UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEMBEC INC., TEMBEC INVESTMENTS INC., TEMBEC INDUSTRIES INC.,	
Petitioners,	
v.	**No. 07-CV-1905 (RMC)**
UNITED STATES OF AMERICA,	
Respondent.	

TEMBEC'S OPPOSITION TO UNITED STATES' MOTION TO DISMISS

Tembec has petitioned to vacate the NAFTA Article 1126 tribunal's costs award, dated July 19, 2007, and released to Tembec on August 2, 2007 ("Costs Award").[1] The Costs Award was issued after this Court's April 19, 2007 decision in case number 05-CV-2345, which addressed the terms of the Settlement of Claims Agreement ("SCA") contained in the Softwood Lumber Agreement of 2006 ("SLA").[2] This Court previously ruled that Tembec could not re-instate that action to challenge an interim award of the NAFTA Article 1126 tribunal dated September 7, 2005, consolidating Tembec's arbitration with those of two other Canadian Lumber producers ("Consolidation Award"). This lawsuit respects the Court's ruling. It concerns a new and different award never previously before the Court. Consequently, it is not barred by *res judicata* or collateral estoppel.

[1] *See Canfor Corporation v. United States, Tembec et al v. United States, Terminal Forest Products Ltd., v. United States*, Joint Order on the Costs of Arbitration and for the Termination of Certain Arbitral Proceedings, attached as Exh. 1.

[2] *See* Settlement of Claims Agreement, attached as Exh. 2.

Res judicata bars the assertion of *claims* or *causes of action* that were decided or could have been decided in a prior lawsuit. Tembec could not have sought vacation of the Costs Award as part of the prior litigation because the Costs Award did not exist prior to the Court's decision. The Costs Award gives rise to a new claim.

In its prior decision, the Court did not address any of the issues raised by this challenge to the Costs Award and, therefore, the doctrine of issue preclusion also does not apply. Issue preclusion applies only when an issue in a prior case was finally adjudicated.

The United States relies upon the SCA to argue that this case is barred, but the very terms of the SCA preserve Tembec's right to bring this action. The United States and Tembec agreed in the SCA that the stipulated dismissal of case number 05-CV- 2345 "is without prejudice to the position of any party to this [SCA] on any issue in any action referenced in this [SCA]."

Tembec does not seek to re-litigate any of the issues previously decided by this Court. Thus, the United States' arguments concerning re-litigation of the negotiation of the SCA and SLA documents are not at issue, and the United States' motion to dismiss should be denied.

I. STATEMENT OF FACTS

A. The *Softwood Lumber* Dispute

The United States initiated antidumping and countervailing duty investigations on softwood lumber imported from Canada in April 2001, imposing duties as high as 29%. Tembec and other Canadian lumber producers repeatedly challenged the legality of these duties. Time and again, arbitration panels convened pursuant to the North American Free Trade Agreement ("NAFTA") concluded that the duties were

unlawful under United States law and international trade agreements. The United States collected more than $5 billion in duty deposits from Tembec and other Canadian lumber companies while litigation continued over enforcement of these agency determinations.

On July 21, 2006, the U.S. Court of International Trade, in a case in which Tembec was the lead plaintiff, finally held the duties unlawful and declared the United States' conduct *ultra vires* and void. *Tembec v. United States*, 441 F. Supp. 2d 1302 (CIT 2006). The duty deposits, however, were never fully reimbursed because the United States and Canada entered into the Softwood Lumber Agreement of 2006 the day before the Court of International Trade ordered full refunds, on October 13, 2006.

The *Softwood Lumber* dispute engaged the leaders and cabinet officers of both countries for more than five years. The U.S. Commerce Secretary, U.S. Trade Representative (who is in the Executive Office of the President) and Secretary of State, personally spent considerable time on the issue.[3] President Bush was personally involved both with his cabinet and with Canadian leaders, including especially in a November 2004 meeting with Canada's then Prime Minister Paul Martin, and in later meetings with Canada's current Prime Minister, Stephen Harper.

[3] *See, e.g., Trade: Hearing of the Senate Finance Committee*, 107th Cong. (2002) (Statement of Robert Zoellick, U.S. Trade Representative). Ambassador Zoellick boasted that he was personally involved in the softwood lumber dispute, stating, "[I]n general on softwood lumber, you and I are actually in very close agreement in that, as you know, we backed the cases that were filed by the coalition, including – I personally, while it was a commerce decision, suggested the critical circumstances finding which was important along the way, was the one that was appropriate. And so we now do have the preliminary countervailing duty and anti-dumping duties." Ambassador Zoellick thus adopted and pursued a position contrary to Tembec's interests without the results of agency investigations.

B. The NAFTA Article 1120 Arbitrations

The unlawful duties inflicted severe damage on Canadian lumber companies. Between November 2001 and March 2004, three Canadian lumber companies initiated arbitration claims against the United States under NAFTA Article 1120, which allows an award of money damages when a NAFTA signatory engages in arbitrary, unfair, and discriminatory conduct towards the nationals of another signatory. The imposition of unlawful duties was such conduct, according to the three claimants. Canfor Products Corp. ("Canfor") filed its statement of claim in November 2001, and Tembec filed one in December 2003.[4] Terminal Forest Products Ltd. ("Terminal") filed a notice of arbitration in March 2004 but never sought to appoint a tribunal.[5] The arbitrations were administered by the International Centre for the Settlement of Investment Disputes ("ICSID"), an agency of the World Bank. In the Canfor and Tembec arbitrations, the claimants and the United States each appointed one arbitrator and the chairman was chosen by consent of both parties.

From the outset, Tembec, Canfor, and the Canfor tribunal all questioned the United States whether it intended to seek consolidation of the arbitrations under NAFTA Article 1126. Tembec inquired as early as January 2004. The United States told the Canfor tribunal, "I can assure you that we have given [consolidation]

[4] *In the Matter of Tembec et al v. United States*, Notice of Arbitration and Statement of Arbitration Claim (Dec. 3, 2003) (hereinafter "Tembec's Statement of Claim"), available at http://www.naftaclaims.com/Disputes/USA/Tembec/Tembec-Claim.pdf (last visited March 13, 2008).

[5] See *In the Matter of Canfor Corp. v. United States*, Notice of Arbitration and Statement of Claim (July 9, 2002) available at http://www.naftaclaims.com/Disputes/USA/Canfor/Canfor%20Notice%20of%20Arbitration%20and%20Statement%20of%20Claim.pdf (last visited March 13, 2008); *In the Matter of Terminal Forest Products Ltd. v. United States*, Notice of Arbitration (March 30, 2004) available at http://naftaclaims.com/Disputes/USA/Terminal/TerminalNoticeOfArbitration.pdf (last visited March 13, 2008).

considerable thought, that we have no intention of invoking Article 1126 in this proceeding [the consolidation provision]."[6] The United States participated in the separate tribunals until both were nearly finished addressing jurisdictional challenges raised by the United States. Only then, after developing a substantial acquaintance with both tribunals (and losing procedural motions) did the United States move to dispose of both of them.[7]

On March 7, 2005 – fifteen months into the Tembec arbitration – the United States asked ICSID to appoint a new tribunal under NAFTA Article 1126 to consolidate the Tembec, Canfor, and Terminal claims.[8] Canfor had already completed a jurisdictional hearing and was awaiting a decision; Tembec had completed jurisdictional briefing and was preparing for a hearing.[9]

C. NAFTA Article 1126 Consolidation

According to NAFTA Article 1126, the ICSID Secretary General appoints the three arbitrators to a consolidation tribunal – as opposed to the consensual appointment process under Article 1120. ICSID's consistent practice during its forty years of existence has been to vet appointments with the parties to ensure they are acceptable.[10] ICSID, however, abandoned its established practice in this case. Without

[6] *In the Matter of Canfor Corp. v. United States*, Hearing Transcript, vol. 3 (Dec. 9, 2004) at p. 112 (Ms. Menaker, representing the United States) available at http://www.naftaclaims.com/Disputes/USA/Canfor/Canfor-Jurisdiction-Transcript-DayThree.pdf.

[7] The United States' appointee to the Canfor tribunal, Conrad Harper, resigned on March 2, 2005 after being questioned by Canfor about an undisclosed conflict. The United States refused to make a timely appointment to replace Mr. Harper. The United States used his recusal as pretext to dispose of the two tribunals.

[8] Letter from Mark A. Clodfelter to Roberto Dañino (Mar. 7, 2005) attached at Exh. 3.

[9] Terminal did not take further action to pursue its claim after filing its Notice of Arbitration in March 2004.

[10] *See* Ibrahim F.I. Shihata and Antonio R. Parra, "The Experience of the International Centre for Settlement of Investment Disputes," 14 *ICSID Review Foreign Investment Law Journal* 299 (Fall 1999).

(continue)

consulting with the parties, ICSID named Dr. Albert Jan van den Berg of The Netherlands, Mr. Davis R. Robinson of the United States, and Mr. L. Yves Fortier of Canada as arbitrators to the consolidation tribunal.[11] The Parties, therefore, did not have the opportunity to conduct due diligence and inform ICSID of potential issues with the appointees before they had been named.

The United States immediately objected to the appointment of Mr. Fortier on the basis that his former law firm had been involved with representing Canadian parties in the United States' trade proceedings, even though Mr. Fortier had no personal involvement in the representation and the lawyers involved already had left his firm. Mr. Fortier immediately withdrew, which has been the long-standing customary practice among international arbitrators.[12] ICSID then appointed Professor Armand de Mestral of Canada in place of Mr. Fortier.[13]

Upon being named, Mr. Robinson did not disclose any relationship to President George W. Bush. During its due diligence, however, Tembec found a family tree on the Internet indicating that a person bearing the name "Davis Robinson" was a member of the Bush inner family. On May 2, 2005, Tembec wrote to ICSID to inquire

---

(continued)
Mr. Parra, ICSID's Deputy Secretary-General, wrote of the pre-appointment consultation process: "As a result of such consultation, most of the appointments of the Chairman have been made with the express concurrence of the parties. A party cannot, however, veto a particular appointment by the Chairman. Obviously unreasonable objections by a party are unlikely to affect such an appointment. The fact remains that none of Chairman's appointments to date has been made over a party's objections to the appointee." *Id.* at 312. Mr. Parra added, "This useful procedure, of consulting with the parties to the extent possible before making an appointment, has also generally been employed by the Secretary-General when he has acted as the appointing authority of ad hoc arbitrators." *Id.* at 354-355.

[11] Letter from Gonzalo Flores to the Parties (April 19, 2005) attached at Exh. 4.

[12] *See* Letter from Gonzalo Flores to the Parties (May 4, 2005), attached at Exh. 5. *See also* Declaration of Ronald A. Cass, attached at Exh. 6.

[13] *See* Letter from Gonzalo Flores to the Parties (May 4, 2005), attached at Exh. 5.

as to whether Mr. Robinson was related to President Bush, and to the nature of any relationship, so Tembec could determine whether to challenge Mr. Robinson's appointment as giving rise to "justifiable doubts as to the arbitrator's impartiality or independence" under Article 10 of the UNCITRAL Rules (the applicable procedural rules under NAFTA Article 1126).[14]

ICSID responded in a letter on Friday, May 6, 2005, confirming the three appointments and attaching a statement from Mr. Robinson.[15] He revealed for the first time that he is married to Suzanne Walker, a first cousin (once removed) of the President of the United States, George Walker Bush.[16]

Mr. Robinson was a close enough member of the Bush family to have been appointed as the Legal Adviser in the U.S. State Department while George Herbert Walker Bush held the office of Vice President of the United States. Mr. Robinson also was appointed by President George Walker Bush as one of four U.S. representatives on the ICSID Panel of Arbitrators.[17] Tembec subsequently discovered, without Mr. Robinson's disclosure, that Mr. Robinson has supported loyally his wife's cousins in their presidential campaigns over three decades,[18] and has benefited from

[14] *See* Letter from Elliot J. Feldman to Jose Antonio Rivas (May 2, 2005) attached at Exh. 7.

[15] *See* Letter from Gonzalo Flores to the Parties (May 6, 2005) attached at Exh. 8.

[16] Letter from Davis R. Robinson to Gonzalo Flores (May 6, 2005) attached at Exh. 9.

[17] *See* Public Papers of the Presidents, Digest of Other White House Announcements (May 23, 2002) attached at Exh. 10. Mr. Robinson denied in his May 6, 2005 letter having received appointments in two different Republican administrations. The appointment he did not acknowledge or disclose was the Presidential assignment as an ICSID arbitrator.

[18] According to www.politicalmoneyline.com, a nationally-acclaimed Internet website that monitors Federal Election Commission data, Mr. Robinson and Mrs. Robinson repeatedly have made maximum contributions to Bush family political campaigns dating back to 1979. *See* documents attached at Exh. 11.

the relationship with presidential appointments and other opportunities, including foreign travel with his wife as personal delegates of the President.[19]

As Legal Adviser, Mr. Robinson was the principal legal counsel to the United States on foreign policy matters and represented the United States in international legal disputes.[20] The Office of the Legal Adviser represents the United States in investor-state arbitrations and has conducted the United States' defense against Tembec's claims before the NAFTA Article 1120 and Consolidation Tribunals.

Tembec, thus, was being forced to arbitrate its claim before the cousin and former chief lawyer for the chief executive of the opposition. With President Bush acting directly on the matter in dispute, Mr. Robinson's relationship violated several provisions of the International Bar Association's Guidelines for conflicts of interest in international arbitrations.[21] His failure to disclose his relationship was a serious breach of the responsibilities of arbitrators recognized by the U.S. Supreme Court and most arbitration rules.[22] The UNCITRAL Arbitration Rules, which governed this arbitration, required disclosure of "any circumstances likely to give rise to justifiable doubts as to his

[19] For example, President George Herbert.Walker Bush sent Mr. and Mrs. Robinson on travel overseas as part of a United States delegation. *See* Christopher Connell, *Bush Makes Global Relations a Family Affair: Having a Relative in the White House has its Privileges*, Associated Press, (Dec. 1, 1991) attached at Exh. 12 ("Suzanne Robinson, a Bush cousin, and her husband Davis Robinson, a former State Department lawyer, were in the official U.S. party that attended the dedication of a new wing of the Polish-American Children's Hospital in Krakow, Poland. Pope John Paul II also attended the ceremony in his hometown, along with Polish President Lech Walesa.").

[20] *See* U.S. Department of State: Office of the Legal Adviser website, *available at* http://www.state.gov/s/l/ (last visited March 14, 2008).

[21] *See* Letter from Elliot J. Feldman to Gonzalo Flores (May 20, 2005) at 2, attached as Exhibit 13.

[22] *See generally Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145 (1968).

impartiality or independence." Strict disclosure requirements are essential to ensure the integrity of the arbitration process.[23]

On Monday, May 9, 2005, the United States requested that the Consolidation Tribunal issue an order to stay Tembec's Article 1120 arbitration proceedings in light of the immediate need, in its view, to prevent a decision from the Canfor Article 1120 tribunal and a June 2-3, 2005 hearing on jurisdiction scheduled by Tembec's Article 1120 tribunal.[24] Tembec opposed the United States' request on that same day, pointing out that a stay would be premature because Tembec had not been allowed the fifteen days allotted under the UNCITRAL Rules to evaluate the startling information disclosed for the first time in Mr. Robinson's May 6 letter.[25]

On May 10, 2005, Canfor wrote to the parties to disclose another potential, undisclosed conflict of interest.[26] Canfor advised that Professor Armand de Mestral was of counsel to a law firm pursuing another NAFTA Chapter 11 claim against the United States, and that one of the co-counsel in Canfor also was acting as co-counsel with Professor de Mestral's firm in the other case.

On May 19, 2005, fewer than fifteen days after information had been disclosed regarding potential conflicts of interest for two of the three named arbitrators—Mr. Davis R. Robinson and Prof. Armand de Mestral—the Consolidation Tribunal ordered a stay of the Article 1120 proceedings pending its decision whether to

---

[23] *See id.* at 147-49.

[24] *See* Letter from Andrea J. Menaker to Prof. Albert Jan van den Berg *et al* (May 9, 2005) at 1 attached at Exh. 14.

[25] *See* Letter from Elliot J. Feldman to Gonzalo Flores and Jose Antonio Rivas (May 9, 2005) attached at Exh. 15.

[26] Letter from P. John Landry to Albert Jan van den Berg *et al* (May 10, 2005) attached at Exh. 16.

assume jurisdiction over the claims, and fixed an expedited schedule for determining the issue of consolidation without consulting any of the parties.[27]

On May 20, 2005, Tembec submitted a timely objection to Mr. Robinson's participation and to the premature action by the Tribunal in staying the Article 1120 proceedings.[28] The other Claimants joined Tembec's objection to Mr. Robinson, while the United States alone opposed.[29]

On June 1, the Tribunal decided to go forward despite the challenge, saying "[o]n the basis of the Tribunal's discretionary powers under the UNCITRAL Arbitration Rules, the consolidations [*sic*] proceedings are not suspended pending the challenge of Mr. Davis R. Robinson."[30] In response to the challenge, Mr. Robinson declined to follow the accepted international practice as Mr. Fortier had done; he responded that he "respectfully refuse[s] to withdraw as an arbitrator in this matter."[31] Because the process is intended to be consensual, international arbitrators routinely withdraw when one party (or in this case three parties) challenges them.[32] As Ronald

[27] *See* Letter from Gonzalo Flores to the Parties (May 19, 2005) attached at Exh. 17; *See also* Letter from Professor Armand de Mestral to Gonzalo Flores (May 20, 2005) attached at Exh. 18. Professor de Mestral disclosed his affiliation with the law firm mentioned in the Canfor letter only after the Article 1120 proceedings were stayed, and explained that he terminated his relationship with that law firm in order to continue his participation in the Consolidation Tribunal even before any decision could be taken whether the Consolidation Tribunal would have any long-term business to conduct.

[28] Letter from Elliot J. Feldman to Gonzalo Flores (May 20, 2005), attached at Exh. 13; Letter from Elliot J. Feldman to Albert Jan van den Berg *et al* (May 20, 2005) attached at Exh. 19. *See also* Letter from Elliot J. Feldman to Roberto Dañino (May 12, 2005) attached at Exh. 20 (indicating that the time for challenging Mr. Robinson's appointment would run until May 21, 2005, in accordance with Article 11 of the UNCITRAL Rules, permitting the parties fifteen days to challenge an appointment).

[29] *See* Letter from P. John Landry to Roberto Dañino. (May 24, 2005) attached at Exh. 21; Letter from Andrea J. Menaker to Roberto Dañino (May 24, 2005) attached at Exh. 22.

[30] Letter from Gonzalo Flores to the Parties (June 1, 2005) attached at Exh. 23.

[31] Letter from Davis R. Robinson to Antonio R. Parra (June 3, 2005) attached at Exh. 24.

[32] See Cass Declaration, attached at Exh. 6.

Cass, former Dean of the Boston University Law School affirmed: "... even the most experienced arbitrators whose reputations for fairness are strong routinely withdraw."[33]

Tembec's Article 1120 tribunal stayed its proceedings as instructed by the Consolidation Tribunal's decision and cancelled the Article 1120 tribunal's hearing on jurisdiction.[34]

Tembec submitted its challenge to Mr. Robinson to the ICSID Secretary-General on June 9, 2005, pursuant to UNCITRAL Article 11(3).[35] The Consolidation Tribunal proceeded as though it had obtained full consent and authorization from the parties, requiring written submissions regarding consolidation, and ordering the parties to appear at a hearing on consolidation on June 16, 2005.[36] ICSID's decision not to compel Mr. Robinson's withdrawal came on the morning of the first hearing with the Consolidation Tribunal, two of whose members had journeyed to Washington, D.C. from foreign countries, just thirty minutes before the hearing was scheduled to begin. Having placed himself in an untenable position by not vetting the tribunal appointees, the ICSID Secretary General discounted Mr. Robinson's familial relationship as "somewhat distant," and wrote, with little explanation, that his government service should not matter in "the NAFTA context."[37]

---

[33] *Id.*

[34] *See* Letter from Jose Antonio Rivas to Tembec and the United States (May 23, 2005) attached at Exh. 25.

[35] Letter from Elliot J. Feldman to Antonio R. Parra (June 9, 2005) attached at Exh. 26.

[36] Letter from Gonzalo Flores to the Parties (June 1, 2005) attached at Exh. 23.

[37] *See* Letter from Roberto Dañino to the Parties (June 15, 2005) attached at Exh. 27 (The facsimile notifying the Parties that ICSID would not sustain the challenge to Mr. Robinson's appointment was not sent until 9:04 p.m. on June 15, 2005, directed to a main office well after the close of business. Tembec and its counsel effectively did not receive notice of ICSID's decision until the morning of June 16, 2005, just before the Consolidation hearing was scheduled to begin at 10:00 a.m.).

The Consolidation Tribunal then decided virtually every argument in favor of the United States and consolidated the NAFTA Chapter 11 cases in the Consolidation Award dated September 7, 2005. Tembec had seen enough of a tribunal that included President Bush's cousin. It sought to withdraw from the proceeding and pursue its objections to the Consolidation Tribunal in this Court.

D. Tembec Requests And Obtains A Termination Of Proceedings

On December 7, 2005, Tembec filed its Petition to Vacate Arbitration Award, which challenged the Consolidation Award, and it wrote the Tribunal asking it to terminate the arbitration proceedings as to Tembec. The Tribunal granted Tembec's request and terminated the proceedings without "declar[ing] the termination … either with prejudice to reinstatement or without prejudice to reinstatement of Tembec's NAFTA claims …." The Tribunal reserved the issue of costs.[38]

Tembec's assessment of the Tribunal proved to be correct. Canfor and Terminal proceeded to argue the jurisdictional question before the Tribunal, despite their own misgivings. The Tribunal ruled against Canfor and Terminal on June 6, 2006, finding that it did not have jurisdiction over effectively all of their NAFTA Chapter 11 claims in connection with the softwood lumber duties.

E. The *Softwood Lumber* Dispute Settles

During 2006, the United States and Canada engaged in negotiations to settle the *Softwood Lumber* dispute, which intensified after the Court of International Trade declared the duties unlawful in *Tembec v. United States.* On October 12, 2006, the United States and Canada executed The Softwood Lumber Agreement of 2006

[38] January 10, 2006 Order at par. 1.3, attached at Exh. 28.

("SLA"), which purported to settle the *Softwood Lumber* dispute (within the first eighteen months of the SLA two arbitrations have been launched by the United States and after eighteen months at least two cases, besides this one, remain open). Canada needed concessions from Tembec, Canfor and Terminal to satisfy the United States' demands to settle the NAFTA Chapter 11 litigation. On October 11 and 12, 2006, Canfor, Terminal, Tembec, the Governments of Canada and the United States, through their various representatives, signed a "Settlement of Claims Agreement," ("SCA") which became Annex 2A of the SLA.[39]

The SCA parties agreed in paragraph 1 that the United States and Tembec "shall file a joint stipulation of dismissal in *Tembec et al. v. United States* (Civil Action No. 05-2345 (U.S. District Ct. for the District of Columbia))." In paragraph 8, the SCA states that, "No party … shall seek to hold any other party liable to pay its costs and expenses of litigation relating to any action referenced in this [SCA]." The parties agreed in paragraph 10 that they would not "re-file any of the actions" referenced in paragraph 1. The SCA also provided in paragraph 9 that it "is *without prejudice to the position of any party to this [SCA] on any issue in any action referenced in this [SCA].* (Emphasis added)."[40]

Based upon the SCA, the United States and Tembec directly negotiated a stipulation of dismissal. Tembec and the United States agreed to dismiss the litigation with prejudice subject to the terms of the SLA. Each party agreed to pay its own costs.

[39] *See* Exh. 2.

[40] *Id.*

When the dust of the negotiations had settled, all of the Canadian lumber companies received only 80 percent refunds of their duty deposits made over a five year period – even though the duties had been determined by the Court of International Trade's decision to have been unlawful from the outset. Tembec settled its claims with the United States, including its NAFTA Chapter 11 claims, even though it meant giving away twenty percent (approximately $77 million) of unlawful duty deposits and hundreds of millions of dollars more in damages that might have been won through its NAFTA Chapter 11 arbitration.

This windfall for the United States was enough as to Canfor and Terminal, but not as to Tembec. The United States wanted a few hundred thousand dollars more in a costs claim against Tembec alone, in retribution for aggressive litigation during the *Softwood Lumber* dispute.

F. Tembec Objects To The United States' Petition For Costs

On October 13, 2006, the very day the SLA was announced as in force, the United States wrote to the Consolidation Tribunal requesting an award of costs against only Tembec (Terminal had not even signed an SCA at that point). Tembec opposed the United States' request, and on November 9, 2006, filed a motion with this Court under FRCP 60(b) to reinstate the motion to vacate the Consolidation Award. The issue before the Court on Tembec's Rule 60(b) motion was whether the United States was permitted under the terms of the SLA and SCA to seek a costs award from the Consolidation Tribunal, and whether the stipulated dismissal was procured through mistake, misrepresentation or misconduct. The Court denied Tembec's motion on April 19, 2007, holding that the SLA and SCA did not prohibit the United States from pursuing a costs award from the Consolidation Tribunal, and that Tembec had not satisfied the

burden of showing mistake, misrepresentation or misconduct in order to reinstate the action to vacate the Consolidation Award.[41] The Court never reached the merits of the Consolidation Award, including Tembec's objections to the appointment of Davis Robinson or to the Tribunal's premature conduct.

G. Tembec's Opposition To The Costs Award

Tembec opposed the United States' request to the Consolidation Tribunal for costs on the merits and also re-asserted its objections to the Tribunal and its conduct.

ICSID delivered the Tribunal's Costs Award on August 2, 2007, awarding the United States $271,844.24.[42] These costs were in addition to the contributions already made by Tembec and the other parties for the Consolidation Tribunal's expenses. The Consolidation Tribunal members awarded themselves $930,294.80 for arbitration proceedings that never advanced to the merits of any party's claims.[43]

The Tribunal wrote that it awarded costs to the United States because Tembec became the "unsuccessful party" when the order terminating the proceedings for Tembec was issued. The Tribunal never reconciled this statement with its prior determination that the Tribunal did not have the "competence" to decide whether the termination was with or without prejudice to Tembec's claim. That approach contravenes the prevailing, historic view that costs are divided equally except for

[41] *See Tembec v. United States*, 2007 U.S. Dist. LEXIS 28952 (D.D.C. April 19, 2007)

[42] *See* Letter (Second) from Emilio Rodriguez Larrain to the parties, Aug. 2, 2007 attached at Exh. 1. The cover letter to the Costs Award said that the award was dated July 19, 2007, but no explanation for the date was provided.

[43] *See* Costs Award at par. 175, attached at Exh. 1.

extreme circumstances when a punitive award is required.[44] Moreover, the Tribunal did not follow its own "costs follow the event" theory with respect to the United States' unsuccessful attempt to keep Tembec in the arbitration proceedings. Instead, the Tribunal brushed the loss aside as merely "a consequence of Tembec's decision to withdraw in the first place."[45]

The award of $271,844.24 included $62,403.02 for arbitration costs and legal costs associated with the NAFTA Article 1120 tribunal. That tribunal, however, had been terminated upon the request of the United States, not Tembec, and the costs should have been decided by the Article 1120 tribunal because they were incurred prior to the Consolidation Tribunal's assumption of jurisdiction.

Of the more than one hundred Canadian lumber companies that had participated in arbitrations and litigation, only Tembec has been subject to a costs award.

H. Motion To Vacate Costs Award

On October 19, 2007, Tembec filed this Petition to Vacate Arbitration Award, objecting to the Costs Award, which had not been made at the time of this Court's prior decision. The United States has moved to dismiss on the grounds of *res judicata* and collateral estoppel, based upon this Court's earlier ruling in the case

[44] *See, e.g., Berschader v. Russian Federation*, SCC Case No. 080/2004, April 21, 2006 at paras. 215, 216 (Tribunal found that equally apportioning costs between parties was "in line with a clear tendency in international investment arbitrations not to order a losing private party to bear the winning government party's costs," and that "the same principle should be applied with regard to costs for legal representation.") (citations omitted); *see also, Mondev International Limited v. United States of America*, ARB(AF)/99/2, October 11, 2002 at para. 159 (declining to award costs to the United States even though claim had been defeated).

[45] Costs Award at par. 172, at Exh. 1.

seeking to challenge the Consolidation Award and upon the United States' interpretation of the SCA.

II. ARGUMENT

A. The New Costs Award Is A Post-Judgment Event That Could Not Have Been Litigated And Cannot Now Be Barred Under A Theory Of *Res Judicata*

The doctrine of *res judicata* precludes re-litigation of the same claim or cause of action; however, *res judicata* "does not bar a litigant from doing in the present what he had no opportunity to do in the past." *Drake v. Federal Aviation Administration*, 291 F.3d 59, 67 (D.C. Cir. 2002). Tembec had no opportunity to bring a cause of action challenging the NAFTA Consolidation Tribunal's Costs Award in its prior litigation before the Court because the Costs Award had not been issued. The Court rendered its decision on Tembec's Rule 60(b) motion on April 19, 2007. The Costs Award was completed on July 19, 2007 and delivered to Tembec on August 2, 2007.[46]

The courts have held that post-judgment events give rise to new claims. In *Lawlor v. Nat'l Screen Service Corp.*, 349 U.S. 322, 327-28 (1955), the Supreme Court held that a stipulated dismissal of plaintiff's antitrust claims with prejudice did not act as a bar to claims for identical conduct that occurred after the prior judgment. Plaintiffs brought an antitrust action against National Screen Service Corp ("NSSC") in 1942. The parties settled and the suit was dismissed "with prejudice" by the court without any findings of fact or law. Plaintiffs subsequently brought another suit against NSSC for anti-competitive conduct that occurred after the first case had been dismissed. The Supreme Court rejected NSSC's *res judicata* defense, saying,

[46] See Letter from E. Rodriguez Larrain to Elliot J. Feldman, Aug. 2, 2007, attached at Exh. 1.

> That both suits involved 'essentially the same course of wrongful conduct' is not decisive. … While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.

349 U.S. at 327-28.

The D.C. Circuit followed *Lawlor* in *Stanton v. District of Columbia Court of Appeals*, 127 F.3d 72 (D.C. Cir. 1997). Attorney John Stanton, had his law license suspended. In successive, annual petitions for reinstatement, he challenged substantive and procedural aspects of the original suspension proceeding. The D.C. Court of Appeals barred those arguments under *res judicata* because Stanton failed to raise them originally in the suspension hearing. He then filed a case in federal court challenging the constitutionality of the D.C. Court of Appeals' procedures for reinstatement, seeking prospective relief. The D.C. Circuit rejected arguments for a *res judicata* defense, stating:

> Federal law is clear that post-judgment events give rise to new claims, so that claim preclusion is no bar. Thus, if the plaintiff alleges a combination in restraint of trade, a new cause of action accrues each time it operates against him, and previous judgments do not bar repeated challenges.

[citing *Lawlor*]. 127 F.3d at 78. The court then held that even if Stanton could have raised the facial challenges to the reinstatement law in prior proceedings, he was not barred from raising them in a subsequent action "so long as they concern post-judgment events," which they did because they would "govern future petitions for reinstatement." *Id.* at 79.

In *Drake v. Federal Aviation Administration*, 291 F.3d 59 (D.C. Cir. 2002), flight attendant Richard Drake was fired from Delta Airlines for failing random employee

drug tests administered by the airline and required by the FAA. Drake sued Delta, alleging, *inter alia*, that its drug testing procedures violated FAA regulations. That aspect of Drake's suit was dismissed by a federal court in New York. *See id.* at 64. Drake then requested the FAA to investigate what he alleged to be illegalities in Delta's processing of his test sample. Before the FAA's investigation could be completed, Drake sued the FAA arguing that its drug testing regulations violated the Fourth Amendment of the Constitution and procedural due process. *See id.* at 64. The FAA subsequently completed its investigation of Delta and reported to Drake that it had not found any violations by the airline. Drake then filed another suit against the FAA, this time alleging that it had conspired with Delta to reach an unreasonable determination about Delta's regulatory compliance, and that the agency had disregarded its own regulations by not providing Drake with certain information from the investigation. *See id.* at 65.

The district court dismissed both cases, the second on grounds of *res judicata*. The Court of Appeals disagreed that *res judicata* barred the claims in the second case. The agency had not told Drake the contents of its investigative report, nor reached a determination on the requested information, until at least four months after the first complaint had been filed. The Court explained:

> *Res judicata* does not preclude *claims* based on facts not yet in existence at the time of the original action. …. So it is here. The doctrine does not bar a litigant from doing in the present what he had no opportunity to do in the past.

Id. at 66-67 (citation omitted).

Tembec's Petition to Vacate the Costs Award is based on a new claim that could not have been raised during the prior litigation. The claim, as defined by the

Federal Arbitration Act, is to "vacate … an award." 9 U.S.C. §12. Factually, Tembec could not have brought a claim to vacate the Costs Award in the prior litigation because the Costs Award did not exist. The District Court issued its judgment with respect to Tembec's Rule 60(b) motion on April 19, 2007. The Costs Award was written on July 19, 2007 and delivered to Tembec on August 2, 2007.

Tembec also could not have brought a cause of action to vacate the Costs Award as a matter of law. Section 12 provides that notice of a motion to vacate must be provided "within three months *after* the award is filed or delivered." *See id.* (emphasis added). Consequently, Tembec could seek to vacate the Costs Award only after it was delivered, which occurred only after the judgment rendered in the prior litigation.

B. Issue Preclusion Does Not Apply Because None Of The Issues In Tembec's Petition To Vacate The Consolidation Order Was Adjudicated

The United States asserts that the stipulation of dismissal precludes the assertion of not only the prior claim, but also any issues that were raised and not adjudicated in the prior claim. That assertion confuses the application of *res judicata* and collateral estoppel. It is true that a stipulated dismissal of a *claim* with prejudice precludes the same *claim* from being raised again, even when not adjudicated on the merits, but the rule is different for issue preclusion.

Under the doctrine of collateral estoppel (or "issue preclusion"), a judgment precludes re-litigation of *issues* that were actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Collateral estoppel does not apply, however, where the issue sought to be precluded arises from a stipulation or a judgment by consent. *See United States v. Int'l Building Co.*, 345 U.S. 502 (1953); *Lawlor*, 349 U.S. at 326; *Levinson v. United States*,

969 F.2d 260 (7th Cir. 1992) (fraud issue was not actually litigated in prior proceeding because it was dismissed by consent of the parties).

The seminal decision on this issue was rendered by the Supreme Court in *United States v. Int'l Building Co.* There, a taxpayer claimed that a prior consent decree stipulating he owed no tax deficiency for three tax years barred the IRS from litigating a similar deficiency claim for subsequent tax years. The Supreme Court rejected this argument because the issue of the tax liability had not been litigated and determined on the merits in the consent decree. 345 U.S. 502 (1953). The parties settled their controversy for reasons undisclosed, and the Court was not able to tell whether the agreement of the parties was based on the merits or on some collateral consideration. *Id*. at 505. The consent judgment entered by the lower court merely was *pro forma* acceptance by the court of the agreement between the parties. The Supreme Court concluded that, unless an issue was adjudicated on the merits, the doctrine of estoppel by judgment would serve an unjust cause, as "it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits." *Id*. at 506.

Similarly, in *Lawlor*, the Supreme Court found that the prior consent judgment, dismissed with prejudice, was "unaccompanied by findings and hence did not bind the parties on any *issue*…which might arise in connection with another cause of action." *Lawlor*, at 327 (emphasis added).

None of the issues raised in Tembec's Petition to Vacate the Consolidation Award ever was litigated and determined by the Court. There were no findings of fact or law. None of the issues from the Petition to Vacate the Consolidation

Award is precluded by the doctrine of issue preclusion from being raised in this separate action to vacate the subsequent Costs Award.[47] In fact, just the opposite is true: the SCA specifically preserved both parties' positions on the issues.

C. The SCA Does Not Prohibit This Action But It Does Prohibit The United States' Assertion Of Issue Preclusion

The SCA specifically prohibits the United States from asserting issue preclusion here based on any prior litigation that was the subject of the SCA. Paragraph 9 states that the SCA is "without prejudice to the position of any party to this [SCA] on any *issue* in any action referenced in this [SCA]." *See* SCA, par. 9 (emphasis added) at Exh. 2. Thus, even were issues of (a) the arbitrators' biases and misconduct; (b) whether the arbitrators exceeded their powers; and (c) whether the arbitrators issued a decision contrary to public policy adjudicated by the Court in the prior action (which also was listed in the SCA), the United States is estopped by its agreement with Tembec in the SCA from asserting issue preclusion.

The United States suggests that the SCA bars this action because paragraph 10 does not allow a party to "re-file" an action. This action, however, is not a "re-filing" of a prior action nor could it have been. Here, Tembec seeks to vacate the Costs Award, which did not exist at any time during the prior litigation and, for the reasons provided

[47] Even had there been findings that the arbitrators did not demonstrate evident partiality, those findings would not necessarily be binding in a subsequent proceeding. In *Aviall v. Ryder*, 110 F.3d 892 (2nd Cir. 1997), the Court of Appeals for the Second Circuit held that neither issue preclusion nor the law of the case doctrine would apply to a future challenge of an arbitration award where the district court had opined that there was no evidence of partiality among the arbitrators. The district court in *Aviall* had ruled that the petitioners were not allowed to sue for substitution of the arbitrators prior to the issuance of an award, and that there did not appear to be evident partiality in any case. The Second Circuit said that the issue of the arbitrators' partiality was not material to the district court's decision, and that Aviall had not received a full and fair opportunity to litigate the issue. Thus, it could not be asserted as issue preclusion once Aviall brought a challenge to the final arbitration award. *See* 110 F.3d at 897-898. In this case, there have been no findings as to the arbitrators' partiality or misconduct, so there can be no issue preclusion.

above, could not have been the subject of the prior litigation factually or as a matter of law.

D. The New Costs Award Raises New Issues

New issues necessarily are raised in this petition because its subject is a previously non-existent arbitration award. Whether the arbitrators exceeded their powers in issuing the Costs Award, and whether the Costs Award violates public policy concerns, are new issues relating to the new award.

The Costs Award also raises new issues regarding the arbitrators' partiality and misconduct. The Tribunal's misconduct in deciding that the "unsuccessful party" pays the other side's fees while refusing to apply that norm to the United States arises in the context of a new award and a new record.

An arbitration award, even in the absence of any allegations of arbitrator misconduct, can demonstrate such "evident partiality" among the arbitrators that a court may decide to vacate the award. *See Tinaway v. Merrill Lynch*, 658 F.Supp. 576, 578-579 (S.D.N.Y. 1987) (vacating award for arbitrators' "evident partiality" where drastic reduction of claimant's award was inexplicable). Some cases also have suggested that a court must scan the record to see whether there is evidence corroborating the arbitrators' partiality, *Saxis S. S. Co. v. Multifacs Intern. Traders, Inc.*, 375 F.2d 577 (2nd Cir. 1967), and a new award necessarily means there is a different record to be scanned.

The Court has settled whether the SCA permitted the United States to submit a claim for costs to the Consolidation Tribunal when Tembec and the United States had stipulated a dismissal of prior litigation before the Court, and that issue will not be in dispute in the forthcoming briefing on the motion to vacate the Costs Award.

However, the grounds for vacatur of the Tribunal's Costs Award were not and could not have been raised until the Costs Award became available, after the prior litigation had concluded. These issues are new, therefore, and subject to adjudication in this case.

E. Tembec Does Not Seek To Re-Litigate Issues Adjudicated By The Court

The United States objects to Tembec's restatement of facts, mistaking it for a forecast of issues to be litigated. Tembec has no intention of re-litigating issues already adjudicated by the Court. Thus, the United States' arguments that Tembec seeks to re-litigate issues in the Rule 60(b) motion from prior litigation, U.S. Motion at 13-17, are moot.

CONCLUSION

For the foregoing reasons, the Court should deny the United States' motion to dismiss.

Respectfully submitted,

/s/

Elliot J. Feldman (D.C. Bar No. 418501)
Mark A. Cymrot (D.C. Bar No. 164673)
Michael S. Snarr (D.C. Bar No. 474719)
BAKER & HOSTETLER LLP
1050 Connecticut Ave. N.W.
Suite 1100
Washington D.C. 20036-5304
Tel: (202) 861-1679
Fax: (202) 861-1783
Counsel for Petitioners

Dated: March 14, 2008