INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID")

İÇKALE İNŞAAT LİMİTED ŞİRKETİ
Claimant

v.

TURKMENISTAN
Respondent

ICSID Case No. ARB/10/24

CLAIMANT'S REPLY TO RESPONDENT'S OBSERVATIONS ON CLAIMANT'S REQUEST FOR SUPPLEMENTARY DECISION AND RECTIFICATION OF THE AWARD

31 May 2016

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I. INTRODUCTION

1. This Reply (the "**Reply**") is filed in response to Respondent's Observations on Claimant's Request for Supplementary Decision and Rectification of the Award (the "**Respondent's Observations**") dated 12 May 2016. In this Reply, unless otherwise stated, Claimant adopts the abbreviations, defined terms and exhibit numbers used in the Parties' submissions to date.

2. Claimant disagrees with all of Respondent's Observations except if otherwise expressly stated.

3. For procedural economy, Claimant will not reply to Respondent's observations and allegations that are unrelated to the current procedure or supported by no evidence. Nor will Claimant make hollow claims concerning how difficult it was to reply to Respondent's claims and arguments, as Respondent does in its Observations, or use hollow rhetoric to express false outrage as does Respondent. This is not the purpose of this proceeding, which concerns merely (1) the rectification of errors that have unfortunately crept into the Award that do not reflect legal judgment, including incorrect math and obvious clerical oversight, and (2) a supplementary decision concerning two of Claimant's claims that were never ruled upon by the Tribunal, which is a secondary matter and will be dealt with last.

4. This procedure does not concern substantive issues on the merits as Respondent claims. Claimant is not calling into question the Tribunal's questionable ruling on the most-favoured nation provision, for instance, although its highly investor-unfriendly interpretation, based on the principle of *effet utile*, can easily be criticized. Nor is Claimant questioning a ruling which effectively finds that State judiciaries are free to impose delay penalties on contractors prior to construction contracts being completed, or which rules on questions of admissibility in a manner that appears to be contradictory. Rather, as set forth in further detail below, Claimant's request for rectification is limited to inadvertent clerical, arithmetical or similar errors that unfortunately made their way into the Award.

5. From Respondent's Observations, it appears that both Parties agree on the fact that the

rectification of errors that occurred in the Award is obligatory.[1] This is indeed clearly stated in Article 49(2) of the ICSID Convention that the Tribunal is obliged to "*rectify any clerical, arithmetical or similar error in the award.*"

6. The request for a supplemental decision, on which Respondent primarily focuses on in its Observations, but is in fact secondary, will be dealt with last.

II. TAKING A STEP BACK, THE MAJORITY'S CALCULATION SHOWING NO SIGNIFICANT DIFFERENCE IN VALUE BETWEEN USD 14 MILLION IN CONFISCATED MACHINERY AND EQUIPMENT AND USD 3 MILLION IN DELAY PENALTIES IS PUZZLING

7. The Arbitral Tribunal should recall the actual expropriation claim that was before it and how it was calculated.

8. Claimant's claim for expropriated assets was very simple, supported first by inter-company transfer prices then, following reasonable criticism by Respondent's expert, Mr. Qureshi[2], by supplier invoices showing the acquisition cost of machinery and equipment with respect to which Claimant was deprived.

9. In order to establish the value of the confiscated equipment and machinery, original supplier invoices were provided by Claimant's Expert Mazars in its Second Expert Report, in Appendix D and the attached exhibits. The value of these original supplier invoices was USD 12.65 million, which can be calculated by simply adding up the amounts of the supplier invoices. No allegation was made by Respondent that these original supplier invoices were invalid.

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[1] Claimant's Request for Supplementary Decision and Rectification of the Award, ¶ 3; C. Schreuer, *The ICSID Convention: A Commentary,* 2d ed. 2009, p. 853, ¶ 38.

[2] First Expert Report of Abdul Sirshar Qureshi, ¶ 121(a).

10. For USD 1.34 million of the USD 13.99 million paid for the confiscated machinery and equipment, the Tribunal accepted that the "*invoices at issue were over ten years old, and that it was therefore not required to retain them under Turkish law*" which was the only explanation that the Tribunal accepted and found to be "*plausible*."[3]

11. The total value of the equipment therefore amounted to USD 13,99 million, which was equal to USD 12.65 million plus USD 1.34 as described in Claimant's expert report:

> 118. However, we could not reconcile 18 invoices with their original invoices. We were informed by the Company that the related original invoices were older than 10 years and as such they might not have been kept in their archives[155]. This is plausible as under the Turkish law[156], it is not mandatory to keep invoices older than 10 years.
>
> 119. The amount of these 18 invoices are presented as below[157]:

	Mazars June 2012
US$ in '000	
	Amount
Total	**1.341**
Asghabat	113
Avaza Canal	900
Avaza Hotel	328

> 120. Although original invoices from suppliers could not have been provided for these 18 invoices, we have considered their amounts in the total amount of confiscated machinery as these machines and equipment have been sent at construction sites to perform the work as per contracts.
>
> 121. Furthermore, the amounts calculated from original invoices sent from suppliers to İçkale Turkey (Mazars response in below table) shows a total amount that is higher than the total amount calculated from import invoices (Mazars June 2012 in below table)[158]:

[3] Award, ¶ 374.

Amount of confiscated machinery & equipment per construction sites (import invoices with original invoices)					
	Mazars June 2012	Mazars response			
US$ in '000	Amount	Amount (VAT excl.)	Δ	Amount (VAT incl.)	Δ
Total amount of expropriated machinery	**10.922**	**12.650** [159]	**(1.728)** [160]	**13.212**	**(2.290)** [161]
Asghabat	1.897	1.834	63 [162]	1.982	(84) [163]
Avaza Canal	8.331	10.191	(1.860)	10.591	(2.260)
Avaza Hotel	694	625	69	639	55

12. The Tribunal agreed that the total value of the Claimant's machinery and equipment was equal to USD 13.99 million based on the evidence that was provided by Claimant: "*based on the Claimant's expert evidence, the total value of the Claimant's machinery and equipment amounts to USD 13,990,000*."[4]

13. The Tribunal itself also agreed that approximately USD 3 million was claimed in delay penalties, although the precise value of the delay penalties used by the Tribunal appears to be slightly off: "*the delay penalties imposed on the Claimant amounts to approximately USD 2,812,786, plus a further USD 419,112 imposed on the Claimant in connection with the Abadan School Contract and the Abadan Kindergarten School Contract*."[5]

14. How did the Majority come to the conclusion that there was no significant difference in value between approximately USD 14 million and USD 3 million delay penalties, which seems odd on its face? Squarely through unintentional math errors, clerical oversight and similar errors which Article 49(2) of the ICSID Convention provides are to be corrected.

III. NONE OF RESPONDENT'S OBSERVATIONS REMOTELY JUSTIFY ALLOWING THE TRIBUNAL'S ERRORS FOR WHICH CLAIMANT IS REQUESTING RECTIFICATION TO REMAIN UNCORRECTED

[4] Award, ¶ 371.

[5] Award, ¶ 371.

A. The Tribunal's Subtraction of USD 1.8 Million for Inter-Company Transfers Is Mathematically Incorrect, Confusing Positive and Negative Values

15. As stated in Claimant's Request, the Tribunal has made an obvious arithmetic error when it deducted USD 1.8 million from the depreciated value of the expropriated assets calculated on the base of original supplier invoices:[6]

> [224] 10,000,000 – (2,812,786 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = 1,564,214.
> [225] 10,000,000 – (2,812,786 + 419,112 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = 1,145,102.

16. The Tribunal's error was due to its confusion between the value in the original supplier invoices and the inter-company invoices, and in no way reflected legal judgment.

17. While Mr. Qureshi rightly observed that Claimant's claim "*increased by approximately USD 1.8 million* […] *based on the original supplier invoices (compared to inter-company invoices)*"[7] the Tribunal erroneously retained that Mr. Qureshi had argued that "*based on inter-company invoices, some of the assets were sold by the Claimant to its Turkmen branch at prices that were, in total approximately USD 1,8 million* ***higher*** *than the prices reflected on the original supplier invoices.*"[8]

18. Instead of "*higher*" the Tribunal should have used the adjective "*lower*" or it should have interchanged "*inter-company invoices*" with "*original supplier invoices*" in order to retain the actual comment of Mr. Qureshi and not its opposite. It is perfectly clear that the Tribunal committed an inadvertent error, confusing higher and lower values and confusing positive and negative values.

19. In its Observations, Respondent agrees with Claimant and with its own expert, Mr. Qureshi,

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6 Award, footnotes 224 and 225.

7 Second Expert Report of Abdul Sirshar Qureshi, ¶ 157, [emphases added]; See also Second Expert Report of Abdul Sirshar Qureshi, ¶ 40.

8 Award, ¶ 372.

that "*the original supplier invoices was a valuation which was US$1.8 million **higher** than previously asserted by Claimant*" on the bases of inter-company invoices,[9] which is precisely the opposite of what the Tribunal writes in its Award. This is also an implicit admission by Respondent that the Tribunal made an error, although of course Respondent does not want to state this explicitly.

20. Respondent's additional observations on this point are irrelevant. For instance, Respondent comments that the "*US$1.8 million deduction was unanimously agreed by all three Tribunal members.*"[10] Even if all Tribunal members indicated that 2 + 2 = 5, by mistake, they would still have an obligation to rectify such an error under Article 49(2).

21. Despite the fact that the Tribunal's error is self-evident, that both Parties admit it, and that it requires a straightforward rectification, Claimant will take this opportunity to reply to Respondent's arguments and to dissipate the doubts and confusion that Respondent is trying to generate in the minds of the Tribunal regarding any potential justification for the Tribunal's erroneous deduction of USD 1.8 million.

22. To do so, Claimant will (1) first go step-by-step through the actual arguments of Respondent's expert, to show that Respondent's current attempt to repackage the meaning of its expert's evidence and comments is dishonest and in bad faith. It will then (2) note the obvious: the Tribunal subtracted USD 1.8 million without even being requested by a Party to do so, or having any expert suggest that this should be done. Claimant will then (3) address Respondent's remaining allegations on this issue.

1. What Did Respondent's Expert Mr. Qureshi Actually Allege? The Opposite of What the Tribunal Understood

23. Mr. Qureshi, in his First Expert Report, criticized Claimant for using inter-company invoices, which could conceivably have been inflated, and indicated that he would expect

[9] Respondent's Observations on Claimant's Request, ¶ 56.

[10] Respondent's Observations on Claimant's Request, ¶ 55.

to see supplier invoices instead to prove the machinery's value:

> "*I have identified the following key weaknesses in the asset valuation in the Mazars report:*
> *(a)* ***the supporting invoices produced to confirm the value of the equipment and machinery appear to have been issued by İçkale to its branch in Turkmenistan and thus represents an inter-company transaction*** [foot note 167: Exhibit C-67]
> *Normally,* ***I would expect to see invoices issued by the original supplier of the equipment and machinery****. In this case, however, it is not clear what the invoice in the inter-company value actually represents. It may refer to the original purchase price, the book value or some theoretical value agreed for the purpose of the customs proceedings only;*"[11] [Emphases added]

24. In order to address Respondent's criticism, Claimant managed to locate and to submit to the Tribunal USD 12.65 million of original supplier invoices.[12] Accordingly, Claimant modified its claim and replaced the amounts in inter-company invoices with the amounts in original supplier invoices, as requested by Mr. Qureshi. As a consequence of this modification, suggested by Respondent's expert himself, the amount of the revised claim was USD 1.8 million higher, which was likely the opposite of what Respondent had expected, since Respondent was implicitly alleging that Claimant's inter-company invoices were inflated.

25. Although Claimant's claims became larger, Mr. Qureshi even expressed appreciation that Claimant had taken into account his criticism and had provided the original supplier invoices, conceding this fact while making new criticisms:

> "***whilst Mazars now rely on third party invoices****, they continue to apply a historical cost approach.*"[13] [Emphases added]

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[11] First Expert Report of Abdul Sirshar Qureshi, ¶ 121.

[12] As indicated supra at ¶ 9, for equipment that was over 10 years old Claimant did not retain copies of its invoices, as this is not required under Turkish law. 18 inter-company invoices, which amounted to only USD 1.34 million, were relied upon as the best evidence that exists to demonstrate the value of the over-10-year old equipment and machinery.

[13] Second Expert Report of Abdul Sirshar Qureshi, ¶ 43.

26. All that Mr. Qureshi does in his Second Report,[14] on which the Tribunal appears to have relied entirely in making its Award, is to concede that when supplier invoices are used, as Mr. Qureshi himself suggested, the value of the expropriated assets in fact ***increases*** (***not decreases***), showing that there was nothing remotely suspect about initial Claimant's use of inter-company invoices which, in fact, ***understated*** (***not overstated***) the value of the expropriated machinery and equipment:

> "*İçkale claims USD 14.6 million in respect of the value of assets allegedly confiscated in Turkmenistan in September 2009. This claim is based on the values assessed by the Second Mazars report, which have increased compared to the original claim by USD 2.4 million* [footnote 107[15]] *because:*
>
> *(a) whereas Mazars previously relied on inter-company invoices to assess the value of the assets, an approach I criticised in my first report,* ***Mazars now rely on supplier invoices, which total a figure higher by USD 1.8 million;***"[16] [Emphases added]

27. Mr. Qureshi also concluded his Second Expert Report by stating that the overall impact of Mazars' shift from inter-company invoices to original supplier invoices is an increase of approximately USD 1.8 million based on supplier invoices as compared to inter-company invoices:

> "*The overall impact is that* ***the claim increased by approximately USD 1.8 million*** *excluding VAT* ***based on the original supplier invoices (compared to inter-company invoices)***."[17] [Emphases added]

28. This is an observation, not a claim. It is impossible to understand how under these conditions and after this debate between the experts the Tribunal, and after asking no questions at the hearing on this subject, the Arbitral Tribunal could have retained that the prices in the inter-

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[14] Claimant reminds the majority that it was given no opportunity to respond to Mr. Qureshi's Second Report.

[15] Second Expert Report of Abdul Sirshar Qureshi, Footnote 107: "*The original claim related to the allegedly confiscated assets comprised USD 12.2 million, as per the Claimant's Memorial, paragraph 335. USD 14.6 million - USD 12.2 million = USD 2.4 million.*"

[16] Second Expert Report of Abdul Sirshar Qureshi, ¶ 40.

[17] Second Expert Report of Abdul Sirshar Qureshi, ¶ 157.

company invoices was "*in total approximately USD 1,8 million **higher** than the prices reflected on the original supplier invoices,*"[18] whereas precisely the opposite was true and argued by both Parties.

29. This was an inadvertent error by the Arbitral Tribunal, which Article 49(2) of the ICSID Convention was designed to make arbitral tribunals correct, both in order to ensure that awards are free from defects and to allow tribunals to rectify their own obvious mistakes.[19] The Arbitral Tribunal confused positive and negative values, and Article 49(2) allows arbitral tribunals to save themselves from the embarrassment of having obvious mistakes in a final award.

2. Mr. Qureshi Never Even Suggested that the Tribunal Should Deduct USD 1.8 Million, Although the Tribunal Went Ahead and Did It Anyway

30. It must be stressed that despite its straightforward error between "*higher*" and "*lower*" values, the Tribunal proceeded to the deduction of USD 1.8 million without ever being requested by Respondent, or Respondent's expert, to do so.

31. Precisely, Mr. Qureshi never claimed that USD 1.8 million should be subtracted from the amount shown by the supplier invoices, although the tribunal subtracted this amount anyway.

32. Respondent also implicitly agrees in its Observations that it never made such a request.[20] Respondent's attempts to justify the Tribunal's obvious error consist solely in attempting to raise doubts about the value of inter-company invoices by appealing to the Tribunal's prejudice, rather than logic, although they were not relied upon in Claimant's revised claims, and although inter-company pricing policy is entirely irrelevant to the issue of whether the

[18] Award, ¶ 372.

[19] Exhibit RA-469, C. Schreuer, *ICSID Convention: A Commentary*, 2009, pp. 849-850, ¶ 28.

[20] Respondent's Observations on Claimant's Request, ¶¶ 54-60, in particular ¶ 56.

initial purchaser invoices, of which the Tribunal had copies, are valid.

33. Respondent has never, including today, suggested that the Tribunal should deduct USD 1.8 million, nor should it, since this would make no sense.

34. Claimant's current observations are also obviously not new arguments being made against Respondent's claims by Claimant, since Respondent made no arguments on this issue.

35. It is finally remarked that Claimant never had an opportunity to debate this particular point since no claim to actually deduct this amount was ever made by Respondent.

3. Respondent's Other Attempts to Retrospectively Justify the Tribunal's Inadvertent Error Cannot Be Taken Seriously by Any Self-Respecting Arbitral Tribunal

36. Respondent's new argument to justify the Tribunal's incorrect deduction of USD 1.8 million is to claim that it is "*because of Claimant's lack of reliable evidence"* that the dismissal of Claimant's claim was appropriate.[21] Respondent is merely appealing to the Tribunal's worst instincts and prejudice.

37. Claimant's evidence was not unreliable in the least: it produced the initial supplier invoices, which were not contradicted, and which showed precisely the price at which it purchased machinery and equipment except for the small amount of machinery and equipment that was over 10 years old. This was the basis of Claimant's claim before the Arbitral Tribunal, which concerned replacement costs,[22] and the fact that Claimant had an inter-company transfer pricing policy, like all companies in the world, is perfectly normal and totally irrelevant to Claimant's claim for replacement costs. Certainly, it does not justify a deduction of USD 1.8 million that was not even claimed by one of the Parties and based on the confusion of "*higher*" versus "*lower*" amounts.

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[21] Respondent's Observations on Claimant's Request, ¶ 60; see also ¶¶ 56-58.

[22] See below at paragraphs 111-118.

38. Despite Respondent's criticism with regard to the evidence provided by Claimant, the Tribunal considered the evidence consisting of original supplier invoices for the equipment that amounts to USD 13,990,000 to be satisfactory:

> "*the Tribunal notes that, based on the Claimant's expert evidence, the total value of the Claimant's machinery and equipment amounts to USD 13,990,000.*"[23]

39. It is hard to see how the Tribunal could have found otherwise: all it had to do was to add up and verify the invoices in Appendix D of Mazars' Second Expert Report and then decide upon the over-10-year-old equipment for which there were no longer invoices.

40. Respondent also relies on the Tribunal's comment that "*the Claimant has failed to explain or demonstrate on what basis the Tribunal should take into account the prices of inter-company transfers of some of the machinery and equipment*"[24] in an attempt to justify the Tribunal's error and the unrequested deduction. The Tribunal's erroneous finding is a direct consequence of the error the Tribunal made in the previous paragraph of the Award that is quoted, i.e. paragraph 372 of the Award, however, confusing positive and negative values. In any event, it was not for Claimant to explain how inter-company invoices should be taken into account, when they should not be taken into account since the revised claim was not based on them and Respondent never even alleged that they should be.

41. Respondent also bluntly alleges, without any reference to the Award, that the Tribunal considered "*that Claimant's failure to address this issue should result in a deduction to be applied in its calculations of the value of Claimant's equipment and machinery*."[25] This is not what the Arbitral Tribunal did, however, and merely a desperate attempt of Respondent to appeal to the Tribunal's prejudice, as opposed to reason, to try to justify a deduction of USD 1.8 million by any means possible.

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[23] Award, ¶ 371.

[24] Award, ¶ 373.

[25] Respondent's Observations on Claimant's Request, ¶ 58.

42. Contrary to Respondents allegations that this error made by the Tribunal "*is a substantive finding*",[26] there is no doubts that changing the word "higher" with "lower" is an inadvertent error by the Tribunal, and not a substantive finding on the merits or a reflection of legal judgment. This is simply an obvious error. Neither Respondent, nor Claimant ever claimed that the price of inter-company invoice should be taken into account, and this basic error must be corrected.

43. The Tribunal must rectify its inadvertent error in paragraph 372 of the Award by replacing the word "higher" by "lower" and by correcting its calculations relying on this inadvertent error.[27] This will remove an obvious defect in the Arbitral Tribunal's award in a manner that is required under Article 49(2) and will also save the Arbitral Tribunal from embarrassment concerning its obvious mistake.

B. Respondent's Observations Do Not Justify the Majority's Erroneous Deduction of USD 2.6 Million in Fictitious Insurance Payments

44. Contrary to Respondent's suggestions,[28] Claimant's request for the correction of the Majority's error regarding its deduction of insurance payments is perfectly permissible, and indeed required, under Article 49(2) of the ICSID Convention, which calls for the Tribunal to "*rectify any clerical, arithmetical or similar error in the award.*"

45. The Majority (1) made an obvious mistake of a clerical or similar error concerning the evidence that was actually before it and the allegations that had actually been made by the Parties and were in dispute regarding insurance, as well as (2) two serious arithmetic errors in its deduction of USD 2.6 million.

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[26] Respondent's Observations on Claimant's Request, ¶ 58.

[27] The relevant paragraph should read as follow: "*Based on inter-company invoices, some of the assets were sold by the Claimant to its Turkmen branch at prices that were, in total approximately USD 1,8 million **lower** than the prices reflected on the original supplier invoices*" (Award, ¶ 372).

[28] Respondent's Observations on Claimant's Request, ¶ 75.

1. The Majority's Inadvertent Clerical and Similar Errors

46. As an initial matter, and in order to undo the confusion that Respondent attempts to generate in its Observations, Claimant will review the actual submissions and evidence on the issue of whether Claimant received insurance payments that were presented by the Parties to the Arbitral Tribunal.

47. In his First Expert Report, Mr. Qureshi raised the issue of the difficulty of making a valuation of leased equipment (since, as the Arbitral Tribunal knows, some of the equipment was leased) without evidence of the provision of the leasing contracts, *inter alia* including the terms of the lease agreements. He did not claim that any amounts should be deducted since they were repaid through insurance, as Respondent today suggests in its Observations,[29] but was concerned squarely with the distinction between leased and owned assets and prodded Claimant to produce more evidence on this issue:

> "*Additionally, I understand from the CEM Direct Loss report that some of the assets were leased and some were owned by İçkale. However,* ***it is not clear, which assets were leased and which owned****. This makes the valuation impossible as:*
> *(a) for leased assets, the terms of the lease agreements would be relevant to determine the value, including the original price of the assets, amount of outstanding lease payments and any provisions as to what happens in the event of loss or damage and any insurance clause;* […]
> *However, no such evidence is available.*"[30] [Emphases added]

48. In its Counter-Memorial, Respondent made a similar indirect "*observation*" concerning its desire to obtain information concerning the leased equipment, which also did not allege that any insurance payments were made:

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[29] *See* Respondent's Observations on Claimant's Request, ¶ 63: "*the question of insurance arrangements for the allegedly confiscated machinery and equipment, and the fact that these arrangements would impact the valuation of these assets, was squarely put in issue in the first round of Respondent's submissions. Accordingly, Claimant's assertion in its Request that "[n]either Respondent in its Counter Memorial, nor Mr. Qureshi in its First Expert Report, asserted that Claimant was reimbursed by insurance," is entirely disingenuous.*"

[30] First Expert Report of Abdul Sirshar Qureshi, ¶ 122.

> "*With respect to the leased equipment, valuation would require an understanding of the terms of the lease agreement, the total value of the lease, the amount of outstanding payments, and whether any of the equipment was insured.*"[31] [Emphases added]

49. As it had done for original supplier invoices, Claimant, as requested by Respondent, provided evidence of the lease agreements in its Second Mazars Report,[32] in order to put this false issue to rest.

50. Afterwards, among the 96 document requests made by Respondent, all of which had multiple rubrics, only document Request 85 had one of 14 rubrics that mentioned insurance agreements. The Arbitral Tribunal most certainly did *not* order Claimant to produce this document, contrary to Respondent's false allegations in its Observations.[33] Rather, the Arbitral Tribunal ordered Request 85 to be granted only with respect to documents ***that supported Claimant's contentions***:

> "*The request is granted to the extent the Claimant has any additional* ***documents to support its contentions***."[34] [emphasis added]

51. Claimant's contentions were of course not that it had been paid through insurance, since it was not, and Respondent had not even made an allegation that Claimant potentially received insurance payments at this time and was engaged in a mere fishing expedition.

52. Respondent's statement in paragraph 67 of its Observations that "*Claimant was ordered by the Tribunal to produce these documents*" is therefore another obvious lie, designed merely to confuse the Tribunal further.

53. Claimant's final written submission on the merits took place on 22 April 2013. Only *after*

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[31] Respondent's Counter-Memorial, ¶ 258.

[32] Second Mazars Report, Exhibit M-035: Machine Rental Agreement.

[33] Respondent's Observations on Claimant's Request, ¶ 3: "*a failure to produce relevant documents even when ordered to do so by the Tribunal (as in regard to insurance arrangements)*."

[34] Procedural Order No. 3, Annex B: Respondent's Document Production Requests with Tribunal's decision, p. 149, Request 85.

Claimant's final written submission on the merits and Mazars' Second Expert Report dated 15 April 2013, did Mr. Qureshi, in his Second Expert Report dated 19 July 2013, go further and state that it seemed "*unlikely*" that none of the allegedly confiscated were insured and assert that insurance arrangements "*need to be taken into account.*" He did not suggest any value for these hypothetical insurance payments that should be taken into account, and his claim was never particularised:

> "*In my first report, I made a number of comments that* ***raised doubts*** *regarding the valuation of the allegedly confiscated assets in the First Mazars report. In my view, the value of the allegedly confiscated assets was not substantiated, in particular with reference to:* […]
> *(d) the Mazars calculation did not take into account whether the assets were insured or not, nor whether they were leased by İçkale rather than owned.*"[35] [emphasis added]
>
> and
>
> "*The Second Mazars report does not appear to consider any of the following issues raised in my first report and/or apparent from other documents in evidence made available prior to the date of the Second Mazars report:* […]
> *(c)* ***it seems unlikely that none of the allegedly confiscated assets was insured. Insurance arrangements need to be taken into account when calculating the Claimant's loss***."[36] [emphases added]

54. Mr. Qureshi based his "*seems unlikely*" assumption on no evidence of receipt of insurance payments, but the mere fact that some agreements required İçkale to insure the leased assets that were confiscated:

> "*172. Both the lease agreement exhibited by Mazars (asset value of USD 631,000)*[37] *as well as the lease agreements with Yapı Kredi Leasing (assets value of USD 2.5 million excluding VAT)*[38] *required İçkale to*

[35] Second Expert Report of Abdul Sirshar Qureshi, ¶ 147.

[36] Second Expert Report of Abdul Sirshar Qureshi, ¶ 163.

[37] Second Expert Report of Abdul Sirshar Qureshi, footnote 407: "*EUR 400,000 (USD 631,000 at a rate of 1.5775 as at 1 July 2008 per www.ecb.int). Exhibit M-035, Clause 10.*"

[38] Second Expert Report of Abdul Sirshar Qureshi, footnote 408: "*Exhibits SQ-44 to SQ-47.*"

> *insure the leased assets for their full value*[39]. I would also expect that the assets owned by ickale were insured. [emphases added]
> *173. The insurance cover and **potential** claims or reimbursement from insurers do not seem to have been taken into account by Mazars.*"[40] [emphases added]
>
> and
>
> "*176. The Second Mazars report did little to address my concerns about the valuation approach to this head of claim. In spite of the additional evidence submitted, I cannot consider the direct loss related to the allegedly confiscated assets substantiated. In particular:* […]
> *(d) no insurance arrangements were considered;*"[41] [emphases added]

55. As Respondent correctly states today, this was merely an "*observation*"[42] or in other words a criticism that potential claims had not been disproven, but it was far from a positive, particularised allegation that Claimant was actually reimbursed by insurance.

56. In its Rejoinder on Merits, Respondent did nothing more than to note that most of the lease agreements were not considered by Mazars' Second Expert Report, dated 15 April 2013, which was perfectly normal since no unsupported allegations that insurance payments had been made at the time that it was written:

> "*371. In addition, these original sale invoices raise more questions than they answer with respect to Claimant's valuation.* […] *Several items have been shown to be leased, although most lease agreements were not considered by Mazars.* [footnote 1009: Second PwC Report, *"¶¶ 167-171. The lease agreements, inter alia, required that İçkale insure the equipment for their full value. Id., ¶ 172.*"]"[43]

57. Here again, Respondent did not assert that Claimant has been reimbursed or make a

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[39] Second Expert Report of Abdul Sirshar Qureshi, footnote 409: "*Exhibit SQ-44, Articles VII and VIII of "Special Conditions", page 2. Exhibit SQ-45, Article VII of "Special Conditions", page 2. Exhibit SQ-46, Articles VII and VIII of "Special Conditions", page 2. Exhibit SQ-47, Articles VII and VIII of "Special Conditions", page 2.*"

[40] Second Expert Report of Abdul Sirshar Qureshi, ¶¶ 172-173.

[41] Second Expert Report of Abdul Sirshar Qureshi, ¶ 176.

[42] Respondent's Observations on Claimant's Request, ¶ 64.

[43] Respondent's Rejoinder on the Merits, ¶ 371.

particularised claim that amounts that were paid by insurance should be deducted, but merely noted that there was a possibility of "*potential claims or reimbursement.*"

58. The lease contracts, to which Mr. Qureshi referred to in its Second Expert Report, after Claimant's written submissions had taken place, only indicate that İçkale had a contractual obligation to insure the equipment, and they do not even indicate that Claimant was required to obtain political risk insurance, the only type of insurance that could hypothetically be available for expropriated assets by a State:

> "[İçkale] *is responsible against the LEASER in case LEASED and, moveable and immoveable goods contributing as the guarantee of hereby contract are not insured or insured as not comprising all the risks.*"[44] [emphases added]

59. Even assuming that Respondent had made the allegation that Claimant was reimbursed for insurance, which it did not do in a particularised manner, it would of course normally have the burden of proving its allegations. Respondent provided no evidence whatsoever that the leased equipment was insured by political risk insurance, that Claimant was reimbursed by insurance, that Claimant was required to obtain political risk insurance, or that such political risk insurance even existed for Turkish companies.

60. In addition, although Claimant had provided e-mail correspondence between the Bank Yapı Kredi and Ozan İckale during document production stating that the leased machineries and equipment were not covered against a confiscation by a State during document production,[45] Mr. Qureshi in his Second Report, in utter bad faith, failed to mention this.

61. The final hearing was Claimant's first opportunity to address the issue of unfounded allegations of "*potential claims or reimbursement from insurers,*" in only an oral manner, as the Tribunal clearly overlooked.

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[44] For example, Exhibit SQ-44, Financial Leasing Contract, Article 16, ¶ 1 *in fine*.

[45] E-mail correspondence provided by Claimant to Respondent under number RDR-122 in response to Respondent's Document Requests - Request No. 85 (c).

62. At the hearing, Claimant explained that it was required to pay the full amount of leased agreements by submitting positive evidence which is a Debt Liquidation Agreement Ex.C-212 (Claimant's Reply), which clearly states that Claimant was under the obligation to pay the full amounts of leased machinery and equipment back to the leasing company,[46] meaning that it was not reimbursed by insurance and had to pay this amount itself:

> "***Claimant was eventually obliged to pay for the full value of the relevant machinery and equipment under the debt liquidation contract****. Because some of this machinery and equipment was initially leased, so it was even worse than having his own equipment that he had purchased: it was leased and it was brought in there.* ***So*** **[the CEO]** ***got in trouble with the lessor, and had to purchase, and lost a lot of money because of that as well****."*[47] [emphases added]

63. Claimant would not have been obliged to pay for the *full value* of the relevant leased machinery if some of these amounts had instead been paid for by insurance. Nor would it have lost money if an insurer was paying in its place. In such circumstances, it would only have had to pay for *part* of the value of the relevant machinery, since insurance would have paid for the rest, and it would not have lost the full value of the machinery and equipment.

64. At the Hearing, Mr. Gürsel merely claimed that Respondent had doubts about the insurance, again making no particularised claim that Claimant was actually paid by insurance, stating that it did not know if İçkale received proceeds from insurance for the equipment and ignoring the response from Yapı Kredi on this issue in bad faith, but supplying no evidence to support Respondent's wholly-unsubstantiated and wholly-unparticularised allegations:

> "*Insurance proceeds. You would expect this equipment to be insured. We don't know if İçkale received proceeds from insurance for this equipment, what it received for renting this equipment to third parties.*"[48] [emphases added]

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[46] Please note that the values with respect to this debt repayment are included only in the Turkish version of this document.

[47] Hearing Transcript, Day 1, p. 206, ¶¶ 21-25 and p. 207, ¶¶ 1-4.

[48] Hearing Transcript, Day 3, p. 37, ¶¶ 6-9.

65. The Arbitral Tribunal, which can be assumed to know that each Party bears the burden of proving the facts with respect to their allegations, under both domestic and international law, then went on to ask precisely no questions at all concerning insurance during the entirety of the two-week hearing, and insurance was not included on the Tribunal's list of issues for post-hearing memorials.

66. In its post-hearing memorial, Claimant again reiterated the fact that it was forced to pay the *full value* of the leased equipment itself, i.e. not the partial value because some of these amounts had been paid for by insurance, citing the Debt Liquidation Contract in paragraph 459 which shows this.[49]

67. In short, over the course of the proceedings, the Majority appears to have inadvertently overlooked the fact that:

(i) The Tribunal did not order Claimant to produce insurance agreements as Respondent falsely claims today;

(ii) Respondent did not make any allegations concerning insurance until after Claimant's written submissions on the merits had ended, and even then they were vague and wholly unparticularised;

(iii) Respondent had the burden of proving its allegations but submitted no evidence showing that Claimant was reimbursed or even could have been reimbursed by political risk insurance;

(iv) The lease agreements do not indicate that Claimant was required to purchase political risk insurance;

(v) It is entirely unclear if such political risk insurance even exists for Turkish construction companies in Turkmenistan;

(vi) Respondent had the burden of proving the amount of insurance payments to be deducted, but submitted no evidence that Claimant received any and made no

[49] Claimant's Post-Hearing Brief, ¶ 459: "*with respect to the leased assets, Claimant also became obligated to pay the value of the relevant machinery and equipment to the lessors.* [footnote 432: "*Ex. C-212 (CL Reply) Debt Liquidation Contract Page 3/33*"]."

estimations of the amount it could potentially have received;

(vii) Respondent ignored a document from Claimant's insurer stating that no reimbursement was provided, which was exchanged at the time of document production and kept hidden from the Tribunal;

(viii) Claimant provided positive evidence that it received no insurance payments in the form of the Debt Liquidation Agreement, showing that Claimant itself was forced to pay the full amounts of the leased machinery and equipment, although Claimant did not have the burden of doing this since it was Respondent's unsubstantiated and wholly-unparticularised allegation;

(ix) The Tribunal asked no questions concerning unsubstantiated insurance payments at the hearings; and

(x) The Tribunal asked no questions concerning Respondent's vague allegations of potential insurance payments in the list of issues for the post-hearing memorials.

68. How then, did the Majority arrive at its conclusion in paragraph 373 of its Award that "*the evidence indicates that the Claimant would have been able to recover these payments from the insurance*"?

69. The Majority did not cite any evidence to support this finding, nor could it, because there was none, as the Tribunal appears to have overlooked.

70. There are only two rational explanations: either the Majority are fantastically bad and biased arbitrators or, as Claimant would prefer to believe, due to the replacement of the Co-Arbitrator and the fact that many documents were in Turkish, including the Debt Liquidation Agreement which only shows the amounts paid by Claimant to the leasing company in the Turkish version[50], the Majority committed an inadvertent error, forgetting that it had not ordered the production of insurance agreements and forgetting that no particularised claim that insurance was received was made.

[50] Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, Exhibit C–212: Debt Liquidation Contract, p. 3, Table 1.

71. While the reversal of the burden of proof from the Party who has the burden of proving the facts of their allegations to Claimant is difficult to explain away, since the Majority knows or should know that a Party making allegations, in this case Respondent, has the burden of proving them, and while it is very difficult to understand why the Tribunal never once whispered the word "*insurance*" at the hearing or in the list of issues for post-hearing memorials if it had doubts about this issue, or why it would not order the production of insurance agreements if it was concerned by this issue, the Majority's finding that the evidence indicates that the Claimant would have been able to recover these payments from the insurance was an obvious clerical mistake or similar error since there was, in fact, no evidence showing this.

72. It may also be that the Tribunal did not see the figures in the Debt Liquidation Agreement through error since they were in Turkish, or that it made a mistake concerning the issue of whether it ordered Claimant to produce insurance agreements, but no ICSID arbitrators could knowingly make such an erroneous ruling.

73. In any event, even if the Majority did intend commit a gross violation of due process, flagrantly violating ICSID arbitrators' basic obligation to "*judge fairly as between the parties*"[51] which Claimant doubts, the Tribunal's deduction is wrong as a matter of basic math.

2. Even If Respondent Had Argued that Insurance Had Paid for Part of the Costs of the Leased Equipment, Which It Did Not Do, the Majority's Deduction of USD 2.6 Million Is Incorrect As a Matter of Very Basic Math

74. Respondent in its Observations does not even pretend that it submitted any evidence to support the Majority's determination that USD 2.6 million should be subtracted for

[51] ICSID Arbitration Rules, Rules 6(2) the arbitrators "*shall judge fairly as between the parties, according to the applicable law*".

insurance payments.

75. Even assuming that the Majority were right to assume, contrary to all evidence that was actually presented in the current arbitration, that Claimant did have political risk insurance and did receive insurance payments, it should not have subtracted 100% of the initial value of the leased assets.

76. This is wrong first because political risk insurance never reimburses 100% of the initial value of assets, only net value, and also because it makes no mathematical sense to subtract an undepreciated amount from a depreciated amount, which incorrectly assumes that the *insured assets had a negative value*.

77. *First*, even if an insurer had been willing to provide political risk insurance for the expropriation of leased assets by Turkmenistan, which was not remotely proven by Respondent and which does not exist for Turkish construction companies operating in Turkmenistan to the best of Claimant's knowledge, no political risk insurance reimburses 100% of the initial value of expropriated assets. According to the book *International Political Risk Management: Exploring New Frontiers,* for total expropriation the "*insurer usually pays the* ***net book value*** *of the insured investment*" and "*compensation is usually paid upon assignment of the insured party's interest in the expropriated investment to the insurer*" although no assignment took place.[52] This is common sense: no insurance policy reimburses the full initial value of expropriated assets.

78. *Second*, Claimant's point that it is obviously wrong for the Majority[53] to depreciate the equipment and material on the one hand, and then to fail to similarly reduce the amounts that should be deducted for insurance payments that were never made nor remotely proven

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[52] **Exhibit CA-1**, *International Political Risk Management: Exploring New Frontiers*, 29 January 2001, by Theodore H. Moran, p. 82.

[53] Ms. Lamm, in her Partially Dissenting Opinion, made the same error by subtracting from the "***real value*** *of all of the Claimants machinery and equipment (i.e., USD 10 million)*" the invoice value (non-depreciated value) of some equipment (footnotes 27 and 28).

on the other hand, is perfectly valid despite Respondent's hollow rhetoric in its Observations.[54] Why would depreciated value be used by the Majority for the value of the equipment and machinery on the one hand, and then initial invoice value be used for fictitious and unproven insurance payments in the other part of the Majority's calculations? It would not, and this is incorrect as a matter of basic math because it results in the deduction of over 100% of the value of the leased assets for the purpose of the Tribunal's comparison and erroneously assumes that the leased assets had a negative value.

79. The depreciation rate proposed by Claimant's expert at the hearing was approximately 28.52%,[55] as explained in further detail below. In its comparison of the real value of the machinery and equipment and the delay penalties, the Majority used the starting value of USD 10 million, part of which was composed of the *depreciated* value of the leased assets. The depreciated value of the leased assets forming part of this USD 10 million was not equal to USD 2.6 million, but only to USD 1,858,470, assuming a depreciation rate of 28.52%.[56]

80. Thus, in the Majority's comparison between the value of the machinery and equipment and the delay penalties, it starts with a value of USD 1,858,470 for the leased assets (the depreciated value of the leased assets) and then deducted USD 2.6 million from this amount in its attempt to exclude the leased assets from consideration. Rather than cancelling out the value of the leased assets, however, the Majority's equation leads to an improper negative value of USD 741,530, which understates the difference in value between the machinery and equipment and the delay penalties by USD 741,530, even assuming that Respondent had proven that Claimant had the most generous political risk insurance policy in the world to ever exist, reimbursing 100% of the initial value of expropriated assets, which it did not do.

81. In other words, the Tribunal's comparison of the real value of the machinery and equipment

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[54] Respondent's Observations on Claimant's Request, ¶¶ 72-73.

[55] The depreciation rates proposed by Claimant is of 28,52% = 3,990,000 * 100% / 13,990,000 = (13,990,000 – 10,000,000) * 100% / 13,990,000.

[56] USD 1,858,470 = 2,600,000 * 10,000,000 / 13,990,000.

and the hypothetical insurance payments *assumes that the leased assets had a negative value*, because the Majority takes the smaller, depreciated value as the starting amount, and then subtracts a larger, undepreciated amount from it. This is obviously wrong as a matter of basic math.

82. In order to correct its calculations, and for this deduction to be mathematically correct, the Majority must not mix apples and oranges with respect to depreciation. It also should only subtract the amount of insurance payments that Respondent has actually proven (i.e., USD 0 in the instant case) or, if the Majority insists on being unfair, the amount of insurance that could be potentially paid for expropriated assets (i.e., less than 100%).

83. The Majority's calculation is totally wrong as a matter of basic arithmetic and common sense, and it must be corrected.

C. The Majority Calculated Depreciation Incorrectly, Mixing Apples and Oranges

84. As a preliminary matter, it should be clarified that contrary to Respondent's attempt to requalify Claimant's request on this issue not as a rectification request but as a request for supplementary decision in order to confuse the Arbitral Tribunal,[57] Claimant's request with respect to depreciation is first and foremost a request for rectification of inadvertent errors with respect to the Tribunal's depreciation and the Tribunal's mathematically incorrect manner of using depreciation.

1. The Majority Erroneously Used USD 6.3 Million as An Alleged Depreciation Alternative

85. Claimant demonstrated in its Request that the Majority made basic errors while making its decision on depreciation.[58] Combined with its mathematically-incorrect deductions for

[57] Respondent's Observations on Claimant's Request, ¶ 76.

[58] Claimant's Request for Supplementary Decision and Rectification of the Award, ¶¶ 58-62.

insurance and its confusion of positive and negative values with respect to inter-company invoices, this led the Majority to come to the conclusion that "*Claimant has failed to prove that the Supreme Court's directive was excessive and as such expropriatory,*"[59] although the Majority itself had noted that the difference in value between USD 13.99 million in machinery and equipment and approximately USD 3 million in delay penalties was significant, as was indeed very difficult to miss.

86. These errors should have not occurred, and in any event must be corrected.

87. The Majority relied on observations made by Mr. Qureshi in his Second Expert Report stating that part of the machinery, representing less than half of the value of total equipment, was four years older than another part:

> "*I note that the portion of assets that are included in the claim and were over four years old at the time of the alleged confiscation amounts to USD 6.3 million.*"[60]

88. As noted in Claimant's Request, the Tribunal made an error by apparently subtracting USD 6.3 million from the total value of USD 13.99 million of the confiscated machinery and equipment in order to determine what it considered to be the depreciated value of the machinery of only USD 7.69 million. USD 7.69 million, however, does not represent the depreciated value of the equipment, unless one assumes that machines that are over 4 years old have no value, which is obviously wrong in the construction industry where equipment can be used for decades.[61]

89. It is unclear why Mr. Qureshi[62] mentioned the value of the machinery that is older than 4 years (USD 6.3 million). He could equally have mentioned the value of the machinery older than 5 years for example (USD 4.7 million) or any other period, since 4 years has no

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[59] Award, ¶ 375.

[60] Second Expert Report of Abdul Sirshar Qureshi, ¶ 166.

[61] Claimant's Request for Supplementary Decision and Rectification of the Award, ¶¶ 53-63.

[62] Second Expert Report of Abdul Sirshar Qureshi, p. 40, ¶¶ 164-166.

particular relevance and is arbitrary. There is also no doubt that USD 6.3 is the invoice value and in no case the amount of the depreciation as the Majority retained by inadvertent mistake.[63]

90. In its Observations, Respondent tries desperately to argue that the Arbitral Tribunal did not made such a deduction,[64] despite the clear evidence to the contrary. Ms. Lamm, who is one of the three Arbitrators who participated in the deliberations of the Tribunal and who was in the possession of the decision of the Majority when it drafted its Partially Dissenting Opinion, has made clear the erroneous manner in which the Majority considered depreciated value was to subtract the entire value of equipment that was over 4 years old from the total value of the machinery, i.e. USD 13,99 million:

> "*I disagree further with the majority's rejection of the testimony of Claimant's expert and the majority's reference to the number in the Second Expert Report of Mr. Qureshi reducing the value of the machinery by USD 6.3 million to USD 7,690,000*.[footnote 22: "*See Award, para. 375 & n. 225*"]"[65]

91. In paragraph 23, Ms. Lamm refers again to the deduction of USD 6.3 million by the Majority as an "***alternative number from Mr. Qureshi's Second Report***" to the depreciation proposed by Claimant. Ms. Lamm illustrates this deduction with the following formula: "*USD 13,990,000 - **USD 6,300,000** = USD 7,690,000*"[66]:

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[63] Award, ¶ 375.

[64] Respondent's Observations on Claimant's Request, ¶¶ 81-86.

[65] Partially Dissenting Opinion of Ms. Carolyn B. Lamm, ¶ 18.

[66] Partially Dissenting Opinion of Ms. Carolyn B. Lamm, ¶ 23, footnote 31, [emphasis added].

23. The real value of all of the Claimants machinery and equipment (*i.e.*, USD 10 million), accounting for the various deductions noted in paragraph 373 of the Award, amounts to USD 6,977,000[27] or, if using USD 13,990,000, to USD 10,973,000.[28] The gap between the amount of the penalties (USD 1,161,961; *see* para. 17 above) and the value of the equipment seized is significant—at least USD 5,815,039[29] or at most USD 9,805,039.[30] Even use of the alternative number from Mr. Qureshi's Second Report results in a valuation results in a gap of USD 3,505,039.[31] The majority however does not accept the various expert reports and import documentation as sufficient and concludes it could not determine the real value of the Claimant's machinery. This imposes too high a standard of proof in my view. The Claimant's evidence when viewed in its totality and weighed against Respondent's rebuttal in my view was sufficient. I therefore conclude that

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may, if it deems necessary at any stage of the proceeding: (a) call up upon the parties to produce documents, witnesses and experts ...."); *see also The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 181 ("The overall effect of these provisions is that an ICSID tribunal is endowed with the independent power to determine, within the context provided by the circumstances of the dispute before it, ... whether it would like to see further evidence of any particular kind on any issue arising in the case ....").

[26] *The Rompetrol Group N.V. v.Romania*, ICSID Case No. ARB/06/3, Award dated 6 May 2013, para. 178.

[27] *See* Award, n. 223: USD 10,000,000 – (USD 1,800,000 + USD 23,000 + USD 1,200,000) = USD 6,977,000.

[28] *See* Award, n. 224: USD 13,990,000 – (USD 1,800,000 + USD 23,000 + USD 1,200,000) = USD 10,967,000.

[29] USD 6,977,000 – USD 1,161,961 = USD 5,815,039.

[30] USD 10,967,000 – USD 1,161,961 = USD 9,805,039.

[31] *See* Award, n. 225: USD 13,990,000 – USD 6,300,000 = USD 7,690,000; USD 7,690,000 – (USD 1,800,000 + USD 23,000 + USD 1,200,000) = USD 4,667,000; USD 4,667,000 – USD 1,161,961 = USD 3,505,039.

92. Ms. Lamm makes it perfectly clear how the Majority arrived at their erroneous conclusion that the "*depreciated value of the assets* ***was substantially less than*** *USD 10 million*."[67] The Majority's reliance on an erroneous calculation of depreciation is moreover shown by the only reference the Majority makes in the corresponding footnote to it statement that the amount of depreciation was substantially less than USD 10 million, which is the Majority's reference to Mr. Qureshi's value of USD 6.3 million:

[67] Award, ¶ 375, [emphasis added].

Respondent or reviewed by the Tribunal. Indeed, the evidence before the Tribunal suggests that the depreciated value of the assets was substantially less than USD 10 million, the amount mentioned by Mr Almaci.[226] The Tribunal therefore cannot accept that this amount

[222] In addition, the claim includes the amount of USD 631,000 (EUR 400,000) relating to a concrete paving machine that appears to have been rented rather than leased by the Claimant. See Second Expert Report of Abdul Sirshar Qureshi, p. 41. It does not appear from the evidence that this item was insured.

[223] Claimant's PHB, para. 459, Debt Liquidation Contract, Exhibit C-212 (Reply), p. 3; Financial Leasing Contract, Exhibit SQ-44.

[224] 10,000,000 – (2,812,786 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = 1,564,214.

[225] 10,000,000 – (2,812,786 + 419,112 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = 1,145,102.

[226] The evidence suggests that some of the assets had been purchased already in 2000, and that the portion of the assets that were more than four years old at the time of the alleged confiscation amounted to approximately USD 6.3 million. See Second Expert Report of Abdul Sirshar Qureshi, p. 40.

93. While the Majority did not explain the manner in which they reached their determination of the amount of depreciation to apply, instead of simply relying on the evidence that had been presented by Claimant, it is obvious that in order to arrive at a conclusion that a value is "*substantially less than*" another value, one needs to perform a subtraction,[68] and it is clear that the Majority incorrectly subtracted USD 6.3 million to arrive at its value of the depreciated equipment.

94. There is no need for a lengthy discussion between the Parties as the members of the Arbitral Tribunal know better what happened during their deliberations than the Parties. It is not too late for the members of the Arbitral Tribunal to correct their errors concerning the proper amount of depreciation under Article 49(2) of the ICSID Convention and to use their good faith, fairness and impartiality, in compliance with their duty as ICSID arbitrators.

95. If the Arbitral Tribunal is to rule that it did not make such a deduction, as Respondent alleges in its Observations, then the reference of the Majority to the value of USD 6.3 evoked by Mr. Qureshi[69] does not comply with the requirement of the ICSID Convention that obliges

[68] The calculation can also easily be reconstructed from the conclusion Ms. Lamm referenced: USD 13,990,000 - USD 6,300,000 = USD 7,690,000 then USD 7,690,000 – (2,812,786 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = – 745,786. In this case the sum is a negative value, which may also explain the obviously incorrect finding of the Majority.

[69] Second Expert Report of Abdul Sirshar Qureshi, p. 40, ¶¶ 164-166.

the Tribunal to "*state reasons*" upon which it bases its decision on questions submitted to the Tribunal.[70] In any event, it is clear that the Tribunal took into consideration the fact that "*the portion of the assets that were more than four years old* […] *amounted to approximately USD 6.3 million*"[71] to come to the conclusion that "*the evidence before the Tribunal suggests that the depreciated value of the assets was substantially less than USD 10 million, the amount mentioned by Mr Almaci.*"[72] Yet, it is perfectly clear that there is no logical or mathematical link between the two values.

96. Prudence was obviously required from the Arbitral Tribunal in circumstances where Claimant has not been given an opportunity to reply in writing to the multitude of Mr. Qureshi's misleading allegations and references to random values in his Second Expert Report.

97. The Tribunal must correct this error. As explained above, the tribunal must either not deduct USD 6.3 million for the total value of machinery, or not refer to Mr. Qureshi's amount for the machinery older than 4 years as a justification to is finding that "*the evidence before the Tribunal suggests that the depreciated value of the assets was substantially less than USD 10 million, the amount mentioned by Mr Almaci.*"[73] The Tribunal should have not made this conclusion as it was based on an erroneous calculation and numbers that have a completely different meaning, and the Majority should correct its footnote.

98. In its Observations, Respondent itself identifies clearly the logical link between this error, i.e. deduction of USD 6.3 million as an alternative for depreciation, and the reason why the Majority did not accept Claimant's evidence of depreciated value of USD 10 million:

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[70] ICSID Convention, Article 48(3): "*The award shall deal with every question submitted to the Tribunal, and **shall state the reasons upon which it is based***." [emphasis added].

[71] Award, footnote 226.

[72] Award, ¶ 375.

[73] Award, ¶ 375.

> "*This evidence was not ultimately accepted by the Majority, which found that "the evidence before the Tribunal suggests that the depreciated value of the assets was substantially less than USD 10 million." Award, ¶ 375.*"[74]

99. As the consequential link is made and both Parties have the same understanding of it, the Tribunal has to correct its error in relation to the meaning of USD 6.3 million,[75] which is unrelated to the issue of depreciation.

2. The Majority Erroneously Deducted Undepreciated Values from Depreciated Values

100. Respondent does not dispute that the Majority used the depreciated value proposed by Mr. Almaci for its comparison of the value between the machinery and equipment and the delay penalties, but that it subtracted undepreciated amounts from this value in order to determine the difference in the value of Claimant's machinery and equipment and delay penalties, which is incorrect as a matter of basic arithmetic.

101. Any student who has touched on the issue of depreciation learns that if you deduct an undepreciated value from a depreciated value, as the Tribunal did, this is mathematically in error. This has already been set forth with respect to the Majority's deduction for insurance, resulting in a negative value although the Tribunal was attempting to cancel out the value of leased machinery and equipment.

102. In its calculations, the Arbitral Tribunal used the depreciated value of the machinery provided by Claimant's expert at the final hearing (and for which the expert offered to provide written evidence) as a starting point for its comparison, but did not similarly apply depreciation to the deductions it made from this depreciated amount, inadvertently resulting in a deduction of *over 100% of the initial* invoice *value* of machinery, which incorrectly assumes that machinery and equipment had a negative value:

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[74] Respondent's Observations on Claimant's Request, footnote 87.

[75] The "consequential error" is an error that is made as a consequence of previous error.

[224] 10,000,000 – (2,812,786 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = 1,564,214.

[225] 10,000,000 – (2,812,786 + 419,112 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = 1,145,102.

103. What the Tribunal is doing makes no sense as a matter of basic math: 10,000,000 [depreciated value] - (2,812,786 [due value] + 1,800,000 [**non-**depreciated value] + 23,000 [**non**-depreciated value] + 1,200,000 [**non**-depreciated value] + 2,600,000 [**non**-depreciated value]) = 1,564,214. It is simply not possible to deduct apples from oranges, however, and the Tribunal obviously needed more help with the math.

104. Even without taking into account its other basic errors, the Tribunal should have used the depreciation rate[76] proposed by Claimant for the deductions, since it was using this depreciation rate for the starting value of its calculations. The corrected calculations in footnotes 224 and 225 of the Award are the following:

> (13,990,000 – 1,800,000 – 23,000 – 1,200,000 – 2,600,000) * 10,000,000 / 13,990,000 – 2,812,786 = **3,167,915**[77]
>
> with additional deduction of USD 419,112: (13,990,000 – 1,800,000 – 23,000 – 1,200,000 – 2,600,000) * 10,000,000 / 13,990,000 – 2,812,786 – 419,112 = **2,748,803**

105. Rectification of this single error results in a difference that is twice as large as the difference obtained by the majority, even assuming that its deductions for inter-company transfers or insurance payments were correct, although this is obviously untrue.

106. The Majority also performed the following computation in order to arrive at the conclusion that "*Claimant has failed to prove that the Supreme Court's directive was* ***excessive*** *and as*

[76] The depreciated value of 10 million translates into a depreciation rate of approximately 28,52% = 10,000,000 * 100% / 13,990,000. With this depreciation rate it is possible to calculate the depreciated value of any given amount by multiplying it by 10,000,000 and then by dividing the result by 13,990,000.

[77] This computation can also be made in the following manner and arrive to the same result: 10,000,000 – [2,812,786 + (1,800,000 * 10,000,000 / 13,990,000) + (23,000 * 10,000,000 / 13,990,000) + (1,200,000 * 10,000,000 / 13,990,000) + (2,600,000 * 10,000,000 / 13,990,000)] = 10,000,000 – (2,812,786 + 1,286,633 + 16,440 + 857,756 + 1,858,470) = 3,167,915.

such expropriatory":[78]

> 13,990,000 – 6,300,000 = 7,690,000 then 7,690,000 – (2,812,786 + 1,800,000 + 23,000 + 1,200,000 + 2,600,000) = **– 745,786**.

107. This is another very basic arithmetic error on the part of the Majority. First, these calculations are erroneous with regard to the value of USD 6.3 million, as explained above, both because USD 6.3 million represents only the invoice value of the machinery over four years old and not the depreciation amount, and because this assumes that machinery over four years old machinery has no value which is plainly false. But even assuming, for the sake of hypothesis, that this figure of USD 6.3 million was the proper amount to deduct for depreciation,[79] and assuming that the Arbitral Tribunal had not inadvertently subtracted USD 1.8 million for inter-company transfers or incorrectly subtracted insurance payments of some USD 2.6 million assuming that leased assets had a negative value, the Tribunal would still find that the Supreme Court's directive was excessive as a matter of basic math if it had used depreciation in a mathematically-correct manner:

> 13,990,000 – 6,300,000 = 7,690,000 then (13,990,000 – 1,800,000 – 23,000 – 1,200,000 – 2,600,000) * 7,690,000 / 13,990,000 – 2,812,786 = **c**[80]
>
> with additional deduction of USD 419,112: (13,990,000 – 1,800,000 – 23,000 – 1,200,000 – 2,600,000) * 7,690,000 / 13,990,000 – 2,812,786 – 419,112 = **1,367,260**

108. Even with a depreciation amount that assumes incorrectly that machinery over 4 years old has no value and forgetting the Tribunal's other obvious errors, the result is still a considerable positive difference between the value of the machinery and equipment and the

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[78] Award, ¶ 375.

[79] The depreciated value of 7,69 million translates into a depreciation rate of approximately 45% = 7,690,000 * 100% / 13,990,000. With this depreciation rate it is possible to calculate the depreciated value of any given amount by multiplying it by 7,690,000 and then by dividing the result by 13,990,000.

[80] This computation can also be made in the following manner and arrive to the same result: 7,690,000 – [2,812,786 + (1,800,000 * 7,690,000 / 13,990,000) + (23,000 * 7,690,000 / 13,990,000) + (1,200,000 * 7,690,000 / 13,990,000) + (2,600,000 * 7,690,000 / 13,990,000)] = 7,690,000 – (2,812,786 + 989,421 + 12,643 + 659,614 + 1,429,164) = 1,786,372.

amount of delay penalties, USD 1,786,372 and USD 1,367,260, and not a negative value as the Majority incorrectly calculated.

109. Of course, the Arbitral Tribunal's USD 1.8 million error with respect to inter-company invoices and whether they were positive or negative values, the Majority's erroneous calculation that USD 2.6 million should be subtracted for fictitious insurance payments, and the rectification of delay penalties which were incorrectly calculated by the Arbitral Tribunal as set forth in paragraph 26 of Claimant's Request, must also be taken into account.

110. In sum, contrary to Respondent's attempts to confuse the Tribunal and to appeal to the prejudice and worst instincts of the Tribunal, it should be clear that Claimant is first requesting merely the rectification of basic math errors and obviously unintentional clerical and similar errors on the part of the Tribunal concerning depreciation, inter-company transfers, and insurance payments, which the Arbitral Tribunal has an obligation to rectify under Article 49(2), prior to consideration of the Claimant's request for a supplemental decision.

3. Respondent Concedes that Claimant's Expert Offered to Provide Written Evidence of Depreciation although the Arbitral Tribunal Showed No Interest in This

111. Respondent does not contest in its Observations that Claimant's expert Mr. Almaci offered to provide the Arbitral Tribunal with his calculations of depreciation, but that the Arbitral Tribunal did not follow-up on this, and it again merely tries to confuse the Arbitral Tribunal and appeal to its biases and baser instincts with respect to which party was making which allegations and which party had the burden of proving the facts of them.

112. In its Reply and Second Mazars Report, Claimant took the position that since İçkale would need to replace the confiscated assets, that replacement costs should be used:

> "*24. Regarding confiscated assets, in our report of June 2012 we have considered the commercial invoices provided to us by İçkale in relation to the confiscated assets. As our report of June 2012 was based on statutory*

*accounts. Furthermore **since İçkale will need to replace these assets it would be a fair statement to calculate replacement cost**."*[81]

and

"*112. In our report of June 2012 we have considered the commercial invoices provided to us by İçkale in relation to the confiscated assets. As our report of June 2012 was based on statutory accounts. Furthermore since İçkale will need to replace these assets it would be a fair statement to calculate **replacement cost**.*

Our response to PwC report
113. PwC report152 states that our June 2012 report "[...] assumes the value of the assets to İçkale was equal to their historical acquisition costs". As stated previously the cost method used was the value of the assets as stated in its invoice at the time of export to Turkmenistan.
*114. **In order to calculate the replacement value of these assets original supplier invoices and their relevant cost in US$k have been reconciled**."*

and

"*123. The calculation is based on **replacement cost**. As a result, we have summed up the amounts as presented in paragraph 119 and the ones as presented in paragraph 121. Thus, the amount of confiscated machinery and equipment per constructions sites is as follows:*"[82]

Amount of confiscated machinery & equipment per construction sites		
US$ in '000	Mazars response	
	Amount (VAT excl.)	Amount (VAT incl.)
Asghabat	1.946	2.094
Avaza Canal	11.091	11.491
Avaza Hotel	953	967
Total amount of expropriated machinery	**13.990**	**14.552**

[81] Second Mazars Report, ¶ 24.

[82] Second Mazars Report, ¶ 123.

134. As a result, the amount related to confiscated assets as replacement costs shall be[174]:

Amount of confiscated machinery & equipment per construction sites with compound interest		
US$ in '000	Mazars response	
	Amount (VAT excl.)	Amount (VAT incl.)
Total amount of expropriated machinery	13.990	14.552
Interest at the rate of the 6-month average LIBOR + 2% per year, compounded yearly as of 01.12.2009 until 28.03.2013 on confiscated assets	15.282	15.896
Interest value on confiscated assets	**1.292**	**1.344**

[174] We would like to highlight that as it is out of our scope, we did not make any research as for market value at the time of confiscation. We have rely on amounts present on invoices sent from suppliers to İçkale in order to provide a fair assessment of replacement cost.

Amount of confiscated machinery & equipment per construction sites					
	Mazars June 2012	Mazars response			
US$ in '000	Amount	Amount (VAT excl.)	Δ	Amount (VAT incl.)	Δ
Total amount of expropriated machinery	**12.263** [175]	**13.990**	**(1.728)** [176]	**14.552**	**(2.290)** [177]
Interest value of confiscated assets at the rate of the 6-month average LIBOR + 2% compounded yearly as of 01.12.2009 until 28.03.2013	**n.a**	**1.292**	**n.a**	**1.344**	**n.a**

113. In its final written memorial, to which Claimant had no opportunity to respond in writing, Respondent again took the position that depreciation should be used, rather than calculating the value of machinery on the basis of its replacement costs,[83] and claimed that Claimant's claim was in fact based on historical costs, rather than replacement costs, because it relied on supplier invoices.

114. During Day 10 of the final hearing, Claimant's expert Mr. Almaci was questioned about the depreciation value of the equipment and the machinery, and how this was taken into account by Claimant in its claim for replacement value.[84]

115. Since the replacement cost is the cost of purchasing similar equipment and materials at the

[83] Respondent's Rejoinder on the Merits, ¶¶ 369-370.

[84] Hearing Transcript, Day 10, pp. 85-93.

date of expropriation, depreciation is irrelevant to the issue of replacement costs. Claimant's expert Mr. Almaci nevertheless calculated the depreciated value of the machinery at the time of confiscation[85] and offered to provide the calculation to the Arbitral Tribunal at the hearing, which Respondent does not contest.

116. The Hearing was the first opportunity to respond to Respondent's comments that the replacement costs method used by Claimant seemed more similar to a historical value approach since it was based on supplier invoices. When Mr. Almaci provided the figure of USD 10 million for depreciated material and equipment at the hearing, he specifically offered to provide the Arbitral Tribunal with the calculations of this depreciated amount, stating "*I can provide you the calculation later on, of course,*"[86] although the Tribunal asked no further questions about this issue and did not include depreciation as an issue on its list of outstanding questions for the Parties' post-hearing memorials or at any other time.

117. Despite the calculation provided by Claimant and the questions asked by the Tribunal and Respondent during the Hearing, the Tribunal wrongly considered that this evidence was not supported by any calculations that could be commented upon by the Respondent or reviewed by the Tribunal:

> "*However, this is not the end of the matter since, as noted above, the Claimant's quantification of the depreciated value of the assets (approximately USD 10 million, as opposed to the acquisition value of USD 13.990 million) is based merely on the oral evidence of the Claimant's expert given at the Hearing and not supported by any*

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[85] Hearing Transcript, Day 10, p. 86, ¶¶ 3-7: "*I can provide you the calculation later on, of course -- it was around* ***$10 million*** […] *If you're interested to know about their* ***depreciated values***"; p. 88, ¶¶ 6-8: "***these machineries are used, at an average, 20 years, for example, and on that basis we have made a calculation****. That was the* ***$10 million, the result of our calculation***"; p. 92, ¶¶ 1-6: "*So we have made a calculation, on the basis of the information provided by the technical expert, about the economic useful lives of the machineries. So on that basis -- but ignoring again, I would like to repeat, the costs that should be added up to this value for transporting or having this machinery at the exact place; there will be additional cost, of course -- so without that cost,* ***just the depreciated value is calculated around****, if I'm not wrong,* ***$10 million***."

[86] Hearing Transcript, Day 10, page 86, ¶¶ 3-7: "*I can provide you the calculation later on, of course -- it was around $10 million* […] *If you're interested to know about their depreciated values*." The Arbitral Tribunal was not interested in the written calculation, however, and while further comments on other points were solicited, this was not included on the list of outstanding points circulated by the Arbitral Tribunal.

> *calculations that could be commented upon by the Respondent or reviewed by the Tribunal. Indeed, the evidence before the Tribunal suggests that the depreciated value of the assets was substantially less than USD 10 million, the amount mentioned by Mr Almaci.*[87] *The Tribunal therefore cannot accept that this amount represents the real value of the Claimant's machinery and equipment at the time of their alleged confiscation. Consequently, the Tribunal finds that that the Claimant has failed to prove that the Supreme Court's directive was excessive and as such expropriatory.*"[88]

118. To be clear, it was *Respondent's allegation* that rather than using replacement costs the machinery should be valued at historical costs from which depreciation should be subtracted. *Respondent* had the burden of proving an amount that should have been subtracted for depreciation, although it did not even attempt to do so. In addition, Claimant made it clear that Respondent was in possession of the confiscated machinery and was therefore well-placed to suggest a value of the machinery on the day of the expropriation, including its depreciation, although it did not do so.[89]

119. Is it a logically true statement that in order to calculate the "*real value*" of assets as provided for in the Turkey-Turkmenistan bilateral investment treaty, the "*depreciated value*" of assets must be proven beyond any reasonable doubt by a Claimant? Of course not, since there are many ways to calculate the "*real value*" of the expropriated assets, which has no defined meaning, including fair market value, replacement value, liquidation value, book value, net book value, actual investment, comparable value, option value, and more, many of which do not depend on a calculation of depreciation.

120. What the Tribunal did was to erroneously assume that Respondent's suggested manner of calculating the machinery and equipment's value at the date of expropriation was the only

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87 Award, footnote 226: "*The evidence suggests that some of the assets had been purchased already in 2000, and that the portion of the assets that were more than four years old at the time of the alleged confiscation amounted to approximately USD 6.3 million. See Second Expert Report of Abdul Sirshar Qureshi, p. 40.*"

88 Award, ¶ 375.

89 Hearing Transcript, Day 1, page 235, ¶¶ 12-17: "***I have not seen from the Respondent any valuation of that machinery at all****. So they just object and say, "The valuation of the Claimant is not reasonable". **I would have expected at least to have a reasonable calculation presented then by the Respondent.***" [emphases added]

manner in which to value expropriated machinery and equipment and then, instead of drawing appropriate inferences on the basis that Respondent provided no evidence of the amount of depreciation to apply, ignored the amount of depreciation that had been calculated and offered by Claimant at the hearings while refusing to rule on this issue itself.

121. This is logically unsound, representing a reversal of the burden of proof and a dereliction of the Tribunal's duty to rule fairly on a dispute. In any event, as already explained, the mathematical use of depreciation is incorrect.

4. If the Majority Does Not Agree With the Replacement Costs, Or the Depreciation, Proposed by Claimant, It Must Calculate It and Not Just Avoid Its Duty

122. It is trite law that each Party has the burden of proving its allegations, in both domestic law and under international law. It was Respondent's allegation, not Claimant's, that the value of Claimant's machinery and equipment should be subject to depreciation, although Respondent utterly failed to prove any amount of depreciation to apply and then blamed Claimant for this. By contrast, Claimant did calculate the reduction to the amount if it were impacted by depreciation, and its expert offered to provide written evidence on this issue to the Arbitral Tribunal at the hearing, which the Tribunal did not take up or mention later.

123. In the Award, the Tribunal does not even mention replacement costs, suggesting that it was confused as to whether Claimant's claim was for replacement costs or for invoice value minus depreciation.

124. Regardless, even if one considers merely the shifting of the burden of proof and forgets about which Party has the burden of proving its allegations or which Party even made what allegations, it is perfectly clear that Mr. Almaci's USD 10 million figure provided at the hearing trumps Respondent's total failure to provide any estimate at all (other than the value of equipment that was over 4 years old, which is not depreciation) to support its allegations, shifting the burden of proof back to Respondent on this issue, if the burden of proof had indeed ever shifted to Claimant.

125. Interestingly, when previous Arbitral Tribunals have confronted almost identical fact patterns concerning depreciation, they have come up with precisely the opposite result of the Majority's finding. In *Petrolane, Inc., Eastman Whipstock Manufacturing, Inc. and others v. The Government of the Islamic Republic of Iran*, for instance, the Majority had doubts on the Claimant's proposition that used drilling equipment would have the same value as new drilling equipment, but declined to include depreciation as an element of valuation, justifying its decision by invoking the lack of evidence on the Respondent's side:

> "*While the Tribunal has some doubts that used directional drilling equipment, even when maintained as good as new, would normally have the same fair market value as new directional drilling equipment, the only evidence in the Case, as noted supra, para. 106, indicates that the Claimant's used equipment did have such a value as a result of the unusual circumstances at that time.* ***The Respondents have introduced no evidence to the contrary.*** **[…]** ***The Tribunal, having no evidentiary basis for a different conclusion, finds that an appropriate measure of the fair market value of the equipment is its replacement value*** *as reflected in Eastman's 1979 Export Price List.*"[90]

126. To be fair, in this Iran-Claims Tribunal decision, the Dissenting Arbitrator criticized the approach of the majority, but not because it disagreed that the Respondent had provided no evidence of the amount of depreciation, as was also true in the instant case, but because the Majority should have attempted to calculate depreciation itself, and its failure to do so represented a "*miscarriage of justice*":

> "*16. Failure to reflect Depreciation in calculating the Replacement Value: … Yet, in the present Case, while the majority cast doubt on the Claimant's proposition that used drilling equipment, even when maintained as good as new, would normally have the same fair market value as new drilling equipment, it finally declined to include depreciation as an element of valuation, justifying its decision merely by invoking the lack of evidence on the Respondents' side. See the Award, para. 108. I too agree that the defense was woefully lacking in evidence on the matter of valuation, (19) but the majority's view as reflected in the Award is equally wanting in*

[90] **Exhibit CA-2**, *Petrolane, Inc., Eastman Whipstock Manufacturing, Inc. and others v. The Government of the Islamic Republic of Iran, Iranian Pan American Oil Company and others*, Award, IUSCT Case No. 131 (518-131-2), 14 August 1991, ¶ 100-101.

> *adequate legal argumentation. Its approach is not logical, for the following reasons.*
> […]
> *In view of the notion of "equitable discretion" endorsed by the Tribunal itself, the majority cannot be relieved of its responsibility in the instant Case by saying, essentially, that in view of the total absence of any rebuttal evidence regarding the valuation issue, it finds it difficult to choose arbitrarily a depreciation factor to be applied to the value of the assets taken.* ***This approach by the majority leads, of course, to a miscarriage of justice and a negation of accepted concepts such as equitable discretion, equitable adjustment, and reasonable approximation****, which were hitherto developed in the course of the Tribunal's history and have helped it to adjudicate valuation issues on various occasions even where the evidence was lacking or insufficient.*" [emphasis added][91]

127. The real question is: why, if the Majority felt that it should have had additional evidence on the amount of depreciation, did it not take up Mr. Almaci's offer to provide such information at the hearing, ask for such information in the issues for the post-hearing memorial, or simply attempt to determine this amount itself, which is not particularly difficult to do, and why did it did fail to mention replacement value at all in the Award? And why did it not provide a reasonable approximation of the real value of the equipment, based on the information that was in the Tribunal's possession, which was more than sufficient and showed an obvious difference in value between roughly USD 14 million in machinery and equipment and roughly USD 3 million in delay penalties?

128. Despite Respondent's attempts to suggest that it is unheard of,[92] it is in fact quite common for a tribunal to retain an independent expert in ICSID proceedings, if the Tribunal feels that it lacks the ability to calculate damages or needs further assistance with math.[93] Why, if the Majority was lost and could not provide a reasonable approximation, did it not simply do

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[91] **Exhibit CA-3**, *Petrolane, Inc., Eastman Whipstock Manufacturing, Inc. and others v The Government of the Islamic Republic of Iran, Iranian Pan American Oil Company and others*, Dissenting and Concurring Opinion of Seyed Khalil Khalilian, IUSCT Case No. 131 (518-131-2), 18 March 1992, ¶¶ 16 and 22.

[92] Respondent's Observations, ¶ 79.

[93] See, e.g., *CMS Gas Transmission Co. v. Argentine Rep.*, Award, ICSID Case No. ARB/01/8, 12 May 2005, 44 ILM 1205 (2005).

this?

129. The Tribunal can also make its own calculations in order to obtain the linear depreciated value for the machinery assuming a useful lifetime of 15 or 20 years. The chart below, based on figures that were in the Tribunal's possession, shows the initial purchase value of the equipment – the majority of which was almost brand new – and its value on 1 December 2009 assuming a useful lifetime of 15 or 20 years:

Linear Depreciation of the Machinery and Equipment, Calculated per 1 December 2009 (based on data from Second Mazars Report, Appendix D)				
Period	Purchase value (USD)	Depreciated value: 20 years of use	Depreciated value: 15 years of use	Share of total value
Less than 1 year	896 000	873 600	866 133	6,40%
Between 1 and 2 years	6 613 000	6 117 025	5 951 700	47,27%
Between 2 and 3 years	215 000	188 125	179 167	1,54%
Between 3 and 4 years	14 000	11 550	10 733	0,10%
Between 4 and 5 years	1 547 000	1 198 925	1 082 900	11,06%
Between 8 and 9 years	2 859 000	1 643 925	1 238 900	20,44%
Between 9 and 10 years	1 846 000	969 150	676 867	13,20%
Total (USD):	**13 990 000**	**11 002 300**	**10 006 400**	100,00%

130. These basic calculations, prepared by a law firm intern, show that the depreciated value of the machinery and equipment on 1 December 2009 was approximately USD 11,002,300 if they are supposed to be in use for 20 years and USD 10,006,400 if their useful lifetime is only 15 years.

131. Furthermore, the breakdown of the machinery by years of use allows the Tribunal to easily see that more than half of the machinery and equipment was less than two years old, so subject to very little depreciation.

132. The following simple example helps to explain why the Tribunal cannot just refuse to determine the depreciated value of the machinery and equipment if it does not agree with

the Parties' position and calculations. If A owes 100 Euros to B, but B owes A a smaller amount (say 10-20 Euros), but there is no precise evidence of the amount that B owes A, it would be totally unfair and illogical not to reimburse B at all with the excuse that he also owes a smaller amount to A but it is not possible to determine with certainty how much. Incertitude regarding the amounts owed is what justice is all about and the very mission of arbitrators and judges is precisely to determine a value which cannot be agreed between the parties, even with a margin of error. To deny any recovery for B, although A clearly owes B a larger amount than B owes A, would plainly amount to a denial of justice and the unjust enrichment of A.

133. If for any reason Tribunal does not rectify, as it obliged, the errors related to the depreciation although it has the elements to do so in its possession, and it does not modify its conclusion by accepting the depreciation provided by Claimant at the hearing or by performing its own basic calculations, Claimant respectfully requests the Tribunal, **alternatively**, to make a supplementary decision and to apply the depreciation rate it considers reasonable with the help of an expert.

D. The Deduction of USD 1.2 Million Is Another Basic Math Error by the Tribunal, Since It Again Deducts Over 100% of the Machinery's Depreciated Value

134. While the Tribunal is not expected to be math experts, but legal experts, this is another very basic error of math concerning USD 1.2 million of confiscated assets that Respondent alleged were transferred within Turkmenistan after their confiscation. As previously noted, the Arbitral Tribunal deducts the undepreciated amount of USD 1.2 million in confiscated assets from a depreciated amount, mixing apples and oranges.

135. Respondent agrees with Claimant that it makes no sense to deduct from a depreciated value the invoice value of the equipment, as it must since there is only one mathematically-correct answer:

> "*it might have been appropriate to deduct from that amount* [original purchase value] *the value of any assets used by Claimant after the alleged confiscation, and then to depreciate the value of the remaining equipment and machinery at an appropriate rate.*"[94]

136. There are two ways in which Tribunal can deal with this error. For the first possibility, the Tribunal can deduct from the total invoice amount USD 13,990,000 the invoice value of the alleged transferred assets USD 1,200,000. Once all the deductions are made, it can then proceed to the calculation of the depreciation, which according to Claimant's calculation and the best evidence available was of 28,52%[95].

137. For the second possibility, the Tribunal can make the deduction directly from the already depreciated amount, as it did already in the Award, but then only the *depreciated value of the equipment* would be deducted. The depreciated value in this case would be USD 857,756[96]. So, the tribunal might have deducted from USD 10,000,000 the depreciated value of allegedly transferred assets, i.e. USD 857,756, instead of the invoice value of USD 1,200,000.

138. Respondent's attempt to justify this basic math error is touching as it attempts to remove any responsibility from the Tribunal for this error, knowing full well that the Tribunal's finding is erroneous. Respondent blames the Claimant for the error made by the Tribunal by stating that the error has been made because the Tribunal "*has not been provided with sufficient and reliable evidence to arrive at its own valuation of the original purchase value of Claimant's equipment and machinery*" and that "*there was no reliable evidence as to the original purchase value of Claimant's equipment and machinery allegedly confiscated, and no evidence at all as to the appropriate rate of depreciation.*"[97]

139. Respondent's comments are totally false and another blatant example of how Respondent

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94 Respondent's Observations on Claimant's Request, ¶ 89.

95 28,52% = 3,990,000 * 100% / 13,990,000 = (13,990,000 – 10,000,000) * 100% / 13,990,000.

96 USD 857,756 = 1,200,000 * 10,000,000 / 13,990,000.

97 Respondent's Observations on Claimant's Request, ¶ 89.

simply lies and aims to confuse the Tribunal while appealing to the Tribunal's baser instincts rather than logic.

140. First, as stated above and as the Tribunal must realize after many years of arbitration proceedings concerning this case, the Tribunal has been provided with all the evidence with regards to the "*original purchase value*" and the Tribunal has accepted that there was sufficient evidence and that the value of the equipment as claimed by the Claimant was of USD 13,99 million. The Tribunal had this number and it is obviously false that there was no "*reliable evidence as to the original purchase value of Claimant's equipment and machinery*" as Respondent now states.

141. Second, the Tribunal cannot do otherwise than to deduct comparable values. If Tribunal applies the depreciation rate of 28,52% to the total amount from which it is making the deductions, i.e. 10 million, then the Tribunal has also to apply the same depreciation value to other invoice values or it is making a basic error of math.

E. The Deduction of USD 23,000 Is Another Basic Math Error by the Tribunal, Since It Again Deducts Over 100% of the Machinery's Depreciated Value

142. Here again, as stated in the previous sections, while the Tribunal is not expected to be math experts, but legal experts, this is a basic error of math that must be corrected.

143. Respondent again tries to justify the deduction of over 100% by appealing to the prejudice of the Tribunal and the alleged lack of evidence as to the original purchase value and the appropriate rate of depreciation:

> "*the Tribunal could not have done its illustrative calculation in the manner proposed by Claimant precisely because Claimant did not provide sufficient information or evidence to support any finding either as to the original purchase value of Claimant's equipment and machinery, or as to*

the appropriate rate of depreciation to be applied after the accepted deductions had been applied"[98]

144. These allegations are false and beside the point. As stated above, the Tribunal had all the necessary evidence to decide the case. The Tribunal admitted that the original purchase value was of USD 13,99 million and has used the depreciated value of USD 10 million in its calculation. The Tribunal should have deducted the USD 23,000 from the original purchase value, or depreciated this amount and deducted it from the depreciated value of USD 10 million using the depreciation rate of approximately 28,52%[99] of which the Tribunal was in possession. In this case the Tribunal would subtract only USD 16,440[100] from the total depreciated amount of USD 10 million in order to have a mathematically-correct calculation.

F. Respondent Does Not Contest That USD 3,096,974 Is the Correct Amount of Delay Penalties

145. Respondent does not contradict Claimant's claim that the correct amount of delay penalties is USD 3,096,074.[101] However, Respondent seems to disagree with the fact that the error needs to be corrected and that the corrected amount should be used in the Tribunal's calculations as Requested by Claimant.[102] It states that "*the relatively de minimus amount identified by Claimant would not have changed the Tribunal's determination as to the "excessive" nature of the Directive in comparison to the delay penalties*" and as this amounts lies within the ranges retained by the Tribunal, this error does not require correction.[103]

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98 Respondent's Observations on Claimant's Request, ¶ 91.

99 28,52% = 3,990,000 * 100% / 13,990,000 = (13,990,000 – 10,000,000) * 100% / 13,990,000.

100 USD 16,440 = 23,000 * 10,000,000 / 13,990,000.

101 Respondent's Observations on Claimant's Request, ¶ 50.

102 Claimant's Request for Supplementary Decision and Rectification of the Award, ¶ 28.

103 Respondent's Observations on Claimant's Request, ¶ 50.

146. It is remarkable how quickly Respondent can change its mind, and blow hot and cold, when it comes to the rectification of errors. At its convenience, Respondent shifts from one extreme to another, by alleging that if an error is substantial it would anyway not justify "*to re-open issues already decided*."[104] At the other extreme, if the error concerns a "*de minimus amount*" and "*would not have changed*" the Tribunal's final decision then the error "*does not require correction.*"[105] Respondent's understanding of Article 49(2) is *à la carte*, either the consequences that the error would have on the decision are too low or nil and the error does not require correction, or the error is overly significant and no rectification is possible.

147. As demonstrated below, this is not what Article 49(2) provides for and all inadvertent arithmetical and clerical errors need to be rectified by the Tribunal.

148. Having discussed the errors that must be corrected, which do not concern substantive legal issues as Respondent alleges but merely the correction of basic arithmetic, clerical and similar errors that could only be unintentional unless the Majority had no intention of even giving the pretence of ruling fairly, Claimant finally turns to its separate request for supplementation.

IV. SEPARATE REQUEST FOR SUPPLEMENTATION

149. Contrary to Respondent's suggestions in its Observations, the issues that are subject to the request for supplementation are the amount of the cement and the water pumps.

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[104] Respondent's Observations on Claimant's Request, ¶ 91, "*even if the Tribunal was to determine that a correction along these lines should and can be made, it would not justify the relief that Claimant seeks in the Request, to re-open issues already decided and reverse its decision rejecting the expropriation claim.*"

[105] Respondent's Observations on Claimant's Request, ¶ 50, "*First, the relatively de minimus amount identified by Claimant would not have changed the Tribunal's determination as to the "excessive" nature of the Directive in comparison to the delay penalties.* […] *This supposed "error" does not require correction.*"

150. As stated in the Request, the Tribunal did not take into account the five sea water pumps[106] confiscated by the Customs Authority pursuant to the Supreme Court's directive.[107] It also did not take into account the significant amount of cement confiscated at the sea port of Turkmenistan pursuant to the Supreme Court's Directive.[108] The invoices concerning these materials were produced in the Second Report of Hill International,[109] and the value of this confiscated material, which was never recovered, was over 3 million Euros:

Material	Value
Five Sea Water Pumps left at the Customs Authority of Turkmenistan	EUR 3,148,200 / USD 3,760,524[110]
Cement left at the Maritime Authority of Turkmenistan	EUR 132,499 / USD 158,270[111]
Total	EUR 3,280,699 / USD 3,918,794

151. For the absence of any doubt, and as indicated in Claimant's Request, depreciation should not be calculated on cement and pumps since depreciation is only applicable for fixed assets (i.e. buildings, machinery, vehicles, etc.) which have economic useful lives of more than a year. Cement and pumps are subject to consumption in terms of inventories, where their cost is included in the cost of sales as soon as they are used.

152. Respondent's claim that this is an entirely new claim is untrue. The pumps were cited in

[106] These sea water pumps were brought to Turkmenistan by Claimant in order to fill the Avaza Canal with the sea water. See Exhibit R-441, Avaza Canal Contract, Bill of Quantities, p. 69. Please also note that although the Contracting Authority Refinery acknowledged that the pumps were at the Turkmenistan Customs Authority and that it would take into account these pumps within the certificate of work performance, this never occurred and the pumps remained with the Customs Authority. See Exhibit C-36 of Claimant's Memorial on the Merits and see also Exhibit H-111, Second Report of Expert Hill International, Letter No.05/9373 from General Manager of the Contracting Authority I.Hoşanov to İçkale, dated 15 October 2009.

[107] Exhibit H-116, Second Report Hill International: Invoice and TIR carnet of the five pumps (for Avaza Canal Project); Exhibit H-117, Second Report of Expert Hill International: Customs declaration of the pumps (for Avaza Canal Project); Exhibit H-118, Second Report of Expert Hill International: International consignment note (CMR) of the pumps.

[108] Exhibit H-119, Second Report of Hill International, Letter No. 05/7663 from General Manager of the Contracting Authority I. Hoşanov to Turkenistan Maritime Authority.

[109] Exhibit H-120, Second Report of Hill International: Invoices relative to cement brought up to Turkmenistan International Seaport (for Avaza Canal Project).

[110] EUR 1 = USD 1.19, as of 9 June 2010, source: oanda website.

[111] EUR 1 = USD 1.19, as of 9 June 2010, source: oanda website.

Claimant's Memorial on the Merits, which notes that the pumps were never paid for and were held at the customs authority:

> "*141. More specifically, the payments which were approved after November 2008 were not paid in a timely fashion, whilst progress payments in respect of the works which were completed in the period March, 2008 through August, 2008 were disapproved and not made without any valid ground. It had been verbally expressed by Turkmen regulatory authorities that they would not make any progress payments and that Claimant must use the advance payments, instead*[84]*. Besides, although it was clearly acknowledged by the Contracting Authority, in its letter dated 15 October 2009, that five (5) pumps and some tons of granite kept at the customs would be reflected to progress payments after completion of customs formalities, the Contracting Authority failed to reflect these to the calculation of the progress payments*[85]*. It was understood from the customs declaration indicating the importation of five (5) pumps and some tons of granite that such equipment was duly imported to Turkmenistan.*[86] *However, Contracting Authority did not reflect the amounts of these equipment to the progress payments*."[112]

153. The pumps that were held at customs and never paid for were also cited in Claimant's Reply:

> *"432. On the other hand, when the relevant provisions of Annex B/2 of Polimeks' Avaza Canal Contract are analyzed, it becomes clear that Polimeks gained a major and unfair advantage in terms of financing of equipment and materials to be imported. Pursuant to Article 2.2.3 of Annex B/2 :*
>
> > *[T]he Amount of 9,633,000.00 (nine million six hundred thirty three thousand) Euros for the value of equipment and materials, products, pumps and spare parts, (hereafter "Equipment and Materials") imported into Turkmenistan shall be paid by the Client through the opening in favor of the Contractor of a documentary, irrevocable, divisible, transferable letter of credit*
> > *-Validity term of the letter of credit calendar days*"[113]
>
> *"485. In fact, the Certificate was sent, and all the line items completed and paid for by Claimant. Moreover, by its letter dated October 15, 2009, Contracting Authority, Turkmenbashi Oil Processing Complex, in response to Claimant's October 7, 2009 letter recognized that* ***5 pumps*** *and a fair amount of granite (all included in Progress Report No. 14) had*

[112] ¶ 141.

[113] Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, ¶ 432.

been purchased and imported. Furthermore, as stated in Claimant's Memorial, it was understood from the customs declaration indicating the importation of five (5) pumps and some tons of granite that such was duly."[114]

154. The value of the confiscated pumps were also cited in Mazars' Second Report:

"*57. Furthermore, based on the Hill report[51] we were informed that the progress report No. 14[52] related to the delivery of materials (granite and pumps) has been submitted. Besides, we were provided with the list of materials delivered for the work to be performed, the invoices of the materials delivered and the customs clearance documents[53].*

[51] Hill Report paragraphs 36, 37, 38

[52] Exhibit R-478; pumps and granites account for 80% of the Progress Report amount. Based on M- 074 and M-071 Pumps + Granites amounts = 4.851.800 + 413.297,41 = ¤ 5.265.097,41. Progress Report No. 14 = ¤ 6.553.038,62.

[53] Exhibit M-076. Exhibits related to granite purchased and delivered for the contract TNGIZ – 13 (Avaza Canal): M-068; M-069; M-070; M-071; Exhibits related to pumps purchased and delivered for the contract TNGIZ – 13 (Avaza Canal): M-072; M-073; M-074; M-075."[115]

155. The value of the pumps was also cited the Expert Report of Hill of 2 April 2013, Appendix M:

"*PUMPS AND GRANITE*

36. Prior to termination of the Contract, Içkale purchased and shipped pumps and granite. On 15 October 2009, after termination of the Contract on 27 August 2009, General Director I.Hoshanov of Turkmenbashy Oil Processing Complex wrote[212] :" ... 5 pumps and a far amount of granite shall be taken into account for calculations pursuant to customs procedures."

37. I was provided with the invoices[213], international carriage of goods by road (CMR)[214] documents and customs clearance documents[215] of the granites.

[114] Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, ¶ 485.

[115] Second Mazars Report, ¶ 57.

38. I was provided with the invoice, TIR carnet[216], customs declaration[217] and International Consignment Note[218] of the pumps referred in above paragraph 36."[116]

156. The value of the cement was also cited the Expert Report of Hill of 2 April 2013, Appendix M:

> "*CEMENT AND CEMENT ADDITIVE*
> *39. I was provided with a letter[219] of General Director I.Hoshanov of Turkmenbashy Oil Processing Complex dated 18 August 2009, recording that 2861.4 cubic meters of cement was brought up to Turkmenbashi International Seaport. The costs incurred by Içkale for transportation is USD 132,882.50 (or ¤95,598.49) and for the material itself is USD 185,392.88 (or ¤132,499.20), converted to euros from the currency exchange rate at the date of the invoices, in the total amount of ¤227,097.69[220]. Adding up 6% profit which the Contract contains through Bill of Quantities, the total amount is ¤240,723.55*
> *40. I was provided with the invoices[221] of a concrete additive which was also left on the site and cannot be used in the construction works hence not certified in the progress payments. The cost of the concrete additives is USD 517,920.00 or ¤351,632.83 converted from USD to ¤ from the currency exchange rate at the date of the invoice. Adding up 6% profit which the Contract contains through Bill of Quantities, the total amount is ¤372,730.80.*"

157. Claimant also indicated at the hearing that the amounts quantified by Hill and Mazars could be used to determine the amounts that were expropriated,[117] although this was done in a broad manner and more particularity would obviously have been of use to the Tribunal:

> "[T]*he Arbitral Tribunal can equally use the amounts quantified by Hill and Mazars to determine the real value of Claimant's investments prior to the creeping expropriation of them in their entirety by Respondent until nothing was left of value in Turkmenistan.*"[118]

158. Respondent in its memorials and Respondent's Experts in their expert reports (PwC and

[116] Expert Report of Hill of 2 April 2013, Appendix M, ¶¶ 36-38.

[117] Expert Report of Hill of 2 April 2013, Appendix M, ¶¶ 39-40.

[118] Hearing Transcript, Day 1, p. 204, ¶¶ 6-12.

Marsh Consulting) did not comment on these 5 pumps left at the Customs Authority or the Cement left at the Maritime Authority of Turkmenistan, although they had the opportunity to do so.Claimant's expert explained the rationale for not including what were confiscated materials with the machinery and equipment claim, which was to avoid the appearance of double-counting, as indicated at the final hearing:

> "*A. What do you mean by -- which kind of expense? You mean related all expenses?*
> *Q. Içkale, let's say, buys a piece of equipment for this project, $1 million, and pays for it.*
> *A. No, it's not here, because machinery and equipment are defined under the caption "confiscated assets", if you are meaning to refer there.*
> *Q. No, this has nothing to do with confiscation.*
> *A. No, I mean the set of machineries are a different set of accounts, okay, which is not in the total cost assumption or methodology. It is handled as a separate, let's say, claim item. That's why you don't see them here.*
> *Q. So this graph does not show all project expenses, project-related expenses?*
> *A. Machinery and equipment, no; or depreciation and amortisation, no.*
> *Q. Why would you not include machinery and equipment here?*
> *A. They are fixed assets.*
> *Q. But I'm referring to specific specialised machinery and equipment for that particular project: say pumps, water pumps.*
> *A. Fixed-asset accounts are excluded, since they are handled as a separate claim. It will be duplicated if you put it here.*
> *Q. If you order a pump to be installed in the canal and left there, and paid for it, and then claim it on a progress certificate, right, would it show in this chart or not?*
> *A. You mean a pump?*
> *Q. Yes.*
> *A. Well, it depends on how you treat it. Accounting-wise, you can register it as a fixed asset if you are using it more than one year; and you can also consider it as an inventory if you are, let's say, consuming less than one year. So it depends on the accounting treatment.*
> *Q. Whose fixed asset would that be, the pump, if you consider it as a fixed asset? Whose fixed asset would that be? You mean Içkale's?*
> *A. Even if it is inventory, even if it is Içkale's, if it is consumed -- let me put it this way: everything is owned by Içkale at the very end, because they are making the purchase; and when they are consuming, it becomes a cost of the project. So if it's consumed and dedicated for a project, then it is a cost of the project.*

Q. If it's reflected in a progress certificate and conveyed to the client, would that not imply to you that it's not a fixed asset of Içkale anymore?
A. It should be a part of the contract or, let's say, the project.
Q. And wouldn't that be reflected in this chart then?
A. Since we handled the fixed assets separately, logically it will not make sense, because it depends on how you present the outputs. It's again cost; all of them are costs. But the way you present it, if you differentiate it as a separate claim, which is instructed, we didn't put it here as well: it will be duplicated, because you are asking for a compensation on one side for
Q. So all machinery that Içkale would have purchased in connection with the canal project would be reflected either under the confiscated machinery and equipment claim or in this chart; would that be correct? Is there a third place?
A. What do you mean by "third place"?
Q. I mean the first one is the confiscated machinery and equipment claim; the second one is what's chargeable to the project, the second claim. Is there a third accounting basket where you would say –
A. Of course there can be.
Q. Such as?
A. Such as you can keep it as your own fixed asset, if physically you own it, if it is under your possession and it is something that you can use also later on.
Q. How can that form the basis of a claim against Turkmenistan, if it's in your possession and you continue using it?
A. That's why you don't put it as a claim.
Q. But what I was referring to is: for something to be a claim, if it's claimed in this arbitration ...
A. Then it's subject to -- it should be the cost of the project.
Q. Okay."[119]

159. The cement was also cited in Claimant's post-hearing memorial:

"*432. Claimant further claims that regarding the Avaza Canal Project it had to leave cement (EUR 240,723.55)*[316] *and cement additive (EUR 372,730.80)*[317] *on the site, which is not included in any Work Performance Certificate. Eventually, Claimant had performed works for Polimeks, while Respondent was the actual ultimate beneficiary. Claimant therefore claims a compensation for the unpaid amount of EUR 119,660.29.*[318] *The total amount of this claim item is EUR 733,114.64 (EUR 240,723.55+ EUR 372,730.80+ EUR 119,660.29).*"[120]

[119] Hearing Transcript, Day 10, p. 64-67.

[120] Claimant's Post-Hearing Memorial, ¶ 432.

> "[316] *Appendix M of the Expert Report of Hill International dated 2 April 2013, ¶39;* [317] *Appendix M of the Expert Report of Hill International dated 2 April 2013, ¶40;* [318] *Appendix M of the Expert Report of Hill International dated 2 April 2013, ¶41*."

160. In the claim concerning the expropriation of the contracts, the Tribunal did not rule on these confiscated materials, which were nevertheless worth many millions of dollars. While the claims could clearly have been made in a more straightforward manner, they were claimed with far more particularity than Respondent's vague allegations that it "did not know" if insurance had been repaid. They also clearly show that the difference between the amounts that were confiscated by Respondent were many millions of USD greater than the machinery and equipment claim alone would suggest.

161. The Arbitral Tribunal clearly has the power to render a supplemental decision on issues that it did not rule upon, such as whether or not Claimant should be compensated for the many millions of U.S. dollars of cement and pumps that were confiscated. Claimant does not contest that this falls entirely within the discretion of the Arbitral Tribunal to admit or reject, however, as this is a request for a supplemental decision rather than for the correction of obvious mistakes.

V. THE TRIBUNAL MUST BE GIVEN A CHANCE TO CORRECT ITS OBVIOUS ERRORS

162. Respondent accepts, or at least does not deny, that the Tribunal made arithmetic errors in its Award.[121] It is hard to do otherwise since the Majority's arithmetic errors are quite obvious and simply wrong as a matter of math and common sense.

163. Respondent does not contradict, in its Observations, Claimant's request for rectification of

[121] See for example Respondent's Observations on Claimant's Request, ¶ 56: "*the original supplier invoices was a valuation which was US$1.8 million* ***higher*** *than previously asserted by Claimant*,"; ¶ 89: "*it might have been appropriate to deduct from* [the original purchase value] *the value of any assets used by Claimant after the alleged confiscation, and then to depreciate the value of the remaining equipment and machinery at an appropriate rate*."; and ¶ 91.

primary errors, e.g. to replace "*higher*" with "*lower*"[122] or to deduct invoice amounts if found necessary in a mathematically correct manner, nor could it, since these are matters that go beyond the Tribunal's discretion and do not depend on legal judgment.

164. Respondent, however, alleges that errors in the Award either cannot be modified or, if they were corrected, this could not justify changing the ultimate decision of the Tribunal:

> "*As such, it is difficult to see how this element can be "corrected" by the Tribunal. Finally, once again, even if the Tribunal was to determine that a correction along these lines should and can be made, it would not justify the relief that Claimant seeks in the Request, to re-open issues already decided and reverse its decision rejecting the expropriation claim.*"[123]

165. Respondent also alleges that Claimant's request for rectification of errors is a request on the merits:

> "*Again, this is not the kind of "clerical" or "arithmetic" error of the type envisioned by Article 49(2). As with all of Claimant's arguments, this request requires the Tribunal to reconsider the merits of issues already decided.*"[124]

166. Claimant's request is plainly not a request on the merits. Claimant's request for the rectification of errors does not require the Tribunal to exercise any legal judgment whatsoever or to change any legal reasoning, or to rule upon any matter over which the Tribunal has discretion in terms of its legal judgment or to rule directly on any substantive issue. These rectifications are entirely a matter of correcting very basic math errors and clerical errors. Rectification does not require the Tribunal to make any analyses of facts or law, nor to exercise any judgment, and its comparison of the value of the machinery and

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[122] "*Based on inter-company invoices, some of the assets were sold by the Claimant to its Turkmen branch at prices that were, in total, approximately USD 1.8 million lower* [instead of higher] *than the prices reflected on the original supplier invoices;*" (Award, ¶ 372) and "*some of the machinery and equipment, which were USD 1.8 million lower* [instead of higher] *than the prices at which they were acquired from third parties.*" (Award, ¶ 373).

[123] Respondent's Observations on Claimant's Request, ¶ 91; see also ¶¶ 6-8, 19.

[124] Respondent's Observations on Claimant's Request, ¶ 90.

equipment and the delay penalties is quite obviously mathematically incorrect on multiple levels and must be corrected.

167. Respondent's use of the expression "*minor*" errors or issues while speaking about the rectification under Article 49(2) of ICSID Convention in its Observations is also misleading.[125] Article 49(2) states that the Tribunal "*shall rectify any clerical, arithmetical or similar error in the award,*" and ICSID Tribunals are held to high standards.

168. While there could be a legitimate debate as to whether the Majority's obvious reversing of the burden of proof with respect to Respondent's unparticularised allegation of insurance is a "*similar error*" to a clerical error or merely demonstrates bias, there can be no debate that clerical, arithmetical and similar errors must be rectified under Article 49(2) of the ICSID Convention, regardless of whether they concern only USD 10,000 or whether they concern many millions of U.S. dollars, as in the present case.

169. Respondent refers in its Observations to two decisions, *Vivendi v. Argentina*[126] and *Perenco v. Ecuador,*[127] in order to suggest that the correction of errors that impact a finding on the merits can be rejected. *Perenco v. Ecuador* did not concern a Request for Rectification (or Supplementation) but a Decision on Reconsideration Motion, however, and no clerical or arithmetic errors were even identified by the requesting party,[128] and Respondent fails to explain how a comment concerning Article 49 is remotely relevant to the present case. In

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[125] Respondent's Observations on Claimant's Request, ¶ 19: "*Nor are the supposed "errors" identified by Claimant mere clerical, arithmetic or minor issues capable of being fixed by "rectification" which are separate from or "accessory" to the merits.*"; ¶ 26: "*it is clear that Claimant is not seeking a "supplementary" decision on overlooked claims or "rectification" of minor "clerical" or "arithmetic" errors in the Award within the meaning of Article 49 of the ICSID Convention.*" [emphasis added].

[126] Exhibit RA-473, *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision of the Ad Hoc Committee on the Request for Supplementation and Rectification of Its Decision Concerning Annulment of the Award, 28 May 2003.

[127] Exhibit RA-474, *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion, 10 April 2015.

[128] Exhibit RA-474, *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion, 10 April 2015, ¶ 62.

Vivendi v. Argentina, a quick review of the "*error*" identified by the parties[129] in those proceedings makes it clear that the current case does not have anything in common with the errors made by the *Ad Hoc* Committee in Vivendi.

170. While inadvertent errors of this size are uncommon in ICSID arbitrations, there are many examples of arbitral tribunals correcting their clerical, arithmetical, computational and similar errors. Moreover, those corrections have led tribunals to modify their final decision and the award when this was necessary, contrary to Respondent's false allegations.

171. In *RDC v. Guatemala*[130] the tribunal, for instance, agreed that it misapplied the discount rate. It upheld the request on this point and corrected, in good faith, the award by increasing it by USD 2 million:

> "*In the Award the Tribunal did its own assessment of the appropriate discount rate to calculate the NPV of existing leases and noted the disagreement of the parties in this respect (Award, paras. 271 and ff). The Tribunal reached the conclusion that a discount rate of 17.36% would be appropriate. It is evident that the Tribunal misapplied the discount rate. The Tribunal has recalculated the NPV of the income streams of leased real estate set forth in Expert Thompson's Rebuttal Report2 using the 17.36% discount rate. The results are identical to those in the table in paragraph 18 of the Request. Paragraphs 277 and 283(2) of the Award shall be rectified accordingly. The correct amount awarded to Claimant on account of the real estate leases is $5,591,469.30.*"[131]

172. Its decision on rectification was the following:

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[129] For e.g. these "errors" were identified by the Ad Hoc Committee in *Vivendi v. Argentina*: "*(i) The Committee erred in affirming that there was no dispute between the parties concerning CGE's control of CAA at the time the arbitration proceedings were commenced (paragraphs 48 and 49 of the Decision); (ii) The Committee erred in stating that the Respondent acknowledged that there exists no presumption either in favor of or against annulment of an arbitral award (paragraph 62 of the Decision);* […] *(vii) The Committee erred in summarizing the arguments of the Respondent in relation to the treatment by the Tribunal of the Tucumán claims (paragraph 93 of the Decision).*" (Exhibit RA-473, ¶ 8)."

[130] **Exhibit CA-4**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Claimant's Request for Supplementation and Rectification of Award, 18 January 2013.

[131] **Exhibit CA-4**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Claimant's Request for Supplementation and Rectification of Award, 18 January 2013, ¶ 43.

> "*3. To rectify the Award as follows:*
> *a) the amounts in line 7 of para. 277 shall be deleted and replaced by "$6,818,865" and "$5,591,469.30" respectively.*
> *b) The amounts in line 5 of para. 283(2) shall be deleted and replaced by "$6,818,865" and "$5,591,469.30" respectively.*"[132]

173. Moreover, one arbitrator went so far as to opine that even in a situation where the Claimant had not even mentioned a set-off amount in its pleadings at all, including apparently during the final hearing, the arbitral tribunal should correct this too, although this is distinct from the fact pattern in the current arbitration:

> "*I write separately because I would grant Claimant's Second Request for Rectification. I view the failure to discount the set-off amount for actual rents received post-Lesivo as an arithmetical error that could be addressed at this stage of the proceedings. Insofar as Claimant's expert erred in not discounting these rents, it is my view that the Tribunal shares in the error. Therefore, the Tribunal should correct it and I would do so. For that reason, I respectfully dissent from this part of the decision.*"[133]

174. There are also countless examples of other arbitral tribunals that have modified their computational errors and, consequently, their decision and the award.[134] For example in the case ICC 10609, Claimant requested that the tribunal correct the final award on the ground that it made an error in computation. The tribunal accepted that it had erroneously deducted twice the amount of the deposit. It rectified its error in good faith as well as its final decision with regard to the amount of damages:

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[132] **Exhibit CA-4**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Claimant's Request for Supplementation and Rectification of Award, 18 January 2013, ¶ 51(3).

[133] **Exhibit CA-4**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Dissent in respect of the Second Rectification Request of Arbitrator Stuart E. Eizenstat, 18 Janvier 2013.

[134] ICC Rules of Arbitration 2012, Article 35: Correction and Interpretation of the Award; Remission of Awards : "*1) On its own initiative, the arbitral tribunal may* ***correct a clerical, computational or typographical error, or any errors of similar nature contained in an award****, provided such correction is submitted for approval to the Court within 30 days of the date of such award. / 2) Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party,* […]. */ 3) A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 31, 33 and 34 shall apply mutatis mutandis.*" The same provisions were contained in the 1998 version of ICC Rules of Arbitration at Article 29.

> "*Claimant has requested that the Arbitral Tribunal correct the Final Award on the ground that it made an error in computation. The Tribunal did in fact deduct from the purchase price an amount of . . . paid by Respondent as of a pre-closing deposit of . . . and then also deducted the entire . . . deposit from the amount of damages found. The Tribunal thus deducted . . . from the purchase price twice and corrects the award by adding . . . to the amount of damages specified in the Award. The amount of damages awarded is therefore . . .*
> *Paragraph 97 of the Award shall therefore be corrected accordingly and the disposition of the Final Award of 9 May 2001 be read as follows:*
> *Disposition*
> *It is for the foregoing reasons that the Tribunal rules, directs, and orders:*
> *1. [Respondent] shall pay [Claimant] an amount of . . . with interest at 10 percent per annum from 1 August 1999 to the date of payment.*
> *2. [Respondent] shall pay all costs of this arbitration, including the administrative costs of the ICC International Court of Arbitration and the fees and expenses of the [Page88:] arbitrators as determined by the ICC Court of International Arbitration in a total amount of . . . and therefore reimburse to [Claimant] its deposit of . . .*
> *3. [Respondent] shall pay [Claimant] an amount of . . . to defray in part the cost of [Claimant]'s legal assistance.*"[135]

175. Such examples show clearly that, contrary to Respondent's false allegations if, once the error is rectified, it causes a necessary modification to the final result, then this is perfectly acceptable. The Tribunal must go step-by-step, however. First, it has to modify its inadvertent errors as it is obliged by Article 49(2) of ICSID Convention, which is the object of Claimant's request for rectification. Second, if these inadvertent errors have an impact on other parts of the award, which happens to be the case in the current arbitration, then these should also be corrected.

176. If the Tribunal did not fix other parts of the award which are predicated on the Tribunal's errors, then the logical syllogism on which its reasoning is based will of course be incoherent. Reduced to its most basic level, the Tribunal's reasoning was the following:

[135] **Exhibit CA-5**, Extracts from ICC Addenda and Decisions on the Correction and Interpretation of Arbitral Awards, ICC International Court of Arbitration Bulletin Vol. 13 No. 1, p. 88, Case No. 10609.

A – A seizure is expropriatory only if the difference between the value of Claimant's seized machinery and the amount due to Respondent is a large, positive value.
B – The difference between the value of the Claimant's seized machinery and equipment and the amount due to Respondent is a negative value.
Conclusion: Claimant's sized machinery is not expropriatory.

177. If the minor premise (B) is incorrect due to arithmetic, clerical and similar errors, as is obviously the case here, then the conclusion of the syllogism must logically be changed in order for the Tribunal's conclusion to have any meaning and not be mere gibberish:

A – A seizure is expropriatory only when the difference between the value of the Claimant's seized machinery and the amount due to Respondent is a large, positive value.
B – The difference between the value of the Claimant's seized machinery and the amount due to Respondent is a large, positive value.
Conclusion: Claimant's sized machinery is expropriatory.

178. Again, in order to arrive at this conclusion there is no need for the Tribunal to exercise any legal judgment or to change any legal reasoning that was used by the Tribunal in its award. It must merely exercise basic logic once the obvious math and clerical errors, which are the object of Claimant's request for rectification, have been corrected.

179. Of course, by not correcting the part of the award that was predicated on innocent errors, this would go against the spirit and the purpose of the Article 49(2) as intended by the drafters, which is to have correct awards that are free from obvious defects.

180. If the Tribunal's errors are not rectified, as well as the logical consequences that necessarily flow from them, then Article 49(2) would be deprived of its effectiveness and would not serve the purpose it was intended to serve by the contracting parties to ICSID Convention. This is of course contrary to the principle of effectiveness (*effet utile* in French or *ut res magis valeat quam pereat* in Latin) as codified in Vienna Convention on the Law of Treaties of 1969 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."[136] This principle, as the Tribunal knows and relied upon in its Award, prevents an interpreter from adopting a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility,[137] as Respondent tries to do in its Observations. The purpose of an Article 49(2) request is to allow the Tribunal to correct defects in an award. Correcting part of the award, but keeping conclusions based on errors that have been corrected, would undermine the basic purpose of Article 49(2), since the resulting award would remain riddled with defects.

181. In this particular case, the calculation of the expropriated value is an issue of arithmetic (which was actually discussed in the damages section of all memorials) that has implications on the merits of the case, i.e. whether there is expropriation or, to be more precise, whether the "*Supreme Court's directive was excessive and as such expropriatory.*"[138] Taking into account the accurate amount following the Tribunal's rectification of errors, which shows a difference of many millions of USD more than the Majority incorrectly calculated, it is clear that the Supreme Court's directive was excessive and by consequence expropriatory.

182. Claimant notes that the fact that there were errors on the part of the Majority is unsurprising, as the evidence shows an acquisition value of nearly USD 14 million and delay penalties of approximately USD 3 million, which basic common sense should dictate suggests a difference in value, rather than a negative value.

183. Claimant will not dwell on this fact, however, and merely respectfully requests the members of the Tribunal to correct their obvious errors in good faith, in accordance with their duties as ICSID arbitrators.

184. As a practical matter, Claimant also notes that the risk of Respondent attempting to annul the Award following the correction of the Tribunal's basic errors is nil, since almost all of the Tribunal's rulings were highly favourable, often unfairly so, to Turkmenistan. Were

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[136] **Exhibit CA-6** Vienna Convention on the Law of Treaties, 23 May 1969, Article 31(1).

[137] See for example: **Exhibit CA-7**, *United States - Standards for Reformulated and Conventional Gasoline*, WTO Case WT/DS2/AB/R, Report of the Appellate Body, p. 23, DSR 1996:I, p. 3, ¶ 21.

[138] Award, ¶ 375.

Respondent to seek annulment of the award, Claimant would gladly accept this, but Respondent is not foolish enough to do this.

VI. CONCLUSION

185. Even if the Tribunal may refuse to produce a supplemental decision with respect to the cement and tubing that were confiscated, as Claimant requests, it has no choice but to rectify its basic math errors with respect to its comparison of the price of the equipment and the delay penalties.

186. The total proved value of the equipment amounts to USD 13,990,000, prior to deductions, while the amount of the delay penalties is only of USD 3,096,974. The difference is consequent and amounts to USD 10,893,026. The Tribunal should be given the chance to spare itself from the embarrassment of such obvious errors, and indeed faith in ICSID as an institution will not be undermined if such obvious errors are corrected.

187. Subject to Claimant's request for rectification, and if the Tribunal were to grant Claimant's request for a supplemental decision, the Tribunal would find a correct difference between the amount of confiscated machinery, equipment and materials of **USD 9,947,624**[139]:

> (13,990,000 – 1,200,000 – 23,000) * 10,000,000 / 13,990,000 – 3,096,974 + 3,918,794 = USD 9,947,624
>
> or
>
> USD 13,990,000 (invoice value of the machinery and equipment) – USD 3,990,000 (depreciation value) – USD 857,756[140] (depreciated value of allegedly transferred assets) – USD 16,440[141] (depreciated value of allegedly double-counted assets) – USD 3,096,974 (actual delay penalty amounts) + USD 3,918,794 (acquisition value of 5 pumps at the

[139] This amount (USD 9,947,624) is slightly higher than in the Request (USD 9,688,820) due to the correct deduction of USD 1,200,000 (value of allegedly transferred assets) and USD 23,000 (value of allegedly double-counted assets) before the depreciation.

[140] USD 857,756 = 1,200,000 * 10,000,000 / 13,990,000.

[141] USD 16,440 = 23,000 * 10,000,000 / 13,990,000.

> Turkmenistan Customs Authority and the cement left at the Turkmenistan Maritime Authority) = USD 9,947,624 (the remaining amount after the relevant offsets).

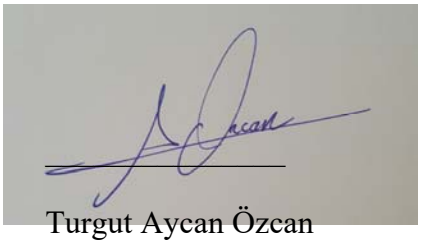
188. If Claimant's request for a supplemental decision concerning the materials were not granted, then the Tribunal would find a mathematical difference in value of: USD 6,028,830 = USD 9,947,624 (the remaining amount after the relevant offsets) - USD 3,918,794 (acquisition value of 5 pumps at the Turkmenistan Customs Authority and the cement left at the Turkmenistan Maritime Authority).

189. ICSID arbitrators are held to very high standards, for which they are well-compensated for their work. The members of the Arbitral Tribunal must show their good faith, fairness and impartiality and correct their obvious arithmetic, clerical and other errors that unfortunately found their way into the Tribunal's calculations and ultimately impact its findings on expropriation, since they are clearly wrong on a very basic level. These are matters over which the Tribunal does not have discretion, do not concern its legal judgment, and do not have multiple correct answers.

190. For the foregoing reasons, as well as those put forward in Claimant's Request which is incorporated by reference, Claimant respectfully requests the Tribunal:

(i) to supplement the Award to include the materials (5 pumps and cement), which were also expropriated by the Supreme Court's Directive;
(ii) to rectify all arithmetic, clerical and similar errors in paragraphs 371-376 of the Award;
(iii) to draw the necessary inference that the Supreme Court of Turkmenistan's Directive dated 9 June 2010 was, after rectification of the Majority's errors, plainly excessive and expropriatory;
(iv) to rule that Respondent shall pay USD 9,947,624 to Claimant as a result of the actions of Turkmenistan plus interests; and
(v) to draw the necessary inference and rule that Respondent shall pay the costs of Claimant in connection with this Arbitration.

Respectfully submitted on 31 May 2016,



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