



School of International Arbitration

IACL  
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London**  
**International Arbitration Case Law**

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**Award Name and Date:**

Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7) - Decision on Jurisdiction - July 2, 2013.

**Case Report by:**

Marina Kofman\*\* *Edited by* Ignacio Torterola \*\*\*

**Summary:**

The dispute arose out of certain measures enacted by Uruguay to introduce graphic health warnings on tobacco products, as well as the requirement for a “single presentation” or branding of tobacco products, rather than distinguishing them into different types of products such as “light” cigarettes. Claimants alleged these measures infringed upon their intellectual property rights and caused a substantial reduction in the value of Abal as a company. The measures were alleged to be in breach of Uruguay’s obligations under the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on Reciprocal Promotion and Protection for Investments dated 7 October 1988 (**BIT**).

Uruguay raised three objections to the Tribunal’s jurisdiction to hear the dispute: firstly that Claimants had not satisfied the jurisdictional requirements under the BIT; secondly that public health measures are excluded from the scope of protections afforded to investors; and thirdly that Claimants’ activities in Uruguay were not an “investment” under Article 25 of the ICSID Convention. Claimants also brought a denial of justice claim pursuant to Article 46 of the ICSID Convention and sought to clarify the Tribunal’s jurisdiction to adjudicate same.

**Main Issues:** jurisdictional requirements - temporal issues in complying with jurisdictional preconditions - principle of consent as a limit on jurisdiction - exclusion of measures from scope of BIT - meaning of “investment” under Article 25 of ICSID Convention - *Salini* test - Article 46 of ICSID Convention - “futility”

**Tribunal:** Prof. Piero Bernadini (President), Mr Gary Born (Arbitrator) and Prof. James Crawford (Arbitrator)

**Claimant's Counsel:** Mr. Stanimir Alexandrov, Ms. Marinn Carlson, Ms. Jennifer Haworth McCandless and Mr. James Mendenhall (Sidley Austin LLP, Washington), Mr. Daniel M. Price (Daniel M. Price PLLC, Washington), Dr. Veijo Heiskanen, Ms. Noradèle Radjai and Mr. Samuel Moss (Lalive, Geneva)

**Respondent's Counsel:** Dr. Luis Almagro Lemes (Ministro de Relaciones Exteriores), Dr. Diego Cánepa Baccino (Prosecretaría de la República), Dr. Jorge Venegas (Ministro de Salud Pública), Mr. Paul Reichler and Mr. Ronald Goodman (Foley Hoag LLP, Washington)

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## **Digest:**

### **1. Relevant Facts**

FTR Holdings S.A. (**FTR**), Philip Morris Products S.A. (**PMP**) and Abal Hermanos S.A. (**Abal**) (together **Philip Morris** or **Claimants**) filed a Request for Arbitration (**RFA**) on 19 February 2010 against the Oriental Republic of Uruguay (**Uruguay** or **Respondent**). FTR and PMP are incorporated and registered in Switzerland. Abal is incorporated in Uruguay. FTR was the direct owner of 100% of Abal but during the course of the proceedings Philip Morris Brands Sàrl (**PMB**) became the direct owner of 100% of Abal and replaced FTR as one of the Claimants in the proceeding (¶ 2).

Claimants' claims arise out of the enactment by the Uruguayan Ministry of Health (**MPH**) of Ordinance 514 dated 18 August 2008, which introduced a "single presentation" of Claimants' branded tobacco products, and the enactment by the President of Uruguay of Decree 287/009 dated 15 June 2009, which mandated that graphic pictorial and text health warnings cover 80% of the surface of the front and back of the packet. MPH enacted Ordinance 466 on 1 September 2009 which allegedly perpetuated the "single presentation" requirements of Ordinance 514 and restated the 80% health warning requirement of Decree 287/009 (¶¶ 4-7).

Claimants alleged that the pictograms were not designed to warn about health effects of smoking, but rather to evoke emotions of repulsion and disgust, even horror, with the effective function of undermining the good will associated with Abal and PMPs trademarks (¶ 5). The effect of the single presentation enactments was that Abal was forced to stop selling all but one of its product varieties under each brand that it owns or licenses, with the forbidden products representing significant sales (¶ 6).

Claimants alleged that Ordinance 514 caused a deprivation of PMP and Abal's intellectual property rights and a substantial reduction in the value of Abal as a company (¶ 8). They alleged the requirements within the enactments constituted breaches of Respondent's Obligations under Articles 3(1), 3(2) 5 and 11 of the BIT, entitling Claimants to compensation under the BIT and international law (¶ 9).

## 2. *Procedural history*

The proceedings were initiated on 19 February 2010 in accordance with Article 36 of the Convention on Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965 (**ICSID Convention**) and Article 10 of (including *Ad Article 10* of the Protocol to) the BIT ( 1).

ICSID registered the RFA on 26 March 2010 (¶ 12). On 1 September 2010 Claimants appointed Mr Gary Born as Arbitrator, who accepted his appointment on 3 September 2010. On 24 September 2010 Respondent appointed Prof. James Crawford, who accepted his appointment on 1 October 2010. As the arbitrators could not agree on the appointment of the President of the Tribunal, ICSID appointed Prof. Piero Barnardini on 9 March 2011, and he accepted his appointment on 15 March 2011 (¶ 15). The Tribunal was constituted on 15 March 2011 (¶ 16).

The Tribunal's first session was held by teleconference on 25 May 2011, and a procedural calendar was established for the proceedings on jurisdiction (¶ 16). Procedural Order No. 1 was issued on 31 August 2011. Respondent filed the Memorial on 24 September 2011 and Claimants filed the Counter-memorial on 23 January 2012. Respondent filed the Reply on 20 April 2012 and Claimants filed the Rejoinder on 20 July 2012 (¶ 18). The hearing on jurisdiction was held on 5 and 6 February 2013 (¶ 20).

## 3. *The Respondent's Objections to jurisdiction*

### 3.1 *First Objection: The Claimants Have Not Satisfied Jurisdictional Requirements*

#### 3.1.1 *Positions of the Parties – Respondent*

According to Respondent, requirements prescribed by Article 10 of the BIT, including the domestic litigation requirement, are jurisdictional preconditions (¶ 31). The language, including use of the terms "if" combined with "shall" introduces cumulative conditions that must be satisfied before resort may be had to arbitration (¶ 33). Respondent also pointed to the history of the BIT's negotiation in support of this position (¶ 34) and international jurisprudence, including *Wintershall v. Argentina* that confirms procedural preconditions limit States' consent to jurisdiction (¶¶ 35-38).

Respondent further argued that Claimants did not follow the prescribed procedure under Uruguayan Law 16,110 of 25 April 1990, which required that they litigate their BIT claims, and not just any municipal law claims as they had done, in the Uruguayan Courts, and await judgment within 18 months ( ¶¶ 40-42). Respondent pointed to the ICJ's decision in *Georgia v. Russia* as supporting its argument that the failure to satisfy the requirement of prior recourse to local courts deprives the Tribunal of jurisdiction, even if in this case the 18-month clock could now be deemed to have expired (¶ 46).

Respondent denied Claimants' contention that the Most-Favored National clause (MFN) in the BIT allowed Claimants to dispense with Article 10(2) requirements by applying BITs that contain more favourable dispute resolution clauses such as those in Uruguay's BITs with Canada and Australia (¶ 47). Respondent argued the ordinary meaning of the language of the MFN clause in Article 3(2) confirmed the MFN clause was confined to fair and equitable treatment (¶ 48). Respondent referenced the ILC Commentary on the Draft Articles on Most-Favored Nation Clauses, the principle of contemporaneity, other relevant contextual parts of the BIT, and prior investment tribunal decisions in support (¶¶ 49-51).

### *3.1.2 Positions of the Parties – Claimant*

Claimant argued that Respondent's objections to the Tribunal's jurisdiction were premised on the incorrect assumption that the prerequisites for arbitration in Article 10 of the BIT had not been satisfied. To the extent that some procedural steps were not taken prior to the registration of the Request for Arbitration (RFA), that did not deprive the Tribunal of jurisdiction (¶ 55). The RFA was filed prior to the expiry of the 18 month litigation period prescribed by the BIT, while a decision of the *Tribunal de lo Contencioso Administrativo (TCA)* on Claimants' request for annulment of Ordinance 287 was still pending (¶¶ 57-64). Even so, Claimant argued, this did not deprive the Tribunal of jurisdiction because the steps in Article 10 are procedural steps that pertained to admissibility, rather than jurisdictional requirements (¶ 67).

Claimants also challenged Respondent's contention that only Abal had met certain of the requirements of Article 10 of the BIT, and the other Claimants had not. Claimants emphasised the corporate ownership structure and the representations made by Abal that made clear it was speaking also on behalf of its parents and affiliates (¶ 66).

Further, Claimants rejected Respondent's contention that Claimants should have invoked the procedures in Law 16,110. Claimants pointed to the fact that this was not raised timely and brought to Claimants' attention during the course of the dispute by Respondent (¶ 72). Claimants also pointed to changes to Uruguay's Constitution, which rendered the provisions of Law 16,110 incompatible with the Constitution (¶¶ 73-76).

Should the Tribunal find that Claimants had not satisfied the domestic litigation requirement of the BIT, the MFN clause allowed Claimants to reply on other BITs that did not contain similar restrictions (¶ 77). Claimants argued other tribunals have held the "treatment" guaranteed by the MFN clause is not limited to substantive treatment as Respondent contended (¶ 80), and it is not necessary for the MFN provision to state explicitly that it covers dispute settlement (¶ 86). Claimants drew support from other textual features of the BIT, and drew distinctions between the policy concerns in *Maffezini* and *Plama*, which were absent in the present case (¶¶ 86-89).

### *3.1.3 Tribunal's analysis on the First Objection*

The Tribunal held that Claimants had convincingly shown that they complied with the six month amicable settlement period before the arbitration was instituted, and in any event that the Respondents conceded this during the hearing (¶¶ 95-96).

In relation to the 18 month domestic litigation period, the Tribunal analysed the objections by reference to two grounds, firstly that Claimants failed to litigate their treaty dispute in

Uruguayan Courts and secondly; even if they had submitted the dispute to Uruguayan courts, Claimants were required to litigate for 18 months before initiating arbitration (¶ 99).

In relation to the first ground, the Tribunal agreed with Claimants' argument that by filing Requests for Annulment with the TCA that included an Assertion and Reservation of Rights in relation to their BIT rights, Claimants had made TCA fully aware of their BIT claims in the context of Article 10(2)'s domestic litigation requirement (¶ 104). The Tribunal concluded that Claimants had no obligation to submit their BIT claims to Uruguayan courts. Rather, the question was whether, for the purposes of the domestic litigation requirement, the dispute brought before the Uruguayan courts must be the same as the dispute brought in the arbitration. The Tribunal did not believe so, based on an analysis of the treaty language in context, in particular the phrase "disputes with respect to investments," and having regard to the object and purpose of the BIT, in accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT) (¶¶ 105-108).

The Tribunal referenced the *ad hoc* committee in *Vivendi v. Argentina* in support of their view that the expansive language of Article 10(1) could be contrasted with the more narrow language of the state-to-state dispute settlement provision in Article 9(1). In the Tribunal's view, this clearly indicated an investor could satisfy Article 10(2) by submitting a domestic law claim to the Uruguayan courts, provided it was based on substantially similar facts and subject matter as the subsequent BIT claim submitted to arbitration (¶¶ 109-111). The Tribunal concluded that Article 10(2) was to be interpreted broadly, and that by submitting their domestic law claims through Requests for Annulment filed with the TCA, Claimants satisfied the domestic litigation requirement under the BIT (¶ 113). The Tribunal also found that even though the Requests for Annulment were filed by Abal, the latter clearly acted in the interests of the other Claimants (¶ 114).

The Tribunal found that Law 16,110 was inapplicable to Claimants' filings with TCA (¶ 124), and pointed out that neither the TCA nor Respondent called Claimants' attention to the need to comply with the procedures in Law 16,110 during the Annulment Requests, and nor did the TCA apply the law, though it was aware of the existence of the BIT claims (¶ 117). The Tribunal held that in any case, Respondent's jurisdiction objection on this ground would be belated under the requirements of Rule 41(1) of the Arbitration Rules. The Tribunal concluded that Claimants' filings with the TCA satisfied the 18 month domestic litigation requirement and that TCA's decisions satisfied the BIT requirement of a "judicial decision in a one and only instance" as they were not appealable before any other judicial authority in Uruguay (¶ 129).

In relation to the second ground of objection, that the arbitration was commenced before the 18 month domestic litigation period has expired, and that that this deprives the Tribunal of jurisdiction, the Tribunal firstly noted the jurisprudence consists of decisions where the treaty language of factual circumstances differed from the present case. Further, the *jurisprudence constante* in this area was still developing (¶¶ 133-134). The Tribunal cautioned that finding that domestic litigation would be futile should be approached with care and circumspection because of the paramount importance of the host State and the opportunity for redress afforded under the relevant treaty before an investor may pursue claims in international arbitration (¶ 137).

The Tribunal analysed the BIT language in light of the VCLT, and found it was apparent from the text and intention of the BIT that the procedures, including the 18 month domestic

litigation period, should be complied with (¶¶ 138-140). The Tribunal recognised the position at international law about the legal character of procedural conditions was that stated by the ICJ in *Russia v. Georgia* regarding the fundamental principle of consent which sets the limit on the Court's jurisdiction, meaning any conditions to which such consent is subject relates to jurisdiction and not admissibility (¶ 141). The Tribunal did not consider it necessary to characterise the 18 month domestic litigation requirement as pertaining to jurisdiction or admissibility for the purpose of its analysis, because in any event its compulsory character was evident (¶ 142).

The Tribunal concluded that even if the 18 month domestic litigation requirement was characterised as jurisdictional, in the present case it could be, and was, satisfied by actions occurring after the date the arbitration was instituted. The Tribunal noted the ICJ's decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes has not prevented that Court from accepting jurisdiction where requirements for jurisdiction were met subsequently (at least when they occurred before the date in which a decision on jurisdiction is to be taken), referring to the *Croatia v. Serbia* Preliminary Objections Judgment (¶ 144). The Tribunal also referred to the PCIJ's reasoning in *Mavrommatis* in support (¶ 145).

The Tribunal ultimately came to the same conclusion as the tribunal in *Teinver v. Argentina*, namely that the core objective of the requirement to give local courts the opportunity to consider the disputed matters, had been met, and to require Claimants to re-file would be a waste of time and resources. As the Claimants' had satisfied the terms and objective of the domestic litigation requirement in the BIT, the Tribunal dismissed the first objection (¶ 148).

### ***3.2 Second Objection: Article 2 of the BIT Excludes Public Health Measures from the Scope of the Protection Afforded Investors.***

#### *3.2.1 Positions of the parties – Respondent's position*

Respondent argued that Article 2 of the BIT excludes the measures the Claimants attack from scope of the BIT's protections (¶ 151). Respondent argued that Article 2, on its wording, left intact the exercise of the State's right to prohibit certain economic activities for reasons of public health as entirely outside the scope of the BIT or its dispute resolution mechanism (¶ 156). Uruguay had clearly taken the three disputed measures for reasons of public health, as supported by its background of persistent tobacco control efforts dating back to the 1970s, and the purposes of and preambles to the relevant Ordinances and Decrees (¶¶ 157 – 162).

Respondent also argued that public health is a primordial right under the Uruguayan Constitution and therefore it could not agree to bestow rights to foreign investors conflicting with this duty (¶ 155).

#### *3.2.2 Positions of the Parties – Claimants' position*

Claimants argued that Article 2 of the BIT was not applicable because it covered admission and did not affect investments already admitted, including those made by Claimants (¶ 163). This was clear from the title "Promotion, admission" and plain language of the provision (¶ 164). Further, Article 2 contains no exceptions to the BIT's post-admission investor rights, therefore it does not foreclose the Tribunal's jurisdiction over Claimants' claims (¶ 165).

Claimants submitted that Uruguay's Constitution has no bearing on whether Respondent had breached its obligations under the BIT. As stated in Article 3 of the ILC Articles on State Responsibility, the characterization of an act of State as internationally wrongful is governed by international law (¶ 166).

### *3.2.3 Findings of the Tribunal*

The Tribunal held that Article 2(2) relates to the post-admission stage, as made clear on its wording (¶ 169), and the reference to public health in Article 2(1) is as a reference to one of the reasons by which economic activities may not be allowed by the host State at the admission stage (¶ 170).

The Tribunal identified the two means by which Uruguay could exclude admission of investments under the BIT. Firstly, it could provide such an exclusion in its internal legislation so that a proposed investment would not be admitted as being "not in accordance with its law" under Article 2(1); or secondly by availing itself of the possibility under Article 25(4) of the ICSID Convention to notify the Centre that it would not consider submitting to the jurisdiction of the Centre disputes relating to public health. In no other case could any such exclusion apply to investments already admitted under the BIT, which was not the case here (¶ 171).

In dismissing the Second Objection, the Tribunal concluded that Article 2(1) does not create an exception to the BIT's substantive obligations with respect to investments that have already been admitted in accordance with Uruguayan law. Rather, it is concerned solely with admission, although it is subject to the subsequent regulation of investments in ways consistent with the BIT (¶ 174).

## ***3.3 Third Objection: The Claimants' Activities in Uruguay are not an "Investment" Within the Meaning of Article 25 of the ICSID Convention***

### *3.3.1 Positions of the Parties – Respondent's position*

Respondents argued that Claimants' interest in Uruguay do not constitute a protected investment since not only do they fail to make any contribution to the Country's development, but they actively prevent and interfere with such development (¶ 175). Respondents relied on the jurisprudence developed in the *Salini* case, known as the 'Salini test', where one of the objective criteria to be satisfied is that the economic activity must contribute positively and significantly to the economic development of the host State.

This reference to contribution to economic development is also emphasized in the Preamble of the ICSID Convention and the Preamble to the BIT. If the investor's interest or activities have an overall negative effect on economic development, as Respondent alleged they did in this case, then under the *Salini* test, such interests would not meet the definition of investments protected by the ICSID Convention (¶¶ 180-182). Respondent also argued that an indication of the significant nature of the contribution to the host State's economic development is whether the activity serves the public interest (¶¶ 177-179).

### 3.3.2 Positions of the Parties – Claimants’ position

Claimants considered Respondent’s assertions that Claimants do not own an investment in Uruguay to be factually and legally incorrect as Claimants owned several investments falling within the definition of investment within the BIT, which were covered by Article 25 of the ICSID Convention (¶ 183). Claimants submitted that Uruguay’s argument rested entirely on controversial, tribunal-created criterion for identifying an investment that has no basis in the plain meaning of the term either in the BIT or the ICSID Convention (¶ 184). Further, the *Salini* criteria are not jurisdictional requirements, rather, most tribunals have used them as typical characteristics (¶ 185). The criteria themselves are problematic for a number of reasons and should not play a role in the Tribunal’s analysis of whether an investment exists, much less than to serve as a jurisdictional requirement (¶¶ 186-189).

In any event, Claimants’ operations in Uruguay of more than 30 years would easily meet the duration and significance criterion (¶¶ 190-191), and Respondent’s argument that Claimant’s activities do not contribute to the State’s economic development are inconsistent with Uruguay’s conduct of active encouragement to Claimants to continue to invest over the past 30 years (¶ 192).

### 3.3.3 Findings of the Tribunal

The Tribunal prefaced by noting that the controversy regarding the term “investment” shown by various arbitral decisions and doctrinal writings, reveals that the meaning of the term is far from settled (¶ 196). The Consent of the Contracting Parties under the BIT to the scope of “investment” is of relevance when establishing the meaning of the term under Article 25(1) of the ICSID Convention, although bound by what some have called the “outer limits” set by the Convention (¶ 199). The notion covers a wide range of economic operations confirming the broad scope of its application, subject to the possibility for States to restrict the jurisdiction *ratione materiae* by limiting their consent either in their investment legislation or in the applicable treaty (¶ 200).

The Tribunal found that the usual reference to the Preamble of the ICSID Convention emphasizing “the need for international cooperation for economic development and the role of private international investment therein” may reasonably be understood in different ways, and therefore does not materially advance the analysis. Likewise with the reference in the Preamble of the BIT to the “important... role of foreign investment in the economic development process” (¶ 201). Therefore the term “investment” under under Article 25(1) of the ICSID Convention, when interpreted according to its ordinary meaning in its context and in light of the object and purpose of the Convention, is to be given a broad meaning (¶ 202).

In relation to the *Salini* test, the Tribunal’s view was that the four constitutive elements of the test do not constitute jurisdictional requirements, but rather they are ‘typical features’ of investments under the ICSID Convention. As such, they may assist in identifying or excluding in extreme cases the presence of an investment, but they “cannot defeat the broad and flexible concept of investment under the ICSID Convention to the extent it is not limited by the relevant treaty...” (¶ 206).

The tribunal also agreed with Claimants’ submissions on the problems with the *Salini* test. Namely, in order to determine whether an investment is capable of contributing to the economic development of the host State a tribunal would be required to conduct an *ex post*



*facto* analysis of a number of elements including business, economic, financial and/or policy assessments. This can not only give rise to a wide spectrum of reasonable opinions, but would not be appropriate to drive a tribunal's jurisdictional analysis. The Tribunal quoted with agreement the findings of the tribunals in *Deutsche Bank AG v. Sri Lanka, Alpha v. Ukraine*, and *Casado v. Chile* in this regard (¶¶ 207-208). The Tribunal accordingly dismissed the Third Objection to its jurisdiction (¶¶ 209-210).

#### **4. Claimants' Denial of Justice Claim**

##### **4.1 Positions of the parties - Claimants' position**

Claimants indicated their intent to include in their Memorial on the Merits an additional claim that TCA's decision of 29 September 2011 rejecting the request for annulment of Ordinance 514 amounts to a denial of justice in breach of the guarantee of fair and equitable treatment under the BIT (¶ 211). This is because TCA's decision addressed a different plaintiff, British American Tobacco (**BAT**), who was not a party to Abal's annulment action. When requested for a clarification, the TCA dismissed the objections, asserting that the so called contradictions between the circumstances of Abal and BAT were not important so did not justify a revision of the decision (¶¶ 211-212).

Claimants argued that seeking redress in Uruguay's domestic courts would not only be futile but also impossible because TCA's decisions are final and unappealable. Resorting to the six-month notification and amicable settlement period would also be futile as the executive would not be able to seek a revision of that decision of the TCA (¶ 213).

In relation to the requirement under Law 16,110 to submit the claim to a court of "one and only instance," Claimants submitted they would have to go before the TCA a third time and ask them to adjudicate a claim that the TCA itself committed a denial of justice while the TCA jurisdiction is limited to claims for annulment of administrative acts and nothing else (¶ 214).

##### **4.2 Positions of the parties - Respondent's position**

Respondent asserted that in advancing this claim Claimants exalt form over substance (¶ 217). Against the futility argument in relation to the amicable settlement period, Respondent submitted that despite the executive having no power to revoke the TCA decision, if the Government were convinced through friendly negotiations that its position were similar to that of Claimants, the support of the Government of Uruguay could be influential on a Tribunal hearing the matter under Law 16,110 (¶ 218). In relation to the 18 -month domestic litigation period, it would not be futile, as even if an unfavourable decision were rendered, Claimants would have recourse to arbitration (¶ 219).

##### **4.3 Findings of the Tribunal**

The Parties agreed that Claimants' denial of justice claim fell within the ambit of Article 46 of the ICSID Convention (¶ 221). The Tribunal held there is no doubt that the denial of justice claim arose directly out of the same subject matter of the dispute that Abal brought before the TCA in relation to the annulment of one of the challenged measures (¶ 226).

In relation to the assertions of futility of pursuing the six-month amicable settlement period, the Tribunal concluded that the executive having no power to revoke the TCA's decision, there would have been no real prospect for an amicable settlement of the dispute, and it therefore would not have served any useful purpose (¶ 228). In relation to the 18-month domestic litigation period, on the provisions of the BIT, if the TCA has rendered a decision within this time limit, whether favourable or not to Claimants, it would preclude resort to arbitration (¶ 231). To go back to the TCA to redress such decision would have been a "useless, time consuming and costly exercise, any decisions by the TCA being final and not appealable...warranting a conclusion of "futility" (¶ 234). The Tribunal affirmed the Centre's jurisdiction and competence to hear the Claimant's claim for denial of justice (¶ 235).