UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEMBEC INC., TEMBEC INVESTMENTS INC., and TEMBEC INDUSTRIES INC.,	)	
Petitioners,	)	
v.	)	No. 07-CV-1905 (RMC)
UNITED STATES OF AMERICA, et al.,	)	
Respondents.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

The Court should dismiss the Petition to Vacate Arbitration Award filed by Tembec Inc., Tembec Investments Inc., and Tembec Industries Inc. (collectively, "Tembec") on the grounds of res judicata and collateral estoppel. Res judicata applies to the issues in the Petition that were raised in a prior case with the same parties, because that case was dismissed with prejudice in connection with a settlement of the underlying dispute. Collateral estoppel applies to each of the other issues in the Petition, because the Court determined those issues in denying Tembec's motion seeking to set aside the dismissal of the prior case under Rule 60(b) of the Federal Rules of Civil Procedure.

INTRODUCTION

On December 7, 2005, Tembec commenced the prior case by filing a Petition to Vacate Arbitration Award ("First Petition"), a copy of which is attached hereto as Exhibit A. Docket No. 1 in C.A. No. 05-2345. The First Petition challenged orders issued by a tribunal constituted under Article 1126 of the North American Free Trade Agreement ("NAFTA tribunal"), consolidating three arbitrations brought against the United States under Chapter Eleven of NAFTA by Canadian companies, including Tembec, that harvest timber and export softwood

lumber to the United States. The First Petition raised issues regarding the consolidation order entered by the NAFTA tribunal, the selection of the tribunal panel, and the tribunal's jurisdiction over Tembec's NAFTA Claim. While the First Petition was pending, the United States and Canada executed the Softwood Lumber Agreement of 2006 in order to resolve the underlying dispute as to duties imposed on such lumber exports, and the United States and Tembec executed the Settlement of Claims Agreement, by which Tembec agreed to dismiss the First Petition and also agreed not to refile it. On October 17, 2006, the Court approved the parties' Stipulation of Dismissal with Prejudice. Docket No. 25 in C.A. No. 05-2345. Tembec received $242 million in connection with the resolution of the underlying dispute.

Meanwhile, the United States pursued its application for attorney fees and tribunal costs in the NAFTA arbitration proceeding, which was filed in April of 2006 and was not subject to the Settlement of Claims Agreement. Tembec filed a "Rule 60(b) Motion to Set Aside the Judgment" in the prior case, raising issues regarding the parties' negotiations and the interpretation of the settlement documents. Docket No. 26 in C.A. No. 05-2345. The Court denied that motion by memorandum opinion dated April 29, 2007, a copy of which is attached hereto as Exhibit B. Docket Nos. 26, 35.

On October 19, 2007, after the NAFTA tribunal awarded attorney fees and tribunal costs to the United States in the arbitration proceeding, Tembec commenced the present case by filing the Petition to Vacate Arbitration Award ("Second Petition"), a copy of which is attached hereto as Exhibit C, seeking to vacate the NAFTA tribunal's fee award and its prior orders. The Second Petition raises issues regarding the NAFTA tribunal's consolidation order, the selection of the tribunal panel, the tribunal's jurisdiction over Tembec's NAFTA Claim, and the parties' negotiations and the settlement documents. Docket No. 1 in C.A. No. 07-1905.

Res judicata bars Tembec from relitigating issues regarding the NAFTA tribunal's consolidation order, the selection of the tribunal panel, and the tribunal's jurisdiction over Tembec's NAFTA Claim, because such issues were included in the First Petition, and the prior case was dismissed with prejudice. Collateral estoppel bars Tembec from relitigating issues regarding the parties' negotiations and the settlement documents, because such issues were determined by the Court in denying Tembec's Rule 60(b) Motion. In addition, the filing of the Second Petition violates the Settlement of Claims Agreement, which bars Tembec from refiling the claims included in the First Petition.

STATUTORY BACKGROUND

The Federal Arbitration Act ("Act"), 9 U.S.C. §§ 1 et seq., provides limited grounds for a District Court to vacate an arbitration award. See Bryson v. Gere, 268 F. Supp.2d 46, 50 (D.D.C. 2003)). Under the Act, such an award may be vacated:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1-4).

The United States has a policy of "favoring arbitration" and "rigorously enforc[ing] agreements to arbitrate," and therefore avoiding unnecessary judicial involvement in that process. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (quotations omitted). The standard of review of arbitral awards by federal courts is extremely high, making such review "extremely limited." Teamsters Local Union No. 61 v. UPS, 272 F.3d 600, 604 (D.C. Cir. 2001). Courts "do not sit to hear claims of factual or legal error by an arbitrator." Id. (quotation omitted). In the absence of a legal basis to vacate, courts have "no discretion but to confirm the award." International Thunderbird Gaming Corp. v. United Mexican States, 473 F. Supp. 2d 80, 83 (D.D.C. 2007); 9 U.S.C. § 9.

Pursuant to this limited scope of review under the Act, "a court must confirm an arbitration award where some colorable support for the award can be gleaned from the record." LaPrade v. Kidder, Peabody & Co., 94 F. Supp. 2d 2, 4 (D.D.C. 2000), aff'd, 246 F.3d 702, 706 (D.C. Cir. 2001). The party seeking to vacate an arbitration award bears the "heavy burden" of establishing that vacatur is appropriate. LaPrade, 246 F.3d at 706; Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996); Int'l Thunderbird Gaming, 473 F. Supp.2d at 83. In particular, the applicable rules provide an arbitration panel with "wide discretion to award costs and fees." Id. at 85.

FACTS AND PROCEEDINGS

A. The First Petition

The First Petition involved a dispute regarding subsidies received by softwood lumber producers, including Tembec, that harvest timber on public Canadian land and export lumber to the United States, and arbitration commenced under the investment chapter of the NAFTA with respect to that dispute. See Ex. A ¶ 2; Ex. B at 1-2. In the arbitration proceeding, Tembec

asserted a claim against the United States ("NAFTA Claim"), seeking to recover "more than $200 million," see Ex. A ¶ 6, for harm alleged to have arisen from antidumping and countervailing duty determinations made by the United States Department of Commerce and the International Trade Commission that resulted in the imposition of duties on softwood lumber exports from Canada. See Ex. A ¶¶ 4-6; Ex. B at 1-2. By order dated September 7, 2005 ("Consolidation Order"), the NAFTA tribunal consolidated three similar arbitrations brought under Chapter Eleven of NAFTA against the United States by Tembec and other Canadian companies that export softwood lumber to the United States. See Ex. A ¶ 2; Ex. B at 2.

Tembec filed the First Petition on December 7, 2005, seeking to vacate the Consolidation Order under 9 U.S.C. § 10, raising issues regarding the NAFTA tribunal's Consolidation Order, the selection of Davis Robinson as a member of the tribunal panel, and the tribunal's jurisdiction over Tembec's NAFTA Claim. See Ex. A ¶¶ 1, 2, 10-16. Tembec filed a Motion to Vacate the Order on February 17, 2006. See Docket No. 7 in C.A. No. 05-2345.

B. The Stipulation of Dismissal of the Prior Case

On September 12, 2006, the United States and Canada signed the Softwood Lumber Agreement of 2006 ("Agreement" or "SLA"). Although it initially set a target date of October 1, 2006, the Softwood Lumber Agreement provided that it would not enter into force until Canada and the United States confirmed that certain conditions precedent had been met, including the execution of a "Termination of Litigation Agreement" ("TLA") by all parties to the twenty covered actions that were listed in the TLA. See Ex. B at 2-3. Pursuant to the TLA, these twenty actions were to be terminated when the Softwood Lumber Agreement entered into force. After Canada and the United States recognized that it would not be possible to satisfy all conditions precedent in the Softwood Lumber Agreement by the initial target date, they modified

some of these conditions and set a new date of October 12, 2006. Id. As a result, the TLA, which contemplated the termination of twenty actions, was replaced with a more limited "Settlement of Claims Agreement" ("SCA") (Docket No. 26, Ex. G; Docket No. 27, Ex. E), which contemplated the termination of four actions, including the First Petition. See the SCA, a copy of which is attached hereto as Exhibit E, ¶ 1; see also Ex. B at 2-3. The SCA provides that the parties "shall not re-file any of the [four] actions." Ex. E ¶ 10.

Tembec and the United States filed a Stipulation of Dismissal With Prejudice on October 12, 2006, dismissing the prior case "with prejudice, subject to the terms and conditions of the Softwood Lumber Agreement," pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure. See Docket No. 25 in C.A. No. 05-2345; see also Ex. B at 3-4; Ex. C ¶ 23. A copy of the Stipulation is attached hereto as Exhibit F. The Court (Collyer, J.) approved the Stipulation on October 17, 2006, thereby dismissing the prior case "with prejudice" pursuant to Rule 41(a)(1)(ii), and denying, as moot, Tembec's then-pending Motion to Vacate. See Minute Order (Docket No. 25).

When Canada and the United States obtained the signatures of Tembec and other necessary parties to the SCA, the Softwood Lumber Agreement entered into force on October 12, 2006. Tembec received $242 million in connection with the resolution of the softwood lumber dispute underlying its NAFTA Claim. See Ex. B at 2; 15; Ex. C ¶ 21; see also Joint Order on the Costs of Arbitration and for the Termination of Certain Arbitral Proceedings dated July 19, 2007, of which relevant portions are attached hereto as Exhibit D, at 4.

C. The Court's Denial of Tembec's Rule 60(b) Motion

In April of 2006, the United States filed an application for legal fees and tribunal costs totaling approximately $270,000 in the NAFTA arbitration proceeding. See Ex. C ¶ 27; Ex. D at 4, 11, 28-9, 89-90. The United States pursued this application, which was not subject to the Settlement of Claims Agreement, in the arbitration proceeding. See Ex. E ¶ 1. On November 9, 2006, Tembec filed a "Notice of Reinstatement of Action or, in the alternative, Rule 60(b) Motion to Set Aside the Judgment" ("Rule 60(b) Motion"), seeking to withdraw the Stipulation of Dismissal with Prejudice under Rule 60(b) of the Federal Rules of Civil Procedure. Docket No. 26 in C.A. No. 05-2345. A copy of the Rule 60(b) Motion is attached hereto as Exhibit G. After the United States filed an Opposition, Tembec filed a Reply Memorandum, and, with leave of court, filed a Supplemental Brief, and the United States filed a response. Docket Nos. 27-32 in C.A. No. 05-2345.

The Rule 60(b) Motion alleged that the Stipulation was subject to the Softwood Lumber Agreement, and that the United States' request for fees and costs in the arbitration proceeding contravened the Agreement, because the Agreement incorporated the TLA, under which each party to the arbitration proceeding would bear its own fees and costs, and the SCA supplemented, but did not replace, the TLA. In the alternative, the Rule 60(b) Motion sought to vacate the Stipulation of Dismissal under Rule 60(b) of the Federal Rules of Civil Procedure, and thereby allow Tembec to proceed with the First Petition, alleging that, if the Softwood Lumber Agreement permitted an award of fees and costs to the United States in the arbitration proceeding, and if the SCA replaced the TLA, the United States misled Tembec into believing that the Softwood Lumber Agreement barred such an award, and that the United States would not seek such an award; that the NAFTA tribunal's Consolidation Order was invalid; and that the

tribunal panel, which included Mr. Robinson, was biased and overreached in considering whether to award fees and costs to the United States.

After holding a hearing, see Docket No. 32, the Court issued a Memorandum Opinion dated April 19, 2007, denying the Rule 60(b) Motion and declining to vacate the Stipulation of Dismissal With Prejudice. See Ex. B at 1, 9; Ex. C ¶ 29. The Court found that the "governing documents in this case – the Stipulation of Dismissal, the SLA, [and] the SCA, . . . are clear and unambiguous, . . . [and] do not preclude the United States from seeking fees and costs against Tembec related to Tembec's NAFTA Claim," Mem. Op. at 8; see also id. at 5, 7; and the Court found that "the TLA never became a binding contract" because "the United States did not execute" it, id. at 6 n.2. In addition, the Court found that Tembec "had reason to know that the SCA replaced the TLA," id. at 9; and found "no evidence that the United States knowingly misled Tembec and no basis to reopen the case." Id. at 1.

D. The Second Petition

After extensive briefing and a hearing, the NAFTA tribunal issued an order dated July 19, 2007, requiring Tembec to pay approximately $270,000 in fees and costs to the United States. See Ex. D at 4, 90; see also Ex. C ¶¶ 27, 29.

Tembec filed the Second Petition on October 19, 2007, seeking to vacate the NAFTA tribunal's award of fees and costs to the United States in the arbitration proceeding, "and all of the tribunal's orders leading up to the final arbitration award," under 9 U.S.C. § 10. See Ex. C ¶¶ 1, 2, 34. The Second Petition asserted: (a) that the Softwood Lumber Agreement barred the award of fees and costs to the United States in the arbitration proceeding; (b) that, if the Agreement permitted such an award, the United States misrepresented that the Agreement bars such an award, and that the United States would not seek such an award; and (c) that the

Consolidation Order issued by the NAFTA tribunal was invalid, the tribunal lacked jurisdiction over Tembec's NAFTA Claim, and the tribunal improperly included Mr. Robinson. Id. ¶¶ 9-32.[1]

After the United States filed a Notice of Related Case, the Court reassigned the present case to Judge Collyer, who had been assigned the prior case, by Order dated December 19, 2007. See Docket No. 6.

ARGUMENT

I. RES JUDICATA AND COLLATERAL ESTOPPEL

"The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel." Allen v. McCurry, 449 U.S. 90, 94 (1980). Under the doctrine of res judicata, which is also termed claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Id.; see also Drake v. FAA, 291 F.3d 59, 66 (D.C. Cir. 2002). Res judicata applies where there is an identity of the cause of action, and of the parties, in both actions, and a court of competent jurisdiction entered a final judgment on the merits in the first action. See Does I Through III v. District of Columbia, 238 F. Supp. 2d 212, 217 (D.D.C. 2002).

The doctrine of collateral estoppel, which is also known as issue preclusion, bars a party from relitigating issues of fact or law that were actually litigated in the course of reaching earlier judgments. See Allen v. McCurry, 449 U.S. at 94. "Some courts and commentators use 'res judicata' as generally meaning both forms of preclusion." Id. at 94 n.5. These related doctrines "encourage[] a party to mount in a single action its claims against the party which it has hailed into court," U.S. Indus. v. Blake Constr. Co., 765 F.2d 195, 209 (D.C. Cir. 1985) (internal

[1] Although The Second Petition also named as respondents the two other Canadian companies that were involved in the consolidated arbitration proceedings, Tembec does not assert any claims against these companies or seek any relief from them. See Ex. C ¶ 34.

citation omitted), "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and prevent serial forum-shopping and piecemeal litigation." Hardison v. Alexander, 655 F.2d 1281, 1288 (D.C. Cir. 1981); see also Bryson v. Gere, 268 F. Supp. 2d at 54. Where either of these doctrines apply, it is appropriate for a district court, even acting sua sponte, to dismiss a complaint for failure to state a claim. See Baker v. Director, U.S. Parole Comm'n, 916 F.2d 725, 726 (D.C. Cir. 1990).

Under collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." Allen v. McCurry, 449 U.S. at 94; Elliott v. FDIC, 305 F. Supp. 2d 79, 83-84 (D.D.C. 2004). As the doctrine has been applied by the D.C. Circuit, collateral estoppel applies where the same issue now being raised was "contested by the parties and submitted for judicial determination in the prior case" and the issue was "actually and necessarily determined by a court of competent jurisdiction in that prior case." Yamaha Corp. v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992).

As discussed below, collateral estoppel and res judicata apply to the issues raised by the Second Petition.

II. RES JUDICATA BARS TEMBEC FROM RELITIGATING ISSUES REGARDING THE NAFTA TRIBUNAL'S CONSOLIDATION ORDER, BECAUSE THE PRIOR CASE WAS DISMISSED WITH PREJUDICE

The First Petition filed by Tembec in the prior case raised issues regarding the Consolidation Order entered by the NAFTA tribunal in the arbitration proceeding, the selection of the tribunal panel, and the tribunal's jurisdiction over Tembec's NAFTA Claim. The Second Petition filed by Tembec in the present case also raises these same issues. The doctrine of res judicata bars Tembec from relitigating such issues, because Tembec dismissed the prior case

with prejudice in connection with the settlement of the underlying dispute.

A. The First Petition in the Prior Case Raised Issues Regarding the NAFTA Tribunal's Consolidation Order, and That Case Was Dismissed with Prejudice in Connection with the Settlement of the Underlying Dispute

After a dispute arose regarding subsidies received by Tembec and other companies that harvest timber on public Canadian land and export softwood lumber to the United States, Tembec commenced arbitration against the United States under Chapter Eleven of NAFTA with respect to that dispute, seeking to recover more than $200 million in connection with duties imposed on softwood lumber exports from Canada. See Ex. A ¶¶ 2-6; Ex. B at 1-2. The NAFTA tribunal issued the Consolidation Order on September 7, 2005, thereby consolidating that arbitration with similar arbitrations brought by other companies. See Ex. A ¶ 2, Ex. B at 1-2. The First Petition sought to vacate the NAFTA tribunal's Consolidation Order under 9 U.S.C. § 10, raising issues regarding the NAFTA tribunal's Consolidation Order, the inclusion of Mr. Robinson on the tribunal panel, and the tribunal's jurisdiction over Tembec's NAFTA Claim. See Ex. A ¶¶ 1, 2, 10-16. Tembec also filed a Motion to Vacate the Order. See Docket No. 7 in C.A. No. 05-2345.

Although Tembec could have litigated these issues and contentions in the prior case, Tembec instead decided to forego that opportunity as part of a settlement of the underlying dispute, by which Tembec received $242 million. See Ex. B at 2-3; Ex. C ¶ 21; Ex. D at 4; Ex. F. The Softwood Lumber Agreement entered into by the United States and Canada provided that it would not enter into force until certain conditions precedent had been met. See Ex. B at 2-3. Among these conditions was the termination of the prior case. See Ex. E ¶ 1. The Softwood Lumber Agreement entered into force on October 12, 2006, after Tembec and the United States filed a Stipulation of Dismissal With Prejudice on October 12, 2006, agreeing to dismiss the

prior case "with prejudice, subject to the terms and conditions of the Softwood Lumber Agreement," pursuant to Federal Rule 41(a)(1)(ii). See Ex. F; see also Ex. B at 3-4; Ex. C ¶ 23. The Court approved the Stipulation, thereby dismissing the prior case "with prejudice" pursuant to Rule 41(a)(1)(ii), and denying, as moot, Tembec's then-pending Motion to Vacate. Docket No. 25 in C.A. No. 05-2345; see also Ex. B at 2; Ex. C ¶¶ 21, 23.

As discussed below, Tembec impermissibly seeks to relitigate the issues regarding the NAFTA tribunal's Consolidation Order, the inclusion of Mr. Robinson on the tribunal panel, and the tribunal's jurisdiction over Tembec's NAFTA Claim.

B. Because Tembec Dismissed the Prior Case with Prejudice, Res Judicata Bars Tembec From Relitigating Issues Regarding the Consolidation Order

The Second Petition seeks to vacate "all of the tribunal's orders leading up to" the NAFTA tribunal's award of fees and costs to the United States in the arbitration proceeding, including the Consolidation Order, under 9 U.S.C. § 10. See Ex. C ¶¶ 1, 2, 27, 34. The Second Petition contends in part that the Consolidation Order issued by the tribunal was invalid, that the tribunal panel should not have included Mr. Robinson, and that the tribunal lacked jurisdiction over Tembec's NAFTA Claim. Id. ¶¶ 9-32.

Under the doctrine of res judicata, a final judgment precludes the parties from relitigating issues that were raised or could have been raised in the prior action. Allen v. McCurry, 449 U.S. at 94; Drake v. FAA, 291 F.3d at 66; Page v. United States, 729 F.2d 818, 820 (D.C. Cir. 1984); U.S. Indus. v. Blake Constr., 765 F.2d at 207. As discussed above, the First Petition raised the same factual and legal issues as are now presented by the Second Petition with respect to the NAFTA tribunal's Consolidation Order, Mr. Robinson's inclusion on the tribunal panel, and the tribunal's jurisdiction over Tembec's NAFTA Claim. Because Tembec raised such issues in the

First Petition and dismissed the prior case with prejudice under Federal Rule 41(a)(1)(ii), Tembec cannot now relitigate these issues.

A stipulation of dismissal with prejudice under Federal Rule 41(a)(1) "has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action." Nemaizer v. Baker, 793 F.2d 58, 60 (2d Cir. 1986). Once such a stipulation has been filed, res judicata bars the plaintiff from raising the same claim "in a later federal suit." Id. at 61; see also Samuels v. Northern Telecom, Inc., 942 F.2d 834, 836-37 (2d Cir. 1991). The fact that Tembec decided to dismiss the prior action with prejudice rather than litigating the issues raised in the First Petition does not preclude the application of res judicata. See Durney v. Wavecrest Labs, LLC, 441 F. Supp. 2d 1055, 1059 (N.D. Cal. 2005). "The test is not whether or not the claim was litigated, but whether or not there was a final judgment on the merits." Id.

Under res judicata, the filing of the Stipulation of Dismissal with Prejudice therefore bars Tembec from relitigating such issues. The Court's approval of the Stipulation, dismissing the case "with prejudice" pursuant to Rule 41(a)(1)(ii), see Docket No. 25, has the same effect.

III. COLLATERAL ESTOPPEL BARS TEMBEC FROM RELITIGATING ISSUES REGARDING THE PARTIES' NEGOTIATIONS AND THE SETTLEMENT DOCUMENTS, BECAUSE THE COURT DETERMINED SUCH ISSUES WHEN IT DENIED TEMBEC'S RULE 60(b) MOTION

The doctrine of collateral estoppel bars Tembec from relitigating issues regarding the parties' negotiations and the interpretation of the settlement documents, because the Court determined these issues when it denied the Rule 60(b) Motion filed by Tembec in the prior case.

A. In Denying the Rule 60(b) Motion, the Court Determined Issues Regarding the Interpretation of the Settlement Documents and the Parties' Negotiations

When the Court denied the Rule 60(b) Motion filed by Tembec, the Court determined factual and legal issues regarding the parties' settlement negotiations and the interpretation of the Softwood Lumber Agreement, the SCA, and the Stipulation of Dismissal with Prejudice, insofar as those negotiations and documents related to the United States' request for fees and costs in the arbitration proceeding.

The Rule 60(b) Motion sought to withdraw the Stipulation of Dismissal, alleging that the Stipulation was subject to the Softwood Lumber Agreement, and that the United States' request for fees and costs in the arbitration proceeding contravened the Agreement, because the Agreement incorporated the TLA, under which each party to the arbitration proceeding would bear its own fees and costs, and the SCA supplemented, but did not replace, the TLA. See Ex. G at 1-6; Tembec's Supplemental Brief at 1-2, 5. In the alternative, the Rule 60(b) Motion sought a court order vacating the Stipulation, asserting that, if the Softwood Lumber Agreement permitted such an award of fees and costs, and if the SCA replaced the TLA, the United States misled Tembec into believing that the Softwood Lumber Agreement barred such an award, and that the United States would not seek such an award. See Ex. G at 3-9; Tembec's Reply Memo. at 1-16; Tembec's Supplemental Brief at 4-6.

After the parties briefed these issues and the Court held a hearing, the Court rejected Tembec's contentions, found "no basis to reopen the case," and denied the Rule 60(b) Motion. See Ex. B (Mem. Op. dated April 19, 2007) at 1; see also Ex. C ¶ 29. First, the Court found that the "governing documents in this case – the Stipulation of Dismissal, the SLA, [and] the SCA, [–] . . . are clear and unambiguous, . . . [and] do not preclude the United States from seeking fees

and costs against Tembec related to Tembec's NAFTA Claim," Mem. Op. at 8; and found that "the TLA never became a binding contract," because "the United States did not execute" it, id. at 6 n.2.

Second, the Court rejected Tembec's claim that it was "misled into believing that the SCA supplemented, but did not replace, the TLA." Mem. Op. at 5. The Court found that the SCA was "presented . . . to Tembec for signature" by Canada, "not [by] the United States," id.; that "[t]he United States had no reason to know whether and to what extent Canada was sharing information with stakeholders like Tembec," id.; that "the United States had no duty to explain the terms of the SLA or the SCA to Canada, with whom it was negotiating, let alone to Tembec," id. at 5-6 (footnote omitted); that "Tembec was at all times represented by counsel," id. at 6; that "Tembec's counsel reviewed the SCA and suggested 'very modest changes,'" id. (citation omitted); and that "Tembec's NAFTA Claim plainly was not referenced by the SCA, and Tembec did not question this," id. The Court therefore found that it was "unreasonable" for Tembec "to interpret the SCA as supplemental to the TLA." Id. As a result of these findings, the Court determined that "Tembec's argument that it believed that the SCA supplemented the TLA, and did not replace it, [was] disingenuous, because Tembec should have known that the TLA was replaced by the SCA." Id. The Court concluded that Tembec did not submit clear and convincing evidence of fraud or misconduct by the United States. Id. at 5.

In denying the Rule 60(b) Motion, the Court thus determined the factual and legal issues raised by Tembec regarding the interpretation of the settlement documents and the parties' negotiations in connection with the United States' requests for fees and costs in the arbitration proceeding. As discussed below, Tembec impermissibly seeks to relitigate these issues.

B. Because the Second Petition Seeks to Relitigate Issues Regarding the Parties' Negotiations and the Settlement Documents, Collateral Estoppel Applies

The Second Petition seeks to vacate, under 9 U.S.C. § 10, the NAFTA tribunal's award of fees and costs to the United States in the arbitration proceeding, asserting that the Softwood Lumber Agreement bars such an award, and, in the alternative, that the United States misrepresented that the Agreement barred such an award, and that the United States would not seek such an award. See Ex. C ¶¶ 21-25, 27, 34. As discussed above, the factual and legal issues presented by the Second Petition regarding the interpretation of the settlement documents and the Parties' negotiations were previously raised by Tembec, contested by the parties, and determined by the Court in connection with the Rule 60(b) Motion filed in the prior case. See Ex. C ¶ 29. In denying the Rule 60(b) Motion, the Court determined that the SLA did not bar the United States from seeking an award of fees and costs in the arbitration proceeding, that the United States did not misrepresent the terms of the governing settlement documents, and that Tembec was not misled by the United States. See Ex. B at 5-9. The Second Petition thus seeks to relitigate the same factual and legal issues that were decided in the prior action.

Collateral estoppel, which is intended to conserve judicial resources, avoid inconsistent results, and prevent serial forum-shopping and piecemeal litigation, see Hardison v. Alexander, 655 F.2d at 1288, bars a party from relitigating issues of fact and law that were litigated in a prior case. See Allen v. McCurry, 449 U.S. at 94. Where, as here, an issue "has already been litigated, and decided, the doctrine of collateral estoppel precludes plaintiff from raising this issue again." Elliott v. FDIC, 305 F. Supp. 2d at 84 (footnote omitted). Collateral estoppel applies because the issues raised by the Second Petition were "contested by the parties and submitted for judicial determination" in connection with the Rule 60(b) Motion filed by Tembec

in the prior case, and such issues were determined by a court of competent jurisdiction. See Yamaha Corp., 961 F.2d at 254. The Second Petition, which seeks to relitigate these same factual and legal issues, must therefore be dismissed. See Elliott v. FDIC, 305 F. Supp. 2d at 84 (dismissing the action with prejudice).

Collateral estoppel bars Tembec from filing the Second Petition, because both cases involve the same issues regarding the parties' negotiations and the interpretation of the settlement documents. The Second Petition seeks to vacate the fee award, based upon Tembec's assertions that the Softwood Lumber Agreement barred an award of fees and costs, or alternatively that the United States misrepresented that it would not seek such an award. Both Petitions are based upon the same factual and legal issues. Collateral estoppel applies to the issues raised and determined in the prior case, rather than being limited to the specific arguments made in that case. See Yamaha Corp., 961 F.2d at 254 ("[O]nce an issue is raised and determined, it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case.") (emphasis in original) (citing Securities Indus. Ass'n v. Bd. of Governors, 900 F.2d 360, 364 (D.C. Cir. 1990)). "Where the basic facts underlying the new claims are indistinguishable from the facts at issue in the prior adjudication, the new claims are properly precluded." Bryson v. Gere, 268 F. Supp. 2d at 58. Because the Court determined the factual and legal issues regarding the settlement negotiations and the interpretation of the settlement documents in denying the Rule 60(b) Motion, Tembec cannot revisit these issues.

IV. THE SETTLEMENT OF CLAIMS AGREEMENT ALSO BARS TEMBEC FROM FILING THE SECOND PETITION

Finally, the Settlement of Claims Agreement executed by the parties prior to the Court's dismissal of the First Petition provides an independent basis for dismissal of the Second Petition. In signing the Settlement of Claims Agreement as part of the settlement of the prior case, Tembec expressly agreed both to dismiss the First Petition and not to "re-file" it. Ex. E ¶¶ 1, 10. The SCA thus serves as an additional bar to Tembec's attempts to relitigate the issues and contentions that were raised by the First Petition. Because res judicata bars Tembec from relitigating these issues and contentions as discussed above, the Court need not, however, decide this point as to the SCA. See U.S. Indus. v. Blake Constr., 765 F.2d at 200 n.9 (because res judicata applied, the court did not reach the issue of whether the terms of a stipulation filed by the parties also barred the action).

CONCLUSION

For these reasons, the Court should dismiss the Petition to Vacate Arbitration Award, in its entirety, with prejudice.

Dated: January 30, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE:

I HEREBY CERTIFY that on January 30, 2008, a true copy of the foregoing Memorandum was served on petitioner's counsel, Mark A. Cymrot, BAKER & HOSTETLER LLP, via ECF, and upon counsel for Canfor Corporation and Terminal Forest Products Ltd. by first-class mail to:

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