Title:
ICSID Award, Apotex v USA, ICSID Case No. ARB(AF)/12/1

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Content:
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ICSID Case No. ARB(AF)/12/1)

In the Arbitration under Chapter Eleven of the North America Free Trade Agreement

(NAFTA)

Between:
(1) APOTEX HOLDINGS INC.
(2) APOTEX INC.

First and Second Claimants

and

UNITED STATES OF AMERICA

Respondent

AWARD

The Arbitration Tribunal:
V.V. Veeder, President
J. William Rowley, Arbitrator
John R. Crook, Arbitrator

The Tribunal’s Secretary:
Monty Taylor
Date of dispatch to the Parties: 25 August 2014

[...]
(3) Res Judicata in International Law

7.10. The Parties agree that the Tribunal, under NAFTA Article 1131, “shall decide the issues in dispute in accordance with this Agreement [NAFTA] and applicable rules of international law.”

7.11. In the Tribunal’s view, the doctrine of res judicata is a general principle of law and is thus an applicable rule of international law within the meaning of NAFTA Article 1131. In its Advisory Opinion of 13 July 1954, the ICJ affirmed that “[a]ccording to a well-established and generally recognized principle of law, a judgment rendered by … a judicial body [such as the U.N. Administrative Tribunal] is res judicata and has binding force between the parties to the dispute.” Accordingly, Professor Bin Cheng writes, “[t]here seems little, if indeed any, question as to res judicata being a general principle of law or as to its applicability in international judicial proceedings.”

7.12. The doctrine of res judicata defines the binding effect of a prior final determination made by a competent tribunal. In Amco, the tribunal decided: “The general principle, announced in numerous cases is that a right, question, or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.” Thus, according to Professor Bin Cheng, “[o]nce a case has been decided by a valid and final judgment, the same issue may not be disputed again between the same parties, as long as that judgment stands.”

7.13. The doctrine of res judicata is often described as operating in international proceedings where three conditions establish the congruence of the matters previously determined and those currently at issue. Legal scholars often refer to Judge Anzilotti’s formulation of this triple identity test in his dissent in the PCIJ case of Chorzów Factory (Interpretation). Judge Anzilotti there referred to: “the three traditional elements for identification, persona, petitum, causa petendi, for it is clear that ‘that particular case’ (le cas qui a été décidé) covers both the object and the grounds of the claim.” The judgment of the majority had there accorded res judicata to the passage in the Court’s earlier declaratory judgment setting out the grounds or ‘essential conditions’ on which that decision was based.

7.14. No issue arises in the present case regarding persona: Apotex Inc. and the Respondent are named parties to the Apotex I & II Award (the position of Apotex-Holdings as a privy, albeit not a named party, is considered separately below). Professors Schreuer and Reinisch explain the Latin legal terms petitum and causa petendi, as follows: “[i]dentical ‘object’ (petitum) means that the same type of relief is sought in different proceedings. Identical ‘ground’ (causa petendi) means that the same legal arguments are relied upon in different proceedings.”

7.15. Whilst the triple identity test is often referred to in describing the requirements for res judicata to operate, certain international tribunals and scholars have
questioned its division between petitum and causa petendi; and many cases have used a simpler analysis. The British-U.S. Claims Arbitral Tribunal saw the doctrine as involving only two elements: “res judicata applies only where there is identity of the parties and of the question at issue.” The Pious Fund tribunal (applying res judicata in the Permanent Court of Arbitration’s first case and viewed as “[t]he leading early case”) also applied a two-part test, emphasising that “there are not only the same parties to the suit, but also the same subject-matter that was judged” in a prior arbitral award.

7.16. Professor Cheng questions the division between petitum and causa petendi, observing that “an examination of international decisions ... throws some doubt about the accuracy of this sub-division, especially in border-line cases.” Professors Schreuer and Reinisch point out that “[i]nternational tribunals have ... been aware of the risk that if they use too restrictive criteria of ‘object’ and ‘grounds’, the doctrine of res judicata would rarely apply: if only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds) in a second case would be precluded as a result of res judicata, then litigants could easily evade this by slightly modifying either the relief requested or the grounds rely upon.

7.17. The Claimants and the Respondent disagree on the scope of res judicata’s effect in international law. The Parties agree that the provisions of the dispositif, or operative part, of a prior judgment or award have res judicata effect. They disagree whether res judicata in international law includes the broader concept of or akin to 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 (or their privies). The Claimants submit it does not; whereas the Respondent says it does.

7.18. It is clear that past international tribunals have applied forms of issue estoppel, without necessarily using the term. Umpire Plumley’s award in Orinoco Steamship found that “every matter and point distinctly in issue ... and which was directly passed upon and determined in said decree, and which was its ground and basis, is confirmed by said judgment, and the claimants ... are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in the said decree.” In Professor Lowe’s opinion, the tribunal in the resubmitted Amco case clearly applied the principle of issue estoppel to the determination of specific facts and of the legal characterisations of facts by the previous tribunal. Most recently, the ICSID tribunal in Grynberg v. Grenada applied issue estoppel (albeit describing it as “collateral estoppel”) to foreclose the claimants’ efforts to re-open issues decided in an award made in a prior ICSID arbitration.

7.19. In Grynberg v. Grenada, the award in the first ICSID arbitration had dismissed the claims against Grenada as the respondent made by a Texan company (RSM) alleging contractual breaches of a concession agreement. In the second ICSID
arbitration, RSM and its three shareholders alleged breaches by the same respondent of the bilateral investment treaty between the USA and Grenada. On the face of it, the triple identity test was not satisfied as regards these three shareholders as persona, nor the *petitum* or *causa petendi* as regards both RSM and the shareholders. Yet, the second arbitration tribunal summarily dismissed all claims made by these four claimants as being “manifestly without legal merit” under ICSID Arbitration Rule 41(5), together with costs orders adverse to the claimants.

7.20. In so doing, the second tribunal accepted the respondent’s submission of issue estoppel arising from the first award, to the effect that the legal and factual contentions on which the new claims depended had already been fully litigated in the first ICSID arbitration. Applying the doctrine to all four claimants as “privies” as a general principle of law recognised in *Amco v Indonesia* and the *Orinoco* case, the second ICSID tribunal accepted that “a finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.” Applying these principles, the tribunal concluded: “that an essential predicate to the success of each of Claimants’ claims is an ability for the Tribunal to re-litigate and decide in Claimants’ favour conclusions of fact or law concerning the parties’ contractual rights that have already distinctly been put in issue and distinctly determined by the Prior Tribunal”;

and having determined that ability adversely to the claimants, the tribunal decided that each of their claims was manifestly without legal merit.

7.21. The Claimants denied the relevance of the *Grynberg* award to the present case, contending that the parties there had agreed to the application of collateral estoppel (issue estoppel) under the governing law. In the Tribunal’s view, this submission is incorrect. The parties strongly disputed its application to their case; but, significantly, there was no dispute as its requirements as a general principle of international law.

7.22. The Claimants also contend that *Orinoco Steamship* (and presumably other like authorities) do not correctly reflect *res judicata* under international law. In their submission, the case reflected Umpire Plumley’s common law orientation, as evidenced by his reliance on a decision of the US Supreme Court decision as legal authority for the cited principle. The Claimants contend that notions of issue estoppel found in common law systems are not found in civil law systems, which typically (so the Claimants submit) limit *res judicata* effects to matters addressed in the dispositif of an award or judgment. Given this significant difference in approach between two major systems of law, the Claimants contend that issue estoppel cannot be said to be an aspect of *res judicata* as a general principle of law “recognised by civilized nations.”

7.23. The Tribunal recognises that historical differences as to issue estoppel have existed and, to a lesser extent, still exist in national laws between certain common law and certain civil law systems. As the ILA Interim Report makes clear, however, there is no sharp divide between these two legal systems. It is also clear that international courts and tribunals have regularly examined under international law a prior tribunal’s reasoning, and the arguments it considered, in determining the scope, and thus the preclusive effect, of the prior award’s operative part. The first international
tribunal’s analysis and reasoning thus often play a significant role before the second international tribunal in determining the res judicata effect of the earlier award.

7.24. This is illustrated in the Pious Fund arbitration, where the tribunal held that an umpire’s award in a prior mixed claims commission proceeding had res judicata effect, and obliged Mexico to pay certain annuities to the USA on behalf of the Archbishop of San Francisco and the Bishop of Monterey. The tribunal rejected Mexico’s contention that only the amount specified in the prior award had res judicata effect, instead considering that it must consider the earlier award in its entirety to determine the res judicata effect of its dispositif: “Considering that all the parts of a judgment or a decree concerning the points debated in the dispute enlighten and mutually supplement each other, and that they all serve to render precise the meaning and bearing of the dispositif (the decisory part of the judgment), to determine the points upon which there is res judicata and which therefore cannot be put in question.”

7.25. The Permanent Court of International Justice was of like mind in Advisory Opinion No. 11: “It is perfectly true that all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion. This is clearly stated in the award of the Permanent Court of Arbitration of October 14th, 1902, concerning the Pious Fund of the Californias ... The Court agrees with this statement.”

7.26. In his dissent in Chorzów Factory, Judge Anzilotti was of the view that “the binding effect attaches only to the operative part of the judgment and not to the statement of reasons.” However, he added: “[w]hen I say that only the terms of a judgment are binding, I do not mean that only what is actually written in the operative part constitutes the Court’s decision. On the contrary, it is certain that it is almost always necessary to refer to the statement of reasons to understand clearly the operative part and above all to ascertain the causa petendi.”

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7.27. The Channel Arbitration tribunal similarly observed that while res judicata “attaches in principle only to the provisions of” the dispositif, “it is equally clear that, having regard to the close links that exist between the reasoning of a decision and the provisions of its dispositif, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the dispositif.”

7.28. The International Court of Justice also looks to the parties’ arguments and submissions to determine the legal effect of prior judgments. As Professor Rosenne observes, “[t]he relevance of whether a question was argued between the parties might arise ... if it is necessary to determine the scope of the res judicata ... In the Asylum case ... the problem was ... of the scope of the binding force of the decision. The res judicata does not derive from the operative clause of the judgment, which confined itself to stating which submissions of the parties were rejected or accepted and to what extent, but from the reasons in point of law given by the Court.” Accordingly, cases such as Asylum and Corfu Channel bring into sharp relief the delayed-action effect attaching to the written and oral pleadings. In the last analysis the scope of res judicata can only be determined by reference to the pleadings in general, and to the parties’ submissions in particular.

7.29. The jurisprudence of the European Court of Justice (ECJ) is to like effect. For the ECJ (applying the laws of the European Union and international law), the legal effect of a decision by the ECJ and other EU institutions is not to be limited to the wording of the operative part. In Asteris & Greece v. Commission, the ECJ noted that the EU institution was required to have regard not only to the operative part of the decision but also to the motifs which led to that decision in order to determine
the former’s exact meaning. In Commission v. BASF, the ECJ noted that: “the operative part of such a decision can be understood, and its full effect ascertained, only in the light of the statement of reasons”; and that a decision’s dispositif and motifs constituted “an indivisible whole.” In Deggendorf v. Commission, the ECJ held that: “the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption.”

7.30. Thus, where there is a question regarding the extent of a prior decision or award’s res judicata effect, international tribunals regularly look to the prior tribunal’s reasons and indeed also to the parties’ arguments, in order to determine the scope of what was finally decided in that earlier proceeding.

7.31. In Professor Rosenne’s opinion, in examining a prior tribunal’s reasoning and the arguments it considered, international tribunals have not drawn the distinctions between ratio decidendi and obiter dicta “which is an essential element of the common-law rule of the binding force of judicial precedents (stare decisis).” For the International Court of Justice, Professor Rosenne observes, “[t]he reasons in point of law of Article 95 ... of the Rules of Court do not contemplate such a finely drawn distinction.” As in the Pious Fund arbitration, tribunals have considered that “all the parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other.”

7.32. It would be possible to cite many further legal materials in support of the legal analysis made above; but it would serve no purpose here to prolong what is already a lengthy analysis. However, the Tribunal is comforted to see its approach above confirmed by the ICJ’s recent Judgment of 11 November 2013 in Cambodia v Thailand. In that Judgment, albeit not directly concerned with the doctrine of res judicata, the ICJ considered in regard to an earlier judgment of 1962 the scope of Article 60 of the ICJ’s Statute, which provides: “The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.” In accordance with the ICJ’s jurisprudence, a dispute under Article 60 must relate to the operative part of the judgment in question and cannot concern the reasons for the judgment except in so far as these are inseparable from the operative part. The ICJ nonetheless held under Article 60 that the “scope of the operative part of a judgment of the Court is necessarily bound up with the scope of the dispute before the Court.” The Tribunal concludes from this Judgment that even with the restrictive language of Article 60, the ICJ is not barred from interpreting the operative part of a judgment by reference to its reasons for that judgment.

(4) Res Judicata under the UNCITRAL Arbitration Rules

7.33. The Apotex I & II Award was made under the UNCITRAL Arbitration Rules 1976 forming part of the arbitration agreement between the parties to that arbitration. Under Article 32(2) of the UNCITRAL Rules, an award “shall be final and binding on the parties”, including an award made in the exercise of the tribunal’s power to decide upon its own jurisdiction. Under Article 32(3) of the UNCITRAL Rules, an award “shall state the reasons upon which the award is based.” Accordingly, as an award containing reasons under Article 32 of the UNCITRAL Rules, the Apotex I & II Award (with its reasons) was and remains final and binding upon Apotex Inc.
and the Respondent, as agreed by those Parties.

7.34. The Respondent submitted at the Hearing that the combined effect of Articles 32(2) and 32(3) means that the reasons in the Apotex I and II Award have effect as res judicata as between the Parties to this arbitration, just as much as its operative part: "… This is because the purpose of an Award is to decide the Parties’ dispute for all time, both as to the whole and as to its constituent parts."55

7.35. The Tribunal is minded to accept this submission as a matter of legal logic; but, for the purpose of deciding this issue, it is unnecessary to apply it here in full. Given the status of both the operative part and the reasons in the Apotex I & II Award under Article 32 of the UNCITRAL Arbitration Rules, the Tribunal concludes that those relevant reasons can be read together with the operative part for the purpose of applying the doctrine of res judicata in this arbitration, similarly to the position under international law. It is not necessary in this case to read the reasons independently from the operative part (as the Respondent submits); but it would clearly be impermissible for this Tribunal to read the operative part independently in isolation from its relevant reasons under the UNCITRAL Arbitration Rules.

7.36. The Tribunal has not addressed separately the legal status under New York law (as the lex loci arbitri) of the reasons or the operative part of the Apotex I & II Award. In the Tribunal’s view, if and to the extent relevant, the effect of New York law does not materially change or add to the analysis made above. It is not disputed that the Apotex I & II Award (with its reasons) is final and binding under New York law; nor has Apotex Inc. sought to challenge that Award before the New York courts (or elsewhere).

(5) Summary as to the Res Judicata Doctrine

7.37. 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, namely Apotex Inc. and the Respondent. It remains to be considered in what manner it operates in regard to the specific claims made by Apotex Inc. in this arbitration.

7.38. As regards Apotex-Holdings, the Claimants agreed at the Hearing that Apotex-Holdings, for the purpose of res judicata, should be identified as a “privy” to the Apotex I and II Award: “… having reviewed the RSM versus Grenada decision, the second one, Apotex would agree that privies are bound to the same extent as the Party with which they stand in privity. So we would accept that Apotex Holdings could not bring the claim asserted and decided in the Apotex [I and ] II case …"56 In other words, the two named Claimants in this arbitration stand in similar shoes, as regards the effect of res judicata resulting from the Apotex I and II Award, notwithstanding the fact that only one of them was a named party to the Apotex I and II Award.

7.39. However, Apotex-Holding’s shoes are only similar and not the same. As the Claimants made clear towards the end of the Hearing, in answer to the Tribunal’s Question A2: "… there is a distinction between derivative claims made on behalf of

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a company and claims made directly by a shareholder on its own behalf. In this arbitration, Apotex Holdings brings a claim in its own right and in its own name. It is different from the claim made by Apotex-Canada [Apotex Inc.]. Apotex Holdings is bound by the Apotex I and II Award only to the extent that it addresses Apotex-Canada as the investor and holder of the two tentatively approved ANDAs at issue.  

7.40. In the Tribunal’s view, independently from the concession (rightly) made by Apotex-Holdings at the Hearing, Apotex-Holdings is a “privy” with Apotex-US, albeit not a named party in the Apotex I & II arbitration. Its relevant claims in this arbitration, albeit made in its own right and in its own name, depend upon Apotex Inc.’s ANDAs as investments under NAFTA Articles 1116 and 1139; and if these are not investments, Apotex-Holdings cannot bring such claims before this Tribunal as a matter of jurisdiction.

(6) The Application of Res Judicata

7.41. It is self-evident that the “Operative Order” in Paragraph 358 of the Apotex I & II Award (pages 118-119) does not, read strictly in isolation by itself, address the Claimants’ specific claims in this arbitration. That operative part merely records, in Paragraph 358(a), that Apotex Inc. “does not qualify as an ‘investor’, who has made an ‘investment’ in the U.S., for the purposes of NAFTA Articles 1116 and 1139, and accordingly both the Sertraline and Pravastatin Claims are hereby dismissed in their entirety, on the basis that the Tribunal lacks jurisdiction in relation thereto.” The Claimants in this arbitration make no similar claims regarding Sertraline and Pravastatin.

7.42. However, in this Tribunal’s view, that operative part as a “dispositif” can and should be read with the relevant “motifs” or reasons for that operative part, as decided above. Hence, the Tribunal concludes, for the purpose of res judicata, that Paragraph 358(a) of the operative part is to be applied together with the reasons applicable to that paragraph, namely the relevant passages in Paragraphs 177 to 246 of the Apotex I & II Award (pages 55 to 78). As indicated above, for ease of reference and given their significance, these paragraphs are reproduced in full from the redacted public version of the Apotex I & II Award in the Annex to this Part VII. It is nonetheless useful briefly to summarise the tribunal’s approach in these parts of the Apotex I & II Award.

7.43. First, the tribunal addresses the issue whether activities surrounding ANDAs qualify as ‘investments’ under NAFTA Article 1139, as there submitted by Apotex Inc. and there disputed by the Respondent: see Paragraphs 177ff. For several reasons, the tribunal rejects Apotex Inc.’s submissions: see Paragraphs 178, 186ff & 225.

7.44. Second, the tribunal addresses the issue whether ANDAs qualify as ‘intangible property’ under NAFTA Article 1139(g) in Paragraphs 196ff. For several reasons, the tribunal rejects Apotex Inc.’s submissions: see Paragraphs 178, 206ff & 225. In Paragraphs 206 and 208, the tribunal equates Apotex Inc. to “a mere exporter of goods into the United States” and decides that “… property is not an ‘investment’ if, as here, it merely supports cross-border sales.” In Paragraph 217, the tribunal states (inter alia): “… The ANDA was thus a requirement in order to conduct an export business. If there had been no ANDA process, the underlying business could not be said to be an ‘investment’ in the U.S. The fact that an ANDA was required does not change the nature of the business.” The tribunal concludes, in Paragraph
225: “Thus, neither Apotex’s ANDAs, nor its activities in Canada, nor the costs incurred there in meeting the requirements of the U.S. regulatory regime for exporting its goods, are ‘investments’ in the United States.”

7.45. Third, the tribunal addresses the issue whether Apotex Inc.’s commitment of capital and resources towards ANDAs could constitute an ‘investment’ under NAFTA Article 1139(h) in Paragraphs 226ff. The tribunal notes that Apotex Inc. “made clear that its submissions under NAFTA Article 1139(h) were to be treated as part of its submissions under NAFTA Article 1139(g), and not as independent grounds”: see Paragraph 229. The tribunal rejects Apotex Inc.’s submissions under Article 1139(h): see paragraph 230ff. In Paragraph 233, the tribunal decides that NAFTA Article 1139(h) “… excludes simple cross-border trade interests. Something more permanent is necessary”; and, in Paragraph 235, that “each of the specific activities and expenses relied upon by Apotex [i.e. Apotex Inc.] simply supported and facilitated its Canadian-based manufacturing and export operations.”

7.46. In Paragraphs 241-246, the tribunal concludes overall that Apotex Inc. had made no “investment” in the territory of the USA within the meaning of NAFTA Article 1139; that, as a necessary consequence, Apotex Inc. does not qualify as an “investor” under NAFTA Article 1116; and that, accordingly, the tribunal has no jurisdiction over the claims there made by Apotex Inc. as the claimant.

7.47. Lastly, in the first part of the operative part, in Paragraph 358(a), the Tribunal unanimously orders and awards: “[Lines 1-2] Apotex does not qualify as an ‘investor’, who has made an ‘investment’ in the U.S., for the purposes of NAFTA Articles 1116 and 1139, [Lines 2-4] and accordingly both the Sertraline and Pravastatin Claims are hereby dismissed in their entirety, on the basis that the Tribunal lacks jurisdiction in relation thereto.”

7.48. This Tribunal accepts that there are several factors in the Apotex I & II Award which qualify the application of its passages for the purpose of res judicata in this arbitration.

7.49. The specific claims pleaded by Apotex-Canada in the Apotex I & II arbitration, as recited and decided in the Apotex I & II Award, are different from the specific claims made by the Claimants in this arbitration. The former claims related to “tentatively approved” ANDAs. This is not the specific case pleaded by the Claimants in this arbitration where the ANDAs were “finally approved” and where no claim as to “tentatively approved” ANDAs is advanced by the Claimants. Hence, the operative part, read by itself and in strict isolation from the preceding reasons, could not form the basis of res judicata in this arbitration.

7.50. However, as decided above, it is necessary to read the first two lines of Paragraph 358(a) of the operative part in the Apotex I & II Award with the tribunal’s earlier relevant reasons for this part of the paragraph. 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. In the Tribunal’s view, it is not required for the application of the res judicata doctrine that there should be a single reason necessary for the tribunal’s decision: there can be two or
more reasons of equal relevance for the application of the doctrine, particularly when the parties advance more than one argument in support of their respective cases (as the parties clearly did in the Apotex I & II arbitration).

7.51. Nevertheless, several reasons in the Apotex I & II Award are inapplicable to this arbitration for the purpose of res judicata, being expressly limited to tentatively approved ANDAs. Accordingly, the Tribunal here takes no account of these reasons in applying res judicata in this case. On the other hand, other passages clearly do refer to or necessarily include finally approved ANDAs. It is therefore not possible to conclude that the tribunal’s reasons are limited to tentatively approved ANDAs.

7.52. Whilst addressing whether ANDAs were “property” under NAFTA Article 1139(g), the tribunal did not independently address ANDAs as “interests” under NAFTA Article 1139(h). In Paragraph 229 of the Apotex I and II Award, as noted above, the tribunal records Apotex Inc.’s confirmation that its submissions under NAFTA Article 1139(h) “were to be treated as part of its submissions under NAFTA Article 1139(g), and not as independent grounds.” It is not entirely clear what these “submissions” were as part of Apotex Inc.’s submissions under Article 1139(g); but it is any event clear that both parties made submissions regarding Article 1139(h) and that the tribunal did address and decide upon ANDAs as investments under Article 1139(h).

7.53. Lastly, it is necessary to record that this is not a case which raises any issue of bad faith or abuse of process by the Claimants. Indeed, the contrary was not suggested by the Respondent; and, although the Claimants’ Request in this arbitration originally included a claim relating to non-approved ANDAs, that claim was abandoned before the publication of the Apotex I & II Award, as already indicated above.

7.54. For the reasons set out below, as regards the claims made by Apotex Inc. in this arbitration, the Tribunal decides that the Apotex I & II Award, applying the doctrine of res judicata, precludes Apotex Inc. from contending that its finally approved ANDAs, within the meaning of NAFTA Article 1139(g), are “property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.”

7.55. In the Tribunal’s view, the operative part (first two lines) 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.

7.56. As regards Apotex Inc., the Tribunal comes to the same conclusion in regard to NAFTA Article 1139(h). Applying the doctrine of res judicata, the Tribunal decides that Apotex Inc. is precluded from contending that its finally approved ANDAs, within the meaning of NAFTA Article 1139(h), are “interests arising from the capital or other resources in the territory of a Party [the USA] to economic activity.
in such territory . . .” As decided in the Apotex I & II Award, an ANDA operates only as a quasi-import licence supporting cross-border trade interests falling outside the definition of this provision. Whilst the tribunal in the Apotex I & II Award did not independently apply NAFTA Article 1139(h), as noted above, the tribunal nonetheless distinctly addressed this provision. The tribunal rejected the case advanced by Apotex Inc.62

7.57. Shorn of all semantic technicalities, it is worth asking the simple question after reading the relevant passages from the Apotex I & II Award in the Annex to this Part VII: how would that tribunal respond to the specific claims made by Apotex Inc. in this arbitration under NAFTA Article 1139? 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 two lines of its 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.

7.58. In the Tribunal’s view, it is impossible to dismiss those reasons as mere ‘obiter dicta’ or to read one passage in isolation from those reasons as a whole. Those reasons under both NAFTA Articles 1139(g) and 1139(h) were essential to the operative part and thereby distinctly determined matters distinctly in issue in the Apotex I & II arbitration. It is also impermissible to parse the two sets of claims in the two arbitrations, so as artificially to distinguish one case from the other. The purpose of the res judicata doctrine under international law is to put an end to litigation; and it would thwart that purpose if a party could so easily escape the doctrine by ‘claim-splitting’ in successive proceedings.

7.59. Thus, the Claimants did not argue (nor could they) that simply because the Apotex I & II Award addressed specific claims relating to Sertraline and Pravastatin, the Claimants could still bring the same claims relating to other drug products. Similarly, in the Tribunal’s view, the Claimants cannot now distinguish tentatively approved ANDAs from finally approved ANDAs so as to frustrate the application of res judicata to issues decided in the Apotex I & II Award. That is an impermissible attempt to re-argue and overturn the final and binding decisions in the Apotex I & II Award. The Tribunal notes that, in Grynberg v. Grenada, that tribunal likewise rejected an analogous attempt based upon a new allegation of corruption.63 Indeed, were it so easy to side-step the application of res judicata, the doctrine would be largely meaningless under international law, a risk recognised by several scholars, including Professors Dodge, Schreuer and Reinisch in the works cited earlier in this Part. The costs and time required for investor-state arbitrations, already not inconsiderable, would be multiplied several times over if unsuccessful claimants could persuade later tribunals to restrict the effect of earlier awards by simply reformulating their claims and arguments. As already described, there is a strong interest, both public and private, in bringing an end to a dispute by one final and binding arbitration award.

7.60. In regard to Apotex-Holdings, the Tribunal decides that same result must follow, albeit for additional reasons. Given that Apotex Inc.’s ANDAs are not “investments” under NAFTA Article 1139, it follows that Apotex-Holdings cannot make any claim in respect of its indirect interest in such ANDAs because Apotex-
Holdings is not, for that purpose, an investor with a relevant “investment” under NAFTA Article 1139.

(7) Conclusion

7.61. Accordingly, for these reasons, the Tribunal (by a majority) decides this second issue in favour of the Respondent and against Apotex Inc. and Apotex-Holdings. Thus, the Tribunal (by a majority) upholds the Respondent’s jurisdictional objections to the claims made by the Claimants in regard to the ANDAs under NAFTA Articles 1101(1), 1116 and 1139. (This decision does not apply, of course, to the other claims made by Apotex-Holdings for itself and for Apotex-US which are considered in the Parts which follow).

7.62. Whilst this conclusion disposes of the Claimants’ claims under the doctrine of res judicata, it should not be assumed that the Tribunal (by a majority) would have reached any different decision on the Claimants’ other submissions under NAFTA Article 1139. Notwithstanding a well-researched argument by Counsel for the Claimants as regards the correct interpretation of Article 1139 (to which the Tribunal here pays tribute), the Tribunal remains attracted to the succinct submissions of the Respondent and Mexico to the effect that the definition of an “investment” under both Article 1139(g) and 1139(h) must be read with Article NAFTA 1101(1), collectively requiring such investment to be “in the territory” of the host State. Although Apotex Inc.’s ANDAs were originally submitted and approved in the USA, this Tribunal (by a majority) considers that such ANDAs cannot meet that particular requirement, particularly when Apotex Inc. has never had any presence, activity or other investment in the territory of the USA, including the non-payment of any relevant US taxes. (This is not inconsistent with the approach taken in the Apotex I & II Award.)

7.63. Dissent: As noted above, the decision on this issue is not made by the Tribunal unanimously. What follows in the next three paragraphs is the dissent on this issue by Mr. Rowley.

7.64. Had he been sitting alone, Mr. Rowley would have reached a different conclusion on this issue. For him, the essence of res judicata is that a right, question or fact has distinctly been put in issue and distinctly determined by a court or tribunal of competent jurisdiction in an earlier proceeding between the same parties. He considers that the Apotex I & II tribunal neither decided, nor needed to decide the question which is now before the Tribunal, i.e., whether Apotex Inc.’s finally approved ANDAs plus associated products are to be characterised as “property” for the purposes of NAFTA Article 1139(g). The Apotex I & II tribunal stated clearly that: “The jurisdictional issue here turns upon the inherent nature of the relevant ANDAs …” (Paragraph 224, emphasis added). The relevant ANDAs were understood to be Apotex Inc.’s Sertraline and Pravastatin ANDA filings which had only been tentatively approved by the FDA. The Apotex I & II tribunal well understood the difference between tentatively approved and finally approved ANDAs, and made the point that “… it remains entirely unclear whether a tentatively-approved ANDA (i.e. as distinct from (i) a finally-approved ANDA, and (ii) a finally-approved ANDA plus associated products) has value.” (Paragraph 220, emphasis added). Because the ANDAs before the Apotex I & II tribunal had only been tentatively approved, the tribunal reasoned that “… at the relevant time, (a) Apotex’s [i.e. Apotex Inc.’s] ANDAs could not (yet) be characterised as ‘property’ for the purposes of NAFTA Article 1139(g), and (b), even if they did constitute “property”, Apotex’s [i.e. Apotex Inc.’s] ANDAs were not yet ‘acquired in the expectation or used for the purpose of economic benefit or other business purposes’
7.65. For Mr. Rowley, it was plain that the Apotex I & II tribunal simply did not determine whether the relevant ANDAs here in issue (i.e. finally approved ANDAs plus associated products) constitute an “investment” under the terms of NAFTA Article 1139(g). Indeed, as it addressed the character of tentatively approved ANDAs, it was at pains to point out how they differed from finally approved ANDAs. How the Apotex I & II tribunal would have decided the claims made by Apotex in this proceeding is not relevant to the question as to what was “distinctly in issue” before it, and what it “distinctly determined”, except to the extent that if the question needs to be asked, it points strongly to the conclusion that the Apotex I & II tribunal did not decide the question here in issue.

7.66. As to whether Apotex Inc.’s finally approved ANDAs are properly characterised as an “investment” for the purposes of NAFTA Article 1139(g), Mr. Rowley considers the uncontroverted evidence that: (i) Apotex’s finally approved ANDAs were being used for the purposes of economic benefit at the time of the Import Alert; (ii) such ANDAs are regularly bought and sold in the US (often for substantial amounts); (iii) FDA regulations explicitly recognise that ANDAs are “owned” by the applicant; and (iv) US tax law treats ANDAs as franchises or intangibles for the purposes of the US tax code, is sufficient proof that Apotex’s ANDAs here in issue constitute intangible property for the purposes of NAFTA Article 1139(g).
23 Amco v. Indonesia, supra.
24 Lowe, supra, at p. 42.
25 Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada, ICSID Case No. ARB/10/6, Award (10 December 2010).
26 Although the Grynberg Award referred to the principle as “collateral estoppel”, the US legal concept of “collateral estoppel” is broader, permitting non-parties (or privies) to a prior litigation to invoke the doctrine to preclude re-litigation of an issue previously decided. That broader principle is not an issue in the present case, as the Respondent recognised [TD4.1190].
27 Grynberg v. Grenada, supra, Para. 7.1.8.
28 Id., Para. 4.1.1.
29 Amco v. Indonesia, supra, quoting the expert report of Professor Reisman at Para. 30: “[A] right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.”
30 Grynberg v. Grenada, supra, Para. 7.1.1.
31 Id., Para. 7.2.1.
32 TD3.542.
33 Grynberg v. Grenada, supra, see (inter alia) Paras. 5.3.5 and 5.3.6.
34 See, e.g., Cheng, supra, at p. 337; Amco v. Indonesia, supra, Para. 30.
37 Id., at p. 15.
38 Pious Fund, supra, at p. 2.
39 Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (Ser. B) No. 11 (May 16), Para. 86.
40 Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow, supra, at p. 24.
42 Rosenne, supra, at p. 1603.
45 Rosenne, supra, at p. 1603.
49 Rosenne, supra, at p. 1556.
50 Id.
51 Pious Fund, supra.
53 Id., Para. 34.
54 Id., Para. 101.
55 TD6.1577-1654.
56 TD6.1577. See also TD3.544.
57 TD3.542.
58 The complaints made in the Request (Paras. 55-56) and the Apotex Memorial (Paras. 530-538) as regards “pending ANDAs” were subsequently abandoned by the Claimants: see the Claimants’ letter to the Tribunal dated 7 February 2013.
59 Apart from its summaries of the parties’ respective arguments, see in Paras. 200, 209, 210 (in part), 211, 212- 215, 220-221 (in part) and 223 (in part) of the Apotex I & II Award.
61 See the Apotex I & II Award, Paras. 226ff and 235. (Apotex Inc. was represented by different Counsel in the Apotex I & II arbitration than Counsel for the Claimants in this arbitration).
62 See the Apotex I & II Award, Paras. 230-235.
63 Grynberg v. Grenada, supra, Para. 7.3.6 (“It is true that Claimants style the present arbitration as Treaty claim based [the first arbitration was contract-based upon a concession agreement]. But the difficulty with this is that, as pleaded and argued, the present case is no more than an attempt to re-litigate and overturn the findings of another ICSID tribunal,
based on allegations of corruption that were either known at the time or which ought to have been raised by way of a revision application and over which the Prior Tribunal had jurisdiction”).

64 See Paras. 186, 192, 196 and 225 of the Apotex I & II Award.

Referring Principles:

XIII.4.5 - Conclusive and preclusive effects of awards; res judicata