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

MERCER INTERNATIONAL INC.,
Claimant,

v.

GOVERNMENT OF CANADA,
Respondent.

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

CLAIMANT'S REQUEST FOR SUPPLEMENTARY DECISION

20 April 2018

Arnold & Porter

SANGRA MOLLER LLP
BARRISTERS & SOLICITORS

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1. Claimant Mercer International, Inc. (“Mercer”) respectfully requests a Supplementary Decision under ICSID Additional Facility Article 57 (“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”).

2. Although Mercer expressly requested damages for the G-48-09 Claim, the Tribunal’s Award of March 6, 2018 appears to have omitted deciding that claim. Instead, the Tribunal mistakenly stated that, “the Claimant only claims damages arising from the Respondent’s alleged liability regarding Celgar’s GBL,” and found Mercer’s G-48-09 Claim “otiose” in light of the Tribunal’s dismissal of “Claimant’s case regarding Celgar’s GBL”¹ As Mercer demonstrates below, Mercer’s claim that Order G-48-09 resulted in discriminatory treatment under Articles 1102 and 1103 constitutes an *independent* claim with an *independent* request for relief not dependent on its GBL claim, and thus the Tribunal’s decision on the question of Mercer’s BC Hydro-set GBL did not render Mercer’s G-48-09 Claim moot. The Tribunal thus failed to render a decision regarding Mercer’s G-48-09 Claim, and Mercer respectfully requests the Tribunal remedy that omission by issuing a supplementary decision on that claim.

I. ICSID Additional Facility Rule Article 57: Supplementary Decisions

3. Article 57 of the ICSID Additional Facility Rules provides that either party can request that the Tribunal decide any question whose decision was omitted in the Award:

(1) Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award.

(2) The Tribunal shall determine the procedure to be followed.

¹ Award, ¶ 7.40.

(3) The decision of the Tribunal shall become part of the award and the provisions of Articles 52 and 53 of these Rules shall apply thereto.²

II. Mercer Expressly Presented the Question of its G-48-09 Claim for Decision to the Tribunal

4. Mercer's case included two separate and independent discrimination claims — involving distinct measures — that it contended each resulted in the same or similar damages. The first concerned Celgar's BC Hydro GBL; the second concerned BCUC Order G-48-09. Both affected the quantity of self-generated electricity Celgar was able to sell at market prices, either directly or by limiting the quantity of electricity Celgar could purchase from its utility while it was making such sales. Accordingly, Mercer contended its damages under the two measures were largely the same. And although Mercer sought to avoid duplicative or overlapping damages, it did make clear that if one claim failed, it still maintained its request for full damages under the other claim.

5. As Mercer expressly set forth in both its written and oral submissions, Mercer presented the question of Canada's discriminatory treatment of its Celgar mill under Order G-48-09's net-of-load restriction as a separate, distinct, and independently compensable NAFTA violation.

² ICSID Additional Facility Rules, Article 57. Regarding the standard to be applied to Article 57 requests for supplementary decisions, the tribunal in *ADM v. Mexico* explained that:

In relation to Article 57, the power to supplement is limited to the situation in which the Tribunal omitted 'to decide any question.' Article 57 does not empower a Tribunal to issue a supplementary decision as a means to consider new evidence, to hear new arguments, to rehear an issue, or to modify or supplement its original reasoning. In short, Article 57 does not empower the Arbitral Tribunal to make a new decision, or to modify its existing decision, or even to supplement the reasoning of its existing decision. The applicant under Article 57 must clearly identify a 'question' that the award had failed to decide.

RA-002, *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 (redacted version), 10 July 2008) (Cremades, Rovine, Siqueiros), ¶ 12.

6. In its Memorial, Mercer stated:

The practical effect of these two direct regulatory restrictions on access to embedded cost utility power — the BCUC’s Order G-48-09 and the BC Hydro-set GBL — *together and separately*, is to prohibit Celgar from selling its biomass-based green energy, and realizing revenues from commercial sales of this valuable, premium energy service, unless it is “net-of-load” electricity — electricity it generates over and above its 2007 load.³

7. In his Second Expert Report, Mercer’s quantum expert, Mr. Kaczmarek, explained that:

As the Measures have the same practical impact on Celgar together and separately, we constructed only one But-For Scenario to calculate Mercer’s historical and future cash flows and the fair market value of Mercer’s investment in Celgar as of 31 December 2013 absent the Measures. To calculate damages, we subtracted the cash flows measured under the Actual Scenario from the cash flows measured under the But-For Scenario.⁴

8. At the Hearing (and in response to a question from Professor Douglas), Mercer reiterated its position with respect to the separate and independent nature of its G-48-09 Claim:

Arbitrator Douglas: Just so I’m clear, do your Claims survive if for whatever reason the conduct in relation to the EPA is excluded? So, in other words, are you still claiming on the basis of G-48-09 alone that that would be sufficient to violate the NAFTA provisions?

³ Claimant’s Memorial (16 December 2014), ¶ 6 (emphasis added).

⁴ Second Expert Report of Brent Kaczmarek (16 December 2014), ¶ 16. Mr. Kaczmarek further explained that:

BCUC Order G-48-09 indirectly prevents Celgar from selling its below load self-generation because it cannot access replacement power as FortisBC is prevented from selling embedded-cost utility electricity that includes BC Hydro PPA electricity to self-generators that are selling electricity below their load. Similarly, the BC Hydro EPA’s GBL of 349 GWh/year (set at Celgar’s 2007 load) and its exclusivity provisions prevent Celgar from selling electricity below the assigned GBL to third parties. BCUC Order G-48-09 and the BC Hydro EPA’s GBL (together and separately) have the same effective impact of holding Celgar to a ‘net-of-2007-load’ standard by preventing it from selling 349 GWh/year of its self-generated electricity.

Id. ¶ 16 fn. 7.

Mr. Shor: Yes.

Arbitrator Douglas: All right. Damages would be the same in both cases? Just to follow it through.

Mr. Shor: Yes.

Arbitrator Douglas: Okay.⁵

9. Most recently, Mercer reiterated in its Post-Hearing Submission:

Mercer challenges two measures. ***The first is the BCUC's 6 May 2009 Order G-48-09***, which effectively prohibits Celgar's access to FortisBC embedded cost electricity while Celgar sells its self-generated electricity. All Canadian and third-country-owned BC pulp mills are afforded *some access* to embedded cost electricity to meet their loads, ostensibly based on historical usage, under Order G-38-01. The second measure, contained in Section 7.4 of Celgar's January 2009 EPA with BC Hydro, subject to modification by the parties' Side-Letter, prohibits Celgar from selling its below-GBL electricity — electricity BC Hydro did not procure — to a third-party, utilizing a discriminatory GBL. . . . ***Mercer reiterates that its damages are the same under each measure.***

Damages are the same because, absent the less favorable treatment afforded Celgar by Order G-48-09's net-of-load standard, as compared to Order G-38-01's historical access standard, the discriminatory GBL-based prohibition in Celgar's EPA *would never have taken effect* under the terms of Celgar's Side-Letter with BC Hydro. In the Side-Letter, BC Hydro agreed to *remove* the 2009 EPA's prohibition on below-GBL third-party sales if the BCUC subsequently ruled that Celgar could obtain replacement electricity from FortisBC to meet its load while selling self-generated electricity. Accordingly, if the BCUC in Order G-48-09 had simply extended to FortisBC and Celgar the same Order G-38-01 historical usage standard already applicable to BC Hydro self-generators, *as NAFTA's provisions regarding no less favorable and the minimum standard of treatment required*, then, under the terms of the Side-Letter, Celgar would have been able to sell, to third parties, additional electricity reflecting the difference between the 349 GWh/yr GBL in its EPA and a reasonable, non-discriminatory GBL to be set by FortisBC or the BCUC.⁶

⁵ Tr. 2216:4–15.

⁶ Claimant's Post-Hearing Submission (7 January 2016), ¶¶ 3-5 (bold emphasis added).

10. Significantly, Mercer further noted that “Celgar thus is entitled to damages based on a non-discriminatory GBL on its claims concerning Order G-48-09 *standing alone*.”⁷ For example, the Tribunal could award damages to Mercer based on the Tribunal’s findings that Order G-48-09 denied Celgar access to Fortis BC electricity while selling electricity, to the extent served indirectly by BC Hydro,⁸ preventing — in the absence of any method for FortisBC to hive off its BC Hydro PPA power from Celgar — sales of electricity below its BC Hydro-set 2007 load-based GBL. Under the BCUC Order G-38-01 principles applied to others, Celgar should have been able to sell all electricity below that GBL and above its 2007 or some other historical level of self-supply, with continuing access to BC Hydro power,⁹ as Mercer had sought as one possible measure of damages.¹⁰

III. The Award Omits Deciding Mercer’s G-48-09 claim

11. After citing to portions of Mercer’s Reply Memorial, the Tribunal provides at paragraph 7.40 of the Award:

7.40 Thus, the Claimant only claims damages arising from the Respondent’s alleged liability regarding Celgar’s GBL. ***The Claimant does not seek further or separate damages resulting from Order G-48-09 itself. Given that the Tribunal has dismissed the Claimant’s case regarding Celgar’s GBL (see above), the Claimant’s claim for “discriminatory treatment” under NAFTA Articles 1102***

⁷ Claimant’s Post-Hearing Submission (7 January 2016), ¶ 5 (emphasis in original).

⁸ Award, ¶¶ 3.90-3.94.

⁹ Award, ¶¶ 3.21-3.22 (standard under G-38-01). *See also* Award, ¶ 3.58 (describing BC Hydro standard, which ostensibly also implemented Order G-38-01).

¹⁰ Claimant’s Post-Hearing Submission, ¶ 5 (“Accordingly, if the BCUC in Order G-48-09 had simply extended to FortisBC and Celgar the same Order G-38-01 historical usage standard already applicable to BC Hydro self-generators, *as NAFTA’s provisions regarding no less favorable and the minimum standard of treatment required*, then, under the terms of the Side-Letter, Celgar would have been able to sell, to third parties, additional electricity reflecting the difference between the 349 GWh/yr GBL in its EPA and a reasonable, non-discriminatory GBL to be set by FortisBC or the BCUC.”) (emphasis in original); Claimant’s Reply (6 December 2014), ¶¶ 376, 405 (Figure 24, first line).

*and 1103 regarding BCUC Order G-48-09 becomes otiose. The Tribunal therefore dismisses this claim.*¹¹

12. The Award makes clear that the Tribunal omitted deciding the question of Mercer's claim for damages due to Order G-48-09. Despite Mercer's express claim for damages related to Order G-48-09, the Tribunal stated that Mercer "only claims damages arising from the Respondent's alleged liability regarding Celgar's GBL [and] does not seek further or separate

¹¹ Award, ¶ 7.40 (emphasis added). At paragraph 7.39 of the Award, the Tribunal quotes Mercer's Reply Memorial for the proposition that "Mercer does not claim additional or separate damages resulting from Order G-48-09's net-of-load restriction, because, as Canada correctly contends [REDACTED] Award, ¶ 7.39 (citing to Claimant's Reply, ¶ 205) But Mercer's point in the sentence quoted by the Tribunal was not that Mercer had no damages under its G-48-09 Claim if the Tribunal rejected its BC Hydro GBL claim. To the contrary, Mercer was expressing only the converse — if the Tribunal were to accept its BC Hydro GBL-based claim, Mercer would have no separate and independent damages under its G-48-09 claim.

As the Tribunal will recall, Mercer's GBL claim was that the GBL of 349 GWh/yr set by BC Hydro for Celgar was discriminatorily high. Mercer's G-48-09 claim was that the BCUC subjected Celgar to a discriminatory net-of-load standard for the sales of self-generated electricity. The former measure limited Celgar to selling electricity it self-generated above the *fixed* amount of 349 GWh. The latter measure, on the other hand, contained a *variable* limitation tied to Celgar's load, which limitation would *increase* as Celgar's own electric load would increase, as it did. The specific issue that Mercer was addressing regarding its damages claims in paragraphs 200-205 of its Reply was one raised by Canada concerning the [REDACTED] provision in the Celgar-BC Hydro EPA. That provisio [REDACTED] as Mercer had explained in Reply paragraph 202). Mercer simply was agreeing with Canada, and only "in part" (Reply, ¶ 201), that its claim for damages (under both its GBL claim and its Order G-48-09 claim) was that it could not sell any electricity until first self-supplying at its GBL-set level of 349 GWh, and that it had no separate or independent claim for damages because it had to self-supply *above* 349 GWh/year up to the level of its actual load, whatever level that may be. This is what Mercer stated in its Reply, ¶ 202: "Nonetheless, Mercer agrees with Canada, that, *as a result of* [REDACTED], Mercer is entitled to, and Mercer has sought, only damages arising from its discriminatory, excessive GBL. Specifically, Mercer claims damages only based on Celgar's 349 GWh/year GBL, and not based on its higher current load (most recently 355.8 GWh/year in 2013). *Mercer claims no damages from not being able to sell power below its current load but above its 349 GWh/year GBL; it has capped its damages based on its GBL of 349 GWh/year, and the 2007 load on which it was based.*" (emphasis added).

damages resulting from Order G-48-09 itself.”¹² This is the sole reason the Tribunal expresses for failing to decide Mercer’s G-48-09 Claim.

IV. Request for Supplementary Decision

13. 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 Claim, Mercer respectfully requests that the Tribunal issue a supplementary decision under Article 57(a) on Mercer’s G-48-09 Claim.

Respectfully submitted,



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¹² Award, ¶ 7.40.