

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 POST-HEARING SUBMISSION

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7 January 2016

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1. At the hearing, Canada's own witnesses confirmed all essential elements of Mercer's claims. Mr. Les MacLaren could not support the reasons he had offered to justify the more restrictive G-48-09 net-of-load standard the BCUC imposed on Celgar, with the Ministry of Energy's support, while the BCUC had imposed a more permissive historical usage standard on all Canadian and third-country-owned pulp mills in BC, in Order G-38-01. Mr. Dyck's testimony confirmed that BC Hydro's professed "self-supply under current normal operating conditions" GBL principle did not exist in writing anywhere at any relevant time, that it afforded BC Hydro considerable discretion, and that BC Hydro failed in any event even to apply that principle to Celgar (by not measuring generation levels actually used to meet load, among other failures), Tembec Skookumchuck (by not scrutinizing or substantiating Tembec's claim that absent an EPA it [REDACTED] [REDACTED]), or Howe Sound (by using a [REDACTED] instead of assessing normal "current" self-supply levels). Canada's explanation that BC Hydro could take from Celgar load displacement services it paid others to provide because "only Fortis BC benefited" is legally irrelevant and contradicts BC Hydro's own argument to the BCUC that its ratepayers would be harmed if Celgar ceased displacing load.

2. Too, Canada's blame-the-victim defense collapsed under the weight of the half-truths, untruths, and blatant mischaracterizations upon which it was based. These ranged from ever-changing, inconsistent explanations for Celgar's GBL calculation, to the fictional "2-GBLs," NECP, and other "attractive" alternatives available to Celgar (notwithstanding Order G-48-09 and the prohibitions in Celgar's EPA), to the false suggestion that Mid-C spot rates bear any relation to long-term utility energy contract rates.

**I. ALL OF MERCER'S CLAIMS ARE WITHIN THE TRIBUNAL'S JURISDICTION AND ARE OTHERWISE ADMISSIBLE**

3. 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.<sup>1</sup>

4. Canada raises no jurisdictional/admissibility objections to any claims relating to the first measure, that of Order G-48-09. Its objections relate *only* to claims relying on the EPA. Before addressing these objections, Mercer reiterates that its damages are the same under each measure, and thus Canada’s jurisdictional objections are not in any event dispositive.<sup>2</sup>

5. 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.<sup>3</sup> 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

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<sup>1</sup> Mercer has not raised separate challenges to the GBL and to the exclusivity provisions in Section 7.4 of its EPA, *see* M. Shor, Tr. 2191:3-16, nor are these separate measures. Mercer’s challenge is to the GBL used in the EPA’s restriction on below-GBL sales, contained in the exclusivity provisions of Section 7.4. See C-221, 2009 Celgar EPA, § 7.4. The GBL standing alone is simply a number, not a measure, nor does it afford “treatment” within the meaning of NAFTA. See Reply ¶ 612 (quoting BC Hydro submission to BCUC that the GBL is “basically just a number” and “the context in which the GBL mechanism is used is key.”).

<sup>2</sup> See Questions by Professor Douglas, Tr. 2216:4-15. All citations to the transcript (“Tr.”) are to the final, amended daily transcripts provided to the parties on 18 October 2015.

<sup>3</sup> C-225, 2009 Side-Letter.

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. Celgar thus is entitled to damages based on a non-discriminatory GBL on its claims concerning Order G-48-09 *standing alone*. In any event, Mercer’s claims concerning the GBL-based sales restrictions in the EPA are within the Tribunal’s jurisdiction.

**A. NAFTA’s Procurement Exception Does Not Apply to BC Hydro’s Prohibition on Below-GBL Sales**

6. Although the procurement exception was the subject of much Tribunal questioning,<sup>4</sup> Mercer’s claim relating to the GBL-based third-party sales restrictions in Celgar’s 2009 EPA does not fall within the NAFTA Article 1108 procurement exception to Articles 1102 and 1103. The challenged provisions in Section 7.4 of its EPA *explicitly* preclude Celgar from selling to third-parties 349 GWh/yr of below-GBL electricity that BC Hydro declined to purchase, and thus require Celgar to use that amount of electricity each year to self-supply. As Mercer demonstrated at the Hearing, these provisions were not “specifications in a procurement contract that are integral to a procurement project,”<sup>5</sup> including BC Hydro’s actual procurement of a *different* 238 GWh/year of electricity from Celgar. Indeed, the “objective” of the challenged prohibition was not “the procurement of electricity” as Canada incorrectly contends.<sup>6</sup>

7. These conclusions are compelled by the Side-Letter and Mr. Les McLaren’s testimony. As already noted, in the Side-Letter, BC Hydro agreed to remove the EPA’s prohibition on below-GBL third-party sales if the BCUC subsequently were to rule that Celgar could obtain replacement electricity from FortisBC to meet its load while selling self-generated electricity. In the event the Side-Letter were activated per its terms, through BC Hydro submitting to the BCUC the required filing of an

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<sup>4</sup> See, e.g., Professor Douglas, Tr. 91:3-4, 2242:20-2243:2, 2271:18-2272:5; President Veeder, Tr. 2192:16-2193:3.

<sup>5</sup> United States Art. 1128 Submission, ¶ 8, cited with approval in Canada Art. 1128 Reply, ¶ 7.

<sup>6</sup> Rejoinder, ¶ 198.

amended EPA Section 7.4<sup>7</sup> — *which BC Hydro has not yet done or agreed to do*<sup>8</sup> — all remaining provisions of the EPA, including the purchase and sale obligations of 238 GWh/year, would remain in full force and effect. The fact that BC Hydro *agreed* that its procurement of electricity from Celgar could continue *without any further EPA modifications* if the prohibition of which Celgar complains were eliminated demonstrates conclusively that those restrictions are not integral to BC Hydro’s procurement from Celgar.<sup>9</sup>

8. For his part, Mr. Les MacLaren, a senior official of BC’s Ministry of Energy, explained that the GBL-based sales prohibition served a distinct governmental policy relating to self-generators — that of preventing the so-called “harmful arbitrage” of utility-supplied embedded cost power to the detriment of other ratepayers (who, Mr. MacLaren acknowledged, benefitted from the self-generator’s displacement of load that the utility would otherwise have to serve with expensive marginal-cost energy).<sup>10</sup> Mr. MacLaren in his hearing testimony defined this governmental policy,<sup>11</sup> and explained it applies irrespective of the buyer, *and thus whether or not the self-generator’s electricity is sold into a BC government procurement.*<sup>12</sup> Most importantly, he testified that if (i) BC had established a different self-generator policy — for example, one that permitted sales of pre-existing self-generated electricity

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<sup>7</sup> C-225, 2009 Side-Letter, ¶ 2.

<sup>8</sup> *See, e.g.*, B. Merwin, Tr. 232:3-15 (“{R}ight after that announcement I contacted BC Hydro, and we requested that they lift the restriction as per the Side Letter and lift the restriction in our exclusivity agreement with BC Hydro to sell our below-load power. And to this date, we have not heard back from BC Hydro. . . . {O}n January 23rd, about two months after we had first requested this from BC Hydro, we sent another e-mail or letter to them and requested that they make this modification. . . . Mr. Scouras omitted that in his Second Witness Statement.”); J. Scouras, Tr. 1207:1-2 (“And from what I understand, in December, Mercer contacted our Contract Management Group.”).

<sup>9</sup> This is consistent with BC Hydro’s agreement earlier in the negotiations, memorialized in Version 7 of the draft EPA, to permit Celgar to sell its below-GBL energy to third parties. *See Reply*, ¶¶ 39-41, 619.

<sup>10</sup> *See L. MacLaren*, Tr. 1067: 2-22.

<sup>11</sup> L. MacLaren, Tr. 1023: 3-10 (“{S}omewhere in here the policy is articulated that the Government is firm that incremental generation is and should be priced on the margin, but that you would not allow the repricing of existing generation or arbitrage against heritage prices. Is that a fair summary of B.C. self-generator policy? A. It is.”); *id.* at 1024:3-7 (“Q. So, as I understand the policy, new and incremental generation could be sold at market prices, but existing generation could not be sold at market prices? A. That is correct.”); *id.* at 1026:4-7 (“So, the purpose of restricting sales of existing generation is to prevent harm to other ratepayers? A. That is correct.”); *id.* at 1029:10-13 (“{Harmful} ‘arbitrage’ is where someone takes their generation and sells it to the market or to another party and replaces it with cost-based supply to the detriment of ratepayers.”).

<sup>12</sup> L. MacLaren, Tr. 1032:7-9 (“The policy is not at all affected by who the buyer is, is it? A. No.”).

— but (ii) BC Hydro still maintained a procurement policy of purchasing only “new or incremental” electricity, then the prohibition in BC Hydro EPAs on below-GBL sales to third-parties would be unnecessary.<sup>13</sup>

9. In other words, the EPA prohibition at issue is not necessary to BC Hydro’s ostensible procurement policy of buying only new or incremental electricity; instead, it serves the distinct BC self-generator regulatory policy goal — which was first articulated by the BCUC in 2001 in Order G-38-01, outside the context of any BC Hydro procurement program — of preventing “harmful” arbitrage to keep BC utility rates low. The prohibition precludes all *sales* by the self-generator to third parties other than BC Hydro (in theory of pre-existing generation used for self-supply); it does not directly relate to *purchases/procurement* by BC Hydro.<sup>14</sup> Put another way, it is one thing for a state enterprise not to buy; it is something entirely different to prohibit a potential supplier from selling to others.<sup>15</sup>

10. Indeed, BC Hydro’s GBL guru, Mr. Dyck, effectively admitted that in establishing Celgar’s GBL, he did not follow BC Hydro’s own Bioenergy Phase I procurement rules as written. Addendum 8 to those rules, issued by BC Hydro, included an RFP clarification with respect to eligibility requirements as follows:

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<sup>13</sup> L. MacLaren, Tr. 1043:12-1044:1 (“Q. {I}n the world where you can have third-party sales, why is requiring or preventing third-party sales, how does that ensure BC Hydro is only buying incremental power? In my hypothetical, I allowed for the sale of everything. A. In your hypothetical example, you could do something like that. Q. Okay. So in my hypothetical example, the policy or the provisions in the EPA that restrict third-party sales would be unnecessary? A. I don't think you would have them in that case, no.”).

<sup>14</sup> Even on direct examination, Mr. MacLaren explained that load displacement in FortisBC’s service territory, which would encompass a commitment by Celgar to use self-generated electricity to meet all or some of its load, does not “assist BC Hydro in its procurement objectives” or “alter BC Hydro’s contractual obligations under the {FortisBC} PPA.” L. MacLaren, Tr. 1011:18-1012:15.

<sup>15</sup> Canada also contended that the prohibition was necessary to help the province meet its 2007 Energy Plan goal of achieving energy self-sufficiency. *See, e.g.*, M. Owen, Tr. 98:8-22, 109:5-22; A. Douglas, Tr. 203:3-7, 205:4-8. This argument supports Mercer’s position on procurement, not Canada’s. To achieve self-sufficiency, BC acted ostensibly (i) to procure “new and incremental” energy, and (ii) to prevent the exportation of “pre-existing” self-generated electricity currently being used by the BC producer in BC. The former is procurement; the latter is not. Canada repeatedly argued that BC Hydro “doesn’t procure existing generation.” *See, e.g.*, M. Owen, Tr. 109:16. Therefore, measures that restrict Celgar’s sale of “existing generation” cannot involve procurement.

Incremental generation (IPP Projects) or incremental self-generation (Customer Projects) includes generation from existing, installed capacity that (i) has been idle for not less than two years, and/or (ii) *has been sold to third parties* (i.e., not BC Hydro, but may include Powerex Corp.), provided that the “Existing Contracts” criterion is satisfied.<sup>16</sup>

Clause (ii) explicitly required BC Hydro to treat as incremental and eligible for procurement “existing” generation from already “installed capacity” that “has been sold to third parties.” When asked why electricity Celgar had been selling to Northpoint and FortisBC under existing and terminable contracts did not qualify as “incremental generation” under the very terms of Addendum 8, Mr. Dyck responded that Addendum 8 “is not my document. This is Power Acquisition’s document.”<sup>17</sup> Mr. Dyck thus understood that his task encompassed more than just power acquisition. He then stated that, for Celgar, he followed his own “interpretation,” one of “determining what was incremental to what had been generated.”<sup>18</sup> This interpretation, of course, flatly is inconsistent with Addendum 8, which specifically defined “what had been generated” as eligible, incremental power as long as it had been sold to third-parties and not used for self-supply. Canada cannot claim that Celgar’s GBL-based sales prohibition is purely procurement-related when it departs from BC Hydro’s own procurement specifications.

11. Too, Canada’s contention that the prohibition on below-GBL sales to third-parties is procurement-related because it is necessary to assure BC Hydro “security of supply” is fatuous. BC Hydro’s Mr. Scouras claimed that, without the provision, a proponent could elect to sell electricity promised to BC Hydro to a third-party instead.<sup>19</sup> But Celgar’s promise to supply 238 GWh/yr of firm electricity to BC Hydro already effectively precludes it from selling that electricity to a third-party, as

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<sup>16</sup> R-121, BC Hydro Bioenergy Call for Power (Phase 10 Addendum 8 (7 May 2008), p. 4, § 8 (emphasis added). *See also* Scouras First Witness Statement, ¶ 44 (explaining that the “Existing Contract” language meant that the existing contract could lawfully be terminated prior to the Commercial Operation Date in the EPA.).

<sup>17</sup> L. Dyck, Tr. 1487:13-14.

<sup>18</sup> L. Dyck, Tr. 1490:3-4.

<sup>19</sup> Scouras Second Witness Statement, ¶ 8; Rejoinder, ¶ 215.



do the EPA's delivery shortfall penalties.<sup>20</sup> In any event, Celgar has no issue with a prohibition on third-party sales as to the 238 GWh of electricity sold to BC Hydro; it takes issue only with extending that prohibition to electricity BC Hydro declined to purchase. Requiring Celgar to use 349 GWh/yr for self-supply does not in any way enhance Celgar's obligation or ability to generate or deliver 238 GWh/yr to BC Hydro.

12. As Mercer explained at the Hearing, its claim relating to the prohibition on below-GBL sales does not involve "procurement by a party or a state enterprise," NAFTA, Art 1108(7)(a), because Mercer does not rely on any discrimination in the application of any procurement rule, regulation, provision, policy, or decision to establish *liability*.<sup>21</sup> If BC Hydro had not been engaging in its Bioenergy Phase I procurement, but *the BCUC* had simply determined a GBL for Celgar in 2009 (as the BCUC had done for Tolko in 2001), under BCUC Order G-38-01, for purposes of determining the level of sales Celgar could make to *any* buyer, there would be no question that such a GBL-related prohibition on third-party sales was *not* procurement related, as there would have been no governmental procurement. That conclusion does not change simply because BC Hydro imposed the identical prohibition in a procurement contract. The measure, its nature, and its purpose remain *exactly the same*.

13. Consider also the following example. Assume that BC Hydro had determined a GBL for Celgar of 349 GWh/yr, determined that Celgar had 238 GWh/yr of energy meeting the "new and incremental" terms of its procurement requirements, but decided to purchase only 119 GWh/yr because it wanted to give a purchasing preference to Canadian suppliers. Any claim by Mercer under NAFTA Arts. 1102 or 1103 that BC Hydro's decision not to purchase the remaining 119 GWh/yr of above-GBL electricity was discriminatory would be barred by the Art. 1108 procurement exception, because

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<sup>20</sup> C-221, Celgar 2009 EPA (27 January 2009), § 13.2.

<sup>21</sup> M. Shor, Tr. 2243:3-11.

Mercer necessarily would be arguing that BC Hydro's *purchasing* rules, policies, or decisions were discriminatory.

14. On the other hand, if BC Hydro were to go further, and prohibit Celgar's exports or sales to third-parties of the un-purchased 119 GWh/yr, Mercer's claim as to *that* restriction would fall outside the procurement exception. As here, BC Hydro would have done much more than simply decline to procure certain electricity from Celgar. BC affords Celgar less favorable treatment than Canadian and third-country self-generators, on the intertwined regulatory-related issues concerning self-supply requirements, access to embedded cost utility power, and the ability to sell self-generated power to *anyone*, regardless of any governmental procurement.

**B. BC Hydro Exercised Delegated Governmental Authority In Directly Imposing a Self-Supply Obligation on Celgar and Indirectly Limiting Fortis BC's Obligation to Serve Celgar**

15. Relatedly, BC Hydro's prohibition in Celgar's EPA, on third-party below-GBL sales constitutes an exercise of governmental authority, delegated by the BCUC in Order G-38-01.<sup>22</sup> In computing a GBL for Celgar that it used directly to restrict Celgar's below-GBL sales to third-parties, just as the BCUC itself did for Riverside/Tolko in its 2001 Order G-113-01,<sup>23</sup> BC Hydro was implementing B.C. government "harmful-arbitrage" regulatory policy and exercising delegated authority that otherwise would reside in the BCUC, as demonstrated by the BCUC's Riverside/Tolko decision that did the same thing. No private party has the authority to tell Celgar how it must use self-produced energy that the private party does not pay for, or, more specifically, to require it to use some or all of its below-load electricity for self-supply by prohibiting its sale. Indeed, the very premise of

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<sup>22</sup> This issue too was a focus of Tribunal questioning, *see, e.g.*, Professor Douglas, Tr. 2179:3-16, 2187:9-17, 2215:2-12, and *see also* President Veeder, Tr. 2188:6-18, including questions as to whether private parties on their own could include such terms in commercial contracts or perform them. *See* Professor Douglas, Tr. 2271:18-2272:14, 2354:10-13, 2355:2-4.

<sup>23</sup> *See generally*, Memorial, ¶¶ 240-47; C-130, BCUC, Order Number G-113-01 (25 October 2001).

Canada's misguided Ministers' Order argument is that the power to impose an electricity self-supply requirement rests with the Government.

16. This jurisdictional issue has but two elements: (1) whether there was a delegation of authority, and (2) is that authority "regulatory, administrative, or other governmental" in nature as required in the case of state enterprises by NAFTA Art. 1503(2), or is it commercial.<sup>24</sup>

17. The requisite delegation occurred in Order G-38-01, continued indefinitely by the BCUC in Order G-17-02, which by its express terms "directs" BC Hydro "to allow" customers to sell self-generated electricity, provided they not do so by taking increased embedded cost utility energy above a baseline BC Hydro is to negotiate.<sup>25</sup> The Order "allows" above-baselines sales and disallows below-baseline sales. If BC Hydro had this power itself, as a commercial actor, Order G-38-01 would have been completely unnecessary.

18. Canada's contends nonetheless that this express direction to determine baselines and prohibit below-baseline sales has nothing to do with GBLs in BC Hydro EPAs. As Mr. Owen put it at the Hearing, Order G-38-01 "does not even use the word 'GBL'."<sup>26</sup> According to Canada, Order G-38-01 is limited to circumstances in which a self-generator is seeking to sell to a third-party, and has no applicability when the sale is to BC Hydro.<sup>27</sup>

19. But the language of Order G-38-01 is not limited to third-party sales, and the BCUC has made it clear, throughout the time BC Hydro established all of the relevant GBLs, that Order G-38-01 applies to GBLs as used in BC Hydro EPAs. In Order E-16-09, the two-page order in which the BCUC accepts the 2009 Tembec EPA, the Commission expressly refers to Order G-38-01, notes that it required BC Hydro to determine a customer baseline for customers seeking to sell self-generation,

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<sup>24</sup> NAFTA Art. 1503(2). *See generally* Memorial, ¶¶ 406-413.

<sup>25</sup> Memorial, ¶¶ 413-414; Reply, ¶ 589.

<sup>26</sup> A. Douglas, Tr. 192:10-13.

<sup>27</sup> Rejoinder, ¶¶ 84-97, 95 ("BCUC Order G-38-01 . . . did not use the term "generator baseline" or GBL.").

notes that G-38-01 was extended indefinitely by Order G-17-02, and states that “[t]he Commission has reviewed the historic energy consumption at the Tembec Pulp Mill.”<sup>28</sup> Plainly the Commission thought that G-38-01 was relevant to BC Hydro EPAs and GBLs, and that in light of Order G-38-01, it had an obligation to review Tembec’s GBL. The Commission mentions no other issue in its Order. The Commission also has made it clear that the term “customer baseline” it used in G-38-01 and the term “GBL” coined by BC Hydro were one and the same thing.<sup>29</sup>

20. With respect to whether the authority to set GBLs used to impose self-supply obligations and prohibit below-GBL sales to third-parties is “regulatory, administrative, or other governmental,” Canada’s own witnesses again provided the key testimony. As noted above, Mr. Les MacLaren testified that this specific usage of the GBL implemented BC’s regulatory policy aimed at preventing self-generators from engaging in “harmful arbitrage” — increasing their purchases of embedded cost utility electricity to meet their industrial load while selling their self-generated electricity at higher prices.<sup>30</sup> It serves a governmental purpose, and, as Mr. MacLaren confirmed, no GBL-based restriction on third party sales would be needed in a BC Hydro EPA absent this policy.<sup>31</sup>

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<sup>28</sup> C-146, BCUC, Order E-16-09 (13 November 2009). Similarly, when the Commission finally got around to ordering BC Hydro to file GBL Guidelines, in November 2009, it again referenced Order G-38-01, and tied the GBL to that Order. It also noted that “the concepts expressed in Order G-38-01 in the context of near term power sales are now being applied to longer term EPAs.” C-132, Letter from Erica Hamilton, Commission Secretary, BCUC, to Joanna Sofield, Chief Regulatory Officer, BC Hydro (27 November 2009). And in its decision accompanying Order G-106-14, the Commission noted expressly that “*the genesis of the GBL was under Order G-38-01* which addressed BC Hydro’s obligation to serve industrial customers with self-generation capability who indicated a desire to sell some of the power they generated at market prices and increase their purchases from BC Hydro under RS 1821 (now RS 1823).” C-284, BCUC Order G-106-14 and Decision (25 July 2014) at 6 of 8 (emphasis supplied). The Commission further noted that BC Hydro EPAs contain “*the GBL as established in Order G-38-01.*” *Id.*

<sup>29</sup> C-284, Order and Decision G-106-14, at 6 of 8 (noting that, in Order G-38-01, “BC Hydro was further directed to make every effort to agree on a self-generator customer baseline {GBL} to establish the normal historical level.”)(bracketing in original).

<sup>30</sup> Of course, BC Hydro also uses its GBL determination to identify how much electricity it will purchase. This other usage of the GBL, however, is not at issue in this proceeding. Thus, when Canada argues that the GBL is used to demark the quantity of energy BC Hydro will purchase, *see, e.g.*, A. Douglas, Tr. 201:3-7, and that this is a commercial not governmental activity, it is arguing about the wrong usage of the GBL. As made clear in Section I.A above, BC Hydro did not use the GBL *exclusively* to demark how much electricity it would purchase. It went further, prohibiting below-GBL sales to third parties.

<sup>31</sup> *See supra* n. 13.

21. Because the BCUC does not directly regulate industrial self-generators, it imposes these restrictions indirectly, through the regulatory requirement of the utility to serve its customer with electricity needed for its industrial operations.<sup>32</sup> Mr. MacLaren testified that, in BC, a utility has a regulatory obligation reliably to serve the electricity demand of customers in its service territory.<sup>33</sup> He stated that only the BCUC and possibly the Government, through Order in Council, could impose limitations on this obligation to serve.<sup>34</sup> Such limitations, Mr. MacLaren acknowledged, are regulatory matters, and not commercial matters of the sort to which private parties could contractually agree.<sup>35</sup>

22. Only the BCUC has the authority to direct BC Hydro or FortisBC that they do not have to serve self-generators that are selling below-GBL electricity, or to impose self-supply obligations, and BC Hydro necessarily relied upon that governmental authority in requiring Celgar to self-supply below its GBL, and prohibiting Celgar from making below-GBL sales to third parties. These restrictions implement a B.C. government regulatory policy, and rely upon regulatory tools limiting the obligation to serve not available to private parties.

23. The conclusion that BC Hydro was exercising governmental rather than commercial authority is confirmed by BC Hydro's own conduct when Howe Sound first raised the issue of self-generator sales in 2001. BC Hydro did not simply negotiate a commercial deal with Howe Sound, but instead

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<sup>32</sup> See L. MacLaren, Tr. 1021:4-11; 1022:2-9. The limitation on BC Hydro's obligation to serve is direct for customers in BC Hydro's service territory. Ever MWh the self-generator is required to use for self-supply is 1 MWh of energy BC Hydro does not have to supply. For Celgar, the measure both (i) limits BC Hydro's need to serve Celgar, indirectly, through the PPA with FortisBC, and (ii) limits FortisBC's obligation directly to serve Celgar.

<sup>33</sup> L. MacLaren, Tr. 1016:15-1017:11 ("Q. If I build a house in Vancouver and I call BC Hydro to obtain electricity, they have an obligation to serve me? A. Yes. Q. That's part of the regulatory compact? The utility gets a monopoly, but they have to serve reliably all Eligible Customers in their service territory? A. That is correct. Q. And the obligation to serve extends to commercial and industrial customers as well? A. That is correct.").

<sup>34</sup> L. MacLaren, Tr. 1017:12-16 ("Q. Who in B.C. has the power to impose limitations on the obligation to serve such that a utility could provide a customer with less than all the electricity it required? A. That would be the {BCUC}.").

<sup>35</sup> L. MacLaren, Tr. 1018:19-1019:8 ("The limit — any limitation on an obligation to serve, that would be a regulatory matter rather than a commercial matter; correct? A. There could be commercial contracts between a utility and its customers that could allow for some curtailment in certain situations or additional generation in certain situations. Q. I'm not talking about curtailments or — I'm talking about a utility avoiding an obligation to serve an Eligible Customer. MR. MACLAREN: I'm not — I don't believe that that's the cases.").

went to the BCUC to provide regulatory guidance on what BC Hydro should do with respect to such sales, and the authority to implement that guidance.<sup>36</sup> Likewise, FortisBC understood it could not act to restrict Celgar's sales, or limit its own sales to Celgar, absent authority from the BCUC.<sup>37</sup>

24. In determining a GBL for Celgar and using it to prohibit below-GBL sales to third-parties, BC Hydro was exercising governmental authority the BCUC had delegated.

### C. Mercer Satisfied NAFTA's Claim Limitations Period

25. The final jurisdictional topic concerning the GBL-based prohibition on third-party sales in Celgar's 2009 EPA, and the subject of questions and argument at the Hearing, concerned the NAFTA limitations period.<sup>38</sup> Those provisions limit claims to those filed within three years "from the date on which the investor first acquired, or should have acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."<sup>39</sup>

26. Tribunal members asked about the effective date of the EPA,<sup>40</sup> whether Celgar had incurred loss or damage as of the date of its EPA,<sup>41</sup> how the Side-Letter fit into this issue,<sup>42</sup> whether this measure and the G-48-09 measure should be analyzed separately or together,<sup>43</sup> and whether the differential treatment of third-party and Canadian investors constituted one continuous claim or

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<sup>36</sup> See Reply, ¶¶ 600-602 (also pointing out that BC Hydro had never utilized a GBL to limit third-party sales before being ordered to do so by the BCUC). FortisBC proved the same point with Mr. Swanson's written testimony that, "we believed we needed to supply our customers (*i.e.*, Celgar and Nelson) with additional power (or more precisely, to 'deem' a supply of additional power absent a clear restriction preventing us from doing so)." Swanson First Witness Statement, ¶ 61 (footnote omitted).

<sup>37</sup> In the G-48-09 proceeding, FortisBC observed that "[p]ursuant to section 28 of the British Columbia Utilities Commission Act (the 'Act'), FortisBC has a statutory duty as a public utility to supply power to customers located within its service territory . . ." C-294, Fortis BC Response to Information Requests, BCUC Proceeding to Amend Section 2.1 of Rate Schedule 3808 (14 August 2008), at 3, 7.

<sup>38</sup> Canada raises no limitations period defense concerning Mercer's claims regarding Order G-48-09. The BCUC issued Order G-48-09 on 6 May 2009, and Mercer filed its RFA on 30 April 2012.

<sup>39</sup> C-1, North American Free Trade Agreement, 17 December 1992, Art. 1116(2).

<sup>40</sup> Professor Douglas, Tr. 2175:3-6; President Veeder, Tr. 2175:21-2176:5.

<sup>41</sup> Professor Orrego Vicuña, Tr. 195:18-196:14.

<sup>42</sup> President Veeder, Tr. 198:2-3.

<sup>43</sup> Professor Douglas, Tr. 2196:18-21.

independent claims.<sup>44</sup> At the hearing, Mercer neglected to address these issues comprehensively, considering both its discrimination claims under NAFTA Article 1102 and 1103, and its Minimum Standard of Treatment claims under NAFTA Art. 1105.

### 1. Article 1102 and 1103 Less Favorable Treatment Claims

27. Canada's argument that the date of signing of the EPA provides the relevant trigger date, because Celgar had been disagreeing with its GBL and thought it should have been lower at that time, conflates the distinct issues of (i) Celgar's dissatisfaction with its own GBL, (ii) knowledge of a breach of a NAFTA obligation, and (iii) knowledge that Mercer has incurred loss or damage.<sup>45</sup> Celgar was dissatisfied with its GBL number in 2008 and 2009, because it thought BC Hydro had treated it unfairly based on Celgar's own circumstances and its then-understanding of the rules, and not because it knew or should have known that others were treated more favorably.<sup>46</sup>

28. Celgar could not have had knowledge of a NAFTA Art. 1102 or 1003 breach — less favorable treatment than another — at the time it signed the EPA, as demonstrated by Canada's witnesses and Canada's own conduct under the Confidentiality Order in this proceeding. Mr. Dyck confirmed that he never told Mercer how BC Hydro had treated others, in their EPAs or LDAs, and that the confidentiality provisions in each EPA or LDA would have precluded other investors from discussing their GBLs with Celgar.<sup>47</sup> And Canada throughout this proceeding has treated *all* information concerning how BC Hydro applied its GBL methodology in individual cases (including under the Tembec 1997 EPA, the Tembec 2009 EPA, the HSPP 2001 Consent Agreement, and the HSPP 2010 EPA) as restricted access information under the Confidentiality Order.<sup>48</sup> Under its terms, the

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<sup>44</sup> President Veeder, Tr. 2182:21-2185:10.

<sup>45</sup> See A. Douglas, Tr. 196:15-197-11.

<sup>46</sup> See Merwin First Witness Statement, ¶¶ 88-91.

<sup>47</sup> L. Dyck, Tr. 1491:17-1494:18.

<sup>48</sup> See Mercer's Letter to Tribunal of today's date objecting to Canada's proposed hearing redactions.

Confidentiality Order affords Mercer’s representative access to confidential information but not restricted access information.<sup>49</sup> Necessarily then, in contending that all details and generalities alike concerning BC Hydro’s treatment of other mills must be kept from Mercer, and Mercer otherwise has no knowledge of these facts, Canada admits that Mercer could not have known about any relevant third-party’s treatment (that were disclosed to Mercer constructively through this proceeding’s document production on or about 3 May 2013) *even today*, much less back in January 2009.

29. Even putting aside the knowledge of breach issue entirely, Mercer could not have had *loss or damage* from any such breach under Arts. 1102 or 1103 at the time of signing of the EPA in January 2009, because the challenged GBL-based exclusivity provisions were neither final nor in effect at that time.<sup>50</sup> NAFTA tribunals have made clear that *both* knowledge of the breach *and* knowledge of loss or damage need to be met in order to toll the three-year limitations period.<sup>51</sup> The EPA specifically provided that the challenged prohibition on third-party sales [REDACTED] [REDACTED],<sup>52</sup> and the Side-Letter Mercer insisted upon left open the issue of whether the prohibition would take effect until the BCUC ruled on Celgar’s ability to arbitrage its below-load power, which it did on 6 May 2009, in Order G-48-09.<sup>53</sup> Both of these potential triggering events fall within the limitations period in light of the 30 April 2012 filing date of Mercer’s Request for Arbitration.<sup>54</sup>

<sup>49</sup> Compare Confidential Order § 9 with § 10.

<sup>50</sup> See Reply, ¶¶ 605-607 (reviewing ripeness requirement described in *Glamis Gold*).

<sup>51</sup> E.g., CA-16, *United Parcel Service of America Inc. v. Canada* (NAFTA), UNCITRAL (Award, 24 May 2007) (Keith, Cass, Fortier) (“*UPS II (NAFTA)*”), ¶ 28; CA-22, *Glamis Gold, Ltd. v. The United States of America* (NAFTA), UNCITRAL (Final Award, 8 June 2009) (Young, Caron, Hubbard) (“*Glamis Gold (NAFTA)*”), ¶ 347.

<sup>52</sup> Exhibit C-221, Celgar 2009 EPA, § 7.1 ([REDACTED]) and § 7.4(a) ([REDACTED]). See also Reply, ¶ 605 and n.704 (documenting COD of [REDACTED]).

<sup>53</sup> Exhibit C-8, at p. 29 (“What will not be permitted is the supply of embedded cost power to service the domestic load, at any time when the self-generator is selling power into the market.”).

<sup>54</sup> Although certain *other* provisions in the contract took effect as of the EPA’s stated Effective Date of 27 January 2009, the contract in its entirety remained subject to BCUC acceptance before becoming final and effective, both under § 3.1

Footnote continued on next page



30. Indeed, President Veeder’s question regarding the Side-Letter, which Canada misinterpreted,<sup>55</sup> was directly on point, because it goes to the question of when the EPA’s prohibition on third-party below-GBL sales was final and effective such that Mercer even could experience loss or damage as a result of less favorable treatment than a comparator. Critically, Mercer did not agree in the EPA negotiations to the prohibition on third-party below-GBL sales. Instead, it negotiated a Side-Letter with BC Hydro that deferred the issue of Celgar’s access to FortisBC embedded cost electricity while it was selling its own electricity, then pending before the BCUC in the G-48-09 proceeding, and left it for the BCUC to decide.<sup>56</sup> The Side-Letter, as noted above, established a procedure to revise Section 7.4 of the EPA should the BCUC decide that Celgar could sell electricity while buying from FortisBC. The date of issuance of Order G-48-09, 6 May 2009, which held Celgar to a net-of-load standard and thus upheld the below-GBL sales restriction in the EPA, fell well within the limitations period. It provides the *earliest* date on which Mercer could possibly have begun to experience loss or damage from a breach of NAFTA Arts. 1102 or 1003. In this respect, the two measures of which Mercer complains — Order G-48-09’s restriction on access to FortisBC embedded cost energy, and the EPA’s restriction on third-party below-GBL sales — are integrated, and must be analyzed together.

## 2. Article 1105 Minimum Standard of Treatment Claim

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(permitting either party to terminate the EPA if not accepted by the BCUC within 150 days) and under the Utilities Commission Act, C-20, § 71(4) (making clear that the BCUC may declare an energy supply contract “unenforceable either wholly or in part,” but that it may also declare certain earlier accrued rights to be enforceable). Each of these two provisions had the practical effect of rendering the EPA contingent on BCUC acceptance. Canada agrees, as it has argued that a “GBL, however, *remains of no force* until it, like the other EPA terms and conditions, receives the approval of the BCUC.” Counter-Memorial, ¶ 339 (emphasis supplied).

<sup>55</sup> Counsel for Canada did not address the limitations period, instead untruthfully contending that the Side-Letter “is in effect” but that Celgar “just haven’t pursued it.” A. Douglas, Tr. 198:7-10. The actual testimony was that Mercer’s Mr. Merwin had written BC Hydro twice asking them to implement the Side-Letter and file an amended Section 7.4 with the BCUC for approval, but that BC Hydro had not responded. B. Merwin, Tr. 232:3-8. Even BC Hydro’s own witness admitted BC Hydro had not taken any action under the Side-Letter. *See* J. Scouras, Tr. 1207:12-15.

<sup>56</sup> *See* Merwin First Witness Statement, ¶¶ 103-107.

31. No party has directly addressed the limitations period analysis for Mercer’s Minimum Standard of Treatment claim. Mercer does so here, as it is somewhat distinct from the limitations period analysis for Mercer’s Article 1102 and 1103 claims.

32. Breach of the Minimum Standard of Treatment obligation “may be cumulative and become apparent only when considering the State’s acts in the aggregate, under one or more pillars.”<sup>57</sup>

Therefore, one must first examine Mercer’s Minimum Standard of Treatment claim as a whole and determine the point in time when Mercer had knowledge of all elements of its claim — in other words, when it had been treated in a non-transparent, unjust, unfair and idiosyncratic, arbitrary and discriminatory manner.

33. Mercer first began to discern that Canada had breached its Minimum Standard of Treatment obligations only when the BCUC issued Order G-48-09, on 6 May 2009. It was only after the issuance of G-48-09 that Mercer began to acquire knowledge of the comparative aspect (that of unfairness and discrimination relative to others) of its Minimum Standard of Treatment claim — that comparator pulp mills were being treated more favorably with respect to their assigned GBLs and access to embedded electricity while selling self-generated electricity.<sup>58</sup> As demonstrated above, Celgar could not have had knowledge of unfair or discriminatory treatment in breach of the Minimum Standard on the date upon

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<sup>57</sup> See Memorial, ¶ 655 (citing CA-38, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (CAFTA-DR), ICSID Case No. ARB/10/23 (Award, 19 December 2013) (Mourre, Park, von Wobeser) (“*TECO* (CAFTA-DR)”), ¶¶ 658, et seq. and CA-4, *Cargill, Inc. v. United Mexican States* (NAFTA), ICSID Case No. ARB(AF)/05/2 (Award, 18 September 2009) (Pryles, Caron, McRae) (“*Cargill* (NAFTA)”), ¶¶ 297-305).

<sup>58</sup> See B. Merwin, Tr. 233:11-234:7 (Mr. Merwin had no idea what BC Hydro’s GBL methodology might be until BC Hydro issued its GBL Guidelines for the first time in 2012.); B. Merwin, Tr. 316:7-11 (Mr. Merwin realized only after the issuance of G-48-09 that Celgar alone (out of all BC pulp mills) could not engage in any arbitrage.); Merwin Second Witness Statement ¶ 6 (Only after BC Hydro “assigned Celgar a net-of-load GBL, and prohibited Celgar’s below-GBL electricity sales to third parties in . . . the 2009 {EPA}, and the BCUC issued Order G-48-09, did I realize {that} Celgar’s ‘unique’ position {was that} Celgar is the only BC pulp mill that is formally banned from purchasing any replacement power from its utility, while no such restriction exists for our BC pulp mill competitors.”).

Moreover, although Mercer undoubtedly was aware of the lack of transparency that pervaded BC Hydro’s GBL methodology while BC Hydro was determining Celgar’s GBL (before the issuance of G-48-09, non-transparency alone does not form the basis of Canada’s breach of the Minimum Standard. It is the totality of Canada’s treatment of Mercer that fell below the Minimum Standard. Consequently, Mercer could not have acquired knowledge of Canada’s breach of its Minimum Standard obligations until it acquired knowledge of all elements of the breach, including unfair and discriminatory treatment.

which Canada focuses — the signing of the Celgar-BC Hydro EPA in January 2009 — as Canada and its witness, Mr. Dyck, confirmed that information regarding BC Hydro’s treatment of other pulp mills was never shared with Mercer.<sup>59</sup> Mercer only acquired constructive knowledge of its comparators’ treatment through its counsel during the document production phase of these proceedings in May 2013.

34. As established above, moreover, Mercer could not have acquired knowledge of loss or damage, at the earliest, until the GBL-based exclusivity provisions were either final or in effect. As noted, the exclusivity provision at issue did not take effect, under the terms of the EPA, until the Commercial Operation date of 27 September 2010, and it did not become final until the BCUC ruled in Order G-48-09 against Celgar’s attempt to purchase electricity from FortisBC while selling power. Both of these dates are within the period of limitations; thus, Mercer’s Minimum Standard of Treatment claim is within the period of limitations.<sup>60</sup>

## **II. THE MINISTERS’ ORDER IMPOSES NO SELF-SUPPLY OBLIGATION OR ELECTRICITY SALES RESTRICTION ON CELGAR**

35. During the hearing, Canada all but abandoned its Ministers’ Order argument. Canada’s relative silence on this issues was understandable, because (i) the parties’ legal experts agree that the language in the Ministers’ Order must be clear and unambiguous in order to impose a binding legal obligation on Celgar that restricts its *right* to sell electricity,<sup>61</sup> and (ii) Canada’s witnesses confirmed that there simply is no clear and consistent language in the 1991 Ministers’ Order that imposed any self-supply or load displacement obligation, or otherwise restricted Celgar’s right to sell its self-generated

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<sup>59</sup> See *supra*, Section I.C.1.

<sup>60</sup> See *supra*, Section I.C.1.

<sup>61</sup> See Expert Report of David Austin (14 December 2014) (“Austin Expert Report”) ¶¶ 21-30; Expert Report of David Bursey (28 March 2015) (“Bursey Expert Report”) ¶¶ 182-186, 191 (Mr. Bursey asserts that the language of the Ministers’ Order is clear; he does not refute the general principle that the language of the Ministers’ Order would need to be clear and unambiguous to restrict Celgar’s right to sell electricity); Mercer Letter to Tribunal pp. 9-10 (12 July 2015); Reply ¶¶ 57, 94-101.

electricity.<sup>62</sup> Indeed, Canada’s witnesses confirmed that no one at that time (pre-Open Access transmission) was even contemplating the sale of self-generation to third-parties,<sup>63</sup> meaning that in 1991 Celgar and the Ministry would have had no reason even to consider creating a binding self-supply obligation.

36. What is more, Canada’s Ministry of Energy witness, Les MacLaren, confirmed that in the last 24 years, the Parties had never interpreted the Ministers’ Order to impose a restriction on Celgar’s sales of electricity.<sup>64</sup> His testimony that the B.C. Government was unaware of Celgar’s commitment until it was “found” in its archives,<sup>65</sup> belies that any binding commitment had been made.<sup>66</sup> Legally binding regulatory obligations are managed — tracked, monitored, and enforced — not left to the lost and found.

### **III. CANADA HAS VIOLATED ITS OBLIGATIONS UNDER NAFTA ARTICLES 1102, 1103, AND 1503 BY ACCORDING MERCER LESS FAVORABLE TREATMENT THAN IT HAS AFFORDED CANADIAN AND THIRD-COUNTRY INVESTORS IN LIKE CIRCUMSTANCES**

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<sup>62</sup> L. MacLaren, Tr. 1114:6-13. For each of the instances in which Mr. MacLaren was requested to confirm the contradictory statements set forth in Celgar’s Energy Project Certificate Application, *see id.* at 1110:13-1111:9, 1111:10-18; 1111:19-1112:18; 1112:19-1113:4; 1113:5-11; 1113:12-19; 1113:20-1114:5, he confirmed that there was nothing specific in the Ministers’ Order that would resolve the contradictory statements in Celgar’s Application, *see* L. MacLaren, Tr. 1115:12-18 (“MR. WITTEN: But, actually, you didn't respond to my question. I see it. If we could go back to that. When the Ministers issued the Order, did they decide which among the five different formulations that were before them about the alleged commitment was going to be the one that would bind Celgar going forward? MR. MACLAREN: I did not see anything specific in the Order.”).

<sup>63</sup> *See* L. MacLaren, Tr. 1058:6-22; *see also, e.g.*, G. Gehring Flores, Tr. 25:16-26:4, and Reply ¶¶ 114.

<sup>64</sup> *See* L. MacLaren, Tr. 1122:1-13; 1125:10-20; 1126:5-14.

<sup>65</sup> L. MacLaren, Tr. 1108:7-11; *see also* L. MacLaren Second Witness Statement, ¶¶ 34-35.

<sup>66</sup> BC had several opportunities to raise the alleged load displacement obligation and electricity sales prohibition in the Ministers’ Order during proceedings before the BCUC — most notably when the BCUC issued Order G-15-01, *approving* Celgar’s sale of above- and *below-load* electricity. *See* C-344, BCUC Order, No. G-15-01; D. Austin Tr. 932:14-933:4; *see also*, C-272, Curtailment Agreement between West Kootenay Power and KPMG; and C-269, General Service Power Contract and Brokerage Agreement Between Celgar and FortisBC Inc. It failed to do so, further evidencing that at no time prior to this proceeding did the B.C. Government take the position that Celgar was subject to any kind of obligation to self-supply. When Canada’s witness, Mr. Dennis Swanson, was questioned about the specific operation of the curtailment agreement that was the subject of the BCUC Order G-15-01 approval, he claimed that he did not know how to interpret the metering data that illustrated Celgar selling its below load electricity to FortisBC, but admitted that FortisBC was compensating Celgar for increasing its generation in the context of a load curtailment agreement. *See*, D. Swanson, Tr. 1663:11-1664: 21.

**A. CANADA HAS FAILED TO DEMONSTRATE THAT DIFFERENCES IN TREATMENT RESULT FROM A RATIONAL GOVERNMENT POLICY NOT TIED TO NATIONALITY**

37. President Veeder inquired about the legal standard for discrimination under Article 1102 and 1103, by noting the U.S. contention, quoting *Grand River*, that there remains a requirement for a Claimant to “establish that a measure, either on its face or as applied, favors nationals over non-nationals,” and raising examples concerning scholarships to a particular nationality of students.<sup>67</sup>

38. At the outset, we note that the U.S. submission was *not* citing to the tribunal’s decision in *Grand River*.<sup>68</sup> As Mercer demonstrated in its Reply, NAFTA decisions, including *Grand River*, all are consistent that a claimant need not establish any intent to discriminate based on nationality.<sup>69</sup> The tribunal in the most recent NAFTA decision, *Bilcon*, agreed, relying upon the *Pope & Talbot*, *UPS*, and *Feldman* decisions.<sup>70</sup> Indeed, the U.S. agrees as well, as it cites its submissions in *Pope & Talbot* and *Grand River*, both of which contend expressly that no showing of discriminatory intent is required.<sup>71</sup>

39. What then does the U.S. mean in arguing for a showing that a measure as applied “favors nationals over non-nationals”? There is no NAFTA language or decision requiring a claimant to show that nationals *as a class* were treated more favorably than non-nationals *as a class*, and it would be contrary to the purpose of national treatment requirements to prevent discrimination “on the basis of nationality” to permit a state to discriminate against *some* non-nationals as long as it did not discriminate against *all* non-nationals. Indeed, Canada made this “class” argument in *Pope & Talbot*,

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<sup>67</sup> President Veeder, Tr. 2279:20-22, quoting U.S. Article 1128 Submission (8 May 2015) at n.14.

<sup>68</sup> Rather, the U.S. was self-citing to *the U.S. rejoinder*, which contained a formulation the tribunal did not adopt. CA-7, *Grand River Enterprises Six Nations, Ltd. v. United States of America* (NAFTA), UNCITRAL (Decision on Objection to Jurisdiction 20 July 2006) (Nariman, Anaya, Crook) ¶ 171.

<sup>69</sup> Reply, ¶¶ 133-145.

<sup>70</sup> CA-82, *Bilcon of Delaware et al v. Government of Canada* (NAFTA), UNCITRAL (Award on Jurisdiction and Liability, 17 March 2015) (Simma, McRae, Schwartz) (“*Bilcon*”) ¶¶ 719-723.

<sup>71</sup> U.S. Article 1128 Submission (8 May 2015), n.14.

contending that a claimant had to show that the full class of American investors were disproportionately disadvantaged in comparison to their Canadian competitors. The tribunal disagreed, stating it “is unwilling to take a step that would so weaken the provisions and objectives of NAFTA and, for the reasons stated, rejects Canada’s disproportionate disadvantage test.”<sup>72</sup> Thus, Mercer need not establish that *all* U.S. nationals were treated less favorably by BC than *all* Canadian or third-country nationals.

40. Mercer need only establish the three *prima facie* elements identified in Articles 1102 and 1103 and by the *UPS* tribunal, namely, that there is (1) treatment for a U.S. investment, (2) in like circumstances to a Canadian or third-country investment, and (3) which treatment is less favorable than treatment afforded by the contracting state to such Canadian or third-country investment.<sup>73</sup> As *Bilcon* confirms, once this three-part *prima facie* case is made out, “the onus is on the host state to show that the measure is still sustainable within the terms of Article 1102” by showing a non-nationality-based justification “for the differential and adverse treatment.”<sup>74</sup>

41. Canada has not met this burden of establishing a non-nationality-based justification for Celgar’s less favorable treatment. It has provided no tenable justification for the more restrictive net-of-load standard applied to Celgar under BCUC Order G-48-09, or for taking load displacement services from Celgar when it paid others, and its justification that BC Hydro applied a consistent “current normal” standard in determining GBLs for all self-generators collapsed when the Hearing testimony revealed that BC Hydro did not follow its own articulated after-the-fact standard to Celgar, Tembec, or Howe Sound, as summarized below.

## **B. LESS FAVORABLE TREATMENT IN ESTABLISHING THE GBL**

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<sup>72</sup> CA-13, *Pope & Talbot Inc. v. Canada*, 10 April 2001 (Devaird, Greenberg, Belman), ¶ 72. *See also, id.* at ¶¶ 43-71 (reviewing precedents), ¶¶ 33-38 (rejecting argument that NAFTA’s use of the plural “investors” requires analysis of entire classes of investors).

<sup>73</sup> *See* Memorial, ¶ 448.

<sup>74</sup> CA-82, *Bilcon*, ¶¶ 723-34.

**USED TO LIMIT THIRD-PARTY SALES AND DEFINE CELGAR'S  
SELF-SUPPLY REQUIREMENT**

42. With respect to the Celgar EPA's GBL-based third-party sales restriction, there is no real dispute that the measure affords Celgar less favorable treatment than BC Hydro afforded to both Howe Sound (a third-country owned comparator) and Tembec (a Canadian-owned comparator). BC Hydro, with the BCUC's approval, set Celgar's GBL at the level of Celgar's 2007 load, thereby requiring Celgar to self-supply up to the level of its pre-existing load, and precluding Celgar from selling 100 percent of its below-load energy as of the baseline period to any third-party. At 349 GWh/yr, Celgar's GBL was higher than *any* level of self-supply *it had ever achieved*,<sup>75</sup> and the highest GBL possible.

43. It also is undisputed that BC Hydro allowed Tembec and Howe Sound each to sell a greater portion of their below-load generation. Mr. Switlishoff quantified the differences in treatment using his BLAP metric, and neither Canada nor its experts offered any alternative to measure the treatment afforded or differences in treatment afforded.

44. Thus, using the *Bilcon* formulation, the onus was on Canada to show a non-nationality based justification for the differential and adverse treatment. Canada sought to do so in its memorials and at the Hearing, using Mr. Dyck's contention that BC Hydro determined GBLs utilizing a consistent principle, measuring "the amount of self-generated energy normally used by the customer to self-supply under current conditions without the prospect of the currently negotiated EPA or LDA."<sup>76</sup> Hearing testimony proved this contention to be problematic on every single level.

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<sup>75</sup> See Memorial, ¶¶ 630-36.

<sup>76</sup> Dyck First Witness Statement, ¶ 44.

45. *First*, every witness addressing the issue confirmed that this supposed consistently-applied principle never existed in writing anywhere at the time any relevant GBL was established.<sup>77</sup> It was articulated *post-hoc* to justify what BC Hydro had already done.

46. *Second*, every witness confirmed that the *post hoc* “standard” did not mandate any particular result, but instead afforded BC Hydro discretion. Mr. Dyck agreed that it was “fair to say that the GBL principle you describe is more of a general principle you seek to apply rather than a specific methodology that can be used for computing a precise GBL.”<sup>78</sup> Necessarily then the observed differences in treatment resulted from BC Hydro’s exercise of discretion, and were not justified by the requirements of any consistently applied methodology.<sup>79</sup>

47. *Third*, Canada’s witnesses could not even agree on how to reconcile Celgar’s GBL to Mr. Dyck’s *post-hoc* principle. Each had a different theory (or multiple inconsistent theories) on why BC Hydro failed fully to subtract Celgar’s sales to third-parties (energy not used by Celgar for self-supply, and which could not be used for self-supply because it was generated in excess of load), as it would later do for [REDACTED].<sup>80</sup> And the still different theory Canada offered at the conclusion

<sup>77</sup> *E.g.*, L. Dyck, Tr. 1353:19-1353:21 (“I would say there isn’t any place you could go to, to find anything in writing prior to that time {of BC Hydro’s June 2012 GBL Guidelines}, no.”); M. Rosenzweig, Tr. 2036:13-2038:2 (testifying that prior to BC Hydro’s proposed June 2012 GBL Guidelines there was no comprehensive list of all of the factors that BC Hydro must consider in setting a GBL in a single place); Switlshoff First Expert Report, ¶ 53 (no evidence of written policy); Switlshoff Second Expert Report, ¶¶ 18, 27-28 (“Canada claims that BC Hydro used ‘current normal levels of self-generation’ in setting the GBLs for EPAs . . . between 2008 and 2010. Canada has provided no documentation to support the notion that the principle of ‘current normal’ was anywhere expressed by BC Hydro in that timeframe.”); J. Stockard, Tr. 1849:18-1851:3.

<sup>78</sup> L. Dyck, Tr. 1368:5-12.

<sup>79</sup> *See* L. Dyck, Tr. 1355:6-8; M. Rosenzweig, Tr. 2034:17-2035:9. *See also* L. Dyck Tr. 1356:2-5 (the principle does not require that we always subtract pre-existing sales), *id.* at Tr. 1356:18-1358:6 (the principle does not require any specific baseline duration), *id.* at Tr. 1358:7-1359:20 (baselines do not have to correspond to a calendar year), *id.* at Tr. 1364:2-6 (the GBL can be based on actual generation data or a model); Switlshoff Second Expert Report, ¶ 35 (BC Hydro’s methodology is “entirely at the evaluator’s discretion.”)

<sup>80</sup> *See, e.g.*, Dyck First Witness Statement, ¶¶ 83, 87 (utilizing a mathematical formula: generation - sales + purchases); L. Dyck, Tr. 1437:6-17 (load is appropriate GBL because “more often than not” the mill generates above load), *id.* at 1441:4-5, 17-18 (“normal is 43 megawatts over 8,400 hours”); *id.* at 1454:4-5 (“I went through any number of calculations and considerations.”); *id.* at 1455:6-8 (“349 is the GBL that I arrived at using other considerations than just simple math”); *id.* at 465:20-21 (“I think I would describe it more as averaging into that neighborhood”); *id.* at 1474:6-10 (“on average, when you smooth out the exports and imports, there are more exports than there are imports. And that’s a state of normal



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of the hearing — that Celgar’s load-based GBL was appropriate because Celgar was “trying to meet their load”<sup>81</sup> — was flatly contradicted by the evidence<sup>82</sup> and inconsistent with a principle tied to *actual annual self-supply levels*, rather than *optimum hourly generation targets*.<sup>83</sup> Howe Sound too was “trying” to generate more electricity than it had managed to generate in recent years, yet BC Hydro based its GBL on actual historical performance rather than what BC Hydro thought it was “trying” to do.<sup>84</sup>

48. *Fourth*, BC Hydro did not apply its stated GBL principle in computing multiple GBLs assigned to HSPP, from 2001-2010. BC Hydro cannot tie the [REDACTED] MW GBL in HSPP’s 2001 Consent Agreement to any HSPP operating data. BC Hydro [REDACTED] HSPP’s GBL in connection with the [REDACTED] renewals of its power sales agreements with Powerex,<sup>85</sup> even though HSPP’s “normal” generation levels [REDACTED], ostensibly because HSPP did not know to ask it to.<sup>86</sup> And BC Hydro’s 2010 HSPP GBL calculation only highlights the utter meaninglessness of the attempt to define a “normal” annual level of generation for a mill, like most, with [REDACTED] generation,

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operations for the Mill”); *id.* at 1474:12-1478:21 (testifying that he adjusted for Celgar’s normal downtime); M. Rosenzweig, Tr. 2059:1-6 (Celgar’s sales not subtracted because they were non-firm); M. Rosenzweig, Tr. 2094:13-14 (“I mean, it’s a matter of physics. It’s a matter of observation that that asset existed.”); J. Stockard, Tr. 1895:13-17 (“the facility was out of balance; namely that the pulp production rates that went above to the point to where there was more steam that could be consumed and the facility itself, at a given point in time, did not have a load.”).

<sup>81</sup> M. Owen, Tr. 2307:3-8, 2307:21-2308:8.

<sup>82</sup> B. Merwin, Tr. 391:17-22 (“No {we were not aiming to meet our load}, we were generating to maximize our power generation.”).

<sup>83</sup> Too, Mr. Owen’s counterfactual tale about what Celgar was “trying” to achieve conflicts with Mr. Dyck’s testimony that he used Celgar’s “actual historical data” in computing its GBL. L. Dyck, Tr. 1429:12-18.

<sup>84</sup> See L. Dyck, Tr. 1418:13-1419:22.

<sup>85</sup> L. Dyck, Tr. 1403:18-1406:22.

<sup>86</sup> L. Dyck, Tr. 1406:13. Mr. Dyck also contended, inconsistently, that BC Hydro has consistently applied his GBL principle since 2001, Tr. 1347:13-1348:8, 1402:20-1403:7, but that HSPP’s 2001 GBL is “not the same Generator Baseline that we apply to the current Day EPAs.” *Id.* at 1406:16-18. Apparently, in 2001, the “consistent” principle was applied differently, to establish “an upper threshold determining what they would generate, under normal operating circumstances generate up to”, *id.* at 1406:18-20, whatever that means.

resulting not in any meaningful “*current normal*” self-supply level, but rather a GBL that is nothing more or less than a [REDACTED].

49. *Fifth*, neither Tembec’s 1997 EPA, implemented in 2001, nor its 2009 EPA contain GBLs that are consistent with Mr. Dyck’s principle. It is not disputed that the 1997 EPA had no GBL, instead permitting Tembec to sell the [REDACTED] 10.8 MW of power it generated, and containing no self-supply obligation whatsoever. The 2009 EPA, on the other hand, does contain a GBL, but BC Hydro departed from using Skookumchuck’s actual historical generation level without substantiating *at all* Tembec’s claim that [REDACTED].<sup>87</sup> Mr. Dyck, in describing the GBL principle, stated categorically that if a mill claimed it would [REDACTED] [REDACTED] that it had been using, “We would have to substantiate the Claim for sure.”<sup>88</sup> Inexplicably, BC Hydro failed to do so for Skookumchuck at the time.<sup>89</sup> Indeed, Canada has presented not one document evidencing any contemporaneous internal analysis by Tembec that its [REDACTED] [REDACTED] was

<sup>87</sup> See L. Dyck, Tr. 1517:21-22 (Tembec could engage in increased arbitrage because they could [REDACTED] [REDACTED] under the new agreement. Mr. Dyck stated, “I’m not defining it as ‘arbitrage’, but I agree they [REDACTED] [REDACTED].”).

<sup>88</sup> L. Dyck, Tr. 1365:1-10. See also *id.* at 1367:12-15 (“... you would perform a robust economic analysis to ensure that the generation was uneconomical, wouldn’t you? MR. DYCK: We would have to do an analysis and determination of their claim, yes.”).

<sup>89</sup> BC Hydro never requested supporting data, L. Dyck, Tr. 1537:3-1538:10, and Mr. Lague’s explanation for not

volunteering the data was that Tembec would have required a confidentiality agreement from BC Hydro. C. Lague, Tr. 1632:9-12. This excuse fails, because in fact a confidentiality agreement was in place. R-198, Tembec 2009 EPA, App. 10.

uneconomic,<sup>90</sup> much less that it could not economically

<sup>91</sup>

**C. LESS FAVORABLE TREATMENT HOLDING CELGAR TO A NET-OF-LOAD STANDARD UNDER ORDER G-48-09**

50. Canada also afforded Mercer less favorable treatment in imposing a net-of-load embedded cost electricity access standard on Celgar, through BCUC Order G-48-09. The Ministry of Energy’s Mr. Les MacLaren conceded the obvious fact that the net-of-load standard is more restrictive than the historical usage standard applicable to all Canadian and third-country BC pulp mills under Order G-38-01.<sup>92</sup>

51. Too, Mr. MacLaren could provide no justification for the difference in treatment. Whereas in his prepared testimony Mr. MacLaren attempted to justify the more restrictive G-48-09 approach on the basis of (1) a lack of support from FortisBC and (2) BC Hydro’s lack of access to data necessary to compute GBL’s for FortisBC self-generators,<sup>93</sup> he could not support either rationale under cross-examination. He readily admitted that the BCUC could have ordered FortisBC to negotiate a GBL with Celgar, subject to BCUC review, as it had ordered BC Hydro to do in Order G-38-01, and that he

<sup>90</sup> As Tembec’s Mr. Lague agreed, a proper analysis would need to compare all to BC Hydro contemporaneously, and the three exhibits Mr. Lague prepared in 2015, for purposes of this case, “in collaboration with counsel for Canada” (C. Lague, Tr. 1631:8-9) were not in existence in 2009. In any event those exhibits fail to analyze . One document, R-589, presents

A utilizes very little electricity, demonstrated by the absence of any electricity costs on the cost reports, R-587 and R-588. These two reports, in turn,

<sup>91</sup> Mr. Lague conceded . C. Lague, Tr. 1626:3-9.

<sup>92</sup> Mr. MacLaren testified that G-48-09 “had a more restrictive effect” on any mill still purchasing electricity from its utility, like Celgar, and afforded Celgar “less access to embedded-cost utility power than they had before”. L. MacLaren, Tr. 1086:6-17.

<sup>93</sup> L. MacLaren First Witness Statement, ¶ 100.

would have expected FortisBC to comply and do so.<sup>94</sup> He also admitted that BC Hydro could have computed a GBL for Celgar, upon requesting data from Celgar (as it did in 2009), or having the BCUC obtain and vet the data.<sup>95</sup> There was thus no reason BC could not have implemented a uniform, province-wide self-generator policy at that time, just as the Ministry of Energy argued for in 2012,<sup>96</sup> after Mercer had notified Canada of its NAFTA claims.

52. With no remaining cognizable defense to Mercer's discriminatory treatment claim available, Canada resorts to its blame-the-victim strategy, contending that Celgar had numerous hypothetical options available to it after Orders G-48-09 and G-188-11, such as requesting a GBL from the BCUC under a "proper application"<sup>97</sup>, or a GBL from Fortis BC, or under the new PPA, or utilizing the NECP Rate Rider, which Canada blatantly mischaracterized not once but twice as providing Celgar with Fortis embedded cost power for 85 percent of its needs and a low rate for the remaining 15 percent.<sup>98</sup>

53. The entirety of this argument quite simply is wrong as a matter of law, and Canada's factual depictions all are demonstrably incorrect. Canada has thrown Celgar in the less favorable net-of-load cage, and it may not blame Celgar for not itself figuring how to escape from the cage. Canada bears the affirmative obligation to provide equally favorable treatment, and, from 2009 through the present, it has not done so.<sup>99</sup>

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<sup>94</sup> L. MacLaren, Tr. 1089:22-1091:7. And FortisBC's Mr. Swanson confirmed that FortisBC would have complied with a BCUC Order to compute a GBL for Celgar. D. Swanson, Tr. 1721:14-21.

<sup>95</sup> L. MacLaren, Tr. 1091:8-1092:14.

<sup>96</sup> R-49, Ministry of Energy and Mines, Comments in the Matter of a Filing by FortisBC of Guidelines for Establishing Entitlement to Non-PPA Embedded Cost Power and Matching Methodology (Compliance Filing to Order G-188-11), 22 June 2012, at 3.

<sup>97</sup> Canada's Closing, Slides 74-75.

<sup>98</sup> See Mercer Letter to Tribunal Concerning New Evidence (7 January 2015) at 9-10 and n. 23.

<sup>99</sup> The relevant state action is the BCUC's Order G-48-09, issued with the BC Ministry of Energy's express written support, that subjected Celgar to discriminatory regulatory treatment. Canada is liable for damages for so long as it continues that discriminatory treatment. It is no defense for Canada to blame FortisBC and/or Celgar for failing to reach an agreement on how to live with the discriminatory regulatory treatment. Indeed, the matter remains entirely within Canada's own control. Canada can end the discriminatory treatment at any time, either by rescinding Order G-48-09 or revising it to treat Celgar the same as other self-generating pulp mills are treated under Order G-38-01.

54. Moreover, even if relevant, Canada has identified no established legal or regulatory option available to Celgar to obtain equal treatment. There is no alternative GBL path or NECP Rate Rider approved by the BCUC, and thus actually available to Celgar, neither of which would in any event result in equal treatment.<sup>100</sup>

55. Indeed, to this date, Celgar remains barred from obtaining additional replacement power from FortisBC to make *any* additional sales of self-generated power, because the exclusivity provisions of Section 7.4 of its EPA expressly prohibit it from doing so. That would require BC Hydro to activate the Side-Letter, which it has not done, and Canada’s argument that this somehow is Celgar’s fault is an outrageous falsehood unsupported by any evidence.<sup>101</sup>

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<sup>100</sup> FortisBC has yet to file, and the BCUC has yet to approve, any FortisBC GBL Guidelines. Instead, FortisBC, on January 13, 2015, filed “high level principles” as to how it proposed to treat self-generators. *See* R-493, FortisBC Inc., Self-Generation Policy Application in BCUC Decision and Order No. G-60-14 Compliance Filing, (13 January 2015). The BCUC has yet to approve even these general principles. Thus, 15-years after Order G-38-01, the Commission has yet to approve any path forward for FortisBC self-generators. D. Swanson, Tr. 1779:21-22 . Not only is there no approved path for Celgar to obtain a FortisBC GBL, but also there is no basis for concluding that FortisBC, post-G-48-09, would or could provide a lower GBL to Celgar than in the 2009 EPA. FortisBC indicated it would consult with BC Hydro, who maintains that the BC Hydro-set **GBL** in discussions that included BC Hydro — a GBL higher than in Celgar’s 2009 EPA. D. Swanson, Tr. 1702:4-19; 1766:21-1773:16.

<sup>101</sup> Faced with the fact that the supposed “options” it had identified were illusory, Canada resorted to repeatedly characterizing Mercer’s pursuit of its arbitrage project as unreasonable, as “shooting for the moon” and “wanting everything”, arguing that Mercer’s own conduct is to blame for the untenable situation in which it finds itself. (*See*, Canada Closing, Slides 23-44; M. Owen, Tr. 2327:1-2330:15 (claiming that Celgar’s shooting for the moon is to blame for Celgar being denied access to embedded-cost power); *Id.* at 2234: 15-2236: 1 (claiming that Celgar’s shooting for the moon is to blame for the NECP being unavailable.); A. Douglas, Tr. 2418:3-12 (same); D. Swanson, Tr. 1780:7-18 (same)). Canada’s depictions of Mercer are desperate and insulting caricatures that have no support in the evidence and are divorced from the context of a foreign investor struggling with a non-transparent and shifting regulatory regime. But more importantly, they are wholly irrelevant to the issues before this Tribunal. Even if Canada’s caricature of Mercer were accurate, how would it relieve Canada of the NAFTA obligations it breached in subjecting Mercer to unfair and discriminatory treatment? It does not. Under no NAFTA provision, doctrine or jurisprudence is Canada justified in treating Mercer unfairly or discriminatorily because Mercer has adopted an allegedly “aggressive” stance in pursuing its corporate goals.

Mercer also maintains its third claim for less favorable treatment based on BC’s taking of load displacement services from Celgar that it paid others to provide. Canada’s defense that the Minister’s Order compelled load displacement fails for the reasons above. Mercer also notes that Canada’s only other argument on this issue — that Celgar’s load displacement benefits FortisBC rather than BC Hydro (Canada Closing, Slide 90) — is irrelevant legally and wrong factually. BC Hydro and the BCUC compelled Celgar to self-supply and provide load displacement services, and it matters not who in BC benefitted by such State Action. Too, Canada’s counsel himself acknowledged that, if FortisBC had been permitted to supply replacement energy to Celgar under their 2008 PPA, FortisBC “planned to source all of the electricity from BC Hydro.” M. Owen, Tr. 118:2-6. Indeed, precisely because all of the additional energy required to supply Celgar would be supplied from BC Hydro under the PPA, BC Hydro benefits from Celgar’s load displacement, and FortisBC does not. This is why Mr. Swanson testified that allowing Celgar to purchase its full energy requirements from FortisBC, without any load displacement, would provide a rate mitigation *benefit* to FortisBC and its customers. *See* D. Swanson. Tr. 1739:8-20. It also

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#### IV. CANADA DENIED MERCER FAIR AND EQUITABLE TREATMENT IN ACCORDANCE WITH THE MINIMUM STANDARD OF TREATMENT

56. The hearing also underscored Canada’s non-transparent, unjust, unfair and idiosyncratic, arbitrary and discriminatory actions in breach of the Minimum Standard of Treatment. As noted above, the evidence that Canada discriminated against and was unfair toward Celgar in comparison to other pulp mills is overwhelming and undeniable.<sup>102</sup>

57. With respect to the non-transparency pillar of Mercer’s claim, even at the hearing Canada presented no clear concept or articulation of a methodology behind the determination of GBLs for Celgar and other pulp mills, and no evidence of written reasons for its various decisions. The fact that each one of Canada’s witnesses on the topic provided a different justification for Celgar’s GBL underscores the absence of transparency even today.<sup>103</sup>

58. It also highlights the arbitrariness of Canada’s treatment of Celgar. The hallmark of arbitrary state action is that it lacks any coherent explanation. The dearth of any rules, guidelines, review process, or other procedures to assure consistency in the determination of GBLs, the absence of a common starting point or general approach,<sup>104</sup> and the absence of written reasons, internal or external,<sup>105</sup> further evidences that Canada’s treatment of Mercer was arbitrary, idiosyncratic and

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is why BC Hydro went to the BCUC to amend the PPA to prevent Fortis from fully supplying Celgar, expressly contending that BC Hydro ratepayers would be harmed with “incremental costs” (*see* Memorial, ¶ 317 and n. 404) by eliminating the benefit they obtained for free from Celgar’s load displacement, and why the BCUC found “there would be some fairly large negative impact on BC Hydro.” C-7, BCUC G-48-09 Decision, at 27.

<sup>102</sup> *See supra* Section III.

<sup>103</sup> *See supra* ¶¶ 44-49.

<sup>104</sup> L. Dyck, Tr. 1419:8-1420:12 (“MR SHOR: So, in summary, the methodology you used for Howe Sound was to start with

MR DYCK: As best as we could, with the information we had at hand, yes. MR SHOR: And is that your default GBL methodology, the one you would normally use absent exigent circumstances? MR. DYCK: No. But it’s an approach that we would consider and did in this case consider as the best approach. MR. SHOR: So, everything is case by case with no common starting point? MR. DYCK: I think I said earlier every situation is unique, and, yes, it takes a different approach to landing at what is a reasonable and agreed-to Generator Baseline.”).

<sup>105</sup> *See* L. Dyck, Tr. 1421:4-10 (confirming that he was not required to provide written reasons for his GBL decisions to anyone).

unjust.<sup>106</sup> Mr. Dyck simply had no coherent explanation for why Howe Sounds' [REDACTED] [REDACTED] in its GBL but Celgar's *above*-load sales to Northpoint and FortisBC were not.<sup>107</sup> The inexplicably differing approaches to determining GBLs rendered Canada's treatment of Mercer arbitrary, idiosyncratic and unjust.

## V. MERCER HAS PROVEN DAMAGES

### A. MERCER'S CONTENTION THAT BC HYDRO WAS THE LIKELY PURCHASER OF ADDITIONAL CELGAR ENERGY AVAILABLE UNDER EQUALLY FAVORABLE TREATMENT DOES NOT TRANSFORM MERCER'S CLAIM INTO A PROCUREMENT CLAIM

59. A finding of liability on any of Mercer's three distinct less favorable treatment claims, and/or its Minimum Standard of Treatment claim, necessarily means that BC Hydro and/or the BCUC should have permitted Celgar to sell more of its self-generated electricity, beginning in 2009. As noted in response to questions at the Hearing, Mercer's contention that BC Hydro would likely have purchased all such available electricity does not transform its non-procurement based liability claim into a procurement claim. NAFTA precludes only less favorable treatment claims based on government procurement *measures*;<sup>108</sup> it does not preclude a damages argument based on a government price or a government purchaser.<sup>109</sup> Put another way, NAFTA Article 1108 identifies certain claims that are not

<sup>106</sup> See L. MacLaren, Tr. 1076:9-18 (The Ministry of Energy did not require that BC Hydro provide written reasons for its GBL determinations); *id.* at 1077:6-22 (Acknowledging that approved written guidelines would be useful to ensure consistent treatment).

<sup>107</sup> See L. Dyck Tr. 1397:22-1398:3; 1480:10-1482:1; 1487:4-10.

<sup>108</sup> Under Art. 1101, Chapter 11 "applies to measures adopted or maintained by a Party", and the Article 1108 exceptions all identify excluded measures. Canada recognized as much in contending that the "procurement exclusion applies to the measures challenged by the Claimant." Counter-Memorial, ¶ 341.

<sup>109</sup> Suppose for example that in Order G-48-09, the BCUC had adopted a province-wide self-generator policy, pursuant to which all self-generators in BC were required to self-supply the first 25 MW of electricity they produced, but Celgar was required to self-supply 250 MW. Assume further there was no non-nationality based justification for the difference in treatment. The BCUC does not procure electricity, and such a measure would not concern government procurement. Finally, suppose that six months after that, BC Hydro offered to purchase electricity from BC self-generators at a price of C\$110/MWh, and that Celgar was otherwise eligible to sell into both power calls. No NAFTA provision precludes Celgar from challenging the BCUC regulatory measure as discriminatory under NAFTA Arts. 1102 and 1103, or contending that but for the discriminatory measure, it would have sold 225 MW to BC Hydro at C\$110/MWh, and its damages should be based on that BC Hydro price.

admissible under Arts. 1102 and 1103; once the Tribunal rules that the claim is admissible, Art. 1108 is not reapplied in the damages context. And the procurement exception never applies at all to Minimum Standard of Treatment claims under Article 1105.

60. The evidence is uncontroverted that BC Hydro was in the market buying bioenergy from BC self-generators in 2008, 2009, 2010, and 2011. BC Hydro issued its Bioenergy Phase I call for proposals on 6 February 2008, and concluded a ten-year EPA with Celgar, for 228 GWh/yr as well as EPAs with three other BC self-generators, for another 340 GWh/year, in January 2009.<sup>110</sup> As Canada itself noted, BC Hydro came up short in that tender, purchasing 421 GWh/year less in total energy than it had wanted.<sup>111</sup>

61. BC Hydro then concluded an EPA with Tembec in August 2009, agreeing to purchase an average of 24.4 MW/h, under no formal tender process, and it concluded a [REDACTED] EPA with Howe Sound in September 2010, purchasing [REDACTED], under BC Hydro's Integrated Power Offer.<sup>112</sup> The starting firm energy price under these various EPAs was [REDACTED] for Celgar, [REDACTED] for Tembec, and [REDACTED] for Howe Sound, with differing annual inflation adjustments.<sup>113</sup> BC Hydro also concluded its Clean Power Call in August 2010, signing 25 EPAs, for 3,266 GWh/yr, at levelized firm energy plant gate prices of C\$83-131/MWh.<sup>114</sup> Lastly, BC Hydro initiated its Bioenergy Phase II power call with an RFP on 31 May 2010, and concluding in August 2011, resulting in four additional EPAs, totaling 754 GWh/yr, at a weighted-average levelized adjusted firm energy price of C\$ 115/MWh (2010 \$).<sup>115</sup>

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<sup>110</sup> See Memorial, ¶¶ 136-138.

<sup>111</sup> A. Douglas, Tr. at 2375:4-12.

<sup>112</sup> See Memorial, ¶¶ 266, 332, 521-22 and n. 632, 561-63

<sup>113</sup> See Memorial, ¶¶ 142 (Celgar), 563 (HSPP), and C-145, 2009 Tembec EPA, at App. 3-4.

<sup>114</sup> NAV 45, BC Hydro Report on Clean Power Call (3 August 2010) at 11.

<sup>115</sup> NAV-44, BC Hydro Report on Bioenergy Phase II (10 February 2012) at 14.



62. Canada nevertheless contends that BC Hydro never would have purchased additional electricity from Celgar, had nondiscriminatory or fair and equitable treatment made such additional energy available for sale, notwithstanding the admitted shortfall in its Bioenergy I purchasing, notwithstanding Celgar's status as the second lowest bidder in Bioenergy I, and notwithstanding all of BC Hydro's subsequent purchases. Bizarrely, Canada effectively bases this damages argument *entirely* on the premise that the Tribunal determines that no violation of Arts. 1102, 1103, or 1105 has occurred. Canada asserts that BC Hydro is "policy barred" from buying "below GBL energy" — energy BC Hydro has defined as "existing."<sup>116</sup> But Canada fails to recognize that if it is found liable under any of Mercer's NAFTA claims, necessarily the Tribunal would have found that Celgar's GBL was discriminatory or unfair, and Canada's NAFTA obligation was to provide Celgar a lower or zero GBL.<sup>117</sup> Thus, all of the additional energy at issue would be *above* GBL energy, rendering moot the entirety of Canada's argument.

**B. PROFITABLE THIRD-PARTY SALES OPPORTUNITIES  
ALSO EXISTED IN 2009**

63. Too, at the time BCUC Order G-48-09 in May 2009 effectively prohibited Celgar from making additional sales of its self-generated electricity, Celgar could also have sold additional electricity to buyers in the United States. Canada's argument to the contrary involves knocking down a fictional strawman of its own creation, baselessly assuming that Celgar could only sell (i) at unprofitable Mid-C spot prices, (ii) using only long-term firm transmission rights.

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<sup>116</sup> Canada Closing, Slide 171. *See also* Rejoinder, ¶¶ 419-423.

<sup>117</sup> Indeed, as detailed above, at least 23.9 GWh/yr of additional electricity, representing the volume of export sales Celgar made in its baseline year of 2007 to Northpoint and FortisBC, qualified as "new and incremental" energy under the express terms of Addendum 8 to BC Hydro's Bioenergy Phase I terms. Canada's argument thus fails even on its own terms. Far from "barring" additional purchases from Celgar, BC Hydro's "policies" favored them.

64. First, Celgar’s objective, was to enter into *long-term* power sales contracts, like the 10-year EPA it concluded with BC Hydro.<sup>118</sup> This objective is confirmed by the fact that the complementary 2008 PSA between FortisBC and Celgar was a 30-year agreement.<sup>119</sup> Witness testimony was consistent that utilities enter into long-term power purchase contracts not at spot market prices, but rather at prices reflecting their own projected long run marginal costs (LRMC) for new electricity resources.<sup>120</sup>

65. That long-term power sales contracts or EPAs are not tied to spot market prices like Mid-C is demonstrated vividly by BC Hydro’s own behavior. Mid-C spot prices were consistently generally lower than C\$60/MWh throughout the period 2009-2011, and on average lower than C\$40/MWh.<sup>121</sup> Yet during this very period, BC Hydro, as detailed above, entered into dozens of long-term, 10-year EPAs, almost all at prices in excess of \$100/MWh, demonstrating that the Mid-C spot price is completely unrelated to long-term electricity purchase prices in the region.<sup>122</sup> As Mr. Merwin pointed

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<sup>118</sup> See, e.g., C-216, Celgar Electricity Opportunities (Mercer internal powerpoint presentation)(July 2007) at 6 (referencing energy markets for “long term power supplies” and an assumed price of C “\$101/MWhr”), B. Merwin, Tr. 441:5-10 (“we were looking to enter into a long-term agreement with another buyer”), *id.* at 484:14-15 (also referring to “long-term power contracts”); *id.* at 230:4-13 (testifying about prices for “long-term power contracts”). While Canada is correct that Mr. Friesen testified that, in mid-2008, he was looking to broker “multi-month power contracts” for Celgar, Friesen Witness Statement, ¶ 4, this was at the time when the Celgar-FortisBC was awaiting BCUC approval, and thus reflected a limited “trial period.” *Id.* n. 3, quoting Merwin First Witness Statement, ¶ 83.

<sup>119</sup> C-220, Power Supply Agreement between Celgar and FortisBC (21 August 2008), § 4.1.

<sup>120</sup> E.g., R. Friesen, Tr. 967:10-12 (“I don’t think I would expect the price of a long-term sale . . . to be anything to do with spot prices — the price of a long-term sale always approaches the price of new generation build or new cost of supply.”); B. Merwin, Tr. 464:18-20; D. Swanson, Tr. 1797:1-2 (EPA prices “[a]re reflective of a longer-run marginal cost type of power”); B. Kaczmarek, Tr. 2006:19:21 (“[L]ong-term electricity contracts don’t price against spot, which is what we were looking at, at Mid-C. They’re typically based upon new builds of electricity to a system . . . .”); M. Rosenzweig, Tr. 2103:2-13 (agreeing that BC Hydro is justifying its EPA prices to the BCUC “on the basis that they are lower than their long-run marginal cost. They are not justifying them with reference to the spot market price . . . .”).

<sup>121</sup> By Canada’s tabulation, Mid-C spot prices averaged US\$32.56 (C\$37.18) in FY2009, US\$32.82 (C\$33.80) in FY2010, and US\$23.81 (C\$23.55) in FY2011. See Canada Opening Presentation Slide 89; C-38, BC Industrial Electricity Policy Review Task Force Final Report (Oct. 2013) at 10 (figures converted to C\$ using annual average exchange rate as reported by Bank of Canada).

<sup>122</sup> Indeed, when BC Hydro justified these EPA prices to the BCUC it compared them to other long-term EPA’s in neighboring jurisdictions, demonstrating as well that comparable pricing would have been available to Celgar elsewhere. See generally Kaczmarek Second Expert Report at 30, Table 4. See also C-63, BC Hydro Report on Bioenergy Call Phase 1 (17 February 2009) at 29 (noting 2007-08 utility purchases in California at C\$100-111/MWh for contract terms of 10-20 years in justifying the cost-effectiveness of the BC Hydro EPAs); NAV-45, BC Hydro Report on Clean Power Call (10

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out during the hearing, in its own report regarding a 2006 power call, BC Hydro justified the prices per MWh it awarded as cost-effective, explaining that “{m}arket prices for firm long-term contracts are most useful as a comparison to the projects awarded EPAs in the F2006 Call. . . . Generally, spot markets cannot be relied upon as a reliable comparator to electricity obtained via long-term EPAs.”<sup>123</sup>

66. Indeed, even more currently, both BC Hydro and FortisBC have reported long run marginal cost data — the data that most closely track the prices offered in long-term electricity sales agreements — to the BCUC far in excess of extant low Mid-C prices. Mr. Dyck confirmed at the Hearing that BC Hydro’s reported LRMC in 2014 was C\$ 129.70/MWh.<sup>124</sup> And while FortisBC’s Mr. Swanson professed not to know FortisBC’s LRMC,<sup>125</sup> on 4 July 2012, Mr. Swanson signed a submission to the BCUC pegging FortisBC’s LRMC at C\$130/MWh.<sup>126</sup> Notably, this is a projected cost for conventional energy, and not green energy.

67. Canada also spent considerable effort in alleging that Celgar would be unable to sell its electricity at “green” prices, which, according to Canada, would be the only prices at which Celgar could sell its self-generated electricity at a profit.<sup>127</sup> This too, however, was a strawman, as the prices that non-green or generic electricity commands in long-term contract are substantially similar to (and in some cases, higher than) the “green” prices upon which Canada has been focused. As Mr. Merwin explained, Celgar was planning to enter into long-term electricity sales agreements with third parties in the Pacific Northwest of the United States. And, as Mr. Kaczmarek explained, the pricing of green and

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Feb. 2012) at 21-22 (“The levelized energy prices for comparable calls in other jurisdictions vary from \$79 to \$176 per MWh (Canadian 2009\$).”

<sup>123</sup> C-98 at pp. 46 (pdf page 51/348), 48 (pdf page 53/348); *see* B. Merwin, Tr. 229:4-230:13.

<sup>124</sup> L. Dyck, Tr. 1230:19-1232:6. *See also* R-221, p. 19.

<sup>125</sup> D. Swanson, Tr. 1797:22-1798:11.

<sup>126</sup> R-266, Fortis Reply Submission, Guidelines for NECP and Model Matching (4 July 2012) Page 12.

<sup>127</sup> *See* A. Douglas, Tr. 210:14-21, 211:12-212:6.

generic electricity are comparatively similar in the context of long-term electricity sales agreements.<sup>128</sup> Furthermore, in addition to explaining that long-term electricity sales contract prices do not follow spot market pricing, in its 2006 power call report, BC Hydro revealed that long-term “green” energy prices are equal to and sometimes lower than the prices awarded for long-term generic energy.<sup>129</sup>

68. For these reasons, assuming *arguendo* that BC Hydro would not have purchased additional electricity from Celgar, the price BC Hydro agreed to pay Celgar was in line with other long-term contract prices in both BC and neighboring jurisdictions, and is the best evidence of the value of Celgar’s electricity to a third-party.<sup>130</sup> No witness for Canada testified otherwise.

69. With respect to transmission access, Celgar could have paired a long term energy sales contract with the use of short-term firm and/or non-firm transmission from the U.S border. Only one witness had actually checked the scheduling system at the time Celgar was looking to sell energy, in 2008-09 — then Northpoint’s Mr. Friesen — who observed that short-term transmission into the Pacific Northwest, in the relatively small volume Celgar would have needed, “would have been available.”<sup>131</sup> There is thus no reason Celgar could not have entered into a profitable long-term energy sales contract in 2009, with a third-party, had BC Hydro and the BCUC not precluded it from doing so.

70. This conclusion not only provides a basis for damages independent of a BC Hydro purchase of Celgar’s additional energy, but also buttresses the likelihood that BC Hydro itself would have purchased that energy. Canada argues that BC Hydro would purchase only “new or incremental” generation only because BC Hydro would not want to pay for existing generation *that already was a*

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<sup>128</sup> See B. Kaczmarek, Tr. 2007:5-10.

<sup>129</sup> See B. Merwin, Tr. 229: 19-230:13 (noting Figure 11 and Table 14 in BC Hydro 2006 Power Call Report, Exhibit C-98 “{a}nd in this exhibit--this is a document prepared by BC Hydro, and you can see that in 2006 the prices for long-term contracts for natural gas was 70 to 129, and coal it was 70 to 125, and hydro and wind, which are green, were actually a little bit lower.”).

<sup>130</sup> As BC Hydro’s Mr. Scouras testified, it is a “reasonable market price,” determined in a competitive bidding process, and was not a subsidy. J. Scouras, Tr. 1213:15-1215:15.

<sup>131</sup> R. Friesen, Tr. 960:13-961:5.

*BC resource.*<sup>132</sup> According to Canada, BC did not want to “incentivize” (*i.e.*, pay for) generation it already could count on to meet BC demand. But once it was possible for Celgar to export its additional energy *out of the Province*, then Celgar’s additional energy no longer is a BC resource available to meet BC demand, and Canada has provided no reason why BC Hydro would not have purchased it. Further, as noted above, the additional energy at issue all would be “above-GBL” energy, and thus qualified as new or incremental.

71. For the foregoing reasons, as well as those expressed in its pleadings and at the hearing, Mercer respectfully submits that it is entitled to the relief it has requested: that the Tribunal find Canada in breach of its obligations under NAFTA Articles 1102, 1103, and 1105, award Mercer damages with interest, order Canada to pay all costs of the arbitration, and award to Mercer any such additional relief it may consider appropriate.

Respectfully submitted,



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<sup>132</sup> A. Douglas, Tr. 2376:22-2377:2 (“The Claimant’s existing generation wouldn’t, however, have added anything to the Province’s resource portfolio.”); Douglas, Tr. 203:3-7 (“The Claimant’s existing generation would not, however, have added anything to BC Hydro’s resource portfolio.”); L. MacLaren, Tr. 1025:15-16 (“Procuring it would not add to the resource base in the Province.”)