Arbitration CAS ad hoc Division (O.G. Sydney) 00/009 in the matter Angel Perez, award of 25 September 2000

Panel: Mr. Michael Beloff QC (England), President; Mr. Stephan Netzle (Switzerland); Judge Bola Ajibola (Nigeria)

Canoe/Kayak
Appeal from a CAS decision
Principle of res judicata

1. **It is special feature of the ad hoc rules that matters before an ad hoc Panel must be dealt with speedily. These rules must be respected not only by the Panel but also by all parties summoned before it. The tight and inflexible schedule of the Olympic Games dictated these elements of the ad hoc rules.**

2. **Usually a Tribunal cannot entertain an appeal against its own decision from a party to such decision: to entertain such an appeal is the function of any body (in any) which has an appellate jurisdiction over such Tribunal. There are situations in which under some systems of law, a Tribunal may revisit its own decision: if, for example, the party who is the object of the adverse decision was not notified of the proceedings. However, the Swiss Act on Private International Law expressly states that when it is sought to set aside such an award because of a violation of the right to be heard, the body, if any, which has power to make such an order is the Swiss Federal Tribunal.**

This is an application of the Cuban National Olympic Committee ("Cuban NOC") filed on 24 September 2000 at 12:10 pm naming CAS as the Respondent and the International Olympic Committee ("IOC") as an interested third party and claiming as relief that *"Rule 46 of the Olympic Charter be accomplished in the case of Mr. Angel Perez"*. It challenges the decision of a CAS Panel of the Ad hoc Division dated 18 September 2000 which held Mr. Perez eligible to compete in the Sydney Olympic Games in the kayak competition ("*Perez N° 2*").

The Cuban NOC appeared before us by their President, José R. Fernandez and their attachée, Mrs. M.L. Fernandez. The IOC appeared by their Director of Legal Affairs, Howard Stupp. The United States Olympic Committee ("USOC"), the International Canoe Federation ("ICF") and USA Canoe/Kayak Federation and Mr. Perez also appeared as Respondents or interested third parties collectively represented by Mr. Mark Williams SC.

Mr. Angel Perez was born in Havana in 1971 and competed for Cuba in the 1992 Olympic Games in Barcelona.

In May 1993, after a competition in Mexico, Mr. Perez did not return to Cuba. He entered the United States and immediately made an application for asylum under the U.S. immigration laws. He has since been a resident of Miami, and has never returned to Cuba.

In 1994, Mr. Perez married a U.S. citizen. He and his wife had a child in 1995, born in Miami.

On 11 September 1995, Mr. Perez was awarded permanent residence status as a "Resident Alien" in the U.S. ("Green Card").

Mr. Perez competed for the U.S. in the kayak World Championships in 1997, 1998 and 1999 in accordance with the Rules of the International Canoe Federation.

In September 1999, Mr. Perez obtained U.S. citizenship.

On 21 August 2000, the United States Olympic Committee and USA Canoe/Kayak requested the IOC to grant Mr. Perez the right to participate in the Sydney 2000 Olympic Games. The IOC denied this request on 28 August 2000, for the following reasons:

> *"The facts of this case clearly fall within paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter. In particular, in view of:*
>
> *(i) Mr. Perez having previously represented Cuba in an international competition as referred to in Paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter;*
>
> *(ii) Less than three years having passed since Mr. Perez has become a national of the United States; and*
>
> *(iii) The NOC of Cuba not agreeing to reduce this three years period referred to in Paragraph 2 of the Bye-law to Rule 46 of the Olympic Charter.*
>
> *Mr. Perez is not eligible to represent the United States at the 2000 Sydney Olympic Games.*
>
> *The IOC regrets that the parties concerned were not able to resolve this matter so as to allow Mr. Perez to compete for the United States, especially in view of the fact that it has been approximately eight years since Mr. Perez last represented Cuba".*

On 12 September 2000, the USOC and USA Canoe/Kayak commenced proceedings before the Court of Arbitration for Sport Ad hoc Division for the Sydney Olympic Games seeking a decision which would allow Mr. Perez to participate for the United States of America in the Kayak competition of the Sydney 2000 Olympic Games ("*Perez N° 1*").

On 13 September 2000, the CAS ad hoc Division for the Sydney Olympic Games delivered an award dismissing the application.

On 17 September 2000, Mr. Perez filed an application instituting *Perez N° 2*. To the application was attached a letter dated 14 September 2000, signed by Edward W. Gnehm, Ambassador of the United States of America, addressed "To Whom it May Concern" and affirming that the Claimant had been a national of the United States under U.S. law *"for a period considerably in excess of three years"* before the beginning of the 2000 Olympic Games.

Hearings in *Perez N° 2* were conducted on 18 September 2000 from 10:30am until the mid-afternoon at the offices of the CAS ad hoc Division, 66 Harrington Street, The Rocks, Sydney ("the CAS offices"). Mr. Perez, USA Canoe/Kayak, IOC and USOC were present or represented. The Cuban NOC received a summons to that hearing. The chronology of events described below was established through means of the documentation referred to, and the uncontested statements of the representatives of the Cuban NOC and of USOC and Mr. Perez before us.

The Cuban NOC was provided a copy of the application and invited to attend the hearings as "a interested third party" entitled to be heard and to adduce evidence (see Article 15 (c) of the Arbitration Rules for the Games of the XXVII Olympic in Sydney) ("the ad hoc Rules"). The invitation to them is evidenced by a summons bearing the fax timing 09:09 am dated September 18, 2000 and which states:

"COURT OF ARBITRATION FOR SPORT (CAS)
TRIBUNAL ARBITRAL DU SPORT (TAS)
Ad hoc Division – Sydney Olympic Games
CAS arbitration N° SYD 5
SUMMONS TO APPEAR

1. *Pursuant to Art. 15 lit. c para. 1 of the CAS Arbitration Rules for the Games of the XXVII Olympiad in Sydney (the "CAS ad hoc Rules"),*

   Cuban National Olympic Committee

   is ***summoned to appear*** *as interested third party on* ***18 September, 2000, at 10:30 hours*** *before a Panel of arbitrators of the ad hoc Division of the Court of Arbitration for Sport in the arbitration between*

   Angel Perez
   and
   The International Olympic Committee (IOC)

   The hearing will be held at the Offices of the CAS ad hoc Division, 66 Harrington Street, The Rocks, Sydney, [Tel: 8115 7970; fax: 8115 7971]

   The Panel of arbitrators is composed of:
   The Hon. Robert Ellicott, President
   Mr. Jan Paulsson
   Mr. Dirk-Reiner Martens

2. *The purpose and contents of the hearing are set forth in Art. 15 lit. c para. 2 of the CAS ad hoc Rules, which reads as follows:*

   "At the hearing, the Panel shall hear the parties and take all appropriate action with respect to evidence. The parties shall introduce at the hearing all the evidence they intend to adduce and produce the witnesses, who shall be heard immediately".

Therefore, if you would like to submit any document to the Panel or have any persons heard by it as witnesses or expert-witnesses, you are requested, to every extent possible, to produce those documents and persons along at the hearing.

3. The following documents are attached to this summons:
- *For the Cuban NOC:*
  a copy of Claimant's application filed before CAS and of Exhibit E. [*]

For the ad hoc Division of CAS
Gabrielle Kaufmann-Kohler – President"

[* The other exhibits already being in the possession of the Cuban NOC]

That notice was given to the Cuban NOC is further evidenced by a memorandum by Mr. Matthieu Reeb, Acting Secretary General of CAS at 09:30 am of the same date ("the Reeb memo".) The Cuban NOC did not attend, but prior to the hearing filed a letter bearing the caption "CAS arbitration N° SYD 5", dated 18 September 2000 (although on its face faxed at 10:42 pm on 17 September) which arrived early in the hearing and reads in its entirety as follows (translation):

"*The Cuban Olympic Committee has restated on various occasions that Mr. Angel Perez, athlete in Canoe-Kayak, has not complied with the requirements of Rule 46 of the Olympic Charter.*

In view of the above, the Cuban Olympic Committee confirms that Mr. Angel Perez is not eligible, and does not authorise him to represent the US Olympic Committee at the Sydney Olympic Games".

This letter establishes receipt of the summons. In any event in the "Statement of Attestation" to this Panel, signed by the President and General Secretary of the Cuban NOC dated 24 September 2000, receipt of the summons is admitted. The Cuban NOC did not request an adjournment of the hearing before it commenced (see the Reeb memo) nor while it was being conducted – as Mr. Fernandez, their President, accepted before us. Their claim that they were in practice prevented from attending was not raised until this present application.

At the hearing in *Perez N° 2*, Mr. Perez produced an opinion on relevant Cuban law signed by Avelino J. Gonzales, Esq., a Cuban lawyer now practising in Florida who is a graduate and former Adjunct Professor of the University of Havana.

On the basis of that opinion, the Panel held that even if (as they found) Mr. Perez did *not* become a U.S. national until 1999, he nevertheless should be treated as a stateless person as of 1993, with the consequence that he "changed his nationality" for the purposes of Rule 46 of the Olympic Charter more than three years previous to the Sydney Olympic Games, and thus could participate as a U.S. national irrespective of the Cuban objection.

The Cuban NOC said that they first heard of the decision in *Perez N° 2* though the press and as a result wrote a letter to the President of the Panel in *Perez N° 2* (The Honourable Robert Ellicott, QC) dated 18 September protesting the decision but making at that time no suggestion that they had previously been denied an opportunity to argue their case.

The Cuban NOC now seeks to challenge the decision in *Perez N° 2* by adducing evidence which, they assert, established that at all material times Perez was and is a national of Cuba and that therefore (as they would submit) that decision was wrong.

The kayak competition in which Mr. Perez is presently an intended participant, commences on 26 September.

LAW

1. These proceedings are governed by the CAS Arbitration Rules for the Games of the XXVII Olympiad in Sydney (the "ad hoc Rules") of CAS enacted by the International Council of Arbitration for Sport ("ICAS") on 29 November 1999. They are further subject to Chapter 12 of the Swiss Private International Law Act of 18 December 1987 ("the Swiss PIL Act") as a result of the express choice of law contained in Article 17 of the ad hoc Rules and the choice of Lausanne, Switzerland, as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to Article 7 of the ad hoc Rules.

2. The jurisdiction of the ad hoc Division is based on the entry form signed by all participants in the Olympic Games and on Rule 74 of the Olympic Charter. (see further as to NOCs: CAS Arbitration N° SYD 6 *Baumann v. IAAF*, para 4.3.2; CAS Arbitration N° SYD 2 *Samoan NOC v. IWF*).

3. Article 17 of the ad hoc Rules requires the Panel to decide the dispute *"pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate"*.

4. According to Article 16 of the ad hoc Rules, the Panel has *"full power to establish the facts on which the application is based"*.

5. Article 18 of the ad hoc Rules requires the Panel to *"give a decision within 24 hours of the lodging of the application"*.

6. A preliminary but critical issue arises as to whether this Panel either could or should entertain this present application. It is common ground that the Cuban NOC was served as an interested party in *Perez N° 2*. Their complaint is that they were not notified in sufficient time to appear at the stipulated hour, given the distance between the Olympic Village where they were located and the CAS office. However, in the circumstances set out above, in our view, they are estopped from disputing that they were a party to *Perez N° 2* with the rights (as well as the obligations) attendant upon such status.

7. In reaching this conclusion we draw attention, in particular, to the following matters:

a. The nature of the issue to be raised in *Perez N° 2* i.e. Mr. Perez's eligibility to compete in the Sydney Olympics was self-evident. The brief written communication from the Cuban NOC set out above indicates the Cuban NOC's awareness of the issue.

b. The summons addressed to the Cuban NOC makes it clear that it was offered a full opportunity to participate in the hearing and to adduce relevant evidence.

c. The Cuban NOC therefore had an option to participate or not. The Reeb memo is direct evidence of their awareness of this, but even if the unidentified person who spoke to Mr. Reeb lacked authority, the existence of the option appears on the face of the summons which was admittedly received.

d. To the extent that the Cuban NOC was unaware as to how Mr. Perez would put his case or was unprepared to deal with it, the remedy lay in its own hands i.e. to ask for an adjournment. It had a right to do so. There is no reason to assume that an adjournment (within the time constraints inherent in the ad hoc Rules) would *not* have been granted.

e. In effect the Cuban NOC *did* indeed participate in *Perez N° 2* by sending the written communication set out above, which further evidences their awareness of their right of audience. In any event, it was a party properly served and had the opportunity to participate in the hearing.

f. The Panel in *Perez N° 2* found that the Cuban NOC *"did not avail itself of the opportunity given to it to appear"*.

8. It is special feature of the ad hoc rules that matters before an ad hoc Panel *must* be dealt with speedily (see Article 18: Time limits; Article 15 (b): Procedure; Article 15 (c): Hearing; Article 9 (a) *in fine*: notice by telephone). These rules must be respected not only by the Panel but also by all parties summoned before it. The tight and inflexible schedule of the Olympic Games dictated these elements of the ad hoc rules.

9. The present NOC application is in form and fact an appeal against the decision in *Perez N° 2* (CAS is being named as Respondent). Usually a Tribunal cannot entertain an appeal against its own decision from a party to such decision: to entertain such an appeal is the function of any body (in any) which has an appellate jurisdiction over such Tribunal. In this instance, *Perez N° 2* was governed by Chapter 12 of the Swiss PIL Act (Article 7 of the Arbitration Rules for the Games of the XXVII Olympiad in Sydney). Under the Swiss PIL any appeal from a decision of an ad hoc panel by a party must go to the Swiss Federal Tribunal (subject to Article 21 of the ad hoc Rules).

10. There are situations in which under some systems of law, a Tribunal may revisit its own decision: if, for example, the party who is the object of the adverse decision was not notified of the proceedings. However, in respect of an arbitration such as *Perez N° 2*, the Swiss PIL Act *expressly* states that when it is sought to set aside such an award because of a violation of the right to be heard, the body, if any, which has power to make such an order is the Swiss Federal Tribunal (The Swiss PIL Act, Article 190, Article 191; also *G. v. FEI and CAS*: Judgement of the Swiss Federal Tribunal of 15 March 1993, para. 7. Cf. CAS 2000/A/298 *R. / AJF*, para 20; SYD N° 2 *Miranda*, para 28).

11. It is not, of course, for us to speculate how the Swiss Federal Tribunal would resolve the issues sought to be raised by the Cuban NOC before us if it were to entertain them.

12. It is not open to the Cuban NOC to by-pass such stipulated procedures on the basis that it is instituting *fresh* proceedings. In our view it is estopped from doing so because it was a party to *Perez N° 2* (see above para. 6-7).

13. With respect to the point properly raised by the IOC before us, the present situation can be distinguished from that in *Perez N° 2* when, it is true, the Panel considered many of the issues raised in *Perez N° 1*. However materially Mr. Perez, the applicant before them, had not been a party to *Perez N° 1* and accordingly the doctrine of *res judicata* or estoppel was inapplicable (see *Perez N° 2*, para. 6). By contrast, the Cuban NOC was, in our view, a party to *Perez N° 2*. Finality as well as fairness is a desirable objective of all litigation and arbitration. We consider that our determination, which accords with relevant legal provision and principle, properly balances these objectives.

14. In those circumstances we hold that we cannot consider this application at all: and we make, in consequence, no observations whatever on the relevance or cogency of the evidence which the Cuban NOC sought to adduce before us: nor on the validity or otherwise of the construction of Olympic Charter Rule 46 and its Bye-Laws to be found in *Perez N° 2* at para. 25-27, which is challenged in the Cuban NOC application.

The CAS ad hoc Division rules:

The application filed by the Cuban National Olympic Committee on 24 September 2000 is rejected.