

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICA FREE TRADE AGREEMENT (“NAFTA”)

BETWEEN:

MERCER INTERNATIONAL INC.

Claimant

- v -

CANADA

Respondent

(ICSID Case No. ARB(AF)/12/3)

Supplementary Decision

Members of the Tribunal:

Mr V. V. Veeder (President)
Professor Francisco Orrego Vicuña
Professor Zachary Douglas QC

Secretary of the Tribunal:

Ms Alicia Martín Blanco

Date of dispatch to the Parties: 10 December 2018

PUBLIC VERSION

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A: Introduction

1. By its Request dated 20 April 2018 and Observations dated 25 June 2018, the Claimant requests a Supplementary Decision under Article 57 of the ICSID Additional Facility Rules on its claim alleging discrimination by the Respondent under NAFTA Articles 1102 and 1103 with respect to BCUC Order G-48-09 (its “G-48-09 Claim”).
2. By its Reply dated 4 June 2018 and Response dated 16 July 2018, the Respondent denies the Claimant’s Request.
3. On 2 October 2018, the Centre informed the Parties that Professor Orrego Vicuña had passed away. On 11 November 2018, Mr. Veeder and Professor Douglas raised with the Parties the possibility that they might wish jointly to consent (in writing) to receiving the Decision signed by the two remaining members of the Tribunal as if it were a decision by the full Tribunal. The two remaining members of the Tribunal explained the situation as follows:

“The Claimant’s request was discussed by all three members of the Tribunal during a telephone-conference call held on 24 July 2018 based upon a draft decision and draft reasons for that decision prepared by the President of the Tribunal (preceded by earlier deliberations). The conference-call was also attended by the Tribunal’s Secretary. At those deliberations, the three members of the Tribunal reached a consensus, unanimously, on a revised version of the draft decision and draft reasons. This consensus is recalled by each of the two remaining members of the Tribunal and the Secretary.

Subsequently, the revised version was sent to Professor Orrego Vicuña by the Tribunal’s President on 9 August 2018 followed, later, by the final document from ICSID for Professor Orrego Vicuña’s formal signature. There was no response from Professor Orrego Vicuña in regard to his signature; he was by then already unwell; and it remains unknown to ICSID whether or not he signed the final document. In these circumstances, it must be presumed that

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he did not do so. In the meantime, the remaining two members of the Tribunal had formally signed the final document, ready for issuance (subject to Professor Orrego Vicuña's signature) to the Parties."

4. By joint communication submitted on 28 November 2018, the Parties provided their written consent to receiving a decision on the Claimant's request for a supplementary decision signed by Mr. Veeder and Professor Douglas as if it were a decision by the full Tribunal.

B: The Parties' Cases

5. *The Claimant's Case:* In brief, the Claimant contends that it expressly claimed damages for its G-48-09 Claim; the Tribunal's Award of 6 March 2018 appears not to have decided that Claim; instead the Tribunal mistakenly stated: "the Claimant only claims damages arising from the Respondent's alleged liability regarding Celgar's GBL"; and it decided that the Claimant's G-48-09 Claim was "otiose" in light of the Tribunal's dismissal of the "Claimant's case regarding Celgar's GBL . . .". (referring to Paragraph 7.40 of the Award).
6. Paragraph 7.40, with Paragraphs 7.38 and 7.39 of the Award for immediate context, state (with original footnotes here omitted):

"7.38 BCUC G-48-09: As regards the Claimant's claims for 'discriminatory treatment' regarding BCUC G-48-09, the Tribunal can decide these claims with relative succinctness. As regards such treatment, the Claimant's complaint is effectively directed at BC Hydro and the BCUC for precluding Celgar's ability to arbitrage with sales of energy to third parties, including its ability to access (via Fortis BC) BC Hydro's low cost energy. However, the effect of that complaint is limited, according to the Claimant's own case.

7.39 In summary, the Claimant submitted (inter alia) in its Reply that the [REDACTED] does allow Celgar to [REDACTED] [REDACTED] [REDACTED] In its Reply, the Claimant

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pleaded: 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]

[REDACTED]

[REDACTED]

[REDACTED]

"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),¹ the Claimant's claim for 'discriminatory treatment' under NAFTA Articles 1102 and 1103 regarding BCUC Order G-48-09 becomes otiose. The Tribunal therefore dismisses this claim."

7. The Claimant submits that Order G-48-09 was a measure attributable to the Respondent resulting in discriminatory treatment under NAFTA Articles 1102 and 1103; its claim constituted an independent claim with an independent request for damages not dependent upon its GBL claim; and thus the Tribunal's decision on the Claimant's GBL claim did not render its G-48-09 Claim "moot". The Claimant concludes that the Tribunal thus failed to render a decision regarding its G-48-09 Claim. The Claimant requests the Tribunal to remedy that omission by issuing a supplementary decision on that Claim under Article 57 of the ICSID Additional Facility Rules.
8. *The Respondent's Case:* In brief, the Respondent contends that the Tribunal, after reviewing the evidence adduced by the Parties, dismissed the Claimant's G-48-09 Claim under NAFTA Articles 1102 and 1103 in several passages in the Award.
9. As submitted by the Respondent, these passages in the Award included the following (in material part, with footnotes here omitted):²

"7.17 Treatment: It is common ground that the treatments

¹ This is a reference to Paragraphs 7.4 to 7.37 of the Award (The BCUC Order G-48-09 is expressly addressed in Paragraphs 7.4, 7.5, 7.17, 7.23 and 7.33).

² The Respondent also relied upon Paragraphs 7.22, 7.23, 7.33 and 7.66 to 7.75 of the Award.

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at issue under NAFTA Articles 1102 and 1103 are the assessment of “discriminatory treatment” by BC Hydro (which the Claimant compares both to other GBLs and to the load displacement agreements offered to other mills) and the BCUC by Order G-48-09.”

“7.45 Summary: In summary, as regards the Claimant’s claims under NAFTA Articles 1102 and 1103 relating to “discriminatory treatment”, the Claimant has established that Celgar was treated differently from other self-generating pulp mills in the Province, including Howe Sound and Tembec. However, in the different circumstances pertaining to Celgar and each of these other mills, that different treatment is not proven to be “discriminatory treatment” in violation of NAFTA Articles 1102 or 1103. Whilst ostensibly comparators, none were “in like circumstances” for the purposes of NAFTA Articles 1102 and 1103; and their different treatment can best be explained on the basis of their individual circumstances under BC Hydro’s consistent application of its GBL methodology. The Claimant here bore the legal burden of proving its case; the evidential burden never shifted to the Respondent; and the Claimant did not discharge its burden.”

“7.46 Conclusion: For these several reasons, the Tribunal dismisses the Claimant’s remaining claims as regards “discriminatory treatment” under NAFTA Articles 1102 and 1103 (together with, as assumed, NAFTA Article 1503).”

“7.63 As regards the first measure [i.e. BCUC Order G-49-09], the Tribunal has decided that that the Claimant’s claims for ‘discriminatory treatment’ based upon NAFTA Articles 1102, 1103 and 1105(1) in relation to BCUC Order G-48-09 must be rejected.”

“7.79: More specifically [under “The Tribunal’s Analysis on BCUC Order G-48-09”], it is clear from the contemporaneous documents produced by the BCUC, Celgar, FortisBC and BC Hydro that BCUC Order G-48-09 did not ‘prevent [] FortisBC from selling Celgar any embedded cost electricity from Fortis’ pre-existing resource stack while Celgar is selling electricity. [Original Emphasis]. Such prevention is the factual premise for the

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Claimant's claim, as to which it bore the legal burden of proof. Indeed, as the Respondent pointed out, Celgar acquired a right that no other mill in British Columbia had, which was the ability to sell all of its self-generation below its GBL to the market and to supply its Mill from FortisBC resources so long as that supply did not include BC Hydro supply to FortisBC under their PPAs."

"7.84. In summary [under "Conclusion"], for the reasons above, the Tribunal (by a majority) has decided that the Respondent has not violated NAFTA Articles 1102, 1103 and 1105(1). Nor did BC Hydro. It therefore follows that the Respondent also did not violate Article 1503(2) (even assuming its application as a matter of jurisdiction) by failing to ensure that BC Hydro did not act contrary to NAFTA Articles 1102, 1103 and 1105(1)."

"7.85 The Tribunal (by a majority) therefore dismisses on the merits as to liability all the Claimant's remaining claims under NAFTA Articles 1102, 1103, 1105 and 1503. It follows that no issues related to compensation under these provisions requires the decision of the Tribunal and, also, that the Claimant's claims for compensation and its related claims for interest are dismissed."

"8.5 Liability: The Tribunal (by a majority) dismisses the Claimant's remaining claims as to which it has and may exercise jurisdiction; namely: (i) the Claimant's claims relating to BCUC Order G-48-09 under NAFTA Articles 1102, 1103, 1105 ...".

10.5: "As to the merits of the claims made by the Claimant (for itself and ZCL), concerning BCUC Order G-48-09, the Tribunal dismisses all such claims under NAFTA Articles 1102, 1103, and 1105(1);"

10. In these circumstances, the Tribunal having dismissed the Claimant's G-48-09 Claim in several passages of its Award, the Respondent submits that the Claimant's Request seeks to re-argue the Tribunal's decisions. The Respondent concludes that such Request therefore lies beyond the scope of Article 57 of the ICSID Additional Facility Rules.

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C: Article 57 of the ICSID Additional Facility Rules

11. Article 57 of the ICSID Additional Facility Rules provides (in material part):³

“(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.”

12. There is no issue between the Parties that the Claimant’s Request was timely, being made within 45 days of the date of the Award. However, there is an issue as to the scope of Article 57 of the ICSID Additional Facility Rules.

13. The Claimant and the Respondent both rely upon the decision in *ADM v Mexico* (2008):⁴

“12. 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.”

14. The Respondent also refers to the decision in *Loewen v USA* (2004):⁵

“19. We agree that, apart from the dismissal in the Award of June 26, 2003 of all the claims ‘in their entirety’, there is no

³ Article 57 of the ICSID Additional Facility Rules has materially the same text as Article 49(2) of the ICSID Convention, which 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...”*

⁴ *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, Paragraph 12.

⁵ *Loewen Group, Inc. and Raymond L. Loewen v. USA*, ICSID Case No. ARB(AF)/98/3, Decision on Respondent's Request for a Supplementary Decision, 6 September 2004, Paragraphs 19-21.

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distinct reference in the Award to a discussion of Raymond Loewen's claim under art. 1116. We agree also that, as there was no jurisdictional objection to his claim under art. 1116, that claim fell to be determined by the decision on the merits.

"20. But the dismissal of all the claims 'in their entirety' following the examination of the merits was necessarily a resolution of the art. 1116 claim. That dismissal was a consequence of the reasoning expressed in paras 213-216. We therefore reject the argument that the Award did not deal with the art. 1116 claim. "21. It follows that Respondent is correct when it argues that Raymond Loewen is asking the Tribunal to reconsider its decision to dismiss that claim and to reconsider the reasoning (described by Raymond Loewen as 'obiter dicta') which led the Tribunal to dismiss the claim. In the context of the dismissal of Loewen's claims, that reasoning was not merely 'obiter dicta'. It was the reasoning on which that part of the Award was based; and it is not open to the Tribunal to reconsider it. There is no logical basis on which the Tribunal can draw a distinction between the relationship of that reasoning to the dismissal of the Loewen claims on the one hand and to the Raymond Loewen claim under art. 1116 on the other hand."

15. In its Response, the Respondent also cited *LG&E v Argentina* (2008);⁶ *Vivendi v Argentina* (2003);⁷ and Schreuer, *The ICSID Convention* (1st ed.).⁸
16. The Tribunal finds no material legal issue between the Parties as regards the interpretation of Article 57 of the ICSID Additional Facility Rules. Both Parties cite

⁶ *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Claimants' Request for Supplementary Decision, 8 July 2008, Paragraph 16: "[T]he supplementation process is not a mechanism by which parties can continue proceeding on the merits or seek a remedy that calls into question the validity of the Tribunal's decision." (This request was decided under Article 49(2) of the ICSID Convention).

⁷ *Compañía de Aguas Del Aconquija S.A. and Vivendi Universal (formerly Compagnie Generale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3 (Decision of the Ad Hoc Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award, 28 May 2003), Paragraph 11: "[A]ny supplementary decision or rectification as may result, in no way consists of a means of appealing or otherwise revising the merits of the decision subject to supplementation or rectification." (This request was also decided under Article 49(2) of the ICSID Convention).

⁸ Christoph H. Schreuer, *The ICSID Convention: A Commentary*, (2001), p. 849. (The Tribunal has checked the second edition of this work which has a passage to similar effect on Article 49(2) of the ICSID Convention, see p. 853ff).

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the decision in *ADM v Mexico*. It merits citing further, beyond the passage cited by the Parties (set out above):

“13. The Claimants’ submissions in the present case link the reference to a ‘question’ in Article 57 to the requirement in Article 52(1)(i) that the Award contains ‘the decision of the Tribunal on every question submitted to it.’ ‘Question’ can be presumed to have the same meaning in both contexts. The meaning of ‘question’, and particularly the level of abstraction at which a ‘question’ should be conceived, are matters that the Tribunal is required to address in the present Decision.”

“14. Article 52(1)(i) also requires a Tribunal in its Award to provide ‘the reasons upon which the decision is based’. The Claimants relate the requirement of reasons in Article 52(1)(i) to the power to make a supplementary decision in Article 57, suggesting that a decision on any question and the requirement of reasons are inextricably linked. This is true in Article 52, but not in Article 57. The Claimants argue, in effect, that the requirement for reasons for a decision on a question in Article 52(1)(i) means that a failure to give reasons, or to give sufficient reasons, ipso facto means the Tribunal has omitted to decide a question. This is not necessarily so ...”

“15. ...The failure to provide an adequate statement of reasons does not necessarily mean that the Tribunal has omitted to decide a question (the only basis of an Article 57 application). Article 57 empowers the Tribunal to ‘decide a question which it had omitted to decide in the award,’ but not to modify or supplement its reasoning on a question it did in fact decide.”

17. The Tribunal endorses this analysis of Article 57 in *ADM*. It is clear that the issue between the Parties does not relate to the interpretation of Article 57 but rather its application to the text of the Award. In particular, it is common ground between the Parties that Article 57 cannot be interpreted to apply to a decision or reasoning made by a tribunal in its award, read as a whole. In the present case, therefore, the material question is whether or not the matter raised by the Claimant’s Request was decided in

the Award.

D: The Tribunal's Analysis

18. The Tribunal accepts, as the Claimant contends, that the Claimant made separate claims comprising its G-48-09 Claim and its GBL Claim. As regards the former, albeit advanced as a subsidiary claim, this distinction is clear from (inter alia), the text of the Award, the transcript of the Hearing recording the Claimant's position and the Claimant's Post-Hearing Submissions.⁹
19. Nevertheless, the Claimant expressly did *not* contend that there were separate damages under these two claims. Indeed, the Claimant expressly contended the opposite.
20. For example, Mr Kaczmarek was called by the Claimant as its expert witness on quantum, testifying in writing and orally at the Hearing. In his second written report (standing as part of his direct examination), Mr Kaczmarek testified:¹⁰

"16. ... As the Measures [i.e. BCUC Order G-48-09 and Celgar's GBL] have the same practical impact on Celgar together and separately [Footnote 7: see below], 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. ..."

"Footnote 7: "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

⁹ Hearing D8.2216; Claimant's Post-Hearing Submission dated 7 January 2016, Paragraphs 3-5.

¹⁰ Kaczmarek ER2, Paragraph 16 and Footnote 7.

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to a ‘net-of-2007-load’ standard by preventing it from selling 349 GWh/year of its self-generated electricity.”

21. More significantly, this matter was also addressed by the Tribunal during the Claimant’s closing oral submissions at the Hearing, as recorded in the verbatim transcript:¹¹

[The Claimant]: Now, this is a little bit of a complicated point, but I think this is one point of common agreement between us and Canada. There are no separate damages stemming from the G-48-09 discrimination that are distinct from the damages that flow from the discriminatory setting of Celgar’s GBL.

[The Tribunal]: To pick up the point by Professor Douglas,¹² so that point it doesn’t matter whether we deal with the Measures separately or collectively.

[The Claimant] That’s correct. I think we deal with them collectively.”

22. As stated above, the present question is whether or not the Tribunal decided the Claimant’s G-48-09 claim as to liability and/or quantum in its Award. The Claimant subtly poses this question as: “whether the Tribunal’s statement that Mercer’s [G-48-09] claim was otiose was itself otiose”.¹³

23. In the circumstances, in the Tribunal’s view (then and now), it was appropriate to address the Claimant’s G-48-09 Claim “collectively” with the Claimant’s GBL Claim as regards both liability and quantum.

24. Read as a whole, the Tribunal does not consider that it failed to address and answer the material question posed by the Claimant’s G-48-09 Claim. As recorded in the Award, the Tribunal decided (by a majority) to dismiss that Claim as to both liability and

¹¹ Hearing D8.2207-2208.

¹² This refers to the exchange between the Tribunal and the Claimant’s Counsel, Hearing D8.2216 cited above.

¹³ Claimant’s Observations, Paragraph 5.

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damages under NAFTA Articles 1102, 1103 and 1105(1). As to liability, the Tribunal decided to dismiss the G-48-09 Claim along with the Claimant's primary GBL Claim on the basis (inter alia) that there was no unlawful discriminatory treatment. That was a considered and deliberate decision. As to damages, it followed, with the dismissal of the Claimant's GBL and G-48-09 Claims as to liability, that the Tribunal (by a majority) had also to dismiss the latter Claim on the further basis (inter alia) that, as contended by the Claimant, both Claims had "the same practical effect" as to damages. That too was a considered and deliberate decision.

25. Moreover, "otiose" does not mean "moot." Nonetheless, as often with a "complicated point" (to use the Claimant's phrase), it is possible with hindsight to supplement the wording of the reasons for a tribunal's decision. However tempting that might be, that step is clearly impermissible under Article 57 of the ICSID Additional Facility Rules, as interpreted with the decision in *ADM*.

E: The Tribunal's Decision¹⁴

26. Accordingly, for these reasons, the Tribunal dismisses the Claimant's Request.

27. As to the costs related to this proceeding for a supplementary decision of the Award, the Tribunal considers it inappropriate to make any order for costs, save to order each Party to bear its own costs and for the Parties to bear in equal shares ICSID's own administrative fees and expenses, to be notified in writing separately to the Parties by the ICSID Secretariat.¹⁵

¹⁴ The Tribunal has designated this Decision as "Restricted Access" until the Parties have had an opportunity to review it and propose redactions pursuant to the Confidentiality Order. Mr. Veeder and Professor Douglas will remain seized of this matter to resolve any disputes over confidentiality designations in this Decision for a period of 60 days after the Decision.

¹⁵ A statement of account will be sent to the Parties in due course by the ICSID Secretariat.

Professor Francisco Orrego Vicuña:
(Subject to my dissent from the Tribunal's Award of 6 March 2018)

Signed:
Dated:

Professor Zachary Douglas:

Signed:
Dated: 10 December 2018

V. V. Veeder (President):

Signed:
Dated: 10 December 2018