INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

GAMA GÜÇ SISTEMLERI MÜHENDISLIK VE TAAHHÜT A.Ş.

Claimant

v.

THE REPUBLIC OF NORTH MACEDONIA

Respondent

STATEMENT OF DEFENCE

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4 April 2023

WHITE & CASE

Counsel for Respondent

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1. In accordance with the agreed procedural schedule, the Republic of North Macedonia ("**Macedonia**" or "**Respondent**") submits its Statement of Defence in response to the Statement of Claim filed by GAMA Güç Sistemleri Mühendislik ve Taahhüt A.Ş. ("**GAMA**" or "**Claimant**") on 2 December 2022 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 complains that the private owner of the power plant that GAMA built in the Macedonian capital, Skopje, failed to pay the contract price in full. GAMA sought to enforce its claim against the plant's owner, TE-TO, in the Macedonian courts, and TE-TO subsequently entered bankruptcy proceedings. Like all the other unsecured creditors, GAMA stands to receive only a fraction of its claim.

3. Investors in every country face the risk that a contract counterparty may default on its obligations and go bankrupt. When that ordinary commercial risk materializes, they write off their losses, swear to be more cautious in the future and move on. Not this investor. GAMA instead has dreamed up the treaty claim that is pending before this Tribunal. GAMA says that it was denied justice (and indeed expropriated) by the Macedonian courts that adjudicated its contract dispute with TE-TO and presided over the latter's bankruptcy. With much rhetoric, GAMA challenges minute details of the court proceedings and presents a kitchen-sink list of grievances about how multiple judges at all levels of the Macedonian judiciary (up to the Supreme Court) should have ruled on the (often novel) issues of Macedonian law that were pending before them.

4. There is a fundamental flaw in GAMA's case. GAMA invites this Tribunal to second-guess the findings of Macedonian courts on matters of Macedonian law. This Tribunal does not sit as an appellate court on matters of domestic law, however, and it has no jurisdiction (and is not equipped) to revisit the decisions of the Macedonian courts. The deferential and cautious approach called for by international law applies with even more

force here where the Macedonian statute at issue (concerning so-called "prepackaged" bankruptcies) has been applied in only a handful of occasions.

5. Even if the Tribunal were to consider the merits of GAMA's challenges, the Macedonian courts correctly interpreted and applied Macedonian law. This is confirmed by Respondent's expert, Mr. Aco Petrov, a leading practitioner of bankruptcy law in Macedonia and the immediate past President of its Chamber of Bankruptcy Trustees. Should the Tribunal find that the Macedonian courts erred in some respect, that would still not be enough. GAMA has not come remotely close to proving a denial of justice under international law (in the words of former ICJ President Eduardo Jiménez de Aréchaga, a violation of municipal law that is "exceptionally outrageous or monstrously grave" and that "no court which was both honest and competent could possibly have delivered"). Nor can GAMA lower its burden by re-packaging its complaints about the Macedonian courts under the six different treaty standards that it invokes, only two of which are actually found in the Treaty.

6. There are further flaws in GAMA's case. It is settled law that a denial of justice does not arise until domestic judicial remedies have been exhausted (because the wrong involves a failure of the entire judicial system). Yet GAMA is still actively litigating in the Macedonian courts. In January this year, GAMA filed (on remand) new proceedings in Macedonia seeking to enforce its payment claim against TE-TO. It is also not enough for an investor merely to exercise available local remedies. It must do so competently. The record reflects many ill-advised decisions by GAMA and its counsel. For example, GAMA faults the Macedonian courts for not referring its claim against TE-TO to arbitration. But, having elected to avail itself of expedited local enforcement proceedings before a local notary, GAMA has only itself (or its counsel) to blame for the Macedonian courts keeping jurisdiction over the claim when TE-TO predictably objected. And, while GAMA says that the local courts should have applied English law to its contract with TE-TO, GAMA failed to articulate any argument based on that law in its submissions in the domestic proceedings.

7. For good measure, GAMA adds a dose of political intrigue to its narrative. It portrays TE-TO as valuable to Macedonian interests, including to a former Macedonian Deputy Prime Minister. If GAMA is to be believed, those interests played out in the most indirect and implausible fashion. GAMA points to an income tax deferral that was granted to TE-TO by one state organ and terminated a year later by another state organ. GAMA speculates that absent the tax deferral, the reorganization plan approved by TE-TO's creditors would have failed, TE-TO would have then been forced into liquidation and its assets sold off, and GAMA would have been better off and able to collect in full on its unsecured claim. In other words, GAMA complains that by providing financial assistance to a struggling local business, Macedonia hurt its creditors. This is hardly serious.

8. The case also fails on causation, including because GAMA cannot prove that it would have been better off in a liquidation scenario. Before TE-TO filed for bankruptcy protection, its book value was deeply negative. Even if its assets could have been auctioned off in a liquidation sale, as an unsecured creditor GAMA would have been paid only after TE-TO's secured creditors and *pari passu* with other unsecured creditors. It is rank speculation to assume that it would have received more than the 10% it stands to receive under the approved reorganization plan.

9. GAMA's case is a prime example of an abuse of the investor-state protection system. It is manufactured and should never have been brought. The claims should be dismissed and costs awarded.

10. This Statement of Defence is accompanied by:

    a) the Expert Opinion of Aco Petrov dated 4 April 2023 ("**Petrov**"). Mr. Petrov is a leading bankruptcy practitioner and trustee in Macedonia, and opines on certain matters of Macedonian bankruptcy law and procedure;

    b) 17 factual exhibits numbered R-1 to R-17; and

    c) 114 legal authorities numbered RL-1 to RL-114.

II. STATEMENT OF FACTS

11. In its Statement of Claim, GAMA presents an incomplete account of the facts that led to this arbitration. In the sections that follow, and to the extent that it has knowledge of the relevant facts concerning what is at its core a private dispute, Macedonia supplements the record and provides the broader context in which this arbitration finds its place.

A. GAMA ENTERS INTO AN EPC CONTRACT WITH TE-TO, A PRIVATE COMPANY

12. Termoelektrana-Toplana Akcionersko Drustvo – Skopje ("**TE-TO**") is a privately-held company established in 2005 as a project vehicle to own, construct, and operate a 220 megawatt Combined Cycle Power Plant in Skopje (the "**Plant**)."[1] Bitar Holdings Limited based in Cyprus ("**Bitar**") holds 29.2% of the shares of TE-TO directly, and 60% of the shares of TE-TO indirectly through Bitar's wholly-owned subsidiary, Project Management Consulting based in the British Virgin Islands ("**PMC**"). Bitar is a wholly-owned subsidiary of Territorial Generating Company No. 2 ("**TGC-2**"), which, Respondent understands, in turn is part of the Sintez Group of companies (the "**Sintez Group**").[2] Toplifikacija JSC based in Skopje ("**Toplifikacija**") holds the remaining 10.8% of the shares of TE-TO.[3]

13. In 2006, TE-TO's shareholders "mandated the board of TE-TO" to commission a study to determine the feasibility of constructing a power plant in Skopje (the "**Feasibility Study**").[4] The Feasibility Study explained that the Plant "was envisaged [by TE-TO] as

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1 UNFCC, CCPP Project Description (**R-14**) at 9; TE-TO Skopje, History (**R-15**).

2 Statement of Claim ¶¶ 4-5.

3 TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC**) (Claimant submitted a version of this document that is 104 pages with its Request for Arbitration, and a version of that is 719 pages with its Statement of Claim (**C-14 SOC**)) at 8 [7] (Bitar Holdings Limited holds 100% of the shares of Project Management Consulting, meaning that Bitar Holdings "owns and manages 89.2% of TE-TO JSC shares directly and indirectly").

4 TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC**) at 14 [13] ("The study foresaw the technical and financial feasibility of the project with a predicted price of natural gas of 18.5 EUR / MWh with a selling price of electricity of 41.5 EUR/MWh, a price of heat energy of 21.28 EUR/MWh. It was planned that the plant would operate 8300 hours a year, with electricity production of 1 800 000 MWh and heat energy of 350 000

an independent power producer [IPP]" that would generate a "net annual profit" of "13 million euros."[5] Based on the Feasibility Study, TE-TO raised EUR 180 million in debt and equity capital, including shareholder loans and a EUR 106 million secured loan from Landesbank Berlin of Germany, to build the Plant.[6]

14. On May 2007, TE-TO and a consortium of two contractors, GAMA and Alstom Switzerland Ltd. ("**Alstom**") (collectively, the "**GAMA Consortium**"), entered into a contract to engineer, procure, and construct the Plant (the "**EPC Contract**").[7] GAMA was the consortium leader.[8] The GAMA Consortium undertook to complete the Plant within 27 months, and TE-TO undertook to pay the contract price of EUR 135.8 million.[9]

15. The EPC Contract includes a set of "Particular Conditions of Contract" (the "**Particular Conditions**") and a set of "General Conditions of Contract ('FIDIC Silver Book') for EPC/Turnkey Projects" (the "**General Conditions**"). Dispute resolution procedures are set out under the General Conditions.[10] The parties to the EPC Contract may appoint a Dispute Adjudication Board ("**DAB**")[11] and may refer disputes "of any kind whatsoever [that arise] between the Parties in connection with, or arising out of, the [EPC Contract]" to the "DAB for its decision."[12]

16. Clause 20.6 of the General Conditions contains an arbitration agreement providing for ICC arbitration. It provides:

MWh. The cash flow foreseen by the study with a net annual profit before payment of the loan repayment obligations amounted to 13 million euros. It corresponded to the terms of the loan agreements from the banks signed later, i.e., it was equal to the amount of the annual instalments towards the banks.").

5 TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC**) at 14-15 [13-14].

6 TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC**) at 12-14 [11-13].

7 EPC Contract, dated 11 May 2007 (**C-2**) at 1.

8 Statement of Claim ¶ 22.

9 EPC Contract, dated 11 May 2007 (**C-2**) Clauses 4, 5.

10 EPC Contract, dated 11 May 2007 (**C-2**) General Conditions, Clause 20.

11 EPC Contract, dated 11 May 2007 (**C-2**) General Conditions, Clause 20.2.

12 EPC Contract, dated 11 May 2007 (**C-2**) General Conditions, Clause 20.4.

> Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:
>
> (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
>
> (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
>
> (c) the arbitration shall be conducted in the language for communication defined in Sub-Clause 1.4 [*Law and Language*].
>
> The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of (or on behalf of) [TE-TO],[13] and any decision of the DAB, relevant to the dispute.
>
> Neither party shall be limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DAB to obtain its decision, or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DAB shall be admissible in evidence in the arbitration.
>
> Arbitration may be commenced prior to or after completion of the Works. The obligations of the Parties and the DAB shall not be altered by reason of any arbitration being conducted during the progress of the Works.

17. Sub-Clause 20.6 of the Specific Conditions adds that "[t]he seat of arbitration shall be in London (U.K.)."[14] The governing law is English law.[15]

18. Respondent understands that construction of the Plant began on 1 August 2007,[16] but then suffered significant delays. Under the EPC Contract, the GAMA Consortium agreed to complete the Plant by 1 November 2009.[17] It failed to do so, and the parties agreed to

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[13] TE-TO is variously the "Owner", "Employer", and "Customer" under the EPC Contract (*see* Particular Conditions, Sub-Clause 1.1).

[14] EPC Contract, dated 11 May 2007 (**C-2**) Specific Conditions, Clause 20.6.

[15] EPC Contract, dated 11 May 2007 (**C-2**) Particular Conditions, Sub-Clause 1.4.

[16] UNFCC, CCPP Project Description (**R-14**) at 45.

[17] EPC Contract, dated 11 May 2007 (**C-2**) Clause 5 ("The Time for Completion shall be 27 months from Commencement Date"). The Commencement Date "is the date [when] the Contract comes into full force" (Specific Conditions, Sub-Clause 8.1), which was "when the Agreement has been signed by both Parties[,] provided that" certain invoicing and advance payment steps were completed and TE-TO confirmed that these had been completed by issuing a "formal 'Notice to Proceed' not later than June 1, 2007" (EPC Contract, Clause 6). Applying those terms yields a completion date of 1 September 2009 (1 June 2007 + 27 months = 1 September 2009). However, Claimant has not disclosed documents that confirm the Commencement Date. At

extend the deadline for completion for another year, until 11 November 2010.[18] The GAMA Consortium missed that deadline too. In December 2011, over a year after the (extended) 1 November 2010 deadline had come and gone, the Plant remained unfinished.[19] By then, "contractual warranty periods provided by the vendors of the materials and equipment procured for the [Plant had] already expired."[20]

19. TE-TO and the GAMA Consortium then reportedly agreed to extend the time for completion to 55 months, more than double the 27 months that was originally specified in the EPC Contract, giving the GAMA Consortium until 1 March 2012 to complete its work.[21]

20. The Plant was apparently substantially completed in or around February 2012 when it passed performance tests and began commercial operations.[22] In February 2012, TE-TO

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the latest, the Commencement Date would have been on the date that construction began, 1 August 2007 (*see* UNFCC, CCPP Project Description (**R-14**) at 45). Applying that date yields a completion date of 1 November 2009 (1 August 2007 + 27 months = 1 November 2009). Respondent conservatively assumes that the original completion date was 1 November 2019. The precise date will be a matter for document production.

[18] Settlement Agreement (**C-4**) at 1. The parties agreed to extend the "Time for Completion" from 27 months to 39 months. The Commencement Date of 1 August 2007 + 39 months = 1 November 2010.

[19] Memorandum of Understanding Between Sintez and GAMA, dated 20 December 2011 (**C-26**) at 1. The "Reliability Run" – which is a condition precedent for conducting "Performance Tests" which in turn precede the "completion date" (Specific Conditions, Clause 8.2) – "is agreed to be completed by the end of December 2011." Since the Reliability Run had not been completed by 20 December 2011, the Plant necessarily had not been completed by that date.

[20] Memorandum of Understanding Between Sintez and GAMA, dated 20 December 2011 (**C-26**) at 1.

[21] Settlement Agreement (**C-4**) at Clause 2. The parties agreed to extend the "Time for Completion" to 55 months. The Commencement Date of 1 August 2007 + 55 months = 1 March 2012.

[22] TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC**) at 8-9 [7-8] ("The construction of the plant lasted until February 2012 when it successfully passed all the tests and was released in commercial work."), 5 ("From 2012, when [TE-TO] started with its commercial work …"); TE-TO Financial Statements, 31 December 2013 (attached to TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC**)) at 393 ("The company has started with production in 2012"). The Plant "suppl[ies] electricity to the market in the Republic of North Macedonia and the region, but also participates in international markets." TE-TO Skopje, Basic Information (**R-16**). TE-TO participates in the international electricity trading market with "about 30 companies, including the largest trading companies in Europe (TE-TO Skopje, Vision and Mission (**R-17**)).

obtained a 35-year operational license to produce heat and electricity from North Macedonia's Energy Regulatory Commission.[23]

B. GAMA AND TE-TO UNDERTAKE, AND THEN FAIL TO PERFORM, MUTUAL OBLIGATIONS UNDER THE SETTLEMENT AGREEMENT

1. GAMA and TE-TO conclude a Settlement Agreement whereby GAMA agrees to remedy defects and TE-TO agrees to pay the remaining contract price

21. By December 2011, the GAMA Consortium had received almost the entire contract price of EUR 135.8 million, leaving EUR 5 million unpaid.[24] But the project was facing "technical and commercial issues" and the Plant remained unfinished.[25] TE-TO (through its majority shareholder, the Sintez Group) and GAMA signed a Memorandum of Understanding (the "**MOU**") which contemplated a "supplement" to the EPC Contract for completion of the project.[26]

22. As anticipated in the MOU, on 14 February 2012, TE-TO and the GAMA Consortium reached a settlement that was recorded in Supplement No. 9 to the EPC Contract (the "**Settlement Agreement**") and described as "a commercial trade-off."[27] TE-TO agreed to pay EUR 5 million "to the Contractor [*i.e.*, the GAMA Consortium] latest until March 31, 2012."[28] The Settlement Agreement was to remain "valid until all the remaining obligations under the [EPC] Contract and its supplements including this [Settlement] Agreement are fully fulfilled by the Parties."[29]

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23 TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC**) at 9 [8]; UNFCC, CCPP Project Description (**R-14**) at 45 ("The plant obtained its operational license on 21/02/2012 … The plant received its operation certificate 14/02/2012.").

24 Memorandum of Understanding Between Sintez and GAMA, dated 20 December 2011 (**C-26**) at 2.

25 Settlement Agreement (**C-4**) at 1.

26 Memorandum of Understanding Between Sintez and GAMA, dated 20 December 2011 (**C-26**).

27 Settlement Agreement (**C-4**) at 3.

28 Settlement Agreement (**C-4**) at 3.

29 Settlement Agreement (**C-4**) at Clause 4.3.

23. Under the Settlement Agreement, the GAMA Consortium agreed to withdraw various claims against TE-TO "upon payment of the net settlement amount."[30] For its part, TE-TO agreed to withdraw claims against GAMA and Alstom related to: "deviation between nominated and realized consumption of natural gas and production of power and heat"; "receipt of permits and operational license"; "no-plume condition of cooling tower"; "fulfillment of noise requirements"; "completion of disputed punch list items"; "warranties and defects liabilities"; and "construction of access road."[31]

24. TE-TO did not relieve the GAMA Consortium of all outstanding obligations, however. The GAMA Consortium remained liable "for latent defects of the equipment and systems as a whole that might occur until 31 August 2012 due to faults in erection and commissioning,"[32] and for completion of all items on the Punch List (*i.e.*, minor items of works that remained to be completed after substantial completion).[33]

2. GAMA fails to remedy latent defects in the Plant, and TE-TO withholds the balance of the contract price

25. On 30 March 2012, GAMA issued an invoice to TE-TO for the EUR 5 million remaining contract price that TE-TO agreed to pay under the Settlement Agreement.[34]

26. Respondent understands that TE-TO did not pay that amount at the time. As the payment was due, in addition to outstanding Punch List works, TE-TO discovered at least 14 "latent defects" in the Plant after the execution of the Settlement Agreement and notified

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30 Settlement Agreement (**C-4**) at Clause 3(i).

31 Settlement Agreement (**C-4**) at Clause 3(ii).

32 Settlement Agreement (**C-4**) at Clause 2(iv) (emphasis added).

33 Settlement Agreement (**C-4**) at Clause 3(iv) ("The agreed Punch List which is given in the attachment of this Agreement shall be the annex of the [Commercial Operation Certificate] and shall be completed by the Contractor as defined in the agreed Punch List."); EPC Contract, dated 11 May 2007 (**C-2**) sub-clause 10.1 ("the Owner and the Contractor shall agree prior to the issue of the Taking-over Certificate all minor outstanding works and defects that (i) are not essential to the operation of the Plant and (ii) do not impair the safe performance of the Plant to be completed including the schedule to do it ('Punch List')").

34 GAMA invoice to TE-TO, dated 30 March 2012 (**C-5**); Settlement Agreement (**C-4**) at 3.

GAMA accordingly.[35] In late May 2012, TE-TO sent a schedule of payments, totaling EUR 5 million, for the remaining contract price to GAMA: EUR 1 million in June 2012 "after closing of all critical punch items and discovered latent failures ensuring plant readiness for safe and reliable operation," EUR 2 million in July 2012, and EUR 2 million in August 2012 "upon closure of remain[ing] minor punch items and finalizing Punch List as well as resolving the eventually new discovered latent failures of equipment."[36]

27. GAMA responded the next day that the payment schedule proposed by TE-TO did "not comply with the … Settlement Agreement," because "[t]he settlement amount … was to be paid by the Owner [TE-TO] latest until March 31, 2012 …."[37] GAMA wrote that it was nevertheless "continuing to exert its best efforts to close [items on the Punch List] within the shortest possible time."[38]

28. On 5 June 2012, TE-TO clarified that its "intention is not to condition the proposed payment schedule with the closing of punch items list," and that GAMA should "not consider the required schedule of closing the punch items as [a] precondition for actual payments per [the Settlement Agreement]."[39] TE-TO advised that, "[n]ever the less, the requested schedule for closure of remaining punch-items is crucial for TE-TO since

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35 Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-48**) at 7; Letter from TE-TO to GAMA and Alstom, dated 27 February 2013 (attached to Findings and Opinion of Expert Witness Goran Markovski, dated November 2013, Macedonian version (**C-48 MK**) at 15); Letter from TE-TO to GAMA, dated 27 March 2013 (attached to Findings and Opinion of Expert Witness Goran Markovski, dated November 2013, Macedonian version (**C-48 MK**) at 21; Letter from TE-TO to GAMA, dated 11 April 2013 (attached to Findings and Opinion of Expert Witness Goran Markovski, dated November 2013, Macedonian version (**C-48 MK**) at 25; Letter from TE-TO to GAMA, dated 31 August 2012 (attached to Objection by TE-TO, dated 13 December 2012 against the Decision of Notary Snezana Vidovska, dated 4 December 2012, Macedonian version (**C-40 MK**) at 7; Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**) at 6.

36 Email from M. Scobioala (TE-TO) to H. Emek (GAMA) sent 31 May 2012 (**C-28**).

37 Email from H. Emek (GAMA) to M. Scobioala (TE-TO) sent 1 June 2012 (**C-29**).

38 Email from H. Emek (GAMA) to M. Scobioala (TE-TO) sent 1 June 2012 (**C-29**).

39 Email from M. Scobioala (TE-TO) to H. Emek (GAMA) sent 5 June 2012 (**C-30**).

solving those items is [a] precondition for Plant readiness for safe and reliable operation."[40]

29. The latent defects in the Plant remained unresolved into 2013. TE-TO advised the GAMA Consortium that the latent defects harmed TE-TO financially and increased safety risks at the Plant. For example:

a) On 27 February 2013, TE-TO informed the GAMA Consortium of a "serious latent defect" caused by improper installation work that led to an "unplanned outage of the plant and heavy losses for TE-TO AD Skopje."[41] Despite the five-day outage, TE-TO saw "still no … actions by EPC Contractor for fixing … the previously reported punch items and latent defects which also can cause further damages for TE-TO AD."[42]

b) On 27 March 2013, TE-TO advised the GAMA Consortium that defects remained and that an accident at the Plant had caused losses of EUR 1.3 million and put the safety of personnel at risk.[43] TE-TO asserted that the GAMA Consortium was responsible for the accident:

> [W]e still consider the Contractor as responsible for the actual accident because it is only caused as a result of Contractor's negligence by using inappropriate gasket type which caused serious financial damages to the Owner and also was [a] serious safety issue for the personnel.[44]

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40 Email from M. Scobioala (TE-TO) to H. Emek (GAMA) sent 5 June 2012 (**C-30**).

41 Letter from TE-TO to GAMA and Alstom, dated 27 February 2013 (attached to Findings and Opinion of Expert Witness Goran Markovski, dated November 2013, Macedonian version (**C-48 MK**) at 15).

42 Letter from TE-TO to GAMA and Alstom, dated 27 February 2013 (attached to Findings and Opinion of Expert Witness Goran Markovski, dated November 2013, Macedonian version (**C-48 MK**) at 15).

43 Letter from TE-TO to GAMA, dated 27 March 2013 (attached to Findings and Opinion of Expert Witness Goran Markovski, dated November 2013, Macedonian version (**C-48 MK**) at 22) (TE-TO listed "direct financial losses" of "Penalties to the MEPSO" (EUR 277,666.36), "Penalties to the trader" (EUR 870,766.61), and "Loss of production" (EUR 211,662.13) for a total of EUR 1,360,095.10).

44 Letter from TE-TO to GAMA, dated 27 March 2013 (attached to Findings and Opinion of Expert Witness Goran Markovski, dated November 2013, Macedonian version (**C-48 MK**) at 21-22).

30. In November 2013, an expert, appointed by TE-TO to review the status of the Plant, found that all 14 defects that had been identified in 2012 remained unresolved, and that six Punch List items were outstanding.[45]

C. GAMA BRINGS A CLAIM AGAINST TE-TO IN THE MACEDONIAN COURTS, THEN CHANGES ITS MIND AND TRIES TO WITHDRAW ITS CLAIM

31. Despite its overdue obligation to address defects and Punch List items, GAMA sought to collect the EUR 5 million from TE-TO under the Settlement Agreement, and a payment dispute arose. GAMA did not try to resolve the dispute in accordance with the EPC Contract's dispute resolution provisions, by referring it to a DAB or arbitration. Rather, GAMA elected to seek remedies from the Macedonian courts and through a Macedonian Notary Public.

1. GAMA unsuccessfully seeks an interim injunction to block TE-TO's accounts

32. On 30 November 2012, GAMA (through Macedonian law firm Debarliev, Dameski and Kjeleshoska ("**DDK**")[46]) applied to the Basic Court Skopje for an interim order that three Macedonian banks (NLB Tutunska Banka AD Skopje, Komercijalna Banka AD Skopje, and Ohridska Banka AD Skopje) "not allow the payment of the amount of EUR 5,000,000.00 from [TE-TO's] transaction accounts" (the "**Injunction Application**").[47]

33. The Injunction Application aimed to ensure that TE-TO had sufficient funds to pay GAMA the remaining contract price of EUR 5 million. TE-TO objected, arguing that the arbitration agreement in the EPC Contract removed jurisdiction from the Basic Court, and that the GAMA Consortium did not provide evidence that they had "fully fulfilled all

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45 Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-48**) at 7 and 11-32.

46 GAMA Application for Provisional Measure, dated 30 November 2012 (**C-31**) at 4.

47 GAMA Application for Provisional Measure, dated 30 November 2012 (**C-31**) at 4.

their contractual obligations."[48] TE-TO stressed that blocking its bank accounts would cause "incalculable damages."[49]

34. On 20 December 2012, GAMA adopted the view in reply that the arbitration agreement was not applicable and that, under the EPC Contract, the parties had agreed to arbitration "only if they fail[ed] to resolve [a] dispute amicably or if the decision of the Dispute Resolution Board ha[d] not become final," but that "by signing … [the] Settlement Agreement, they reached an amicable solution for all disputed issues."[50] GAMA further submitted that the Macedonian Law on International Commercial Arbitration allowed a party to "submit a proposal for the imposing of a provisional measure to the court before or during the Arbitration" and that, under the Rules of the International Chamber of Commerce, the Basic Court had "subject-matter and territorial jurisdiction to act on the [Injunction Application]."[51]

35. On 1 February 2013, the Basic Court denied the Injunction Application. The Court cited the test under Article 33 of the Law on Securing the Claim, which permits a "provisional measure for securing monetary claims … if the creditor proves the existence of the claim and the danger that without such a measure the debtor will thwart or significantly complicate the collection of the claim."[52] The Court held that this test was not met: "the Creditor [GAMA] did not prove the existence of its monetary claim,"[53] because the Settlement Agreement set forth "obligations of the Creditor … which [GAMA] did not fulfil."[54] The Basic Court further held that:

> the Debtor [TE-TO] submitted written correspondence to the Creditor in which it pointed out hidden defects and unfinished works discovered during the operation of the power plant during 2012, after the

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48 TE-TO objection to Interim Injunction Application, dated 24 December 2012 (**C-33**) at 2-4.

49 Decision of Basic Court, dated 1 February 2013 (**C-34**) at 3.

50 Decision of Basic Court, dated 1 February 2013 (**C-34**) at 4.

51 Decision of Basic Court, dated 1 February 2013 (**C-34**) at 4.

52 Decision of Basic Court, dated 1 February 2013 (**C-34**) at 5.

53 Decision of Basic Court, dated 1 February 2013 (**C-34**) at 5.

54 Decision of Basic Court, dated 1 February 2013 (**C-34**) at 6.

> [conclusion] of the Settlement Agreement. It calls the Creditor to fix the defects and eliminate the errors, but the Creditor did not do so and did not act in accordance with the Settlement Agreement, although the last letter is dated 31.08.2012.[55]

36. GAMA appealed.[56] The Skopje Court of Appeal dismissed the appeal, finding that (i) the Basic Court correctly applied the Law on Securing the Claim, (ii) "the creditor did not prove its claim," as GAMA had unfulfilled obligations under the Settlement Agreement, and (iii) GAMA "did [not] prove the danger of thwarting or hindering the fulfillment of its claim, [nor] the risk of incurring irreparable damage if the provisional measure is not allowed."[57]

2. GAMA is granted a Payment Order for the EUR 5 million unpaid contract price

37. On 3 December 2012, three days after filing the Injunction Application, GAMA (again through the Macedonian law firm DDK[58]) applied to a notary public for a so-called enforcement order against TE-TO (the "**Enforcement Proposal**"), based on the EUR 5 million invoice that GAMA had issued to TE-TO on 30 March 2012 in the aftermath of the Settlement Agreement.[59]

38. Under Macedonian law, an uncontested debt may be enforced and collected through an expedited process overseen by a notary public. Pursuant to the Macedonian Law on Enforcement, a notary public may issue a "determination allowing enforcement," which can then proceed through a bailiff.[60] The creditor first submits a "proposal for the adoption of a determination … to the notary of his/her choice," which must be "based on an authentic document" proving the debt, such as "an invoice."[61] If the notary finds that

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55 Decision of Basic Court, dated 1 February 2013 (**C-34**) at 6.

56 Decision of the Court of Appeal, dated 14 March 2013 (**C-35**) at 1.

57 Decision of the Court of Appeal, dated 14 March 2013 (**C-35**) at 3.

58 Proposal for the adoption of an enforcement order, dated 3 December 2012 (**C-36**) at 1.

59 Proposal for the adoption of an enforcement order, dated 3 December 2012 (**C-36**).

60 Macedonian Law on Enforcement (**R-6**) Art. 2(2).

61 Macedonian Law on Enforcement (**R-6**) Arts. 16-a, 16-b, 16-v(2).

the creditor's proposal is well founded, the notary makes a determination allowing enforcement.[62] If the notary's determination is not objected to by the debtor "within eight days from the day of receipt of the determination,"[63] the "notary will certify the finality and enforceability of the determination," thus "allowing enforcement to the creditor."[64] If the debtor objects to the notary's determination, the notary must submit the case to the Basic Court.[65]

39. On 4 December 2012, Notary Snezana Vidovska found that GAMA's 30 March 2012 invoice for EUR 5 million was an authentic document.[66] She allowed the Enforcement Proposal and issued an order requiring TE-TO to pay GAMA EUR 5 million (the "**Payment Order**").[67] The Payment Order noted that TE-TO "can file an objection … within 8 (eight) days … through this Notary Public [Ms. Vidovska] to the Basic Court."[68] If TE-TO "[did] not file an objection or [did] not pay" within eight days, or if the objection was rejected, then the Payment Order would have "the status of an enforceable document."[69]

40. TE-TO received the Payment Order on 6 December 2012 and objected to it within the prescribed timeline on 13 December 2012 (*i.e.*, "within eight days of receiving the

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62 Macedonian Law on Enforcement (**R-6**) Art. 16-g(1).

63 Macedonian Law on Enforcement (**R-6**) Arts. 16-d(1).

64 Macedonian Law on Enforcement (**R-6**) Art. 16-gj(1) and (2).

65 Macedonian Law on Enforcement (**R-6**) Art. 16-d(3) ("The notary to whom a timely and admissible objection has been submitted against the determination he has made will deliver the files to the Basic Court … for the implementation of a procedure on the occasion of the objection and the adoption of a decision in accordance with the provisions of the Law on Litigation Procedure for handling an objection to a payment order."); Macedonian Law on Civil Litigation Procedure (**C-39**) Art. 428-a(2) ("Upon the receipt of an objection submitted against the decision on the issuance of a notary payment order, the notary shall be obliged to deliver the case together with all acts to the competent basic court within a period of three days.").

66 Payment Order, dated 4 December 2012 (**C-6**) at 1.

67 Payment Order, dated 4 December 2012 (**C-6**).

68 Payment Order, dated 4 December 2012 (**C-6**) at 2.

69 Payment Order, dated 4 December 2012 (**C-6**) at 2.

Payment Order").[70] Notary Vidovska was thus required to submit the Enforcement Request, Payment Order and TE-TO's objection to the Basic Court, which she did.

3. GAMA changes its mind and unsuccessfully tries to withdraw its Payment Order claim

41. On 26 December 2012, shortly after TE-TO objected to the Payment Order, the Sintez Group explained in a letter to GAMA that "[b]ecause of [a] delay of start of commercial exploitation of the [Plant] due to reasons beyond the control of TE-TO[,] it was forced to postpone the remittance of 5 million Euros to GAMA, but GAMA did not fulfill its obligations under [the Settlement Agreement] as well."[71] The Sintez Group offered that "5 million Euros could be repaid to GAMA not later than 21 January 2013" and proposed that TE-TO and GAMA "conclude an amicable settlement."[72]

42. GAMA replied on 4 January 2013 that it "has fulfilled its necessary obligations under [the Settlement Agreement]" and "fulfilment of the obligations of [GAMA] is not a precondition to payment of the settlement amount."[73] GAMA observed that "the matter is currently being pursued by our authorized legal counsels through legal actions."[74]

43. Four months later, on 9 May 2013, and after TE-TO had objected and Notary Vidovska had referred the matter to the Basic Court, GAMA changed its mind and tried to withdraw its Payment Order claim against TE-TO.[75] Contrary to GAMA's assertion in this arbitration,[76] GAMA's withdrawal application did not challenge the Basic Court's

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

71 Letter from Sintez to GAMA, dated 26 December 2012 (**C-41**).

72 Letter from Sintez to GAMA, dated 26 December 2012 (**C-41**).

73 Letter from GAMA to Sintez, dated 4 January 2013 (**C-42**).

74 Letter from GAMA to Sintez, dated 4 January 2013 (**C-42**).

75 GAMA's submission to withdraw its claim, dated 9 May 2013 (**C-46**) ("[GAMA] WITHDRAWS the lawsuit against the defendant TE-TO AD Skopje.").

76 Statement of Claim ¶ 43.

jurisdiction over the Payment Order claim (whether based on the arbitration clause or otherwise) at the time.[77]

44. On 27 May 2013, TE-TO informed the Basic Court that "TE-TO AD Skopje DOES NOT GIVE CONSENT to the withdrawal of the lawsuit in question."[78] TE-TO relied on Article 428 of the Law on Civil Litigation Procedure, which provides: "The plaintiff can withdraw the lawsuit without the consent of the defendant only before filing the objection."[79]

45. TE-TO's objection meant that GAMA could not unilaterally withdraw its claim. So, GAMA raised a new argument during a 19 December 2013 hearing before the Basic Court, namely that the Basic Court did not have jurisdiction over the Payment Order claim, because the arbitration clause in the EPC Contract "states that all disputes are resolved before an international arbitration court with headquarters in London, consisting of three arbitrators."[80] GAMA did not, however, submit the payment dispute to arbitration (not then, nor at any time thereafter).

46. GAMA objected to the Basic Court's jurisdiction based on the arbitration clause despite having taken the opposite position a year earlier.[81] As explained above, on 20 December 2012, GAMA had argued before the Basic Court that disputes relating to the EPC Contract were to be resolved by arbitration "only if [the parties] fail to resolve the dispute amicably or if the decision of the Dispute Resolution Board has not become final," but in this case "by signing [the] Settlement Agreement, they reached an amicable solution for all disputed issues," including payment of the remaining contract price.[82]

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77 GAMA's submission to withdraw its claim, dated 9 May 2013 (**C-46**).

78 TE-TO's objection to withdrawal of GAMA's claim, dated 27 May 2013 (**C-47**).

79 Macedonian Law on Civil Litigation Procedure (**C-39**) Art. 428(1). *See also* TE-TO's objection to withdrawal of GAMA's claim, dated 27 May 2013 (**C-47**).

80 Minutes of hearing before Basic Court, dated 19 December 2013 (**C-49**) at 2. Contrary to Claimant's assertion that GAMA made this argument in its application for withdrawal (Statement of Claim ¶ 43), it was only later, during the December 2013 hearing, that GAMA first raised an objection to the Basic Court's jurisdiction.

81 *See supra* ¶ 34.

82 Decision of Basic Court, dated 1 February 2013 (**C-34**) at 4.

47. Unsurprisingly, the Basic Court dismissed GAMA's jurisdictional objection. On 7 March 2014, the Basic Court "deem[ed] that the Macedonian court has jurisdiction based on the defendant's [TE-TO's] consent."[83] The Court relied on Articles 52(1) and 57(2) of the Macedonian Law on Private International Law which provide:

> Article 52
>
> (1) **Jurisdiction** of the court of the Republic of Macedonia **exists if the defendant has a residence**, i.e. a seat in the Republic of Macedonia.
>
> Article 57
>
> …
>
> (2) It is considered that the **defendant has agreed to the jurisdiction** of the court of the Republic of Macedonia, **if he/she has submitted** an response to the lawsuit or **an objection against the payment order** or if at the preparatory hearing, i.e. when there was no such preparatory hearing, at the first hearing for the main trial, he/she entered into an argument for the merits, **and he/she did not dispute the jurisdiction**.[84]

48. These jurisdictional conditions were met because TE-TO had its seat in Macedonia, had objected to the Payment Order, and had not disputed the Basic Court's jurisdiction.[85]

49. GAMA appealed, arguing that under Article 28 of the Law on Enforcement, "the creditor may, at any time, and without consent by the debtor, withdraw the request for enforcement."[86] On 15 December 2014, the Court of Appeal dismissed GAMA's appeal, holding that the Law on Enforcement does not apply to notarial enforcement orders.[87] The Court upheld the jurisdiction of the Basic Court under Articles 52 and 57 of the Law on Private International Law by virtue of TE-TO having "a residence or headquarters in

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83 Decision of the Basic Court, dated 7 March 2014 (**C-7**) at 4.

84 Macedonian Law on Private International Law **(R-1**) Art. 52(1); Macedonian Law on Private International Law (**C-52**) Art. 57(2) (emphasis added).

85 Final Reorganization Plan (**C-14 SOC**) at 674; TE-TO's objection to withdrawal of GAMA's claim, dated 27 May 2013 (**C-47**).

86 GAMA submission to the Court of Appeal Skopje, dated 29 April 2014 (**C-54**) at 4; Macedonian Law on Enforcement (**C-37**) Art. 28(1).

87 Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**) at 3-4.

the Republic of Macedonia, and … [having] accepted the jurisdiction of a court in the Republic of Macedonia [by] submit[ing] an … objection to an order to pay."[88] The Court of Appeal observed that while GAMA was "aware of the circumstance that with the defendant they have agreed [to] the jurisdiction of the international arbitration court, but they have, nevertheless, decided to have the dispute resolved before the courts in the Republic of Macedonia with the application of the Macedonian law."[89]

50. The decision of the Basic Court, upheld by the Court of Appeal, is hardly extraordinary. Courts around the world recognize that a party may waive its right to arbitrate by commencing or participating in judicial proceedings.[90] In this arbitration, GAMA nonetheless argues that the Basic Court and Court of Appeal misapplied Article 57 of the Law on Private International Law, because (according to GAMA) the rule on "tacit consent to … jurisdiction" in Article 57 applies only if a payment order was issued by a court and not a notary.[91] GAMA's argument is contrary to the plain text of Article 57, which provides that a defendant consents to jurisdiction if it objects to a "payment order," without any limitation as to whether that order was issued by a notary or court. GAMA provides no support for its argument that a situation where a defendant objects to a

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88 Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**) at 3. GAMA says that the Court of Appeal erred by not adhering to Art. 425 of the Law on Litigation Procedure, under which a "court may, upon the respondent's objection against the payment order, only declare that it has no territorial jurisdiction" (Statement of Claim ¶ 52). That is wrong. Art. 425 states that "[t]he court can pronounce itself locally incompetent, only upon an objection of the defendant stated in the objection against the court payment order" (Law on Litigation Procedure (**C-39**) Art. 425 (emphasis added)). Here, TE-TO did not state an objection to the court's jurisdiction in its objection to the payment order. The Court of Appeal noted as much, and observed that TE-TO cannot later challenge the court's jurisdiction having already filed an objection to the payment order (Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**) at 3).

89 Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**) at 3.

90 *See e.g. 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.")

91 Statement of Claim ¶ 51.

notary-issued payment order in court should be treated differently from a situation where a defendant objects to a court-issued payment order in court.

4. TE-TO brings a damages claim against GAMA and files fraud charges against GAMA

51. On 30 December 2014, TE-TO brought a claim against GAMA in the Basic Court, seeking approximately EUR 5 million in damages arising from alleged breaches of the Settlement Agreement, and requested that this claim be joined with the ongoing proceeding concerning GAMA's Payment Order.[92] The Basic Court joined the proceedings on 12 June 2015,[93] reasoning that since TE-TO's claim was "related to the claim [by GAMA] arising from the same contractual relationship," it would be "expedient" to join the proceedings (effectively treating TE-TO's claim as a counterclaim).[94]

52. GAMA appealed the joinder and prevailed before the Court of Appeal in June 2016.[95] In September 2016, the Basic Court thus ordered that TE-TO's claim be heard separately.[96]

53. Around the same time, TE-TO filed a criminal complaint against GAMA with the Basic Public Prosecutor's Skopje Office.[97] TE-TO's complaint alleged that GAMA had "misled" TE-TO by "falsely presenting or concealing facts,"[98] causing TE-TO to suffer damages of EUR 3.5 million.[99] Specifically, TE-TO asserted that GAMA intentionally concealed two serious deficiencies of the Plant during performance tests:

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92 Statement of Claim ¶ 58; Basic Court decision, dated 12 June 2015 (**C-59**).

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

94 Decision of the Basic Court, dated 12 June 2015 (**C-59**) at 2.

95 GAMA's appeal of decision to join claims, dated 21 July 2015 (**C-60**); Decision of the Court of Appeal Skopje, dated 16 June 2016 (**C-61**) at 2.

96 Decision of the Basic Court, dated 29 September 2016 (**C-62**).

97 TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**).

98 TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**) at 3.

99 TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**) at 10.

a) Lack of "hot-start" functionality: TE-TO asserted that the Plant was incapable of re-starting after a short standstill (of less than eight hours), which "every thermal power plant in the world" should be able to do.[100] TE-TO alleged that during testing, GAMA "forced command signals from the engineering station to bypass the protective functions of the control system, thereby deceiving and misleading [TE-TO]."[101] TE-TO said that this defect caused it to incur penalties, pay inspection and repair costs, and lose sales of electricity and thermal energy, in a total amount of EUR 2.6 million.[102]

b) Structural problem with the gas turbine: TE-TO contended that "an endoscopic (visual) inspection" revealed a "serious structural problem with the gas turbine"[103] that caused the turbine to move such that it "could hit the connector, break it, and cause a major failure."[104] TE-TO alleged that GAMA "noticed the movement [of the gas turbine] during the gas turbine handover inspection, reworked (shortened) the endoscope connector, and deliberately covered up the deficiency in the gas turbine handover report."[105] TE-TO asserted repair costs of EUR 0.9 million.[106]

D. TE-TO FILES FOR BANKRUPTCY, REORGANIZES AND THUS REDUCES THE AMOUNTS OWED TO ITS CREDITORS, INCLUDING GAMA

1. As TE-TO suffers ongoing losses, one of its lenders and shareholders, Bitar, demands immediate repayment

54. Respondent understands that TE-TO suffered losses at the Plant from the beginning of commercial operations in 2012, reportedly because the assumptions underpinning the

[100] TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**) at 5.

[101] TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**) at 5.

[102] TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**) at 8.

[103] TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**) at 8.

[104] TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**) at 10.

[105] TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**) at 10.

[106] TE-TO application for criminal charges against GAMA, dated 27 September 2016 (**C-64**) at 10.

Feasibility Study turned out differently in practice.[107] This is described in TE-TO's Final Reorganization Plan (which is discussed further below):

> With the commencement of commercial work, TE-TO faced an extremely unfavorable situation in energy markets. Namely, the price of natural gas on the market in the Republic of Macedonia exceeded more than 2 times the price [in the Feasibility Study] at which TE-TO was supposed to work. This caused the production price of the energy produced by TE-TO to be uncompetitive on the regional stock exchanges for most of the year, so the plant worked effectively for 2 to 3 months in the year, i.e., the utilization of the capacity ranged between 15-20%.[108]

55. TE-TO borrowed from its shareholders to meet its debt payment obligations to its banks.[109] By the end of 2016, TE-TO owed approximately EUR 215 million, including approximately EUR 151 million to related parties.[110]

56. In November 2017, Bitar exercised its right under certain loan agreements with TE-TO to demand immediate repayment of loans that totaled EUR 48.4 million.[111] TE-TO did not make the requested payment.[112] In February 2018, TE-TO and Bitar agreed to reschedule

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[107] TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC EN**) at 10 [9] ("In the period from 2012, when it started with its commercial work, until 2016, TE-TO worked with loss, while it showed the trend of positive performance in 2017 for the first time."), 14-16 [13-15].

[108] TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC EN**) at 15 [14].

[109] TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC EN**) at 16 [15].

[110] TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC EN**) at 529. Total 2016 loan payables (current + non-current) = 11,443,386,000 + 1,711,244,000 = MKD 13,154,630,000. MKD/EUR exchange rate on 31 December 2016 = 61.21. Total loan payables in MKD/61.21 = EUR 214,910,975. Total loans (secured and unsecured) from related parties = 9,248,298,000 MKD = EUR 151,091,292.

[111] *See* Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-80**) at 3 (EUR 17,925,829.28); Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-81**) at 3 (EUR 18,275,000.00); Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-82**) at 3 (EUR 5,829,408.00); Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-83**) at 3 (EUR 6,394,448.19). The total amount of these loans was = EUR 48,424,685.47 (=EUR 17,925,829.28 + EUR 18,275,000.00 + EUR 5,829,408.00 + EUR 5,829,408.00).

[112] Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-80**) at 3; Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-81**) at 3; Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-82**) at 3; Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-83**) at 3.

the payment over three installments of roughly EUR 16 million each over a four-month period from February through June 2018 (the "**Bitar Payments**").[113]

57. TE-TO failed to make the first Bitar Payment.[114]

58. As would be recorded in the Final Reorganization Plan, by 1 March 2018 TE-TO owed EUR 221.5 million to its shareholders, its banks, and other third parties:[115]

-	Remaining debt to LBB	51.4 million euro
-	Remaining debt to KB	2.2 million euro
-	Bitar Holdings Limited	112.0 million euro
-	Project Management Consulting	8.8 million euro
-	Kardicor Investments Limited	8.7 million euro
-	Toplifikacija AD Skopje	28.0 million euro
-	Sintez GTeen Energy	3.9 million euro
-	Gama Gue, Turkey	5.0 million euro
-	current liabilities to third parties	1.5 million euro

59. In mid-March 2018, Bitar obtained an enforcement order against TE-TO for approximately EUR 18 million,[116] and blocked TE-TO's accounts.[117]

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[113] Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-80**) at 4 (installments of EUR 5,975,000.00 on 26 February 2018, EUR 5,975,000.00 on 26 April 2018, and EUR 5,975,829.28 on 26 June 2018); Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-81**) at 3-4 (installments of EUR 6,091,600.00 on 26 February 2018, EUR 6,091,600.00 on 26 April 2018, and EUR 6,091,800.00 on 26 June 2018); Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-82**) at 3 (EUR 1,943,100.00 on 26 February 2018, EUR 1,943,100.00 on 26 April 2018, and EUR 1,943,208.00 on 26 June 2018); Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-83**) at 3-4 (EUR 2,131,400.00 on 26 February 2018, EUR 2,131,400.00 on 26 April 2018, and EUR 2,131,648.19 on 26 June 2018). The installments added up to EUR 16,141,100 on 26 February 2018, EUR 16,141,100 on 26 April 2018, and EUR 16,142,485.47 on 26 June 2018.

[114] *See*, *e.g.*, TE-TO Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC EN**) at 215-216.

[115] TE-TO Reorganization Plan, dated April 2018 (**C-13**) at 8 (setting out the total indebtedness of TE-TO on 1 March 2018).

[116] Enforcement Order in favor of Bitar Holdings against TE-TO, dated 12 March 2018 (attached to Reorganization Proposal (**C-74**) at 15-16).

[117] Reorganization Proposal (**C-74**) at 1 ("Bitar Holdings Limited and TOPLIFIKACIJA AD have blocked the debtor's transaction account") and 10-12 (indicating that as of 19 April 2018, TE-TOs accounts at NLB Bank AD Skopje, Komercijalna Banka AD Skopje, and Ohridska Banka AD Skopje had each been blocked for 38 days, *i.e.* since 12 March 2018).

60. On 2 April 2018, a second shareholder with significant loans, Toplifikacija, obtained an enforcement order against TE-TO.[118] A dispute amongst shareholders appears to have ensued. Later that month, Toplifikacija applied for a temporary injunction from the Basic Court "prohibit[ing] [Bitar] from taking any action" or "collecting any claim" based on the Bitar Payments.[119]

61. On 4 April 2018, Bitar withdrew its enforcement order (which had no effect on the EUR 112 million total that TE-TO still owed Bitar).[120]

2. TE-TO applies to the Macedonian courts for bankruptcy reorganization

62. With its accounts blocked, TE-TO turned to the Macedonian courts. TE-TO prepared a plan for reorganization dated 4 April 2018 (the "**Reorganization Plan**"), which will be described further below.[121] On 24 April 2018, TE-TO submitted the Reorganization Plan to the Basic Court along with a proposal for the "implementation of a reorganization plan prior to the opening of bankruptcy proceedings with a reorganization plan prepared by the debtor" (the "**Reorganization Proposal**").[122]

63. TE-TO made its Reorganization Proposal under Articles 215(2)(1) and 215-a(1) of the Bankruptcy Law, which allow a debtor to prepare and submit (in consultation with its creditors) a reorganization plan together with a proposal to commence bankruptcy proceedings (a procedure known elsewhere as "Prepackaged" or "Prepack

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118 Reorganization Proposal (**C-74**) at 1; Enforcement Order in favor of Bitar Holdings against TE-TO, dated 12 March 2018 (attached to Reorganization Proposal (**C-74**) at 14-16); Enforcement Order in favor of Toplifikacija against TE-TO, dated 2 April 2018 (attached to Reorganization Proposal (**C-74**) at 17-20).

119 Toplifikacija motion for temporary injunction, filed 25 April 2018 (**C-86**).

120 GAMA submission to Basic Court, dated 12 June 2018 (**C-101**) at 1 (stating "execution orders for the collection of a claim by Bitar Holdings Limited which were withdrawn on 04.04.2018").

121 TE-TO Reorganization Plan, dated 4 April 2018 (**C-13**); TE-TO Reorganization Plan, dated 4 April 2018 (**C-13 MK**) (showing date stamp of "04 04 2018" on the cover); Macedonian Law on Bankruptcy (**R-10**) Art. 215-b.

122 TE-TO proposal for implementing reorganization plan, dated 24 April 2018 (**C-74**) at 1. The Reorganization Proposal was submitted to the "Basic Court Skopje" (at 1). The Bankruptcy Law requires the "bankruptcy judge" rather than the court to confirm that the Reorganization Proposal is in compliance with the Bankruptcy Law and to take other steps with respect to the it (*See* Macedonian Law on Bankruptcy (**R-10**) Art. 215-v(3), and generally Arts. 215-a through 215-d).

Bankruptcy").[123] The debtor has incentive to use a Prepackaged Bankruptcy procedure so as to have an opportunity to submit its own reorganization plan, as opposed to entering a bankruptcy procedure first and then risking liquidation (or waiting for a bankruptcy trustee to propose their own reorganization plan).[124]

64. The Prepackaged Bankruptcy procedure was introduced in Macedonian law only in 2013 and, since then, has been used only in a handful of occasions.[125] TE-TO was only the third company to avail itself of that procedure in the Basic Court of Skopje when it filed its proposal in April 2018.[126]

65. Under Macedonian law, the debtor may choose the procedure under Articles 215(2)(1) and 215-a(1) of the Bankruptcy Law if it is either "insolvent or he/she faces a future inability to pay," as defined under Article 5(1) of the Bankruptcy Law.[127]

66. The Reorganization Proposal explained TE-TO's imminent insolvency:

> The debtor Company for the production of electricity and thermal energy TE-TO AD Skopje faces a future inability to pay, that is, **the debtor cannot fulfill its existing monetary obligations** toward Bitar Holdings Limited in the amount of [EUR 112 million] and TOPLIFIKACIJA AD in the amount of [EUR 28 million], and due to that the debtor submits this

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123 TE-TO proposal for implementing reorganization plan, dated 24 April 2018 (**C-74**) at 1; Macedonian Law on Bankruptcy (**R-10**) Arts. 215 - 215-a; Petrov ¶ 47.

124 Macedonian Law on Bankruptcy (**R-10**) Arts. 215 - 215-d; Petrov ¶ 52. The Prepackaged Bankruptcy procedure is analogous to so-called "Prepackaged" reorganizations that exist in some jurisdictions, such as the United States. Mr. Petrov explains that "the essence of the [Prepackaged Bankruptcy] is that the debtor is given the opportunity to submit to the Court a proposal for commencement of bankruptcy proceedings, together with a previously prepared reorganization plan in preliminary proceedings," and that "[t]he intention of these legal provisions is to ensure greater efficiency in bankruptcy proceedings, as well as to enable the debtor to continue to exist and function in the market by negotiating with creditors on the manner and amount of settling their claims." (Petrov ¶ 47, 44).

125 Petrov ¶ 46.

126 Petrov ¶ 46.

127 Macedonian Law on Bankruptcy (**R-10**) Art. 5(1) ("A bankruptcy or reorganization may be opened over the bankruptcy debtor when the bankruptcy debtor is insolvent or he/she faces a future inability to pay"), 5(2) ("The debtor shall be considered insolvent if, within a period of 45 days, there has not been any payment completed, from any of his accounts at any institution authorized for payment operations, for the amount that was due for payment based on valid grounds for payment"), (5) ("Future inability to pay exists if the debtor makes it likely that he/she will not be able to fulfill his/her existing monetary liabilities when they become due for payment."); Petrov ¶ 50.

> Proposal for the implementation of a reorganization plan prior to the opening of bankruptcy proceedings with a reorganization plan by the debtor.
>
> On the other hand, creditors Bitar Holdings Limited and TOPLIFIKACIJA AD have **blocked the debtor's transaction account** for the collection of monetary claims.[128]

67. The Reorganization Plan, submitted to the Basic Court along with the Reorganization Proposal, explained that TE-TO "is threatened with future insolvency"[129] and described its rationale for a Prepackaged Bankruptcy:

> At the moment, TE-TO AD has financial difficulties that can be overcome without the need for conducting a bankruptcy procedure or terminating of the business. With the implementation of the Reorganization Plan, the financial crisis of TE-TO will be solved, and the creditors will be sure that the claims will be paid according to the schedule foreseen in the plan. By implementing the proposed Reorganization Plan, the creditors will receive the maximum of their claims.[130]

68. The Reorganization Plan classified TE-TO's creditors into three classes:

a) First Class: secured creditors and banks, consisting of two banks, Landesbank Berlin and Komercijalna Banka;

b) Second Class: unsecured creditors with claims based on "loans and investments," including shareholder loans from Bitar and Toplifikacija, and GAMA's claim for EUR 5 million; and

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[128] Reorganization Proposal (**C-74**) at 1 (emphasis added).

[129] TE-TO Reorganization Plan, dated April 2018 (**C-13**) at 9, 51. The Reorganization Plan also described measures taken by TE-TO to improve the company's situation, and TE-TO's anticipated recovery after reorganization: "With the implementation of the Reorganization Plan, the financial crisis of TE-TO AD will be solved, and the creditors will be sure that the claims will be paid according to the schedule foreseen in the plan. By implementing the proposed Reorganisation Plan, the creditors will receive the maximum of their claims." (at 5).

[130] TE-TO Reorganization Plan, dated April 2018 (**C-13**) at 5; TE-TO proposal for implementing reorganization plan, dated 24 April 2018 (**C-74**)

c) Third Class: unsecured creditors with claims based on "current operational business" with TE-TO.[131]

69. The Reorganization Plan called for a "write-off on 90% of the principal debt" and a "full write-off of the interest" owed to Second Class creditors (including GAMA), with the remaining 10% paid "during 2028 and 2029 after the payment of debts to the Creditors of the First Class under equal conditions for all Second-Class Creditors."[132]

70. On the same day that TE-TO submitted the Reorganization Plan, the bankruptcy judge requested further information to be provided by TE-TO within eight days.[133] This request was in accordance with Article 215-v(4) of the Bankruptcy Law, which provides that "when the prepared plan for reorganization contains deficiencies and technical mistakes which can be corrected, the bankruptcy judge shall order the bankruptcy debtor with a decision to complete the plan within eight days."[134]

71. On 26 April 2018, the bankruptcy judge appointed Marinko Sazdovski as interim bankruptcy trustee and implemented security measures which prohibited TE-TO from taking "any legal actions, aimed at alienation, burden or concluding agreements," making payments from TE-TO's accounts except for works related to TE-TO's main activities, and taking "any action related to forced enforcement or safeguarding" against TE-TO (collectively, the "**Security Measures**").[135]

72. On 2 May 2018, TE-TO replied to the bankruptcy judge's request for information made on 30 April 2018.[136] The same day, the bankruptcy judge initiated an "examination of the conditions for the opening of a proceeding with a submitted plan for reorganization," appointed Marinko Sazdovski as temporary bankruptcy trustee (as distinct from his prior

131 TE-TO Reorganization Plan, dated April 2018 (**C-13**) at 15-17.

132 TE-TO Reorganization Plan, dated April 2018 (**C-13**) at 18.

133 Request for information from the Basic Court, dated 30 April 2018 (**C-91**).

134 Macedonian Law on Bankruptcy (**C-75**) Art. 215-v(4).

135 Decision of the Basic Court, dated 26 April 2018 (**C-89**) at 1.

136 TE-TO additional information, dated 2 May 2018 (**C-92**).

appointment as "interim" trustee), and scheduled a hearing and vote on the Reorganization Plan to take place on 5 June 2018.[137]

73. On 8 May 2018, the proposed Reorganization Plan was announced and published in the Official Gazette.[138] Toplifikacija and Komercijalna Banka submitted comments regarding the Reorganization Plan on 21 May 2018, and GAMA submitted comments on 22 May 2018.[139] GAMA argued in its submission that:

a) TE-TO did not meet the insolvency requirements of Article 5 of the Bankruptcy Law, because TE-TO had made a profit in 2017;[140]

b) "[t]he grouping of creditors into [three] classes is contrary to the Bankruptcy Law";[141]

c) under Article 215-b(1)(2) of the Bankruptcy Law, the deadline for implementation of a reorganization plan cannot be longer than five years, which the Reorganization Plan exceeded;[142] and

d) the legality of loans from TE-TO's shareholders should be assessed.[143]

74. On 30 May 2018, TE-TO responded to GAMA's submission. TE-TO argued that it met the insolvency requirements under Article 5 of the Bankruptcy Law since it had a "current and future inability for payment" given that its accounts were blocked and it did "not have sufficient funds to pay its debt to Toplifikacija AD Skopje and Bitar

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137 Decision of the Basic Court, dated 2 May 2018 (**C-93**) at 1.

138 Announcement in the Official Gazette (**C-94**).

139 GAMA response to Reorganization Plan, dated 22 May 2018 (**C-97**); Toplifikacija response to Reorganization Plan, dated 21 May 2018 (**C-98**); Komercijalna Banka AD response to Reorganization Plan, dated 21 May 2018 (**C-99**).

140 GAMA response to Reorganization Plan, dated 22 May 2018 (**C-97**) at 1.

141 GAMA response to Reorganization Plan, dated 22 May 2018 (**C-97**) at 2.

142 GAMA response to Reorganization Plan, dated 22 May 2018 (**C-97**) at 4.

143 GAMA response to Reorganization Plan, dated 22 May 2018 (**C-97**) at 5-6.

Holdings."[144] In response to GAMA's concern about the classification of creditors, TE-TO "propose[d] that all unsecured creditors should be included in a single second class."[145] The claims in that second class would be 90% written off, with the remaining 10% paid during 2028 and 2029.[146]

3. In response to an application from TE-TO's shareholder Toplifikacija, criminal charges are investigated and ultimately dropped

75. In May 2018, in the midst of TE-TO's reorganization process, minority shareholder Toplifikacija filed a criminal complaint with the Basic Public Prosecutor seeking criminal charges against Bitar, TE-TO, Nikola Arsovski (Bitar's attorney), Vadim Mihailov (the President of TE-TO's Management Board), Snezana Sardzovska (the notary who notarized the Bitar Payments), and Vasko Blazhevski (an enforcement agent).[147] Under the Macedonian Law on Criminal Procedure, any individual or company may file such a criminal complaint.[148] No evidence of wrongdoing is necessary, unless the application is made by the "judicial police."[149] Upon receipt of a complaint, the public prosecutor must oversee a preliminary investigation.[150] Toplifikacija's application alleged an abuse of

144 TE-TO response to GAMA, dated 30 May 2018 (**C-100**) at 2.

145 TE-TO response to GAMA, dated 30 May 2018 (**C-100**) at 3.

146 TE-TO response to GAMA, dated 30 May 2018 (**C-100**) at 4.

147 Toplifikacija request to Public Prosecutor (**C-87**).

148 Law on Criminal Procedure (**R-11**) Art. 273(3) ("Anyone may report a crime that is being prosecuted ex-officio").

149 Law on Criminal Procedure (**R-11**) Arts. 21(1)(9) (the term "judicial police" includes officers of the Financial Police), 272 ("The public prosecutor and the judicial police can learn of a criminal offense committed by direct observation, heard rumors or criminal charges filed."), 273(1) ("All state entities, public enterprises and institutions are obliged to report crimes that are being prosecuted ex-officio, about which they have been informed or found out about them otherwise."), 273(2) ("When filing charges, the applicants as referred to in paragraph 1 of this Article will also specify any evidence known to them and take necessary measures to preserve any traces of the criminal offence, items that have been used while it was committed or resulted from the commission of the criminal offense and other evidence."), 280 ("On the basis of the information collected, the judicial police compiles a criminal application on any actions performed, specifying all the evidence that was obtained.").

150 Law on Criminal Procedure (**R-11**) Art. 283.

official position by the persons named in the application, which purportedly caused damage to TE-TO's creditors.[151]

76. The Financial Police subsequently filed criminal complaints with the public prosecutor against two individuals named in Toplifikacija's complaint (Mr. Mihailov and Ms. Sardzovska) as well as Sashka Trajkovska (the bankruptcy judge who had by then approved TE-TO's proposal for reorganization),[152] but the charges were dismissed by the prosecutor in September 2020.[153]

4. GAMA's objection causes TE-TO to modify its Reorganization Plan

77. On 5 June 2018, the Basic Court held a hearing and vote on the Reorganization Plan. GAMA attended and reiterated the objections to the Reorganization Plan that it had previously made in its 22 May 2018 submission.

78. First, GAMA argued that "the requirements of art. 5 of the [Bankruptcy Law] are not met," because TE-TO's future insolvency was premised on making the Bitar Payments and Bitar had withdrawn its enforcement orders for those payments.[154] The Basic Court responded that Bitar's "withdrawal of enforcement orders [on 4 April 2018] does not mean the debtor's [TE-TO's] account is unfrozen. From the evidence enclosed in the

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151 Toplifikacija request to Public Prosecutor (**C-87**) at 2.

152 Financial Police Office announcement, dated 21 June 2019 (**C-19**).

153 Public Prosecutor's dismissal of criminal charges (**C-110**) ("The filed criminal charges related to possible irregularities in the work of the legal entity TE-TO" "From the overall analysis of all the material and verbal evidence attached and provided during the procedure, as well as from the legal evaluation of the criminal acts, it emerged that … the rights and obligations between these legal entities and their mutual claims are the subject of other procedures regulated by law, because business relations have been established between those legal entities and they are not subject to criminal legal proceedings. At the same time, the procedure for opening and implementing bankruptcy is regulated by a special law, which represents Lex specialis, and from the analysis of the evidence and the legal regulation, it appears that proceeding according to this law in the specific case also does not constitute a basis for criminal prosecution."); Public Prosecutor's dismissal of criminal charges (**C-110 MK**) (date of 29 September 2020 is shown on Macedonian original).

154 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 10 ("At the moment when the proposal to declare bankruptcy was proposed, the debtor's account has not been blocked for more than 45 [days], and bankruptcy has been declared for the reason of future insolvency. The enforcement orders in favour of the dominant shareholder [Bitar Holdings] are listed as proof of future insolvency. Since the enforcement orders dated 04.06.2018 … pertained to the creditor [Bitar Holdings], have been withdrawn, we consider that the reasons to open bankruptcy proceedings are no longer valid.").

casefile it can be seen that the account has been frozen for more than 45 days."[155] Under Macedonian bankruptcy law, the freezing of the debtor's bank accounts for more than 45 days is one of two possible grounds upon which bankruptcy proceedings may be started (the other ground being where "he/she faces a future inability to pay").[156]

79. Second, GAMA argued that the classification of creditors in the Reorganization Plan "subjected [GAMA] to unequal treatment in respect to the rest of [the] third class creditors."[157] TE-TO responded, as it had previously done in writing, by offering to reduce the number of creditor classifications from three to two.[158] The bankruptcy judge agreed with that approach and ordered TE-TO to "submit a corrected and consolidated version of the reorganization plan" within three days.[159] To allow those changes to be made, the bankruptcy judge postponed "deciding on the proposal and voting on the reorganization plan" until 14 June 2018.[160]

5. The Basic Court upholds TE-TO's Final Reorganization Plan

80. On 8 June 2018, TE-TO submitted its modifications to the Reorganization Plan to the Basic Court, thus creating a "corrected and consolidated" reorganization plan (the "**Final Reorganization Plan**").[161]

81. Responding to GAMA's concern, and as directed by the bankruptcy judge, the Final Reorganization Plan groups creditors into only two classes: creditors with secured claims (namely, Lades Bank Berlin and Komercijalna Banka) and creditors with unsecured claims (56 creditors including GAMA).[162] Creditors with secured claims would receive

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155 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 8.

156 Macedonian Bankruptcy Law Art. 5(1).

157 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 8.

158 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 8.

159 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 9.

160 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 9.

161 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 23.

162 TE-TO's Final Reorganization Plan (**C-14 SOC**) at 32-38 [31-37].

100% of their claim "according to the existing loan agreements until 2028."[163] Unsecured creditors would lose their claims to outstanding interest and to 90% of the principal debt claims, with the remaining 10% paid starting in 2028-2029 (*i.e.*, after the secured creditors had been paid in full).[164] Funds for repayment would come from operations and "additional sources" as necessary after "successful implementation of the Plan."[165]

82. TE-TO warned that since unsecured trade creditors with whom it had ongoing operational business (the Third Class of creditors in the initial Reorganization Plan) would not be fully paid, TE-TO might face "financial problems [that] impede[] the normal operations of TE-TO."[166] Still, the Final Reorganization Plan offered those creditors "the maximum possible,"[167] and otherwise they would receive nothing:

> If the Plan is not adopted, TE-TO JSC will enter into a classical bankruptcy procedure and if liquidation of the property occurs, neither the Secured Creditors will receive full settlement, nor the Unsecured Creditors will be able to collect anything from the amount received from the sale.[168]

83. At a hearing held on 14 June 2018, the bankruptcy judge adopted TE-TO's proposal to open a Prepackaged Bankruptcy procedure.[169] The bankruptcy judge observed that TE-TO "made all the corrections in [the Reorganization Plan] that were instructed" by the bankruptcy judge, and that the remark of GAMA:

> is accepted in the reorganization plan that it is a first-order creditor, but belongs to the class of unsecured creditor and that a claim is being filed with the debtor, so the classes are changed and two classes are suggested,

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163 TE-TO's Final Reorganization Plan (**C-14 SOC**) at 26 [25].

164 TE-TO's Final Reorganization Plan (**C-14 SOC**) at 26-27 [25-26].

165 TE-TO's Final Reorganization Plan (**C-14 SOC**) at 27 [26].

166 TE-TO's Final Reorganization Plan (**C-14 SOC**) at 32 [31].

167 TE-TO's Final Reorganization Plan (**C-14 SOC**) at 32 [31].

168 TE-TO's Final Reorganization Plan (**C-14 SOC**) at 32 [31].

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

> which are classes of secured and unsecured creditors and the manner in which they are settled with creditors.[170]

84. The bankruptcy judge determined that TE-TO "is insolvent, which is confirmed by all written evidence provided by the debtor on the economic and financial condition of the debtor, the report of the temporary Bankruptcy Trustee and the certificate from the Central Registry of [the Republic of Macedonia]."[171]

85. In confirming that TE-TO's accounts had been blocked for more than 45 days (as required under Article 5 of the Bankruptcy Law), the bankruptcy judge found that TE-TO's accounts were "blocked not only by the creditor Bitar Holdings Limited, but also by other legal entities, including Toplifikacija."[172] The bankruptcy judge held also that the Bitar Payments were "null and void [because they were] concluded in the period of 90 days before the submission of the [Reorganization Proposal]," but found that Bitar's underlying loan to TE-TO (as distinct from the accelerated Bitar Payments of that loan) remained payable.[173]

86. During the hearing on 14 June 2018, Toplifikacija and GAMA each filed motions that the President of the Basic Court recuse the bankruptcy judge, citing "doubts about her impartiality."[174] As Mr. Petrov explains, motions for recusal are a commonplace stalling tactic in bankruptcy proceedings in Macedonia.[175] In this case, the moving parties argued that the bankruptcy judge had given TE-TO and its shareholders "preferential treatment throughout" the reorganization process by wrongly allowing TE-TO to amend its reorganization plan and classify creditors as it did.[176] The Basic Court recessed for an

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170 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 24.

171 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 37. The Court explained further that "[i]n order to conduct this type of bankruptcy procedure, permanent insolvency is not required, but also future insolvency [is sufficient], which is something that is determined and supported by the other written submissions and the extraordinary audit report" (at 37).

172 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 37.

173 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 25.

174 Statement of Claim ¶ 111.

175 Petrov ¶ 94.

176 Statement of Claim ¶ 111; GAMA brief to Basic Court, dated 12 June 2018 (**C-101**).

hour to allow the President of the Basic Court to decide on the motion.[177] The President dismissed the motion.[178]

87. TE-TO's creditors voted on the Final Reorganization Plan at the 14 June 2018 hearing. GAMA voted against, as did Komercijalna Banka and Toplifikacija.[179] But 82.38% of all creditors present voted in favor, including 95.86% of the secured creditors (including Landesbank Berlin) and 77.45% of unsecured creditors.[180] The bankruptcy judge "concluded that the Assembly [of creditors] made a decision for accepting and adopting the submitted consolidated text of the reorganization plan."[181]

88. GAMA points out in this arbitration that "but for 'unexpected' claims of [its] shareholders, TE-TO was in a sustainable financial position, as TE-TO itself recognized in the proposed reorganization plan."[182] Indeed, TE-TO recognized in its Final Reorganization Plan that *if* its shareholder loans were "excluded" from consideration, then "in essence the company is in a sustainable financial position."[183] But that was describing a hypothetical situation. TE-TO did face payment obligations under its EUR 140 million in shareholder loans and could not walk away from them.[184]

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177 Minutes of the Basic Court hearing, held 14 June 2018 (**C-102**) at 5.

178 Minutes of the Basic Court hearing, held 14 June 2018 (**C-102**) at 5.

179 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 28.

180 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 28. The Court calculated that 90.14% of claims in the secured class, and 87% of claims in the unsecured class, were present for voting (at 28).

181 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 29. On 17 July 2018, the Basic Court issued a minor correction to its 14 June 2018 decision (Correction of the Basic Court, dated 17 July 2018 (**C-16**) (the correction added the word "consolidated" before the phrase "plan for reorganization," and added a paragraph rejecting a proposal from Toplifikacija to open a bankruptcy proceeding against TE-TO.).

182 Statement of Claim ¶ 78.

183 Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC**) at 85 [84].

184 TE-TO Reorganization Plan, dated April 2018 (**C-13**) at 8 (showing a loan payable to Bitar of EUR 112 million and a loan payable to Toplifikacija of EUR 28 million).

6. GAMA appeals the adoption of the Reorganization Proposal

89. On 25 June 2018, GAMA appealed the bankruptcy judge's 14 June 2018 decision to adopt TE-TO's Reorganization Proposal.[185] GAMA argued that the conditions for opening bankruptcy had not been met, TE-TO should not have been permitted to submit a "new" reorganization plan, the Final Reorganization Plan had not been published in the Official Gazette, and shareholder loans should not have been classified together with claims of other unsecured creditors.[186]

90. On 30 August 2018, the Court of Appeal (comprised of three judges) dismissed GAMA's appeal. The Court observed that "in this case it 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" (i.e., a Prepackaged Bankruptcy).[187] The Court elaborated that:

> reorganization is one of the ways to conduct bankruptcy proceedings, and the purpose of the reorganization plan, ie redefining the debtor-creditor relationship is to continue the business venture of the bankruptcy debtor in a formal legal sense by eliminating the reasons that led to insolvency of the debtor and by revitalizing his business venture with a series of legal economic measures.
>
> 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 [regular] bankruptcy of the bankruptcy debtor. Undoubtedly, the employees of the bankruptcy debtor also benefit, as well as the social community.[188]

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185 Appeal by GAMA, dated 25 June 2018 (**C-104**).

186 Appeal by GAMA, dated 25 June 2018 (**C-104**); Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 7.

187 Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 11; Petrov ¶¶ 47-49.

188 Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 14.

91. The Court of Appeal held that the Final Reorganization Plan was not a new reorganization plan, as GAMA had argued, "but only [a] corrected reorganization plan which includes all the remarks of the creditors."[189]

92. GAMA also argued that the "reorganization plan did not reflect the real situation and the capacity [of TE-TO] for regular servicing of the liabilities."[190] The Court of Appeal held that under "Article 215-a from the Bankruptcy Law, in which procedure the reorganization plan is submitted," it was "the creditors' assembly [that] decides whether the debtor's business venture shall be liquidated or the debtor will continue with work [according to the reorganization plan] overcoming the financial problems."[191] Moreover, TE-TO's financial situation had been independently assessed:

> In the specific case, in the case file there is a report on the economic financial condition of the debtor prepared by the Bankruptcy Trustee which gives a description of the financial condition of the debtor with a proposal to accept the reorganization plan and the debtor to continue the execution of its activity, and there is a financial report from a competent body, i.e. a report from an auditor in which consent is given for the submitted corrected reorganization plan …[192]

93. In this arbitration, GAMA asserts that the "[Court of Appeal] entirely failed to address" other arguments that GAMA purportedly raised on appeal, namely, that the Final Reorganization Plan "was in breach of provisions of the Bankruptcy Law regarding the ranking of creditors, that [the Bitar Payments] are null and void and that the period of implementation of the plan manifestly exceeds statutory defined period of five years …."[193] But the The Bitar Payments had been declared "null and void" by the Basic Court,[194] and the Court of Appeal addressed the arguments raised by GAMA together

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

190 Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 13.

191 Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 13.

192 Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 13.

193 Statement of Claim ¶ 120

194 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 25.

with arguments raised by other appellants.[195] In any case, each of those issues had already been addressed by the Basic Court. GAMA's concern about the "ranking of creditors" caused the Basic Court to order TE-TO to "submit a corrected and consolidated version of the reorganization plan,"[196] which led to the Final Reorganization Plan. And the Basic Court dismissed GAMA's complaint about the deadline for implementation of the Final Reorganization Plan "because the reorganization plan envisages repayment of creditors' claims with a longer period, which is allowed by provisions of the Bankruptcy Law."[197]

7. Macedonia terminates a tax deferral to TE-TO stemming from its reorganization

94. The write-off of TE-TO's liabilities under the Final Reorganization Plan resulted in profits for TE-TO in fiscal year 2018, which in turn triggered an unanticipated income tax liability for TE-TO.[198]

95. TE-TO "submitted several different proposals" to the Government of Macedonia "for state aid … [which would] postpone the profit tax payment obligation."[199] On 16 October 2019, the Macedonian Commission for Protection of Competition decided that payment of TE-TO's 2018 profit tax "shall be postponed … in accordance with Article 8, paragraph (2), item (6) from the Law on control of State Aid."[200] On 28 October 2019,

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[195] Decision of the Court of Appeal Skopje, dated 30 August 2018 (**C-17**) at 10, 12 (summarizing GAMA's grounds for appeal), 13 ("the First Instance Court determined correctly that the legal conditions were met to open bankruptcy proceedings" noting that "this case is not a class 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"), 14 ("creditors are divided into two classes" and the "conclusion of the First Instance Court is correct that this procedure is sui generis"), 15 ("the First Instance Court applied the substantial rights properly when applying the provisions from … 215-b … from the Bankruptcy Law" (which addresses the timeline for implementation)).

[196] Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 9.

[197] Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 23; Macedonian Bankruptcy Law (**R-10**) Art. 215-b(1) ("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 … in accordance with the plan for reorganization"); Petrov ¶¶ 159-163.

[198] Email from the Government dated 18 November 2019 (**C-24**) at 1.

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

[200] Decision of the Commission for Protection of Competition, dated 16 October 2019 (**C-120**) at 1.

TE-TO and the Government of Macedonia entered into an Agreement for Granting State Aid.[201] The state aid provided a deferral of TE-TO's "debt toward PRO [the Public Revenue Office] based on profit tax due to the recorded revenues of the conducted write-off of 90% of the liabilities towards the creditors under the Reorganization Plan."[202] In November 2019, the Macedonian Government, through the office of its Spokesperson, recognized that TE-TO "has financial difficulties [and] is practically not able to pay such a profit tax" and announced the Government's decision "to provide [a] deferral of profit tax" to TE-TO.[203]

96. The next day, Toplifikacija submitted a complaint to the State Commission for Prevention of Corruption, "expressing suspicions about corruptive actions … for granting state aid to [TE-TO]."[204] The Commission investigated the complaint, including by holding "several working meetings … with representatives of [Toplifikacija], with the bankruptcy trustee of TE-TO AD Skopje, with representatives and experts from competent bodies and institutions, and an online meeting was also held with the President of [North Macedonia]."[205] On 27 November 2020, the Commission decided that TE-TO's deferral of income tax should be terminated.[206] While the Law on State Aid Control permitted the Government to provide "aid for rescue and restructuring of enterprises in difficulties," the Commission found that the implementing regulations which "would determine the conditions and the procedure for granting state aid" had not yet been adopted.[207]

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201 Decision of the State Commission for Prevention of Corruption, dated 7 December 2020 (**C-139**) at 3.

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

203 Email from the Government dated 18 November 2019 (**C-24**) at 1, 2.

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

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

206 Decision of the State Commission for Prevention of Corruption, dated 7 December 2020 (**C-139**) at 1.

207 Macedonian Law on State Aid Control (**R-2**) Arts. 8(2)(v); Decision of the State Commission for Prevention of Corruption, dated 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.").

97. In April 2021, following the decision of the Commission, TE-TO borrowed funds from Komercijalna Banka, which allowed it to pay the 2018 profit tax.[208]

98. GAMA speculates in this arbitration that, "[i]f the Public Revenue Office would have commenced proceedings for enforced collection of the tax debt against TE-TO, this would have triggered the collapse of TE-TO's reorganisation and immediate opening of bankruptcy proceedings over TE-TO."[209] This assertion is unsupported, speculative, and implausible on its face. The fact that TE-TO was able to borrow funds to pay its tax debt in 2021 shows that TE-TO likely would have been able to do so earlier, had this been necessary.

99. GAMA then alleges that there were various connections between TE-TO and Macedonian officials at the time of the tax deferral. GAMA cites public statements made by former Macedonian Prime Minister Zoran Zaev in support of helping TE-TO.[210] Taken at its highest, GAMA paints a picture of various interests aligned with providing assistance to a struggling local business, TE-TO. That picture is not only unremarkable, but also incomplete. It omits, for example, that the President of the Government of Macedonia informed the State Commission for Prevention of Corruption, during their investigation of the tax deferral to TE-TO, that the "Agreement for Granting State Aid [to TE-TO] should be annulled-terminated due to the lack of legal regulations and bylaws."[211]

100. GAMA also asserts that EDS (an electricity trader owned by former Macedonian Deputy Prime Minister Kocho Angjushev) was "involved in[] anti-competitive arrangements with TE-TO and Gazprom [which imports gas into Macedonia],"[212] and assails the Macedonian Competition Commission for allegedly doing "nothing to investigate" what

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208 TE-TO Financial Statements, dated 31 December 2021 (**C-137**) at 77.

209 Statement of Claim ¶ 130.

210 Statement of Claim ¶¶ 146-149.

211 Decision of the State Commission for Prevention of Corruption, dated 7 December 2020 (**C-139**) at 3.

212 Statement of Claim ¶¶ 141-144.

GAMA says were illegal "restrictive agreements."[213] GAMA provides no elaboration or concrete evidence for its charge against EDS. And, even if there had been something to investigate, GAMA does not explain how those matters would have any relevance to the present case.

101. Finally, GAMA points to the Treaty Establishing Energy Community ("**TEC**") which governs the internal energy market within the E.U. and associated countries, and which GAMA says requires Macedonia to implement "competition law" including "rules prohibiting cartels, abuses of a dominant position, and rules prohibiting State aid."[214] GAMA says that Macedonia breached the State aid provision of the TEC by providing the tax deferral to TE-TO.[215] In doing so, GAMA ignores that the State Commission, which terminated the tax deferral to TE-TO, conducted its investigation under authority of the type of legislation that GAMA points to – the Law on Prevention of Corruption and Conflicts of Interests – and took appropriate action in light of the Macedonian Law on State Aid Control.[216]

102. In other words, GAMA appears to take the position that various 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. This is not a serious case, and it should be treated as such.

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213 Statement of Claim ¶¶ 145-146.

214 Statement of Claim ¶ 154.

215 Statement of Claim ¶ 157.

216 Decision of the State Commission for Prevention of Corruption, dated 7 December 2020 (**C-139**) at 1.

E. GAMA CONTINUES TO LITIGATE ITS CASE AGAINST TE-TO IN THE MACEDONIAN COURTS, EVEN AFTER STARTING THIS ARBITRATION

1. The Basic Court annuls GAMA's Payment Order

103. In early May 2018, after two appeals on procedural issues had run their course, the Basic Court turned to the merits of the claim that GAMA had filed in 2012 (before changing its mind and attempting to withdraw the same) seeking to enforce the EUR 5 million Payment Order.[217] The Court considered a report prepared by an economic expert, Goran Markovski. Mr. Markovski had been retained by TE-TO to opine on GAMA's claim of EUR 5 million, and prepared his report in that capacity. Based on a review of TE-TO's documents, Mr. Markovski concluded that:

> [T]he Claimant [GAMA] failed to meet the obligations and tasks undertaken in relation with the Respondent [TE-TO] in terms of removal of the identified latent defects of the equipment installed and the systems, which were detected during their exploitation or during the commissioning of the plant.[218]

104. The Basic Court reviewed Mr. Markovski's report, the "final list of tasks to be completed" (i.e., the Punch List), meeting minutes, correspondence exchanged between TE-TO and GAMA, and the EPC Contract and Settlement Agreement.[219] The Court found that:

> [TE-TO] did not pay the [EUR 5 million] debt according to the claimant's [GAMA's] invoice due to the fact that the claimant did not fulfil the obligations and tasks owed to the defendant to eliminate identified hidden deficiencies of the built-in equipment and systems, discovered during exploitation, with common defects in performance and commissioning of the power plant.[220]

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

218 Expert report of Goran Markovski, dated November 2013 (**C-48**) at 9.

219 Decision of the Basic Court, dated 4 May 2018 (**C-10**) at 6.

220 Decision of the Basic Court, dated 4 May 2018 (**C-10**) at 7.

105. The Basic Court held that "the tasks agreed between the parties were a condition for payment of the disputed amount, but they were not completed by the claimant."[221] The Court relied on "Article 111 of the Law on Obligations, according to which the defendant is not obliged to fulfil the obligation if the claimant as another contracting party has not fulfilled its obligation."[222] Applying that provision, the Court concluded that "the defendant is not obliged to fulfil the obligation to the claimant … given that the claimant has not fulfilled his obligations."[223] The Basic Court therefore held that TE-TO did not owe a debt to GAMA and annulled the Payment Order.[224]

106. GAMA had argued, among other things, that the Basic Court was "obliged to apply the English law" to interpret the Settlement Agreement and to determine if TE-TO had a payment obligation toward GAMA, and faults the courts in this arbitration for not having done so.[225] But GAMA did not adduce any evidence about the content of English law, and did not articulate how the Settlement Agreement should be interpreted under English law.[226]

2. TE-TO's damages claim against GAMA is dismissed

107. The Macedonian courts also considered the damages claim brought by TE-TO against GAMA in December 2014, seeking approximately EUR 5 million for an alleged breach of the Settlement Agreement.[227] In early April 2019, GAMA objected to the Basic

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221 Decision of the Basic Court, dated 4 May 2018 (**C-10**) at 8.

222 Decision of the Basic Court, dated 4 May 2018 (**C-10**) at 9. Article 111(1) of the Law on Obligations provides: "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" (Macedonian Law on Obligations (**R-5**) Art. 111(1)).

223 Decision of the Basic Court, dated 4 May 2018 (**C-10**) at 9.

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

225 Statement of Claim ¶ 49, FN 62 (pointing to GAMA submission to the Basic Court, dated 13 March 2015 (**C-55**) at 4).

226 GAMA submission to the Basic Court, dated 13 March 2015 (**C-55**).

227 *See supra* ¶ 51; Claimant refers to TE-TO's damages claim against GAMA as "TE-TO's counterclaim" (*see e.g.* Statement of Claim ¶ 58), and the Basic Court has referred to it as a "counterclaim" (*See e.g.* Decision of Basic Court, dated 12 June 2015 (**C-59**) at 2). In September 2016, GAMA successfully resisted the joinder of that claim with the proceedings concerning GAMA's Payment Order claim (Decision of the Basic Court, dated 29 September 2016 (**C-62**)).

Court's jurisdiction over TE-TO's damages claim.[228] The Court of Appeal decided this objection at the end of April 2019, relying on Article 15(3) of the Law on Litigation Procedure, which provides:

> When the court, during the course of the procedure, finds that a court in the Republic of Macedonia is not competent for resolving the dispute, it shall ex-officio pronounce itself incompetent, abolish the activities conducted in the procedure and dismiss the lawsuit, except in cases when the competence of a court in the Republic of Macedonia depends on the defendant's consent, where[] he has given the consent.[229]

108. The Court of Appeal also relied on Article 56(1) of the Law on Private International Law, under which "the parties may agree on the competence of a foreign court" if at least one of the parties is a foreign entity.[230]

109. Applying those provisions, the Court of Appeal determined that because TE-TO and GAMA (a foreign entity) had entered into the arbitration agreement in the EPC Contract, and since the defendant to the damages claim (GAMA) did not consent to the jurisdiction of the Macedonian courts, the Basic Court was not competent to hear TE-TO's damages claim.[231]

3. GAMA unsuccessfully appeals the Basic Court's annulment of the Payment Order before the Court of Appeal

110. As explained above, the Basic Court decided in May 2018 to annul the EUR 5 million Payment Order that GAMA had obtained against TE-TO. GAMA subsequently appealed the Basic Court's decision, arguing that: (i) TE-TO's obligation to pay EUR 5 million (based on GAMA's invoice dated 31 March 2012) cannot be "conditioned with the fulfillment of obligations [under the Settlement Agreement] for which the performance

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[228] Decision of the Court of Appeal Skopje, dated 23 April 2019 (**C-63**) at 1. TE-TO made its damages claim against GAMA on 30 December 2014

[229] Macedonian Law on Litigation Procedure (**C-39**) Art. 15(3). *See also* Decision of the Court of Appeal Skopje, dated 23 April 2019 (**C-63**) at 1.

[230] Decision of the Court of Appeal Skopje, dated 23 April 2019 (**C-63**) at 2; Macedonian Law on Private International Law **(R-1**) Art. 56(1).

[231] Decision of the Court of Appeal Skopje, dated 23 April 2019 (**C-63**) at 2-3.

period was in April, June and August 2012",[232] (ii) the Settlement Agreement "do[es] not contain [*sic*] that payment is conditioned on fulfillment of any obligations",[233] and (iii) "TE-TO recognized GAMA as the creditor with [a] claim of EUR 5,000,000" in its reorganization plan.[234]

111. In October 2019, the Court of Appeal upheld the Basic Court's annulment of the Payment Order. The Court of Appeal held that "the First instance court gave an analysis of the determined facts and the presented evidence and stated the reasons why it considered a certain fact to be determined and in the explanation of the judgement it presented the legal reasons for its judgment."[235] The Court of Appeal found that the Basic Court had examined:

> written letters, memorandum signed and stamped by the defendant [TE-TO], submitted by the defendant to the claimant … from which the court correctly determined that the defendant addressed the claimant in writing and indicated determined defects in terms of omissions and unfinished items and new things discovered during the operation of the power plant during 2012 and … called the claimant in writing to correct and eliminate the errors due to breach of the contract by the claimant, but the claimant did not do so and did not act according to the Supplement number 9 [Settlement Agreement].[236]

112. The Court of Appeal found that GAMA "did not submit evidence of the basis for the claim other than invoice A028 from 30.03.2012 in the amount of 5,000,000 Euros,"[237] whereas TE-TO submitted the expert report of Mr. Markovski which included a report on unfinished tasks and hidden defects based on an "analysis of the documentation."[238]

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232 GAMA appeal, dated 25 September 2018 (**C-68**) at 3.

233 GAMA appeal, dated 25 September 2018 (**C-68**) at 4.

234 GAMA appeal, dated 25 September 2018 (**C-68**) at 5.

235 Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**) at 3.

236 Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**) at 6.

237 Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**) at 5.

238 Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**) at 4-5.

113. The Court of Appeal confirmed the Basic Court's finding that GAMA "was responsible for all hidden defaults and defects in the equipment and systems observed during the performance or commissioning," and that "Article 3 [of the Settlement Agreement] stated the obligation of [GAMA] to perform removal of construction defects in accordance with the agreed list of tasks and a revised list of tasks."[239]

4. GAMA successfully appeals the annulment of the Payment Order before the Macedonian Supreme Court

114. On 23 December 2020, the Supreme Court quashed the Court of Appeal's decision annulling the Payment Order and remanded the case to the Basic Court.[240] The Supreme Court found that (i) GAMA "is obliged to eliminate the defects in the construction in compliance with the agreed list of tasks and a revised list of tasks," (ii) TE-TO is obliged "to pay the contractor a net amount of 5,000,000 EUR," and (iii) the expert findings of Mr. Markovski established a list of "unfinished tasks" and the "state of hidden defects" that GAMA was obligated to finish and remedy.[241] The Supreme Court did not fully accept the lower courts' finding that the Settlement Agreement made TE-TO's obligation to pay contingent on GAMA's completing its work.[242]

115. The Supreme Court instructed the Basic Court to "take into account the assessments of this court" and "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."[243]

116. GAMA asserts in this arbitration that "the Supreme Court fully accepted GAMA's arguments."[244] It did not. The Supreme Court held that "it is not clear why the lower

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239 Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**) at 4.

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

241 Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**) at 2.

242 Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**) at 3 (emphasis added).

243 Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**) at 3 (emphasis added).

244 Statement of Claim ¶ 64; Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**) at 3.

courts" accepted TE-TO's debt as conditional, and instructed the Basic Court to consider "whether" it is conditional.

117. GAMA argued before the Supreme Court that the application of the Macedonian Law on Obligations is "opposite to the [parties'] selected applicable legislation" (i.e., English law).[245] But GAMA again did not submit evidence on the content of English law, or articulate how the Settlement Agreement would be interpreted under English law.

5. When the Payment Order claim is remanded to the Basic Court, GAMA accepts the court's jurisdiction

118. In August 2021, GAMA submitted a brief on the enforcement of the Payment Order to the Basic Court, which was considering the Payment Order claim on remand. In its brief, GAMA argued that despite the arbitration agreement in the EPC Contract, the Basic Court "is obliged to decide" and competent to "pass a lawful decision" on the Payment Order claim:

> The [EPC Contract] stipulates that the parties will resolve any disputes by applying the English law and arbitration proceeding before the Arbitration Court of the United Kingdom, so since there is no evidence that TE-TO initiated arbitration proceeding before the said Arbitration Court, there is no evidence that TE-TO has any claim against [GAMA] and any allegation otherwise is intended only to avoid the obligation to pay the amount of EUR 5 million. In any event, **the court in this retrial is obliged to decide** on the basis of the allegations and the evidence submitted in the previous proceeding. …
>
> **[W]e believe that the Court**, on the basis of a complete and correct evaluation of each piece of evidence and all the evidence together, **is able to** correctly and completely establish the factual situation and **pass a lawful decision** dismissing TE-TO's Complaint on the merits, and ordering that the Decision of Notary Snezhana Vidovska UPDR no. 2806/12 of 04.12.2012 remain in force ….[246]

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[245] Statement of Claim ¶ 49, FN 62 (pointing to GAMA submission to the Macedonian Supreme Court, dated 24 December 2019 (**C-69**) at 5).

[246] GAMA brief filed with the Basic Court, dated 23 August 2021 (**C-70**) at 2-3 (emphasis added).

119. In October 2021, the Basic Court (on remand and differently constituted) issued a decision revoking the Payment Order.[247] In doing so, the Basic Court "acted upon the instruction provide by the Supreme Court … and conducted [a] re-evaluation of the presented evidence."[248] The Basic Court found that:

a) GAMA "is responsible for all defects in the power plant, and they are obliged to remove such defects according to the List of tasks and … as stated in [Article 3 of the Settlement Agreement], as a result of late performance."[249]

b) TE-TO "explained in detail the outstanding works which were the obligation of [GAMA] …."[250]

c) "[T]he obligations for [GAMA] were known and they were the result of the concluded main agreement concluded between the parties, and not from [the Settlement Agreement] …."[251]

d) With respect to the deadlines for GAMA to fulfill its obligations, "most of them matured immediately" (*i.e.* upon execution of the Settlement Agreement in February 2012).[252]

120. The Basic Court thus followed the instructions given by the Supreme Court "to assess the deadlines set in the agreement" and "to consider whether and why there is a conditionality."[253] The Basic Court found that "most" of the deadlines for GAMA's obligations were immediate (upon execution of the Settlement Agreement on 24 February 2012), yet GAMA had not satisfied those obligations. Accordingly, the Basic Court concluded that GAMA's Payment Order claim was unfounded:

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247 Decision of the Basic Court, dated 8 October 2021 (**C-71**).

248 Decision of the Basic Court, dated 8 October 2021 (**C-71**) at 9.

249 Decision of the Basic Court, dated 8 October 2021 (**C-71**) at 9.

250 Decision of the Basic Court, dated 8 October 2021 (**C-71**) at 9.

251 Decision of the Basic Court, dated 8 October 2021 (**C-71**) at 9.

252 Decision of the Basic Court, dated 8 October 2021 (**C-71**) at 9-10.

253 Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**) at 3.

> [T]he court, according to the instructions from the Supreme Court, decided that the claim of the plaintiff is completely unfounded. The Defendant did not pay their debt according to the plaintiff's invoice, due to reasons that the plaintiff failed to fulfill their obligations and tasks towards the defendant for removal of the established hidden defects in the installed equipment and systems, as discovered during the exploitation, along with the usual defects from the construction and commissioning of the power plant.[254]

6. After starting this arbitration, GAMA successfully appeals the Basic Court's second annulment decision

121. In February 2022, almost three months after starting this arbitration, GAMA appealed the Basic Court's decision of October 2021 before the Court of Appeal.[255]

122. GAMA again submitted that the application of "Macedonian substantive law … [rather than] the English legislation is also disputable,"[256] but still relied on Macedonian law and did not submit evidence on English law, let alone articulate how the Settlement Agreement would be interpreted under English law.[257] GAMA argued also that TE-TO cannot deny its debt to GAMA because TE-TO recognized the debt in its Final Reorganization Plan.[258]

123. On 30 June 2022, the Court of Appeal agreed with GAMA that the debt had been recognized.[259] The Court of Appeal remanded the matter to the Basic Court with instructions to "take into consideration" that "the plaintiff [GAMA] is a bankruptcy creditor and has a claim in the amount of 5 million euros" in TE-TO's reorganization

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254 Decision of the Basic Court, dated 8 October 2021 (**C-71**) at 10.

255 GAMA submissions to the Court of Appeal Skopje, dated 2 February 2022 (**C-72**). GAMA commenced this arbitration in November 2021. *See* Request for Arbitration, dated 23 November 2021.

256 GAMA submissions to the Court of Appeal Skopje, dated 2 February 2022 (**C-72**) at 8.

257 GAMA submissions to the Court of Appeal Skopje, dated 2 February 2022 (**C-72**) at 7 (GAMA submitted arguments about the application of Art. 111 of the Macedonian Law on Obligations).

258 GAMA submissions to the Court of Appeal Skopje, dated 2 February 2022 (**C-72**) at 5, 6. GAMA argued also that since some "irregularities" identified by TE-TO's expert, Mr. Markovski, were discovered after the Settlement Agreement was executed, they could not have been pre-conditions for TE-TO's payment obligation (at 3).

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

plan that was approved by the Basic Court and "confirmed by the decision of the Court of Appeal Skopje."[260]

124. On 31 January 2023 – after filing its Statement of Claim in this arbitration – GAMA filed another written submissions in the Basic Court, restarting proceedings in pursuit of its EUR 5 million claim against TE-TO.[261] These proceedings remain pending.

III. GAMA HAS FAILED TO ESTABLISH A VIOLATION OF THE TREATY

125. GAMA's Treaty claims revolve around the Macedonian court proceedings concerning TE-TO's reorganization and GAMA's Payment Order claim. Macedonia shows below that, absent proof of a denial of justice, investment tribunals defer to the decisions of domestic courts on issues of domestic law (**Section A**). GAMA's complaints about the Macedonian courts fall to be assessed against the denial of justice standard (**Section B**), and GAMA's treatment before Macedonian courts does not come remotely close to meeting that standard (**Section C**). Macedonia did not expropriate GAMA's investment (**Section D**) and treated it no less favorably than investments of its own nationals or those of nationals of third States (**Section E**). GAMA cannot import substantive protections from other treaties, and in any case, Macedonia did not violate those standards (**Section F**).

A. GAMA'S CLAIMS FAIL BECAUSE THIS TRIBUNAL IS NOT AN APPELLATE COURT FOR MACEDONIAN COURT DECISIONS AND PROCEEDINGS

126. Investment tribunals have no jurisdiction to review the decisions of domestic courts for errors of facts or law. It is firmly established that investment treaty tribunals are not "supranational appellate courts" sitting in judgment on the decisions and proceedings of national courts on national laws.[262] As the tribunal in *Oostergetel v. Slovak Republic* put

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[260] Decision of the Court of Appeal Skopje, dated 30 June 2022 (**C-73**) at 2.

[261] GAMA submission to the Basic Court, dated 31 January 2023 (**R-12**) at 4 (asking the Basic Court to "make a legal decision … [that] the Determination of the Notary Snezhana Vidovska UPDR no. 2806/12 of 04.12.2012 remains in force".).

[262] *See*, *e.g.*, *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility (14 June 2013) ("***Apotex v. United States***") (**RL-71**) ¶ 278 ("[I]t is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court,

it succinctly, "[t]he role of an investment tribunal is not to serve as a court of appeal for national courts."[263] The tribunal in *Perenco v. Ecuador* elaborated on this fundamental principle:

> [I]n applying international law, the Tribunal does not act as a court of appeal on questions of Ecuadorian law. This jurisdictional limit is well-established in the jurisprudence. The Tribunal must recognise the allocation of competencies between adjudicatory bodies at the national

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or to act as a supranational appellate court."); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003) **(RL-23)** ¶ 190 ("[T]he Tribunal has no authority to review the legal validity and standing of the U.S. measures here in question under U.S. internal administrative law. We do not sit as a court with appellate jurisdiction with respect to US measures."); *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V 2014/168, Award (29 April 2020) (**RL-107**) ¶ 474 ("The Tribunal agrees with a number of investment tribunals, which have underscored that investment treaty tribunals are not courts of appeal and their role is not to assess the correctness of local judgments, as courts of appeal normally do."); *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**) ¶ 274 ("[A]n 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."); *Limited Liability Company Amto v. Ukraine*, SCC Arb. No. 080/2005, Final Award (26 March 2008) ("***Amto v. Ukraine***") (**RL-36**) § 80 ("This Tribunal is not a court of appeal for the decisions of the Ukrainian courts."); *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***") (**CL-46**) ¶¶ 8.36-8.37*; Elettronica Sicula S.p.A. (ELSI), United States of America v. Italy*, Judgment of the Court (20 July 1989) ("***ELSI***") (**CL-28**) ¶ 124 ("[I]t must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise."); *Amto v. Ukraine* (**RL-36**) ¶ 80 ("In the absence of any demonstrated procedural irregularity or interference, the Claimant's objection to these decisions is simply that they are wrong in law. This Tribunal is not a court of appeal for the decisions of the Ukrainian courts.") *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V 078/2005, Award (12 September 2010) (**RL-50**) ¶ 275 ("The Tribunal emphasises again …[it] 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."); *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010) (**RL-52**) ¶ 7.1.11 (holding that "BIT tribunals do not reopen the municipal law decisions of competent fora, absent a denial of justice"); *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, 102-103 ("The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction"; *See also Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) ("***Mondev v. United States***") (**CL-13**) ¶ 126 (citing *Azinian v. Mexico* with approval); Eduardo Jiménez de Aréchaga, *International Responsibility*, 159 RECUEIL DES COURS 267 (1978) (**RL-12**) at 281 ("As a rule, a State does not incur 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.") 282 ("It is not for an international tribunal to act as a court of appeal or of cassation and to verify in its minute detail the correct application of municipal law.").

[263] *Jan Oostergetel and Theodora Laurentius v. Slovak Republic*, UNCITRAL, Award (23 April 2012) ("***Oostergetel v. Slovak Republic***") (**RL-63**) ¶ 291 (citing *Mondev v. United States* (**CL-13**) ¶ 126 and *Azinian v. Mexico* (**RL-15**) ¶ 99).

> and international levels. An international tribunal cannot second-guess the court's interpretation and application of local law.[264]

127. The tribunal in *Gramercy Funds v. Peru* recently reiterated that the decisions of a State's judiciary enjoy a "presumption of legality,"[265] explaining that "[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."[266]

128. The powers of international tribunals in this context are therefore strictly limited.[267] The starting point is that tribunals must defer to decisions of municipal courts, affording them

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[264] *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) ("***Perenco v. Ecuador***") (**RL-77**) ¶ 583.

[265] *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. ("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")

[266] *Gramercy Funds v. Peru* (**RL-114**) ¶ 1020. *See also RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010) (**RL-52**) ¶ 7.1.11 (holding that "[e]ven when the contractual forum is not an ICSID Tribunal, BIT tribunals do not reopen the municipal law decisions of competent fora, absent a denial of justice"); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (3 July 2008) (**RL-37**) ¶ 106 ("An ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the Tribunal will accept the findings of local courts as long as no deficiencies, in procedure or substance, are shown in regard to the local proceedings which are of a nature of rendering these deficiencies unacceptable from the viewpoint of international law, such as in the case of a denial of justice."); *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**) ¶ 264 ("ICSID tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law. They only have to consider whether they constitute a violation of international law, and in particular whether they amount to a denial of justice."); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011) (**RL-62**) ¶ 312 ("[A]n 'erroneous judgment' by a court would not violate the treaty in the absence of a denial of justice, that is, a violation of the due process principle."); *Liman v. Kazakhstan* (**RL-48**) ¶ 326 ("[A] court decision can be incorrect in terms of domestic law but still be irreproachable from the perspective of international law."); *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 national law does not per se involve responsibility."); JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (CAMBRIDGE UNIVERSITY PRESS 2005) ("**PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW**") (**RL-28**) at 81 ("The erroneous application of national law cannot, in itself, be an international denial of justice.").

[267] *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**) ¶ 369 ("The starting point of any analysis of denial of justice must be an acknowledgement that in this area the Tribunal's powers are subject to strict limitations: the Tribunal is not a municipal Court of appeal ….").

a "wide margin of appreciation"[268] and adopting the presumption that these courts acted properly.[269] It is for the claimants to rebut this strong presumption by proving that there has been a denial of justice. Absent proof of a denial of justice, tribunals cannot substitute their own application and interpretation of national law and are instead bound by findings of national law by local courts.

B. GAMA'S CASE OF ALLEGED MISTREATMENT BY THE MACEDONIAN JUDICIARY MUST BE ASSESSED UNDER THE DENIAL OF JUSTICE STANDARD

129. Even if GAMA could prove that the Macedonian courts made errors of fact or law, this would not be enough to engage Macedonia's responsibility under the Treaty. It is a longstanding principle of international law, including international investment law, that the conduct of a State's judiciary does not attract international liability unless a denial of justice is proved. GAMA has not come close to showing conduct that could amount to a denial of justice.

1. It is firmly established in international jurisprudence that the conduct of a municipal judiciary does not give rise to an international wrong absent a Denial of Justice

130. Customary international law has long recognized that judicial conduct may trigger the responsibility of a State only in the case of a denial of justice (absent a specific treaty provision to the contrary). In *The Lotus Case*, the Permanent Court of International Justice thus observed that an error of a judicial authority "can affect international law

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[268] *Lion v. Mexico* (**RL-113**) ¶ 369.

[269] *Chevron v. Ecuador* (**CL-46**) ¶¶ 8.41-42 (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"); Eduardo Jiménez de Aréchaga, *International Responsibility of States for Acts of the Judiciary*, *in* ESSAYS IN HONOR OF PHILIP C. JESSUP (1972) (**RL-10**) at 182 ("[I]t is unanimously agreed that in this subject there is one important presumption: that municipal judicial decisions are in conformity with both municipal and international law. The result of this presumption is that the onus of proof is on the claimant state to demonstrate that the acts of judicial organs are in violation of municipal or international law.")' CAMPBELL MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2017) ("**CAMPBELL MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION**") (**RL-96**) ¶ 7.135 ("The international tribunal may not substitute its view of the correct application of national law for that of the national courts.").

only in so far as a treaty provision enters into account, or the possibility of a denial of justice."[270]

131. Former ICJ Judge Christopher Greenwood explains that where only judicial conduct is at issue, "[i]f there is to be a cause of action at all 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."[271] Echoing this view, international legal scholar Edwin M. Borchard opined almost a century ago that "[o]nly if the court has misapplied international law, or if the municipal law in question is in derogation of the international duties of the state, or if the court has willfully and in bad faith disregarded or misinterpreted its municipal law, does the state incur international liability."[272]

132. More recently, Professor J.L. Brierly explained that the special considerations at play in a review of judicial conduct are justified because "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."[273] Professor Zachary Douglas likewise observes that there is "something special about the form of decision-making known as adjudication that justifies both the imposition of this additional burden for establishing liability in the form of the rule on recourse to local remedies as well as the existence of a separate delict relating to acts or omissions relating to an adjudicative process more generally."[274]

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[270] *The Case of the S.S. "Lotus"*, Judgment No. 9, PCIJ Reports Series A No. 9 (7 September 1927) (**RL-2**) at 24.

[271] 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) ("**Greenwood, *State Responsibility For The Decisions Of National Courts***") (**RL-27**) at 60.

[272] EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1927) (**RL-3**) at 332.

[273] J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (6th ed. 1963) ("**J.L. BRIERLY, THE LAW OF NATIONS**") (**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.").

[274] *Id.,* at 3. See also MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT (2013) (**RL-74**) at 208.

2. Investment treaty jurisprudence likewise recognizes that it is only in case of Denial of Justice that domestic judicial decisions may engage the host State's responsibility

133. Those established rules on denial of justice apply to the realm of international investment law.[275] As many investment treaty tribunals have concluded, when a claim challenges the conduct of the judiciary under an investment treaty, that conduct falls to be assessed under the denial of justice standard.

134. The tribunal in *Jan de Nul v. Egypt*, for example, concluded that where the actions of the judiciary "lie[] at the core" of the impugned acts, the relevant legal standards are those relating to denial of justice:

> Even though the Claimants deny that the Judgment is 'the object' of their claim . . . . [t]he Judgment lies at the core of this set of acts. Therefore, the Tribunal is of the opinion that the relevant 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.[276]

135. In *Swisslion v. Macedonia*, the tribunal (chaired by ICJ Judge Gilbert Guillaume) cautioned that "ICSID tribunals are not directly concerned with the question of 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."[277]

136. The claimant in *Amto v. Ukraine,* not unlike GAMA in this case, contended that a bankruptcy proceeding was marred by "delay, error, and tolerance of procedural abuse" by the courts[278] and that certain court decisions "lacked a foundation in reality as well as

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[275] *Swisslion v. Macedonia* (**RL-65**) ¶ 262 ("Those rules [regarding state responsibility for denial of justice] are applicable in international investment law and have been applied by ICSID arbitral tribunals.").

[276] *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.

[277] *Swisslion v. Macedonia* (**RL-65**) ¶ 264. *See also Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007) ("***Parkerings v. Lithuania***") (**RL-34**) ¶ 313 ("subject to denial of justice, which is not at issue here, an erroneous judgment [...] shall not in itself run against international law, including the Treaty.").

[278] *Amto v. Ukraine* (**RL-36**) ¶ 77.

in law."[279] The tribunal ruled that, while there had been some "procedural irregularities" in the bankruptcy proceeding,[280] the "treatment of an investor by national courts should be examined . . . to determine whether or not there has been a denial of justice."[281] The tribunal rejected all claims about the court proceedings because the claimant "failed to demonstrate any denial of justice … or any series of circumstances that cumulatively amount to a denial of justice."[282]

3. GAMA provides no authority saying that investment treaty tribunals can assess the conduct of domestic courts against a standard other than denial of justice

137. To engage Macedonia's liability, GAMA must establish a denial of justice against a standard that has evolved over many decades to account for the unique nature of judicial conduct. GAMA cannot circumvent this requirement by labelling its complaints about the Macedonian judicial system as treaty breaches of different names. As observed by the *Jan de Nul* tribunal, "[h]olding otherwise would allow [a claimant] to circumvent the standards of denial of justice."[283]

138. GAMA devotes a single sentence in its Statement of Claim to denying that the conduct of a national judiciary must be assessed solely against the denial of justice standard. GAMA says that "the Tribunal may review the decisions of the courts both under treaty standards of protection and denial of justice," and footnotes five cases in support.[284]

139. None of those five cases gives permission to avoid the denial of justice standard. Rather, the tribunal in each case assessed judicial conduct against the denial of justice standard or was concerned with the conduct of other state organs intertwined with the judicial conduct at issue.

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279 *Amto v. Ukraine* (**RL-36**) ¶ 79.

280 *Amto v. Ukraine* (**RL-36**) ¶ 79.

281 *Amto v. Ukraine* (**RL-36**) ¶ 78.

282 *Amto v. Ukraine* (**RL-36**) ¶ 84.

283 *Jan de Nul v. Egypt* (**RL-39**) ¶ 191.

284 Statement of Claim ¶ 186, and footnotes 282-283.

a) In *Arif v. Moldova*,[285] the tribunal dismissed the claimant's expropriation claim because it was not convinced that the Moldovan courts had colluded with the claimant's competitors or that there had been a "denial of justice in any way."[286] While the tribunal found that Moldova breached the claimant's legitimate expectation of a secure legal framework, that was based on the conduct of the state airport enterprise and aviation authority which had endorsed and encouraged an investment that the Moldovan courts later found illegal.[287] That part of the decision was therefore concerned with the conduct of other state organs, not the courts.

b) In *Deutsche Bank v. Sri Lanka*,[288] the tribunal found a "serious" due process violation where an interim judicial order was issued for "political reasons" on instructions of the Sri Lankan government.[289] The tribunal found also that the Sri Lankan Supreme Court had coordinated its actions with the Sri Lankan Central Bank.[290] This was a textbook example of a denial of justice (*i.e.*, a judicial decision had been dictated by the executive[291]). The combined effect of Sri Lanka's judicial and non-judicial misconduct provided the basis for the tribunal's conclusion that Sri Lanka had breached the FET standard and expropriated the claimant's investment.[292]

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285 Statement of Claim ¶ 186, footnote 282.

286 *Mr. Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award (8 April 2013) ("***Arif v. Moldova***") (**RL-69**) ¶ 441.

287 *Arif v. Moldova* (**RL-69**) ¶ 547(b).

288 Statement of Claim ¶ 186, footnote 283.

289 *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**) ¶ 479.

290 *Deutsche Bank v. Sri Lanka* (**CL-22**) ¶ 521; ¶ 511-512; see also ¶ 523 ("The entire value of Deutsche Bank's investment was expropriated for the benefit of Sri Lanka itself…the actions by the Supreme Court and the Central Bank were not legitimate regulatory actions. They involved excess of powers and improper motive as well as serious breaches of due process, transparency and indeed a lack of good faith.").

291 J.L. BRIERLY, THE LAW OF NATIONS (**RL-6**) at 287 (listing "a judgment dictated by the executive" as an example of denial of justice).

292 *Deutsche Bank v. Sri Lanka* (**CL-22**) ¶ 561.

c) In *Saipem v. Bangladesh*,[293] 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 it was instituted" and that the claimant had effectively exhausted local remedies.[294] The tribunal thus formulated its findings in the language of denial of justice.

d) In *ATA Construction v. Jordan*,[295] the tribunal found Jordan liable for the Jordanian courts' retroactive application of a law extinguishing the claimant's right to new arbitration against an entity effectively controlled by the State.[296] The tribunal did not specify on what grounds it found against Jordan, but said: "Retroactivity is the problem here."[297] A court's retroactive application of a law is a hallmark of denial of justice.[298]

e) In *OAO Tatneft v. Ukraine*,[299] the tribunal found that the alleged defects in a Ukrainian court procedure did not give rise to a denial of justice,[300] holding that

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[293] Statement of Claim ¶ 186, footnote 283.

[294] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009) ("***Saipem v. Bangladesh***") (**CL-24**) ¶¶ 155, 159-161, 167-169, 182-183, 187. *See also GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case ARB/08/16, Award (31 March 2011) (**RL-58**) ¶¶ 234, 236 (the tribunal characterized *Saipem v. Bangladesh* as having involved "egregious" acts by the courts "deliberately taken to thwart" the investor's ability to enforce its award).

[295] Statement of Claim ¶ 186, footnote 283.

[296] *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010) ("***ATA Construction v. Jordan***") (**CL-15**) ¶ 126-127.

[297] *ATA Construction v. Jordan* (**CL-15**) ¶ 128 ("Retroactivity is the problem here. The new rule should cover only those arbitration agreements concluded after the coming into force of the Jordanian Arbitration Law in 2001 and not arbitration agreements existing before the 2001 Law came into force… the Jordanian Court of Appeal and Court of Cassation could have complied with their duty in this case by refusing to apply retroactively the new rule.")

[298] See PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (**RL-28**) at 199-200 ("Unfettered discretion to apply new or modified rules retrospectively may obviously result in the negation of legal security…It is not difficult to see that the retroactive application of law by judges must be characterized as a denial of justice if courts thereby make themselves the tools of 'targeted legislation.'"…the sudden emergence of a full-blown rule where none had existed, must be viewed with the greatest skepticism if their effect is to disadvantage a foreigner."

[299] Statement of Claim ¶ 186, footnote 283.

"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."[301] Rather, it was judicial intervention as "part of a complex network of acts" – including the executive actions of the Prosecutor General ("an executive organ under the authority of the Presidential Administration" with an "overly powerful role"[302]), which appeared to have served the interests of the Ukrainian minority shareholder that ended up controlling the refinery in which the claimant had invested, and from whose office "[m]ost of the judicial decisions relevant in this dispute originated" – that engaged Ukraine's international responsibility and led the tribunal to find a breach of the FET standard.[303]

4. A denial of justice requires a showing of outrageous and discreditable miscarriage of justice by the judicial system as a whole

140. The denial of justice standard is "a demanding one."[304] It "goes far beyond the mere misapplication of domestic law."[305] In Judge Fitzmaurice's words, "the merely erroneous or unjust decision of a court, even though it may involve what amounts to a miscarriage of justice, is not a denial of justice, and, moreover, does not involve the responsibility of the state.[306] Bare "judicial error, even if it results in serious injustice, does not amount to a denial of justice in the context of a Treaty claim."[307]

141. The commissioners in *Chattin v. Mexico* observed that, under customary international law "as far as acts of the judiciary are involved … state responsibility is limited to

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300 *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on the Merits (29 July 2014) ("***OAO "Tatneft" v. Ukraine***") (**CL-23**) ¶ 351.

301 *OAO "Tatneft" v. Ukraine* (**CL-23**) ¶ 352.

302 *OAO "Tatneft" v. Ukraine* (**CL-23**) ¶ 404.

303 *OAO "Tatneft" v. Ukraine* (**CL-23**) ¶ 465.

304 *Chevron v. Ecuador* (**CL-46**) ¶ 8.36 (internal quotations omitted).

305 *Liman v. Kazakhstan* (**RL-48**) ¶ 274 (emphasis added).

306 G. Fitzmaurice, *The Meaning of the Term "Denial of Justice"*, 13 BRIT. Y.B INT'L L. 93 (1932) (**RL-4**) at 110.

307 *Peter Franz Vöcklinghaus v. Czech Republic*, UNCITRAL, Final Award (19 September 2011) ("***Vöcklinghaus v. Czech Republic***") (**RL-60**) ¶ 205.

judicial acts showing outrage, bad faith, willful neglect of duty, or manifestly insufficient government action."[308] Former ICJ President Eduardo Jiménez de Aréchaga explained that, to engage State responsibility, a violation of municipal law by the municipal courts must be "exceptionally outrageous or monstrously grave" and one that "no court which was both honest and competent could possibly have delivered."[309]

142. Numerous investment treaty tribunals have adopted this rigorous approach.[310] This exacting standard applies because at issue is not the substantive correctness or justice of the judicial decision (a matter which is beyond the jurisdiction of an international tribunal), but the good faith and honesty of its author. In *Mondev v. United States*, an authority relied on by GAMA, the tribunal confirmed that establishing a denial of justice requires proving a "wilful disregard of due process of law … which shocks, or at least surprises, a sense of judicial propriety."[311] "The test is not whether a particular result is

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[308] *B. E. Chattin (United States.) v. United Mexican States*, General Claims Commission, Award (23 July 1927) (**RL-1**) ¶ 11. See also *Gramercy Funds v. Peru* (**RL-114**) ¶ 1018 ("It is common ground that the threshold to establish a denial of justice is high: it is only reserved to final decisions of the State's highest courts, which result from an improper and egregious procedural conduct, which fail to meet basic, internationally required standards of administration of justice and due process, and which shock or surprise a sense of judicial propriety.")

[309] Eduardo Jiménez de Aréchaga, *International Responsibility*, 159 RECUEIL DES COURS 267 (1978) (**RL-12**) at 282.

[310] *See, e.g.*, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania,* ICSID Case No. ARB/07/21, Award (30 July 2009) (**RL-43**) ¶ 94 (explaining that proving a denial of justice based on the "[w]rongful application of the law" requires an "extreme test: the error must be of a kind which 'no competent judge could reasonably have made. Such a finding would mean that the state had not provided even a minimally adequate justice system.") (emphasis added) (internal quotations omitted); *Jan de Nul v. Egypt* (**RL-39**) ¶ 192 ("The definition adopted by the Loewen tribunal pursuant to which denial of justice implies '[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety' constitutes good guidance.") (emphasis added); *Azinian v. Mexico* (**RL-15**) ¶ 105 (holding that if a claimant "cannot convince" an arbitral tribunal that the complained judgments are "so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious, they simply cannot prevail"); *Vöcklinghaus v. Czech Republic* (**RL-60**) ¶ 209 ("none of the decisions of Czech tribunals or the Czech criminal investigation authorities reviewed in the course of this Award could be described as 'clearly improper' or 'discreditable' on any objective analysis."); *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V 078/2005, Award (12 September 2010) (**RL-50**) ¶ 275 ("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."); *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.").

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

surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome."[312]

143. The authorities are consistent that, for a denial of justice to arise, it is the national judicial system as a whole that must be shown to have failed. The tribunal in *Chevron v. Ecuador* observed in this respect:

> 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.[313]

144. As a result, and as GAMA seems to acknowledge, a claimant must exhaust local remedies before a denial of justice claim arises.[314] As observed by the tribunal in *Marfin v. Cyprus*, "[e]xhaustion of local remedies is not, in the case of a denial of justice claim, a mere pre-condition to arbitration, but a constituent element of the delict."[315] So long as a lower court decision can be appealed, the State cannot be held responsible for a breach of international law based on that court's holding: "a court decision which can be challenged through the judicial process does not amount to a denial of justice."[316]

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312 *Mondev v. United States* (**CL-13**) ¶ 127.

313 *Chevron v. Ecuador* (**CL-46**) ¶ 8.36. (emphasis added) See also *Gramercy Funds v. Peru* (**RL-114**) ¶ 1040 ("[T]he host State judicial system, as a whole, must be granted an opportunity to rectify judicial errors of lower court instances; and international tribunals cannot be turned into courts of appeal, which review judicial measures that have not been vetted by the highest Court of the land.").

314 Statement of Claim ¶ 242 ("It is generally accepted that the claim for denial of justice presupposes prior exhaustion of local remedies.").

315 *Marfin Investment Group Holdings S.A. and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award (26 July 2018) (**RL-98**) ¶ 1272. ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009) (**RL-46**) ¶ 59 ("In this sense [of denial of justice], the local remedies rules is a substantive requirement for liability rather than a procedural precondition for the presentation of claims to an international court or tribunal.").

316 *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**) ¶ 153, and ¶ 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.").

Multiple investment tribunals have confirmed this substantive requirement.[317] Sir Christopher Greenwood clarifies that "[s]o long as the system itself provides a sufficient guarantee of such treatment, the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal."[318]

145. It is also firmly established that foreign investors do not get a second try on the international plane where, because of poor choices or ill-advised counsel, they failed in their action in the municipal courts or failed to avail themselves of available local remedies.[319] Former ICJ President Eduardo Jiménez de Aréchaga thus observed that:

> In order to exhaust local remedies the private claimant has to adduce before the domestic organs all the material reasonably available to him which might be essential for him to win his case. Where the claimant party has omitted to put forward necessary contentions or essential evidence, the respondent State may object that local remedies have not been exhausted.[320]

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317 *See e.g. Gramercy Funds v. Peru* (**RL-114**) ¶ 1040 ("[I]nternational tribunals cannot be turned into courts of appeal, which review judicial measures that have not been vetted by the highest Court of the land *Jan de Nul v. Egypt* (**RL-39**) ¶ 255 ("The Tribunal considers that the 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."); *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award (5 March 2011) (**RL-56**) ¶ 251 ("The non-exhaustion of local remedies is per se sufficient to exclude the States' responsibility in international law for actions or omissions of its judiciary."); *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) (**RL-92**) ¶ 499 ("A denial of justice claim may be asserted only after all available means offered by the State's judiciary to redress the denial of justice have been exhausted"); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**RL-25**) ¶ 97 (holding that the domestic judicial "system must be tried and have failed, and thus in this context the notion of exhaustion of local remedies is incorporated into the substantive standard and is not only a procedural prerequisite to an international claim.").

318 Greenwood, *State Responsibility For The Decisions Of National Courts* (**RL-27**) at 61. *See also* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (CAMBRIDGE UNIVERSITY PRESS 2006) (1953) (**RL-32**) at 179 ("cases of denial of justice proper [are] where the international unlawful act consists in the remedial organs of the State failing to comply with the requirements of international law to provide redress for private wrongs suffered within its jurisdiction.").

319 *Amto v. Ukraine* ¶ 76 (**RL-36**); D. P. O'CONNELL, INTERNATIONAL LAW (2d ed., London: Stevens & Sons, 1970) (**RL-9**) at 1059 (explaining that international law has adopted "[t]he rule common to municipal systems that a litigant cannot have a second try if, because of ill-preparation, he fails in his action.").

320 Eduardo Jiménez de Aréchaga, *International Responsibility*, 159 RECUEIL DES COURS 267 (1978) (**RL-12**) at 293.

146. Not only is the standard of conduct demanding, but, given the gravity of the charge which condemns the State's judicial system, claimants face an "elevated standard of proof"[321] requiring "[c]onvincing evidence."[322]

147. As the *Mondev* tribunal explained, "[i]t 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."[323] Establishing a denial of justice thus "requires the claimant to prove objectively that the impugned judgment was 'clearly improper and discreditable'."[324]

148. In short, GAMA must establish that the conduct of the Macedonian judiciary, taken as a whole, amounts to a "notoriously unjust,"[325] "scandalously irregular,"[326] administration of justice "which offends a sense of judicial propriety."[327] GAMA must do so against an "elevated standard of proof."[328] And GAMA must show that it has exhausted local remedies (and did so competently).[329]

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321 *Phillip Morris v. Uruguay* (**RL-92**) ¶ 499; *Staur Eiendom AS EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award (28 February 2020) ("***Staur Eiendom v. Latvia***") (**RL-106**) ¶ 472 ("a very high threshold is required to be met in order for an investor to prevail on a claim for denial of justice.").

322 *B. E. Chattin (United States.) v. United Mexican States*, General Claims Commission, Award (23 July 1927) at (**RL-1**) ¶ 11. *White Industries Australia Limited v. The Republic of India*, 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) ("***El Oro Mining and Railway Co***.") (**CL-49**).

323 *Mondev v. United States* (**CL-13**) ¶ 126.

324 *Chevron v. Ecuador* (**CL-46**) ¶ 8.40.

325 PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (**RL-28**) at 44 (citing J. Irizarry y Puente, *The Concept of "Denial of Justice" in Latin America*, 43 MICH. L. REV. 383 (1944) (**RL-5**) at 406).

326 *Staur Eiendom v. Latvia* (**RL-106**) ¶ 473.

327 *Loewen Group v. United States* (**RL-24**) ¶ 132 (finding that misadministration of justice may give rise to a breach of the minimum standard of treatment in NAFTA Article 1105 where there has been a "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety").

328 *Philip Morris v. Uruguay* (**RL-92**) ¶ 499.

329 *Marfin Investment Group Holdings S.A. and others v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award (26 July 2018) (**RL-98**) ¶ 1272; *See supra* ¶ 144.

C. GAMA'S TREATMENT BEFORE THE MACEDONIAN COURTS DOES NOT COME EVEN REMOTELY CLOSE TO A DENIAL OF JUSTICE

149. Since submitting its Statement of Claim, GAMA appears to have abandoned any hope of proving a denial of justice at the international level. On 31 January 2023, in a remarkable turn of events, GAMA recommenced collection proceedings against TE-TO in the Macedonian courts seeking to have its Payment Order claim recognized.[330] Not only can GAMA no longer claim to have exhausted local remedies – which is sufficient on its own to forestall a finding of denial of justice[331] – but GAMA has abandoned its stated pretext for not being required to exhaust local remedies: that doing so would be "futile or unreasonable" or "obsolete."[332] GAMA has evidently changed its mind.

150. In any case, even without GAMA's renewed recourse to the Macedonian courts, GAMA comes nowhere close to establishing a denial of justice, so as to engage Macedonia's liability under the Treaty. Both the bankruptcy proceedings and GAMA's debt enforcement proceedings were conducted in accordance with Macedonian law, as demonstrated below.

1. The bankruptcy proceedings were conducted in accordance with Macedonian law

151. Even if this Tribunal's role were to conduct an appellate review of TE-TO's bankruptcy proceedings (which it is not), GAMA's claims would still fail because those bankruptcy proceedings were conducted in accordance with Macedonian law, as demonstrated below.

152. TE-TO pursued a Prepackaged Bankruptcy procedure, whereby TE-TO prepared its Reorganization Plan and submitted it together with a Reorganization Proposal initiating bankruptcy proceedings.[333] This type of procedure was introduced in Macedonia through

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330 GAMA submission to the Basic Court, dated 31 January 2023 (**R-12**).

331 *See supra* ¶ 144.

332 Statement of Claim ¶ 242.

333 *See supra* ¶¶ 62-74; the Prepackaged Bankruptcy procedure is set out in the Macedonian Law on Bankruptcy (**R-10**) Arts. 2, 215-a, 215-b, 215-v, 215-g, and 215-d (these sections are numbered sequentially using the Cyrillic alphabet).

an amendment to the Bankruptcy Law in 2013, and TE-TO's Prepackaged Bankruptcy was one of the first instances in which the procedure was used.[334] Accordingly, the bankruptcy judge was asked to interpret and apply the applicable provisions of the Bankruptcy Law with little or no precedent.

(a) TE-TO qualified for Prepackaged Bankruptcy

153. To avail itself of the Prepackaged Bankruptcy procedure, a debtor must meet one of the two conditions for opening a bankruptcy proceeding set out under Article 5(1) of the Bankruptcy Law:[335]

a) Actual insolvency, which is established if the debtor's current bank accounts have been blocked and no payment has been made from them for 45 days, as evidenced by a confirmation from the Central Register of Macedonia.[336]

b) Future inability to pay, which "exists if the debtor makes it likely that he/she will not be able to fulfill his/her existing monetary liabilities when they become due for payment."[337]

154. GAMA says that this threshold requirement was not met.[338] In particular, GAMA alleges that when TE-TO submitted its Reorganization Proposal on 24 April 2018, it "failed to show that it was cash flow insolvent or balance sheet insolvent, as required under the Law on Bankruptcy," because at the time "TE-TO was unable to pay its liabilities for a period of [only] 38 days instead of 45 days" (*i.e.*, since 12 March 2018).[339]

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334 Law Amending and Supplementing the Law on Bankruptcy, published in the Official Gazette of the Republic of Macedonia no. 79/2013 (**R-3**); Petrov ¶ 46.

335 Macedonian Law on Bankruptcy (**R-10**) Art. 5(1); Petrov ¶¶ 14-16, 50.

336 Macedonian Law on Bankruptcy (**R-10**) Arts. 5(2), 5(3), and 5(4); Petrov ¶¶ 14-15.

337 Macedonian Law on Bankruptcy (**R-10**) Art. 5(5); Petrov ¶ 16.

338 Statement of Claim ¶ 197(e)(i); Expert report of Dejan Kostovski ("**Kostovski**") ¶ 19.

339 Statement of Claim ¶¶ 70-71; TE-TO proposal for reorganization, dated 24 April 2018 (**C-74**) at 10-12 (indicating that as of 19 April 2018, TE-TOs accounts at NLB Bank AD Skopje, Komercijalna Banka AD Skopje, and Ohridska Banka AD Skopje had each been blocked for 38 days, *i.e.* since 12 March 2018).

155. Those allegations miss the mark. As GAMA recognizes, the Reorganization Proposal was made on the basis "that [TE-TO] was facing 'imminent insolvency'," rather than actual insolvency, which is an independent ground for Prepackaged Bankruptcy under Article 5(1), as explained above.[340] The Reorganization Proposal explained that TE-TO's bank accounts had been blocked, and it provided, among other things, (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.[341]

156. One of the reasons why TE-TO was facing imminent insolvency was that it had defaulted on loans from its shareholders, including a series of loans from Bitar that became immediately due and payable on 6 December 2017.[342] TE-TO was unable to repay that amount. As explained above, TE-TO and its shareholder Bitar had agreed to a short rescheduling of EUR 48 million of these loans (the Bitar Payments).[343]

157. In its Statement of Claim, GAMA alleges that TE-TO "fictitiously fabricat[ed] the reasons for TE-TO's 'imminent insolvency'" by agreeing to the Bitar Payments.[344]

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340 Statement of Claim ¶ 73 (emphasis omitted).

341 Reorganization Plan, dated April 2018 (**C-13**) at 6-8, 20-26, 215-460, 482-522.

342 *See* Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-80**) at 3 (EUR 17,925,829.28); Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-81**) at 3 (EUR 18,275,000.00); Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-82**) at 3 (EUR 5,829,408.00); Agreement between TE-TO and Bitar Holdings, dated 23 February 2018 (**C-83**) at 3 (EUR 6,394,448.19). The total amount of these loans was = EUR 48,424,685.47 (=EUR 17,925,829.28 + EUR 18,275,000.00 + EUR 5,829,408.00 + EUR 5,829,408.00).

343 *See* ¶¶ XX. The Bitar Payments of approximately EUR 48 million were for repayment of part of TE-TO's debt to Bitar which totaled EUR 112 million on 1 March 2018 (TE-TO Reorganization Plan, dated April 2018 (**C-13**) at 8) (setting out the total indebtedness of TE-TO on 1 March 2018).

344 Statement of Claim ¶ 75; Kostovski ¶ 51. GAMA says that the bankruptcy judge "failed to assess that TE-TO's account was blocked due to" the Bitar Payments (Statement of Claim ¶ 197(e)(iv)). That is wrong. The bankruptcy judge found that TE-TO's accounts were blocked by Bitar but noted that other entities had also blocked TE-TO's accounts (Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 37). Thus, neither the Bitar Payments nor the enforcement order obtained by Bitar to collect the first Bitar Payments were necessary for TE-TO's accounts to have been blocked. The blocking of accounts caused forthcoming insolvency until the 45-day point, and then amounted to existing insolvency.

GAMA made the same allegation in a submission to the Basic Court in June 2018.[345] The Basic Court reasoned that even without the Bitar Payments – which the Court held to be "null and void" because they had been agreed less than 90 days before TE-TO submitted the Reorganization Proposal[346] – Bitar still "has a claim on the basis of a loan which is due for collection."[347] This was a reference to the EUR 112 million underlying loan that Bitar had made to TE-TO (which would have been reduced by the Bitar Payments).[348]

158. GAMA asserts that the bankruptcy judge "failed to assess that TE-TO's account was blocked due to" the Bitar Payments, which had been declared null and void.[349] That is wrong. The bankruptcy judge found that TE-TO's accounts were "blocked not only by the creditor Bitar Holding[s] Limited, but also by other legal entities, including Toplifikacija."[350] Because its accounts were blocked, TE-TO was facing imminent insolvency (*i.e.*, the "inability to pay exists if the debtor makes it likely that he/she will not be able to fulfill his/her existing monetary liabilities when they become due for payment") when it submitted its Reorganization Plan on 26 April 2018.[351]

159. In any event, by the time the Basic Court held a hearing on the Reorganization Plan on 5 June 2018, TE-TO was actually insolvent, *i.e.*, its accounts had been blocked for more

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345 GAMA submission to the Basic Court, dated 12 June 2018 (**C-101**) at 1 (stating that the conditions for "future insolvency" were not met because the Bitar Payments were withdrawn on 04 April 2018 which had formed "the basis on which the debtor itself founds the future insolvency").

346 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 25; Macedonian Law on Bankruptcy (**R-10**) Art. 174(1) ("A legal action by which one bankruptcy creditor is given or is enabled collateral or settlement, which collateral or settlement he was not entitled to demand or did not have a right to request in such manner and at that time, can be challenged if it was undertaken: … 2) within ninety days prior to the filing of the proposal for the commencement of the bankruptcy procedure, and the debtor was insolvent at that time".).

347 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 25.

348 *See supra* ¶¶ 56-59.

349 Statement of Claim ¶ 197(e)(iv).

350 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 37.

351 Macedonian Law on Bankruptcy (**R-10**) Art. 5(2) and (5).

than 45 days.[352] The Basic Court confirmed this in its 14 June 2018 decision to adopt TE-TO's Reorganization Proposal.[353]

160. GAMA points to the statement in TE-TO's Final Reorganization Plan of 8 June 2018, that "'[i]f the extraordinary arisen situation is excluded due to unexpected claims from the creditors-shareholders, in essence the company is in a sustainable financial position and can continue to operate and settle its obligations.'"[354] It is unclear what conclusions GAMA seeks to draw from this. If GAMA is arguing that TE-TO did not qualify for Prepackaged Bankruptcy, this argument misses the mark. The 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 Prepackaged Bankruptcy.[355] GAMA nowhere suggests that these shareholder loans were fraudulent or otherwise illegitimate, and does not and cannot explain why they should be ignored in determining TE-TO's overall financial situation and whether the company was facing imminent or actual insolvency.

(b) The bankruptcy judge properly ordered the Security Measures and appointed Mr. Sazdovski as interim bankruptcy trustee

161. On 26 April 2018, the Basic Court's bankruptcy judge (Ms. Sashka Trajkovska) appointed a registered bankruptcy trustee, Mr. Marinko Sazdovski, as interim bankruptcy trustee of TE-TO and ordered certain provisional measures (the Security Measures), including a ban on the disposal of TE-TO's assets.[356] GAMA and its expert, Mr. Kostovski, put forward four arguments why Mr. Sazdovski's appointment and the Security Measures violated Macedonian law.

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352 *See supra* ¶ 78.

353 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 8; Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 22 ("Evidence has been submitted in the case file from which it can be determined that the account has been blocked for more than 45 days in accordance with [Article 5] of the Bankruptcy Law.").

354 Statement of Claim ¶ 78, quoting Final Reorganization Plan (**C-14 SOC**) at 85 [84].

355 Final Reorganization Plan (**C-14 SOC**) at 17 [16].

356 *See supra* ¶ 71.

162. First, Mr. Kostovski argues that the bankruptcy judge breached Article 215-g of the Bankruptcy Law by ordering the Security Measures on 26 April 2018 "before deciding to proceed with a preliminary proceeding" (which decision was issued six weeks later, on 14 June 2018).[357] Mr. Kostovski's opinion has no basis in the text of the Bankruptcy Law. Although Article 215-g(2) provides that the bankruptcy judge shall take security measures at the same time as deciding to open a Prepackaged Bankruptcy procedure, it cross-refers to Article 58 of the Law, which sets out provisions regarding security measures.[358] Article 58(3) provides that the "bankruptcy judge can adopt the determination for ruling security measures … before the adoption of the determination for initiating [a] preliminary procedure."[359] Mr. Kostovski opines that Article 58 does not apply in the context of a Prepackaged Bankruptcy.[360] But that is plainly contradicted by the reference to "Article 58" in the wording of Article 215-g(2). As Mr. Petrov explains, "the purpose of [Article 215-g(2)] is to determine the latest moment when the bankruptcy judge must pass a determination to impose security measures" while Article 58 allows the bankruptcy judge to order security measures before then.[361]

163. Second, GAMA argues that, "[i]n judicial reorganisation proceedings, the Macedonian courts are limited to issuing security measures for a stay of enforcement against a debtor," and that the Basic Court breached the Bankruptcy Law by ordering "a general prohibition on disposal of TE-TO's assets."[362] Mr. Kostovski says that this general

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357 Kostovski ¶ 41; Decision of the Basic Court, dated 26 April 2018 (**C-89**) at 1.

358 Macedonian Law on Bankruptcy (**R-10**) Arts. 58, 215-g(1) ("The bankruptcy judge within three days from the day of submission of [a] complete proposal from Article 215-c of this Law, shall adopt a determination for initiating a preliminary procedure for examination of the conditions for opening a bankruptcy procedure and reorganization procedure upon a prepared plan for reorganization"), 215-g(2) ("At the same time, the bankruptcy judge is obliged to adopt a determination with which it shall determine the security measures from [A]rticles 58 and 59 of this Law, by appointing an interim bankruptcy trustee.").

359 Macedonian Law on Bankruptcy (**R-10**) Art. 58(3) (emphasis added).

360 Kostovski ¶ 43.

361 Petrov ¶ 71. Mr. Petrov elaborates that "[b]oth provisions have the same objective: protecting the interests of creditors by providing for security measures for their claims and appointment of an interim bankruptcy trustee."

362 Statement of Claim ¶ 81; Kostovski ¶ 41, 43.

prohibition is "problematic" because it placed limitations on TE-TO's "management bodies" during reorganization.[363]

164. Neither GAMA nor Mr. Kostovski identifies any provision of the Bankruptcy Law that would have prohibited the Basic Court from imposing a ban on the disposal of the debtor's assets in a Prepackaged Bankruptcy. Under Article 215-g(2), which applies to a Prepackaged Bankruptcy, the bankruptcy judge must determine the appropriate security measures available under Articles 58 and 59, including the power under Article 58(2) to "impose a general prohibition for disposal of the property of the debtor."[364]

165. Third, GAMA argues that the bankruptcy judge appointed Mr. Sazdovski in breach of Article 215-g(2) of the Bankruptcy Law, under which the "appointment of the interim bankruptcy trustee is done by electronic selection of the bankruptcy trustees that have special knowledge in the field of the plan for reorganization."[365]

166. Mr. Sazdovski was not appointed through the electronic selection process because there was no (and still is no) roster of bankruptcy trustees specifically for Prepackaged Bankruptcy procedures.[366] The lack of a specialized roster is explained by the fact that the Prepackaged Bankruptcy procedures are rare, with TE-TO's Prepackaged Bankruptcy being only one of three such procedures heard in the Basic Court of Skopje since its introduction in 2013.[367] In any event, Mr. Sazdovski is on the list of authorized bankruptcy trustees from which an electronic process would draw names.[368] Mr. Petrov knows him as "an experienced, long-term bankruptcy trustee with extensive practical experience and has led and continues to lead bankruptcy proceedings on a significant scale."[369] While GAMA questions the mechanics of his appointment, GAMA does not

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363 Kostovski ¶ 44.

364 Macedonian Law on Bankruptcy (**R-10**) Art. 58(2); Petrov ¶¶ 68-69.

365 Macedonian Law on Bankruptcy (**R-10**) Art. 215-g(2); Statement of Claim ¶ 84; Kostovski ¶ 46;.

366 Petrov ¶ 80.

367 Petrov ¶¶ 79-80.

368 Petrov ¶ 80.

369 Petrov ¶ 80.

take issue with his qualifications, and in fact does not take issue with any of his actions and decisions as interim bankruptcy trustee.

167. Fourth, GAMA asserts that Mr. Sazdovski's appointment was an "egregious breach of the Bankruptcy Law" and "made in clear contradiction" to the Code of Ethics of Bankruptcy Trustees, because the Reorganization Plan proposed to compensate him with a monthly fee of approximately EUR 700, which allegedly created a conflict of interest for Mr. Sazdovski.[370] However, it is of course normal for bankruptcy trustees to be compensated for their work.[371] The Minister of Economy has published guidance for the remuneration of bankruptcy trustees, and TE-TO's proposal falls within the range indicated in that guidance.[372] The Code of Ethics provides that "[b]efore accepting the appointment, the bankruptcy trustee is obliged to examine whether there are any business-financial ties with the bankrupt debtor,"[373] and GAMA has not explained how compensation after accepting the appointment can reasonably amount to "business-financial ties" before accepting the appointment.

168. If GAMA means to argue that Mr. Sazdovski had a conflict because he was compensated by TE-TO, that argument would have no merit either. It is standard practice for bankruptcy trustees in Macedonia (and elsewhere) to be compensated from the debtor's assets.[374]

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370 Statement of Claim ¶¶ 82-83; Reorganization Plan, dated April 2018 (**C-13**) at 20 ("a net amount of 40,000 MKD per month will be paid for the period during which the plan will be implemented."). Over the 12-year period during which the Reorganization Plan would be implemented, the total proposed compensation to Mr. Sazdovski would be approximately EUR 93,000 (40,000 MKD x 12 months x 12 years x 0.016 EUR/MKD).

371 Law on Bankruptcy (**R-10**) Art. 22 (which sets out the grounds for establishing a conflict of interest that would disqualify one from serving as a bankruptcy trustee, including relatives, employees, contractual counterparts, and debtors of TE-TO. That a trustee is compensated by the debtor is not a ground for a conflict of interest.); Petrov ¶ 84 ("In my opinion and experience, the foreseen compensation for the controller over the implementation of the TE-TO Reorganization Plan was within the framework of the Regulation on the Award and Compensation of the Realistically Necessary Costs of the Bankruptcy Trustee and the Method of Determining their Amount. In my experience, I would also not consider that remuneration to be excessive.").

372 Rulebook on the Award and Compensation of Bankruptcy Trustees (**R-4**) Arts. 9-12; Petrov ¶ 84.

373 Statement of Claim ¶ 83, fn. 139 (citing "Code of Trustees (**C-90**) Section 4. "Independency in the work" para 3").

374 Macedonian Law on Bankruptcy (**R-10**) at Art. 37(1) ("The bankruptcy trustee is entitled to a reward for his work."); Petrov ¶ 84.

(c) The bankruptcy judge acted lawfully in ordering TE-TO to correct the Reorganization Plan

169. The bankruptcy judge identified deficiencies in the Reorganization Plan that TE-TO submitted on 24 April 2018. On 30 April 2018, the judge "order[ed] [TE-TO] to submit the motion, evidence and the corrected reorganization plan … within a period of 8 days."[375] TE-TO responded two days later by making the requested corrections and submitting the missing information.[376]

170. GAMA argues that the bankruptcy judge's order was "in egregious breach of the Bankruptcy Law" because it provided "guidance and instructions on how to ensure" that the Reorganization Plan would comply with the Bankruptcy Law, whereas orders for corrections are permitted only "to the extent that [a reorganization] plan contains minor deficiencies and technical errors which can be removed."[377] GAMA refers to Article 215-v(4) of the Bankruptcy Law, but that provision does not support its argument. Article 215-v(4) provides:[378]

> 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 with a decision to complete the plan within eight days.

171. Article 215-v(4) does not say that the bankruptcy judge shall order the correction only of "minor" deficiencies. Mr. Petrov confirms that, based on his experience, "[t]here was nothing out of the ordinary in the bankruptcy judge inviting the debtor [TE-TO] to revise its proposal."[379]

172. Mr. Kostovski opines that the bankruptcy judge breached Article 215-v(4) of the Bankruptcy Law because she requested the necessary corrections through a letter,

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375 Request for information from the Basic Court, dated 30 April 2018 (**C-91**).

376 TE-TO additional information, dated 2 May 2018 (**C-92**).

377 Statement of Claim ¶¶ 88 (emphasis added) ¶ 197(e)(iii) (emphasis added).

378 Macedonian Law on Bankruptcy (**R-10**) Art. 215-v(4) (emphasis added).

379 Petrov ¶ 58.

"instead of by a written decision."[380] This is elevating form over substance. Mr. Petrov agrees that the judge "should arguably have used a formal determination, instead of a letter," but "from a substantive point of view, the letter issued by the judge contained all the elements of a determination ordering the debtor to revise the proposal."[381]

173. GAMA asserts that the bankruptcy judge "was acting with explicit bias in relation to TE-TO in particular by providing guidance and instructions" on how to revise the reorganization plan.[382] In particular, GAMA impugns directions from the bankruptcy judge regarding an auditor's report.[383] Those instructions were: "In the audit report … the auditor should supplement the finding and the opinion by clearly stating the findings, rather than us[ing] assumptions such as 'possibly' or 'it is assumed that.'"[384] In other words, the bankruptcy judge sought not a particular audit result, but clarity from the auditor, which cannot support a finding of any "explicit bias."[385]

174. GAMA points also to directions from the bankruptcy judge that GAMA replace the words "'partially or fully'" with specific amounts on page 11 of the Reorganization Plan, delete a sentence that was contrary to the Bankruptcy Law, include measure for utilizing additional funds "for the interests and protection of the creditors," state the due date of claims in the third class, and "clearly state" that the "second class of claims are ranked lower."[386] GAMA does not explain why these directions reveal that the bankruptcy judge was "acting with explicit bias" in relation to TE-TO.[387]

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380 Kostovski ¶ 49.

381 Petrov ¶ 58.

382 Statement of Claim ¶ 88.

383 Statement of Claim ¶¶ 87-88.

384 Request for information from the Basic Court, dated 30 April 2018 (**C-91**) at 3; Statement of Claim ¶¶ 87-88;.

385 Statement of Claim ¶ 88.

386 Statement of Claim ¶ 86.

387 Statement of Claim ¶ 88.

(d) The bankruptcy judged acted lawfully in ordering TE-TO to prepare the Final Reorganization Plan based on comments from creditors

175. On 5 June 2018, the bankruptcy judge held a hearing for the creditors to vote on TE-TO's Reorganization Proposal. As explained above, in light of objections raised by some of TE-TO's creditors (including GAMA) and TE-TO's agreement to try to accommodate those objections, the bankruptcy judge ordered TE-TO to "submit a corrected and consolidated version of [its] reorganization plan," which would be voted on at a new hearing on 14 June 2018, such that creditors "can be acquainted with the content of the consolidated version and can clearly determine what position to take and what to vote for."[388]

176. GAMA and Mr. Kostovski make four arguments why the bankruptcy judge's conduct regarding the hearings on 5 and 14 June 2018 breached Macedonian law. None of these arguments has merit.

177. First, GAMA and Mr. Kostovski assert that it was unlawful for the bankruptcy judge to entertain objections from the creditors at the 5 June 2018 hearing.[389] Mr. Kostovski argues that this hearing was "a Meeting of the Assembly of Creditors to review the objections by the creditors,"[390] and that there were "no legal grounds to revise the Reorganization Plan at [the 5 June 2018] … hearing scheduled for voting on the Reorganization Plan, instead of convening a separate hearing according to Article 215-g(6)."[391]

178. Mr. Kostovski's argument is unsupported by Articles 215-g(1) and (7) of the Bankruptcy Law, which provide:

> (1) The bankruptcy judge within three days from the day of submission of complete proposal from article 215-c of this Law, shall adopt a decision

388 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 9.

389 Statement of Claim ¶ 107; Kostovski ¶ 63.

390 Kostovski ¶ 59.

391 Kostovski ¶ 63.

> for initiating a preliminary procedure for examination of the conditions for opening a bankruptcy procedure and reorganization procedure upon a prepared plan for reorganization with which it **schedules a hearing for deciding on the proposal and voting for the plan** at which it shall invite all known creditors of the bankruptcy debtor. The hearing shall be held within 60 days from the day of the adopting the determination, in which deadline the preliminary procedure should be completed.
>
> …
>
> (7) In the course of the preliminary procedure the bankruptcy judge may schedule a hearing at which certain issues regarding the previously prepared reorganization plan shall be reviewed.[392]

179. Article 215-g(7) thus empowers the bankruptcy judge to hold a hearing to review, together with the creditors, "issues regarding the previously prepared reorganization plan." This is commonly referred to as an assembly of the creditors.[393] Article 215-g(1) requires the bankruptcy judge to hold a hearing "for deciding on the [reorganization] proposal and voting for the [reorganization] plan." Neither article prevents a bankruptcy judge from convening a single hearing to review issues regarding a reorganization plan and also vote on that plan. Thus, the bankruptcy judge in this case did not act contrary to either provision by using the 5 June 2018 hearing to vote on TE-TO's Reorganization Plan and also review issues regarding that Reorganization Plan (which then led to a postponement of the vote).[394]

180. Mr. Kostovski's position is inconsistent with the purpose of a Prepackaged Bankruptcy procedure, which, as Mr. Petrov explains, is to "enable the debtor to continue to exist and function in the market by negotiating with creditors."[395] Various provisions in the Bankruptcy Act facilitate that negotiation. For example, the bankruptcy judge must announce the Prepackaged Bankruptcy, notify creditors that they may inspect the reorganization plan, and schedule a hearing.[396] Here, the announcement of the

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392 Macedonian Law on Bankruptcy (**R-10**) Arts. 215-g(1) and (7) (emphasis added).

393 Petrov ¶ 95.

394 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 3; Petrov ¶¶ 95-103.

395 Petrov ¶ 44.

396 Macedonian Law on Bankruptcy (**R-10**) Arts. 215-d(5), 215-e(1).

Reorganization Plan was published in the Official Gazette on 2 May 2018 (34 days before the hearing) and informed creditors that they "may inspect the prepared Reorganization Plan" and invited "remarks about the proposal."[397] Three creditors – Toplifikacija, Komercijalna Banka, and GAMA – then submitted written comments,[398] to which TE-TO responded.[399] At the 5 June 2018 hearing, Toplifikacija, Komercijalna Banka, and GAMA reiterated their views, and TE-TO again offered responses.[400] Allowing this type of exchange at the 5 June 2018 hearing was consistent with the basic objective of the Prepackaged Bankruptcy procedure to facilitate negotiations between the debtor and its creditors. It is in any event unclear how GAMA was prejudiced by having its comments on the proposed Reorganization Plan considered and discussed at the hearing.

181. Second, GAMA argues that "the [bankruptcy] judge could not have allowed TE-TO to make changes to the creditors' classes," as TE-TO proposed to do in response to GAMA's objections to the initial Reorganization Plan (including three classes).[401] In Mr. Kostovski's view, by allowing this amendment, the bankruptcy judge "allowed the start of a development of a <u>new</u> Reorganization Plan, … particularly to amend the provisions … that refer to the formation of creditor classes."[402]

182. As explained further below, however, a debtor is free to determine the classes of creditors in a Prepackaged Bankruptcy procedure, subject to the creditors' approval of that classification through their vote on the reorganization plan.[403] If the debtor modifies the classification of creditors in response to comments from its creditors, this does not imply

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397 Announcement in the Official Gazette (**C-94**).

398 GAMA response to Reorganization Plan, dated 22 May 2018 (**C-97**); Toplifikacija response to Reorganization Plan, dated 21 May 2018 (**C-98**); Komercijalna Banka response to Reorganization Plan, dated 21 May 2018 (**C-99**).

399 TE-TO response to GAMA, dated 30 May 2018 (**C-100**) at 3.

400 Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 4-8.

401 Statement of Claim ¶ 107.

402 Kostovski ¶ 63 (emphasis added).

403 *See infra* ¶¶ 192-195; Petrov ¶ 138-142; Macedonian Law on Bankruptcy (**R-10**) Art. 215-b.

the creation of an entirely "new" plan. As Mr. Petrov explains, the Final Reorganization Plan "[was] not a new plan for reorganization, but only a corrected version of the reorganization plan in which all the comments of the creditors had been incorporated."[404] And, again, it is unclear how GAMA was prejudiced by having the bankruptcy judge allow TE-TO to modify the proposed Reorganization Plan in the manner that GAMA itself had urged.[405]

183. Third, GAMA alleges that its motion to recuse the bankruptcy judge during the 14 June 2018 hearing was decided by the Deputy President of the Basic Court only "after the judge had already approved the Reorganisation [P]lan."[406] That allegation is false and plainly contradicted by the minutes of the hearing, which show that the bankruptcy judge (i) adjourned the hearing to refer the motion to the Deputy President of the Basic Court, (ii) resumed the hearing after an hour to advise the attendees that the Deputy President had denied the motion, and (iii) only then proceeded with the creditors' vote on the Reorganization Plan.[407]

184. After the 14 June 2018 hearing, the Deputy President of the Basic Court issued a written record of her decision to reject the recusal motion.[408] GAMA asserts that this record contains a "statement provided by the [bankruptcy] judge … [which] shows that the decision [on the motion] was not made during the adjournment of the hearing" but only after the hearing concluded.[409] In other words, GAMA appears to allege that the bankruptcy judge lied at the 14 June 2018 hearing when, after the one-hour adjournment, she said that the motion to recuse her had been rejected. In any event, the written record of the Deputy President's decision shows no such thing. The record merely provides a

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404 Petrov ¶ 122.

405 GAMA response to Reorganization Plan, dated 22 May 2018 (**C-97**) at 2 ("[t]he grouping of creditors into [three] classes is contrary to the Bankruptcy Law"); Minutes of Basic Court hearing, held 5 June 2018 (**C-18**) at 8 (GAMA submitted that the classification of creditors in the Reorganization Plan "subjected [GAMA] to unequal treatment in respect to the rest of [the] third class creditors.").

406 Statement of Claim ¶ 112.

407 Minutes of the 14 June 2018 hearing (**C-102**) at 5-6.

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

409 Statement of Claim ¶ 112.

description of the events at the 14 June 2018 hearing, which was apparently provided after the end of the hearing and before the record was prepared. The record does not, as GAMA alleges, show that the Deputy President decided the recusal motion only after the 14 June 2018 hearing had concluded.[410]

185. Fourth, GAMA argues that the bankruptcy judge's approval of the Final Reorganization Plan on 14 June 2018 was "indefensible under the provisions of the Bankruptcy Law and reveals that GAMA was discriminated [against] in relation to TE-TO's shareholders."[411] In particular, GAMA complains that the bankruptcy judge (i) "endorsed the change of the number of the creditors' classes by TE-TO by acknowledging that this was done due to GAMA's claim of higher priority,"[412] and (ii) "acknowledged that the claims of TE-TO's shareholders are of lower priority and that under the Bankruptcy Law all creditors from the same class must be treated equally, but in contradiction with these findings still approved the Reorganisation plan."[413] But, as explained below, the debtor in a Prepackaged Bankruptcy is free to determine the classes of creditors, subject to approval of the creditors.[414] Here, the wide majority of TE-TO's creditors, including those who faced the same 90% write-off of their claims as GAMA, approved the Final Reorganization Plan and the classification of creditors in it.[415] GAMA points to no provision in the Bankruptcy Law that would have prohibited this classification creditors.

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

411 Statement of Claim ¶ 115.

412 Statement of Claim ¶ 116.

413 Statement of Claim ¶¶ 117, 197(e)(v). GAMA relies on Art. 118(1)(5) of the Bankruptcy Law to assert that unsecured claims of TE-TO's shareholders are ranked as a lower priority than GAMA's unsecured claims. That assertion is wrong because Art. 118 does not apply in the context of a Prepackaged Bankruptcy reorganization which is governed by Articles 215-a through 215-d of the Bankruptcy Law. Article 215-d(6) states that Art. 220, which provides for grouping of creditors into higher and lower ranks, does not apply to Prepackaged Bankruptcy reorganization plans. Thus the specific instructions for grouping creditors under Art. 118 also do not apply (see Petrov ¶¶ 149-158).

414 *See supra* ¶¶ 192-195; Petrov ¶¶ 138-142; Macedonian Law on Bankruptcy (**R-10**) Art. 215-b.

415 Decision of the Basic Court, dated 14 June 2018 (**C-15**) at 28.

(e) TE-TO's Reorganization Plan and Final Reorganization Plan complied with Macedonian law

(i) TE-TO's reorganization plans were complete

186. GAMA and Mr. Kostovski allege that TE-TO's Reorganization Plan breached Article 215-v(3) of the Bankruptcy Law for being "incomplete," because it did not contain (i) an "analysis as to why reorganization was a more favourable option … compared to the option [of] liquidation of assets," (ii) how reorganization would "affect the position of creditors," (iii) information on "the course of negotiations" between the debtor and the creditors, (iv) "financial projections" that captured income tax, (v) the "elements of an enforceable deed" including "specific dates of claim payments," (vi) an explanation of "how TE-TO will deal with any future risks that could threaten its business venture," or (vii) "data on the estimated value of TE-TO's entire immovable and movable assets."[416]

187. GAMA and Mr. Kostovski do not identify any provision in the Bankruptcy Law that requires that a reorganization plan contain elements (i), (ii) or (v) through (vii).[417]

188. As for element (iii), contrary to GAMA's assertion, the Reorganization Plan describes "the course of negotiations" between TE-TO and its creditors, namely, that the plan was sent to the "largest creditors with a majority of votes according to their claims," that the issues raised by those creditors were timely responded to by TE-TO, and that the "creditors were given a reasonable deadline to comment on the acceptability of the Plan."[418] The Final Reorganization Plan also attached statements by the majority creditors in each one of the two classes creditors indicating that they would vote in favor

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[416] Kostovski ¶¶ 21, 24, 27, 28, 31, 33, 85; Statement of Claim ¶ 197(e)(i); Macedonian Law on Bankruptcy (**R-10**) Art. 215-v(3) ("The bankruptcy judge … shall refuse the proposal … if … the plan is incomplete.").

[417] *See e.g.* Petrov ¶¶ 124 (explaining that Law on Bankruptcy Art. 215-b "does not include any obligation on the debtor (who prepares the reorganization plan) to include in the plan: "a detailed analysis as to why reorganization was a more favourable option to settle the claims of unsecured creditors of a higher payment priority order, compared to the option [of] liquidation of assets"), 126 ("Article 215-b of LB … does not include an obligation on the debtor (who prepares the plan) to include in the plan: 'an analysis on how TE-TO will deal with any future risks.'").

[418] Reorganization Plan (**C-13**) at 41, Section 2.20; Macedonian Law on Bankruptcy (**R-10**) Art. 215-b(2)(4).

of the plan, including Landesbank Berlin (accounting for 95.56% of the secured claims) and Bitar Holding (accounting for 66.61% of unsecured claims).[419]

189. As for element (iv), Mr. Kostovski alleges that "financial projections [in the Reorganization Plan] … did not include [TE-TO's] liabilities based on profit tax that would arise from the proposed write-off of unsecured creditors' claims."[420] While Mr. Kostovski is correct that the financial projections in the Reorganization Plan calculated earnings and available cash before interest, taxes, depreciation, and amortization ("EBITDA"),[421] he does not point to a provision in the Bankruptcy Law that requires the financial projections to be prepared otherwise.

190. GAMA, for its part, alleges that the Reorganization Plan "failed to enclose a decision by [TE-TO's] management board approving the reorganisation, [or] the audited annual financial statements for 2017."[422] That is wrong. The Reorganization Plan included minutes of the 12 March 2018 meeting of TE-TO's Management Board at which the decision was taken to "prepare and submit to the court and to the creditors a proposal for a Plan for reorganization,"[423] as well as minutes of the 9 April 2018 meeting of the Management Board indicating that the "Manage[ment] Board has decided to draft a Plan for Reorganization."[424] Audited financial statements for TE-TO for 2017 were also appended to the Reorganization Plan.[425]

191. GAMA asserts that the Reorganization Plan was "manifestly unfair, biased and in breach of … the liquidation test and the absolute priority rule."[426] This assertion does not withstand scrutiny.

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419 Final Reorganization Plan (**C-14 SOC**) at 537 (Landesbank Berlin), 630 (Bitar Holdings).

420 Kostovski ¶ 28.

421 Reorganization Plant (**C-13**) at 33.

422 Statement of Claim ¶ 86.

423 Reorganization Plan (**C-13**) at 475.

424 Reorganization Plan (**C-13**) at 501.

425 Reorganization Plan (**C-13**) at 415-460.

426 Statement of Claim ¶¶ 90, 91.

a) GAMA says that the "'liquidation test'" is set out in the Rulebook for Professional Standards for Bankruptcy Proceedings and provides that "no creditor should receive less, under a reorganization, than what they would have received in the liquidation of the debtor's estate."[427] GAMA has not shown that the Rulebook for Professional Standards applies to reorganization plans prepared by debtors such as TE-TO instead of by professional trustees. Nor has GAMA proven that it would have been better off following a liquidation procedure.

b) GAMA says that the "absolute priority rule" is set out in Article 116(2) of the Bankruptcy Law and prevents distribution "to creditors with lower priority claims if creditors with higher priority claims are not paid in full."[428] As explained in the following section, however, Article 116(2) does not apply to Prepackaged Bankruptcy procedures.[429]

(ii) TE-TO's reorganization plans lawfully classified the claims

192. GAMA argues that the Final Reorganization Plan "violated fundamental principles on the priority of creditors under the Bankruptcy Law" under Articles 116 and 118 of the Bankruptcy Law, because it failed to rank the claims of unsecured creditors "into higher and lower priority categories."[430] Relying on the same provisions, Mr. Kostovski argues

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[427] Statement of Claim ¶ 91, footnote 151 (Rulebook for Professional Standards for Bankruptcy Proceedings (**C-95**)). GAMA argues that the Reorganization Plan fails this test, because "the accounting value of TE-TO's fixed assets amounted to EUR 167.3 million," whereas the Reorganization Plan "envisaged settlement of the creditors in the first two classes in the amount of EUR 69.1 million," which purportedly "shows that the creditors in the second class [including GAMA] … would have received substantially more in case of the liquidation of CCPP Skopje than under the Reorganisation plan …."

[428] Statement of Claim ¶ 92.

[429] *See infra* ¶¶ 192-195.

[430] Statement of Claim ¶¶ 96, 116-117, 197(e)(v); Macedonian Law on Bankruptcy (**R-10**) Arts. 116(1) ("The claims of bankruptcy creditors are categorized in higher and lower payment orders."), 116(2) ("The claims of the creditors of the lower payment order may only be settled after the creditors of the previous (higher) payment order have been fully settled. The bankruptcy creditors of the same payment order are settled in proportion to the size of their claims."), and 118(1) ("Claims of lower payment ranks are settled in the following order: 1) Interest on the claims of the bankruptcy creditors that are due as of the date of opening of the bankruptcy procedure; 2) Costs of certain creditors that could incur as a result of the creditors` participation in the procedures; 3) Fines for criminal acts or misdemeanors, as secondary consequences from criminal acts or misdemeanors that impose the payment of fines; 4) Claims for debtor's services, provided free of charge, and 5)

that "claims of shareholders shall be treated as of a lower order of payment priority, i.e. in a separate class," which the Reorganization Plan did not do.[431]

193. The rules that GAMA references with respect to the priority of claims have no place in a Prepackaged Bankruptcy such as the one at issue here. As Mr. Petrov explains, the pre-determined "lower payment ranks" under Article 118 are inapplicable to a Prepackaged Bankruptcy.[432] That is because the classes of creditors in a Prepackaged Bankruptcy are governed by Article 215-b of the Bankruptcy Law, which does "not explicitly state the criteria by which the classes of creditors should be made" and instead gives the debtor broad freedom to propose classifications that it sees fit, always subject to approval of the creditors.[433]

194. All that is required in a Prepackaged Bankruptcy is for the reorganization plan to include a "[l]ist of creditors with a division of classes of creditors and criteria on the basis of which classes are formed," as well as "the monetary amounts or assets that will be used for full or partial settlement of the classes of creditors, including the secured and non-secured creditors."[434] TE-TO's initial Reorganization Plan complied with that requirement: it divided creditors into three classes (secured creditors, unsecured creditors based on loans and investments, and unsecured creditors based on "current operational business") and specified the amounts that would be used for partial settlement of each class, including cash flow projections and a schedule of payments by class.[435]

Claims for the return of a loan or other appropriate claim that indemnifies the property of a partner/member, i.e. a shareholder"). nn-confirmed

431 Kostovski ¶¶ 70-71, 78.

432 Petrov ¶¶ 149-158. This is because the requirement to differentiate "between creditors with a right to separate settlement and creditors of higher payment rank" is set out in Article 220 of the Bankruptcy Law, which article is inapplicable to Prepackaged Bankruptcies pursuant to Article 215-d(6) of the Bankruptcy Law.

433 Petrov ¶¶ 138-142; Macedonian Law on Bankruptcy (**R-10**) Art. 215-b.

434 Macedonian Law on Bankruptcy (**R-10**) Art. 215-b.

435 Reorganization Plan, dated April 2018 (**C-13**) at 15-18, 27-35.

195. Mr. Kostovski asserts that the Reorganization Plan lacked "clear criteria based on which" the classes of creditors were established.[436] That is not correct. The first category was described as "secured creditors-banks whose claims are secured by pledge or mortgage."[437] The second category was described as "unsecured creditors based on loans granted to TE-TO AD for construction of the plant and claims arising from the period of construction of the plant."[438] The third category encompassed claims of "unsecured creditors who have claims based on the current operational business [of] TE-TO AD without which TE-TO AD cannot maintain the business venture."[439] The Final Reorganization Plan set forth only two classes, again established with clear criteria: the "first class encompasses secured creditor-banks whose claims are secured by pledge or mortgage," and the "second class encompasses unsecured creditors."[440]

196. Leaving aside the classification of creditors, GAMA asserts that the Reorganization Plan should have recognized "default interest of approximately EUR 3 million as of the invoice's due date up to 1 March 2018" on its EUR 5 million claim.[441] GAMA does not provide any authority for the purported requirement that a debtor's reorganization plan should include interest on unsecured claims. There is none. On the contrary, Article 136 of the Bankruptcy Law provides that unsecured claims shall not include interest.[442]

(iii) The deadline for repayment under the Final Reorganization Plan complies with the Bankruptcy Law

197. The Reorganization Plan envisaged repayment over a period of 12 years, with TE-TO settling the claims of secured creditors first until 2028 and then the claims of unsecured

436 Kostovski ¶ 35.

437 Reorganization Plan, dated April 2018 (**C-13**) at 15.

438 Reorganization Plan, dated April 2018 (**C-13**) at 15.

439 Reorganization Plan, dated April 2018 (**C-13**) at 15.

440 Final Reorganization Plan, dated 6 June 2018 (**C-14 SOC**) at 32 [31].

441 Statement of Claim ¶ 98.

442 Macedonian Law on Bankruptcy (**R-10**) Art. 136(3) ("As of the day of opening the bankruptcy procedure, the interest on the unsecured claims shall not be calculated.") Art. 136(4) ("The interest rate on secured claims shall be calculated only if agreed, but only up to the value of the property that is used as collateral for the claims.").

creditors in 2028 and 2029.[443] GAMA argues that this was "an egregious breach" of Article 215-b(1)(2) of the Bankruptcy Law, which provides that "[the] [d]eadline for implementation of the plan for reorgsnization … cannot be longer than five years …"[444]

198. GAMA acknowledges (as it must) that the five-year period in Article 215-b(1)(2) is subject to exceptions, but asserts that these exceptions were inapplicable because "GAMA's claim and that of other unsecured creditors were not based on granted loans, credit, or similar claims, but were commercial claims …"[445] GAMA misconstrues the exceptions set out in Article 215-b(1)(2). That Article 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.[446]

199. Mr. Petrov explains that Article 215-b(1)(2) sets out a "basic rule … for implementing the reorganization plan of 5 years. However, that same provision makes clear that the basic rule is not absolute. There are exceptions where the deadline for implementing the reorganization plan can be longer than 5 years.."[447] As he explains, the 12-year repayment deadline for unsecured creditors in the Final Reorganization Plan falls within the exception under Article 215-b(1)(2) because "GAMA's claim can be regarded as an 'other claim' for which the 'maturity period' and 'other conditions' are changed with the Plan."[448]

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443 Reorganization Plan, dated April 2018 (**C-13**) at 18.

444 Statement of Claim ¶ 100; Kostovski ¶¶ 29-30, 72-74; Macedonian Law on Bankruptcy **R-10**) Art. 215-b(1)(2).

445 Statement of Claim ¶ 101; Kostovski ¶¶ 29-30.

446 Macedonian Law on Bankruptcy (**R-000**) Art. 215-b(1)2) (emphasis added).

447 Petrov ¶ 160.

448 Petrov ¶ 162.

200. In sum, as Mr. Petrov concludes, for all of GAMA's hyper-technical procedural nitpicking, the bankruptcy proceedings of TE-TO were conducted substantially in compliance with Macedonian law and practice.[449] And, even if GAMA could establish that the Macedonian judges had made errors of law in applying the then novel bankruptcy reorganization procedure, GAMA cannot show that those errors were so grave as to compel the conclusion that the multiple judges who addressed these issues acted with malice or in bad faith as would be required to prove a denial of justice.

2. GAMA's debt enforcement proceedings were conducted in accordance with Macedonian law

201. GAMA assails the conduct of the Macedonian judiciary in the proceedings related to its Payment Order. In doing so, GAMA seeks to turn its back on the choices that it and its counsel made in pursuit of the EUR 5 million claim against TE-TO. Those choices included:

a) entering into the Settlement Agreement, and then failing to timely fulfill its obligations under that Agreement;[450]

b) requesting and obtaining a Payment Order *ex parte* from a Macedonian notary instead of initiating arbitration under the arbitration agreement in the EPC Contract;[451]

c) refusing an offer from TE-TO to pay EUR 5 million in exchange for GAMA abandoning its Payment Order;[452]

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449 Petrov ¶ 4.

450 Settlement Agreement (**C-4**); Findings and Opinion of Expert Witness Goran Markovski, dated November 2013 (**C-48**) at 7 and 11-32 (listing 14 defects and 6 Punch-List items that remained outstanding).

451 GAMA Application for Payment Order, dated 3 December 2012 (**C-36**) at 1-2 ("Considering the above mentioned [dispute arising out of the EPC Contract], the Creditor files this proposal to the Notary Public, in accordance with article 16-d, paragraph 1 from the Law on Enforcement to adopt the following DECISION The Debtor [TE-TO] IS HEREBY OBLIGED to pay to the Creditor [GAMA] the claim in total amount of EUR 5.000.000.00").

452 Letter from Sintez to GAMA, dated 26 December 2012 (**C-41**); Letter from GAMA to Sintez, dated 4 January 2013 (**C-42**).

d) changing its mind regarding the Payment Order claim, and attempting to withdraw it after the fact through proceedings before the Basic Court and the Court of Appeal over 19 months;[453]

e) challenging the Macedonian courts' interpretation of the Settlement Agreement, but failing to articulate how English law that GAMA says should apply to that interpretation would have led to a different result;[454] and

f) failing to introduce expert evidence to rebut the evidence of TE-TO's expert in determining whether GAMA had fulfilled its obligations under the Settlement Agreement.[455]

202. GAMA cannot escape the consequences of these choices through an investment treaty claim. 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."[456]

203. In any case, and as explained above and summarized below, the conduct of the Macedonian judiciary in response to GAMA's choices was proper and lawful.[457] None of GAMA's assertions and arguments comes close to showing that the Macedonian judicial

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[453] GAMA application to Basic Court, dated 9 May 2013 (**C-46**); Court of Appeal decision, dated 15 December 2014 (**C-8**).

[454] *See e.g.* GAMA submissions to Basic Court, dated 19 December 2013 (**C-50**); Minutes of Basic Court, dated 7 March 2014 (**C-53**); GAMA submissions to Basic Court, dated 19 March 2015 (**C-55**); GAMA submissions to Court of Appeal, dated 25 September 2018 (**C-68**); GAMA submissions to the Supreme Court, dated 24 December 2019 (**C-69**); GAMA submissions to Basic Court, dated 23 August 2021 (**C-70**); GAMA submissions to Court of Appeal, dated 2 February 2022 (**C-72**).

[455] Decision of the Basic Court, dated 4 May 2018 (**C-10**); Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**) at 5.

[456] *Amto v. Ukraine* (**RL-36**) ¶ 76.

[457] *See supra* Sections II C, E.

system as a whole has failed[458] or that the courts' conduct was "exceptionally outrageous or monstrously grave."[459]

204. First, GAMA alleges that the "excessive duration" of the court proceedings relating to the Payment Order caused or contributed to a denial of justice.[460] In support of its position, GAMA relies on four cases, none of which is comparable to this case.[461] In *Pey Casado v. Chile*, a first instance decision on the merits remained unresolved for seven years.[462] The delay in *White Industries v. India* included waiting on the Supreme Court for over five years to set a date for an appeal.[463] In *El Oro Mining aWated nd Railway Co.*, nine years passed without "any action whatever."[464] In *Chevron v. Ecuador*, the claimant's seven

pending cases lingered for 13 to 15 years (and six of those cases had never seen a decision).[465]

205. Those cases usefully contrast that the Macedonian courts addressed GAMA's claims diligently and in accordance with Macedonian court procedure. The Macedonian judiciary allowed GAMA to avail itself of 11 proceedings in 9.5 years – including the

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458 *Chevron v. Ecuador* (**CL-46**) ¶ 8.36.

459 Eduardo Jiménez de Aréchaga, *International Responsibility*, 159 RECUEIL DES COURS 267 (1978) (**RL-12**) at 282.

460 Statement of Claim ¶¶ 197(d), 189(a).

461 Statement of Claim ¶ 249; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, (I), ICSID Case No. ARB/98/2, Award (8 May 2008) (**CL-48**); *White Industries v. India* (**CL-37**); *El Oro Mining and Railway Co.* (**CL-49**) at 191-199; *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**). Claimant also relies on cases from the European Court of Human Rights (Statement of Claim ¶ 250). Those cases are not only inapposite to an investment treaty claim, but they all involve longer timelines: *Zorc v. Slovenia*, Application No. 2792/02, Judgment of the ECtHR (2 November 2006) (**CL-51**) involved a 7.5-year proceedings during which the Slovenian courts took more than 2.5 years to dismiss a party's request for transfer of the case and recusal of the judge (¶¶ 34, 37); *Pakom Sloboda Dooel v. The Former Yugoslav Republic of Macedonia*, Application No. 33262/03, Judgement of the ECtHR (21 January 2010) (**CL-52**) included a five-year delay of the first-instance court to advise the parties on a procedural matter, as well as a two-year period in which the proceedings were dormant (¶¶ 27-29); in *Delić v. Bosnia and Herzegovina*, Application No. 59181/18, Judgement of the ECtHR (2 March 2021) (**CL-53**), the first-instance court took nearly seven years to decide whether the defendant had properly filed a defense to the applicant's claim (¶ 7).

462 *Pey Casado v. Chile,* (**CL-48**) ¶ 659.

463 *White Industries v. India* (**CL-37**) ¶ 11.4.19.

464 *El Oro Mining and Railway Co.* (**CL-49**) at 2.

465 *Chevron v. Ecuador I* (**CL-50**) ¶ 270.

notarial application process, three first-instance hearings, and seven appeals (including to the Supreme Court) – all of which were completed.[466]

206. In any case, GAMA's litigation choices contributed to the overall timeline,[467] as did TE-TO's litigation choices.[468] Macedonia shoulders no responsibility for those choices.

207. Second, GAMA argues that Macedonia denied GAMA justice by "failing to decline jurisdiction over the dispute between GAMA and TE-TO on the basis of the arbitration agreement,"[469] thus "extinguishing GAMA's right to arbitration under the EPC Contract."[470]

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[466] Notarial decision on GAMA application for Payment Order, dated 4 December 2012 (**C-6**); Decision of Basic Court on GAMA's injunction application, dated 1 February 2013 (**C-34**); Decision of the Court of Appeal, dated 14 March 2013 (**C-35**); Decision of Basic Court on GAMA's application to withdraw its claim, dated 7 March 2014 (**C-7**); Decision of the Court of Appeal on GAMA's application to withdraw its claim, dated 15 December 2014 (**C-8**); Decision of the Court of Appeal on GAMA's objection to joinder of TE-TO's counter-claim, dated 16 June 2016 (**C-62**); Decision of the Court of Appeal on GAMA's appeal of TE-TO's reorganization plan, dated 30 August 2018 (**C-17**); Decision of the Court of Appeal on GAMA's appeal of annulment of Payment Order, dated 18 October 2019 (**C-11**); Decision of Macedonian Supreme Court on GAMA's appeal of annulment of Payment Order, dated 23 December 2020 **(C-70**); Decision of Basic Court on GAMA's re-filed claim, dated 8 October 2021 (**C-71**); Decision of the Court of Appeal on GAMA's re-filed claim, dated 30 June 2022 (**C-73**).

[467] GAMA (1) applied for the Payment Order and then tried to withdraw its claim 4 months later (in May 2013), thus triggering proceedings about withdrawal that lasted 19 months (until December 2014) (*see* GAMA application for Payment Order, dated 3 December 2012 (**C-36**); GAMA's submission to Basic Court, dated 9 May 2013 (**C-46**); Decision of the Court of Appeal, dated 15 December 2014 (**C-8**)); (2) appealed the joinder of TE-TO's counterclaim (in July 2015), thus delaying the start of the counterclaim process for 14 months (until September 2016) (*see* GAMA submission to the Court of Appeal, dated 21 July 2015 (**C-60**); Decision of the Court of Appeal, dated 16 June 2016 (**C-61**)); (3) waited 4 months after the Basic Court decision on the merits (in May 2018) to launch an appeal (in September 2018) which required 13 months for a Court of Appeal decision (in October 2019) (*see* Decision of the Basic Court, dated 4 May 2018 (**C-10**); GAMA submission to the Court of Appeal, dated 25 September 2018 (**C-68**); Decision of the Court of Appeal, dated 18 October 2019 (**C-11**)); (4) appealed the October 2019 Court of Appeal decision, which required 15 months for a Supreme Court decision (in December 2020) that remitted the case back to Basic Court (*see* Decision of the Court of Appeal, dated 18 October 2019 (**C-11**); Decision of the Macedonian Supreme Court, dated 23 December 2020 (**C-12**)); (5) waited 8 months before filing a brief with Basic Court in August 2021 (*see* GAMA submission to Basic Court, dated 23 August 2021 (**C-70**)).

[468] For example, TE-TO initiated criminal proceedings for fraud against GAMA in September 2016 and applied for a related stay in the Basic Court in December 2016, which paused proceedings for 14 months (until February 2018) (*see* TE-TO application to Basic Court, dated 15 December 2016 (**C-64**); Decision of the Appellate Court Skopje, dated 8 February 2018 (**C-67**)).

[469] Statement of Claim ¶ 278(a). *See also* Statement of Claim ¶¶ 189(a), 197(a), 228, 232, 247.

[470] Statement of Claim ¶¶ 229, 235.

208. GAMA's argument rings hollow, because GAMA never sought to have its dispute with TE-TO settled under the EPC Contract's arbitration agreement.[471] Rather, GAMA started (and continues) Macedonian court procedures to collect from TE-TO. Macedonian courts properly assumed jurisdiction according to Macedonian law. As explained above,[472] under Macedonia's Law on Private International Law, the Basic Court found jurisdiction[473] because TE-TO is a "legal entity with headquarters in the Republic of Macedonia"[474] and, as the defendant, it "consented to the jurisdiction of the courts of the Republic of Macedonia" by objecting to the Payment Order.[475]

209. Third, GAMA argues that "[p]ursuant to Macedonian law, the Macedonian courts should have *ex officio* applied English law to the merits of the dispute"[476] regarding the Settlement Agreement, but the courts "never attempted to [do so] … although GAMA

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471 GAMA's position can be usefully contrasted with that of the claimants in the cases that it relies on. The facts of those cases compel the conclusion that Macedonia never "extinguished" GAMA's claim. In *ATA v. Jordan*, the tribunal held that the claimant's right to arbitration was impermissibly "extinguished" when the Jordanian court retroactively applied a law to extinguish claimants' right to avail themselves to arbitration: "Retroactivity is the problem here" (*ATA Construction v. Jordan* (**CL-15**) ¶ 128). That bears no resemblance to the conduct of the Macedonian judiciary here. Claimant also cites *Saipem v. Bangladesh*. There the Bangladeshi courts had baselessly revoked the authority of the ICC tribunal amounting to an "abuse of right." (¶159); issued injunctions against continuation of the arbitration (¶168); and issued an award declaring that the ICC arbitration award was "non-existent." (¶173.) The part of *White v. India* cited by Claimants says that an arbitral award constitutes a right under White's original investment that is subject to protection; it does not support Claimant's case that its decision to submit itself to Macedonian court's jurisdiction and failure to, at any point thereafter, turn to arbitration despite its unhindered ability to do so, amounted to a denial of justice.

472 *See supra* ¶ 49.

473 Decision of the Court of Appeal, dated 15 December 2014 (**C-8**) at 3.

474 Macedonian Law on Private International Law (**R-1**) Art. 56(3).

475 Macedonian Law on Private International Law (**C-52**) Art. 57(2) (Art. 57(1) "In cases when an agreement on jurisdiction of the court of the Republic of Macedonia is permissible under paragraphs (3) and (4) of Article 56 hereof, the jurisdiction of the courts of the Republic of Macedonia may also be based on the consent of the defendant; Art. 57(2) "The defendant shall be considered as having consented to the jurisdiction of the courts of the Republic of Macedonia if he entered a plea or lodged an objection against the payment order …"). To the extent that GAMA argues that the Macedonian courts should have denied jurisdiction from the outset – when GAMA sought a Macedonian remedy and TE-TO consented to the jurisdiction of Macedonian courts – there is no basis for its position. The arbitration agreement provides that disputes will be resolved by arbitration "[u]nless otherwise agreed by both Parties." (EPC Contract, dated 11 May 2007 (**C-2**) General Conditions, Clause 20.6).

476 Statement of Claim ¶ 197(b).

repeatedly demanded that English law be applied as the governing law of the Settlement Agreement and the EPC Contract."[477]

210. GAMA omits that it never submitted any evidence on the content of English law nor articulated how English law might have supported GAMA's interpretation of the Settlement Agreement.[478] Indeed, GAMA advanced arguments about the content and applicability of Macedonian law.[479] Against that background, the Macedonian courts could reasonably assume that English law would not change the interpretation of the Settlement Agreement.

211. Fourth, GAMA asserts a "failure of the Civil Court Skopje and the Appellate Court Skopje to consider GAMA's claim under the straight-forward Settlement Agreement as unconditional."[480] GAMA argued before the courts that TE-TO's obligation under the Settlement Agreement to pay EUR 5 million to GAMA by 31 March 2012 was not conditional on GAMA's obligations under the Settlement Agreement to remedy defects and resolve issues on the Punch List.[481] TE-TO took a different view.[482] Both parties made submissions.[483] The Macedonian courts considered the submissions and evidence before rendering decisions.[484] That cannot amount to a denial of justice, no matter how the courts decided on the merits of the arguments. Only if Macedonian courts "willfully

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477 Statement of Claim ¶ 49, and FN 62 (pointing to GAMA submission to the Basic Court Skopje, dated 13 March 2015 (**C-55**) at 4, and to GAMA submission to the Macedonian Supreme Court, dated 24 December 2019 (**C-69**) at 5).

478 *See supra* ¶¶ 106, 117, 122.

479 *See e.g.* GAMA submissions to Court of Appeal, dated 25 September 2018 (**C-68**) at 6 (GAMA argues that Art. 111 of the Macedonian Law on Obligations applies to the Settlement Agreement); GAMA submissions to the Court of Appeal Skopje, dated 2 February 2022 (**C-72**) at 7 (GAMA again submitted arguments about Art. 111 of the Law on Obligations).

480 Statement of Claim ¶ 197(c). Claimant also says that the courts came to contradictory views, which is addressed below at ¶ 212.

481 *See*, *e.g.*, GAMA submissions to Court of Appeal, dated 25 September 2018 (**C-68**) at 2-4.

482 *See*, *e.g.*, Decision of Basic Court, dated 1 February 2013 (**C-34**) 2-3; Decision of the Basic Court, dated 4 May 2018 (**C-10**) at 3, 10.

483 *See*, *e.g.*, GAMA submissions to Court of Appeal, dated 25 September 2018 (**C-68**) Decision of the Basic Court, dated 4 May 2018 (**C-10**) at 3, 10.

484 *See*, *e.g.*, Decision of the Court of Appeal Skopje, dated 18 October 2019 (**C-11**) at 3-7; Decision of the Basic Court, dated 8 October 2021 (**C-71**) at 8-12.

and in bad faith disregarded or misinterpreted its municipal law does the state incur international liability."[485] GAMA offers no evidence of that sort.

212. Fifth, GAMA argues that "the Civil Court Skopje and the Appellate Court Skopje … disregard the fact that GAMA's claim was acknowledged by the same courts in TE-TO's reorganisation proceedings."[486] That is wrong. The Court of Appeal found on 30 June 2022 that "the plaintiff's [GAMA's] claim was recognized in the respondent's [TE-TO's] reorganization proceedings" and accordingly remanded the claim to the Basic Court with instructions to "take into consideration" that "the plaintiff [GAMA] is a bankruptcy creditor and has a claim in the amount of 5 million euros."[487] Thus, GAMA's argument that its claim was recognized in the bankruptcy proceedings was accepted on appeal and taken into consideration upon remand. That cannot support a finding of a denial of justice. To quote Professor Greenwood, "the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal."[488] In any event, as Mr. Petrov explains, there was nothing inconsistent in the Basic Court finding that the Payment Order claim was unfounded (because payment was conditional on GAMA complying with its contractual obligations regarding the defects and punch list items) and the Bankruptcy Judge allowing the same claim to be recognized in the bankruptcy.[489] Under Macedonian bankruptcy law, upon the opening of bankruptcy proceedings, all debts are deemed to be matured and due.[490]

213. Finally, GAMA argues that the conduct of the Macedonian courts have relieved it of the obligation to exhaust local remedies because doing so would be "evidently futile or

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485 EDWIN M. BORCHARD, The Diplomatic Protection of Citizens Abroad (1927) (**RL-3**) at 332. see also *Perenco v. Ecuador* (**RL-77**) ¶ 583 (observing that an international "tribunal does not act as a court of appeal on questions of [local] law" and "cannot second-guess the court's interpretation and application of local law."); *Chevron v. Ecuador* (**CL-46**) ¶¶ 8.41-42 (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").

486 Statement of Claim ¶ 197(c).

487 Decision of the Court of Appeal, dated 30 June 2022 (**C-73**) at 2.

488 Greenwood, *State Responsibility For The Decisions Of National Courts* (**RL-27**) at 61.

489 Petrov ¶¶ 131-138.

490 Petrov ¶ 148.

unreasonable," given that (i) its claim "relates to excessive delays in judicial proceeding" and (ii) its Payment Order claim is "obsolete … considering that GAMA's claim was acknowledged and written-off in separate reorganisation proceedings at the same court."[491] GAMA's argument in this respect is embarrassing. Less than two months after making these arguments with its Statement of Claim, GAMA did exactly what it said would be "evidently futile or unreasonable" – GAMA returned to Macedonian courts. As explained above, on 31 January 2023, GAMA recommenced proceedings in Basic Court to recover the EUR 5 million payment from TE-TO.[492]

214. In any case, relief from the requirement to exhaust local remedies is only exceptionally available where remedies are "manifestly ineffective"[493] or where pursuit of a remedy is "obviously futile."[494] This narrow exception does not relieve a claimant from exhausting local remedies simply because their claim before domestic courts has no merit or because their counsel is ineffective.[495] And a foreign investor's lack of success before national courts after exhausting local remedies does not automatically translate into a denial of justice.[496] Even with respect to delay as a cause of futility, GAMA would have to establish that the delay in court proceedings was already so excessive as to amount to a

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491 Statement of Claim ¶242.

492 GAMA submission to the Basic Court, dated 31 January 2023 (**R-12**).

493 *Gramercy Funds v. Peru* (**RL-114**) ¶ 503l.

494 *Philip Morris v. Uruguay* (**RL-92**) ¶ 503. *See also Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's expedited preliminary objections in accordance with Article 10.20.5 of the DR-CAFTA (31 May 2016) (**RL-91**) ¶ 261 ("there is an exception to the requirement to exhaust local remedies, where seeking such an appeal domestically would be obviously futile or manifestly ineffective,, a position which finds support in a number of international investor/State arbitration awards[.]")); *Apotex v. United States* (**RL-71**) ¶ 276 ("[U]nder established principles, the question whether the failure to obtain judicial finality may be excused for "*obvious futility*" turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief."

495 *Amto v. Ukraine* (**RL-36**) ¶ 76.

496 *Gramercy Funds v. Peru* (**RL-114**) ¶ 1018; MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION (**RL-96**) ¶ 7.147 (discussing the relation between denial of justice and other causes of actions and explaining that "[w]here 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 system in order to prevail in his claim").

treaty breach on its own.[497] As shown above, the Payment Order proceedings did not involve any notable delay, let alone "excessive" delay.[498]

D. MACEDONIA DID NOT EXPROPRIATE GAMA'S INVESTMENT

215. GAMA frames its primary claim under the Treaty as one of unlawful expropriation.[499] GAMA argues that (i) the judicial proceedings, consisting of the Payment Order proceeding and TE-TO's reorganization proceedings, and (ii) the temporary deferral of TE-TO's 2018 income taxes "assessed in isolation, constitute an expropriation of GAMA's investment"[500] and, collectively, "constitute a creeping expropriation of GAMA's investment."[501]

216. GAMA's expropriation claim fails because international law does not recognize a concept of "judicial expropriation" distinct from a denial of justice (**Section 1**). This is illustrated by the cases on which Claimant relies, which all involved either a denial of justice or expropriatory conduct by State organs other than courts (**Section 2**). The sole non-judicial conduct that GAMA impugns, the deferral of TE-TO's 2018 income taxes, does not amount to an expropriation (**Section 3**).

1. International law does not recognize a claim for "judicial expropriation" distinct from a denial of justice

217. Investment treaty tribunals have repeatedly held that an investor's claims relating to domestic judicial proceedings must be assessed according to the denial of justice standard, not under the expropriation standard.[502] This is because international law does not recognize a concept of "judicial expropriation" as distinct from a denial of justice.

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[497] *Jan de Nul v. Egypt* (**RL-39**) ¶ 256; *Chevron v. Ecuador* (**CL-46**) ¶ 7.152-7.153; *Chevron v. Ecuador I* (**CL-50**) ¶ 270.

[498] *See supra* ¶¶ 204-205.

[499] Statement of Claim ¶ 189.

[500] Statement of Claim ¶ 193.

[501] Statement of Claim ¶ 193.

[502] *Loewen Group v. United States* (**RL-24**) ¶ 141 ("a claim alleging an appropriation in violation of [NAFTA] Article 1110 can succeed only if [the claimant] establishes a denial of justice under Article 1105"); See also

218. In the *Barcelona Traction* case, Belgium pled expropriation of its nationals' investments in a corporation that the Spanish courts had declared bankrupt. While the majority of the ICJ dismissed Belgium's claim for lack standing, in his separate opinion, Judge Tanaka assessed the merits of the claim and did so solely under the standard of denial of justice (not expropriation), concluding that "error[s] in fact-finding or in the interpretation" of Spanish bankruptcy law could not constitute a denial of justice.[503]

219. This view has been adopted by investment treaty tribunals. For example, *Vöcklinghaus v. Czech Republic* concerned the conduct of the Czech judiciary with respect to the bankruptcy and liquidation of the claimant's resort project. The claimant contended that it had been expropriated, but the tribunal assessed the claimant's allegations solely against the denial of justice standard.[504]

220. The claimant in *MNSS v. Montenegro* similarly argued that its investment had been expropriated by a Montenegrin court's allegedly improper dismissal of the claimants' proposed reorganization plan in a bankruptcy proceeding.[505] The tribunal dismissed the claim, because "[a] court decision cannot be considered a direct expropriation unless a denial of justice is found," and the claimant had not proven (or even alleged) a denial of justice.[506]

Lion v. Mexico (**RL-113**) ¶ 188 (Under the heading "No judicial expropriation without denial of justice," the tribunal majority ruled that "liability for expropriation … arising from the decisions of domestic courts requires a finding of a denial of justice.").

503 *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)*, 1970 ICJ 3, Separate Opinion of Judge Tanaka (5 February 1970) (**RL-8**) at 157-158.

504 *Vöcklinghaus v. Czech Republic* (**RL-60**) ¶ 205 ("It is well accepted that any investment claim tribunal faced with an allegation of 'denial of justice' must be astute to avoid the assumption of the role of a court of appeal over foreign domestic courts. It is equally well established that 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.").

505 *MNSS B.B. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 June 2016) *("**MNSS v. Montenegro**")* (**RL-90**) ¶ 370.

506 *MNSS v. Montenegro* (**RL-90**) ¶ 370.

221. In *Azinian v. Mexico*, the tribunal considered whether Mexican court decisions upholding the termination of the claimant's contract amounted to an expropriation.[507] The tribunal found that, even if it were established "that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required; the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end."[508] The claimants' failure to allege a denial of justice was fatal to their expropriation claim.[509]

222. The tribunal in *Manolium v. Belarus* likewise rejected an expropriation claim after the Belarusian Supreme Court upheld the termination of the claimant's investment contract.[510] The tribunal held that "judicial expropriation must result from denial of justice," that there was no denial of justice on the facts, and that this "preclude[d] the possibility that the [Supreme Court] Decision gives rise to a judicial expropriation."[511]

223. Commentators have likewise rejected the concept of judicial expropriation. Professor Douglas opines that this concept is bound to encroach on the integrity of domestic adjudication.[512] In his view, "acts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial

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[507] *Azinian v. Mexico* (**RL-15**) ¶ 85 (see Section C: "the contention that the annulement was an act of expropriation"

[508] *Azinian v. Mexico* (**RL-15**) ¶ 99. The tribunal explained that a "'pretence of form' to mask a violation of international law" overlaps with a "clear and malicious misapplication of the law" (¶ 103) which is amounts to a denial of justice (PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (**RL-28**) at 202 (stating that a pretence of form is a denial of justice consisting of "an abuse of form to mask an internationally wrongful purpose"). The *Azinian* tribunal's reference to a "pretence of form" thus should not be understood as drawing a distinction from a denial of justice.

[509] *Azinian v. Mexico* (**RL-15**) ¶ 100 (The tribunal observed that, absent a complaint of denial of justice, "a determination by a competent court that a contract governed by Mexican law was invalid under Mexican law" meant that "there is by definition no contract to be expropriated.").

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

[511] *OOO Manolium-Processing v. Belarus* (**RL-112**) ¶¶ 591-592.

[512] Zachary Douglas, *International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed*, 63(4) INT'L & COMP. L.Q. 28 (2014) ("**Zachary Douglas, *International Responsibility for Domestic Adjudication***") (**RL-80**) at 29-30 ("[A] claim for expropriation in respect of a first instance court decision is inadmissible. A claim for denial of justice would have to be made through the medium of the fair and equitable standard of treatment.").

of justice and not for any other form of delictual responsibility towards foreign nationals."[513] Similarly, Aniruddha Rajput observes that accepting the concept of judicial expropriation would mean that "[e]very 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."[514]

224. The practice of States is to the same effect. The United States, for example, has consistently rejected the notion of judicial expropriation. In recent non-disputing party submissions, the United States emphasized that "[j]udicial measures applying domestic law may give rise to a claim for denial of justice ... Decisions of domestic courts acting in the role of neutral and independent arbiters of the legal rights of litigants do not, however, give rise to a claim for expropriation … "[515]

2. The "judicial expropriation" cases on which GAMA relies involved a Denial of Justice or the participation of other State organs in the expropriatory conduct

225. The cases on which GAMA relies do not establish that court decisions can be expropriatory without a denial of justice.[516] Rather, as explained below, these cases

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513 Zachary Douglas, *International Responsibility for Domestic Adjudication* (**RL-46**) at 29.

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

515 *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru*, ICSID Case No. UNCT/18/2, Submission of the United States of America (21 June 2019) (**RL-104**) ¶ 28; See also *Angel Samuel Seda & Others v. Republic of Colombia,* ICSID Case No. ARB/19/6, Submission of the United States of America (26 February 2021) (**RL-110**) ¶¶ 29 (same); 46-47 ("[A]n investor's claim challenging judicial measures under Article 10.5.1 is limited to a claim for denial of justice under the customary international law minimum standard of treatment. A fortiori, domestic courts performing their ordinary function in the application of domestic law as neutral arbiters of the legal rights of litigants before them are not subject to review by international tribunals absent a denial of justice under customary international law."); *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Submission of the United States of America (21 July 2019) (**RL-105**) ¶¶ 9, 20 (similar); *Eli Lilly and Company v. Canada*, ICSID Case No. UNCT/14/2, Submission of the United States of America (18 March 2016) (**RL-88**) ¶¶ 23, 28-29 (similar).

516 Statement of Claim ¶¶ 190-192, citing *Saipem v. Bangladesh* (**CL-14**), *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**), *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/, Award (9 September 2009) ("***Sistem v. Kyrgyz Republic***") (**CL-59**),

entail either (i) clear examples of a denial of justice or (ii) participation by non-judicial State organs in the expropriatory conduct.

a) In *Saipem v. Bangladesh*, the tribunal held that the Bangladeshi courts had expropriated the claimant's investment by annulling an ICC award in its favor.[517] That holding has been the subject of significant criticism,[518] and as explained above, the conduct of the Bangladeshi courts was a clear example of denial of justice. The tribunal framed its decision in those terms.

b) *Dan Cake v. Hungary* involved a claim of denial of justice. GAMA cites from the tribunal's decision on jurisdiction that "the acts of the Hungarian bankruptcy court 'had the effect of depriving [the investor] of the ownership of its investment, and can therefore be considered to be measures 'having the equivalent effect' to an expropriation.'"[519] On the merits, the tribunal made no findings of expropriation, however,[520] and instead held that Hungary had breached the FET standard "in the form of a denial of justice."[521]

c) In *Rumeli v. Kazakhstan*, "the court process which resulted in the expropriation of Claimant's shares was brought about through improper collusion between the State, acting through the Investment Committee, and [the claimant's competitor]

OAO "Tatneft" v. Ukraine (**CL-23**), *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**), and *Deutsche Bank v. Sri Lanka* (**CL-22**).

517 *Saipem v. Bangladesh* (**CL-14**) ¶ 159.

518 *See* MARTIN PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 2013) (**RL-74**) at 208 (noting that the decision "is problematic" because "while taking of property through the judicial process could be said to constitute expropriation, the rules and criteria to be applied for establishing the breach should come from denial of justice").

519 Statement of Claim ¶ 192, quoting *Dan Cake v. Hungary* (**CL-26**) ¶ 78.

520 *Dan Cake v. Hungary* (**CL-26**) ¶ 81 ("when one reads the arguments which Claimant develops in its Reply, it appears that neither expropriation nor full protection and security are mentioned, and that the particular acts of which Dan Cake complains are characterised as being in breach only of the BIT's provisions on fair and equitable treatment (Article 3.1) and unfair or discriminatory measures (Article 3.2).").

521 *Dan Cake v. Hungary* (**CL-26**) ¶ 144.

Telcom Invest."[522] The Kazakh court's sole role was to affirm the purchase of claimants' shares under the applicable law, and to decide claimant's share price. The tribunal found that "there was no evidence that [the court's decision] was not made 'in accordance with due process of law'."[523] The expropriatory conduct thus involved other State organs and not solely (or even mainly) judicial conduct.[524]

d) In *Deutsche Bank v. Sri Lanka*, as explained above, the tribunal found an expropriation because the Sri Lankan Supreme Court had issued an interim judicial order for "political reasons" on the instructions of the Sri Lankan government, amounting to a "serious" due process violation.[525] The finding was also based on actions by the Sri Lankan Central Bank, which had acted with "improper motive" and "bad faith" and continued to block payments to the claimant even after the Supreme Court had lifted its interim order.[526] The case was thus a textbook example of a denial of justice (a judgment dictated by the

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[522] *Rumeli v. Kazakhstan* (**CL-25**) ¶ 707.

[523] *Rumeli v. Kazakhstan* (**CL-25**) ¶ 705.

[524] *Rumeli v. Kazakhstan* (**CL-25**) ¶708 ("[T]he conclusion of the Tribunal is that this was a case of 'creeping' expropriation, instigated by the decision of the Investment Committee which was then collusively and improperly communicated to Telcom Invest and its shareholders before Claimants were made aware of it, and which proceeded via a series of court decisions, culminating in the final decision of the Presidium of the Supreme Court. The decision of the Investment Committee was moreover unfair and inequitable in itself, as the Tribunal has found.)

[525] *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. He indeed declared that 'the Government was forced to comply with the hedging agreements. We will stop that on a judicial order, just pass on to benefit to the people. The Government said you stop the hedging agreements we won't pass on the benefit.' The Chief Justice further recognized that internationally, Sri Lanka had no defence to present in the arbitration proceedings, that it was a difficult fight."); ¶ 520 (the tribunal basing its ruling on expropriation on "the developments presented in the section devoted to fair and equitable treatment").

[526] *Deutsche Bank v. Sri Lanka* (**CL-22**)¶ 523.

executive[527]) which, when combined with non-judicial conduct, amounted to an expropriation.[528]

e) In *Sistem v. Kyrgyz Republic*, the finding of expropriation rested on a forced takeover of the claimant's hotel by a group of armed men, led by the claimant's former partner and with the apparent collusion of State officials, followed by the failure of the State to take steps to restore the hotel to the claimant and the Kyrgyz courts' abrogation of a share purchase agreement under which the claimant had acquired ownership rights in the hotel.[529] Thus, judicial conduct and other State actions together amounted to an expropriation.

f) In *OAO Tatneft v. Ukraine* the tribunal considered both judicial and non-judicial conduct, and found that while the judicial intervention at issue was "not given in isolation but was part of the complex network of acts that led one way or another to the courts' determinations."[530] In any event, the tribunal found that it was "not necessary to pass upon the claim of expropriation" because it had already found that the State's combined judicial and non-judicial measures were "manifestly unfair and unreasonable" and breached FET standards.[531]

3. The (terminated) tax deferral granted to TE-TO cannot amount to an expropriation

226. The short-lived deferral by the Macedonian Government of TE-TO's income tax liability is the only non-judicial conduct that GAMA argues constitutes an expropriation (and a breach of the Treaty). GAMA contends that the tax deferral "assessed in isolation,

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[527] J.L. BRIERLY, THE LAW OF NATIONS (**RL-6**) at 287 (listing "a judgment dictated by the executive" as an example of denial of justice).

[528] *Deutsche Bank v. Sri Lanka* (**CL-22**) ¶ 523 ("The entire value of Deutsche Bank's investment was expropriated for the benefit of Sri Lanka itself…the actions by the Supreme Court and the Central Bank were not legitimate regulatory actions. They involved excess of powers and improper motive as well as serious breaches of due process, transparency and indeed a lack of good faith.")

[529] *Sistem v. Kyrgyz Republic* ¶¶ 97-104, 118-119.

[530] *OAO "Tatneft" v. Ukraine* (**CL-23**) ¶ 465.

[531] *OAO "Tatneft" v. Ukraine* (**CL-23**) ¶ 405.

constitute[s] an expropriation of GAMA's investment," and that, together with the Payment Order proceedings and TE-TO's reorganization proceedings, it "constitute[s] a creeping expropriation of GAMA's investment through a composite act in the sense of Article 15 of the ILC Articles."[532]

227. GAMA then jumps ahead to a recitation of the conditions for an expropriation to be lawful.[533] Those conditions are listed in Article III(1) of the Turkey-Macedonia BIT.[534] GAMA argues that Macedonia did not meet those conditions because the temporary tax deferral was "a violation of required due process of law,"[535] did not serve a public purpose,[536] and contributed to expropriation with "no compensation to GAMA."[537] GAMA concludes that, because the conditions for avoiding liability for expropriation are (allegedly) not present, then an expropriation must have occurred.

228. Tribunals have rejected this type of reasoning as "entirely wrong."[538] In *Fireman's Fund v. Mexico*, for example, the tribunal explained why considering the conditions for a lawful expropriation before establishing that an expropriation occurred amounts to "putting the cart before the horse":

> In determining whether a State Party to the NAFTA has violated its obligations under Article 1110 of the NAFTA, an arbitral tribunal has to start with the analysis whether an expropriation has occurred. Mexico correctly points out that **one cannot start an inquiry into whether expropriation has occurred by examining whether the conditions** in Article 1110(1) of the NAFTA **for avoiding liability in the event of an**

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532 Statement of Claim ¶ 193. ILC Article 15 does not assist. That Article recognizes that an act or omission "taken with the other actions or omissions, is sufficient to constitute the wrongful act." International Law Commission, Draft articles on "Responsibility of Sates for Internationally Wrongful Acts" (**RL-19**) Art. 15(1).

533 Statement of Claim ¶¶ 195-206.

534 Turkey-Macedonia BIT (**CL-1**) Art. III(1) ("except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II of this Agreement.")

535 Statement of Claim ¶ 197(f).

536 Statement of Claim ¶ 205, referring to ¶¶ 147 and 151.

537 Statement of Claim ¶ 202.

538 *European Media Ventures SA v. Czech Republic*, UNCITRAL, Partial Award on Liability ("***European Media v. Czech Republic***") (8 July 2009) (**RL-42**) ¶ 50(2).

> **expropriation have been fulfilled.** That would indeed be putting the cart before the horse ("poner la carreta delante de los caballos"). Paragraphs (a) through (d) do not bear on the question as whether an expropriation has occurred. Rather, the conditions contained in paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110.[539]

229. The tribunal in *European Media v. Czech Republic* likewise rejected that same illogical approach:

> The fact that a measure adversely affects a foreign investment and is not 'taken in accordance with a lawful procedure' and/or is discriminatory and/or is not accompanied by appropriate provision for compensation does not mean that it constitutes expropriation. The conditions in the second part of Article 3(1) come into play only if there has been an expropriation or a measure having similar effect; the absence of one or more of them is not in itself indicative of expropriation or a similar measure. This is an important point which has been emphasized by some other tribunals but which is all too frequently overlooked.[540]

230. In this case, GAMA must establish that the tax deferral constitutes an expropriation or "measure having similar effect," before considering the conditions for liability for unlawful expropriation. An expropriation requires proof of a substantial deprivation of property caused by State action.[541] GAMA must be put to the task of demonstrating how (counter to common sense and logic) the provision of financial assistance (tax deferral) to an insolvent debtor (TE-TO) results in the substantial deprivation of the property of its debtors.[542]

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[539] *Fireman's Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, Award (17 July 2006) (**RL-30**) ¶ 174.

[540] *European Media v. Czech Republic* (**RL-42**) ¶ 50.

[541] *Enkev Beheer BV v. Republic of Poland, PCA Case No. 2013-01* (UNCITRAL), First Partial Award (29 Apr. 2014) (**RL-76**) ¶ 344 ("the requirement under international law [is] for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or their virtual annihilation and effective neutralization.")

[542] *Link-Trading Joint Stock Company v. Republic of Moldova*, UNCITRAL Final Award dated 18 April 2002 (**RL-20**) ¶ 87 ("Claimant has the burden of proving the causal link between the measures complained of and the deprivation of its business."); *Oostergetel v. Slovak Republic* (**RL-63**) ¶ 320 ("[I]n a legal brief, a rationalization is necessary if acts that have been previously characterized as undue delay, unfair trial, discriminatory treatment, or denial of justice…are to be considered also as an "expropriation" in the technical sense of the

231. GAMA offers only speculation in response. GAMA asserts that without the temporary tax deferral:[543]

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

232. This speculative chain of causation does not establish that the temporary tax deferral itself was an expropriatory act. GAMA in any case misreads the record. While Macedonia acknowledged at the time of granting the tax deferral that it expected immediate collection of TE-TO's profit tax to "lead to the opening of bankruptcy proceedings over [TE-TO] and the collapse of the Reorganization Plan,"[544] that expectation turned out to be unfounded. A year later, when Macedonia terminated the deferral, TE-TO did not enter into bankruptcy proceedings and the Final Reorganization Plan did not collapse. Instead, TE-TO borrowed funds from Komercijalna Banka to pay its tax bill.[545] GAMA has not shown why TE-TO could not have done the same a year earlier, had the tax deferral not been granted.

233. Further, Macedonia never suggested, contrary to GAMA's assertion, that if TE-TO entered bankruptcy proceedings, "TE-TO would have been required to settle the claims

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word. The random "sprinkling" throughout the pleadings of a strong term with a well defined legal meaning such as "expropriation" or "creeping expropriation" does not transform that term by itself into an allegation of facts founding a treaty violation. In other words, the Claimants have not discharged the burden of allegation of a treaty breach involving expropriation." It does not assist GAMA to label the actions "creeping expropriation." (See Statement of Claim ¶ 93) Although expropriation can occur through a "creeping expropriation" that consists of a "series of measures [that] eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking" (*Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000) (**RL-17**) ¶ 76), Claimant has the burden of proving the causal link between each of the measures complained of and the deprivation of its business. Claimant has failed to do so.

543 Statement of Claim ¶ 130.

544 Email from the Government, dated 18 November 2019 (**C-24**) at 1.

545 TE-TO Financial Statements, dated 31 December 2021 (**C-137**) at 12-13.

of GAMA in full."[546] In support of its assertion that its claim would have been settled in full, GAMA offers only a rough comparison that at the end of 2017 "the accounting value of TE-TO's fixed assets amounted to EUR 167.3 million" while the First Reorganization Plan allowed for payments to all creditors (including GAMA) of EUR 70.9 million.[547] GAMA's comparison is unsupported by any evidence as to how bankruptcy proceedings under Macedonian law would treat TE-TO's "fixed assets" and the claims in the First Reorganization Plan, or what portion of the book value of fixed assets would be recovered on liquidation. In addition, GAMA ignores the full picture of TE-TO's financial statements as of 31 December 2017. The EUR 70.9 million that GAMA references are the payments *after* the 90% reduction of claims implemented by the Reorganization Plan which GAMA says should have been rejected.[548] GAMA would evidently not have benefited from that reduction had the plan been rejected and the company liquidated. In fact, the financial statements as of 31 December 2017 reveal "total assets" of MKD 10.8 billion (approx. EUR 176 million) and "total liabilities" of MKD 13.4 billion (approx. EUR 218 million), *i.e.*, a negative book value.[549] This is irreconcilable with GAMA's conjecture that it would have recovered "in full" its EUR 5 million claim in a liquidation.[550]

E. MACEDONIA ACCORDED GAMA TREATMENT NO LESS FAVORABLE THAN THAT ACCORDED TO ITS OWN NATIONALS AND NATIONALS OF THIRD STATES

234. GAMA says that Macedonia breached the most-favored nation ("**MFN**") clause in Article II(3) of the Treaty, which provides:

> Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments

[546] Statement of Claim ¶ 130.

[547] Statement of Claim ¶ 94.

[548] TE-TO's First Reorganization Plan (**C-13**) at 17-18 (payments to third-class creditors of approximately EUR 1.8 million (MKD 109,724,680) + payments to first and second-class creditors (after writing-off 90%) of EUR 69,143,759 = EUR 70,943,759 under the Plan).

[549] TE-TO's First Reorganization Plan (**C-13**) at 421.

[550] Statement of Claim ¶ 130.

> of its investors or to investments of investors of any third country, whichever is the most favourable.[551]

235. The MFN clause in Article II(3) is a non-discrimination provision. The tribunal in *İçkale İnşaat v. Turkmenistan* considered an MFN clause identical to Article II(3) of the Treaty[552] and held that:

> the 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.'**[553]

236. The MFN clause thus requires Macedonia not to discriminate against Turkish investments in a similar situation as compared to investments of its own nationals or of nationals of a third State.[554] To state a claim under the MFN clause, GAMA must show

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551 Macedonia-Turkey BIT.

552 *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 March 2016) ("***İçkale İnşaat v. Turkmenistan***") (**RL-87**) ¶ 326 ("Article II(2) of the [Turkey-Turkmenistan] BIT … provides as follows: 'Each Party shall accord to these investments [i.e., investments permitted into its territory pursuant to Article II(1)], 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.'"). *See also 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**) ¶ 784 (Considering an MFN clause identical to Article II(3) of the Treaty and also finding that "[T]he words "similar situations"…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… the wording of Article II(2), requiring such factually similar situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT, and to rely on such standards in the present Arbitration.")

553 *İçkale İnşaat v. Turkmenistan* (**RL-87**) ¶ 328.

554 See, e,g., *İçkale İnşaat v. Turkmenistan* (**RL-87**) ¶ 328 ("the legal effect of the MFN clause, properly interpreted, is to prohibit discriminatory treatment of investments of investors of any third state…in a "similar situation.") *International Law Commission, Final Report of the Study Group on the Most-Favored-Nation Clause*, UN DOC. A/70/10, Annex (2015) (**RL-85) ¶** 37 (finding that "MFN treatment is essentially a means of providing for non-discrimination between one State and other States."); United Nations Conference on Trade and Development, Most-Favoured-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements II (2010) (**RL-54**) at 29 (explaining that MFN clauses are legal instruments intended to ensure "an equality of competitive conditions between foreign investors of different nationalities [and] prevent[] competition between investors from being distorted by discrimination based on nationality considerations.").

"(i) the existence of another person or company in like circumstances, (ii) differential treatment, and (iii) the absence of rational justification for such treatment."[555]

237. GAMA has made no serious effort to make that showing. Instead, GAMA asserts that the "decisions of Macedonian courts [on the Reorganization Plan], which approved the write-off of 90% of the GAMA's claim and accrued interest in favour of TE-TO, treated GAMA less favourably in comparison to foreign and domestic creditors of TE-TO, which have been treated better than GAMA in TE-TO's reorganisation proceedings."[556]

238. There is no factual basis for that argument. GAMA does not (and cannot) dispute that there was a rational justification for treating secured creditors differently than unsecured creditors, such as GAMA. The very purpose of the security held by secured creditors is to ensure better treatment than unsecured creditors in bankruptcy.[557] Under the Final Reorganization Plan, TE-TO's two secured creditors, Landesbank Berlin and Komercijalna Banka, thus "will be paid 100% … according to the existing loan agreements until 2028."[558] GAMA takes no issue with this.

239. GAMA argues, however, that its unsecured claim was treated less favorably than that of other unsecured creditors. GAMA says that the Final Reorganization Plan "illegally privileged" TE-TO's shareholders "from Cyprus (Bitar Holdings), British Virgin Islands (Project Management Consulting) and, indirectly, Russia (TGC-2)" by including their

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[555] *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award (30 August 2018) (**RL-100**) ¶ 711. See also *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) ("***Crystallex v. Venezuela***") (**RL-89**) ¶ 616 ("To show discrimination the investor must prove that it was subjected to different treatment in similar circumstances without reasonable justification"); *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) (**RL-84**) ¶ 175 ("[A] mere showing of differential treatment is not sufficient to establish unlawful discrimination …. For discriminatory treatment, comparators must be materially similar; and there must then be no reasonable justification for differential treatment."); and *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award (17 March 2006) ("***Saluka v. Czech Republic***") (**RL-29**) ¶ 313 ("State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification").

[556] Statement of Claim ¶ 208.

[557] *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award (7 December 2018) (**RL-102**) ¶ 505 ("It is to state the obvious that a creditor in a bankruptcy proceeding who has a credit secured by a mortgage is in a better position to obtain satisfaction of its claim than a creditor who does not.")

[558] Final Reorganization Plan (**C-14 SOC**) at 26.

unsecured claims "in the class of unsecured creditors with higher priority claims, such as GAMA."[559] That is wrong as a matter of Macedonian law. As explained above, under a Prepackaged Bankruptcy procedure, TE-TO was free to classify creditors as it saw fit.[560] TE-TO chose to classify all unsecured creditors in a single class.[561] It did not distinguish among "higher priority claims" or lower-priority claims within that class, nor was it required to do so under the Bankruptcy Law.

240. GAMA further alleges that it was discriminated against because the Final Reorganization Plan (which was approved by the bankruptcy judge) "acknowledged" GAMA's claim "without the default interest," whereas "the interest on the claims of TE-TO's shareholders and related parties was fully acknowledged."[562] This misconstrues the Final Reorganization Plan. The Plan does indeed "acknowledge" the principal and interest components of claims made by each creditor, and identifies that GAMA's claim did not include a claim for interest.[563] But that is irrelevant to the treatment of creditors under the Final Reorganization Plan, because the plan calls for "the claims of unsecured creditors, a full write-off of all interest shall be performed, both of statutory penalties, and contractual interest."[564] Again, GAMA's claim was treated the same as all other unsecured creditors, *i.e.*, no creditor received interest under the Plan.

241. Because GAMA was treated the same as other unsecured creditors, GAMA's discrimination claim has no basis in fact and ought to be rejected. In any event, GAMA's discrimination claim fails because it concerns the conduct of the Macedonian judiciary, which falls to be assessed according to the denial of justice standard.[565] As shown in

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559 Statement of Claim ¶ 214.

560 *See supra* ¶¶ 192-195; Macedonian Law on Bankruptcy (**C-75**) Arts. 118(1), 215-b and 215-d; Petrov ¶¶ 138-142.

561 TE-TO's Final Reorganization Plan (**C-14 SOC**) at 32-38 [31-37].

562 Statement of Claim ¶ 98.

563 E-TO's Final Reorganization Plan (**C-14 SOC**) at 36-37 [35-36].

564 TE-TO's Final Reorganization Plan (**C-14 SOC**) at 26-27 [25-26].

565 *Manchester Securities Corporation v. Republic of Poland*, PCA Case No. 2015-18, Award (7 December 2018) (**RL-102**) ¶ 424 ("Arbitrary and discriminatory treatment by courts, and interference by the Respondent in judicial proceedings, are directly related to the claim of denial of justice."); Expert Opinion of former ICJ judge

above, the Macedonian courts' approval of TE-TO's Reorganization Proposal and its Final Reorganization Plan comes nowhere close to establishing a denial of justice.[566]

F. GAMA'S ATTEMPT TO IMPORT ADDITIONAL SUBSTANTIVE STANDARDS OF TREATMENT FOUND IN OTHER TREATIES IS UNAVAILING

242. GAMA relies on the MFN clause in Article II(3) of the Treaty to impose a laundry list of additional treaty obligations on Macedonia, namely:[567]

a) the obligation to accord fair and equitable treatment ("**FET**") under the Macedonia-Lithuania BIT, the Macedonia-Austria BIT, and the Slovakia-Macedonia BIT;[568]

b) the obligation to accord full protection and security ("**FPS**") under the Macedonia-Lithuania BIT and the Macedonia-Austria BIT;[569]

c) the obligation not to impair by arbitrary, unreasonable, or discriminatory measures the management, maintenance, use, enjoyment, or disposal of

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Christopher Greenwood in *Loewon Group v. USA* (**RL-24**) ("[I]t is important to bear in mind that international tribunals are understandably cautious in concluding that the judicial system of a State has fallen so far short of international standards that it has perpetrated a denial of justice. Only if there is clear evidence of discrimination against a foreign litigant or an outrageous failure of the judicial system is there a denial of justice in international law."); Greenwood, *State Responsibility For The Decisions Of National Courts* (**RL-27**) at 60.

566 *See supra* Section III B.

567 Statement of Claim ¶ 220.

568 Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments, dated 7 March 2011 (**CL-39**) Art. 3(1); Agreement between the Republic of Austria and the Republic of Macedonia on the Promotion and Protection of Investments, dated 28 March 2001 (**CL-40**) Art. 3(1); Agreement between the Slovak Republic and the Republic of Macedonia on the Promotion and Reciprocal Protection of Investments, dated 25 June 2009 (**CL-41**) Art. 2(2).

569 Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments, dated 7 March 2011 (**CL-39**) Art. 3(1); Agreement between the Republic of Austria and the Republic of Macedonia on the Promotion and Protection of Investments, dated 28 March 2001 (**CL-40**) Art. 3(1).

investments under the Macedonia-Lithuania BIT and the Macedonia-Spain BIT;[570] and,

d) the obligation to provide effective means of asserting claims and enforcing rights with respect to investments under the Macedonia-Kuwait BIT.[571]

243. In short, GAMA argues that the MFN clause in Article II(3) allows it to cherry-pick clauses from treaties concluded by Macedonia with States other than Turkey. Such an *à la carte* interpretation of the MFN clause is unreasonable and, as the language of the MFN clause confirms, was not intended by Macedonia and Turkey (**Section 1**). Even if these additional standards were to be read into the Treaty, GAMA has not remotely proven a breach (**Sections 2 to 5**).

1. The MFN clause of the Treaty does not support GAMA's argument that additional standards of treatment should be read into the Treaty

244. Investment treaty tribunals have repeatedly cautioned that the starting point of any MFN analysis must be the language of the applicable treaty.[572] In its ordinary meaning (as required under the Vienna Convention),[573] the wording of Article II(3) – "shall accord to

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[570] Agreement between the Government of the Republic of Macedonia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments, dated 7 March 2011 (**CL-39**) Art. 3(2); Agreement between the Macedonian Government and the Spanish Government on the Promotion and Reciprocal Protection of Investments, dated 20 June 2005 (**CL-42**).

[571] Agreement between Macedonia and Kuwait for the Encouragement and Reciprocal Protection of Investments, dated 4 August 2008 ("**Macedonia-Kuwait BIT**") (**RL-40**) Art. 3(3).

[572] *Krederi Ltd. v. Ukrain*e, ICSID Case No. ARB/14/17, Award (2 July 2018) (**RL-97**) ¶ 289 ("The Tribunal…agrees that it is preferable to look at the precise MFN clause in order to determine its effect than to rely on general concepts of what the invocation of such clauses may achieve or may not achieve." ; see also *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 (stressing that it is important to "analyze the specific language" of the MFN clause in order to determine "the intent [of] the parties as best as possible.") (translated from Spanish)

[573] Vienna Convention on the Law of Treaties, dated 23 May 1969, 1155 U.N.T.S. 331 (**RL-35**) Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). Arbitral practice and scholarship alike agree that the interpretation of an international treaty begins with the meaning of the very language of that treaty. See, e.g., *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2009- 11, Partial Award (23 May 2011) (**RL-59**) ¶ 116 ("It is by now a truism that these classic provisions of the Vienna Convention require that the process of interpretation begin with the terms of the treaty itself in their ordinary meaning, as assessed in context, and in light of the treaty's 'object and purpose.'").

these investments, once established… treatment no less favourable than that accorded in similar situations… to investments of investors of any third country" – contemplates actual differential treatment and not the mere possibility of disparate treatment of any investment (as would be the case, for example, if the Treaty provided that Macedonia had to provide treatment no less favorable than that which "may be granted to" other investments).[574]

245. This is fatal to GAMA's argument that the MFN clause may be used to import additional standards of treatment in the Treaty. The mere existence of a different obligation in another treaty entered into by Macedonia does not show actual discriminatory "treatment" and is thus an insufficient basis for GAMA to seek shelter under protections offered by that other treaty. As the tribunal in *Hochtief v. Argentina* observed regarding the MFN clause in the Germany-Argentina BIT:

> [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.[575]

246. Allowing GAMA to seize on State obligations in third-party treaties by simply invoking their existence would also disregard the express requirement that GAMA show that the allegedly disparate treatment has been accorded in a "similar situation." The claimant in *İçkale İnşaat v. Turkmenistan* attempted to import clauses from third-State treaties,

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[574] See, e.g. *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) (**RL-58**) ¶ 343 (rejecting the claimant's MFN claim on the ground that the tribunal could not rule against the respondent based on "mere assumptions" of contracts with more advantageous terms, which were unsupported by the record); *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) (**RL-70**) ¶ 667 (denying the claimant's MFN claim on the ground that the "discrimination necessary to establish the breach of the MFN clause does not exist") (translated from Spanish); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Award (Redacted) (12 January 2011) (**RL-55**) ¶¶ 169-172 (finding no breach of MFN treatment due to lack of evidence that the claimant was subjected to a differential treatment or that other similarly situated businesses were treated more favorably).

[575] *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) (**RL-61**) ¶ 81; *Muhammet v. Turkmenistan* (**RL-111**) ¶ 788.

relying on an MFN clause identical to Article II(3) of the Treaty. The tribunal rejected that attempt:

> [G]iven 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. The standards of protection included in other investment treaties create legal rights for the investors concerned, which may be more favorable in the sense of being additional to the standards included in the basic treaty, but such differences between applicable legal standards cannot be said to amount to 'treatment accorded in similar situations,' without effectively denying any meaning to the terms 'similar situations.' Investors cannot be said to be in a 'similar situation' merely because they have invested in a particular State.[576]

247. The tribunal in *Muhammet v. Turkmenistan,* which considered whether an MFN clause identical to Article II(3) of the Treaty could be used to import clauses from third party treaties, came to the same conclusion, holding that "the benefit of MFN is not 'automatic'."[577] This type of MFN clause extends protection to investors when it is established that they are placed in similar situations and that activities in the host State are similar to those investors from a third state."[578]

248. GAMA's arguments to the contrary are based on (i) inapposite authorities and (ii) interpretive gymnastics.[579] They should be dismissed.

249. As for its authorities, GAMA relies on cases that either featured less restrictively drafted MFN clauses or provided no substantive analysis of the treaty language at issue (despite

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[576] *İçkale İnşaat v. Turkmenistan* (**RL-87**) ¶ 329.

[577] *Muhammet v. Turkmenistan* (**RL-111**) ¶ 781.

[578] See also *Muhammet v. Turkmenistan* (**RL-111**) ¶ 784 ("[T]he words "similar situations"…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… the wording of Article II(2), requiring such factually similar situation, does not entitle Claimants to rely on the MFN provision to import substantive standards of protection from a third-party treaty which are not included in the BIT, and to rely on such standards in the present Arbitration.")

[579] Statement of Claim ¶¶218, 219.

arbitral practice and scholarship agreeing that the interpretation of an international treaty must begin with the meaning of the specific language of the treaty at issue[580]):

a) In *White Industries v. India*[581] and *MTD v. Chile*,[582] the MFN clauses at issue were less restrictive than the Turkey-Macedonia Treaty, in that neither MFN clause expressly limited protection to investments "in similar situations." The MFN clauses considered in those cases are of an entirely different species than the one at issue here.[583]

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[580] *The Renco Group Inc. v. Republic of Peru I*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent Preliminary Objections Under Article 10.20.4 (18 December 2014) (**RL-79**) ¶ 175 ("[T]he starting point for the Tribunal's analysis of [the BIT] must be Article 31(1) of the Vienna Convention on the Law of Treaties, by which a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose") and ¶ 176 ("It is generally accepted that Article 31(1) of the Vienna Convention requires that a treaty should be interpreted first on the basis of its "plain language.") (internal citation omitted); *AsiaPhos Limited and Norwest Chemicals Pte Ltd v. People's Republic of China*, ICSID Case No. ADM/21/1, Award (16 February 2023) (**RL-51**) ¶ 60. ("In accordance with Article 31(1) of the Vienna Convention, the Arbitral Tribunal will first turn to the ordinary meaning of the text of Article 13(3) of the Treaty."); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) (**RL-26**) ¶ 112 ("This being a Tribunal established under the BIT, it is obliged to apply the provisions of the BIT and interpret them in accordance with the norms of interpretation established by the Vienna Convention on the Law of the Treaties, which is binding on the State parties to the BIT. Article 31(1) of the Vienna Convention requires that a treaty be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.').

[581] *White Industries v. India* (**CL-37**); Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, adopted on 26 February 1999 (**RL-22**) Art. 4 (2): "A Contracting Party shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country."

[582] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004) (**RL-26**); Agreement between Chile and Malaysia for the Promotion and Protection of Investment, adopted on 11 November 1992 (**RL-14**) Art. 3(1) ("1. Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State")

[583] *International Law Commission, Final Report of the Study Group on the Most-Favored-Nation Clause*, UN DOC. A/70/10, Annex (2015) (**RL-85**) ¶¶ 65, 67, 73 (Identifying MFN clauses that include the requirement that MFN treatment be provided only to those investments that are "in similar situations" as a distinct type of MFN clause and stating that "[i]t is widely accepted by investment dispute settlement tribunals that MFN clauses, as treaty provisions, must be interpreted in accordance with the rules of treaty interpretation embodied in articles 31 and 32 of the VCLT… there are dangers in adopting interpretations of one investment agreement as applicable automatically to other agreements, and this is even more so where the wording of the two agreements is different.")

b) In *Bayindir v. Pakistan*,[584] the tribunal was concerned only with whether the claimant had made out a *prima facie* case for the purpose of establishing jurisdiction.[585] The tribunal observed that Pakistan had not disputed the claimant's assertion that other treaties concluded by Pakistan contained FET clauses, and concluded that, "[u]nder these circumstances and for the purposes of assessing jurisdiction, the Tribunal considers, prima facie, that Pakistan is bound to treat investments of Turkish nationals 'fairly and equitably.'"[586] That observation provides slender, if any, support for the proposition that this Tribunal should read an FET obligation into the Turkey-Macedonia Treaty.[587]

c) In *ATA Construction v. Jordan*, the tribunal dedicated only a footnote to its determination that claimants could borrow substantive provisions from other BITs through an MFN clause.[588] The tribunal made no effort to reconcile its finding with the language of the BIT or provide any other reasoning for its conclusion. This cursory approach is contrary to the requirements of the Vienna Convention and the weight of authority, as confirmed by arbitral scholarship. The case is no authority for the proposition that Macedonia must read FET obligations into the Turkey-Macedonia Treaty.

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[584] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan* ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005 ("***Bayindir v. Pakistan,* Decision on Jurisdiction**") (**CL-34**).

[585] *Bayindir v. Pakistan,* Decision on Jurisdiction (**CL-34**).

[586] *Bayindir v. Pakistan,* Decision on Jurisdiction (**CL-34**) ¶¶ 231-232.

[587] On the merits, the *Bayinder v. Pakistan* tribunal reconsidered the issue. The tribunal found (in an award not cited by GAMA in support of its claim under Art. II(3) of the Treaty) that the MFN clause at issue was capable of importing treaty protections from other BITs. But in doing so, the *Bayindir* tribunal paid only lip-services to Article 31(1) Vienna Convention by interpreting the MFN clause at issue by reference to other, differently worded BITs and failing to parse the language of the particular MFN clause at issue as required by Article 31(1). *See Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I)*, ICSID Case No. ARB/03/29, Award (27 August 2009) ¶ 178 ("***Bayindir v. Pakistan,* Award**") (**CL-32**) ¶ 157. Tribunals that more recently interpreted MFN clauses in accordance with Article 31(1) of the Vienna Convention came to the opposite conclusion from the *Bayinder v. Pakistan* tribunal. *See e.g. HOCHTIEF Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) (**RL-61**) ¶ 81; *Muhammet v. Turkmenistan* (**RL-111**) ¶ 784; *İçkale İnşaat v. Turkmenistan* (**RL-87**) ¶ 329.

[588] *ATA Construction v. Jordan* (**CL-15**) ¶ 125 and note 16.

d) In *Rumeli v. Kazakhstan*,[589] the parties agreed for the purpose of jurisdiction that "in view of the MFN clause contained in the BIT, Respondent's international obligations assumed in other bilateral treaties, and in particular the United Kingdom-Kazakhstan BIT, are applicable to this case."[590] That agreement between different parties to a different treaty offers no authority on the interpretation of the MFN clause in Article II(3) of the Treaty.

250. GAMA also offers a strained and unsupported interpretation of Article II(3). Relying on the principle of *expressio unius est exclusion alterius*, GAMA argues that because Article II(3) expressly does not apply to customs union or regional economic organization agreements, whereas there is no express exclusion of substantive protections under other investment treaties, Macedonia and Turkey must have intended for the term "treatment" to cover all substantive protections granted by Macedonia and Turkey to other foreign investors under other treaties.[591] That asks too much of an interpretive principle. Interpreting an identical exclusion clause, the tribunal in *Muhammet v. Turkmenistan* found that "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) [a provision identical to Article II(3) of the Treaty], they can be imported by using the MFN provisions … is of no merit."[592] The tribunal explained:

> 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

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589 *Rumeli v. Kazahkstan* (**CL-25**).

590 *Rumeli v. Kazakhsta*n (**CL-25**) ¶ 575 ("The parties agree that in view of the MFN clause contained in the BIT, Respondent's international obligations assumed in other bilateral treaties, and in particular the United Kingdom-Kazakhstan BIT, are applicable to this case, such obligations including: - the obligation to ensure the fair and equitable treatment of the investments of investors of the other Contracting Party; - the duty not to deny justice; - the obligation to accord full protection and security to such investments; and - the obligation not to impair by unreasonable, arbitrary, or discriminatory measures the management, maintenance, use, enjoyment, or disposal of such investments.").

591 Statement of Claim ¶ 219; Turkey-Macedonia BIT (**CL-1**) Art. II(5)("The provisions of this Article shall have no effect in relation to the following agreements entered into by either of the Parties; (a) relating to any existing or future customs unions, regional economic organization or similar international agreements, (b) relating wholly or mainly to taxation.").

592 *Muhammet v. Turkmenistan* (**RL-111**) ¶ 791.

> 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.[593]

251. In sum, GAMA cannot rely on Article II(3) of the Treaty to seek shelter under substantive protections contained in third-State treaties. It must identify a corresponding third party investment, in "a similar situation" to GAMA's investment, that has actually been treated more favorably than GAMA's investment.[594]

252. GAMA points to investments made by TE-TO's shareholders from Cyprus, the British Virgin Islands, and, indirectly, Russia.[595] But none of those investments were treated differently, as shown above, and none of them received the benefit of the substantive standards that GAMA seeks to import.

2. In any case, Macedonia did not violate the Treaty standards that GAMA seeks to import

253. Even if GAMA could use the MFN clause in Article II(3) of the Treaty to import substantive standards of protection from other treaties, GAMA has not established a breach of these treaty standards, as demonstrated below.

(a) Macedonia afforded GAMA's investment fair and equitable treatment

254. The authorities are consistent that the conduct of municipal courts may violate the FET standard only if it amounts to a denial of justice.[596] As demonstrated above, GAMA falls short of showing a denial of justice.[597]

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[593] *Muhammet v. Turkmenistan* (**RL-111**) ¶ 791.

[594] *Parkerings v. Lithuania* (**RL-34**) at 396 (observing that 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," which could only be ascertained "by looking at the circumstances of the individual cases.").

[595] Statement of Claim ¶ 214.

[596] *See e.g. Mondev v. United States* (**CL-13**) ¶ 96 (a claim that the local courts violated NAFTA Article 1105, which includes the obligation to accord FET, "concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals."); *Swisslion v. Macedonia* (**RL-65**) ¶ 265 (ruling that insofar as an FET claim concerned the decisions of the Macedonian courts, the only relevant question was "whether there has been a denial of justice."); *David Aven v.*

255. GAMA points to various acts of the Macedonian courts that it says "constitute[] a violation of FET on [their] own" and "through the combined effects of the acts."[598] Even if something short of a denial of justice could establish an FET violation by a court (which it cannot), none of the court conduct challenged by GAMA would establish such an FET violation.

256. First, GAMA says that the FET standard includes obligations to afford due process and refrain from arbitrary and discriminatory measures[599] and to use legal instruments "in conformity with the function usually assigned to such instruments."[600] But this merely rehashes the elements of a denial of justice.[601] The cases that GAMA relies on do not say otherwise. In *Rumeli*, the tribunal concluded that the "decisions of the various Kazakh Courts which have been reviewed above were wrong procedurally or substantially, or

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The Republic of Costa Rica, UNCITRAL, Final Award (18 September 2018) (**RL-101**) ¶ 357 (holding that "the 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); *Oostergetel v. Slovak Republic* (**RL-63**) ¶ 225 (referencing *Jan de Nul* approvingly and noting that "[o]ther tribunals have also held that denial of justice, understood as the failure of a national legal system as a whole to satisfy minimum standards for a fair procedure, or resulting in an egregious misapplication of the law, was part of the FET standard."; *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" only "if they involve a denial of justice."); *OOO Manolium Processing v. Republic of Belarus*, PCA Case No. 2018-06, Final Award [Redacted] (22 June 2021) (**RL-112**) ¶ 591 (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) (**RL-108**) ¶¶ 594, 587 (the tribunal rejected an FET claim regarding judicial conduct on the ground that actions of the court "could only amount to a Treaty breach under the paradigm of denial of justice.").

597 *See supra* Section III C.

598 Statement of Claim ¶ 227.

599 Statement of Claim ¶ 233, citing *Bayindir v. Pakistan,* Award (**CL-32**); *Rumeli v. Kazahkstan* (**CL-25**) ¶ 609.

600 Statement of Claim ¶ 233.

601 *See e.g. Swisslion v. Macedonia* (**RL-65**) ¶ 263 ("denial of justice includes inadequate or unjust procedures incompatible with due process of law"); *Liman v. Kazakhstan* (**RL-48**) ¶ 279 ("Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process."); *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (**RL-25**) ¶ 130 ("the Tribunal does not discern in the decisions of the federal courts any denial of justice as that concept has been explained by NAFTA tribunals … The Mexican court decisions were not, either ex facie or on closer examination, evidently arbitrary, unjust or idiosyncratic. There is no trace of discrimination … and no evident failure of due process.")

were so egregiously wrong as to be inexplicable other than by a denial of justice."[602] The dispute in *Bayindir* over a construction contract between the claimant and the Government of Pakistan did not involve the Pakistani judiciary.[603]

257. In any case, the Macedonian court proceedings at issue in this case were not "arbitrary or discriminatory," did not lack due process, and did not lack transparency. As explained above, GAMA's allegations in those respects regarding TE-TO's reorganization proceedings have no merit.[604] With respect to the Payment Order proceedings, GAMA chose to rely on the Macedonian judicial system. When TE-TO challenged that Payment Order, the Basic Court assumed jurisdiction under the Macedonian Law on Private International Law[605] because one of the parties, TE-TO, is a "legal entity with headquarters in the Republic of Macedonia"[606] and "consented to the jurisdiction of the courts of the Republic of Macedonia."[607] As explained above, the Payment Order proceedings unfolded according to Macedonian law, including by providing written reasons for decisions and allowing GAMA multiple opportunities to appeal.[608]

258. Second, GAMA argues that it "legitimately expected" Macedonian courts to decline jurisdiction over its dispute with TE-TO and instead to "refer [the] parties to the contractually-agreed arbitration."[609] By not doing so, according to GAMA's theory,

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602 *Rumeli v. Kazahkstan* (**CL-25**) ¶ 619.

603 *Bayindir v. Pakistan,* Award (**CL-32**).

604 *See supra* Section III C(2).

605 Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**) at 3.

606 Macedonian Law on Private International Law (**R-1**) Art. 56(3).

607 Macedonian Law on Private International Law (**C-52**) Art. 57(2) (Art. 57(1) "In cases when an agreement on jurisdiction of the court of the Republic of Macedonia is permissible under paragraphs (3) and (4) of Article 56 hereof, the jurisdiction of the courts of the Republic of Macedonia may also be based on the consent of the defendant; Art. 57(2) "The defendant shall be considered as having consented to the jurisdiction of the courts of the Republic of Macedonia if he entered a plea or lodged an objection against the payment order …").

608 *See supra* Section III C(2).

609 Statement of Claim ¶ 234.

"Macedonia breached the FET standard by extinguishing GAMA's right to arbitration."[610]

259. GAMA's legitimate expectations claim has no factual basis. Contrary to its assertion that it "expected" the dispute to be referred to arbitration, GAMA asked the Macedonian judicial system to do otherwise – first by seeking an injunction in the Basic Court,[611] and later by applying for the Payment Order.[612] The claim is also misconceived as a matter of law. GAMA does not explain the basis for its purported expectation, save for a reference to the New York Convention and Macedonian law.[613] But rules of general application are not enough to found a legitimate expectation claim.[614] As the *Clayton v. Canada* tribunal explained, "[w]hat is needed are specific representations, rather than abstract references to the general legal framework in relation to an investment."[615] Multiple other treaty tribunals have held similarly.[616] And, to prevail on a legitimate expectation claim,

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610 Statement of Claim ¶ 229.

611 GAMA application for a temporary injunction, dated 30 November 2012 (**C-31**).

612 GAMA application for the Payment Order, dated 3 December 2012 (**C-36**).

613 Statement of Claim ¶ 234.

614 UNCTAD, UNCTAD, Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II: A Sequel (2012) (**RL-67**) at 69 (explaining that "legitimate expectations" may derive only "from (a) specific commitments addressed to [the investor] … or (b) rules that are not specifically addressed to a particular investor but which are put in place with a specific aim to induce foreign investments and on which the foreign investor relied in making his investment.")

615 *William Ralph Clayton et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (17 March 2015) (**RL-82**) ¶ 589.

616 *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013) (**RL-73**) ¶ 621 "It 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."; *Gavrilovic et al. v. Croatia*, ICSID Case No. ARB/12/39, Award (26 July 2018) (**RL-99**) ¶ 956 ("Legitimate expectations founded on specific assurances or representations made by the State to the investor are protected"); *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 ("General statutory norms thus do not give rise to legitimate expectations unless they contain a specific commitment of stability"); *See also* CAMPBELL MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION (**RL-96**) ¶ 7.184 ("In order to find the existence of a legitimate expectation, tribunals have generally required the presence of three (interlocking) elements: (a) The existence of a promise or assurance attributable to a competent organ or representative of the State, which may be explicit or implicit; (b) Reliance by the claimants as a matter of fact; and (c) Reasonableness of the reliance–this cannot be separate from (a) in particular where the promise is not contained in a contract or otherwise stated explicitly.") (emphasis added).

GAMA would also have to show that it held the alleged legitimate expectations at the time of making its investment.[617] Yet GAMA offers no evidence that it did.

260. Third, GAMA says that Macedonia breached the FET standard "through acts of its courts … in that they applied the wrong substantive law," *i.e.*, Macedonian law instead of English law (the law governing the EPC Contract).[618] GAMA alleges that in doing so the courts "'shock[ed], or at least surprise[ed] a sense of judicial property'"[619] – taking a page from the denial of justice standard.[620] According to GAMA, the application of Macedonian law by the courts was "'clearly improper and discreditable'"[621] and "breached GAMA's legitimate expectations."[622]

261. This is argument by labelling, not analysis.[623] There is no factual basis for the claim. As explained above and as the Court of Appeal pointed out, it was GAMA that "decided to have the dispute resolved before the courts in the Republic of Macedonia with the application of the Macedonian law."[624] And GAMA has not shown that it ever articulated arguments, or indeed provided any evidence, about the content of English law and how English law should be applied. Nor has GAMA argued (let alone established) that, if the Macedonian courts had applied English law, they would have reached a different result.

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617 *See e.g.*, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) (**RL-31**) ¶ 127 ("the fair and equitable treatment analysis involves consideration of the investor's expectations when making its investment").

618 Statement of Claim ¶ 237.

619 Statement of Claim ¶ 239, citing *ELSI* (**CL-28**) ¶ 128; *Dan Cake v. Hungary* (**CL-26**) ¶ 146.

620 Statement of Claim ¶ 239; *See ELSI* (**CL-28**) ¶ 128 (defining denial of justice as "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."); *Mondev v. United States* (**CL-13**) ¶ 127 (applying the *ELSI* standard in the context of denial of justice); *Dan Cake v. Hungary* (**CL-26**) ¶¶ 145-146 (the tribunal applied the "shocks, or at least surprises, a sense of juridical propriety" standard to find a denial of justice when courts failed to convene a composition hearing as required by Hungarian law. The court's decision "deprived [the claimant] of the chance – whether great or small – to avoid the sale of its assets and its disappearance as a legal person," which the tribunal determined was a "clear violation" of FET through a denial of justice.).

621 Statement of Claim ¶ 239, citing *Mondev v. United States* (**CL-13**) ¶ 127.

622 Statement of Claim ¶ 239.

623 *Oostergetel v. Slovak Republic* (**RL-63**) ¶ 319 ("labelling…is no substitute for analysis.")

624 Decision of the Court of Appeal Skopje, dated 15 December 2014 (**C-8**) at 3.

262. Fourth, GAMA says the Basic Court's conclusion that TE-TO's payment obligation under the Settlement Agreement was "conditioned" on GAMA's fulfillment of certain obligations under that same agreement shares "the same attributes of shocking, arbitrary, clearly improper and discreditable behaviour in breach of the FET standard."[625] GAMA may disagree with the Basic Court's "stance" in its interpretation of the Settlement Agreement, but that is not sufficient to attract international liability, as explained above.[626]

263. Fifth, GAMA alleges "inconsistent action" by the Macedonian courts in breach of the FET standard.[627] The impugned action – the recognition of GAMA's claim under TE-TO's Final Reorganization Plan after that claim had been denied during the Payment Order proceedings – was remedied by the Court of Appeal.[628] Correction on appeal does not amount to a denial of justice or a breach of the FET standard.[629]

264. Sixth, GAMA says that the "excessive duration of proceedings constitutes a denial of justice, as a breach of the FET standard."[630] As explained above, GAMA has not shown that the time it spent before the Macedonian courts comes close to an "excessive duration" that would meet the high standard of a denial of justice.[631] Not only was the

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625 Statement of Claim ¶ 240.

626 *See supra* Section III B.

627 Statement of Claim ¶ 243.

628 Decision of the Court of Appeal Skopje, dated 30 June 2022 (**C-73**) at 2-3 (finding that since GAMA's claim was recognized in the Final Reorganization Plan, the Basic Court should determine "whether it is possible to decide on the same claim twice.").

629 *See supra* ¶ 144.

630 Statement of Claim ¶ 254.

631 *See supra* ¶¶ 204-205; Claimant relies on four cases (Statement of Claim ¶ 249). In *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, (I), ICSID Case No. ARB/98/2, Award (8 May 2008) (**CL-48**), a first instance decision on the merits remained absent for seven years. The delay in *White Industries v. India* (**CL-37**) included waiting on the Supreme Court of India for over five years to set a date for the appeal. In *El Oro Mining and Railway Co.* (**CL-49**) at 191-199, nine years passed without "any action whatever." In *Chevron v. Ecuador I* (**CL-50**), the claimant's seven pending cases lingered for 13 to 15 years (and six of those cases had never seen a decision). Claimant also points to three cases before the European Court of Human Rights (Statement of Claim ¶ 250): *Zorc v. Slovenia*, Application No. 2792/02, Judgment of the ECtHR (2 November 2006) (**CL-51**) involved a 7.5-year proceedings during which the Slovenian courts took more than 2.5 years to dismiss a party's request for transfer of the case and recusal of the judge. (¶¶ 34, 37); *Pakom Sloboda Dooel v. The Fomer Yugoslav Republic of Macedonia*, Application No. 33262/03, Judgement of the

duration of the Payment Order proceedings dictated by the litigation choices of GAMA (and TE-TO) rather than by any acts or omissions of Macedonia, but by any measure, a duration of 9.5 years to hold 11 proceedings cannot be described as "excessive."[632]

265. Finally, GAMA says that during TE-TO's reorganization proceedings, the "treatment accorded to GAMA by the Macedonian courts"[633] violated the FET standard through a "denial of justice,"[634] "a breach of due process, [and] arbitrary and discriminatory treatment,"[635] and "discrimination in the treatment of GAMA's claim."[636]

266. There was no denial of justice in TE-TO's reorganization proceedings, as explained above.[637] The alleged judicial misconduct that GAMA reiterated here under the headings of due process and arbitrary and discriminatory treatment rests on a misconception of Macedonian law.[638] As explained above, there was no lack of due process, or arbitrary and discriminatory conduct.[639]

ECtHR (21 January 2010) (**CL-52**) included a five-year delay of the first-instance court to advise the parties on a procedural matter, as well as a two-year period in which the proceedings were dormant. (¶¶ 27-29); in *Delić v. Bosnia and Herzegovina*, Application No. 59181/18, Judgement of the ECtHR (2 March 2021) (**CL-53**), the first-instance court took nearly seven years to decide whether the defendant had properly filed a defense to the applicant's claim (¶ 7).

632 *See supra* ¶¶ 204-205.

633 Statement of Claim ¶ 256.

634 Statement of Claim ¶ 265.

635 Statement of Claim ¶ 257.

636 Statement of Claim ¶ 267.

637 *See supra* Section III C(1).

638 Statement of Claim ¶¶ 261-262 (GAMA says that the conditions for commencement of bankruptcy proceedings were not met, that the Final Reorganization Plan was incomplete and a breach of the Bankruptcy Law, that TE-TO's shareholders are lower-ranking creditors, that approval of the Final Reorganization Plan violated principles on the ranking of creditors, that GAMA would have had the decisive vote under the "normal ranking of liquidation priorities," that the default interest was wrongly denied, and that the 12-year deadline for repayment breaches the Bankruptcy Law, and that the bankruptcy judge should have been recused).

639 *See supra* Section III C(2).

(b) GAMA's investment enjoyed full protection and security

267. GAMA says that the same acts that allegedly breached the FET standard also breached the FPS standard[640] in the Macedonia-Lithuania BIT and Macedonia-Austria BIT.[641]

268. The treaty language that GAMA purports to import into the Treaty does not support its position, however. The Macedonia-Lithuania BIT provides that:

> Each Contracting Party shall at all times ensure fair and equitable treatment of the investments made by investors of the other Contracting Party as well as their full protection and security.[642]

269. The Macedonia-Austria BIT provides that:

> Each Contracting Party shall accord to investments of the other Contracting Party fair and equitable treatment and full and constant protection and security.[643]

270. The dominant view among investment tribunals is that, absent language to the contrary, the FPS standard applies only to the physical security of investments.[644] The tribunal in *Saluka*, for example, explained that "[t]he practice of arbitral tribunals seems to indicate … that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."[645] The *Gold Reserve*

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640 Statement of Claim ¶ 278.

641 Statement of Claim ¶¶ 272-274.

642 Macedonia-Lithuania BIT (**CL-39**) Art. 3(1).

643 Macedonia-Austria BIT (**CL-40**) Art. 3(1).

644 *See e.g. UAB v. Latvia,* ICSID Case No. ARB/12/33, Award (22 December 2017) (**RL-95**) ¶ 840 ("[T]he standard of full protection and security seeks specifically to protect the physical integrity of the investment against the use of force"); KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION (2010) (**RL-53**) at 244 ("The language of the standard varies among BITs. Other formulations include, but are not limited to, 'most constant protection and security.' 'full protection and security' 'full protection,' 'full and constant protection and security,' 'protection and security,' and 'adequate protection and security.' These different formulations, however, generally have not been treated as creating any substantive difference in the standard of care required of the host country.").

645 *Saluka v. Czech Republic* (**RL-29**) ¶ 484.

tribunal concurred: the "more traditional, and commonly accepted view … is that [FPS] refers to protection against physical harm to persons and property."[646]

271. GAMA seeks to expand the scope of FPS protection to include "legal security" broadly and in the context of judicial conduct specifically.[647] Such an expansive reading has been repeatedly rejected by treaty tribunals, including because it "would result in an overlap with other treaty standards" which would conflict with the *effet utile* principle of interpretation.[648] The cases that GAMA relies on do not show that FPS includes "legal security" in the context of judicial conduct, absent an explicit treaty provision to that effect:

a) In *Siemens v. Argentina*, the FPS clause explicitly provided for "legal security."[649] In any event, this case did not consider judicial conduct.[650]

b) The tribunals in *CSOB v. Slovak Republic* and *Biwater Gauff v. Tanzania* did not consider judicial conduct.[651]

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646 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (**RL-78**) ¶¶ 622-623.

647 Statement of Claim ¶¶ 275-276.

648 *See Crystallex v. Venezuela* (**RL-89**) ¶ 634; *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) (**RL-49**) ¶ 174 ("an 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").

649 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) ("***Siemens v. Argentina***") (**CL-27**) ¶¶ 301, 303.

650 *Siemens v. Argentina* (**CL-27**) ¶ 286 ("Siemens refers to the following measures or omissions that deprived it of its protection and legal security: failure to make the budgetary allocations, suspension of the income-generating activities, renegotiation of the Contract under extreme pressure, and abusive use of the 2000 Emergency Law to terminate the Contract."

651 *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award (29 December 2004) (**CL-56**) involved Slovakia's default on an agreement to provide funds for repayment of a loan owed to the claimant, but the municipal courts were not impugned; in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) ("***Biwater v. Tanzania***") (**CL-54**) the tribunal accepted that FPS implies a guarantee of legal stability in the face of the State removing the claimant's management from its offices and seizing the premises without the actual use of force, but that decision did not consider judicial conduct.

c) GAMA notes that in *Mondev v. United States* the tribunal examined the immunity of public officials against legal action on the basis of the FPS standard.[652] This bears no resemblance to the issues in this case. GAMA also fails to mention that the tribunal found that extending statutory authority for immunity for suit did not amount to a breach of FPS.[653] In any event, as already explained, when the *Mondev* tribunal considered Article 1105(1) of NAFTA, which contains the obligation to accord FET and FPS, it ruled that because the claim considered the treatment of investments before the courts of the host State, "[t]he Tribunal is thus concerned only with that aspect of the Article 1105(1) which concerns what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals."[654]

d) GAMA asserts that the ICJ in *ELSI* considered whether the 18-month delay of an Italian appeals court decision could violate the FPS standard.[655] But in the paragraph cited by GAMA the ICJ considered this delay against the "minimum international standard," found it doubtful that the 18-month delay fell below that standard, and went on to say with regards to this delay that "[c]ertainly, the Applicant's use of so serious a charge as to call it a 'denial of procedural justice' might be thought exaggerated.'" [656] This authority provides GAMA no support.

272. In any event, even if the imported FPS clauses could be read to extend to "legal security," this would not allow GAMA to avoid the strictures of the denial of justice standard. As explained above, to the extent that GAMA impugns the conduct of the Macedonian courts, GAMA cannot avoid that standard by labelling its claim a breach of a different treaty provision.

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652 Statement of Claim ¶ 276.

653 *Mondev v. United States* (**CL-13**) ¶ 154: ("After considering carefully the evidence and argument adduced and the authorities cited by the parties, the Tribunal is not persuaded that the extension to a statutory authority of a limited immunity from suit for interference with contractual relations amounts in this case to a breach of Article 1105(1)").

654 *Mondev. v. United States* (**CL-13**) ¶ 96.

655 Statement of Claim ¶ 276.

656 *ELSI* (**CL-28**) ¶ 111.

273. GAMA relies on *Al-Bahloul v. Tajikistan*,[657] but that case does not hold otherwise. The tribunal there determined that "while the concept of protection and security in investment treaties has developed principally in the context of physical security … it could arguably cover a situation in which there has been a demonstrated miscarriage of justice."[658] Yet no violation of FPS was found because the tribunal was "unable to find that the Tajik courts could not legitimately reach the substantive law conclusions which they did."[659] The tribunal determined that the denial of justice standard was not met: "Suffice it to say, we do not find the Tajik court's application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for GAMA's claim of denial of justice."[660]

274. Even if GAMA could rely on the FPS standard (which it cannot), and even if the FPS standard applied to more than the physical security (which it does not), and even if FPS claims about judicial conduct did not fall to be assessed against the denial of justice standard (which they do), GAMA cannot point to conduct that offends the FPS standard it proposes, namely, "excessive judicial delays, extreme misapplication of the law by courts or [S]tate intervention in the repayment of claims"[661] and "'clearly improper and discreditable decisions.'"[662]

275. As explained above, not only was there no judicial delay, but the timeline of proceedings was driven by GAMA and TE-TO, not by Macedonia.[663] There was no misapplication of the law,[664] let alone an "extreme misapplication."[665] The decisions in the Payment Order

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657 Statement of Claim ¶ 276, citing *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No V 064/2008, Partial Award on Jurisdiction and Liability (2 September 2009) *("**Al-Bahloul v. Tajikistan**")* (**CL-55**) ¶ 246. (The claimant asserted as a breach of due process that he was "not given notice of court hearings" and that the "court did not adjourn a hearing to allow him to take part" (¶ 219). The claimant also alleged that the Tajik judiciary maliciously misapplied Tajik law to his detriment (¶ 233). The tribunal could not conclude based on the evidence that a denial of due process occurred (¶¶ 227, 231).

658 *Al-Bahloul v. Tajikistan* (**CL-55**) ¶ 246.

659 *Al-Bahloul v. Tajikistan* (**CL-55**) ¶ 246.

660 *Al-Bahloul v. Tajikistan* (**CL-55**) ¶ 237.

661 Statement of Claim ¶ 276.

662 Statement of Claim ¶ 278.

663 *See supra* ¶ 206.

664 *See supra* Section III C(1), (2).

proceedings and the TE-TO reorganization proceedings were neither improper nor without a right to appeal (which GAMA exercised to its benefit).[666]

276. Finally, the impugned "State intervention" through a temporary tax deferral had no causal connection to GAMA's inability to collect from TE-TO.[667]

(c) Macedonia did not impair GAMA's investment by arbitrary, unreasonable or discriminatory measures

277. GAMA devotes less than two pages to its argument that Macedonia breached a purported "duty not to impair [GAMA's investment] by arbitrary, unreasonable or discriminatory measures."[668] GAMA says that this duty, which GAMA (wrongly) imports from the Macedonia-Lithuania BIT and the Macedonia-Spain BIT,[669] was violated by the same conduct that allegedly breached the MFN and FET standard.[670]

278. Not only is the alleged conduct repeated, but the treaty standard overlaps. The requirement not to impair an investment by unreasonable measures overlaps with the obligation to not treat an investment in an arbitrary manner under the FET standard.[671] As the tribunal in *Saluka v. Czech Republic* observed, "[t]he standard of 'reasonableness' has no different meaning in [the context of the non-impairment standard] than in the

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665 Statement of Claim ¶ 276.

666 *See supra* Section III C(1), (2).

667 *See supra* ¶ 232.

668 Statement of Claim ¶¶ 279-287.

669 Statement of Claim ¶¶ 279-281; Lithuania-Macedonia BIT (**CL-39**) Art. 3(2); Spain-Macedonia BIT (**CL-42**) Art. 3(2).

670 Statement of Claim ¶ 279.

671 *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) (**RL-33**) ¶ 369 (observing that "[i]nequitable or unfair treatment, like arbitrary treatment, can be reasonably recognized by the Tribunal as an act contrary to law."); *Muszynianka Spólka z Ograniczona Odpowiedzialnoscia v. Slovak Republic*, PCA Case No. 2017-08, Award (7 October 2020) (**RL-109**) ("The Tribunal concurs that reasonableness and non-discrimination imply the same obligations on behalf of the host State under the FET and non-impairment standards. This being so, while a FET breach exists irrespective of the harm it may have caused, the non-impairment standard, as its name indicates, implies the existence of an impairment, *i.e.*, of harm. If there was no impairment then it serves no purpose to inquire into the reasonable and non-discriminatory nature of a measure.").

context of the 'fair and equitable treatment' standard with which it is associated."[672] In *Rumeli v. Kazahkstan*, the arbitral tribunal considered that the violations alleged by the investor under the non-impairment clause were "better qualified and dealt with as issues falling under the [FET] standard, which also includes in its generality the principle of no-unreasonable, arbitrary or discriminatory measures."[673]

279. GAMA argues that "Respondent's acts constitute arbitrary treatment of GAMA's investment through 'clearly improper and discreditable' decisions 'which shock[], or at least surprise[] a sense of judicial propriety."[674] It thus relies on the denial of justice standard.[675] As has been explained, the impugned conduct of the Macedonian judiciary is a far cry from conduct that might amount to a denial of justice.[676]

280. GAMA sets its sights also on acts of the Public Revenue Office and the Competition Commission,[677] presumably in reference to the tax deferral. Again, the tax deferral was terminated and had no causal connection to GAMA's inability to collect from TE-TO,[678] and thus had no impact on GAMA's investment.

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672 *Saluka v. Czech Republic* (**RL-29**) ¶¶ 460, 461 ("Insofar as the standard of conduct is concerned, a violation of the non-impairment requirement does not therefore differ substantially from a violation of the 'fair and equitable treatment' standard. The non-impairment requirement merely identifies more specific effects of any such violation, namely with regard to the operation, management, maintenance, use, enjoyment or disposal of the investment by the investor.").

673 *Rumeli v. Kazahkstan* (**CL-25**) ¶ 681. *See also Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award (16 May 2012) ("***Unglaube v. Costa Rica***") (**RL-64**) ¶ 246 (finding that like the FET standard, the non-impairment standards requires proof of "more than mere legal error. Instead… the evidence must establish actions or decisions which are 'manifestly inconsistent, non-transparent, [or] unreasonable'" and citing with approval *Saluka v. Czech Republic* (**RL-29**) ¶ 309.)

674 Statement of Claim ¶ 285.

675 *See e.g. ELSI* (**CL-28**) ¶ 128 (defining denial of justice as "wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."). A non-impairment claim requires proof of "more than mere legal error. Instead … the evidence must establish actions or decisions which are 'manifestly inconsistent, nontransparent, [or] unreasonable.'" *See Unglaube v. Costa Rica* (**RL-64**) ¶ 246 (citing with approval *Saluka v. Czech Republic* (**RL-29**) ¶ 309).

676 *See supra* Section III C.

677 Statement of Claim ¶ 282.

678 *See supra* ¶ 232.

281. Finally, GAMA argues that GAMA's claim was discriminated against because "TE-TO voluntarily settled its claim [with the Public Revenue Office] during the judicial reorganisation proceedings," whereas TE-TO did not voluntarily settle GAMA's claim.[679] GAMA points to a letter from the Macedonian Public Revenue Office to the Macedonia State Attorney Office, in which the Public Revenue Office states that the Final Reorganization Plan shows a debt owing of approximately EUR 260,000 from TE-TO to PRO "at the cut-off date 01/03/2018, which has been changed subsequently, based on voluntary actions taken by the debtor."[680] GAMA ignores that Toplifikacija had alleged "falsehoods" in TE-TO's Reorganization Proposal regarding a claim by the Public Revenue Office, that the Public Revenue Office considered those allegations, and that the Public Revenue Office then asked the bankruptcy judge to "delete the Public Revenue Office from the list of creditors." GAMA does not explain how State organs taking corrective actions amounts to discrimination.

(d) Macedonia afforded GAMA effective means of asserting its claims and enforcing its rights

282. GAMA relies on a (wrongly) imported duty that Macedonia provide "effective means" for GAMA to assert claims and enforce its rights.[681] Even if GAMA could invoke the Kuwait-Macedonia's effective means standard (which it cannot), it would be unable to establish a breach.

283. The effective means standard requires a State to "provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases."[682] As the tribunal in *Chevron v. Ecuador I* observed:

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679 Statement of Claim ¶ 131.

680 Letter from Public Attorney's Office to the Civil Court Skopje, dated 24 December 2019 (**C-118**)

681 Macedonia-Kuwait BIT (**RL-40**) Art. 3(3) ("Each contracting state shall ensure to investors of the other Contracting State, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to mandate persons of their choice, who qualify under applicable laws and regulations for the purpose of the assertion of claims and the enforcement of rights with respect to their investments.")

682 *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***")

> [T]he threshold of 'effectiveness' stipulated by the provision requires that a measure of deference be afforded to the domestic justice system; the Tribunal is not empowered by this provision to act as a court of appeal reviewing every individual alleged failure of the local judicial system *de novo*.[683]

284. GAMA relies on *White Industries v. India* and *Chevron v. Ecuador I* for the proposition that the effective means standard is a "potentially less demanding test in comparison to the denial of justice in customary international law."[684] Commentators have criticized this distinction,[685] and other tribunals have not treated the effective means standard as requiring less than a denial of justice. For example, in *Duke Energy v. Ecuador*[686] the tribunal found that the effective means standard "seeks to implement and form part of the more general guarantee against denial of justice."[687] Similarly, in *Gavazzi v. Romania*, the tribunal considered the effective means and denial of justice claims together, noting that effective means is "a wide notion that does not guarantee that each and every decision is correct."[688]

(**RL-83**) ¶ 260 ("This Tribunal notes that 'effective means' … is a wide notion that does not guarantee that each and every decision is correct.").

683 *Chevron v. Ecuador I* (**CL-50**) ¶ 247. The *Chevron I* tribunal found a breach of the effective means standard based on "undue delay of judicial proceedings," as Chevron's cases before the Ecuadorian courts had been pending for more than 13 years without resolution. *Chevron v. Ecuador I* (**CL-50**) ¶¶ 263-264, 270.

684 Statement of Claim ¶ 290 (citing *White Industries v. India* (**CL-37**) ¶ 11.3.2, and *Chevron v. Ecuador I* (**CL-50**) ¶¶ 242, 244, 275).

685 *See e.g.,* CAMPBELL MCLACHLAN, ET AL., INTERNATIONAL INVESTMENT ARBITRATION (**RL-96**) ¶ 7.127 ("The positive duty on the host State to put in place effective means may well have wider systemic implications for the provision of remedies through legislation, rules of court and judicial structures. In circumstances such as those in both *Chevron* and *White Industries* where it was undisputed that such remedies did exist and what was in issue was the operation of the system in a particular case, there would not appear to be a good ground for a difference in standard. The result is to create a significant level of uncertainty as to exactly what the standard of effective means does require in particular cases, an uncertainty that has not yet been resolved.") (emphasis added).

686 *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**).

687 *Duke Energy v. Ecuador* (**RL-38**) ¶ 391 (emphasis added).

688 *Gavazzi v. Romania* (**RL-83**) ¶¶ 243, 260.

285. GAMA repeats its FET claim under this new heading of "effective means."[689] It says that Macedonian courts failed to provide GAMA with effective means to assert its claims by assuming jurisdiction over the Payment Order proceedings, applying Macedonian law to the Settlement Agreement, causing an "excessive duration" of the Payment Order proceedings, treating GAMA in an "arbitrary" manner, and breaching GAMA's due process rights.[690] As demonstrated above, these claims are without merit.[691]

IV. GAMA IS NOT ENTITLED TO ANY COMPENSATION

286. GAMA identifies the cause of its loss in the opening paragraphs of its brief: "TE-TO failed to pay[.]"[692] GAMA has not, and cannot, show that Macedonia caused the loss that GAMA claims to have suffered (**Section A**). And, in any event, GAMA has provided no calculation of its alleged loss (**Section B**).

A. MACEDONIA DID NOT CAUSE GAMA'S CLAIMED LOSSES

287. GAMA bears the burden of proving that its alleged losses were caused by Macedonia's alleged BIT breaches.[693] As the tribunal in *Lemire v. Ukraine* observed, "it is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (i.e. not 'too remote')."[694]

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689 Statement of Claim ¶ 291.

690 Statement of Claim ¶ 291.

691 *See supra* Section III C.

692 Statement of Claim ¶ 7.

693 See, e.g., *Ron Fuchs v. Republic of Georgia*, ICSID Case No. ARB/07/15, Award (3 March 2010) (**RL-47**) ¶ 453 ("[T]he Claimants hold the burden of proving their loss in accordance with international law principles of causation."); *Biwater Gauff v. Tanzania* (**CL-54**) ¶ 787 ("The Arbitral Tribunal considers that in order to succeed in its claims for compensation, [the claimant] has to prove that the value of its investment was diminished or eliminated, and that the actions [it] complains of were the actual and proximate cause of such diminution in, or elimination of, value.").

694 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award (28 March 2011) ("***Lemire v. Ukraine***") (**RL-57**) ¶ 155 (adding that "[t]he duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act."); Judge Crawford explains Commentaries to the ILC Articles on State Responsibility ("[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

288. The test for causation in international law is both factual and legal. GAMA must show not only that Macedonia's alleged BIT breaches were the "but for" (or *sine qua non*) cause of the claimed losses[695], but also that the breaches were their "proximate" or "dominant" cause.[696] Proximate causation requires proof of "a sufficient causal link between the actual breach … and the loss sustained,"[697] or, conversely, that the alleged losses are not "too indirect, remote, and uncertain."[698] To establish that "a sufficient causal link exists between the Respondent's breach of the BIT and the losses alleged, the Claimants must prove … that the dominant cause [of the loss] was the [breach of the BIT]."[699]

289. GAMA must also show that there were no intervening causes for its alleged losses. The tribunal in *Lauder v. Czech Republic*, for example, observed that, even if a wrongful State act "constitutes one of several 'sine qua non' acts [of the claimant's losses], this alone is

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is, globally, the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.") ILC Articles and Commentary (**RL-7**), p. 92, Article 31, cmt. (9).

695 See, e.g., *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").

696 See, e.g., *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013) ("***Micula v. Romania***") (**RL-72**) ¶ 1137 (To establish that "a sufficient causal link exists between the Respondent's breach of the BIT and the losses alleged, the Claimants must prove … that the dominant cause [of the loss] was the [breach of the BIT]."); "*Lemire v. Ukraine* (**RL-57**) ¶ 155 ("The duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act."); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award (21 October 2002) (**RL-21**) ¶ 140 ("[D]amages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might be that the harm must not generally accepted that factual causation is not sufficient. An additional element linked to the nature of the cause, sometimes called 'cause in law' or adequate causation is required."

697 *Biwater Gauff v. Tanzania* (**CL-54**) ¶ 779. The tribunal also found that the claimant must prove that the "value of its investment was diminished or eliminated, and that the actions [the investor] complains of were the actual and proximate cause of such diminution in, or elimination of, value." See also ¶¶ 100-101, 787/

698 ILC Articles and Commentary (**RL-7**) Article 31(1), cmt. (10).

699 *Micula v. Roman**ia*** (**RL-72**) ¶ 1137.

not sufficient."[700] To establish "compensable damage[s]," the claimant must also to show that "that there existed no intervening cause for the damage."[701]

290. GAMA asserts that Macedonia, through a "series of denial of justice and unlawful acts by the Macedonia courts," caused GAMA "loss and damage."[702] Specifically, GAMA asserts that Macedonia "prevent[ed] GAMA from collecting its claim from TE-TO"[703] by (i) asserting jurisdiction over the GAMA's claim (ii) holding that GAMA's right to payment was conditional on GAMA's correction of latent defects and completion of Punch List items (iii) granting Macedonia state aid and then approving the write-off of 90% of GAMA's claim.

291. GAMA cannot show factual causation because it cannot show that it would have been better off (and would have received more) had the Reorganization Plan failed and TE-TO's assets been liquidated. In fact, as explained, TE-TO's book value as of the end of 2017 was negative (*i.e.*, its assets were worth significantly less than its liability).[704] There is no guarantee that the full value of TE-TO's assets would have been realized had they been liquidated and auctioned off; most often liquidated assets are sold at a severe discount.[705] And, as an unsecured creditor, GAMA would have been paid out of the sale proceeds only after TE-TO's secured creditors and *pari passu* with other unsecured creditors.[706] GAMA therefore cannot show but-for causation, and its compensation claim fails on that basis alone.

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700 *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award (3 September 2001) ("***Lauder v. Czech Republic***") (**RL-18**) ¶ 234.

701 *Lauder v. Czech Republic* (**RL-18**) ¶ 234 (emphasis added) ("[I]t is also necessary that there existed no intervening cause for the damage. In our case the Claimant therefore has to show that the last, direct act, the immediate cause, namely the termination by CET 21 [a non-State entity] did not become a superseding cause and thereby the proximate cause.").

702 Statement of Claim ¶ 1.

703 Statement of Claim ¶ 7.

704 *See supra* ¶ 233; TE-TO's First Reorganization Plan (**C-13**) at 421.

705 Petrov ¶ 174.

706 Petrov ¶ 173.

292. Even if GAMA could show "but-for" causation, GAMA still cannot show that Macedonian's conduct was the dominant cause of its loss. The cause of GAMA's loss has a much simpler explanation: "TE-TO failed to pay" GAMA and its other creditors.[707] Whatever Macedonia's acts or omissions were after TE-TO's failure to pay, they are not the proximate cause: the damage was already done. GAMA cannot prove that the alleged breaches of international law were the "dominant cause" of its loss.[708]

293. In *ELSI,* the United States brought claims on behalf of US shareholders in the Italian company ELSI, arguing that Italy had wrongfully requisitioned *ELSI* in an attempt to save it from liquidation. ELSI subsequently entered bankruptcy proceedings and was sold to another company. The International Court of Justice found that "[n]o doubt the effects of the requisition might have been one of the factors involved" in the US shareholders' loss, "[b]ut the underlying cause was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition."[709] The International Court dismissed the United States' claim for compensation.[710]

294. In *Blusun v. Italy*, the investors argued that Italy's amendment of its renewable energy feed-in tariff regime thwarted their chances to develop a photovoltaic energy generation project and eventually caused the insolvency of the project companies.[711] The tribunal found that the investors had encountered major financing issues before Italy took the measures complained about[712], and that their inability to secure financing was "the

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707 Statement of Claim ¶ 7.

708 *Micula v. Roman**ia*** (**RL-72**) ¶ 1137.

709 *ELSI* (**CL-28**) ¶ 101 (emphasis added). See also *Biwater Gauff v. Tanzania* (**CL-54**) ¶ 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.")

710 *ELSI* (**CL-28**) ¶ 101 (emphasis added).

711 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award (27 December 2016) ("***Blusun v. Italy***") (**RL-93**) ¶ 310.

712 *Blusun v. Italy* (**RL-93**) ¶ 390 (noting that the failure to obtain project financing "predated the [feed-in tariff] Decree" (emphasis in the original).

proximate cause of the Project's failure."[713] The tribunal concluded that the investors had "not discharged the onus of proof of establishing that the Italian state's measures were the operative cause of the … Project's failure"[714] and that, as result, the inventors' claim for compensation failed.[715]

295. The tribunal in *Biwater Gauff v. Tanzania* similarly found that the Tanzanian company at issue, of which the claimant was a shareholder, had failed financially and had become worthless before Tanzania breached the UK-Tanzania BIT.[716] The tribunal concluded that, because "none of the Republic's violations of the BIT . . . caused the loss and damage for which [the claimant] now claims compensation, it follows that each of [the claimant's] claims for damages must be dismissed."[717]

296. Just like in those cases, GAMA has failed to prove legal causation, because the dominant cause of the loss was not any judicial misconduct by the Macedonian courts, but TE-TO's insolvency and failure to pay its creditors. The relevant injury had been, wholly or largely, incurred before the alleged State breach.

B. GAMA HAS NOT PROVEN THE LOSS IT CLAIMS

297. Even if GAMA were not seeking double-recovery, and was able establish causation (which it cannot), it would not be entitled to the amount of damages it claims in this arbitration.

298. GAMA cites ILC Article 32, under which a State may have the obligation to make "'full reparation for the injury caused by the internationally wrongful act.'"[718] But in its Statement of Claim, GAMA presents no damages calculations to prove the extent of its losses. Instead, GAMA's damages claim is based not on its actual injury, but on the

[713] *Blusun v. Italy* (**RL-93**) ¶ 387.

[714] *Blusun v. Italy* (**RL-93**) ¶ 394.

[715] *Blusun v. Italy* (**RL-93**) ¶ 394.

[716] *Biwater Gauff v. Tanzania* (**CL-54**) ¶¶ 788-792.

[717] *Biwater Gauff v. Tanzania* (**CL-54**) ¶ 807.

[718] Statement of Claim ¶ 300.

outstanding debt allegedly owed to it by TE-TO (plus interest). Even if that debt were owed, it would not reflect GAMA's losses for several reasons.

299. To start, as of 31 January 2023, it is (again) seeking, to recover that debt in the same (EUR 5 million) before Macedonian courts.[719] GAMA is improperly seeking double-recovery, and its compensation claim should be rejected on that basis. [720]

300. Second, under the current Reorganization Plan, GAMA will receive payment for 10% of its claim. This is unaccounted for in GAMA's claim in this arbitration.

301. Third, had GAMA performed its obligations under the Settlement Agreement with TE-TO (conditional or not), as it had agreed to do, it would have incurred expenses that would offset the amount of benefit that it would have gotten from TE-TO. GAMA has provided no accounting of its projected expenses for fulfilling its obligations under its agreement with TE-TO. The extent of its injury (caused by TE-TO's failure to pay) is therefore uncertain, and is clearly not the full EUR 5 million.

302. GAMA's interest claim (apparently running at 10%, compounded, from 1 April 2012) is also exorbitant and unsupported.[721] GAMA presents no justification, economic or otherwise, for that claim. It is facially unreasonable for GAMA to claim interest from 1 April 2012, that is, the day after it issued its invoice to TE-TO on 30 March 2012. The Macedonian courts had not even been seized of any matter regarding that case and evidently cannot have breached the Treaty as of then.

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719 GAMA submission to the Basic Court, dated 31 January 2023 (**R-12**).

720 *See e.g. Factory at Chorzów*, P.C.I.J. Judgment, Merits, Series A, No. 17, 13 September 1928 (**CL-58**) at 49 (noting the principle that an award of damages should "avoid awarding double damages."); Mino Han, Konstantin Christie and Charis Tan, *Quantification of ISDS Claims: Theory in The Guide to Investment Treaty Pretection and Enforcement* (14 January 2022) (**RL-44**) at 7 (emphases added) ("investment tribunals shall make sure that no double or multiple damages are awarded.").

721 Statement of Claim ¶ 305(b) ("Interest at one monthly rate of EURIBOR for euros for each semi-annual period based on the rate applicable on the last day of the semi-annual period preceding the current semi-annual period, increased for 10% from 1 April 2012[.]")

303. Finally, GAMA claims EUR 11,959.00 as the alleged cost of legal representation in the Macedonian legal proceedings.[722] GAMA does not provide any support for that claim in its Statement of Claim, and instead asserts that it "will provide a specific quantification of its fees and costs incurred in legal proceedings at Macedonian courts, as well as accrued interests, at a subsequent stage of these proceedings when it is necessary for the Tribunal's quantification of damages."[723] But the present arbitration is not bifurcated, and the time for GAMA to support its damages claim was with its Statement of Claim. Its failure to do so should be fatal to its damages claim.

V. REQUEST FOR RELIEF

304. 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: 4 April 2023

Respectfully submitted on behalf of
Respondent

White & Case LLP

White & Case LLP

[722] Statement of Claim ¶ 304.

[723] Statement of Claim ¶ 304.