Tribunal Arbitral du Sport
Court of Arbitration for Sport

By fax

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Lausanne, 2 May 2011/AZ/ln

Re: CAS 2010/A/2277 Roberto La Barbera v/International Wheelchair & Amputee Sports Federation (IWAS)

Dear Sirs,

Please find enclosed a copy of the Award issued by the Court of Arbitration for Sport in the above-referenced matter.

The parties will receive the award duly signed by the members of the Panel in due course.

Please be advised that I remain at the parties' disposal for any further information.

Yours faithfully,

Andrea ZIMMERMANN
Counsel to the CAS

Encl.
Cc : Panel

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2010/A/2277 Roberto La Barbera v/International Wheelchair & Amputee Sports Federation (IWAS)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition :

President : Mr Conny Jörneklint, Chief Judge, Kalmar, Sweden

Arbitrators : Mr José Juan Pinto, Attorney-at-Law, Barcelona, Spain

Judge James Robert Reid, West Liss, Great Britain

Clerk of the Court : Prof. Philippe Gilliéron, Attorney-at-Law, Lausanne, Switzerland

In the arbitration between

ROBERTO LA BARBERA, Mandrogne, Italy
represented by Mr Stefano Comellini, Attorney-at-law in Torino, Italy

- Appellant -

and

INTERNATIONAL WHEELCHAIR & AMPUTEE SPORTS FEDERATION (IWAS), Bucks, Great Britain

represented by Mrs Anna-Marie Blakeley, Solicitor in London, England

- Respondent -

I. FACTS

1. Parties

1.1. The Appellant, Mr Roberto La Barbera (« Mr La Barbera »), an Italian citizen, was born on 25 February 1967. Mr La Barbera has been competing for over a decade in athletics, namely the 400 meters, the long jump as well as the pentathlon in class T44 and F44 (below-knee amputation).

1.2. The Respondent, International Wheelchair & Amputee Sports Federation (« IWAS »), is the international federation governing sports for disabled people in wheelchairs or who are amputees. The IWAS maintains its seat in Bucks, United Kingdom.

2. Facts of the case

2.1. The background facts stated herein are a summary of the main relevant facts. Additional facts will be set out where material, in connection with the discussion of the parties' factual and legal submissions.

2.2. From 4 to 6 June 2010, Mr La Barbera competed at the IWAS Athletics European Open Championships in Stadskanaal in The Netherlands ("the Event").

2.3. On 6 June 2010, Mr La Barbera won the long jump competition and was thereafter notified that he had to provide a sample for doping control.

2.4. In agreement with the International Paralympic Committee, the IWAS was responsible for all doping control carried out at the Event and was the results management authority for all samples. The actual sample collection was conducted on behalf of the IWAS by the Doping Autoriteit (the Netherlands Anti-Doping Authority).

2.5. The sample collected was sent to the WADA-accredited Institute of Biochemistry, German Sport University Cologne (the "Cologne Lab"), for analysis.

2.6. The urine sample provided by Mr La Barbera revealed the presence of Stanozolol and 16β-hydroxystanozol, a metabolite of Stanozolol, a prohibited substance appearing on the WADA 2010 Prohibited List under category S1(1)(a), exogenous anabolic androgenic steroid.

2.7. On 22 July 2010, Mr La Barbera was notified by the IWAS of the adverse analytical finding, namely that his "A Sample" had been tested positive, as well as of his provisional suspension from the date of the notification.

2.8. On 27 July 2010, Mr La Barbera accepted the provisional suspension as of 22 July 2010, but did not accept the result of the A Sample and requested the B Sample to be analyzed as well as a hearing.

2.9. On 3 August 2010, the Cologne Lab confirmed the adverse analytical finding made in respect of the A Sample.

2.10. On 11 August 2010, Mr La Barbera was notified of the adverse analytical finding.

2.11. On 7 September and 7 October 2010, a hearing took place before the IWAS Anti-Doping Committee ("The IWAS Tribunal") and was attended by both parties and their counsel.

2.12. On 20 October 2010, the decision issued by the IWAS Tribunal confirmed the doping offence, ruled that Mr La Barbera was automatically disqualified of his individual results obtained in the IWAS Athletic European Championships and any competition subsequent to the Sample collection on 6 June 2010, including the forfeiture of any medals, points and prizes won.

2.13. Additionally, the IWAS Tribunal declared Mr La Barbera ineligible for a period of two years commencing as from the date of the provisional suspension, i.e. from 22 July 2010 until 22 July 2012.

3. IWAS Tribunal's decision (20 October 2010)

3.1. In its decision, the IWAS Tribunal had to address two issues raised by Mr La Barbera:

3.2. First, Mr La Barbera contended that the sample collection procedure had been flawed. To that regard, the IWAS Tribunal held that "*the doping control form records clearly the Urine Collection Vessel numbers, and the matching seal numbers, for the partial samples. The athlete and the doping control officer both signed the doping control form, and the athlete recorded no remarks in the "comments" box about unsealed vessels, or the handling of samples by other people*". While Mr La Barbera argued that he did not know that there had been a violation of the procedure at the time he signed the doping control and that, as a clean athlete, he had no idea of such flaw until he was notified of the positive result, the IWAS Tribunal pointed out that Mr La Barbera was an experienced athlete who, should he have had any serious concerns with the sealing of the samples, their handling by others or non-attendance by a chaperone, would not have signed off the doping form. As a consequence, the IWAS Tribunal ruled that: "*[i]n these circumstances, and in the absence of any other evidence of procedural*

irregularities in the sample collection forwarded by the athlete aside from his word, the Hearing Panel must take the documents signed by the DCO and the athlete at face value. The Hearing Panel must consider the procedure to have been completed correctly. The doping control officer was experienced, and no reason is given to doubt the integrity of his process. As such, the Hearing Panel rejects the athlete's claim that the problems with the doping control collection make the result unsound."

3.3. Second, Mr La Barbera contended that he had been inadvertently contaminated by the prohibited substance after having treated his wife's dogs. The IWAS Tribunal ruled that the possession of the prohibited substance had been documented, but accepted as an "acceptable justification" according to Art. 2.6.1 of the IWAS Code. The Tribunal however considered that "*the possible contamination by contact with this veterinary product has not been established by the athlete. Aside from his word, the athlete has provided no further evidence at all in the form of witness statements, scientific material, or anything to corroborate his story. [...]. Moreover, the Panel is not aware of any reports in scientific literature which describe such kind of contamination through the skin. As such, the Hearing Panel has found that an anti-doping rule violation of Article 2.1 of the IWAS Code, "Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample" was committed by the athlete*". The Tribunal further added that the athlete had produced no evidence aside from his word as to how the prohibited substance entered his system. As a consequence, the Tribunal held that "*[i]n this matter, the Hearing Panel cannot be satisfied on the balance of probabilities about how the substance entered the Respondent's system and, accordingly must deny any elimination or reduction of sanction under Article 10.5 of the IWAS Code.*"

3.4. Based upon what precedes, the IWAS Tribunal confirmed the doping offence and ruled in the sense described under para. 2.12 and 2.13 above. On 20 October 2010, the IWAS Executive Management Committee on behalf of the IWAS Executive Board ratified the decision of the Tribunal.

4. Procedure before the CAS

4.1. On 17 November 2010, Mr La Barbera filed with the CAS its statement of appeal against the decision of the IWAS Tribunal, and expressly invited the CAS to consider the statement of appeal as the appeal brief. The timeliness of the appeal filed by Mr La Barbera is undisputed.

4.2. On 22 November 2010, the CAS notified the statement of appeal to be considered as an appeal brief to the IWAS, and invited the latter to submit its answer within twenty days.

4.3. On 1st December 2010, IWAS informed the CAS that the parties had agreed to extend the deadline to file the answer until 20 December 2010.

4.4. On 2 December 2010, the CAS granted the requested extension until 20 December 2010.

4.5. On 17 December 2010, the CAS informed the parties as to the composition of the Arbitral Panel.

4.6. On 20 December 2010, IWAS filed with the CAS its answer to Mr La Barbera's appeal brief.

4.7. On 21 December 2010, the CAS invited the parties to inform the CAS Court office by 29 December 2010 whether their preference was for a hearing to be held or for the Panel to issue an award based on the parties' written submissions.

4.8. On 29 December 2010, the IWAS informed the CAS that its preference was for the Panel to issue an award based on the parties' written submissions. On 7 January 2011, Mr La Barbera informed the CAS of its preference for a hearing to be held.

4.9. On 7 February 2011, the CAS issued an Order of Procedure to be signed by the parties by 1 March 2011. Such signature took place respectively on 24 February 2011 for the IWAS, and on 28 February 2011 for Mr La Barbera.

4.10. On 21 March 2011, the IWAS sent to the CAS a fully signed version of Mr Van Weert's witness statement, and referred the CAS of the recent decision in *International Wheelchair Basketball v. UK-Anti-Doping & Simon Gibbs* (CAS 2010/A/2230, 22 February 2011).

4.11. On 25 March 2011, the hearing was attended by both parties and their counsel, as well as an interpreter for Mr La Barbera (see below para. 7).

5. Outline of the parties' positions

5.1. The following summarises the parties' positions and does not purport to include every contention put forward by the parties. However, the Panel has carefully considered all of the arguments advanced by the parties, even if there is no specific reference to those arguments in the following outline of their positions.

A. Mr La Barbera's position

5.2. In substance, Mr La Barbera's appeal is consistent with the arguments he raised in front of the IWAS Tribunal and based upon two lines of reasoning:

b) Sample collection and analysis

5.3. First of all, Mr La Barbera argues that the doping control that took place on 6 June 2010 and led to the adverse analytical finding departed from the International Standard for Testing ("IST").

5.4. While there is no dispute that the doping control took place on 6 June 2010 between 12'12 (twelve minutes after noon) and 13'31 (thirty-one minutes after one in the afternoon), that Mr La Barbera had to provide three samples to provide the minimum amount of urine required to carry out the control, i.e. 90 ml, and that Mr La Barbera had to temporarily leave the doping control station to attend the medal ceremony, Mr La Barbera argues that the control itself significantly departed from the IST so as to raise reasonable doubts as to the test results.

5.5. According to Mr La Barbera, there exists a great uncertainty as to the way the whole procedure got conducted. In spite of the Doping Control Officer ("DCO"), Mr Cor Van Weert's witness statement, Mr La Barbera argues that there remain contradictions and inconsistencies in Mr Van Weert's statement. To name a few, Mr La Barbera points out that there is neither certainty as to the exact time when the first sample was collected, nor as to the time when the athlete left the doping control station for the medal ceremony. More than that, one would not know how the collected samples have actually been kept while Mr La Barbera attended the medal ceremony. Mr La Barbera further adds that he was neither accompanied by a chaperone to the medal ceremony nor asked to seal or invited to check that the samples had been properly sealed prior to leaving for the medal ceremony. As a consequence, Mr La Barbera considers that: "*This means that anything could drop into Mr La Barbera's samples. The undersigned didn't say that someone did something to stitch him up, but there is no doubt that in this case the chain of custody of the samples was broken and there is no prove [sic] that the urine examined in the labs is really coming from the athlete*".

5.6. Mr La Barbera further adds that his signature at the bottom of the doping form, written in Dutch, English and French, languages he does neither speak nor understand, cannot be considered as an acceptance that the control was conducted in accordance with the IST. Confronted between two versions of the doping control process, the one of Mr La Barbera, respectively the one of Mr Van Weert, the DCO in charge of the control, Mr La Barbera finally considers that "*the Panel must adopt more evidences, like, as said before, witness declarations. Without this "third part" elements, it appears to be unwarranted to simply choose one part version like the truth*".

b) Accidental ingestion

5.7. First of all, Mr La Barbera recognizes having possessed the prohibited substance, but argues that the adverse analytical finding is the result of some inadvertent and undesired absorption of the prohibited substance. According to Mr La Barbera, while the production of some evidence as to how the prohibited substance entered his system is impossible, the presence of Stanozolol and 16β-hydroxystanozol in his body can be explained as follows:

5.8. Mr La Barbera's wife has several dogs. Due to the illness of two of them, a veterinarian prescribed a drug named "Stargate", as evidenced by a prescription on file. This drug took the form of tablets that had to be crushed into powder prior to their ingestion by the dogs, three times a week. Over the three months that the treatment lasted, i.e. from the beginning of March 2010 until the end of May 2010, Mr La Barbera regularly crushed those tablets between spoons to assist his wife in the dogs' treatment. Mr La Barbera admits to never have wondered what compounds the tablets actually contained, never to have read the label and asserts that he sometimes forgot to wash his hands after having crushed those tablets. Alleging that he has the bad habit of biting his fingernails, Mr La Barbera assumes that the substance must have been ingested in his system while biting his nails after having crushed the tablets.

5.9. Based upon these explanations, Mr La Barbera concludes that his ingestion of the prohibited substance was purely accidental. As a consequence, he argues that he has satisfied the burden of Art. 10.4 IWAS Anti-Doping Code, according to which "*where an Athlete [...] can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility for a first violation found in Article 10.2 shall be replaced with at a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two years of Ineligibility*". Mr La Barbera further submits he has met the threshold of Art. 10.5.1, respectively Art. 10.5.2 of the IWAS Anti-Doping Code. According to these provisions, " *if an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated*" (Art. 10.5.1), respectively may be reduced up to a maximum of one-half of the period of Ineligibility otherwise applicable should the athlete bear "*No Significant Fault or Negligence*" (Art. 10.5.2). Both provisions further provide that: "*When a Prohibited Substance or its Markets or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated*" or, as the case may be, "*reduced*". Arguing that a definitive evidence is impossible to provide to that purpose, Mr La Barbera submits he has met that threshold and that the principle "*favor rei*" should lead the Panel to rule in his favor considering the reasonable doubts existing.

5.10. In his oral pleadings, Mr La Barbera concluded that his ineligibility period should be reduced, so as to enable him to try and qualify for the 2012 London Paralympics.

B. IWAS' position

a) Sample collection and analysis

5.11. The IWAS first disputes Mr La Barbera's suggestion that while he was away from the doping control station, the partial samples he had provided were not properly sealed.

5.12. For the IWAS, it is up to Mr La Barbera to prove, on the balance of probabilities, that departures from the IST occurred during testing that could reasonably have caused the adverse analytical finding.

5.13. The IWAS considers that Mr La Barbera has not satisfied that burden. There is no reason to depart from Mr Van Weert's witness statement, an experienced DCO. The doping control form, duly signed by Mr La Barbera and the DCO, records the numbers of both the collection vessels in which Mr La Barbera's partial samples were stored and of the seals used to seal those collection vessels. Should Mr La Barbera have had serious concerns, it was up to him to raise such concerns and not to sign the doping control form; as an experienced athlete, the IWAS considers that such a signature makes it clear that Mr La Barbera had no concern as to the way the doping control has been handled.

5.14. The IWAS further points out that, even if the partial samples had not been properly sealed, such a departure would still be irrelevant unless Mr La Barbera could show that such departure could have caused the adverse analytical finding. Mr La Barbera's mere assertion that "*the chain of custody of the samples was broken and there is no prove [sic] that the urine examined in the labs is really coming from the athlete*" is insufficient to that regard, all the more as there is sufficient proof that the concerned sample actually came from Mr La Barbera. Mr La Barbera's speculations that "*anything could drop into [his] samples*" or that there were people coming and going from the doping control station who had nothing to do with the doping control process have not been substantiated and directly run against Mr Van Weert's witness statement. Consequently, the IWAS Tribunal was right in concluding that Mr La Barbera violated Article 2.1 of the IWAS Code.

b) Accidental ingestion

5.15. The IWAS argues that Mr La Barbera is wrong in stating that it was up to the IWAS to prove beyond reasonable doubt Mr La Barbera's conviction and that, absent such proof, the principle *favor rei* should apply to him. To the contrary, Art. 10.2 of the IWAS

Code makes it clear that the presence of a prohibited substance in an athlete's sample gives rise to a two-year sanction unless the athlete can prove, on the balance of probabilities, that the prohibited substance got into his system through "No Fault or Negligence" of his own or that it got there through "No Significant Fault or Negligence" of his own. In other words, it is up to the athlete to prove the elements of these pleas in mitigation, and not up to the IWAS to disprove them.

5.16. The IWAS goes on stating that Mr La Barbera's assertion that it is "*practically impossible to prove*" how a substance got into his system is incorrect. Several athletes have demonstrated, by reference to scientific and/or other evidence, how it was that that exposure led to the substance getting into their system. Mr La Barbera was given ample opportunity to provide proof but failed to do so. Having failed to do so, and basing his own arguments on mere speculations, his plea cannot stand.

5.17. As a consequence, the IWAS submitted that Mr La Barbera's appeal should be entirely dismissed.

6. Mr Cor Van Weert's witness statement

6.1. Mr Cor Van Weert's has issued two witness statements, one on 16 September 2010, and another one on 17 December 2010 that shall be more specifically addressed here.

6.2. Mr Van Weert was the doping control officer ("DCO") responsible for the collection of samples from male athletes during the IWAS Athletics European Open Championships, while another DCO was responsible for collecting the female samples. Both were supported by four chaperones who were in charge of escorting the athletes to the control and supervising them throughout the control. Four athletes got tested during the Event: three males and a female.

6.3. The doping control station consisted of two rooms: one large reception room and a separate toilet. There was only one door to the doping control station and the DCO had the set of keys to lock that door; all the windows were closed. Either Mr Van Weert or his colleague were always present in the doping control station to ensure that the samples were supervised and secured. Set aside both DCOs, the only people who entered the doping control station were the four tested athletes and the chaperones, to the exclusion of anyone else.

6.4. Any sample collection starts by asking the athlete to select a collection kit on the table, then by asking him or her to confirm that he or she is satisfied that the sealed collection kit selected has not been tampered with. The athlete is then invited to open the chosen collection kit and to provide the required amount of urine into the urine collection

vessel ("UCV") contained in the kit. Assuming that an insufficient amount of urine is produced (i.e. less than 90 ml), the athlete is requested to close the lid of the UCV to ensure that none of the sample is spilled; he or she is then asked to select a so-called "void seal" from a number laid out on the table, in order for the DCO to seal the UCV with it. The "void seal" ensures that the samples have not been tampered with, or a "void" mark will be perceived on the UCV. The DCO then fills in the relevant section of the doping control form, recording the unique number of both the UCV and the seal, and asks the athlete to confirm that these numbers are correct. The athlete is then invited to return to the waiting room until he or she is able to produce a further sample. That procedure repeats itself until the athlete has been able to provide a sufficient quantity of urine. Once a sufficient quantity of urine has been provided, the DCO checks the numbers on the UCV and the void seal with the numbers that are noted on the doping control form with the athlete, and check that there is no evidence of tampering. When three partial samples have been filled in to provide the requisite level of urine – as has been the case with Mr La Barbera – the DCO instructs the athlete to open the spouts of the UCV of the first partial sample and second partial sample and then pour the second partial sample into the first partial sample; the same operation will be conducted to pour the third partial sample into the first sample, until the requisite quantity of urine is met. The DCO then fills in the missing part of the doping control form, takes the athlete through the form and check that he or she is satisfied that the code number on the transportation box is the same as the bottle code numbers written on the form. The athlete is finally asked to insert details of any medication taken recently, and to confirm whether he or she was satisfied with the sample collection procedure or has any comment related thereto before signing the form.

6.5. In the present case, Mr Van Weert remembers that Mr La Barbera came to the doping control station accompanied by a chaperone, at the exclusion of anyone else, at 12'12pm as stated on the form. The doping control form records that Mr La Barbera provided three samples: (i) the first UCV chosen by the athlete was numbered M395218 and was sealed with the void seal number 3692272; (ii) the second was numbered M397515 and sealed with the void seal number 3692348, and (iii) the third was numbered M397517, but did not need to be sealed as there was sufficient urine at that point and that all samples could be combined according to the procedure described above (see para. 6.4). While Mr Van Weert confirms that Mr La Barbera left the doping control station with his permission to attend the medal ceremony, Mr Van Weert affirms that Mr La Barbera was at all times chaperoned. The athlete came back after ten to thirty minutes to resume the collection sample that was completed at 13'31pm. Apart from the medal ceremony, Mr Van Weert does not remember anything out of the ordinary with the collection procedure, as confirmed by the signature of Mr La Barbera on the doping control form.

6.6. At the hearing, Mr Van Weert, heard as a witness through a conference call, confirmed his written statements.

Hearing

7.1. A hearing was held on 25 March 2011 at the CAS premises in Lausanne. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel or any further procedural issue.

7.2. The following persons attended the hearing:

7.2.1 Mr La Barbera, accompanied by his attorneys, Mr Stefano Comellini, assisted by Mr Ardingo Scarzella, as well as an interpreter, Mrs Claudia Chiaperotti.

7.2.2 For the IWAS: Mrs Anna-Marie Blakeley, solicitor.

7.3. The Panel heard evidence from the following persons:

7.3.1 Mr La Barbera;

7.3.2 Mr Cor Van Weert, the DCO, through a conference call.

7.4. Each person heard by the Panel was invited by its President to tell the truth subject to the consequences provided by the law and was examined and cross-examined by the parties, if they wished to do so, as well as questioned by the Panel.

7.5. The parties had then ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Panel. After the parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel heard carefully and took into consideration its discussion and subsequent deliberation all the evidence and arguments presented by the parties even if they have not been summarized herein.

7.6. Neither during nor after the hearing did the parties raise with the Panel any objection as to the respect of their right to be heard and to be treated equally in these arbitration proceedings.

II. LAW

1. Jurisdiction

1.1. The jurisdiction of the CAS to act as an appeal body is based on Art. R47 of the CAS Code of Sports-related Arbitration in the version in force as of January 2010 ("the CAS Code") which provides that:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said*

body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body."

1.2. According to Art. 13.2.1 of the IWAS Code:

"*In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such* court."

1.3. The concerned event being the IWAS Athletics European Open Championships, the CAS has jurisdiction in compliance with the afore mentioned provision, as explicitly recognized by the parties in the Order of Procedure that they signed on 24 February 2011 (IWAS) and 28 February 2011 (Mr La Barbera).

2. Admissibility of the appeal

2.1. According to Art. 13.5 of the IWAS Code:

"*The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. [...]*"

2.2. The decision of the IWAS Tribunal was issued on 20 October 2010 and notified to Mr La Barbera on 28 October 2010. Mr La Barbera filed a statement of appeal against this decision to the CAS on 17 November 2010.

2.3. The appeal of Mr La Barbera, whose timeliness is not disputed, is therefore admissible.

3. Applicable law

3.1. Art. R58 of the CAS Code provides that:

"*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

3.2. The above mentioned provision was expressly mentioned in the Order of Procedure and was accepted by all the parties.

3.3. It is common ground between the parties that the applicable regulations in this case are the IWAS Code. The IWAS has its seat in Bucks, United Kingdom, thus leading to the application of English law. Therefore, the IWAS Code shall apply primarily and English Law shall apply complementarily.

4. Merits

4.1. The main issues to be resolved by the Panel are:

A. Has there been a valid adverse analytical finding with respect to Mr La Barbera's urine sample?

B. If a doping offence has been committed, can Mr La Barbera prove, considering the required standard of evidence, how the prohibited substance entered his system?

C. If Mr La Barbera can meet the relevant requirements of evidence of the prior question, was he acting with no fault or negligence or with no significant fault or negligence?

A. Adverse analytical finding

(i) Applicable provisions

4.2. According to Art. 2.1 of the IWAS Code:

> *"Presence of a Prohibited Substance of its Metabolites or Markers in an Athlete's Sample*
>
> *2.1.1: It is each Athlete's personal duty to ensure that no Prohibited Substances enter his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.*
>
> *2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.*

4.3. As to the burden of proof, Art. 3.1 of the IWAS Code provides that:

> *"The IWAS shall have the burden of establishing that an anti-doping violation has occurred. The standard of proof shall be whether the IWAS has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation, which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability except as provided in Articles 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof."*

4.4. Art. 3.2 of the IWAS Code further adds that:

> *"Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules shall be applicable in doping cases.*
>
> *3.2.1: WADA-accredited laboratories are presumed to have conducted Sample Analysis and custodial procedures in accordance with the WADC International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard, for Laboratories undermining the validity of Adverse Analytical Finding, occurred which could reasonably have caused the Adverse Analytical Finding. [...]*
>
> *3.2.2: Departures from any other International Standard or other anti-doping rule or policy which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such Results. If the Athlete or other Person establishes that a departure from the International Standard or other anti-doping rule violation occurred, then the IWAS shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation."*

(ii) Present case

4.5. In the present case, the IWAS has met its burden of proof as foreseen under Art. 3.1 of the IWAS Code. The Cologne Lab has reported an adverse analytical finding for Stanozolol and 16β-hydroxystanozolol, a metabolite of Stanozolol, classified in the World Anti-Doping Agency 2010 Prohibited List as a S1(1)(a) exogenous anabolic androgenic steroid, for both the A and B Samples. According to Art. 4.1 of the IWAS Code, "*the Prohibited List adopted by the IWAS is the WADC Prohibited List published and revised by WADA*". Sufficient proof of an anti-doping rule violation under Art. 2.1 of the IWAS Code has thus been established by the IWAS, in compliance with Art. 2.1.2 of the IWAS Code. It remains to be seen whether Mr La Barbera has successfully

rebutted that finding on a balance of probability, as foreseen under Art. 3.2.1 or 3.2.2 of the IWAS Code.

4.6. It is not disputed that the Cologne Lab is a WADA-accredited laboratory. Mr La Barbera does not allege that the Cologne Lab would have departed from the WADC International Standard for Laboratories as foreseen under Art. 3.2.1 of the IWAS Code. The application of Art. 3.2.1 of the IWAS Code can therefore be ruled out by the Panel.

4.7. Rather, Mr La Barbera argues that the doping control procedure would have departed from the IST. To prevail on that argument, Mr La Barbera has to satisfy the burden of proof foreseen under Art. 3.2.2 of the IWAS Code, i.e. to establish "*[...] a departure from the International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule occurred [...]*". In spite of Mr La Barbera's assertions, the Panel sees no reason to depart from the IWAS Tribunal's decision for the reasons described below.

4.8. On appeal, Mr La Barbera limited himself to repeat the grievances he has already alleged in front of the IWAS Tribunal. In spite of Mr La Barbera's allegations, there are no contradictions or inconsistencies in Mr Van Weert's witness statements. The time the sample collection procedure took place is clearly referred to in the doping control form, with an arrival date at 12'12pm, and a finishing time at 13'31pm. Mr Van Weert has made it clear that, while Mr La Barbera had indeed left the doping control station to attend the medal ceremony, he had at all times been chaperoned. Mr Van Weert has further added that there had always been at least one DCO at any time in the doping control station to supervise and secure the samples. All in all, the Panel is of the opinion that Mr Van Weert was extremely clear as to the way the procedure got conducted, and explained in detail the way the doping control test had been carried out with the three samples, the respective numbers of each UCV and void seal, as well as the procedure to combine these samples. Mr Van Weert's explanations are consistent with the IST, in particular its Article F.4.

4.9. While Mr La Barbera argues that his signature at the bottom of the doping control form cannot be construed as an acceptance of the way the doping control procedure took place as he does neither speak Dutch, nor English nor French, such an argument cannot be accepted. In *ITF v. Hingis*, 3 January 2008, the Anti-Doping Tribunal has correctly made it clear that the doping control form is intended to provide contemporaneous record of the process precisely because accurate and detailed recollection is unlikely; while an athlete signature does not amount to a waiver of the athlete's right to later allege that the requirements of the IST have been breached, such signature is of potential evidential value in determining whether [the procedures set out in the IST] have been complied with. Going even further, the CAS held in *V. v. FINA* (CAS 2003/A/493, 22 March 2004) that the appellant's plain signature of the doping control records expresses his approval of the procedure and prevents him – short of compelling

evidence of manipulation of the records or fraud or any similar facts – from raising any such issue at a later stage. As correctly held by the IWAS Tribunal, it was up to Mr La Barbera to ask for further explanation if he did not understand the form; by having omitted to do so, Mr La Barbera has to support the consequences of his own negligence. As a result, the Panel is of the opinion that Mr La Barbera has been unable to put forward any convincing ground to reject the statements made by Mr Van Weert, an experienced DCO.

4.10. Even if the Panel was to accept that there had been any departure from the IST, which it does not, Mr La Barbera has been unable to prove that any alleged departure could reasonably have caused the adverse analytical finding. Mr La Barbera merely assumes that, due to his attendance to the medal ceremony, "*the chain of custody of the samples was broken and there is no prove [sic] that the urine examined in the lab is really coming from the athlete*". Mr La Barbera's line of argument amounts to mere speculation without any supporting facts. Mr Van Weert made it clear that there had always been at all times a DCO to supervise and to secure the samples, so that there has never been any break in the chain of custody. Mr La Barbera does not allege that the samples referred to in the doping control form were not his own; he even admits that he has no basis to argue that "*someone did something to stitch him up*". No evidence was presented by Mr La Barbera neither that someone could have tampered with his sample nor how such tampering could have happened. Arguably, nobody knew precisely when Mr La Barbera has been required to provide a sample and, if they did, nobody would have known that he had only been able to provide a partial sample and that, assuming that such sample was left unattended – which the Panel excludes – that Mr La Barbera would leave to attend the medal ceremony thus providing someone with the opportunity to tamper such sample (see *Azevedo v. CBDA,* CAS 2003/A/510, 15 January 2004).

4.11. All in all, the Panel is satisfied that Mr La Barbera has been unable to discharge the burden of proving that (i) there has been any departure from the IST, and that (ii) such departure could reasonably have caused the adverse analytical finding.

(iii) Conclusion

4.12. As a result, the Panel holds that Mr La Barbera has committed an anti-doping rule violation, in compliance with Art. 2.1 of the IWAS Code. Consequently, the following sanctions are applicable:

4.13. According to Art. 9 of the IWAS Code:

"*Automatic Disqualification of Individual Results*

An anti-doping violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in

that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes."

4.14. Art. 10.1 further adds that:

"*Disqualification of results in IWAS Sanctioned Events*

An anti-doping rule violation occurring during or in connection with an IWAS Sanctioned Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athlete's individual results obtained in that Event with all Consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.

10.1.1. If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Events shall not be disqualified unless the Athlete's results in Events other than the Event in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

4.15. Finally, Art. 10.2 reads that:

"*Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods*

The period of Ineligibility imposed for a first violation of Article 2.1 [...] shall be two (2) years Ineligibility, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5 [...] are met."

4.16. As a result, the Panel now has to put under scrutiny whether Art. 10.4 or 10.5 may apply to the present case, which leads the Panel to the second and third questions previously raised (see para. 4.1):

B. Accidental Ingestion

(i) Relevant provisions

4.17. At the hearing, Mr La Barbera relied upon both Art. 10.4 and 10.5 of the IWAS Code:

4.18. According to Art. 10.4:

"*Elimination or Reduction of Period of Ineligibility for Specified Substances under Specific Circumstances*

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Ahtlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility for a first violation found in Article 10.2 shall be replaced with at a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two years of Ineligibility.

To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing body the absence of intent to enhance sport performance or mask the Use of a performance-enhancing substance."

4.19. Art. 10.5 further adds that:

"*Elimination or Reduction of Period of Ineligibility for Based on Exceptional Circumstances*

10.5.1 No Fault or Negligence.

If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility must be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2 No Significant Fault or Negligence.

If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced."

(ii) Article 10.4 of the IWAS Code

4.20. The Panel will first address the potential application of Art. 10.4 of the IWAS Code, which was invoked by Mr La Barbera during the hearing. The Panel however has no hesitation to rule out the application of Art. 10.4 to the present case for the following reason. Art. 10.4 of the IWAS Code does not relate to "Prohibited Substances", but to "Specified Substances".

4.21. According to Art. 4.2 of the IWAS Code:

> "*For purposes of the application of Article 10 (Sanctions on Individuals), all Prohibited Substances shall be "Specified Substances" except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Prohibited Methods shall not be Specified Substances.*"

4.22. In the present case, Mr La Barbera has been convicted with an adverse analytical finding for Stanozolol and 16β-hydroxystanozolol, a metabolite of Stanozolol. These substances are classified in the World Anti-Doping Agency 2010 Prohibited List as a S1(1)(a) exogenous anabolic androgenic steroid. Considering that anabolic agents are not considered "Specified Substances" within the meaning of Art. 4.2 of the IWAS Code, Art. 10.4 cannot apply to the present case. The Panel shall therefore focus its analysis upon Art. 10.5 of the IWAS Code.

(iii) Article 10.5 of the IWAS Code

4.23. To prevail under Art. 10.5 of the IWAS Code, Mr La Barbera must first (i) establish how the Prohibited Substance entered his system, and then (ii) demonstrate that he bears No Fault or Negligence, respectively No Significant Fault or Negligence. The Panel shall put both these requirements under scrutiny.

4.24. Prior to this analysis, the Panel considers it worth pointing out that, contrary to Mr La Barbera's assertions, it is to be kept in mind that, as commented in the Code, "*the Code adopts the rule of strict liability [...]. Under the strict liability principle, an Athlete is responsible, and an anti-doping violation occurs, whenever a Prohibited Substance is found in an Athlete's Sample*" (Comment ad art. 2.1.1). From the strict liability principle follows that, once the IWAS has established that an anti-doping rule violation has occurred, as in the presence case, it is up to the Athlete to demonstrate that the requirements foreseen under Art. 10.5 of the IWAS Code are met. Such a burden of proof is expressly stated under Art. 3.1 of the IWAS Code, which provides that: "*where these rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability [...]*".

In *FIFA v. STJDF & CBF & Dodo* and *WADA v. STJDF & CBF & Dodo*, the Tribunal held on that regard that "*according to the CAS jurisprudence, the balance of probability standard means that the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence*" (CAS 2007/A/1370 and CAS 2007/A/1376, 11 September 2008). As a result, it is up to Mr La Barbera to prove how, on a balance of probability, (i) the Prohibited Substance entered his system, (ii) and No (or No Significant) Fault or Negligence.

4.25. As to the first requirement, i.e. the ingestion of the Prohibited Substance, Mr La Barbera argues that such an ingestion must have occurred while he was assisting his wife with the dogs' treatment that took place between March and the end of May 2010. During that period of time, Mr La Barbera would have regularly crushed the tablets to be provided to the dogs between spoons. Admitting that he sometimes must have forgotten to wash his hands after having crushed those tablets, and considering his bad habit to bite his fingernails, Mr La Barbera assumes that the substance must have been ingested in his system while biting his nails after having crushed the tablets.

4.26. The Panel is not satisfied with Mr La Barbera's explanations. The prescription of the Stargate product by the veterinarian, Dr Marco Colombo, has been attested in a signed letter dated 9 September 2010, which provides that:

> "*I hereby declare that on 4th March 2010, I prescribed a package of Stargate tablets, 2mg, for two dogs, Maltese terriers, owned by Mrs Margherita Valenti, living in via Cascinagrossa 15, Mondragone, which were showing signs of failure to thrive, to be administered at the dose of 1mg per day per kilo in one-week cycles followed by three days of remission and for a total period of 90 days.*"

While this letter may explain the possession of the Prohibited Substance by Mr La Barbera, the mere assumptions raised by Mr La Barbera as to how such substance would have entered his body prove unconvincing. In spite of Mr La Barbera's assertion that evidence as to how the Prohibited Substance entered his system "*[...] is practically impossible to prove: is clearly visible that there is no way to demonstrate how a substance entered in a body and due to that "nemo tenetur ad impossibilia" the panel can not request this evidence from Mr La Barbera*", such a line of arguments is unpersuasive. The CAS has constantly repeated that the requirement of showing how the Prohibited Substance got into the Athlete's system must be enforced quite strictly since, if the manner in which a substance entered an athlete's system is unknown or unclear, it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent such occurrence (*Karatantcheva v. ITF*, CAS 2007/A/1399, 17 July 2008). Consequently, the Tribunal made it clear in *WADA v. Stanic & Swiss Olympic Association* that the "threshold" requirement of showing how the substance entered the player's system was to enable the Tribunal to determine the issue of fault on

the basis of fact and not mere speculation (CAS 2006/A/1140, 4 January 2007). In other words, the threshold requirement of proof of how the substance got into the system "*meant not only that the player must show the route of administration – in this case probably oral ingestion – but that he must be able to prove the factual circumstances in which administration occurred*" (*WADA v. Stanic & Swiss Olympic Association*, CAS 2006/A/1140, 4 January 2007).

4.27. In the present case, Mr La Barbera's explanations only amount to a speculative guess or explanations uncorroborated in any manner. One hypothetical source of a positive test does not prove to the level of satisfaction required that such explanations are factually or scientifically probable. Mere speculation is not proof that it did actually occur. Mr La Barbera has a stringent requirement to offer persuasive evidence of how such contamination occurred. In line with the CAS jurisprudence (see for instance *IRB v. Keyter*, CAS 2006/A/1067, 13 October 2006), the Panel is of the opinion that, unfortunately, apart from his own words, and unlike others cases where the Athlete has managed such burden of proof (see, for instance: *Puerta v. ITF*, CAS 2006/A/1025, 12 July 2006; *ITF v. Gasquet*, CAS 2009/A/1296, 17 December 2009), Mr La Barbera did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of the Prohibited Substance would have occurred. Mr La Barbera does in particular neither bring any scientific evidence that would explain how the Prohibited Substance could still be found in his system one week after the end of the dogs' treatment, nor whether such a potential ingestion through his biting his nails could result in the level of substance found in his body. As a result, the Panel finds that Mr La Barbera's explanations lack in corroborating evidence and prove unsatisfactory, thereby failing the balance of probability test. In other terms, the Panel is not persuaded that the occurrence of the alleged ingestion of the Prohibited Substance through his biting his nails is more probable than its non-occurrence. Mr La Barbera has therefore failed on the first hurdle, so that the exceptional circumstances foreseen under Art. 10.5 of the IWAS Code have not been established at the Panel's satisfaction.

C. Absence of Fault or Negligence

4.28. Should the Panel have ruled differently and considered that Mr La Barbera had proved, on a balance of probability, how the Prohibited Substance entered his body that the result would not be different, Mr La Barbera has in any case failed on the second hurdle, i.e. to establish that such ingestion occurred without any (Significant) Fault or Negligence. It is to be remembered that, according to Art. 2.1.1 of the IWAS Code, "*it is each Athlete's personal duty to ensure that no Prohibited Substance enter his or her body*". In other words, Athletes are responsible for what they ingest. Once again taking into account the strict liability principle resulting therefrom, the CAS has ruled in *Puerta v. ITF* that, "*in order to establish No Fault or Negligence, [the Athlete] must prove that he did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost care, that he had used or been administered*

with the prohibited substance" (CAS 2006/A/1025, 12 July 2006). Such "utmost care" has obviously not been exercised in the present case. Mr La Barbera himself admits neither to have wondered what the drug for the dogs actually was, nor to have taken the precaution to read its label nor to wash his hands each time he crushed the tablets. Such carelessness for an experienced athlete as Mr La Barbera obviously widely departs from the exercise of the utmost care required. One can therefore not see how Mr La Barbera, while admitting his lack of precautions, could in the same time try and argue that he did not commit any (Significant) Fault or Negligence. In recognizing that he neglected to handle the product with due care, that he did not even read the label, Mr La Barbera himself recognizes that he has acted negligently. As a result, the Panel has no difficulty in ruling that Mr La Barbera has to bear the consequences of his negligence and, consequently, to rule out the application of Art. 10.5 to the present case.

5. Conclusion

5.1. The IWAS has established that Mr La Barbera had committed an anti-doping violation rule according to Art. 2.1 of the IWAS Code, since both A and B Samples have confirmed the presence of Stanozolol and 16β-hydroxystanozol, a metabolite of Stanozolol, a prohibited substance appearing on the WADA 2010 Prohibited List under category S1(1)(a), exogenous anabolic androgenic steroid (art. 2.1.2 of the IWAS Code).

5.2. Mr La Barbera has been unable to discharge his burden of proving under Art. 3.1 and 3.2.2 of the IWAS Code that, on a balance of probability, (i) there had been any departure from the IST in the way the doping control procedure was carried out and that (ii) such departure could reasonably have caused the adverse analytical finding.

5.3. Mr La Barbera has been unable to discharge his burden of proving under Art. 10.5 of the IWAS Code how, on a balance of probability (i) the Prohibited Substance had entered his system and that (ii) such ingestion had occurred without any (Significant) Fault or Negligence.

5.4. As a result, the appeal filed by Mr La Barbera has to be dismissed and, taking into account Art. 9, 10.1 and 10.2 of the IWAS Code (see paras 4.13-4.15), the decision issued by the IWAS Tribunal on 20 October 2010 is affirmed.

6. Costs

6.1. Subject to the payment of the CAS Court Office fee of CHF 500 (five hundred Swiss francs) by Mr La Barbera, Art. R65.2 of the CAS Code provides that the CAS proceedings shall be free. The fees and costs of the arbitrators are borne by the CAS in accordance with Art. R65.2 of the CAS Code.

6.2. Art. 65.3 of the CAS Code provides that:

> *"The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion that parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties."*

6.3. In the case at hand, the appeal filed by Mr La Barbera was dismissed. As a general rule, the CAS grants the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. The CAS may however depart from that principle under certain circumstances, in particular when such a burden put on the losing party would put its financial situation at stake. Such appears to be the case here. While the Panel is willing to accept that IWAS certainly is not a wealthy sports federation, it nevertheless receives regular proceeds and thus disposes of a certain amount, though limited, of financial resources. Such is not the case of Mr La Barbera who, according to his own assertions, had to put a mortgage on his home to afford the present proceedings. The Panel is willing to accept such statement. To grant the IWAS a contribution towards its legal fees would thus unnecessarily worsen Mr La Barbera's financial situation. As a consequence, the Panel takes the view that it is reasonable in the present case to order that each party shall bear its own costs.

6.4. The award is therefore pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss francs) that is retained by the CAS according to Art. R65.2 of the CAS Code.

ON THESE GROUNDS

The Court of Arbitration for Sports rules:

1. The appeal filed on 17 November 2010 by Mr Roberto La Barbera against the decision of the IWAS Anti-Doping Committee Hearing Panel dated 20 October 2010 is dismissed.

2. The decision rendered on 20 October 2010 by the IWAS Anti-Doping Committee Hearing Panel is confirmed.

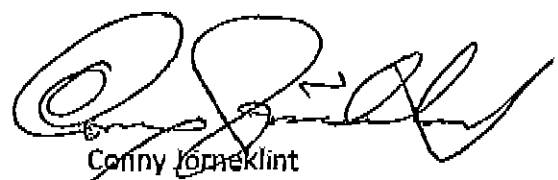
3. This award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by Roberto La Barbera which is retained by the CAS.

4. Both parties shall bear their own legal and other costs.

5. All other motions or prayers for relief are dismissed.

Done in Lausanne, 2 May 2011

THE COURT OF ARBITRATION FOR SPORT



Conny Jorneklint

President of the Panel