Arbitration CAS 2007/A/1396 & 1402 World Anti-Doping Agency (WADA) & Union Cycliste Internationale (UCI) v. Alejandro Valverde & Real Federación Española de Ciclismo (RFEC), preliminary award of 10 July 2008

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

Cycling
Doping (suspicion)
Principles of interpretation of a provision
CAS jurisdiction
Admissibility of the appeal
Interim measures

1. **Under Swiss law, for the interpretation of contracts, one first has to look at the text. If the text is not clear, then one must look at the intention of the Parties (subjective test); if that cannot be established, then the contract should be interpreted in an objective manner (objective test). However, the UCI-ADR may be more in the realm of a statute, a bylaw, or general conditions to a contract rather than a contract between the parties. According to the CAS jurisprudence, in practice, the principles of interpretation overlap to a large degree and both methods converge considering that the literal meaning (the wording) of the provision or clause is the starting point. In any event, according to the Swiss Federal Tribunal, if the text of statutes, rules or regulations is not clear and unambiguous, and if the intention of the parties to such statutes, rules or regulations cannot be established – if that subjective criterion should play a role at all in this context – the interpretation must be on the basis of what the other party to the one from whom such statutes, rules or regulations emanate could reasonably expect the meaning thereof to be.**

2. **The issue of the CAS jurisdiction might depend in certain circumstances on the meaning of some provisions -contained in UCI-ADR- and notably on the meaning of a *"discovery"*, referred to in those provisions. There is a discovery in the sense of Articles 9 and 10 of the UCI-ADR if there is a reasonable suspicion, at a certain finding, that there is an anti-doping violation.**

3. **The purpose of any provision relating to a time bare and more particularly to the admissibility of an appeal is to protect the interest of all concerned. In the interest of justice and proper proceedings, art. 247 and 248 of the UCI-ADR should be interpreted strictly. In such strict interpretation, this means that the term for the Appeal for the Appellant does not start before the day after the Appellant has in its possession an official copy of the decision of the relevant authority.**

4. As a general rule, the CAS grants provisional remedies (1) if the requested measure is useful to preserve the appellant from substantial harm, (2) if it is likely that the action is not deprived of any chance of success on the merits and (3) if the interests of the requesting parties outweigh those of the opposing parties.

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 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 licensed by the RFEC and currently racing for Caisse d'Epargne.

In 2004, the Spanish penal investigation and prosecution commonly known as *Operación Puerto* was commenced. This investigation was conducted as a coordinated effort by the Guardia Civil of Spain ("Guardia Civil") and the Madrid *Juzgado de Instrucción no. 31* as it was based on public law and the violation of public health.

The primary focus of these investigations was Dr. Eufemiano Fuentes Rodriguez (Dr. Fuentes). Dr. Fuentes is a sports physician and gynaecologist whose practice often involved a high rate of consultations by elite athletes, including many cyclists.

On 23 May 2006, Mr Maolo Saiz, the Sport Director of the cycling team *Liberty Seguros-Würth*, and four other people, including Dr Fuentes were arrested and charged with various violations of Spanish public health legislation.

In the context of seizures conducted by the Guardia Civil in *Operación Puerto*, a high volume of documents, doses of doping products, various machines for blood manipulation and transfusion, and nearly two hundred packets of blood products, including bags containing blood taken from numerous individuals were seized by the Guardia Civil.

On or about 30 May 2006, the RFEC intervened as a civil party in these proceedings against Dr. Fuentes.

On 28 June 2006 the Public Prosecutor requested the investigation magistrate, Judge Don Antonio Serrano ("Judge Serrano"), to release a copy of the Guardia Civil's report no. 116, relating to these proceedings, to the Consejo Superior de Deportes (CSD) for sports disciplinary purposes.

On 29 June 2006, Judge Serrano ordered that a copy of the *Operación Puerto* file be remitted to the CSD for transmission to the RFEC, the UCI and WADA.

On 29 June 2006, the CSD wrote to the RFEC, in transmitting the file and stated *inter alia*,

> *"Having received official information and documentation, which seem to show the possible commission of sport disciplinary infringements relating to doping offences committed by Spanish and/or foreign athletes, who hold a license issued by the Real Federación Española de Ciclismo and or by the International Cycling Union, such information and documentation is enclosed herewith in order that this entity, empowered with the sports disciplinary authority pursuant to Ley del deporte 10/1990, of 15 October identifies the possible disciplinary responsibilities and informs the International Cycling Union of the facts which might fall under its jurisdiction within the sports disciplinary order".*

The entity referred to as empowered with the sports disciplinary authority pursuant to the Ley del deporte 10/1990 of 15 October was the Comite Nacional de Competicion y Disciplina Deportiva (CNCDD), the competent body for doping matters within the RFEC.

On 8 March 2007, the investigating magistrate closed the *Operación Puerto* investigation.

On 12 March 2007 and 7 May 2007 the UCI and WADA respectively were granted status as civil parties in the *Operación Puerto* proceedings.

On 3 September 2007, the decision to close the proceedings was appealed by the RFEC, the UCI and WADA.

On 11 February 2008, the Audiencia Provincial de Madrid partially accepted the appeal and remitted the file to the investigating magistrate for reconsideration.

On 29 August 2007, the UCI Anti-doping Commission, having reviewed the file, sent a request to the RFEC, asking that the national federation open disciplinary proceedings against Mr Valverde. This request was accompanied by elements of the file seized by the Guardia Civil in the context of *Operación Puerto*.

On 7 September 2007, the CNCDD 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 decisions of 7 September 2007 which both WADA and the UCI appeal in this case.

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 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 fro 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 cost".

By letters dated 19 October 2007, the Respondents wrote to the CAS indicating, in essence, the following:

1. That regarding the language of procedure they would consent to the arbitrations being in English, provided that evidence may be produced in either French or English;
2. It was intended to raise a defence of lack of jurisdiction and to challenge the CAS competence to rule on the present dispute;
3. The UCI lodged its appeal late;
4. Nominating Prof Miguel Angel Fernández-Ballesteros as common arbitrator for the Respondents;
5. Requesting that any and all proceedings relating to these two CAS arbitrations be stayed until the Panel issues a final and interim decision on CAS jurisdiction; that it makes no sense to proceed with any provisional measure requested by the Appellants.

It was agreed by all parties that documents in any language other than English or French would be translated into either of these languages.

On 20 February 2008, the Respondents accepted the joinder of these two cases.

On 12 February 2008, the Panel wrote to the parties stating that a preliminary hearing would be held in April 2008 to determine the issues of jurisdiction, admissibility of the appeal and the request for provisional measures.

On 13 February 2008, the UCI wrote to the CAS requesting that the Panel make an urgent ruling under interim request number 3. UCI further informed the CAS that it had recently learned the Court of Appeal in Madrid would soon convene to make a decision on the appeal against the decision of Judge Serrano and consequently there was a significant threat that the contents in blood bag no. 18 would be lost.

On 13 February 2008, WADA also wrote to the CAS making an urgent request that the Panel decide immediately on WADA's interim request number 2.

In response to these communications, the Respondent RFEC wrote to the CAS by way of letter dated 14 February 2008 and objected to the CAS making this order stating,

- That it objects and opposes any order or measure to be issued by the Panel so long as CAS jurisdiction is not established;
- The UCI appeal was filed late and consequently the Panel should give no consideration to its request of 13 February 2008;
- The measure UCI seeks is not provisional in nature because the purpose of it is not to prevent the occurrence of an irreparable harm;
- The UCI's statement that according to the Puerto file, the bag number 18 has been attributed to Mr Valverde is wrong.

Similarly, by way of letter dated 14 February 2008, Mr. Valverde wrote to the CAS objecting to the CAS making a ruling on the UCI's request.

On 20 February 2008, the Respondents made a number of submissions on the jurisdiction of the Panel, the details of which are summarised in the interim order the Panel issued on 5 March 2008.

On 26 February 2008, the Panel wrote to the parties indicating its intention to issue a decision shortly on the "urgent" provisional request. The Panel further stated that the issue of provisional measures would nevertheless be finally decided on at the hearing.

The Panel issued this decision in its Order of 5 March 2008.

In this Order the Panel ruled that,

> *"1. The CAS shall Request Judge Don Antonio Serrano, Juzgado de Instrucion No. 31, Plaza de Castilla 1 (Planta 8a), 289046 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 perform further tests, if so decided later.*
>
> *2. If the Parties would not agree differently within two days after this Order the CAS shall in its Repeal designate the (Lausanne Laboratory)*[1].
>
> *3. The decision whether the blood shall be used for relevant DNA test, as requested in the second part of the Request for this interim measure, is postponed".*

On 7 March 2008, in response to the Panel's Order, the CAS received a letter from Mr. Valverde which stated, *inter alia,* that Mr. Valverde is of the opinion that the CAS Panel should have waited until the Respondent lodged his views on the Appellants' request for provisional measures prior to issuing its Order. However, Mr.Valverde nevertheless expressed that he respected the decision of the Panel on this matter. Mr. Valverde further submitted that in consideration of the Order being to safeguard evidence only, it could well remain in the Barcelona laboratory.

[1] The full name for the Lausanne Laboratory is *Laboratoire Suisse d'Analyse du Dopage.*

On 7 March 2008, the RFEC equally submitted by way of letter, that considering the purpose of the order, the blood bag could remain in the Barcelona Laboratory.

By way of letters on 11 March 2008, both Appellants wrote to the CAS objecting to the Respondents' requests regarding the location of the blood bag and sought the transfer of the blood bag, or contents thereof to the Laboratory located in Lausanne, Switzerland.

On 12 March 2008 the Panel clarified its order that in light of the disagreement between the Appellants and Respondents on the requested location of the blood bag, the blood bag was to be sent to the Lausanne Laboratory.

In connection with its Order of 5 March 2008, a letter was written and sent to Judge Serrano on behalf of the CAS on 1 April 2008.

On 11 March 2008, the Respondents both submitted to the CAS their views on the Appellants' requests for interim measures.

On 18 March 2008 the Appellants made further written submissions on the Respondents' submissions on jurisdiction.

On 1 April 2008, the Appellants filed with the CAS their response to the Respondents' views on the requests for interim measures.

On 11 April the CAS received a communication from Judge Serrano in response to its request made on 1 April 2008. The request of the CAS was denied, stating,

> *"Dada cuenta; recibida la anterior comunicación del Tribunal Arbitral su Sport, que se unirá a las diligencias de su razon.*
>
> *Visto el contenido de la petición, no ha lugar a acceder a lo que se solicita, por cuanto el Tribunal Arbitral de Deporte (TAS) dependiente del Consejo Internacional de Arbitraje en materia deportiva (CIAS) es una fundación de dercho privado y por lo tanto sus miembros son todos personas juridico-privadas, quedando excluidas por tanto del Convenio de Asistencia Juridica en materia penal entre los Estados miembros de la UE, de 29 de mayo de 2000 y su posterior desarrollo a través de la Declaración de 23 de septiembre de 2003.*
>
> *Communiques est resolución al Tribunal solicitante a los fines que procedan".*

The following informal English translation was provided to the Panel regarding the above:

> *"Acknowledging receipt of the communication from the Court of Arbitration for Sport, which will be included in the file.*
>
> *Once analyzed its content, it is concluded that the request contained in it must be rejected as the Court or Arbitration for Sport (CAS), depending on the International Council of Arbitration for Sport (ICAS), is a private law foundation and therefore its members are all private corporate bodies, being excluded, for this reason, of the Convention in Legal Assistance in Criminal Law among the EC State member of 29 May 2000 of its later development from 23 September 200".*

This translation was forwarded to the Parties for potential comments. There were no comments received so this translation can be considered as approved.

The final views of the Respondents with respect to the Appellants' submissions and requests were submitted on 14 April 2008.

On 14 April 2008 Mr Valverde submitted the following request,

> *"In accordance with Art. 44.3 the Respondent beg the Panel, for the sake of the defence, to ask the Appellants to bring the following documents before the Hearing:*
>
> *UCI: Written of opposition, dated 6 November 2007, to the Appeal Resource against the Sentence passed by the Juzgado de Primera Instancia Number 6 in Almeria…*
>
> *RFEC: Copies of the Decisions taken by the CNCDD of the RFEC related to the opening and closure of the procedures initiated against the Spanish riders included in the Report number …".*

On 17 April 2008, the CAS Panel wrote to UCI and RFEC inviting them to bring the requested documents to the hearing.

On 18 April 2008 a hearing was held in Lausanne, Switzerland to determine the issues of the jurisdiction, timeliness of the UCI's appeal, and the interim requests.

At the conclusion of the hearing, the Panel requested that the parties, by way of a joint submission, provide to it, all relevant articles and translations thereof that, according to the parties, the Panel would require in order to make a complete and final assessment of all the matters in issue. Furthermore, the Panel also requested the parties provide an agreed translation of the 3 October 2006 decision of the Juzgado de Instruccion 31 of Madrid.

LAW

Jurisdiction and applicable law

1. According to Article 186 of the Loi de Droit International Privé the arbitral tribunal shall rule on its own jurisdiction (*"le tribunal arbitral statue sur sa propre compétence"*).

2. The CAS' jurisdiction is disputed by the Respondents. This issue shall be dealt with hereafter. It is not in dispute that if, pursuant to Articles 9 and 10 of the UCI-ADR, the UCI has jurisdiction, the decision at issue can be appealed against to the CAS, pursuant to chapter XI of the UCI-ADR.

3. With regard to the applicable law, R58 of the CAS Code provides:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the

parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for tits decision".

4. It is common ground that the applicable regulations in the case at hand are the UCI-ADR.

5. Article 290 of the UCI-ADR provides:

"The CAS shall decide the dispute according to these Anti-Doping Rules and the rules of law chosen by the parties or, in the absence of such o choice, according to Swiss law".

6. No rules of law were chosen by the parties. Accordingly Swiss law shall apply to the merits of this dispute, in addition to the UCI-ADR.

On the Merits

7. There are three issues to be addressed in this Decision:
   (a) jurisdiction;
   (b) the admissibility of the UCI-appeal;
   (c) Interim Measures no. 1, 3 and 4 (WADA) and 1, 2, 4 and 5 (UCI).

A. Jurisdiction

8. It is common ground that the issue of the Panel's jurisdiction depends on, first of all, the meaning of Articles 9 and 10 of the UCI-ADR; and notably on the meaning of a *"discovery"*, referred to in those provisions.

9. The UCI-ADR do not contain a rule for the interpretation of its provisions. Consequently, this interpretation has to be made in the light of Swiss law.

10. Under Swiss law, for the interpretation of contracts, one first has to look at the text; if the text is not clear, then one must look at the intention of the Parties (subjective test); if that cannot be established, then the contract should be interpreted in an objective manner (objective test)[2].

11. However: the question is whether such rules and regulations as the UCI-ADR should be considered to be a contract between certain parties. They may be more in the realm of a statute, a bylaw, or general conditions to a contract.

12. This question is not answered by the UCI-ADR.

[2] Cf. THEVENOZ-WERRO, Code des Obligations I, nr. 133 *et seq*.

13. There seems to be less unanimity in Swiss doctrine and case law, whether statutes and similar rules and regulations should be interpreted in a likewise manner as contracts. But it is the Panel's impression that the overriding opinion is that the same criteria should apply.

14. Besides, as it was said in a recent CAS award:

"Under Swiss law there is some controversy regarding the method of interpretation that applies to the rules of an association, i.e. whether they should be interpreted using the method applicable to provisions of law or using the method applicable to contracts. However, in practice the principles of interpretation overlap to a large degree and both methods converge considering that the literal meaning (the wording) of the provision or clause is the starting point[3]".

15. In any event, if the text of statutes, rules or regulations is not clear and unambiguous, and if the intention of the parties to such statutes, rules or regulations cannot be established - if that subjective criterion should play a role at all in this context - the interpretation must be on the basis of what the other party to the one from whom such statutes, rules or regulations emanate could reasonably expect the meaning thereof to be.

16. As the Swiss Federal Tribunal said in ATF 87 II 89 JT 1961 I 1529:

"Les statuts doivent être interprétés selon le principe de la confiance, le sens que les membres peuvent raisonnablement attribuer aux dispositions statutaires d'après les règles de la bonne foi étant déterminant et la règle, qu'un texte doit être interprété contre celui qui l'a rédigé étant applicable".

This is the principle of confidence (*"Vertrauensprinzip"*), which is also a principle of Swiss Contract law[4].

17. Another principle that is accepted under Swiss law for the application and interpretation of statutes and the like is the *"contra proferentem"*- principle[5].

18. In the light of these considerations, the Panel has first of all analysed the text of Articles 9 and 10 of the UCI-ADR.

19. With regard to the word *"discover"*, a leading English dictionary[6] gives the following definition:

1) to be the first person to become aware that a particular place or thing exists …

2) to find somebody/something that was hidden or that you did not expect to find …

3) to find out about something; to find some information about something …

4) (often passive)

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[3] CAS 2007/A/1377

[4] PERRIN, Droit de l'association, p. 59; ZEN-RUFFINEN, Droit du sport, nr. 169; Tribunal Fédéral, 27 June 2002, 5C.328/2001 (Kroatische-Kulturverein/Jovic et alia).

[5] ATF 87 II 89, JT 1961 I 1529; Tribunal Fédéral, 25 February 2003, 4C.350/2002 (Dame B contre X).

[6] Oxford Dictionary (Advanced learners), 7th ed.

To be the first person to realise that somebody is very good at singing, acting etc. and help them to become successful and famous.

20. It is questionable whether this definition gives much guidance (let alone: decisive guidance) although, interestingly, it should be noted that, at 2) the example is added:

"Police discovered a large stash of drugs while searching the house"[7].

21. If that definition and example would be followed literally, the Appellants might be correct in contending that it was the Guardia Civil that made the relevant discovery as, indeed, the Guardia Civil reports:

"Considérant le contenu de la législation administrative du sport dans son état actuel, tant au plan national qu'international, et en outre la motivation pour les prochains évènements sportifs de haut niveau qui pourraient se voir compromis par la participation d'équipes ou de sportifs qui auraient enfreint les normes actuelles, nous vous informons des identifications et des implications détectées jusqu'ici de la part de sportifs qui, de l'opinion de l'Instruction, auraient contracté les groupes FUENTES et MERINO dans le but d'augmenter leur rendement sportif en compétition".

22. This (part of the) Guardia Civil report is worded in a special manner in the light of the Spanish legislation at the time, when an anti-doping violation was not considered to be a crime but "only" a violation of the law pertaining to public health. However, the gist of this report is, notably in its last part and considered in the light of the preceding pages, where it appears that material had been seized which can be considered to be related to the finding of forbidden substances, that the Guardia Civil is of the opinion to have discovered *"… drugs while searching …"*.

23. But the analysis of the mere text of Articles 9 and 10 of the UCI-ADR, and notably of what *"discover"* could mean, does not necessarily lead to a decisive conclusion. Therefore, the Panel finds that it should in addition be considered whether such strict interpretation of the text of Articles 9 and 10, and then of what *"discover"* could mean, is acceptable in the light of the other tests which can be made under Swiss law, i.e. the subjective and the objective test.

24. In the light of both tests, WADA submits that it was either the Guardia Civil or the UCI, or, alternatively, the Public Prosecutor or the Investigating Magistrate, that made the relevant discovery. It submits:

"Using a subjective test would entail establishing which entity first believed that the evidence obtained demonstrates that an anti-doping violation has been committed and thus warrants the opening of disciplinary proceedings".

Whereas

"Using an objective test would entail establishing which entity first obtained material possession of evidence that

[7] It is noted that the main edition of the Oxford Dictionary does not precisely copy this definition, but its first definition and example is *"to find unexpectedly or during a search (firemen discovered a body in the debris)"*. And the Cambridge Dictionary for advanced learners gives its first definition and example as follows: *"1) to find something ("the body was discovered in a ditch")"*.

an anti-doping violation has been committed".

In WADA's view, in both cases the relevant conclusion is that CAS has jurisdiction.

25. As mentioned above, a subjective test under Swiss law means that one should look at what the intention of the parties was with regard to the text involved (*"la volonté des parties"*).

26. However no evidence has been offered on what the intention was with Articles 9 and 10 of the UCI-ADR from all those parties interested and involved when those provisions were drafted and adopted. There is no provision in the UCI-ADR to the effect that the unilateral interpretation by such bodies as WADA and/or the UCI of these Rules is decisive.

27. As the intention of the Parties relevant for the UCI-ADR – if that criterion would be applicable at all under Swiss law – cannot be established, an objective construction of the text has to be considered.

28. In that context, the debate between the Parties was (in summary) whether the mere fact that someone, a person or a body, confronted with a finding that could possibly be an anti-doping violation, is sufficient for there to be a discovery, or that there is a further dimension thereto, viz. that such person or body should have the capacity to legally recognize such finding as an anti-doping violation. The latter is the view of the Respondents, the former is the view of the Appellants.

29. Both approaches would be unacceptable in their ultimate consequences from a reasonable, objective point of view.

30. At the Hearing, the example was mentioned of a person finding, during a cycling race, an empty, unidentified syringe and handing this syringe to some authorities; eventually it is found that this syringe contains traces of some forbidden drug. Who, in that example "discovered" the anti-doping violation?

31. In the approach of the Respondents, the discovery occurs when a person or body qualified thereto has established the anti-doping violation. The ultimate consequence of this approach would be that an anti-doping violation can only be established at the final stage: when the authority decisively competent to establish whether or not there has been an anti-doping violation - a state or disciplinary court or an arbitral tribunal - has in the last instance ruled that there is or was an anti-doping violation.

32. The Appellants' approach, in its ultimate consequence, would be that it was – in hindsight – the finder of the syringe that made the discovery. That would equally be unacceptable. Such finder may have had a suspicion that the syringe could have contained forbidden substance, but the question is whether that is sufficient. The syringe might as well have been filled with insulin, used by a diabetic spectator and having lost its label. Even if it would have come from one of the competing cyclists it might have contained some harmless or in any event not forbidden medicine.

33. As so often is the case, the proper interpretation is in between those extremes. The Panel is of the opinion that there is a discovery in the sense of Articles 9 and 10 of the UCI-ADR if there is a reasonable suspicion, at a certain finding, that there is an anti-doping violation.

34. The question then is whether it was, in the light of this criterion, the CSD that made the relevant discovery as the Respondents contend. There is something to be said for that. Nevertheless, the Panel rejects this approach.

35. First, as already expressed in the Order of 5 March 2008, it is questionable whether the wording used by the CSD itself:

"having received official information and documentation, which seem to show possible commission of sport disciplinary infringements relating to doping offences committed by Spanish and/or foreign athletes, who hold a license issued by the Real Federacion Espagnola de Ciclismo and or by other International Cycling Union, such information and documentation is enclosed herewith in order that this entity, empowered with the sports disciplinary"

is sufficient to constitute a reasonable suspicion. If not, then the discovery in the case at hand was not made by the CSD but at some later stage - possibly: has yet to be made as the chain of events for the discovery, in fact, stopped after the CSD's intervention. This was this Panel's prima facie impression when it decided on the Interim Measure regarding the letter to Judge Serrano.

36. But second, even if, in applying this criterion, one should consider the CSD to have met this test, it would not help the Respondents. The fact is that the CSD in all respects acted as an in-between. It based its conclusion on the findings of the Guardia Civil. It did not carry out any investigation of its own. It received the file, noted the findings and conclusions of the Guardia Civil, made them its own and passed the file on to the RFEC all on the same day: 29 June 2006.

37. In fact, the CSD did refer to the Guardia Civil's finding as:

"official information and documentation, which seem to show possible commission of sport disciplinary infringements relating to doping offences".

It did not refer to such findings as its own. Its conclusion, in other words, was ancillary to that of the Guardia Civil. Also in that light, it was the Guardia Civil that made the relevant discovery, not the CSD. The fact that the legal competence of the CSD may be different from that of the Guardia Civil is, for the case at hand, not decisive in the opinion of this Panel; the reasonable suspicion of an anti-doping violation was with the Guardia Civil, the CSD merely reflected this without an investigation of its own. The mere fact that the competence of the CSD was different is not relevant under these circumstances.

38. It is common ground that the Guardia Civil is not an Anti-Doping Organization. Therefore, Article 10 of the UCI-ADR does not apply. Pursuant to Article 9 (ii), the UCI has jurisdiction and, consequently, with regard to the present appeal, the CAS.

39. It has been argued by the Respondents that, in some cases, the UCI has accepted Spanish jurisdiction. Even if that would be so this is, in the opinion of the Panel, irrelevant for the decision at hand. The Panel has to rule on its jurisdiction in the light of the relevant facts and circumstances pertinent to this case. Those facts and circumstances may be different from those in other cases. It has not been argued by the Respondents that, in the cases they referred to, the facts and circumstances were identical to those of the present case and/or that the (alleged) acceptance by the UCI of Spanish jurisdiction in other cases amounts to a waiver with regard to the CAS-jurisdiction in the case at hand.

40. For those reasons, the documents, the production of which was requested by Mr. Valverde on 14 April 2008, are irrelevant.

41. For the same reason, it is irrelevant for the CAS jurisdiction that the Appellants intervened in the Spanish proceedings. This did not amount to a waiver of the jurisdiction of the CAS.

42. There has also been a debate as to whether the file that was remitted to the CSD for transmission to the RFEC, the UCI and WADA can be used for any purpose other than administrative purposes.

43. That question, whatever its merits, is equally irrelevant for this Panel's jurisdiction. This Panel's jurisdiction – in summary – hinges on the interpretation of articles 9 and 10 of the UCI-ADR in the light of the relevant facts and circumstances of the case at hand, not on the question whether the said file can be used for other purposes or not.

44. For the same reason, the Panel considers that the documents (…) are not relevant for its ruling on jurisdiction.

B. Admissibility

45. Articles 247 and 284 of the UCI-ADR Rules provide as follows, respectively.

"One full copy of the decision, signed at least by the president of the hearing body, shall be sent to the License-Holder and the UCI. These copies shall be sent by registered post with proof of receipt within 3 (three) working days of the decision. The UCI shall send the text of the decision to WADA and to the License-Holder's National Anti-Doping Organization".

"The statement of appeal by the License-Holder or the other party to the case must be submitted to the CAS within 1 (one) month of his receiving the full decision as specified in article 247. Failure to respect this time limit shall result in the appeal being disbarred".

46. It is common ground that the relevant decision of 7 September 2007 was sent to the UCI by the RFEC by fax on that day and by normal post on the same day; this letter was received by the UCI on 11 September 2007.

47. The UCI's appeal against that decision was lodged on 11 October 2007.

48. If follows further from the evidence on record that:

- the decision that the UCI received was not a document signed by the president of the hearing body – which would be the CNCDD – but a document drafted, signed and sent by the RFEC:
- the real and formal CNCDD-decision, signed by its president, was not received by the UCI before 22 September 2007; and then not by registered mail but as an Exhibit in the proceedings concerning Mr. Valverde being allowed to participate in the World Championships[8].
- materially, the UCI knew what the CNCDD's decision of 7 September was before it received the official document.

49. Obviously, in the light of the provisions just quoted, the UCI-Appeal would be too late if one would take the fax transmission of 7 September 2007 as the criterion. This is what the Respondents contend: the term of the appeal starts as from the moment that the party that wishes to lodge an appeal has knowledge of the decision to be appealed against, regardless as to whether that knowledge is the result of the formal notification referred to in Article 247 or not. The Appellants submit the opposite.

50. It is common knowledge that questions related to a time bar, including the question when a time bar commences or is supposed to commence, can create numerous problems. If no strict and formal criterion is applied, all sorts of borderline questions can occur. Such as, in the case at hand, as to what knowledge of a decision should or can be allowed to be sufficient, when such knowledge should or can be deemed to exist and the like.

51. It is fully understandable, and legally fully acceptable that regulations, in order to prevent those kinds of problems, contain clear, strict and unambiguous provisions in this regard. That should be recommended. Article 247 of the UCI-ADR is an example thereof.

52. In applying this provision, it should be borne in mind that this provision purports to protect the interest of all concerned: all parties that wish to appeal against a decision that they consider to be wrong – the athletes as well as the associations – such as the UCI itself. Everybody can only benefit when debates on problems as referred to above are avoided.

53. For those reasons, this Panel considers it in the interest of justice and proper proceedings that such provisions are interpreted strictly.

54. In such strict interpretation, this means for the question at issue that the term for the Appeal for the UCI did not start before 23 September 2007, the day after the UCI had in its possession an official copy of the decision of the relevant authority, the CNCDD.

[8] TAS 2007/O/1381.

55. Also in this context the Panel observes that the criterion to be applied – the formal one rather than the informal one – should not be carried to the extreme. Should one do this, then the term of appeal against the decision of the CNCDD would never have commenced, as this decision was apparently never communicated to the UCI by way of registered mail. It cannot be excluded that this, under other circumstances, should be the conclusion. But not in the case at hand: by lodging its appeal against the CNCDD-decision, the UCI must be deemed to have waived its right to a registered letter as required by Art. 247 of the UCI-ADR.

56. In contrast, the UCI has not waived its right not to accept the fax of 7 September as the proper means of communication, at all or in particular for the official CNCDD-decision.

57. The debate as to whether the receipt by the UCI, on 11 September, of the RFEC's letter of 7 September should be considered to constitute a proper notification is irrelevant. Probably not, as it did not enclose the relevant CNCDD decision in its proper form; and the UCI did not waive any right in this regard. But even if that letter were considered as a proper notification - even when not sent by registered mail and without an official copy of the relevant decision - the appeal was lodged within a month thereafter[9].

58. In conclusion, on these grounds the UCI's appeal is admissible.

59. It is uncontested that WADA's appeal is admissible.

C. Should the Interim Measures be ordered?

60. The joinder requested by the UCI at 1 of its Statement of Appeal can be granted in the light of the fact that the Respondents have accepted this request.

61. WADA's and the UCI's requests for an Interim Measure at 2 and 3, respectively, have been dealt with in the Panel's ruling of 5 March 2008.

62. Thus, the Interim Measures that have to be decided upon in this Decision are the following:

For WADA

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;

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;

[9] Under art. 77 para. 1 of the Swiss Code of Obligations, where an obligation is to be performed or another legal transaction is to be effected within a certain number of months after a contract is concluded, the relevant expiry date is *"the date in the last month corresponding to the date in the month when the contract was concluded"*. The effect of Article 77 paragraph 2 of the CO is that this rule also applies in cases like the present, where *"the period runs from a date other than the conclusion of a contract"* such as the receipt of a certain document (CAS 2007 A/1362 & 1393 para. 5.6).

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;

For UCI

2. Order Alejandro Valverde Belmonte to submit to the collection of a biological sample for the purpose of DNA analyses;

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;

63. The most controversial requests concern Mr. Valverde's submission to the collection of a biological sample for the purpose of DNA analyses; WADA's request at 1, the UCI's request at 2.

64. At the Hearing, the Appellants made it specifically clear that the test which is requested does not necessarily mean a physical intrusion. A hair or nail clippings would suffice.

65. Equally at the Hearing, the lawyers for Mr. Valverde made it specifically clear that Mr. Valverde still confirms the Statement made by him on 3 July 2007 (the "Declaration"). It was also stressed that Mr. Valverde wanted a quick solution for the present situation as the uncertainty causes him damages (notably: loss of contracts). However, Mr. Valverde nevertheless rejects to give a follow up to the Declaration on principle grounds. In essence: he is to be considered innocent and it is not up to him to prove that he is not.

66. There has been a debate first of all as to whether the test requested should be considered to be a provisional or conservatory measure in the sense of R37 of the Code or an evidentiary measure as in the sense of R44.3.

67. Technically, the request cannot be considered to be for an evidentiary measure in the sense of R44.3. That provision only deals with the possibility of the production of documents or the hearing of witnesses and experts. Obviously, the present request goes beyond those borders[10].

68. The reference to *"any other procedural act"* in R 44.3 is not specific enough in order to conclude that it encompasses such far reaching measures as those requested by the Appellants under 1 and 2 respectively.

69. As has been set out in the Order of 5 March 2008 as a general rule, the CAS grants provisional remedies (1) if the requested measure is useful to preserve the appellant from

[10] It is noted that e.g. Article 25 of the Arbitration Rules of the LCIA, has a wider range. *Inter alia*, an LCIA Tribunal has the power to order, on a provisional basis, subject to final determination in an award, any relief which the Tribunal would have power to grant in an award, including a provisional order for the payment of money or the disposition of property as between any parties.

substantial harm, (2) if it is likely that the action is not deprived of any chance of success on the merits and (3) if the interests of the requesting parties outweigh those of the opposing parties[11]. The Panel agrees with an earlier CAS decision that each of these considerations is relevant but that one of them may be decisive on the facts of a particular case[12]. The question is whether those standards are met for the Requests at hand.

a) Substantial harm

70. In considering this question, it should be borne in mind that the Requests relate to the collection of a biological sample from which DNA may be obtained. Then the DNA from Valverde can be compared with the blood in blood bag no. 18.

71. It is clear that such comparison can only be made when such blood from blood bag nr. 18 is available. It is equally clear, in the light of Judge Serrano's answer to the CAS-letter of 1 April 2008, that it may take some time, if not: a long time before this shall be the case (if it shall come at the disposal of the CAS or the Appellants at all.)

72. In that light, the Panel can see no substantial harm to the Appellants if the requested material – be it a hair, nail clippings or other – is not put at the disposal of the Appellants at this point in time; no comparison can be made anyway as long as the blood bag no. 18 is not at its disposal. If the blood of blood bag no. 18 would at a certain point in time be available for a comparison to be made, a consideration of a similar request then made by the Appellants might be different. There is no irreparable harm either if the Order would be granted at a later point in time (if at all).

73. There is no other urgent reason why the Appellants' request should be granted either. Paradoxically, it follows from Mr. Valverde's statement that there is urgency on his part: first, already in his Declaration, he requested that a test be made as soon as possible. Second, as noted at the Hearing, he claims that he is missing contracts and thus suffers damages on account of this present situation

74. However, the fact that there is urgency on Mr. Valverde's part to those reasons does not mean that there is urgency on the Appellants' side. And since Mr.Valverde resists the request for this Interim Measure - inconsistent as that may seem to be in the light of the urgency pleaded on his part - that test for the Appellants still has to be applied.

75. The Appellants' request fails to meet that test. There may be a general interest for the Appellants as well to come to an end of the present uncertain situation but that in itself is not enough to establish urgency.

[11] See for instance the order issued on 25 July 2005 in the case CAS 2005/A/916 and the order issued on 17 July 1998 in the case CAS 98/100.
[12] CAS OG 02/004, 14 February 2002.

76. There is another element to be taken into account. The Respondents have submitted repeatedly that, since the Appellants have been admitted as a civil party in the Spanish criminal proceedings, they could lodge a request to release the blood bags directly to the competent Spanish Court. The Appellants have equally repeatedly submitted that it is preferable that the CAS lodges such a request and that, in any event, such a request by the CAS would support their position.

77. Now the CAS has lodged the request. The (informal) request was rejected by the Spanish judge but that should not mean that it could, as such, no longer be considered as supportive of a request to that effect made by the Appellants.

b) Balance of interests

78. Similar observations can be made with regard to the balance of interests. In the light of his repeated Declaration, Mr. Valverde may seem to have no interest in resisting the requested Interim Measure – subject again of course to his principle arguments. But that does not automatically entail that the balance of interests tips in favour of the Appellants.

c) Success on the merits

79. Paradoxically, the question whether the Appellants have any chance of success on the merits depends (possibly to some extent) on the request being granted and the outcome of the test to be performed thereafter.

80. But that is putting the cart before the horse. It might be different if there would be strong evidence from other sources, at this point in time, to support this Appellants' case on the merits. However, that is not the case.

d) The other aspects of the Request for a test

81. In the light of these considerations, the Panel needs at this point in time not deal with the other arguments as to whether a test as requested can be allowed or not.

e) Stay of Proceedings

82. With regard to the Appellants' request for a Stay of the Proceedings, the majority of the Panel considers it prudent to stay the Proceedings for some time until, hopefully, there is further clarification with regard to the question whether blood bag no. 18 or part thereof shall become available for further tests.

83. Such stay should not be indefinite. Therefore, the Tribunal rules that the proceedings on the merits are stayed until the date when a formal answer by the Spanish Juzgado de Instrucion shall have been received. However, the Panel may revisit this issue, spontaneously or at the request of a party, if there would, in its view, be reasons thereto. Moreover if, after 6 months from the date of the preliminary award, no formal response from the Spanish Juzgado de Instruction would have been received, the proceedings will resume.

The Court of Arbitration for Sport rules:

1. The CAS has jurisdiction.

2. The appeal filed by WADA on 5 October 2007 is admissible.

3. The appeal filed by the UCI on 11 October 2007 is admissible.

4. The request for interim measures filed by WADA and the one filed by the UCI are dismissed at this point in time.

5. The present appeal, including the submission by WADA and the UCI of their appeal briefs under article R51 of the CAS Code, shall be stayed, on the terms of Panel's observation above.

6. Any further requests of the parties are stayed**.**

7. The costs of the present preliminary award will be determined in the final award or in an award on costs to be rendered by the Panel in this matter.