PUBLIC VERSION

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

BETWEEN:

MERCER INTERNATIONAL INC.

Claimant

- v -

CANADA

Respondent

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

AWARD

Members of the Tribunal:

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

Secretary of the Tribunal:
Ms Alicia Martín Blanco

Date of dispatch to the Parties: 6 March 2018

Representing the Claimant:

c/o Mr Michael T. Shor
Ms Gaela K. Gehring Flores
Mr Samuel Witten
Ms Catherine Kettlewell
Mr Andrew Treaster
Mr Pedro Soto
Ms Shepard Daniel
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U.S.A.

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1000 Cathedral Place
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Canada

Representing the Respondent:

c/o Mr Michael Owen
Mr Adam Douglas
Ms Krista Zeman
Mr Andrew Mason
Ms Lori Di Pierdomenico
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Global Affairs Canada
125 Sussex Drive
Ottawa, Ontario K1A 0G2
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Mr Jonathan Eades
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Legal Services Branch
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Victoria, BC V8W 9J7
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[1] From 1 January 2017, Arnold & Porter Kaye Scholer LLP.

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ABBREVIATIONS

1993 PPA	Power Purchase Agreement between BC Hydro and FortisBC (1 October 1993)
2002 Energy Plan	Energy for Our Future: a Plan for BC (22 November 2002)
2007 Energy Plan	The BC Energy Plan: A Vision for Clean Energy Leadership (27 February 2007)
2008 PSA	Power Service Agreement between Celgar and FortisBC (21 August 2008)
2009 EPA	Electricity Purchase Agreement between Tembec and BC Hydro (13 August 2009)
2014 PPA	Renewed Power Purchase Agreement between BC Hydro and FortisBC (2014)
ACIA	ASEAN Comprehensive Investment Agreement (29 March 2012)
BC Government	The Government of British Columbia
BC Hydro	British Columbia Hydro and Power Authority, a British Columbia state-owned electricity utility and state enterprise
BCUC	The British Columbia Utilities Commission, the Provincial public utility regulatory agency
Bioenergy Power Call Phase I	BC Hydro, Report on Bioenergy Call Phase I: Request for Proposals (17 February 2009)
Bursey ER	Expert Report of David Bursey (28 March 2015)
Celgar 1990 EPC Application	Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the Utilities Commission Act by Celgar Pulp Company (12 October 1990)
Celgar Mill or Mill	The pulp mill in Castlegar, British Columbia, Canada
Cl. Mem.	The Claimant's Memorial (31 March 2014)

Cl. Reply	The Claimant's Reply (16 December 2014)
Confidentiality Agreement and Order	Confidentiality Agreement and Order issued (24 July 2012)
D[day].[page.]	Transcript of Hearing
Dyck WS1	First Witness Statement of Lester Dyck (21 August 2014)
Dyck WS2	Second Witness Statement of Lester Dyck (9 April 2015)
EPA	The electricity purchase agreement between Celgar and BC Hydro (27 January 2009)
FortisBC	FortisBC Inc., a wholly-owned subsidiary of Fortis Inc., a Canadian publicly listed distribution utility
Gandossi WS	Witness Statement of David Gandosssi (28 March 2014)
GBL	Generator Baseline
Green Energy Project	The installation of an additional 48 MW condensing turbine at the Celgar Mill
ICSID Arbitration AF Rules	ICSID Arbitration (Additional Facility) Rules
ICSID or the Centre	International Centre for Settlement of Investment Disputes
LDA	Load Displacement Agreement
MEM	BC Government's Ministry of Energy
Merwin WS1	First Witness Statement of Brian Merwin (28 March 2014)
Mexico's Article 1128 Submission	United Mexican States' written submission as a non-disputing State Party pursuant to NAFTA Article 1128 (8 May 2015)
Ministers' Order	BC Ministers of Energy and the Environment's Order in the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion (23 May 1991)

NAFTA	North American Free Trade Agreement that entered into force on 1 January 1994
NBSK	Northern Bleached Softwood Kraft
net-of-load	A requirement to first use self-generated electricity to meet own load prior to selling electricity to third parties
Order E-08-09	BCUC Order No. E-08-09 (31 July 2009)
Order G-106-14	BCUC Order No. G-106-14 (25 July 2014)
Order G-113-01	BCUC Order No. G-113-01 (25 October 2001)
Order G-168-15A	BCUC Order No. G-168-15A (26 October 2015)
Order G-17-02	BCUC Order No. G-17-02 (14 March 2002)
Order No. G-174-15	BCUC Order No. G-174-15 (30 October 2015)
Order G-188-11	BCUC Order No. G-188-11 (14 November 2011)
Order G-19-14	BCUC Order No. G-19-14 and Accompanying Decision (17 February 2014)
Order G-191-13 or The Kelowna Decision	BCUC Order No. G-191-13 (22 November 2013)
Order G-27-16	BCUC Order No. G-27-16 (4 March 2016)
Order G-38-01	BCUC Order No. G-38-01 (5 April 2001)
Order G-48-09	BCUC Order No. G-48-09 (6 May 2009)
Order G-60-14	BCUC Order No. G-60-14 (6 May 2014)
Ostergaard WS	Witness Statement of Peter Ostergaard (21 August 2014)
Port Mellon	Howe Sound Pulp & Paper Corporation's Pulp Mill
Powerex	Powerex Corp., BC Hydro's wholly-owned power-trading subsidiary

PPA	Power Purchasing Agreement
PPGTP	The Pulp and Paper Green Transformation Program
R-[#]	Respondent's Exhibit
Resp. C-Mem.	Respondent's Counter-Memorial (22 August 2014)
Resp. Rej.	Respondent's Rejoinder (31 March 2015)
RLA-[#]	Respondent's Legal Authority
Rosenzweig ER1	Expert Report of Michael Rosenzweig (22 August 2014)
Rosenzweig ER2	Rebuttal Expert Report of Michael Rosenzweig (31 March 2015)
Scouras WS	Witness Statement of Jim Scouras (21 August 2014)
Skookumchuck mill	A mill owned by Tembec Industries Inc (also "Tembec")
SOP	Standing Offer Program, established in the 2007 Energy Plan
Swanson WS1	First Witness Statement of Dennis Swanson (21 August 2014)
Swanson WS2	Second Witness Statement of Dennis Swanson (27 March 2015)
Switlishoff ER1	First Expert Statement of Elroy Switlishoff (27 March 2014)
TG	Turbine Generator
the Claimant or Mercer	Mercer International Inc.
the Hearing	Oral hearing on Jurisdiction, Merits, and Quantum held at the World Bank in Washington, DC, USA (21 to 31 July 2015)
the Province or BC	British Columbia
the Request or RfA	Claimant's Request for Arbitration (30 April 2012)
the Respondent or Canada	The Government of Canada

Tribunal or Arbitral Tribunal	Arbitral Tribunal constituted on 9 October 2012
UCA	Utilities Commission Act, S.B.C. 1980, c. 60
USA's Article 1128 Submission	United States of America's written submission as a non-disputing State Party pursuant to NAFTA Article 1128 (8 May 2015)
ZCL	Zellstoff Celgar Limited, a company incorporated in British Columbia, the Claimant's acquiring company for the purchase of the Celgar Mill
ZCLP	Zellstoff Celgar Limited Partnership, a limited partnership organized under the laws of Canada, with ZCL as the general partner and the Claimant as the limited partner.

DRAMATIS PERSONAE

Brent Kaczmarek	Managing Director in the Dispute & Investigative Division and leads Navigant Consulting's International Arbitration group, the Claimant's expert witness in the arbitration
Brian Merwin	Vice-President Strategic Initiatives for Mercer International Inc., the Claimant's witness in the arbitration; and the Claimant's representative at the Hearing
Christian Lague	Former Project Engineer and Energy Coordinator at Skookumchuck mill, the Respondent's witness in the arbitration
David Austin	Canadian lawyer with over thirty years of legal experience. Associate Counsel to Clark Wilson LLP, a Canadian law firm located in Vancouver, British Columbia, the Claimant's expert witness in the arbitration
David Bursey	Partner with the law firm of Bennett Jones LLP based in Vancouver, British Columbia, the Respondent's expert witness in the arbitration
David Gandossi	Executive Vice-President, Chief Financial Officer, and Secretary for Mercer International Inc. ("Mercer"), the largest Northern Bleached Softwood Kraft ("NBSK" or "kraft") market pulp producer in the world, the Claimant's witness in the arbitration.
Dean Krauss	Director of Business Development and Contract Services at NorthPoint Energy Solutions Inc., the Respondent's witness in the arbitration
Denise Mullen	Director of Environment and Sustainability with the Business Council of British Columbia, the Respondent's witness in the arbitration
Dennis Swanson	Director, Regulatory Affairs, at FortisBC Inc., the Respondent's witness in the arbitration
Elroy Switlishoff	President and principal engineer of Jetson Consulting Engineers Ltd., the Claimant's expert witness in the arbitration
Fred Forminoff	General Manager, Fibre & Energy at Howe Sound Pulp & Paper Corporation, the Respondent's witness in the arbitration

James McLaren	Celgar Mill's Environment Manager, and held various other positions at the Mill, such as Technical Services Manager, Utilities Manager, Strategic Projects Manager, and Energy Coordinator, until retirement in 2011, the Claimant's witness in the arbitration
Jay Stockard	Senior Consultant at Poyry Management Consulting Inc., the Respondent's expert witness in the arbitration
James Scouras	Regional Relationship Manager within BC Hydro's Aboriginal Relations Department, the Respondent's witness in the arbitration
John Allan	Former senior official of the Government of British Columbia, having served four times as Deputy Minister, including Acting Deputy Minister (1990) and Deputy Minister of Energy, Mines and Petroleum Resources from 1990-1993 and Deputy Minister, Environmental Assessment Office (1993-1996) and Land Use Coordination Office (1995-1996), Deputy Minister, Ministry of Environment, Lands and Parks (1996-1997), and Deputy Minister, Ministry of Forests (1997-1999), in each case reporting to the Premier's Office, the Claimant's witness in the arbitration
Jon O'Riordan	Adjunct Professor, School of Community and Regional Planning, University of British Columbia, previously held different positions with the BC Ministry of Environment, the Respondent's witness in the arbitration
Les MacLaren	Assistant Deputy Minister of the Electricity and Alternative Energy Division of the British Columbia Ministry of Energy and Mines, the Respondent's witness in the arbitration
Lester Dyck	Sector Manager of Pulp and Paper and Customer Generation in the Key Accounts Management Division of BC Hydro, the Respondent's witness in the arbitration
Michael MacDougall	Director of Trade Policy & Information Technology for Powerex Corp, the Respondent's witness in the arbitration
Michael Rosenzweig	Special Consultant with NERA Economic Consulting, the Respondent's expert witness in the arbitration
Peter Fox-Penner	Principal, Director, and past Chairman of The Brattle Group, the Claimant's expert witness in the arbitration

Peter Ostergaard	Principal of Ostergaard Consulting Group, the Respondent's witness in the arbitration
Pierre Lamarche	Former Howe Sound Manager - Energy, the Respondent's witness in the arbitration
Robert Friesen	Director of Rainbow Energy Marketing Corporation, an energy trading company, with an office located in Regina, Saskatchewan. Prior to assuming current position at Rainbow Energy, from 2001 to 2010, he filled a number of positions, including the Head of Trading and Director of Electricity at NorthPoint Energy Solutions, Inc., an electrical energy marketing and trading company in Regina, Saskatchewan. Before his work at NorthPoint Energy, from 1995 to 2000, he was an Energy Trading Supervisor at SaskPower, the principal electric utility in Saskatchewan and the parent company of NorthPoint Energy, the Claimant's witness in the arbitration
Robert Sweeney	General Manager of the Celgar Mill from 1986 until retirement in 1992, the Claimant's witness in the arbitration
Roger Garratt	Director Strategic Initiatives at Puget Sound Energy, Inc., Respondent's witness in the arbitration

LIST OF LEGAL MATERIALS

Grand River v USA	*Grand River Enterprises Six Nations, Ltd, et al. v United States of America* (UNCITRAL) Decision on Objections to Jurisdiction of 20 July 2006 [RA-17]
ADF Group v USA	*ADF Group Inc. v United States of America* ICSID Case No. ARB(AF)/00/1, Award of 9 January 2003 [RA-1 and CA-1]
Cargill v Mexico	*Cargill, Incorporated v United Mexican States,* ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009 [RA-6 and CA-4]
ELSI v. Italy	*Elettronica Sicula SpA (ELSI) United States v. Italy* Judgment of 20 July 1989
Glamis v USA	*Glamis Gold, Ltd. v United States of America,* (UNCITRAL) Award of 8 June 2009 [RA-15]
Merrill & Ring v Canada	*Merrill & Ring Forestry L.P. v The Government of Canada* (UNCITRAL) Award of 31 March 2010 [RA-24 and CA-10]
Methanex v USA	*Methanex Corporation v United States of America*, (UNCITRAL) Award on Jurisdiction and Merits of 3 August 2005 [CA-11 and RA-28]
NAFTA	North American Free Trade Agreement that entered into force on 1 January 1994
Pulp Mills	*Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment on the Merits of 20 April 2010, I.C.J. Reports
SD Myers v Canada	*S.D. Myers, Inc. v. The Government of Canada* (UNCITRAL) Second Partial Award of 21 October 2002 [CA-14 and RA-39]
UPS v Canada	*United Parcel Service of America Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of 24 May 2007 [CA-16 and RA-46]
Vienna Convention	Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969

PART I: THE ARBITRATION

(A) The Parties

1.1 *The Claimant*: The Claimant is Mercer International Inc. ("Mercer" or "the Claimant"), a corporation established under the laws of the state of Washington in the United States of America. Through Mercer's Canadian affiliates owned and/or controlled by it, Zellstoff Celgar Limited ("ZCL") and Zellstoff Celgar Limited Partnership ("ZCLP" or "Celgar"), Mercer indirectly owns and operates an industrial plant in Castlegar, British Columbia, Canada (the "Celgar Mill" or the "Mill"). Mercer has a place of business at Suite 1120, 700 West Pender St Vancouver, British Columbia V6C 1G8, Canada.

1.2 For the purpose of this arbitration, as pleaded by the Claimant under NAFTA Articles 1116(1) and 1117(1), the Claimant (Mercer) is the "investor" and the "enterprise" is ZCL. For ease of reference, ZCL and Celgar are collectively called "Celgar" (save where the context requires otherwise).

1.3 *The Respondent*: The Respondent is Canada ("Canada" or "the Respondent"), a Party to the North American Free Trade Agreement ("NAFTA") with the USA and Mexico that entered into force on 1 January 1994.

(B) The Arbitration Agreement

1.4 This arbitration takes place under an arbitration agreement invoked by the Claimant resulting from its consent and that of its enterprise, both of which accompanied the Request for Arbitration dated 30 April 2012, NAFTA Articles 1116(1), 1117(1) and 1122(1), to submit their claims to arbitration under the ICSID Arbitration (Additional Facility) Rules (the "ICSID Arbitration AF Rules"). For ease of reference, this arbitration agreement is here called the "Arbitration Agreement."

1.5 The Respondent denies the jurisdiction of this Tribunal (including the exercise of jurisdiction), as asserted by the Claimant for certain of its claims against the Respondent under the Arbitration Agreement.

(C) The Arbitration Tribunal

1.6 The Tribunal is composed of three arbitrators, appointed pursuant to NAFTA Article 1123, as follows:

1.7 The Claimant appointed Professor Francisco Orrego Vicuña, a national of Chile, of Avenida El Golf No. 40. Piso 6 Santiago 755-0107, Chile.

1.8 The Respondent appointed Professor Zachary Douglas QC, a national of Australia, of Matrix Chambers, 15 Rue Général-Dufour 15, 1204 Geneva, Switzerland.

1.9 The Parties agreed on the appointment of Mr V.V. Veeder, a national of the United Kingdom, as presiding arbitrator, of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom.

1.10 The Tribunal was constituted on 9 October 2012 in accordance with Article 6(3) of the ICSID Arbitration AF Rules.

1.11 Ms Alicia Martín Blanco, ICSID Legal Counsel, was designated to serve as the Secretary to the Tribunal.

(D) The Arbitral Procedure

1.12 *Request*: On 30 April 2012 the Claimant submitted its Request for Arbitration against the Respondent ("the Request") pursuant to Article 2 of the ICSID Arbitration AF Rules, for itself under NAFTA Article 1116 and on behalf of ZCL under NAFTA Article 1117.

1.13 The Request was registered by the Secretary-General of ICSID pursuant to Articles 4 and 5 of the ICSID Arbitration AF Rules on 16 May 2012. The Secretary-General notified in writing the Parties of such registration on the same day.

1.14 The President of the Tribunal held a first session with the Parties on 5 December 2012 (by telephone conference call). The Parties confirmed that the Tribunal was properly

constituted and that no Party had any objection to the appointment of any member of the Tribunal. The agreement of the Parties was embodied in Procedural Order No. 1 of 24 January 2013 signed by the President of the Tribunal and circulated to the Parties. Procedural Order No. 1 also confirmed that the place of arbitration was Toronto, Canada and that the geographical place of the oral hearing(s) would be the World Bank, Washington DC, USA.

1.15 Also on 24 January 2013, the Tribunal issued a Confidentiality Agreement and Order signed by the President of the Tribunal and the Parties.

1.16 *The Claimant's Memorial*: On 31 March 2014 the Claimant filed its Memorial.

1.17 With the Memorial, the Claimant also filed, in writing: (i) an Expert Report of Mr Brent Kaczmarek dated 31 March 2014; (ii) an Expert Report of Mr Elroy Switlishoff dated 27 March 2014; (iii) a Witness Statement of Mr Brian Merwin dated 28 March 2014; and (iv) a Witness Statement of Mr David Gandossi dated 28 March 2014.

1.18 *The Respondent's Counter-Memorial*: On 22 August 2014, the Respondent filed its Counter-Memorial, including its objections to jurisdiction and admissibility.

1.19 With the Counter-Memorial, the Respondent also filed, in writing: (i) an Expert Report of NERA Economic Consulting, signed by Dr Michael Rosenzweig, dated 22 August 2014; (ii) an Expert Report of Pöyry Management Consulting, signed by Mr James Stockard dated 22 August 2014; (iii) a Witness Statement of Mr Dennis Swanson dated 22 August 2014; (iv) a Witness Statement of Mr Fred Forminoff dated 19 August 2014; (v) a Witness Statement of Mr Jim Scouras dated 21 August 2014; (vi) a Witness Statement of Mr Les MacLaren dated 20 August 2014; (vii) a Witness Statement of Mr Lester Dyck dated 21 August 2014; (viii) a Witness Statement of Mr Peter Ostergaard dated 21 August 2014; and (ix) a Witness Statement of Mr Pierre Lamarche dated 20 August 2014.

1.20 *The Claimant's Reply*: On 16 December 2014, the Claimant filed its Reply.

1.21 With the Reply, the Claimant also filed, in writing: (i) an Expert Report of Dr Peter Fox-Penner dated 16 December 2014; (ii) an Expert Report of Mr David Austin dated 15 December 2014; (iii) a Second Expert Report of Mr Brent Kaczmarek dated 16 December

2014; (iv) a Second Expert Report of Mr Elroy Switlishoff dated 10 December 2014; (v) a Second Witness Statement of Mr Brian Merwin dated 15 December 2014; (vi) a Witness Statement of Mr John Allan dated 11 December 2014; (vii) a Witness Statement of Mr Robert Friesen dated 1 December 2014; (viii) a Witness Statement of Mr James McLaren dated 12 December 2014; and (ix) a Witness Statement of Mr Robert Sweeney Dated 5 December 2014.

1.22 *Respondent's Rejoinder*: On 31 March 2015, the Respondent filed its Rejoinder.

1.23 With the Rejoinder, the Respondent also filed, in writing: (i) an Expert Report of Mr David Bursey dated 28 March 2015; (ii) a Second Expert Report of NERA Economic Consulting, signed by Dr Michael Rosenzweig, dated 31 March 2015; (iii) a Second Expert Report of Pöyry Management Consulting, signed by Mr James Stockard, dated 30 March 2015; (iv) a Second Witness Statement of Mr Dennis Swanson dated 27 March 2015; (v) a Second Witness Statement of Mr Jim Scouras dated 30 March 2015; (vi) a Second Witness Statement of Mr Les MacLaren dated 24 March 2015; (vii) a Second Witness Statement of Mr Pierre Lamarche dated 23 March 2015; (viii) a Witness Statement of Mr Christian Lague dated 27 March 2015; (ix) a Witness Statement of Mr Dean Krauss dated 31 March 2015; (x) a Witness Statement of Ms Denise Mullen dated 25 March 2015; (xi) a Witness Statement of Mr Jon O'Riordan dated 25 March 2015; (xii) a Witness Statement of Mr Michael MacDougall dated 21 March 2015; (xiii) a Witness Statement of Mr Roger Garratt dated 19 March 2015; and (xiv) a Second Witness Statement of Mr Lester Dyck.

1.24 On 9 April 2015, the Respondent filed a corrected version of its Rejoinder and Second Witness Statement of Mr Lester Dyck.

1.25 *USA's Article 1128 Submission*: On 8 May 2015, the United States of America filed a written submission as a non-disputing State Party pursuant to NAFTA Article 1128.

1.26 *Mexico's Article 1128 Submission*: Also on 8 May 2015, the United Mexican States filed a written submission as a non-disputing State Party pursuant to NAFTA Article 1128.

1.27 *The Responses to Article 1128 Submissions*: On 12 June 2015, the Parties filed their respective responses to Mexico's and the USA's Article 1128 Submissions.

1.28 *The Hearing*: An oral hearing on jurisdiction, merits and quantum took place at the World Bank in Washington DC, USA, from 21 to 31 July 2015 ("the Hearing"), recorded by verbatim daily transcript.[2]

1.29 In addition to the three Members of the Tribunal and the Secretary of the Tribunal, those present at the Hearing were:

For the Claimant:

Counsel

Mr Michael Shor	Arnold & Porter LLP
Ms Gaela Gehring Flores	Arnold & Porter LLP
Mr Samuel Witten	Arnold & Porter LLP
Ms Catherine Kettlewell	Arnold & Porter LLP
Mr Andrew Treaster	Arnold & Porter LLP
Mr Pedro Soto	Arnold & Porter LLP
Ms Shepard Daniel	Arnold & Porter LLP
Mr Kelby Ballena	Arnold & Porter LLP
Ms Aimee Reilert	Arnold & Porter LLP
Ms Bailey Roe	Arnold & Porter LLP
Ms Ellen Brabo	Arnold & Porter LLP
Mr Claudio Matute	Arnold & Porter LLP
Mr Kim Moller	Sangra Moller LLP
Ms Laura Dominiak	TrialTek

The Claimant's Representatives

Mr Brian Merwin	Mercer
Mr David Gandossi	Mercer

The Claimant's Expert Witnesses

Mr Elroy Switlishoff	Jetson Consulting Engineers Ltd (retired)
Dr Peter Fox-Penner	The Brattle Group
Mr David Austin	Clark Wilson LLP
Mr Brent Kaczmarek	Navigant Consulting
Mr Andrew Peterson	Navigant Consulting
Ms Katie Best	Navigant Consulting

The Claimant's Factual Witnesses (subject to sequestration)

Mr James McLaren
Mr Robert Friesen

[2] The references to this transcript are made thus: "D4.1203" signifies Day 4 of the transcript, at page 1203.

Mr John Allan

For the Respondent:

Counsel

Mr Michael Owen	Trade Law Bureau
Mr Adam Douglas	Trade Law Bureau
Mr Stephen Kurelek	Trade Law Bureau
Mrs Lori di Pierdomenico	Trade Law Bureau
Ms Krista Zeman	Trade Law Bureau
Mr Louis-Philippe Coulombe	Trade Law Bureau
Mr Andrew Mason	Trade Law Bureau
Ms Diane Kissick	Trade Law Bureau
Mrs Cheryl Fabian-Bernard	Trade Law Bureau
Ms Shawna Lesaux	Trade Law Bureau
Mr Chris Reynolds	Core Legal
Ms Anh Nguyen	Dept. of Foreign Affairs, Trade and Development
Mr Alex Miller	

The Respondent's Representatives

Mr Jonathan Eades	Government of British Columbia
Ms Vicki Antoniades	British Columbia Hydro and Power Authority
Ms Jennifer Champion	Lawson Lundell
Mr Nathiel Gosman	Government of British Columbia

The Respondent's Expert Witnesses

Mr David Bursey	Bennett Jones LLP
Mr James Stockard	Pöyry Management Consulting Inc.
Dr Michael Rosenzweig	NERA Economic Consulting
Mr Carlos Pabon-Agudelo	NERA Economic Consulting
Mr Willis Geffert	NERA Economic Consulting
Mr Casey Pond	NERA Economic Consulting

The Respondent's Factual Witnesses (subject to sequestration)

Mr Leslie MacLaren	Government of British Columbia
Mr Lester Dyck	B.C. Hydro and Power Authority
Mr Christian Lague	Skookumchuck Pulp Mill
Mr Dennis Swanson	FortisBC
Mr Dean Krauss	NorthPoint Energy Solutions Inc.
Mr James Scouras	BC Hydro and Power Authority
Ms Denise Mullen	Business Council of British Columbia
Mr Michael MacDougall	Powerex Corp.

For the USA (as a non-disputing party)

Ms Alica Cate	US Department of State
Mr John Blanck	US Department of State

1.30 *Oral Testimony*: At the Hearing, the Tribunal heard oral testimony from the following factual and expert witnesses:

(i) Called by the Claimant:

Mr Brian Merwin
Mr Robert Friesen
Mr John Allan
Mr Elroy Switlishoff
Dr Peter Fox-Penner
Mr David Austin
Mr Brent Kaczmarek

(ii) Called by the Respondent:

Mr Leslie MacLaren
Mr Lester Dyck
Mr Christian Lague
Mr Dennis Swanson
Mr Dean Krauss
Mr Michael MacDougall
Mr David Bursey
Mr James Stockard
Dr Michael Rosenzweig

1.31 At the end of the Hearing, the evidential record was, in principle, closed to the Parties.[3]

1.32 *Procedure after the Hearing*: By order of the Tribunal, the Claimant filed its Post-Hearing Submission on 7 January 2016 and the Respondent on 26 February 2016. The Parties further exchanged written submissions on costs after the Hearing, as follows: (i) the Claimant's initial submission on costs of 15 March 2016; (ii) the Respondent's initial submission on costs of 15 March 2016; (iii) the Claimant's supplemental submission on costs of 3 April 2017; and (iv) the Respondent's updated costs statement also of 3 April 2017.

1.33 There also followed, after Hearing, a number of procedural applications that the Tribunal addressed in its Procedural "Omnibus" Order No 13 of 6 March 2017. The Tribunal

[3] D8.2152.

decided, inter alia, the following matters: (1) the Respondent's letter of 6 November 2015 requesting permission to file new evidence concerning two decisions of the B.C. Utilities Commission or BCUC (the "Respondent's Request to File New Evidence"), with related correspondence and the Tribunal's Procedural Order No. 10; (2) the Claimant's letter of 4 April 2016 requesting permission to file the new BCUC Decision and Order G-27-16 as new evidence (the "Claimant's Request to File New Evidence"), with related correspondence and the Tribunal's Procedural Order No. 12; (3) the Claimant's letter of 7 January 2016 requesting that the Tribunal resolve disputes between the Parties concerning the Respondent's proposed redactions to the transcript of the Hearing (the "Claimant's Request Concerning Redactions to the Hearing Transcript"), with related correspondence and the Tribunal's Procedural Order No. 11; (4) the Respondent's letter of 16 August 2016 concerning the Claimant's proposed confidentiality designations in its Statement of Costs (the "Respondent's Request Concerning Confidentiality Designations in the Claimant's Costs Statement"); (5) the Respondent's letter of 15 April 2016 requesting that the Tribunal close the evidential record to any new evidence following its decisions on the pending applications (the "Respondent's Closure Request"); (6) the Respondent's corrected communication of 25 November 2016 requesting, conditionally, a term sheet between Celgar and FortisBC to be produced by the Claimant with ancillary relief; and (7) the Claimant's communication of 30 November 2016 requesting that the Tribunal disregard the Respondent's communication of 25 November 2016.

1.34 In Paragraph 35 of Procedural Order No 13, the Tribunal found that it "*does not consider it necessary to decide the Claimant's request, by its communication of 30 November 2016, that the Tribunal should disregard the Respondent's corrected communication of 25 November 2016. Further, the Tribunal does not think it necessary, for the time being at least, to decide the Respondent's application by its corrected communication of 25 November 2016. For the avoidance of doubt, the Tribunal confirms that the Respondent's corrected communication is not evidence in this arbitration; nor was there any documentary evidence attached to such communication. The Tribunal reserves the right to review the situation, if and to the extent appropriate, following the Parties' responses to the order made above in Paragraph 34 and below in Paragraphs 43(a) and (b).*"

1.35 In Paragraph 43 the Tribunal decided the remaining matters as follows:

> *"a. Regarding the Respondent's Request to File New Evidence, the Tribunal grants such request as made, save that either Party may make (but is not required to make) any appropriate application to the Tribunal as soon as practicable, but not later than 21 days from the date of this Procedural Order, for permission to file further written submissions regarding the weight or effect of this new documentary evidence, if submitted;*
> *b. Regarding the Claimant's Request to File New Evidence, the Tribunal grants such request as made, save that either Party may make (but is not required to make) any appropriate application to the Tribunal as soon as practicable, but not later than 21 days from the date of this Procedural Order, for permission to file further written submissions regarding the weight or effect of this new documentary evidence, if submitted;*
> *c. Regarding the Claimant's Request Concerning Redactions to the Hearing Transcript, the Tribunal dismisses such request, as a result of which the proposed redactions from the Hearing Transcript shall be made as proposed by the Respondent;*
> *d. Regarding the Respondent's Request Concerning Confidentiality Designations in the Claimant's Costs Statement, the Tribunal reserves its decision in full, save to order the Claimant to explain its position in writing as soon as practicable, but not later than 21 days from the date of this Procedural Order;*
> *e. Regarding the Respondent's Request regarding Closure, the Tribunal re-closes the record to any new evidence and any new pleading from the Parties, unless ordered by the Tribunal here or later; […]"*

1.36 *"Post-Hearing New Evidence":* As regards Items Nos 1 and 2 in Paragraph 1 of Procedural Order No 13, as decided in Paragraph 43 under sub-paragraphs (a) and (b), the Tribunal thereby granted the requests by the Claimant and the Respondent respectively to introduce their new factual evidence upon the terms ordered; namely the new evidence concerning (i) the BCUC Decision and Order G-174-15 and the BCUC Decision and Order G-168-15A); and (ii) the BCUC Decision and Order G-27-16. (The Tribunal refers to this evidence below in Part III(I) as the "Post-Hearing New Evidence".)

1.37 By letter dated 27 March 2017, with reference to Procedural Order No. 13, the Respondent confirmed that it had no further comments on the weight and effect of the new evidence admitted by the Tribunal on 6 March 2017. However, so its letter continued, should the Claimant make an application under sub-paragraph 43(b) of Procedural Order No. 13 to

file further written submissions on the newly admitted evidence, and if the Tribunal were to grant this request, the Respondent requested that: (i) the Claimant's submission be no longer than three pages; (ii) the Respondent be given an opportunity to respond in a submission of the same length; and (iii) to the extent the Claimant's submission was inconsistent with developments in the FortisBC Stage II Self-Generator Policy Application then before the BCUC, the Tribunal should: (a) admit into the record FortisBC's application as well as the term sheet the Claimant negotiated with FortisBC which relates to this proceeding; and (b) allow the Parties to file simultaneously three-page comments on the application and the term sheet.

1.38 By email message also dated 27 March 2017, with reference to Paragraphs 34 and 43(a-b) of Procedural Order 13, the Claimant confirmed that it did not seek permission to file any further written submissions regarding the Parties' Requests to File New Evidence.

(E) Closing the File

1.39 By Paragraphs 41 and 43(e) of its Procedural Order No 13, the Tribunal closed the file to the Parties, subject only to the terms of that order and without prejudice to Article 44(1) of the ICSID Arbitration (Additional Facility) Rules.

1.40 Under Article 44(1) of the ISCID Arbitration (Additional Facility) Rules, the Tribunal closed the file on 23 December 2017, subject only to matters concerning confidentiality designations.

1.41 By Procedural Order No 14 of 23 January 2018, the Tribunal decided the Parties' dispute over confidentiality designations in the Claimant's submissions on legal costs. As jointly requested by the Parties, Paragraph 17 of the order stated that the Tribunal would designate the Award "Restricted Access" until the Parties had had an opportunity to review it and propose redactions pursuant to the Confidentiality Order and that the Tribunal would remain seized of this matter to resolve any disputes over confidentiality designations in the Award. Accordingly, PO No 14 further provided (inter alia) as follows: "… the Tribunal's procedural order of 23 December 2017 closing this proceeding is and shall remain 'subject to matters concerning confidentiality designations' under the Confidentiality Order for a

period of 60 days after the Award, unless further extended by the Tribunal at the request of one or both Parties" (Paragraph 18).

PART II: THE PARTIES' DISPUTE

(A) Introduction

2.1 The Parties' dispute is best summarised for present purposes in their respective early written pleadings. Inevitably, as these arbitration proceedings progressed, the issues arising from the Parties' dispute became more complex and more numerous, but their dispute remained essentially the same.

2.2 The summaries below are taken largely from the Claimant's Memorial and the Respondent's Counter-Memorial. The Tribunal emphasises that these are only brief and necessarily incomplete summaries of the Parties' respective cases and consist of allegations or submissions made by the Parties and not findings or decisions by the Tribunal.

(B) The Claimant's Case

2.3 In summary, through its Canadian affiliates, ZCL and Celgar, Mercer owns and operates the Celgar Mill in Castlegar, British Columbia, Canada that uses an integrated, joint production process to produce Northern Bleached Softwood Kraft ("NBSK") market pulp and to generate biomass-based, "green" electricity.[4] The Celgar Mill's generation capacity to produce "green" electricity is capable of exceeding the Mill's own electricity load.[5]

2.4 The regulatory issue in dispute concerns the extent and conditions under which the British Columbia Province permits the Celgar Mill to purchase electricity to meet the needs of its pulp operations from its local electricity utility ("FortisBC"), at normal rates based on the actual "embedded costs" of service, whilst the Mill is also selling its self-generated biomass-based green electricity.[6]

2.5 By "embedded costs", the Claimant means the total cost of all a utility's electricity resources, including the depreciation expense associated with the historical costs of generation assets, divided by the total electricity volume, which yields an overall

[4] Cl. Mem., Paragraph 1.
[5] RfA, Paragraphs 1 and 14. Cl. Mem., Paragraph 636.
[6] Cl. Mem., Paragraph 3.

average unit cost of electricity. The British Columbia Utilities Commission ("BCUC"), as the Provincial public utility regulatory agency, has defined embedded cost of service power as "the weighted average cost of existing sources of power in a utility's resource stack." [7]

2.6 This industry practice of purchase and sale is referred to as "arbitrage."[8] Arbitrage in the form of simultaneous sales and purchases of electricity by self-generators occurs because the market price for biomass-based green electricity has at times been significantly higher than the embedded cost rates that electricity utilities in British Columbia charge their industrial customers, as these utilities benefit from relatively low-cost hydroelectric generating stations installed many decades ago.[9]

2.7 Through actions taken in 2009 by the BCUC, with the involvement of the BC Hydro and Power Authority, a British Columbia state-owned electricity utility and state enterprise ("BC Hydro"), the Province has denied Celgar all access to electricity from its local utility, FortisBC, at embedded cost rates when Celgar is selling electricity.[10]

2.8 *BCUC Order G-48-09:* In May 2009, the BCUC issued Order G-48-09, which effectively prohibited FortisBC from providing embedded cost electricity to self-generators in its service territory whilst they were selling electricity, except on a "net-of-load" basis.[11] Under such Order, Celgar had first to use its self-generated electricity to meet its own load prior to selling electricity to third parties (a requirement referred to as "net-of-load").[12] In other words, Celgar could sell only that part of its self-generated electricity that exceeded its own load, thereby compelling Celgar to use first its own self-generated electricity unless and until its own load was met.

2.9 *Celgar's GBL:* Consistent with this net-of-load standard, as part of its process for entering into an electricity purchase agreement ("EPA") with Celgar in January 2009,[13] BC Hydro determined and fixed what it terms Celgar's "generator baseline," at the level

[7] Cl. Mem., Paragraph 2; BCUC Order G-191-13 and Accompanying Reasons for Decision (22 November 2013) (The "*Kelowna Decision*"), p. 6 n.2 [C-21]).
[8] Cl. Mem., Paragraph 2; The Claimant cites *The Kelowna Decision*, p. 22 [C-21] and the BC Hydro Information Report of June 2012, p. 9 ("The simultaneous purchase and sale of a commodity such as electricity to profit from unequal prices is commonly referred to as 'arbitrage.'").
[9] Cl. Mem., Paragraph 2.
[10] Cl. Mem., Paragraph 3.
[11] *Id.*
[12] *Id.*
[13] The BC Hydro-Celgar EPA of 27 January 2009 [C-221].

of Celgar's 2007 load. The BCUC then approved and made effective the EPA containing this generator baseline in June 2009.[14]

2.10 A "generator baseline" (or "GBL") is a term used by BC Hydro for electricity purchase contracts with self-generators, at the express direction of the BCUC, to delineate the level of self-generated electricity a customer must use to self-supply its own load and below which it cannot sell to any person or entity.[15] The GBL also defines the level of access the customer will have to embedded cost energy from its utility to meet its load. This level is equal to its own load minus its GBL.[16] With its GBL set by BC Hydro and the BCUC at the level of its 2007 load, Celgar, since 2009, has been afforded no access to embedded cost electricity from its utility while selling electricity.[17]

2.11 The practical effect of these two direct regulatory restrictions on access to embedded cost utility power (the BCUC's Order G-48-09 and the BC Hydro-set GBL, together and separately) is to prohibit Celgar from selling its biomass-based green energy and realising revenues from commercial sales of this valuable, premium energy service, unless it is "net-of-load" electricity; i.e. electricity it generates over and above its 2007 load.[18]

2.12 This "net-of-load" standard to which the Province and BC Hydro have held Celgar constitutes treatment less favourable than that which the Province affords Canadian-owned and third-country owned pulp mills with self-generation capacity that also are selling electricity.[19] Within the same political jurisdiction, and under the province-wide authority of the BCUC, the Province permits these comparable mills to maintain access to embedded cost utility electricity while they sell a significant portion of their self-generated "below-load" electricity.[20] In other words, these other mills are permitted to engage in arbitrage by purchasing some amount of utility electricity at low, embedded cost rates for their pulp manufacturing operations, whilst simultaneously selling some of their self-generated, "below-load" electricity at the higher, market-based rates

[14] Cl. Mem., Paragraph 4.
[15] Cl. Mem., Paragraph 5.
[16] *Id*.
[17] *Id*.
[18] Cl. Mem., Paragraph 6.
[19] Cl. Mem., Paragraph 7.
[20] *Id*.

obtainable for biomass-based green energy. These comparable pulp mills profit from such arbitrage.[21]

2.13 No BC pulp mill other than Celgar that is selling its self-generated electricity is held to a net-of-load standard, and thereby denied all access to embedded cost utility power whilst selling self-generated electricity.[22]

2.14 *BCUC Order G-38-01*: Instead, under a distinct BCUC Order issued in 2001, Order G-38-01, the Province applies a "historical usage" standard to these other mills, directing BC Hydro to define each mill's GBL based on the amount of self-generated electricity that the respective mill historically used to meet its own load.[23]

2.15 As examples, under this less-restrictive standard, the Province permits Howe Sound's Port Mellon pulp mill to arbitrage over [redacted] of its below-load electricity; and Tembec's Skookumchuck pulp mill may arbitrage over [redacted] of its below-load electricity.[24] For Celgar, the comparable percentage is zero.[25]

2.16 On 23 November 2013, the BCUC ruled that it was "unduly discriminatory" for a utility to hold one self-generation customer to a net-of-load standard and another to a GBL computed on the basis of historical usage.[26] It is likewise "treatment less favourable" under NAFTA for the Province to hold Celgar to a net-of-load standard while applying to all other pulp mills a historical usage baseline methodology, which affords them access to embedded cost utility electricity to facilitate some below-load electricity sales.[27]

2.17 Celgar is the only pulp mill with self-generation concerning which the Province has taken regulatory action to limit the mill's access to embedded cost utility electricity whilst it is selling self-generated electricity.[28] Other pulp mills have lower relative GBLs compared to their generation or load, enabling them to access utility electricity and thus sell more below-load electricity than Celgar (which can sell none). Also, most of these other mills agreed voluntarily to use some of their self-generated energy to meet a

[21] *Id.*
[22] Cl. Mem., Paragraph 8.
[23] *Id.*
[24] Cl. Mem., Paragraph 9.
[25] *Id.*
[26] Cl. Mem., Paragraph 10; the Claimant cites *The Kelowna Decision*, p. 21 [C-21].
[27] *Id.*
[28] Cl. Mem., Paragraph 11.

portion of their own load, often in exchange for compensation from BC Hydro.[29] In particular, BC Hydro contributed funds [redacted] each toward the construction or financing of new generation at other mills, or provided other consideration, in exchange for the mills agreeing to meet a portion of their load with self-generated electricity and thereby "displace" electricity BC Hydro otherwise would have had to supply to the mills. In industry parlance, these are known as "load displacement" agreements ("LDAs").[30]

2.18 Celgar obtained no such consideration from BC Hydro or any other Provincial instrumentality. Celgar never voluntarily agreed to use its self-generated electricity to displace some or all of its own load.[31] The Province, by regulatory action and without compensation, is thus forcing Celgar to use its self-generated electricity to displace its own load, whereas BC Hydro has provided valuable consideration to others to do so.[32]

2.19 The Respondent is responsible under NAFTA for the actions of its Province, British Columbia and the BCUC. The Respondent has therefore breached Articles 1102 and 1103 of NAFTA, by according to the Claimant and its investments less favourable treatment than it has accorded to Canadian investors and third-country investors and their investments in like circumstances in British Columbia.[33]

2.20 The Respondent is obligated under NAFTA Chapter 15 to ensure that its state enterprises comply with the obligations of Article 1102 and 1103. The Respondent also has breached NAFTA Article 1503(2) with respect to any measures imposed exclusively by BC Hydro.[34]

2.21 In addition, the procedures and standards used by BC Hydro and the Province to determine the amount of arbitrage that is permissible (or the amount of below-load self-generated electricity that an industrial self-generator may sell at market rates and replace with purchases from its utility at embedded cost rates) are not well-established or

[29] *Id.*
[30] *Id.*
[31] Cl. Mem., Paragraph 12.
[32] *Id.*
[33] Cl. Mem., Paragraph 13.
[34] *Id.*

transparent.[35] There is no statute governing this issue; nor has the Province adopted any written regulations, policies, guidelines or procedures.[36]

2.22 The BCUC has explicitly delegated the task of setting a GBL, and, correspondingly, the degree of access a self-generator is afforded to embedded cost utility electricity to meet the remainder of its load, to the Province's utilities, and almost exclusively to BC Hydro, because BC Hydro has purchased the vast majority of the energy sold by self-generators in the province.[37] Yet, when it made these GBL determinations, BC Hydro had no written policies or procedures for determining generator baselines, no internal controls, and no apparent mechanism for ensuring non-discriminatory treatment. Indeed, it issued written guidelines for GBL determinations only in June 2012, long after it had set most GBLs, and after the Claimant had filed its Notice of Claim under NAFTA Chapter 11.[38]

2.23 Yet, even these unapproved, post-hoc guidelines are too vague to enable the calculation of a GBL or to explain or validate past determinations that BC Hydro has made. Indeed, on 13 December 2013, the BCUC commented that BC Hydro's guidelines "are fairly general, subject to considerable interpretation, not necessarily transparent and have not been approved by the Commission."[39]

2.24 Further, BC Hydro has unfairly and arbitrarily used different historical baseline periods for different mills, ignoring the cyclical nature of the pulp industry and changes over time in other factors that affect the economics of self-generation.[40] The duration of the baseline period BC Hydro uses also varies from mill to mill, and even the basic calculation methodology it applies has not on its face been consistent.[41] BC Hydro has revisited and amended baselines and baseline periods on an ad hoc basis.[42] The BCUC has then ratified BC Hydro's GBL determinations by approving the Energy Purchase Agreements ("EPAs") in which they are embodied (although many have been exempted from BCUC review).[43]

[35] Cl. Mem., Paragraph 14.
[36] *Id.*
[37] Cl. Mem., Paragraph 15.
[38] *Id.*
[39] Cl. Mem., Paragraph 16; the Claimant cites the letter from Erica Hamilton (Commission Secretary) to Janet Fraser (Chief Regulatory Officer, BC Hydro) of 13 December 2013, Exhibit A-17 to BC Hydro PPA - RS 3808, TS No. 2 & 3 Proceeding), p. 1 [C-27].
[40] Cl. Mem., Paragraph 17.
[41] *Id.*
[42] *Id.*
[43] *Id.*

2.25 Further, BC Hydro routinely shields its determinations from public scrutiny and comment through confidentiality agreements, such that no mill can ascertain any other mill's GBL or how it was computed.[44] It thus is impossible for any mill effectively to argue to BC Hydro or to the BCUC that its treatment was unjust or discriminatory, to the extent the Province even provides for BCUC review.[45]

2.26 The whole process is rendered all the more unfair by the fact that BC Hydro is not a disinterested regulator but is instead a financially self-interested party. In most cases, it is either the purchaser of the self-generator's power, or it agrees to sell the electricity through its affiliated trading company, Powerex, and in all cases to date, except for Celgar, it is the supplying utility.[46]

2.27 In failing to provide reasons for its differences in treatment or any transparency in its regulatory regime for industrial self-generators, particularly those like Celgar that are not direct customers of BC Hydro, and through its arbitrary, discriminatory and unfair actions that have denied Celgar regulatory fairness, the Respondent has also breached its obligations under NAFTA Article 1105 (and Article 1503(2) with regard to the conduct of BC Hydro) by failing to provide fair and equitable treatment in accordance with the minimum standard.[47]

(C) The Respondent's Case

2.28 The Respondent raises objections as to jurisdiction and admissibility to certain of the Claimant's claims. As to the merits, the Respondent denies any liability to the Claimant on all the Claimant's claims.

2.29 In summary, the Respondent contends that this arbitration arises out of the failure of the Claimant's plan to profit from low cost regulated rates for electricity in British Columbia. In particular, the Claimant planned to have BC Hydro purchase its "self-generated" energy without receiving anything in return. The Claimant referred to this plan as its "Arbitrage Project." It also believed that its Celgar Mill was in a "unique"[48] position to purchase more electricity from FortisBC, its local utility, at low-cost

[44] Cl. Mem., Paragraph 18.
[45] *Id*.
[46] Cl. Mem., Paragraph 19.
[47] Cl. Mem., Paragraph 20.
[48] The Respondent cites the memorandum from Brian Merwin to the Board, Re: Celgar Energy Project of 20 April 2008, p. 2 [R-276].

regulated rates and then sell it on as if it were its own "self-generated" electricity to BC Hydro or an imaginary U.S. buyer.[49]

2.30 None of the Claimant's "self-generated" electricity would actually change hands in these transactions. Rather, the Claimant intended "notionally" to purchase as much electricity from FortisBC as was normally self-generated at the Celgar Mill. It would then pretend that this electricity was its own "self-generated" electricity so that it could sell it at a higher price. In reality, the Claimant's self-generated electricity would continue to serve its Mill, as it always had. This arbitrage of electricity was a simple accounting transaction.[50]

2.31 FortisBC was to obtain the additional electricity for this accounting transaction from its supplier, BC Hydro, under the terms of a low-cost long-term power purchase agreement. The Claimant then planned to buy this low-cost electricity from FortisBC and sell it back, for more than three times the price, to BC Hydro as if it were the Claimant's own self-generated electricity. This elaborate buy-and-sell scheme would provide BC Hydro with no new electricity and would ultimately have harmed both BC Hydro and its ratepayers.[51]

2.32 The Claimant was aware that it might not be able to persuade BC Hydro to purchase its own electricity. Not to be dissuaded, the Claimant, having convinced FortisBC to increase its purchases of low cost electricity from BC Hydro, hoped that it could instead sell this electricity as its "self-generated" electricity for a profit in the USA. It was an unlikely prospect at best given the lack of transmission capacity and the need to find a purchaser in the USA willing to pay a premium for Canadian "self-generated" energy. The Claimant, however, stood to profit from the difference between the price for BC Hydro's low-cost electricity and prevailing electricity prices in the USA.[52]

2.33 The Claimant was under no illusion that what it was doing was questionable. It was subject to a Ministers' Order[53] requiring its Mill to use its self-generated electricity to

[49] Resp. C-Mem, Paragraph 1.
[50] *Id.*, Paragraph 2.
[51] *Id.*, Paragraph 3.
[52] *Id.*, Paragraph 4.
[53] The Respondent cites the Minister's Order, "In the Matter of an Application By Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion" of 23 May 1991 (the "1991 Ministers' Order"), p. 2 [R-100]; the affidavit of the General Manager of Celgar, Robert W. Sweeney, of 12 October 1990 and the Application for an Energy Project Certificate (E.P.C.A.) under Section 18 of the Utilities Commission Act, Celgar Pulp Company (the "Celgar 1990 EPC Application"), s. (b) [R-97]; Ostergaard WS, Paragraphs 13-23.

remain energy self-sufficient. It was aware that FortisBC was prohibited from exporting and selling the low cost electricity it purchased from BC Hydro. It also knew that the BCUC had prohibited the arbitrage of BC Hydro's low cost electricity in Order G-38-01 as it could harm BC Hydro's ratepayers.[54] It was even advised by FortisBC that the contract the Claimant and FortisBC had negotiated to facilitate its plan to arbitrage low-cost power stood a 50 per cent chance of being rejected by the BCUC.[55]

2.34 Nor would the Arbitrage Project have somehow "leveled the playing field" between B.C. pulp mills. Quite the opposite in fact: if the Claimant had managed to pull off this scheme; it would have received far better treatment than any other BC pulp mill. Having failed to reshape BC's regulatory landscape and energy policy to its own advantage, the Claimant now seeks the same preferential treatment in this NAFTA arbitration.[56]

2.35 Celgar has, by all accounts, been a very successful participant in BC Hydro's procurement processes. In fact, Celgar has received the same treatment from BC Hydro as other self-generating customers of BC Hydro, regardless of the fact that it was not a customer of BC Hydro. BC Hydro has also offered many accommodations to Celgar, as described below.[57]

2.36 At the outset of the 2008 Bioenergy Call for Power, Celgar submitted two proposals to BC Hydro. The Arbitrage Project, now renamed the "Biomass Realization Project" in all correspondence with BC Hydro, was Celgar's first proposal. The Green Energy Project, through which Celgar offered to build a new additional condensing turbine at its Celgar mill, was its second proposal.[58]

2.37 Upon receiving the "Biomass Realization Project" application, BC Hydro requested a meeting with Celgar so as to better understand this project. Mr Merwin, Celgar's representative, described how BC Hydro saw the Celgar's "Biomass Realization Project" for what it really was: nothing more than exploiting the arbitrage of existing power. He admitted in an internal email that: "[BC Hydro] do [es] not like the fact that

[54] The Respondent cites Mercer International Group, Celgar Electricity Opportunities of July 2007, p. 9–10 [R-278].
[55] *Id*., Paragraph 5. The Respondent cites to Swanson WS1, Paragraphs 63-64.
[56] Resp. C-Mem, Paragraph 6.
[57] *Id*., Paragraph 7.
[58] *Id*., Paragraph 8. The Respondent cites to Dyck WS1, Paragraph 68.

we would be buying power from Fortis who is buying power from them and we are turning around and selling them the power."[59]

2.38 Not surprisingly, BC Hydro rejected Celgar's "Biomass Realization Project."[60]

2.39 However, BC Hydro had no objection to Celgar's "Green Energy Project" which would provide BC Hydro with a new source of electricity. In reaching these conclusions, BC Hydro offered Celgar the same treatment that it provided to all of the other proponents in the Bioenergy Call.[61]

2.40 Celgar was one of four proponents out of a total of thirteen to secure an EPA from the Bioenergy Call for its Green Energy Project.[62] BC Hydro requested detailed information from Celgar which it employed to fix a GBL for Celgar of 40 MW using the same methodology it used for every other self-generating pulp mill. BC Hydro selected the Celgar's Green Energy Project as it would supply new or "incremental" electricity which met the terms of the Bioenergy Call – that is, additional generation above what the pulp mill normally self-generated for its own consumption. This EPA, together with an additional C$57.7 million subsidy Celgar received from the Government of Canada[63] to build this condensing turbine, currently provides Celgar with approximately [redacted] in revenue per year.[64]

2.41 BC Hydro applied the same considerations to Celgar's "Biomass Realization Project" (*i.e.*, the Arbitrage Project) but found that this project was not eligible for the Bioenergy Call as it would not provide BC Hydro with any new electricity. In essence, that project would have required BC Hydro to purchase back its own electricity at great cost - a cost that would have then been passed on to its ratepayers.[65]

2.42 Although BC Hydro had rejected its Arbitrage Project, Celgar almost immediately entered into an agreement with FortisBC to achieve the same result. The arrangement enabled Celgar to sell electricity FortisBC purchased from BC Hydro as its own "self-

[59] Resp. C-Mem, Paragraph 8. The Respondent quotes from the email message from Brian Merwin to Jimmy Lee and David Gandossi, "Phase I Request for Proposals: Notice to Customers of GBL" of 2 May 2008 [R-279].
[60] Resp. C-Mem, Paragraph 9.
[61] *Id.*
[62] The Respondent cites to Dyck WS1, ibid, Paragraph 53.
[63] The Respondent states that "[t]he Claimant received these funds from the Respondent under the Pulp and Paper Green Transformation Program that provided financing for capital investments aimed at improving environmental performance in the pulp and paper sector" Resp. C-Mem., Paragraph 10, n. 8.
[64] Resp. C-Mem, Paragraph 10. The Respondent refers to Rosenzweig ER1, Paragraph 99.
[65] Resp. C-Mem, Paragraph 11.

generated" electricity. BC Hydro, after learning of this agreement, filed an application with the BCUC requesting an amendment to its long-term power purchase agreement with FortisBC, in order to prevent FortisBC from supplying BC Hydro's energy to customers that intended to use it for arbitrage. It did so because it was concerned that Celgar's Arbitrage Project would harm its ratepayers.[66]

2.43 The BCUC considered the prohibition in this agreement against FortisBC arbitraging BC Hydro's low-cost electricity and observed that, when it was originally negotiated, none of the parties could have foreseen that customers would have been able to arbitrage electricity.[67] The BCUC also considered its previous regulatory decisions in Orders G-38-01 and G-113-01 where it had found that arbitraging low-cost electricity in a manner that would harm other ratepayers was unacceptable. Finally, it noted that both BC Hydro and the BCUC staff had quantified the cost to BC Hydro's ratepayers of allowing FortisBC to supply this regulated low-cost energy for arbitrage at between C$12-16 million. Accordingly, the BCUC in Order G-48-09 approved BC Hydro's request for an amendment to the agreement and prohibited FortisBC from accessing BC Hydro's low cost energy for the purpose of supplying it to customers engaged in this form of harmful arbitrage.[68]

2.44 Celgar, however, remained intransigent, despite Order G-48-09 and would, in the following years, repeatedly appear before the BCUC with new variations of its "Arbitrage Project." In these regulatory proceedings, Celgar would suggest that the BCUC should force FortisBC to give the Celgar Mill a GBL of either 1.5MW or 0 MW, thus enabling Celgar to "notionally export" everything above this FortisBC GBL (and below BC Hydro's 40 MW GBL) to the USA.[69] In trying to convince the BCUC, Celgar lauded BC Hydro's methodology for GBL determinations, but attempted to twist it in a manner that would support its unreasonable request for a 1.5 MW GBL, a request based on 15 year old data that would bear no resemblance to its current normal operations.[70]

[66] *Id*., Paragraph 12.

[67] The Respondent refers to the BCUC Order No. G-48-09 and Decision, in the Matter of an Application by BC Hydro to Amend Section 2.1 of Rate Schedule 3808 Power Purchase Agreement, of 6 May 2009 ("Order G-48- 09"), p. 10 [R-32].

[68] Resp. C-Mem, Paragraph 13. The Respondent refers to Order G-48-09, s. 5.0, at 22 [R-32].

[69] The Respondent cites Celgar, Evidence Submission, in the Matter of an Application by FortisBC for Approval of a 2009 Rate Design and Cost of Service Analysis, of 15 March 2010 at 11 and 24 [R-280].

[70] Resp. C-Mem, Paragraph 14. The Respondent cites Celgar, Evidence Submission, ibid, at 11 [R-280]; 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, of 25 March

2.45 In subsequent BCUC proceedings, Celgar would eventually turn against its own utility, FortisBC, shifting its position to demand that FortisBC supply Celgar with its own low-cost electricity (excluding BC Hydro's PPA electricity), which the Claimant would then arbitrage. FortisBC, in response, raised the issue of potential harm to its ratepayers. Celgar, predictably, took the position that any harm to other FortisBC ratepayers was irrelevant and should not thwart its arbitrage plans.[71] In other words, when it became clear that Celgar would not be allowed to profit at the expense of BC Hydro's ratepayers, it decided to shift the burden to FortisBC and its smaller base of rural ratepayers.[72]

2.46 The BCUC repeatedly rejected the Claimant's positions concerning its entitlement to low-cost electricity. However, the BCUC directed FortisBC, in another regulatory proceeding, to attempt to develop rates in a manner that would provide Celgar with additional access to electricity without harming FortisBC's other ratepayers.[73]

2.47 FortisBC complied with this direction, proposing a rate and a methodology that would allow it to supply all of Celgar's electricity by making matching purchases from the U.S. electricity market. By sourcing the purchases from the USA, FortisBC could address the BCUC's concern that its customers would arbitrage BC Hydro's power. However, this proposal did not satisfy Celgar. The latter preferred to resell BC Hydro's or FortisBC's low-cost electricity into the U.S. market as these regulated rates would fluctuate less than corresponding market prices.[74]

2.48 Celgar, in pursuit of its arbitrage plans, would also adopt a practice of repeatedly intervening in FortisBC's regulatory proceedings. These repeated interventions, the cost of which is borne in large part by FortisBC, have had the effect of fueling an annual 1.5% rate increase in FortisBC's service area.[75]

2011 ("Celgar GSA Complaint") at 5 [R-264]; BCUC Decision and Order No. G-60-14 in the Matter of an Application by BC Hydro for Approval of Rates between BC Hydro and FortisBC Inc. with regards to Rate Schedule 3808, Tariff Supplement No. 3 – Power Purchase and Associated Agreements, and Tariff Supplement No. 2 to Rate Schedule 3817 of 6 May 2014 ("Order G-60-14"), at 67, [R- 221].

[71] The Respondent cites Celgar GSA Complaint at 3 ("Celgar should not be required to concern itself with how FortisBC sources power to meet its supply obligations […] [Were] FortisBC to secure additional energy from non-[PPA] sources for the purpose of servicing Celgar's load, the cost of which would simply be rolled into its rate base along with all other sources of power that FortisBC procures to service customer needs.") [R-264].

[72] Resp. C-Mem, Paragraph 15.

[73] *Id.*, Paragraph 16.

[74] *Id.*

[75] *Id.* The Respondent cites to Swanson WS1, Paragraph 152.

2.49 To hide the underlying weakness of its claims and their complete disconnect from any energy policy and procurement practice, the Claimant mischaracterizes the subject matter of this arbitration by focusing on a single irrelevant metric of its own invention: the "below load access percentage." In doing so, the Claimant appears to suggest that a provincial state enterprise must always procure the exact same percentage of a product from all suppliers regardless of their relative size, the particularities of their business or, perhaps most importantly, the amount of the product the supplier actually has for sale.[76]

2.50 This assertion is untenable. It effectively amounts to a claim for a subsidy, an "access percentage" subsidy. This "access percentage" subsidy would require BC Hydro to purchase the same percentage of electricity from every pulp mill in the Province regardless of whether these pulp mills have any new electricity for sale. Such a result would be economically inefficient, contrary to good regulatory policy and detrimental to all ratepayers in the Province.[77]

2.51 The Respondent considers the subject matter of this arbitration to be British Columbia's provincial energy policies, BC Hydro's energy procurement practices and the BCUC's regulation of the electricity sector. In particular, certain energy policies of the BC Government have had a direct effect on BC Hydro's procurement of electricity. For example, the 2007 Energy Plan and resulting Clean Energy Act[78] directed BC Hydro to acquire additional electricity from BC clean or renewable sources so as to become self-sufficient by 2016. BC Hydro's long-term electricity is similarly central to this case. Notably, in planning to meet its self-sufficiency objective, BC Hydro chose to incentivise and procure additional electricity from biomass producers, including pulp mills, through the Bioenergy Call for Power Phase I, bilateral negotiations and the Integrated Power Offer. Also crucial to this case is the BCUC's regulation of the electricity sector, including the relationship between BC Hydro and FortisBC with respect to the provision of electricity under the PPA.[79]

2.52 The Claimant, broadly speaking, alleges that two measures are inconsistent with NAFTA. First, it asserts that BC Hydro set the GBL under the Claimant's EPA in a manner that was discriminatory, non-transparent and arbitrary. The GBL is used to

[76] Resp. C-Mem, Paragraph 17.
[77] *Id.*
[78] The Clean Energy Act, SBC 2010, c 22 (the "Clean Energy Act" or "CEA") [R-154].
[79] Resp. C-Mem, Paragraph 18.

demark the electricity that a mill generates for self-supply in normal operating conditions from the "incremental" or "new" energy that BC Hydro can incentivise and procure. The Claimant alleges that BC Hydro set the GBL for the Claimant's EPA using a different methodology than for other mills.[80]

2.53 Second, the Claimant alleges that BCUC Order G-48-09 imposed a "net of load" standard on the Claimant pursuant to which the Claimant can only sell its self-generated electricity to a third party once it has fully met its electricity needs. The Claimant argues that other mills have the right to sell to third parties below their loads and that the BCUC has therefore acted in an arbitrary and discriminatory manner.[81]

2.54 These claims should be rejected not only because they lack merit, but also on the basis that the Tribunal lacks jurisdiction over claims directed at BC Hydro's setting of the GBL.[82]

2.55 The setting of the GBL is outside the scope of NAFTA because it was not an exercise of governmental authority. Rather, BC Hydro sets a GBL as part of its contractual negotiations and for the procurement of electricity as this delineates the amount of electricity it will be willing to purchase. The procurement of electricity from private sector biomass producers pursuant to a competitive bidding process is a commercial enterprise that falls outside the ambit of NAFTA Article 1503(2) (on State Enterprises).[83]

2.56 Further, the limitation period for some of the claims directed at the setting of the GBL has expired. The GBL determination occurred well before the three-year limitation period set out in NAFTA Articles 1116(2) and 1117(2). The Claimant's GBL was set on 30 May 2008 and accepted by the Claimant on 10 June 2008. The Claimant thus had three years from the later date to submit a claim; *i.e.* by 10 June 2011. The Claimant, however, waited until 30 April 2012; and it is therefore time-barred. Even the full EPA, of which the GBL became a contractual term, was executed outside of this limitation period, namely on 27 January 2009.[84]

[80] *Id*., Paragraph 19.
[81] *Id*., Paragraph 20.
[82] *Id*., Paragraph 21.
[83] *Id.*
[84] *Id.*

2.57 Even if the Tribunal had jurisdiction to hear these claims (which the Respondent denies), the Claimant has failed to show that any of the alleged measures breached Canada's obligations under NAFTA for the reasons set out below.[85]

2.58 First, the Respondent does not have any obligations under NAFTA Articles 1102 or 1103 with respect to the Claimant's GBL which was set to determine the amount of electricity BC Hydro would purchase pursuant to an EPA. NAFTA Article 1108 sets out an exemption for procurement by state enterprises from Articles 1102 and 1103.[86]

2.59 Second, even if the Tribunal were to consider the alleged breaches of NAFTA Articles 1102 and 1103, the Claimant's allegations have no merit. As discussed above, the Claimant bases its entire case on its claim that it is entitled to an "access percentage" subsidy. It ignores the economic and regulatory rationales that support the limits set on the arbitraging of electricity. Seen in its full and proper context, BC Hydro applied consistent, coherent and correct policies to all pulp mills, including the Claimant, based on sound economic and regulatory principles, dealing with the arbitrage of regulated, low-cost electricity. These policies required that BC Hydro issue incentives only to increase generation resources and not in a way that would be economically disadvantageous to BC Hydro ratepayers. No other pulp mill in the Province has been provided this type of incentive without conforming to these policies.[87]

2.60 The Claimant also ignores the fact that NAFTA Articles 1102 and 1103 are designed to prohibit nationality-based discrimination against USA or Mexican investors in favour of either Canadian or foreign third-party investors. The Claimant fundamentally misconstrues these provisions when it argues that it need not prove that discrimination was accorded on the basis of nationality. It is not surprising that the Claimant distorts the meaning of Articles 1102 and 1103 in this way, given the obvious lack of any nationality-based discrimination in this case.[88]

2.61 Third, the Respondent has also not violated any of its obligations under NAFTA Article 1105(1). The Claimant under this provision merely recycles the allegations it makes under NAFTA Articles 1102 and 1103, arguing that the minimum standard of treatment

[85] *Id*., Paragraph 22.
[86] *Id*., Paragraph 23.
[87] *Id*., Paragraph 24.
[88] *Id*., Paragraph 25.

under customary international law includes protection against discrimination that is broader than the obligations under Articles 1102 and 1103. This distorted interpretation of Article 1105 would render Articles 1102 and 1103 'inutile' and meaningless; and, in any event, the allegations the Claimant makes under Article 1105 are baseless for the reasons stated above.[89]

2.62 Finally, even if this Tribunal were to find a breach of the Respondent's obligations, the Claimant's damages are significantly inflated. As explained above, but for the two measures at issue the Claimant is nonetheless bound to supply itself with electricity from its own generation assets. The measures are therefore incapable of causing the Claimant any loss. The Claimant also fails to proffer evidence of any "competitive disadvantage" it has suffered as a result of the measures. Although the Claimant's pleaded case is littered with allegations of a loss of competitive advantage, it does not provide any evidence to substantiate this claim.[90]

2.63 The Claimant's quantification of damages is also inherently speculative. To make out its case for damages, the Claimant assumes that BC Hydro would purchase all of Celgar's self-generated electricity. There is no evidence to support this assumption. Nor did the Claimant provide any evidence of a third party that would purchase the electricity at a price high enough to cover Celgar's cost of purchasing the replacement electricity from FortisBC. Even if such a willing third party existed, the Claimant has not demonstrated how Celgar could deliver its self-generated electricity below load to such a third party. For these reasons the Claimant's quantification of damages is unfounded.[91]

2.64 This claim for an "access percentage" subsidy is a first for an arbitration under NAFTA Chapter 11. Never has a respondent faced a claim from an investor over its entitlement to a subsidy of its own creation. No doubt this is because no other claimant has been brazen enough to advance such a claim.[92]

2.65 The Respondent concludes that Celgar attempted to arbitrage electricity so that it would profit from the harm it caused to BC Hydro's ratepayers. It then failed to persuade the

[89] *Id*., Paragraph 26.
[90] *Id*., Paragraph 27.
[91] *Id*., Paragraph 28.
[92] *Id*., Paragraph 29.

BCUC that it should be allowed to cause the same harm to FortisBC's ratepayers. Now, the Claimant has brought a NAFTA Chapter 11 claim to shift the burden of Celgar's plans onto all Canadian taxpayers. The Claimant's claims are devoid of legal merit. They are frivolous. This Tribunal should dismiss all these claims and award full costs to Canada for this arbitration.[93]

(D) The Parties' Prayers for Relief

2.66 The Tribunal here records the formal relief sought from the Tribunal by the Parties at successive stages of this arbitration.

2.67 *The Claimant:* The Claimant requests an award in its (i) Request for Arbitration, as re-stated in its (ii) Memorial and (iii) Reply, as follows:

2.68 *The Claimant's Request*: The Claimant's Request for Arbitration, Section VII, Paragraph 97 (page 47) states:

> *"Because these issues have not been resolved through amicable consultations, Mercer requests the following relief:*
> *(a) Damages for the full measure of direct losses and consequential damages sustained as a consequence of the measures that are inconsistent with Canada's obligations contained within Part A of Chapter Eleven and Article 1503(2) of NAFTA, which have been accruing at a rate of C$ 19 million per year to date, and, should the status quo remain unchanged, would total C$ 250 million on a net present value basis;*
> *(b) The full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal and any administering institution;*
> *(c) Pre-award and post-award interest at a rate to be fixed by the Tribunal;*
> *(d) Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and*
> *(e) Such further relief as the Arbitral Tribunal may deem just and appropriate."*

2.69 *The Claimant's Memorial*: Paragraph 708 (Page 314) states:

> *"For the reasons articulated herein, Mercer respectfully requests that the Tribunal make the following determinations:*
>
> *(a) The Tribunal has jurisdiction to address all of the claims asserted by Mercer in this arbitration;*

[93] *Id*., Paragraph 30.

(b) Canada, through the various wrongful acts and omissions described above, has violated its obligations under NAFTA with respect to Mercer and its investment, including violations of Articles 1102, 1103, 1105, and 1503(2):
(c) Mercer is entitled to compensation for the harm it has suffered as a result of Canada's unlawful acts and omissions with respect to Mercer and its investment in Canada, in the amount of up to C$ 232 million, plus interest starting from 1 January 2009, compounded annually at the prime rate plus 2 per cent, until the date of payment of the Award.
(d) Mercer is entitled to all costs of this arbitration, including fees and expenses of its attorneys and external advisers."

2.70 *The Claimant's Reply*: Paragraph 629 (page 307) states:

"For the reasons explained herein, as well as in its Memorial of 31 March 2014, Mercer respectfully requests that the Tribunal:

(a) find that Canada has breached its obligations to provide Mercer the substantive protections under NAFTA articles 1102, 1103, and 1105, and award to Mercer damages with interest;
(b) order Canada to pay all costs of the arbitration, including Mercer's legal and expert fees and expenses, fees and expenses of the Tribunal, as well as the costs charged by the Centre; and
(c) award to Mercer any such additional relief as it may consider appropriate."

2.71 *The Respondent*: The Respondent requests an award in its (i) Counter-Memorial, as re-stated in its (ii) Rejoinder, as follows:

2.72 *The Respondent's Counter Memorial*: In its Counter-Memorial, Paragraph 531 (page 229), the Respondent states:

"For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper."

2.73 *The Respondent's Rejoinder:* This claim for relief was re-stated in the Respondent's Rejoinder to like effect in Paragraph 451 (page 209).

PART III: THE PRINCIPAL FACTS

(A) Introduction

3.1 It is necessary at the outset to set out the principal facts relevant to the Tribunal's reasons for its several decisions later in this Award, many of which are materially fact specific or at least require factual explanations. Whilst there is much common ground between the Parties as regards some of these facts, there remain significant differences. Where factual references are made later in this document, these should be read with the fuller account of those facts set out below, including their respective evidential references.

3.2 The Tribunal emphasises that the following recites only its findings on the principal facts relevant to this Award. It would burden this document unduly, even if it were possible, for all potentially relevant factual evidence, documents and testimony to be set out here in the fullest detail. Nonetheless, as with the Parties' pleadings and submissions, it should be assumed that the Tribunal has considered all relevant factual evidence adduced by the Parties in this arbitration and, further, that no relevant evidence has been overlooked by the Tribunal by reason only of its omission below.

(B) The Parties and Associated Entities

3.3 The Claimant owns and operates a pulp mill in Castlegar, British Columbia ("BC" or "the Province"), Canada (the "Celgar Mill" or "Mill") through its Canadian affiliates, Zellstoff Celgar Limited and Zellstoff Celgar Limited Partnership ("ZCL and ZCLP"). As already indicated, for ease of reference, save where the context requires otherwise, the Tribunal refers to ZCL and ZCLP collectively as "Celgar".

3.4 On 22 October 2004, the Claimant incorporated ZCL, a company incorporated in BC, to act as the acquiring company for the purchase of the Celgar Mill.

3.5 On 14 February 2005, ZCL acquired the land and all the assets of the Celgar Mill.

3.6 On 10 January 2006, ZCL entered into a limited partnership agreement, with itself as the general partner, to form ZCLP.

3.7 ZCL transferred the Celgar Mill to ZCLP on 1 March 2006. ZCL retained legal title to the land, which it holds on trust for ZCLP. ZCL is the sole general partner, and receives 0.10 per cent of the partnership's profits in consideration for acting as general partner. The Claimant is the sole limited partner; and it owns 100 per cent of ZCLP's capital and receives 99.90 per cent of its profits.[94]

3.8 The British Columbia Hydro and Power Authority ("BC Hydro"), is a provincial Crown corporation in British Columbia. The Government of British Columbia (the "BC Government") is BC Hydro's sole shareholder and appoints its Board of Directors and Chair. BC Hydro reports to the BC Government through the Minister of Energy. BC Hydro is the predominant electricity generator and distributor in the Province. In 1988, BC Hydro established Powerex Corp. ("Powerex"), a wholly-owned power-trading subsidiary.

3.9 An important exception to BC Hydro's geographical coverage is the West Kootenay–Okanagan region, located in the South Central portion of the Province. There FortisBC Inc. ("FortisBC") provides electricity services. FortisBC is a wholly-owned subsidiary of Fortis Inc., a Canadian publicly listed distribution utility.

3.10 FortisBC acquires much of its electricity through long-term power-purchase contracts: notably a Power Purchase Agreement with BC Hydro dated 1 October 1993 (the "1993 PPA"). FortisBC's purchases of electricity under the 1993 PPA were subject to a capacity limit of 200 MW. For service provided below this capacity limit, FortisBC would purchase the electricity under Rate Schedule 3808. The arrangement between BC Hydro and FortisBC was renewed with a PPA made in 2014 on materially similar terms (the "2014 PPA").

3.11 The only pulp mill in FortisBC's electricity service territory is the Celgar Mill. All other BC pulp mills are in BC Hydro's service territory.

3.12 The British Columbia Utilities Commission ("the BCUC") is an independent regulatory agency, operating under and administering the Utilities Commission Act ("UCA").[95] Its primary responsibility is the supervision of BC's public utilities, such as BC Hydro and FortisBC. The UCA, section 43, enables the BCUC to require utilities to answer all

[94] Gandossi WS, Paragraphs 39–41.
[95] Utilities Commission Act, {RSBC 1996} Chapter 473 (2014) [C-20].

questions and provide all information deemed necessary for the purposes of administering the UCA. The BCUC is responsible for supervising and regulating all public utilities in BC, including both BC Hydro and FortisBC; and it has the power to pass legally binding rulings and other measures.

3.13 The BC Government's Ministry of Energy (the "MEM") is responsible for BC's electricity policy and has certain powers under the UCA to that end.

(C) The Regulatory History

3.14 On 12 October 1990, as part of a plan to expand the Celgar Mill, Celgar submitted an Application for an Energy Project Certificate for a proposed 52 MW turbine to the MEM. The Application explained that Celgar intended to operate, in normal conditions, the steam generated with the new turbine to supply 100% of the modernized mill's electrical power requirements.[96]

3.15 *The Ministers' Order:* On 23 May 1991, the BC Minister of Energy and the BC Minister of the Environment issued a Ministers' Order, which exempted Celgar's installation of its 52 MW turbine from provisions of the UCA subject to certain conditions, including that: "Celgar shall [...], cause the Project to be designed, located, constructed and operated in accordance with (a) the Application."[97] (the "Ministers' Order"). These operating conditions included a commitment to use the new generator to self-supply under normal operating conditions.

3.16 The Respondent accepts that the Ministers' Order "didn't come to light for many years."[98] In particular, the order's existence does not appear to have crossed the mind of anyone at BC Hydro or the BCUC until this arbitration was commenced. Nonetheless, the Claimant's expert witness Mr Austin testified that, in in his view, the Ministers' Order remains in force; and the Tribunal, accepting his testimony and the testimony to like effect of Mr Ostergaard (the Energy Ministry' Assistant Deputy Minister), so finds.[99]

[96] Affidavit of the General Manager of Celgar, Robert W. Sweeney of 12 October 1990 and Application for an Energy Project Certificate (E.P.C.A.) under section 18 of the Utilities Commission Act, Celgar Pulp Company, p. 12 [R-97].
[97] In the Matter of an Application by Celgar Pulp Company for an Energy Project Certificate for the Celgar Pulp Mill Expansion, Ministers' Order of 23 May 1991, p. 1 [R-100].
[98] TD8.2345.
[99] TD4.953; Ostergaard WS1, Paragraphs 20-23.

3.17 Nevertheless, given its other decisions in this Award, the Tribunal considers that it would not be appropriate or material to take into account the Ministers' order as a decisive factor deciding the Parties' dispute. Its terms are not free from ambiguity; and, being long forgotten by the Respondent itself, its belated use by the Respondent as a determining document in this arbitration adverse to the Claimant, would simply add another issue for no practical purpose.

3.18 *GBLs:* The first occasion on which BC Hydro and the BCUC considered any form of GBL related to Howe Sound's application to sell its self-generated electricity into the USA market in 2000-2001. BC Hydro raised concerns about this proposal at the time with Howe Sound, by letter dated 12 February 2001:[100]

> *"[T]he management of BC Hydro… and most likely the government as its shareholder, will have serious concerns about any potential proposal that will see customer self-generated power sold into market, and with BC Hydro then being required to supply make-up power under Schedule 1821. This will be financially detrimental to BC Hydro and its other ratepayers, both in the short and long term."*

3.19 BC Hydro did, however, recognise that if incremental power were to be sold to the market, this would alleviate the concern:[101]

> *"If the situation were one in which incremental power would be made available for sale in the market, i.e. power which is not now being produced but the generation of which would be made attractive if it could be sold at market prices, I expect that the situation (in BC Hydro's view) would likely be different. Any incremental power supply in the province, regardless of where it is being sold (in the short term at least) would likely be viewed as positive."*

3.20 On 23 February 2001, BC Hydro wrote to the BCUC advising it that some of its customers with self-generation capability wished to sell power they generated at market prices to take advantage of new "Open Access" proposals allowing them to access a utility's transmission system with a view to selling on that electricity.

3.21 Subsequently, the BCUC issued Order G-38-01 on 5 April 2001.[102] It provided (inter alia):

[100] Letter from Craig Folkestad to Jerry Peet of 12 February 2001, p. 1 [R-79].
[101] *Id*.
[102] BCUC Order No. G-38-01 of 5 April 2001, p. 2 [R-19].

> *"The Commission directs B.C. Hydro to allow Rate Schedule 1821 customers with idle self-generation capability to sell excess self-generated electricity, provided the self-generating customers do not arbitrage between embedded cost utility service and market prices. This means that B.C. Hydro is not required to supply any increased embedded cost of service to a RS 1821 customer selling its self-generation output to market. The Commission recognizes that considerable debate may ensue over whether a self-generator has met this principle, but the Commission expects B.C. Hydro to make every effort to agree on a customer baseline, based either on the historical energy consumption of the customer or the historical output of the generator. In instances where the parties cannot agree on an appropriate baseline, an affidavit may be required from the self-generator that it will not adjust its consumption of electricity under Rate Schedule 1821 to take advantage of market sales from its self-generation."*

3.22 Accordingly, BCUC Order G-38-01 directed BC Hydro to allow relevant customers with idle self-generation capability to sell excess self-generated electricity, provided those customers did not arbitrage between embedded-cost utility service and market prices. To that end, the BCUC further stated that it expected BC Hydro to make every effort to agree on a customer baseline, based either on the historical energy consumption of the customer or the historical output of the generator. This baseline was to be agreed with any customer that wished to increase its electricity generation. Despite the initially temporary nature of Order G-38-01, it was then extended until the BCUC should determine otherwise, by Order G-17-02.

3.23 Next, in 2002, the BC Ministry of Energy issued its 2002 Energy Plan.[103] Pursuant to that Plan, BC Hydro, on 2 September 2002, issued a Customer-Based Generation Call for Power with the aim of obtaining attractively priced electricity under long-term agreements from non-utility generation to meet BC Hydro's future demand. BC Hydro explained in its Call For Tender documentation:[104]

> *"As noted under Evaluation of Tenders and Prices/Award of EPAs, the proposed electricity supply must be new or incremental. Where the bidder's project involves an increase in the capacity of, or energy from, existing facilities resulting from capital modifications, it is necessary to determine the generator's historic generation capability. The historic generation capability is referred to in the Standard EPA as the Generator Baseline or 'GBL'. For purposes of determining electricity eligible for sale to BC Hydro, the GBL will be deducted from the*

[103] British Columbia Ministry of Energy, Mines and Petroleum Resources, Energy For Our Future: A Plan for BC ("2002 Energy Plan") [R-21].
[104] Customer-Based Generation, 2002 Call for Tenders of 6 September 2002, p. 12 [R-109] (emphasis omitted).

> *metered electricity. Except in very limited circumstances as described in the Standard EPA, BC Hydro will not purchase electricity that is part of the GBL."*

3.24 Accordingly, the proposed electricity supply had to be incremental, that is "electricity from new generation facilities or from an increase in the capacity of, or energy from, existing facilities resulting from capital modifications (other than normal capital maintenance programs)."[105] BC Hydro further made the acquisition of self-generation from customers in this call contingent upon the customer's agreeing to a baseline that was representative of its historical self-generation, which BC Hydro referred to as a "generator baseline" or "GBL".

3.25 A separate form entitled "2002 CBG Generator Baseline (GBL) Application" was annexed to the document. It was there envisaged that the GBL would be established through a negotiation between BC Hydro and the customer. The following information was required from the customer for this purpose:[106]

> *"The nameplate capacities will be used to determine the Generator Baseline, unless the bidder submits information acceptable to BC Hydro as to why the Generator Baseline should be less than nameplate capacities. Such a submission must include at least the following:*
> • *historical operating data for each electric generator in MWh as a daily average listed by month for a minimum of 3 years, or the total length of time the Generator has been installed and operating whichever is less, and*
> • *the peak output for each month for each electric generator in the last 10 years or the period in which the generator has been installed whichever is less."*

3.26 No self-generator was ultimately awarded a contract under this Call for Power.[107]

3.27 The Respondent accepted that this GBL served as the dividing line between "pre-existing" and "new" or "incremental" energy[108], as did its factual witness Mr Dyck in cross-examination.[109] The Tribunal so finds.

3.28 There is a dispute between the Parties whether the concept of a GBL was a single concept or whether it in fact referred to one or other of two quite different matters, depending on context: namely, a "service GBL" or a "procurement GBL". The former

[105] *Id*., p. 15.
[106] *Id*., p. 40.
[107] Scouras WS1, Paragraph 31.
[108] TD1.111–2, TD8.2348.
[109] TD5.1572.

defines the scope of a utility's obligation to serve and the latter defines the level above which it will procure electricity. This distinction had at most been hinted at in the Respondent's written pleadings.[110] At the Hearing, however, the Respondent's witness, Mr Dyck (of BC Hydro), positively asserted that "BC Hydro's use of a GBL in an EPA with a self-generator is not connected to its obligations to serve its customers."[111]

3.29 The Tribunal disagrees with this testimony. It finds, on the contemporaneous documents, that the GBL is a composite concept fixing at a single value *both* the limit of BC Hydro's obligation to serve and the level above which it will procure electricity. That was expressly stated by the BCUC on 25 June 2014 in the reasons accompanying its Order G-106-14: "Because these self-generators are selling to BC Hydro, a GBL in these cases has a dual purpose. On the one hand, it is used to establish BC Hydro's obligation to serve under RS 1823 (Order G-38-01) and on the other hand, it identifies how much idle self-generation is available for BC Hydro to purchase under an EPA. As pointed out by Celgar in its submission [to the BCUC], these two amounts are aligned; and there is in fact only one GBL. This issue is analogous to two sides of the same coin."[112] As a general concept, the Tribunal does not think it material to distinguish between its application to BC Hydro's obligation as a utility to serve its own customers directly and BC Hydro's indirect obligation as a utility to serve FortisBC's customers, including (particularly) Celgar.

3.30 Accordingly, as regards the BCUC's reasons cited above, the Tribunal does not accept the Respondent's explanation in its closing submissions that this was "a little bit of loose language".[113] In its reasons, the BCUC confirmed that the function of demarcating a utility's obligation to serve is one purpose, albeit noting also in Appendix A to its Order G-191-13, that "a GBL [represents] in its most basic form the load a self-generator is required to serve".[114] These are clearly distinct purposes.

3.31 As explained by the Respondent in its closing submissions in regard to the second of these purposes, the GBL "defines the line above which BC Hydro *will procure* from the Claimant. If they have a lower GBL, BC Hydro *will procure* more. That is the very

[110] It appears, if at all, in Resp. Rej., Paragraphs 273, 278.
[111] Dyck WS 2, Paragraph 6.
[112] BCUC Order No. G-106-14 of 25 July 2014, p. 6 [C-284].
[113] TD8.2292.
[114] Order G-191-13, p. 4 [C-21].

purpose of the GBL." (emphasis here supplied).[115] This is confirmed by the testimony of the Respondent's witness, Mr Scouras (of BC Hydro), that once the GBL is identified, BC Hydro simply "purchase[s] what is in excess of that" [GBL].[116]

3.32 Whilst there is a dispute about whether G-38-01 bound BC Hydro as such, the Respondent's case is that BC Hydro did in fact set GBLs "in accordance with G-38-01"[117] and "based on the principles set out in BCUC Order G-38-01".[118] The Tribunal so finds.

3.33 Ultimately, the 2002 Customer-Based Generation call resulted in only three Energy Purchase Agreements ("EPAs"), none of which dealt with incremental self-generation.[119]

3.34 Shortly afterwards, in November 2002, the BC Government issued its 2002 Energy Plan with the aim of ensuring low electricity prices and public ownership of BC Hydro; a secure, reliable supply of energy; more private sector opportunities; and environmental responsibility with a guarantee of no nuclear generation in the Province. The 2002 Energy Plan was to be the foundation for establishing an overarching "Heritage Contract" aimed at preserving the benefit of BC Hydro's existing "heritage" generation assets. The Heritage Contract was to be implemented through legislation and "lock in the value of existing low-cost generation assets for an extended period."

3.35 In 2003, on the BCUC's recommendation, the BC Government enacted the BC Hydro Public Power Legacy and Heritage Contract Act and Heritage Special Direction No. HC2. These measures prohibited the sale of BC Hydro's generation assets and provided that the benefits of low cost generation from BC Hydro's historic assets would continue to be available to ratepayers. (The BC Hydro hydroelectric system and storage reservoirs were built in the 1960s, 1970s and 1980s.)

3.36 On 16 February 2005, the Claimant (by its attorneys who represent it as co-counsel in this arbitration) wrote to the Executive Director of the Environmental Assessment Office, in the Office of the BC Deputy Minister, to request an amendment to the

[115] TD8.2348.
[116] TD4.1203.
[117] Resp. C-Mem., Paragraph 135.
[118] Resp. Rej., Paragraph 99.
[119] Scouras WS1, Paragraphs 27–31.

Ministers' order to reflect ZCL's acquisition of the Celgar Mill.[120] The request was granted, by letter dated 2 March 2005, making ZCL responsible for Celgar's compliance with the Ministers' order.[121] (This is not the same Ministers' Order of 23 May 1991 described above.)

3.37 On 27 February 2007, the BC Government released an energy plan entitled "The BC Energy Plan: A Vision for Clean Energy Leadership" (the "2007 Energy Plan").[122] It aimed, amongst other things, to ensure that the Province achieved self-sufficiency of electricity supply by 2016, and that the Province maintained its competitive electricity rate advantage. Policy Action No. 30 of the 2007 Energy Plan set out a bioenergy strategy to increase biomass electricity, or "bioenergy", generating capacity in the Province, since biomass energy was considered carbon-neutral. Bioenergy includes energy generated by pulp mills such as the Celgar Mill.

3.38 The 2007 Energy Plan directed BC Hydro to issue an expression of interest, followed by a call for proposals, for electricity from sawmill residues, logging debris and timber killed by the mountain pine beetle infesting British Columbia forests. The 2007 Energy Plan also established a "Standing Offer" program ("SOP") with a set purchase price for projects up to 10 MW.

3.39 Pursuant to the 2007 Energy Plan, BC Hydro issued its Request for Proposals for its Bioenergy Call for Power on 6 February 2008.[123] The timetable in this Request for Proposals envisaged that the customer would submit GBL data on 7 March 2008 and that BC Hydro would give notice to the customer of the GBL on 2 May 2008. The following type of project was among those considered to be eligible: [124]

> *"New self-generation, or incremental self-generation, in any event excess of the Customer's GBL at a Customer's facility to serve the Customer's industrial load at the facility (i.e. load displacement) and/or effect net energy export to the System (i.e. Customer Projects), but excluding generation projects, where the current output is under contract through a load displacement or demand side management agreement with BC Hdyro [sic]."*

[120] Letter from Tom Theodorakis, Sangra Moller, Barristers & Solicitors to Joan Hesketh, Executive Director, Environmental Assessment Office of 16 February 2005 [R-322].
[121] Letter from Joan Hesketh, Executive Director, Environmental Assessment Office to Tom Theodrakis, Sangra Moller Barristers & Solicitors of 2 March 2005 [R-310].
[122] BC Hydro and HSPP, Electricity Purchase Agreement: Integrated Power Offer of 7 September 2010 [R-23].
[123] Letter from HSPP to BC Hydro of 16 June 2009 [R-25].
[124] *Id*., p. 7.

3.40 The Registration Form for the Request for Proposals specified the "Preliminary GBL Data" that would have to be submitted by the customer:[125]

> *"2. Provide the information requested in "Section A - Estimated GBL" as follows:*
> *(a) In the column titled "Generator #", give a number to each generator located on the site that forms part of the system that generates energy (each a "Generator").*
> *(b) In the column titled "Name Plate Capacity", insert the name plate capacity (in MW) for each Generator.*
> *(c) In the column titled "Net Operating Output", insert the actual average hourly generation output (in MW) for each Generator.*
> *(d) In the column titled "Annual Energy Output", insert the annual energy output (in GWh/year) for each Generator for the Proponent's customer base line ("CBL"') development year (which, for most Proponents will be the 2005 operating year).*
> *(e) In the row titled "Estimated GBL", insert the total of the Annual Energy Output column."*

3.41 Two information sessions were held by BC Hydro for those interested in submitting a bid under the Request for Proposals. Celgar's representatives attended both sessions. BC Hydro's presentations were subsequently placed on its website.

3.42 The first session included a presentation dated 20 February 2008. It contained the following information concerning the establishment of a GBL:[126]

> *"Generation Base Line*
> ** The purpose of the GBL is to define incremental generator output that can be considered for a prospective energy sale*
> ** Each customer, including all customer owned and operated generators behind the point of interconnection will need to have GBL set for their project*
> ** For transmission voltage connected customers with multiple generators a GBL will need to be set for all generations*
> ** The initial customers' 'estimated GBLs' should reflect a 365 day annual period*
> ** The GBL start point is the same as the GBL establishment year*
> ** The GBL may then need to be adjusted for unique customer circumstances (existing LD contracts, EPAs, market sales, 1880/ad hoc purchases etc.)."*

[125] BC Hydro Bioenergy Call for Power (Phase I) – Registration Forms of 6 March 2008, p. A-1 [R-123].
[126] BC Hydro's Bioenergy Call, Kamloops, BC of 20 February 2008, p. 22 [R-116].

3.43 The second session included a presentation dated 26 March 2008. It also contained information concerning the establishment of a GBL:[127]

> *"Incremental Generation*
> ** Requires historical data from existing generators proximal to the proposed generator (i.e. same facility).*
> ** Requires future biomass utilization forecasts up to your GBL if current customer, or to your existing annual generation if not a customer.*
> **Requires future incremental biomass requirements."*

3.44 The process for establishing the GBL was described as follows:[128]

> *"GBL Determination Process*
> ** GBL discussions and determinations will follow the same process as the initial CBL discussions.*
> ** Individual meetings will be conducted between the customer proponents and a BC Hydro GBL review team in the next few weeks.*
> **Once GBLs have been agreed to with the review team they will be filed along with the individual customer GBL statements and ultimately filed with the BCUC.*
> ** After GBLs have been determined and expected generation operations are defined (relative to BC Hydro energy sales to customers), both planning for metering configurations and billing system programming can begin"*

3.45 BC Hydro received 20 proposals from 13 different customers; but it ultimately decided to award four EPAs to (i) Celgar, (ii) PG Interior Waste to Energy Ltd, (iii) Canfor Pulp Ltd. Partnership (Prince George) and (iv) Domtar Pulp and Paper Products Inc. (Kamloops).[129] Celgar received the largest EPA amongst those four mills.[130]

3.46 On 2 May 2008, BC Hydro informed Celgar that it considered that its Green Energy Project was eligible for the Bioenergy Call.[131] BC Hydro and Celgar then agreed to work together to set a GBL for Celgar's Mill.[132]

3.47 In Celgar's letter dated 7 May 2008 to BC Hydro, Mr Merwin proposed a GBL of 33 MW based on the Mill's generation levels in 2006.[133] This was different from the GBL

[127] Bioenergy Call Phase I, Proponent Information Session of 26 March 2008, p. 15 [R-117].
[128] *Id*., p. 63.
[129] BC Hydro Report on the Bioenergy Call Phase I Request for Proposals of 17 February 2009, Appendix A [R-170].
[130] *Id*.
[131] Letter from BC Hydro RFP Administrator to Brian Merwin Re: Zellstoff Celgar Limited Partnership ("Celgar") – Biomass Realization Project of 2 May 2008 [126].
[132] Letter from Brian Merwin to BC Hydro RFP Administrator of 7 May 2008, p. 2 [R-127].
[133] *Id*.

of 34.3 MW originally proposed by Celgar in its Registration Form submitted a year earlier and based on Celgar's generation levels in 2005.[134] Mr Merwin's proposal to BC Hydro concerning Celgar's GBL contained the following information: [135]

> *"Historically, under normal operating conditions Celgar's load was 38 MW to 39 MW. In 2007, Celgar's load under normal operating conditions was 43 MW, depending on whether Celgar's chipping plant is running this number could go as high as 45 MW. During less than ideal operating conditions the mill load would likely be a slightly lower number. As Celgar moves to a higher reliability, meaning running at target rates, there will be a higher frequency when Celgar's load is equal or greater than 43 MW."*

3.48 Mr Dyck (who was the person responsible at BC Hydro for setting Celgar's GBL) testified to the effect that:[136] BC Hydro's policy was to set a GBL to reflect a one-year period; he nonetheless considered all the data that BC Hydro received from Celgar for the period 2002-2007; he disregarded the data from 2002-2004 as that reflected a period when the Mill was in bankruptcy; he examined the data from 2005 and 2006, but he did not consider that this reflected normal operations for the Mill in 2008 given that these preceded the extensive improvements made during 'Project Blue Goose'.

3.49 Ultimately, by letter dated 30 May 2008 to Celgar, Mr Dyck set Celgar's annual GBL at 349 GWh/year (or 40 MW).[137]

3.50 BC Hydro and Celgar signed their EPA on 27 January 2009, together with the Side Letter (described more fully below).

3.51 On 27 November 2009, following other proceedings before the BCUC regarding Tembec's EPA, the BCUC wrote to BC Hydro to request that it "... develop guidelines for the establishment of GBLs" to assist it with the efficient review of GBL determinations. Its letter concluded: [138]

> *"The Commission believes that it may be helpful and timely to develop guidelines for the establishment of GBL's, to assist efficiency and consistency in the determination and review of GBL's. Therefore, the Commission requests that as part of its next major EPA filing that involves GBL's or next Long Term Acquisition Plan filing, BC Hydro include draft Guidelines for the determination*

[134] BC Hydro Bioenergy Call for Power (Phase I) – Registration Forms of 6 March 2008 [R-123].
[135] Letter from Brian Merwin to BC Hydro RFP Administrator of 7 May 2008, p. 4 [R-127].
[136] Dyck WS1, Paragraphs 80-83; Dyck WS 2, Paragraphs16-17.
[137] Letter from RFP Administrator (Bioenergy Call - Phase I) to Brian Merwin of 30 May 2008 [R-181].
[138] Letter from Constance Smith to Joanna Sofield of 27 November 2009, p. 2 [R-202].

> *of GBL's. Attachment A to this letter identifies several questions related to the determination of GBL's, and the Commission requests that BC Hydro address these questions when it submits the draft GBL Guidelines and related discussion.*

The Attachment listed twenty questions for BC Hydro.

3.52 On 20 June 2012, BC Hydro filed a GBL Information Report with the BCUC, reflecting its established business practices.[139] That Information Report stated (at pages 14–15):[140]

> *"In the EPA, the customer will be contractually obligated to generate an amount in excess of the GBL for each year … To meet this obligation, the customer must first generate the GBL for self-supply. This is a benefit … since there is value to BC Hydro given that the customer's self-supply commitment in the contract removes the uncertainty associated with serving customer load for resource planning purposes."*

3.53 This Information Report, which also set out BC Hydro's detailed representations as to how it calculated GBLs, was provided to the Claimant for the first time during this arbitration. The Respondent submits that this document was not the first to set out in writing BC Hydro's approach to determining GBLs. On the materials provided to this Tribunal, this submission would be largely correct: see above.

3.54 On 13 December 2013, in its letter to BC Hydro, the BCUC described BC Hydro's guidelines for calculating GBLs (as described in the Information Report) as "fairly general, subject to considerable interpretation, not necessarily transparent and … not approved by the Commission".[141]

3.55 The Tribunal agrees with this criticism of BC Hydro's methodology. In particular, both the approach set out in the Information Report and the explanation of its rationale are at times difficult to follow, even with the assistance of the Parties' expert witnesses and Counsel at the Hearing many years later.

3.56 The Information Report acknowledged (on page 10) that GBLs were to be at least consistent with Order G-38-01: "For the EPAs having GBLs that BC Hydro has signed

[139] BC Hydro 2012 GBL Information Report of 20 June 2012 [R-177].

[140] *Id*., pp. 14-15; This is consistent with a MEM briefing note of 11 January 2010, which explains that self-generation by customers may save ratepayers (and, presumably, the utility) money, MEM Briefing Note for Decision of 11 January 2010, p. 2 [R-389].

[141] Letter from Erica Hamilton, Commission Secretary, BCUC, to Janet Fraser, Chief Regulatory Officer, BC Hydro of 13 December 2013 [C-229].

with customers since 2009, BC Hydro has established a GBL for each customer, consistent with the principles, process and considerations set out in section 4.1 of this Information Report. The overriding purpose of these GBLs was to mitigate the risk of arbitrage, consistent with BCUC Order No. G-38-01."

3.57 The Information Report continues (on page 11):

> *"A GBL is not the only means of mitigating the risk of arbitrage. Another method has been referred to as 'net-of-load'. In Letter No. L-106-09, the BCUC asked several questions of BC Hydro about the net-of-load approach, including the advantages and disadvantages of using this method.*
> *Under a net-of-load approach, a customer would not be able to sell self-generated electricity unless the customer first displaces its entire load at its own cost. By definition, there would be no risk of arbitrage under a net-of-load regime because a customer simply would not be allowed to buy electricity from BC Hydro at the same time that it is selling its self-generated electricity to BC Hydro or others.*
> *There are advantages to the net-of-load approach. In addition to avoiding the risk of arbitrage, the net-of-load approach removes the need to consider historical generation because it is based on what the customer is actually generating (and delivering to the grid) on a real-time basis …".*[142]

3.58 The Information Report explains (on page 14), how GBLs that form part of negotiated contracts are arrived at:

> *"First, BC Hydro and the customer establish a baseline (the contracted GBL) that reflects 365 days of generation output for self-supply. The annual GBL is determined, in consultation with the customer, using the best available information including the customer's historical self-generation output and energy consumption data, and information about the customer's unique manufacturing process. The annual GBL represents a reasonable estimate of the annual self-generated energy normally used by the customer for self-supply under current conditions and in the absence of a contract."*[143]

3.59 Celgar, in an earlier document submitted to the BCUC on 15 April 2010, had asserted that, "[t]he determination of the GBL should be made in consideration of the customer circumstances."[144]

3.60 The Information Report continued (on page 16):

[142] BC Hydro 2012 GBL Information Report of 20 June 2012, p. 11 [R-177].
[143] *Id*., p. 14.
[144] Zellstoff Celgar Response to BCUC IRs (X) Q 6.1 of 15 April 2010 [R-372].

> *"Regardless of the differences between customers and power procurement processes, the objective of the contracted GBL determination process is always the same; namely, to determine the annual self-generated energy used by the customer for self-supply, in the absence of a contract, in a normal current operating year, as of the time period the EPA is negotiated."*[145]

3.61 This "current normal" approach was confirmed in the testimony of the Respondent's witness, Mr Dyck (of BC Hydro), on BC Hydro's approach to setting GBLs.[146]

3.62 This relatively detailed description of BC Hydro's methodology forms an important background to the Parties' dispute. This methodology was much criticised by the Claimant as retrospective, with no coherent or consistent methodology having been in place at the time when Celgar's GBL was fixed. Whilst there is some force in such criticism, for the reasons set out later in this Award, the Tribunal does not find it necessary to address further the factual evidence on the regulatory history beyond 2013.

(D) Celgar's Infrastructure Investment

3.63 The Celgar Mill, like many pulp mills, produces pulp whilst at the same time generating electricity as both a means to and by-product of doing so. It is not in dispute that it is not economical for the Celgar Mill (or pulp mills generally) to produce electricity otherwise than whilst producing pulp. For present purposes, the specifics of the process by which pulp and electricity are produced in combination are not relevant. What is relevant is that it is a process in BC peculiar to pulp mills.

3.64 Whether a pulp mill produces enough electricity to meet its pulp-making needs varies from pulp mill to pulp mill. If the mill does not produce enough electricity to meet its needs (referred to as its "load"), it must buy electricity from elsewhere, most naturally from its local utility. If, on the other hand, it produces more electricity than its load, it may seek to sell that electricity to its utility or to third parties. A crucial point is that a pulp mill may be able to buy electricity at a price lower than that at which it can sell it, making it economical to buy electricity with the aim of selling on the same amount. As already noted above, this is called "arbitrage". A pulp mill's ability successfully to arbitrage thus clearly depends on the terms, if any, on which it can both buy and sell electricity. It may be economical for a pulp mill to engage in arbitrage below its load if

[145] BC Hydro 2012 GBL Information Report of 20 June 2012, p. 16 [R-177].
[146] Dyck WS1, Paragraph 45.

it can acquire electricity cheaply enough to meet that load. It also depends on the equipment and processes in place at the pulp mill, including investments thought likely to yield better opportunities for arbitrage.

3.65 In anticipation of its acquisition of the Celgar Mill in 2005, Celgar devised a project to increase its production of both pulp and electricity by installing new infrastructure. This was referred to as "Project Blue Goose". The new infrastructure was installed in April 2007 and brought online over the succeeding months.[147] As a result of Project Blue Goose, the Celgar Mill's electricity generation increased over 20 per cent, from 290.4 GWh/year in 2006 to 350.6 GWh/year in 2007. As a corollary of this increase, the Celgar Mill's electricity requirement from FortisBC fell from an average of 54.1 GWh/year between 1996 and 2006 to 22.6 GWh/year in 2007.[148]

3.66 This enabled Celgar to enter into a series of agreements with the aim of maximising its investments from the sale of electricity, including a Transmission Agreement of July 2006 with FortisBC,[149] an Agreement of July 2006 with NorthPoint,[150] and a Brokerage Agreement of October 2006 with FortisBC.[151]

3.67 On 6 June 2007, Celgar signed a non-disclosure agreement with FortisBC to facilitate discussions about FortisBC's interest in purchasing more of Celgar's self-generated electricity.[152] Since [redacted] the discussions shifted to the possibility of FortisBC's supplying Celgar with electricity to meet its full load requirements whilst Celgar simultaneously sold the output of its two generators to third parties.[153] Celgar called this proposal its "Arbitrage Project".

(E) Celgar's GBL before the 2009 EPA

[147] Merwin WS1, Paragraph 57.
[148] Merwin WS1, Paragraph 60.
[149] Letter Agreement between FortisBC, and Zellstoff Celgar Limited Partnership of 7 July 2006 [C-212].
[150] Marketing Services Agreement between Celgar and NorthPoint Energy Solutions Inc. of 12 July 2006 [C-213].
[151] General Service Power Contract and Brokerage Agreement Between Zellstoff Celgar Limited Partnership and FortisBC Inc. of 1 October 2006 [C-269].
[152] Confidentiality Agreement between Celgar and FortisBC of 6 June 2007 [C-188].
[153] Merwin WS1, Paragraphs 66 to 67; Email chain between FortisBC to Mr Merwin. [C-214].

3.68 As already set out above, on 6 February 2008, in accordance with the 2007 Energy Plan, BC Hydro issued its first call for bioenergy power proposals known as "Bioenergy Power Call Phase I".[154]

3.69 On 4 May 2008, during Celgar's negotiations with BC Hydro, Mr Merwin (of Celgar) wrote internally to his colleague, Mr McLaren, about Celgar's expectations and strategy:

> *"It appears BC Hydro has formally come out against our arbitrage project. I think there is still an opportunity with them as they have a fair bit of arrogance that they are the option for us and it won't stop us. I have spent some time this weekend drafting a response letter as we need to get our GBL set in either case as we need it so that we can submit our bid. It still needs some editting [sic]. I would like you to take a quick look at it when you get a chance on Monday morning and offer comment if my analysis on the mill data seems plausible to you."*[155]

3.70 Mr McLaren replied to Mr Merwin the same day:

> *"If we can't break the BC Hydro position that the existing TG GBL portion is ineligible [TG = Turbine Generator], then we must fight to establish our GBL to be as low as is credible - I support your logic of picking a GBL of 33 MW to reflect conditions prior to Mercer's energy investments."*[156]

(On the basis set out in Celgar's draft letter to BC Hydro, that the Celgar Mill would operate for 8,400 hours a year, 33 MW was equivalent to approximately 277 GWh/year.)

3.71 Celgar was ultimately successful under the call, the most significant condition of its success being BC Hydro's assignment to it, on 30 May 2008, of a GBL of 349 GWh/year. It is not disputed that this was essentially equivalent to the Celgar Mill's load for 2007 (with Project Blue Goose completed).[157]

3.72 On 7 June 2008 Mr Merwin wrote in an internal memorandum within Celgar: "We are currently debating our GBL with Hydro as we believe they have not treated assignment

[154] BC Hydro, Bioenergy Call for Power – Phase I, Request for Proposals of 6 February 2008 [R-25].
[155] Email from J. MacLaren to B. Merwin of 4 May 2008, p. 1 [R-534].
[156] Id.
[157] Letter from BC Hydro RFP Administrator to Brian Merwin of 30 May 2008 [C-248]; Resp. C-Mem., Paragraph 232.

of this number the same as what they have done for other pulp and paper mills."[158] Nonetheless, despite Mr Merwin's 'belief', the Respondent's witness, Mr Dyck (of BC Hydro), accepts (and his evidence was not contradicted) that Celgar was not provided with any substantial information as to BC Hydro's fixing of any other pulp or paper mill's GBL until this arbitration was commenced.[159]

3.73 As a next stage of its infrastructure investment, Celgar had envisaged a "Green Energy Project" entailing the installation of an additional 48 MW condensing turbine (along with other energy-related upgrades) that would use the Celgar Mill's surplus steam to generate additional new electricity. However, the subsequent 2008–09 global economic crisis resulted in that project being postponed until sufficient funding became available for it. This ultimately came, first, in the form of a C$ 57.7 million credit under the Pulp and Paper Green Transformation Program ("PPGTP") announced by the Government of Canada in June 2009. Then, in November 2009, Celgar entered into a non-repayable Contribution Agreement with Natural Resources Canada, whereby Natural Resources Canada agreed to provide approximately C$ 40.0 million in grants towards certain costs of the Green Energy Project.

3.74 Celgar ultimately completed the Green Energy Project in September 2010. It cost C$ 64 million, of which the Canadian Government provided C$ 46.8 million.

(F) Celgar's 2009 EPA and the Side Letter

3.75 Following Celgar's success in the Bioenergy Phase I Call for Power, Celgar (as seller) and BC Hydro (as buyer) began to negotiate and eventually agreed an EPA for a ten year period ("the 2009 EPA").

3.76 During negotiations for the EPA, Celgar had sought to agree with BC Hydro that it would be allowed to sell any below-GBL power to third parties. Although apparently open to this proposal at first, BC Hydro ultimately refused to accede to it as a term of the EPA.

3.77 Instead, as signed on 27 January 2009, the 2009 EPA contained at clause 7.4 an "Exclusivity Provision" to the effect that Celgar was prohibited from selling below-

[158] Memo from Brian Merwin to Jimmy Lee and David Gandossi, BC Hydro Bid Price & Associated Terms of 7 June 2008, pp. 9 to 10 [R-559].
[159] TD5.1491to 1494.

GBL power to third parties.[160] The Respondent's position was that every EPA concluded by BC Hydro with a pulp mill includes an equivalent of this Exclusivity Provision.[161]

3.78 Conversely, the 2009 EPA provided by clause 7.3 to the effect that BC Hydro was obliged to buy all electricity produced by Celgar above its GBL.[162] This is consistent with one of the two purposes of a GBL as identified by the Tribunal above.

3.79 On 27 January 2009 (the date the 2009 EPA was signed by the Parties), Celgar, being dissatisfied with the Exclusivity Provision, sought and obtained an agreement from BC Hydro in the form of a "Side Letter" whereby (inter alia) the offending part of the Exclusivity Provision would be removed if Celgar obtained an order from the BCUC allowing it access to utility power other than on a net-of-load basis.[163]

3.80 This Side Letter provided, in material part as follows:

> *"1. The inclusion of section 7.4(b) in the EPA in its present form, and the support of the Parties for the EPA in any proceeding (the "section 71 proceeding") arising from the filing of the EPA with the BCUC under section 71 of the UCA, are without prejudice to the right of (i) the Seller to take a position in any other pending or future regulatory proceeding before the BCUC, the effect of which if such position were to prevail in that proceeding, would be that (A) FortisBC may supply electricity to the Seller to serve the Seller's Mill Load, in circumstances where the Seller sells self-generated electricity diverted from serving Mill Load, (B) the Seller may sell such self-generated electricity in those circumstances, and (C) section 7 4(b) of the EPA in its present form should have no force or effect, and (ii) BC Hydro to take a contrary position. For certainty, the Seller acknowledges that it will comply with section 3.3 of the EPA, and will not take the position described in (i) above in the section 71 proceeding.*
> *2. If the BCUC makes an order in any pending or future regulatory proceeding upholding the position described in paragraph l(i) above, then subject to the*

[160] Electricity Purchase Agreement between BC Hydro and Celgar of 27 January 2009, p. 13 [C-221] (Clause 7.4:"Exclusivity - The Seller shall not at any time during the Term commit, sell or deliver any Energy to any Person, other than the Buyer under this EPA, except …. (b) that portion of the Energy generated in any Season during the Term after GOD that is less than the Seasonal GBL, and greater than the Mill Load, in each case, for that Season; …").

[161] TD8.2381. See also Integrated Power Offer Meeting Summary, Howe Sound Pulp and Paper of 28 August 2009 [R-62], BC Hydro and Domtar Pulp and Paper Products Inc., Electricity Purchase Agreement, Bioenergy Call for Power – Phase I of 27 January 2009 [R-136], BC Hydro and Tembec Electricity Purchase Agreement of 13 August 2009 [R-198].

[162] Electricity Purchase Agreement between BC Hydro and Celgar of 27 January 2009 [C-221] (Clause 7.3: "Post-COD Purchase of Energy - Subject to subsection 7.7(b) in each Season during the Term after COD, the Buyer shall purchase, and shall accept delivery from the Seller at the POI of, all Eligible Energy").

[163] Letter Agreement between BC Hydro and Celgar of 27 January 2009 [C-225].

> *outcome of any reconsideration or appeal thereof, the Parties shall execute and deliver an agreement amending the EPA to substitute the alternate section 7.4(b) for that section in the present EPA, which amendment shall be filed with the BCUC under section 71 of the UCA and shall be subject to acceptance by the BCUC.*
> *3. If the BCUC makes an order in the section 71 proceeding containing a condition upholding the position described in paragraph 1 (i) above, neither Party will exercise its right to terminate the EPA under section 3.1 in respect thereof, and all rights under section 3.1 to terminate the EPA in respect of such condition are hereby waived by both Parties.*
> *4. This letter may be filed by either Party with the BCUC or in evidence in any pending or future regulatory proceeding before the BCUC, including any section 71 proceeding."*[164]

3.81 On 31 July 2009, under section 71 of the UCA, the BCUC "accepted for filing" the 2009 EPA along with three other such agreements, apparently concluded between BC Hydro and other parties.[165]

3.82 There was some disagreement between the Parties as to when the 2009 EPA took effect: in particular, whether it did so on 27 January 2009 (the "effective date" according to its contractual terms) or upon acceptance for filing by the BCUC on 31 July 2009. In the Tribunal's view, this disagreement raises an issue of applicable law, not fact; but it is nonetheless appropriate to decide that legal issue here. By Clause 1.5, the EPA's applicable law is agreed to be "made under, and shall be interpreted in accordance with, the laws of the Province of British Columbia".[166]

3.83 The Tribunal accepts the position ultimately put forward by the Respondent at the Hearing that the EPA took effect, under its applicable law, according to its own express terms: see its title at page 1 and paragraph 39 of appendix 1.[167] Its effect did not depend upon approval by the BCUC. The BCUC procedure was expressed as a "negative disallowance scheme": in other words, the BCUC had the power to declare a contract unenforceable (as a condition subsequent), but it did not have the power to make a bare agreement contractually enforceable in the first place (as a condition precedent).[168]

[164] *Id*., pp. 1 to 2.
[165] BCUC Order No. E-08-09 of 31 July 2009, p. 2 [C-226].
[166] Electricity Purchase Agreement between BC Hydro and Celgar of 27 January 2009, p. 2 [C-221].
[167] *Id*., p. 1 and 39 of Appendix 1.
[168] TD1.194; TD8.2367.

3.84 This approach comports with Section 71 of the UCA, under which the BCUC "accepted for filing" the 2009 EPA. Subsections (3)–(4) of that section provide:

> *"(3) If [the BCUC] determines that an energy supply contract is not in the public interest], the commission may*
> *(a) by order, declare the contract unenforceable, either wholly or to the extent the commission considers proper, and the contract is then unenforceable to the extent specified, or*
> *(b) make any other order it considers advisable in the circumstances.*
> *(4) If an energy supply contract is, under subsection (3)(a), declared unenforceable either wholly or in part, the commission may order that rights accrued before the date of the order under that subsection be preserved, and those rights may then be enforced as fully as if no proceedings had been taken under this section."*

3.85 Accordingly, by reason of the Exclusivity Provision in the 2009 EPA with BC Hydro, Celgar was precluded from selling any of its self-generated electricity below its GBL, both to BC Hydro and any third parties (subject to the Side Letter, as yet untriggered).

(G) BCUC Order G-48-09

3.86 On 21 August 2008, Celgar and FortisBC executed a 30-year Power Supply Agreement (the "2008 PSA"), pursuant to which Celgar (as buyer) was entitled to purchase from FortisBC (as seller), on a firm basis and at embedded-cost, all the electricity required to operate the Celgar Mill.[169] The 2008 PSA was subject to approval by the BCUC; and to that end FortisBC filed the 2008 PSA with the BCUC on 26 August 2008.

3.87 On 16 September 2008, BC Hydro filed an application with the BCUC to clarify (inter alia) that the 1993 Power Purchase Agreement between BC Hydro and FortisBC (the "1993 PPA") prevented FortisBC from allowing self-generators to access electricity obtained by FortisBC from BC Hydro under the 1993 PPA whilst these self-generators were selling self-generated electricity.[170] BC Hydro argued that self-generators in FortisBC's service area should be subjected to the principles expressed in Order G-38-01. Celgar took part in these BCUC proceedings as interveners.

[169] Power Supply Agreement between Celgar and FortisBC Inc. of 21 August 2008 [C-220].
[170] BC Hydro Final Argument, Application to Amend Section 2.1 of the Rate Schedule 3808 Power Purchase Agreement of 16 January 2009, p. 7 [C-147].

3.88 At the end of September 2008, the BCUC asked FortisBC to withdraw the filing of its 2008 PSA with Celgar until after the proceedings initiated by BC Hydro had concluded. FortisBC did so.[171]

3.89 On 6 May 2009, by Order G-48-09, the BCUC granted BC Hydro's application to amend its 1993 EPA with FortisBC, thereby directly imposing a "net-of-load" standard on FortisBC's customers.[172]

3.90 The BCUC's Order G-48-09 and Decision provided (inter alia) as follows:

> *"… given the industry practices, regulation and transmission capabilities that were present in 1993 when the PPA was executed, the Commission Panel is of the view that the parties to the PPA could not reasonably be expected to have addressed the possible sale of power, not in excess of load, by self-generating customers of FortisBC. Had the issue been posed by one of the parties at that time, the response probably would have been: 'But that's impossible!' As noted by the BCOAPO [the British Columbia Old Age Pensioner's Organization], 'the PPA became effective prior to market access of transmission services when export activities of FortisBC customers with their own generation was not possible.' (BCOAPO Argument p. 2-3) As noted above, the same issue did not come up as between BC Hydro and its self-generating customers until the Commission considered the matter in 2001 and issued Order G-38-01."*
>
> *"5. The Commission Panel is persuaded that a rate allowing for the sale of power by self-generators, not in excess of their historical loads, is unjust and unreasonable and therefore contrary to the public interest for the reasons that follow. The Panel is of the view that the general principles enunciated in Order G-38-01 ought to be extended to customers of FortisBC. We agree with BC Hydro as to the characterization of the issue at hand as: '…whether the new use of PPA power by FortisBC renders the current PPA, and specifically section 2.1 of it, unjust or unreasonable because it allows certain (Fortis BC) customers to unfairly profit from embedded cost utility service to the detriment of all other customers." (BC Hydro Reply Argument, p. 14, para. 43) …"*
>
> *"6.3 (a) The electricity purchased under this agreement is solely for the purpose of supplementing FortisBC's resources to enable it to meet its service area load requirements and, shall not be exported or stored … and (b) shall not be sold to any FortisBC customer when such customer is selling self generated electricity which is not in excess of its load. For greater certainty, paragraph (b) above is to prevent FortisBC self-generating customers from purchasing power at*

[171] Merwin WS1, Paragraph 75.
[172] BCUC, Decision Accompanying Order No. G-48-09 of 6 May 2009 [C-8]; Order G-48-09 [R-32].

> *regulated embedded cost rates and simultaneously selling an equivalent amount of power into available domestic and export markets …"*[173]

Since the Celgar Mill was the only one of the Province's pulp mills located within FortisBC's service area, the Celgar Mill was the only pulp mill that could be affected by Order G-48-09. Accordingly, FortisBC could not supply Celgar embedded cost electricity that it received from BC Hydro under the 1993 EPA unless Celgar was "net of load".

3.91 The BCUC subsequently acknowledged in its reasons accompanying Order G-19-14 that, in practical terms, Order G-48-09 affected Celgar and not merely FortisBC. BCUC there observed as follows:[174]

> *"The practical effect of [Order G-48-09] was to require self-generating customers of FortisBC, of which Celgar is one, to service 100 per cent of their load from self-generation, prior to engaging in export sales, to the extent their load would otherwise be served indirectly by BC Hydro, and the 1993 PPA ("net of load"). (Commission Order G-48-09, RS 3808 PPA Decision, pp. 28-29.) This 'net of load' methodology is different than the GBL methodology approved for BC Hydro's customers by Order G-38-01."*

3.92 The Tribunal accepts the BCUC's characterisation of the practical effect of Order G-48-09 on Celgar. The Tribunal returns later below to the issue whether BC Hydro's methodology towards its own mill customers was materially different from that applied to FortisBC's customers (i.e. Celgar).

3.93 FortisBC's generation and electricity purchases (including its purchase from BC Hydro) are commingled into a single resource stack. Following Order G-48-09, FortisBC advised Celgar that, because FortisBC could not segregate BC Hydro PPA power from power FortisBC generated from its own resources, FortisBC could comply with the amended 1993 PPA only by denying Celgar all access to embedded cost utility power whilst Celgar was selling its own self-generated electricity.

3.94 The Tribunal accepts the account given by Mr Merwin (of Celgar) in his written testimony: [175]

[173] BCUC, Decision Accompanying Order No. G-48-09 of 6 May 2009, pp. 20, 23, 31 [C-8].
[174] BCUC Order No. G-19-14 and Accompanying Decision of 17 February 2014, p. 21 [C-168].
[175] Merwin WS1, 121.

> *"As a general matter, after the issuance of G-48-09,* [redacted] *Finally, during a phone call in February 2010,* [redacted] *advised me that FortisBC had no tariffs or mandate in place to set a GBL, and considered that only BC Hydro had the authority to assign GBLs to its customers.* [redacted] *thus informed me that* [redacted] *had decided that, before calculating a GBL, Fortis would require guidelines from the BCUC on how to make that calculation. On another occasion, FortisBC also advised Celgar that, because it could not segregate BC Hydro PPA power from power FortisBC generated from its own resource stack, FortisBC could comply with the amended 1993 PPA only by denying Celgar all access to embedded cost utility power while Celgar is selling its self-generated electricity."*

3.95 As to the Amended 1993 PPA between BC Hydro and FortisBC, the Claimant's expert witness, Mr Switlishoff, testified:

> *"From a procedural and practical standpoint … it is difficult to conceive that BC Hydro could have computed a GBL for Celgar using anything other than the net-of-load standard defined by the BCUC in Order G-48-09. With that proceeding ongoing, BC Hydro would have undercut its position before the BCUC if it had agreed to a less than load GBL for Celgar, as Celgar would have pointed that out to the BCUC. Correspondingly, if BC Hydro had adopted a below-load GBL for Celgar, and then prevailed before the BCUC in the proceedings that resulted in Order G-48-09, it would not have been able to implement such GBL. BC Hydro had little choice but to apply a net-of-load GBL to Celgar, which is exactly what it did."*[176]

3.96 The Tribunal finds Mr Switlishoff's analysis broadly compelling.

(H) BCUC Order G-188-11

3.97 On 14 November 2011, the BCUC issued Order G-188-11.[177] It provided, as the order's summary puts it, "Celgar is entitled to *some* amount of FortisBC's non-PPA embedded

[176] Switlishoff ER1, Paragraph 185.
[177] BCUC Decision Accompanying Order No. G-188-11 of 14 November 2011, p. 2 [C-14].

cost power when selling power" (emphasis in original). The Tribunal mentions it for completeness because it occupied much of the Hearing. The short point, however, is that the Respondent adopts the evidence of its witness Mr Swanson (of FortisBC). He testified that any action taken on the strength of this order in regard to the 2014 PPA between BC Hydro and FortisBC and the NECP proceedings before the BCUC remains "held in abeyance" for the time being, as a result of Celgar's own choosing.[178]

3.98 On the strength of Order G-188-11, by its letter dated 6 December 2011, Celgar also wrote to BC Hydro seeking to put in place the measures envisaged by the Side Letter.[179] BC Hydro has not taken any significant steps to put those measures in place, so that the Side Letter likewise remains in abeyance. The Respondent's witness, Mr Scouras, explained in cross-examination that this was because "the focus of [their] efforts" had been this arbitration.[180] In these circumstances, the Tribunal proceeds on the assumption, for the purpose of this award, that the effect on Celgar of Order G-48-09 remains unaffected by the Side Letter.

(I) "Post-Hearing New Evidence"

3.99 As already recited in Part I above, this new post-hearing evidence comprised: (i) the two decisions of the BCUC of 30 October 2015 (BCUC Order G-174-15 and Decision)[181] and 26 October 2015 (BCUC Order G-168-15A and Decision)[182] with related correspondence;[183] and (ii) the BCUC Order G-27-16 and Decision of 4 March 2016.[184] It is convenient to consider each in turn.

3.100 (*i) The Two Orders and Decision of the BCUC - G-174-15 and G-168-15A*: This material was the subject of the Respondent's disputed application to admit the same

[178] TD6.1651.
[179] Letter from Brian Merwin to BC Hydro of 6 December 2011 [R-485].
[180] TD4.1208.
[181] BCUC Order No. G-174-15, and Decision, in the Matter of the Utilities Commission Act, RSBC 1996, Chapter 473 and British Columbia Hydro and Power Authority, Application for Approval of Contracted Generator Baseline Guidelines and Reconsideration and Variance of Order G-19-14, of 30 October 2015 [R-618].
[182] BCUC, Order No. G-168-15A, and Decision, in the Matter of the Utilities Commission Act, RSBC 1996, Chapter 473 and FortisBC Inc. Application for Stepped and Stand-by Rates for Transmission Voltage Customers, of 26 October 2015 [R-619].
[183] Letter from Diane Roy to Erica Hamilton, Re FBC Submission on the NECP Rate of 29 September 2015 [R-620]; Letter from KC Moller to Erica Hamilton Re Zellstoff Celgar FortisBC Application for Stepped and Standby Rates, of 6 October 2015 [R-621]; and Letter from Diane Roy to Erica Hamilton Re FBC Reply Submission on NECP Rate Rider, of 14 October 2015 [R-622].
[184] Order No. G-27-16, and Decision, in the Matter of the Utilities Commission Act, RSBC 1996, Chapter 473 and FortisBC Inc. Self-Generation Policy Application, of 4 March 2016 [C-348].

into evidence. It was granted by the Tribunal in Procedural Order No. 13 (see Part I above).

3.101 BCUC Order G-174-15 addresses BC Hydro's application relating to the approval of Contracted GBL Guidelines as well as the reconsideration of BCUC Order G-19-14 regarding Tariff Supplement No. 74, where the Guidelines would apply to prospective EPA or LDA BC Hydro customers with new or incremental self-generation facilities.[185] The Order decides that "after certain amendments the Guidelines will provide an adequate and transparent framework to assist the Commission in the review of future EPAs." It concludes that "the Panel will give the final approval to the Guidelines with the amendments directed in this decision after receipt of the updated Guidelines" from BC Hydro,[186] which BC Hydro is directed to file.[187]

3.102 BCUC Order G-168-15A denies Fortis BC's proposal for the NECP Rate Rider "as part of the subject Application". It notes that there was no opposition from the registered interveners (including Celgar) and states that the "Commission will revisit Directive 4 of Order G-188-11, when the Commission makes a final determination on the FortisBC Self-Generation Policy and the British Columbia Hydro and Power Authority Section 2.5 Guidelines Applications."[188]

3.103 With regard to BCUC Order No. G-174-15, in brief, the Respondent contends that it is the BCUC's final ruling in the reconsideration process of BCUC Order No. G-19-14. It shows that Order No. G-38-01 did not direct BC Hydro to set Contracted GBLs (i.e. procurement GBLs), that Service GBLs are distinguished from Contracted GBLs, that only Service GBLs pertain to the obligation to serve, and that a GBL is not a rate.

3.104 With regard to BCUC Order G-168-15A (with related correspondence), in brief, the Respondent contends that this material forms part of the record on the status of proceedings before the BCUC on the Non-PPA Embedded Cost Power Rate Rider (the "NECP Rate Rider"). These disprove, so Respondent submits, a number of statements made by the Claimant concerning the NECP Rate Rider, showing that the issue is one

[185] Order G-174-15, p. (i) [R-618].
[186] *Id*., pp. (i) to (ii).
[187] *Id*., p. 3.
[188] Order G-168-15A, p. 2 [R-619].

between Celgar and FortisBC, and that the latter (as Celgar's utility) disagrees with Celgar's understanding of the NECP.

3.105 *(ii) The BCUC Decision and Order G-27-16*: This material was the subject of the Claimant's disputed application to admit the same into evidence. It was also granted by the Tribunal in Procedural Order No 13 (see Part I above).

3.106 BCUC Order G-27-16 addresses FortisBC self-generation policy ("SGP") application filed with the BCUC on 9 January 2015. If the SGP application was approved by the BCUC, the Commission had anticipated that it could possibly remove completely the restrictions contained in Section 2.5 of Rate Schedule 3808 applicable to Rate Schedule 3808 electricity sales under the New PPPA of 2014 between BC Hydro and FortisBC.[189] The Commission determined that it would proceed to review the application following a two-stage approach, of which this Decision constitutes the first prong.[190] The Commission "provides both guidance and determinations to assist FortisBC in the development of a comprehensive Self-Generation Policy and GBL Guidelines" and orders Fortis BC "to file a Stage II Self-Generation Policy Application, which includes both a comprehensive Self-Generation Policy and Generator Baseline Guidelines" that will form the basis for Stage II of the review process.[191]

3.107 In brief, the Claimant contends that BCUC Decision and Order G-27-16 contradicts evidence adduced by the Respondent on the issues of procurement and delegated governmental authority. In addition, it is relevant to the Respondent's contentions that the Claimant is no longer subject to Order G-48-09's net-of-load regulatory standard due to Orders G-188-11 and G-202-12, that the Claimant is no longer subject to Order G-48-09's net-of-load regulatory standard due to Clause 2.5 of the 2013 PPA; that Celgar could have previously obtained a "Service" GBL from FortisBC; that BCUC Order G-38-01 applies only to third parties (as opposed to sales of electricity by a self-generator to BC Hydro), on the role of a GBL in effectuating the regulatory policy of the BC Ministry of Energy and BCUC to protect ratepayers by preventing "harmful" arbitrage, and on whether the GBL and GBL-related exclusivity provisions of a BC Hydro EPA impact a utility's obligation to serve the self-generating customer.

[189] Order G-27-16, p. (i) [C-348].
[190] *Id*., p. (i).
[191] *Id*., p. 2.

3.108 For two reasons, the Tribunal has not taken these materials into account in arriving at its decisions in this Award. First, as regards the Respondent's materials, it is unnecessary to do so. Second, as regards the Claimant's material, not only is its weight as evidence less than conclusive, but the end-result (as with the Respondent's materials) appears still to lie in the future. This is inevitable given the continued involvement of Celgar within the BCUC's regulatory regime, together with BC Hydro and FortisBC. Accordingly, for the purpose of this Award, the Tribunal decides to limit its consideration of evidential materials as adduced by the Parties at the Hearing.

PART IV: THE PRINCIPAL LEGAL TEXTS

(A) Introduction

4.1 It is convenient, for ease of reference later, to cite here in full the relevant parts of the principal legal texts considered below, from NAFTA and the ICSID Arbitration AF Rules.

(B) North American Free Trade Agreement (NAFTA)

4.2 *Article 1101 NAFTA*: Article 1101(1) provides (in relevant part) as follows:

> *"This Chapter [Eleven] applies to measures adopted or maintained by a Party relating to:*
> *(a) investors of another Party;*
> *(b) investments of investors of another Party in the territory of the Party; ...".*

4.3 *Article 1102 NAFTA*: Article 1102 provides (in relevant part) as follows:

> *"(1) Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
> *(2) Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
> *(3) The treatment accorded to a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part."*

4.4 *Article 1103 NAFTA*: Article 1103 provides as follows:

> *"(1) Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.*
> *(2) Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment,*

acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

4.5 *Article 1104 NAFTA*: Article 1104 provides as follows:

"Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103."

4.6 *Article 1105 NAFTA*: Article 1105 provides as follows:

"(1) Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
(2) Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
(3) Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b)."

4.7 *NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001)*: Clause 2 of the Commission's Notes of Interpretation provides as follows, under the heading "Minimum Standard of Treatment in Accordance with International Law":

"(1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
(2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
(3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

4.8 *Article 1108 NAFTA*: Article 1108(7) provides as follows:

"7. Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise; or (b) subsidies or grants provided by a Party or a state enterprise, including government supported loans, guarantees and insurance."

4.9 *Article 1116 NAFTA*: Article 1116 provides as follows:

"(1) An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
(a) Section A or Article 1503(2) (State Enterprises), or
(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach."
(2) An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

4.10 *Article 1117 NAFTA*: Article 1117 provides (in relevant part) as follows:

"(1) An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.
(2) An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage …"

4.11 *Article 1120 NAFTA*: Article 1120 provides as follows:

"(1) Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:
(a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
(c) the UNCITRAL Arbitration Rules.
(2) The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section."

4.12 *Article 1122 NAFTA*: Article 1122 provides as follows:

> *"(1) Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.*
> *(2) The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:*
> *(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;*
> *(b) Article II of the New York Convention for an agreement in writing; and*
> *(c) Article I of the InterAmerican Convention for an agreement."*

4.13 *Article 1131 NAFTA*: Article 1131 provides as follows:

> *"(1) A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*
> *(2) An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."*

4.14 *NAFTA Article 1135*: Article 1135 provides:

> *"1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:*
> *(a) monetary damages and any applicable interest;*
> *(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.*
> *A tribunal may also award costs in accordance with the applicable arbitration rules.*
> *2. Subject to paragraph 1, where a claim is made under Article 1117(1):*
> *(a) an award of restitution of property shall provide that restitution be made to the enterprise;*
> *(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and*
> *(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.*
> *3. A Tribunal may not order a Party to pay punitive damages."*

4.15 *Article 1136(1) NAFTA*: Article 1136(1) provides as follows:

> *"An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case."*

4.16 *Article 1503(2) NAFTA*: Article 1503(2) provides:

"Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges."

4.17 *NAFTA Note 45*: NAFTA Note 45 explains (in relevant part) that delegation:

"includes a … government order, directive or other act …, transferring to the monopoly, or authorizing the exercise by the monopoly of governmental authority".

(C) The ICSID Arbitration AF Rules

4.18 *Article 52(1)*: Article 52(1) of the ICSID Arbitration AF Rules provides (in relevant part) as follows:

"The award shall be made in writing and shall contain: ...
(i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; ..."

4.19 *Article 52(4):* Article 52(4) of the ICSID Arbitration AF Rules provides (in relevant part) as follows:

"The award shall be final and binding on the parties. ..."

4.20 *Article 58*: Article 58 of the ICSID Arbitration AF Rules provides:

"(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.
(2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award."

PART V: THE PRINCIPAL ISSUES

(A) Introduction

5.1 The Tribunal addresses the Parties' differences as to jurisdiction (with admissibility) and as to the merits as distinct groups of principal issues. These issues are listed below and subsequently addressed seriatim by the Tribunal in the Parts of the Award indicated. These principal issues are not exhaustive of the Parties' many other less material differences comprising the entirety of their dispute.

(B) The Principal Issues

5.2 *(1) Jurisdiction and Admissibility—NAFTA Articles 1108, 1116, 1117, and 1503(2)*: The Respondent raises three objections as to the jurisdiction and admissibility of the Claimant's claims: (i) that they are brought out of time; (ii) that they fall in part within the exception concerning "procurement"; and (iii) that they concern the exercise of commercial as opposed to delegated governmental authority. These jurisdictional objections are addressed in Part VI below.

5.3 *(2) Merits - NAFTA Articles 1102, 1103, 1105(1) and 1503(3)*: These principal issues as to liability concern the merits of certain claims made by the Claimant under NAFTA Articles 1102, 1103 and 1105(1), with, as assumed *arguendo*, NAFTA Article 1503(2), together with related claims for compensation and interest. These principal issues are addressed in Part VII below.

5.4 In Part VIII below, the Tribunal summarises its decisions.

5.5 *(3) Costs:* These issues concern legal and arbitration costs. These are addressed in Part IX below.

5.6 In Part X below, the Tribunal sets out the Operative Part of this Award.

PART VI: JURISDICTION AND ADMISSIBILITY

(A) Introduction

6.1 These principal issues comprise the Respondent's several independent objections to the Tribunal's jurisdiction and its exercise of jurisdiction over the Claimant's claims (under NAFTA Articles 1116(2), 1117(2), 1108(7)(a) and 1503(2)). These objections concern only the claims relating to the 2009 EPA between Celgar and BC Hydro, with Celgar's GBL and the EPA's Exclusivity Provision as contractual terms.[192] (They do not concern directly the Claimant's claims relating to BCUC Order G-48-09.)

6.2 The Parties were at times ambivalent whether these objections should be classified as objections to jurisdiction or (as to some) to admissibility.[193] For present purposes, the distinction is immaterial. In this case, the practical effect of each leads to the same result under the Tribunal's decisions.

6.3 It is common ground, which the Tribunal accepts, that the Claimant's claims otherwise meet the formal requirements required for the Tribunal to decide them in this arbitration. On 26 January 2012, as required by NAFTA Article 1119, the Claimant served its Notice of Intent upon the Respondent; and on 30 April 2012, not less than 90 days after its Notice and not less than six months since the events giving rise to its claims, the Claimant served its Request for Arbitration upon the Respondent.

6.4 The Tribunal addresses in turn each of these several jurisdictional objections, falling under three headings, beginning with NAFTA Articles 1116(2) and 1117(2). Each is independent from the other.

(B) NAFTA Articles 1116(2) and 1117(2)

6.5 The first jurisdictional question is whether the claims concerning the 2009 EPA are brought in time by the Claimant.

[192] Clause 7.4 of the EPA, as set out in Part III above [C-221].

[193] The Claimant contended that the distinction between jurisdiction and admissibility did not matter in this case [TD8.2172]. The Respondent contended that its jurisdictional objections were jurisdictional, save for its objection as to "procurement" which went to admissibility, being a limited exception [TD1.199-200].

6.6 NAFTA Articles 1116(2) and 1117(2) provide that an investor or enterprise on behalf of which an investor claims, respectively, "may not make a claim if more than three years have elapsed from the date on which the investor [or enterprise] first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or enterprise] has incurred loss or damage."

6.7 It is common ground that the relevant time-bar date is 30 April 2009, i.e. three years before the Claimant made its claims by filing its Request for Arbitration on 30 April 2012.[194]

6.8 It is disputed whether the time-bar date 30 April 2009 is after the date on which the Claimant, ZCL or ZCLP first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it had incurred loss or damage, within the meaning of NAFTA Articles 1116(2) and 1117(2).

6.9 For ease of reference below, the Tribunal refers to the knowledge, actual or constructive, of Celgar only (comprising ZCL and ZCLP jointly) and not to each of the Claimant, ZCL and ZCLP. Neither Party sought to distinguish between these parties' respective state of knowledge. Moreover, given the close relationship between these three parties as to ownership and control, the Tribunal infers that whatever was known or should have been known to ZCL is attributable to the Claimant and/or ZCLP (neither less nor more).

6.10 In brief, the Respondent submits, citing the NAFTA tribunal's decision in *Grand River*,[195] that the time-bar will run from the first moment at which an investor "by exercise of reasonable care or diligence … would have known" of the facts giving rise to the claim.[196] According to the Respondent, that was 30 May 2008, when Celgar's GBL was set or, at the latest, 7 June 2008, when Mr Merwin (of Celgar) was able to write an internal memorandum stating:

> *"Assigned GBL: It should be noted that our commercial proposal includes a Generator Base Load that has been assigned by BC Hydro. Essentially what this means is BC Hydro will buy electricity above the GBL and the electricity below is Celgar's to do what it wishes with. The lower the GBL for Celgar the more*

[194] TD1.84, TD1.193, TD8.2173.
[195] *Grand River Enterprises Six Nations Ltd v United States of America*, Decision on Objections to Jurisdiction of 20 July 2006, Paragraph 59 [RA-17].
[196] Resp. Rej., Paragraph 224.

> *Celgar gets to arbitrage to Hydro. We are currently debating our GBL with Hydro as we believe they have not treated assignment of this number the same as they have done for other pulp and paper mills."*[197]

6.11 The effect of the Respondent's submissions is the same so far as the Claimant's claims depend upon the treatment of several mill-comparators and Celgar's knowledge of those comparators' treatment. According to the Respondent, this is not a case of an alleged continuing breach or a pattern of conduct.[198] Accordingly, the time-bars can begin to run once only, i.e. on the date of treatment of the *first* comparator or knowledge thereof, and not "with every single comparator".[199]

6.12 The Respondent thus submits that the Claimant's claims crystallised when Celgar's GBL was set, since before the GBL was set "FortisBC [had] raised the regulatory treatment Howe Sound had received in its discussions with the Claimant and that the Claimant completed its own regulatory research in the context of laying the groundwork for its so-called Arbitrage Project. The Claimant, therefore, knew, or ought to have known, of Tembec's and Howe Sound's earlier treatment before it received its own GBL from BC Hydro on May 30, 2008".[200] At the latest, therefore, the Claimant's knowledge ran from the memorandum of 7 June 2008 by Mr Merwin referred to above.[201] (The Respondent did not specifically address the date on which the time on the claim concerning the Exclusivity Provision began to run, but it did submit that the 2009 EPA, with the Exclusivity Provision, took effect on 27 January 2009.)

6.13 In brief, the Claimant submits, conversely, that the time-bars started to run only when the Claimant's claims were "ripe", *i.e.* when the measure it complains of actually took effect.[202] Since the GBL itself was "just a number", it had effect only when the 2009 EPA gave effect to it; and the 2009 EPA itself entered into force, at the earliest, when "approved" by the BCUC on 31 July 2009 (or perhaps even later, on its "Commercial Operation Date" of 1 May 2010, later extended to 27 September 2010).[203]

[197] Memo from Brian Merwin to Jimmy Lee and David Gandossi, BC Hydro Bid Price & Associated Terms of 7 June 2008, pp 9-10 [R-559].
[198] TD8.2358–2362.
[199] TD8.2357-2358.
[200] Resp. Rej., Paragraph 229.
[201] Memo from Brian Merwin to Jimmy Lee and David Gandossi, BC Hydro Bid Price & Associated Terms of 7 June 2008 [R-559].
[202] Cl. Reply, Paragraph 607, citing *Glamis Gold Ltd v United States of America*, Award of 8 June 2009, Paragraphs 328–31 [CA-22].
[203] Cl. Reply, Paragraphs 612–615.

6.14 So far as the Claimant's claims depend upon the Respondent's treatment of a comparator, or the knowledge (actual or constructive) of that treatment by Celgar, the Claimant submits that the time-bars began to run on the date of "the more favorable treatment afforded to other mills" and that such treatment occurred after 31 July 2009.[204] In its closing submissions, the Claimant argued that Celgar had no relevant knowledge of the more favourable treatment of any of its comparators until this arbitration.[205]

6.15 In its submission made under NAFTA Article 1128, the USA submits that the plain terms of these NAFTA provisions mean that the limitation periods start to run once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby, since knowledge cannot "first" be acquired more than once. Accordingly, the USA submits, "where a comparator in like circumstances receives treatment prior to the less favorable treatment accorded to an investor or investment, the limitation period would commence on the date the investor or investment received its treatment, to the extent that on that date the claimant knew or should have known of the breach and of the alleged damage or loss."[206]

6.16 The Tribunal has found in Part III above that the 2009 EPA took contractual effect on its "Effective Date": 27 January 2009. By this date, as there explained, both the GBL and the Exclusivity Provision had been contractually agreed (subject to the Side Letter), after negotiations and "debate" between Celgar and BC Hydro. Although it disputes the date's relevance, the Claimant accepts that, on 27 January 2009, "the implications of the GBL and related restrictions were known to Mercer …"[207] By that date, therefore, any arbitrariness, irrationality, non-transparency, or purely "idiosyncratic, unfair, or unjust" treatment by BC Hydro in imposing both the GBL and the Exclusivity Provision as contractual terms would have been apparent to Celgar. These are not relative standards. Hence, before 30 April 2009, as to these particular factors only, Celgar had acquired or should reasonably have acquired sufficient knowledge of any relevant

[204] *Id*.
[205] TD8.2180–2181.
[206] USA 1128 Submission, Paragraphs 4–7. (Mexico made no submission under NAFTA Article 1128 on the time bars in NAFTA Articles 1116(2) and 1117(2)).
[207] Cl. Reply, Paragraph 614.

breach of NAFTA causing loss or damage, within the meaning of NAFTA Articles 1116(2) and 1117(2).

6.17 Subject to the following point, in regard to these particular factors, the Tribunal therefore decides that it does not have jurisdiction (nor can it exercise jurisdiction) to hear the Claimant's claims concerning the 2009 EPA brought under NAFTA by virtue of the time-bars in NAFTA Articles 1116(2) and 1117(2).

6.18 The Tribunal decides that the position is materially different, however, as regards the Respondent's jurisdictional objections to the Claimant's claims for what may broadly be described as "discriminatory treatment", brought under any of NAFTA Articles 1102, 1103 and 1105. These are pleaded by the Claimant as relative standards. As pleaded, these claims depend (inter alia) upon Celgar's actual or constructive knowledge that at least one other BC pulp mill, as a comparator "in like circumstances", had received more favourable treatment than Celgar by 30 April 2009, causing loss or damage to Celgar, the Claimant or ZCL. If such knowledge, whether actual or constructive, was first acquired by Celgar after 30 April 2009, there can of course be no time-bar under NAFTA Articles 1116(2) or 1117(2).

6.19 As to actual knowledge, the Tribunal notes the specificity of the pleading in the Claimant's Request for Arbitration of 30 April 2012, naming as mill comparators Tembec's Skookumchuck mill, Domtar's Kamloops mill, Howe Sound's Port Mellon mill and Canfor's Prince George mill:

> *"60. For example, BC Hydro's 2009 EPA with Tembec sets the GBL for its Skookumchuck mill at 14 MW, which coincides with its historical generation capacity from the 1990s. Although Tembec's actual mill load is 28 MW, it is permitted to sell all generation over 14 MW to the market, while making purchases of embedded cost power, that include Heritage Power, from BC Hydro, to service the (14 MW) balance of its actual mill needs. Similarly, under the terms of a 2008 agreement, Domtar's Kamloops mill is obligated to self-supply only 20 MW, based on its historical generating capabilities from the 1970s. The Domtar mill's current load is 50 MW. Thus, Domtar is permitted to sell to the market all generation above 20 MW, while making purchases of embedded cost power that include Heritage Power, from BC Hydro, to service the 30 MW balance of its mill load. The Port Mellon mill owned by Howe Sound apparently has a similar arrangement, in which it will self-supply only about 20 per cent of its mill load requirements, purchasing far in excess of 400 GWh/year from BC Hydro to service its load while at the same time selling 400 GWh/year of its own generation*

> *output to BC Hydro. Canfor's Prince George mill apparently also is able to sell a portion of its self-generation that was previously used to supply mill load, while purchasing embedded cost power that includes Heritage Power from BC Hydro to satisfy an increased portion of its load requirements. Under the recently-announced (January 4, 2012) agreement between BC Hydro and Nanaimo, Nanaimo (it appears, based on publicly disclosed information) will be obligated to self-supply slightly less than 50 percent of its mill load while selling power in excess of such amount to BC Hydro. In each case, the mill receives the benefit of Heritage Power denied, in similar circumstances, to the Celgar mill."*[208]

6.20 In the Tribunal's view, there is a marked contrast between these detailed allegations of "discriminatory treatment" and the generalities in Mr Merwin's memorandum of 7 June 2008. In the Tribunal's assessment, there is no evidence that Celgar had, by 30 April 2009, acquired actual knowledge remotely equivalent to that reflected in the Request for Arbitration. Indeed, the Claimant submits that all the alleged discriminatory treatment occurred after 31 July 2009 (see above); and that, in submission as to that treatment, "Mercer's first knowledge of breach and actual loss was first acquired through its counsel in this arbitration."[209]

6.21 As to constructive knowledge of such discriminatory treatment, the Tribunal does not consider that Celgar could have acquired sufficient knowledge before 30 April 2009 with the exercise of reasonable care and diligence. The Tribunal notes that relevant information regarding other pulp mills was not then publicly available. Indeed, as already noted, BC Hydro considered such information (as regards GBLs) confidential to each mill: Mr Dyck (of BC Hydro) testified that at the time in question BC Hydro provided no information at all to Celgar about other entities' GBLs or the details of their EPAs, because it was confidential and so "[shouldn't] have been available" to them.[210]

6.22 Last but not least, the Tribunal notes Tembec concluded an EPA with BC Hydro that included a GBL on 13 August 2009.[211] As regards Howe Sound, it concluded an EPA with BC Hydro that included a GBL on 7 September 2009.[212] Unless actual or

[208] RfA, Paragraph 60.
[209] TD8.2180.
[210] TD5.1491–4.
[211] BC Hydro and Tembec Electricity Purchase Agreement of 13 August 2009 [C-145 and NERA-38]. (Tembec's predecessor (Purcell Power Corp.) and BC Hydro had concluded an earlier EPA on 5 September 1997).
[212] BC Hydro and HSPP, Electricity Purchase Agreement: Integrated Power Offer of 7 September 2010 [C-23 and NERA-46].

constructive knowledge long in advance of agreement upon these GBLs is to be attributed to Celgar (as to which there is no evidence), it follows that such knowledge could only have been acquired by Celgar after the time-bar date of 30 April 2009.

6.23 Accordingly, the Tribunal concludes that nothing in the evidence cited by the Respondent in support of its contentions establishes that Celgar knew or ought to have known by 30 April 2009 anything of sufficient substance about the different treatment that any of its pulp mill comparators had received from BC Hydro, let alone the basis upon which their respective GBLs had been calculated or their consequential effect on Celgar.[213] Mr Merwin's internal memorandum of 7 June 2008 evidences at its highest a general suspicion within Celgar that some other entity or entities may have been treated more favourably, without Celgar being able to identify such treatment or its effect on Celgar.[214]

6.24 In these circumstances, it is not possible for the Tribunal to conclude that Celgar first acquired, or should have first acquired, knowledge of any "discriminatory treatment" and resulting loss or damage by 30 April 2009 within the meaning of NAFTA Articles 1116(2) and 1117(2). The burden of proof for that allegation rested on the Respondent. It was not discharged by the Respondent, neither as to actual knowledge nor constructive knowledge acquired by the exercise of reasonable case or diligence.

6.25 Accordingly, as to this part of the first jurisdictional question, the Tribunal decides under NAFTA Articles 1116(2) and 1117(2) that it has jurisdiction over the Claimant's claims concerning the 2009 EPA by reference to Celgar's GBL and Exclusivity Provision only insofar as the Claimant's pleadings allege "discriminatory treatment" under any of NAFTA Articles 1102, 1103 and 1105(1); i.e. that one or more other self-generating pulp mills qualifying as Celgar's comparators "in like circumstances" received treatment more favourable than that received by Celgar, thereby causing loss or damage. (That is not the end of the Respondent's jurisdictional objections: such claims raise different questions as to both jurisdiction and the merits, as considered below.)

[213] Swanson WS 2, Paragraphs 7, 9–12; Mercer International Group, Celgar Electricity Opportunities of July 2007 [R-278]; Memorandum from Brian Merwin to Jimmy Lee and David Gandossi, BC Hydro Bid Price & Associated Terms of 7 June 2008 [R-559].

[214] Memorandum from Brian Merwin to Jimmy Lee and David Gandossi, BC Hydro Bid Price & Associated Terms of 7 June 2008, pp. 9-10 [R-559] (recited in Part III above).

6.26 Save for that allegation in regard to "discriminatory treatment", the Tribunal accepts the Respondent's jurisdictional objection to these claims under the time-bars imposed by NAFTA Articles 1116(2) and 1117(2).

(C) NAFTA Article 1108(7)(a)

6.27 The second jurisdictional question is whether the Claimant's claims (for itself, ZCL and Celgar) relating to the 2009 EPA brought under NAFTA Articles 1102 and 1103 concern "procurement" by a state enterprise (BC Hydro), so that they are precluded by NAFTA Article 1108(7)(a). NAFTA Article 1108(7)(a) provides that NAFTA Articles 1102 and 1103 "do not apply to procurement by a Party or a state enterprise".

6.28 It is common ground between the Parties that "procurement" refers to "the obtaining by purchase by a governmental agency or entity of title to . . . possession of, for instance, goods, supplies, materials and machinery."[215] It is also common ground that BC Hydro was "a state enterprise" (being a Canadian provincial Crown corporation wholly owned by the BC Government).[216]

6.29 In brief, the Respondent contends that the GBL was a contractual term establishing the amount of electricity that BC Hydro would purchase from Celgar under the 2009 EPA and that the EPA's Exclusivity Provision was an essential term adjunct to it, so that the GBL and the Exclusivity Provision were alone and in combination a paradigm procurement activity by BC Hydro as a state enterprise.[217]

6.30 In brief, the Claimant contends that the GBL and Exclusivity Provision applying to the 2009 EPA do not fall within this definition. The GBL, so the Claimant submits, was a regulatory concept with its origins in Order G-38-01.[218] As for the GBL and the Exclusivity Provision, the Claimant contends that since both terms had the effect of limiting purchases by third parties, neither can have been material to purchases by BC Hydro.[219] Indeed, the Claimant contends that the focus of its case is not directed on

[215] Cl. Reply, Paragraph 620; Resp. C-Mem., Paragraph 342.
[216] Cl. Mem., Paragraph 391-; TD1.190.
[217] Resp. C-Mem., Paragraphs 345–349; Rejoinder Paragraphs 202–209.
[218] Cl. Reply, Paragraph 619.
[219] *Id*., Paragraph 620.

electricity that BC Hydro bought from Celgar, but on electricity that BC Hydro declined to buy from Celgar.[220]

6.31 Nonetheless, the Claimant accepts that, if (which it denies) Celgar's GBL did nothing more than define BC Hydro's purchase obligation under the 2009 EPA, such a measure would fall within the procurement exception in NAFTA Article 1108(7)(a).[221]

6.32 In its submission under NAFTA Article 1128, the USA observes that the Spanish and French language versions of NAFTA use terms equivalent to "purchases" (*compras* and *achats*, respectively) whereas the English has the term "procurement" only. The USA submits that the procurement exception extends to "specifications in a procurement contract that are integral parts of a procurement project".[222]

6.33 In its submission under NAFTA Article 1128, Mexico submits that the term "procurement" in NAFTA Article 1108(7)(a) is "not qualified or limited in any manner", again given that in the Spanish and French versions of NAFTA the generic terms for "purchases" are used. Mexico further submits that "all of the contractual terms and conditions associated with the procurement of a good by a NAFTA Party or a state enterprise fall within the ambit of the term 'procurement' and thus are exempted from Articles 1102 and 1103".[223]

6.34 In the Tribunal's view, the English word "procurement", as a matter of ordinary English language, is the general act of buying goods and services. It is a broad term. The Tribunal does not consider that the Spanish (or French) wording cited by the Parties and Non-Disputing Parties introduces any materially different meaning. Nor, in the Tribunal's view, does the word "procurement" require a restricted meaning in NAFTA Article 1108(7), because it operates as an exception to the grant of protection to investors and investments under NAFTA Articles 1102 and 1103. To the contrary, its ordinary meaning is broad and not restrictive.

6.35 As to its ordinary meaning in NAFTA Article 1108(7)(a), the Tribunal decides that the phrase "procurement by a Party or a state enterprise", in its context and in the light of NAFTA's object and purpose, signifies the buying of goods or services for or by a State

[220] *Id*.
[221] *Id*., Paragraph 617.
[222] USA Article 1128 Submission, Paragraph 8.
[223] Mexico Article 1128 Submission, Paragraphs 5-6.

or a state enterprise (as defined in NAFTA Annex 1505) owned or controlled through ownership interests by that State.

6.36 Here, under the EPA, the state enterprise (BC Hydro) is acting as the buyer of the goods or services at issue. Therefore, provided that activity amounts to "procurement", NAFTA Articles 1102 (National Treatment), 1103 (MFN Treatment) and, albeit here irrelevant, 1107 (Senior Management and Boards of Directors) do not apply to the Claimant's claims relating to the 2009 EPA.

6.37 NAFTA's Chapter 11 does not define "procurement" any further. However, the phrase is addressed in NAFTA's Chapter 10 on "Government Procurement". As scholarly commentators had initially indicated, the relationship between NAFTA Article 1108 in Chapter 11 and Chapter 10 was possibly less than clear. For example, there was an issue whether NAFTA Article 1108(7)(a) included procurement by provincial or state entities or whether it excluded entities and enterprises not listed in Annex 1001.1a2 and (when agreed) Annex 1001.1a-3 to Chapter 10 of NAFTA. This question was answered with a broad interpretation of NAFTA Article 1108(7) by the ICSID tribunal in *ADF Group v USA* (considered below).

6.38 Conversely, where the NAFTA Party by any of its state enterprises (as defined in NAFTA Annex 1505) acts as the seller of goods or services to investments in its territory of investors of another NAFTA Party, that NAFTA Party is required (by NAFTA Article 1503(3) on State Enterprises) to ensure that the qualifying state enterprise accords non-discriminatory treatment. Here, the state enterprise is acting as the seller or provider of goods or services at issue; and NAFTA Articles 1102, 1103, 1107 and 1503 do apply. Hence, there is a marked asymmetry in NAFTA's Chapter 11 between a NAFTA Party's state enterprise acting as the buyer and as the seller of goods and services. Hence, in the Tribunal's view, it can serve no purpose to interpret NAFTA Article 1108(7) in the light of NAFTA Article 1503(3).

6.39 The issue of procurement has been addressed in other international instruments. Article 3(4)(c) of the ASEAN Comprehensive Investment Agreement (ACIA) excludes from the scope of ACIA's application "government procurement", without any additional wording. Thus, the ordinary English meaning of the word applies to signify the State as the buyer or acquirer of the goods or services at issue. Article 8(3)(e) of the 2012 USA Model BIT excludes "government procurement" from the prohibition of certain

performance requirements under Article 8(1) of the Model BIT. For this purpose, Article 1 of the Model BIT defines "government procurement" as "the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or re-sale." The additional wording may add to the ordinary English meaning of procurement; but, for present purposes, it retains its ordinary broad meaning as signifying the government as the buyer of the goods or services at issue.

6.40 In *ADF Group v USA,*[224] the award addressed measures relating to a project by the state of Virginia, USA, which had no direct contractual privity with the claimant. The NAFTA tribunal looked to the ordinary meaning of procurement (with citations here omitted):[225]

> *"In its ordinary or dictionary connotation, 'procurement' refers to the act of obtaining, 'as by effort, labor or purchase.' To procure means 'to get; to gain; to come into possession of'. In the world of commerce and industry, 'procurement' may be seen to refer ordinarily to the activity of obtaining by purchase goods, supplies, services and so forth. Thus, governmental procurement refers to the obtaining by purchase by a governmental agency or entity of title to or possession of, for instance, goods, supplies, materials and machinery."*

Hence, the tribunal, applying an English dictionary meaning, adopted an ordinary broad interpretation of "procurement".

6.41 In *UPS v Canada,*[226] the award addressed measures relating to services provided by Canada Post to Canada for a fee. The NAFTA tribunal decided that such services were provided pursuant to a "commercial fee-for-service contract" covering services provided to Canada, even though the fees were paid by third persons other than Canada. It also cited, with approval, the interpretation made in the *ADF Group v Canada* award. Again, in the Tribunal's view, this decision sprang from an ordinary broad interpretation of the word "procurement".

[224] *ADF Group Inc. v United States of America*, ICSID Case No. ARB(AF)/00/1, Award of 9 January 2003 [CA-1 and RA-1].
[225] *Id*., Paragraph 161.
[226] *United Parcel Service v. Canada* (UNCITRAL), Award on the Merits of 24 May 2007 [CA-16 and RA-46].

6.42 From these several interpretations of "procurement", applying the customary rules of interpretation codified in Article 31(1) of the Vienna Convention on the Law of Treaties, the Tribunal turns to its application in the present case. In so doing, it accepts the Claimant's submission that such an application should relate to substance and not mere form.[227]

6.43 The Tribunal accepts that one purpose of the GBL was to define the level above which BC Hydro would purchase (hence, procure) electricity from Celgar. As a contractual term of the EPA, it defined the level above which BC Hydro would purchase electricity from Celgar. The Tribunal does not accept the Claimant's submission that, as a contractual term, Celgar's GBL was simply 'tuck[ed]' into the EPA as a matter of form only, so as to relieve the Respondent from responsibility under NAFTA Articles 1002 and 1103.[228] Nor, conversely, does the Tribunal accept Mexico's submission under NAFTA Article 1128 that "all" of the contractual terms and conditions of a procurement contract fall within the definition of "procurement".

6.44 However, the Tribunal has found in Part III above that Celgar's GBL, as a concept, performed a dual purpose. Outside the EPA, it defined the extent of BC Hydro's obligation to serve Celgar (as transmitted via FortisBC). The BCUC itself suggested that an essential function of a GBL was the definition of BC Hydro's obligation to serve. To this extent, therefore, the Tribunal agrees with the Claimant's submission (above) that Celgar's GBL did more than define BC Hydro's purchase obligation under the 2009 EPA.

6.45 Was this difference materially affected by the fact that Celgar's GBL of 30 May 2008 was then used to define BC Hydro's purchase obligation under the 2009 EPA on 27 January 2009? In the Tribunal's view, as applied to the 2009 EPA, it is not possible to have one purpose extinguish the other.. This is a matter of substance and not mere form.

6.46 As decided in Part III above, this coin had two sides. Celgar's GBL was a composite concept where BC Hydro's procurement of new (not existing) electricity was an

[227] Cl. Reply, Paragraph 623.
[228] *Id*.

essential objective under the 2009 EPA, as understood by both BC Hydro and Celgar. This point was best explained by Mr Dyck (of BC Hydro) in his testimony:[229]

> *"Through an EPA or an LDA, BC Hydro then provides a financial incentive to the customer in return for the customer's commitment to produce self-generation in excess of the GBL, which will decrease the demand on BC Hydro's system to the benefit of all customers. BC Hydro has no interest in paying a customer for electricity that it already self-generates under normal operating conditions. Payment for such 'existing' electricity would add nothing to BC Hydro's resource base, and would merely transfer wealth from BC Hydro and its customers to one self-generator in exchange for nothing in return."*

This objective was achieved by Celgar's GBL as a contractual term in the 2009 EPA. However, the EPA could not affect Celgar's GBL in defining the extent of BC Hydro's obligation to serve Fortis BC with electricity supplied by FortisBC. As already indicated, this was a different objective, not limited to "procurement".

6.47 Accordingly, the Tribunal finds that Celgar's GBL, as a contractual term (but not otherwise), was integral to the procurement function of the 2009 EPA. Accordingly, the Tribunal (by a majority) decides that Celgar's GBL, as part of the 2009 EPA, falls within the procurement exception in NAFTA Article 1108(7)(a).

6.48 In the light of this decision, the Tribunal considers it unnecessary to address the Respondent's further submissions based on the EPA's contemporary Side Letter.[230]

6.49 The Tribunal also finds that the Exclusivity Provision in the 2009 EPA was integral to the procurement function of the 2009 EPA. An exclusive-supply term is a common feature of a procurement contract. In many cases, it is an important part of the commercial bargain that is struck between the transacting parties, as a valuable assurance to the purchaser that sufficient supply will be available, that is likely to be reflected in the financial terms of that bargain. It was in fact a standard provision in all the EPAs concluded by BC Hydro with self-generators. Again, this is a matter of substance, not form. Accordingly, the Tribunal (by a majority) decides that the Exclusivity Provision, as part of the 2009 EPA, falls within the procurement exception in NAFTA Article 1108(7)(a).

[229] Dyck WS1, Paragraph 43.
[230] Resp. Rej., Paragraph 208; TD1.197-198.

6.50 In summary, the Tribunal (by a majority) decides that it has no jurisdiction over the Claimant's claims under NAFTA Articles 1102 and 1103 insofar as they concern Celgar's GBL or the Exclusivity Provision as contractual terms in the 2009 EPA (whether before or after 30 April 2009). To that extent only, the Tribunal (by a majority, as explained below) accepts the Respondent's jurisdictional objection under NAFTA Article 1108(7)(a).

6.51 This decision does not affect the Claimant's remaining claims by reference to Celgar's GBL unconnected with "procurement" under the EPA, under NAFTA Article 1105(1) – which, as to the merits, are addressed later in this Award. The Tribunal now turns to consider the Respondent's jurisdictional objection to the Claimants' claims based upon BC Hydro's alleged lack of "delegated governmental authority" for the purposes of NAFTA Article 1503(2).

(D) NAFTA Article 1503(2)

6.52 This third jurisdictional question is whether the claims regarding the 2009 EPA concern BC Hydro's exercise of "delegated governmental authority", so as to permit the Claimant to invoke the protection of NAFTA Article 1503(2).

6.53 NAFTA Article 1503(2) provides that Chapter 11 of NAFTA applies to the acts of state enterprises, such as BC Hydro, only to the extent that a state enterprise "exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges".

6.54 In brief, as to BC Hydro's determination of Celgar's GBL, the Respondent submits that the negotiation of a GBL by BC Hydro is a commercial act and not an exercise of delegated governmental authority,[231] since these words have a "limited scope" that do not apply to the rights and powers of state enterprises "to enter into contracts for purchase or sale and to arrange and manage their own commercial activities."[232] It relies on the expert report of Mr Bursey to the effect that, at least as a matter of Canadian law,

[231] Resp. C-Mem., Paragraphs 331–335.
[232] Resp. Rej., Paragraph 211, citing *UPS v Canada*, Paragraphs 74–75.

the BCUC's practice of allowing BC Hydro to negotiate a GBL is not a delegation of statutory decision-making authority or other governmental authority.[233]

6.55 In brief, the Claimant submits that BCUC Order G-38-01 "directed" BC Hydro to set GBLs with its customers. It contends that BCUC provided BC Hydro with a discretion to refine the general principle, to develop more detailed guidelines and to determine GBLs in individual cases, which discretion is the hallmark of delegation.[234] Indeed, so the Claimant concludes, "BC Hydro was *de jure* the final arbiter and approver, and thus, under Canada's own argument, the responsible party exercising governmental authority."[235]

6.56 In its submission under NAFTA Article 1128, Mexico contends that wide discretion is at best uncorrelated with the delegation of *governmental* authority. Mexico agrees with the Respondent and the NAFTA tribunal in *UPS v Canada* that acts of a commercial character fall outside the scope of NAFTA Article 1503(2) and that, in identifying whether acts are of a commercial character, it is helpful to consider whether they are within the powers of other businesses.[236]

6.57 In its submission under NAFTA Article 1128, the USA draws the Tribunal's attention to NAFTA Note 45, which explains that delegation "includes a … government order, directive or other act …, transferring to the monopoly [or state enterprise], or authorizing the exercise by the monopoly [or state enterprise] of governmental authority".[237] The USA submits that these examples confirm that the term "other governmental authority" means the authority of the NAFTA Party in its sovereign capacity; and that a state enterprise is not exercising "governmental authority" merely because it acts as a commercial participant in the marketplace.[238]

6.58 The Tribunal is divided in its views as to this third jurisdictional objection, essentially on the issue of BC Hydro's "delegated governmental authority" regarding Celgar's

[233] Bursey ER 1, Paragraphs 120–123.
[234] Cl. Reply, Paragraph 592.
[235] *Id*., Paragraph 594.
[236] Mexico Article 1128 Submission Paragraphs 8–9.
[237] NAFTA Note 45 provides that a "delegation," for these purposes, "includes a legislative grant, and a government order, directive or other act [,] transferring to the monopoly [or state enterprise], or authorizing the exercise by the monopoly [or state enterprise] of, governmental authority." The USA considers that, although Note 45 refers to NAFTA Article 1502(3), the same definition of "delegation" should apply to NAFTA Article 1503(2), given that both refer to delegations of "regulatory, administrative or other governmental authority"; referring to *UPS v Canada*, Paragraph 69.
[238] USA Article 1128 Submission Paragraphs 2–3.

GBL. Rather than elaborate upon its differences here, the Tribunal prefers to leave this objection open in the light of other decisions made in this Award and proceed to the merits in Part 7 on the basis of a working assumption in favour of jurisdiction, for the sake of analysis only. As appears below, these other decisions render this jurisdictional objection moot.

(E) Conclusion

6.59 No jurisdictional objection was taken by the Respondent to the Claimant's claims concerning BCUC Order G-48-09; and the Tribunal confirms that it has jurisdiction and may exercise jurisdiction over the legal and factual merits of those particular claims.

6.60 So far as concerns the Claimant's claims concerning the 2009 EPA between Celgar and BC Hydro under NAFTA Articles 1102, 1103 and 1105, the Tribunal (by a majority) decides that it has no jurisdiction to decide such claims by reason of NAFTA Articles 1116(2), 1117(2) and 1180(7)(a), save only insofar as these claims allege "discriminatory treatment" under NAFTA Article 1105 (as advocated by the Claimant), i.e. that one or more other pulp mills qualifying as Celgar's comparators "in like circumstances" received treatment more favourable than that received by Celgar, causing loss or damage to the Claimant, ZCL or Celgar.

6.61 Save only for the Claimant's said claims alleging "discriminatory treatment" (addressed below), it follows that no claim concerning the 2009 EPA for compensation under NAFTA Articles 1102, 1103 and 1105(1) requires the decision of the Tribunal; and that, consequentially, the Tribunal (by a majority) dismisses the Claimant's claims for such compensation and related claims for interest.

6.62 The Tribunal here leaves open, for present purposes, the Respondent's jurisdictional objection under NAFTA Article 1503(2). As indicated above, it requires no adjudication by the Tribunal for the purpose of this Award; and, in the circumstances, an attempt to do so would be inappropriate. Nonetheless, for the sake of argument only, it is appropriate to assume that the Tribunal has jurisdiction address the Claimant's remaining claims with NAFTA Article 1503(2).

6.63 *Dissent:* Arbitrator Orrego Vicuña regrets not to be able to join the views of his distinguished colleagues in this Tribunal.

6.64 A first discrepancy concerns the issue of procurement discussed in Paragraphs 6.27ff. The Tribunal has opted at Paragraph 6.58 of the Award to leave open the question about the nature of the authority of BC Hydro regarding the determination of Celgar's GBL. There is no doubt in this Arbitrator's mind about the fact that BC Hydro operated for this purpose under a delegated government authority. While in Canada's argument this is the exercise of procurement, which as such is excluded from NAFTA's jurisdiction, the Claimant is of the view that the delegation of government authority is separate from procurement and hence under the Tribunal's jurisdiction.

6.65 A broad interpretation of procurement would have the effect of transforming a carve out provision into an escape clause because any exercise of government authority, however indirect, would result in excluding the transaction involved from NAFTA'a jurisdiction under the concept of procurement. This cannot be a reasonable interpretation of a Treaty as all obligations and commitments would vanish as procurement activities. BC Hydro operated beyond doubt under government authority channeled through different layers of State, Provincial or local authorities. This is not procurement. Hence the Respondent cannot evade its responsibility for breach of the Treaty. This discussion brings to the fore the traditional international law distinction between "jure gestionis" and "jure imperii". In the instant case the procurement exception under the former could not be possible without the latter.

6.66 A still more difficult issue concerns the counting of time in this dispute. As the Award explains, in Paragraphs 6.6ff, the general criterion governing a time bar is that an investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage. Knowledge or assumption of knowledge can of course only be determined after the obligation has been born. This will ordinarily occur at the time a contract is executed. In the instant case, however, it is impossible to learn about the alleged breach and the consequential damage until the process of approval of the contract has been completed by the BCUC, as this body is entitled even to turn down the contract entered into. This only happened at a point in time different and later from the formal execution of the contract which is within the allowable time to bring a claim. Before this point in time, it is impossible to establish whether knowledge of a breach and the existence of loss or damage has occurred.

6.67 In case of doubt the Tribunal should have opted for an interpretation more favorable to the Claimant. While the trend in the vast literature and jurisprudence available both under international law and investment treaty law is varied, nonetheless it is clear that time only starts counting at the moment when there is a firm obligation on the part of the Respondent, which in this case was in fact different from the date of execution of the contract.

PART VII: MERITS

(A) Introduction

7.1 In this Part VII, as to the merits, the Tribunal addresses the principal issues arising from the Claimant's remaining claims under NAFTA Articles 1102, 1103 and 1105(1), with, as assumed *arguendo*, NAFTA Article 1503(2).

7.2 Earlier, in Part VI above, the Tribunal decided that it has no jurisdiction (nor the right to exercise any jurisdiction) to decide the Claimant's claims, save for (i) its claims relating to BCUC Order G-48-09 of 6 May 2009 under NAFTA Articles 1102, 1103 and 1105 (as to which there was no jurisdictional objection) and (ii) its claims relating to "discriminatory treatment" by reference to Celgar's GBL under NAFTA Article 1105 (as to which the "procurement" exception in NAFTA Article 1108(7)(a) does not apply, nor the Respondent's time-bar objections under NAFTA Articles 1116(2) and 1117(2)).

7.3 These are therefore the Claimant's "remaining claims" to be addressed on their merits. Although these two groups of claims are distinct, they overlap as regards "discriminatory treatment" in regard to Celgar's GBL. For this reason, it is convenient to consider them together in the following sections.

(B) The Parties' Cases on "Discriminatory Treatment"

7.4 *The Claimant:* In brief, the Claimant contends, first, that the Respondent required Celgar under its GBL to meet its own energy load without compensation, whereas other pulp mills were compensated fully for doing so. Second, the Claimant contends that through BCUC Order G-48-09, the Respondent subjected Celgar to treatment less favourable than that accorded to domestic or other foreign investors and investments. Third, assuming jurisdiction, the Claimant contends that the Respondent failed to put in place supervision adequate to ensure that the rights of the Claimant, ZCL and Celgar were not breached under NAFTA by BC Hydro, thereby rendering the Respondent liable under NAFTA.

7.5 *The Respondent:* In brief, the Respondent contends that, far from being subjected to less favourable treatment, the treatment of Celgar has been conspicuously favourable: in particular, Celgar had the unique benefit of the EPA's Side Letter, as well the ability

to arbitrage in accordance with Order G-118-14. In any event, the Respondent submits that BC Hydro properly fixed GBLs for BC pulp mills according to principles that could not be reduced to mere formulae, but rather depended upon the particular circumstances of each individual mill. The Respondent further contends that Order G-48-09 had no effect on Celgar directly, as it was a restriction on FortisBC rather than on Celgar and that, in any case, it post-dated the setting of Celgar's GBL.

(C) The Tribunal's Analysis on "Discriminatory Treatment"

7.6 *Legal Standard:* Although the Parties approached the matter slightly differently, it was common ground that establishing a violation of NAFTA Articles 1102 or 1103 involves an inherently fact-specific analysis of whether Celgar: (i) was accorded *treatment* by the Respondent with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments; (ii) was *in like circumstances* with the identified *domestic* or *foreign* investors or investments as comparators; and (iii) received treatment *less favourable* than that accorded to those identified investors or investments.

7.7 The Claimant added that it did not have to establish discriminatory intent on the Respondent's part.[239] The Respondent characterised this as a mistaken submission that nationality was wholly irrelevant.[240] The Tribunal does not accept the Claimant's submission, based (inter alia) on the submissions of the USA and Mexico summarized below which the Tribunal accepts.

7.8 In its submission made under NAFTA Article 1128, the USA submits that discrimination under NAFTA Articles 1102 and 1103 may be *de jure* or *de facto*, with *de facto* discrimination occurring when a facially-neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality.[241]

7.9 In its submission made under NAFTA Article 1128, Mexico submits that a NAFTA tribunal should only find a breach of NAFTA Article 1102 where the impugned measure facially discriminates on the basis of nationality, or where it can properly be inferred, in all of the circumstances, that a facially neutral measure has the effect of

[239] Cl. Reply, Paragraphs 133-145.
[240] Resp. Rej., Paragraph 242.
[241] USA 1128 Submission, Paragraph 12.

discriminating against foreign investors as a class with no rational or good faith policy objectives. Mexico adds that such a finding will be most unlikely in situations where the treatment accorded to domestic investors is not materially different to that accorded to other foreign investors.[242]

7.10 It is not in issue that the requirements for establishing a violation of NAFTA Article 1103 are the same as establishing a violation of NAFTA Article 1102, except that the applicable comparator, in like circumstances, is a foreign (non-Canadian) investor or investment.

7.11 *Burden of Proof:* Relying on the award in *UPS*, the Respondent submits that the legal burden of proof rests on the Claimant to prove its allegations, namely that each of these three elements was "a legal burden that rests squarely with the Claimant. That burden never shifts to the Party."[243]

7.12 In its submission under NAFTA Article 1128, the USA submits that, "Nothing in the text of Articles 1102 or 1103 suggests a shifting burden of proof. Rather, the burden to prove a violation of these articles, and each element of its claim, rests and remains squarely with the claimant."[244]

7.13 In its submission under NAFTA Article 1128, Mexico likewise agrees that the burden remains on the Claimant throughout; and that the Claimant must establish more than a *prima facie* case.[245]

7.14 The Tribunal agrees with these Article 1128 submissions. However, the Tribunal must also take account of the distinction between the legal burden of proof (which never shifts) and the evidential burden of proof (which can shift from one party to another, depending upon the state of the evidence). Moreover, every party bears the burden of proving its positive allegations, whether claimant or respondent.

7.15 In the *Pulp Mills* case, the ICJ noted that: "...in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been

[242] Mexico 1128 Submission, Paragraph 15.
[243] *UPS v Canada*, UNCITRAL, Paragraph 84.
[244] US 1128 Submission, Paragraph 13.
[245] Mexico Article 1128 Submission, Paragraph 14.

consistently upheld by the Court applies to the assertions of fact both by the Applicant and the Respondent."[246] It is thus, under international law, for a claimant to prove its own positive case and likewise for a respondent to prove its own positive defence, if it has a case to meet.

7.16 Accordingly, the Tribunal decides that, whilst the legal burden of proof rests always on the Claimant to prove its claims under NAFTA Articles 1102 and 1103, the question whether the evidential burden shifts to the Respondent remains relevant, including the question whether any positive defence put forward by the Respondent is established.

7.17 *Treatment:* It is common ground that the treatments at issue under NAFTA Articles 1102 and 1103 are the assessment of "discriminatory treatment" by BC Hydro (which the Claimant compares both to other GBLs and to the load displacement agreements offered to other mills) and the BCUC by Order G-48-09.

7.18 *Like Circumstances:* The next question confronted by the Tribunal is whether it is required to determine whether it is the investor or the treatment received by the investor that is to be "in like circumstances".

7.19 The Claimant's submissions focus on the circumstances of the investor.[247] The Respondent contends that that is inappropriate and contrary to the plain wording of NAFTA Articles 1102 and 1103, which require the Claimant to prove that the *treatment* accorded to the investor or its investments was "in like circumstances".[248] In its submission made under NAFTA Article 1128, Mexico agrees with the Respondent on this issue.[249]

7.20 The Tribunal agrees with the Respondent and with Mexico. In its view, the clearest explanation of the position is found in the NAFTA award in *Cargill v Mexico:*[250]

> *"Thus, in both GAMI and Pope & Talbot, 'like circumstances' was determined by reference to the rationale for the measure that was being challenged. It was not a determination of 'like circumstances' in the abstract. The distinction between those affected by the measure and those who were not affected by the*

[246] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement on the Merits of 20 April 2010, (2010) I.C.J. Reports, p. 14, Paragraph 162 (citations omitted).
[247] Cl. Reply, Paragraphs 146–148.
[248] Resp. Rej., Paragraph 238.
[249] Mexico Article 1128 Submission, Paragraph 13. (The USA did not make a specific submission on this point).
[250] *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009 [RA-6 and CA-4], Paragraph 206.

> *measure could be understood in light of the rationale for the measure and its policy objective. Indeed, it is possible that in respect of other, different measures, the mills in GAMI and the lumber producers in Pope & Talbot could have been found to be in 'like circumstances' ..."*

7.21 In this case, therefore, the question for the Tribunal is whether Celgar's treatment is in "like circumstances" with any comparator with respect to the particular measures in question.

7.22 The Claimant identified a series of comparators for various purposes during the arbitration. At its highest, the Claimant's case focused on two mills and their respective owners:

(1) *The Port Mellon mill*: Howe Sound Pulp and Paper (also "Howe Sound"), owned at all relevant times 50 per cent by a Canadian corporation and 50 per cent by a non-US foreign corporation; and

(2) *The Skookumchuck mill*: Tembec Industries Inc (also "Tembec"), owned at all material times by Canadian interests.

7.23 Both alleged comparators are self-generating pulp mills operating not in FortisBC's area (like Celgar) but in BC Hydro's own service area, subject to Order G-38-01. One comparator is domestic; and the other foreign. Both have GBLs set under EPAs with BC Hydro: Howe Sound's EPA is dated 7 September 2010[251] and Tembec's EPA is dated 13 August 2009.[252] The Tribunal accepts them as being ostensibly comparators, whilst addressing below the additional issue of "like circumstances" as regards both measures, namely Order G-48-09 and Celgar's GBL.

7.24 *Less Favourable:* The Claimant contends that it is entitled to "best in jurisdiction" treatment, under both NAFTA Articles 1102 and 1103. It draws attention to NAFTA Article 1102(3), which provides: "The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part."[253]

[251] BC Hydro and HSPP, Electricity Purchase Agreement: Integrated Power Offer of 7 September 2010 [C-23].
[252] BC Hydro and Tembec Electricity Purchase Agreement of 13 August 2009 [C-145].
[253] Cl. Reply, Paragraph 158, citing NAFTA Art. 1102(3) [C-1].

7.25 It submits that the same result is implicit in NAFTA Article 1103 because: "The only way to provide treatment no less favorable than afforded to *all* comparators is to provide treatment equal or better to that afforded *the most favorable* treatment."[254] In any case, the Claimant observes that NAFTA Article 1104 requires each NAFTA Party to accord investors "the better of" the treatment required by NAFTA Articles 1102 and 1103.

7.26 The Respondent submits, without differentiating between NAFTA Articles 1102 and 1103, that the Claimant would be entitled not to "best in jurisdiction" treatment, but treatment "at least as favourable as the treatment of the relevant comparator to which it is being compared."[255]

7.27 The Tribunal agrees with the Claimant. In a case such as the present, where the treatment of both domestic and other foreign comparators is in question, the effect of NAFTA Article 1104 is that the Claimant is entitled to treatment no less favourable than the most favourable of the more favourable treatment afforded to domestic or foreign comparators, in like circumstances. For completeness, the Tribunal doubts that the omission of any equivalent of paragraph (3) of NAFTA Article 1102 in NAFTA Article 1103 is without significance.

7.28 The relevant pulp mills as regards the Claimant's submissions on different treatment applied to Celgar comprised mills owned by Howe Sound and Tembec, namely Port Mellon and Skookumchuck. If these were comparators in "like circumstances" to Celgar, NAFTA Article 1104 entitled Celgar to have the GBL for its Mill calculated similarly to the GBLs for the Mellon and Skookumchuck mills, if more favourable.

7.29 As regards these suggested differences, was the treatment applying to Howe Sound and Tembec "in like circumstances" to the treatment applying to Celgar; and, if so, was either "more favourable"? As to these questions, the disagreements between the Parties' respective expert witnesses were stark. Whilst acknowledging the industry and expertise of all four of the Parties' experts, the Tribunal prefers the expert testimony of Dr Rosenzweig and Mr Stockard adduced by the Respondent to that of Dr Fox-Penner and Mr Kaczmarek adduced by the Claimant.

[254] Cl. Reply, Paragraph 157.
[255] Resp. C-Mem., Paragraph 358.

7.30 Dr Rosenzweig concluded, as regards Celgar's GBL, that "Differences in GBL were the result of differences in the mills' individual circumstances. This was true not only across all the mills [i.e. the 12 mills in the Province assessed by Dr Rosenzweig], but also when Celgar was compared to each of the individual mills, including the two mills on which Mercer bases its claim [i.e. Tembec's Skookumchuck mill and Howe Sound's Port Mellon mill]."[256]

7.31 As regards Tembec's Skookumchuck's mill, Dr Rosenzweig confirmed that, whilst Celgar's GBL was based on actual generation in its GBL base year, Skookumchuck's GBL was not. He continued:[257]

> *"This difference, however, does not constitute an inconsistent methodology, but rather reflects the differences in contractual obligations of the mills. The critical difference is that, during the years leading up to the 2009 EPA, Skookumchuck's operational decisions were influenced by its contract that committed it to sell generation from its plant. Because the obligations under the 1997 EPA would be disappearing, actual generation at Skookumchuck would have been an inappropriate baseline for its GBL as it would not have accurately represented what was truly incremental generation to be incentivized in the 2009 EPA. It was therefore necessary to base Skookumchuck's GBL on a model of the amount of* [redacted] *as the parties agreed it would, considering the economic conditions at the time absent an EPA. In contrast, Celgar never had a contract with BCH, [i.e. BC Hydro] it self-supplied essentially all of its load, and its operations in 2007 represented current normal self-generation in the absence of a contract.*
>
> *In conclusion, both Celgar's and Tembec's GBLs were set following a consistent BCH methodology. The differences in the details of how each mill's GBL was calculated are explained by the unique circumstances of the mill (such as a prior EPA with BCH), and reflect a consistent application of BCH's GBL methodology."*

7.32 As regards Howe Sound's Port Mellon mill, Dr Rosenzweig testified:[258]

[256] Rosenzweig ER2, Paragraph 10.
[257] Rosenzweig ER1, Appendix 2, GBL Comparison Memo: Tembec/Skookumchuck, Part IV (footnotes here omitted).
[258] Rosenzweig ER1, Appendix 2, GBL Comparison Memo: Howe Sound/Post Mellon, Part IV (footnotes here omitted).

"Like Celgar, Port Mellon was assigned a GBL set at the level of its own load that it would have supplied with self-generation in the absence of a contract with BCH. At the time its EPA was negotiated, Celgar's generation exceeded the level of its load on an annual basis, so its GBL was adjusted downward to reflect the amount of generation it used to self-supply, i.e. its entire load. Similarly, Howe Sound's GBL was based on the amount of historical generation it used to supply its load. In Howe Sound's case, however, this level was below its load. As Howe Sound's mill load is almost three times greater than Celgar's, this difference is not surprising. There are other small differences in the details of the two mills' GBL determinations. While Celgar experienced a normal year of operation in 2007 (and so that year was the basis for its GBL), Port Mellon had to rely on [redacted] *of self-generation due to the* [redacted] *In the case of Port Mellon, the use of* [redacted] *In Celgar's case,* [redacted] *would have led to an unjustifiably lower GBL by ignoring improvements in the mill's productivity which would continue into the foreseeable future. Further, Howe Sound's GBL was set based on its historical generation* [redacted] *Celgar's GBL was established at the mill load consistent with BCH's methodology as discussed above. All of Celgar's sales were from generation incremental to its load, so setting the GBL at load effectively adjusts the GBL for Celgar's net annual exports. These treatments are appropriate because of the differences between how Celgar and Howe Sound operated their mills and turbines, and the contractual circumstances of their sales. Last, Port Mellon's EPA* [redacted] *, but Celgar's does not.* [redacted] *. In Celgar's case, its GBL was based on its actual generation in 2007,* [redacted] *.*

In conclusion, both Celgar's and Howe Sound's GBLs were set following a consistent BCH methodology. The differences in the details of how each mill's GBL was calculated are explained by the unique circumstances of the mill (such as prior sales contracts with BCH/Powerex and problems with generation equipment), and reflect a consistent application of BCH's GBL methodology."

7.33 The Tribunal accepts this expert testimony. Beyond that, albeit with due deference to the Parties' extensive submissions and the testimony of their expert witnesses, the Tribunal considers that it would be inappropriate to come to its own view about the correctness of the particular GBL fixed for any of Tembec, Howe Sound or Celgar. Under NAFTA's Chapter 11, this Tribunal cannot operate as a court of appeal from

decisions made by BC Hydro or the BCUC, particularly on such extensive and complex technical matters calling for specialist judgment to be exercised by BC Hydro and the BCUC at the particular time.

7.34 *LDAs:* That leaves the Claimant's claim that it received less favourable treatment than Howe Sound and Canfor inasmuch as these companies had the benefit of LDAs, whereas Celgar did not. This claim, described by the Claimant as its "simplest", is that it is "less favorable" treatment for BC Hydro to compel Celgar to provide load displacement services. The Claimant submits that, because BC Hydro did not obtain an LDA with Celgar, it cannot require Celgar to provide any load displacement services without treating Celgar less favourably than those to whom it paid substantial consideration.[259] The consequence, so the Claimant concludes, is that "Celgar's GBL should have been zero".[260]

7.35 In the Tribunal's view, it is logically dubious and highlights the solecism identified by the Respondent (and the tribunal in *Cargill*, above) of attempting to draw comparisons in the abstract rather than concentrating on the particular circumstances of the impugned treatment.

7.36 The first difficulty is the Claimant's simple equiparation of the GBL with load displacement. Although the Tribunal has emphasised the importance of the GBL's purpose in delineating BC Hydro's obligation to serve, that was clearly not its only purpose (see Part VI(C) above). The GBL's purpose of setting the level above which BC Hydro was required to purchase power remained a significant purpose. The Claimant's elision of an LDA and GBL overlooks this latter purpose.

7.37 More fundamentally, the Claimant has not demonstrated that any comparison between a GBL and an LDA can be meaningfully carried out. There are any numbers of arrangements that an enterprise such as BC Hydro might conclude with its counterparties. The Tribunal accepts, of course, that if such arrangements are entered into, then they must be entered into without violating NAFTA Articles 1102 and 1103. That does not mean that every investor is entitled to precisely the same arrangements relating to the treatment of its investment as are agreed with every other investor relating to the treatment of its investment, whatever the particular circumstances

[259] Cl. Mem., Paragraph 586.
[260] Cl. Closing Presentation, slide 42.

relevant to both investments. In short, the Claimant is not entitled to the benefit of every arrangement ever agreed by BC Hydro merely because a benefit exists, whatever the particular circumstances of the beneficiary. The Tribunal finds these difficulties to be fatal to this part of the Claimant's claims.

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

7.39 In summary, the Claimant submitted (inter alia) in its Reply that the [redacted] does allow Celgar to [redacted][261] In its Reply, the Claimant pleaded: "Mercer does not claim additional or separate damages resulting from Order G-48-09's net-of-load restriction, because, as Canada correctly contends, [redacted][262]

7.40 Thus, the Claimant only claims damages arising from the Respondent's alleged liability regarding Celgar's GBL.[263] The Claimant does not seek further or separate damages resulting from Order G-48-09 itself.[264] Given that the Tribunal has dismissed the Claimant's case regarding Celgar's GBL (see above), the Claimant's claim for "discriminatory treatment" under NAFTA Articles 1102 and 1103 regarding BCUC Order G-48-09 becomes otiose. The Tribunal therefore dismisses this claim.

7.41 *Policy Defence:* Lastly, the Tribunal has been generally influenced by a further submission made by the Respondent. Without prejudice to its contention that it bears

[261] Cl. Reply, Paragraph 203.
[262] Cl. Reply, Paragraph 205; Resp. Rej., Paragraph 354.
[263] Cl. Reply, Paragraph 202.
[264] Cl. Reply, Paragraph 205.

no burden of proof and that a "high measure of deference"[265] is owed to its Province's regulatory policy, the Respondent put forward in its Rejoinder a positive defence of the governmental policy on which it says BC Hydro's GBL methodology was based. This defence was directly responsive to criticisms made by the Claimant in its Reply.[266]

7.42 Consistent with its analysis above, the Tribunal approaches this policy defence on the basis that the Respondent bore the burden of making good its positive case. The Tribunal also accepts as a general legal principle, in the absence of bad faith, that a measure of deference is owed to a State's regulatory policies.

7.43 The Respondent contends that BC Hydro's GBL policy sought efficient and incremental generation resources that did not result in harmful arbitrage, rather than to "award benefits" to self-generating mills, and to do so in a way that was neutral as to where a purchaser of Celgar's electricity resided.[267] The Tribunal concludes that these were objectives that it was not improper for BC Hydro to pursue.

7.44 The Tribunal determines that, however opaque the BCUC may have considered BC Hydro's GBL methodology to be at the time, BC Hydro did approach Celgar's GBL on the basis of a materially consistent methodology and that it differed in the results between different mills (particularly the Celgar Mill, the Skookumchuck mill and the Port Mellon mill) owing to the particular circumstances of each individual mill. It would accordingly be meaningless for this Tribunal retrospectively to adjust these different circumstances in order to attempt an exact comparison of what account ought to have been taken, or not, by BC Hydro of any particular circumstance; for example (which achieved some prominence at the Hearing) the significance of the Skookumchuck mill's hog boiler in determining Tembec's GBL. As already explained, this Tribunal is not a court of appeal.

7.45 *Summary:* In summary, as regards the Claimant's claims under NAFTA Articles 1102 and 1103 relating to "discriminatory treatment", the Claimant has established that Celgar was treated differently from other self-generating pulp mills in the Province, including Howe Sound and Tembec. However, in the different circumstances pertaining

[265] *S.D. Myers, Inc. v. the Government of Canada*, (UNCITRAL) Second Partial Award of 21 October 2002 (RA-39 and CA-14), Paragraph 263.
[266] Cl. Reply, Paragraphs 310 *et seq*.
[267] Resp. Rej., Paragraphs 276–278.

to Celgar and each of these other mills, that different treatment is not proven to be "discriminatory treatment" in violation of NAFTA Articles 1102 or 1103. Whilst ostensibly comparators, none were "in like circumstances" for the purposes of NAFTA Articles 1102 and 1103; and their different treatment can best be explained on the basis of their individual circumstances under BC Hydro's consistent application of its GBL methodology. The Claimant here bore the legal burden of proving its case; the evidential burden never shifted to the Respondent; and the Claimant did not discharge its burden.

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

(D) NAFTA Article 1105(1)

7.47 The Tribunal here considers the Claimants' claims that the Respondent has breached NAFTA Article 1105(1). Again, the effect of the Tribunal's jurisdictional decisions in Part VI means that it has jurisdiction (or can exercise jurisdiction) over these claims only insofar as they concern BCUC Order G-48-09 or allege "discriminatory treatment" under NAFTA Article 1105(1). It is appropriate to consider first the Claimant's claims for "discriminatory treatment".

7.48 *NAFTA Article 1105(1)*: NAFTA Article 1105(1) requires that: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

7.49 On 31 July 2001, the NAFTA Free Trade Commission adopted the following Note of Interpretation regarding the minimum standard of treatment under Article 1105(1), entitled "Minimum Standard of Treatment in Accordance with International Law":

> *"(1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate*

international agreement, does not establish that there has been a breach of Article 1105(1)."

7.50 Under NAFTA Article 1131(2), an interpretation by the Free Trade Commission of a NAFTA provision "shall be binding on a Tribunal established under this Section." The Tribunal, of course, accepts in this arbitration the binding effect of the Free Trade Commission's Note of Interpretation.

(E) The Parties' Cases on NAFTA Article 1105(1)

7.51 *The Claimant's Case:* In brief, the Claimant begins by submitting that the customary standard of treatment imported by NAFTA Article 1105 is not fixed in time,[268] but has rather evolved in particular to prohibit treatment that is arbitrary, grossly unfair, non-transparent and discriminatory, including insofar as it precluded a stable regulatory environment for its investment.[269]

7.52 The Tribunal intends no criticism of the Claimant in observing that its case under NAFTA Article 1105(1) restates the allegations that it raised in respect of NAFTA Articles 1102 and 1103. It is necessary again to recall that only the claims concerning Order G-48-09 and any allegedly "discriminatory treatment" under NAFTA Article 1105(1) are here eligible for consideration by the Tribunal on their merits. It is therefore relevant to note that the Claimant expressly adopts and repeats its case under NAFTA Articles 1102 and 1103 so far as it alleges "discriminatory [treatment]" under NAFTA Article 1105(1).[270]

7.53 As to its other claims under NAFTA Article 1105(1), the Claimant summarises its "grievance" as being "that BC has permitted the persistence of a completely non-transparent, idiosyncratic, and arbitrary regulatory regime - one that had no lacking written rules or standards governing self-generators' access to embedded cost utility power, and where the BCUC and BC Hydro made arbitrary GBL decisions *ad hoc*, case by case, in a process utterly lacking in transparency."[271]

7.54 *The Respondent's Case:* In brief, the Respondent's position is that the Claimant has failed properly to apply the legal standard applicable under NAFTA Article 1105(1)

[268] Cl. Reply, Paragraph 480, citing *ADF Group v USA*.
[269] Cl. Reply, Paragraphs 498, 504–6.
[270] Cl. Reply, Paragraph 507.
[271] Cl. Reply, Paragraph 506.

and that none of the measures of which the Claimant complains come close to establishing that the Respondent violated its obligations under NAFTA Article 1105(1).[272]

7.55 *NAFTA Article 1128 Submissions:* Both the USA and Mexico submit that the threshold under NAFTA Article 1105(1), as in customary international law, is high and does not embrace nationality-based discrimination, which is instead properly addressed under NAFTA Articles 1102 and 1103.[273]

(F) The Tribunal's Analysis on NAFTA Article 1105(1)

7.56 The Tribunal's starting-point concerns the content of the standard of treatment, comprising fair and equitable treatment and full protection and security, under NAFTA Article 1105(1) read with the FTC Interpretation.

7.57 In a broad survey of legal materials, the NAFTA tribunal concluded, in *Merrill & Ring v Canada*, that the minimum standard of treatment under customary international law, even in the absence of bad faith or malicious intention on the part of the State, precluded conduct "which is unjust, arbitrary, unfair, discriminatory or violation of due process".[274] As regards that standard under NAFTA 1105(1), the tribunal decided that it provided for "the fair and equitable treatment of alien investors within the confines of reasonableness".[275]

7.58 So far as concerns the Claimant's claims of "discriminatory treatment" contrary to NAFTA Article 1105(1), the Tribunal's agrees with the non-disputing NAFTA Parties' submissions that such protections are addressed in NAFTA Articles 1102 and 1103, rather than NAFTA Article 1105(1).

7.59 The Tribunal also notes the approach taken in the Final Award in *Methanex v USA*.[276] There, the NAFTA tribunal decided that, even without the FTC Interpretation:

> *"… the plain and natural meaning of the text of Article 1105 does not support the contention that the 'minimum standard of treatment' precludes governmental differentiations as between nationals and aliens. Article 1105(1) does not mention*

[272] Resp. Rej., Paragraph 358.
[273] Mexico Article 1128 Submission Paragraphs 19–20; USA Article 1128 Submission Paragraphs 17–20, 23, 27.
[274] *Merrill & Ring Forestry L.P. v Canada*, (UNCITRAL) Award of 31 March 2010 [CA-10 and RA-24], Paragraphs 182 to 208.
[275] *Id*, Paragraph 83.
[276] *Methanex v USA*, Final Award, Paragraph 14ff at Part IV, Chapter C, pp. 7-8 [CA-11].

discrimination; and Article 1105(2), which does mention it, makes clear that discrimination is not included in the previous paragraph. By prohibiting discrimination between nationals and aliens with respect to measures relating to losses suffered by investments owing to armed conflict or civil strife, the second paragraph imports that the preceding paragraph did not prohibit – in all other circumstances – differentiations between nationals and aliens that might otherwise be deemed legally discriminatory – inclusion unius est exclusion alterius. The textual meaning is reinforced by Article 1105(3), which makes clear that the exception in paragraph 2 is, indeed, an exception."

7.60 In the circumstances, the Tribunal decides that the Claimant's claims for "discriminatory treatment" under NAFTA Article 1105(1) can add nothing to the Claimant's claims under NAFTA Articles 1102 and 1103, which the Tribunal has already dismissed.

7.61 The Tribunal adds that it would be inconsistent with the principle of *effet utile* for a claimant to avoid the "procurement" exception in NAFTA Article 1108(7) (which excludes discrimination claims under NAFTA Articles 1102 and 1103 in relation to "procurement") simply by advancing the same discrimination claims as a breach of the minimum standard of treatment in NAFTA Article 1105(1). A measure relating to procurement can be impugned pursuant to NATA Article 1105(1), but not on the basis that nationals of the respondent State or nationals of a third State were treated more favourably in the context of a procurement exercise undertaken by the respondent State or one of its state enterprises.

(G) BCUC Order G-48-09

7.62 *Introduction:* The Tribunal next addresses the remaining parts of the Claimant's claims under NAFTA Article 1105(1) relating to BCUC Order G-48-09. The Claimant provides a succinct summary of these claims in its Reply, here cited in full as regards measures impugned by the Claimant:

"33. Mercer contends first that BCUC Order G-48-09 imposes a net-of-load access standard on Celgar, by effectively preventing FortisBC from selling Celgar any embedded cost electricity from Fortis' pre-existing resource stack while Celgar is selling electricity. This direct restriction on FortisBC indirectly restricts Celgar. Without access to utility electricity to meet its pulp mill load, Celgar has no practical choice but to self-supply its own load.
34. Mercer contends secondly that the GBL and related exclusivity provisions in Section 7.4(b) of Celgar's 2009 EPA with BC Hydro directly prevent Celgar from

> *selling any power it generates below its 2007 load, again, not to BC Hydro but to any third party."*
> *35. One measure (BCUC Order G-48-09) restricts Celgar's access to embedded cost utility electricity; the other measure (BC Hydro's GBL and related contractual exclusivity provisions) restricts Celgar sales of below-load self-generated electricity."*

7.63 As regards the first measure, the Tribunal has decided that that the Claimant's claims for "discriminatory treatment" based upon NAFTA Articles 1102, 1103 and 1105(1) in relation to BCUC Order G-48-09 must be rejected.

7.64 As regards the second measure, the Tribunal has decided that it has no jurisdiction over certain of the Claimant's claims based upon NAFTA Articles 1102, 1103 and 1105(1), by virtue of both the "procurement" exception in NAFTA Article 1108(7)(a) and the time bars in NAFTA Articles 1116(2) and 1117(2). As to the merits of this second measure, the Tribunal has decided to reject the Claimant's remaining claims for "discriminatory treatment" resulting from this second measure by virtue of NAFTA Articles 1102, 1103 and 1105(1).

7.65 That leaves for decision only the Claimant's remaining non-discrimination claims based upon NAFTA Article 1105(1) in respect of BCUC Order G-48-09 as the third measure. As indicated above, the Respondent makes no jurisdictional objection to this particular claim. As to its merits, the Tribunal addresses first the factual premise of this claim as set out in the quotation from Paragraph 33 of the Claimant's Reply above, namely: "BCUC Order G-48-09 imposes a net-of-load access standard on Celgar, by effectively preventing FortisBC from selling Celgar any embedded cost electricity from Fortis' pre-existing resource stack while Celgar is selling electricity".

7.66 *BCUC Order G-48-09*: The proceedings leading to BCUC Order G-48-09 dated 9 May 2009 were initiated by BC Hydro in relation to two agreements between FortisBC and the City of Nelson that were filed with the BCUC on 24 June 2008. In the context of those proceedings, BC Hydro applied to the BCUC for an amendment to the 1993 PPA between BC Hydro and FortisBC "to clarify that electricity purchased by FortisBC

under the PPA cannot be sold to FortisBC customers to replace electricity to be sold by those customers".[277] BC Hydro's application was approved by the BCUC.[278]

7.67 Neither BCUC Order G-48-09, nor the Decision accompanying it, refer explicitly to a "GBL". Nonetheless, the BCUC in its Decision made it clear that "self-generators can still sell 'excess' power"[279]. It then sought to clarify what "excess power" means:

> *"[T]here must be a simple definition of what constitutes "excess power" and we define that term to mean power "net of load on a dynamic basis." The Commission Panel determines that any self-generators, as owners of the generation facilities, should have the flexibility to reduce domestic load as they see fit in the commercial circumstances at hand in order to optimize the export of self-generated power. 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."*[280]

7.68 The BCUC referred to its previous Order G-38-01 and acknowledged that both the terms "baseline" and "historical" are used in that order. It continued:

> *"The Commission Panel believes that in any short term resolution of the policy issue addressed in this proceeding, there must be some definition for each self-generator of the historical baseline load served, or, in the alternative, some means of monitoring, on a dynamic basis, excess self-generation net of load."*[281]

The Tribunal notes that this language is not consistent with the establishment of an inflexible net-of-load standard by the BCUC.

7.69 Celgar later appeared to accept that BCUC Order G-48-09 only prevented FortisBC from selling embedded cost electricity supplied under the 1993 PPA between BC Hydro and FortisBC: it did not, in other words, prevent FortisBC from selling embedded cost energy to Celgar from its own resource stack. According to the submission of Celgar's lawyers to the BCUC in 2011:

> *"Order G-48-09 provides that FortisBC will not sell electricity 'purchased under' the PPA to Celgar, while Celgar sells self-generation that is not in excess of its*

[277] Order G-48-09, Recital F.
[278] *Id*., p. 2
[279] BCUC, Decision Accompanying Order No. G-48-09, p. 28 [C-8].
[280] *Id*., p. 29.
[281] *Id*.

load. It does not prohibit FortisBC from selling other energy to Celgar, while Celgar sells such self-generation."[282]

7.70 On that basis, Celgar requested the BCUC to set a GBL in its service agreement with FortisBC:

"Celgar seeks a FortisBC GBL that does not rely upon additional utilization of 3808 power by FortisBC to serve Celgar's proposed increased firm energy requirements while Cclgar sells self-generation that is not in excess of load."[283]

7.71 The BCUC ultimately declined to establish a GBL for the service agreement between Celgar and FortisBC, preferring to leave this to the contracting parties themselves.[284] It nonetheless affirmed Celgar's right to access at least some of Fortis BC's non-PPA embedded cost power in its Decision accompanying Order G-188-11 and would be free to arbitrage that embedded cost power:

"Given that Celgar has entitlement to some amount of FortisBC non-PPA embedded cost power, it follows that Celgar would be allowed to sell such power to third parties unless specifically precluded by doing so by contract with FortisBC. That is, such non-PPA power could be exposed to the potential for arbitrage, subject to the terms of an agreement between FortisBC and Celgar which would require Commission approval.

[…] [I]t is evident that Celgar is free to sell all or a portion of its generation below the BC Hydro GBL into the market and supply its mill from FortisBC resources, not including BC Hydro PPA Power."[285]

7.72 The BCUC also confirmed that: "Order G-48-09 does not consider power from FortisBC's own generation or other non-BC Hydro PPA Power components of its resource stack."[286]

7.73 FortisBC also shared this view of the regulatory landscape in its letter dated 13 April 2012 to the BCUC: [287]

"FortisBC concludes… that there will be power generated by Celgar, below the BC Hydro GBL of 40 MW, available for sale that will be replaced from FortisBC

[282] Letter from K.C. Moller, Re: Zellstoff Celgar Limited Partnership of 1 September 2011, p. 1 [R-483].
[283] *Id*., pp. 1-2.
[284] BCUC, Decision and Order G-188-11, p. 28 [R-275].
[285] *Id*., pp. 39 and 49.
[286] *Id*., p. 37.
[287] Letter from Dennis Swanson, Director, Regulatory Affairs to Alanna Gillis, Acting Commission Secretary of 13 April 2012 [R-497], p. 4.

resources. The amount, whether Celgar chooses to self-supply all or no power to its mill, is immaterial in the face of proper pricing. [FortisBC] is of the opinion that the [BCUC] has established the principle that arbitrage of FortisBC non-PPA power is not prohibited out of hand."

7.74 Mr Merwin (of Celgar) proclaimed Order G-188-1 to be a "major victory" at the time in his memorandum of 7 December 2011 to Mercer's Board of Directors.[288] He stated that the BCUC had confirmed that "Celgar is able to buy all of its power requirements from FortisBC and free to sell the output of all of its generation to third parties."[289]

7.75 This interpretation of Order G-188-1 was confirmed by the BCUC in its subsequent Decision of 27 December 2012 accompanying Order G-202-12. It summarised the entitlements of customers of FortisBC: "[The] entitlement to non-BC Hydro PPA embedded cost power by a self-generating customer may be as high as 100 percent of load as nominated by that customer".[290]

(H) The Tribunal's Analysis on BCUC Order G-48-09

7.76 In the Tribunal's view, on the evidence before it, the Claimant falls short of establishing that BCUC Order G-48-09 or any associated aspect of the BCUC's regulatory regime breaches the customary international law standard of treatment under NAFTA Article 1105(1), as explained in the NAFTA award in *Merill & Ring v Canada*. The Claimant has not established irrationality, injustice, arbitrariness, or a violation of due process within the meaning of the customary international law standard.

7.77 As to transparency, it suffices to cite the *Cargill* Award cited above, in which the tribunal decided that the customary international law standard had not yet been shown to embrace a claim to transparency.[291] The Tribunal also notes that the tribunal in *Merill & Ring* decided that transparency was not part of the customary international law standard.[292] In any event, even if applicable, the Tribunal would not be inclined to decide that the Claimant's case reaches the threshold for non-transparency.

[288] Memorandum from Management to Mercer International Board of Directors, Re Update on Celgar's Generator Baseline Issue of 7 December 2011, p. 1 [R-531] (emphasis in the original).
[289] *Id*.
[290] BCUC Decision and Order No. G-202-12 of December 27, 2012 [R-265], p. 3.
[291] *Cargill v. Mexico*, ibid, Paragraphs 290 and 294.
[292] *Merill & Ring v Canada*, ibid, Paragraph 208.

7.78 As to arbitrariness, the International Court of Justice's judgment in *ELSI* decided, in a well-known passage, that: "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law... it is willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety."[293] The present case, in the Tribunal's view, is not shown to amount to such "willful disregard" by BC Hydro or the BCUC.

7.79 More specifically, it is clear from the contemporaneous documents produced by the BCUC, Celgar, FortisBC and BC Hydro that BCUC Order G-48-09 did not "prevent [] FortisBC from selling Celgar *any* embedded cost electricity from Fortis' pre-existing resource stack while Celgar is selling electricity" [Emphasis here supplied].[294] Such prevention is the factual premise for the Claimant's claim, as to which it bore the legal burden of proof. Indeed, as the Respondent pointed out, Celgar acquired a right that no other mill in British Columbia had, which was the ability to sell *all* of its self-generation below its GBL to the market and to supply its Mill from FortisBC resources so long as that supply did not include BC Hydro supply to FortisBC under their PPAs.[295]

7.80 Lastly, as regards the FPS provision in NAFTA Article 1105(1), it is not entirely clear whether or not the Claimant, by its several references to NAFTA Article 1105(1) is advancing a claim under this FPS provision. Assuming such a claim were advanced, the Tribunal considers that this FPS provision addresses a third person causing harm to the Claimant, other than the Respondent (or persons whose acts are attributable to the Respondent under international law). There is no malign third person in this case. Hence, such claim could not succeed on the facts of the present case.

7.81 *Conclusion*: For these several reasons, as regards BCUC Order G-48-09, the Tribunal dismisses the Claimant's remaining claims under NAFTA Article 1105(1).

7.82 The Tribunal (by a majority) emphasises that it has in this Part 7 of the Award only addressed the Claimant's claims under NAFTA Article 1105(1), as it must, under the customary international law minimum standard of treatment of aliens within the confines of the FTC Interpretation and the particular wording of NAFTA Article 1105

[293] *Elettronica Sicula SpA (ELSI) United States v. Italy* Judgment of 20 July 1989, I.C.J. Reports 1989, Paragraph 128 [RA-70].
[294] Cl. Reply, Paragraph 33.
[295] Resp. Rej., Paragraphs 156-157.

interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties.

(I) NAFTA Article 1503(2)

7.83 The Tribunal has decided that the Respondent's treatment of Celgar was not contrary to provisions of NAFTA Chapter 11. As already indicated above, even assuming its application, it is therefore unnecessary to address further NAFTA Article 1503(2). That provides for the Respondent's liability if it failed to "ensure" that BC Hydro and/or the BCUC did not act contrary to NAFTA Chapter 11. In the Tribunal's view, no such act was committed by BC Hydro or the BCUC towards the Claimant, ZCL or ZCLP.

(J) Conclusion

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

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

7.86 *Dissent:* Arbitrator Orrego Vicuña's reading of the NAFTA Articles discussed from Paragraph 7.76 onwards is different. First, because the concept of a comparator is broader than that followed by the majority; and it also includes cases that do not need to be identical. The proper comparison is between cases where the treatment is different in respect of activities of a similar nature, which is very much the case here.

7.87 It follows that also the concept of discrimination is broader than that considered in the Award. Intentional or unintentional, the different treatment is sufficient to prove discrimination in the instant case, whichever the technicalities of the GBL's different calculations. Having already excluded the considerations relating to procurement, it is

not necessary for this Arbitrator to discuss the Award's reasoning in respect of Article 1105 in this connection.

7.88 The majority also supports the view that no breach of the customary standard of required treatment is involved in this case. To consider the nature of the specific breaches alleged it is sufficient to establish its connection or disconnection with the customary law standard of treatment. Under current international law it is not possible to exclude discrimination as one kind of breach of the required treatment, a proposition that seems to be generally accepted today.

7.89 In this respect the interpretation of the FTC on the meaning of international minimum treatment is not in contradiction with the views of this arbitrator on this case. The FTC interpretation on this matter, particularly as it concerns discrimination, does not condone mistreatment of the investor. While in some respects the FTC interpretation could be seen as tantamount to a freeze of customary law in time, it is not the case here. The minimum treatment and non-discrimination are among the first standards accepted as customary law since the outset of the jurisprudence governing this matter. The role of a comparator has not meaningfully changed either. It follows that when the same policy has been taken up by the fair and equitable treatment standard, no contradiction can be found with the international minimum standard.

7.90 In this connection, the possibility of submitting a claim under Article 1105 is not limited by the issue of procurement and could also allow for claims relating to more favourable treatment. In summary, while this arbitrator can agree to parts of the arguments in respect of Articles 1102 and 1103, under Article 1105(1) the situation is different. Fair and equitable treatment is a fundamental tool for the understanding of current international law, certainly in respect of investments. This arbitrator believes we should safeguard this element.

PART VIII: SUMMARY OF DECISIONS

(A) Introduction

8.1 For ease of reference and as a fuller explanation of the Operative Part of this Award, the Tribunal briefly summarises the several decisions made earlier in this Award.

(B) Jurisdiction and Admissibility

8.2 The Tribunal confirms that it has jurisdiction and may exercise jurisdiction over the Claimant's claims concerning BCUC Order G-48-09 (subject to its working assumption as regards NAFTA Article 1503(2) as summarised below).

8.3 The Tribunal (by a majority) decides that it has no jurisdiction to decide the Claimant's claims concerning the 2009 EPA between Celgar and BC Hydro under NAFTA Articles 1102, 1103 and 1105, by reason of NAFTA Articles 1116(2), 1117(2) and 1180(7)(a), save only insofar as these claims allege "discriminatory treatment" under NAFTA Article 1105 (as advocated by the Claimant).

8.4 The Tribunal leaves open *arguendo*, as regards jurisdiction and admissibility, the Respondent's objection under NAFTA Article 1503(2). In the event, even assuming such jurisdiction for the purpose of deciding the merits of the Claimant's claims, this objection requires no adjudication by the Tribunal for the purpose of this Award.

(C) Merits of Remaining Claims

8.5 *Liability:* The Tribunal (by a majority) dismisses the Claimant's remaining claims as to which it has and may exercise jurisdiction; namely: (i) the Claimant's claims relating to BCUC Order G-48-09 under NAFTA Articles 1102, 1103, 1105 and (ii) the Claimant's claims relating to "discriminatory treatment" by reference to Celgar's GBL under NAFTA Article 1105. The Tribunal (by a majority) also dismisses the Claimant's claims under NAFTA Article 1503(2) as to their merits, on the jurisdictional assumption described above.

8.6 *Compensation:* As a result of the Tribunal's decisions on jurisdiction, admissibility and liability, the Claimant's claims for compensation are moot; and the Tribunal therefore dismisses them.

8.7 *Interest:* As a result of the Tribunal's decisions on jurisdiction, admissibility, liability and compensation, the Claimant's claims for interest are moot; and the Tribunal therefore dismisses them.

8.8 *Relief:* As to the Claimant's requests for relief in its Request, Memorial and Reply (set out in Part II(D) above), the Tribunal dismisses such requests, save only as to costs (considered separately in Part IX below).

8.9 As to the Respondent's requests for relief in its Counter-Memorial and Rejoinder (as also set out in Part II(D) above, the Tribunal grants such requests save only as to costs (considered separately in Part IX below).

PART IX: LEGAL AND ARBITRATION COSTS

(A) Introduction

9.1 In this Part IX of the Award, the Tribunal addresses the issues of costs, both arbitration costs ("Arbitration Costs") and the legal and other costs of the Parties ("Legal Costs").

9.2 The Parties have addressed these issues in their respective submissions on costs; namely: (i) the Claimant's initial submission on costs of 15 March 2016; (ii) the Respondent's initial submission on costs of 15 March 2016; (iii) the Claimant's supplemental submission on costs of 3 April 2017; and (iv) the Respondent's updated costs statement also of 3 April 2017.

(B) The Tribunal's Discretion as to Costs

9.3 Under Part IV of the Tribunal's Procedural Order No 1, as agreed by the Parties, the applicable arbitration rules are the ICSID AF Arbitration Rules except to the extent that they are modified by Section B of NAFTA Chapter Eleven.

9.4 NAFTA Article 1135(1) provides: "A tribunal may also award costs in accordance with the applicable arbitration rules". Article 52(1)(j) of the ICSID AF Arbitration Rules requires the Tribunal to have its Award contain "any decision of the Tribunal regarding the cost of the proceeding." Article 58(1) of the ICSID AF Arbitration Rules further provides:

> *"Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne …"*

(Article 58(2) of the ICSID AF Arbitration Rules also requires the Tribunal's decision under this sub-paragraph (1) to form part of the Award.)

9.5 In these circumstances, the Tribunal considers that it has broad discretionary powers to decide in this Award: (i) the allocation and assessment of Legal Costs (i.e. the legal fees and other expenses incurred by the Parties in connection with this arbitration); and (ii) the allocation of Arbitration Costs (i.e. the fees and expenses of the members of the Tribunal, and the expenses and charges of the ICSID Secretariat)

(C) The Parties' Costs Submissions

9.6 *The Claimant's Costs Submissions*: In its submissions on costs, the Claimant submits that the Respondent should bear the total Arbitration Costs and pay all the Legal Costs incurred by the Claimant; namely:

Arbitration Costs (paid by way of advances to ICSID): US$ 425,000; and

Legal Costs: US$ 11,483,376.64 plus CAN$ 1,254,961.

9.7 *The Respondent's Costs Submissions:* In its submissions on costs, the Respondent submits that the Claimant should bear all the Arbitration Costs and pay all the Legal Costs incurred the Respondent; namely:

Arbitration Costs (paid by way of advances to ICSID): CAN$ 492,182.50 (then equivalent to US$425,000); and

Legal Costs: CAN$ 9,154,166.56.

(D) The Tribunal's Decision on Legal Costs

9.8 The Parties have each criticised the other for malign and other mischievous conduct in this arbitration, thereby unnecessarily complicating the arbitration, with consequential delays and additional expenses. It is unnecessary, given the Tribunal's decision below, to summarise such criticism here.

9.9 In the Tribunal's view, there was no misconduct in the conduct of this arbitration attributable to either Party. Both the Claimant's claims and the Respondent's defences were reasonably advanced, in good faith. In particular, the Claimant's claims were not "frivolous", as alleged by the Respondent. To the extent that there were innocent mishaps and delays, these are unfortunately a common feature of many complicated arbitrations with much at stake for both sides. Moreover, the Parties' dispute was not only complicated, it was also difficult. The absence in this Award of unanimous agreement by the Tribunal on several important issues speaks for itself. Accordingly, the Tribunal rejects each Party's criticisms of the other Party's conduct in this arbitration. No part of the Tribunal's decisions on costs should be understood, therefore, as having any punitive element.

9.10 As to the allocation of Legal Costs, the Tribunal decides that the paramount factor should be the overall success of the Parties in the arbitration. As to that, given the result of this Award, there is no doubt that the Respondent is the successful party and the Claimant is the unsuccessful party. Thus, in principle, the Claimant should not recover its Legal Costs; and the Respondent should recover its Legal Costs from the Claimant.

9.11 As to the assessment of the Respondent's Legal Costs (addressed below) the Tribunal decides to grant the Respondent's claim for Legal Costs in the total amount of CAN$ 9,000,000.00. As to this amount, the Tribunal considers that the sums claimed by the Respondent are reasonable and were reasonably incurred, particularly given the much greater sums incurred by the Claimant (as to more than 35%).

(E) The Tribunal's Decision on Arbitration Costs

9.12 These Arbitration Costs are broken down as follows:

Arbitrators' fees and expenses	
President (Mr Veeder):	US$ 200,529.77
Professor Orrego Vicuña:	US$ 143,851.45
Professor Douglas:	US$ 108,959.40
Other direct expenses:	US$ 107,658.30
ICSID's administrative fees	US$ 202,000.00
Total	US$ 762,998.92

9.13 As a result, each Party's share of the Arbitration Costs paid amounts to US$ 381,499.46.

9.14 As to allocation, the Tribunal decides to follow its approach to Legal Costs, with a relatively minor modification. Whilst the Respondent was overall the successful party as regards the result of this arbitration, it did not succeed on every issue, particularly important issues of jurisdiction. The Tribunal considers, therefore, that its decision on Arbitration Costs should reflect, as to such issues, the relative success of the Claimant.

9.15 Accordingly, the Tribunal decides that each Party should bear its own Arbitration Costs, without recourse to the other Party.

9.16 These Arbitration Costs have been paid out of the advances made to ICSID by the Parties in equal parts (measured in US$). The remaining balance shall be reimbursed by ICSID to the Parties in the same proportions as each Party paid its advances to ICSID.

(F) Summary

9.17 As to Legal Costs, the Tribunal decides that the Claimant shall pay to the Respondent the total amount of CAN$ 9,000,000.00.

9.18 As to Arbitration Costs, the Tribunal decides that each Party should bear its own Arbitration Costs, without recourse to the other Party.

PART X: THE OPERATIVE PART

10.1 For the reasons set out above in this Award, the Tribunal decides and awards as follows:

10.2 As to jurisdiction and admissibility, the Tribunal declares that it has jurisdiction and may exercise such jurisdiction to decide the merits of: (i) the Claimant's claims (for itself and ZCL) alleging "discriminatory treatment concerning Celgar's GBL" (with, arguendo, NAFTA Article 1503(2)) and (ii) the Claimant's claims (for itself and ZCL) concerning BCUC Order G-48-09, under NAFTA Articles 1102, 1103 and 1105(1);

10.3 Save as aforesaid, the Respondent's jurisdictional objections are upheld;

10.4 As to the merits of the claims made by the Claimant (for itself and ZCL), alleging "discriminatory treatment' concerning Celgar's GBL, the Tribunal dismisses all such claims under NAFTA Articles 1102, 1103, 1105(1) and 1503(2);

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

10.6 In consequence of the dismissals above as to the merits, the Tribunal dismisses the claims by the Claimant (for itself and ZCL) for compensation and interest;

10.7 As to Legal Costs, the Tribunal decides that the Claimant shall pay to the Respondent the total amount of CAN$ 9,000,000.00;

10.8 As to Arbitration Costs, the Tribunal decides that each Party should bear its own Arbitration Costs, without recourse to the other Party; and

10.9 Save as aforesaid, the Tribunal dismisses all claims made by the Claimant (for itself and ZCL) and all claims made by the Respondent.

Professor Francisco Orrego Vicuña:
(subject to the dissents recorded at Paragraphs 6.63ff and 7.86ff above)

Signed:
Dated: 27 February 2018

Professor Zachary Douglas:

Signed:
Dated: 1 March 2018

V. V. Veeder (President):

Signed:
Dated: 2 March 2018