

4A\_234/2010<sup>1</sup>

Judgment of October 29, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge ROTTENBERG LIATOWITSCH (Mrs),

Federal Judge KOLLY (Mrs)

Federal Judge KISS (Mrs),

Clerk of the Court: M. CARRUZZO.

Alejandro Valverde Belmonte,

Appellant,

Represented by Mr. Sébastien Besson

v.

1. Comitato Olimpico Nazionale Italiano (INOC),

Represented by Mr. Antonio Rigozzi

2. World Anti-Doping Agency (WADA),

Represented by Mr. François Kaiser and Mr. Yvan Henzer,

3. International Cycling Union (ICU),

Represented by Mr. Philippe Verbiest,

Respondents

Facts:

A.

In a decision of May 11, 2009, the *Tribunale Nazionale Antidoping* of the Italian National Olympic Committee (INOC) found Alejandro Valverde Belmonte, a Spanish professional cyclist, guilty of

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<sup>1</sup> Translator's note : Quote as Alejandro Valverde Belmonte v. 1. Comitato Olimpico Nazionale Italiano (INOC), 2. World Anti-Doping Agency (WADA), 3. International Cycling Union (ICU), 4A\_234/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch).

violating the Italian Anti-Doping Rules (ADR) and banned him for two years from competitions organized by INOC or any other national sport federations on Italian soil.

B.

B.a On June 16, 2009, Alejandro Valverde Belmonte appealed this decision to the Court of Arbitration for Sport (CAS). By letter of June 30, 2009 INOC appointed Ulrich Haas, a Zurich law Professor, as arbitrator. Prof. Haas accepted the appointment in a letter of July 9, 2009, whilst formulating the following remarks (sic)<sup>2</sup>:

"In 2006/2007 I was a member of the Code Team Project (hereafter mentioned as "CTP") established by WADA, the task to revise the World Anti-Doping Code had been entrusted to us. That task was finished in November 2007 with the adoption (of the new) World Anti-Doping Code (hereafter mentioned as "the 2009 Code") at the World Anti-Doping Conference in Madrid. The 2009 Code is the result of three referendums with the contracting parties in the entire world. My position in the CTP was that of an independent expert. My role consisted principally in carrying out legal expert analysis on the proposals of the various contracting parties, to suggest how to integrate these proposals in the text of the 2009 code, to find compromises in conflict situations between the contracting parties and to report to some of the contracting parties as to their proposals and observations (for instance to the German Government, the European Sport Minister, to the Council of Europe, to the Sports Team, to the IOC). In total I attended about twelve meetings (CTP meetings and contracting parties meetings) during about twenty months."

No party having challenged Prof. Haas, an arbitral tribunal composed of Mr. Romano Subiotto QC (Chairman), a lawyer in Brussels and in London, Mr. José Juan Pintó, arbitrator appointed by the Appellant, a Barcelona lawyer and Ulrich Haas, was constituted on August 3, 2009. Arbitrator Pintó eventually withdrew for lack of disponibility; he was substituted by Mr. Ruggero Stincardini, a Perugia lawyer.

B.b On September 4, 2009 INOC filed its answer joining the International Cycling Union (ICU) and the World Anti-Doping Agency (WADA) in the proceedings. In a preliminary decision of October 12, 2009, the CAS invited these two bodies to participate in the arbitral proceedings as joint Respondents.

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<sup>2</sup> Translator's note : The "sic" refers to some inadequacies in the French text of the remarks.

In a letter of October 16, 2009, the Appellant cast doubt on Prof. Haas' independence due to WADA being admitted as a new party to the proceedings. Thus each arbitrator was invited to supplement his previous statement of independence. On October 23, 2009 Ulrich Haas did so as follows (sic)<sup>3</sup>:

"I headed in function as a legal expert the Team of Independent Observers at the Athens Olympic Games in July/August 2004. The Group (9 people) contained a representative of the athletes, some specialists knowing the aspects of the doping control process (picking of samples, laboratory analysis, management of the results, etc.), a medical expert and a legal expert. The members of the Group were chosen by WADA. The role of the Group was to observe in full independence all aspects of the Anti-Doping Program at the Olympic Games and to give to the public a report on their performance with possible recommendations for future sport events. The report of the Group was published without changes by WADA in 2004.

The task of the Independent Observers was based on certain basic principles. Among these principles were particularly:

- the total prohibition to interfere at whatever stage or in whatever aspect of the doping control process and
- total independence, including financially, from all the concerned parties towards the IOC and WADA. In no time during my work in Athens or when writing the report was I subject to directives from the IOC or from WADA."

In a letter of October 29, 2009 the Appellant challenged Prof. Haas. Besides the reasons already mentioned in his letter of October 16, 2009 (participation in the revision of the World Anti-Doping Code and in the Group of Independent Experts at the Olympic Games in Athens) he also argued with supporting documents that he had participated in various meetings or conferences as a representative of WADA.

After giving all interested parties an opportunity to express their views on the challenge, the Board of the International Council of Arbitration for Sport (ICAS) rejected it in a decision of November 23, 2009. In the reasons for that decision the Board of the ICAS found that Prof. Haas had never represented one of the parties but had merely been given two assignments as a neutral and

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<sup>3</sup> Translator's note : The "sic" again refers to some inadequacies in the French text of the supplementary statement.

independent expert, the second of which had been terminated in November 2007. On that basis it stated the following on the disputed issue (sic):

"36.

Admittedly, it is possible that in view of his appointment by WADA as Chairman of the Independent Observers in 2004, of his obligation to report his observations to WADA and of his participation in the revision of the Code established under the aegis of that body, the Petitioner may have had the impression that Prof. Ulrich Haas did not at the time present total independence towards WADA despite the nature of the assignments he had been entrusted with. The Board of the ICAS nonetheless considers that absolutely none of the grievances raised would suggest that, today, there would be a link of subordination, an economic or an emotional one, between him and that Party, which may impede his decision.

37.

After duly considering the arguments of the Parties, Prof. Haas' observations, legal writing, case law and purely as an illustration the IBA (International Bar Association) Guidelines, the Board of the ICAS holds that there is absolutely no circumstances which, objectively considered, would be such as to cast doubt as to Prof. Haas' impartiality or independence in this arbitration. The request must accordingly be rejected."

B.c On December 30, 2009 the Appellant filed a Civil law appeal with the Federal Tribunal to obtain the annulment of the ICAS decision.

In a judgment of April 13, 2010 the First Civil Law Court found that the matter was not capable of appeal, the decision on a challenge by a private body such as the ICAS not being subject to a direct appeal to the Federal Tribunal (Case 4A\_644/2009).

B.d Once the challenge of Prof. Haas was disposed of, the CAS dealt with the merits of the case. On March 16, 2010 it issued a unanimous award in which it confirmed the ban against the Spanish racing cyclist for two years from May 11, 2009.

In short, the CAS held that the blood plasma contained in pack nr. 18 found in Dr. Fuentes' laboratory during a criminal investigation opened in Spain in 2004 for doping offences (Operation Puerto) corresponded to the sample given by Alejandro Valverde Belmonte during an anti-doping

control carried out on several cyclists on July 21, 2008 when the Tour de France passed through Italy. It concluded that the Spanish cyclist had at the very least attempted to engage into forbidden doping practices, thus violating the anti-doping rules applicable in this case, so that the sanction against the Appellant, which was proportionate to the offense committed, should be confirmed on appeal.

C.

On April 28, 2010 Alejandro Valverde Belmonte filed a Civil law appeal submitting that the Federal Tribunal should annul the CAS award and revoke Arbitrator Ulrich Haas.

In their respective answers of July 9, 14 and 19 INOC, ICU, WADA and the CAS, which attached a statement by Prof. Haas of July 12, 2010 to its brief, all submitted that the appeal should be rejected.

In a reply of August 27, 2010 the Appellant submitted further arguments with regard to the Respondents' answers.

The CAS filed a rejoinder on September 24, 2010. INOC did the same on October 7, 2010.

Reasons:

1.

In the field of international arbitration, a Civil law appeal is possible against the decisions of arbitral tribunals under the requirements of Art. 190-192 PILA<sup>4</sup> (Art. 77 (1) LTF<sup>5</sup>)

1.1 The seat of the CAS is in Lausanne. At least one of the parties did not have its domicile in Switzerland at the relevant point in time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

1.2 The award under appeal is final and may accordingly be appealed on all the grounds set forth at Art. 190 (2) PILA. The grievances raised by the Appellant, namely that the arbitral tribunal was

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<sup>4</sup> Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291.

<sup>5</sup> Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

irregularly composed and that the right of the parties to be heard was violated, are in the exhaustive list of the aforesaid provision.

There is no need to decide here the disputed issue as to whether or not a Civil law appeal is subject to the requirement of a minimal amount in dispute when it is directed against an international arbitral award. Should this be the case, that requirement would indeed be met as the Appellant claims, without being challenged by the Respondents, that the ban imposed on him causes him a minimum of CHF 30'000.- in damages.

The Appellant is directly affected by the award under appeal, which bans him from participating in any sport event on Italian territory for two years. Thus he has a personal, present and legally protected interest to ensure that the award was not issued in violation of the guarantees arising from Art. 190 (2) PILA, which gives him standing to appeal (Art. 76 (1) LTF).

Timely filed (Art. 100 (1) LTF in connection with Art. 46 (1) (a) LTF) and in the legally prescribed format (Art. 42 (1) LTF), the matter is capable of appeal.

2.

2.1 The Federal Tribunal issues its decision on the basis of the facts established by the arbitral tribunal (Art. 105 (1) LTF). It may not rectify or supplement *ex officio* the findings of the arbitrators even when the facts were established in a manifestly inaccurate manner or in violation of the law (see Art. 77 (2) LTF ruling out the applicability of Art. 105 (2) LTF). However, as was already the case under the aegis of the Federal Statute organizing Federal Courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the possibility to review the factual findings on which the award under appeal is based if one of the grievances mentioned at Art. 190 (2) PILA is raised against the factual findings or when new facts or evidence are exceptionally taken into consideration in the framework of the Civil law appeal (see Art. 99 (1) LTF).

2.2 At the outset the Appellant states that he will supplement his statement of facts to the extent necessary by way of the evidence introduced during the arbitration, which is already part of the record. He adds that this was endorsed by the Federal Tribunal in a recent decision (Judgment 4A\_600/2008 of February 20, 2009 at 3). In its answer, INOC follows suit and expresses its intent to refer to some exhibits in the record to demonstrate that the appeal should be rejected.

Whilst in agreement, these two opinions cannot be approved. As to the Appellant he relies on the opinion of a single legal writer, who is none other than his own counsel (SÉBASTIEN BESSON, *Le recours contre la sentence arbitrale internationale selon la nouvelle LTF [aspects procéduraux]*, in *Bulletin de l'Association Suisse de l'Arbitrage [ASA] 2007 p. 2 ss, 27 n° 59*) and on a precedent of which he gives an excessively broad interpretation. The case he quotes had indeed the particularity that the award under appeal merely took notice of the irrevocable withdrawal of an appeal due to lack of payment of the deposit requested by the CAS. In that case it was accordingly necessary that the Federal Tribunal review the proceedings in front of the CAS on the basis of the arbitration records in order to decide on the grievance against that award.

The aforesaid principles must remain applicable. When seized of a Civil law appeal against an international arbitral award, it does not behoove the Federal Tribunal to reopen the case as an appeal court would but merely to examine whether the arguments raised against the award are well-founded or not. Allowing the parties to rely on other facts than those found by the arbitral tribunal, other than in the exceptional circumstances reserved by case law, would no longer be consistent with such a task, even though such facts may be established by the evidence in the arbitration record.

In this case, applying the principles of case law requires considering the nature of the Appellant's grievances. As to the alleged irregular composition of the CAS Panel which issued the award under appeal, it is therefore normal for the Federal Tribunal to review it only on the basis of only the facts found in the decision of the Board of the ICAS as to the challenge of arbitrator Ulrich Haas of November 23, 2009. Since the challenge of a CAS arbitrator must be made within a time limit set by the Code under penalty of forfeiture, it would be contrary to the rules of good faith to authorize a party to rely in front of the Federal Tribunal on facts or evidence which could have been the basis of a new challenge during the proceedings. However the facts found in the award under appeal shall be the ones to be taken into account to decide whether, as the Appellant claims, the proceedings concluded by the award respected neither his right to be heard nor the rule of equal treatment of the parties. No consideration shall accordingly be given to the lengthy explanations of appellatory nature given by the Appellant and by the Respondents in their briefs. Similarly, the facts alleged by Prof. Haas in his statement attached to the CAS brief shall be considered only to the extent that they correspond to those found by the ICAS Board.

In his observations of August 27, 2010 the Appellant deplores that the CAS answer, including the statement of the arbitrator involved, should be from the General Secretary of that body and not from the panel which issued the award under appeal. In this respect he relies on the opinion of two writers who state that they do not know the reasons for which the Federal Tribunal allows this singular practice (KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international*, 2e éd. 2010, p. 490, note 585). It is true that the regulatory basis on which the practice under challenge rests is not immediately clear, for expressing a view on an appeal against an arbitral award (see Art. 102 (1) LTF) is apparently not among the tasks that the Sport Arbitration Code (hereafter the Code) gives to the CAS Court Office, namely to the Secretary General or to the counsels who substitute him when required (art. S22 of the Code; on the attributions of the CAS Court Office, see ANTONIO RIGOZZI, *L'arbitrage international en matière de sport*, 2005, n° 241 and the articles of the Code quoted). It would be doubtlessly appropriate for the ICAS to clarify the situation itself (see S6 (1) of the Code), notwithstanding the opinion of the two aforesaid legal writers, there should be no major objection in principle to the practice at issue to be confirmed as it dates back from some twenty years and can be justified particularly by the institutional nature of CAS arbitrations (as opposed to *ad hoc* arbitrations) and by the desire to ensure a certain unity of practice (in this respect also see Art. R46 (1) *in fine* and R59 (2) of the Code allowing the Secretary General to draw the attention of the Panel to fundamental issues of principle). In this respect the CAS rightly points out in its rejoinder that most of its arbitrators are not domiciled in Switzerland, sometimes do not speak the language used in front of the Federal Tribunal and are not familiar with the Federal Law on the Federal Tribunal (LTF; RS 173.110), so that it is in a position to coordinate in the interest of a good administration of justice. More generally it must be observed with the CAS that such a body actively participates in resolving disputes in the field of sports and at all levels of the proceedings, namely from the initiation of arbitration (Art. R52 of the Code) until the notification of the award (Art. R59 of the Code). Be this as it may one does not see why the Appellant should be entitled to argue in this case that the observations as to his appeal came from the Secretary General of the CAS rather than from the Panel that issued the award under appeal as he was given an opportunity to reply (see Bernard CORBOZ, *Commentaire de la LTF*, n° 19 ad art. 102 LTF). In any event there is nothing there to base a grievance within the meaning of Art. 190 (2) PILA. As to the statement of the two aforesaid writers (KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, n° 782c) according to which it would not be consistent with the arbitrator's impartiality to "defend" the award against an appeal by one party, its wording appears too absolute. In any event it is not appropriate when, as is the case here, the independence and impartiality of a member of the arbitral tribunal are under challenge: in such a case, the arbitrator personally under challenge must be able to defend himself through the

arbitration institution which appointed him against attacks that may harm him personally, particularly as to his professional honor.

3.

In a first grievance based on Art. 190 (2) (a) PILA, the Appellant argues that the CAS Panel which issued the award under appeal was irregularly composed.

3.1 On October 29, 2009 the Appellant, in conformity with the rule of Art. R34 of the Code had also filed a challenge against Arbitrator Haas with the ICAS. The Board of that body rejected the challenge in a decision of November 23, 2009. Issued by a private body, that decision, which could not be appealed to the Federal Tribunal directly (see above at B.c) could not bind it. This Court may accordingly review freely whether or not the circumstances invoked to justify the challenge are such as to base a grievance of irregular composition of the CAS Panel that included the challenged arbitrator (ATF 128 III 330 at 2.2 p. 332).

3.2

3.2.1 Similarly to a state judge, an arbitrator must present sufficient guarantees of independence and impartiality (ATF 125 I 389 at 4a; 119 II 271 at 3b and cases quoted). Breaching that rule leads to irregular composition pursuant to Art. 190 (2) (a) PILA (ATF 118 II 359 at 3b). In order to say whether an arbitrator presents such guarantees or not, reference must be made to the constitutional principles developed with regard to state courts (ATF 125 I 389 at 4a; 118 II 359 at 3c p. 361). However the specificities of arbitration and particularly those of international arbitration must be taken into account when reviewing the circumstances of the case at hand (ATF 129 III 445 at 3.3.3 p. 454).

According to Art. 30 (1) Cst<sup>6</sup> any person whose case must be adjudicated in judiciary proceedings has a right to his case being brought in front of a court established by law, having jurisdiction, independent and impartial. This guarantee makes it possible to challenge a judge whose situation or behaviour are such as to cause doubt as to his impartiality (ATF 126 I 68 at 3a p. 73); it seeks in particular to avoid that some external circumstances may influence the decision in favour of or against a party. A challenge is not only justified when the judge's actual bias is established, because an internal disposition on his part may hardly be proved; it is sufficient that the circumstances should give the appearance of bias and that a biased activity by the magistrate may

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<sup>6</sup> Translator's note : Cst is the French abbreviation for the Swiss Constitution.

be feared. Only circumstances objectively ascertained must be taken into consideration; purely individual impressions of a party to the dispute are not decisive (ATF 128 V 82 at 2a p. 84 and cases quoted).

Subjective impartiality – which is presumed until disproved – guarantees that one's case will be adjudicated without personal considerations (ATF 129 III 445 at 3.3.3 p. 454; 128 V 82 at 2a p. 84 and cases quoted).

Objective impartiality seeks in particular to prevent that the same magistrate should participate in the same case under different titles (ATF 131 I 113 at 3.4 p. 117) and to guarantee the judge's independence towards all parties (Judgment 4P.187/2006 of November 1<sup>st</sup>, 2006 at 3.2.2).

3.2.2 The party wishing to challenge an arbitrator must raise the ground for challenge as soon as it knows about it. This rule of case law, specifically adopted at Art. R34 of the Code, concerns both the grounds for challenges which the party concerned effectively knew and those which it could have known by displaying proper attention (ATF 129 III 445 at 4.2.2.1 p. 465 and the cases quoted), for, depending on circumstances, choosing to remain in ignorance may be considered as an abusive manoeuvre comparable to postponing the announcement of a challenge (Judgment 4A\_506/2007 of March 20, 2008 at 3.1.2). This rule applies the principle of good faith to arbitral proceedings. Based on that principle, the right to raise the allegedly irregular composition of the arbitral tribunal is forfeited if the party does not do so immediately as it could not keep it in reserve only to invoke it if the outcome of the arbitral proceedings is unfavourable (ATF 129 III 445 at 3.1 p. 449 and the cases quoted).

3.3 The arguments raised on both sides in this case justify that the Federal Tribunal be somewhat more precise as to the principles just recalled.

3.3.1 In its answer to the appeal (nr. 49 to 53) INOC argues that, the caption of his grievance notwithstanding ("lack of independence and impartiality of an arbitrator"), the Appellant in reality merely argues the lack of impartiality of Arbitrator Haas. Yet according to that Respondent the most authoritative classical legal writing holds the view that the requirement of impartiality does not apply to party appointed arbitrators but exclusively to the chairman of the arbitral tribunal or to the sole arbitrator. Hence the Respondent invites the Federal Tribunal to decide whether the issue is

capable of appeal or not to the extent that the Appellant challenges the impartiality of Arbitrator Haas and not his independence.

In case law prior to the entry into force of PILA on January 1<sup>st</sup>, 1989 the Federal Tribunal had held that the impartiality of the members of an arbitral tribunal was required as the party appointed arbitrators as well as for the chairman (ATF 105 Ia 247; see also ATF 113 Ia 407 at 2a p. 409). Under the aegis of the new law, the Court left the issue open at first (ATF 118 II 359 at 3c). In two subsequent unpublished decisions, the Court relied on the absence of reference to the notion of impartiality at Art. 180 (1) (c) PILA to conclude that the abandonment of that requirement mitigates the assimilation which case law made between the position of a party arbitrator and that of chairman of the arbitral tribunal or sole arbitrator (Judgments 4P.224/1997 of February 9, 1998 at 3a and 4P.292/1993 of June 30, 1994 at 4). Eventually the Federal Tribunal again let the issue undecided (Judgment 4P.188/2001 of October 15, 2001 at 2b) holding in the last published decision on this issue that determining whether or not one should be less demanding as to the party appointed arbitrator is an issue which has not been decided (ATF 129 III 445 at 3.3.3 p. 454; cf. CORBOZ, *op. cit.*, n° 91 i.f. ad art. 77 LTF who may see there an implicit rejection of the idea).

Legal writing is divided on the issue at hand. Some writers, who could be called realist or pragmatic, hold that it would be an illusion to demand from a party appointed arbitrator the same degree of independence and impartiality as that which is required from the chairman of an arbitral tribunal or from a sole arbitrator, particularly in international arbitration (see among others PIERRE LALIVE, *Sur l'impartialité de l'arbitre international en Suisse*, in SJ 1990 p. 362 ss, 368 à 371; LALIVE/POUDRET/REYMOND, *Le droit de l'arbitrage interne et international en Suisse*, 1989, n° 4 ad art. 180 LDIP; ANDREAS BUCHER, *Le nouvel arbitrage international en Suisse*, 1988, nos 168 à 170; FRANK VISCHER, in *Zürcher Kommentar zum IPRG*, 2e éd. 2004, n° 8 ad art. 180 LDIP; PATOCCHI/GEISINGER, *Internationales Privatrecht*, 2000, n° 5.5 ad art. 180 LDIP; PETER/BESSION, in *Commentaire bâlois, Internationales Privatrecht*, 2e éd. 2007, nos 13/14 ad art. 180 LDIP; FRANK OSCHÜTZ, *Sportschiedsgerichtsbarkeit*, 2004, p. 125 ss). Other writers consider this an issue of credibility of arbitration and hold to the contrary that the guarantees of independence and impartiality must be the same for a party appointed arbitrator as for the chairman of an arbitral tribunal or for the sole arbitrator (see among others KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international*, 2e éd. 2010, nos 362 s.; BERGER/KELLERHALS, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, 2006, n° 738; RÜEDE/HADENFELDT, *Schweizerisches Schiedsgerichtsrecht*, 2e éd. 1993, p. 173 s.; BERNARD DUTOIT, *Droit international privé suisse*,

4e éd. 2005, n° 4 ad art. 180 LDIP, p. 635; KNOEPFLER/SCHWEIZER, in *Arbitrage international*, 2003, p. 613 s.; JENS-PETER LACHMANN, *Handbuch für die Schiedsgerichtspraxis*, 3e éd. 2008, nos 974 ss; FOUCHARD/GAILLARD/GOLDMAN, *Traité de l'arbitrage commercial international*, 1996, n° 1046 i.f.; THOMAS CLAY, *L'arbitre*, 2001, nos 343 ss). According to the last writer quoted, the latter conception, which he calls monolithical independence, as opposed to variable independence, would be “the majority view to the point of being almost universal” (CLAY, *op. cit.*, n° 343; also see the original interpretation of the Swiss position made by that commentator in nr. 350). That approach was also followed by the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (see KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, n° 363). It also underlies the provisions of the new Swiss Code of Civil Procedure (CPC; RS 272) as to challenges in domestic arbitration, in particular Art. 367 (1) (c) CPC (RO 2010 1825), which specifically spells out the criteria of impartiality, for the sake of clarity and in order to make the text consistent with foreign and international law (Message of the Federal Council of June 28, 2006 concerning the Swiss Civil Code of Procedure in FF 2006 7003 [ad Art. 361 of the draft] and 7004 [ad Art. 365 of the draft]) and applies to all members of the arbitral tribunal (URS WEBER-STECHER, in *Commentaire bâlois, Schweizerische Zivilprozessordnung*, 2010, n° 19 ad art. 367 CPC).

The absence of a reference to the concept of impartiality at Art. 180 (1) (c) PILA, referred to in the two precedents relied upon by INOC to substantiate its argument, does not appear decisive to resolve the issue at hand. Indeed when adjudicating a grievance based on the irregular composition of arbitral tribunal (Art. 190 (2) (a) PILA), the Federal Tribunal refers to a higher norm – Art. 30 Cst – to deduct from it directly that an arbitral tribunal, like a state court, must present sufficient guarantees of impartiality as well as independence. To decide whether an arbitral tribunal presents such guarantees or not, present case law actually refers to the constitutional principles developed with regard to state courts (see the cases quoted at 3.2.1 above). In doing so, no strict distinction is drawn between the concepts of independence and impartiality, to the extent that this would be possible at all in arbitration and the first concept appears to be included in the second, which is broader, by way of objective impartiality as opposed to subjective impartiality (with regard to the distinction between the two types of impartiality see the judgments quoted at 3.2.1 *in fine*). Moreover and above all, case law makes no distinction between the position of an arbitrator and that of the chairman of the arbitral tribunal (see among others judgment 4A\_458/2009 of June 10, 2010 at 3.2 and 3.3), thus implicitly rejecting the idea of such a distinction. The same must be done expressly herein. It must accordingly be held that the independence and the impartiality demanded from the members of an arbitral tribunal extend to the party appointed arbitrators as well as to the

chairman of the arbitral tribunal. Whilst affirming this principle, the Federal Tribunal is admittedly aware that absolute independence by all arbitrators is an ideal which will correspond to reality only rarely. Indeed whether one wishes it or not, the way of appointing the members of an arbitral tribunal creates an objective nexus, subtle as it may be, between the arbitrator and the party appointing him because the former, as opposed to a state judge, derives his power and his place only from the latter's will. Yet this is an inherent consequence of the arbitral procedure with which one must live. It implies that an arbitrator may not be challenged merely because he was chosen by one of the parties to the dispute. Yet the so called system of the party-arbitrator must be ruled out, in which the party appointed arbitrator would not be subject to the same requirement of independence and impartiality as the chairman of the arbitral tribunal. The idea that the arbitrator may merely be the advocate of "his" party within the arbitral tribunal must be categorically rejected, failing which the very institution of arbitration would be jeopardized. To that extent the Federal Tribunal may adopt the following conclusion, drawn almost fifteen years ago by authoritative professors of French law in the field of international arbitration: "considering the degradation of standards sometimes seen in international arbitration and the manoeuvres to which the party appointed arbitrator sometimes resorts, it is not sufficient to require good faith behaviour from him: it is better to hold on to the principles, hoping that in practice they will make it possible to mitigate the misbehaviour of biased arbitrators (FOUCHARD/GAILLARD/GOLDMAN, *ibid.*).

3.3.2 In its answer to the appeal (nr. 21), WADA, pointing out that the award under appeal was unanimous, expresses doubts that the Appellant could argue the alleged partiality of Arbitrator Haas to substantiate his argument based on Art .190 (2) (a) PILA.

That Respondent's doubts are unfounded. Indeed the grievance involved is formal, to the extent that PILA does not require that the Appellant demonstrate that the award would have been different if the arbitral tribunal had been regularly composed (KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, n° 798). Incidentally one hardly sees how such a demonstration could be made specifically, even though it is not *per se* excluded that a challenged arbitrator's participation in the decision of the arbitral tribunal could have a decisive impact on the decision in the dispute although the award would have been unanimous. It is indeed perfectly possible to conceive that such unanimity could only have been secured due to that arbitrator's power of persuasion and to the influence he brought to bear, for whatever reason, on the co-arbitrator (or on the two co-arbitrators) who were not of the same opinion at first.

Accordingly the CAS may at most be granted that the annulment of a unanimous award would be a decision of last resort in view of its possible consequences. Yet it remains the only possible decision when lack of independence or impartiality of the challenged arbitrator is established.

3.3.3 According to the Appellant there should be some higher requirements of independence and impartiality for the arbitrators acting in the CAS Panels due to the specificities of sport arbitration.

However this is not the meaning of case law in this field, which there is no need to review again. According to case law, sport arbitration as instituted by the CAS shows some specificities, such as the closed list of arbitrators, which could not be disregarded even though they not justify *per se* to be less demanding for sport arbitration than for commercial arbitration (aforesaid judgments 4A\_458/2009, at 3.1 and 4A\_506/2007, at 3.1.1 and cases quoted). In other words, respect for the guarantees of independence and impartiality demanded from each arbitrator must be reviewed in the same way in both fields. There is accordingly no justification for a special treatment of CAS arbitrators, namely to be particularly strict in reviewing their independence and their impartiality. In this respect, KAUFMANN-KOHLER/RIGOZZI (*op. cit.*, n° 368 p. 204) disregard the meaning of the aforesaid case law when they appear to hold the view that, according to the Federal Tribunal, the aforesaid specificities "which could not be disregarded", would require examining more demandingly the guarantees given by CAS arbitrators than those given by arbitrators dealing with commercial disputes. To the contrary, the passage quoted by these two writers and particularly the expression "even if" shows that if the independence and the impartiality of a CAS arbitrator must not be examined more indulgently, neither should the specificities of sport arbitration be disregarded during that examination. This particularly means that, the institutional independence of the CAS towards all parties relying on its services having been held in a seminal decision (ATF 129 III 445 at 3.3.4), the specificities of sport arbitration may not be disregarded when the regularity of the composition of a CAS Panel is under review; accordingly one must take into account the fact that the choice of arbitrators is limited, but they must have legal training and they have to be acknowledged as competent in the field of sport (ATF 129 III 445 at 4.2.2.2 p. 467). These peculiarities may lead CAS arbitrators to meet sport organisations, specialized lawyers and other experts in sport law without these contacts being by themselves such as to necessarily compromise their independence. Not to take into account such particularities would be self-defeating as this would merely multiply the possibilities of challenges and procedural disputes when the purpose of institutional sport arbitration is to provide speedy resolution of sport disputes by specialised arbitral tribunals presenting sufficient guarantees of independence and impartiality (see ATF 133 III 235 at 4.3.2.3 p. 245). Be

this as it may, deciding whether the Panel at hand presented such guarantees or not will always depend on an analysis of the circumstances of the case at hand, so that it would be vain to attempt to state some immutable rules in this field.

### 3.3.3.1 The Appellant submits that the Federal Tribunal should revoke Arbitrator Haas.

In internal arbitration such a submission is clearly capable of appeal because there is no provision such as Art. 77 (2) LTF ruling out the application of Art. 107 (2) LTF. Accordingly in view of the latter provision, which gives the Federal Tribunal the power to decide the issue itself, nothing would prevent the Court from revoking itself an arbitrator in a domestic arbitration if it held that the cantonal authority defined at Art. 3 (b) CA<sup>7</sup> wrongly rejected the challenge (Judgment 4A\_586/2008 of June 12, 2009 at 1.1). From that point of view, the situation is not different from that which prevails when a decision rejecting the challenge of a state judge is annulled (see decision 1B\_242/2007 of April 28, 2008 at 3, not published in ATF 134 I 238).

In international arbitration the issue is more delicate because the former provision, ruling out the applicability of the latter, provides only for annulment in a federal appeal against an international arbitral award. The issue has indeed been left open in the latest decisions issued in this respect (Judgments 4A\_539/2008 of February 19, 2009 at 2.2, 4A\_210/2008 of October 29, 2008 at 2.2 and 4P.196/2003 of January 7, 2004 at 2.2), whilst the Federal Tribunal previously held at least once and *in dictum*, that it could itself revoke the challenged arbitrator should the grievance based on Art. 190 (2) (a) PILA be admitted (Judgment 4P.263/2002 of June 10, 2003 at 3.2).

The writers who considered the issue appear in favour of the solution contained in the last case quoted even though they may not be as clear (see among others LALIVE/POUDRET/REYMOND, *op. cit.*, n° 3.6 ad art. 191 LDIP; BUCHER, *op. cit.*, n° 380; DUTOIT, *op. cit.*, n° 7 ad art. 182 LDIP and n° 8 ad art. 191 LDIP; KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, n° 779a; BESSON, *op. cit.*, p. 22 n° 50). One of them justifies his opinion by the risk that the award may be annulled by the Federal Tribunal for lack of independence of an arbitrator without assurance that the arbitral tribunal would subsequently be regularly composed (BESSON, *ibid.*).

That a federal appeal against an international arbitral award may only lead to its annulment is not an absolute requirement. Under the old statute organising federal courts an exception had already

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<sup>7</sup> Translator's note: CA is the French abbreviation for the Swiss Inter-cantonal Concordat on Arbitration of March 27, 1969.

be made with regard to the jurisdiction or lack of jurisdiction of the arbitral tribunal, which the Federal Tribunal could find itself (ATF 128 III 50 at 1b). The same exception has been maintained since the LTF came into force (Judgment 4A\_128/2008 of August 19, 2008 at 2.1, not published in ATF 134 III 565). For reasons of procedural economy and legal certainty it must be the same as to the challenge of an arbitrator. Indeed should the Federal Tribunal merely annul the award under appeal after admitting a grievance based on Art. 190 (2) (a) PILA, the new award would in principle have to be issued by the same arbitrators (see LALIVE/POUDRET/REYMOND, *ibid.*), which would force the party prevailing in front of the Federal Tribunal to file a new challenge against the arbitrator concerned should he refuse to resign spontaneously. The outcome of the arbitral proceedings would be postponed and dilatory manoeuvres could not be excluded in such a situation. Accordingly, should it admit the grievance raised by the Appellant, this Court would itself revoke Arbitrator Haas.

3.4 On the basis of the principles of case law thus supplemented it must be examined whether or not the arbitral award which issued the award under appeal was irregularly composed because of Prof. Haas' presence within it.

3.4.1 To decide that issue the Federal Tribunal shall limit itself to the facts held in the decision issued by the Board of the ICAS as to the challenge of Arbitrator Haas on November 23, 2009 (see 2.2 4e § above). Hence the Court will disregard the Appellant's claim, substantiated by new exhibits, that Prof. Haas would have been appointed as arbitrator by WADA, at least three times recently in CAS cases (Appeal nr. 43). Neither will it take into account, for the same reason, the Claimant's argument and the exhibit relating thereto, according to which it would have been "as a WADA delegate" that Ulrich Haas participated in various meetings and conferences concerning Anti-Doping Rules, particularly in a congress organized by SPORTACCORD in 2007 (Appeal nr. 84). Indeed, the ICAS holds in this respect in the aforesaid decision that "it is mentioned nowhere that Prof. Ulrich Haas would have participated in the revision of the Code or in meetings as a WADA representative" (nr. 28). Similarly, the Appellant departs from the factual findings of the aforesaid decision when he underlines "the importance of WADA for the market of legal services concerning the fight against doping" (Appeal nr. 95).

The only established circumstances which are relevant to the issue of the challenged arbitrator's independence and impartiality are, on the one hand, the fact that as a legal expert he headed the group of nine independent persons chosen by WADA to observe how the Anti-Doping Program was

applied during the Athens Olympic Games in 2004 and provide the public with a written report as to this program; on the other hand the arbitrator's belonging to the team of experts created under the aegis of WADA to revise the World Anti-Doping Code in 2006/2007 and, in that framework, his participation in the SPORTACCORD conference to present the status of the revision works in April 2007.

3.4.2 As was already pointed out, the rules of good faith as contained at Art. R34 of the Code require the party wishing to challenge an arbitrator to invoke the ground for challenge as soon as it learns of it or could have learned of it by displaying proper attention (see 3.2.2 above).

In its answer to the appeal (nr. 9 and 10) the CAS casts doubt as to the Appellant's compliance with these rules. Admittedly, on the basis of the factual chronology contained in the latter's observations (nr. 17) and starting from the day the Appellant was officially notified that WADA would participate in the arbitral proceedings (preliminary decision of October 12, 2009), it appears that the Appellant acted timely by challenging Prof. Haas's independence in a letter of October 16, 2009, then formally challenging the arbitrator in a request of October 29, 2009 after receiving the supplementary statement of independence of October 23, 2009. Yet the problem is elsewhere. One must indeed recognise that when Ulrich Haas accepted his appointment on July 9, 2009 the Appellant did not ignore or at least he could not reasonably ignore the two circumstances which he subsequently raised as to the arbitrator: Prof. Haas' involvement in the revision of the World Anti-Doping Code was specifically mentioned in the statement of acceptance of July 9, 2009. As to the fact that he had headed the group of independent observers at the 2004 Athens Olympic Games, this was already mentioned in the WADA report, particularly on its website (as to the duty of curiosity behooving the parties, see the aforesaid judgment 4A\_506/2007 at 3.2). Yet the Appellant did not challenge Prof. Haas at the time, a sign that he had no objection to his presence in the Panel entertaining his appeal. He did so only later, after WADA was invited to participate in the arbitral proceedings at INOC's request. Such procrastination is surprising. Indeed if the interests of WADA in the arbitration "are identical to those of INOC" and "clearly opposed" to the Appellant's, as he claims (Appeal nr. 80), one may wonder with the CAS why considering the grounds for challenge raised, the Appellant would at first have accepted to be judged by a Panel including an arbitrator who, according to him, had close connections with the World Organisation specialising in the fight against doping and that INOC, a party to the arbitral proceedings, had chosen when that body, according to the Appellant, "plays the role of National Anti-Doping Agency in Italy" (appeal *ibid*).

Be this as it may it is not necessary to analyse the issue any further because for the reasons indicated hereunder (see at 3.4.4) the grievance is unfounded.

3.4.3 As to the two circumstances pertinent to the grievance under review (see 3.4.1 2e §), the Appellant submits the arguments summarized hereunder.

Prof. Haas was chosen by WADA to chair the Group of Independent Observers at the 2004 Athens Olympic Games. He thus had the great honour of being appointed to review how a fundamental program was applied; moreover his appointment took place the first time that the program was implemented within the framework of a major sport event and at the time the World Anti-Doping Code came into force.

Furthermore WADA chose Prof. Haas to participate in the Expert Group entrusted with drafting the new World Anti-Doping Code. This assignment lasted at least two years – 2006 and 2007 – and the information in this respect is clearly mentioned in that arbitrator's biographical note published on the CAS website. Prof. Haas, who incidentally participated in various conferences on behalf and in the name of WADA in connection with that appointment, such as the SPORTACCORD congress in 2007, thus actively participated in elaborating the Anti-Doping Rules of WADA, which were adopted by INOC and thus indirectly used to decide the dispute at hand. There is accordingly a risk that Prof. Haas may not feel free to interpret or apply the rules that he helped create.

Prof. Haas was paid for the activities conducted at WADA's request. They were entrusted to him as an agent for that body, the instructions of which he was bound to follow and to which it had to report. It is likely that WADA will again call upon Prof. Haas when it needs the services of that specialist acknowledged in the entire world in the field of Anti-Doping Rules. That connection between WADA and Prof. Haas and the latter's expectations as to future assignments are facts which, objectively examined, are such as to cause any reasonable person, such as the Appellant, to have legitimate doubts as to that arbitrator's impartiality, which the ICAS incidentally mentioned in its decision yet without drawing the necessary conclusions. In this respect there is a particularly clear analogy between the case at hand and those decided by the Federal Tribunal (ATF 116 Ia 135 and 485) in which a lawyer acting as a temporary judge had been called upon to decide a dispute between one of his important clients (a Cantonal bank or a large town) and a third party. In this case as well it is indeed to be feared that an arbitrator with a close and persistent connection with a party

would be in a situation of conflict between administering impartial justice and the interests of one of his important clients, leading him to favour the latter.

3.4.4 Prof. Haas indeed headed the Group of Independent Observers at the July-August 2004 Olympic Games in Athens, namely some five year before the CAS appeal proceedings began. In his statement of independence supplemented on October 23, 2009 (see above B.b), he described that mission, particularly insisting on the fact that he had carried it out freely and without ever being subjected to instructions from WADA. The Appellant does not challenge Prof. Haas's description of his activity in that context. Yet he casts doubt on his independence towards WADA because according to the definition given by the World Anti-Doping Code for the Program of Independent Observers, they would work "under the supervision of WADA". Yet that argument, based merely on the abstract definition of the program involved, does not alter the specific description of the task of the observers, made in this case, from which it appears that Prof. Haas carried out his task in complete independence towards WADA. Moreover, no matter what the Appellant says, it is not established that Ulrich Haas would have received anything else than mere reimbursement of expenses for that assignment. That he may have been honoured to be chosen to head the Group of Independent Observers, as the Appellant also claims, is doubtlessly not excluded but this is not a circumstance such as to make him dependent from the body which had chosen him.

Prof. Haas participated in the drafting of the World Anti-Doping Code, 2009 version, within the Code Project Team in 2006-2007; he never hid that fact, which he spontaneously disclosed in his statement of independence of July 9, 2009, giving a detailed description of his assignment (see above B.a). Yet it is not possible to follow the Appellant when he claims that such activity would be part of a mandate strictly speaking, long lasting and against compensation (see appeal 83, 85 and 86). Firstly, the task entrusted to the team of experts was finished in November 2007 and was accordingly not meant to last beyond the adoption of the new Code; secondly, it is in no way established that Prof. Haas would have been not only reimbursed his expenses for that task but also received a fee comparable to a lawyer's. Thirdly, nothing in the facts allows a finding that the expert would have been bound to follow WADA's instructions in carrying out his assignment as a representative would be. Moreover one does not see how Arbitrator Haas could have felt himself limited in his freedom of decision due to his mere participation in the revision works of the World Anti-Doping Code since in this case the Panel applied the Italian Anti-Doping Rules (NSA) in force as of May 2006 (see award nr. 81). Finally, if Prof. Haas participated in one or several conferences

in 2007 it is in no way established that he would have done so in the name and on behalf of WADA or as the latter's representative (see 3.4.1 above).

From these two circumstances the Appellant seeks to extrapolate to show the existence of close professional connections between WADA and Prof. Haas and the latter's expectations as to further business with a body enjoying, according to the Appellant, a quasi-monopoly on the market for legal services related to doping. Yet this is a somewhat artificial construction, which rests on no solid foundation. To substantiate his argument, the Appellant wrongly assimilates Prof. Haas' position towards WADA to that of a lawyer towards an important client, whom one would avoid displeasing and he does so in the obvious intent to apply to the circumstances of the case at hand the principles set by the Federal Tribunal in a completely different context (see the aforesaid ATF 116 Ia 135 and 485). It is indeed obvious that Ulrich Haas' position, as a full time paid university teacher, is not comparable to that of a lawyer deriving his income from the fees charged to his clients. Moreover it is not established that Prof. Haas would have been entrusted by WADA with new assignments similar to those that body had asked him to perform in 2004 and 2006/2007. Furthermore it is wrong to claim as the Appellant does that (Prof. Haas') assignments would fall within paragraph 3.4.2 of the orange list contained in the IBA Guidelines on Conflicts of Interest in International Arbitration (on the applicability of such guidelines see the aforesaid decision 4A\_506/2007 at .3.2.2 and references). Indeed that provision, according to the free translation given in the rejoinder (nr. 38) refers to the "arbitrator associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner". Obviously, Prof. Haas may not be assimilated to a former partner or employee of WADA within the meaning of that provision, let alone that one of the two assignments mentioned by the Appellant was finished at the end of the 2004 Olympic Games in Athens, namely more than three years before the appointment of the arbitrators entertaining the Appellant's case. In any event, it must be recalled that the orange list deals with intermediary situations which have to be disclosed whilst not necessarily justifying a challenge. Yet in this case Arbitrator Haas in no way disregarded his duty to disclose when he established and then supplemented his statement of independence in which the two aforesaid circumstances are expressly mentioned.

The Appellant gives great weight to the remark – reproduced above (see B.b) – the ICAS made at nr. 36 of its decision of November 23, 2009. Apparently he sees there a sign that, according to this very body, the circumstances concerning Prof. Haas, examined objectively, were such as to cause him or any other reasonable person to have legitimate doubts as to that arbitrator's impartiality.

However the Appellant interprets that remark in his own way. In that remark indeed the ICAS merely mentions a possibility as to the impression that the Appellant may have had with regard to Prof. Haas' independence towards WADA at the time he was entrusted the aforesaid two missions (years 2004 and 2006/2007). In no way does it find that such an impression would still have been justified at the time the arbitral proceedings at hand were opened. Quite to the contrary, in the subsequent wording of its decision (nr. 37 also reproduced above), the ICAS states that such subjective impression no longer has to be as there is no circumstance which, objectively considered, would cause suspicion as to Prof. Haas' impartiality or independence in the arbitration.

To conclude, if one considers only the circumstances objectively established, leaving aside the Appellant's subjective impressions whilst having regard to the specificities of international sport arbitration as organised by the CAS, it does not appear that Ulrich Haas' presence within the Panel, pursuant to his appointment by INOC and not by WADA, would justify the grievance of irregular composition of the Arbitral Tribunal within the meaning of Art. 190 (2) (a) PILA. The CAS arbitrators have to be on a closed list; they must have legal training and an acknowledged competence in the field of sport (ATF 129 III 445 at 4.2.2.2 p. 467). Such requirements almost necessarily imply that an arbitrator meeting them would occasionally have some contacts with one or several sport federations, or that he would have carried out some activities on behalf of one of them. When this involves only some specific assignments going back several years, as is the case here, carried out by a university professor who merely put his expertise at the service of the sport community in the general interest (*i.e.* codifying Anti-Doping Rules and reviewing their application) – a teacher whose great qualities the Appellant himself emphasises – it must be presumed that when sitting in an arbitral tribunal entrusted with deciding an appeal made by an athlete in a dispute with the World Sport Organisation for which the arbitrator previously carried out some limited assignments, that arbitrator will have the capacity to raise above the contingencies relating to his appointment (the aforesaid ATF 129 III 445 *ibid.*). That such presumption is well-founded was indeed shown here because Arbitrator Haas joined his co-arbitrators to reject the WADA and ICU requests seeking a two years ban worldwide for the Appellant (see award nr. 62).

It goes without saying that this decision in no way precludes the appreciation which could be made as to the same arbitrator's independence and impartiality towards WADA in the light of other circumstances not considered here.

This being so, the Appellant's first grievance appears unfounded.

4.

In a second line of arguments, the Appellant claims that the CAS breached the rule of equal treatment and his right to be heard in contradictory proceedings in many respects.

4.1 The right to be heard as guaranteed by Art. 182 (3) and 190 (2) (d) PILA is not different in principle from that which is contained in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus it was held in the field of arbitration that each party has the right to express its views on the essential facts for the judgment, to present its legal arguments, to propose evidence on pertinent facts and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

As to the right to present evidence, it must be exercised timely and according to applicable formal rules (ATF 119 II 386 at 1b p. 389). The arbitral tribunal may refuse to receive evidence without violating the right to be heard if the evidence cannot base a conviction, if the fact is already established, if it is irrelevant or if the arbitral tribunal, assessing the evidence in advance, reaches the conclusion that it has already formed its opinion and that the results of the evidence proposed could not change it.

The rule of equality between the parties, also guaranteed by Art. 182 (3) and 190 (2) (d) PILA, requires the proceedings to be conducted in such a way that both parties have the possibility to present their arguments. Finally, the principle of contradiction, guaranteed by the same provisions, requires that each party should have an opportunity to express its views on its opponent's arguments, to review and discuss its evidence and to challenge it with its own evidence (ATF 117 II 346 at 1a).

The party claiming a violation of its right to be heard or some other procedural violation must raise it immediately in the arbitral proceedings under penalty of forfeiture. It is indeed contrary to good faith to invoke a procedural violation only in the framework of an appeal against the award when the violation could have been raised during the proceedings (decisions 4A\_348/2009 of January 6, 2010 at 4 and 4A\_69/2009 of April 8, 2009 at 4.1).

## 4.2

4.2.1 The first argument raised in this context refers to the issue of the correspondence between the DNA of the blood plasma contained in pack nr. 18 and the DNA in the blood sample collected from the Appellant as the Tour de France was going through Italy.

The Appellant claims that he wished the DNA test to be repeated as long as his rights in the criminal proceedings against him in Italy would not be jeopardized. Yet, according to him, whilst not challenging the principle, INOC ensured that the new evidence could not be adduced by forcing the Appellant to undertake steps in Italy which would have jeopardized his rights.

Thus, still according to the Appellant, INOC would have prevented him from proving a decisive element in the dispute in violation of his right to be heard.

4.2.2 The Appellant's presentation of the grievance involved does not reflect the factual situation as showed by the record, at least not entirely.

It appears from the award under appeal that at the CAS hearing of January 12, 13 and 14 2010, the Panel, after discussing the issue with the parties, invited them to agree on how to carry out a new DNA test "without prejudice to the recognized reliability of the DNA tests", giving them an additional two weeks for that purpose; yet the parties could not agree; hence the Panel decided to issue its decision on the basis of the record (nr. 63).

Thus the Appellant, who incidentally did not formally require a new DNA test in his appeal brief, contrary to the rules of Art. R51 of the Code, was given at the end of the proceedings a last possibility to prove his allegation that the blood contained in pack nr. 18 did not correspond to his. However that possibility was subject to a condition, which the Appellant apparently did not challenge, namely an agreement between the Parties within two weeks as to the procedure to be followed. On January 19, 2010, INOC proposed its assistance to repeat the DNA test whilst recalling that it behooved the Appellant to take the necessary steps with the Rome Public Prosecutor. In a letter of January 22, 2010, counsel for the Appellant rejected that proposal and stuck to the proposal, not made in the letter, that he had put forward during the hearing and alternatively suggested to seek the assistance of the Spanish criminal authorities. Eventually the situation did not change and the Appellant no longer insisted as to the issue of a new DNA test in the letters he sent to the CAS until the beginning of March 2010.

It does not appear and the Appellant certainly did not show that the Respondents or the CAS should be blamed for the fact that no agreement could be found as to the modalities of the new DNA test discussed at the hearing. Therefore, since the condition to which the introduction of that evidence was subject did not come about, without his opponents preventing it from being realized in breach of the rules of good faith and without any fault from the Arbitrators, the Appellant wrongly argues a violation of his right to be heard within the meaning of Art. 190 (2) (d) PILA and the principles of case law relating thereto.

### 4.3

4.3.1 Secondly, the Appellant deplores that the day before the hearing he received from ICU 700 pages of documents concerning the "Puerto Case" investigated in Spain, a record to which he has no access contrary to his opponents. In his view this circumstance would imply a violation of the rule of equality between the parties because he had only partial access to the record of that case, as opposed to the Respondents and that he was therefore in a situation of blatant disadvantage compared to them.

4.3.2 The Appellant fails to state that he sought the production of documents and did so only on December 23, 2009, namely just before the yearend recess and only three weeks or so before the hearing. The Panel accepted his request on December 21, 2009 and gave the ICU until January 8, 2010 to produce the documents requested. Therefore the Appellant cannot blame the Respondent for the little time he had available to acquaint himself with the documents between the time when they were filed and the beginning of the hearing.

In his answer to the appeal, the CAS emphasizes that since the first day of the hearing the Appellant did not ask anything specific as to the voluminous documents produced by the ICU, that he raised no serious and explicit complaint in this respect before the end of the hearing and that counsel for the Appellant answered by the affirmative when asked at the end of the hearing by the chairman of the Panel if he was satisfied with the proceedings. For its part INOC points out that the Appellant raised no complaint in connection with the 700 pages of documents within the two months between the end of the hearing and the notification of the award under appeal. These remarks of the CAS and of INOC are in no way disproved by the general observations the Appellant makes in this respect in his rebuttal of August 27, 2010. The Appellant does not demonstrate in that brief in what way the information contained in those documents could be useful to his defense.

Under such conditions the Appellant cannot in good faith claim after the award that his right to be heard was violated or that the Parties were not treated equally because allegedly he would not have had the possibility to study at leisure the 700 pages of documents produced by ICU and that he did not have the same access as the Respondents to the record of proceedings to which he was not a party. Because he did not raise a grievance at the time although the irregularity he now argues was in no way insurmountable, he is no longer entitled to rely on the grievance at Art. 190 (2) (d) PILA in this respect.

4.4 The appeal is therefore to be rejected to the extent that the matter is capable of appeal. The Appellant shall pay the judicial costs (Art. 66 (1) LTF); he shall also pay costs to INOC, to WADA and to ICU (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected to the extent that the matter is capable of appeal.
2. The judicial costs set at CHF 4'000.- shall be borne by the Appellant.
3. The Appellant shall pay to each of the three Respondents an amount of CHF 5'000.- for the federal judicial costs.
4. This judgment shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, October 29, 2010

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The presiding Judge:

The Clerk:

KLETT (Mrs)

CARRUZZO