the claim in any event fails on the merits. GAMA merely repeats the assertions it made in support of its denial of justice claim. As shown above and summarized below, these assertions have no merit.

237. First, GAMA asserts that the "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," which allegedly frustrated GAMA's legitimate expectations.[567] As shown above, the Macedonian courts did not unlawfully assume jurisdiction or apply Macedonian law: GAMA waived recourse to arbitration by resorting to the Macedonian courts, and GAMA failed to plead English law in the Macedonian courts, accepting the application of Macedonian law instead.[568]

238. Second, GAMA contends that "[t]he 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 reorganization proceedings," which allegedly "represent[s] … an inconsistent action of state organs in breach of the FET."[569] But as explained, any inconsistency was remedied by the Court of Appeal's instructions on remand to the Basic Court.[570]

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566 Reply ¶ 258.

567 Reply ¶¶ 257-258, 263.

568 *See supra* § III.B.

569 Reply ¶¶ 267-268.

570 *See supra* § III; Statement of Defense ¶¶ 123, 263; Decision of the Court of Appeal Skopje, dated 30 June 2022 (**C-73**) at 2-3.

239. Third, GAMA argue that the duration of the proceedings concerning its payment claim against TE-TO was "excessive."[571] GAMA acknowledges that it made the same argument in support of its denial of justice claim.[572] As shown above, the duration of the proceedings was not excessive.[573]

240. Fourth, GAMA contends that "the conduct of the Civil Court Skopje and the Appellate Court Skopje in TE-TO's reorganization proceedings amount to a denial of justice," and that "[t]he denial of justice at the same time entails a breach of the FET obligation …."[574] GAMA thus admits that its FET claim is duplicative of its denial of justice claim. Macedonia showed above that its courts did not deny justice to GAMA in the reorganization proceedings,[575] and GAMA's FET claim fails for the same reasons.

241. GAMA cites three cases – *Dan Cake v. Hungary*, *Gramercy Funds v. Peru*, and *Petrobart v. Kyrgyz Republic* – that supposedly involved analogous issues to those that arose in TE-TO's reorganization, arguing that "[s]imilar reasoning applies to the present case."[576] None of these three cases assists GAMA:

a) In *Dan Cake v. Hungary* the claimant was the majority shareholder in the local company that declared bankruptcy. The tribunal found an FET breach in "the form of a denial of justice" not only because the Hungarian court baselessly imposed changes on the draft composition agreement to eliminate the shareholders' right to participate in the composition hearing, but also because it refused to convene a composition hearing *at all*, and instead ordered the investor to "submit a number of documents which were not required by law and were obviously unnecessary," and thereby guaranteed the liquidated local company's

[571] Reply ¶ 275.

[572] Reply ¶ 273.

[573] *See supra* § III.B.6.

[574] Reply ¶¶ 276-277.

[575] *See supra* § III.C.

[576] Reply ¶ 278.

"disappearance as a legal person."[577] This illustrates the high standard for a denial of justice violation that is not met on the facts of this case.

b) *Gramercy Funds v. Peru* concerned decrees issued by the Peruvian Ministry of Economy to change the process for repaying holders of so-called agrarian bonds. The *Gramercy Funds* tribunal held that the decrees were arbitrary because, among other things: (i) the Ministry defied instructions from the Peruvian Constitutional Tribunal about the procedure that should be applied to bondholders;[578] (ii) according to the Constitutional Tribunal's interpretation of Peruvian law, the bondholders suffered a "severe and improper curtailment of the[ir] rights"; (iii) "the sole purpose" of the Ministry's decree was to "minimize the amounts payable by the Republic to [the bondholders], including (and in particular) Gramercy"; and (iv) the bondholder repayment process was "only accepted by a minority of the bondholders."[579] This is a far cry from the facts of this case, not least because the majority of TE-TO's creditors approved the company's reorganization and no payment obligation of Macedonia was involved.

c) In *Petrobart v. Kyrgyz Republic*, the Kyrgyz government transferred assets from one State-owned company, KGM, to other State-owned companies, thereby precipitating KGM's bankruptcy and preventing the claimant from recovering amounts owed to it by KGM.[580] Moreover, when the claimant had previously tried to collect the amounts owed through local court proceedings, Kyrgyzstan's Vice Prime Minister wrongfully interfered and effectively instructed the court to stay the proceedings.[581] There are no comparable facts in this case.

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[577] *Dan Cake v. Hungary* (**CL-26)**, ¶¶ 145-146. Here GAMA complains about the exact opposite, namely that the debtor (TE-TO) should have been liquidated and disappeared as a legal person and accuses the Macedonian government of breaching the BIT by not letting this happen.

[578] *Gramercy Funds v. Peru* (**RL-114**) ¶ 980 ("The mandate received from the *Tribunal Constitucional* required the MEF to develop a methodology that would result in a fair application of the principio valorista. The DS 242/2017 parity exchange rate was designed, not to comply with the instructions of Peru's Highest Court, but to achieve an unreasonably low revaluation of the Bonos.")

[579] *Gramercy Funds v. Peru* (**RL-114**) ¶¶ 964, 985-986, 989.

[580] Reply ¶ 278, citing *Petrobart v. Kyrgyz Republic* (**CL-30**) at 74-76.

[581] *Petrobart v. Kyrgyz Republic* (**CL-30**) at 74-76.

242. Fifth, GAMA asserts that the rejection of GAMA's request to recuse the bankruptcy judge "was a denial of justice in breach of the FET obligation."[582] But as shown above, GAMA's dilatory recusal request was properly decided in accordance with Macedonian law.[583]

243. Sixth, GAMA recycles its allegations that the Macedonian courts discriminated against "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."[584] Again, these complaints go nowhere:

a) Macedonia's Prepackaged Bankruptcy procedures allow the debtor (TE-TO) to propose classifications (rankings) of creditors, subject to approval by its creditors.[585] TE-TO created two classes of creditors (following a concern raised by GAMA about TE-TO's initial classification of creditors) with all unsecured creditors (including GAMA's claim and shareholder loans) in the second class, behind secured creditors. TE-TO's plan was overwhelmingly approved by its creditors. It cannot be said that GAMA was treated differently (or had a basis to be treated differently, but was treated the same) from TE-TO's shareholders *as lenders*.

b) Macedonian courts did not discriminate against GAMA with respect to the recognition of default interest because "there was a dispute between GAMA and TE-TO about whether GAMA's claim was ripe" so as to trigger default interest.[586]

c) Third, the courts did not discriminate against GAMA by approving the period for TE-TO to pay its unsecured creditors 10% of their claims. The Bankruptcy Law

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582 Reply ¶ 282.

583 *See supra* § III.C.4.

584 Reply ¶ 284.

585 *See supra* § III.C.2(b).

586 *See infra* § VII.B.2; Petrov II ¶ 34.

allows repayment over periods greater than five years, and all of TE-TO's creditors were treated the same in that respect.

244. Seventh, GAMA argues that "[t]he decisions of the Macedonian courts in TE-TO's reorganization bear no reasonable relationship to a rational policy, which underlines the Bankruptcy Law."[587] GAMA points to an OECD working paper to assert that a rational policy "gives creditors priority to the company's assets over shareholders."[588] But an OECD working paper cannot displace Macedonian law with respect to Macedonian bankruptcy procedures. As explained above, Macedonia's Prepackaged Bankruptcy provisions allow the debtor freedom to establish classes of creditors.[589] In any event, Mr. Petrov explained the rational policy basis for Prepackaged Bankruptcy, namely "to ensure greater efficiency in bankruptcy proceedings, as well as to enable the debtor to continue to exist and function in the market."[590]

245. Finally, GAMA argues that the PRO's decision to "refrain[] from commencing proceedings for enforced collection against TE-TO prior to, during [*sic*] the tax debt deferral approved by the Government and after the termination of the tax debt deferral" had "no legal basis" and "cannot be justified by any rational policy."[591] Both before and after recommending that the Macedonian Government take the necessary legal steps to grant TE-TO a tax deferral[592] the PRO took reasonable steps to collect TE-TO's tax debt by sending warning letters.[593] The temporary tax deferral was an unremarkable effort to

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587 Reply ¶ 286.

588 Reply ¶ 287.

589 *See supra* § III.C.2(b).

590 Petrov I ¶ 44.

591 Reply ¶ 290.

592 Notification by the Public Revenue Office, no. 28- 3845-7 (4 November 2019) (**C-184**) at 22 ("Based on the above, we propose that the Decision to be adopted by the Government of the Republic of North Macedonia in accordance with the Law on State Aid Control should clearly and unambiguous define the right as in Article 4 paragraph 1 Item 2 and Article 5 paragraphs 1 and 2 regarding all obligations arising from the 2018 Tax Balance Sheet.")

593 *See* Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly tax advance payment for February 2019 (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 (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 (25 June 2019) (**C-190**), Letter of warning by the Public Revenue Office to TE-TO for payment of the monthly

lawfully exercise Macedonia's sovereign prerogative to grant State aid to a struggling energy company.[594] TE-TO paid its bill soon after the Government terminated the tax deferral agreement.[595]

246. GAMA also repeats its contention that the conduct of the Macedonian courts and other State organs (namely those involved in TE-TO's tax deferral) should amount to a "composite act" under Article 15 of the ILC Articles on State Responsibility.[596] However, not every series of State acts or omissions can be deemed to be a composite act. The commentary to the ILC Articles explains that, to be a composite act, the acts or omissions in a series must be "sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system."[597] GAMA contrives a connection between the payment claim proceedings related to its private dispute with TE-TO, the decisions of TE-TO's other creditors to exercise their rights under loan agreements, the outcome of TE-TO's prepackaged bankruptcy triggered by TE-TO's financial circumstances, and Macedonia's response to a local company's request for financial aid by granting a tax deferral. This is no "pattern or system" of State conduct, let alone a pattern or system aimed at damaging GAMA's investment. In any event, GAMA's composite act allegation is no greater than the sum of its parts, and each part is far from an FET breach, as shown above.

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tax advance payment for June 2019 (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 (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 (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 (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 (21 January 2020) (**C-196**).

[594] *See supra* § V.

[595] The Government terminated the tax deferral agreement in December 2020; TE-TO sought and obtained a loan and then paid its tax bill in April 2021. *See* Statement of Defence ¶ 97, Minutes of the 25th session of the Government of the Republic of North Macedonia (1 December 2020) (**C-140**) at 6.

[596] Reply ¶ 292.

[597] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001) (**RL-19**) at 63.

2. Macedonia did not impair GAMA's investment by arbitrary, unreasonable, or discriminatory measures

247. GAMA's Reply dedicates a handful of paragraphs to the claim that Macedonia breached the non-impairment standards in the Macedonia-Spain BIT and Macedonia-Lithuania BIT.[598] GAMA "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."[599] Thus, insofar as GAMA's non-impairment claim relates to the conduct of the Macedonian courts, it is duplicative and fails for the same reasons as GAMA's denial of justice claim, discussed above.

248. In addition, GAMA still argues that "TE-TO prioritized repayment of PRO over GAMA, which was overlooked by the Macedonian court and constituted a discriminatory treatment."[600] Macedonia explained that the Final Reorganization Plan included a EUR 260,000 tax debt to PRO, which TE-TO paid.[601] The PRO asked the bankruptcy judge to "delete the Public Revenue Office from the list of creditors."[602] The bankruptcy judge did so. Macedonian does not know why TE-TO paid the PRO when it did. But once the PRO was paid, it should naturally be omitted from the list of creditors. GAMA still cannot explain how this amounts to discrimination against GAMA by the PRO or the bankruptcy judge.

3. Macedonia afforded GAMA full protection and security

249. Macedonia has shown that the FPS standard in the Macedonia-Lithuania BIT and the Macedonia-Australia BIT, which GAMA invokes, imposes an obligation of due diligence

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598 Reply ¶ 305.

599 Reply ¶ 305.

600 Reply ¶ 308.

601 Statement of Defence ¶ 281.

602 Statement of Defence ¶ 281.

to protect the physical security of an investment against harm caused by third parties.[603] GAMA's FPS claim fails because it alleges no physical harm to its investment.

250. In its Reply, GAMA says that it "disagrees" with Macedonia that the position described above is the majority view among international tribunals and commentators on the FPS standard.[604] But GAMA cannot overcome the long line of authorities that confirm this majority view.[605] For example, the tribunal in *Addiko Bank v. Montenegro* recently "consider[ed] that, in line with a majority of tribunals, absent treaty language that indicates that the FPS standard also covers legal security, the FPS standard refers to the duty of due diligence of a State to ensure the physical protection of the investor and its property in the host State from acts inflicted by third parties."[606]

251. GAMA also fails to engage with the rationale behind this majority view, namely that expanding the scope of the FPS standard to legal protection against harm caused by the State itself would collapse the FPS and FET standards into one, thus rendering FPS superfluous, contrary to the *effet utile* principle. As observed by McLachlan, Shore and Weiniger, for example, "[t]he incorporation of both of these standards [FET and FPS] into an investment treaty requires an interpretation in accordance with the principle of effectiveness or *effet utile* that accords a distinct meaning to each. If the terms were

603 Statement of Defence ¶¶ 270-271.

604 Reply ¶ 298.

605 GAMA ignores some of the authorities cited in Macedonia's Statement of Defence, including the *Gold Reserve v. Venezuela* tribunal's observation, cited in the Statement of Defence, that the "more traditional, and commonly accepted view … is that [FPS] refers to protection against physical harm to persons and property." *See* Statement of Defence ¶ 270, citing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (**RL-78**) ¶¶ 622-623.

606 *Addiko Bank AG v. Montenegro*, ICSID Case No. ARB/17/35, Award (Excerpts) (24 November 2021) (**RL-164**) ¶ 775. *See also Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Final Award (29 March 2019) (**RL-157**) ¶ 267 ("Unless the relevant treaty clause explicitly provides otherwise, the standard of full protection and security does not extend beyond physical security nor does it extend to the provision of legal security."); *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021) **(CL-70)** ¶ 623 ("The Tribunal's view is that … the FPS standard is intended to ensure physical protection and integrity of the investor and its property within the territory of the host State.").

synonymous, the inclusion of both would be otiose."[607] The ICJ in *Certain Iranian Assets* recently affirmed this reasoning:

> [T]he core of the obligation to accord the most constant protection and security under the Treaty of Amity **concerns the protection of property from physical harm** … international investment agreements often provide for fair and equitable treatment and the most constant protection and security, consecutively or even in the same sentence. **These two separate standards will overlap significantly if the standard of the most constant protection and security is interpretation to include legal protection**.[608]

252. If States intend to depart from this position, they say so expressly in their treaties, as was the case in the Germany-Argentina BIT at issue in *Siemens v. Argentina*, where the FPS standard extended to full protection and "legal security."[609] Neither the FPS provision in the Lithuania-Macedonia BIT nor that in the Austria-Macedonia BIT, which GAMA invokes, contains such language.[610]

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[607] Campbell McLachlan, et al., INTERNATIONAL INVESTMENT ARBITRATION (**RL-96**) ¶ 7.261. *See also Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) (**RL-157**) ¶ 7.83 ("In the Tribunal's view, given that there are two distinct standards under the ECT, they must have, by application of the legal principle of 'effet utile,' a different scope and role."); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (**RL-89**) ¶ 634 ("[T]he Tribunal is of the view that the more 'traditional' interpretation better accords with the ordinary meaning of the terms. Furthermore, as rightly observed by a number of previous decisions, a more extensive reading of the 'full protection and security' standard would result in an overlap with other treaty standards, notably FET, which in the Tribunal's mind would not comport with the 'effet utile' principle of interpretation."); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) (**RL-130**) ¶ 323 ("There is no doubt that historically this particular [FPS] standard has been developed in the context of physical protection and the security of a company's officials, employees and facilities. The Tribunal cannot exclude as a matter of principle the possibility that there might be cases in which a broader interpretation could be justified ... If such an exception were justified, then the situation would become difficult to distinguish from that resulting in a breach of fair and equitable treatment, and even from some form of expropriation."); *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) (**RL-49**) ¶ 174 ("[A]n overly extensive interpretation of the full protection and security standard may result in an overlap with the other standards of investment protection, which is neither necessary nor desirable.").

[608] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, ICJ Judgement, 2023 I.C.J. (**RL-166**) ¶ 190 (emphasis added).

[609] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) **(CL-27) ¶¶** 301, 303 (emphasis added).

[610] GAMA argues that "the treaty language of the Macedonia-Lithuania BIT and the Macedonia-Australia BIT has no limitation to 'physical' protection and security, which in contrast can be found in certain investment treaties …." Reply ¶ 300(a) (citations omitted). However, the fact that some States may have preferred to clarify that

253. Contrary authorities cited in GAMA's Reply are either inapposite or represent an isolated view that should not be followed.[611]

254. Even if the FPS standard extended legal protection against harm caused by the State itself as opposed to third parties, Macedonia explained in its Statement of Defense that this would not allow GAMA to avoid the strictures of the denial of justice standard.[612] GAMA does not deny this in its Reply.

255. In any event, GAMA's FPS claim is duplicative of its denial of justice and FET claims and fails for the same reasons set out above in the context of those claims.

256. First, GAMA cross-references its denial of justice claim by arguing that 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."[613] As shown above, the Macedonian courts heard and decided GAMA's payment claim against TE-TO and TE-TO's reorganization application in accordance with Macedonian law.[614]

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the FPS standard applies only to physical security against harm caused by third parties does not change that this is in any event the majority position among tribunals, as described above.

611 For example, GAMA relies on *CME v. Czech Republic* and *Azurix v. Argentina*. *See* Reply ¶ 297, footnote 572, citing *CME v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001) (**CL-101**), *Azurix Corp. v. The Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award (14 July 2006) (**CL-57**). As the tribunal in *Suez v Argentina* observed neither the *CME* nor the *Azurix* tribunal provided "any clear reason" for holding that the FPS standard at issue in those cases extended beyond physical security. *See Suez v. Argentine Republic* (**RL-136**) ¶ 177 ("[T]here is another reason for the Tribunal not to follow the interpretation made in, inter alia, *CME* and *Azurix*. Neither the *CME* nor the *Azurix* awards provide a historical analysis of the concept of full protection and security or give any clear reason as to why it was departing from the historical interpretation traditionally employed by courts and tribunals and expanding that concept to cover non-physical actions and injuries.").

612 Statement of Defence ¶¶ 272-273.

613 Reply ¶ 301. GAMA also argues that "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." Reply ¶ 303. This merely repeats GAMA's assertion that the "conduct of [the] Macedonian courts involved extreme misapplication of the Macedonian law," which, as shown above, has no merit. *See supra* ¶ 253.

614 *See supra* § III.B-C.

257. Second, GAMA argues that "but for" the PRO's temporary deferral of TE-TO's income tax liability, "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."[615] GAMA makes the same allegation in the context of its expropriation claim. As shown above in response to that claim, the allegation that TE-TO's reorganization would have collapsed and that GAMA would have received full payment of its claim in bankruptcy are speculative and contradicted by the record.[616]

4. Macedonia afforded GAMA effective means of asserting its claims and enforcing its rights

258. Macedonia showed in its Statement of Defense that even if GAMA could bring an effective means claim under Article 3(3) of the Kuwait-Macedonia BIT, the claim would fail on the merits because Macedonia provided GAMA with effective means of asserting claims and enforcing rights with respect to investments.[617] While the effective means standard requires a State to provide an effective framework to enforce rights, it "does not offer guarantees in individual cases."[618] Further, the effective means standard "seeks to implement and form part of the more general guarantee against denial of justice."[619] It is not an avenue to avoid the high threshold required for proving a denial of justice.

259. In its Reply, GAMA argues that the effective means standard is different from the denial of justice standard and that "the effective means clause is subject to a less demanding test."[620] GAMA relies on the same two authorities that it cited in its Statement of Claim,

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615 Reply ¶ 302.

616 *See supra* § III.B.

617 Agreement between Macedonia and Kuwait for the Encouragement and Reciprocal Protection of Investments, dated 4 August 2008 ("**Macedonia-Kuwait BIT**") Article 3(3) of the Kuwait-Macedonia BIT **(RL-40)** Art. 3(3); Reply ¶ 309.

618 Statement of Defence ¶ 283 citing *Amto v. Ukraine* (**RL-36**) ¶ 88. *See also Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability (21 April 2015) ("***Gavazzi v. Romania***") (**RL-83**) ¶ 260.

619 *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) ("***Duke Energy v. Ecuador***") (**RL-38**) ¶ 391 (explaining that the effective means standard "seeks to implement and form part of the more general guarantee against denial of justice.").

620 Reply ¶ 313.

*White Industries v. Indi*a and *Chevron v. Ecuador I*, while ignoring Macedonia's submissions about these authorities in its Statement of Defence.[621] Macedonia showed that commentators have criticized the position on effective means in *White Industries* and *Chevron I*, and other tribunals have not treated the effective means standard as being less demanding than the denial of justice standard.[622] As the tribunal in *Gramercy Funds v. Peru* recently held:

> **The Effective Means Clause represents a historic formulation of the denial of justice standard**. The U.S. excluded such Clause from its treaty practice and replaced it with the current denial of justice provision. An Effective Means Clause **does not create an additional layer of protection, further to the MST of aliens under customary international law, including denial of justice**, already found in the FTA. Under these circumstances, **if the Tribunal were to allow the incorporation of the Effective Means Clause of another treaty through the MFN clause, it would be permitting Claimants to challenge the Impugned Measures twice on the same ground**.[623]

260. GAMA also contends that "the effective means clause requires both an effective legal system and that this works effectively in a particular case."[624] GAMA relies on *Petrobart*

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621 Reply ¶ 313.

622 *See* Statement of Defence ¶ 284. Moreover, on the facts, *White Industries* and *Chevron (I)*, are not examples of States being held liable in situations where the conduct of their courts fell short of a denial of justice but nevertheless amounted to a failure to provide effective means to assert the investor's rights. *White Industries v. India* involved extreme delay in resolving claims that included waiting on the Supreme Court of India for over five years to even set a date for an appeal. *See White Industries v. India* **(CL-37)** ¶ 11.4.19. In *Chevron (I),* the claimant's seven pending cases in the Ecuadorian courts lingered for 13 to 15 years, with six of those cases remaining undecided in the first instance. *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) ("***Chevron v. Ecuador I***") (**CL-50**) ¶ 270. GAMA also relies on *Mercuria Energy v Poland (II)* which concurred with *Chevron (I)* that the effective means standard is distinct from "and potentially less demanding" than the denial of justice standard. See Reply ¶ 310, FN 592, citing *Mercuria Energy Group Limited v. Republic of Poland (II)*, SCC Case No. 2019/126, Final Award (29 December 2022) (**CL-103),** ¶ 764. But that concurrence is merely *dicta*, and *Mercuria* is inapposite on the facts. The tribunal held that Poland's courts had provided the claimant with effective means of asserting claims and enforcing rights, but that Poland had breached the effective means standard by failing to comply with the courts' decisions. *Id.* ¶ 776 (acknowledging that the Polish judiciary "provided effective means for the assertion of JSE and Claimant's claims" but that "[t]he problem rather rests on the failure of the administrative authorities to comply in a timely fashion – if at all – with the decisions rendered by the Polish administrative courts.") Such non-compliance is not at issue in this case.

623 *Gramercy Funds v. Peru* (**RL-114**) ¶ 1228 (emphasis added.)

624 Reply ¶ 310.

v. Kyrgyzstan, which does not assist GAMA's position.[625] The *Petrobart* tribunal found a breach of the effective means standard based on a letter from Kyrgyzstan's Vice Prime Minister urging a domestic court to stay the execution of a judgment issued in the claimant's favor.[626] The tribunal considered that the letter "must be regarded as an attempt by the Government to influence a judicial decision to the detriment of [the claimant]," and that "such Government intervention in judicial proceedings is not in conformity with the rule of law in a democratic society."[627] This confirms that the effective means standard guarantees an effective framework to assert and enforce rights, not that it is an avenue for challenging the outcomes of individual cases. Moreover, *Petrobart* is a textbook example of a denial of justice involving executive interference in the decision-making of the judiciary.[628]

261. GAMA argues that the cases cited in Macedonia's Statement of Defence on this point are distinguishable, but GAMA's arguments do not withstand scrutiny:[629]

a) The *Amto v. Ukraine* tribunal held that the effective means standard "is systematic in that the State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases."[630] GAMA says that *Amto* tribunal's holding is "specific to the wording of the [Energy Charter Treaty] ECT and the way how the investor framed its claim."[631]

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625 Reply ¶ 311(a), footnote 596, citing *Petrobart v. Kyrgyz Republic* (**CL-30**) at 77.

626 *Petrobart v. Kyrgyz Republic* (**CL-30**) at 77, 84.

627 *Petrobart v. Kyrgyz Republic* (**CL-30**) at 75.

628 *See Gramercy Funds v. Peru* (**RL-114),** ¶ 1092-1093 ("*Petrobart* and *Chevron II* confirm that if governmental interference with the judiciary or other external influence of third parties obtained by corruption is proven, an international adjudicator may conclude that justice has been denied. In these two cases, the tribunals found convincing proof of external influence, which sapped the independence and impartiality of the local courts … [In *Petrobart*] [t]he local court admitted issuing a stay of enforcement of a judgment that was favorable to the investor, precisely because of the ex parte intervention of the Government.").

629 Reply ¶ 311.

630 *Amto v. Ukraine* (**RL-36**) ¶ 88.

631 Reply ¶ 311(a); *Amto v. Ukraine* (**RL-36**) ¶ 88 ("Bearing in mind the context and the object and purpose of the ECT, the Tribunal considers that 'effective' is a systematic, comparative, progressive and practical standard. It is systematic in that the State must provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases. Individual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12).").

GAMA fails to explain what "specific … wording" of the ECT would lead to a different interpretation of the effective means standard in this case. No such distinction is warranted.

b) The *Gavazzi v. Romania* tribunal considered the effective means and denial of justice claims together and held that effective means is "a wide notion that does not guarantee that each and every decision is correct."[632] GAMA says that "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."[633] But this merely confirms Macedonia's position that the effective means standard is not about offering guarantees in individual cases (the denial of justice standard is) and does not allow a claimant to avoid the high threshold for establishing a denial of justice.

c) In *Duke Energy v. Ecuador*, the tribunal held that the effective means standard "seeks to implement and form part of the more general guarantee against denial of justice."[634] GAMA says that the *Duke Energy* tribunal "considered that '[w]hat is at issue and must be reviewed by the Tribunal is how these mechanisms performed.'"[635] GAMA omits that by "mechanisms" the tribunal was referring to "the existence and availability of the Ecuadorian judicial system."[636] The *Duke Energy* tribunal assessed the performance (as opposed to the availability) of the judicial system against the denial of justice standard.[637]

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632 *Gavazzi v. Romania* **(RL-83)** ¶¶ 260.

633 Reply ¶ 311(b).

634 Statement of Defence ¶ 284, quoting *Duke Energy v. Ecuador* **(RL-38)** ¶ 392.

635 Reply ¶ 311, quoting *Duke Energy v. Ecuador* (**RL-38**) ¶ 392.

636 *Duke Energy v. Ecuador* (**RL-38**) ¶ 392. *See also* ¶ 391.

637 *Duke Energy v. Ecuador* (**RL-38**) ¶ 391 ("Such [effective means] provision guarantees the access to the courts and the existence of institutional mechanisms for the protection of investments. As such, it seeks to implement and form part of the more general guarantee against denial of justice."); ¶ 392 ("[T]he Tribunal notes that the existence and availability of the Ecuadorian judicial system and of recourse to arbitration under the Mediation and Arbitration Law are not at issue here. What is at issue and must be reviewed by the Tribunal is how these mechanisms performed, as well as the alleged failure of the State to respect its promise to arbitrate,"); ¶ 402 ("On this basis, the Tribunal concludes that the Claimants have failed to show that no adequate and effective remedies existed.").

262. In any event, GAMA's effective means claim is duplicative of its denial of justice claim, in that both claims rely on the same allegations.[638] These allegations fail for the same reasons in the context of its effective means claim as they do in the context of its denial of justice claim.[639]

263. GAMA also contends that the PRO's conduct breached the effective means standard, repeating the same allegations as in the context of its expropriation claim. According to GAMA, "[b]ut 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 would have been fully repaid …."[640] As shown above in response to GAMA's expropriation claim, the allegations that TE-TO's reorganization would have collapsed and that GAMA would have received full payment of its claim in bankruptcy are speculative and contradicted by the record.[641]

VIII. GAMA STILL FAILS TO SHOW THAT IT IS ENTITLED TO ANY COMPENSATION

264. As demonstrated below, GAMA's claim fails on causation because its alleged loss was caused by TE-TO's failure to pay, not by anything that Macedonia did or did not do (**Section IX.A**). In any event, GAMA has still not proven the quantum of loss it claims (**Section IX.B**).

A. GAMA'S ALLEGED LOSS WAS CAUSED BY TE-TO'S FAILURE TO PAY, NOT BY ANYTHING THAT MACEDONIA DID OR DID NOT DO

265. Even if GAMA could demonstrate a breach of the Treaty, its claim would still fail because GAMA has not discharged its burden of proving, as a matter of fact or law, that

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638 *See* Reply ¶¶ 315-320.

639 *See supra* § V.A and V.B.

640 Reply ¶ 320.

641 *See supra* § III.B. Referring to *Petrobart v. Kyrgyz Republic*, GAMA argues that "State intervention, which stays or prevents the collection of claims against debtor, amount to a breach of the effective means standard as well." Reply ¶ 320, citing *Petrobart v. Kyrgyz Republic* **(CL-30)** at 77. The *Petrobart* tribunal found a breach of the effective means standard based on the fact that the Kyrgyz Vice Prime Minister sent a letter to a local court effectively instructing it to stay the execution of a judgment issued in the claimant's favor. *Id.* 76-77.

the alleged breaches caused its alleged losses.[642] As Macedonia explained, the dominant and effective cause of GAMA's purported loss was TE-TO's insolvency and its failure to repay GAMA, not any action by Macedonia.[643] TE-TO was unprofitable from the start of the Plant's commercial operations, as the assumptions on which its feasibility study was based did not turn out as expected.[644] TE-TO borrowed from its shareholders to pay its banks, and when it did not repay these shareholders its accounts were blocked. GAMA's failure to correct the Plant's defects exacerbated TE-TO's financial troubles, and TE-TO refused to pay GAMA.[645] In 2018, TE-TO entered bankruptcy and its debt to GAMA (and its other creditors) was restructured.[646]

266. In its Reply, GAMA does not dispute that it must establish both factual and legal causation to recover damages for any breach of the Treaty.[647] GAMA instead argues that (i) factual causation should be "proven to a standard of probability,"[648] (ii) if factual causation is established, there is a rebuttable presumption of legal causation,[649] (iii) there is "no settled view" that proving legal causation requires GAMA to prove that Macedonia's breach was the "dominant cause" of its loss, and (iv) inability to exactly quantify loss is no barrier to finding causation.[650] Under these assumptions, GAMA's principal argument is that 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

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642 Statement of Defence ¶¶ 286-296.

643 Statement of Defence ¶¶ 286, 296.

644 Statement of Defence ¶ 54.

645 Statement of Defence ¶¶ 53, 107-109. In 2013 TE-TO advised the GAMA Consortium that the latent defects were harming TE-TO financially and increased safety risks to the plant including through a "serious latent defect" that led to an "unplanned outage of the plant and heavy losses for TE-TO AD Skopje" and other defects that were responsible for an accident that caused losses of EUR 1.3 million (Statement of Defence ¶ 29, quoting Letter from TE-TO to GAMA and Alstom, dated 27 February 2013 (**C-48-MK**)). TE-TO also complained that the Plant that GAMA had built could not restart after a short standstill causing TE-TO losses of EUR 2.6 million and that problems with GAMA's gas turbine caused it another EUR 0.9 million loss (Statement of Defence ¶ 53, citing TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**)).

646 Statement of Defence ¶ 62.

647 Statement of Defence ¶ 288.

648 Reply ¶ 336.

649 Reply ¶ 336.

650 Reply ¶ 335.

proceedings."[651] GAMA also argues that its loss was "a result of the flawed debt enforcement proceedings."[652] GAMA's contentions are addressed below. None shows that Macedonia caused the loss that GAMA complains of.

1. International law requires GAMA to meet a high standard to prove causation in fact and in law

267. Macedonia explained in its Statement of Defence that to prove factual causation GAMA must show that Macedonia's alleged BIT breaches were the "but for" cause of its purported losses.[653] Legal causation requires showing that those breaches were also the "dominant" (or "proximate") cause of the losses such that there is a "sufficient causal link" between the breach and the loss sustained, and to show that such a link not too indirect, remote, or inconsequential.[654]

268. As for factual causation, citing *Lemire v. Ukraine*, GAMA accepts that it must show "but for" factual causation but contends that factual causation needs only be "proven to a standard of probability."[655] Macedonia agrees in principle that, as stated by the *Lemire* tribunal, proving factual causation requires showing that it is "is probable – and not

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[651] Reply ¶ 358.

[652] Reply ¶ 358.

[653] Statement of Defence ¶ 288, citing *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) ("***Chevron v. Ecuador I***") (**CL-50)** ¶ 374 ("[T]he Claimants must prove the element of causation – i.e., that they would have received judgments in their favor as they allege 'but for' the breach by the Respondent").

[654] Statement of Defence ¶ 288. *See also Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) ("***Biwater Gauff v. Tanzania***") (**CL-54)** ¶ 785 ("The requirement of causation comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote."); *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (7 August 2002) (**RL-127**) ¶ 138 ("The possible consequences of human conduct are infinite, especially when comprising acts of government agencies; but common sense does not require that line to run unbroken towards an endless horizon"); *Trail Smelter Case (United States v. Canada*), 3 R.I.A.A. 1905, 1931 (16 April 1938) (**RL-116**) at 1931 (declining to find Canada liable for damages to business enterprises allegedly resulting from reduced economic status of area residents as a result of harmful fumes emitted from a smelter, finding that such losses were "too indirect, remote and uncertain"); International Law Commission, Draft Articles on "Responsibility of States for Intentionally Wrongful Acts with commentaries" (2001) (**RL-19**) at 92 ("[I]t is only 'Injury … caused by the internationally wrongful act of a State' for which full reparation must be made. This phrase is used to make clear that the subject matter of reparation is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.") (emphasis added).

[655] Reply ¶ 336.

simply possible" that but for the alleged breaches GAMA would have recovered its debt from TE-TO and therefore not suffered the losses it complains of.[656] But the *Lemire* tribunal did not address expressly the level of probability that a claimant must meet to prove factual causation. Other international tribunals have clarified that under international law establishing factual causation requires showing a "high standard of factual certainty" such that it can be concluded that "in all probability" the breach caused the alleged loss.[657] Indeed, the *Lemire* tribunal's reasoning reflects this demanding standard.[658]

269. GAMA also suggests that once factual causation is established, there is a rebuttable presumption of legal causation. GAMA relies again on the *Lemire* tribunal, which explained that "[i]f it can be proven that in the normal course 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."[659] This does not assist GAMA. In the normal course of events, TE-TO's insolvency and failure to pay its creditors was bound to cause losses to the creditors. If a

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656 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) ("***Lemire v. Ukraine***") (**RL-57**) ¶ 169.

657 *Clayton v. Canada* (**RL-156**) ¶ 110 ("Authorities in public international law require a *high standard of factual certainty* to prove a causal link between breach and injury: the alleged injury must '*in all probability*' have been caused by the breach (as in *Chorzów*), or a conclusion with a 'sufficient degree of certainty' is required that, absent a breach, the injury would have been avoided (as in *Genocide*)") (emphasis added). *See also Nordzucker AG v. Republic of Poland*, UNCITRAL, Second Partial Award (28 January 2009) (**RL-134**) ¶ 95 (finding that Poland breached its treaty obligations by "not communicating transparently about the reasons of the slow down of the procedure," but declining to award any damages on the basis that the investor had failed to prove that, had Poland acted in a manner consistent with its treaty obligations, that would "necessarily" have led to the investor acquiring the two sugar companies.).

658 The *Lemire* tribunal considered and based its decision on detailed evidence that the claimants in that case would have won a tender and established their business but for the State's wrongfully conduct in the tender. See *Lemire v. Ukraine* (**RL-57**) ¶¶ 199-200, 205, 207 (holding that the claimant would have probably won the tender had it been conducted properly because they were "by far the best qualified of the three competitors, the only one with a broadcasting experience in Kyiv, with a proven and successful track record as a music transmitter and as a news provider" and "certainly … the participant which best complied with the criteria established by legislation" and further considering that, if the claimants had won the tender, they probably would have established their business because they "had the financial strength and the necessary know how to successfully operate the two radio channels… had won a number of awards for the quality of its broadcasting, it employed four of the top 10 disc jockeys in Ukraine…and it had held the number 1 or number 2 position among the broadcasting stations in Kyiv.").

659 Reply ¶ 336; *Lemire v. Ukraine* (**RL-57**) ¶ 169.

rebuttable presumption arises based on the normal course of events, it is that TE-TO's failure to pay was the proximate cause of GAMA's loss.[660]

270. As for legal causation, GAMA quibbles that "there is no settled view" that GAMA must show the alleged treaty breach was the "dominant" cause of loss.[661] For support, it points to the ILC Commentaries which state 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, but without the addition of any particular qualifying phrase."[662] But, if anything, that statement shows that establishing factual causation is not enough and that legal causation must also be established. In any event, investment tribunals require that "Claimants must prove … that the dominant cause [of the loss] was the [breach of the BIT]."[663]

271. Finally, GAMA notes that "tribunals frequently award compensation in the insolvency context, even where exact quantification of loss was not possible."[664] GAMA confuses causation and quantum. While tribunals may award compensation where the exact quantification of loss is not possible, they do so only if it has already been established to a high degree of certainty that the respondent caused the loss that claimant suffered. For example, as GAMA points out,[665] the tribunal in *Gavazzi v. Romania* held that the difficulty in quantifying monetary damages "provides no justification in refusing any

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660 See also Statement of Defence ¶¶ 292-296. *ELSI*, *Blusun v Italy*, and *Biwater Gauff v. Tanzania* illustrate the principle that a claimant will be unable to prove legal causation in circumstances where the dominant cause of the loss is not any act of the State, but damage attributable to other underlying causes. GAMA attempts (incorrectly) to distinguish these cases on the facts, but does not dispute the legal principle they stand for, which applies here.

661 Reply ¶ 335.

662 Reply ¶ 335, citing International Law Commission, Draft Articles on "Responsibility of States for Intentionally Wrongful Acts with commentaries" (2001) **(CL-104)** at 93.

663 Statement of Defence ¶ 288, quoting *Ioan Micula v. Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013) **(RL-72)** ¶ 1137. *See also Biwater v. Tanzania* (**RL-81**) ¶ 786 (noting that the ICJ in the *ELSI* case "applied an 'underlying' or 'dominant' cause analysis" in order to conclude that the primary cause of the claimant's difficulties lay in its own mismanagement over a period of years); *Yukos Capital SARL v. The Russian Federation*, PCA Case No. 2013-31, Final Award (23 July 2021) (**RL-162**) ¶¶ 607, 687 (affirming the *Biwater* tribunal's analysis of *ELSI* with regards to causation and stating that "[t]he proximate cause of loss is the cause that is predominant or operative, which may not be the most immediate in time.").

664 Reply ¶ 355.

665 Reply ¶ 356.

compensation to an innocent party," but GAMA omits that the tribunal had already found that, on the facts before it, "there [was] no doubt that the Claimants suffered some damage caused by the Respondent's violations of the BIT."[666] Where a claimant's alleged loss is too speculative, tribunals will decline to find causation (and thus decline to award damages) before even arriving at the question whether an exact quantification of loss is possible.[667]

2. Macedonia did not cause GAMA's purported loss in TE-TO's reorganization

272. In its Statement of Defence, Macedonia explained that to establish factual causation GAMA must show (to the required standard of certainty) that it would have been better off (and would have received more) had the Final Reorganization Plan failed and TE-TO's assets been liquidated.[668]

273. Macedonia demonstrated that GAMA failed to make such a showing.[669] TE-TO's assets were worth significantly less than its liabilities at the end of 2017, and there is no evidence that, if liquidated, they would have avoided the usual fate of liquidated assets – being sold off at a severe discount in a fire sale.[670] As an unsecured creditor, GAMA's claim would have been paid out after the secured creditors and *pari-passu* with other unsecured creditors. After these predictable events, GAMA cannot show that it would

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666 *Gavazzi v. Romania* (**CL-105**) ¶ 121 (emphasis added).

667 *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Award (24 December 2007) (**RL-131**) ¶ 428 ("Damages that are 'too indirect, remote, and uncertain to be appraised' are to be excluded. In line with this principle, the Tribunal would add that an award for damages which are speculative would equally run afoul of 'full reparation' under the ILC Draft Articles."); US-Yugoslavia International Claims' Commission's *Dorner Claim*, Settlement of Claims (1949-1955) (**RL-117**) at 3 ("Generally, international and domestic tribunals in the determination of international claims… do not allow for indirect damages such as the loss of use of property, loss of profits and the like… if they are too conjectural or speculative or not reasonably certain or susceptible of accurate determination."), described in CAMPBELL MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION (**RL-96**) ¶ 9.86-9.88 as setting out the "generally accepted principle" for "deciding when an action is a cause of loss."; Craig Miles & David Weiss *Overview of Principles Reducing Damages*, *in* THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION 83 (John A. Trenor ed., 2nd ed. 2017) (**R-151**) ("Most legal systems, if not all, including international law, reject damages that are too speculative.").

668 Statement of Defence ¶ 291.

669 Statement of Defence ¶ 291.

670 Statement of Defence ¶ 291.

have been paid at all, let alone more than the 10% of its claim that it is set to receive under the Final Reorganization Plan.[671]

274. In its Reply, GAMA maintains that, had TE-TO entered into a standard bankruptcy and been liquidated, "GAMA would have entirely recovered its claim against TE-TO."[672] This is nothing but wild speculation. GAMA offers no valuation expert evidence in support of its assertion, and instead looks to its Macedonian legal expert, Mr. Kostovski, who reckons that between 33-60% of TE-TO's "accounting value" would materialize.[673] As explained above, in a standard bankruptcy TE-TO's assets would be sold for no more than 30% of market value.[674] GAMA offers no basis for assuming that TE-TO's market value approximates its accounting value. Even if it did, 30% of accounting value would be insufficient to pay TE-TO's secured creditors, leaving nothing for GAMA and the other unsecured creditors.[675]

275. GAMA asserts that TE-TO was worth US$ 263 million as a going concern, but that assertion is based on a single unsourced sentence in a 2014 article in *Russia Beyond*.[676] That makes a mockery of the serious valuation evidence necessary to support GAMA's Treaty claim. In any case, GAMA offers no independent assessment of whether TE-TO might reasonably have been sold off as a going concern, let alone any expert evidence about how much such a sale would raise.[677] In short, GAMA offers nothing of substance to show that it would have been better off if TE-TO had entered regular bankruptcy.[678]

276. GAMA also repeats its claim that, "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

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671 Statement of Defence ¶ 291.

672 Reply ¶ 340 (emphasis added).

673 Reply ¶ 353.

674 *See supra* § III.C.2(e).

675 *See supra* § III.C.2(e).

676 Reply ¶ 148.

677 *See supra* § III.C.2(e).

678 If the Tribunal were to find that any actions by the bankruptcy trustee breached the BIT and that these actions caused GAMA's loss, these actions as explained are not attributable to the State and therefore the State would not be responsible for GAMA's loss. *See supra* § VIII.

customary international law, TE-TO's reorganization would have collapsed and TE-TO would be put in bankruptcy."[679] Such a speculative chain of events falls well short of the "high degree of factual certainty" required to establish factual causation under international law and is also too remote from GAMA's alleged loss to be considered its proximate cause. The claim rests on the same speculative (and counterintuitive) notion that GAMA would have fared better if TE-TO was liquidated, and GAMA also cannot show that TE-TO would have been pushed into bankruptcy absent the (temporary) tax deferral.[680] When Macedonia terminated the tax deferral in 2020, TE-TO borrowed money to pay its tax bill.[681] GAMA has not shown that TE-TO could not have done the same a year earlier had the tax deferral not been granted.[682]

277. In its Reply, GAMA asserts that "borrowing funds was not an option for TE-TO at the time" because TE-TO found it necessary "to turn to the Macedonian Government" in 2021.[683] But, as a matter of common business sense, it is unsurprising that TE-TO first sought to have its tax payment obligation deferred rather than take on the expense of borrowing money. That TE-TO did so does not show that TE-TO could not have borrowed funds. The evidence shows that TE-TO could have. As GAMA recognizes, TE-TO's financial health was improving steadily at the time. GAMA thus notes elsewhere that "[s]ince 2017, TE-TO's profits have been on a steady upward climb, from EUR 8.4 million to EUR 20.6 million in 2021, after making a substantial payment of EUR 7.1 million to the Public Revenue Office."[684] Healthy and increasing profits suggest that banks would have been ready to do in 2020 exactly what they did in 2021 – lend TE-TO money to pay its tax bill.[685]

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679 Reply ¶ 348; Statement of Claim ¶ 310.

680 Statement of Claim ¶ 152.

681 Reply ¶ 232; Statement of Defense ¶ 97.

682 Statement of Defense ¶ 232.

683 Reply ¶ 177.

684 Reply ¶ 147.

685 GAMA also says that "if TE-TO had anticipated the tax liabilities during its reorganization it would never have found itself needing to request a tax debt deferral … nor would it have had to borrow funds to settle this debt" (Reply ¶ 178). That does not follow. If TE-TO had (explicitly) anticipated its (uncertain) tax liabilities, presumably by including them in the financial projections in the Final Reorganization Plan, that would not

278. None of the authorities cited by GAMA assist its case:

a) GAMA says *Petrobart v. Kyrgyz Republic* supports a finding of State liability "in circumstances where investors held claims in financially distressed private companies, which the state failed to restructure in respect of their international obligations."[686] But *Petrobart* bears no resemblance to the present case. The *Petrobart* tribunal found that there was a "strong likelihood" that the impugned State action (stripping a State-owned company of its assets) harmed the debtor financially, unlike the impugned State action here which assisted TE-TO financially.[687]

b) GAMA relies on *Dan Cake v. Hungary* to show that causation can be established where a court deprives a claimant "of the chance – whether great or small" to succeed at a bankruptcy composition hearing.[688] But that statement relates to the existence of a treaty breach, not causation. The tribunal reserved its decision on causation for a later stage and clarified that, to establish causation, the claimant

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make them disappear. And GAMA's point that TE-TO paid EUR 17.1 million in taxes in 2021 does not "demonstrate" anything about TE-TO's "capacity to provide more favorable terms" three years earlier when it prepared its reorganization proposal. *See* Reply ¶ 178, footnote 373.

686 Reply ¶ 334.

687 *Petrobart v. Kyrgyz Republic* (**CL-30**) at 82 ("The Arbitral Tribunal considers, however, that there is a strong likelihood that Petrobart, as a creditor, suffered considerable damage as result of this massive transfer of assets.") (emphasis added). The tribunal noted that if KGM would had been unable to pay its bill to Petrobart even before the State started transferring KGM's assets to other companies, such that Petrobart would not in any case have been paid, it would have denied Petrobart's claim for lack of causation. *See Petrobart v. Kyrgyz Republic* (**CL-30**) at 79 (considering that "if it appeared that [the debtor's] financial situation before property was transferred … was such that Petrobart would in any case not have received any payment for delivered goods, the transfer of property to the other companies could not be considered to have caused any additional damage to Petrobart."). The tribunal also found that the claimant had not discharged its burden of proving causation with respect to other state actions. *Petrobart v. Kyrgyz Republic* (**CL-30**) at 85 ("The Arbitral Tribunal does not feel called upon to take a position on the interpretation of Article 21(3) of the Bankruptcy Law, this being a question of Kyrgyz domestic law which is ultimately to be decided by Kyrgyz domestic courts. However, the Arbitral Tribunal cannot find it established with a sufficient degree of likelihood that Petrobart, even if there had been no decision to stay the execution, would have been able to execute the judgment of 25 December 1998 or, if execution had taken place, to resist a claim from the administrator in KGM's bankruptcy for the recovery of the proceeds from such execution.") (emphasis added.).

688 Reply ¶ 334, relying on *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (24 August 2015) ("***Dan Cake v. Hungary***") **(CL-26)** ¶ 145.

would have to show *inter alia* that "had a composition hearing been convened, a composition agreement would have been concluded."[689]

c) GAMA reads *Gavazzi v. Romania* to establish a sweeping rule 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 the adjudication of disputes between private parties."[690] That case does nothing of the sort. Romania breached its contractual obligation to restructure the claimant's public debts, causing the claimants' local company to become insolvent.[691]

3. Macedonia's alleged BIT breaches did not cause GAMA's loss in the Payment Dispute proceedings

279. In its Reply, GAMA argues that but for the alleged delay and subsequent misapplication of Macedonian law in GAMA's Payment Dispute proceedings, it would have obtained full payment of its claim from TE-TO before TE-TO's prepackaged bankruptcy in 2018, and would have therefore avoided the write-off of its claim:

> [H]ad the Macedonian Courts acted in accordance with the treatment required 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-**

689 *Dan Cake v. Hungary* **(CL-26)** ¶ 161 ("There remains an issue as to the extent (if at all) that the breach caused any loss to the Claimant, which in turn will depend inter alia upon whether the Court's decision was the operative factor that prevented the conclusion of a settlement with all creditors; and whether, had a composition hearing been convened, a composition agreement would have been concluded. Further, assuming the establishment of a causal link, there remains the issue as to the quantification of any damages. All of these matters are reserved for subsequent determination.").

690 Reply ¶¶ 325, 328.

691 *Gavazzi v. Romania* (**RL-83**) ¶¶ 206-207 ("Due to the fact that the public debts were not rescheduled or waived as promised in the Government's Note No. 5/3228 of 17 May 1999, Socomet had to use its funds to pay these debts and Socomet became deprived of funds to finance its operations. When these debts were not paid, Socomet's Romanian bank accounts were frozen… included the freezing of Socomet's accounts by the Romanian Ministry of Finance… in August 2002 this situation ultimately resulted in Socomet's insolvency[.]"). Macedonia addresses *Saipem v. Bangladesh*, *Chevron v. Ecuador*, and *White Industries v. India*, which GAMA also relies on, at *infra* ¶¶ 281-282; footnote 715.

TO significantly before the acknowledgment and writing-off of its claim in TE-TO's reorganization in 2018.[692]

280. GAMA's case has thus narrowed considerably from its Statement of Claim:

a) GAMA no longer says that the Macedonian courts' assumption of jurisdiction caused its loss.[693] GAMA has apparently abandoned any effort to show that, but for the court's assumption of jurisdiction in 2013, GAMA would have recovered its debt from TE-TO (by succeeding in an ICC arbitration, for example, where TE-TO would likely have counterclaimed).[694]

b) GAMA no longer says that the Macedonian courts' alleged failure to apply English law caused its loss.[695] GAMA has not sought to show that, had the Macedonian courts applied English law, GAMA would have in all probability obtained a court decision approving the Payment Order and that, with this order in hand, it would have in all probability recovered from TE-TO.

c) GAMA no longer says that the Macedonian courts caused its loss by "den[ying] GAMA's claim after it had been acknowledged in TE-TO's judicial reorganization."[696] GAMA's claim had been written off in that reorganization,

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692 Reply ¶ 359. TE-TO's reorganization plan was approved by the Civil Court Skopje on 14 June 2018 and upheld by the Appellate Court on 30 August. (Decision of the Basic Court, dated 14 June 2018 (**C-15**); Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**)). The Civil Court Skopje annulled GAMA's notary payment order on 4 May 2018, which was upheld by the Appellate Court Skopje on 19 October 2019 (Decision of the Basic Court, dated 4 May 2018 (**C-10**); Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**)).

693 Statement of Claim ¶¶ 299, 303.

694 The Court of Appeal dismissed TE-TO's claim for EUR 5 million for GAMA's breaches of the Settlement Agreement based on GAMA's objection as defendant that this should be addressed in ICC arbitration. *See* Statement of Defence ¶¶ 51-53, 107-109. As explained, by contrast TE-TO did not object to jurisdiction when it was defendant in GAMA's debt enforcement claim and the courts therefore properly assumed jurisdiction. *See* Statement of Defence ¶¶ 44-45, 47-48.

695 Statement of Claim ¶ 288.

696 Reply section heading III(B)(4).

which GAMA now says was "[t]he final and proximate cause of GAMA's loss."[697]

281. What remains of GAMA's causation argument regarding the payment dispute proceedings focuses on the alleged delay, but for which GAMA says TE-TO would have paid GAMA under the Payment Order before TE-TO became insolvent in 2018.[698] Even this narrow version of GAMA's causation argument fails. GAMA references *Chevron v. Ecuador (I)*, but that case does not assist. The *Chevron* tribunal held that in order to prove that a judicial delay that breached the treaty caused Chevron's loss, Chevron had to show that it would have prevailed on the merits had Ecuadorian courts rendered a timely decision:

> The Tribunal must ask itself how a competent, fair, and impartial Ecuadorian court would have resolved TexPet's claims. The Tribunal must **step into the shoes and mindset of an Ecuadorian judge** and come to a conclusion about what the proper outcome of the cases should have been; that is, the Tribunal must determine **what an Ecuadorian court**, **applying Ecuadorian law**, would have done in these cases, **rather than directly apply its own interpretation of the agreements**.[699]

282. Applying the *Chevron* reasoning, GAMA cannot show that but for the alleged judicial delay, it would have recovered its debt claim before TE-TO's reorganization unless GAMA also proves that "in all probability" a "competent, fair, and impartial" Macedonian court applying Macedonian law would have (i) agreed with GAMA's interpretation of the Settlement Agreement and (ii) granted GAMA's payment claim

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697 Reply ¶ 358. *See also* Reply ¶ 201 ("The taking was directly and irreversibly completed by the 2018 Decision of the Appellate Court Skopje in TE-TO's reorganization proceedings, which confirmed that 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.") (emphasis added).

698 Statement of Claim ¶¶ 299, 303; Reply ¶¶ 358, 362 ("[I]f the Macedonian law was properly and timely applied, the honest, independent and impartial Macedonian judge would have upheld GAMA's claim against TE-TO.").

699 *Chevron v. Ecuador I* **(CL-50)** ¶ 375. GAMA also relies on *White Industries v. India*. That tribunal held that causation was established by applying similar reasoning as *Chevron v. Ecuador* by deciding that if the excessive delay were removed, and had Calcutta High Court declined jurisdiction to set aside the award, Claimant would have been able to persuade the Delhi Courts that the ICC award should be enforced in India (and therefore received the sums due to it under the award and avoided costs). *See* Reply ¶ 361; *White Industries v. India* (**CL-37**) ¶¶ 14.3.4. – 14.3.5.

without any offsetting obligations.[700] GAMA must also show that it would have been able to collect before TE-TO became insolvent. The *Chevron* tribunal considered that it could take into account judgments of the Ecuadorian courts as evidence of how a hypothetical impartial Ecuadorian court would have decided the case.[701] Here, the evidence discussed at length shows that an impartial Macedonian court applying Macedonian law would not have enforced GAMA's payment claim.[702]

B. GAMA HAS STILL NOT PROVEN THE QUANTUM OF LOSS IT CLAIMS

283. Macedonia showed in its Statement of Defence that, even if GAMA establishes causation (which it still has not), it would not be entitled to the quantum of damages claimed in this arbitration.[703] GAMA presented no damages calculation, but merely asserted that its loss was the full amount allegedly owed to it by TE-TO, plus interest.[704] In making that assertion, GAMA failed to deduct the amount that it will receive from TE-TO under the Final Reorganization Plan, and the expenses that GAMA would have reasonably incurred had it performed its obligations under the Settlement Agreement.[705] Macedonia also explained that GAMA failed to justify its claim for interest running from two days after it issued its invoice to TE-TO (*i.e.*, from 1 April 2012, before Macedonian courts were even seized of the matter).[706]

284. In its Reply, GAMA repeats that its quantum of loss is the gross amount it invoiced TE-TO plus interest and legal fees.[707] That remains unsustainable.

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700 *Clayton v. Canada* (**RL-156**) ¶ 110; *Chevron v. Ecuador (I)* (**CL-50**) ¶ 375.

701 *See Chevron v. Ecuador (I)* (**CL-50**) ¶ 376-377 ("The Tribunal's task, given a completed breach for undue delay, is to evaluate the merits of the underlying cases and decide upon them as it believes an honest, independent, and impartial Ecuadorian court should have. In doing so, the Tribunal may take into account a judgment issued after the critical date as evidence of how a hypothetical honest, independent, and impartial Ecuadorian court would have decided.").

702 *See supra* § III.B.

703 Statement of Defence ¶¶ 297-303.

704 Statement of Defence ¶ 298.

705 Statement of Defence ¶¶ 300-301.

706 Statement of Defence ¶ 302.

707 Reply ¶ 370.

285. Regarding the principal amount, GAMA assumes that absent a "manifest misapplication of Macedonian procedural and substantive law" that Macedonian courts would have awarded it the gross amount it invoiced TE-TO.[708] That is unwarranted. Even if Macedonian courts agreed with GAMA's interpretation of the Settlement Agreement (that TE-TO's obligation to pay was unconditional) and upheld the Payment Order, that would not free GAMA from its contractual obligations. GAMA does not dispute that it never performed under the Settlement Agreement (and did not correct latent defects and close out the Punch List items.) Yet GAMA make no deduction for the expenses associated with performing those obligations.[709]

286. GAMA also makes no deductions for any taxes that it would have had to pay had it obtained the principal amount that it invoiced TE-TO.[710]

287. GAMA relies on cases which, it says, show that where "treaty claims arose from acts of states in local court proceedings, tribunals generally award a sum corresponding to the value of the claim in local proceedings."[711] The cases cited by GAMA do not support this position. For example, GAMA relies on *Petrobart*, but the tribunal in that case did not award the claimant a sum corresponding to the value of its claim in local proceedings, but rather a sum corresponding to the value it would have recovered for its claim in bankruptcy of the debtor, KGM, but for the State's treaty breach.[712] The *Petrobart* tribunal considered, based on "a general assessment, based on its appreciation of the

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[708] Reply ¶ 359.

[709] *See* Statement of Defence ¶ 301.

[710] Such taxes must be taken into account in calculating damages. *See, e.g., Chevron v Ecuador* (**CL-50**) ¶¶ 552-553 ("In the absence of a BIT breach by Ecuador, the Claimants may not have kept the entire amount as being equivalent to their loss. To calculate the Claimants' real loss, that amount must be reduced if such would have been required by any applicable Ecuadorian tax laws. Were the Tribunal not to take such tax laws into account, it would run the risk of overstating the loss suffered by the Claimants, such that the Claimants would be overcompensated. Put differently, the loss suffered by the Claimants is the amount plus interest it should have been awarded by the Ecuadorian judges net of amounts due under any applicable Ecuadorian tax laws. When quantifying and assessing damages, the Tribunal cannot award more than the amount that Claimants ultimately would have obtained. The Tribunal wishes to make clear that the issue of taxes in this case goes to the calculation of the quantum of the Claimants' loss. The consideration of taxes does not constitute a de facto taxation by Ecuador of the Tribunal's award.").

[711] Reply ¶ 364.

[712] *Petrobart v. Kyrgyz Republic* (**CL-30**) at 83.

situation as a whole," that "if there had been a bankruptcy … , Petrobart would have been able to obtain payment for a substantial part of its claim for delivered gas."[713] On that basis, the tribunal awarded Petrobart 75% of its claim.[714] Here, as explained, there is a strong likelihood that GAMA would not have recovered any part of its claim in bankruptcy. Following the *Petrobart* tribunal's reasoning, GAMA is therefore not entitled to damages.[715]

288. Regarding interest, GAMA claims that default interest "consistent with Article 266-a(2) of the Macedonian Law on Obligations" would run from 1 April 2012 (two days after GAMA issued its March invoice to TE-TO) until 30 May 2018 as "the day of the potential opening of the [regular] bankruptcy proceedings over TE-TO."[716] GAMA says that interest of approximately EUR 3 million would accumulate through 30 May 2018.[717] In the alternative, GAMA contends that the default interest would run from 1 April 2012

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[713] *Petrobart v. Kyrgyz Republic* (**CL-30**) at 84 ("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.").

[714] *Petrobart v. Kyrgyz Republic* (**CL-30**) at 84.

[715] GAMA also relies on the *Chevron v Ecuador (I)* tribunal's statement that "[w]hen 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." Reply ¶ 364, citing *Chevron v Ecuador (I)* (**CL-50**) ¶ 546. GAMA omits that Ecuador had been a party to the local proceedings, and did "not appear to have significantly disagreed" in the local court proceedings "on … [the] amount of compensation due if Texpet were to succeed on the Merits of its claims." *Id.* ¶ 546. And although the *Chevron (I)* tribunal took the amount claimed by claimants in local proceedings as a starting point, these were reduced by the applicable Ecuadorian tax laws, and the claimant recovered less than 12% of the quantum asked. *See Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Final Award (31 August 2011) (**RL-167**) ¶ 348. As for *Saipem v. Bangladesh*, on which GAMA also relies, the tribunal valued the claimant's expropriated right to arbitration based on the value of an ICC award that the claimant had already obtained. *See Saipem v. Bangladesh* (**CL-24**) ¶ 204. The tribunal also held that the claimant could not claim other amounts including its legal costs for local court proceedings because "it is impossible to conclude that Saipem's costs, legal fees and other expenses in relation to the intervention of the Bangladeshi courts have been the object of an expropriation. It follows that these expenses cannot be part of the reparation for the illegal expropriation for which the Tribunal has jurisdiction." *Id.* ¶ 205. *White Industries v India* is also inapposite as it also involved an award of the amounts payable under an already rendered arbitral award. *See White Industries v India* (**CL-37**) ¶ 14.3.6. As for *Deutsche Bank v. Sri Lanka*, GAMA omits that Sri Lanka "d[id] not dispute the process followed by Deutsche Bank in calculating its claim of USD 60,368,993, being the loss amount as of the Early Termination Date." *Deutsche Bank v. Sri Lanka* (**CL-22**), ¶ 572.

[716] Reply ¶¶ 371, 375.

[717] Reply ¶ 375. GAMA calculates interest from 1 April 2012 through 30 May 2018 to be EUR 3,074,175.00 (Calculation of the statutory default interest on GAMA's claim from 1 April 2012 to 30 May 2018 (**C-200**)).

"until 19 July 2023".[718] GAMA says that interest of approximately EUR 5.5 million would accumulate through 19 July 2023.[719]

289. But GAMA still offers no authority for interest starting to run from 1 April 2012 (*i.e.*, two days after the date of GAMA's invoice to TE-TO).[720] Nor has GAMA proven that its claim of interest would have been sustained in the but-for world. GAMA says that the hypothetical opening of regular bankruptcy proceedings would have occurred on 30 May 2018, but GAMA has not established that its claim would be recognized with interest in such regular proceedings. The bankruptcy trustee would have had discretion regarding whether to accept GAMA's claim at all, and whether to accept that the claim previously came due and thus attracted interest.[721] That discretion would have been exercised in light of TE-TO having disputed that claim for six years on the basis of GAMA's failure to perform under the Settlement Agreement. As Mr. Petrov explains, "there was a dispute between GAMA and TE-TO about whether GAMA's claim was due [and therefore eligible for interest]."[722]

290. GAMA also contends that there is no risk of double recovery with regards to the full principal of EUR 5 million that it seeks in this arbitration *and* 10% of that amount that it will receive in TE-TO's reorganization because "the chance of GAMA being able to collect the remaining part of its claim from TE-TO has been annihilated" by amendments to the statute of limitations.[723] As explained above, GAMA's claim under the Final

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[718] Reply ¶¶ 372, 375.

[719] Reply ¶ 375. GAMA calculates interest from 1 April 2012 through 19 July 2023 to be EUR 5,527516.00 (Calculation of the statutory default interest on GAMA's claim from 1 April 2012 to 19 July 2023 (**C-201**)).

[720] *See* Statement of Defence ¶ 302. GAMA says in its Reply that "[b]ut 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" (Reply ¶ 372). But GAMA does not offer any authority for interest starting two days after an invoice date instead of after a reasonable period for payment.

[721] Petrov II ¶ 127.

[722] Petrov II ¶ 34.

[723] *See* Reply ¶ 382.

Reorganization Plan is secure and there is no basis for GAMA's professed concern about that claim becoming time barred.[724]

291. GAMA also fails to acknowledge what was made clear during document production in this arbitration: that GAMA entered into an agreement entitling its JV Partner, Alstom, Alstom to EUR 600,000 for its portion of the payment claim against TE-TO. Under that agreement of 2 March 2012, GAMA agreed to pay Alstom "Euro 600,000 (six hundred thousand) within 10 days of receipt by GAMA of the net settlement amount of Euro 5 (five) million under the [Settlement Agreement]."[725] As a Swiss company, Alstom is not protected under the Treaty. GAMA has not shown, or even attempted to show, that the Treaty covers claims made on behalf of an entity that is not eligible for Treaty protection on its own. Nor could it.[726] Thus any amounts claimed must be net of the portion to which Alstom is entitled (*i.e.* EUR 600,000).

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[724] *See supra* § III.C.2; Statement of Defence ¶ 299. GAMA says that if the Tribunal awards it "the full amount sought in this arbitration (including interest and legal costs)" that it will "undertake[] that it will not further pursue the recovery of legal costs against TE-TO" (Reply ¶ 383). That is not understood. If GAMA is awarded legal costs in this arbitration, it clearly would not pursue recovery of those same legal costs against TE-TO.

[725] Amendment to Joint Contractor Agreement, dated 2 March 2012 (**R-30**) at 3.

[726] *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment (2 November 2015) (**RL-146**) ¶ 262 (referring to the "general principle of international investment law" that "claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties."); *See also Occidental Petroleum Corporation, et al .v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Professor Stern Dissenting Opinion (20 September 2012) (**RL-138**) ¶¶ 148-149 ("As far as the position of international law towards beneficial owners, in cases where the legal title and the beneficial ownership are split, is concerned, it is quite uncontroversial, after a thorough review of the existing doctrine and case-law, that international law grants relief to the owner of the economic interest."); *Id.* ¶ 151 ("only the beneficial owner, AEC/Andes, can claim for interference with his interests, OEPC having no standing to claim in the name of the beneficial owner."); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction (22 April 2005) (**RL-128**), ¶¶ 144-152 (Declining jurisdiction over claims brought by Impregilo on behalf of an unincorporated joint venture, GBC, holding that neither GBC nor the joint venture partners were protected investors under the applicable Italy-Pakistan bilateral investment treaty.); The Tribunal rejected this argument, noting that the Tribunal "has no jurisdiction in respect of claims on behalf of, or losses incurred by, either GBC itself, or any of Impreglio's joint venture partners" because GBC and the joint venture partners do not qualify as protected investors under the relevant treaty, and "[t]here [was] nothing in the BIT to extend [Pakistan's consent to jurisdiction] to claims of nationals of any other state, even if advanced on their behalf by Italian nationals.") *Id.* ¶¶ 136-139, 144-153. *See also PSEG Global Inc., and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007) (**RL-129**) ¶ 325 (concluding that compensation could not be "awarded in respect of investments or expenses incurred by entities over which there is no jurisdiction, even if this was done on behalf . . . of the Claimants"); *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award (15 March 2002) (**RL-126**) ¶¶ 24-26 (holding that a US corporation could claim only its own rights and not that of a Canadian partner under the US-Sri Lanka BIT.).

292. Finally, GAMA repeats its claim for legal fees associated with "representation in the Macedonian legal proceedings" (now totaling EUR 15,189, up from EUR 11,959 in its Statement of Claim).[727] But GAMA has still not supported that (apparently running) amount.[728] Macedonia reiterates that GAMA's failure to support this head of damages in its Statement of Claim is fatal.[729]

[727] Reply ¶ 377.

[728] *See* Statement of Defence ¶ 303.

[729] *See* Statement of Defence ¶ 303.

IX. REQUEST FOR RELIEF

293. For the reasons set out above, Respondent respectfully requests that the Arbitral Tribunal:

a) Dismiss all claims presented by Claimant in this arbitration with prejudice;

b) Award Respondent all costs associated with defending this arbitration, including legal fees and expenses and expert fees and expenses; and

c) Award Respondent any and all further or other relief as the Arbitral Tribunal may deem appropriate.

* * *

Dated: 11 December 2023

Respectfully submitted on behalf of Respondent

White & Case LLP

White & Case LLP