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The Futility Exception to The Exhaustion Requirement: *Apotex v. United States*

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In its [Award on Jurisdiction and Admissibility](#), a unanimous tribunal in *Apotex, Inc. v. United States* dismissed a Canadian manufacturer's claims that the United States judiciary had violated NAFTA by mis-applying a regulatory time period.

Most of the reaction to *Apotex* has focused on the tribunal's decision that the claimant's activities in the United States—and in particular its submissions for regulatory approval—did not constitute an “investment” under [NAFTA Article 1139](#). While the tribunal struggled with claimant's assertion that the regulatory filings were actually treated as “property” as a technical matter, the Award essentially concluded that *Apotex* simply had not otherwise engaged in sufficiently investment-like behavior to trigger NAFTA protections. The decision thus offers a good—though very fact-specific—example of how tribunals can reasonably read even broad bi-/tri-lateral treaty definitions of “investment” to exclude categories of assets or activity that stray too close to the “sales contract” boogeyman that stalks discussions of this topic.

Less well recognized, however, is another aspect of the Award that may prove more significant, certainly given the smaller body of investment law on the relevant topic. And that is the tribunal's separate conclusion that some of *Apotex*'s claims were also barred for the additional reason that *Apotex* had failed to exhaust its domestic remedies. In so deciding, the tribunal adopted a notably strict understanding of the futility exception to the exhaustion requirement that applies to international delicts committed by domestic judiciaries. Given the relative paucity of directly on-point precedent from judicial authorities (especially in comparison to the large quantities of ink spilled by commentators), a brief description of the Award's decision on this point seems appropriate.

Even if its conceptual resting place is disputed, the existence of the exhaustion requirement is fairly uncontroversial. In *Apotex*, part of the tribunal's reasoning was appropriately specific to NAFTA. Article 1101 permits challenges only to measures “adopted or maintained by a Party,” and both parties in *Apotex* adopted respondent's argument from [Loewen Group v. United States](#) that “the terms of Article 1101 . . . require finality of action.” The *Apotex* tribunal went further, however, by additionally grounding its futility reasoning in customary international law—made applicable by

NAFTA Article 1131, which provides that “a tribunal established under this section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law.”

Under these sources of law, Apotex’s problem was that it had abandoned one of its domestic judicial actions after an appeals court refused to grant provisional relief. In Apotex’s view, since by that time there were barely two months left in the relevant regulatory time period, there was no serious possibility either of securing Supreme Court review or of securing a trial court ruling on the merits after a full trial. The question confronting the *Apotex* tribunal was whether abandonment under these circumstances forfeited the claimant’s right to pursue the matter further under international law.

While both parties “primarily invoked authorities concerning denial of justice claims,” they apparently agreed that “*all* causes of action premised upon judicial acts” require the victim to have exhausted local remedies. The logic was traditional:

Such claims depend upon the demonstration of the systemic failure in the judicial system. Hence, a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself.

Apotex’s failure to pursue certain formally available remedies thus brought the tribunal to the futility if exception, which renders a claimant’s failure to exhaust remedies irrelevant—if and only those remedies were “‘obviously futile.’” In the tribunal’s view, “the ‘obvious futility’ threshold is a high one”: it “requires an actual unavailability of recourse or recourse that is proven to be ‘manifestly ineffective’—which, in turn, requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued.” Citing Article 15 of the [ILC Draft Articles on Diplomatic Protection](#), the tribunal emphasized that it is “not enough . . . to allege the ‘absence of a reasonable prospect of success or the improbability of success, which are both less strict tests.’”

The tribunal acknowledged a certain “sympathy for Apotex’s position” that neither U.S. Supreme Court relief nor trial proceedings on the merits offered any genuine prospect of relief given the time frame. It held, however, held that “the question whether the failure to obtain judicial finality may be excused for ‘obvious futility’ turns on the **unavailability** of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief.” The tribunal therefore concluded that Apotex’s abandonment of judicial proceedings was fatal to its arbitral claim. As it noted, “even if the chance of the U.S. Supreme Court agreeing to hear Apotex’s case was remote, the availability of a remedy was certain,” since “Apotex **could** have sought U.S. Supreme Court review on an expedited basis” The tribunal was uninterested in Apotex’s argument that “the chances of a successful outcome were ‘unrealistic’”; in response, it quoted Judge

Lauterpacht's assertion in *Norwegian Loans* that "however contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them."

The tribunal's strict and formalistic approach to the question of futility—and its indifference to the extreme improbability of success for further, presumably expensive, litigation—sets a high bar for futility, and will doubtless be cited by future respondents to that effect. This aspect of the award also stands as a warning to wise litigants that they should exhaust every technical avenue for relief prior to initiating a claim under an investment treaty. Less clear are the precedential implications for other doctrinal areas in which futility is relevant, in particular mandatory time periods contained in many BITs relating either to "prior recourse" to the local courts or to obligatory efforts to reach an amicable settlement.

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