INTERNATIONAL CENTRE FOR

SETTLEMENT OF INVESTMENT

DISPUTES ("ICSID")

İÇKALE İNŞAAT LİMİTED ŞİRKETİ

Claimant

v.

TURKMENISTAN

Respondent

ICSID Case No. ARB/10/24

CLAIMANT'S REQUEST FOR SUPPLEMENTARY DECISION AND RECTIFICATION OF THE AWARD

29 March 2016

1. In accordance with Article 49(2) of the ICSID Convention and Rule 49 of the ICSID Arbitration Rules, Claimant İçkale İnşaat Limited Şirketi respectfully submits this request for supplementary decision and rectification of the award rendered on 8 March 2016 in İçkale Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24 (the "**Award**").

2. Article 49(2) of the ICSID Convention provides that:

> "The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award."

3. The purpose of a supplementary decision under Article 49(2) is to provide a remedy for questions that were put before the Tribunal during the proceedings on the merits but not addressed or decided in the Award.[1] In order to warrant a supplemental decision, the omitted question must concern an issue that materially affects the award according to Christoph Schreuer.[2] Article 49(2) further states that the Tribunal "*shall rectify any clerical, arithmetical or similar error in the award*." The rectification of clerical, arithmetical or similar errors in the Award is obligatory.[3]

4. Claimant's Request for Supplementary Decision and Rectification is limited to the Tribunal's ruling concerning the expropriation of Claimant's assets by the Supreme Court of Turkmenistan's Directive dated 9 June 2010.

5. In particular, Claimant refers to paragraphs 371 to 376 of the majority's decision where, after finding that the Directive dated 9 June 2010 from the Supreme Court of Turkmenistan to the State Customs Service shows that machinery and equipment "*may have been taken without justification*" and "*may have been expropriatory*," the majority performs a number of adjustments pursuant to the Second Expert Report of Abdul Sirshar Qureshi in order to conclude that the difference between the real value of Claimant's machinery and equipment and the delay penalties is small and has not been shown, and therefore the Supreme Court's directive which permanently deprived Claimant of its assets

[1] *LG&E Energy Corp v. Argentine Republic, ICSID Case No. ARB/02/1*, Decision on Claimant's Request for Supplementary Decision dated 8 July 2008, ¶13.
[2] Christoph H. Schreuer, *The ICSID Convention: A Commentary* 853 ¶ 40 (2d ed. 2009)
[3] *Id.* at 853 ¶ 38

in Turkmenistan was not excessive or expropriatory.

6. The problem with the majority's finding is more than simply that the "*majority assessed the evidence without balanced consideration of both sides*" as indicated in Carolyn Lamm's Dissenting Opinion,[4] or that "*[t]o the extent the majority had any doubt at the conclusion of the Hearing as to whether Claimant's evidence was sufficient with respect to the depreciation and insurance issues, the issues could have been included among the questions put to the parties for post hearing briefing*" but did not, as she correctly indicated.[5] While this is true, the problem is also one of basic arithmetic, clerical and similar errors by the Tribunal.

7. The claim for the expropriated assets was a simple claim, supported first by inter-company transfer prices then, following criticism by Respondent's expert, Mr. Abdul Sirshar Qureshi, by supplier invoices showing the historical acquisition cost of machinery and equipment with respect to which Claimant was permanently deprived.[6]

8. The Tribunal notes in its Award that the Supreme Court's Directive of 9 June 2010 prevented Claimant from removing all "*equipment and materials*" of Claimant from Turkmenistan and that the ban was never lifted.[7] The Tribunal then indicates that the issue arises as to whether the directive went beyond what would have been necessary for recovering the delay penalties imposed on Claimant:

> "The directive dated 9 June 2010 from the Supreme Court to the State Customs Service requesting that the Custom Service identify and locate İçkale's equipment and materials, take inventory of the equipment, and prevent the Claimant from removing equipment and materials from Turkmenistan, also suggests that the Claimant's machinery and equipment may have been taken without justification.219 The directive applies, on its face, to all 'equipment and materials' of the Claimant, and there is no evidence before the Tribunal that the Supreme Court ever lifted the ban. Consequently, the issue arises as to whether the directive went beyond what would have been necessary for the purpose of recovering the delay penalties that the Contracting Parties were entitled to pursuant to the Arbitration Court's decisions, and thus potentially excessive."[8]

9. In order to determine whether the directive went beyond what was necessary to recover

[4] See Carolyn Lamm's Dissenting Opinion, ¶ 22.
[5] See Carolyn Lamm's Dissenting Opinion, ¶ 21.
[6] See Paragraph 121 of the Expert Report of Abdul Sirshar Qureshi, ¶121(a).
[7] Award ¶371.
[8] Award ¶371.

the delay penalties imposed on Claimant, the Tribunal performs a calculation. The formula by which the Arbitral Tribunal determines that there is no significant mathematical difference between the value of the equipment and machinery expropriated by the Supreme Court of Turkmenistan and the Delay Penalties imposed on Claimant is shown in footnote 225 of the Award and is the following:

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

10. Here, USD 10,000,000 is used by the Tribunal to represent the depreciated value of the confiscated machinery and equipment by the Supreme Court's directive, whose acquisition cost was USD 13.990 million.

11. From this depreciated value, the Tribunal then subtracts USD 2,812,786 for delay penalties plus USD 419,112 for additional delay penalties imposed on the Claimant in connection with the Abadan School Contract and the Abadan Kindergarten School Contract.

12. It then subtracts USD 1,800,000 for "inter-company invoices."

13. It next subtracts USD 23,000 for alleged double-counting of certain materials and equipment.

14. It then subtracts USD 1,200,000 for assets that were allegedly transferred by the Claimant's employees to third parties after their confiscation.

15. Finally, the majority subtracts USD 2,600,000 for insurance arrangements that allegedly repaid Claimant for the value of some of its equipment.

16. After determining that the difference between the value of the expropriated items and the delay penalties is only USD 1,145,102, the majority then concludes that no expropriation occurred based on this small amount and its doubts concerning the correct amount of depreciation to apply.

17. Claimant will briefly (**I**) look at the value of the items expropriated by the Supreme Court's Directive, followed by (**II**) the deductions performed by the majority of the Arbitral Tribunal.

I. THE VALUE OF THE ASSETS EXPROPRIATED BY THE SUPREME COURT'S DIRECTIVE SHOULD BE SUPPLEMENTED

18. As the Tribunal indicates in its Award, on 9 June 2010, the Supreme Court of Arbitration sent a letter to the Customs Service and requested the Customs Service to prevent Claimant from taking "***all equipment and materials***" out of Turkmenistan.[9]

19. In order to determine the difference between the value of the confiscated equipment and materials and the delay penalties, the value of "*all equipment and materials*" should be used as the starting point. Rather than use the value of "*all equipment and materials*", however, the Tribunal uses the value of only the "*equipment and machinery*," which is approximately 3 million Euros less.

20. In particular, the Tribunal did not take into account the five sea water pumps[10] confiscated by the Customs Authority pursuant to the Supreme Court's directive.[11] 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.[12] The invoices concerning these materials were provided in the Second Report of Hill International,[13] and the value of this confiscated material, which was never recovered, was over 3 million Euros:

[9] **Ex.C-63** of Claimant's Memorial on the Merits – Letter of the Supreme Court of Turkmenistan dated 9 June 2010 and addressed to State Customs Service; *see* Award ¶368 …."a request from the Supreme Court to the State Customs Service that the Claimant be prevented from removing ***equipment and materials*** from Turkmenistan."

[10] These sea water pumps were brought to Turkmenistan by Claimant in order to fill the Avaza Canal with the sea water. See Ex.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 Ex.C-36 of Claimant's Memorial on the Merits and see also Ex.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.

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

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

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

Material	Value
Five Sea Water Pumps left at the Customs Authority of Turkmenistan	Eur 3,148,200 / USD 3,760,524[14]
Cement left at the Maritime Authority of Turkmenistan	Eur 132,499 / USD 158,270[15]
Total	Eur 3,280,699 / USD 3,918,794

21. The Tribunal likely missed these amounts because the values were presented with respect to the Avaza Canal project.[16] As explained by Claimant's expert at the hearing, however, this was merely a matter of "*presentation*" in order to avoid duplicating claimed amounts elsewhere.[17] As also indicated during the hearing by Claimant's Counsel, the Arbitral Tribunal could use the amounts quantified by Hill and Mazars to determine the value of what was expropriated.[18]

22. While this oversight is understandable, since it required a careful examination of the evidence and claims, the gross errors made by the majority with respect to deductions are not.

II. THE DEDUCTIONS MADE BY THE MAJORITY IN ITS CALCULATION ARE OBVIOUSLY IN ERROR AND MUST BE CORRECTED

23. From the value of the confiscated assets used by the majority in its calculation to determine whether there was a difference between the value of the confiscated assets and the delay penalties, the Tribunal makes a number of gross errors in its calculations. These include (**A**) using the incorrect amount of delay penalties, (**B**) an obvious error with respect to whether inter-company transfers represent a positive or negative value, (**C**) an

[14] Eur 1 = USD 1.19 (as of 9 June 2010) – Source: oanda website
[15] Eur 1 = USD 1.19 (as of 9 June 2010) – Source: oanda website
[16] Second Hill Report paragraphs 36 to 38, Appendix M - Contract TNGIZ-I 13 AVAZA CANAL.
[17] See Hearing Transcript:Day 10, Pages 66-67 ("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 machinery and equipment, due to confiscation, but it doesn't matter (…)**.")
[18] Hearing Tr. Day 1, p. 204, lines 6-12 ("[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.") Respondent in its memorials and Respondent's Experts in their expert reports (PwC and Marsh Consulting) did not make a single 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.

incorrect deduction for insurance payments, (**D**) the Tribunal's incorrect deduction for depreciation, (**E**) the mathematically-incorrect deduction of USD 1,200,000 from an already-depreciated amount and (**F**) the mathematically-incorrect deduction of USD 23,000 from an already depreciated amount.

A. THE DELAY PENALTY AMOUNTS INDICATED IN THE AWARD ARE WRONG

24. While it is quite difficult to understand how neutral arbitrators could rule that the domestic courts of Turkmenistan had the right to impose delay penalties prior to a contract's completion date, here we are only concerned with the actual value of the delay penalties that were imposed on Claimant, which were incorrectly stated in the Award. The latter is apparently a clerical error.

25. The majority indicates that there were USD 2,812,786[19] in delay penalties plus USD 419,112 for additional delay penalties imposed on the Claimant in connection with the Abadan School Contract and the Abadan Kindergarten School Contract, without referring to any evidence.[20] Thus, the majority of the Tribunal calculates the total delay penalty as USD 3,231,898 (USD 2,812,786 + USD 419,112 = USD 3,231,898).

26. There is a USD 134,924 difference between the value calculated by the majority of the Tribunal (USD 3,231,898) and the correct amount of delay penalties imposed (USD 3,096.974), which should be corrected in the majority's calculation. As the table below shows, citing the relevant evidence, the total amount of delay penalties imposed by the Turkmen Arbitration Court was, in fact, USD 3,096,974:

Exhibit No	**Date of the Court Decision / Project Name**	**Delay Penalty Amount**
Ex. AI-68 (Respondent's Counter Memorial – Mr. Imamberdiyev WS)	**Decision of Arbitration Court of Turkmenistan dated 10 March 2010 regarding Kipchak Culture Project TNG-I 10**	**USD 122,500**
Ex-AI-89 (Respondent's Counter Memorial – Mr. Imamberdiyev WS)	**Decision of Arbitration Court of Turkmenistan dated 22 April 2010 regarding Ashgabat Cinema Project TNG-I 16**	**USD 621,500**

[19] The Tribunal did not explain how it determined the amount of USD 2,812,786 in its Award. *See* Award ¶371
[20] Award ¶371

Ex.AI-89 (Respondent's Counter Memorial – Mr. Imamberdiyev WS)	**Decision of Arbitration Court of Turkmenistan dated 22 April 2010 regarding Babarap Projects TNG-I 08**	**USD 1,029,825**
SQ - 36 (Respondent's Counter Memorial – Expert Report of Abdul Sirshar Qureshi)	**Decision of Arbitration Court of Turkmenistan dated 5 October 2009 regarding Abadan School and Abadan Kindergarten Project AWH-I 11 and AWH-I 12**	**USD 419,111**
R-420 (Respondent's Counter Memorial)	**Decision of Arbitration Court of Turkmenistan dated 24 November 2009 regarding Dayhanbank DB-I 06**	**USD 3,658**
R-480 (Respondent's Counter Memorial)	**Decision of Arbitration Court of Turkmenistan dated 26 November 2009 regarding Avaza Canal TNGIZ-I 13 and subsequent Decision of the Arbitration Court of Turkmenistan dated 18 March 2010**	**Eur 228,520 / USD 313,000[21] + The governmental tax of 1,625,582 Manat (USD 587,380)**
Total:		**USD 3.096.974**

27. There were also delay penalty certificates executed between Claimant and TNGS for the Avaza Hotel[22], Kipchak School[23] and Kipchak Hotel projects.[24] However, these delay penalty amounts were deducted from progress payments and already paid, and it does not appear that they account for the different amount in the Award.[25]

28. This error should be corrected, and the value of USD 3,096.974 rather than the amount of USD 3,231,898 should be used in the Award and the Tribunal's calculation.

B. THE TRIBUNAL INCORRECTLY DEDUCTS USD 1,800,000 FOR INTER-COMPANY TRANSFERS

29. According to the Award, Mr. Qureshi argued in its Second Report that "*based on inter-company invoices, some of the assets were sold by the Claimant to its Turkmen branch at*

[21] 1 Eur = 1,37 USD (Oanda website – the currency rate on 18 March 2010)
[22] **R-5** - Delay Penalty Certificate to Contract No. TNG-I 01, dated May 25, 2009
[23] **R-115** - Delay Penalty Certificate to Contract No. TNG-I 05, dated March 2, 2009, **R-116** - Delay Penalty Certificate to Contract No. TNG-I 05, dated March 30, 2009
[24] **R-207** - Delay Penalty Certificate to Contract No. TNG-I 09, dated March 2, 2009, **R-208** - Delay Penalty Certificate to Contract No. TNG-I 09, dated March 30, 2009
[25] For Avaza Hotel see **R-75 -** Invoice No. 21 to Contract No. TNG-I 01, dated May 25, 2009. For Kipchak School see **R-145** Invoice No. 9 to Contract No. TNG-I 05, dated January 25, 2009, **R-149** Invoice No. 10 to Contract No. TNG-I 05, dated April 28, 2009. For Kipchak Hotel see **Ex. R-230**, Invoice No. 6 to Contract No. TNG-I 09, dated January 25, 2009, **Ex. R-234**, Invoice No. 7 to Contract No. TNG-I 09, dated April 28, 2009.

prices that were, in total approximately USD 1,8 million higher than the prices reflected on the original supplier invoices."[26]

30. Based on this statement, the Tribunal indicates that 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 which were 1.8 million higher than the prices at which they were acquired from third parties, and the Tribunal deducts this amount from the total value of the confiscated machinery and equipment of Claimant.[27]

31. The Tribunal, however, does precisely the opposite of what Mr. Qureshi suggested it should do, and it is perfectly clear that the Tribunal simply did not understand Mr. Qureshi's comment and made a gross error, confusing positive and negative values.

32. In his First Report, Mr. Qureshi had criticized Claimant for using inter-company invoices, which could conceivably have been inflated, so Claimant replaced inter-company invoices with actual supplier invoices, as requested by Mr. Qureshi, and Claimant's claim reviewed by the Tribunal was based on actual supplier invoices of which the Tribunal had a copy.[28] All that Mr. Qureshi does in his Second Report[29] is to concede that when supplier invoices are used, as he suggested, the value of the expropriated assets in fact ***increases*** (***not decreases***), showing that there was nothing remotely suspect about Claimant's use of initial inter-company invoices initially 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 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;**
>
> and

[26] Award ¶372
[27] Award ¶373
[28] First Expert Report of Abdul Sirshar Qureshi, ¶ 121
[29] Claimant reminds the majority that it was given no opportunity to respond to Mr. Qureshi's Second Report.

(b) the Updated Claim includes VAT of USD 0.6 million (although Mazars appear to conclude that the correct approach to the claim is to exclude VAT)."[30]

33. Mr. Quershi concludes 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)**."[31]

34. To be clear, ***Mr. Qureshi did not claim that USD 1.8 million should be subtracted from the amount shown by the supplier invoices***, although the majority incorrectly subtracts this amount.

35. In addition to the Tribunal's deduction being obviously wrong, Claimant was given no opportunity to discuss Mr. Qureshi's comment in writing, since it was given no additional written submissions on damages following Mr. Qureshi's Second Report.

36. Claimant respectfully asks the Tribunal to correct its obvious error and to remove **the amount of USD 1.8 million** that it incorrectly subtracts from the value of the expropriated assets, as the value claimed was based on supplier invoices and it makes no sense whatsoever to deduct this amount when inter-company invoices were not used in the revised claim before the Tribunal.

37. In addition, even if we were to suppose that the Tribunal's error did not occur, it is mathematically incorrect to subtract USD 1.8 million from the depreciated value of equipment and machinery rather than from the acquisition costs of materials and equipment.[32] If the USD 1.8 million corresponded to an increase caused by inter-companies invoices, this amount should have been mathematically subtracted from the actual acquisition costs of 13.99 million of the machinery and equipment, and not from their value after depreciation. The Tribunal, however, is both subtracting 100% of a value for inter-company transfers and also subtracting part of this amount for depreciation, which results in a deduction of over 100% of this amount and is mathematically incorrect.

[30] Second Expert Report of Abdul Sirshar Qureshi, ¶40
[31] Second Expert Report of Abdul Sirshar Qureshi, ¶157.
[32] Please also note that Mr. Qureshi himself alleges that the difference of 1.8 Million between the acquisition value based on supplier invoices and the acquisition value based on inter-company transfer invoices may be accounted for by depreciation (Second Expert Report of Abdul Sirshar Qureshi, ¶157(c)(ii).

C. THE MAJORITY INCORRECTLY DEDUCTS USD 2,600,000 FOR INSURANCE PAYMENTS

38. In addition to incorrectly subtracting USD 1.8 million for inter-company transfers, the majority also incorrectly subtracts USD 2.6 million for hypothetical insurance payments that were never made. The majority indicates in the award that:

> *"Neither the Claimant nor its experts have commented on Mr. Qureshi's argument that insurance arrangements should have been considered as the evidence indicates that the lease agreements concluded by the Claimant for some of the machinery and equipment required it to insure the leased assets for their full value. The value of these assets when acquired amounted to approximately USD 2.6 million. In the absence any response on this point from the Claimant, the Tribunal considers that the Claimant must be assumed to have recovered the value of these assets from insurance. It follows that, even if the evidence suggests that the Claimant was required under the relevant lease contracts to pay, and argues that it did pay, the value of the leased machinery and equipment to the lessors in the even it failed to return them, the evidence indicates that the Claimant would have been able to recover these payments from the insurance."*[33]

39. The majority's application of this offset was correctly criticized by Carolyn Lamm in paragraph 20 of her Partially Dissenting Opinion in the following terms:

> *"In paragraph 373 of the Award, the majority notes that Claimant has not commented on Respondent's (unsubstantiated) assertion that Claimant's insurance arrangements for the leased assets should be taken into account when determining the actual valuation of the machinery. The majority assumes that Claimant would have been able to recover any payments it made to the lessors for the leased assets from its insurance arrangements and Claimant's silence is essentially acquiescence in this. I note however, that Claimant's evidence establishes that it was obligated to pay the value of the leased machinery and equipment to its lessors. Furthermore, as the Award recognizes in footnotes 220, 221 and 222, only some of the equipment was leased, with the rest being rented or owned by Claimant, and only some of the lease agreements required insurance coverage. There is no evidence in the record showing that Claimant was reimbursed through an insurance policy for any of the machinery and equipment leased from third parties. Respondent thus failed to satisfy its evidential burden to support its assertion that insurance recovery should be taken into account."*

40. If Respondent had any evidence suggesting any insurance payment, it is clear that Respondent would have submitted this to the Tribunal. It did not submit anything.

41. In fact, as the Tribunal may or may not recall, during the document production phase, under its Redfern Schedule number 85 (c), Respondent requested from Claimant

[33] Award ¶373

"*Insurance agreements or arrangements relating to the Items, any insurance claims filed by İçkale relating to the Items, any payments received from the insurer(s) relating to the Items, and any related Documents."*[34]

42. In response to this request Claimant provided email correspondence between an official of Yapı Kredi Leasing and Ozan İçkale dated 10 January 2013 which clearly states that: *"**The insurance policies of goods leased don't include the phrase "Confiscated by State of Turkmenistan", so the reimbursement the cost of the machines are [sic] not possible**."*[35] Thus, Respondent was already aware that the insurance policies of the leased machinery and equipment did not cover the confiscation of these assets by a State.[36]

43. Claimant would have produced this document if it were given the opportunity by the Arbitral Tribunal, but it was not. Namely, in his first Report, Mr. Qureshi stated that:

> "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;** and…*"*[37]

44. Neither Respondent in its Counter Memorial, nor Mr. Qureshi in its First Expert Report, asserted that Claimant was reimbursed by insurance. Moreover, although Claimant provided the abovementioned e-mail correspondence between Yapı Kredi and Ozan İckale proving that the leased machineries and equipment were not covered against a confiscation by a State,[38] Mr. Qureshi in his Second Report, as if this e-mail correspondence had not submitted by Claimant, stated that leased machineries and equipment were insured and Claimant might have (potentially) been reimbursed.[39]

45. Since Qureshi's Second Report was submitted with Respondent's Rejoinder on the Merits, and since Claimant already submitted its all pleadings on the merits and only its Rejoinder on Jurisdiction was left to be submitted, there was no opportunity for Claimant to rebut this baseless allegation of Mr. Qureshi.

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[34] Respondent's Document Requests - Request No. 85 (c)
[35] E-mail correspondence provided by Claimant to Respondent under number RDR-122 in response to Respondent's Document Requests - Request No. 85 (c). Claimant was never given the opportunity to produce this document to the Tribunal, but it would be glad to do so.
[36] However, through its financial expert, Respondent repeated its baseless allegation without submitting any evidence.
[37] First Expert Report of Abdul Sirshar Qureshi, ¶ 122
[38] E-mail correspondence provided by Claimant to Respondent under number RDR-122 in response to Respondent's Document Requests - Request No. 85 (c).
[39] Second Expert Report of Abdul Sirshar Qureshi, ¶ 173

46. Moreover, during the arbitral proceedings, and although Respondent had the burden of proof on this issue, which concerned its own unsubstantiated allegation, Claimant had already shown that it was required to pay the 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 amounts of leased machinery and equipment back to the leasing company.[40] During the hearing, Claimant also emphasized that it was obligated to pay for the full value of the machinery and equipment (including the leased machinery, to which it obtained title) under the debt liquidation agreement.[41]

47. The majority's deduction on the basis of no evidence, in addition to flagrantly reversing the burden of proof and demonstrating bias, also uses an obviously incorrect hypothetical value. As the majority's deduction of USD 2.6 million is based on the unsubstantiated allegations contained in Mr. Qureshi's Expert Reports, the majority of the Tribunal should also have taken into consideration Mr. Qureshi's claim that the machinery and equipment brought from Turkey were subject to depreciation to conclude that there would be a decrease in value for the leased machinery and equipment over time as well:

> *"*It is unrealistic to assume the real value of an asset in use would be equal to its historical acquisition costs a few years earlier.*"*[42]

48. Therefore, the majority should not have assumed that an insurance company would make a hypothetical insurance payment to Claimant based on 100% of the historical acquisition costs of the machinery, since the hypothetical value of the machinery would diminish over time in an amount that requires calculation.

49. Of course, if the Tribunal had simply asked Claimant during the Hearing, or the Post-Hearing Brief,[43] or at any other time at all during the arbitration how much it was paid in insurance, Claimant would have told the Tribunal that "*there was no payment made by the insurance company*" since the insurance policy did not cover State-confiscated assets,

[40] Please note that the values with respect to this debt repayment are included only in the Turkish version of this document.
[41] Hearing Tr. Day 1, p. 206, lines 21-25 and p. 207, lines 1-4
[42] Second Expert Report of Mr. Abdul Sirshar Qureshi dated 19 July 2013, para. 164, p.40
[43] ICSID Convention, Art. 43 ("… the Tribunal may, if it deems it necessary at any stage of the proceedings (a) call upon the parties to produce documents or other evidence….") ICSID Arbitration Rule 34(2)(a) ("The Tribunal may, if it deems necessary at any stage of the proceeding; (a) call up upon the parties to produce documents, witnesses and experts…")

referring to the e-mail correspondence between Ozan İçkale and Yapı Kredi stating this.[44] Unfortunately, the Tribunal did not ask anything concerning insurance over the entire arbitral proceeding.

50. Claimant respectfully asks the Tribunal to remove the fictitious and unsubstantiated insurance payment amount of USD 2.6 million from the scope of the amounts that are incorrectly subtracted, since it is made up, wholly unsubstantiated, Claimant was given no chance to comment on this issue, and it would not be the correct amount, in any event, since an insurance company would obviously not reimburse 100% of historical acquisition costs.

51. While such a fictitious deduction, in an incorrect hypothetical amount that reverses the burden of proof, might be acceptable before certain State courts, one would hope that ICSID arbitrators hold themselves to a much higher standard and will correct their obvious clerical and arithmetic errors concerning insurance, which merely shows bias.

D. INCORRECT DEDUCTION FOR DEPRECIATION

52. The Tribunal's calculation begins by taking into account the depreciated value of the machinery and equipment as USD 10,000,000, representing a USD 3.9 million deduction from the amounts claimed, pursuant to Mr. Qureshi's claim that depreciation should be taken into account.

53. To the extent that the correct amount that should be subtracted due to depreciation is in dispute, as the Tribunal apparently believes, the Tribunal has failed to rule upon an issue that was put to it. The Tribunal has failed to determine the precise reduction that it would like to apply to the value of the machinery and equipment for depreciation despite the fact that it had all the necessary elements to determine this value, which is a simple calculation. The Tribunal cannot hide behind the unjustified allegation that Claimant did not prove how much depreciation there should be with respect to the machinery and equipment in order to justify its decision. If the Tribunal was not satisfied by the way in which the evidence was presented, it should have asked for questions and further precisions by the parties, or accepted the written calculations concerning depreciation that Claimant offered at the hearing, or ruled on this amount using the help of an expert.

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

54. Although the majority casts doubt on the validity of this USD 3.9 million figure for lost value due to depreciation on the basis that it "*is based merely on the oral evidence of the Claimant's expert given at the Hearing and not supported by any calculations that could be commented upon by the Respondent or reviewed by the Tribunal,*"[45] as Ms. Lamm indicates in her Dissenting Opinion, to the extent the majority had any doubt at the conclusion of the Hearing as to whether Claimant's evidence was sufficient with respect to the depreciation, this issue could have been included among the questions to the Parties for post hearing brief, but was not.

55. The Tribunal also appears to overlook that ***calculations were, in fact, offered to the Tribunal at the hearing by Mr. Almaci*** but Claimant was given no opportunity to present them. 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, stating "*I can provide you the calculation later on, of course,*"[46] 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.

56. The calculation of depreciation on construction equipment is straightforward. A simple "Straight Line Depreciation Method" is normally applied over an economic useful life which is considered to be reasonable on the basis of the technical performance of such assets. According to this methodology, the total depreciation is calculated as USD 3.9 million, consequently the value of the machinery and equipment at the date of the confiscation amounts to approximately USD 10 million, as explained at the hearing. The Tribunal could have performed this calculation itself, which is very easy to do today online and requires only inputting a few values,[47] or it could have accepted Claimant's request to provide this calculation, or relied upon an expert to do this, but it cannot in good faith blame Claimant for not providing what was, in fact, offered to the Tribunal, especially when Respondent had the burden of proof of establishing the amount that it

[45] Award, ¶ 375

[46] Page 86:Lines 2-7 (20 March 2015) ("*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.

[47] The Tribunal could have requested an expert to perform this calculation, or it could have performed this calculation online: http://www.calculatorsoup.com/calculators/financial/depreciation-straight-line.php. Similarly, the majority's comments concerning Mr Uyar nor Mr Cilek not being present at the hearing are very difficult to understand, as it was Respondent who refused to call them (see Award, paragraph 366).

claimed should be deducted for depreciation.

57. If the Tribunal will not use acquisition costs due to Respondent's arguments concerning depreciation, Claimant respectfully requests the Tribunal to take the Straight Line Depreciation Method into consideration as a reasonable method for determining the amount of depreciation, and to calculate the amount of depreciation to apply, pursuant to a Supplemental Decision or the rectification of the Award.

58. To the extent that the value of the machinery and equipment may have been partially determined by the Tribunal, which is unclear from the Award, the Tribunal appears in any event made mathematical errors. Although the majority is circumspect on this issue, it is Claimant's understanding that the majority calculated the value of the expropriated machinery by reducing the acquisition value of the machinery of USD 13,990,000 by USD 6.3 million, thus obtaining the amount of USD 7,690,000:[48]

> "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: See Award, para. 375 & n. 225.]

and

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.

[48] Carolyn Lamm's Dissenting Opinion, ¶18.

59. If the Tribunal did rely on this USD 6.3 million figure, this is due to an incorrect reading of Mr. Qureshi's comments in his Second Report. According to the Award:

> "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.[footnote]"[49]

and

> "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."[50]

60. According to Mr. Qureshi, the USD 6.3 million figure represents the acquisition cost of the machinery and equipment aged between 4 and 9 years. Mr. Qureshi never suggested that the amount to subtract due to depreciation was USD 6.3 million, which makes no sense. He merely noted that part of the machinery is 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."[51]

61. If the Tribunal deducted USD 6.3 million from the total amount of machinery in order to determine what it considered to be the depreciated amount, then this was obviously wrong as a matter of arithmetic, and this would mean that the majority considers that the value of machinery aged between 4 and 9 years ***is zero*** although no party requested this and although this makes no sense since construction equipment can be used for well over a decade.

62. At most, Mr. Qureshi's comment suggested that there are two lots of machinery. The first lot with an acquisition value of USD 6.3 million for machinery aged between 4 and 9 years, and a second lot with an acquisition value of USD 7.69 million for machinery aged less than 4 years. This obviously does not mean that the expropriated machinery aged over 4 years has no value.

[49] Award, ¶ 375.
[50] Award, footnote 226.
[51] Second Expert Report of Abdul Sirshar Qureshi, p. 40.

63. In any event, the Tribunal has made multiple arithmetic errors concerning its deduction for depreciation, both with respect to deductions for inter-company transfers and fictitious insurance payments, as set forth above, and deductions of USD 1.2 million for transferred assets and double-counted assets, as set forth below.

E. INCORRECT DEDUCTION OF USD 1,200,000 FROM DEPRECIATED AMOUNT

64. The majority deducts USD 1.2 million on the basis that confiscated assets were transferred. While Claimant has explained that it received no compensation for transfers as a matter of fact, and the documents in question were forged, here we are merely concerned with the Tribunal's basic arithmetic errors.

65. The obvious mathematical error here is that the Tribunal incorrectly deducted the value of USD 1.2 million from *already depreciated* equipment costs, rather than from the cost of the equipment.

66. This is mathematically incorrect, since it results in ***a deduction of over 100% of the value of the allegedly transferred assets***: both a 100% deduction for the cost of the allegedly transferred assets, plus an additional deduction for the portion of these assets that the Tribunal has already deducted for depreciation. The Tribunal cannot mathematically or logically subtract over 100%, and this is wrong as a matter of arithmetic.

F. INCORRECT DEDUCTION OF USD 23,000 FROM DEPRECIATED AMOUNT

67. The majority similarly makes the mistake of deducting USD 23,000 for alleged double counting of assets from already depreciated costs. This again makes no mathematical or logical sense and is obviously incorrect as a matter of arithmetic: the Tribunal cannot both deduct 100% of the value of assets that it finds were double counted, and then deduct an additional amount for depreciation, which results in ***a deduction of over 100%***.

III. CORRECTED CALCULATIONS

68. In light of the foregoing, Claimant respectfully requests the Tribunal to correct the obvious arithmetic, clerical and similar errors it made in the calculation of the difference between the value of the expropriated assets and the amount of delay penalties imposed

on Claimant, by correcting the Award.

69. The corrected calculations are as follows:

> "Acquisition value of USD 13.990 million *(value of the machinery and equipment based on supplier invoices)* + USD 3,918,794 *(acquisition value of 5 pumps at the Turkmenistan Customs Authority and the cement left at the Turkmenistan Maritime Authority)*[52] - USD 3,096,974 (*actual delay penalty amounts*) – USD 3.9 million (*loss due to depreciation of materials and equipment*) - USD 1,200,000 (*value of allegedly transferred assets*[53]) – USD 23,000 (*value of allegedly double-counted assets*) = **USD 9,688,820 (the difference between the value of the expropriated assets and the delay penalties after all relevant offsets)**"

70. Based on the corrected calculations, which show that nearly USD 9.7 million of materials and equipment more than was required to satisfy delay penalties imposed upon Claimant was expropriated by the Supreme Court's Directive, the Claimant respectfully requests the Tribunal to correct its Award, and its finding in relation to expropriation.

71. Claimant also requests the Tribunal to issue a Supplementary Decision concerning the value of the pumps and cement, which can also deal with any outstanding issues concerning expropriation where the Tribunal would find additional guidance from the Parties to be helpful.

72. The majority's obvious mistakes could not be made knowingly by neutral arbitrators. Although Mr. Qureshi himself agreed that there was a large difference in the value of the expropriated equipment and the delay penalties, the majority misses this, and it frankly seems as if the majority has a target that it is attempting to achieve and seeking any justification possible to this end, no matter how obviously wrong.

73. In any event, regardless of whether or not the majority intends to rule fairly, with respect to which Claimant reserves all rights, the Tribunal must correct its many obvious arithmetic, clerical and similar errors with respect to its decision on expropriation.

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[52] Depreciation should not be calculated on cement and pumps since depreciation is applicable for fixed assets (i.e. buildings, machinery, vehicles, etc.) which have economic useful lives 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 (as in production, construction, etc.).

[53] Claimant did not, in fact, receive this amount, but this issue is beyond the scope of the current submission.

74. Finally, as Claimant has proven that Respondent's actions are unjust and in violation of the Turkey-Turkmenistan BIT, and only the majority's obviously incorrect calculations unjustly deprived Claimant from a ruling in its favour, Claimant respectfully asks the Tribunal to rectify its ruling regarding the costs of the arbitral proceedings and to rule that Respondent shall pay the costs of Claimant in connection with this Arbitration.

75. For the foregoing reasons, 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 correct all arithmetic, clerical and similar errors in paragraphs 372-376 of the Award;

(iii) to rule that the Supreme Court of Turkmenistan's Directive dated 9 June 2010 was excessive and expropriatory;

(iv) to rule that Respondent shall pay USD 9,688,820 to Claimant as a result of the actions of Turkmenistan;

(v) to rule that Respondent shall pay the costs of Claimant in connection with this Arbitration.

Respectfully submitted on 29 March 2016,[52]

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[52] ***Attachment:*** *The bank receipt indicating the payment of the lodging fee of USD 10,000 by Claimant with respect to Its Request for Supplementation and Rectification of the İçkale İnşaat Limited Şirketi v. Turkmenistan Award dated 8 March 2016 (ICSID Case No. ARB/24/10)*