INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

İÇKALE İNŞAAT LIMITED ŞIRKETI

Claimant

and

TURKMENISTAN

Respondent

(ICSID Case No. ARB/10/24)

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

Members of the Tribunal
Dr Veijo Heiskanen, President of the Tribunal
Ms Carolyn B. Lamm, Arbitrator
Prof. Philippe Sands QC, Arbitrator

Secretary of the Tribunal
Mr Paul-Jean Le Cannu

Date of dispatch to the Parties:

4 October 2016

REPRESENTATION OF THE PARTIES

Representing İçkale İnşaat Limited Şirketi:

Prof. Dr Ata Sakmar
Ms Mine Sakmar
Mr Aycan Özcan
Sakmar Hukuk Bürosu
Cumhuriyet Caddesi, Pak Apt.
No. 30/11, Elmadağ – Taksim
Istanbul, 34373, Turkey

and

Mr William Kirtley
Mr Andrian Beregoi
Aceris Law SARL
Rue du Rhone 14
1204 Geneva, Switzerland

Representing Turkmenistan:

Ms Miriam K. Harwood
Mr Ali R. Gürsel
Mr Simon Batifort
Ms Christina Trahanas
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178 U.S.A.

and

Ms Gabriela Álvarez Ávila
Ms Kate Brown de Vejar
Curtis, Mallet-Prevost, Colt & Mosle S.C.
Rubén Darío 281, Piso 9
Col. Bosque de Chapultepec
11580 México, D.F., Mexico

and

Mr Ruslan Galkanov
Curtis, Mallet-Prevost, Colt & Mosle LLP
Yimpas Business Center 54
Turkmenbashy Ave., Suite 301-A
Ashgabat, Turkmenistan 744027

TABLE OF CONTENTS

1 THE PROCEEDINGS

1. On 29 March 2016, İçkale İnşaat Limited Şirketi ("**İçkale**" or the "**Claimant**") filed with the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") a Request for Supplementary Decision and Rectification of the Award rendered by the Tribunal on 8 March 2016 (the "**Request**") pursuant to Article 49(2) of the Convention on Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965 (the "**ICSID Convention**").

2. By letter dated 6 April 2016, the ICSID Secretary-General informed the Parties that the Centre had registered the Request pursuant to ICSID Arbitration Rule 49(2)(a).

3. By letter dated 11 April 2016, the Tribunal established a schedule for written submissions to address the Request pursuant to ICSID Arbitration Rule 49(3). According to the schedule, the Respondent was to submit its observations on the Request by 9 May 2016, the Claimant was to file its Reply by 23 May 2016, and the Respondent was to file its Rejoinder by 6 June 2016.

4. By email dated 9 May 2016, the Respondent requested an extension of the deadline to file its observations on the Request until 12 May 2016.

5. By email dated 10 May 2016, the Tribunal granted the Respondent's extension request and amended the existing schedule. According to the amended schedule, the Respondent was to submit its observations on the Request by 12 May 2016, the Claimant was to file its Reply by 26 May 2016, and the Respondent was to file its Rejoinder by 9 June 2016.

6. On 12 May 2016, the Respondent filed its observations on the Request (the "**Observations**").

7. By letter dated 18 May 2016, the Centre requested that each Party make an advance payment in the amount of USD 60,000 in order to meet the costs arising out of the Request within 30 days, i.e. by 17 June 2016, in accordance with ICSID Administrative and Financial Regulation 14(3)(d).

8. By letter dated 25 May 2016, the Claimant requested a three-day extension of the deadline to file its Reply to the Respondent's Observations.

9. By letter dated 26 May 2016, the Tribunal granted the Claimant's extension request and amended the existing schedule for written submissions to the effect that the Claimant was to file its Reply by 31 May 2016, and that the Respondent was to file its Rejoinder by 14 June 2016.

10. On 31 May 2016, the Claimant filed its Reply to the Respondent's Observations (the "**Reply**").

11. On 14 June 2016, the Respondent filed its Rejoinder on the Request (the "**Rejoinder**").

12. By letter dated 16 June 2016, the Claimant requested a three-month extension of the deadline to pay the advance on costs. The Claimant also requested the ICSID Secretariat and the Tribunal to reconsider the amount of the advance payment. The Claimant further agreed that, in view of the Respondent's objection that one of the Claimant's exhibits (Exhibit CA-1) constitutes new evidence, this exhibit be struck from the record.

13. By letter of 20 June 2016, the Respondent submitted comments in response to the Claimant's letter of 16 June regarding Exhibit CA-1 and the introduction of new evidence by the Claimant.

14. By letter dated 21 June 2016, having considered the Claimant's letter of 16 June 2016 and the relevant circumstances, the ICSID Secretariat reduced the amount of the advance payment to be made by each Party to USD 40,000, and extended the deadline for payment until 18 July 2016.

15. By letter of 27 June 2016, the Claimant submitted comments in response to the Respondent's letter of 20 June.

16. On 15 July 2016, the Centre confirmed receipt of the Claimant's advance payment.

17. On 26 July 2016, the Centre confirmed receipt of the Respondent's advance payment.

18. On 16 August 2016, the Respondent requested leave from the Tribunal to file a response to the Claimant's argument regarding the Claimant's new depreciation calculations in footnote 2 of the Claimant's letter of 20 June 2016. On the same day, the Claimant objected to the Respondent's request, stating that the Respondent had already responded to the Claimant's letter, and that it was too late to raise the issue now.

19. On 17 August 2016, the Tribunal granted the Respondent's request and invited the Respondent to file its comments by 19 August 2016. The Claimant was provided with an opportunity to file a brief response by 23 August 2016.

20. On 19 August 2016, the Respondent filed a brief comment on footnote 2 of the Claimant's letter of 20 June 2016.

21. On 24 August 2016, the Claimant filed its reply to the Respondent's submission of 19 August 2016.

22. On 14 September 2016, the Tribunal declared the proceedings closed pursuant to ICSID Arbitration Rule 46.

2 THE PARTIES' POSITIONS AND REQUESTS FOR RELIEF

2.1 The Claimant's Position

23. The Claimant explains that its Request "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."[1] The Claimant refers, in particular, to paragraphs 371 to 376 of the Award in which, according to the Claimant, the Tribunal,

> "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,' […] 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

[1] Request, para. 4.

shown, and therefore the Supreme Court's directive which permanently deprived Claimant of its assets in Turkmenistan was not excessive or expropriatory."[2]

24. The Claimant takes issue with the Tribunal's valuation of the assets allegedly expropriated as a result of the Supreme Court directive (the "**Supreme Court Directive**" or the "**Directive**"), which the Claimant contends should be supplemented, and with the deductions made by the Tribunal when calculating the difference between the value of these assets and the delay penalties imposed on the Claimant.[3] According to the Claimant, the Tribunal's calculations include "gross errors."[4]

2.1.1 The scope of Article 49(2) of the ICSID Convention

25. According to the Claimant, its Request falls within the ambit of Article 49(2) of the ICISD Convention. The Claimant argues, referring to the decision of the tribunal in *LG&E v. Argentina*[5] and legal scholarship,[6] that

> "[t]he 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. In order to warrant a supplemental decision, the omitted question must concern an issue that materially affects the award according to Christoph Schreuer. 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."[7]

26. The Claimant denies that its Request amounts to a request of reconsideration of the Tribunal's decision on the merits, as alleged by the Respondent. According to the Claimant,

> "[the] 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

[2] Request, paras. 4-5.
[3] See Request, paras. 6-23.
[4] Request, para. 23.
[5] *LG&E Energy Corp v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Claimant's Request for Supplementary Decision, 8 July 2008, Ex. RA-480, para. 13.
[6] Christoph Schreuer, with Loretta Malintoppi, August Reinisch and Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press, 2d ed. 2009), Ex. RA-469 p. 853, para. 40.
[7] Request, para. 3. See also Reply, para. 5.

> to make any analyses of facts or law, nor to exercise any judgment, and its comparison of the value of the machinery and equipment and the delay penalties is quite obviously mathematically incorrect on multiple levels and must be corrected."[8]

27. The Claimant argues that, despite the Respondent's misleading references to "minor"[9] errors, all errors should be corrected, whether they concern small or large sums.[10]

28. The Claimant contends that the Respondent cannot rely on *Vivendi v. Argentina* and *Perenco v. Ecuador* to argue that corrections of errors cannot lead tribunals to modify their findings on the merits.[11] While *Vivendi* addressed errors that have nothing to do with those at issue in this case, *Perenco* did not concern a request for rectification, but a request for reconsideration.[12] The Claimant refers instead to *RDC v. Guatemala* in which the tribunal corrected the discount rate and as a result increased the amount awarded by USD 2 million.[13] The Claimant also draws support from the dissenting opinion in the same case which suggested 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."[14] The Claimant further relies on ICC Case No. 10609 in which the tribunal agreed to rectify an error in computation and its decision regarding the amount of damages.[15]

29. The Claimant suggests that, if the Tribunal did not modify the findings which were based upon its errors, the "logical syllogism" at the centre of its reasoning would no longer stand.[16]

---

[8] Reply, para. 166.
[9] Reply, para. 167, quoting paras. 19 and 26 of the Observations.
[10] Reply, paras. 167-168.
[11] Reply, para. 169.
[12] Reply, para. 169.
[13] Reply, para. 171, *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, Exhibit CA-4, para. 43.
[14] Reply, para. 173, *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 January 2013, Exhibit CA-4.
[15] Reply, para. 174, 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, Exhibit CA-5.
[16] Reply, para. 176. The Claimant argues that this syllogism is as follows:
"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.

This would also go against the spirit and purpose of Article 49(2) and deprive it of its effectiveness, contrary to the requirement of *effet utile*.[17] The Claimant adds that if the Tribunal were to make the requested modifications to its findings, the risk that the Respondent may file an application for annulment would be inexistent.[18]

2.1.2 The Claimant's request that the Award be supplemented to reflect a correct valuation of the confiscated assets

30. The Claimant requests that the Tribunal supplement the Award to include assets which it alleges were also expropriated by the Supreme Court Directive. In the Claimant's view, rather than using the value of "all equipment and materials" as a starting point to establish the value of the assets expropriated by the Directive, the Tribunal used the value of the "equipment and machinery" and thus failed to take into account (i) five seawater pumps, which the Claimant state were confiscated by the Customs Authority pursuant to the Directive and (ii) a "significant amount of cement," which the Claimant contends was confiscated at the sea port of Turkmenistan pursuant to the Directive.[19]

31. The Claimant contends that the Tribunal "likely missed these amounts because the values were presented with respect to the Avaza Canal project."[20] However, according to the Claimant,

> "this was merely a matter of 'presentation' in order to avoid duplicating claimed amounts elsewhere. 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."[21]

Conclusion: Claimant's sized machinery is not expropriatory." (Reply, para. 176 (original emphasis omitted)).
In the Claimant's view, proposition B being incorrect, it must be corrected and the conclusion must change:
"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." (Reply, para. 177 (original emphasis omitted)).

[17] Reply, paras. 179-180.
[18] Reply, para. 184.
[19] Request, paras. 19-20.
[20] Request, para. 21.
[21] Request, para. 21, referring to Transcript, Day 1, p. 204, lines 6-12 (footnotes omitted). See also Reply, paras. 157-158.

32. According to the Claimant, the value of the five seawater pumps and cement amounts to EUR 3,280,699 or USD 3,918,794.[22]

33. In the Reply, the Claimant clarified that its request for a supplementary decision is "secondary."[23] However, contrary to the Respondent's allegation, it does not amount to a new claim.[24] The Claimant refers in this respect to portions of its memorials and expert reports which show that (i) the pumps were never paid for, were held at Customs and have a specific value,[25] and that (ii) the value of the cement was also cited.[26] The Claimant argues that, "[w]hile 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."[27] According to the Claimant, the claims "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."[28]

2.1.3 The Claimant's argument that the Tribunal made "gross errors" when calculating the difference between the confiscated assets and the delay penalties

36. The "gross errors" which the Claimant alleges should be rectified by the Tribunal include "using the incorrect amount of delay penalties;" "an obvious error with respect to whether inter-company transfers represent a positive or negative value;" "an incorrect deduction for insurance payments;" "the Tribunal's incorrect deduction for depreciation;" "the mathematically-incorrect deduction of USD 1,200,000 from an already depreciated amount; and "the mathematically-incorrect deduction of USD 23,000 from an already depreciated amount."[29]

[22] Request, para. 20 (see table).
[23] Reply, para. 6.
[24] Reply, para. 152.
[25] Reply, paras. 152-155.
[26] Reply, paras. 156, 159.
[27] Reply, para. 160.
[28] Reply, paras. 160-161.
[29] Request, para. 23.

2.1.3.1 The Claimant's argument that the amount of delay penalties used by the Tribunal is incorrect

37. The Claimant argues that the amount of delay penalties used by the Tribunal, namely USD 2,812,786 + USD 419,112 = USD 3,231,898, is wrong[30] and should be reduced to USD 3,096,974.[31] The Claimant provides a table at paragraph 26 of its Request, which summarizes the evidence on record, in support of its contention.

38. According to the Claimant, the Respondent does not contest that the Tribunal did not use the correct figure.[32] Contrary to the Respondent's position, whether or not the amount is "*de minimis*" is irrelevant.[33] According to the Claimant, Article 49(2) is not "*à la carte*;"[34] all arithmetical and clerical errors, whether small or significant, must be corrected.[35]

2.1.3.2 The Claimant's argument that the Tribunal made "a gross error" as to whether inter-company transfers represent a positive or negative value

39. According to the Claimant, the Tribunal made a "gross error, confusing positive and negative values"[36] when it criticized the Claimant for failing to explain why the Tribunal should take into account inter-company invoices which were USD 1.8 million higher than the original supplier invoices. The Claimant argues that the Tribunal misunderstood Mr Qureshi's comment on this point in his Second Report and as a result erroneously deducted this amount from the total value of the confiscated assets.[37] According to the Claimant:

> "All that Mr Qureshi does in his Second Report 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."[38]

[30] Request, para. 25.
[31] Request, para. 26.
[32] Reply, para. 145.
[33] Reply, paras. 145-146.
[34] Reply, para. 146.
[35] Reply, para. 146.
[36] Request, para. 31.
[37] Request, paras. 30-31.
[38] Request, para. 32 (emphasis in the original; footnotes omitted). See also Reply, para. 26.

40. The Claimant further argues that the Respondent agrees that the valuation based on the original supplier invoices was USD 1.8 million higher than the inter-company invoices.[39] The fact that the USD 1.8 million deduction was unanimous is irrelevant.[40] The Claimant also emphasizes that, as the Respondent implicitly agrees,[41] the Tribunal subtracted this amount without being requested to do so either by the Respondent or by its expert, Mr Qureshi.[42] The Tribunal's error cannot be explained by the Respondent's allegation that the Claimant's evidence was unreliable.[43] While the Respondent's argument is, in the Claimant's view, an effort to appeal "to the Tribunal's worst instincts and prejudice,"[44] it is clear that the initial supplier invoices produced by the Claimant were held by the Tribunal to be satisfactory evidence.[45]

41. While also arguing that it was given no opportunity to comment on Mr Qureshi's comment in writing,[46] the Claimant requests that the Tribunal correct its error, which is not a substantive finding,[47] and not subtract the amount of USD 1.8 million from the value of the confiscated assets.[48] Specifically, the Claimant requests that the Tribunal "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."[49]

[39] Reply, para. 19.
[40] Reply, para. 20.
[41] Reply, para. 32.
[42] Reply, paras. 22, 30.
[43] Reply, paras. 36-37.
[44] Reply, para. 36.
[45] Reply, para. 38.
[46] Request, para. 35. See also Reply, para. 35.
[47] Reply, para. 42.
[48] Request, paras. 35-36. Alternatively, the Claimant argues that "[i]f 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." (Request, para. 37)
[49] Reply, para. 43.

2.1.3.3 The Claimant's argument that the Tribunal made an incorrect deduction for insurance payments

42. The Claimant contends that "the majority also incorrectly subtracts USD 2.6 million for hypothetical insurance payments that were never made."[50] The Claimant refers to Ms Lamm's Partially Dissenting Opinion, which in the Claimant's view rightly criticized this subtraction.[51] According to the Claimant, if the Respondent had any evidence that showed the insurance payments had been made, it would have submitted it, but it did not.[52]

43. The Claimant also notes that during the document production phase it produced email correspondence between an official of Yapı Kredi Leasing and Ozan İçkale dated 10 January 2013, in response to the Respondent's own document production request.[53] The Respondent was therefore aware, based on the contents of this correspondence, that "the insurance policies of the leased machinery and equipment did not cover the confiscation of these assets by a State."[54]

44. The Claimant further contends that it did not have the opportunity to produce this document in the arbitration.[55] As Mr Qureshi addressed the issue in his Second Report, which was submitted with the Respondent's Rejoinder on the Merits, the Claimant had no opportunity to address Mr Qureshi's allegations.[56] Even then, Mr Qureshi never made a "positive, particularised allegation that Claimant was actually reimbursed by insurance."[57] Nor did the Respondent in its Rejoinder on the Merits or at the hearing make any such argument.[58] Had the Respondent done so, it would have had the burden of proving its allegation.[59] The Claimant insists that the Respondent should have proved, which it did not, that "the leased equipment was insured by political risk insurance, that Claimant was reimbursed by

[50] Request, para. 38.
[51] Request, para. 39, referring to Ms Lamm's Partially Dissenting Opinion, para. 20.
[52] Request, para. 40.
[53] Request, para. 42.
[54] Request, para. 42.
[55] Request, para. 43.
[56] Request, para. 45.
[57] Reply, para. 55.
[58] Reply, paras. 56-57, 64.
[59] Reply, para. 59.

insurance, that Claimant was required to obtain political risk insurance, or that such political risk insurance even existed for Turkish companies."[60]

45. The Claimant further argues that, although the Respondent had the burden of proof on this issue, the 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."[61]

46. The Claimant contends that the majority of the Tribunal was wrong to assume that insurance payments would be made on the basis of 100% of the historical acquisition costs of the machinery rather than the decreased value that would take into account depreciation over time.[62] According to the Claimant, "political risk insurance never reimburses 100% of the initial value of assets, only net value."[63] Indeed, the Tribunal's calculation produces "an improper negative value"[64] as it results in deducting an "undepreciated amount from a depreciated amount."[65] The Claimant requests that this amount not be subtracted from the value of the confiscated assets.[66] The Tribunal "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%)."[67]

2.1.3.4 The Claimant's argument that the Tribunal made an incorrect deduction for depreciation

47. The Claimant argues that, "by taking into account the depreciated value of the [confiscated] machinery and equipment as USD 10,000,000"[68] rather than its acquisition value of USD

[60] Reply, para. 59.
[61] Request, para. 46. See also Reply, paras. 62, 66.
[62] Request, paras. 47-48. See also Reply, paras. 76, 78-80.
[63] Reply, para. 76.
[64] Reply, para. 80.
[65] Reply, para. 76.
[66] Request, para. 50.
[67] Reply, para. 82.
[68] Request, para 52.

13.9 million, the Tribunal has failed "to rule upon an issue that was put to it," namely determining "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."[69]

48. According to the Claimant, there is no justification for the Tribunal's ruling that the Claimant did not prove the loss of value owing to depreciation.[70] First, it was the Respondent and not the Claimant who made the allegation that "rather than using replacement costs the machinery should be valued at historical costs from which depreciation should be subtracted."[71] The Respondent therefore had the burden of proving the amount to be subtracted for depreciation,[72] as arbitral tribunals such as the *Petrolane* tribunal have required.[73] The Respondent however failed to prove the amount.[74] Second, in the Claimant's view, the Tribunal should have "asked for questions and further precisions by the parties;"[75] accepted or followed up on the calculations that the Claimant's expert, Mr Almaci, offered at the hearing;[76] relied upon an expert to calculate depreciation;[77] or done the calculation itself,[78] including online using the "Straight Line Depreciation Method."[79] The Claimant requests that the Tribunal "take the Straight Line Depreciation Method into consideration as a reasonable method for determining the amount of depreciation, and to calculate the amount

[69] Request, para. 53.
[70] Request, para. 53.
[71] Reply, para. 118.
[72] Reply, para. 118. See also Reply, paras. 122-124.
[73] Reply, para. 125, *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, Exhibit CA-2, paras. 100-101. The Claimant also refers to the dissenting opinion in this case, which in the Claimant's view suggested that the failure by the majority of the Tribunal to calculate the amount of depreciation itself amounted to a "miscarriage of justice." See Reply, para. 126, *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, Exhibit CA-3, paras. 16 and 22.
[74] Reply, para. 122.
[75] Request, para. 53.
[76] Request, para. 55; Reply, paras. 111, 116.
[77] Request, para. 56. See also Reply, para. 128.
[78] Reply, para. 129. The Claimant provides an example of calculations, prepared by a law firm intern. See Reply, paras. 129-130.
[79] Request, para. 56.

of depreciation to apply, pursuant to a Supplemental Decision or the rectification of the Award."[80]

49. The Claimant also argues that the Tribunal appears to have made further mathematical errors.[81] The Claimant infers from paragraph 375 and footnote 226 of the Award and paragraph 23 of Ms Lamm's Partially Dissenting Opinion[82] that the Tribunal deducted USD 6.3 million from the acquisition value of the confiscated assets (USD 13.9 million) and contends that the latter figure is based on an incorrect reading of Mr Qureshi's Second Report.[83] While Mr Qureshi indicates in his Second Report that the USD 6.3 million figure corresponds to the acquisition value of the machinery and equipment aged between four and nine years,[84] the Tribunal appears to have subtracted this amount from the total acquisition value "in order to determine what it considered to be the depreciated amount" as if the value of the assets aged between four and nine years were nil.[85] This, according to the Claimant, is "obviously wrong."[86] In order to correct this error, "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.'"[87]

50. According to the Claimant, the Tribunal has also "mixed apples and oranges" by subtracting undepreciated values from the depreciated value proposed by the Claimant's expert, and made a mathematical error,[88] which has resulted in deducting more than 100% of the initial invoice value of the assets.[89] Because the Tribunal used the depreciation rate proposed by

[80] Request, para. 57. In its Reply, the Claimant indicates that its request on this issue is a request for rectification and not a request for a supplementary decision, as wrongly suggested by the Respondent. (Reply, para. 84.)
[81] Request, para. 58.
[82] Request, paras. 58-59. See Reply, paras. 90-92.
[83] Request, para. 59. See also Reply, paras. 88-89.
[84] Request, para. 60.
[85] Request, para. 61.
[86] Request, paras. 61-62.
[87] Reply, para. 97 (emphasis in original).
[88] Reply, paras. 100-101, 103.
[89] Reply, para. 102.

the Claimant's expert to determine the starting value of the confiscated assets, it should have used the same rate for its deductions.[90]

51. Finally, in the Reply, the Claimant requests that:

> "If for any reason Tribunal does not rectify, as it obliged [sic], 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."[91]

2.1.3.5 The Claimant's argument that the deduction of USD 1,200,000 from an already-depreciated amount is mathematically incorrect

52. The Claimant submits that the Tribunal wrongly subtracted USD 1.2 million for confiscated assets that were allegedly transferred to third parties from "already depreciated equipment costs, rather than from the cost of the equipment."[92] This results in "a deduction of over 100% of the value of the allegedly transferred assets,"[93] which is mathematically incorrect.

53. The Claimant asserts that, contrary to what is argued by the Respondent, the Claimant did provide reliable evidence in relation to the original purchase value of the equipment, as recognized by the Tribunal.[94] According to the Claimant, the Tribunal can only deduct depreciated values from the depreciated starting value using the Claimant's proposed depreciation rate.[95]

---

[90] Reply, para. 104. The Claimant indicates in footnote 76 of the Reply how it calculates the depreciation rate: "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."
[91] Reply, para. 133 (original emphasis omitted).
[92] Request, para. 65 (original emphasis omitted).
[93] Request, para. 66 (original emphasis omitted).
[94] Reply, para. 140.
[95] Reply, para. 141.

2.1.3.6 The Claimant's argument that the deduction of USD 23,000 from an already depreciated amount is mathematically incorrect

54. The Claimant argues that the Tribunal cannot deduct USD 23,000 on the basis of double counting from already depreciated costs because this amounts to "a deduction of over 100%."[96]

55. According to the Claimant, it had submitted to the Tribunal "all the necessary evidence to decide the case."[97] Based on this evidence, "[t]he 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% of which the Tribunal was in possession."[98]

2.1.4 The Claimant's Request for Relief

56. In its Request, the Claimant requests that the Tribunal correct all of the arithmetic, clerical and similar errors identified by the Claimant as they are so obvious that they "could not be made knowingly by neutral arbitrators."[99] The Claimant's summarizes its corrections 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) - 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) – 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)."[100]

57. In the Reply, the amount calculated by the Claimant is "slightly higher" than the amount calculated in the Request (USD 9,947,624 as opposed to USD 9,688,820) "due to the correct

[96] Request, para. 67 (original emphasis omitted).
[97] Reply, para. 144.
[98] Reply, para. 144 (footnote omitted).
[99] Request, para. 72. See also Request, paras. 47, 51.
[100] Request, para. 69 (footnotes and original emphasis omitted).

deduction of USD 1,200,000 (value of allegedly transferred assets) and USD 23,000 (value of allegedly double-counted assets) before the depreciation."[101]

58. The Claimant further requests the Tribunal to correct its finding of expropriation as a result of the corrected calculations.[102] It also requests that the Tribunal "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."[103] The Claimant further requests that the Tribunal rectify its decision on costs and rule that the Respondent shall pay the Claimant's costs in connection with this arbitration since the "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."[104]

59. In its Request, the Claimant 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."[105]

---

[101] Reply, footnote 139. The Claimant's calculation is as follows:
"(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 857,756140 (depreciated value of allegedly transferred assets) – USD 16,440141 (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 Turkmenistan Customs Authority and the cement left at the Turkmenistan Maritime Authority) = USD 9,947,624 (the remaining amount after the relevant offsets)." (Reply, para. 187).
[102] Request, para. 70.
[103] Request, para. 71.
[104] Request, para. 74.
[105] Request, para. 75.

60. In its Reply, the Claimant 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."[106]

2.2 The Respondent's Position

61. The Respondent argues that the Claimant's Request should be rejected, and that the Claimant should be ordered to pay the costs of the Request.[107]

62. According to the Respondent, while the "dearth of evidence and incoherent arguments"[108] put forward by the Claimant should have led it "to walk away from a failed and misguided gamble,"[109] the Claimant has elected "to attempt to re-open the merits of issues already decided by the Tribunal, re-plead its case, present new claims, new evidence, new methodologies, new arguments on issues that it could have and should have addressed before, and ask the Tribunal to change its decision on the merits."[110]

63. According to the Respondent, the Claimant's Request falls outside the scope of Article 49(2) of the ICSID Convention,[111] and none of the grounds that the Claimant asserts for

[106] Reply, para. 190. At paragraph 188, the Claimant states that, "[i]f 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)."
[107] Observations, paras. 7, 20.
[108] Observations, para. 4.
[109] Observations, para. 6.
[110] Observations, para. 6.
[111] Observations, paras. 6-7.

supplementation or rectification can succeed.[112] Even if the Claimant's requests for rectification concerned errors within the meaning of Article 49(2), "neither the supplementary decision Claimant seeks, nor any of the alleged errors that Claimant seeks to rectify, nor the sum of all of these, would affect the Tribunal's ultimate decision to dismiss Claimant's expropriation claim."[113]

2.2.1 The scope of Article 49(2) of the ICSID Convention

64. The Respondent submits that the Claimant's Request "has nothing to do"[114] with the procedure provided for in Article 49(2) of the ICSID Convention. In the Respondent's view, leaving aside the requirements of this provision, "there is no justification for the relief Claimant is requesting, under any standard."[115] The Claimant cannot introduce new factual evidence in the context of a request pursuant to Article 49(2) and does not understand how the rules allocating the burden of proof operate.[116]

65. Relying on legal scholarship[117] and the decisions of the *ad hoc* committee in *Vivendi v. Argentina*[118] and the tribunal in *Perenco v. Ecuador*,[119] the Respondent argues that the scope of Article 49(2) is narrow, and that the provision "cannot be invoked to appeal or challenge the substance or validity of the Tribunal's decision."[120]

---

[112] Observations, paras. 22 et seq.
[113] Rejoinder, para. 9.
[114] Observations, para. 7.
[115] Observations, para. 7.
[116] Rejoinder, paras. 25-44.
[117] Observations, para. 10, referring to Christoph Schreuer, with Loretta Malintoppi, August Reinisch and Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press, 2d ed. 2009), Ex. RA-469, Article 49, pp. 849-850, para. 28. The Respondent also refers, *inter alia*, to Daniel Kalderimis, Noah Rubins, Ben Love, ICSID Convention, in CONCISE INTERNATIONAL ARBITRATION (2nd ed., Kluwer Law International 2015), Ex. RA-470, p. 131.
[118] Observations, para. 12, referring to *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 dated May 28, 2003, Ex. RA-473, para. 11.
[119] Observations, para. 13, referring to *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Ecuador's Reconsideration Motion dated April 10, 2015, Ex. RA-474, para. 63. In the Rejoinder, the Respondent underlines that while the request in the *Perenco* case was described as a Motion for Reconsideration, the *Perenco* tribunal did offer what it viewed as the correct interpretation of Article 49(2) of the ICSID Convention. (Rejoinder, para. 14.)
[120] Observations, para. 10.

66. According to the Respondent, requests for supplementary decisions that seek the reversal of the tribunal's decision on the merits have been consistently denied.[121] Nor can a request for a supplementary decision be used "as a means to improve or expand upon arguments or theories presented in the underlying proceeding,"[122] as confirmed by the tribunal's decision in *Genin v. Estonia*.[123] The only decision cited by the Claimant, *LG&E v. Argentina*, dismissed the request for supplementary decision, holding that the claimants were "attempting to reopen the discussion of a question that has been dealt with and disposed of by the Tribunal."[124]

67. As to rectification, the Respondent submits that its purpose is "'not to reconsider the merits of issues already decided, nor the "weight or credence" accorded to arguments or evidence put forward by the parties,' but to correct minor errors in the award."[125] The Respondent refers, in support, to the decision of the *Vivendi ad hoc* committee,[126] which contrary to Claimant's position articulates the standard to be applied under Article 49(2).[127] To illustrate the limited scope of the rectification procedure, the Respondent refers to cases in which rectification was granted to amend the list of party representatives, to correct spelling errors, or to replace a specific term with another in an award.[128] By contrast, the Claimant in this

[121] Observations, para. 14. The Respondent refers to *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 dated May 28, 2003, Ex. RA-473, para. 19; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Decision on the Requests for Correction, Supplementary Decision and Interpretation, 10 July 2008, Ex. RA-477, paras. 12, 53; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Respondent's Request for a Supplementary Decision,6 September 2004, Ex. RA-478, paras. 17, 21.

[122] Observations, para. 15.

[123] Observations, para. 15, referring to *Alex Genin et al. v. Republic of Estonia*, ICSID Case No. ARB/99/2, Decision on Claimants' Request for Supplementary Decisions and Rectification dated April 4, 2002, Ex. RA-479, para. 10.

[124] Observations, para. 16, quoting *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Claimants' Request for Supplementary Decision, 8 July 2008, Ex. RA-480, para. 15.

[125] Observations, para. 17. The Respondent quotes Christoph Schreuer, with Loretta Malintoppi, August Reinisch and Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press, 2d ed. 2009), Ex. RA-469, Article 49, p. 858, para. 57.

[126] *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 dated May 28, 2003, Ex. RA-473, para. 25.

[127] Rejoinder, para. 15.

[128] Observations, para. 18. The Respondent refers to *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Rectification of Award, 19 May 2006, Ex. RA-483, paras. 2, 7; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Rectification of the Decision of the Ad Hoc Committee on the Application for Annulment of Mr Soufraki, 13 August 2007, Ex. RA-484, paras. 3, 8; *Industria Nacional de Alimentos, S.A. and Indalsa Perú,*

case is asking the Tribunal to overturn its decision on the Claimant's expropriation claim and its decision on costs.[129] Citing *Genin v. Estonia*, the Respondent argues that the Claimant has had its "day in court"[130] and cannot be allowed now "to re-argue substantive aspects" of the Tribunal's award.[131]

68. According to the Respondent, the decision in *RDC v. Guatemala*, upon which the Claimant relies, does not help its case.[132] While the *RDC* tribunal acceded to the claimant's first request for rectification and corrected its computational error and, therefore, the amount of damages awarded, this correction did not lead the *RDC* tribunal to change its reasoning or methodology, its finding on liability or on any aspect of the merits of the case, or its decision on costs.[133] The Claimant, which also relies on the dissent in *RDC v. Guatemala*, fails to refer to the majority's decision regarding the second request for rectification,[134] in which the majority emphasized the "very limited nature" of its power under Article 49(2):

> "It was not for the Tribunal to go beyond what Claimant pleaded prior to the Award and consider the mathematical implications of Claimant's approach when Claimant itself did not take them into account. In these circumstances to rectify the Award as requested is not just a simple mathematical operation, it implies the Tribunal accepting a change of pleading in the context of a rectification request. This is beyond the power of the Tribunal under Article 49(2) of the ICSID Convention."[135]

69. According to the Respondent, the Claimant has also misunderstood the rules governing burden of proof.[136] The Respondent submits, relying on the distinction made in legal

---

S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Rectification of the Decision on Annulment of the Ad Hoc Committee, 30 November 2007, Ex. RA-485, paras. 3, 8; *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Rectification of the Award, 20 September 2013, Ex. RA-486, paras. 1.5-1.6, 2.1.1; *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Rectification of Award, 8 June 2000, Ex. RA-487, paras. 8, 16; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Rectification of the Award dated January 31, 2001, Ex. RA-488, paras. 8, 19.

[129] Observations, para. 19.

[130] Observations, para. 20, quoting *Alex Genin et al. v. Republic of Estonia*, ICSID Case No. ARB/99/2, Decision on Claimants' Request for Supplementary Decisions and Rectification dated April 4, 2002, , Ex. RA-479, paras. 19-20.

[131] Observations, para. 20, quoting Daniel Kalderimis, Noah Rubins, Ben Love, ICSID Convention, in CONCISE INTERNATIONAL ARBITRATION (2nd ed., Kluwer Law International 2015), , Ex. RA-470, p. 132.

[132] Rejoinder, paras. 16-18; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Claimant's Request for Supplementation of Award, 18 January 2013, Ex. CA-4.

[133] Rejoinder, para. 18.

[134] Rejoinder, para. 19.

[135] Rejoinder, para. 20, quoting *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Claimant's Request for Supplementation of Award, 18 January 2013, Ex. CA-4, para. 47.

[136] Rejoinder, para. 34, quoting para. 122 of the Reply.

scholarship between the legal and evidential burdens of proof,[137] and the awards rendered in *Soufraki v. Egypt*[138] and *GAMI v. Mexico*, as follows:[139]

> "Claimant ignores the fact that, throughout the case, it bore the legal burden of proof on the issue of the value of the allegedly expropriated assets. That burden did not (and indeed cannot in any circumstances) shift to Respondent. The relevant question is not whether Claimant produced better evidence on this issue than Respondent, but whether Claimant's evidence was sufficient to carry its legal burden on that issue. The Majority determined that it was not."[140]

2.2.2 The Respondent's argument that the Claimant has presented no valid grounds for supplementation or rectification

70. The Respondent contends that, in order to prove that the Supreme Court Directive was expropriatory, the Claimant unsuccessfully seeks "to 'supplement' the value of the assets allegedly expropriated by virtue of the Directive by identifying additional items that it argues were not taken into account by the Tribunal namely, five sea water pumps and a quantity of cement, both of which were supposedly purchased for the Avaza Canal project, and which Claimant asserts have a combined value of 3,280,699 Euros (US$3,918,794);"[141] "to reduce the amount of the delay penalties that were the subject of the court judgments at issue;"[142] and "to challenge certain 'deductions' to the estimated value of the assets allegedly affected by the Directive put forward by Claimant's expert, which the Tribunal applied when it was attempting to arrive at a reasonably plausible valuation of those assets."[143] These deductions include (a) the deduction of USD 1.8 million in respect of discrepancies in the prices of equipment and machinery as reflected in inter-company invoices; (b) the deduction of USD 2.6 million for insurance payments; (c) the appropriate deduction for depreciation; (d) the

[137] Rejoinder, paras. 35-37, referring to Gary B. Born, On Burden and Standard of Proof in BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 43 (Meg N. Kinnear et al. eds., Kluwer Law International 2015), Ex. RA-490, pp. 44, 46, 48-49.
[138] Rejoinder, para. 41, referring to *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, 7 July 2004, Ex. RA-185, para. 62.
[139] Rejoinder, paras. 42-43 referring to *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Final Award, 15 November 2004, Ex. RA-165, paras. 132-133.
[140] Rejoinder, para. 40 (emphasis in original; footnotes omitted).
[141] Observations, para. 27.
[142] Observations, para. 27.
[143] Observations, para. 27.

deduction of USD 1.2 million for assets which the Claimant used after they were allegedly confiscated; and (e) the deduction of USD 23,000 for double counting.

2.2.2.1 The Claimant's claim that seawater pumps and cement should be included in the value of the allegedly expropriated assets is submitted for the first time in this arbitration

71. The Respondent contends that the Claimant never alleged that five seawater pumps and cement were expropriated as a result of the Directive, and never included their value in the quantum it claimed for allegedly confiscated assets.[144] Since the Claimant never submitted this claim for compensation, the Tribunal cannot be blamed for failing to decide it.[145]

72. According to the Respondent, the Claimant is in reality seeking to amend its claim for compensation for allegedly expropriated assets under the guise of a request for a supplementary decision.[146] Indeed, the detailed list of allegedly expropriated items that the Claimant's expert, Mazars, submitted with the Memorial did not include the seawater pumps and the cement. Nor were they identified or valued in the Claimant's claim for compensation for allegedly expropriated assets.[147] These items were also absent from the claim in the Reply on the Merits and Mazars' Second Report.[148]

73. In the Respondent's view, "[i]t would have been easy, and, indeed, necessary, for Mazars to note on its list of expropriated assets for Avaza Canal, or somewhere in its report, that it was intentionally omitting the pumps and cement even though they were also expropriated, if that were the case."[149] It was up to the Claimant and Mazars, not to the Tribunal, to specify what items were to be included or excluded in each of the Claimant's heads of claim.[150] Contrary to the Claimant's allegation, the value of the pumps was not indicated and accounted for elsewhere; the Hill International Second Report discusses the pumps in the section on alleged

[144] Observations, para. 28. See also Rejoinder, para. 49.
[145] Observations, para. 28.
[146] Observations, para. 29.
[147] Observations, para. 30.
[148] Observations, para. 31.
[149] Observations, para. 34.
[150] Observations, para. 34.

"additional work" for the Avaza Canal project, but does not mention their value anywhere.[151] As for the value of the cement, the Hill International Second Report is also the only place where it is discussed, in connection with the "additional works" relating to the Avaza Canal project.[152] The Claimant cannot now claim the cost of cement as damages for a different breach and under a different head of damages.[153] This not only falls outside the realm of Article 49(2) of the ICSID Convention, but also raises an issue of due process since the Respondent never had the opportunity to address this new claim for the value of pumps and cement.[154]

74. Moreover, if the Respondent had to address it now, the Respondent would need to conduct factual investigations, to consult its experts, and to submit factual and legal arguments.[155] The Respondent argues that the Claimant "has not even made a prima facie showing that the pumps and cement were in fact affected by the Directive."[156] Indeed, the Claimant's argument that the omission of the pumps and cement as allegedly expropriated assets was a matter of presentation intended to avoid duplication is contradicted by its own expert according to whom these items should be treated as "consumables" or a cost of the project rather than as assets of the Claimant.[157] According to the Respondent, the Claimant's new claim would require additional investigation and evidence, including a number of discrepancies between the Claimant's allegations and the exhibits it relies upon,[158] and has no place in a rectification or supplementation procedure.[159]

75. The Respondent notes that the Claimant itself has minimized the importance of its request by characterizing it as "secondary." According to the Respondent, this confirms that it should be rejected.[160]

[151] Observations, para. 35.
[152] Observations, para. 36.
[153] Observations, para. 36
[154] Observations, paras. 36-38.
[155] Observations, para. 38.
[156] Observations, para. 39.
[157] Observations, para. 40.
[158] Observations, paras. 42-46.
[159] Observations, para. 47.
[160] Rejoinder, paras. 48, 64.

2.2.2.2 The amount of delay penalties calculated by the Tribunal does not require correction

76. The Respondent contends that the "relatively *de minimis*" difference in amount that the Claimant has identified between the Tribunal's and the Claimant's calculation of the delay penalties, USD 134,924, would not have changed the Tribunal's decision as to the excessive nature of the Directive.[161]

77. In addition, the majority identified two alternate figures for the delay penalties, USD 3,231,898 (including the USD 419,221 for the Abadan School and Abadan Kindergarten projects) and USD 2,812,786 (not including the USD 419,221), which it then used to calculate, "for illustrative purposes," the difference between the "assumed actual value" of the allegedly expropriated assets and the delay penalties.[162] The Respondent argues that the Claimant's proposed "correct amount" (USD 3,096,974) falls within the range of delay penalties identified by the Tribunal.[163]

78. As a result, according to the Respondent, the Tribunal's alleged error does not require correction.[164]

2.2.2.3 The Claimant's arguments regarding the deductions applied by the Tribunal to the estimated value of the assets allegedly affected by the Directive are inappropriate and would not in any event justify a reversal of the Tribunal's decision on expropriation

79. The Respondent contends that the presentation of arguments and evidence by the Claimant was "often incoherent, inconsistent, and incomplete."[165] The Claimant had the burden of providing sufficient evidence to determine the value of the allegedly expropriated assets, which it failed to do.[166] In the absence of a reliable estimate of this value, the Tribunal exercised, in the Respondent's view, "its best judgment […] in order to reach a reasoned

[161] Observations, para. 50.
[162] Observations, para. 50.
[163] Observations, para. 50. See also Rejoinder, para. 69.
[164] Observations, para. 50.
[165] Observations, para. 51.
[166] Observations, para. 52.

decision on the claim for expropriation of such property."[167] It applied all the deductions unanimously, except those relating to the insurance payments.[168]

80. The Respondent further argues that "[e]ven if Claimant's arguments and proposed modifications of the Tribunal's adjustments were appropriate, which they are not, they would not justify a reversal of the Tribunal's decision rejecting the claim for expropriation of the equipment and machinery, under the standards of Article 49(2) or under any standard of fairness and due process."[169]

2.2.2.4 The deduction of USD 1.8 million regarding discrepancies in the prices of equipment and machinery reflected in the inter-company invoices for these items

81. The Respondent argues that the Claimant's position regarding the USD 1.8 million deduction, which was applied by the Tribunal unanimously, ignores one of the criticisms made by Mr Qureshi in his Second Report that there were significant unexplained discrepancies between the value of certain equipment and machinery as reflected in the original supplier invoices and the value of the same items as reflected in the inter-company invoices for these items.[170] While "PwC noted that the net impact of relying exclusively on the original supplier invoices was a valuation which was US$1.8 million higher than previously asserted by Claimant,"[171] the fact remains that the evidence as to the value of the equipment and machinery was unreliable because of the many unexplained discrepancies.[172] The Claimant and its experts, Mazars, failed to address these discrepancies although they had "multiple opportunities" to do so at the hearing and in the post-hearing submission.[173]

82. The Respondent concludes that the Tribunal's substantive finding that the "Claimant has failed to explain or demonstrate on what basis the Tribunal should take into account the

[167] Observations, para. 52.
[168] Observations, para. 53.
[169] Observations, para. 53.
[170] Observations, paras. 54, 56. See also Rejoinder, para. 78.
[171] Observations, para. 56 (emphasis in the original). See also Rejoinder, para. 78.
[172] Observations, para. 56.
[173] Observations, para. 57. See also Rejoinder, para. 80.

prices of inter-company transfers of some of the machinery and equipment"[174] is both correct and insusceptible of being challenged as an "error" within the meaning of Article 49(2) of the ICSID Convention.[175] The Tribunal exercised its judgment on the basis of the evidence and arguments before it.[176]

83. The Respondent also disagrees with the Claimant's position that any adjustments resulting from the inter-company invoices should have been made prior to the adjustment for depreciation.[177] According to the Respondent, addressing this issue would require additional factual and expert evidence, which again shows that the Claimant "failed to carry its burden of proving the value of its equipment and machinery; both the original purchase value, as well as the depreciated value."[178]

2.2.2.5 The deduction of USD 2.6 million for insurance payments

84. The Respondent contends that, contrary to the Claimant's position, the question of insurance arrangements for the allegedly expropriated assets and their impact on the valuation of these assets was raised in both the Counter-Memorial and PwC's First Report.[179] When PwC's Second Report criticized Mazars' own Second Report for apparently not taking into account "insurance cover and potential claims or reimbursement from insurers,"[180] the Claimant and its expert did not respond.[181]

85. Moreover, despite being ordered to produce insurance arrangements during the document production phase, the Claimant failed to do so, with the exception of one brief email, which was not put in the record and was "generated during the course of this Arbitration and specifically during the document production period."[182] The Respondent also points out that the email "does not indicate the identity of the sender […], nor does it identify what lease,

[174] Observations, para. 58, quoting para. 373 of the Award.
[175] Observations, para. 58.
[176] Rejoinder, para. 82.
[177] Observations, para. 59.
[178] Observations, para. 60.
[179] Observations, paras. 62-63. See also Rejoinder, para. 83.
[180] Observations, para. 65, quoting para. 173 of PwC's Second Report.
[181] Observations, para. 66.
[182] Observations, para. 68 (original emphasis omitted). See also Rejoinder, paras. 84-89.

what equipment or machinery, or what insurance arrangement was the subject of this particular email communication."[183] As a result, the Claimant cannot possibly claim that the Respondent was aware that the Claimant's insurance policies did not cover the allegedly expropriated assets or that this email proved this alleged absence of insurance coverage.[184]

86. The Claimant's allegation that it had no opportunity to rebut Mr Qureshi's arguments regarding the insurance arrangements when in reality it failed to do so is, in the Respondent's view, equally baseless.[185] So is the Claimant's attempt to recast the Debt Liquidation Agreement as "positive evidence" that it received no insurance payments when this Agreement was never before identified as being relevant to the issue of insurance payments.[186]

87. The Respondent submits that it is no excuse for the Claimant to argue that the Respondent bore the burden of proof; it did not.[187] The Respondent insists that the Claimant had the burden of proving the value of the allegedly expropriated assets and failed to respond to the Respondent's arguments regarding the insurance arrangements with evidence that the Claimant alone could have had in its possession.[188]

88. Finally, the Claimant's argument that the Tribunal "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 value of the machinery would decline over time, should be rejected.[189] The Respondent underscores that "(i) Claimant never made this argument during the Arbitration, (ii) Claimant never suggested an appropriate rate of depreciation during the Arbitration, and (iii) Claimant never produced the relevant insurance agreements, claims or reimbursement documents which would have permitted the Tribunal to understand the terms of any reimbursement by the insurance

[183] Observations, para. 68.
[184] Observations, para. 69.
[185] Observations, para. 70.
[186] Rejoinder, para. 91.
[187] Observations, para. 71.
[188] Observations, para. 71. See also Rejoinder, para. 90.
[189] Observations, para. 72

companies."[190] The Claimant cannot blame the Tribunal for its own failure to raise arguments and provide evidence on the issue of insurance arrangements and cannot use the rectification procedure to present new evidence post-award.[191]

2.2.2.6 The appropriate deduction for depreciation

89. The Respondent disputes the Claimant's contention (i) that the Tribunal failed to rule on the issue of the amount to be deducted from the value of allegedly expropriated assets owing to depreciation or (ii) that if the Tribunal was not satisfied with the evidence offered by the Claimant, it should have taken steps to remedy this.[192]

90. In the Respondent's view, the Claimant refused throughout the arbitration to acknowledge that depreciation should be taken into account, including at the hearing and in its Post-Hearing Brief.[193] For the Respondent, this is not an issue that the Tribunal failed to decide, but rather one that "Claimant and its expert failed to address with sufficient and reliable evidence, despite having had the opportunity to do so."[194] The Claimant had the legal burden of proving the value of the allegedly expropriated assets and elected to use a methodology that did not account for depreciation, a weakness which the Respondent identified and the Claimant never remedied.[195] The Claimant's reliance on the *Petrolane* case to argue that the Tribunal should have performed its own depreciation calculations is misplaced,[196] including because it is distinguishable from the present one.[197] Similarly, the Claimant's argument that the Tribunal should have appointed an expert overlooks the fact that this is uncommon, discretionary, cannot be done in the context of a rectification, and raises due process issues.[198]

[190] Observations, para. 73.
[191] Observations, paras. 74-75.
[192] Observations, para. 76.
[193] Observations, para. 77.
[194] Observations, para. 78. See also Observations, paras. 79-80 ; Rejoinder, para. 100.
[195] Rejoinder, para. 101.
[196] Rejoinder, para. 103.
[197] Rejoinder, paras. 104-106.
[198] Rejoinder, paras. 107-108.

91. According to the Respondent, the Claimant also erroneously asserts that the Tribunal made a deduction of USD 6.3 million to calculate the value of the allegedly expropriated assets;[199] the Tribunal never used this figure in its calculation.[200] Instead, the Tribunal adopted "for argument's sake" the value of USD 10 million which the Claimant's expert proposed at the hearing as the depreciated value of those assets.[201] The Tribunal then held that "the evidence before the Tribunal suggests that the depreciated value of the assets was substantially less than USD 10 million […]."[202] In support of this proposition, the Tribunal referred to PwC's Second Report, which merely referred to "evidence in the record that a significant portion of the equipment and machinery included in Claimant's expropriation claim was more than four years old, and that this was another reason why Claimant's expert's US$10 million figure was unreliable."[203] The Respondent stresses that the Tribunal's valuation was not designed to be a precise quantitative exercise, but was used "to make a qualitative judgment as to whether that Directive was so 'excessive' as to be considered an 'expropriation' in violation of the Treaty."[204]

92. The Respondent concludes that there is no basis to make any supplementary decision on the issue of the appropriate deduction for depreciation. The Tribunal has already decided this issue.[205]

2.2.2.7 The deduction of USD 1.2 million for assets which were used by the Claimant after the alleged confiscation

93. The Respondent contends that the Claimant's pleadings on the original value of the allegedly confiscated assets were deficient, and evidence as to the appropriate rate of depreciation was absent.[206] The Respondent points out that, "[i]n these circumstances, it is difficult to fault the Tribunal for taking the assumed depreciated value of Claimant's equipment and

[199] Observations, paras. 81-82
[200] Observations, para. 85. See also Rejoinder, para. 97. The Respondent requests that the Claimant's insistence on maintaining this frivolous claim for rectification be reflected in the Tribunal's decision on costs.
[201] Observations, para. 82.
[202] Observations, para. 83, quoting para. 375 of the Award.
[203] Observations, para. 85. See also Rejoinder, para. 99.
[204] Observations, para. 86. See also Rejoinder, para. 67.
[205] Observations, para. 87.
[206] Observations, para. 89.

machinery allegedly confiscated, precisely because it had no other number, and applying the accepted deductions to that amount."[207] Far from being a request for the rectification of a clerical or arithmetical error, the Claimant's request would imply a reconsideration of the merits, which Article 49(2) does not allow.[208]

2.2.2.8 The deduction of USD 23,000 for double counting

94. The Respondent argues that, while the Claimant blames the Tribunal for erroneously "deducting USD 23,000 for alleged double counting of assets from already depreciated costs,"[209] the Tribunal was not in a position to make calculations in the way the Claimant suggests 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."[210]

95. According to the Respondent, the proposed "correction" thus cannot be made and even if it could, it would not justify a reversal of the Tribunal's decision on the Claimant's expropriation claim.[211]

2.2.3 The Respondent's Request for Relief

96. In its Observations, the Respondent requests that, for the reasons set out in the Observations, the Claimant's Request "should be denied and Claimant should be ordered to pay the legal fees and costs incurred by Respondent in connection with the Request."[212] The Respondent reiterated the request in its Rejoinder without any modifications.[213]

[207] Observations, para. 90.
[208] Observations, para. 90.
[209] Observations, para. 91, quoting para. 67 of the Request.
[210] Observations, para. 91.
[211] Observations, para. 91.
[212] Observations, para. 92.
[213] Rejoinder, para. 111.

3 THE TRIBUNAL'S ANALYSIS

97. The relevant legal provisions governing supplementary decisions and rectification of errors by ICSID tribunals are Article 49(2) of the ICSID Convention and ICSID Arbitration Rule 49. Article 49(2) of the ICSID Convention provides:

> "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. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered."

98. As set out above, the Claimant requests that the Tribunal make a supplementary decision to resolve a question that the Tribunal allegedly omitted to decide in the Award, and that it correct certain errors in the Award that require rectification.

99. The procedure governing the submission, receipt and processing of requests for a supplementary decision or for the rectification of an award is set out in ICSID Arbitration Rule 49 ("Supplementary Decisions and Rectification"), which provides:

> "(1) Within 45 days of the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:
>
> (a) identify the award to which it relates;
>
> (b) indicate the date of the request;
>
> (c) state in detail:
>
> (i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and
>
> (ii) any error in the award which the requesting party seeks to have rectified; and
>
> (d) be accompanied by a fee for lodging the request.
>
> (2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:

(a) register the request:

(b) notify the parties of the registration;

(c) transmit to the other party a copy of the request and of any accompanying documentation; and

(d) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.

(3) The President of the Tribunal shall consult the members on whether it is necessary for the Tribunal to meet in order to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration.

(4) Rule 46-48 shall apply, *mutatis mutandis*, to any decision for the Tribunal pursuant to this Rule.

(5) If a request is received by the Secretary-General more than 45 days after the award was rendered, he shall refuse to register the request and so inform forthwith the requesting party."

100. The Tribunal has provided the Parties with an opportunity to file observations pursuant to ICSID Arbitration Rule 49(3), and has applied ICSID Arbitration Rules 46-48, *mutatis mutandis*, in preparing this decision, as required by ICSID Arbitration Rule 49(4).

101. The Tribunal will address each of the Claimant's two requests in turn below.

3.1 The Claimant's Request for Supplementary Decision

102. According to Article 49(2) of the ICSID Convention, the Tribunal "may […] decide any question which it had omitted to decide in the award" in a supplementary decision. Such a decision "shall become part of the award and shall be notified to the parties in the same manner as the award." The language used in Article 49(2) ("may") suggests that the tribunal may decide, in its discretion, whether a supplementary decision is required or indeed appropriate. This is the position adopted by other ICSID tribunals.[214]

[214] See, *e.g.*, *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, Exhibit CA-4, para. 39 ("The Tribunal observes that the Parties are in agreement that the Tribunal has discretion as to whether or not to supplement an award under the terms of Article 49(2) of the ICSID Convention. The term 'may' leaves no doubt that this is the case when the Tribunal has omitted to decide a question submitted to it.")

103. The Tribunal notes that the scope of Article 49(2) of the ICSID Convention is limited. The provision provides a mechanism to remedy "inadvertent omissions and minor technical errors in the award," but "[i]t is not designed to afford a substantive review or reconsideration of the decision;" rather its purpose is to "enable[] the tribunal to correct mistakes that may have occurred in the award's drafting in a non-bureaucratic and expeditious manner."[215] This position has been confirmed by ICSID tribunals, and by the *ad hoc* committee in V*ivendi v. Argentina*, which stressed that:

> "[I]t is important to state that that procedure [i.e. supplementation and rectification], and any supplementary decision or rectification as may result, in no way consists of a means of appealing or otherwise revisiting the merits of the decision subject to supplementation or rectification."[216]

104. The Claimant requests that the Award be supplemented. According to the Claimant, the Tribunal's decision on the Claimant's expropriation claim relating to the assets allegedly confiscated as a result of the Supreme Court Directive only considered the value of "all equipment and machinery," even though the Directive applied to "all equipment and materials." The Claimant contends that the Tribunal in particular failed to take into account five seawater pumps allegedly confiscated by the Customs Authority pursuant to the Directive, and a "significant amount of" cement that was similarly said to have been confiscated at the sea port of Turkmenistan pursuant to the Directive.

105. The Claimant explains that the relevant invoices were provided in the Second Report of Hill International and amount to over EUR 3 million, and that "[t]he Tribunal likely missed these amounts because the values were presented with respect to the Avaza Canal project."[217] However, according to the Claimant, this was merely "a matter of presentation" in order to avoid duplication, referring to Mr Almaci's explanations at the hearing.[218] The Claimant

[215] Christoph Schreuer, with Loretta Malintoppi, August Reinisch and Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY (Cambridge University Press, 2d ed. 2009), Ex. RA-469, pp. 849-50.
[216] *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 dated May 28, 2003, Ex. RA-473, para. 11 (footnote omitted).
[217] Request, para. 21.
[218] Transcript, Day 10, pp. 66-67.

notes that its counsel also mentioned at the hearing that "the Arbitral Tribunal could use the amounts quantified by Hill and Mazars to determine the value of what was expropriated."[219]

106. As summarized above, the Respondent argues that the Claimant's argument constitutes a "new claim."[220] According to the Respondent, the Claimant "never once asserted – let alone proved – that these items were expropriated as a result of the Directive, nor did Claimant include the value of these items in the quantum it claimed for allegedly confiscated assets."[221] The Respondent contends that the Claimant has not even made a *prima facie* showing that the pumps and cement were in fact affected by the Directive; indeed, the evidence suggests that there were only three seawater pumps, and that the Claimant had already invoiced the contractual counterparty for them. In other words, the seawater pumps were not assets but consumables and "were incorporated into the project and were billed to the Contractual Counterparty."[222] According to the Respondent, the same applies to the cement.[223]

107. The Tribunal has carefully reviewed the Parties' submissions and evidence, including expert reports, in order to determine whether it omitted to decide a "question" relating to the Claimant's confiscation claim. It has concluded that the claims for the seawater pumps and cement were not presented on the basis of these having been expropriated by the Supreme Court Directive; the Parties did not address the claims as such and accordingly the Tribunal did not omit deciding the issue.

108. As a preliminary matter, the Tribunal notes that while the Claimant points out that the Supreme Court Directive prevented it from taking "equipment and <u>materials</u>" out of Turkmenistan (and not "equipment and machinery"), the Claimant argued throughout the arbitration that its claim was for confiscation of "machinery and equipment" and "confiscated assets," and that it never articulated a claim in its legal submissions for expropriation or confiscation of "materials."[224] More specifically, neither the seawater pumps nor the cement

[219] Request, para. 21, referring to Transcript, Day 1, p. 204, lines 6-12.
[220] Observations, Part III.A.
[221] Observations, para. 28.
[222] Observations, para. 43 (original emphasis omitted).
[223] Observations, para. 45.
[224] Thus, the Claimant's Memorial contained a heading that read "Respondent Unfairly Confiscated the Machinery and Equipment of Claimant," and the Reply Memorial on the Merits and Counter-Memorial on Jurisdiction ("Reply

at the sea port were ever mentioned by the Claimant in any of its legal submissions or on any list of expropriated assets as being among the assets that allegedly had been confiscated.

109. In this connection, the Tribunal notes that the Claimant's Memorial does not list the allegedly confiscated machinery and equipment,[225] but refers to the First Mazars Report, which does list them, under the heading "Confiscated Machinery and Equipment" and "Appendix 1 – List of Confiscated Machinery and Equipment." The lists in Appendix 1, which are organized per construction site, have not been translated but the headings are in English and only refer to "machinery and equipment." As far as the Tribunal can discern, Appendix 1 does not list the five seawater pumps or the cement. Moreover, while the "pumps" item is mentioned in the Memorial,[226] this is in connection with the Claimant's claim for breach of the fair and equitable treatment ("**FET**") standard and not in relation to the confiscation claim.[227]

110. Similarly, the Claimant's Reply Memorial states that "the confiscated machinery and equipment were identified as per construction sites."[228] It again refers to the First Mazars Report, which as noted above, does not mention seawater pumps and cement. While "pumps" are also mentioned in the Reply Memorial, this is again in connection with the FET claim.[229] The Second Mazars Report corrects the amount claimed and relies on original supplier invoices instead of the inter-company transfer invoices, which increases the amount claimed from USD 12.228 million to USD 13.990 million; Appendix D to the report then lists the confiscated machinery and equipment for which original invoices had been provided.

Memorial") contained a heading that read "Respondent Unlawfully Expropriated Machineries and Equipment of Claimant in Violation of Article III of the BIT in Turkmenistan." The argument under these headings set out the Claimant's substantive claims and its Reply to the Respondent's Counter-Memorial on the Merits. Moreover, while the factual section in the Reply Memorial did also contain a heading "Respondent Has Confiscated Machineries, Equipment and Significant Amount of Construction Materials of Claimant without any Legal Basis and Compensation," the argument under this heading related to the question of whether the Claimant's claims were treaty claims or contract claims. The substantive discussion of the claim for expropriation only mentioned "machinery and equipment."

[225] Memorial, p. 82 et seq.

[226] See Memorial, para. 141.

[227] See heading III.C.1.c (sub-heading "Respondent arbitrarily forced and pressurized the Contracting Authorities not to approve and make the progress payments without President's prior consent and therefore made the completion of some construction projects impossible for Claimant.")

[228] Reply Memorial, p. 354 et seq.

[229] See Reply Memorial, paras. 432 and 485 (sub-headings III.D.2.a(i) and (v)).

The items on the list are not translated, but the heading again reads "List of Confiscated Machinery & Equipment." The Claimant has not argued (in the arbitration or in the present proceedings) that the seawater pumps and cement are among the listed items.[230]

111. As pointed out by the Claimant, the seawater pumps were included in the Hill International Report, which dealt with the cost claim (unpaid progress payments, delay penalties, retention, and costs for additional works).[231] The Claimant's Reply Memorial takes these figures and claims them under the sub-heading "Value of additional works and cost overruns unpaid," under the main heading "Value of the works completed but not paid."[232] "Cement" was also mentioned in the Hill International Report, as an item under the heading "additional works,"[233] and it was also claimed in the Reply Memorial under the sub-heading "Value of additional works and cost overruns unpaid," under the main heading "Value of the works completed but not paid."[234] "Cement" left at the Avaza Canal project site was further mentioned in the Claimant's Post-Hearing Brief, but again in connection with the FET claim for additional costs.[235]

112. The Claimant did not therefore expressly include the seawater pumps and cement in its confiscation claim.

113. The Tribunal is also unable to agree with the Claimant's argument that the inclusion of the seawater pumps and the cement in the cost claim and not as part of the confiscation claim was merely a matter of "presentation." The Claimant refers to the explanation provided by Mr Almaci at the hearing.[236] It is clear, however, that he stated he had been instructed to put the confiscated assets in a separate claim from the cost claim, and that this made sense from an accounting point of view as pumps were considered consumables (rather than İçkale's assets) as they were incorporated into the works and thus became a cost of the

[230] "Pumps" are mentioned in passing at para. 57 of the Second Mazars Report, which deals with Mazars' "responses to PwC report" (under the heading "Status of Completion of Projects/Progress Report").
[231] See Second Hill International Report, Appendix M, paras 36-38.
[232] See Reply Memorial, para. 1185.
[233] See Second Hill International Report, Appendix M, paras 39-40.
[234] Reply Memorial, paras. 1176-1185.
[235] Claimant's Post-Hearing Brief, para. 342.
[236] Request, para. 21.

project.[237] Consequently, the distinction made by the Claimant and its experts between a cost claim and a confiscation claim was not merely a matter of "presentation" as the Claimant suggests, but reflective of a distinction between materials (consumables) which would be incorporated into the project (and therefore would have to be accounted for as costs), on the one hand, and assets that İçkale had purchased and that would not be incorporated into the project (and therefore would be accounted for as İçkale's assets), on the other.[238] While this does not mean that materials could not have been confiscated before they were incorporated into the works, this is not a claim the Claimant ever advanced. In this context, counsel for the Claimant's argument at the hearing, to the effect that the Tribunal "could use the amounts quantified by Hill and Mazars to determine the value of what was expropriated,"[239] does not change the fact that the Claimant never presented and quantified the five seawater pumps and the cement allegedly left at the sea port as part of its claim for assets confiscated as a result of the Directive. In order to make such a claim, the Claimant should have presented evidence as to the value of the pumps and cement at the time of the alleged taking and as to their status (e.g., whether or not they were incorporated into the Avaza Canal project at the time of the Supreme Court Directive), and to explain the basis for the application of the Directive to them. The evidence presented to the Tribunal did not address these details.

114. The Tribunal finds that the Claimant's request for a supplementary decision to deal with "any question which it had omitted to decide in the award" is not, in substance, a request for a supplementary decision. Rather it constitutes an attempt to make a new claim, one that was not made in the arbitration. The Tribunal cannot assess now what the Claimant would have been able to prove as to their value, whether or not they were incorporated into the Avaza Canal project, and whether they were within the reach of the Supreme Court Directive. The Tribunal would also have to hear the Respondent's arguments and evidence on the issue before it could decide. None of this occurred because the claim was not presented. The Tribunal therefore could not have omitted, and did not omit, to decide the issue in the Award.

[237] Transcript, Day 10, pp. 65-66.
[238] Indeed, the Claimant recognizes this in its Reply: "[D]epreciation should not be calculated in cement and pumps since depreciation is only applicable to 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." (Reply, para. 151).
[239] Request, para. 21, referring to Transcript, Day 1, p. 204, lines 6-12.

115. The Claimant's request for a supplementary decision therefore must be dismissed.

3.2 The Claimant's Requests for Rectification of Errors

116. According to Article 49(2) of the ICSID Convention, upon a request of a party made within 45 days after the date on which the award was rendered, an ICSID tribunal "shall rectify any clerical, arithmetical or similar error in the award." The language ("shall rectify") suggests that, unlike a supplementary decision, an ICSID tribunal has no discretion as to whether or not to make a correction; rather, "any clerical, arithmetical or similar" errors "shall" be rectified. Like a supplementary decision dealing with a question that was omitted from the award, such a decision "shall become part of the award and shall be notified to the parties in the same manner as the award."

117. As noted above, Article 49(2) of the ICSID Convention provides a remedy for "minor technical errors in the award" and "is not designed to afford a substantive review or reconsideration of the decision but enables the tribunal to correct mistakes that may have occurred in the award's drafting in a non-bureaucratic and expeditious manner."[240] Like a request for supplementary decision, rectification "in no way consists of a means of appealing or otherwise revisiting the merits of the decision subject to […] rectification."[241]

118. Moreover, as explained by the *Vivendi ad hoc* committee:

> "A review of pertinent arbitral awards illustrates that the availability of the rectification remedy afforded by Article 49(2) depends upon the existence of two factual conditions. First, a clerical, arithmetical or similar error in an award or decision must be found to exist. Second, the requested rectification must concern an aspect of the impugned award or decision that is purely accessory to its merits. Simply stated […], Article 49(2) does not permit the 'rectification' of substantive findings made by a tribunal or committee or of the weight or credence accorded by the tribunal or committee to the claims, arguments and evidence presented by the parties. The sole purpose of a

[240] See para. 103 above.
[241] *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 dated May 28, 2003, Ex. RA-473, para. 11 (footnote omitted).

> rectification is to correct clerical, arithmetical or similar errors, not to reconsider the merits of issues already decided."[242]

119. Similarly, the *RDC v. Guatemala* tribunal stressed that "[t]he power of the Tribunal to rectify the Award is limited. The threshold question is whether the rectification requested falls within the parameters of Article 49(2) of the ICSID Convention."[243]

120. All of the Claimant's several requests for rectification relate to its claim for the alleged confiscation of its machinery and equipment, which was dealt with by the Tribunal in paragraphs 364-76 of the Award. According to the Claimant, "the Tribunal makes a number of gross errors in its calculations" of the difference between the value of the allegedly confiscated assets and the delay penalties.[244] It asserts that these include using an incorrect amount for delay penalties; an "obvious error" with respect to whether inter-company transfers represent a positive or negative value; an incorrect deduction for insurance payments; an incorrect deduction of depreciation; a "mathematically-incorrect deduction" of USD 1,200,000 from an already depreciated amount; and a "mathematically-incorrect deduction" of USD 23,000 from an already depreciated amount.[245]

121. The Tribunal recalls that the Claimant's confiscation claim was dismissed because the Tribunal found, by majority, that the Claimant had "failed to prove that the Supreme Court's Directive was excessive and as such expropriatory."[246] Accordingly, the Tribunal's decision on the Claimant's confiscation claim turned on the question of whether the evidence before the Tribunal established that the Supreme Court Directive had an expropriatory effect, that is, whether an expropriation had taken place. This is a qualitative determination as to the application of the law to the facts; it is not a decision on quantification of compensation for expropriation that the Tribunal has determined to have taken place. Consequently, as the purpose of the calculations in paragraphs 364-76 of the Award was to enable the Tribunal to determine whether the evidence before it established that the Supreme Court Directive could

[242] *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 dated May 28, 2003, Ex. RA-473, para. 25.
[243] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Claimant's Request for Supplementation of Award, 18 January 2013, Ex. CA-4, para. 46.
[244] Request, para. 23.
[245] Request, para. 23.
[246] Award, para. 375.

be characterized as being excessive and, as such, as having an expropriatory effect, the calculations were necessarily only indicative, or approximations, and were not intended to provide a precise quantification for the purposes of formal valuation of either the value of the assets or any of the adjustments accepted or not accepted by the Tribunal.

122. It also should be noted that a precise quantification of the difference between the delay penalties and the value of the allegedly confiscated assets was not possible as many of the adjustments were approximations to begin with.[247] In the circumstances, the Tribunal concluded that the evidence before it suggested that "the depreciated value of the assets was substantially less than USD 10 million, the amount mentioned by Mr Almaci," which the Tribunal used as a basis of its approximative calculations. The Tribunal therefore could "not accept that this amount represents the real value of the Claimant's machinery and equipment at the time of their alleged confiscation."[248]

123. The majority of the Tribunal would have had to tackle these evidentiary issues and seek to quantify the difference between the delay penalties and the value of the allegedly confiscated assets only if it had first determined that the evidence before it indeed established that the Supreme Court Directive was excessive. Moreover, had the majority of the Tribunal concluded on the basis of the evidence that the Supreme Court Directive was indeed *prima facie* excessive in the sense that the total depreciated value of the Claimant's machinery and equipment exceeded the amount of the delay penalties, the question would also have arisen whether this finding, in itself, would have been sufficient to establish that the measure had a confiscatory effect and that an expropriation had taken place.[249] The majority of the Tribunal never reached these questions because it concluded that "the Claimant had failed to prove that the Supreme Court Directive was excessive and as such expropriatory."[250]

[247] Thus, for instance, the difference between the original supplier invoices and the inter-company invoices, the value of the assets transferred to third parties, and the value of the leased assets and the depreciated value of the machinery and equipment could not be reliably quantified in the first place.
[248] Award, para 375.
[249] The Tribunal notes, in this connection, that there were indications on the record that some of the assets may have been sold or rented to third parties in Turkmenistan, or were still being used by the Claimant. See paras. 144 163 and 372 (last bullet point) of the Award.
[250] Award, para. 375.

124. Keeping in mind these observations on the nature of the Tribunal's findings, the Tribunal will address each of the Claimant's requests below in turn.

3.2.1 Delay penalties

125. The Claimant argues that the total amount of delay penalties imposed by the Turkmen Arbitration Court was "incorrectly stated" in the Award. According to the Claimant, the amount should be USD 3,096,974 and not USD 3,231,898 (which is the total of the two figures mentioned in the Award, USD 2,812,786 and USD 419,112), i.e., there is a difference of USD 134,924. The Claimant provides in its Request a table demonstrating the difference between the Tribunal's calculations and its own calculations, citing to the relevant evidence.[251] The Claimant requests that the error be corrected, and that "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 calculations."[252]

126. The Respondent states that "the relatively *de minimis* 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."[253] Moreover, according to the Respondent, the Tribunal merely established, "for illustrative purposes," a possible range of delay penalties (from USD 2,812,786 to USD 3,231,898), without making a definitive determination as this was not required.[254]

127. The Tribunal notes that the difference between the Claimant's calculations and the amounts mentioned in the Award is indeed *de minimis* (USD 134,924) and concludes that it would not require correction of the Award even if the Claimant's figures were correct. Moreover, as explained above, the calculations made by the Tribunal in paragraphs 371-76 of the Award were only approximations and also involved currency conversions from Euro and Manat into US Dollars.

[251] Request, para. 26.
[252] Request, para. 28.
[253] Observations, para. 50.
[254] Observations, para. 50.

128. In any event, the Claimant's table appears to be incorrect as it omits the tax ("state duty") in the amount of USD 165,082 imposed by the Arbitration Court.[255] The delay penalty mentioned for item 2 in the Claimant's list ("Decision of Arbitration Court of Turkmenistan dated 22 April regarding Ashgabat Cinema Project TNG-I 16") is also incorrect; it should be USD 621,000 and not 621,500.[256] These corrections not only reduce the difference between the Claimant's and the Tribunal's totals to USD 30,658; they also mean that the Claimant's total is slightly higher than that of the Tribunal (which further reduces the difference between the delay penalties and the value of the allegedly confiscated assets, as calculated by the Claimant). The remaining difference (USD 30,658) appears to be a result of different exchange rates used for currency conversion for the Euro and Manat amounts.

129. For these reasons, the Tribunal concludes that there is no error in the Award relating to the amount of delay penalties that requires rectification. The Claimant's request for rectification on this issue must be dismissed.

3.2.2 Inter-company transfers

130. The Claimant argues that the Tribunal incorrectly deducted USD 1,800,000 for inter-company transfers from the value of the allegedly confiscated assets.

131. The issue was addressed in paragraphs 372 and 373 of the Award. Referring to the evidence of Mr Qureshi, the Respondent's expert, the Tribunal noted that, according to Mr Qureshi, "[b]ased on inter-company invoices, some of the assets were sold by the Claimant to its Turkmen branch at prices that were, in total, approximately 1.8 million higher than the prices reflected on the original supplier invoices."[257] The Tribunal then concluded that "the Claimant has failed to explain or demonstrate on what basis the Tribunal should take into account the price of inter-company transfers of some of the machinery and equipment, which were USD 1.8 million higher than the prices at which they were acquired from third parties."[258]

[255] See Exhibit AI-89.
[256] See Exhibit AI-89.
[257] Award, para. 372.
[258] Award, para. 373.

132. The Claimant argues that the Tribunal misstates Mr Qureshi's criticism as the value of the original supplier invoices was in fact USD 1.8 million higher than the inter-company invoices, and "Mr Qureshi did not claim that USD 1.8 million should be subtracted from the amount shown by the supplier invoices."[259] The Claimant requests 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."[260]

133. The Respondent argues, in response, that the Claimant ignores that "the point of PwC's criticism was that Claimant's evidence regarding the value of the equipment and machinery reflected in different invoices for the same items was inconsistent, incomprehensible, and therefore unreliable."[261] Although PwC (Mr Qureshi) noted that "the net impact" of relying exclusively on the original supplier invoices "was a valuation which was US$ 1.8 million higher than previously asserted by Claimant, that does not change the fact that the evidence contained unexplained discrepancies, and could therefore not be accepted."[262] According to the Respondent, the Claimant "failed to carry its burden of proving the value of its equipment and machinery, both the original purchase value, as well as the depreciated value."[263]

134. The Tribunal notes that there is a drafting error in the Award, but it relates only to the manner in which the issue is described: the relationship between the two figures (original supplier invoices and the inter-company invoices) is inaccurately described in that the inter-company invoices were USD 1.8 million lower than the original supplier invoices, and not vice versa. While the Tribunal agrees that the drafting error must be corrected, this has no effect on the decision of the majority of the Tribunal, which took the lower of the two values, based on Mr Qureshi's evidence. The issue arose as a result of the change in the Claimant's approach to the valuation of the allegedly confiscated assets in the course of the proceeding. While the Claimant initially relied on the inter-company invoices that showed the lower value (USD 12.228 million), it subsequently amended its claim and relied on the original supplier invoices (to the extent they were available), which increased the amount claimed from some

[259] Request, para. 34 (original emphasis omitted).
[260] Request, para. 36 (original emphasis omitted)..
[261] Observations, para. 56.
[262] Observations, para. 56.
[263] Observations, para. 60.

USD 12.228 million to USD 13.990 million. As noted by Mr Qureshi in the relevant part of his Second Report (on which the Tribunal relied; see para. 372 of the Award):

> "There is no consistency between the original supplier prices (now relied upon by Mazars) and the prices used on the inter-company invoices from Ickale to its branch in Turkmenistan (relied upon in the First Mazars report):
>
> (i) 39 assets were sold by Ickale to its Turkmen branch for a higher price than for which they were originally purchased. The item with the highest difference is a crane (model 1995), where the import price of USD 135,000 contrasts with the original purchase price of USD 24,000 (excluding VAT), which suggests a 462.5% increase; and
>
> (ii) 21 assets were sold to the Turkmen branch for a lower price compared to the original purchase price. The item with the highest difference is a Caterpillar excavator (model 2001), where the import price of USD 460,000 contrasts with the original purchase price of USD 856,000 (excluding VAT), which suggests a 46.3% decrease.
>
> 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). I believe this should have been analysed in detail as the differences may be due to partial depreciation of the assets already at the time of the import to Turkmenistan, technical enhancements to the machinery, adjusting prices for customs declarations or other factors. However Mazars do not appear to address any of the differences and therefore my questions from my first report remain unanswered."[264]

135. Accepting Mr Qureshi's evidence that the Claimant's valuation was unreliable, the Tribunal concluded that "the Claimant has failed to explain or demonstrate on what basis the Tribunal should take into account [the prices at which the some of the machinery and equipment were acquired from third parties, which were USD 1.8 million higher than the prices of inter-company transfers]."[265] Due to the drafting error noted above, the conclusion was incorrectly described in the Award, and it needs to be corrected. The Tribunal considers that such a drafting error may be considered a "clerical" or "similar" error (i.e., an error similar to a clerical or an arithmetical error) within the meaning of Article 49(2) of the ICSID Convention. The correction does not require any consequential changes to either the

[264] Second Report of Abdul Sirshar Qureshi, para. 157 (footnotes omitted).
[265] Award, para. 373. The drafting error in the Award is corrected in the bracketed part.

majority's Award or to Ms Lamm's Partially Dissenting Opinion, which relied on the same number to reach a different conclusion.

136. Consequently, the following correction must be made to paragraph 372 of the Award:

(a) Paragraph 372 of the Award reads:

> "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;"

(b) Paragraph 372 of the Award is corrected to read:

> "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;"

137. Similarly, the following correction must be made to paragraph 373:

(a) Paragraph 373 of the Award reads:

> "Second, 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, which were USD 1.8 million higher than the prices at which they were acquired from third parties."

(b) Paragraph 373 of the Award is corrected to read:

> "Second, the Claimant has failed to explain or demonstrate on what basis the Tribunal should take into account the prices at which some of the machinery and equipment were acquired from third parties, which were USD 1.8 million higher than the prices of inter-company transfers."

3.2.3 Deduction of insurance payments

138. The Claimant argues that the majority of the Tribunal "incorrectly subtracts USD 2.6 million for hypothetical insurance payments that were never made."[266]

139. The relevant part of the Award reads as follows:

[266] Request, para. 38.

> "Finally, 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 of 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 event it failed to return them, the evidence indicates that the Claimant would have been able to recover these payments from the insurance."[267]

140. The Claimant contends that, apart from challenging the Claimant's evidence, the Respondent did not submit "anything," and argues that the insurance in any event did not cover confiscations. The Claimant refers, in support, to an email message that it provided to the Respondent in connection with document production;[268] however, this email message is not on record, and in any event, no new evidence could be submitted at this stage of the proceedings.

141. The Claimant also argues that it had no opportunity to comment on Mr Qureshi's Second Report, which was submitted with the Respondent's Rejoinder; that the Tribunal reversed the burden of proof; and that it failed to "ask anything concerning insurance over the entire arbitral proceeding."[269]

142. The Respondent argues, in response, that the Claimant's complaints are another attempt "to make new arguments now, post-Award, which it did not make during the Arbitration."[270] The Respondent notes that the insurance issue was raised by Mr Qureshi already in his first report, and was also addressed by the Respondent in its Counter-Memorial, and was therefore "squarely put in issue in the first round of Respondent's submissions."[271] The Respondent also points out that during the document production phase the Tribunal ordered the Claimant to produce all insurance agreements or arrangements, but the Claimant failed to do so. The

[267] Award, para. 373 (footnotes omitted).
[268] See para. 43 above.
[269] Request, paras. 45-49.
[270] Observations, para. 61.
[271] Observations, para. 63.

only document produced was the email that the Claimant now seeks to introduce in this proceeding, dated 10 January 2013 and thus generated during the arbitration, and which does not prove what the Claimant says it does.[272] The Claimant also had an opportunity to comment on the issue in its Post-Hearing Brief, but did not, even if it did address the lease arrangements.[273] According to the Respondent, the Claimant simply failed to carry its burden of proof, and only has itself to blame.[274]

143. The Tribunal finds that the Claimant's request is not a request to correct a typographical, clerical or similar error. Rather it is in effect a request for reconsideration of the Tribunal's reasoning and evaluation of the evidence that was before the Tribunal, coupled with a complaint as to the manner in which the Tribunal conducted the proceedings. Such matters fall outside the scope of Article 49(2) of the ICSID Convention, and the Claimant's request for rectification must therefore be dismissed.

3.2.4 Incorrect deduction of depreciation

144. The Claimant argues that the Tribunal "failed to determine the precise reduction that it would like to apply to the value of machinery and equipment for depreciation despite the fact that it had all the necessary elements to determine this value, which is a simple calculation."[275] According to the Claimant, "[i]f the Tribunal was not satisfied by the way in which the evidence was presented, it should have asked 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."[276] The Claimant suggests that "[t]he Tribunal could have performed the calculation itself, which is very easy to do today online and requires only inputting a few values."[277]

145. The Claimant further argues that, "[t]o the extent that the value of the machinery and equipment may have been partially determined by the Tribunal," it appears to have "made

[272] Observations, para. 67-68.
[273] Observations, para. 70.
[274] Observations, paras. 70-71, 74.
[275] Request, para. 53.
[276] Request, para. 53.
[277] Request, para. 56.

mathematical errors."[278] The Claimant states that, according to its understanding, the Tribunal 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."[279] According to the Claimant, "[i]f the Tribunal did rely on this USD 6.3 million figure," this would be "an incorrect reading" of Mr Qureshi's report.[280]

146. The Respondent points out that it was the Claimant's case throughout the arbitration that the appropriate valuation should be based on the replacement cost, and that is not necessary to consider depreciation.[281] According to the Respondent, the Claimant "cannot fill a hole in its case today, after apparently deciding that its strategy was ill-advised."[282] It is not the task of the Tribunal to "invit[e] Claimant's expert to provide some depreciation calculations 'later on.'" Indeed, such a step "would have been a gross violation of due process, depriving the Respondent of the opportunity to cross-examine Claimant's expert, or to present its own expert evidence on the issue."[283] Nor is it the task of the Tribunal to "alert Claimant as to the points on which its case is weak or its evidence insufficient."[284]

147. The Tribunal notes that, to the extent that the Claimant complains of the way in which the Tribunal dealt with and evaluated the evidence before it, its request fails to qualify as a request for a clerical, arithmetical or similar error, within the meaning of Article 49(2) of the ICSID Convention. It therefore stands to be dismissed.

148. To the extent that the Claimant complains of an alleged "mathematical error" in the Tribunal's assessment of the evidence relating to depreciation, the Claimant is mistaken. The majority of the Tribunal did not deduct the amount mentioned by Mr Qureshi, USD 6.3 million, from the acquisition value of the machinery; the amount of USD 6.3 million (which represents the value of the assets that were more than four years old at the time of the alleged confiscation) is mentioned in footnote 226 of the Award to support the Tribunal's finding

[278] Request, para. 58.
[279] Request, para. 58.
[280] Request, para. 59.
[281] Observations, para. 77.
[282] Observations, para. 80.
[283] Observations, para. 79.
[284] Observations, para. 80.

that the evidence before it "suggest[ed] that the depreciated value of the assets was substantially less than USD 10 million, the amount mentioned by Mr Almaci."[285] The footnote was merely a comment relating to the reliability of Mr Almaci's evidence on depreciation, not an attempt to calculate the depreciated amount.

149. Consequently, the Claimant's request for rectification relating to the issue of depreciation must be dismissed.

3.2.5 Incorrect deduction of USD 1,200,000 from depreciated amount

150. The Claimant argues 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."[286] According to the Claimant, this is "mathematically incorrect" since it results in a deduction of over 100% of the value of the allegedly transferred assets.

151. The Respondent responds that "it is difficult to fault the Tribunal for taking the assumed depreciated value of Claimant's equipment and machinery allegedly confiscated, precisely because it had no other number, and applying the accepted deductions to that amount."[287] The Claimant's arguments also require the Tribunal "to reconsider the merits of issues already decided."[288]

152. As already noted above,[289] the Claimant's request is based on a misunderstanding of the nature of the decision taken by the Tribunal in paragraphs 364-76 of the Award. The majority of the Tribunal did not seek to quantify a loss incurred by the Claimant as a result of an expropriation that had been found to have taken place; it made a qualitative determination as to whether the Supreme Court Directive was excessive and had a confiscatory effect. Consequently, the Tribunal's calculations were made for this qualitative purpose only and were therefore merely indicative; they were not made for the purpose of quantifying the Claimant's loss. Nonetheless, while the Tribunal considered that there was not sufficiently

[285] Award, para. 375.
[286] Request, para. 65 (original emphasis omitted).
[287] Observations, para. 90.
[288] Observations, para. 90.
[289] See paras. 121-123 above.

reliable evidence before it to determine the precise depreciated value of the allegedly confiscated assets, it did find that this depreciated value was "substantially less" than the amount mentioned by Mr Almaci.

153. In conclusion, the Claimant's request is not a request for a correction of a clerical, arithmetic or similar error. Rather it is a request for reconsideration of the Tribunal's decision on whether the Supreme Court Directive was excessive and as such expropriatory. It too must therefore be dismissed.

3.2.6 Incorrect deduction of USD 23,000 from depreciated amount

154. The Claimant argues that the Tribunal incorrectly deducted the value of USD 23,000 from already depreciated equipment costs, rather than from the cost of the equipment. According to the Claimant, this is "obviously incorrect as a matter of arithmetic."[290]

155. The Claimant's argument here is essentially the same as that addressed in Section 3.2.5 above, and is subject to the same analysis and conclusion. It too must therefore be dismissed, for the reasons set out in Section 3.2.5.

4 COSTS

156. Both Parties request that the Tribunal award the costs incurred by them in connection with these proceedings under Article 49(2) of the Convention.

157. Having considered the Parties' positions, and taking into account the Tribunal's decisions, which resulted in two clerical corrections to the Award, the Tribunal determines that each Party shall bear their legal and other costs and half of the Tribunal's fees and costs and of the administrative expenses of ICSID. The Tribunal's fees and costs and the administrative expenses of ICSID amount to USD 77,952.28.[291]

[290] Request, para. 67.
[291] These costs include estimated charges related to the dispatch of this Decision. Once the case account balance is final, the ICSID Secretariat will provide the Parties with a detailed financial statement, and the remaining balance will be reimbursed to the Parties in proportion to the advances they made.

5 DECISION

158. For the reasons set out above, the Tribunal unanimously decides as follows:

(a) The Claimant's request for supplementary decision is denied;

(b) The Claimant's requests for rectification of the Award are denied, with the exception of the following;

(i) The fourth bullet point in paragraph 372 of the Award is rectified by the substitution of the word "lower" for the word "higher;"

(ii) The fourth sentence in paragraph 373 of the Award is corrected to read:

> "Second, the Claimant has failed to explain or demonstrate on what basis the Tribunal should take into account the prices at which the some of the machinery and equipment were acquired from third parties, which were USD 1.8 million higher than the prices of inter-company transfers."

(c) Each Party shall bear 50% of the administrative expenses of ICSID and of the costs and fees of the Tribunal; and

(d) Each Party shall bear their own legal and other costs.

[signed]

Ms Carolyn B. Lamm
Arbitrator
Date: 25 September 2016

[signed]

Prof. Philippe Sands QC
Arbitrator
Date: 19 September 2016

[signed]

Dr Veijo Heiskanen
President of the Tribunal
Date: 16 September 2016