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Apotex III's Application of Res Judicata Ensures Finality, Legal Security and Judicial Economy

Nicole Thornton (US Department of State) · Monday, October 13th, 2014

The recently published Award in *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (Apotex III Award) is the first NAFTA award to apply the doctrine of *res judicata*. The Apotex III Tribunal confirmed that the operative part, together with the underlying reasoning, of an earlier award determined that Apotex's abbreviated new drug applications (ANDAs) did not qualify as "investments" under the NAFTA. As such, the Tribunal, by a majority,* held that Apotex was barred from relitigating the issue despite Apotex's argument that the earlier award concerned different kinds of ANDAs (those that were tentatively approved by the U.S. Food and Drug Administration as opposed to those that were finally approved). Apotex's attempt to distinguish its new claims on this basis was rejected as impermissible "claim-splitting." The Apotex III Award's approach to *res judicata* promotes the doctrine's objectives of finality, legal security and judicial economy, and should be followed by future investor-State tribunals.

Background

In February 2012, Apotex Holdings Inc. and Apotex Inc. initiated arbitration against the United States. Apotex claimed that a 2009 Import Alert placed on two of Apotex Inc.'s Canadian manufacturing facilities violated the United States' obligations under NAFTA Chapter Eleven to accord Apotex and its U.S. investments national and most-favored-nation treatment. Apotex also claimed that the United States adopted the Import Alert without due process, in violation of the customary international law minimum standard of treatment.

Apotex asserted that certain of its ANDAs which had been finally approved by the U.S. Food and Drug Administration qualified as "investments" in the United States under NAFTA Article 1139. The United States disagreed, and thus argued that the Tribunal lacked jurisdiction to hear Apotex's claims on this basis. On June 14, 2013, a final award had been issued in an earlier NAFTA proceeding, *Apotex Inc. v. United States of America* (Apotex I & II Award). In that proceeding, Apotex contended that two of its tentatively-approved ANDAs qualified as "investments" for purposes of the NAFTA. The Apotex I & II Award held that Apotex's ANDAs did not so qualify and dismissed Apotex's claims in their entirety. The United States then objected in Apotex III that Apotex's claim that its ANDAs qualified as "investments" was barred by *res judicata*.

Apotex III Award

The Apotex III Award, by a majority, upheld the United States' objection and made several important determinations with respect to *res judicata* under the NAFTA and international law.

First, the Apotex III Tribunal rejected the claimants' argument that NAFTA Article 1136(1) barred the operation of *res judicata*. That Article provides that "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." Article 1136(1) closely parallels Article 59 of the ICJ Statute (and the earlier PCIJ Statute) and has been understood to mean that the Court has no rule of *stare decisis*. Given that the Court has nevertheless applied *res judicata*, the Tribunal found that Article 1136(1) similarly did not preclude the application of *res judicata* under the NAFTA:

> If the position were otherwise, the Claimants' submission would effectively mean that it could re-litigate the same claims over and over again in different arbitrations against the same party, which would be an absurd result for an arbitral procedure intended to produce finality with a legally binding decision.

Second, the Tribunal found that *res judicata* was a "general principle of law and thus an applicable rule of law within the meaning of NAFTA Article 1131," NAFTA's governing law provision. With respect to *res judicata's* traditional "triple identity test"– same *persona, petitum* (object), and *causa petendi* (grounds), it was undisputed that Apotex Inc. and the United States were both parties to the prior and current arbitrations. The Tribunal, moreover, found Apotex Holdings to be a "privy" with Apotex Inc. and bound by the Apotex I & II Award to the extent that Holdings' claims depended on Apotex Inc.'s ANDAs as "investments" under the NAFTA.

The Tribunal noted, however, the questionable division between object and grounds. Requiring that the object and grounds be exactly as pleaded in the first arbitration could enable litigants to evade *res judicata* by modifying slightly the requested relief or legal arguments in the second proceeding (a tactic known as "claim-splitting"). The Tribunal cited jurisprudence in favor of a simpler, two-part test. For example, the *Pious Fund of the Californias* award required only sameness of parties and the "subject-matter that was judged".

Third, the Tribunal found that international courts and tribunals regularly examine a prior award's reasoning in determining the scope and preclusive effect of its operative part. In this connection, the Tribunal considered (as a matter of legal logic and consistent with international law) that under Article 32 of the 1976 UNCITRAL Rules,** the relevant reasons in the Apotex I & II Award "can be read together with the operative part for the purpose of applying the doctrine of *res judicata*[.]"

> Applying NAFTA Article 1131(1), the rules of international law and the UNCITRAL Arbitration Rules, the Tribunal concludes that the Apotex I & II Award, with its relevant reasons, operates in this arbitration as *res judicata* as regards both named parties to that arbitration[.]

After making these determinations, the Tribunal then examined the effect of the Apotex I & II Award on Apotex's claims in Apotex III.

Critically, the Tribunal accepted that Apotex pleaded specific claims in Apotex I & II that differed from those advanced in Apotex III. Namely, the former claims related to tentatively approved ANDAs rather than finally approved ANDAs. Nevertheless, examining the reasons in the earlier award, the Tribunal held that:

> It is clear from those reasons that the parties put distinctively in issue ANDAs generally, not limited to tentatively approved ANDAs but also including finally approved ANDAs; that the tribunal actually decided that issue; and that, as that tribunal saw it, that decision, amongst others, was necessary to resolve the parties' dispute before it.
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> […]
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> In the Tribunal's view, the operative part … and its relevant reasons in the Apotex I & II Award apply equally to all ANDAs, whether tentatively approved or finally approved. As part of their essential character, as distinctly decided in the Apotex I & II Award, Apotex Inc.'s ANDAs are no more than applications operating as quasi-import licences which support cross-border sales by Apotex Inc. to its consignees in the USA of products manufactured at its Canadian facilities. The possibilities of Apotex Inc. selling or transferring ANDAs (albeit revocable and remaining site-specific to the designated manufacturing facility) do not change the inherent nature of these ANDAs, as decided in the Apotex I & II Award. ANDAs are not commodities in the territory of the USA.

The Tribunal therefore applied the concept of issue estoppel ("the principle that a party in subsequent proceedings cannot contradict an issue of fact or law not reflected in the dispositif if it has already been distinctly raised and finally decided in earlier proceedings between the same parties"), even if it did not expressly use the term.***

To confirm the logic of its holding, the Tribunal asked "the simple question": how would the Apotex I & II tribunal respond to Apotex's claims in Apotex III?

> In this Tribunal's view, that question admits of only one answer: the Apotex I & II tribunal would say that it had already decided the essential issues relating to these claims in its award; and, applying the same … operative part with its same supporting reasons, that these claims failed to meet the requirements of NAFTA Article 1139 for jurisdiction under NAFTA's Chapter Eleven.

In reaching its conclusion, the Tribunal appeared to endorse the *Pious Fund* award's simpler two-part test for *res judicata*, remarking that it was "impermissible to parse the two sets of claims" to artificially distinguish one case from the other. In this connection, Apotex (represented by new counsel) raised new arguments in Apotex III concerning the interpretation of Article 1139 and why its ANDAs should be considered "investments." The Tribunal found that allowing a party to escape the effects of *res judicata* by simply reformulating their claims and arguments (i.e., "claim-splitting") would multiply the cost and time expended in already costly and lengthy arbitrations and thwart the purpose of the doctrine to end litigation by one final and binding award.

Conclusion

The Apotex III Award represents a significant milestone for the interpretation and application of *res judicata* in investor-State arbitration. The Tribunal rejected more formalistic approaches and read *res judicata* to include an award's operative part and also its underlying reasoning. In so doing, the Tribunal accepted the concept of issue estoppel, finding that the question of Apotex's

ANDAs as “investments” had been distinctly put in issue and actually decided in a decision that was necessary to the resolution of the parties’ earlier dispute. Apotex’s attempt to “split” its claims and avoid *res judicata* was rejected given the Apotex I & II Award’s reasoning.

The Apotex III Tribunal’s approach should be employed by future investor-State tribunals where the same issue, involving the same treaty, was litigated by the same parties and actually determined by the prior tribunal in a binding award. This approach ensures finality and legal security, protecting parties (particularly defendants) from having to litigate twice and avoiding potentially divergent decisions with respect to the same matter. It also promotes judicial economy by preventing the costly and time-consuming relitigation of repeat claims.

* The Apotex III Tribunal was comprised of John R. Crook, J. William Rowley, and V.V. Veeder (presiding). Mr. Rowley, dissenting on this issue, would have concluded that the Apotex I & II tribunal did not decide the specific question of whether Apotex’s finally approved ANDAs constitute an “investment” under NAFTA Article 1139.

** The Apotex I & II proceedings were conducted pursuant to the 1976 UNCITRAL Rules, Article 32(2) of which provides that the award “shall be final and binding on the parties” and Article 32(3) of which provides that an award “shall state the reasons upon which the award is based.”

*** Earlier in the Award, the Tribunal found it was “clear” that past tribunals had applied forms of issue estoppel (e.g., *Orinoco Steamship*, *Amco v. Indonesia*, and *Grynberg v. Grenada*), even if some tribunals had not used the term.

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