Arbitration CAS 2007/A/1396 & 1402 World Anti-Doping Agency (WADA) and Union Cycliste Internationale (UCI) v. Alejandro Valverde & Real Federación Española de Ciclismo (RFEC), award of 31 May 2010

Panel: Mr Otto L.O. de Witt Wijnen (the Netherlands), President; Prof. Richard H. McLaren, (Canada); Prof. Miguel Angel Fernandez Ballesteros (Spain)

Cycling
Blood Doping
No explicit prohibition in the CAS Code for the Appeal Brief to go beyond the Statement of appeal
Decision not to open disciplinary proceedings as an appealable decision before the CAS
De novo review and procedural defects occurred at the initial stage
Establishment of an anti-doping rule violation to the comfortable satisfaction of the Panel
Use of evidence illegitimately collected in case of an overriding public interest

1. **There is no specific provision in the CAS Code that forbids an Appeal Brief to go beyond the Request for Relief as formulated in the Statement of Appeal. Article R56 clearly sees to the procedural phase after the Appeal Brief. Article R51, addressing the Appeal Briefs, does not specifically prohibit an amendment of the Statement of appeal.**

2. **According to Swiss legal scholars, an appealable decision of a sport association is normally a communication of the association directed to a party based on an *"animus decidendi"*, i.e. an intention to decide on a matter, even if this is only a decision on its competence (or non-competence). A decision not to open disciplinary proceedings against an athlete was clearly intended to affect the legal position of a number of addressees, including but not limited to the sports federations and the athlete.**

3. **Even if there was a procedural defect in the first instance, the CAS case law is quite clear that the de novo rule is intended to address and cure "any procedural defect" that occurs at the initial stage, after all relevant parties have been heard: this can also encompass the right to be heard. Thus, there is no reason not to accept this Panel's authority for a full de novo hearing. The Panel can – and even should – take into account all the facts with which the athlete was charged in the first instance. CAS jurisprudence also shows that, in reviewing the case in full, a Panel cannot go beyond the scope of the previous litigation. It is limited to the issues arising from the challenged decision**

4. **As has been held in several CAS-cases, an anti-doping rule violation has to be established to the comfortable satisfaction of the Panel, bearing in mind the seriousness of the allegation which is made. It is common ground that this standard is greater than a mere balance of probability, but less than the criminal standard of proof**

beyond a reasonable doubt. This standard of proof is to be applied, irrespective of whether allegations of anti-doping rules violations are based on Adverse Analytical Findings or other reliable evidence. In several cases, it has been said that doping offences can be proved by a variety of means.

5. **Even if the Operacion Puerto evidence should be deemed to have been collected illegitimately, under Swiss law such evidence can be used, even if it was collected with violation of certain human rights, if there is an overriding public interest at stake. In the case at hand, the internationally accepted fight against doping is a public interest, which would outweigh a possible violation of the athlete's personal rights.**

The World Anti-Doping Agency (WADA) is the international independent organization that promotes, coordinates, and monitors the anti-doping programs in sports. It is responsible for the worldwide harmonization and implementation of national and international anti-doping programs in sport. WADA is a Swiss private law foundation with its seat in Lausanne, Switzerland and its headquarters in Montreal, Canada.

The Union Cycliste Internationale (UCI) is the international federation responsible for the organization of the sport of cycling worldwide. It is an association of national cycling federations. The purpose of the UCI is to direct, develop, regulate, control and discipline all forms of cycling. The UCI is a Swiss private law association with its seat in Aigle, Switzerland.

The Real Federación Española de Ciclismo (RFEC) is the Spanish national federation in charge of cycling and is endowed with a disciplinary capacity at a national level. The RFEC is a member of the UCI and its headquarters are in Madrid, Spain.

Mr Alejandro Valverde Belmonte (Mr Valverde) is an elite Spanish road racing cyclist and currently races for Caisse d'Epargne. Mr Valverde is licensed by the RFEC.

This case arises as a result of the Spanish criminal investigation commonly referred to "Operacion Puerto" which began in May of 2004.

The full facts and proceedings will not be reiterated in this award and the Panel would direct the readers to the various awards and orders that have been issued by this Panel prior to this award. Please refer to Orders dated 5 March 2008; 24 December 2008; 15 June 2009; and 22 December 2009. There is also a Preliminary Award dated 10 July 2008.

The Operacion Puerto proceedings focused on Dr. Eufemiano Fuentes, and on 23 May 2006, Dr. Fuentes and other individuals were arrested and charged with violating Spanish Public Health Legislation. This was the "final step" of the "Operacion Puerto" investigation and prosecution that had begun in May 2004 by the Spanish Guardia civil and the *Juzgado de Instruccion no. 31 de Madrid*.

On 29 August 2007, the UCI by way of letter requested, *inter alia*, the RFEC to initiate disciplinary proceedings against Alejandro Valverde Belmonte. This request was based on the UCI's review of the file and evidence gathered within the Operacion Puerto proceedings, including the blood bag labelled Blood Bag no. 18, the blood from which was purported to belong to Mr Valverde.

On 7 September 2007, the Comite Nacional de Competicion y Disciplina Deportiva (CNCDD), the competent body for doping matters within the RFEC rendered a decision not to open a disciplinary file against Mr Valverde.

Similarly, on 7 September 2007, the President of the RFEC also resolved to deny UCI's request and refused to open disciplinary proceedings against Mr Valverde.

It is these two actions of 7 September 2007 which WADA and the UCI appeal in this case.

On 30 January 2009 the Spanish court closed the criminal investigations and held that the complaints against several of the incriminated individuals, including Dr. Fuentes, and his sister Yolanda shall be filed. As of the date of this award, the Operacion Puerto proceedings are continuing.

At the same time as the proceedings were going on in Spain, the Italian authorities were also pursuing Mr Valverde.

In an effort to pursue Mr Valverde the Italian authorities issued Letters Rogatory to the Spanish court requesting the release of Blood Bag no. 18.

On 22 January 2009, Spanish Judge Sra. Jimenez Valverde (Judge Jimenez) issued a Court Order granting the request contained in the Letters Rogatory issued by the Italian authorities and authorizing the collection by Italian officials, for their use, of samples from Blood Bag no. 18.

On that same date, Judge Jimenez also ordered the Director General of the hospital of which the Barcelona Laboratory forms part to facilitate the collection of the samples to be taken from Blood Bag no. 18.

On 28 January 2009, the Italian Olympic Committee's prosecuting officer (CONI-UPA) sent a letter to the Italian Ministry of the Interior, Department of Public Safety, identifying the two representatives of the Italian Olympic Committee (CONI) and the two officers of the Italian police who would travel to Barcelona on 30 January 2009 to collect samples from Blood Bag no. 18.

That same day, the CONI wrote to Dr. Jordi Segura, the Director of the Barcelona laboratory to inform him of the identity of the individuals who would travel to Barcelona to collect the samples. Those individuals would be Dr. Marco Arpino, former Head of the CONI Anti-doping Office; Dr. Sra Tiziana Sansolini, Haematologist and Doping Control Officer; Captain Angelo Lano, Police Officer, Criminal Investigation Department; and Marshall Renzo Ferrante, Police Officier, Police Forensics Laboratory.

On 30 January 2009, those individuals attended at the Barcelona laboratory to collect the samples.

Dr Segura as well as the CONI and Italian police officials present during the sample collection signed the Record of Delivery of Material evidencing the collection of samples taken from Blood Bag no. 18.

On or about 11 February 2009, CONI commenced proceedings against Mr Valverde and summoned him for questioning regarding his involvement in Operacion Puerto and the possible related anti-doping rule violations associated with same.

Subsequent announcements further revealed that the Italian judicial authorities had also commenced separate criminal proceedings against Mr Valverde for certain violations of Italian criminal law.

On 11 February 2009, the CONI informed the Italian Public Prosecutor of its decision to commence anti-doping proceedings against Mr Valverde on the basis of evidence which it had in its possession, including a sample and DNA analysis of the blood from Blood Bag. No. 18.

On 1 April 2009, the CONI filed an official summons against Mr Valverde, setting out the factual and legal grounds of CONI's case against him.

On 11 May 2009, the hearing against Mr Valverde in the CONI matter took place in Rome before the Italian *Tribunale Nazionale Antidoping* (TNA).

WADA and the UCI were parties to these proceedings, as permitted by the applicable CONI Anti-doping Rules.

On 11 May 2009, the TNA issued its dispostif, with reasons to follow. The TNA ruled that Mr Valverde had committed, among other anti-doping rule violations, a violation of Article 2.2 of the WADC which pertains to *"Use or Attempted Use of a Prohibited Substance or a Prohibited Method"*. As a result, Mr Valverde was banned for two-years from participating in or attending athletic events organized under the auspices of CONI or related national sport organizations in Italy.

On 10 June 2009, the TNA delivered its reasons.

Mr Valverde appealed the TNA Decision to the CAS and on 12, 13 and 14 January 2010, the parties attended a hearing in relation to this appeal.

On 16 March 2010, the CAS Panel, in what this Panel shall call Valverde-II, issued its ruling, wherein the Court of Arbitration for Sport (CAS), ruling unanimously:

> *Declares the appeal filed by Alejandro Valverde Belmonte against Decision no. 42/2009 rendered May 11, 2009 by the Tribunale Nazionale Antidoping (TNA) of CONI is admissible;*
>
> *Upholds, based on the reasons of this award, Decision no. 42/2009 rendered May 11, 2009, by the TNA sentencing Alejandro Valverde Belmonte to a ban from assuming duties or offices within CONI, Italian national sport Federations or Disciplines, and participating in sporting events or competitions organized by the above organizations on Italian territory for a period of two years as of May 11, 2009;*

(…)

Dismisses all other applications or conclusions of the parties.

On 5 October 2007, WADA filed its Statement of Appeal with CAS as CAS 2007/A/1396 against the decision reached by the CNCDD and the President of the RFEC on 7 September 2007 and requested that the CAS Panel,

On an interim basis

1. *Order Alejandro Valverde Belmonte to submit to the collection of a biological sample for the purpose of DNA analyses, such analyses to be conducted by a specialised laboratory to be agreed upon by the parties or designated by the CAS;*
2. *Request judge Don Antonio Serrano, Juzgado de Instrucion no. 31, Plaza de Castilla 1 (Planta 8a), 28046 Madrid, Spain to release to the CAS or to a specialised laboratory to be agreed upon by the parties or designated by the CAS all or part of Blood Bag no. 18 (if part only, then sufficient quantities of blood from Blood Bag no. 18) in order to proceed to the relevant DNA tests on that blood and the comparison of the results of those tests to the results of the DNA testing of Mr Valverde;*
3. *Stay the present appeal, including the submission of WADA of its Appeal Brief under Article R51 of the CAS Code, until such time as the testing referred to in the preceding paragraphs 1 and 2 is completed;*
4. *Grant WADA 10 days from the date it receives the results of the testing referred to in the preceding paragraphs 1 and 2 to file its Appeal Brief;*

And on the merits

5. *Uphold the present appeal;*
6. *Find Alejandro Valverde Belmonte guilty of an anti-doping rule violation under Article 15.2 of the UCI Rules;*
7. *Pronounce a 2-year suspension against Mr Valverde in accordance with Article 261 of the UCI Rules; and*
8. *Grant WADA a portion of its costs.*

On 11 October 2007, the UCI filed the Statement of Appeal with CAS as CAS 2007/A/1402 against the decision reached on 7 September 2007 by the CNCDD and the President of the RFEC, and requested that the CAS Panel,

1. *Join this appeal with the one lodged by WADA in the same matter on 5 October 2007;*

On an interim basis

2. *Order Alejandro Valverde Belmonte to submit to the collection of a biological sample for the purpose of DNA analyses;*
3. *Request directly or via the competent (Swiss) authorities, Judge Don Antonio Serrano, Juzgado de Instrucion No 31, Plaza de Castilla 1 (Planta 8a), 28046 Madrid, Spain, to release to CAS or to a specialised Laboratory designated by CAS sufficient quantities of blood from Blood Bag no. 18 in order*

to proceed to the relevant DNA tests on that blood and the comparison of the results of those tests to the results of the DNA testing of Mr Valverde;

4. *Stay the present appeal, including submission by UCI of its Appeal Brief under Article R51 of the CAS Code, until such time as the testing referred to in the preceding paragraphs 1-3 is completed;*

5. *Grant UCI 10 days from the date it receives the results of the testing referred to in the preceding paragraph 1-3 to file its Appeal Brief;*

And on the merits

6. *Uphold the present appeal;*

7. *Find Alejandro Valverde Belmonte guilty of an anti-doping rule violation under Article 15.2 of UCI Anti-Doping Rules;*

8. *Pronounce a 2-year suspension against Mr Valverde;*

9. *Grant UCI a portion of its costs.*

On 2 July 2009, following the closure of the stay of proceedings ordered on 24 December 2008, and further suspension or extension of the deadline to file the appeal briefs, both the UCI and WADA submitted their Appeal Briefs in this matter.

The UCI requested that the Panel *inter alia*:

1. *Reform the decision of the Real Federacion Espanola de Ciclismo;*

2. *Find Alejandro Valverde Belmonte guilty of anti-doping violations under article 15.1 and 15.2 ADR;*

3. *Sanction Alejandro Valverde Belmonte in accordance with Art. 261 of the anti-doping rules of the CUI with a period of two years ineligibility;*

4. *Disqualify Alejandro Valverde from all sporting results as from the date of the earliest anti-doping violation and at least as from 4 May 2004;*

5. *Condemn the Real Federacion Espanola de Ciclismo and Alejandro Valverde Belmonte jointly and severally to the costs of the proceedings;*

6. *Condemn the Real Federacion Espanola de Ciclismo and Alejandro Valverde Belmonte jointly and severally to participate in UCI's costs*

7. *On an interim basis […]*

In its Appeal Brief, WADA requested that this Panel:

UPHOLD the present appeals;

FIND Alejandro Valverde Belmonte guilty of an anti-doping rule violation under Article 15.1 of the UCI Rules and Article 2.1 of the WADC;

FIND Alejandro Valverde Belmonte guilty of an anti-doping rule violation under Article 15.2 of the UCI Rules and Article 2.2 of the WADC;

ORDER a two-year suspension against Mr Valverde in accordance with Article 261 of the UCI Rules and 10.2 of the WADC;

ORDER the disqualification of all competitive results obtained by Mr Valverde as from 4 May 2004 in accordance with Article 274 of the UCI Rules and Article 10.7 of the WADC;

ORDER the Respondents to reimburse WADA all costs and fees incurred by it in the arbitration;

On 31 July 2009, Mr Valverde submitted his Answer Brief, and requested the Panel:

1. *To declare inadmissible the appeals of the UCI and WADA.*
2. *To confirm the decision of the RFEC of 7 September 2007.*

With a subsidiary nature:

3. *If the decision of the RFEC is modified, to order the commencement of disciplinary procedure and to suspend them until the criminal proceedings have ended.*
4. *If a decision is announced on the merits of the case, to declare Alejandro Valverde innocent.*

With a subsidiary nature:

5. *For the Panel to sentence the Appellants to pay all the costs of the proceedings.*
6. *For the Panel to sentence the Appellants to contribute to Alejandro Valverde's expenses with an amount that the Panel itself determines.*

On 31 July 2009, the RFEC submitted its Answer Brief requesting that

I. *The appeals filed by the World Anti-Doping Agency and the Union Cycliste Internationale against the decisions issued on 7 September 2007 by the President of the Real Federacion Esapnola de Ciclismo and by RFEC's Comité Nacional de Competicion y Disciplina Deportiva are dismissed;*

II. *The arbitration costs, if any, shall be borne by the World Anti-Doping Agency and the Union Cycliste Internationale;*

III. *The World Anti-Doping Agency and the Union Cycliste Internationale shall be ordered to pay jointly and severally to the Real Federacion Espanola de Ciclismo a contribution towards the legal and other costs incurred by the latter in an amount to be determined at the discretion of the Panel.*

As stated previously, the Panel will not re-enter into a recitation of all the procedural aspects leading up to the hearing of the merits on these aspects. With regard to procedure, this Award will limit itself to a discussion of the procedure since the last Order was issued on 24 December 2009.

On 21 January 2010, Mr Valverde provided further commentary to the Panel pursuant to the Order of the Panel on 22 December 2009.

On 25 January 2010, in accordance with the 22 December 2009 Order of the Panel, the UCI and WADA provided further documentation.

On 28 January 2010, the UCI provided the Panel with a draft request to the Tribunal Cantonal in Lausanne to assist the CAS in obtaining evidence from the Spanish judiciary.

On 15 February 2010, the parties provided the Panel with the list of anticipated witnesses for the hearing.

On 17 February 2010, Mr Valverde provided the parties and the Panel with the 18 January 2010 ruling of the Appeal Court of Madrid denying CONI's appeal of Judge Serrano's decision rendering the Letters Rogatory process null and void.

Noting that some witnesses had not previously been nominated by either party, the Panel, by letter of 26 February 2010, invited some parties to indicate the reasons for the delay in nominating some witnesses and for the other parties to express any objections to the hearing of these witnesses. The parties were also invited to comment on the potential implications of the above-mentioned decision to the current proceedings before the CAS.

On 4 March 2010, the parties responded to the CAS correspondence and on 9 March 2010 the Panel issued a direction to the parties in respect of same. Furthermore, the Panel invited the parties to prepare specific comments on the following issues for the hearing:

1. *An articulation of the applicable law and rules/regulations*

   In their answer briefs of 31 July 2009, the Respondents submit that the UCI-ADR in force in 2004, i.e. those from 1 July 2001 are applicable, adding that subsequent rules may be applied if they are more favorable to the rider and that Spanish rules and regulations should be applied. The Panel would appreciate the Appellants' view hereon.

2. *What is the power of the Panel under R57 of the Code of Sports-related Arbitration for each of the Parties' requests for relief?*

   If the Panel would decide that the challenged decisions are ill-founded, can it then issue new decisions to replace the challenged ones? If so, can then all of the Appellants' Requests for Relief be granted and, in principle, would the Panel be empowered to establish whether there was an Anti-Doping Violation under the applicable rules and can any sanctions thereon be ordered?

3. *Are the Serrano-Orders, in light of the legislation on which they are based, of such a nature that, on further scrutiny, they do prohibit the use of the Operación Puerto-documents and other data collected in the course of the criminal proceedings?*

   The Panel would like the parties to address here questions such as: are the orders issued by the Judge Serrano based on Spanish mandatory law or public order? In the affirmative, could such law be binding on an arbitral tribunal sitting in Switzerland, when it is reviewing a decision issued by a Spanish body such as the RFEC?

4. *Apart from that general argument: Can the "CONI-evidence" be used, especially in light of the specific objections raised by Mr Valverde against using that evidence?*

5. *The weight of the scientific, documentary and other evidence*

   The Parties should however avoid repeating here the points already made in their written submissions (see the general observation above).

6. *If the Panel would accept the evidence as convincing and subject to other general and legal defenses, is there then a violation of the applicable Rules, especially in light of Mr Valverde's legal arguments against this?*

On 12 March 2010 the President of the Panel issued a letter to the parties in respect of late production of documents, and admissibility of certain witness testimony.

Evidence was heard on 18 and 19 March 2010, and closing arguments were heard on 20 March 2010.

WADA called the following witnesses: Captain Angelo Lano, officer of the Italian Carbinieri; Dr Tiziana Sansolini, haematologist and doping control officer; Dr. Marco Arpino, former chief Investigator for CONI; Dr. Alexandra Caglia, biologist and Technical Director of the Police Forensic Laboratory in Rome; Dr. Renato Biondo, Director of the Police Forensics Laboratory in Rome; Dr. Vincent Castella, Head of the Department of Forensic Genetics at the Centre Universitaire Romand de Médecine Légale in Lausanne, Switzerland.

WADA and the UCI jointly called Mr Jesús Manzano, former professional cyclist.

The UCI called Mr Jon Riva, journalist.

Mr Valverde called as witnesses: Mr Ignacio Colomer, expert in Spanish Law; Mr Eugenio Bermúdez, former General Secretary of the RFEC; Dr. Douwe de Boer, Professor of Chemistry; Mr José Miguel Echávarri, former general manager of the cycling team; and Mr José Luis Arrieta, cyclist and former colleague of Mr Valverde.

At the outset of the hearing, and in order to avoid duplication of evidence, it was agreed by all parties that the transcripts of the evidence given by the witnesses in the Valverde II case would become the evidence in chief of the witnesses at this hearing.

LAW

Jurisdiction, Admissibility and Applicable Law

1. In the Preliminary Award, the jurisdiction of the CAS has been established.

2. As noted in the Preliminary Award, no rules of law were chosen by the Parties and it was also established that the applicable regulations are the UCI-ADR. Thus, pursuant to Article R58 of the CAS Code and to Article 290 of the UCI-ADR, Swiss law shall apply to the merits in this dispute, in addition to the UCI-ADR.

3. As mentioned above, in his Answer Brief of 31 July 2009, Mr Valverde submitted that the UCI-ADR to be applied are those which were in force in 2004, i.e. those from 1 July 2001 ("the 2001-Rules"), adding that subsequent rules may be applied if they are more favorable to the rider. He equally submitted that Spanish rules and regulations should be applied. This general statement was further addressed by both Respondents at the Hearing pursuant to the Panel's request of 9 March 2010. The RFEC argued likewise.

4. At the Hearing, the Appellants contested this and submitted that the 2004-Rules should apply.

5. In Mr Valverde's Answer to the Statements of Appeal, as well as in the RFEC's Answer thereto, reference was only made to the UCI-ADR which entered into force in 2004 ("the 2004-Rules"). Both Respondents disputed CAS-jurisdiction on the basis of Articles 9 and 10 of those Rules. This was not articulated by the Respondents, but their contestation of the CAS-jurisdiction was clearly based on (their interpretation of) certain provisions of those Rules, notably Articles 9 and 10, which were absent in the 2001-Rules. Likewise, the Respondents then submitted that UCI's appeal was filed too late in the light of Art. 284 of the 2004-Rules. It was only in their Answer Briefs of 31 July 2009 that Mr Valverde and the RFEC submitted that the 2001-Rules should apply.

6. It is questionable whether Mr Valverde's new submission can be received, as it was made after the Partial Award and after the phase in which the Parties were requested and supposed to make full and final submissions on jurisdiction and on the admissibility of the Appeals.

7. However, in any event, as will be set out hereafter, Mr Valverde's doping offence was established on 6 May 2006, when his EPO-contaminated blood was found in Dr. Fuentes' freezer. Consequently, the UCI-ADR then in force apply. Before the said date, there is some uncertainty as to when the contaminated blood was placed in the freezer.

8. It is also noted that, on 16 March 2010, Mr Valverde addressed a letter to CAS, which stated *inter alia* that Mr Valverde accepted this arbitration only for Request nr. 1 as formulated by the UCI in its letter to the RFEC of 29 August 2009, and not with regard to any other matter. As this letter was an uninvited letter, and the Panel had repeatedly informed the Parties that they should not write any such letters, the Panel could ignore this letter. However, the matter nevertheless needs to be addressed as the same issue was raised by Mr Valverde at the Hearing.

9. In the Partial Award of 10 July 2008, CAS jurisdiction in this arbitration was established, without restriction as to any element of the Relief Requested. Apart from the fact that the debate on jurisdiction should be considered as terminated and settled by the Partial Award, no new substantive reason has been raised by Mr Valverde as to why that ruling should be changed. The fact that Mr Valverde has a different view and/or wish is no such (new) substantive reason.

10. It has further been argued by the Respondents, that the Appellants have first raised their Requests for Relief on the disqualification of all competitive results obtained by Mr Valverde

in the past for the first time in their Appeal Briefs, and that an Appeal Brief cannot go beyond the Request for Relief as formulated in the Statement of Appeal.

11. The Panel sees no specific provision in the CAS Code forbidding this by way of principle[1]. Article R56, to which the Respondents refer, clearly sees to the procedural phase after the Appeal Brief. Article R51, addressing the Appeal Briefs, does not specifically prohibit an amendment of the Request for Relief. Even if one would consider that it contains such a prohibition implicitly, it is noted that (i) the Appellants have made an explicit reservation in this regard in their Statement of Appeal, (ii) this Request for Relief is a logical consequence of the Appellants' Request for Relief in their Statement of Appeal to find Mr Valverde guilty of an anti-doping rule violation under article 15.2 of the UCI Rules (cf. article 274). Respondents cannot be considered to be hampered unduly in their defense by this amendment.

12. In conclusion, the Ruling in the Partial Award on the CAS jurisdiction, on the admissibility of the Appeals and with regard to the applicable law and regulations is confirmed without variation.

The issues to be decided: Is there an appealable decision?

13. The main issue to be decided is whether or not the Appellants' Requests for Relief should be granted.

14. This hinges on the general question of what should be decided with regard to the decisions against which the Appeals were addressed. These were:

- the CNCDD-decision of 7 September 2007 not to bring a disciplinary file against Mr Valverde.
- the "Resolution" of the RFEC of the same date to reject UCI's requests of 29 August 2007.

15. More precisely, in its said Resolution, the RFEC ruled to *"Rejeter les demandes déduites par la Commission Anti-Dopage de l'UCI"* addressed to it by the (Anti-doping Committee of) the UCI on 29 August 2007 which request comprised the following:

> *"1. Ouverture du dossier disciplinaire à l'encontre du coureur Alejandro Valverde ou faire suivre le dossier à l'instance compétente.*
>
> *2. Examen de la documentation jointe, ainsi que des pièces qui parviendront plus tard et que nous ferrons suivre.*
>
> *3. Informer immédiatement l'UCI de toute mesure d'instruction de sa fédération et des moyens de défense du coureur.*
>
> *4. Demander au coureur de se soumettre à un test d'ADN conformément à la déclaration signée par ce dernier le 3 juillet 2007 afin de procéder à une comparaison avec le sang contenu dans le sac n°. 20 (sic) 1e 242 23/5.*

1 See also the partial award issued on 7 October 2009 in the case TAS 2009/A/1881, para 59.

5. Ne pas considérer que l'instruction est terminée ou fixer une date d'audience sans:

a) Informer l'UCI de l'état de la procédure et de ses conclusions;

b) Demander l'avis de l'UCI".

16. The first question in this regard is whether there is an appealable decision in the sense of the applicable rules, more specifically in the sense of art. 280 of the 2004 Rules. Also with regard to this question, it could be said that it was never raised by a Party until after the Partial Award on jurisdiction and admissibility and therefore as such, is raised too late. However, even if the question should be considered, the answer is in the affirmative.

17. Article 280 of the 2004-Rules provides as follows.

"The following decisions may be appealed to the Court of Arbitration for Sport:

a) the decisions of the hearing body of the National Federation under article 242;

b) a decision that a Rider shall be banned from participating in Events under article 217 if the ban is for more than 1 (one) month;

c) the decisions concerning Therapeutic Use Exemptions as specified under articles 67, 68, 70 and 72.

d) the final decision at the level of the National Federation regarding a license-Holder that was referred to his National Federation according to article 183.

No other form of appeal shall be permitted".

18. Sub-article a) is relevant in the present context: was there a decision in the sense of this provision?

19. As noted above, the Appellants' Request for Relief addressed two documents:

- The CNCDD-decision of 7 September 2007 not to open a disciplinary file against Mr Valverde.
- The resolution of the RFEC of the same date to deny UCI's requests of 29 August 2007.

20. At the Hearing, it was explained by the Appellants that they were, at the time of their Statement of Appeal and their Appeal Briefs, not quite certain whether these two documents constituted two decisions or only one and that, for completeness' sake, they formally addressed the appeal to both.

21. The following was then explained by counsel for the RFEC:

- The RFEC has delegated all power regarding disciplinary decisions to the CNCDD, a body of the RFEC, the chairman of which body, Mr Ricardo Huesca Boadihla, signed the CNCDD-letter.
- A separate document, a resolution signed by the President and the Secretary-General of the RFEC, Messrs Fulgencio Sánchez Montesinos and Eugenio Bermúdez González,

gave a further reasoning to this decision, which should be considered as an explanation to the CNCDD-decision.

22. On the basis hereof, the conclusion of the Panel is that, although there are two documents – hereafter to be referred to respectively as: "the CNCDD-decision" and "the RFEC-reasoning" – there is only one decision legally, viz. the CNCDD-decision, of which the RFEC-reasoning forms an integral part. This ties in also with what was said by the RFEC and Mr Valverde earlier on this issue, viz. in their "Requête d'Arbitrage" in TAS 2007/O/1381, (*"the Stuttgart-proceedings")* where, without exception or limitation, reference is made to one decision only (*"… la decision du 7 septembre 2007"*).

23. This CNCDD-decision, in the opinion of the Panel, is an appealable decision in the light of article 280, a) of the 2004-Rules.

24. As one learned writer concluded:

"… an appealable decision of a sport association is normally a communication of the association directed to a party and based on an "animus decidendi", i.e. an intention of a body of the association to decide on a matter , being also only the mere decision on its competence (or non-competence). A simple information, which does not contain any "ruling", cannot be considered as a decision"[2].

25. The CNCDD-decision which certainly reflects an *"animus decidendi"*, is far more than a simple information.

26. And in TAS 2009/A/1869, the following was said:

"Selon la définition du Tribunal fédéral, une décision est un acte de souveraineté individuel adressé au particulier, par lequel un rapport de droit administratif concret, formant ou constatant une situation juridique, est réglé de manière obligatoire et contraignante. Les effets doivent se déployer directement tant à l'égard des autorités qu'à celui du destinatoire de la décision' (ATF 101 Ia 73, JdT 1977 I 67). Il s'agit donc d'un acte unilatéral adressé à un ou plusieurs destinataires déterminés et destiné à produire des effets juridiques (BOVAY B., Procédure administrative, Berne 2000, p. 253 s.).

Bien que les règles de procédure administrative ne soient pas directement applicables aux décisions émanant d'associations de nature privée, la jurisprudence du TAS considère que les principes qui en émanent définissent de manière adéquate les éléments principaux d'une décision (cf. TAS 2007/A/1293, para 29 ; CAS 2005/A/899, para 60).

En l'occurrence, il est constant que l'ordonnance de classement du 27 mai 2009 constitue une décision au sens de la définition ci-dessus rappelée. Il s'agit en effet d'un acte unilatéral de l'Autorité de recours SFL adressé au FCC La Chaux-de-Fonds SA et destiné à produire des effets juridiques dans la mesure où il met fin à la cause et confrère un caractère définitif à la décision de la Commission des licences de la SFL.

En ce qui concerne la prise de position du 4 juin 2009, la jurisprudence du TAS a déjà eu l'occasion d'établir que l'existence d'une décision n'était pas tributaire de la forme en laquelle elle était rendue. Ainsi, une communication sous forme de lettre peut parfaitement constituer une décision susceptible de faire l'objet d'un

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2 BERNASCONI M., *When is a "decision" an* appealable *decision?* in RIGOZZI/BERNASCONI (eds), *The Proceedings before the Court of Arbitration for Sport*, Zurich 2007, p. 273.

appel au TAS (cf. notamment CAS 2007/A/1251, para 30 ss ; CAS 2005/A/899, para 63 ; CAS 2004/A/748, para 86 ss).

Toutefois, seule une communication affectant la situation juridique de ses destinataires ou de tiers peut constituer une décision (cf. CAS 2008/A/1633, para. 31 et les réf. citées ; CAS 2004/A/748, para. 91)"[3].

27. The CNCDD-decision meets all these legal requirements: The CNCDD-decision not to open disciplinary proceedings against Mr Valverde was clearly intended to affect the legal position of a number of addressees, including but not limited to the UCI, which request pertaining to taking a number of legal decisions was rejected, and of Mr Valverde.

28. It is noted that the decision was not only sent to the UCI but also to Mr Valverde and his team.

The issues to be decided: The scope of review

29. The next (sub)issue is: if the CAS would conclude that the Decision of the CNCDD of 7 September 2007 not to open a disciplinary file against Mr Valverde cannot be simply confirmed, should then the matter be decided by the CAS or should it be referred back to the RFEC? Could, in the first case, the Panel establish whether there is an anti-doping violation or not and, if so, impose a sanction? And could, if necessary, the Panel take an even further step, i.e. carry out an investigation in order to establish whether there was an anti-doping violation?

30. Generally, that question depends on the interpretation of Article R57 of the CAS-Code, which gives the Panel

"…. the full power to review the facts and the law and to either issue a new decision which replaces the decision challenged or annul the decision challenged and refer the case back to the previous instance".

31. On this text, the Panel can either issue a new decision, which – without restriction – then annuls and replaces that challenged decision, or annul the decision challenged and send it back to the previous instance.

32. In a well known work on CAS-matters[4], the following is said in this regard:

"Ce qui est décisif à nos yeux, c'est que les formations du TAS auront le choix entre le renvoi de l'affaire à l'instance inférieure lorsque cela leur paraît la meilleure solution et, dans les cas normaux, le fait de trancher directement le litige. Dans ce cas, en vertu des pouvoirs que leur confère l'art. R57 al. 1 Code TAS elles «peu[vent], à partir de leur propre appréciation, soit confirmer la décision entreprise, soit, si elle[s] le veu[lent] s'en écarter, rendre une nouvelle décision [la] remplaçant». La liberté dont disposent les arbitres ne doit pas leur faire oublier qu'ils ne peuvent en aucun cas «statuer au-delà des demandes dont ils étai[ent] saisi[s]» (art. 190 al. 2 let. C LDIP)".

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3 A similar decision was taken in the award CAS 2008/A/1564. This award was annulled by the Swiss Federal Tribunal but not on this ground. See also CAS 2005/A/899 and CAS 2007/A/251.

4 RIGOZZI A., L'arbitrage international en matière de sport, Basle et al. 2005, § 1087.

33. The reason why the CNCDD, in its part of the Decision, concluded that it could not open a disciplinary file against Mr Valverde was that a ban had been issued by the Spanish Court of First Instance No. 31, twice, to use copy of the record of the Spanish criminal proceedings. As it said, such copy may

"… in no case be used to process an administrative file on people who allegedly are the focus of the proceedings as long as neither the nature nor the degree of their involvement can be determined during the trial phase of these proceedings, otherwise, it could give rise to a violation of the provisions of Section 299 of the Criminal Prosecution Act, in relation to Section 118.2 and 3 of the Spanish Constitution".

34. The same reason was repeated in the RFEC-reasoning. The RFEC elaborated in its decision, providing even further reasoning. We will turn to those reasons later in our decision.

35. The said Court Order was since then repeated in other Rulings of the competent Spanish Court(s), most recently on 18 January 2010[5]. They have been to in this Panel's Order of 22 December 2009 as "the Serrano-Orders".

36. It is questionable whether the reasoning of the CNCDD is correct, as it appears from the record that Mr Valverde was not the focus of the Spanish Criminal proceedings. Also, even if he was, it is questionable whether not a file could have been opened and some preliminary steps taken without using the evidence from Operation Puerto or using only the report 116, that, according to the UCI, is not covered by the Serrano orders (such as, as mentioned at the Hearing by the Appellants, inviting Mr Valverde and establish whether or not he was willing to cooperate voluntarily in further investigations).

37. Be that as it may, it is also understandable that the CNCDD hesitated to take such steps in light of the Serrano-Orders, as it explained, it may have felt bound by the Serrano-Orders, even if, from an objective point of view, it wasn't. In that light, its decision on this particular issue need not to be referred back to the previous instance for a new decision.

38. It is reasonably likely that the CNCDD will issue precisely the same resolution for the same formal reason, because the ban of the Serrano-Orders has not been lifted at the date of this award. In fact, the RFEC confirmed at the Hearing in front of this Panel that it still feels that it cannot open any file until the said ban has been lifted. As ruled in the Panel's Order of 22 December 2010, it does not find itself bound by such Orders. As will be set out hereafter, this is confirmed after the Hearing. This is a situation where the Panel feels it appropriate to prevent a national federation from being too lenient[6].

39. For those reasons, the CNCDD-decision can be replaced as provided for in Article R57. Consequently, this Panel has full power to review the facts and the law, including notably the issues mentioned in the further reasons of the CNCDD-decision (i.e. the RFEC-reasoning) and has full power to address the Appellants' Requests for Relief.

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5 Ruling number 128/2010 of the Provincial Court of Madrid, Section No. 5, Roll RT 270/2009. Produced in translation by Counsel to Mr Valverde, letter of 22 February 2010.

6 Cf. e.g. TAS 98/214.

The question of the two instances

40. Even if this Panel has, in principle, full power under Article R57 of the CAS-Code to review the case in all its aspects and, if it thinks fit, to issue a *de novo*-decision, the question is if that should lead to a different conclusion in the case at hand because Mr Valverde was not personally heard in the first instance.

41. It is noted first of all that Article R57 does not require Mr Valverde to have been personally heard in the first instance.

42. The Panel further notes that Mr Valverde was notified of the fact that the file had been sent to the RFEC by the UCI[7]; He was sent a copy of the full CNCDD-Decision. He was aware of the proceedings but never had to appear because the matter was not commenced. He was a party in the sense that he was advised of the UCI's request and the decision thereon.

43. Even if there was a procedural defect in the first instance in this regard, the CAS case law is quite clear that the de novo rule is intended to address and cure "any procedural defect" that occurs at the initial stage, after all relevant parties have been heard. As it was said in CAS 2009/A/1920:

*87. According to article R57 of the Code, the CAS has full power to review the facts and the law. The consequences deriving from this provision are described in the consistent CAS jurisprudence, according to which "if the hearing in a given case was insufficient in the first instance (…) the fact is that, as long as there is a possibility of full appeal to the Court of Arbitration for Sport, the deficiency may be cured" (CAS 94/129 award of 23 May 1995, par. 59). Later the CAS has reaffirmed this principle, holding that "the virtue of an appeal system which allows for a rehearing before an appeal body is that issues relating to the fairness of the hearing before the Tribunal of First instance 'fade to the periphery'" (CAS 98/211, award of 7 June 1999, par.8). More recently, the CAS has further relied on the Swiss Federal Tribunal case law, which held that "any infringement of the right to be heard can be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised" (CAS 2006/A/1177, award of May 2009, par. 7.3). For another recent case, see for instance, CAS 2008/A/1594 para. 109, "**However, as CAS has complete power to review the facts and the law and to rule the case de novo, the procedural deficiencies which affected the procedures before FILA disciplinary bodies may be cured by virtue of the present arbitration proceedings** (see e.g. CAS 2006/A/1175 paras. 61 and 62, CAS 2006/A/1153, para. 53, CAS 2003/O/486, para. 50)". **This CAS jurisprudence is actually in line with European Court of Human Rights decisions**, which in par. 41 of the Wickramsinghe Case concluded that "**even where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6 (1) [ECHR] in some respect, no violation of the Convention will be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1)**"* (emphasis added).

7 In contrast to the situation in TAS 2004/A/558.

44. This can also encompass the right to be heard[8].

45. Thus, there is no reason not to accept this Panel's authority for a full *de novo* hearing. The Panel can – and even should – take into account all the facts with which the athlete was charged in the first instance[9].

46. CAS jurisprudence also shows that, in reviewing the case in full, a Panel cannot go beyond the scope of the previous litigation. It is limited to the issues arising from the challenged decision[10].

47. As mentioned above, the CNCDD-Decision consists of two parts, the CNCDD-letter and the RFEC-reasoning. Both address the Serrano-Order of that point in time. The RFEC-reasoning adds a number of other arguments why a file should not be opened against Mr Valverde. In essence, these other RFEC reasons are the following:

- after analysis of the documents received (which included the UCI-file) there are no new indications that serve as a basis for opening a disciplinary file against Mr Valverde nor to impose a conservatory measure that would prevent him to participate in an official competition;
- the Guardia Civil Report does not formally identify Mr Valverde as it did in some other cases; thus, there are no new facts showing or giving rise to the perception in an evident manner that Mr Valverde was involved in the doping offence discovered by the Guardia Civil. The UCI's assertion to this effect is "gratuite".
- Mr Valverde has proven himself not to be guilty.

48. These are the issues which the Panel is requested and thus required to review. In essence: whether there is sufficient evidence to, in contrast to the RFEC's conclusion, justify the opening of a disciplinary proceeding against Mr Valverde and (even) find him guilty of an anti-doping rule violation.

49. Mr Valverde has had full and proper opportunity to review the evidence to the extent it was obtained in the first instance.

50. Insofar as it has been submitted that, as required by R47 of the CAS Code, not all remedies legally available have been exhausted by the Appellants, this should be rejected. There is no evidence that there were any other legal remedies available to the Appellants in accordance with the statutes or regulations of the relevant sports related body – i.e. the CNCDD – that have not been exhausted. To the contrary, the *"Stuttgart Appeal"* of the RFEC indicates clearly, several times, that the only remedy against the CNCDD-decision is an appeal to the CAS. Quite apart again from the fact that this argument, if it was raised at all, was raised after the Preliminary Award on admissibility of the Appeals.

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8 Cf. e.g. TAS 98/214.
9 Cf. for a situation in which this was clearly not the case CAS 2009/A/1914, para 52.
10 CAS 2008/A/1478, CAS 2007/A/1294, TAS 2007/A/1433, TAS 2002/A/415 & 426.

The issues to be decided: Is there an anti-doping violation?

51. The Appellants assert that the evidence shows that Mr Valverde has committed an anti-doping rule violation, notably a violation of art. 15.1 and 15.2 of the applicable UCI-ADR. In summary: use or an attempted use of a Prohibited Substance or Prohibited Method.

52. Art. 15.1 and 15.2 of the 2004-Rules provide as follows.

"The following constitute anti-doping rule violations:

1. The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen.

1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping violation under article 15.1.

Warning:

1) Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.

2) Medical treatment is no excuse for using Prohibited Substances or Prohibited Methods, except where the rules governing Therapeutic Use Exemptions are complied with.

1.2 Excepting those substances for which a threshold concentration is specifically identified in the Prohibited List, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample shall constitute an anti-doping rule violation.

1.3 As an exception to the general rule of article 15.1, the Prohibited List may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

2. Use or Attempted Use of a Prohibited Substance or a Prohibited Method.

2.1 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed".

53. As has been held in several CAS-cases, an anti-doping rule violation has to be established to the comfortable satisfaction of the Panel, bearing in mind the seriousness of the allegation which is made. It is common ground that this standard is greater than a mere balance of probability, but less than the criminal standard of proof beyond a reasonable doubt. This standard of proof is to be applied, irrespective of whether allegations of anti-doping rules violations are based on Adverse Analytical Findings or other reliable evidence. In several cases, it has been said that doping offences can be proved by a variety of means[11].

11 CAS 2004/O/645, award of 13 December 2005; CAS 2004/O/649, award 13 December 2005.

54. These principles are laid down in Articles 16 and 17 of the applicable UCI-ADR which read as follows:

Proof of doping

Burdens and standards of proof

16. The UCI and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or its National Federation 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 Anti- Doping Rules place the burden of proof upon the Rider 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.

Methods of establishing facts and presumptions

17. Facts related to anti-doping rule violations may be established by any reliable means, including admissions.

55. The next (sub) issue is therefore whether there is sufficient evidence in the case at hand to conclude that there is anti-doping violation. But before coming to that, a preliminary question has to be answered.

The issues to be decided: Can the evidence that was introduced be used?

56. In its Order of 22 December 2009, the Panel has considered the effects – if any – of the Serrano-Orders on the use of the evidence collected in the course of the Operacion Puerto for this arbitration. Its conclusion was, for the reasons referred to in paras 30-46 of that Order, which should be deemed to be incorporated herein that, in the light of these considerations, this Panel did not regard the Serrano-Orders as prohibitive for the production and use of Operacion Puerto-documents in this arbitration.

57. As discussed above, in its letter of 9 March 2010, the Panel asked the Parties to address this issue at the occasion of the Hearing, notably as to whether the orders issued by the Judge Serrano are based on Spanish mandatory law or public order and, in the affirmative, whether such law could be binding on an arbitral tribunal sitting in Switzerland, when it is reviewing a decision issued by a Spanish body such as the RFEC.

58. In this respect, there has been no further evidence produced by any Party and no convincing argument was brought forward which should lead to a conclusion different from the Panel's conclusion in its said Order.

59. It is noted that, in TAS 2009 A/1879, – hereafter also Valverde II – the Panel came to a similar conclusion. This Panel agrees with the reasoning leading thereto, in addition to what it considered in its said Order.

60. Further, the following is noted.

a) As mentioned in the said Order[12], Mr Valverde, by letter of 15 October 2009, announced that he would produce the full report of Messrs Alfonso and Hernandez. This has never been done, so the Panel continues to rely on the conclusions of Prof. Garcia[13].

b) It was confirmed at the Hearing that Mr Valverde is not one of the license holders facing criminal charges.

c) Even if the Operacion Puerto evidence should be deemed to have been collected illegitimately (quod non) it is noted that, under Swiss law – as Swiss counsel for the Appellants and the REC agreed at the Hearing – such evidence can be used, even if it was collected with violation of certain human rights, if there is an overriding public interest at stake. In the case at hand, the internationally accepted fight against doping is a public interest, which would outweigh a possible violation of Mr Valverde's personal rights[14].

61. The Panel cannot find that the Appellants ever renounced their right to use the Operation Puerto-documents.

The issues to be decided: Is there sufficient evidence in the case at hand to conclude that there is an anti-doping violation?

62. As mentioned above, the evidence on which the Appellants rely is partly documentary, and partly scientific.

63. Generally, on this issue, the Appellants make the same submissions, support each others submissions and rely on the same evidence. With regard to the evidence on which they rely WADA elaborates notably on what will be called the scientific evidence and the UCI on what will be called the documentary evidence.

64. Therefore, for the sake of efficiency, unless stated otherwise, the Panel will refer to WADA and the UCI's arguments and submissions with respect to the commission of an Anti-Doping Rule violation collectively.

65. The **scientific evidence** consists in essence, in their view, of the following.

- Blood Bag no. 18, as identified in the Guardia Civil Report.
- (Undisputed) scientific evidence that this blood contains EPO.
- DNA evidence that clearly demonstrates that Blood Bag no. 18 contains Mr Valverde's blood.

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12 At para 35.
13 Quoted at para 32 of the Order.
14 Cf. also TF, 17 December 2009, 8 C 239/2008, para 6.4.2.

66. WADA and the UCI's position is that the evidence clearly demonstrates that the blood in Blood Bag no. 18, which the Spanish authorities long ago determined contains EPO, is Mr Valverde's. In particular, the Appellants state that the scientific evidence establishes the following:

- The Barcelona Laboratory confirms that the blood in Blood Bag no. 18 contains recombinant (exogenous) EPO, a prohibited substance.
- From this blood bag samples were taken – Samples no. 278920 and no. 278833 – by the Italian authorities, under the supervision of the Director of the Barcelona Laboratory, with the express consent and on the explicit instructions of the Spanish judiciary and subsequently tested in Rome.
- Analytical results of DNA testing of the blood contained in Blood Bag no. 18 and comparison of that DNA with the DNA in sample no. 278350, which is a sample collected from Mr Valverde on 21 July 2008 in Chiusa di Pesio during the Tour de France show a positive match, establishing that the blood in Blood Bag no. 18 is Mr Valverde's.
- WADA and the UCI contend that the sample collection procedure by which the samples were collected from Blood Bag no. 18 was reliable and the documentation establishes that there was no break in the chain of custody. Sra Sansolini and Captain Lano who attended at the sample collection in the Barcelona lab signed the Chain of Custody Form dated 30 January 2009, recording the transfer of custody of the samples taken from the blood bag.
- The Chain of Custody form also establishes that the samples originally received by the Barcelona Lab from the Guardia Civil was transferred to a sealed plastic contained on 19 August 2008, was identified at "18- 1 242 – code IMIM GC", and remained frozen and not tampered with until Thursday, 29 January 2009, when it was moved to a refrigerator in order to permit the planned sample collection on the following day.
- WADA and the UCI further contend that the evidence and documentation establishes that the samples were then transported from the Barcelona Laboratory to the Rome Police Forensics Laboratory under police escort.
- WADA and the UCI submit that the DNA analysis and comparison which was conducted by the Rome Police Forensics Laboratory is reliable, and indisputably establishes that the DNA in Blood Bag no. 18 is a match to the sample collected from Mr Valverde during the Tour de France.

67. The RFEC does not address the scientific evidence. As mentioned previously, the RFEC limited their position to the appropriateness of the decision not to open up disciplinary proceedings against Mr Valverde. In the submissions of the RFEC it was of the opinion that because the decision of this Panel should be limited to the correctness of the RFEC's decision only, it would not enter into a discussion on the merits of the case.

68. Generally, Mr Valverde takes issue with this scientific evidence as mentioned above as follows:

- Plasma bags may not be considered blood doping, nor their possible transfusion a blood transfusion banned by applicable anti-doping regulations, as it does not improve the transfer of oxygen. Blood Bag no. 18 only contains plasma and does not contain red blood cells.
- Blood extractions may not *a priori* be considered banned by anti-doping rules. There are blood extractions designed to analyse the blood in question, to give the blood to sick people, and even to carry out blood transfusions for therapeutic purposes. The list of banned substances and methods permits the use of blood, red blood cells or similar products in cases of proven medical need.
- The transfusion of that blood, which may be carried out subsequently, must also not *a priori* be considered as being in breach of the Anti-Doping Regulation, as any of the athletes could have requested authorisation for the therapeutic use of that blood which, as also stated by Dr. Fuentes, could be advisable e.g. in case of an accident.
- It is completely irrational that the plasma of the bag had the purpose of being transfused to some athlete with prohibited purposes. Blood transfusions can be used by the athletes as a prohibited method in competition, for which reason that bag, if used for illicit motives, would have been transfused during the competition. Plasma is a part of the blood that does not improve sports performance, for which reason there is no motive for using it as a competition or outside a competition. Moreover, if we assume that it is established that there is EPO in this plasma, the transfusion of this plasma in competition would entail the detection of this prohibited substance in the urine or blood of this athlete.
- The Guardia Civil report states that the bags of plasma were not used for doping purposes.
- There is inequality between athletes anti doping violation committed by other riders, which were not sanctioned by the competent authorities which was accepted by WADA and the UCI.

69. More specifically, on the scientific evidence, Mr Valverde submits that:

- In order for analytical results to validly accredit the presence of a banned substance in an athlete's sample, the analyses carried out must respect WADA International Standards for Control and for Laboratories, and the Procedure Guidelines of the UCI.
- The analyses carried out did not respect the WADA International Standards for Control and for Laboratories, or the Procedure Guidelines of the UCI.
- In order to carry out anti-doping analysis on the blood samples, the blood samples must be delicately handled to accelerate coagulation; the samples must be kept at 4 degrees Celsius, and changes of temperature must not exceed 2-12 degrees Celsius; the samples must remain in a vertical position; the samples must be analysed by recognized laboratories and using analytical methods recognized for that laboratory. If a banned substance is detected, the athlete must have the opportunity to verify the chain of

custody of the samples, receive a copy of the analytical report of sample A, and is entitled to request the carrying out of an analysis of sample B and to be present at that second analysis.

- The result of the analysis presented by the Appellants, i.e. of the analysis carried out by the Barcelona Laboratory, cannot be used either, as none of the safeguards that had to be observed were complied with.
- The samples were analysed using an analytical method not recognized for the Barcelona laboratory.
- The Provincial Court of Madrid acknowledges there are doubts concerning the temperature at which the samples were kept.
- It has not been proved that the samples were delicately handled to accelerate coagulation.
- The temperature underwent considerable variations which exceeded the limits permitted by the regulation.
- The samples were not kept in a vertical position.
- The chain of custody of the samples was not guaranteed; as such it is possible that the bag was manipulated, or contaminated with the blood of other persons.
- The athlete has not been able to verify the analytical report of sample A and he has not had the chance to request an analysis of sample B nor to verify its being carried out.
- The blood analysis performed by CONI during the Tour de France was illegal; it violated Valverde's right to privacy, his right to protection of his personal information; and has been used to make a profile of his DNA without his consent.
- Once the Tour de France sample was analysed for the purpose of an anti-doping rule violation, it should have been destroyed. The purpose for the collection of that sample was never for conducting a DNA analysis. Article 6.3 of the WADA Code states that *"No sample may be used for any purpose other than to detect prohibited substances and prohibited methods identified on the Prohibited List and other substances as may be directed by WADA pursuant to Article 4.5 (Monitoring Program), without the Athlete's written consent"*.
- The results from the DNA analysis cannot be used as a result of the 18 February 2009, Criminal Court no. 31 of Madrid's decision declaring null and void the entire process of the Letters Rogatory of CONI.
- DNA analyses conducted in the framework of criminal proceedings cannot be used in other proceedings.

70. Mr Valverde's general objections against the scientific evidence are rejected. Quite apart from the question whether those objections were correct – in fact and/or in law – there is no evidence that supports the speculative assertions as being fact. The crucial point is that Mr Valverde does not deny that EPO is a prohibited substance. As follows from the UCI-ADR, the mere presence of exogenous EPO in the blood of an athlete is an anti-doping violation and Mr Valverde's general observations need only be addressed if the Panel would conclude that there is more than this "simple" anti-doping violation. As will be set out

hereafter, there is overwhelming evidence for such anti-doping violation and for a sanction thereon.

71. With regard to Mr Valverde's reference to other possible anti-doping violations dealt with by other competent anti-doping organizations[15], the Panel refers to its Order of 22 December 2009: only if it could be established that, in identical circumstances, Mr Valverde, without justification, has been treated differently by the anti-doping authorities competent in this regard, there might be ground to consider whether the equality principle has been violated. There is no evidence to this effect. Likewise, there is no evidence that the Appellants have violated any equality rights. There is no evidence either that any other personal rights of Mr Valverde were violated as alleged by him. But even if this were different, the overriding interest of the fight against doping would warrant this.

72. With respect to Mr Valverde's arguments related to the principle of good faith (*venire contra factum proprium*), that is recognized by Swiss law (article 2 of the Swiss Civil Code), such principle would be part of the Swiss public policy and would have been breached by the Appellants, who, by challenging the appealed decision and by sustaining that the documents related to the Operacion Puerto can be used, would act against their own action, the Panel deems that they are also ill-founded. While Swiss law does indeed protect good faith, it however disapproves the fact to act *venire contra factum proprium*, only under certain circumstances: as underlined in a comment on the Swiss Civil Code[16] *"l'ordre juridique ne réprouve le fait de* venire contra factum proprium *que si le comportement antérieur a motivé une confiance digne d'être protégée et a déterminé à des actions qui, vu la nouvelle situation, entraînent un dommage ATF 116 II 700 JT 1991 I 643, ATF 121 III 350 JT 1996 I 187, ATF 127 III 506 JT 2002 I 306, ATF 133 I 149 SJ 2007 I 421"*; such conditions are clearly not fulfilled here.

73. With regard to Mr Valverde's more specific defenses against the scientific evidence, the Panel's view is as follows:

74. It is common ground that the blood in Blood Bag no. 18 was not collected by way of an anti-doping test, but as forensic evidence. The Tour de France-sample blood was however collected by way of an anti-doping test.

75. Consequently, the first mentioned sample, and what happened with it after collection by way of transport and analysis, is formally not subject to the same rules, regulations and guarantees for the athlete as the latter mentioned sample is. That does not mean however that such forensic evidence cannot be used as evidence in a doping offence-case. Also Dr. de Boer testified that, if certain standards are met, such evidence can be used, also in non-criminal cases of a doping offense. And reference is made to the CAS-jurisprudence quoted at 53 above and to the similar conclusion in the Valverde-II case.

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15 P. 29/33 of his Answer Brief of 31 July 2009.

16 SCYBOZ/GILLIÉRON/BRACONI, CC & CO annotés, 8th ed., Basel 2008, ad. Art. 2 CC, p. 11.

76. In the situation at hand, the question to be answered is whether both samples, and their history – the manner in which they were collected, transported, stored, analyzed and reported upon – constitute convincing evidence to the Panel's comfortable satisfaction.

77. Mr Valverde asserts that this cannot be the case. His objections against the use of the Tour de France-sample as evidence is that there is a lack in the chain of custody, notably as regards the transport of the sample to the laboratory in Rome and until the analysis started there. With regard to the forensic sample, his objections are in essence equally that there are lacunae in the chain of custody, and also that the test carried out at the Barcelona laboratory is not reliable.

78. On these objections, a number of witnesses were heard at the Hearing. All of them testified in Valverde II as well, and it was accepted by all Parties that the parts of the Transcripts of their oral testimony in that case would be considered as their written testimony in the present arbitration. All witnesses heard in the present arbitration confirmed those statements before they gave oral testimony[17].

79. It follows from the evidence given by those witnesses that also Mr Valverde's more specific objections are to be rejected.

The witness/expert testimony on the scientific evidence

80. **Dr. Sansolini** testified that she was involved in this matter on two occasions. She was part of the team, with Messrs Arpino, Lano and Ferrante, that was sent to Barcelona in order to collect the sample for Blood Bag no. 18 in January 2009, and she was involved in the taking of the blood samples from Mr Valverde during the Tour de France in Italy in July 2008 (as well as a sample of urine). She was the responsible person for the sample taken during the Tour de France.

81. It follows from her testimony regarding the latter that:

- She was the responsible officer from the time the sample was taken during the Tour de France on 21 July 2008 until its reception in the Rome laboratory.
- She took the sample from Mr Valverde, all in conformity with the applicable rules; he was very cooperative and friendly.
- There were no irregularities when the blood sample was taken.
- This sample was handed to the official courier for these purposes, TNT, on 22 July, 00:45 a.m, for transportation it to the laboratory in Rome for further analysis.
- The transport was carried out in optimal conditions.
- The chain of control was guaranteed between the moment the sample left the place where it was taken until its arrival at the Rome laboratory.

[17] With one small exception being Dr. de Boer, who informed the Panel during his testimony that he was unaware that one exhibit he was presented with in the Valverde II matter in fact included details from Mr Valverde's EPO test. To that extent he said he did not ratify his previous testimony.

- This laboratory is WADA accredited, very strict and would have reported any irregularities which would have made the sample unfit for properly analyzing it, if it had noticed such irregularities on arrival of the sample and/or during the time the sample was analyzed.

82. With regard to her role in collecting the sample in Barcelona, it follows from her testimony that:

- Dr. Sansolini was appointed as an auxiliary to the criminal investigation division of the police and was authorized to take sample from Blood Bag no. 18 in Barcelona.
- Dr. Sansolini attended at the lab in Barcelona to collect the sample on 29 January 2009. She was accompanied by Dr. Arpino, Dr. Ferrante and Captain Lano.
- When they arrived at the lab Dr. Segura had defrosted the blood bag to enable Dr. Sansolini to take the samples.
- The blood bag was actually kept in a jar and it was opened before all the people present.
- With the equipment that Dr. Sansolini had brought with her from Rome, she took out 8 small samples from Blood Bag no. 18 and these samples were then sealed and packaged as per the protocol.
- Dr. Sansolini's actions in taking this sample were consistent with her normal practice in carrying out such activities.
- The samples collected had the identification numbers 278920 and 278833 and compounded with the Guardia Civil Nr. 18-1/242.
- The boxes in which the samples were kept, were sealed.

83. The Appellants have produced a "Record of delivery of material"[18] signed by i.a. Dr. Sansolini and Dr Jordi Segura, the Director of the Barcelona laboratory which states:

"Record of delivery material

In compliance with the instructions issued by Court No. 31 of Madrid (according to the Letters Rogatory No. 447/08), Messrs, Marco Arpino, Angelo Lano, Renzo Ferrante and Ms. Tiziana Sansolini have been authorized to take aliquot part of biological samples.

The aliquot parts so delivered correspond to portions of a plasma sample originally contained in a plastic bag received from the Civil Guard on August 1, 2006 in connection with Preliminary Proceedings No. 4293/06. The original sample received from the Civil Guard was transferred to a capped plastic container on August 18, 2006. Said sample was then kept in the freezer and never tampered with until Thursday, January 29, 2009 when it was moved to a fridge in order to facilitate its liquid condition on the date the aliquot parts were to be retrieved. Therefore, today eight aliquot parts have been taken from the plasma contained in the plastic contained in the plastic container and have been delivered to the above-mentioned persons".

[18] Exhibit 42 to WADA's Appeal Brief.

84. **Captain Lano** testified that he, along with Officer Ferrante, received the samples taken in Barcelona from Dr. Sansolini and Dr. Arpino in accordance with the applicable rules – i.e. in a cooled container – on 30 January 2009. And further:

- The procedure under which the CONI obtained the evidence in Blood Bag no. 18 was penal procedure 5599/2008, on behalf of the Prosecutor in Rome;
- he was given his mandate and directed by M. Ferraro of the Public Prosecutor's office in Rome;
- from the moment the samples were taken by Dr. Sansolini, they were placed inside a control temperature container which had been sealed with a mechanism to ensure safety
- that at all times he respected the chain of custody in a very precise manner;
- that he personally carried and delivered the samples to the laboratory in Rome on 31 January 2009;
- that the samples were received by him in a sealed container;
- that he received a declaration from the laboratory at Barcelona for the chain of control, covering the time since the Guardia Civil took possession and until the arrival at the Barcelona laboratory, until he took over when receiving the samples;
- after that, the chain of custody was not interrupted.

85. **Dr. Arpino** testified that he went to Barcelona with his colleagues Dr. Sansolini, Mr Ferrante and Captain Lano in order to collect the samples from the Barcelona laboratory pursuant to the letter rogatory. His evidence is further summarized as follows:

- Dr. Arpino was nominated as an auxiliary for the judicial police by the judicial authorities, as such he took part in various stages of the collection of a sample from Blood Bag no. 18;
- The request to the Spanish court clearly emanated, not only from CONI's office (*"officio di procura anti-doping"*) but also from the judiciary. This is clear from the stamps and the text and signature on the said request of 6 November 2008. The stamp bottom left is from the Procura della Republica, the round stamp bottom right is from the judge's (Judge Ferrano's) office.
- He attended at the Barcelona lab at an earlier occasion to collect blood samples as it turned out, from cyclist Ivan Basso. This cyclist was coded, in Dr. Fuentes' records, as Birillo, Basso's pet dog. Dr. Fuentes had a practice of using mainly names of dogs for his codes.
- He confirmed that courier services for the transport of samples be used and that the couriers that are normally used – such as TNT in Italy – are reliable. If anything would go wrong during a transport it is reported to CONI. Nothing was reported with regard to the blood sample taken from Mr Valverde during the Tour de France in July 2008 and transported to Rome by TNT.

86. **Dr. Biondo** testified that there was no indication of tampering with the samples he received in Rome; they pay attention to the slightest details on changes, if they would find anything

worth noting they would report it (such as a broken seal). His evidence is further summarized as follows:

- There was no degradation of the blood samples and Dr. Caglia and Dr. Castella confirm this in the sense that the result that Dr. Caglia obtained showed that the sample was not degraded.
- He also confirmed that plasma can be used for DNA-testing (also confirmed by Castella) and that the samples, when received the evening before the analyzing was made, were left in the appropriate department of the laboratory and at proper conditions.
- DNA-analyzing is high quality evidence, clear and final (Dr. Caglia confirms this).
- While it is theoretically possible to construct an artificial DNA profile, it would be nearly impossible to create an artificial blood sample in which to insert the DNA profile.

87. **Dr. Caglia** testified that she received 2 ampoules/flacons with blood, constituting sample ARA 278350, A and B, of which the A-sample was subjected to a DNA analysis by her. This sample had not been manipulated, it was sealed until tested. The B-sample, which was not tested, is still sealed. She checked whether the samples received had been tampered with; that was not the case. If the seals had been broken she would have noticed it. It follows from p. 4 of her Report that also the storing had been good. Castella agrees, de Boer saying that he is not an expert on DNA-analysis.

88. She did the DNA-analysis, and had at that time no idea whose blood it was and where it came from. The analysis was performed manually, by experienced and highly specialized persons, working diligently in order to prevent contamination. The reliability of the test was not compromised by the fact that the tests were manual, not automatic (also in Valverde II). Dr. Biondo confirms this. She then also compared the plasma and the blood; she had a sufficient quality of plasma for that purpose.

89. She referred to the Technical Report on the analyses conducted at her laboratory, confirming the following information:

- A description of the samples which were received and analyzed, viz. (inter alia) sample 3 (39236-01-003), a test tube containing a blood sample marked A-278350 which was analyzed; and a B-Sample (sealed) marked B-278350 which was not analyzed.
- Samples 4 (39236-01-004) and 7 (39236-01-007), test tubes containing blood plasma marked A-278920 and A-278833, which were equally analyzed. The B-samples were not analyzed.
- A description of the method used.
- An overview (p. 4 of 21) of the genetic profiles deducted from the analyses. The genetic profile of Sample 3A-278350 was identical to those of Samples 4 and 7, A-278920 and A 278833.

90. It follows from the Record that Sample A-278350 was the Tour de France sample, the other two were the Barcelona samples.

91. **Dr. Castella**, director of the DNA-analyses centre of Lausanne, Switzerland, by telephone, testified as follows.

- As a DNA-expert he found the (Caglia-report) convincing and he had no doubts with regard to the methods used with the results as indicated in that report.
- Storage conditions have no effect on the DNA-profile. Some genetic features may differ as a result of inadequate storage, but there is no influence there on genetic features that are discovered.
- There was no degradation of the sample, it had good quality also the quantity was sufficient.

92. He confirmed that the DNA, showing 16 loci, was of good quality. 10 loci would have sufficed. The chance that these profiles can be attributed to different persons is very, very low. There is only such possibility with identical twins. If the blood would have been contaminated, it would have been seen in this table.

93. **Dr. De Boer** testified that he has never conducted an EPO-analysis himself, but has observed them during B-sample analysis. He considers himself to be an EPO-analysis expert, and has some experience in and knowledge of forensic law. He agrees to the statements made by Biondo and Caglia with regard to the forensic aspects. And further:

- The analysis made at Barcelona was not performed in accordance with the WADA Code or a code in International Standards of Laboratories, i.e. there is not enough information with regard to the quality of the analysis made.
- The same is true with regard to the specific anti-doping ISO-norm.
- It was difficult to review the report of the EPO analysis that he was provided with because the copy was of very poor quality.
- The poor quality of the copy caused him to have some reservations about the method used and results obtained in this case.
- Therefore he considers this report is not sufficient to give a conclusion according to anti-doping rules.
- As far as he remembers, it is normal for an EPO-analysis that a second opinion is obtained from a certain number of experts.
- Storage conditions i.e. with regard to temperature are very important as they can influence the pattern of the final result. However, he had not seen any samples where (wrong) storage conditions had caused a false positive.
- The Barcelona laboratory usually tested EPO using urine-samples. Blood testing was probably new for it at the time, and therefore its method had to be adapted. The method in itself is good, but good quality control is required. He cannot judge whether that was the case.

- In Valverde II, he was unexpectedly confronted with a scientific article. After that Hearing he read this article more carefully. This reinforced the doubts that he expressed already at the other hearing.
- He repeated the difference between WADA-accredited laboratories and tests performed there, notably with regard to guaranteeing certain rights of control for the athletes, and forensic tests in other laboratories, such as the Barcelona laboratory, which do formally not grant the same rights.
- In his view, this entails that test results of the latter should give maximum information, beyond the minimum information required by the WADA Code.
- He confirmed that the Barcelona laboratory used ISA-norm 17025, which also served as the basis for the WADA Code but then specially adopted for anti-doping laboratories. This means that it did work according to certain quality standards, also in the case at hand.
- Consequently, there is no reason not to accept the result of the Barcelona test. Even laboratories not working according to the ISO-standard can deliver a good result. But he maintains his reservations as to whether the maximum information regarding the test in the case at hand was given or not; also because the athlete cannot check the process, e.g. on the chain of custody.
- It is impossible to add EPO to a blood sample afterwards.
- He accepts that storage conditions cannot entail a false positive, except in hypothetical circumstances that have not been studied yet. He did not know the actual storage conditions for the Valverde-samples.
- His reservations are not on the contamination of EPO reflected in the publication in the Barcelona-report, his reservations are on the question whether there was sufficient peer control in the publication, e.g. in a check whether immunopurification could have caused a shift in the position of the bands.

94. With the consent of all Parties, **Dr. Rabin**, Science Director of WADA, was heard as well, as the scientific counsel of a party. Also he had testified in the other Valverde-case and confirmed his testimony as transcripted that occasion. The following follows from his testimony.

- At the hearing in the other case, he had discussed with Dr. de Boer a publication that has been produced by the group of Dr. Jordi Segura and his team, the experts in his group. The title was *"Recombinant Erythropoietin found in seized blood bags for sportsmen"*.
- This publication was about blood samples, more precisely, on the presence of EPO in blood samples which had been analyzed as part of the activities of the Barcelona-laboratory in this operation.
- The Barcelona-laboratory is WADA-accredited. If a laboratory is not WADA accredited or not officially classified under the ISO-norm, it can very well carry out a proper analysis.

- WADA accredited laboratories are required to furnish a document on the chain of control with regard to samples kept and analyzed in order to prevent manipulation.
- In 2006, it was not usual to ask a second opinion from another laboratory on analyses made elsewhere, but it was possibly (strongly) recommended.
- The fact that this laboratory used the methods of isoelectrofocalisation, which it normally used for urine testing, is fully acceptable, provided that certain conditions are fulfilled.
- 8 Columns in the publication refer to samples with R-EPO: 5, 6, 7, 8, 9, 10, 11 and 12 (Col. 10 is Valverde).
- The dotted line separates the upper part, reflecting exogenous EPO, and the lower part reflecting endogenous EPO.
- Col. 10 shows a heavy construction of exogenous EPO. The number of 38 at the bottom, indicating the EPO concentration, is beyond 30 and therefore bad.
- In the Barcelona-report Mr Valverde is "18-1º242" on p. 6/49. The EPO-concentration reflected there (40, 95 (37, 29) differs only slightly from the retest in the publication.
- Col. 4 reflects the test of a person with no exogenous EPO.
- The publication was peer reviewed, which implies i.a. that immunopurification could not have caused a shift in the bands.

95. It was argued by Mr Valverde's counsel that the report of the Barcelona laboratory cannot be used as evidence because its author, Dr. Segura, did not appear as a witness. This is rejected. First, article 5.5 of the IBA-Rules on the Taking of Evidence in International Arbitration does not apply, as Dr. Segura is not a party appointed expert. Second, Dr. Segura has not produced a written witness statement either, so that article 4.7 of the said Rules does not apply either. In view of the above and of the importance of this article that has been demonstrated at the hearing, the Panel rules, in application of Article R44.3 of the Code (applicable by reference contained under Article R57) that his report is part of the documentary evidence. If Mr Valverde would have considered it useful, if not necessary, to have Dr. Segura's testimony, he could have called him as a witness.

The Panel's conclusion on the scientific evidence

96. Having carefully considered the scientific evidence on record, the Panel is satisfied that the result of both the tests carried out at the Barcelona-laboratory and those carried out in Rome meet the required standard of proof. There is no convincing evidence merely speculative arguments that there was anything wrong with the samples that were tested, with the taking of the blood for those samples, with the transport of those samples to the said laboratories and/or the storage and handling of those samples there and/or with the analyses for EPO and or DNA respectively.

97. The fact that Dr. de Boer may have some doubts, notably with regard to the analysis as performed in Barcelona, is insufficient to prove the contrary, also in the light of his statement

that, given e.g. the ISO-standard according to which this laboratory works, there is no reason not to accept the result.

Documentary evidence

98. Although the Panel considers the scientific evidence to be decisive for a conclusion that there was an anti-doping violation, it will, for the sake of completeness, also consider the documentary evidence.

99. To that end, the Appellants argue that the following demonstrates conclusively that Mr Valverde committed an anti-doping rule violation:

- Report no. 116 of the Guardia Civil clearly establishes Dr. Fuentes practice of blood doping, Dr. Fuentes himself explained that he manipulated athletes' blood values. Dr. Fuentes further confirmed that each blood bag referred to in the file was intended for the person who originally donated it.
- Report no. 116 clearly shows that Dr. Fuentes established a "code system".
- The Code "18 VALV.(Piti)" appear on documents 114 and 116 of Report no. 116.
- VALV. is visibly an abbreviation of the name Valverde.
- The Operacion Puerto documentation links other cyclists to the case.
- Dr. Fuentes was the team doctor for the professional cycling team Kelme (of which Valverde had been a member) and has intense contacts with the professional cycling team Liberty Seguros via Manolo Saiz.
- Dr. Fuentes was found in the possession of a business card of a hotel on which he had written by hand the name "Valverde".
- Dr. Fuentes himself declared that the "blood operations were essentially meant for athletes, cyclists as well as other athletes".
- In the Spring of 2006, a Spanish journalist E. Iglesias spent a day with Valverde and wrote an article about it. In that article E. Iglesias reported that when they arrived back at Valverde's after a training ride *"Piti una perra pastor aleman, nos da la bienvenida"* – translated to *"We're welcomed by Piti, a German shepherd bitch"*.
- Another article in December 2006 was published wherein Valverde states that he has two dogs, "Sara" and "Piti".
- Other riders in the Operacion Puerto documents were similarly referred to by their dog's name.
- Dr. Fuentes' calendar shows an appointment for code number 18 on 7 April for a treatment "R". "R" stands for the Spanish word "reinfusion", meaning the reinjection of blood.
- Document 87 to the Guardia Civil file is a list of riders and the number 18 is on the list.

- A tapped telephone conversation between Dr. Fuentes and Ignacio Labarta records them speaking about Alejandro Valverde.
- Jesús Manzano, a former cyclist and client of Dr. Fuentes admitted to having doped and further commented that Valverde would *"get the same things as me"*.
- The reliability of the documents presented was even acknowledged by counsel for Mr Valverde in an interview in September 2007.

100. Mr Valverde submits more specifically:

- The documentary evidence of the Appellants is speculative and not based on specific evidence. The identification the UCI has made of Valverde within the context of the Operacion Puerto filed is based on mere press clippings.
- It has yet to be proven that the lists of names or of banned substances found in the Operacion Puerto file are reliable.
- In no event, according to Report no. 116, did Dr. Fuentes use a code name to identify athletes together with the initials of their surname.
- Valverde does not have a dog called Piti.
- Dr. Fuentes' calendar shows that Valverde had a blood transfusion on 7 April 2005. However, 7 April 2005, Valverde was taking part in the "Vuelta Ciclista al Pais Vasco". On 6 and 7 April 2005, Valverde won the stage and as such was submitted to mandatory doping tests which were determined to be negative.
- Valverde's performance declined after 7 April 2005 which is incompatible with the carrying out of blood transfusion to improve performance.
- Following what is stated in Report no. 116, the letter "R" in Dr. Fuentes' calendar referred to a blood transfusion of blood extracted three or four weeks at most before the transfusion. However, in reviewing Dr. Fuentes' calendar there is no blood extraction attributed to Valverde in that period of time.
- Document no. 87 in the Operacion Puerto file is unreliable and does not make it possible to affirm that Mr Valverde was a client of Dr. Fuentes, or that he used banned substances, or engaged in banned methods.
- The Business Card with the word "Valverde" on it, found on Dr. Fuentes' person when he was first arrested does not make it possible to affirm that Valverde was a client of Dr. Fuentes or that he used banned substances or engaged in banned methods. In fact, the name on the card does not correspond with Dr. Fuentes' usual practice and as such, points one to the opposite conclusion, that Valverde was not a client of Dr. Fuentes.
- The alleged conversation between Mr Labarta, an associate of Dr. Fuentes, and Dr Fuentes where they refer to Valverde does not make it possible to confirm that Mr Valverde was a client of Dr. Fuentes or that he committed an anti-doping rule violation.
- The statements of Mr Manzano are not reliable. Not a single document has appeared in the context of Operacion Puerto that confirms his statements.

101. Before concluding on the weight of the documentary evidence, the Panel will deal with some of the other evidence that was offered. Inter alia with regard to the issue of the Code name Piti (or Pity), other witnesses were heard.

102. **Mr Jesús Manzano** testified that several times in the past, Mr Valverde and his wife spoke of his dog Piti. In his view, that must be the same dog as was mentioned in 2006.

103. On record is an extract of a press article written by a journalist Mr Enrique Iglesias which corroborates this evidence.[19]

104. Equally, at the Hearing, another journalist, Mr Jon Riva testified that he was at Mr Valverde's home in December 2005 and heard Mr Valverde called his dog – a puppy German shepperd – by its name Pity.

Conclusion on documentary evidence

105. On the basis of the evidence on record, the Panel also accepts the documentary evidence as convincing. Notably:

- The reference to Valverde Piti and (nr.) 18 in the Guardia Civil-report, in the light of the testimony of Messrs Manzano and Riva, and of the article written by Mr Iglesias. It is noted that no alternative explanation of these data was given by Mr Valverde. Whether this was Piti or Pity is not relevant in this context.
- The relation between Dr. Fuentes and the Kelme-team, of which Mr Valverde was a member until 1 January 2005.
- There is sufficient evidence of Dr. Fuentes using code names, i.e. with regard to the riders Basso ("Birillo") and Jörg Jaksche ("Bella") and Michele Scarponi ("Zapatero").

106. The fact that no other documents were found to show the relation between Dr. Fuentes and Mr Valverde (such as payment receipts) does not outweigh the other evidence.

Other evidence

107. Other evidence is on record as well. Insofar as that other evidence, notably of other witnesses testifying at the hearing is not dealt with in this Award, it means that the Panel has considered it not relevant or in any event not decisive for its conclusion in the light of the evidence that it has specifically referred to.

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19 "Un Dia con Valverde" of 23 June 2006, Exhibit 50 to WADA's Appeal Brief.

108. It should be mentioned that Mr Manzano testified on a possible doping offence by Mr Valverde already in the beginning of this century. He stated as follows:

- He visited, during the Vuelta 2003, a certain Dr. Merino Batres; his, Manzano's blood was taken then, and, although he did not see that Valverde's blood was taken as well, Valverde, and all the other riders, went there for the same reason, i.e. that their blood be taken by Dr. Batres; he saw though that Valverde entered a cabin, with another rider named Sevilla, where the blood was to be taken and that he left this cabin with his arm folded.
- Winter 2002, at the hotel Patilla à Santa Paula, *"ampulles"* inter alia of EPO were distributed to the members of the team of which Valverde and Manzano formed part., in different quantities in syringes with different colours EPO was named *"pelas"*; it was Dr. Fuentes who said that this was *"pela"*. At the same occasion, he saw Valverde using a patch of testosterone.
- During the 2002 Vuelta, at the hotel Reconquista, he saw Valverde being injected by Dr. Fuentes with 2000 pela, in the room that he shared with Mr Valverde that day; he even saw, several times, syringes as well as injections of cortisone or corigina.
- That situation however was different from what was done at the hotel Patilla; the syringes that were given to the riders then were for medical treatment at home, and different from what was administered during competition.
- In his world, the letter *"R"* stands for *"Reinjection"* and the letter *"E"* for *"Extraction"*.
- In his calendar, an *"E"* would generally precede an *"R"*.
- The reinjection of blood would take between 35 and 45 minutes.
- He did not know whether Dr. Fuentes added EPO to the blood before such transfusion. The EPO treatment would take place some 12 days earlier.

109. On the other hand **Mr Arrieta** denied that, on 7 April 2005, Mr Valverde received a blood transfusion. According to Mr Arrieta, he and Valverde spent the entire day together and on the few occasions they were not together, there would have been no opportunity or time to undergo one.

110. It also transpired that Mr Manzano may have been mistaken with regard to the hotels mentioned by him.

Conclusions with regard to an anti-doping violation

111. On the basis of the foregoing there is, in the Panel's view, sufficient evidence that an anti-doping violation was committed by Mr Valverde in 2006, more precisely on 6 May 2006 when Mr Valverde's blood was discovered by the Guardia Civil and, as was established later, this blood contained EPO, a prohibited substance as meant in article 15 of the UCI-ADR. At least of article 15.2:

2. "Use or Attempted Use by a Rider of a Prohibited Substance or Prohibited Method"

for which, pursuant to article 15.2.1, Mr Valverde is responsible. It might also be considered to be a violation of Article 15.1. But the Panel needs not go into this as the violation of article 15.2 – and of Article 2.2 of the World Anti-Doping Code – is sufficient for its further conclusions.

112. On the strength of this finding it is not necessary to go into other possible offences that were alleged by the Appellants, such as whether there was also an attempt to an anti-doping violation by Mr Valverde at any point in time, or an anti-doping violation already before 2006 as might follow from Mr Manzano's evidence.

Double jeopardy or *ne bis in idem*?

113. Two days before the Hearing in the present case, the Award was rendered in what in the said Hearing was referred to as "the Other Valverde-case"[20], and above as "Valverde-II".

114. That Award triggered the question whether there could be a double jeopardy or a "ne bis in idem", as the suspension imposed on Mr Valverde in that Award was based on the same facts – in essence: EPO-contaminated blood in Blood Bag no. 18 which was proved to be his blood – that play a role in the present case.

115. It is noted that this argument has not been duly brought forward by any Party in the present case. Mr Valverde has argued that, if an anti-doping violation would be established and he would be suspended for a period of 2 years, he would in fact be suspended for a total period of 3 years, having taken into account his suspension in the other case. That is, in the opinion of this Panel, a different argument.

116. The ne bis in idem principle is defined in Article 14.7 of the International Convention on Civil and Political Rights as follows:

"No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

117. And Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Liberties (ETS No. 117), of 22 November 1984, Art. 4.1 provides:

"No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State".

118. These provisions refer to criminal or penal proceedings and are not applicable here. They could however be considered in proceedings like the one at hand here, as it can be argued that a severe sanction imposed in disciplinary proceedings should be subject to the same principle.

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20 TAS 2009/A/1879.

119. It is noted that, in one handbook on Swiss criminal law, it is said that there are three specific requirements to be fulfilled for this principle to apply: an identity of the object, of the parties and of the facts[21].

120. The identity of the object is described as follows:

"1°. L'identité d'objet. L'objet, c'est-à-dire ce qui est recherché, est toujours, en matière répressive, l'application d'une peine ou d'une mesure à l'auteur de l'infraction. Il est donc nécessaire que la décision revêtue de l'autorité de la chose jugée soit identique quant à son objet. Tel ne sera pas le cas si l'auteur d'une infraction a été soumis à une enquête disciplinaire qui a conduit à un prononcé disciplinaire: avertissement, amende, suspension, révocation. Dans cette situation, il n'y a pas identité d'objet entre une poursuite et un prononcé disciplinaires et une poursuite pour infraction pénale, en raison des mêmes faits. De par leurs buts différents, la procédure pénale et la procédure disciplinaire sont en principe indépendantes l'une de l'autre. Aussi, rien ne s'oppose à ce que les mêmes faits soient punis pénalement et sanctionnés disciplinairement".

121. The identity of the parties, as described in this handbook, focuses in part on the identity of the person subject to the proceedings.

"2°. L'identité de parties. La deuxième condition requise pour qu'une décision répressive ait l'autorité de la chose jugée est celle de l'identité de la personne poursuivie. Il faut en effet que, dans les deux procès, le prévenu soit le même"

122. The identity of the facts is described as follows.

"Le même fait, c'est donc le même fait matériel. Si la juridiction acquitte, c'est que le fait poursuivi n'était punissable sous aucune qualification; si elle condamne sous une qualification donnée, c'est qu'aucune autre qualification ne pouvait être retenue. L'identité de fait pour fonder l'exception de la chose jugée, doit être niée lorsque les faits nouvellement poursuivis sont matériellement distincts les uns des autres. Ainsi, par exemple, la réitération du même fait, après un premier jugement d'acquittement ou de condamnation, ou la persistance du même fait, mais une première condamnation, permet de nouvelles poursuites".

123. It is noted that the same criteria were referred to in CAS 2008/A/1677.

124. Interestingly, the same criteria seem to be applied in Swiss civil law. In one leading handbook it is said that, also in civil law, the relief sought is essential:

"Il faut alors se reporter aux motifs de la demande et aux motifs du précédent jugement pour déterminer si les prétentions sont identiques.

(…)

21 PIQUEREZ G., Traité de procédure pénale suisse, 2nd ed., Zurich 2006, nr. 1541.

Par contre, il n'y a pas identité d'objets:

- *Lorsque les conclusions sont différentes.*

  Ainsi, l'action en revendication fondée sur la propriété n'est pas identique à celle fondée sur le droit de gage (ATF 84 I 221 p. 224)

- *(…)"*[22].

125. In the two Valverde-cases, there is clearly an identity *"… de la personne poursuivie …"* and of the facts. In both cases, Mr Valverde is involved as well as WADA and the UCI. The fact that the RFEC was not a party to "Valverde II" is not decisive, as the sanction which could possibly be imposed twice was not directed against the RFEC.

126. The question is whether there is identity of the object as well. This is not the case in the sense that, in the present case, *"ce qui est recherché"* or *"(les motifs de) la demande"* are more far reaching than in Valverde II.

127. What was sought – and ruled – in Valverde II was a suspension for the protection of Italian sporting competition only for Italy. What is sought in the present case is the punishment of the athlete for violation of the rules of his sport, thus justifying a worldwide ban against his participation in his sport.

128. Thus, there is no *"ne bis in idem"*. With regard to double jeopardy, the Tribunal has the impression from Mr Valverde's racing activities that he did not participate in any race in Italy already before the first decision in the other case, of May 2009.

129. In any event, the importance of a worldwide ban if there is an anti-doping violation would outweigh the fact that an earlier, more limited ban was imposed.

The sanctions to be imposed

130. Article 261 of the UCI-ADR provides as follows:

"Except for the specified substances identified in article 262, the period of Ineligibility imposed for a violation of article 15.1 (presence of Prohibited Substance or its Metabolites or Markers), article 15.2 (Use or Attempted use of Prohibited Substance or Prohibited Method) and article 15.6 (Possession of Prohibited Substances and Methods) shall be:

First violation: 2 (two) years' ineligibility

Second violation: Lifetime ineligibility

However, the License-Holder shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in articles 264 and 265".

22 HOHL F., Procédure civile, Tome I, Bern 2001, nrs 1300 and 1304.

131. Article 275 of the UCI-ADR provides as follows:

"The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period during which provisional measures pursuant to articles 217 through 223 were imposed or voluntarily accepted shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction may start the period of Ineligibility as on earlier date commencing as early as the date of the anti-doping violation.

(text modified on 26.06.07: amendment applicable on any case not finally decided on 26 June 2007)".

132. Mr Valverde has not contested the sanction pursuant to Article 261 in case of a violation of Articles 15.1 and 15.2 as such, but he has argued, notably at the Hearing, that, in the light of the two year-suspension imposed on him in Valverde- II, a two year-suspension in the present case, would amount to a suspension of three years or more in total, counting from, respectively, the day on which the sanction in the other case takes effect – 11 May 2009 – and the date of this present Award.

133. This is incorrect. The suspension in Valverde-II was limited to the Italian territory, and it is widely known that Mr Valverde has participated in many races elsewhere since that suspension was imposed; accordingly, that sanction had no, or limited, impact outside Italy.

134. It is, however, the view of this Panel that this arbitration has been subject to delays, even major delays. These proceedings have been ongoing for nearly three 3 years now. Those delays were mainly caused by – in summary:

a) the requests by WADA and the UCI that further evidence should be sought, notably by making formal requests, through the appropriate Swiss channels, to the Spanish judiciary, to release Blood Bag no. 18 or a sample thereof.

b) the delay that, unfortunately, occurred after the CAS request pertaining thereto, to the Tribunal Cantonal de Vaud ("TC"): Due to circumstances beyond either of the parties' control, or the CAS', this formal request was delayed for lack of translation of the request by the TC into Spanish. The formal request was thus not re-transmitted to the Spanish authorities in the appropriate form until 1 September 2008. In the light thereof, the Panel extended the stay for a second time by way of its Order of 24 December 2008.

c) the fact that, owing to one of the Panel members being prevented from attending the Hearing scheduled for November 2009, this Hearing had to be postponed until March 2010.

135. Mr Valverde opposed all of the Appellants' requests for extension, urging the Panel to continue the proceedings and not grant any further extensions.

136. Further delay was caused by the appeal in Valverde-II. One day before the expiration of the extension granted by the Panel's Order of 24 December 2008, on 27 February 2009, WADA and the UCI requested a further stay of the proceedings based on the fact that the Italian

proceedings had just commenced. Also this request was opposed by Mr Valverde and was, after further discussion, denied by the Panel on 15 June 2009.

137. It could be argued that the delays caused by the Appellants' requests for further evidence, which were accepted by the Panel until its Order of 15 June 2009, resulted from the fact that Mr Valverde did not cooperate in making such evidence available himself, notably by refusing, in actual fact, to make Blood Bag no. 18 available and to submit himself to further testing.

138. As a matter of principle, an athlete has the right to refuse such cooperation. But in the case at hand Mr Valverde has specifically committed himself to a certain cooperation, in his Rider's Commitment to a New Cycling, in which he avowed that he would make a contribution to putting the situation right and making cycling clean by signing the said statement, to demonstrate that he fully adheres to principles defended by the International Cycling Union (UCI). That statement read:

"I declare to the Spanish Law, that my DNA is at its disposal, so that it can be compared with the blood samples seized in the Puerto affair. I appeal to the Spanish Law to organize this test as soon as possible or allow the UCI to organize it".

139. Having regard to Mr Valverde's conduct throughout this arbitration, it is clear that no attempt was ever made on his part to follow through with this commitment.

140. On the other hand, it equally follows from the record that Mr Valverde has always strongly opposed any request from the Appellants for extensions, stating that it was in his interest to have these proceedings terminated as quickly as possible. It is also noted that the delays enabled WADA and UCI to gather more evidence (particularly the CONI evidence) to which they would not have access to had the proceedings not been delayed.

141. Weighing all the circumstances, the Panel considers it fair to let the period of Ineligibility referred to in Article 275 start on 1 January 2010.

142. Article 274 of the UCI-ADR provides as follows:

"In addition to the automatic Disqualification of the results in the Competition pursuant to article 256, all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition, or other doping violation occurred, through the commencement of any Ineligibility period, shall, unless fairness required otherwise, be Disqualified.

Comment: it may be considered as unfair to disqualify the results which were not likely to have been affected by the Rider's anti-doping rule violation".

143. 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.

The Court of Arbitration for Sport rules:

1. The appeals filed by the Union Cycliste Internationale and the World Anti-doping Agency are partially upheld.

2. Alejandro Valverde is found guilty of an anti-doping rule violation under Article 15.2 of the UCI Anti-doping Rules (version 2004).

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.

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

(…).