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Before the Additional Facility of the  
**INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES (ICSID)**

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**MERCER INTERNATIONAL INC.,**  
*Claimant,*

v.

**GOVERNMENT OF CANADA,**  
*Respondent.*

**ICSID CASE NO. ARB(AF)/12/3**

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**CLAIMANT'S OBSERVATIONS CONCERNING CANADA'S 4 JUNE 2008 REPLY  
TO CLAIMANT'S 20 APRIL 2018 REQUEST  
FOR SUPPLEMENTARY DECISION**

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**25 June 2018**

**Arnold & Porter**

**SANGRA MOLLER LLP**  
BARRISTERS & SOLICITORS

**TABLE OF CONTENTS**

	<u>Page</u>
I. MERCER CLAIMED SEPARATE DAMAGES ON ITS G-48-09 DISCRIMINATION CLAIMS .....	1
II. THE TRIBUNAL DID NOT OTHERWISE DECIDE MERCER'S G-48-09 DISCRIMINATION CLAIM IN ITS AWARD .....	3
III. REQUEST FOR SUPPLEMENTARY DECISION.....	5

1. On 20 April 2018, Claimant Mercer International, Inc. (“Mercer”) filed a request for a Supplementary Decision under Article 57 of the ICSID Arbitration Additional Facility Rules (“Article 57”) on Mercer’s discrimination claim under NAFTA Articles 1102 and 1103 with respect to BCUC Order G-48-09 (the “G-48-09 Claim”). Respondent filed its Reply on 4 June 2018. Mercer observes, however, that Respondent has failed to address, much less refute, either of the only two questions posed by Mercer’s 20 April Request. Accordingly, the Tribunal must grant Mercer’s request, and proceed to issue a supplementary decision.

**I. MERCER CLAIMED SEPARATE DAMAGES ON ITS G-48-09 DISCRIMINATION CLAIMS**

2. The first question Mercer’s Request poses is whether Mercer claimed separate damages on its G-48-09 discrimination claim, or whether it waived such claim to damages by contending that the only damages for discrimination it sought were under its claim regarding its BC Hydro-set GBL. In Paragraph 7.40 of the 6 March 2018 Award, the Tribunal stated that “[t]he Claimant does not seek further or separate damages resulting from Order G-48-09 itself,” and then dismissed without deciding that liability claim on the grounds that Claimant’s supposed failure to seek separate damages had rendered the claim “otiose.”<sup>1</sup> The Tribunal thus declined to address Mercer’s liability claim on the merits, because it believed Mercer sought no damages with a nexus to that liability claim.

3. Canada simply reads portions of Mercer’s Reply Memorial out of context. Canada offers no response to Mercer’s contextual explanation of the cited portion of its Reply Memorial,<sup>2</sup> nor does it address Mercer’s unambiguous response to questions at the Hearing, or Mercer’s later-filed Post-Hearing Submission in which, far from claiming it had no damages

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<sup>1</sup> Award, ¶ 7.40.

<sup>2</sup> Mercer 20 April 2018 Request, ¶ 11 n.11.

under its G-48-09 discriminatory treatment claim, it states “that its damages are the same under each measure.”<sup>3</sup>

4. Mercer could not have waived its liability claim under Order G-48-09 without doing so expressly and unambiguously.<sup>4</sup> Mercer did not do so in the cited text in its Reply Memorial, which, in any event, Mercer subsequently clarified not once but twice — at the Hearing, and then again in its post-Hearing Submission. Mercer understands how the Tribunal might have overlooked these two statements, but there can be no excuse for Canada ignoring them after Mercer pointed to both clarifications in its Request.

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<sup>3</sup> Mercer Request, ¶¶ 8-9, quoting Hearing Tr. 2216:4-15, and Claimant’s Post-Hearing Submission (7 January 2016), ¶¶ 3-5.

<sup>4</sup> See *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8 (Excerpts of Decision on Annulment, 22 May 2013) (Sureda, Danelius, Silva Romero), ¶¶ 137–38. The *Libananco* annulment committee explained that lack of perfect clarity in articulating a claim does not constitute waiver of that claim. With regard to counsel’s placement of a request for relief in an annex to a pleading, the committee noted:

While it is unusual that counsel would not seek relief in the Rejoinder in reference to the evidence in Annex I or in a separate request to the Tribunal in the terms expressed substantively in Annex I, the Committee is of the view that the terms of Annex I constituted request to the Tribunal. Therefore, ***there is no basis for Respondent’s argument that Applicant had waived its right to raise its complaint in this proceeding.*** The Committee also considers that the request required a decision or a reply in some other form from the Tribunal.

***The Committee understands that the underlying arbitration proceedings were complex and agrees that Applicant’s request, as a matter of form, could have been presented more explicitly. At the same time, the matter was brought to the attention of the Tribunal in other contexts.*** During the hearing in November 2010, Applicant reminded the Tribunal that, in addition to the request to join liability and quantum, Applicant had made other filings and Applicant’s Petition for Costs of July 1, 2010 retold the story of the surveillance issue as grounds for the petition.

*Id.* (emphasis added); see also *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13 (Award, 27 September 2017) (Lévy, Aynès, Salès), ¶ 324 (“In the opinion of the Tribunal, a waiver by the Respondent of its right to challenge this Tribunal’s jurisdiction cannot be admitted lightly and must be based on a clear and unambiguous statement in this sense by the Respondent.”).

## II. THE TRIBUNAL DID NOT OTHERWISE DECIDE MERCER'S G-48-09 DISCRIMINATION CLAIM IN ITS AWARD

5. The second question posed by Mercer's request is whether — notwithstanding the Tribunal's Statement in Paragraph 7.40 of the Award that it was dismissing Mercer's G-48-09 discrimination claim as "otiose" because Mercer was not seeking "further or separate damages resulting from Order G-48-09 itself" — the Tribunal nonetheless decided the claim it said it did not need to decide. Put another way, the second issue is whether the Tribunal's statement that Mercer's claim was otiose was itself otiose.

6. Whereas Mercer would have thought the answer to this second question would be obvious — why would the Tribunal have stated it did not need to decide an issue if it had elsewhere decided it? — Canada appears to believe otherwise. Mercer therefore briefly addresses Canada's ill-considered *post hoc* interpretation of the Tribunal's decision.

7. *First*, Canada quotes from several summary paragraphs in the award where the Tribunal notes that it has dismissed or rejected Mercer's claims for discrimination relating to Order G-48-09.<sup>5</sup> But all of these statements appear subsequent to Paragraph 7.40, in which the Tribunal dismissed the liability claim based on its belief that Mercer had made no separate claim for damages. None is a separate disposition of the claim on the merits. All are summary paragraphs that tie to the Tribunal's dismissal of the Claim in Paragraph 7.40.<sup>6</sup>

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<sup>5</sup> Canada Reply, ¶ 5 (citing to Award, ¶¶ 7.63, 8.5, 10.5).

<sup>6</sup> With respect to ¶ 7.63 of the Award, the Tribunal's use of the words "has decided" makes plain that the contents of that paragraph only echo what the Tribunal had earlier determined. Paragraph 8.5, in turn, appears in Part VIII of the Award, entitled "Summary of Decisions." Paragraph 10.5 appears in Part X of the Award, the first paragraph of which makes clear that the contents of that section relate to findings and conclusions that the Tribunal has "set out above in this Award."

8. *Second*, Canada refers to “many other instances in the Award where the Tribunal assessed the merits of the Claimant’s G-48-09 claim.”<sup>7</sup> Yet every single one of the “assessments” to which Canada refers are to findings made by the Tribunal in the context of evaluating Mercer’s distinct claims for violation of the standard fair and equitable treatment under NAFTA Article 1105(1).<sup>8</sup> Notably, the Tribunal concluded that because protections against “discriminatory treatment” are addressed in NAFTA Articles 1102 and 1103, claims concerning discrimination cannot also provide a basis for a claim under Article 1105.<sup>9</sup> Thus, the Tribunal drew no conclusions concerning discrimination under NAFTA Articles 1102 and 1103, nor could it have otherwise “squarely decided the issue in substance,” as Canada erroneously asserts.<sup>10</sup> In fact, if the Tribunal had engaged in an analysis and determination of Mercer’s Article 1102 and 1103 discrimination claims with respect to BCUC Order G-48-09, it necessarily would have had to address the issues Mercer raised in making this claim, including (i) *when* exactly Celgar was provided access to replacement electricity while selling its self-generated electricity, as the BCUC granted other pulp mills under its April 2001 Order G-38-01,<sup>11</sup> (ii) *under what terms and conditions* Celgar was given access to replacement electricity while selling electricity, in comparison to the terms and conditions provided other pulp mills (*e.g.*, whether prices for replacement electricity are set based on the utility’s embedded costs or at market prices, and whether the full range of the utility’s resource stack would be available for

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<sup>7</sup> Canada Reply, ¶ 7.

<sup>8</sup> This Section of the Award comprises paragraphs 7.56-7.82, and the paragraphs upon which Canada relies are paragraphs 7.65, 7.66-7.75, and 7.79. *See* Canada Reply, nn. 17-19 and accompanying text.

<sup>9</sup> *See* Award, ¶¶ 7.58, 7.60, and 7.61.6.

<sup>10</sup> Canada Reply, ¶ 12.

<sup>11</sup> *See, e.g.*, Mercer Memorial ¶ 338, 369; Mercer Reply ¶¶ 238, 246, 249; Mercer Post Hearing Brief ¶¶ 5, 7, 54-55, n. 55.

replacement electricity or if certain resources would have to be “segregated” from the utility’s resource stack),<sup>12</sup> and (iii) *why BC Hydro had not activated its Side Letter* with Celgar, and removed the EPA’s prohibition on Celgar selling electricity to third-parties, if, as Canada has contended, the BCUC has in fact approved a mechanism for Celgar to access replacement electricity from Fortis BC and otherwise authorized such third-party sales.<sup>13</sup>

9. Finally, Canada suggests that Mercer improperly is asserting “that tribunals should assess claims for damages where liability has not been established.”<sup>14</sup> But this argument consists of nothing more than a disingenuous mischaracterization of Mercer’s argument. The Tribunal dismissed Mercer’s G-48-09 discrimination claim and *did not reach the issue of liability*, which it found unnecessary as it believed no damages had been claimed. Mercer therefore is asking for a supplementary decision on liability (and damages), and not damages alone as Canada erroneously suggests.

### **III. REQUEST FOR SUPPLEMENTARY DECISION**

10. In light of the existence of a question that the Tribunal omitted to decide, specifically, the Tribunal’s failure to decide the merits of Mercer’s G-48-09 discrimination

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<sup>12</sup> See, e.g., Mercer Memorial ¶¶ 232-233, 356-370, 639; Mercer Reply ¶¶ 228-229, n. 256, ¶ 248; Mercer Post Hearing Brief ¶¶ 52-55.

<sup>13</sup> See, e.g., Mercer Memorial ¶ 338; Mercer Post-Hearing Brief ¶¶ 5, 7, 55, n. 55.

<sup>14</sup> Canada Reply, ¶ 12.

claim, Mercer reiterates its request that the Tribunal issue a supplementary decision under Article 57(a) on Mercer's G-48-09 Claim.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'Harjit Sangra', written in a cursive style.

Michael T. Shor  
Gaela K. Gehring Flores

ARNOLD & PORTER KAYE SCHOLER LLP  
601 Massachusetts Avenue, N.W.  
Washington, D.C. 20001  
United States of America  
Tel. +1 202 942 5000  
Fax + 1 202 942 5999

Harjit Sangra

SANGRA MOLLER LLP  
1000 Cathedral Place  
925 West Georgia Street  
Vancouver, B.C.  
Canada V6C 3L2  
Tel. + 1 604 692 3020  
Fax + 1 604 669 8803

25 June 2018