

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

BETWEEN:

MERCER INTERNATIONAL INC.,

Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

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

GOVERNMENT OF CANADA

REPLY TO CLAIMANT'S REQUEST FOR SUPPLEMENTARY DECISION

4 June 2018

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ICSID ADDITIONAL FACILITY RULE ARTICLE 57 IS LIMITED IN SCOPE..... 1

III. THE TRIBUNAL DID NOT OMIT TO DECIDE THE QUESTION IDENTIFIED BY THE CLAIMANT 2

IV. CONCLUSION..... 8

I. INTRODUCTION

1. The Claimant's request for a supplementary decision ("Request") under Article 57 of the ICSID Additional Facility Rules ("Article 57") should be rejected. After reviewing the evidence provided by the Parties, the Tribunal agreed with Canada and dismissed the Claimant's claim with respect to BCUC Order G-48-09 ("Order G-48-09") under NAFTA Articles 1102 and 1103. The Claimant's Request seeks to re-argue this decided question, which is beyond the scope of Article 57.

II. ICSID ADDITIONAL FACILITY RULE ARTICLE 57 IS LIMITED IN SCOPE

2. Article 57 provides that a party may request a supplementary decision from a tribunal in the limited circumstance where it has "omitted to decide" a question in its award.¹ Accordingly, an applicant under Article 57 must clearly identify a "question" that the award failed to decide,² and the request must be denied if the award already provides an answer. A supplementary decision is not an opportunity for the Tribunal to reconsider its decision or reasoning.

3. Tribunals faced with requests under Article 57 have properly recognized that its scope is limited. For example, the tribunal in *ADM v. Mexico* explained that: "Article 57 does not empower the Arbitral Tribunal to make a new decision, or to modify its existing decision, or even to supplement the reasoning of its existing decision."³ Similarly, the tribunal in *Loewen v. United States* explained that "it is not

¹ Article 57(1) provides: "Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award."

² *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Decision on the Requests for Correction, Supplementary Decision and Interpretation (redacted version), 10 July 2008), ¶ 12.

³ *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Decision on the Requests for Correction, Supplementary Decision and Interpretation (redacted version), 10 July 2008), ¶ 12.

open to the Tribunal to reconsider [its reasoning]" or its decision to dismiss the claim before it.⁴

4. In rejecting the claimant's request for a supplementary decision in the *Loewen* case, the tribunal considered the entirety of the award to assess whether the question posed with respect to the claimant's NAFTA Article 1116 claim had been answered. In particular, apart from a dismissal "of all the claims 'in their entirety'" in the *Loewen* award, there was "no distinct reference in the Award" to the claimant's NAFTA Article 1116 claim.⁵ Nonetheless, the tribunal found that the dismissal of all of the claims after the examination on the merits – including the Article 1116 claim – "was a consequence" of the reasoning it had expressed.⁶ Thus, an assessment of whether a tribunal omitted to decide a question cannot be formalistic – if the award provides an answer in substance to the question posed, then Article 57 provides no further recourse.

III. THE TRIBUNAL DID NOT OMIT TO DECIDE THE QUESTION IDENTIFIED BY THE CLAIMANT

5. The question the Claimant alleges the Tribunal omitted to decide in its Award was the Claimant's "discrimination claim under NAFTA Articles 1102 and 1103 with respect to Order G-48-09."⁷ It is, however, patently obvious from the Award that the Tribunal decided this question. In three separate places in the Award, the Tribunal ruled:

⁴ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 ([Decision on Respondent's Request for a Supplementary Decision](#), September 6, 2004), ¶ 21.

⁵ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 ([Decision on Respondent's Request for a Supplementary Decision](#), September 6, 2004), ¶¶ 19-20.

⁶ *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 ([Decision on Respondent's Request for a Supplementary Decision](#), September 6, 2004), ¶¶ 19-20.

⁷ Claimant's Request for Supplementary Decision, ¶ 1.

[T]he 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.⁸

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 and 1105.⁹

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. The Award is clear: the Tribunal answered the question put to it with respect to Order G-48-09 and NAFTA Articles 1102 and 1103. The Claimant's Request is nothing more than an attempt to have the Tribunal reconsider its existing decision, and on this basis alone it must be rejected.

7. The inappropriate nature of the Claimant's request is further shown by the many other instances in the Award where the Tribunal assessed the merits of the Claimant's Order G-48-09 claim. For example, the comparators used by the Claimant to make out its claim under Articles 1102 and 1103 were Howe Sound and Tembec.¹¹ In particular, the Claimant has argued that Order G-48-09 "effectively prohibits Celgar's access to FortisBC embedded cost electricity while Celgar sells its self-generated electricity", while others, like Howe Sound and Tembec, are afforded some access to embedded cost electricity under Order G-38-01.¹² While the tribunal

⁸ Award, ¶ 7.63 (emphasis added).

⁹ Award, ¶ 8.5.

¹⁰ Award, ¶ 10.5.

¹¹ Award, ¶ 7.22.

¹² Claimant's Request for Supplementary Decision, ¶ 9, quoting Claimant's Post-Hearing Submission (7 January 2016), ¶ 3. *See also* Claimant's Request for Supplementary Decision, ¶ 4; Claimant's Reply Memorial, ¶ 33 ("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."); First Expert Report of Brent Kazcmerek (31 March 2014), ¶ 79

agreed with the Claimant that Order G-48-09 constituted treatment for the purposes of Articles 1102 and 1103¹³ and accepted that Howe Sound and Tembec “were ostensibly comparators” as regards Order G-48-09,¹⁴ it ultimately determined that neither were “‘in like circumstances’ for the purposes of NAFTA Articles 1102 and 1103.”¹⁵ This determination again makes it clear that the Tribunal answered the question the Claimant now alleges that it omitted to decide.

8. The Tribunal also recognized that deference was due to decisions of the BCUC in the specialized and technical matters of which it is seized – such as those addressed in Orders G-48-09 and G-38-01. In particular, in support of its rejection of the Claimant's discrimination claims, the Tribunal reasoned as follows:

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.¹⁶

9. The Tribunal set out further reasons elsewhere in its Award that fully answer the Claimant's question with respect to NAFTA Articles 1102 and 1103 and Order G-48-09. For example, in the context of Article 1105, the Tribunal turned its mind to the very allegation at the centre of the Claimant's discrimination claim:

(“..the Measures claimed by Mercer are twofold. First, Mercer claims that BCUC Order G-48-09 has applied a “net of load” standard to Celgar, preventing it from accessing embedded cost power to supply its load while it sells self-generated electricity.”); and Second Expert Report of Brent Kazcmerek (16 December 2014), ¶ 3 (“...BCUC Order G-48-09 prevented FortisBC from selling any electricity purchased from BC Hydro under the parties' 1993 power purchase agreement (the “1993 BC Hydro-FortisBC PPA”) while the self-generator was selling electricity. As FortisBC's generation and electricity purchases are commingled into a single resource stack, the practical impact of BCUC Order G-48-09 is that FortisBC is prevented from selling any electricity to self-generators that are selling their self-generated electricity (e.g., Celgar).”).

¹³ Award, ¶ 7.17.

¹⁴ Award, ¶¶ 7.23, 7.45.

¹⁵ Award, ¶ 7.45

¹⁶ Award, ¶ 7.33 (emphasis added).

[...] 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."¹⁷

10. After analysing the parties' evidence over several paragraphs,¹⁸ the Tribunal agreed with Canada and found:

[I]t 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]. 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.¹⁹

11. Since the Claimant relied on the same factual premise for its Articles 1102 and 1103 claims with respect to Order G-48-09, the Tribunal's factual determination here fully answers the Claimant's argument under Articles 1102 and 1103. It is thus again made clear that the Claimant's Request asks the Tribunal to reconsider its decision and reasoning, which it is not permitted to do under Article 57.

12. The Claimant's assertion that the Tribunal omitted to decide "the question of Mercer's claim for damages due to Order G-48-09"²⁰ is equally incorrect. The Tribunal considered all of the evidence and squarely decided the issue in substance.

¹⁷ Award, ¶ 7.65.

¹⁸ Award, ¶¶ 7.66-7.75.

¹⁹ Award, ¶ 7.79.

²⁰ Claimant's Request for Supplementary Decision, ¶ 12 ("The Award makes clear that the Tribunal omitted deciding the question of Mercer's claim for damages due to Order G-48-09.").

Putting aside the impropriety of the Claimant's assertion that tribunals should assess claims for damages where liability has not been established, the Tribunal did, in fact, make a decision concerning the Claimant’s damages with respect to Order G-48-09. This is apparent on the face of the Award and is reconfirmed when the Claimant’s allegations are set alongside key sections of the Tribunal’s decision:

<p>Claimant’s Reply Memorial, ¶¶ 200-205 [emphasis added]</p>	<p>Tribunal’s Award, ¶¶ 7.38-7.40</p>
<p>200. Canada also contends that this [redacted] somehow eliminates any discrimination or that it reduces Mercer’s damages, in respect of Mercer’s claim based on Order G-48-09’s imposition of a net-of-load standard. In making this argument, Canada appears to be distinguishing (1) harm caused by Order G-48-09, from (2) harm caused by the establishment of a discriminatorily high GBL for Celgar. ...</p> <p>201. ... <u>Mercer disagrees that it is possible to separate the harm caused by the two Measures, because they are interrelated.</u> ...</p> <p>202. ... Mercer agrees with Canada, that, as a result of [redacted] <u>Mercer is entitled to, and Mercer has sought, only damages arising from its discriminatory, excessive GBL.</u> Specifically, Mercer claims damages only based on Celgar’s 349 GWh/year GBL, and not based on its higher current load [redacted] 229). <u>Mercer claims no damages from not being able to sell power below its current load but above its 349 GWh/year GBL;</u> it has capped its damages based on its GBL of 349 GWh/year, and the 2007 load on which it was based. ...</p> <p>204. ... If this is what Canada means when it contends that Celgar’s less favorable treatment under Order G-48-09 “disappears in the face of its [redacted]</p>	<p>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.</p> <p>7.39 In summary, the Claimant submitted (inter alia) in its Reply that the [redacted] does allow Celgar to [redacted] 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]”</p> <p>7.40 Thus, the Claimant only claims damages arising from the Respondent’s alleged liability regarding Celgar’s GBL. The Claimant does not seek further or separate damages resulting from Order G-48-09 itself. Given that the Tribunal has dismissed the Claimant’s case</p>

<p>arrangement with BC Hydro,” then Mercer agrees.</p> <p>205. Put another way, as Mercer laid out in its Memorial, <u>the Tribunal’s initial task with respect to damages is to determine the GBL Celgar should have received to afford it treatment comparable to the best treatment afforded any comparator. The difference between that GBL and Celgar’s 2009 EPA GBL of 349 GWh/year will reflect the additional quantum of electricity Celgar should have been permitted to sell.</u> Mercer’s damages then are based on the diminution in Celgar’s enterprise value resulting from the loss of that revenue stream (less Celgar’s cost to procure replacement electricity). <u>Mercer does not claim additional or separate damages resulting from Order G-48-09’s net-of-load restriction,</u> because, as Canada correctly contends, [REDACTED]</p>	<p>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.</p>
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13. The Claimant’s suggestion that the Tribunal’s decision was “mistaken” because damages from Order G-48-09 are “separate” from damages due to the GBL set by BC Hydro²¹ is not only irrelevant, but contradicts the Claimant’s own pleadings.²² Article 57 is not an avenue to challenge decisions made by a tribunal or to have a tribunal “supplement the reasoning of its existing decision.”²³ The question the Claimant alleges was omitted from the Award was plainly answered. The Claimant simply appears to be unhappy with the result. The Request is improper and should be rejected.

²¹ Claimant’s Request for Supplementary Decision, ¶¶ 2, 6-8.

²² Claimant’s Reply Memorial, ¶¶ 200-205.

²³ *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05 (Decision on the Requests for Correction, Supplementary Decision and Interpretation (redacted version), 10 July 2008), ¶ 12.

IV. CONCLUSION

14. The Request is beyond the scope of Article 57. The Tribunal decided that the Claimant's claim with respect to Order G-48-09 had no merit, and it is not open to the Tribunal to reconsider or supplement its decision or reasons. Canada has incurred costs responding to the unjustified Request and therefore seeks its costs, in addition to the costs that it has already been awarded by the Tribunal.

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*Respectfully submitted
on behalf of Canada,*



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