Víctor Pey Casado and President Allende Foundation v Republic of Chile

Layers of Preclusion

I. INTRODUCTION

In a Decision dated 8 January 2020,[1] the *ad hoc* Committee in *Víctor Pey Casado and President Allende Foundation v Republic of Chile* decided in favour of the Respondent declining to annul a 2016 Award—the second in the dispute.[2] The decision is remarkable, not just because it serves as the final chapter in the longest-running ICSID dispute to date,[3] but also because it illustrates the many difficulties that may arise from the application of the principle of *res judicata* in resubmission proceedings. This case comment focuses on the Committee's application of *res judicata*: to this end, it succinctly reviews the background to the dispute (Section II), addresses the decision of the Committee (Section III) as well as the Separate Opinion (Section IV), and comments on the Tribunal's application of the doctrine and its potential implications for future cases (Section V).

II. BACKGROUND TO THE ANNULMENT PROCEEDINGS

The dispute arose from the occupation and later nationalization of the *El Clarín* newspaper. Mr Pey Casado, born in Spain but a naturalized Chilean national, had purchased all the shares in the parent company of the newspaper. The latter was shut down on the day of the 1973 Chilean coup d'état. Mr Pey Casado fled the country and only returned after democracy was re-established, seeking indemnification in the courts of Chile. In 1997, the Applicants[4] initiated ICSID arbitration, and there began the longest-running dispute within the Centre's jurisdiction. In 2008, the First

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[1] *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on Annulment (8 January 2020) (Rolf Knieper, President; Nicolas Angelet; Yuejiao Zhang) ('Decision').

[2] *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Award (13 September 2016 2008) (Frank Berman, President; V.V. Veeder; Alexis Mourre) (hereinafter 'Resubmission Award' and 'Resubmission Tribunal').

[3] In a parallel case, an UNCITRAL Tribunal had declined to hear

[4] As the present note focuses on the last Annulment decision, the term 'Applicants' will be used throughout for reasons of consistency, except in quotations.

Tribunal's Award saw the Applicants prevail.[5] The decision was partially annulled in 2012.[6] The Applicants resubmitted the dispute to the Centre's jurisdiction, and an Award ('Resubmission Award') followed in 2016. Although an in-depth history of these proceedings, culminating in the 2020 Annulment decision, is beyond the scope of this comment, it is essential to recall the key chapters in the dispute.

A. *The First Tribunal's Award*

The First Tribunal held that the Applicants had suffered an injury and were to be compensated, but several qualifiers complicated the matter. Among these, the failure of the Applicants' claim for unlawful expropriation was to prove crucial. The First Tribunal found that the claim, brought under Article 5 of the BIT,[7] fell outside the treaty's temporal scope.[8] One of the key issues had to do with the status of Decree No. 165 of February 1975, the act with which the expropriation was perfected.[9] Applicants sought to describe the Decree as marred by a specific breed of nullity—inexistence— in order to portray the expropriation as a continuous process lasting well after the entry into force of the BIT.[10] The First Tribunal, did not accept this view,[11] characterizing the expropriation as an instantaneous act the consummation whereof occurred outside the treaty's temporal scope.[12]

The Applicants had better luck with their claim under the heading of fair and equitable treatment ('FET'), arising from the lengthy delays and discrimination suffered by the Applicants in proceedings initiated for the return of a printing machine.[13] In the framework of a national reparation program, a decision had also been taken by the Chilean Ministerio de Bienes Nacionales[14] awarding compensation for expropriatory acts, but having the effect of compensating persons other than the true owners of the investment.[15] The First Tribunal saw the above as a

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[5] *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Award (8 May 2008) (Pierre Lalive, President; Mohammed Chemloul; Emmanuel Gaillard) (hereinafter 'First Award' and 'First Tribunal').
[6] *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on the Application for Annulment (18 December 2012) (L Yves Fortier, President; Piero Bernardini; Ahmed El-Kosheri) (hereinafter 'First Annulment Decision' and 'First Committee').
[7] Agreement between the Kingdom of Spain and the Republic of Chile on the Reciprocal Promotion and Protection of Investments (signed 2 October 1991, entered into force 28 March 1994) ('BIT').
[8] First Award, paras 601-612.
[9] Ibid.
[10] Ibid para 612
[11] Indeed, it bears noting that the Decree was still in force at the time.
[12] Consistent with ARSIWA
[13] Ibid para 459.
[14] National Assets Ministry of the Republic of Chile, Decision No 43 (28 April 2000) ('Decision No 43').
[15] The Applicants had, in any event, elected not to participate to that compensation process by virtue of the fork-in-the-road clause in the BIT. The point was later raised in the Resubmission Award (para 232).

breach of the BIT's FET provision and found in favour of the Applicants, ordering compensation.[16] The two claims—expropriation and FET—were, however, deeply interwoven,[17] and perhaps for this reason, The Tribunal ruled in favour of and awarded compensation to the Applicants, but calculated damages on the basis of 'objective elements', and, chiefly, the above-mentioned Decision No. 43. [18]To add further complexity, in its *dispositif*, after its finding of a breach of FET in paragraph 2 and before ordering damages in paragraph 4), the Tribunal ambiguously included a paragraph to the effect that 'les demanderesses ont droit à compensation'.[19]

B. *The First Annulment Decision, the Award of the Resubmission Tribunal*

The First Award was impugned by Chile and partially annulled.[20] Out of the eleven aspects of the Award impugned by the Respondent,[21] the Committee only annulled the section on damages on the basis of Article 52(1)(d),[22] as Chile's right to be heard had been violated, as well as under Article 52(1)(e),[23] for the Tribunal's reasoning on damages was found to be contradictory.[24] The latter finding arose from the circumstance that the First Tribunal based its calculation of damages on the above-mentioned Decision No. 43, which was expropriation-based, despite affirming earlier in the Award that any expropriatory acts ought to fall outside of the temporal scope of the BIT, and that any allegations, evidence, or discussions concerning damage suffered as a result of the expropriation were to be considered irrelevant in establishing injury arising from another breach.[25] The consequence of one such conflation was to negate the very distinction between expropriation claims and other claims, and, to put it as Chile did, 'compensating Claimants—through the back door—for the very expropriation that it had said was outside the *ratione temporis* scope of the BIT'.[26] Ultimately, the First Committee annulled paragraph 4 of the *dispositif* of the First Award, on

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[16] First Award para 674.
[17] This was the case, at least, in the Applicants' arguments. Specifically, the latter sought to demonstrate that, had a denial of justice not occurred, the Applicants could have obtained a domestic judgment pronouncing on the inexistence of Decree No. 165, thereby succeeding in showing that the expropriation at issue in the first claim lacked an instantaneous character and indeed fell into the temporal scope of the treaty.
[18] First Award paras 689-704.
[19] Ibid, *dispositif* (Section X) para 3.
[20] For an aptly-titled early comment on these proceedings see Christoph Schreuer, 'Víctor Pey Casado and President Allende Foundation v Republic of Chile: Barely an Annulment' (2014) 29 ICSID Review - Foreign Investment Law Journal 321.
[21] First Annulment Decision para 93.
[22] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) ('ICSID Convention') Article 52(1)(d)
[23] ICSD Convention, Article 52(1)(e).
[24] First Annulment Decision, paras 278-287.
[25] Ibid para 283.
[26] Ibid para 279.

damages, and 'the corresponding paragraphs in the body of the Award related to damages (Section VIII)'.[27]

The lack of clarity in the identification of the annulled parts of the Award led to difficulties in the Resubmission proceedings. These were initiated by the original Applicants the following years, pursuant to Article 52(6) of the ICSID Convention.[28] In the corresponding Award ('Resubmission Award'), rendered three years later, the Tribunal (hereinafter 'Resubmisson Tribunal') immediately caveated its determination by setting out its understanding of its mission excluding any reconsideration of portions of the award that were not annulled.[29] Accordingly, it accepted the First Tribunal's conclusions on the relevant violations as final and untouched by the First Annulment Decision and dismissed the claims based on Article 4 of the BIT.[30] Conversely, it did address the question of the Applicants' 'droit à compensation' included in paragraph 3 of the *dispositif* of the First Award. On this point, the Resubmission Tribunal read the French expression as synonymous with 'entitlement to reparation', and thereby took up the role of determining its nature and form by relying on rules of general international law.[31] To do so, it further concluded that, while *res judicata* attached to the First Tribunal's identification of the FET breach, the First Award had in fact made no findings as to the injury caused to the Applicants by that breach.[32] The matter thus needed to be determined, the burden of proof resting on Applicants. The latter, having chiefly focused their submissions on the evaluation of damages,[33] were found to have failed to demonstrate any injury or loss arising from that breach.[34]

The Resubmission Tribunal also disposed of the unjust enrichment claim, following Respondent's submission that awarding compensation without a prior finding of breach would have de-linked the claim from the BIT,[35] thereby reading the 'droit à compensation' as referring to the FET breach and reaffirming that *res judicata* covered both the question of liability and the preclusion of any claim, however disguised, relating to expropriation.[36] Thus, the Resubmission Tribunal decided, unanimously, that the 'formal recognition of the Applicants' rights and its finding that they were

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[27] Ibid para 359.
[28] ICSID Convention, art 52(6).
[29] This conclusion also followed from Rule 55(3) of the ICSID Arbitration Rules.
[30] Resubmission Award, paras 189-198.
[31] Ibid para 202.
[32] Ibid para 230.
[33] Ibid para 232.
[34] Ibid paras 235-236.
[35] Ibid para 238.
[36] Ibid paras 238-240.

the victims of a denial of justice constitutes in itself a form of satisfaction under international law' and declined to make any award of financial compensation.[37] Shortly thereafter, the Tribunal issued a decision on rectification, in which*, inter alia*, it confirmed that its conclusion on the value of the First Tribunal's decision as satisfaction had been its own independent finding.[38]

Days after the Rectification Decision, Applicants filed for annulment on several grounds, including: 1) that the Tribunal had manifestly exceeded its powers by rejecting evidence on facts that had occurred before the entry into force of the BIT, thereby appearing biased; 2) the Resubmission Tribunal's alleged failure to give *res judicata* effect to unannulled findings.[39]

III. THE COMMITTEE'S DECISION

A. *Evidence and burden of proof before the Resubmission Tribunal*

As to the first group of challenges, the Applicants' position was that the excluded evidence was essential to determine the amount of compensation for the FET breach, which, they argued, needed to be appraised on the basis of the value of the assets confiscated in 1973/1975. According to the Applicants, the Resubmission Tribunal should have taken into account facts having occurred before the BIT's entry into force. The Committee engaged in a thorough analysis of the preceding chapters of the dispute and found that, while some confusion persisted as to what parts of the original Award the First Committee had in fact annulled,[40] there was no doubt that the it had confirmed the approach of the First Tribunal, as demonstrated by its approving quotation of paragraph 688 of the First Award, dealing the exclusion of the matter of the expropriation and related evidence.[41] Accordingly, *res judicata* attached to this determination. It further found that, despite some confusion, the Resubmission Award, too, was ultimately unambiguous as to the same point, by expressly characterizing that determination as *res judicata*. Moreover, the First Tribunal had determined that the evidence presented for the damages resulting from expropriation was

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[37] Ibid para 96.
[38] *Víctor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Decision on Rectification (6 October 2017) para 55. In fact, the Tribunal did rectify a minor aspect of its decision, that is to say, the reference in a footnote to a paragraph of the First Award, in which the Tribunal observed 'que le prononcé de la présente sentence, notamment par sa reconnaissance des droits des demanderesses et du déni de justice dont elles furent victimes, constitue en soi une satisfaction morale substantielle et suffisante' (First Award, para 704). It bears noting, however, that the point had been made in the First Award in the context of the discussion of *moral* damages.
[39] Decision, para 10. Specifically, these were : (i) improper constitution of the Resubmission Tribunal, manifest excess of powers; (iii) serious departure from a fundamental rule of procedure; and (iv) failure to state the reasons on which the award is based.
[40] Ibid para 623.
[41] Ibid para 634, referring to First Annulment Decision, para 688.

simply not relevant for damages resulting from the FET breach, and this determination had been confirmed by the First Committee. For its part, According to the Committee, the Resubmission Tribunal had correctly understood the scope of *res judicata* and exercised its power accordingly. In practice, the Applicants failed to adduce evidence of their prejudice that was not based on the value of the expropriated assets and which the Resubmission Tribunal could take into account given the *res iudicata*.[42]

B. *Res judicata effect of the unannulled findings of the First Tribunal*

The second set of arguments related to the Applicants' claim that the Resubmission Tribunal had failed to grant *res judicata* effect to the findings of the First Tribunal which had survived annulment. The claim was articulated under three different grounds: manifest excess of power, serious departure from a fundamental rule of procedure, and failure to state reasons.

As to the first, the Committee summarily rejected the claim that the Resubmission Tribunal had reopened the matter of the FET breach under the BIT, thereby fully respecting that *res judicata* status of that determination by, first, expressly accepting its role as delimited accordingly.[43] It further elaborated on the issue of evidence related to the expropriation by clarifying the scope of *res judicata* in that sense,[44] clarifying that only the paragraphs dealing with 'the adjudication of damages' in the original Award had been annulled,[45] with the consequence that *res judicata* covered the exclusion of the compensation claim for expropriation from the temporal scope of the BIT and the inclusion of the one relating to the FET breach.[46] While the original Award did not did not specifically address whether the consequences of the *completed* expropriation were also precluded *ratione temporis*, the Committee took its discussion of the applicable law[47] as implying a refusal to adjudicate matters not covered by the BIT.[48] Accordingly, the Committee determined that by declining to consider the evidence concerning the expropriation and considering whether FET breaches had caused injury and damage the Resubmission Tribunal did not exceed its powers by disrespecting *res judicata*—in fact, it granted it the necessary weight.[49]

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[42] Ibid para 638.
[43] Ibid para 656-657.
[44] Ibid para 659.
[45] Ibid para 662.
[46] Ibid para 663.
[47] In particular, this was the reference to the International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/83 (2001) (ARSIWA). It is however true that the Committee discussed Article 14, whereas See First Award, para
[48] Ibid para 664.
[49] Ibid para 672.

The Committee then had to consider the *res judicata* scope of the pronouncement on the 'droit à compensation', which the Applicants alleged the Resubmission Tribunal disrespected by not granting financial compensation. The Applicant's first argument also hinged on the purported agreement between the parties that the term was to be taken as implying monetary compensation under international law.[50] While the Committee conceded that arbitral tribunals are creatures of consent, it denied that mere similarity of views short of a 'meeting of the minds' could bind them.[51] The Committee, however, held that the First Tribunal had used the term 'compensation' as a 'term of art influenced by English legal terminology',[52] thereby finding the Resubmission Tribunal's use of the term as equivalent to 'reparation' wanting.[53] After recalling the limited scope of ICSID annulment proceedings, it held that no annulment should follow from errors having no direct impact on the outcome.[54] In the case at issue, for this to be the case the 'right to compensation' would have needed to be completely unreserved, untethered to any assessment of causation and evidence, and thus amounting to a prohibited decision *ex aequo et bono*.[55] The First Tribunal was mindful of the fact that the Applicants had not discharged their burden of proof relating to the FET breach, focusing instead on the expropriation, but nevertheless awarded damages based on objective elements found in the domestic compensation proceedings relating to the expropriation.[56] Since the First Committee had annulled this determination, *res judicata* covered the existence of the breach and that compensation was owed, but not that an unreserved entitlement to compensation independent from proof of injury and damage.[57] Accordingly, the Resubmission Tribunal correctly understood the scope of *res judicata*, and no consequence could be attached to its misinterpretation of the term 'compensation', for the Applicants would have still failed to discharge their burden of proof.[58] No excess of powers could be found.[59]

In the same section, the Committee also rejected the charge of departure from a serious rule of procedure, judging that the Resubmission Tribunal had not addressed approached the issue of scope of *res judicata* with bias.[60] Similarly, it found that the Resubmission Award approach to the

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[50] Ibid para 674.
[51] Ibid paras 675-676.
[52] Ibid para 679.
[53] Ibid para 680.
[54] Ibid para 684.
[55] Ibid para 686.
[56] Ibid para 692.
[57] Ibid para 693.
[58] Ibid paras 695-698.
[59] Ibid para 699.
[60] Ibid paras 700-702.

issue could not be censured for failure to state reasons.[61] In essence, the Applicants' argument was that an inconsistency existed between parts of the Resubmission Award where their position on damages was summarised[62] and the Resubmission Tribunal's conclusion on burden of proof.[63] Here, the Committee adopted a more holistic reading of the decision and, after observing that mere inconsistency would have not in any event warranted an annulment,[64] it held that the Resubmission Tribunal's conclusion on burden of proof was not at odds with its previous description of the Applicants' position, but did in fact pay deference, albeit implicitly, to *res judicata*.[65]

IV. THE SEPARATE OPINION

Member Angelet appended a short separate opinion (hereinafter 'Separate Opinion') in which he voiced his disagreement as to certain *res judicata* issues, while concurring entirely with the rejection of the annulment application.[66] To this end, *first*, he argued that dispositive paragraphs 1 and 4 of the First Annulment Decision were to be read together, thereby pushing the entirety of the First Award's section on damages outside the scope of *res judicata*. *Second*, he observed that, contrary to the Committee's view, the paragraphs of the First Annulment decision identified by the majority as proof that the First Committee had made its own the content of content of paragraph 688 of the First Award, relating to the exclusion of the expropriation claim and relative evidence on damages from the adjudication of the FET breach, were in fact mere summaries of the First Tribunal's reasons.[67] Further, the Committee had ruled that the problem in the damages section of the First Award was not in the method of calculation, but rather in the reasoning followed to arrive to it.[68] Accordingly, the First Committee did not validate the method (which it was not empowered to do), but did not censure it either. Accordingly, *res judicata* did not extend to that determination.[69] In that regard, it could not be argued that the Resubmission Tribunal's presentation of scope of *res judicata* as excluding of expropriation-related evidence and calculation methods for other BIT violations was consistent with the First Annulment.[70] All the same, as its *dispositif* explicitly shielded Section VII of the Award from annulment, the statements of the First

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[61] Ibid paras 703-715.
[62] Resubmission Award, para 196.
[63] Ibid paras 232-233.
[64] Second Annulment Decision, para 711.
[65] Ibid para 713.
[66] Separate Opinion, para 1.
[67] Ibid paras 10-13.
[68] Ibid paras 14-15.
[69] Ibid para 17.
[70] Ibid.

Tribunal to the effect that it could consider facts predating the entry into force of the BIT in deciding on violations within the latter's temporal scope were *res judicata*.[71] In that decision the Resubmission Tribunal's reasoning found a partial basis, thereby surviving the challenges levelled against it.[72] As a methodological point, the Opinion spoke against bestowing *res judicata* effect to a proposition on the basis of inferences from other parts of the Award where they were neither part of the *dispositif* nor a necessary underpinning of it.[73]

V. COMMENTS

The final chapter of the Pey Casado saga provides ample illustration of the key difficulty in the application of the principle of *res judicata*, namely the fact that controversy rarely arises about its strength, but rather hinges its scope—deciding what has been decided is never an easy task, especially after a lengthy and convoluted series of decisions. This second Annulment Decision provides an excellent testing ground for the proposition.

The complexity of the assessment, of course, was amplified by the presence of the First Committee's decision. As the Committe in *MTD v Chile* observed *obiter*, an annulment decision 'can extinguish a *res judicata* but on a question of merits it cannot create a new one'.[74] In fact, by extinguishing a *res judicata*, an annulment decision inevitably creates another—more circumscribed, to be sure, but sometimes less neatly cut.[75] It is in this context that the insistence of the Resubmission Tribunal on striving for coherence with the First Annulment decision, and its scrutiny of the Second Committee, may be understood, in particular, on the matter of the 'droit à compensation' discussed in paragraph 3 of the First Award: with the annulment of the following dispositive paragraph on damages, what originally served as a logical antecedent was turned into a self-standing proposition.[76]

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[71] Ibid para 19.
[72] Ibid.
[73] Ibid para 17.
[74] *MTD v Chile*, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007) para 54. In a footnote to the observation, that Committee cited approvingly the excursus made by the *Amco Asia* Resubmission Tribunal and conceded that 'a reconvened tribunal following an annulment will no doubt have regard to the reasoning of an annulment Committee', without it being binding in any way. See also *Amco Asia v Indonesia*, ICSID Case No ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding (10 May 1988).
[75] See also Decision, para 643, discussing 'the First Award's res iudicata effect *as determined* by the First Committee' (emphasis added).
[76] Resubmission Award, paras 199-200.

In this respect, the solution provided by the Resubmission Tribunal cannot be faulted for lack of elegance. By interpreting the dispositive paragraph on *compensation* as only referring to the basic principle of reparation, in spite of the parties' agreement to the contrary, the Resubmission Tribunal could depict the First Award itself as a form of satisfaction. The seeming contradiction with a of a finding of liability covered by *res judicata* could thus be resolved. Had that solution failed, as it did—as a matter of principle—before the Committee, compensation could still be ruled out if damage was not proven. Ultimately, this was ascribed to the adjudication of damages not being covered by *res judicata*. Still, a similar solution could have been based, although more awkwardly, on a different construction of the preclusion, arguing that the First Tribunal had conclusively pronounced on the Applicants' failure to displace the burden of proof.[77]

This point leads to the second noteworthy aspect of the case, that is to say, the handling of the notion of 'findings' in the treatment of the matter of evidence by the Resubmission Tribunal, which was in turn approved by the Committee. The former saw, and the latter agreed, the matter as covered by a finding not just to the rejection of the expropriation claim as outside the scope of the BIT, but also by a finding that the evidence relating to the expropriation was irrelevant to establishing damage for the FET breach.[78] In this respect, it is striking that even the disagreement in the Separate Opinion seems to single out this approach as the only instance of criticism devoted to the application of the principle by the majority, targeting the extent to which *res judicata* can be said to extend to statements that are not necessary antecedents of dispositive paragraphs.[79] The issue is a complex one, and even the International Court of Justice (ICJ), having weighed on the issue,[80] has found it difficult to apply in practice—in one recent case, leading to an evenly split bench.[81]

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[77] The difficulty in this approach lies in the fact that while the issue was adjudicated upon, the claim was *not* rejected. Another comparison is possible here with the view of the minority in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (Preliminary Objections) [2016] ICJ Rep 100. The dissenters insisted in the preclusive effect of a failure to prove an entitlement as a rejection of a claim. See Joint Dissenting Opinion of Judges Yusuf, Cançado Trindade, Xue, Gaja, Bhandari, Robinson, and Brower (ad hoc) at 52, para 20.

[78] *Decision*, paras 643-644.

[79] Supra n73 and accompanying text.

[80] The earliest pronouncement in this sense by the World Court may be found in the *Polish Postal Service in Danzig, Poland v. High Commissioner of the League of Nations and Free City of Danzig*, Advisory Opinion, PCIJ Rep Series B No 11, at 29–30

[81] This was indeed the case of *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia*, where controversy erupted on the meaning and significance of the expression 'cannot uphold' in the dispositif. For a comment expanding on the ICJ's approach see Niccolò Ridi, 'Precarious Finality? Reflections on Res Judicata and the Question of the Delimitation of the Continental Shelf Case' [2018] Leiden Journal of International Law 1.

It is true that *res judicata* issues in the context of disputes featuring annulment and resubmission proceedings are peculiar in many ways. Yet, many of the difficulties relating to the identification of the *personae*,[82] *petita*, and *causae petendi* remain the same. The approach adopted in the case suggestive of a broad understanding of *res judicata*, extending to the broader notion of issue estoppel.[83] In this regard, it seems fitting to observe that one member of the Resubmission Tribunal had sat on the *Apotex* Tribunal, perhaps the investment dispute in which *res judicata* issues have received the most thorough treatment, and which adopted one such broad understanding of the notion.[84]

Overall, a broad notion of *res judicata* was perhaps more consistent with the desire, palpable throughout the resubmission proceedings and the annulment decision, to put an end to a seemingly endless dispute (*expedit rei publicae ut sit finis litium*),[85] and, before the Committee, to uphold the limited and exceptional nature of the annulment remedy.[86] The latter point, in particular, deserves special attention in that the strength of the preclusion arising from *res judicata* found a limit in the very objective of the annulment mechanism, thereby preventing in-depth scrutiny of inconsistencies not amounting to annullable errors and thus the 'policing' of the doctrine's application. Indeed, it remains abundantly clear that matters of preclusion hinge on determining the boundaries of a decision, and interpretive dexterity might get one further than adherence to any doctrinal stance.

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[82] For reasons of space, the present case comment does not deal with the question of identity of parties, which was nevertheless raised with regards to the status of independent claimant of Ms Coral Pey Grebe, the daughter of the aging Mr Pey Casado's, who eventually died during the proceedings. See Alison Ross, 'Pey Casado dies at 103 but claim lives on' Global Arbitration Review (02 November 2018) https://globalarbitrationreview.com/article/1176457/pey-casado-dies-at-103-but-claim-lives-on accessed 12 May 2020.

[83] For an early example, see *Claim of Company General of the Orinoco Case*, Report of French-Venezuelan Mixed Claims Commission of 1902 (1906) 355.

[84] *Apotex Holdings Inc and Apotex Inc v The Government of the United States of America*, ICSID Case No ARB(AF)/12/1 (NAFTA), Award (25 August 2014) paras 7.10-7.40. On that decision see Charles T Kotuby and James A Egerton-Vernon, 'Apotex Holdings Inc and Apotex Inc v The Government of the United States of America: The Adoption by International Tribunals of a Substantive/Transactional Approach to Res Judicata—A New Paradigm in International Dispute Resolution?' (2015) 30 ICSID Review - Foreign Investment Law Journal 486. The member was the late V.V. Veeder, who, incidentally, also authored an oft-cited study on issue estoppel: see VV Veeder, 'Issue Estoppel, Reasons for Awards and Transnational Arbitration' in *Complex Arbitrations* (ICC Pub No 688E, 2003) 73.

[85] Somewhat ironically, it was by reference to the idea that lengthy disputes should eventually come to an end that the First Tribunal justified its reliance, later subject to annulment, on Decision No 43 for the purposes of calculating damanges. See First Award, para 691 ('En tout état de cause, le Tribunal arbitral est conscient de son devoir de mettre un terme, dès que l'état du dossier le permet, à une procédure d'une durée qui, dépassant la moyenne, a été allongée, ainsi qu'on l'a vu, pour des raisons diverses, dont la complexité inhabituelle des questions litigieuses et l'attitude même des parties.').

[86] Decision, para 804.

It is understandable, if a matter of regret, that no further elaboration of a principled approach to *res judicata* issues should have been offered. Still, this second Annulment Decision contributes to elucidating the contours of the notion and will provide important guidance for future tribunals examining such issues. As such, the decision shall not be seen as an anticlimactic conclusion of one of the foundational cases in ICSID jurisprudence, but as adding to its important legacy.