

**BEFORE THE ADDITIONAL FACILITY OF THE  
INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES (ICSID)**

**BETWEEN:**

**MERCER INTERNATIONAL INC.**

**Claimant / Investor**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent / Party**

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

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**GOVERNMENT OF CANADA**

**POST-HEARING SUBMISSION**

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**26 February 2016**

Departments of Justice and of  
Foreign Affairs, Trade and  
Development  
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## I. INTRODUCTION

1. The Claimant's lengthy written submissions and the testimony of its witnesses confirm that it is challenging certain terms and conditions of its electricity purchase agreement ("EPA") with BC Hydro because it desires to sell more self-generated electricity pursuant to this procurement contract. Yet NAFTA Chapter Eleven does not apply to the commercial activities of state-owned enterprises; nor does it protect claimants from discrimination in procurement. The Claimant's attempt to cloak its procurement contract in quasi-regulatory language obfuscates the fact that it *freely agreed* to the terms and conditions in its EPA.

2. In any event, the facts do not support any claim of discriminatory or manifestly arbitrary conduct. The evidence presented at the hearing confirmed that the Claimant not only received the same treatment as everyone else but, in certain instances, received better treatment.<sup>1</sup> The Claimant's efforts at the hearing to avoid the testimony of some witnesses while asking others questions beyond their knowledge should be noted by the Tribunal.<sup>2</sup> The Claimant has sought to confuse rather than clarify in the hopes of manufacturing a claim. All that the Claimant has succeeded in manufacturing is an expensive four-and-a-half-year arbitration that should never have been filed.

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<sup>1</sup> The Claimant's Side Letter Agreement and [REDACTED] are both examples of treatment the Claimant received that no one else did: *see* TR Day 1, 167:12-21 (per DOUGLAS); TR Day 4 1206:8-13 (per SCOURAS); TR Day 7, 2018:17 – 2019:5 (per ROSENZWEIG). *See also* Counter-Memorial, ¶ 444.

<sup>2</sup> Canada sets out several examples of this practice below: *see, e.g.*, ¶¶ 15-16, ¶ 21, fn 87, fn 133, fn 138, ¶¶ 42-43.

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## II. THE CLAIMANT CONTINUES TO MISCHARACTERIZE THE MEASURES

### A. The Claimant Erroneously Conflates its GBL with the Exclusivity Provision in its EPA

3. The Claimant continues to conflate the GBL and exclusivity provision in its EPA,<sup>3</sup> ignoring that they are distinct elements of BC Hydro's procurement process. The Claimant's GBL was set by BC Hydro's Key Accounts Management Group,<sup>4</sup> following negotiations with Celgar, *prior to* its bid into the Bioenergy Call for Power.<sup>5</sup> By contrast, Celgar negotiated its exclusivity provision with BC Hydro's Power Acquisitions Group *during* the Bioenergy Call for Power.<sup>6</sup> The two aspects of the EPA were negotiated by different departments and at different times.

4. GBLs and exclusivity provisions also serve distinct purposes. Hearing testimony confirmed that the GBL in Celgar's EPA demarks incremental from existing generation<sup>7</sup> and, once the EPA is signed, BC Hydro is contractually obligated to procure *all* electricity generated above the GBL.<sup>8</sup> The exclusivity provision in BC Hydro's EPAs

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<sup>3</sup> Claimant's Post-Hearing Submission ("Claimant's PHS"), ¶ 3.

<sup>4</sup> See TR Day 5, 1576:3-18 (per DYCK).

<sup>5</sup> Letter from RFP Administrator (Bioenergy Call Phase I) to Brian Merwin Re: Bioenergy Call (Phase I) – GBL, dated May 30, 2008, **R-181**.

<sup>6</sup> BC Hydro Bioenergy Call for Power (Phase I) - Commercial Proposal, 9 June 2008, **R-128**; see also Scouras Statement I, ¶¶ 2-3.

<sup>7</sup> See, e.g., TR Day 4, 1134:8-12 (per MACLAREN); TR Day 4, 1187:8-11 (per SCOURAS). See also Scouras Statement I, ¶¶ 26, 45-52; Dyck Statement I, ¶¶ 62-3, 67-8. The Claimant itself has acknowledged this before the BCUC: see Zellstoff Celgar Response to BCUC IRs (X) Q 6.1 at 16, April 15, 2010, pp. 2, 18, **R-372**; Argument of Zellstoff Celgar Limited Partnership, 2009 Rate Design and Cost of Service Analysis, July 14, 2010, p. 43, **R-373**.

<sup>8</sup> The procurement GBL in Celgar's EPA was 349 GWh/yr: see Celgar 2009 EPA, s. 7.4; Appendix 1, ¶ 1, **R-135**. Celgar agreed to deliver BC Hydro with above-GBL energy in the amount of 238 GWh/yr (Celgar 2009 EPA, s. 7.2, definition of Seasonally Firm Energy Amount in Annex 1-17; Appendix 2-1, Part I, **R-135**), and BC Hydro additionally agreed to [REDACTED]



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The Claimant is thus forced to mischaracterize the measures at issue and refer instead to a fictional “GBL-based sales prohibition.”<sup>14</sup> The Claimant argues that BC Hydro set Celgar’s GBL too high in comparison to other mills and thus, through the exclusivity provision, unlawfully “forced” Celgar to self-supply a certain amount of its below-GBL electricity that it could have otherwise sold to third parties.<sup>15</sup>

6. The Claimant’s theory makes no sense. BC Hydro has not forced the Claimant to do anything. The EPA is a contract that the Claimant freely negotiated and signed with BC Hydro.<sup>16</sup> Moreover, a lower GBL in the EPA would not have freed up electricity for the Claimant to sell to third parties, but would have increased the amount of electricity that BC Hydro would procure under the contract, since BC Hydro procures *all* electricity above the GBL. The Claimant’s mischaracterization of the measures must be rejected.

#### **B. The Claimant Mischaracterizes BCUC Order G-48-09**

7. The Claimant maintains that Canada has, through BCUC Order G-48-09, imposed “a discriminatory net-of-load standard on Celgar for access to embedded cost utility

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<sup>14</sup> Claimant’s PHS, fn 1, ¶ 5. *See also* TR Day 8, 2191:5 (per SHOR); TR Day 8, 2197:12-15 (per Arbitrator DOUGLAS and SHOR). The Claimant is also forced to conflate Celgar’s GBL and exclusivity provision to: (i) support its argument that the exclusivity provision is not necessary to BC Hydro’s procurement (Claimant’s PHS, ¶ 9, TR Day 4, 1201:8-11 (per SCOURAS), *see* Section III.A below); and (ii) support its position that BC Hydro has exercised delegated governmental authority pursuant to BCUC Order G-38-01 in negotiating the GBL and the exclusivity provision (*see* Section III. B below). Despite the Claimant’s attempts to muddy the waters, Celgar’s GBL and exclusivity provision are distinct measures.

<sup>15</sup> Claimant’s PHS, ¶ 6.

<sup>16</sup> In fact, the Claimant won the largest of the four contracts awarded in the Bioenergy Call for Power Phase I. Twenty bids were submitted: *see* BC Hydro Report on the Bioenergy Call Phase I Request for Proposals, 17 February 2009 at 150614-150615, **R-170**.



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proposing a 3.5MW GBL to FortisBC<sup>26</sup> and a 1.5MW GBL to the BCUC.<sup>27</sup> Had the Claimant not pursued “the moon,”<sup>28</sup> a service GBL with FortisBC that included PPA power could have been possible.

10. Third, in BCUC Orders G-188-11 and G-202-12, the BCUC in fact determined that the Claimant could have access to embedded cost utility supply for up to 100% of its load while selling its self-generated electricity, a right that no mill in BC Hydro territory holds.<sup>29</sup> This is the very antithesis of the Claimant's net-of-load fiction.<sup>30</sup> While the Claimant complains about the rate proposed by FortisBC pursuant to these Orders, Canada is not liable for the actions of FortisBC. Rather than challenge FortisBC's rate on the basis of BCUC Orders G-188-11 and G-202-12 at the BCUC, the Claimant advocated a suspension of the rate proceeding at the BCUC arising from G-188-11 and G-202-12 so that it could challenge section 2.5 of the 2014 PPA in domestic courts.<sup>31</sup>

11. Finally, section 2.5 of the 2014 PPA expressly allows FortisBC to use PPA power while selling to Celgar while Celgar sells electricity to third parties below its load, under baseline principles approved by the BCUC.<sup>32</sup> For all of the foregoing reasons, the Claimant's argument that it has been subject to a “net-of-load” standard is incorrect.

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<sup>26</sup> Memo from Celgar to FortisBC, Setting a Generator Base Line for Celgar, January 12, 2010, p. 5, **R-273**.

<sup>27</sup> Zellstoff Celgar Evidence Submission, 15 March 2010, p. 1, **R-280**.

<sup>28</sup> TR Day 6, 1780:9 (per SWANSON)

<sup>29</sup> TR Day 2, 569:9-16 (per SWILITSHOFF); TR Day 6, 1644:2-6 (per SWANSON).

<sup>30</sup> The Claimant has in fact confirmed its understanding that these Orders “replace[] the ‘net of load’ criterion.”: Letter from KC Moller to Erica Hamilton, Aug 10, 2012, p. 10, **R-499**. *See generally* Canada's Letter to Tribunal dated February 26, 2015, fn. 68.

<sup>31</sup> *See* Canada's Letter to Tribunal dated February 26, 2015, pp. 9-20.

<sup>32</sup> TR Day 6, 1734:19-1737:2, 1697:11-13. *See also* Swanson Statement II, ¶ 36.



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### III. CLAIMS RELATING TO THE GBL AND EXCLUSIVITY PROVISION IN CELGAR'S EPA ARE INADMISSIBLE AND FALL OUTSIDE THE TRIBUNAL'S JURISDICTION

#### A. Hearing Testimony Confirms that the GBL and Exclusivity Provision in Celgar's EPA Relate to a Procurement

12. The procurement exception was the subject of several Tribunal questions at the hearing.<sup>33</sup> Responses to these questions and witness testimony confirmed that Celgar's EPA is a procurement contract<sup>34</sup> and that the GBL and exclusivity provision contained in the EPA "are integral to [the] procurement project."<sup>35</sup>

13. Messrs. Scouras, Dyck and MacLaren confirmed at the hearing that Celgar's GBL is integral to BC Hydro's procurement of electricity because it defines the amount of new or incremental energy that BC Hydro would purchase.<sup>36</sup> The Claimant also agreed that its GBL "determine[s] the energy and capacity to be sold to BC Hydro,"<sup>37</sup> such that changing the GBL "changes the definition of what's preexisting and what's new and incremental"<sup>38</sup> and that "BC Hydro would have had to purchase everything above the

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<sup>33</sup> See, e.g., TR Day 1, 91:3-4 (per Arbitrator DOUGLAS); TR Day 8, 2192:21 – 2193: 5 (per President VEEDER); TR Day 8, 2242:20 – 2243:2 (per Arbitrator DOUGLAS).

<sup>34</sup> TR Day 4, 1202:6-11, 15-6 (per SCOURAS); TR Day 5, 1318:13-21 (per DYCK).

<sup>35</sup> See, e.g., TR Day 4, 1192:9-17; 1201:7-11 (per SCOURAS). See also US 1128 Submission, ¶ 8; Mexico 1128 Submission, ¶ 6. See also *ADF*, Award, ¶ 161, **RA-1**.

<sup>36</sup> See, e.g., TR Day 4, 1192:9-12 (per SCOURAS); TR Day 5, 1331:2-4 (per DYCK); TR Day 4, 1134:8-12 (per MACLAREN).

<sup>37</sup> See references in Canada's Closing Presentation, at slide 103. See also TR Day 8, 2190:10-12 ("SHOR: The GBL is used by BC Hydro to define its procurement obligation above that amount."); Claimant's PHS, fn 30.

<sup>38</sup> TR Day 8, 2212:11-2213:7 (per SHOR). See also TR Day 1, 90:19 – 91:2 ("Arbitrator DOUGLAS: Just before you move on, if you're right that BC Hydro has to purchase all eligible electricity, then doesn't changing the GBL essentially determine how much electricity it is going to be obliged to purchase? GEHRING FLORES: Yes.").

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GBL.”<sup>39</sup> At the hearing, the Claimant also confirmed that its entire damages case is premised on the assumption that BC Hydro would procure everything above a lower, allegedly non-discriminatory, GBL.<sup>40</sup> In this respect, the Tribunal asked: “if, ultimately, the way you assess [your] damages is equivalent to a scenario whereby BC Hydro would have purchased more, does that not indicate that we're talking about procurement?”<sup>41</sup> The inescapable conclusion is yes.

14. Nevertheless, the Claimant maintains that Celgar's GBL does not relate to procurement.<sup>42</sup> It attempts to distinguish between Celgar's GBL of 349 GWh/yr and the 238 GWh/yr that Celgar agreed to sell to BC Hydro, arguing that only the 238 GWh/yr figure pertains to procurement.<sup>43</sup> This distinction is untenable. The Claimant ignores that the 238 GWh/yr figure only represents the amount of above-GBL energy that Celgar has committed to *supply*. BC Hydro has, in fact, committed to procure *all* of Celgar's above-GBL energy (above and beyond 238 GWh/yr).<sup>44</sup>

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<sup>39</sup> TR Day 1, 92:3-6; TR Day 8, 2242:7-10 (per GEHRING FLORES); TR Day, 8, 2240:9-11 (per SHOR).

<sup>40</sup> See TR Day 7, 1986:1-5, 1984:4-15 (“KACZMAREK: I don't understand on what basis BC Hydro would have decided to buy at some other level of power other than everything above the GBL.”); TR Day 8, 2241:10-13, 2241:22-2242:6 (per SHOR).

<sup>41</sup> TR Day 8, 2242:20-2243:2 (per Arbitrator DOUGLAS).

<sup>42</sup> See, e.g., TR Day 8, 2193:5-10 (per SHOR); Claimant's PHS, ¶ 6. The Claimant also alleges that it does not rely on any “discrimination in the application of any procurement rule [...] provision, policy, or decision to establish liability”: Claimant's PHS, ¶ 12. Yet, the Claimant has repeatedly argued that its GBL, a procurement provision, was discriminatory. At the hearing it framed its “liability issue” as: “was our GBL set in a discriminatory fashion? *Should we have been allowed to sell more?*”: TR Day 8, 2234:5-7 (per SHOR, emphasis added). Moreover, the Claimant expressly argues that BC Hydro failed to abide by its “own procurement specifications” in setting its GBL (which Canada denies, see ¶ 41 below): Claimant's PHS, ¶ 10. This further demonstrates that its claim is about alleged discrimination in a procurement process.

<sup>43</sup> See, e.g., TR Day 8, 2194:16-18 (per GEHRING FLORES).

<sup>44</sup> TR Day 4, 1202:15-16 (“SCOURAS: If we have EPAs with them, then we've agreed to purchase what's above the GBL.”). As BC Hydro's procurement activity is not limited to 238 GWh/yr, but to all above-

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15. With respect to the exclusivity provision contained in Celgar's EPA, Mr. Scouras confirmed that it plays a central role in BC Hydro's procurement of electricity because it "maintain[s] the integrity of that procurement"<sup>45</sup> by making BC Hydro the sole purchaser of the energy.<sup>46</sup> The Claimant chose not to cross-examine Mr. Scouras on this point,<sup>47</sup> but nonetheless continues to maintain its position that the exclusivity provision is not tied to procurement. None of the Claimant's arguments have merit.

16. First, the Claimant mischaracterizes the testimony of Mr. MacLaren – who had no involvement in BC Hydro's procurement activities – to suggest that the exclusivity provision is not related to procurement.<sup>48</sup> The Claimant's characterization is without merit.<sup>49</sup> Mr. MacLaren expressly confirmed that the exclusivity provision is related to procurement.<sup>50</sup>

17. Second, the Claimant argues that the purpose of the exclusivity provision is not related to procurement but is intended to impose a "self-supply obligation."<sup>51</sup> The

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GBL energy, the Claimant is misguided when it argues that BC Hydro could procure from Celgar without using the term "GBL" at all. The 238 GWh/y figure does not capture the entirety of BC Hydro's procurement commitment: *see* fn 8 above.

<sup>45</sup> TR Day 4, 1201:8-11. *See also* Scouras Statement II, ¶¶ 8-10; 21.

<sup>46</sup> Scouras Statement II, ¶¶ 8-9.

<sup>47</sup> TR Day 8, 2352:10-12 (per DOUGLAS).

<sup>48</sup> Claimant's PHS, ¶ 8.

<sup>49</sup> The Claimant relies on an exchange in which it put a convoluted hypothetical to Mr. MacLaren and on a series of statements made by Mr. MacLaren about the Province's policy of only procuring incremental energy: Claimant's PHS, ¶ 8, fn. 11,12, 13 (with reference to TR Day 4, 1023:3-10; 1024:3-7; 1026:4-7; 1029:10-13; 1032:7-9; 1043:12-1044:1). Mr. MacLaren never stated, or implied, that a GBL or an exclusivity provision in an EPA is not related to procurement.

<sup>50</sup> TR Day 4, 1042:22-1043: 4 ("SHOR: Okay. So the limitation on the third-party sales flows from the policy choice the Government made to require self-supply? MACLAREN: I would say, Mr. Shor, it flows from the way we've chosen to procure incremental energy.")

<sup>51</sup> TR Day 8, 2191:3-9 (per SHOR); Claimant's PHS, ¶ 6.

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Claimant ignores that Celgar signed the EPA of its own volition and thus the EPA could not have “imposed” anything.<sup>52</sup> Moreover, the exclusivity provision ensures that BC Hydro is the sole buyer of a proponent’s energy, and makes no mention of an obligation to self-supply.<sup>53</sup>

18. Third, the Claimant argues that it is not the exclusivity provision but the “delivery shortfall penalties” in the EPA that ensure “security of supply.”<sup>54</sup> However, breaches of exclusivity allow BC Hydro to seek commercial remedies beyond those set out in the delivery shortfall provisions.<sup>55</sup> These additional remedies confirm that the exclusivity provision is related to BC Hydro’s procurement, as it provides “greater certainty that BC Hydro will in fact receive the benefit of the electricity under the EPA.”<sup>56</sup>

19. Finally, the Claimant argues that the exclusivity provision is not integral to BC Hydro’s procurement because of the Side Letter Agreement, which would allow the provision to be modified to permit sales to third parties.<sup>57</sup> However, the Side Letter

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<sup>52</sup> Indeed, when the Tribunal asked how a self-supply obligation could have been “imposed” on Celgar in contractual negotiations when it could have simply walked away (TR Day 8, 2215:3-8 (per Arbitrator DOUGLAS)), the Claimant avoided the question, instead alleging that due to the Side Letter Agreement there was no agreement with respect to the exclusivity provision at all: see TR Day 8, 2215:13 – 2216:2 (per SHOR). This, however, ignores the fact that Celgar signed the EPA and agreed to abide by its terms and conditions, including the Side Letter Agreement: *see* fn 99.

<sup>53</sup> Scouras Statement II, ¶ 10. Even if the exclusivity provision could be construed as a requirement to self-supply, which is denied, the provision is still integral to BC Hydro’s procurement activities and is thus caught by the exception.

<sup>54</sup> Claimant’s PHS, ¶ 11.

<sup>55</sup> Sections 13.5 and 13.7 of the EPA specify that BC Hydro’s remedies are not limited to liquidated damages, and that the ordinary limits on liability for damages do not apply, if a proponent engages in a “Deliberate Breach”, which is defined to include “any sale or transfer by the Seller of Energy to any Person, other than the Buyer, except where such sale or transfer is expressly permitted under this EPA”: *see* Celgar 2009 EPA, ss. 13.5, 13.7, Appendix 1-4, ¶ 34(d), **R-135**.

<sup>56</sup> Scouras Statement II, ¶ 9.

<sup>57</sup> Claimant’s PHS, ¶ 7.

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Agreement was concluded to reach agreement on the EPA and to account for Celgar's unique circumstances as a customer of FortisBC. BC Hydro remained concerned about "eroding the procurement of additional electricity under the EPA."<sup>58</sup> At the time of the negotiations, the issue of FortisBC's right to purchase additional PPA power to facilitate export sales by FortisBC's customers was being reviewed by the BCUC.<sup>59</sup> BC Hydro thus agreed to the Side Letter Agreement "[i]n light of the ongoing proceedings before the BCUC and in order to accommodate Celgar."<sup>60</sup>

**B. Hearing Testimony Confirms that BC Hydro was not Exercising Delegated Governmental Authority when it Negotiated Celgar's EPA**

20. The Claimant has failed to meet its burden under NAFTA Article 1503(2) to show: (1) that there was a "delegation", or "affirmative transfer or authorization of government authority" to BC Hydro;<sup>61</sup> and (2) that the delegation was a delegation of sovereign powers or authority.<sup>62</sup> Rather, testimony at the hearing confirmed that Celgar's GBL and exclusivity provision were terms negotiated as part of a commercial procurement activity.<sup>63</sup>

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<sup>58</sup> Scouras Statement II, ¶ 21.

<sup>59</sup> Scouras Statement II, ¶ 23.

<sup>60</sup> Scouras Statement I, ¶ 59.

<sup>61</sup> See NAFTA Note 45; US 1128 Submission, ¶ 2. NAFTA Note 45 was the subject of Tribunal questions: see TR Day 8, 2188:6-10, 13-8 (per President VEEDER).

<sup>62</sup> See, e.g., TR Day 8, 2187:9-17; 2271:18 – 2272:9; 2354:16-22 (per Arbitrator DOUGLAS). See also US 1128 Submission, ¶ 3.

<sup>63</sup> TR Day 7, 2055:3:4 (per KACZMAREK), with respect to the EPA process: "This is BC Hydro acting as a commercial entity under BCUC regulation." The Claimant's witness, Mr. Allan, confirmed that the Bioenergy Phase I process was a "competitive call[]" (TR Day 3, 847:19-21), while Mr. MacLaren clarified that BC Hydro "negotiates to purchase a quantity of power that's incremental according to its procurement documents" (TR Day 4, 1078:19-21) and Mr. Scouras confirmed that GBLs are negotiated in the context of a "procurement and in respect to purchasing energy" (TR Day 4, 1174:2).

21. With respect to delegation, the Claimant continues to argue that Order G-38-01 “directed” BC Hydro to set a procurement GBL for Celgar, such that it constituted an affirmative transfer of authority.<sup>64</sup> There is no evidentiary basis for this assertion. In fact, Messrs. Scouras, Dyck and MacLaren all confirmed that Order G-38-01 did *not* delegate any authority to BC Hydro with respect to procurement.<sup>65</sup> Canada’s legal and regulatory expert, Mr. Bursey, explained that the BCUC “did not delegate any of its decision-making to BC Hydro at any time.”<sup>66</sup> The Claimant did not challenge his testimony.

22. The Claimant’s argument also conflates procurement GBLs in EPAs and service GBLs as envisioned by Order G-38-01.<sup>67</sup> The BCUC’s Order G-38-01 could not have delegated authority to BC Hydro to negotiated procurement GBLs because Order G-38-

<sup>64</sup> TR Day 8, 2189:19-2190 (per SHOR). The Claimant seeks to support its position that there must have been a delegation in Order G-38-01 by arguing that in 2001, “BC Hydro did not simply negotiate a commercial deal with Howe Sound, but instead went to the BCUC,” and by noting that restrictions on FortisBC’s supply of energy to Celgar also required “authority from the BCUC”: Claimant’s PHS, ¶ 23. However, this supports Canada’s position. Both situations clearly involved a utility’s statutory obligation to serve its customer. This is distinct from a situation where BC Hydro is engaged in the commercial activity of procuring energy from Celgar.

<sup>65</sup> See e.g., TR Day 4, 1175:9-13 (per SCOURAS), 1141:2-11 (per MACLAREN); TR Day 5, 1318:17-21 (per DYCK); Canada’s Rejoinder, ¶¶ 215-222; Canada’s Reply to 1128 Submission, ¶ 11. The Claimant argues that BC Hydro must have been exercising delegated governmental authority by setting a GBL because the BCUC set a GBL for Riverside/Tolko in G-113-01: Claimant’s PHS, ¶ 15. Tolko’s service GBL was negotiated with its utility (see Recitals B, C, E and F of BCUC, Order Number G-113-01, **C-130**); the BCUC has never imposed a GBL (see TR Day 8, 2287:6-16 (per OWEN); Canada’s Rejoinder, ¶¶ 193-6).

<sup>66</sup> Bursey Report, ¶¶ 122-123. See also Canada’s Rejoinder, ¶ 219, fn. 438.

<sup>67</sup> See e.g., TR Day 8, 2286:18-2287:1 (per OWEN); Canada’s Rejoinder, ¶ 217. The Claimant relies on BCUC Order E-16-09 to suggest that a G-38-01 baseline and a negotiated GBL (in this case in Tembec’s EPA) are one and the same: Claimant’s PHS, ¶ 19. However, the BCUC did not expressly link any term in Tembec’s EPA to Order G-38-01, nor did BC Hydro reference Order G-38-01 in the Justification Report it filed in support of Tembec’s EPA: see Justification Report, Tembec EPA, pp. 2-4, **R-192**. Were the two baselines the same, one might also expect to see a linkage made between Order G-38-01 and the Bioenergy Call for Power Phase I EPAs BC Hydro filed for acceptance with the BCUC. No such linkage was made: see BCUC, Order E-08-09, **R-308**; BC Hydro Report on the Bioenergy Call Phase I Request for Proposals, February 17, 2009, p. 19, **R-170**.

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01 had nothing to do with procurement.<sup>68</sup> The Claimant's own experts, Mr. Switlishoff and Dr. Fox-Penner, acknowledged the distinction between service and procurement GBLs at the hearing,<sup>69</sup> and the Claimant has itself confirmed its understanding of the distinction before the BCUC.<sup>70</sup> Canada's witnesses, Messrs. MacLaren and Swanson, also discussed the difference at the hearing.<sup>71</sup> It was BC Hydro alone that determined, without any direction from the BCUC, that a GBL concept would be useful in demarcating new and incremental energy that would be eligible for procurement in its energy procurement initiatives.<sup>72</sup>

23. The Claimant also argues that the BCUC's Order G-38-01 delegated authority to BC Hydro to "disallow" or "prohibit" below-GBL sales in the form of an exclusivity provision.<sup>73</sup> The Claimant cannot cite to any part of the Order to support its position. The Claimant has also argued before the BCUC that Order G-38-01 was "not necessarily a

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<sup>68</sup> Indeed, as the very title of Order G-38-01 demonstrates ("Obligation to Serve Rate Schedule 1821 Customers with Self-Generation Capability"), it pertained solely to BC Hydro's obligation to serve its customers, see **R-19**, p. 1. While a public utility's obligation to serve its customers arises from section 38 of the *Utilities Commission Act* ("UCA"), the BCUC assesses whether EPAs are in the public interest pursuant to s. 71 of the UCA (see UCA, **R-205**). When negotiating its EPA with Celgar, BC Hydro was negotiating the terms under which it would purchase electricity, not supply it.

<sup>69</sup> TR Day 2, 540:15-541:16 (per SWITLISHOFF); TR Day 3, 873:6-19, 874:8-12 (FOX-PENNER: "As I said, I think these—the two GBLs here are used, if they will, as I understand it, in a little different way, and, thus, that's a factor that could affect the proper application of any GBL methodology.")

<sup>70</sup> Zellstoff Celgar Evidence Submission, 15 March 2010, pp. 22-23, **R-280**.

<sup>71</sup> TR Day 4, 1134:15-22, 1159:15-1160:17 (per MACLAREN); TR Day 6, 1744:14-1746:17 (per SWANSON).

<sup>72</sup> Dyck Statement II, ¶ 6; Email from David Keir to Alex Adams, Lester Dyck, February 12, 2008, **R-171**.

<sup>73</sup> Claimant's PHS, ¶¶ 15, 17.

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prohibition against sales.”<sup>74</sup> Order G-38-01 does not delegate any regulatory authority to BC Hydro to “prohibit” third party sales.

24. With respect to the issue of sovereign powers or authority, the Claimant argues that BC Hydro exercised governmental authority when it included a GBL and an exclusivity provision in Celgar’s EPA. First, the Claimant argues that these provisions serve the governmental purpose of preventing harmful arbitrage and are thus vested with sovereign authority.<sup>75</sup> Canada confirmed at the hearing that no governmental authority is required to negotiate a GBL or exclusivity provision in a commercial contract.<sup>76</sup> In response to the Tribunal’s questions, Canada affirmed that a privately-owned public utility, such as FortisBC, could negotiate the very same terms in its own electricity purchase agreement.<sup>77</sup> This illustrates that, contrary to the Claimant’s arguments, the GBL and the exclusivity provision serve commercial rather than governmental purposes.

25. Second, the Claimant argues that its GBL and exclusivity provision are an exercise of sovereign authority because “no private party has the authority to tell [the Claimant] how it must use self-produced energy.”<sup>78</sup> However, the Claimant overlooks the

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<sup>74</sup> TR Day 4, 1136:9-17 (per MACLAREN), referring Argument of Zellstoff Celar Limited Partnership, 2009 Rate Design and Cost of Service Analysis, 14 July 2010, ¶¶ 58-59, **R-373**.

<sup>75</sup> The Claimant argues that the “GBL-based restriction on third party sales” serves only a “governmental purpose,” namely “implement[ing] BC’s regulatory policy aimed at preventing [...] harmful arbitrage”: Claimant’s PHS, ¶ 20. It relies once again on a confusing hypothetical put to Mr. MacLaren: TR Day 4, 1043:12-1044:1. However, as discussed in ¶¶ 13, 16 above, Mr. MacLaren in fact confirmed the commercial procurement purpose of both a GBL and the exclusivity provision: TR Day 4, 1043:3-4; 1060:15-8.

<sup>76</sup> See TR Day 8, 2352:20-2355:22 (per DOUGLAS).

<sup>77</sup> The Tribunal queried whether a non-governmental utility or private party could employ contractual terms such as a GBL or an exclusivity provision: TR Day 8, 2271:21-2272:5, 2354:10-2355:8 (per Arbitrator DOUGLAS and DOUGLAS). See also Swanson Statement I, ¶ 8.

<sup>78</sup> Claimant’s PHS, ¶¶ 15, 22. See also TR Day 8, 2272:15-22 (per SHOR).



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fact that Celgar freely signed its EPA and accepted the GBL and the exclusivity provision as terms of that contract. No one has “told” it to do anything.

26. Finally, the Claimant argues that its GBL and exclusivity provision are governmental because they “limit FortisBC’s obligation to serve Celgar.”<sup>79</sup> Witness testimony confirms the opposite.<sup>80</sup> Moreover, suggesting that BC Hydro could limit FortisBC’s obligation to serve the Claimant through the terms of the EPA ignores basic principles of privity of contract. The rights and obligations in Celgar’s EPA exist with respect to the signatories of that EPA alone. The GBL and exclusivity provision have absolutely nothing to do with, or impact upon, FortisBC’s obligation to serve Celgar.<sup>81</sup> In negotiating the terms of Celgar’s EPA, BC Hydro did not limit FortisBC’s obligation to serve by exercising governmental or sovereign authority.<sup>82</sup>

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<sup>79</sup> See, e.g., TR Day 8, 2187:9 -2188:5 (per SHOR).

<sup>80</sup> See, e.g., TR Day 4, 1138:6-12 (per MACLAREN). See also Dyck Statement II, ¶ 6; Bursey Expert Report, ¶ 61(e);.

<sup>81</sup> FortisBC’s obligation to serve its customers is governed by the UCA, the Access Principles Application, its Electric Tariff, and service contracts such as General Service Agreements. It is subject to the oversight of the BCUC: Swanson Statement I, ¶¶ 13-15; UCA, ss. 28-30, 63, **R-205**; BCUC, Decision and Order G-188-11, November 14, 2011, p. 34, **R-275** (discussing the extent of FortisBC’s obligation to serve under the Access Principles Application); FortisBC’s Electric Tariff No. 2 for Service in the West Kootenay and Okanagan Areas, **R-210**. See also Canada’s Letter to the Tribunal, February 26, 2016, pp. 8-9.

<sup>82</sup> As an afterthought to its delegated governmental authority argument, the Claimant also alleges that because the BCUC “approved” the GBL and exclusivity provision and made them “effective,” this is constitutes an independent basis for “finding state action”: TR Day 8, 2187:3-8. As discussed in greater detail below, the BCUC does not “approve” GBLs or other terms in an EPA, and therefore does not make EPAs “effective”: see fn. 87. FortisBC must also file the energy supply agreements in which it acquires power from IPPs or self-generating customers with the BCUC, but this does not transform its commercial purchasing activity into an exercise of governmental authority. Nor would Canada be internationally liable for the negotiation of the terms in such a FortisBC agreement simply because it was accepted for filing by the BCUC.

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### C. The Claimant's Allegations Concerning its GBL and Exclusivity Provision are Time-Barred

27. At the hearing, the Tribunal asked the parties when a claimant *first* acquires knowledge of breach and loss in the context of discrimination claims.<sup>83</sup> Contrary to the Claimant's position,<sup>84</sup> later treatment of a similar nature accorded to a new comparator in like circumstances does not reset the time limitation for the purposes of a discrimination claim.<sup>85</sup> Such a position would toll the limitation period into infinity, imposing an onerous burden on the NAFTA Parties that they did not intend.<sup>86</sup>

28. In this case, the Claimant could not have *first* acquired knowledge of the alleged breach and loss any later than January 27, 2009, which is the effective date of its EPA.<sup>87</sup>

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<sup>83</sup> TR Day 8, 2182:13-2185:12 (per President VEEDER). *See also* US 1128 Submission, ¶ 7.

<sup>84</sup> TR Day 8, 2184:13-2185:11 (per SHOR). Canada notes that the examples of "different" later treatment offered by Claimant's counsel at the hearing in response to President Veeder's questions do not go to knowledge of breach or loss, but instead to the extent of damage. If a later comparator is afforded allegedly better treatment than the first comparator, the nature of the knowledge of an alleged breach at the first occurrence remains unchanged; the claimant has only acquired knowledge of potentially greater loss or damage. NAFTA Articles 1116(2) and 1117(2) make no distinction between different quanta of loss. Indeed, for the time limitation to start running, a claimant need not even have knowledge of the extent of its loss: *Grand River - Jurisdiction*, ¶ 77, **RA-17**.

<sup>85</sup> US 1128 Submission, ¶ 7. The disputing parties agree that this is not a case in which there is a continuing act (*see* TR Day 8, 2361:18-2362:16 (per Arbitrator VICUNA and DOUGLAS)); Claimant's Reply to 1128 Submissions, ¶ 17).

<sup>86</sup> TR Day 8, 2357:21-2358:19 (per DOUGLAS).

<sup>87</sup> In response to Tribunal questions about the effective date of the EPA (*see, e.g.*, TR Day 8 2175:22-2176:5; 2177:4-8 (per President VEEDER and Arbitrator DOUGLAS)), the Claimant argues that the contract remained subject to BCUC acceptance before becoming final and effective, under s. 3.1 of the EPA and under s. 71(4) of the UCA: Claimant's PHS, fn. 54. The Claimant is incorrect on both counts. First, the plain reading of the EPA is that it becomes effective as of the Effective Date: *see* Celgar 2009 EPA, s. 2.1, **R-135**. If the EPA was contingent on BCUC acceptance, there would be no need to provide for its *termination* in the event the BCUC did not accept it: Celgar 2009 EPA, s. 3.1, **R-135**. Second, while s. 71 of the UCA, **R-205** gives the BCUC power to order contracts unenforceable, it is silent on the power to order contracts enforceable. Section 71(4) states that rights accruing prior to an order declaring a contract unenforceable are "preserved" and "may then be enforced *as fully as if no proceedings had been taken under this section*" (emphasis added). This confirms that "the BCUC doesn't approve the contracts. They come into effect according to their own terms": TR Day 6, 1831: 4-5, 1833:11-15 (per BURSEY). *See also* UCA, s. 71(3). Finally, Canada notes that the Claimant relied on the testimony of Messrs. Dyck and

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The record shows that the Claimant had the requisite knowledge of breach and loss arising from both the exclusivity provision and the GBL in its EPA by that time, which is before the time-bar cut-off date of March 31, 2009.

29. With respect to the exclusivity provision, the Claimant alleges that it has been compelled to “self-supply and provide load displacement services without compensation”, while other self-generators have been paid for this same service.<sup>88</sup> The Claimant compares its treatment to that accorded to Canfor,<sup>89</sup> noting at the hearing that Canfor was paid \$49 million to displace 390 GWh/yr of electricity over a period of 15 years.<sup>90</sup> Mercer officials were aware of these precise terms as early as October 2008, as evidenced by a presentation they gave to the BC Government at that time.<sup>91</sup>

30. With respect to the GBL, the Claimant maintains that it was set in a way that was discriminatory when compared to the treatment received by other mills. As Canada

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MacLaren to support its theory of the contract's effective date: Claimant's Closing Presentation, Slides 14-15. While the Claimant agreed that the contract's effective date is a legal question, (TR Day 8, 2174:13-20), they specifically avoided putting the question to Canada's regulatory law expert, Mr. Bursey: TR Day 6, 1834:1-7.

<sup>88</sup> Claimant's Opening Presentation, Slide 44.

<sup>89</sup> When asked directly by the Tribunal which comparators were relevant for the purposes of time bar, the Claimant failed to mention Canfor: TR Day 8, 2181:22-2182:12 (“President VEEDER: So the only two comparators you're relying on are Tembec and Howe Sound. SHOR: “Tembec and Howe Sound”). The absence of Canfor from the Claimant's answer is particularly surprising given the number of times it relied on Canfor at the hearing: *see, e.g.*, TR Day 1, 43:4-5, 43:19-44:7; TR Day 8, 2200:17-21, 2202:4-13 (“SHOR: The comparator we utilized is Canfor, another pulp mill.”) The Claimant has also quantified its damages vis-à-vis Canfor: *see* TR Day 1, 87:13-20; 88:5-12 (per GEHRING FLORES).

<sup>90</sup> *See* Claimant's Opening Presentation, Slide 52.

<sup>91</sup> Mercer International, Celgar Self Generation, Presentation re Confidential Discussion with MEMPR, October 2008 at MER00065545, **R-34** (“Canfor received \$50 million cash from BC Hydro to increase generation at Intercom/PG pulp mills by 390 GWhrs per year. Canfor's mills are under contract to self-supply this generation for 15 years”). *Cf.* Claimant's Memorial, ¶ 584. *See also* Letter from Brian Merwin to BC Hydro RFP Administrator, May 7, 2008, **R-127**, in which the Claimant alleges that BC Hydro had treated it in a “discriminatory manner”, in part because it had not been eligible for “subsidies through load displacement contracts” (p. 1).

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pointed out at the hearing,<sup>92</sup> Mr. Merwin reported to Mercer's senior management on June 7, 2008 that "we believe [BC Hydro] have not treated assignment of this [GBL] number the same as what they have done for other pulp and paper mills."<sup>93</sup> Four months later, in October 2008, the Claimant represented to the BC Government that "BC Hydro has chosen to be discriminatory against Celgar in its declaration that it only views generation in excess of Celgar's 2007 record output as being incremental".<sup>94</sup>

31. The Claimant had knowledge of loss by January 27, 2009. The Claimant admits: "the implications of the GBL and related restrictions were known to Mercer" on the day it signed its EPA.<sup>95</sup> These implications were such that it believed it (a) would be "forced" to displace its load and (b) should have been able to sell more electricity than BC Hydro would buy.<sup>96</sup> As the Claimant need not have knowledge of the extent of its loss – merely that it suffered a loss<sup>97</sup> – the Claimant is time-barred from bringing its EPA-related claims.<sup>98</sup>

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<sup>92</sup> TR Day 8, 2357:7-16 (per DOUGLAS).

<sup>93</sup> Memo from Merwin Re BC Hydro Bid Price, June 7, 2008 at MER00071685, **R-559**.

<sup>94</sup> Mercer International, Celgar Self Generation, Presentation re Confidential Discussion with MEMPR, October 2008 at MER00065553, **R-34** [emphasis removed].

<sup>95</sup> Claimant's Reply, ¶ 614.

<sup>96</sup> TR Day 8, 2365:12-18 (per DOUGLAS). The Claimant had acquired this knowledge of loss even prior to its EPA signing date, as shown by the October 2008 presentation to the BC government referred to above. After alleging that BC Hydro had discriminated against Celgar in defining what was incremental generation at that facility, Mercer submitted that: "all of Celgar's generation is incremental": Mercer International, Celgar Self Generation, Presentation re Confidential Discussion with MEMPR, October 2008 at MER00065546, **R-34** [emphasis in original]. In other words, the Claimant was asserting Celgar should be able to sell everything, but was unable to because of its BC Hydro GBL.

<sup>97</sup> *Grand River - Jurisdiction*, ¶ 77, **RA-17**; TR Day 8, 2364:12 - 2365:9 (DOUGLAS); Canada's Rejoinder, ¶ 225.

<sup>98</sup> The Claimant attempts for the first time to argue that the limitation period for its claim under NAFTA Article 1105 started to run later than its claim under Articles 1102 and 1103: Claimant's PHS, ¶¶ 31-34. The Claimant's argument is premised on the allegation that it only acquired knowledge of the "comparative

32. The Claimant's argument that it could not have had knowledge of loss because the EPA's provisions "were neither final nor in effect at the time"<sup>99</sup> is irrelevant. Canada has consistently argued that NAFTA Articles 1116(2) and 1117(2) emphasize constructive knowledge of breach and loss.<sup>100</sup> The Claimant had both by the time it signed its EPA.

#### **IV. THE CLAIMANT HAS FAILED TO PROVE THAT CANADA BREACHED NAFTA ARTICLES 1102 AND 1103**

##### **A. Responses to the Tribunal's Questions on the Legal Standard under NAFTA Articles 1102 and 1103**

33. At the hearing, the Tribunal asked the disputing parties to explain the role that nationality plays under Articles 1102 and 1103.<sup>101</sup> All three NAFTA Parties agree that Articles 1102 and 1103 "prevent discrimination on the basis of nationality" and "are not intended to prohibit all differential treatment among investors or investments."<sup>102</sup> To find

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aspect (that of unfairness and discrimination relative to others)" of its Article 1105 claim when the BCUC issued Order G-48-09: Claimant's PHS, ¶ 33. Not only is this a new argument in contravention of Procedural Order 10, but it is also wrong because, as described above, the Claimant had first acquired knowledge of this alleged difference in treatment by January 27, 2009.

<sup>99</sup> Claimant's PHS, ¶ 29 (arguing that the exclusivity provision did not come into effect until the project's Commercial Operating Date, and that the Side Letter Agreement tolled the effective date of that same provision). The Claimant mischaracterizes the Side Letter Agreement when it asserts that it "deferred the issue of Celgar's access to FortisBC embedded cost electricity while it was selling its own electricity": Claimant's PHS, ¶ 29. The parties agreed to be bound by the existing s. 7.4(b) until – if at all – the BCUC made an order that might trigger an amendment: *see* Side Letter Agreement between BC Hydro and Zellstoff Celgar Limited Partnership, RE: Electricity Purchase Agreement, with Effective Date of January 27, 2009, s. 1, **R-138**. At the time it signed its EPA and the Side Letter, the Claimant thus knew it was bound by the current version of the exclusivity provision, potentially for the full term of the contract: *id.*, s. 2, **R-138**.

<sup>100</sup> Canada's Rejoinder, ¶ 228; Canada's Reply to 1128 Submissions, ¶ 14.

<sup>101</sup> *See, e.g.*, TR Day 8, 2273:17-22, 2275:15-18 (per Arbitrator DOUGLAS); TR Day 8, 2279:13-2280:7 (per President VEEDER).

<sup>102</sup> US 1128 Submission, ¶ 10; Mexico 1128 Submission, ¶ 11; Canada's Reply to 1128 Submissions, ¶¶ 2, 18-20.

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a violation, a claimant must do more than merely establish the existence of differential treatment; it must establish that nationality was the basis for that differential treatment. Without nationality, there is no meaningful distinction between Articles 1102 and 1103 and Article 1105.<sup>103</sup>

34. A claimant need not prove that the State *intended* to discriminate on the basis of nationality – unless it pleads that such intent exists, which the Claimant has done in this case.<sup>104</sup> Determining whether a facially neutral measure discriminates on the basis of nationality will depend on the facts of the case and a tribunal must consider the totality of the treatment and circumstances.<sup>105</sup> This will include an analysis of the treatment accorded to other investors from the claimant's home State,<sup>106</sup> and an analysis of all relevant treatment accorded to the claimant.

35. The Claimant admits that nationality plays a role, but argues that it is the State's burden to provide "non-nationality-based justifications" for any differential treatment.<sup>107</sup> Under the Claimant's theory of Articles 1102 and 1103, an investor need only prove *prima facie* that it has been accorded less favorable treatment and then it should be *assumed* that nationality-based discrimination has occurred unless the State can prove

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<sup>103</sup> See TR Day 8, 2273:17- 2374: 1 (per Arbitrator DOUGLAS)

<sup>104</sup> See TR Day 8, 2378:12-21 (per DOUGLAS). See also Canada's Rejoinder, ¶ 242.

<sup>105</sup> TR Day 8, 2276:7-22 (per Arbitrator DOUGLAS)

<sup>106</sup> The Claimant relies on *Pope & Talbot* to support its position that it "need not establish that *all* U.S. nationals were treated less favorably by BC Hydro than *all* Canadian or third-country nationals": Claimant's PHS, ¶ 39. The Claimant misses the point. Evidence that other U.S. nationals were accorded the same treatment as domestic or third-country nationals in like circumstances is evidence that there has not been *nationality-based* discrimination: see Canada's Rejoinder, ¶ 245. All three NAFTA Parties agree: see Mexico 1128 Submission, ¶ 15; U.S. 1128 Submission, ¶ 12; Canada's Reply to 1128 Submissions, ¶¶ 30-33.

<sup>107</sup> Claimant's PHS, ¶ 39.

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otherwise. All of the NAFTA Parties disagree with the Claimant's theory, which would invite claims well beyond the scope of what the Parties intended under the NAFTA.<sup>108</sup>

**B. Hearing Testimony Confirms that the Claimant has not Faced Nationality-Based Discrimination as a Result of BCUC Order G-48-09**

36. Canada has already explained that the Claimant's argument that Order G-48-09 imposed a "net-of-load" standard is incorrect.<sup>109</sup> For example, the Claimant is currently selling electricity above its GBL and below its mill load to BC Hydro under its EPA.<sup>110</sup> Even if the Claimant's characterization were true, however, it has not been accorded less favourable treatment, in like circumstances, to other self-generating mills.<sup>111</sup>

37. The Claimant admits that Order G-48-09 has not caused it any damages.<sup>112</sup> The Claimant also recognizes that, in any event, Order G-188-11 "replaced the net of load criterion," and that Order G-202-12 gives it greater access to embedded cost power than Order G-38-01 provides to BC Hydro customers.<sup>113</sup> Although the Claimant may argue that the rate proposed by FortisBC pursuant to these Orders does not reflect embedded

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<sup>108</sup> While the Claimant points to the *Bilcon* decision to support its argument (see Claimant's PHS, ¶40), all three NAFTA Parties agree: the burden to prove all elements of an Article 1102 or 1103 claim rests with the Claimant; it never shifts: see U.S. 1128 Submission, ¶ 13; Mexico 1128 Submission, ¶ 11; Canada's Reply to 1128 Submissions, ¶¶ 21-24.

<sup>109</sup> See Section II.B. above. See also Canada's Letter to the Tribunal dated February 26, 2016, pp. 9-20; TR Day 1, 179:17-180:17; 182:15-189:17 (per DOUGLAS and Arbitrator DOUGLAS).

<sup>110</sup> TR Day 2, 604:6-605:2 (per SWITLISHOFF).

<sup>111</sup> See TR Day 1, 183:3-9, 189:8-12 (per DOUGLAS).

<sup>112</sup> See Claimant's Reply, ¶ 205; Canada's Rejoinder, ¶ 354.

<sup>113</sup> TR Day 1, 183:3-5 (per DOUGLAS); TR Day 2:569:9-14 (per SWITLISHOFF). See also TR Day 2, 458:22-459:4 (per MERWIN); TR Day 2, 512:17-22, 561:14-562:11 (per SWITLISHOFF). This reality stands in stark contrast to the Claimant's argument that it has been forced to displace its load, when others have been compensated for providing such a service: Claimant's PHS, fn. 101. See also Canada's Letter to the Tribunal dated February 26, 2016, fn. 68.

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cost rates, Canada is not liable for the actions of FortisBC.<sup>114</sup> Moreover, the Claimant advocated suspension of the G-188-11 and G-202-12 proceedings so that it could challenge section 2.5 of the 2014 PPA, which itself would enable FortisBC to provide Celgar with access to embedded cost power (including PPA power) while selling below its mill load. For these reasons, the Claimant has not been accorded less favourable treatment.<sup>115</sup>

38. Even if Order G-48-09 could be construed as according less favourable treatment, it was not treatment accorded in like circumstances to that accorded to mills in BC Hydro's service territory. As the BCUC has explained, and the Claimant's expert confirmed, FortisBC's and BC Hydro's service areas are unique, and different circumstances must be taken into account when they are regulated.<sup>116</sup> Wide discretion is owed to the BCUC to regulate in a manner that accounts for these differences.<sup>117</sup> These different circumstances, not nationality, are the basis for any different treatment. The

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<sup>114</sup> The NECP rate does not, in any event, constitute less favourable treatment because it allows the Claimant to sell 100% of its self-generated electricity (which no BC Hydro customer can do), and reflects an embedded cost rate: *see* Canada's Letter to the Tribunal dated February 26, 2016, pp. 9-20.

<sup>115</sup> The Claimant has argued that BCUC Order G-48-09 also breaches NAFTA Article 1105 because it was discriminatory: Claimant's Opening Presentation, Slide 107. As set out above, it was not. Moreover, as pointed out at the hearing, the Claimant did not appeal the decision, nor did it properly ask the BCUC to reconsider the decision: *see* TR Day 2, 524:1-6 (per SWITLISHOFF); TR Day 6, 1742:3-20 (per SWANSON); TR Day 8, 2385:14-2386:4 (per DOUGLAS). The Claimant's failure to exhaust local remedies is an equally sufficient basis upon which to dismiss its claim.

<sup>116</sup> BCUC, Decision and Order G-202-12 (Compliance Filing to Order G-188-11), December 27, 2012, p. 11, **R-265** ("Different mechanisms are appropriate in this case because of the different relationships (utility to customer or utility to utility) and the different service characteristics of the utilities, namely the Heritage Contract for BC Hydro and the APA for FortisBC.") *See also* TR Day 3, 890:4-192:22 (per FOX-PENNER, discussing G-202-12).

<sup>117</sup> *See* Mexico 1128 Submission, ¶ 14 ("NAFTA tribunal should accord significant deference to governmental policy making. It is not the role of a tribunal to sit retrospectively in judgment against the discretionary exercise of sovereign power 'not made irrationally and not made in bad faith.'").



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Claimant's expert, Mr. Switlishoff, confirmed that Celgar was treated identically to other mills in FortisBC's service area, such as Canadian-owned Tolko (Riverside).<sup>118</sup>

**C. Hearing Testimony Confirms that the Claimant Did Not Face Nationality-Based Discrimination in the Negotiation of its GBL**

39. Hearing testimony confirmed that BC Hydro consistently applied the same principled GBL methodology to the range of unique operating circumstances presented by each proponent seeking to negotiate an EPA.<sup>119</sup> Contrary to the Claimant's insistence on reducing a complex negotiation item to a simple mathematic formula,<sup>120</sup> Canada's witnesses explained that BC Hydro took into account a range of factors through discussions with each proponent,<sup>121</sup> with a view to obtaining a complete picture of each mill's unique normal operations.<sup>122</sup> This flexible approach, which allowed BC Hydro and its counterparties to arrive at an agreed number,<sup>123</sup> was both supported by the Claimant's

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<sup>118</sup> See TR Day 3, 749:7-12 ("SHOR: Now, shortly after 48-09, did the Commission revisit the GBL that it set for Riverside? SWITLISHOFF: Yes. I believe there was a proceeding just for that purpose. SHOR: What did it do? SWITLISHOFF: It put Riverside also, I believe, on a net-of-load.") While Canada does not agree with Mr. Switlishoff's characterization of the treatment, he is clearly identifying identical treatment. Mr. Scouras also identified Tolko as a self-generator with exactly the same treatment available to the Claimant – two GBLs: see TR Day 4, 1195:13-1200:3. When asked at the hearing what its position was with respect to Tolko, the Claimant's counsel responded: "We're not comparing ourselves to Tolko because Tolko is a sawmill." TR Day 8, 2181: 20-21 (per SHOR). Tellingly, the Claimant considered Tolko's Riverside sawmill a relevant comparator when the circumstances supported its case: see Claimant's Request for Arbitration, ¶¶ 72-76, 89; Canada's Counter-Memorial, ¶¶ 446-452.

<sup>119</sup> Canada notes that the Claimant's heading with respect to Articles 1102 and 1103 refers to the GBL and exclusivity provision contained in its EPA: see Claimant's PHS, p. 20. However, the substance of the section discusses only the GBL. This further confirms that the Claimant's case hinges on that element of its contract that defines the amount of energy that BC Hydro will procure.

<sup>120</sup> See, e.g., TR Day 1, 61:2-4, 63:3-4; Day 5:1393:16-17; Day 7, 2057:15-16 (per SHOR). Cf TR Day 5, 1434:17-20, 1444:22-1445:3 ("DYCK: It wasn't as simple as a mathematic formula like that."); TR Day 7, 2034:22-2035:8, 2036:3 ("ROSENZWEIG: It's not a formula.").

<sup>121</sup> See, e.g., TR Day 5, 1346:4-10, 1357:1-6 (per DYCK).

<sup>122</sup> See, e.g., TR Day 5, 1363:5-1364:1, 1393:2-6 (DYCK discussing Howe Sound), TR Day 5, 1440:2-7 (DYCK discussing Celgar).

<sup>123</sup> See, e.g., TR Day 5, 1354:15-18, 1356:8-11; 1369:8-11; 1421:18-22 (per DYCK). See also TR Day 7,

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expert at the hearing,<sup>124</sup> and lauded by the Claimant itself before the BCUC.<sup>125</sup> This approach also reflects the commercial nature of EPA negotiations.<sup>126</sup>

40. Much evidence was canvassed with respect to Celgar, Tembec, and Howe Sound at the hearing. First, Mr. Dyck explained that he relied on all of the data presented, and representations made, by Mr. Merwin at the time to develop his overall view of normal operations at the Celgar mill.<sup>127</sup> The Claimant argues that BC Hydro “failed fully to subtract Celgar’s sales to third-parties,”<sup>128</sup> but ignores that the relevant consideration is the circumstances under which the sales were made, because those circumstances help define normal operations at a mill.<sup>129</sup> BC Hydro took the same circumstances-based approach with all of the self-generators with which it concluded EPAs.<sup>130</sup> Moreover, BC

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2038:22-2039-4; 2040:2-4; 2040:10 (per ROSENZWEIG).

<sup>124</sup> TR Day 2: 540:5-14 (“DOUGLAS: Would you agree that GBLs can be a negotiated amount? SWITLISHOFF: Yes. DOUGLAS: And that would give consideration to the unique circumstances of the negotiating mill? SWITLISHOFF: Yes. They should be. DOUGLAS: And that GBLs should not be determined by any set formula? SWITLISHOFF: Formulaically I believe it would be too constrictive.”)

<sup>125</sup> See Canada’s Closing Presentation, Slide 20; Zellstoff Celgar Evidence Submission, 15 March 2010, p. 11, **R-280**; Sangra Moller LLP on behalf of Zellstoff Celgar, Letter to the BCUC in the Matter of a Complaint Regarding the Failure of FortisBC and Celgar to Complete a General Service Agreement and FortisBC’s Application of Rate Schedule 31 Demand Charges, March 25, 2011, pp. 2-3, **R-264**.

<sup>126</sup> The commercial nature of the negotiations further undermines the Claimant’s Article 1105 arguments with respect to its GBL. Nonetheless, Canada has demonstrated that BC Hydro’s actions – even if they could be considered an exercise of governmental authority – come nowhere close to the threshold required to establish a breach of Article 1105: see TR Day 8, 2383:14-2385:13 (per DOUGLAS); Canada’s Closing Presentation, Slides 153-156; Canada’s Rejoinder, ¶¶ 107-127, 258-270, 368-382.

<sup>127</sup> See, e.g., TR Day 5, 1464:20-1465:9; 1469:20-22; 1472:7-11 (“DYCK: We had a long discussion about what was normal. ‘Normal’ means that in those 8,400 hours, as it is shown in this table – some years it might be more or less—but when the Mill is operating normally, it is generating more, on average, than it is consuming.”)

<sup>128</sup> Claimant’s PHS, ¶ 47.

<sup>129</sup> See, e.g., TR Day 5, 1454:16-21, 1470:4-10 (“DYCK: When we discussed issues about under what circumstances were you selling and under what circumstances were you buying and how do we define ‘normal,’ those were the sort of discussions we were having. And the result of those discussions gets me to this view of and this perspective of the operation of their mill.”)

<sup>130</sup> For example, BC Hydro took into account the circumstances under which proponents such as Celgar and

Hydro did not use “optimum hourly generation targets” as the basis for the GBL, as the Claimant now argues.<sup>131</sup> The Claimant thought 40 MW was a reasonable representation of what Celgar was normally generating for self-supply in 2007, as demonstrated by contemporaneous representations made both to BC Hydro and to third parties.<sup>132</sup>

41. The Claimant has also argued that Celgar's GBL was set in a manner inconsistent with Addendum 8 of the Bioenergy Call for Power Phase I Request for Proposals (“RFP”).<sup>133</sup> However, the Claimant takes a single sentence out of context, fixating on “one portion of the RFP clarification”<sup>134</sup> in Addendum 8 that provides additional

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Howe Sound made sales in determining how they should be treated. In Howe Sound's case, their sales were [REDACTED]: TR Day 5, 1399:19-20 (per DYCK), which warranted a particular type of adjustment. In Celgar's case, however, Mr. Dyck's view was that “the Mill, whether it runs with a contract for sale in place or doesn't, it would continue to operate at that level where it is in some hours exporting...”: TR Day 5, 1472:19-22. Canada's independent expert Mr. Stockard confirmed this view: TR Day 6, 1896:4-12 (testifying that the “tight linkage between the pulp mill and the chemical recovery process” at the mill was such that, if the mill was not generating at the levels it was, it “r[a]n the risk of not producing pulp.” In other words, their sales were tied to the mill's normal operations.). The different circumstances of these sales thus warranted a different type of adjustment.

<sup>131</sup> See Claimant's PHS, ¶ 47. Mr. Dyck's testimony directly contradicts the Claimant's argument: see TR Day 5, 1468:17-20 (“DYCK: I didn't base their entire GBL on the targeted amount. It was just something, some supporting evidence that showed that it's consistent with generator output that is greater than Mill Load.”) Moreover, in his May 7, 2008 letter to BC Hydro, Mr. Merwin also describes “typical”, rather than “optimal”, operations: see Letter from Brian Merwin to BC Hydro RFP Administrator, May 7, 2008, **R-127**. Mr. Dyck explained that discussions he had with Mr. Merwin led him to understand that this single-line diagram was reflective of the mill's normal operations: see TR Day 5, 1441:7-1442:12.

<sup>132</sup> See TR Day 2, 474:3-18, discussing **R-354** (“MERWIN: Celgar has also been studying a larger opportunity which would essentially be an additional 40-megawatt hours more than the first project. OWEN: That was your estimate for the Arbitrage Project? MERWIN: That was when – that was – there was the Biomass Realization Project and there was the Green Energy Project, and that is how we were splitting the Projects, and we were consistent when we split the Projects in 2008 in new applications.”). In describing these split projects to BC Hydro, Celgar described the Biomass Realization Project in the following manner: “The Biomass Realization Project will only include electricity that Celgar currently utilizes, at its option, to displace its load at the Celgar Industrial Facility”: see TR Day 2, 332:3-6 (per MERWIN); Letter from Brian Merwin to BC Hydro RFP Administrator, May 7, 2008 at 019772, **R-127**.

<sup>133</sup> See, e.g., TR Day 8, 2221:11-18 (per SHOR); Claimant's PHS, ¶ 10. The only reference made by the Claimant in its written pleadings to Addendum 8 refer exclusively to Mr. Scouras' testimony: Claimant's Reply Memorial, ¶ 260. While Mr. Scouras testified about Addendum 8 (see Scouras Statement, ¶ 44), and Mr. Dyck did not, the Claimant chose to put questions only to Mr. Dyck on this issue at the hearing.

<sup>134</sup> TR Day 5, 1489:22-1490:1 (per DYCK).

information as to what constituted eligible “Project Type[s]” in the original RFP. In doing so, the Claimant ignores both the definition of “Project Type” in the original RFP (which requires that an eligible project for “incremental self-generation” must “*in any event* [be in] excess of the customer’s GBL”)<sup>135</sup> and the separate section of the original RFP that establishes the requirement for a GBL.<sup>136</sup> Addendum 8 does not alter this requirement. When read in the context of these provisions, the Claimant’s argument crumbles.

42. Second, a great deal of time was spent at the hearing dissecting various analyses relating to [REDACTED] operations at the Tembec Skookumchuck mill. In contrast to the Claimant’s counsel or Mr. Switlishoff, who admitted he is “not an expert on [REDACTED] operation,”<sup>137</sup> Tembec’s Mr. Lague has [REDACTED].<sup>138</sup> The analyses presented through Mr. Switlishoff in an attempt to

<sup>135</sup> BC Hydro, Bioenergy Call for Power – Phase I, Request for Proposals, 6 February 2008, p. 7, **R-25**; BC Hydro, Bioenergy Call for Power (Phase 1) - Addendum 8, p. 4, **R-121**.

<sup>136</sup> See BC Hydro, Bioenergy Call for Power – Phase I, Request for Proposals, 6 February 2008, p. 6, **R-25**.

<sup>137</sup> TR Day 5, 1310:11-12 (per SWITLISHOFF).

<sup>138</sup> TR Day 6, 1637:5-6 (per LAGUE). Mr. Dyck also remarked: “Mr. Lague is pretty thorough in all of his analysis and detail. He also fully understands [REDACTED]”

[REDACTED] : TR Day 5, 1536:18-1537:2.

The Claimant’s argument that there is no evidence of any internal analysis by Tembec that its [REDACTED] was [REDACTED] (see Claimant’s PHS, ¶ 49) ignores this reality: that Mill personnel, especially managers like Mr. Lague, understand very well the costs of operating their machinery. The Claimant did not – nor could it – question Mr. Lague’s expertise with respect to his mill’s operations. The tables Mr. Lague presented at the hearing (**R-592**) simply reflect what Mr. Lague knew in 2008 and 2009. The Claimant again ignores witness testimony when it states that the hog boiler cost reports presented by Paper Excellence in good faith “fail to consider ... [REDACTED]”

[REDACTED] Claimant’s PHS, fn 90. Mr. Lague was clear: the [REDACTED] :

TR Day 6, 1633:6-20. Finally, the Claimant ignores the evidence provided by Paper Excellence, namely that a [REDACTED] EBITDA report, **R- 587**, is an example of “internal analyses and financial models” prepared by the mill’s Financial Manager at the time: see, Letter from Paper Excellence regarding the documents produced, **R-576**, p. 4. Canada also presented evidence of BC Hydro’s internal analysis: see Inter-office Memo from David G. Keir to Lester Dyck et al, April 8, 2009, **R-189**.



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GBL in Howe Sound's 2010 EPA demonstrates "the utter meaninglessness of the attempt to define a 'normal' annual level of generation for a mill, like most, with [REDACTED] generation."<sup>145</sup> However, Mr. Fominoff testified that an annual figure reflecting normal operations was meaningful. He explains that he reached an agreement with BC Hydro that was a "fair and reasonable representation of normal operations" at his mill<sup>146</sup> and believed "the GBL was set on clear principles articulated by BC Hydro and was fair to both parties."<sup>147</sup> Mr. Fominoff's unchallenged testimony is consistent with Mr. Dyck's testimony.<sup>148</sup>

44. The record ultimately shows that the Claimant has failed to prove that Celgar's GBL – a negotiated term of the commercial contract it willingly signed – constitutes treatment that is less favourable,<sup>149</sup> or that any less favourable treatment that may exist is based on its nationality. The Claimant has equally failed to proffer *any* evidence that BC

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agreed that [REDACTED] was still appropriate because [REDACTED]": TR Day 5, 1406:13-16 [emphasis added]. Mr. Lamarche's unchallenged testimony is the same: *see* Lamarche Statement II, ¶ 6. In any event, Howe Sound's 2001 Agreement is not treatment accorded in like circumstances to that accorded to Celgar in its 2009 EPA: *see* Canada's Rejoinder, ¶ 324.

<sup>145</sup> Claimant's PHS, ¶ 48.

<sup>146</sup> Fominoff Statement, ¶ 32.

<sup>147</sup> *See* TR Day 8, 2325:12-14 (per OWEN). *See also* Fominoff Statement, ¶ 38.

<sup>148</sup> *See, e.g.*, TR Day 5, 1418:4-8 (per DYCK).

<sup>149</sup> The Claimant refers again to Mr. Switlishoff's Below-Load Access Percentage ("BLAP") metric to measure less-favourable treatment in this case: Claimant's PHS, ¶ 43. Mr. Switlishoff's hearing testimony confirms Canada's consistent arguments that the BLAP subverts the purpose of the GBL in the context of procuring new and incremental energy: *see* Canada's Rejoinder, ¶¶ 280-285. Specifically, Mr. Switlishoff admitted that, had Celgar been accorded the same BLAP as Howe Sound, it would have increased its purchases from its utility, FortisBC: *see* TR Day 3, 726:7-733:6. He further admitted that at least two of the below-load access scenarios he presented for Celgar (*see* Claimant's Reply, Figure 31, p. 265) were inconsistent with BCUC Order G-38-01, one of the factors against which he assessed Celgar's allegedly discriminatory treatment: *see* TR Day 3, 736:8-16; Switlishoff Report I, ¶ 94.

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Hydro intended to discriminate against Celgar.<sup>150</sup> Hearing testimony confirms what Canada has made clear throughout this proceeding: any differences between Celgar's GBL and the GBLs of its narrowly-selected comparators are not by reason of the mills' nationality, but of their unique operating circumstances.<sup>151</sup>

45. Moreover, when viewed as a whole, the treatment accorded to the Claimant has not been discriminatory, but remarkably favourable, considering: (i) the fact that the Claimant was one of only four proponents awarded an EPA in the Bioenergy Call for Power;<sup>152</sup> (ii) the fact that BC Hydro agreed to buy more from the Claimant than from any other proponent in that Call for Power;<sup>153</sup> (iii) [REDACTED] and side letter agreement accommodations made by BC Hydro for the Claimant;<sup>154</sup> and (iv) the \$58 million Pulp and Paper Green Transformation Program funding the Claimant received from the government for its second turbine, which it operates to make sales to

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<sup>150</sup> The Claimant maintains its "third claim" (formally its first claim) that, when setting the GBL, BC Hydro took "load displacement services from Celgar that it paid others to provide": Claimant's PHS, fn. 101. The Claimant posits that BC Hydro exercised unfettered discretion when setting the GBL and "chose as high a number to strand as much as Celgar's load as they could without any payment" (TR Day 2, 579:11-580:9). However, no evidence was presented at the hearing to corroborate the Claimant's story that BC Hydro "chose" (i.e. *intended*) to discriminate against the Claimant in this manner (TR Day 8, 2375:17-18 (per DOUGLAS)). Moreover, both Mr. MacLaren (TR Day 4, 1012:5-14) and Mr. Swanson (TR Day 6, 1753:12-16) confirmed that load displacement in FortisBC territory does not affect BC Hydro's contractual obligations under the PPA.

<sup>151</sup> See, e.g., TR Day 1, 204:2-10; TR Day 8, 2379:12-19 (per DOUGLAS).

<sup>152</sup> Indeed, the Claimant "didn't have to sign up to the EPA": TR Day 8, 2215:6-7 (per Arbitrator DOUGLAS). The Claimant made clear to BC Hydro in its GBL negotiations that it believed it could have sold its electricity to third parties: see Letter from Brian Merwin to BC Hydro RFP Administrator, May 7, 2008 at 019773, **R-127**. See also TR Day 7, 2088:13-19 (per ROSENZWEIG).

<sup>153</sup> See Canada's Opening Presentation, Slide 18. See also Canada's Rejoinder, ¶ 116.

<sup>154</sup> See TR Day 4, 1147:8-1148:5, 1205:12-1206:13 (per MACLAREN and SCOURAS); TR Day 1, 206:3-5, TR Day 8, 2381:8-18 (per DOUGLAS).

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BC Hydro under its EPA at revenues totaling \$25 million/year.<sup>155</sup> In these circumstances, it is difficult to comprehend how the Claimant could have been discriminated against on the basis of nationality.

## V. THE CLAIMANT HAS FAILED TO MAKE OUT ITS DAMAGES CLAIM

### A. Hearing Testimony Confirms that the Claimant Has Only Quantified One Damages Scenario

46. At the hearing, the Claimant explained to the Tribunal that, for jurisdiction and liability purposes, the setting of its GBL in the EPA context and BCUC Order G-48-09 are to be assessed separately.<sup>156</sup> The Claimant posited that damages would be the same in both cases, remarking that there “are no separate damages stemming from the G-48-09 discrimination.”<sup>157</sup> But as Mr. Kaczmarek described, while going through the motion of “assum[ing] away the Measures”<sup>158</sup> for the purposes of its but-for test, the Claimant has only assumed away one of the Measures: that “the GBL would have been set and calculated differently.”<sup>159</sup>

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<sup>155</sup> See TR Day 1:120:21-121:10 (per OWEN); Day 8, 2372:18-2372:2 (per DOUGLAS). See also NERA Report II, ¶ 132 (fn 249).

<sup>156</sup> See TR Day 8, 2196:18-2197:17 (per SHOR).

<sup>157</sup> See TR Day 8, 2207:17-2208:6, 2216:4-14 (per SHOR).

<sup>158</sup> TR Day 7, 1969:10-13 (“KACZMAREK: So in our But-For Scenario, we assume away the Measures. So there would never have been – this 349 doesn’t exist. BC Hydro would have come up with something different.”). See also TR Day 7, 2018:15-18 (“ROSENZWEIG: The problem with the case that – the damages case that’s been presented here is the Measures aren’t related to the quantum.”)

<sup>159</sup> See, e.g., TR Day 7, 1999:20-2000:2 (“KACZMAREK: I’ve put no calculations whereby BC Hydro would be buying below-GBL power. Every one of them involves BC Hydro buying above-GBL power. It’s that the GBL would have been set and calculated differently.”).



47. Despite claiming that the alleged NAFTA breaches prevented Celgar from selling below-GBL electricity to third parties in the United States,<sup>160</sup> Mr. Kaczmarek admitted that he had not quantified Mercer's damages due to Celgar's inability to sell its below-GBL power.<sup>161</sup> The Claimant's counsel also remarked that "Celgar's third-party sales [are] not particularly relevant" to its damages scenario.<sup>162</sup>

48. These admissions confirm that the Claimant's GBL-related claims are squarely in the realm of procurement.<sup>163</sup> Given that the Claimant has failed to quantify its damages flowing from any other measure,<sup>164</sup> the Tribunal has no damages claim it can accept.<sup>165</sup>

**B. Hearing Testimony Confirms that the Claimant Has Not Made Out its Damages Case on the Facts**

49. Hearing testimony confirmed that the Claimant has failed to prove critical facts underpinning its assumptions that: (1) BC Hydro would have purchased Celgar's self-generation at Bioenergy Call renewable energy prices;<sup>166</sup> (2) it could have sold its self-generation in a long-term contract in the United States for generic electricity prices

<sup>160</sup> See Claimant's PHS, ¶¶ 3, 63; Claimant's Reply, ¶¶ 36, 216.

<sup>161</sup> TR Day 7, 1996:2-7; TR Day 7, 1996:21-1997:2 (per KACZMAREK).

<sup>162</sup> TR Day 7, 2006:9-10, TR Day 8, 2236:6-11 (per GEHRING FLORES)

<sup>163</sup> See TR Day 8, 2242:20-2243:2 (per Arbitrator DOUGLAS). See also TR Day 7, 1986:2-6 ("KACZMAREK: Because, again, if the GBL was set lower at a different level, I don't see why BC Hydro wouldn't have bought everything above it...Everything is above GBL in the But-For Scenario.")

<sup>164</sup> See, e.g., TR Day 8, 2239:8-2240:2 (per President VEEDER); TR Day 7, 2019:11-12 (per ROSENZWEIG).

<sup>165</sup> Indeed, the Claimant has already agreed that, if the Tribunal were to find that only BCUC Order G-48-09 breached NAFTA (it has not), it has suffered no damage at all: Claimant's Reply, ¶ 205. See also TR Day 7, 2019:2-6 ("ROSENZWEIG:...G-48-09 is not linked to quantum.")

<sup>166</sup> Mr. Scouras testified to the contrary: see TR Day 4, 1211:14-1213:14; Scouras Statement II, ¶¶ 52-53. Mr. Kaczmarek's response was that Mr. Scouras was "confused as to the calculations": TR Day 7, 1999:3-2000:4 (per KACZMAREK).

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equivalent to BC Hydro's procurement of renewable electricity in its Bioenergy Call;<sup>167</sup> and (3) its sale of self-generation to the U.S. in a long-term contract could be supported by short-term firm transmission, without a reflection in the price.<sup>168</sup>

50. First, Mr. Kaczmarek acknowledged that his "primary But-For Scenario is that BC Hydro would be the buyer."<sup>169</sup> However, Messrs. MacLaren and Scouras both explained that BC Hydro was policy-barred from purchasing this existing self-generated electricity.<sup>170</sup> As Canada has consistently pointed out, it would have been in BC Hydro's interest to procure more electricity from Celgar if the energy it offered were new or incremental.<sup>171</sup> On cross-examination, Mr. Scouras illustrated the point with another example: Tolko Riverside.<sup>172</sup> Tolko had a 2 MW baseline above which it was allowed to sell. Although Tolko's utility was obligated to provide service to Tolko for anything over that baseline, and BC Hydro *could* have purchased everything above 2 MW, BC Hydro determined that a [REDACTED] MW GBL was consistent with its policy, and was not willing to

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<sup>167</sup> Claimant's PHS, ¶¶ 64-65. The Claimant relies on Mercer International Group, Presentation titled "Celgar Electricity Opportunities", C-216 to establish its intent to enter into U.S. long-term sales contracts for generic electricity. But "energy markets" for "long term power supplies" in this document refers to BC Hydro purchasing "long-term power supplies" (p. 6). The Claimant refers to a price of C\$101/MWh as evidence that it sought to enter into U.S. long-term contracts, but ignores that this price was for Celgar's "contemplated generation project" (i.e, the installation of its second condensing turbine), which it intended to sell to BC Hydro in the Bioenergy Call. This indicates that the Claimant was not actually looking to sell to the U.S., and is consistent with the fact that the Claimant never approached NorthPoint to negotiate a long-term contract: *see* TR Day 6, 1816:8-12 (per KRAUSS).

<sup>168</sup> Mr. MacDougall testified to the contrary: *see* TR Day 6, 1925:13-1927:3, 1949:19-1950:8.

<sup>169</sup> TR Day 7, 1984:2-3.

<sup>170</sup> *See* TR Day 4, 1213:4-14 (per SCOURAS); Scouras Statement II, ¶¶ 52-54; MacLaren Statement II, ¶¶ 18-21.

<sup>171</sup> *See, e.g.*, TR Day 8, 2375:3-2376:18 (per DOUGLAS).

<sup>172</sup> TR Day 4, 1199:4-1200:3.

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procure electricity ██████████ MW. These are highly relevant facts that the Claimant ignores in its but-for scenario.

51. Second, although the Claimant initially claimed that it could have sold its electricity as green or renewable electricity,<sup>173</sup> it shifted its position at the hearing<sup>174</sup> alleging that it could have sold its electricity in the U.S. market through a long-term contract for generic electricity for prices equivalent to BC Hydro's procurement of renewable electricity in the Bioenergy Call. The Claimant's new position, however, created a serious problem for its damages claim.<sup>175</sup> It had not quantified the damages relating to U.S. long-term contracts for generic electricity. Its attempt to do so in its Post-Hearing Submission is too little, too late.<sup>176</sup>

52. Third, the Claimant relies on the testimony of Mr. Kaczmarek and Mr. Friesen to support its theory that it can quantify its damages on the basis of U.S. long-term electricity contracts supported by short-term firm transmission.<sup>177</sup> However, as Messrs.

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<sup>173</sup> See, e.g., Navigant Second Report, ¶¶ 72, 80-83; Claimant's Reply Memorial, ¶ 18. See also Merwin Statement I, ¶¶ 138, 142, 144-145, 148; Navigant First Report, ¶ 54.

<sup>174</sup> See, e.g., TR Day 1, 87:7-12; TR Day 8, 2245:8-11.

<sup>175</sup> See, e.g., Second Navigant Report, ¶¶ 72, 80-83; First Navigant Report, ¶ 54.

<sup>176</sup> Claimant's PHS, ¶ 65. The Claimant relies on BC Hydro's report to the BCUC on its 2006 Call for Tenders to support the price it alleges it could have received for a U.S. long-term contract for generic electricity: see Claimant's PHS, ¶ 65, fn. 122, 123. The figures cited by the Claimant do not reflect ██████████ ██████████ concluded negotiated prices, nor their accompanying terms or conditions. Moreover, there is no evidence that these figures, reflecting proposals made in 2006, would have reflected market conditions in 2009. The Claimant also fails to provide sufficient information in connection with its allegation that the price of U.S. long-term electricity contracts "approach" the long run marginal cost of utilities, and relies on one of BC Hydro's Bioenergy Call for Power documents as evidence of the price it could receive for its electricity without acknowledging that these are *green* energy prices. On all counts, the Claimant has simply not provided enough information to quantify its damages claim.

<sup>177</sup> The Claimant's willingness to assume that it could renew short-term transmission indefinitely to support a long-term firm contract stands in stark contrast to Mr. Merwin's unwillingness to rely on the NECP to support a long-term firm contract: see TR Day 2, 465:7-21 (per MERWIN).

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MacDougall, Krauss and, to a lesser extent, Friesen confirmed, there are special risks associated with short-term firm transmission, including transmission or delivery risk, reputational risk, and credit risk, and only if a purchaser would have entered into this type of long-term contract without long-term firm transmission access in the first place.<sup>178</sup> Messrs. Friesen, Krauss, MacDougall and Dr. Rosenzweig all agree: parties to a long-term contract supported by short-term firm transmission would have to allocate financial risk amongst themselves through the terms and conditions of the contract.<sup>179</sup> However, in contrast to Mr. MacDougall,<sup>180</sup> neither Mr. Kaczmarek, nor Mr. Friesen provided evidence concerning the price of such a contract.<sup>181</sup> This confirms that the Claimant's new theory is simply not credible.

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<sup>178</sup> For example, there is no right of renewal with respect to short term firm transmission, as compared to long-term firm transmission which can be rolled over in perpetuity: *see* TR Day 4, 955:9-20, 957:20-22 (per FRIESEN). Mr. Friesen further testified that short-term firm transmission could disappear over time if someone entered the market and started purchasing large amounts of this transmission: *see* TR Day 4, 965:22-966:8(per FRIESEN). *See also* TR Day 4, 955:9-19, 957:20-22 (per FRIESEN); TR Day 6, 1812:16-1813:3, 1813:4-8, 1813:9-1814:7, 1814:9-1815: 6 (per KRAUSS); TR Day 6, 1925:12-1927:2, 1949:18-1950:7 (per MACDOUGALL).

<sup>179</sup> TR Day 4, 964:17-965:9, 991:11-992:16 (per FRIESEN); TR Day 6, 1925:12-1927:2,1949:18-1950:7 (per MACDOUGALL); TR Day 7, 2019:14-2020:18, 2101:8-2102:12 (per ROSENZWEIG).

<sup>180</sup> *See* TR Day 6, 1925:12-1927:2, 1949:18-1950:7 (per MACDOUGALL).

<sup>181</sup> While Mr. Kaczmarek was directed to provide evidence explaining how the prices in U.S. long-term contracts for generic electricity and renewable electricity could be "comparatively the same" (TR Day 7, 1979:11-13), the Claimant did not ask him to consider how the absence of firm long-term transmission would affect the price the Claimant could have received in a long term contact: *see* TR Day 7, 1994:22-1995:1-5 (per KACZMAREK). Mr. Friesen's testimony concerning the terms, conditions and price of U.S. long-term contracts for generic electricity supported by short-term transmission was too general to support damages quantification.

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Respectfully submitted on behalf of  
the Government of Canada  
this 26 day of February, 2016.



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