4A_386/2010[1]

Judgment of January 3, 2011

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge CORBOZ,

Federal Judge ROTTENBERG LIATOWITSCH (Mrs),

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: M. CARRUZZO.

Alejandro Valverde Belmonte,

Appellant, represented by Mr Sébastien Besson

v.

1. World Anti-Doping Agency (WADA), represented by Mr François Kaiser and Mr Yvan Henzer

2. International Cyclist Union (ICU), represented by Mr Philippe Verbiest

3. Real Federación Española de Ciclismo (RFEC), represented by Mr Jorge Ibarrola

Respondents

Facts:

A.

A.a In May 2004 a criminal investigation was initiated in Spain for doping offenses ("Operation Puerto"). Two years later it led to the arrest of Dr. Fuentes and other individuals. They were accused of violating Spanish law on public health.

On August 29, 2007 the International Cycling Union (ICU), which was a plaintiff in the criminal proceedings next to the World Anti-Doping Agency (WADA) asked the Spanish Cycling Federation, the Real Federación Española de Ciclismo (RFEC) to initiate disciplinary proceedings against Alejandro Valverde Belmonte, a professional cyclist of Spanish citizenship. Its request was based on the fact that on May 6, 2006, in the framework of Operation Puerto, the investigators had seized

[1] Translator's note : Quote as Belmonte *v.* WADA, ICU and RFEC 4A_386/2010. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

a pack containing blood allegedly from that racing cyclist in Dr. Fuentes' laboratory (hereafter pack nr. 18).

On September 7, 2007 the Comité Nacional de Competiciòn y Disciplina Deportiva (CNCDD), the competent body for doping matters within RFEC, decided not to open any disciplinary proceedings against Alejandro Valverde Belmonte. The President of RFEC took a decision identical of that of the CNCDD on the same day.

A.b Italian authorities too were conducting anti-doping operations at the time. On July 21st, 2008 as the Tour de France was going through Italy, Alejandro Valverde Belmonte gave a blood sample during a test made on several racing cyclists by the Italian National Olympic Committee (INOC). On January 30, 2009 Italian police, duly authorized by a Spanish examining magistrate, took samples of pack nr. 18 in a Barcelona laboratory. The analysis showed a correspondence between these samples and that which had been taken from the Spanish racing cyclist on July 21st, 2008.

In a decision of May 11, 2009 the National Anti-Doping Tribunal of INOC found Alejandro Valverde Belmonte guilty of violating Italian Anti-Doping Rules (NSA) and banned him from competitions organized by INOC or other national sport federations on Italian territory for two years.

Upon an appeal by the racing cyclist the Court of Arbitration for Sport (CAS) confirmed the ban in an award issued on March 16, 2010.

On October 29, 2010 the Federal Tribunal rejected the Civil law appeal made by Alejandro Valverde Belmonte against that award to the extent that the matter was capable of appeal (case 4A_234/2010).

B.

In October 2007 WADA and the ICU both filed an appeal to the CAS against the decisions taken on September 2007 by CNCDD and the President of RFEC. In their last submissions on the merits they sought a two years ban for Alejandro Valverde Belmonte and the cancellation of all his results since May 4, 2004.

The racing cyclist submitted that the matter was not capable of appeal and the RFEC that they should be rejected.

On January 28, 2008 a Panel (hereafter: the Panel) was constituted, composed of Mr. Otto L.O. de Witt Wijnen, an attorney at Bergambacht (Pay-Bas) (Chairman), of Prof. Richard H. McLaren, an attorney in London (Canada) (arbitrator appointed by the Appellants), and of Dr Miguel Angel Fernández Ballesteros, a Professor in Madrid (Spain) (arbitrator appointed by the Respondents).

On July 10, 2008 the Panel issued a preliminary award in which it admitted the jurisdiction of the CAS in particular and found that the two appeals were admissible.

After examining the merits of the case the Panel issued a majority award on May 31st, 2010, in which it granted the appeals in part, found Alejandro Valverde Belmonte guilty of violating Art. 15.2 of the ICU Anti-Doping Rules (2004 version) and banned him for two years as from January 1st, 2010. Moreover it rejected the requests of the ICU and WADA seeking the annulment of the results obtained by the Spanish racing cyclist before January 1st, 2010.

The reasons supporting that arbitral award will be mentioned hereunder to the extent necessary to review the grievances made against it.

C.

On June 29, 2010 Alejandro Valverde Belmonte filed a Civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the May 31st, 2010 award and to obtain a finding that the CAS did not have jurisdiction to decide the case on the merits.

In their respective answers of October 18 and 21st, 2010 WADA, the ICU and the CAS all submitted that the appeal should be rejected. The RFEC did not file an answer within the time limit given.

In a letter of November 22, 2010 the Appellant renewed his procedural motion, made in his appeal brief, seeking an order from the Federal Tribunal that the CAS should produce all correspondence and email exchanged with arbitrator Fernández Ballesteros.

D.

On June 29, 2010 the Appellant filed a request of interpretation or correction of the May 31st, 2010 award with the CAS. The Deputy President of the Appeals Arbitration Division of the CAS refused to accept the request in a decision of July 9, 2010.

The Appellant also filed a Civil law appeal to the Federal Tribunal against that decision on July 28, 2010 (4A_420/2010). He requested that case to be joined to case 4A_386/2010. His request was rejected by a decision of the Presiding Judge of October 4, 2010 and so was the request by the CAS of September 17 and 20, 2010 seeking a stay in the proceedings of case 4A_420/2010 until a decision would be issued in case 4A_386/2010.

Reasons:

1.

According to Art. 54 (1) LTF[2] the Federal Tribunal issues its decision in an official language[3], as a rule in the language of the decision under appeal. When the decision is in another language (here English), the Federal Tribunal resorts to the official language chosen by the parties. In front of the CAS they used English. In the brief he submitted to the Federal Tribunal the Appellant used French. According to its practice the Federal Tribunal will adopt the language of the appeal and consequently issue its judgment in French.

2.

In the field of international arbitration a Civil law appeal is possible against the decisions of arbitral tribunals under the conditions set forth by Art. 190 to 192 PILA[4] (Art. 77 (1) LTF).

The seat of the CAS is in Lausanne. At least one of the Parties did not have its domicile in Switzerland at the decisive time. The provisions of Chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

The award under appeal is final and may accordingly be appealed on all the grounds contained at Art. 190 (2) PILA. The grievances raised by the Appellant are included in that exhaustive list.

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 minimum amount in dispute when it is directed against an international arbitral award. Should this be the case that requirement would indeed be met here as the Appellant

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[2] Translator's note : LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

[3] Translator's note : The official languages of Switzerland are German, French and Italian.

[4] Translator's note : PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

claims without being contradicted by the Respondents that the ban against him causes him to undergo damages of at least CHF 30'000.-.

The Appellant is directly affected by the award under appeal as it prevents him from participating in any sport competition whatsoever for two years and cancels the results he obtained since January 1st, 2010. He therefore 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) and in the legally prescribed format (Art. 42 (1) LTF), the matter is capable of appeal.

3.

3.1 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 factual findings of the arbitrators even if the facts were established in a manifestly erroneous way 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 Law 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 of the award under appeal if one of the grievances mentioned at Art. 190 (2) PILA is raised against them or if some new facts or evidence are exceptionally taken into account in the framework of the Civil law appeal (see Art. 99 (1) LTF).

3.2 The Appellant points out at the outset that he will supplement his statement of facts to the extent useful with evidence submitted during the arbitration which is part of the record of the case. He adds that proceeding in this manner was upheld by the Federal Tribunal in a recent decision (judgment 4A_600/2008 of February 20, 2009 at 3).

Such an opinion cannot be shared. The Appellant merely relies on the opinion of a commentator 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 to which he gives too broad an interpretation. The case he quotes had indeed the particularity that the decision under appeal merely took notice of the irrevocable withdrawal of an appeal due to the failure to pay the advance

requested by the CAS. In that case it was therefore necessary for the Federal Tribunal to review the way in which the CAS proceedings had been conducted as they appeared from the record of the arbitration in order to decide the grievances made against that decision.

The aforementioned principles must remain binding. When it is seized of a Civil law appeal against an international arbitral award the task of the Federal Tribunal is not to try the case again as a Court of appeal might but merely to examine whether the admissible grievances made against the award are well-founded or not. Except for the exceptional cases reserved by case law, allowing the parties to claim facts other than those which were found by the arbitral tribunal would no longer be consistent with such a task, even though the facts may be established by some evidence in the record of the arbitration (judgment 4A_234/2010 of October 29, 2010 at 2.2).

4.

4.1 In a first argument relating to the composition of the Panel the Appellant argues that at a certain stage in the proceedings and before the award under appeal was issued, arbitrator Fernández Ballesteros resigned and was no longer in a position to participate in the deliberations relating to the award. According to him the absence of signature by the co-arbitrators, information published in the Spanish press and the ambiguous answers of the CAS would demonstrate the existence of a serious malfunctioning in the deliberation process.

To substantiate his argument the Appellant filed an article published in the electronic edition of the Spanish newspaper El País on June 2, 2010, which mentions the resignation of the aforesaid arbitrator (Exhibit 25) and the correspondence exchanged in this respect by Spanish counsel for the Appellant and the CAS (Exhibits 27 to 30). Invoking his right to be heard he asks that the Federal Tribunal order the CAS Court Office and the Panel to produce all documents “related to the resignation of arbitrator Ballesteros and/or to the deliberation of the award under appeal”, in particular the letters or emails to which reference is made in the answer of the CAS and in the “Statement” of the aforesaid arbitrator of October 15, 2010 attached thereto, with an appropriate time limit being given to the Appellant to supplement his argument after receiving the evidence (appeal nr. 81, 83 to 86, 101 and 152; letter of November 22, 2010).

From a legal point of view the Appellant argues that according to federal case law the right to a correctly composed tribunal is violated when the other members of an arbitral tribunal continue the proceedings notwithstanding the resignation, albeit unjustified, of an arbitrator, without being

authorized to do so by an agreement (ATF 117 Ia 166). This would be the case here because the Code for Sport Arbitration (hereafter: the Code) does not provide the possibility for two arbitrators to continue the proceedings in case of resignation of the third arbitrator. Such a situation would moreover be different from the one – not encompassed by Art. 190 (2) (a) PILA – in which the arbitrator refuses to collaborate or obstructs the arbitration, particularly by refusing without valid reason to participate in the deliberations of the arbitral tribunal (ATF 128 III 234 at 3b/aa). Hence according to the Appellant the award under appeal should be annulled on the basis of Art. 190 (2) (a) PILA or in the alternative pursuant to Art. 190 (2) (d) or (e) PILA.

4.2

4.2.1 WADA points out in its answer that the resignation of an arbitrator during the proceedings is a known problem to which the most authorized legal commentators and several international arbitration rules recommend to remedy by letting the remaining arbitrators decide alone, at least when the resignation takes place at the deliberation stage. According to WADA Art. R59 of the Code does not prevent the CAS from adopting such a solution.

WADA further points out that the resignation of arbitrator Fernández Ballesteros is not established. It adds that even if it were, that arbitrator's resignation would not have been given according to the Rules of Swiss Law in any event because the State Court was not required to ratify it.

Furthermore according to the Respondent nothing would indicate that the arbitrator would not have participated in the deliberations of the Panel or that he would not have been invited to do so. Consequently according to that party the award under appeal was issued by an arbitral tribunal regularly composed.

4.2.2 For its part the ICU argues that it was not informed of the possible resignation of arbitrator Fernández Ballesteros. Moreover it denies that a press article could have any evidentiary value in this respect whilst reserving the possibility to supplement its arguments should other elements become available.

4.2.3 The CAS for its part summarizes in its answer (nr. 8 to 11) the circumstances relating to the alleged resignation of the Spanish arbitrator. It sets forth in this respect that the deliberations of the Panel were finished on May 25, 2010 when the final draft of the award was circulated with a view to a last reading; that on May 28, 2010 arbitrator Fernández Ballesteros proposed his resignation from

the Panel to the General Secretary of the CAS; that the proposal was rejected; that subsequently its author did not seek to send a formal resignation letter to the competent body (the President of the Appeals Arbitration Division of the CAS, the Deputy of the President, the Secretary General of the CAS); that the majority final award was notified to the Parties on May 31st, 2010; that on June 2nd, 2010 an article published by the Spanish newspaper El País revealed without any further precisions that arbitrator Fernández Ballesteros would have informed people close to him of his resignation from the Panel; that the article remained without follow up and that no other media mentioned the issue of the possible resignation of that arbitrator; finally that in an exchange of correspondence in June 2010 the CAS confirmed to Spanish counsel for the Appellant that there was no formal letter of resignation from that arbitrator.

A document entitled "STATEMENT" written in English and signed by Prof. Fernández Ballesteros on October 15, 2010 was attached to the answer of the CAS, in which the latter confirmed that he had offered his resignation without success to the Panel and to the Secretary General of the CAS, that he had not challenged the latter's decision and that he considers that the award under appeal should not be annulled due to alleged irregular composition of the Panel (Exhibit 4).

In law the CAS denies that the award of May 31st, 2010 would have been issued by an irregularly composed Panel because there was no formal resignation by arbitrator Fernández Ballesteros, the Appellant's claims being based only on some rumors carried by a single Spanish newspaper. It adds that the fact that the award was signed only by the President of the Panel is without pertinence because that possibility is specifically anticipated by Art. R59 (1) of the Code and is used fairly often, in particular in case of a majority award.

As to the Appellant's procedural request the CAS, whilst conceding that *a priori* it would have no particular reason to oppose it nonetheless considers that it is based on insufficiently solid clues. Moreover since arbitrator Fernández Ballesteros has already given his version of the facts himself it appears disproportionate to order an in-depth investigation, which would moreover be tantamount to piercing the secret of the deliberations of the Panel, which must normally be guaranteed in CAS arbitration proceedings.

4.3

4.3.1 In the decision published at ATF 117 Ia 166 the Federal Tribunal dealt with the resignation of an arbitrator without cause. It held that in such a case the proceedings could not go on in the

resigning arbitrator's absence without the agreement of the parties and before a new arbitrator was appointed: consequently if the other members of the arbitral tribunal decide to continue the proceedings despite their colleague's resignation without being previously empowered by the parties to do so, the arbitral tribunal is no longer regularly constituted (at 6c).

However the Federal Tribunal subsequently clarified that such a situation should be distinguished from that in which a party appointed arbitrator does not formally give up his position but refuses to collaborate or obstructs the proceedings, particularly by abstaining without valid reason to participate in the deliberations of the arbitral tribunal. In the latter case it is generally considered that the arbitral tribunal continues to be regularly constituted and that the recalcitrant arbitrator cannot block the panel when a majority of its members decides to continue the proceedings and to issue an award, by circulating it among them as the case may be (ATF 128 III 234 at 3b/aa p. 238).

The so called issue of the "truncated arbitral tribunal" caused much legal writing (Antonio Rigozzi, L'arbitrage international en matière de sport, 2005, n° 1001). Some legal writers are very critical towards the first of the two aforementioned cases and consider that the arbitral tribunal may validly deliberate without the participation of the arbitrator who was put under notice to continue his task by the competent authority as he resigned without cause (see among others Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 2nd edition 2010, n° 869 and 870). Other commentators – the majority view according to Poudret/Besson (Comparative law of international arbitration, 2nd edition 2007, n° 738 p. 657) – hold to the contrary that the resigning arbitrator must be substituted unless the parties agreed to the contrary or are subject to arbitration rules providing differently (see in particular Kaufmann-Kohler/Rigozzi, Arbitrage international, 2nd edition 2010, n° 413c).

4.3.2 In this case it is not necessary to examine this delicate issue any further. Indeed the alleged resignation of arbitrator Fernández Ballesteros is not established whilst it appears from the aforesaid "STATEMENT" that he offered to resign but the resignation was refused and he did not oppose that refusal. It must be concluded that the arbitrator in question was still part of the Panel when the award under appeal was issued, so that there is no need to apply the controversial case law of ATF 117 Ia 166 in this case, as the award was not issued by a "truncated" arbitral tribunal. Moreover nothing suggests that the arbitrator involved was not in a position to participate in the deliberations of the Panel regularly. The Appellant's mere allegation to the contrary, based on an isolated press clipping, does not change the situation. The same applies to his remark according to

which the lack of signatures of the co-arbitrators at the bottom of the award would be highly unusual in CAS practice: on the one hand Art. R59 (1) of the Code states that the signature of the President of the Panel is sufficient; on the other hand the General Secretary of the CAS, who is in the best position to determine this, states that this is a "possibility which, in practice, happens relatively often…" (Answer nr. 15).

The evidentiary measures requested by the Appellant are not to be ordered. This Court holds as sufficient the explanations given by the Arbitrator himself as to the issue in dispute in his "STATEMENT" of October 15, 2010. In his letter of November 22, 2010 counsel for the Appellant does not justify his request that documents would be produced in any particular way and he does not claim that the Spanish arbitrator's statements would be false. This being so, the grievance based on Art. 190 (2) (a) PILA shall be rejected as well as the alternate submissions, not reasoned incidentally, drawn from Art. 190 (2) (d) or (e) PILA.

5.

5.1

5.1.1 Relying on Art. 190 (2) (b) PILA the Appellant then argues that the CAS went beyond its jurisdiction by deciding "beyond the object of the first decision appealed in front of it". The reasons in support of the argument may be summarized as follows.

The appeal proceedings falling within the scope of the arbitration clause are limited in substance by the object of the decision appealed. It is indeed an appeal and the mission of the CAS in that framework is only to control the decisions of the federations in certain cases and not to act as a substitute to their bodies.

In this case the decision brought in front of the CAS was that of the CNCDD refusing to address the ICU request seeking the initiation of disciplinary proceedings against the Appellant. Yet the CAS, instead of verifying whether that decision was justified or not, issued a decision on the merits and sanctioned the Spanish cyclist, thus going beyond its powers.

Moreover the CNCDD decision, which did not contain the indications prescribed by Art. 242 and 243 of the Anti-Doping Rules of the ICU, 2004 version (hereafter the ICU Rules), was not covered by the arbitration clause, namely Art. 280 of the ICU Rules, which is an additional reason for lack of jurisdiction.

Finally it must be pointed out that the Appellant immediately challenged jurisdiction according to Art. 186 (2) PILA and that the July 10, 2008 preliminary award did not decide the issue of jurisdiction presently in dispute, so that the Appellant had no reason to appeal it.

5.1.2 Contrary to the Appellant WADA claims in its answer that the aforesaid preliminary award disposed of the aforesaid issue. It argues also that the Appellant would abuse his rights by addressing the issue again since he specifically accepted that the CAS would issue a decision on the merits in his answer of July 31st, 2009, *i.e*. after the preliminary award was issued.

For WADA the CAS jurisdiction is anyway not debatable. In general it is based on the ICU Rules and with regard to the issue in dispute on Art. R57 of the Code which empowers the CAS to substitute its decision for that taken in the first instance.

Moreover WADA points out that the Appellant never argued that there would be no decision within the meaning of Art. 242 of the ICU Rules and therefore he could not argue today what he should have submitted at the latest when the CAS decided on its jurisdiction.

5.1.3 Similarly to WADA the ICU also argues that the Appellant forfeited his right to raise the jurisdictional defense. According to it the CAS would have admitted jurisdiction without any restriction in its preliminary award, which would have been confirmed at nr. 5.9 of the final award.

Alternatively the ICU points out that there cannot be any doubt as to the jurisdiction of the CAS on the merits. To substantiate the argument it refers in particular to Art. 289 of the ICU Rules from which it deducts the power of the CAS to adjudicate cases *de novo*.

5.1.4 The CAS did not express a view on the issues in dispute in its answer.

5.2 Seized for lack of jurisdiction the Federal Tribunal freely reviews the legal issues including the preliminary issues determining jurisdiction or lack of jurisdiction of the arbitral tribunal (ATF 133 III 139 at 5 p. 141 and the cases quoted).

An appeal based on Art. 190 (2) (b) PILA is open when the arbitral tribunal decided on claims which it had no jurisdiction to address, whether because there was no arbitration agreement or because it

was limited to certain issues, which did not include the claims at hand (*extra potestatem*) (ATF 116 II 639 at 3 in fine p. 642). Indeed an arbitral tribunal has jurisdiction only if, among other conditions, the dispute falls within those anticipated by the arbitration agreement and that it does not exceed the limits contained in the request for arbitration and, as the case may be, the terms of reference (Decision 4A_210/2008 of October 29, 2008 at 3.1 and references).

According to Art. 186 (2) PILA, the defense of lack of jurisdiction must be raised before any defense on the merits. This is in conformity with the rule of good faith embodied at Art. 2 (1) CC[5], which applies to all realms of the law, including civil procedure. Stated differently, the rule at Art. 186 (2) PILA means that the arbitral tribunal in front of which the respondent proceeds on the merits without reservation acquires jurisdiction from that very fact. Hence he who addresses the merits without reservation in contradictory arbitral proceedings involving an arbitral matter thereby recognizes the jurisdiction of the arbitral tribunal and definitely loses the right to challenge the jurisdiction of the tribunal. However the respondent may state its position on the merits in an alternate way, only for the case in which the defense of lack of jurisdiction would be rejected, without thus tacitly accepting the jurisdiction of the arbitral tribunal (ATF 128 III 50 at 2c/aa p. 57 ff and references).

If a party wishes to challenge an interlocutory decision of the arbitral tribunal as to its own jurisdiction, it must proceed with an immediate appeal against the decision within the meaning of Art. 190 (3) PILA under penalty of forfeiture (ATF 130 III 66 at 4.3 p. 75; 121 III 495 at 6d p. 502 and references).

5.3 Applied to this case these principles of case law call for the following remarks.

5.3.1 It is established that when WADA and the ICU appealed to the CAS against the decisions of CNCDD and of the Chairman of RFEC in October 2007, the Appellant immediately challenged the jurisdiction of the CAS in accordance with Art. 186 (2) PILA and R55 of the Code. Hence he could not have forfeited his rights by his attitude at the outset of the proceedings.

5.3.2 On July 10, 2008 the Panel issued a preliminary award addressing its own jurisdiction among other issues. The Appellant did not appeal that award. Hence he would have forfeited his right to have the issue reviewed by the Federal Tribunal supposing the issue of jurisdiction that he raises in

[5] Translator's note : CC is the French abbreviation for the Swiss Civil Code.

this appeal would already have been decided by the Panel at the time. An interpretation of the preliminary award is called for to verify if this is the case.

Admittedly, as WADA points out, the first item of the award states the following. “The CAS has jurisdiction”[6]. The ICU is also right to point out that the sentence contains no limitation. Yet it is wrong to claim that the reasons of the aforesaid award would contain nothing which could suggest “that any part of jurisdiction would still be in discussion” (Answer nr. 28). It must indeed be admitted with the Appellant that the preliminary award of July 10, 2008 only decided the jurisdiction of the CAS with regard to Art. 9 and 10 of the ICU Rules, which addressed the issue of the jurisdiction of the ICU in case of serious violations of the Anti-Doping Rules not concerning the collection of a sample. In particular the Panel had to interpret the world “discovered” used in the English version of both provisions. Thus the preliminary award did not in any case decide the issue of the jurisdiction of the CAS not only to annul the decisions of the CNCDD and of the President of RFEC and to send the case back to them for new decisions, but also to issue itself a decision on the merits. The remark made by the Panel at nr. 5.9 of the final award, apparently going in the other direction, does not alter this conclusion at all, because if this was not the case, one would not understand why the Panel devoted several paragraphs of the award to demonstrating that it had the power to decide (the Issues to be Decided: The Scope of Review; nr. 7) and to the issue of the double degree of jurisdiction (the question of the two instances; nr. 8).

Therefore the Appellant may not be deemed to have failed to appeal the preliminary award, which dealt with the issue of jurisdiction only in part.

5.3.3 No matter what WADA says the Appellant did not forfeit his right to appeal merely because in his answer of July 31st, 2009 he submitted that he should be found innocent if a decision was issued on the merits (nr. 4: “If a decision is announced on the merits of the case, to declare Alejandro Valverde innocent.”[7]). Indeed that submission was only in the alternative to the principal submission that the matter was not capable of appeal by ICU and WADA, a submission in support of which the Appellant submitted among other arguments that the jurisdiction of the CAS was limited to a possible order to RFEC to initiate disciplinary proceedings (brief in answer p. 17).

[6] Translator’s note : In English in the original text.
[7] Translator’s note : In English in the original text.

5.3.4 It is not disputed in this case that the CAS is the appeal body according to the ICU Rules. Neither does the Appellant challenge his submission to CAS jurisdiction according to the system of the arbitration clause by reference (ATF 133 III 235 at 4.3.2.3).

According to Art. 280 (a) of the ICU Rules, “the decisions of the hearing body of the National Federation” may be appealed “based on Art. 242”. The Appellant claims that the CNCDD decision did not contain the required indications according to the latter provision and Art. 243 of the ICU Rules. In his view the decision in question was therefore not within the scope of an arbitration agreement (in this case Art. 280 of the ICU Rules) which is an additional reason to deny CAS jurisdiction. It must be pointed out with the ICU (Answer nr. 42) and WADA (Answer nr. 37) that the Appellant did not raise that argument before the preliminary award on jurisdiction was issued. The Panel indeed pointed out in the interlocutory decision that if it had jurisdiction on the basis of Art. 9 and 10 of the ICU Rules it would also have jurisdiction according to Chapter XI of the same Rules which contains the aforesaid Art. 280 (nr. 6.2). Consequently the Appellant may no longer argue that the latter provision was violated. Moreover he does not explain why the decision within the meaning of Art. 280 (a) of the ICU Rules should also contain the indications required by Art. 243 of the ICU Rules, which the former provision does not mention; neither does he explain what are the formal requirements set by Art. 242 of the ICU Rules or why the CNCDD decision would have disregarded them. This is a second reason not to address that part of the argument.

Case law recommends to avoid admitting too easily that an arbitration clause was concluded if the issue is disputed. However once the principle of arbitration is admitted, case law is flexible as to the scope of the arbitration clause even if such large interpretation, consistent with the principles that proceedings should be effective and not multiple, cannot imply a presumption in favor of the jurisdiction of the arbitrators (decision 4A_562/2009 of January 27, 2010 at 2.1 and references). In this case it is true that the CNCDD decision not to initiate disciplinary proceedings against the Appellant was a decision to refuse to address the issue, similar to the identical decision issued on the same day by the president of RFEC.

Yet this did not at all prevent the CAS from itself issuing a decision on the merits if it considered that decision unjustified and from imposing a disciplinary sanction on the Spanish cyclist for violation of the Anti-Doping Rules. Jurisdiction was based on Art. R57 (1) of the Code (on that issue see Rigozzi, op. cit., nr. 19079 ff). That provisions states that “the Panel shall have full power to review the facts and the law” and that “it may issue a new decision which replaces the decision challenged

or annul the decision and refer the case back to the previous instance". The CAS chose the former solution. One does not see why this could be wrong. Contrary to what the Appellant argues, such a solution is not at all inconsistent with the nature of appeal proceedings. It is rather a characteristic of an appeal that the higher body may decide the merits itself. Neither does the solution chosen by the CAS go against the mission of that arbitral jurisdiction, no matter what the Appellant claims: it is apt to facilitate quick disposition of disputes and may be an adequate way to remedy the categorical refusal of a National Sports Federation to open disciplinary proceedings against an athlete who is a citizen of the country in which it is based. This being said, the grievance of lack of jurisdiction shall be rejected to the extent that the matter is capable of appeal in this respect.

6.

6.1 The next grievance is entitled "lack of independence and impartiality of the CAS (Art. 190 (2) (a) PILA) or violation of the right to be heard and of public policy (Art. 190 (2) (d) and (e) PILA)".

The Appellant points out that this multifaceted argument corresponds to the previous one from the point of view of the constitution of Arbitral Tribunal. He argues in substance that the CAS disregarded the guarantees arising from Art. 7 (2) (d.i) of the Anti-Doping Convention concluded in Strasburg on November 16, 1989 (entered into force for Switzerland on January 1st, 1993; RS 0.812.122.1), of Art. 225 ff of the ICU Rules and of Art. 8 of the World-Anti Doping Code (WADC), to the extent that they seek to ensure independence and impartiality of the appeal body and the right of the athlete to be heard, such guarantees being part of procedural public policy according to the Appellant. Claiming that there was no first instance in this case, the Appellant argues that the CAS wanted to act as an investigating body, a disciplinary body and an appeal body in the very same case. Quoting a recent decision (CAS decision of June 25, 2010 in CAS case 2010/A/2031) he argues that the scope of review given by Art. R57 of the Code to the CAS does not empower it to cure the procedural violation.

6.2 As the Respondents rightly point out in their respective answers, it is doubtful that the matter is capable of appeal in this respect. Indeed, as they rightly state, the Appellant raises three arguments simultaneously, which he presents in a jumble without indicating how each of the guarantees he invokes would be violated by the award under appeal. Be this as it may his wholesale criticism is unfounded.

Thus when he relies on the aforesaid international treaty the Appellant ignores the fact that it applies only to the signatory states and that the provision he quotes merely encourages the sport organizations of these states to "clarify and harmonize their respective rights, obligations and duties, in particular by harmonizing […] disciplinary procedures, applying agreed international principles of natural justice and ensuring respect for the fundamental rights of suspected sports men and sports women", one of these principles requiring that the investigative body should be distinct from the disciplinary body. From this quote it appears that the treaty provision invoked by the Appellant merely contains a recommendation to the signatory states and that it is not a self executing[8] norm which would bind a private arbitral jurisdiction such as the CAS.

Similarly the Appellant does not explain why the provisions of the ICU Rules and of WADC which he merely enunciates without quoting their contents, would require any instance in charge of sanctioning a violation of Anti-Doping Rules to separate the role of investigating body from that of disciplinary body.

Moreover one does not see why the CAS, having the broad powers given by Art. R57 (1) of the Code, could not investigate itself the matter which it must decide on appeal when the First Instance Body refused to open disciplinary proceedings. The precedent quoted by the Appellant in this respect does not help him at all because it refers to a case in which the Panel had chosen the second possibility given by this provision, namely that of referring the case back to the previous instance.

Finally the requirement of two instances or of a double degree of jurisdiction does not fall within procedural public policy within the meaning of Art. 190 (2) (e) PILA, contrary to what appears to be the Appellant's opinion. It is sufficient to recall in this respect and as an example that before Art. 75 (2) LTF so required, albeit with certain exceptions, no rule of private federal law imposed the principle of a double degree of jurisdiction, which was not common to all cantonal laws of civil procedure (see judgment 4P.152/2002 of October 16, 2002 at 2.2).

7.

7.1 The Appellant then argues a violation of his right to be heard (Art. 190 (2) (d) PILA). He argues that the Panel issued its decision without waiting for the results of two letters rogatory which it had issued to establish a pertinent fact and without at least justifying its decision to forgo that evidence.

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[8] Translator's note : In English in the original text.

7.2 According to constant case law the right to be heard in contradictory proceedings consecrated by Art. 182 (3) and 190 (2) (d) PILA is violated when, inadvertently or due to a misunderstanding, an arbitral tribunal does not take into consideration evidence and offers of evidences submitted by one of the parties and important for the decision to be issued. It behooves the allegedly harmed party to demonstrate in its appeal against the award that the arbitral tribunal did not examine some evidence which it had regularly put forward in support of its submissions and moreover that such elements were of such a nature as to impact the resolution of the dispute (ATF 133 III 235 at 5.2 p. 248).

In this case, as is clear from the CAS Procedural Order of December 22, 2009, the aforementioned letters rogatory were initiated upon request by the ICU and not by the Appellant. Hence only the ICU could argue that the Panel issued its award without receiving that evidence. The Appellant cannot argue a violation of his right to submit evidence because evidence proposed by his opponent was not administered. He would be even less entitled to do so since at the time he opposed the letters rogatory (brief in answer of July 31st, 2009 p. 52) as the ICU points out.

Accordingly the argument that the right to be heard was violated can only be rejected.

8.

8.1 Arguing a violation of public policy within the meaning of Art. 190 (2) (e) PILA the Appellant further claims that in this case there would be a clear contradiction between the award and its reasons. He argues in this respect that the award rejects the requests by the ICU and by WADA seeking to have him disqualified with regard to the sport results obtained before January 1st, 2010, which would implicitly mean that the requests were granted for those he obtained after that date. Yet, according to the Appellant, the reasons of the award indicate without ambiguity that the aforesaid requests are entirely rejected, the award stating explicitly that no reason justifies disqualification for the results “up to this day”. This would be an irresolvable and inadmissible contradiction form the point of view of public policy according to the Appellant.

8.2 In their answers the Respondents and the CAS deny the existence of the contradiction alleged by the Appellant. The UCI and WADA also deny that such a contradiction, should it be established, would belong to public policy.

8.3

8.3.1 In Judgment 4A_464/2009 of February 15, 2009[9] the Federal Tribunal, coming back to the case law relied upon by the Appellant (judgments 4P.198/1998 of February 17, 1999 at 4a and 4P.99/2000 of November 10, 2000 at 3b/aa) held on the basis of some more recent decisions, such as the one published at ATF 132 III 389 at 2.2.1 that an argument based on the intrinsic incoherence of the reasons of an award does not fall within the scope of substantive public policy (at 5.1). Previously this Court had already excluded from the scope of that definition an arbitral award containing an internal incoherence (ATF 128 III 191 at 6b). Present case law is based on the premise that from a qualitative point of view, it is hardly justified to consider an award presenting such a flaw more severely than an award based on some untenable finding of facts or on an arbitrary interpretation of the rule of law, yet such an award would not fall within the scope of Art. 190 (2) (e) PILA.

The Appellant objects that the aforesaid case law does not refer to cases such as the one at hand in which there is an obvious contradiction but not between the various reasons of the award or between the various points of the award, but rather between the award and the reasons supposed to justify it. Yet his demonstration stops there. From reading the appeal brief it is impossible to understand which decisive consideration would require the distinction proposed by the Appellant. That an irresolvable contradiction would affect the premise (reasons) or the conclusion (award) of a judiciary syllogism does not indeed appear less serious at first sight than that which affects the deductive reasoning making it possible to arrive at the latter starting from the former. At least the Appellant does not explain why there should be no common measure between these different types of incoherence. As a general rule the one which he claims leads to a request for interpretation of rectification rather than an actual appeal (see for instance Art. 334 (1) of the Code of Civil Procedure of December 19, 2008 [CPC; RS 272] and Art. 129 (1) LTF).

The matter is therefore not capable of appeal in this respect. If it had been the appeal would have been rejected for the following reasons.

8.3.2 As to the merits this Court adopts the explanations given by the CAS and by the Respondents as to the alleged contradiction between the award and its reasons.

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[9] Translator's note : English translation available on www.praetor.ch. Also see my introductory note to the mailing list sent to you on September 21, 2010.

The parts of the award at issue state the following:
"3. Alejandro Valverde is suspended for a period of two years, starting on 1 January 2010.
4. The requests of the UCI and WADA for disqualification of the competitive results obtained by Mr Valverde before 1 January 2010 are denied."[10]

The Appellant compares them with the following parts of the reasons (n. 19.14):
"There is no evidence that any of the results obtained by Mr Valverde since 6 May 2006 until now was through doping infraction. Thus, the Appellants'' Request to annul those results should be denied."[11]

The issue as to the duration of the ban against the Spanish cyclist must be distinguished from that of the annulment of the results of the competitions in which he took part after May 6, 2006, in other words as from his disqualification for the subsequent period.

As to the first item, the award clearly states at nr. 19.12 that within the meaning of Art. 275 of the ICU Rules, the ban shall start from the first of January 2010. This is in connection with nr. 3 of the award.

The following two paragraphs of the reasons (nr. 19.13 and 19.14) relate to the second aforesaid item. The Panel addresses the issue of the Appellant's disqualification and more precisely the date from which the results he obtained in competitions must be annulled. It wonders whether or not the Spanish cyclist's results after May 6, 2006 – the date pack nr. 18 was discovered – must be annulled. In its opinion it is not so because it is not established that the results obtained by the Appellant after that date would have been acquired in violation of Anti-Doping Rules. This is why the Panel rejects the Respondents' request to annul all the results obtained by the Appellant since May 4, 2004. This is stated at nr. 4 of the award.

The words "until now" at nr. 19.14 of the reasons obviously cannot be interpreted as the Appellant would like, namely that the results obtained after January 1st, 2010 until the award was issued (May 31, 2010) would not fall within the scope of disqualification. It is obvious that when an athlete is banned retroactively the results he obtained from the time the ban took effect until it was pronounced cannot be maintained. This is what the Panel stated in the award at nr. 4 by refusing to

[10] Translator's note : In English in the original text.
[11] Translator's note : In English in the original text.

disqualify the Appellant for the results obtained before January 1st, 2010, namely, *a contrario,* by disqualifying the Spanish cyclist for the results obtained in competitions after that date.

Thus, no matter what the Appellant says, the award does not in any way contradict the reasons.

9.

9.1 In a last argument based on the violation of public policy (Art. 190 (2) (e) PILA), the Appellant claims that the Panel violated the principle of *ne bis in idem* or the principle of *res judicata*. According to him the CAS issued an award on March 16, 2010 in a case relating to the same facts and to the same violation as those of this case.

Disregard for the existence of that precedent would also, according to the Appellant, be tantamount to disregarding the absence of arbitrability causing the Panel to lack jurisdiction and prohibiting it from issuing a new decision on an issue already decided in a previous award entered into force. Considered from that point of view, the award should be annulled on the basis of Art. 190 (2) (b) PILA (lack of jurisdiction of the Arbitral Tribunal).

In support of that last argument the Appellant claims to have been punished twice for the same offense; he points out in this respect, on the basis of a legal opinion, that a ban is similar to a criminal sanction and fully warrants applying the principle of *ne bis in idem.* That the first sanction was geographically limited to Italian territory would not change this according to him because the worldwide ban he was given subsequently necessarily includes that territory as well. Thus the Appellant is of the view that in order to comply with the rule of *res judicata* the CAS should not have sanctioned him again or, at the very least, should have postponed the beginning of the ban to May 11, 2009 to the extent that it applies on Italian territory, namely to the date at which the two years ban he was given for that territory took effect.

9.2

9.2.1 In its answer the ICU starts by casting doubt on the neutrality of the legal opinion produced by the Appellant. It argues in this respect that the writer of the legal opinion signed with counsel for the Appellant a legal opinion that he filed in the case which led to the arbitral award of March 16, 2010 (CAS 2009/A/1879) then to the judgment of the Federal Tribunal of October 29, 2010 (case 4A_234/2010).

The Respondent then seeks to demonstrate that the requirements of *ne bis in idem* would not be met in this case. Indeed according to that Respondent the CAS would not have applied the same rules in the award issued on March 16, 2010 against the Appellant and in the award presently under appeal, as the latter was based on the Italian Anti-Doping Rules (NSA) and the former on the ICU Rules. Moreover the *inibizione* mentioned in the first award would not be a disciplinary sanction but a preventive measure which could be pronounced with a sanction when the athlete convicted of doping has a license of a national federation.

9.2.2 For its part, after recalling the requirements of the principle of *ne bis in idem*, WADA points out that as opposed to the *inibizione*, which is an "Italian public law measure" that can be issued against anyone, the ban is a disciplinary sanction issued by an International Sport Federation against a licensee, namely a private sanction. In its view the two successive decisions had neither the same object nor the same purpose. One was "a measure of public interest of national scope adopted in Italy by a public authority"; the other was a private sanction imposed by an International Sport Federation to one of its licensees. The former sought territorial exclusion to participate in competitions; the latter the prohibition to practice a professional sport. Hence there was no reason to apply the aforesaid principle.

9.2.3 For its part the CAS did not take a position on the Appellant's argument because the issue in dispute was examined in details in the award.

9.3

9.3.1 An arbitral tribunal violates procedural public policy within the meaning of Art. 190 (2) (e) LTF if it issues a decision without taking into account the *res judicata* effect of a previous decision or if in the final award it departs from the opinion contained in an interlocutory award deciding a preliminary issue on the merits (ATF 136 III 345 at 2.1 p. 348 and the cases quoted).

Case law views the principle of *ne bis in idem* as a corollary (judgment 2P.35/2005 of September 10, 2007 at 6) or as the negative aspect of res judicata (judgment 6B_961/2008 of March 10, 2009 at 1.2).

In criminal law this principle prohibits the prosecution of the same person for the same facts twice (last case quoted *ibid*.). It is recognized by international law (Art. 14 (7) of the International Covenant on Civil and Political Rights (UN Covenant II RS 0.103.2; Art. 4 (1) of the 7th Protocol to

the ECHR [hereafter the Protocol], RS 0.101.07) and by Swiss law (ATF 128 II 353 at 5.2) which codified it recently (Art. 11 of the Swiss Code of Criminal Procedure [CP] of October 5, 2007, RS 312.0). The importance and the generalization of the “right not to be tried or punished twice” (title of Art. 4 (1) of the Protocol) or of the “Prohibition of double prosecution” (title of Art. 11 CCP) are such that the principle *ne bis in idem* must be included in the concept of public policy within the meaning of Art. 190 (2) (e) PILA (for the definition of that concept see ATF 132 III 389 at 2.2). Determining whether that principle belongs to procedural public policy or to substantive public policy is a more delicate question, which however needs not be decided here.

That a violation of the principle of *ne bis in idem* may fall within the scope of Art. 190 (2) (e) PILA is one thing. That sport disciplinary law would also be governed by that principle germane to criminal law is another matter, which is not obvious (on that issue see CHRISTOPH LÜER, Dopingstrafen im Sport und der Grundsatz "Ne bis in idem", 2006, passim). It must be stated however that the CAS itself held that the principle should be applied in this case, at least by analogy, in view of the severity of the disciplinary sanction imposed on the Appellant (award nr. 18.5). There is therefore no need to examine more in depth here the issue of the applicability to sport disciplinary law of the aforesaid principle, which is germane to criminal law. It will be sufficient to verify how it was applied by the Panel in this case.

9.3.2 On the basis of a treaty on Swiss procedural law (GÉRARD PIQUEREZ, Traité de procédure pénale suisse, 2e éd. 2006, n° 1541), the Panel points out that in order to be relied upon the *res judicata* defense requires three identities, of the object, of the parties and of the facts (in the same direction see judgment 2P.35/2007 quoted above). The Panel held the last two to be clearly realized in this case because the Appellant was implicated in both parallel disciplinary proceedings which led to the awards issued by the CAS on March 16 and May 31st 2010 (award nr. 18.12). However this would not be the case for the first one. Indeed the object of the disciplinary proceedings opened in Italy was to protect the good conduct of sport competitions on Italian soil, whilst the second disciplinary proceedings aimed at sanctioning the athlete for behavior contrary to the rules of the sport he practices professionally, which justified a worldwide extension of the sanction against him. Thus according to the majority of the Panel the principle of *ne bis in idem* could not be applied in this case for lack of an identity of object. Be this as it may the importance of a worldwide ban as sanction of the violation of an Anti-Doping Rule would prevail in their view on the fact that a territorially narrower ban was issued against the same person previously (award nr. 18.13 to 18.16).

Applying the principle of *ne bis in idem* supposes that the goods protected are identical (identity of object). Thus the prohibition of double prosecution does not prevent trying the same person when the same behavior may have consequences that are not only criminal but also civil, administrative or disciplinary (MICHEL HOTTELIER, in Commentaire romand, Code de procédure pénale suisse, 2010, n° 8 ad art. 11 CPP). In this case, as the Panel points out in the award under appeal, followed in this respect by UCI and AMA and as another Panel had already set forth in greater detail in the March 16, 2010 award (see in particular nr. 62, 73, 90 and 182) the *inibizione* is essentially a preventive measure applicable to anyone (athlete or not, affiliated to the Italian Federation or not), which principally seeks to ensure that sport competitions on Italian territory will not be distorted by the involvement of people convicted of violating Anti-Doping Rules and the effects of which are limited to the territory of that country. In this way it is distinct from the ban imposed on the Spanish racing cyclist in the May 31st, 2010 award, the latter measure being repressive in nature above all, to the extent that its purpose is to issue a worldwide sanction against a professional sportsman affiliated to a sport federation. The Appellant does not demonstrate in his brief that the Panel would have erred by refusing to hold that the two measures issued against him would be of the same nature. He merely asserts that it is so, arguing that "the normative foundation of these two proceedings is identical" because the Anti-Doping Rules edicted by INOC and ICU would both incorporate the mechanism and the rules of the WADC (appeal nr. 143). Such a statement however cannot substitute for the reasoned demonstration of its contents.

Under such conditions the Panel did not violated the rule of *ne bis in idem* for lack of identity of object between the two measures taken against the Appellant. The argument that it issued an award inconsistent with public policy or that it had no jurisdiction to issue is therefore to be rejected.

10.
This appeal must be rejected. As the Appellant loses he shall pay the judicial costs and compensate WADA and ICU (Art. 68 (1) and (2) LTF). As the RFEC did not submit an answer it is not entitled to costs.

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected.

2. The judicial costs, set at CHF 4'000.-, shall be borne by the Appellant.

3. The Appellant shall pay to the World Anti-Doping Agency (WADA) an amount of CHF 5'000.- for the federal judicial proceedings. He shall pay the same amount to the International Cyclist Union (ICU) for the same reason.

4. This judgment shall be notified to the representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, January 3, 2011

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

The Presiding Judge:	The Clerk:
KLETT (Mrs)	CARRUZZO