Arbitration CAS 2016/A/4828 Carlos Iván Oyarzun Guiñez v. Union Cycliste Internationale (UCI) & UCI Anti-Doping Tribunal (UCI-ADT) & Pan American Sports Organization (PASO) & Chilean National Olympic Committee (CNOC), award of 31 May 2017

Panel: Mr Jacques Radoux (Luxembourg), President; Mr Jeffrey Benz (USA), Mr Romano Subiotto QC (United Kingdom)

Cycling
Doping (molecule FG-4592)
Standing to be sued
Inadmissibility of evidence regarding "presence" of a prohibited substance affected by improper B sample notification
Admissibility of evidence regarding the establishment of "use" of a prohibited substance
Conditions to benefit from a reduced sanction

1. **The question of standing to be sued is a matter related to the merits. An organ of a federation such as the UCI-ADT does not, as such, have a legal personality and therefore has no standing to be sued. Likewise, entities which were not parties in the procedure in front of the first instance body have no standing to be sued and the appeal must be dismissed in so far as they are concerned.**

2. **The athlete's right to attend the opening and analysis of the B Sample is of fundamental importance and if not respected, the B Sample results may be disregarded. The failure to properly notify the athlete with sufficient, reasonable reaction time to secure his/her attendance affects the admissibility of the analytical results of both samples for establishing an anti-doping rule violation (ADRV) for "Presence" of the prohibited substance. Yet, the fact that the analytical results of a B Sample cannot be used to establish an ADRV for "Presence" because it was obtained in breach of the athlete's fundamental right to attend the opening and analysis of said sample does not preclude the competent authorities to take this sample into account for a "Use" violation. In such a situation, the sample in question must be regarded with particular care and cannot by itself be sufficient to establish a "Use" violation.**

3. **According to the comment to Article 2.2 of the UCI Anti-Doping Rules (UCI-ADR), Use or Attempted Use may be established by other reliable means which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. In this respect, valid existing urine samples, blood samples as well as an athlete's blood profile and the conclusions drawn from the correlating expert reports are admissible for establishing an ADRV under Article 2.2 as they constitute corroborating evidence.**

4. **To benefit from a reduced sanction, the athlete bears the burden of establishing that the ADRV was not intentional within the meaning of Article 10.2.3 of the UCI-ADR.**

The standard of proof imposed on the athlete is a "balance of probability", as provided by Article 3.1 of the UCI-ADR. There could be cases, although extremely rare ones, in which a panel may be willing to accept that an ADRV was not intentional although the source of the substance had not been established. But, as a general matter, proof of source must be considered an important and even critical first step in any exculpation of intent. In this respect, the fact that the substance used at the time of the ADRV was still in clinical trial and, thus, not available on the market, precludes the athlete to demonstrate that the prohibited substance could have unintentionally entered his/her body. Consequently, no reduction of the period of ineligibility can be justified by an established lack of intent. For the same reasons, no reduction of the sanction based on No Fault or Negligence or on "exceptional circumstances" can be granted.

I. PARTIES

1. Mr Carlos Iván Oyarzun Guiñez ("Mr Oyarzun" or the "Appellant") is a Chilean national, born on 26 October 1981. He is a professional road cyclist since 2008 and a licence holder of the Chilean Cycling Federation ("CCF").

2. The Union Cycliste Internationale (the "First Respondent" or "UCI") is an association under Articles 60 et seq. of the Swiss Civil Code ("CC"), having its seat in Aigle, Switzerland. It is the governing international body of the sport of cycling and, as such, oversees all cycling-related matters worldwide. The CCF is a member of the UCI.

3. The UCI Anti-Doping Tribunal (the "Second Respondent" or "UCI-ADT") is an international anti-doping tribunal established by the UCI in 2015. The UCI-ADT handles disciplinary proceedings and renders decisions concerning violations of the UCI Anti-Doping Rules (the "UCI-ADR").

4. The Pan-American Sports Organisation, (the "Third Respondent" or "PASO") is a regional international organisation recognized by the International Olympic Committee ("IOC") and the Association of National Olympic Committees responsible, inter alia, for the celebration and conduct of the Pan-American Games.

5. The Chilean National Olympic Committee (the "Fourth Respondent" or "CNOC") is an organisation composed of all Chilean sports federations and is recognized by the IOC. The CNOC is in charge of organizing the participation of Chilean athletes at events such as the Olympic Games and the Pan-American Games.

II. FACTUAL BACKGROUND

A. Background Facts

6. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced as well as the submission made at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

7. Mr Oyarzun was selected by the CNOC to participate, as a cyclist, in the Road Cycling Competitions of the 2015 Pan-American Games which were held in Toronto (Canada) between 22 and 25 July 2015. He was a member of the CNOC delegation.

8. On 15 July 2015, the Rider provided a urine and blood sample as part of an "In-Competition" test carried out by the PASO. On the Doping Control Form (the "DCF"), the Rider declared that he had taken the following medications or supplements during the seven days prior to the sample collection: *"Amino acids, Proteins, Iron, Vitamin C, Vitamin Complex, Prozac, Beta Alanine, Glutamine, Multi Vitamin"*. He also confirmed that the samples were taken in accordance with the applicable procedures.

9. On 16 July 2015, the urine sample was analysed at the World Anti-Doping Agency (the "WADA") accredited Laboratory in Montreal, Canada (the "Laboratory").

10. On 18 July 2015, the Laboratory reported the presence of FG-4592 (the "Adverse Analytical Finding" or "AAF") in the urine A Sample. The molecule FG-4592 was created to stabilize hypoxia-inducible factors (HIF) and is listed under Class "S2. Peptide Hormones, Growth Factors, Related Substances and Mimetics" on the 2015 and 2016 editions of the WADA Prohibited List. Such molecule is still in test phase and is known to stimulate the production of red cells. It is prohibited both In- and Out-of-Competition. Article 4.1 of the applicable UCI-ADR incorporates the WADA Prohibited List into the UCI-ADR.

11. On 18 July 2015, the PASO informed the CNOC of: (a) Mr Oyarzun's AAF; (b) the decision of the PASO to impose on Mr Oyarzun a mandatory provisional suspension, in accordance with Article 7.9.1 UCI-ADR, starting on the date of the notification, i.e. 18 July 2015; (c) Mr Oyarzun's right to request the opening and analysis of his B Sample; and (d) Mr Oyarzun's right (i) to provide explanations on the circumstances of the AAF; (ii) to request the Laboratory's Documentation Package for the A Sample and; (iii) to ask for a hearing to be held.

12. On 19 July 2015, the CNOC informed the PASO that Mr Oyarzun did not admit the alleged anti-doping rule violation and requested the opening and analysis of the urine B Sample. Mr Oyarzun did not request the Laboratory's Documentation Package for the A Sample.

13. On 20 July 2015, the PASO informed the CNOC that the analysis of the urine B Sample would take place on 24 July 2015 at 10:00 local time.

14. Mr Oyarzun submits that he became aware of the date of the B Sample analysis through social media on 23 July 2015. The same day, he contacted the CNOC and the PASO to request the postponement of the urine B Sample analysis for approximately 15 days so that either he or his representative could attend the opening.

15. On the same day, the PASO, after having consulted the CNOC, instructed the Laboratory to proceed with the analysis of the urine B Sample on 24 July 2015, as previously agreed upon.

16. Accordingly, on 24 July 2015, and despite another request from Mr Oyarzun to postpone the urine B Sample analysis, the Laboratory analysed the sample in the presence of the technical manager of the CNOC, a representative of the PASO and two observers from the Laboratory. Neither Mr Oyarzun nor a representative appointed by him was present.

17. On 25 July 2015, the Laboratory submitted the test report of the urine B Sample analysis, which confirmed the presence of FG-4592. On the same day, the PASO excluded Mr Oyarzun from the 2015 Pan-American Games.

18. On 2 August 2015, the UCI received the [urine] Documentation Package from the Laboratory.

19. On 13 August 2015, the PASO provided the UCI with a set of documents comprising of: (a) the test report dated 18 July 2015; (b) the DCF of 15 July 2015; (c) the notification of the AAF submitted by the PASO to the CNOC on 18 July 2015; and (d) Mr Oyarzun's request to have his B Sample analysed.

20. On 20 August 2015, the UCI received a copy of the PASO's decision excluding Mr Oyarzun from the Pan-American Games. On the same day, the UCI informed the PASO that it would start with the results management of the case with regard to the sanctions and consequences applicable beyond Mr Oyarzun's exclusion from the 2015 Pan-American Games, in accordance with Article 7.1.1 UCI-ADR.

21. On 21 August 2015, the UCI contacted Mr Oyarzun to inform him that: (a) the UCI was now in charge of the result management of the case; (b) he had the right to submit explanations and/or provide substantial assistance in accordance with Article 10.6.1 UCI-ADR; and (c) the UCI alleged that Mr. Oyarzun had committed an anti-doping rule violation ("ADRV") for the "Presence" and "Use" of FG-4592 under Articles 2.1 and 2.2 UCI-ADR.

22. On 3 September 2015, Mr Oyarzun submitted to the UCI a statement as well as a package of documents in Spanish, including an Expert Report. Relevant English translations were provided on 28 September 2015. According to Mr Oyarzun, the urine B Sample results should be disregarded because: (a) the PASO deprived him of his right to attend the opening of the urine B Sample; and (b) the Laboratory committed several departures from the International

Standards for Laboratories ("ISL") during the analysis of the urine sample. Thus, Mr Oyarzun requested that the proceedings against him be closed.

23. On 10 September 2015, the UCI requested the PASO, the CNOC and the Laboratory to complete the information and documents submitted by the PASO on 13 August 2015. In particular, the UCI sought more information regarding the circumstances which led the PASO to proceed to the analysis of the urine B Sample on 24 July 2015 despite the request from Mr Oyarzun to postpone such analysis.

24. On the same day, the PASO replied that it could not accommodate Mr Oyarzun's request essentially because of the late nature of that request.

25. On 12 November 2015, the Laboratory submitted its opinion in which it contested any departures from the ISL during the analysis of the samples. The WADA-accredited Laboratory of Köln (Germany) was also asked to provide its opinion on the testing procedure followed by the Laboratory. In its report dated 26 January 2016, the Köln Laboratory validated the procedure followed by the Montreal Laboratory after having noted that *"[n]one of the deviations alleged by [Mr Oyarzun's] expert could have caused the AAF"*.

26. On 18 December 2015, at the request of the UCI, the haematological profile of Mr Oyarzun was submitted to an Athlete Biological Passport ("ABP") Expert from the Athlete Passport Management Unit (the "APMU Expert") of the Lausanne Laboratory for a general review and assessment. The APMU Expert was not informed of the AAF for the presence of FG-4592 in the urine sample.

27. On 21 December 2015, the APMU Expert concluded that the ABP of Mr Oyarzun was "suspicious" and requested "further data" to complete his analysis.

28. On 8 January 2016, the UCI informed the APMU Expert of the AAF for FG-4592 and requested the APMU Expert's opinion on whether the haematological profile of Mr Oyarzun was consistent with the use of FG-4592.

29. On 23 February 2016, the APMU Expert sent his final opinion to the UCI in which he stated as follows: *"I confirm that (…) the above described haematological variations are suspicious and that these suspicious changes are fully consistent, on temporal, physiological and scientific bases, with the use of FG-4592"*. In his opinion, the APMU Expert also observed that an identical finding could be observed between the blood sample of Mr Oyarzun and the blood parameters of another athlete who tested positive for FG-4592.

30. On 26 February 2016, the UCI contacted Mr Oyarzun to: (a) provide him with a copy of the APMU Expert's opinion; (b) give him a second opportunity to provide explanations and/or provide substantial assistance within the context of Article 10.6.1 UCI-ADR; (c) inform him that, after having examined his arguments and having verified the validity of the AAF with the Laboratories and the Köln Laboratory, the UCI considered that a violation of Article 2.1 and Article 2.2 UCI-ADR was established; (d) inform him of the potential consequences for

the alleged ADRV; (e) propose him an Acceptance of Consequences pursuant to Article 8.4 UCI-ADR which would prevent disciplinary proceedings before the UCI-ADT; and (f) advise him that if he did not agree with the proposed Acceptance of Consequences, the case would be referred to the UCI-ADT.

31. On 21 March 2016, Mr Oyarzun informed the UCI that he did not consent to the Acceptance of Consequences.

B. Proceedings before the UCI-ADT

32. On 11 May 2016, the UCI filed a petition to the UCI-ADT requesting the latter to: (a) declare that Mr Oyarzun had committed a violation of the ADR; (b) impose on Mr Oyarzun a period of ineligibility of 4 (four) years; (c) disqualify all the results obtained by Mr Oyarzun between 15 and 18 July 2015; (d) order Mr Oyarzun to pay the costs of the results management incurred by the UCI; and (e) order Mr Oyarzun to pay a contribution towards the costs of the UCI-ADT and towards the legal and other costs of the UCI in connection with the proceedings.

33. On 13 May 2016, Mr Oyarzun was informed that: (a) disciplinary proceedings had been initiated against him before the UCI-ADT; (b) any objection to the jurisdiction of the UCI-ADT should be raised within 7 days of the receipt of the correspondence; and (c) he was granted until 28 May 2016 to submit his Answer.

34. By letter dated 20 May 2016, Mr Oyarzun: (a) acknowledged receipt of the UCI petition of 11 May 2016; (b) raised an objection to the jurisdiction of the UCI-ADT; and (c) requested the case file to be transmitted to the National Anti-doping Organisation of Chile.

35. On 25 May 2016, the UCI-ADT, inter alia, acknowledged Mr Oyarzun's jurisdictional objection, set a deadline for the UCI to submit comments thereto and confirmed the deadline of 28 May 2016 for Mr Oyarzun to submit his Answer. On the same day, Mr Oyarzun requested, inter alia, an extension of the deadline to file the Answer until 20 June 2016 as well as the production of documents and reserved his right to ask for a hearing to be held.

36. On 27 May 2016, the UCI-ADT granted Mr Oyarzun an extension of the deadline to submit his Answer until 13 June 2016 and dismissed his request for the production of the documents because the cumulative conditions laid down in Article 19.6 of the Anti-Doping Tribunal Procedural Rules (the "ADTPR") were not fulfilled.

37. On 1 June 2016, the UCI responded to Mr Oyarzun's objection to the UCI-ADT's jurisdiction. The UCI concluded, on the basis of Articles 7 and 8.2 of the UCI-ADR, that the UCI-ADT was competent to hear the case and should, therefore, proceed with the case.

38. On 13 June 2016, Mr Oyarzun's counsel requested a further extension for the submission of his Answer until 17 June 2016. This extension was granted on 14 June 2016.

39. On 17 June 2016, Mr Oyarzun's counsel filed his Answer in which he reiterated the request for the production of documents and withdrew his objection to the jurisdiction of the UCI-ADT, as well as his request for a hearing to be held.

40. On 26 August 2016, the UCI-ADT rendered the operative part of its decision, the grounds of which were communicated to Mr Oyarzun on 16 September 2016 (the "Appealed Decision"). Regarding the applicable rules and regulations, the UCI-ADT held that it was bound (Article 25.1 ADTPR) to apply the UCI-ADR and the standards referenced therein as well as the UCI Constitution, the UCI Regulations and, subsidiarily, Swiss law, and that, given the alleged ADRV took place on 16 June 2015, the 2015 edition of the UCI-ADR applied to Mr Oyarzun's case. The application of the rules was supported by Article 7.1.3.3 of the UCI-ADR, Article 7.1.1 of the 2015 WADA Code and Article 7.1.2 of the PASO Anti-Doping Rules which all provide that results management and the conduct of hearings for a test conducted by a Major Event Organisation, in the present case PASO, shall be referred to the applicable International Federation in relation to Consequences beyond exclusion from the event.

41. Concerning the alleged violation of Article 2.1 of the UCI-ADT, which relates to the "Presence" of a prohibited substance in Mr Oyarzun's, the UCI-ADT recalled that the analysis of both the A and B Samples of Mr Oyarzun's urine showed that the urine contained FG-4592 and rejected Mr Oyarzun's allegations that he did not commit an ADRV and that the quantity of prohibited substance found in his A and B Samples was extremely low. Further, the UCI-ADT held that the analysis of the A and B Samples of Mr Oyarzun's urine was conducted at a WADA-accredited laboratory and that it was therefore up to the athlete to rebut the presumption that the analyses have been conducted in accordance with the ISL. The UCI-ADT went on by noting that the rights conferred to Mr Oyarzun by Article 7.3 (d) and (e) of the UCI-ADR are, as it follows from well-established CAS jurisprudence, so fundamental that, if not respected, the B Sample results must be disregarded for the purposes of determining whether an athlete has committed a violation of "presence". With regard to Mr Oyarzun's case, the UCI-ADT found, first, that by not communicating the relevant information about the date of the opening of the urine B Sample in a fair and timely manner, the PASO has breached the right conferred to Mr Oyarzun under Article 7.3 (d) of the UCI-ADR and, second, that by doing nothing to accommodate Mr Oyarzun's request to postpone the date of the opening and analysis of the urine B Sample in order to enable him to attend or be represented accordingly, PASO violated the rights vested on Mr Oyarzun by Article 7.3 (e) of the UCI-ADR. The UCI-ADT therefore concluded that the breach of Mr Oyarzun's rights with respect to the urine B Sample was so fundamental that, in accordance with CAS jurisprudence, the results of the urine B Sample analysis cannot validly confirm the analytical results of the urine A Sample, with the consequence that a violation of Article 2.1 UCI-ADR for "Presence" of FG-4592 cannot be established.

42. Regarding the alleged violation of Article 2.2 UCI-ADR relating to the "Use" of a prohibited substance by Mr Oyarzun, the UCI-ADT recalled that, according to Article 3.2 of the UCI-ADR, facts related to anti-doping rule violations may be established by any reliable means, such as, *inter alia*, *"reliable documentary evidence"* or *"other analytical information which does not otherwise*

satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1 of the UCI-ADR". In consideration of the APMU Expert report – that has not been contested by Mr Oyarzun – as well as the fact that the evidence of the UCI is coherent with and further corroborated by the findings of the Laboratory which reported that the urine A and B Samples contained FG-4592, the UCI-ADT referred to itself to the CAS jurisprudence according to which the circumstance that the analytical results of the urine B Sample cannot be used to establish a "Presence" of the prohibited substance because it was obtained in breach of certain fundamental rights conferred to the athlete, does not mean that the B Sample result is irrelevant to establishing "Use". It merely means that it must be regarded with particular care and cannot, by itself, be sufficient to establish a "Use" violation". The UCI-ADT found that, in Mr Oyarzun's case, "taken together" the urine and blood analytical results were sufficient to establish a violation of "Use" under Article 2.2 UCI-ADR to its comfortable satisfaction. Mr Oyarzun having failed, in the view of the UCI-ADT, to provide any evidence or substantiated explanation regarding an alternative explanation for the urine and blood evidence demonstrating that FG-4592 was in his system, the only plausible explanation would be that Mr Oyarzun used FG-4592. Thus, the UCI-ADT concluded that it was comfortably satisfied that Mr Oyarzun committed a violation of Article 2.2 of the UCI-ADR.

43. With regard to the consequences of the ADRV, the UCI-ADT held that, given that Mr Oyarzun had failed to establish that the ADRV was not intentional, and that he had not committed such offence with "No Fault or Negligence" in the sense of Article 10.4 of the UCI-ADR or "No Significant Fault or Negligence" in the sense of Article 10.5.2 of the UCI-ADR, the period of ineligibility set out in Article 10.2.1 (a) of the UCI-ADR, i.e. 4 (four) years, should be imposed. In the Appealed Decision, the UCI-ADT further ruled (a) that the period of Ineligibility shall commence on the date of the notification of the operative part of the Judgment, i.e. 26 August 2016; (b) that the provisional suspension already served by Mr Oyarzun, starting from 18 July 2015, shall be credited against the four-year period of ineligibility; (c) that the results obtained by Mr Oyarzun between 15 and 18 July 2015, if any, were disqualified; and (d) Mr Oyarzun was condemned to pay CHF 2'500 (two thousand and five hundred Swiss Francs) for the costs of the results management by the UCI.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

44. On 16 October 2016, the Appellant filed his statement of appeal serving as his appeal brief at the Court of Arbitration for Sport (the "CAS") against the Appealed Decision in accordance with Article R47 *et seq*. and R51 of the Code of Sports-related Arbitration (the "Code"). The Appellant submitted that, given the circumstances and the complexity of the present appeal, pursuant to Article R50 of the Code, the Panel should be composed of three arbitrators. Further, the Appellant requested that this matter be expedited in accordance with Article R52 of the Code. The Appellant nominated Mr Jeffrey G. Benz, attorney-at-law in Los Angeles (CA), USA, and in London, United Kingdom, as arbitrator.

45. On 19 October 2016, the CAS Court Office acknowledged receipt of the Appellant's statement of appeal and, inter alia, invited the Respondents to take a position on the Appellants request regarding the expedited procedure as well as the proposed timetable.

46. On 21 October 2016, the First and Second Respondents answered that it was willing to work with the Appellant to expeditiously resolve the appeal but that it could not agree with the suggested timetable.

47. On 28 October 2016, the First and Second Respondents informed the CAS Court Office that it had unsuccessfully tried to contact the Third and Fourth Respondents in order to appoint a common arbitrator and that it nominated Mr Romano F. Subiotto, attorney-at-law in Brussels, Belgium, and in London, United Kingdom, as arbitrator.

48. On 31 October 2016, the CAS Court Office acknowledged receipt of the First and Second Respondents' nomination of Mr Subiotto and invited the other Respondents to state whether they agreed with his appointment, their silence in this respect being considered acceptance of such joint nomination.

49. On 8 November 2016, having no response from the Third and Fourth Respondents, the CAS Court Office confirmed the joint nomination of Mr Subiotto on behalf of the Respondents.

50. On 16 November 2016, the First Respondent filed its answer in accordance with Article R55 of the Code. No other Respondent filed an answer.

51. On 7 December 2016, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, informed the parties that the Panel appointed to hear the present appeal was as follows:

    President: Mr Jacques Radoux, legal secretary at the European Court of Justice in Luxembourg

    Arbitrators: Mr Jeffrey G. Benz, attorney-at-law in Los Angeles (CA), USA, and in London, United Kingdom and Mr Romano F. Subiotto QC, attorney-at-law in Brussels, Belgium, and in London, United Kingdom

52. On 14 February 2017, the parties were advised that the Panel decided, in accordance with Article R56 of the Code, to allow a final round of written submissions. The scope of these submissions was limited as to their subject as well as to their volume. The parties were further informed that the Appellant was permitted to rely on one of its proposed experts in biochemistry at the hearing.

53. On 25 February 2017, the Appellant filed its response submission.

54. On 6 March 2017, the UCI filed its rejoinder.

55. On 13 March 2017, the Appellant and First Respondent signed and returned the Order of Procedure to the CAS Court Office. The remaining Respondents did not sign or return the Order of Procedure, or otherwise object to its contents.

56. On 14 March 2017, a hearing was held at the CAS headquarters in Lausanne, Switzerland. The Panel was assisted by Mr Brent J. Nowicki, Managing Counsel at the CAS, and joined by the following participants:

For the Appellant:

- Mr Carlos Iván Oyarzun Guiñez, athlete (in person)
- Mr Pedro Fida, counsel (in person)
- Ms Edurne Amoros Candela, interpreter (in person)
- Dr. Luiz Claudio Cameron, expert (by phone)

For the First Respondent:

- Prof. Antonio Rigozzi, counsel (in person)
- Ms Charlotte Frey, counsel (in person)
- Prof. Giuseppe d'Onofrio, expert (in person)
- Dr. Martial Saugy, expert (in person)

57. The Panel observes that no party raised an objection to the composition of the Panel and at the conclusion of the hearing, the Parties confirmed that their right to be heard had been fully and fairly respected.

IV. SUBMISSIONS OF THE PARTIES

58. The Appellant's submissions, in essence, may be summarized as follows.

59. First, as a preliminary remark, the Appellant argues that the length of the proceedings leading up to the Appealed Decision (more than 13 months) constitutes a denial of justice by the PASO and the UCI. By exceeding the reasonable length of such proceedings, PASO and UCI violated, inter alia, Article 27.5 of the UCI Regulations as well as Article 6 (1) of the European Convention of Human Rights - both of which provide, in substance, that anyone is entitled to have a hearing and a decision within in a "reasonable time".

60. Second, the Appellant claims that the analytical results of the urine A and B Samples are invalid and inadmissible evidence for establishing "Presence" in the sense of Article 2.1 UCI-ADR. As the Appellant requested the opening of the urine B Sample, the urine A Sample cannot, in absence of a valid analytical result of the said B Sample, be used to establish an ADVR under Article 2.1.

61. In support of this claim, the Appellant argues that, in the present matter, the results of the urine B Sample cannot be considered valid as they have been obtained in violation of the Appellant's right to be formally informed of the date and time of the opening of the urine B Sample and to be given the opportunity to attend the opening in person or by way of a duly appointed representative. The Appellant's request, sent on 23 July 2015, to postpone the

opening of the urine B Sample has simply been ignored and PASO did not make any attempt to enable the Appellant to reasonably attend in person or appoint a representative to attend in his absence.

62. Further, the Appellant did not receive the complete documentation package prior to the urine B Sample opening. Although this non-communication does not constitute a breach of the WADA Code it prevented the Appellant from exercising effectively his right to appoint a representative of his choice to reassure the identity and integrity of the urine B Sample. Further in the proceedings, his right to obtain communication of the full documentation packages relating to the urine and blood sample collection has equally been violated by the UCI-ADT. It was only with the response of the UCI in the present appeal that the Appellant received the documentation package of the blood sample. Thus, he was precluded from having all the elements that he needed in support of his defence before the UCI-ADT.

63. The conclusion that the analytical results of the B Sample are invalid and cannot be considered admissible evidence is fully in line with existing CAS jurisprudence and in particular, among others, CAS 2002/A/385 (para. 22-34), CAS 2003/A/477 (para. 27-33), CAS 2008/A/1607 (para 120-122), CAS 2010/A/2161 (para. 15-17). In the absence of a valid urine B Sample, the analytical results from the urine A Sample are not confirmed and the requirements of Article 2.1 UCI-ADR are not met. Thus, the urine A Sample has to be considered invalid as well.

64. Furthermore, but not informing the Appellant of the exact date and time of the opening of the urine B sample and affording him the essential procedural rights foreseen in Articles 7.1 and 8 of the PASO-ADR and the UCI-ADR, the PASO and the UCI breached several general principles of Swiss law and some general principals applied by the CAS, such as, inter alia, the obligation to act in accordance with mandatory provisions of Swiss association law, the principles of good faith, estoppel, fairness, prohibition of abuse of rights and due process. The cumulative consequences of the denial of certain of these rights have compromised the Appellant's right to defend himself to such an extent that the alleged ADRV must be, in application of the "Varis" jurisprudence of the CAS, set aside in its entirety.

65. Finally, in the present case, the fact that a representative of the CNOC was present at the opening of the urine B sample cannot be considered a remedy to the failure to respect the Appellant's fundamental rights to attend the said opening himself or to appoint a representative of his choice. Similarly to the situation in CAS 2015/A/3977, by not giving him the opportunity to attend the urine B Sample opening, PASO treated the Appellant *"as the object of the doping test procedure not its subject"*.

66. Third, the Appellant submits that the urine A and B Samples are inadmissible evidence for the purpose of establishing "Use" under Article 2.2 of the UCI-ADR. In support of this claim, the Appellant argues that as the analytical results of the urine A and B Samples cannot be considered as admissible or reliable evidence under Article 2.2 as they constitute inadmissible evidence under Article 2.1 UCI-ADR. Thus, contrary to what the UCI has done, these analytical results could not be used to influence the expert, i.e. Prof d'Onofrio, responsible for

assessing the blood profile of the Appellant. Given that the expert based his second report according to which the blood profile was consistent with the use of FG-4592 on the information that the urine A Sample contained said substance, the expert's second report is not only biased but inadmissible and invalid. Thus, the Appellant's blood sample shall also be deemed invalid and inadmissible evidence.

67. Fourth, it is obvious that the sample was not supposed to be used for the Athlete Biological Passport (the "ABP") but for the search of prohibited substances as the blood sample taken from the Appellant has been divided in an A and B Sample. But, in the present case, no adverse analytical finding was issued on basis of the blood samples. Moreover, the Appellant has not been informed of the opening of the blood B sample. In addition, the blood sample was analysed 5 (five) months after collection although the relevant dispositions prescribe that such analyse should take place "within 36 (thirty six) hours from its collection. Given all of these flaws, the Appellant's blood samples should be deemed invalid and inadmissible evidence for establishing an ADRV pursuant to Article 2.2 UCI-ADT.

68. Fifth, before the Appellant's blood samples were taken, he had stayed and trained for two months, i.e. from Mid-April until Mid-May as well as from Mid-June to Mid-July 2015, at an altitude of 3000 meters. This prolonged stay in high altitude could, as Dr. Cameron specified in his written statement, explain the values found in the blood samples. Thus, there could be other explanations than the one Prof d'Onofrio considered as most likely.

69. Sixth, on a subsidiary basis, the Appellant asserts that he did not deliberately or knowingly take FG-4592; that he has always been very careful to ensure that he did not inadvertently take FG-4592 and that he always submitted himself to all In- and Out-of-Competition doping controls. After having analysed all the substances that he had taken prior to the day the Samples were taken, the Appellant considers that it is very likely that cross-contamination occurred through his medications or vitamins. Further, for the reasons already set out, the Appellant cannot be considered as having committed any fault or negligence and the alleged ADRV, if established, was clearly not intentional as the Appellant never used or had intention to use any Prohibited Substance to cheat.

70. Finally, considering that he has suffered irreparable financial and sporting damages as well as mental harm, due to all the flaws committed by the Respondents, the Appellant claims financial compensation, whose amount the Panel should determine. Moreover, the Appellant argues that the Respondents should be ordered to pay his legal costs.

71. In his requests for relief, the Appellant seeks the following:

(i) That the present Appeal is admissible;

(ii) That the Appeal Decision is set aside;

(iii) No sanction be impose on the Rider, since there is no reliable basis or evidence upon which to find Mr Oyarzun has committed an anti-doping rule violation under Articles 2.1 or 2.2 of the UCI ADR;

(iv) Mr Oyarzun is to be reinstated to sports participation with immediate effect;

In a subsidiary basis, and only if the above-mentioned requests are not granted, Appellant seeks conformation that

(a) If paragraph (iii) above does not apply, the maximum period of ineligibility shall be limited to two years;

(b) That any applicable period of ineligibility commences on 15 July 2015, the date of sample collection;

(c) In any case, that the period of Provisional Suspension served by Mr Oyarzun be credited against the total period of ineligibility to be served, pursuant to Article 10.11.3.1 of the UCI Cycling Regulations;

(v) UCI, UCI ADT and PASO to be ordered to reimburse the Appellant's legal costs and bear any and all costs eventually applicable to these proceedings;

(vi) Mr Oyarzun is awarded moral and material damages in an amount to be determined by the Panel in view of the serious procedural and formal errors committed by the PASO and the UCI and considering the time he has been unfairly provisionally suspended, which resulted in several financial losses;

(vii) Mr Oyarzun further submits that the PASO/UCI/CNOC should bear the costs of Mr Oyarzun's legal fees in pursuing this defense, in a minimum amount of CHF 20.000,00 (twenty thousand Swiss francs) based on the following grounds:

(a) The PASO/CNOC/UCI's failure to accord Mr Oyarzun his due process rights, as set out above, have resulted in these proceedings, which may not have been necessary had the PASO/UCI adhered to its own rules;

(b) Mr Oyarzun has only very limited financial resources by comparison to the PASO/UCI/CNOC.

72. The UCI's submissions can be summarized as follows.

73. First, the UCI-ADT formally being a body of the UCI and not having legal personality, has no standing to be sued in the present appeal procedure. The Appeal should therefore be dismissed to the extent that it is directed against the UCI-ADT. Further, the Appellant not having given any explanation on the standing of the PASO and the CNOC in the present procedure, the Appeal should equally be dismissed to the extent it is directed against these two organisations.

74. Second, the present Appeal concerning a decision on the consequences beyond exclusion from a Major Event, in the sense of Article 7.1.3.3 of the UCI-ADR, the UCI-ADR seeks the exclusion of the PASO-ADR.

75. Third, the Appellant did not take any step to object to or appeal the PASO's decision to exclude him from the Pan-American Games. The UCI therefore was required, under Article 15.1 of the WADA Code, to recognise and respect the PASO's decision that an ADRV had occurred. Given that the Appellant did not challenge that decision, all arguments in relation to the PASO's failure to hold a hearing in his case are moot and in any event totally irrelevant to the present proceedings.

76. Fourth, concerning the alleged denial of justice, the UCI replies that the factual and procedural background of the case show that the Appellant himself contributed to many of the delays that occurred and that any delays, on the part of the UCI, were a direct result of the latter's attempt to address all of the Appellant's concerns at the first instance and to ensure the ADRV was correctly asserted.

77. Fifth, with regard to the alleged departures from the ISL, the UCI notes that neither the Appellant nor his expert identified any departures from the ISL or other standards and most certainly no departure that could reasonably have caused the AAF.

78. Sixth, regarding the alleged inadmissibility of the urine samples, the UCI, although acknowledging that the Appellant did not attend the opening and analysis of the urine B Sample, argues that this was due to the Appellant's own conduct and was not unreasonable under the circumstances. In this regard, the UCI highlights, inter alia, that the Appellant was granted the right to attend the opening of the urine B Sample; that the request for postponing the said opening was submitted the evening before, that the Appellant had returned to Chile and supposedly did not have the financial means to pay for the analyses let alone pay for a flight back to Canada, and that the Appellant indicated that he might need 15 days to attend the opening whereas, according to Article 5.2.4.3.2.1 of the ISL, the B Sample analysis should occur as soon as possible and should take place *"no later than seven working days starting the first working day following notification"* of an A Sample AAF by the Laboratory.

79. The UCI further considers that the Appellant's submissions are not supported by the CAS jurisprudence that he relies on. Each case must be considered on its own merits and there are several factors that distinguish the present case from past jurisprudence.

80. In any event, according to the UCI, while in certain circumstances it may be correct that a B Sample cannot confirm the A Sample, in the context of a ADRV for "Presence", when an athlete's right to request or attend the analysis is breached, it is a significant leap to suggest that this means that both the A and B Sample results are *"automatically invalid and inadmissible"*. This is particularly so given that the Appellant also suggests that this applies equally to an ADRV for "Use". Such a submission is at odds with the express wording of the UCI-ADR, the very jurisprudence relied on by the Appellant, and the rationale of the ADRV for "Use" as described in the comment to Article 2.2 of the UCI-ADR.

81. Seventh, the UCI sustains that the results of the urine sample analyses should be considered to be reliable evidence, at the very least as far as an ADRV for "Use" is concerned, given (i) that the fact that the Appellant did not attend the opening and analysis of the B Sample is due to the special and unique factual background to this case; (ii) that three witnesses verified that the B Sample showed no signs of tampering and that there were no other irregularities in terms of the B Sample opening and analysis; (iii) that three anti-doping experts have confirmed that the presence of FG-4592 was reliably identified in the Appellant's urine samples and (iv) that the Appellant's expert has not established any relevant departure from the relevant standards, least of all one which could reasonably have caused the AAF.

82. Eight, concerning the admissibility and evidentiary value of the Blood Sample Results, the UCI argues that these results are valid and admissible, given that the blood sample of 15 July was taken in the context of the Appellant's ABP, that it was tested in the relevant deadlines, that this is not a passport case and that the analysis of the ABP is not produced as evidence of an independent Adverse Passport Finding, but as corroborating evidence of the findings that resulted from the analyses of the urine samples. Further it is wrong to state that Prof. d'Onofrio's reports are biased as he was not informed of the analytical results of the urine samples when establishing his first report. Moreover, the Appellant's allegations that his stay at high altitude could have affected the values of the blood sample, are unsubstantiated and irrelevant.

83. Ninth, according to the UCI, the factual circumstances of the present case are so particular that, contrary to what the UCI-ADT has done, one could conclude that an ADRV for "Presence" is established. An athlete should not be allowed to request the postponement of the opening of the B Sample the evening before its scheduled opening and a delay of 15 days should not be considered reasonable. In any event, the present case is a textbook case of a "Use" ADRV as can be seen from the comments to Articles 2.2 and 3.2 of the UCI-ADR. The fact that the Appellant did not attend the opening of the urine B Sample does not affect the reliability of the analytical results of the said sample. The finding that the urine A and B Samples contained FG-4592 is further corroborated by the blood sample taken the same day as the urine samples and the haematological variations detected in the blood profile of the Appellant.

84. Tenth, the UCI points out that the Appellant did not establish the origin of the substance, that he did not establish that he did not intentionally commit the ADRV and that neither a reduction for "No Fault or Negligence" (Article 10.4 of the UCI-ADR) nor a reduction for "No Significant Fault or Negligence" (Article 10.5 of the UCI-ADR) can be applied in the present case. Thus, pursuant to Article 10.2.1.1 of the UCI-ADR, the period of ineligibility should be 4 (four) years.

85. Finally, regarding the Appellant's claim for damages, the UCI replies that the Appellant has not identified the legal basis of his claim, that there is no evidence for the alleged damages let alone an established link between the Appealed Decision and the alleged damages, and that the CAS has no jurisdiction to examine this claim.

86. In his prayers for relief, the First Respondent requests the Panel to issue an award:

(i) Summarily dismissing Mr Carlos Iván Oyarzun Guiñez's Appeal to the extent that it is directed against the UCI-ADT, the PASO and the CNOC; and

(ii) Dismissing Mr Carlos Iván Oyarzun Guiñez's Appeal and all prayers for relief;

(iii) Declaring that Mr Carlos Iván Oyarzun Guiñez has committed an Anti-Doping Rule Violation (under Article 2.1 and/or Article 2.2 of the UCI-ADR);

(iv) Condemning Mr Carlos Iván Oyarzun Guiñez's to pay a significant contribution towards the UCI's legal fees and other expenses.

V. JURISDICTION

87. Article R47 of the Code provides as follows:

An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

88. The Appellant asserts that the jurisdiction of the CAS derives from Article 13.2.1 of the UCI-ADR, which provides that *"[i]n cases arising from participation in an International Event or in cases involving International-Level Riders, the decision may be appealed exclusively to CAS"*. In the present case, it is not contested that the Appellant is an International-Level Rider and UCI expressly consents to the jurisdiction of the CAS in its answer. In light of the foregoing, the Panel finds that the CAS has jurisdiction in this appeal. In addition, both parties confirmed CAS jurisdiction by execution of the order of procedure.

VI. ADMISSIBILITY

89. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

90. Article 13.2.5.1 of the UCI-ADR provides that *"[u]nless otherwise specified in these rules, appeals under Article 13.2.1 and 13.2.2 from decisions made by the UCI[-ADR] … shall be filed before CAS within 1 (one) month from the day the appealing party receives notice of the decision appealed"*.

91. The Appellant received notification of the grounds of the Appealed Decision on 16 September 2016 and filed his statement of appeal on 16 October 2016. The Respondents do not dispute that the Appeal is admissible to the extent that it is directed against the UCI.

92. In light of the foregoing, the Panel finds that the Appeal is admissible.

VII. APPLICABLE LAW

93. Article R58 of the Code provides as follows:

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

94. In the present case, the alleged ADRV occurred on 15 July 2015 (date of urine sample collection). Thus, the 2015 rules should apply. Further, in the present case it is undisputed that the Appellant was a licence holder of the CCF, which was a member of the UCI, and that the Appellant was an International-Level Rider in the sense of the 2015 UCI-ADR. According to point C. of the introduction of the 2015 UCI-ADR the said anti-doping rules apply to "any" license holder in general and in particular to International-Level Riders.

95. It follows from the Appealed Decision as well as from the submissions of the Parties, that the present matter is related to the results management for the anti-doping test conducted at the Pan-American Games in July 2015. In this regard, Article 7.1.2 of the PASO-ADR, applicable at the Pan-American Games, provides as follows:

"Responsibility for results management and the conduct of hearings for anti-doping rule violations arising under these Anti-Doping Rules in relation to Consequences that extend beyond PASO's Event(s) (e.g., period of Ineligibility for other Events) shall be referred to the applicable International Federation".

96. Article 7.1.1 of the 2015 WADA Code contains, in substance, the same provision as it states that results management and the conduct of hearings conducted by, inter alia, a Major Event Organization *"shall be referred to the applicable International Federation in relation to Consequences beyond exclusion from the Event …".*

97. Given that the UCI is the applicable International Federation, the Panel finds that the UCI rules and regulations, in particular the UCI-ADR, are applicable to the present Appeal. In addition, as the UCI has its headquarters in Switzerland, Swiss law will apply subsidiarily.

98. According to Article 3.1 of the UCI-ADR, the UCI has the burden of proof that an ADRV has occurred and has to establish that proof to the "comfortable satisfaction" of the Panel.

VIII. EVIDENCE

A. Evidence relied on by the UCI

99. The UCI primarily relies on the fact that the analyses, by the Laboratory, of the Appellant's urine A and B Samples show that said samples contained the prohibited substance FG-4592. According to the UCI, the analytical results of the urine samples are reliable evidence as the Laboratory, which conducted them, is one of the most respected laboratories in anti-doping. It is undisputed that there were no issues with the opening and analysis of the urine B Sample. Thus, the analytical results of the two samples have to be considered as valid and reliable evidence.

100. Concerning the alleged departures from the relevant regulations and standards, the UCI submits that the Montreal Laboratory re-verified its initial findings and came to the conclusion that the alleged departures could not have caused the ADRV. The conclusion that the testing was valid has been confirmed by the Köln Laboratory. Further, Dr. Saugy could establish that

the departures, in case they exist, had no impact on the analytical results and could not be the origin of the ADRV.

101. Considering that the substance FG-4592 was still in a clinical trial period, the only way for this substance to have gotten into the Appellant's system was by him utilizing, applying, ingesting or consuming it in accordance with Article 2.2 of the UCI-ADR.

102. The UCI argues that the above-mentioned evidence is corroborated by the expert opinion of Prof. d'Onofrio, according to which the Appellant's *"haematological variations are suspicious and that these suspicious changes are fully consistent, on temporal, physiological and scientific bases, with the use of FG-4592"*.

103. The expert evidence submitted by the Appellant does by no means explain the variations observed in his blood profile, as the argument relating to the Appellant's alleged long time presence in high altitude has been duly taken into account by Prof. d'Onofrio.

B. Evidence relied on by the Appellant

104. The Appellant, first, relies on his sworn Affidavit in which he states that he has been very careful with everything he ate and drank, that he took his role as a professional athlete very serious – especially his obligations regarding doping, that he was always aware of WADA's list of prohibited substances. Given the fact that athletes are commonly tested during competitions, he would therefore never have knowingly ingested any of these substances and intentionally jeopardize his career and that he never knowingly or deliberately took any prohibited substance to gain an unfair advantage over competitors.

105. Second, he relies on witness statements from his wife (Ms Victória Pérez), his coach (Mr Francesco Cabello Lunque), his doctor (Mr Mauricio Cabezas Urrutia), his mechanic (Mr Franceso Reyes Pérez), and his kinesiologist (Mr Angelo Giuseppe De Barti Ciaraldi), confirming, inter alia, that the Appellant was very conscious and professional in all matters relating to his obligation to respect the anti-doping rules and that the Appellant was an honest person and a fair sportsman who achieved his sporting results through hard work.

106. Third, the Appellant submits that the UCI has not established the ADRV as it did not provide any valid and admissible evidence. In the Appellant's view, the fact that he was prevented from attending the opening of his urine B Sample renders all analytical results of the urine samples void. The Appellant, who acknowledged during the hearing that he did not contest, as such, the findings of the analysis of the B Sample, highlighted nevertheless, that the result of the analysis could in no case be used to establish an ADRV even for "Use" under Article 2.2 UCI-ADR.

107. Regarding the argument that the ADRV is corroborated by the expert opinion on the blood profile, the Appellant argues, that the expert has been biased because the UCI had informed him that FG-4592 had been found in the Appellant's urine samples taken on the same day than the blood sample. Thus, both of his reports could not be considered reliable evidence.

In any event, Prof. d'Onofrio had not stated that FG-4592 has been found in the blood sample of the Appellant.

108. Finally, the Appellant submits that it follows from Dr. Cameron's expert report that the variations in the blood values, pinpointed by Prof. d'Onofrio in his reports, could be due to other reasons than the presence of FG-4592, i.e. the Appellant's stay in high altitude (two month at 3000 meters) or the use of other prohibited substances. Dr. Cameron further considers that it is not possible to categorically affirm that the Appellant used FG-4592 only by analysing the blood profile and the documentation package of the blood sample of the Appellant taken on 15 July 2015. Thus, in the Appellant's view, Prof. d'Onofrio's statement that the blood profile was "fully consistent" with the alleged use of FG-4592 has to be disregarded.

C. Oral evidence of Mr Oyarzun

109. At the hearing, Mr Oyarzun confirmed that he had stayed over a long time period, i.e. between Mid-April and Mid-May (in Mexico) and between Mid-June and 15 July (in Spain), at an altitude between 2300 and 3000 meters for competition and training purposes. According to Mr Oyarzun, after having been informed that the analysis of his urine A Sample had returned positive and after requesting the opening of the B Sample, he did not receive any information about the date of the opening of the B Sample until 23 July, when he discovered that information in the (social) media. All of the previous exchange of information with the CNOC has been done orally. Between the 20 and 23 July, he tried to call the chief of mission of the CNOC many times but without result.

110. Mr Oyarzun further stated that he did not mention any of the flaws related to the sample taking procedure on the DCF, because he just wanted to make the situation more difficult than it was already. He just confirmed that the conditions, under which the samples were taken, were, in his view, chaotic and inappropriate for such a prestigious event as the Pan-American Games.

D. Oral evidence of Experts

111. At the hearing Prof. d'Onofrio and Dr. Cameron were questioned by the Parties as well as the Panel with regards to the blood profile of the Appellant and the conclusions one could draw from it. In substance, both experts agreed on the fact that variations in haemoglobin and reticulocytes could be due to a stay in high altitude combined with other physiological factors, such as anemia which leads to a suppression of red blood cells. They agreed as well on the fact that the analysis of the Appellant's blood sample taken on 15 July could not establish the presence of FG-4592 in the blood. Both experts further agreed, that the effect of high altitude on the blood values would vanish after 10 to 15 days.

112. Dr. Cameron disagreed with Prof. d'Onofrio's finding that the magnitude of the variations in the blood profile was too important to be explained by a stay in high altitude and reaffirmed that such a variation could be explained by other causes that the use of FG-4592, such as the

use of EPO. He nevertheless acknowledged that the use of FG-4592 could very well explain the variations at hand and further specified, that when establishing his report he focused on the question whether it could be concluded, from the blood documentation package and the blood profile of the Appellant, "beyond reasonable doubt" that the latter had used FG-4592.

113. Prof. d'Onofrio confirmed the findings from his reports in so far as he considers that the increase in haemoglobin combined with a decrease in reticulocytes which led to a relatively high off-score are not fully consistent with a stay in high altitude, especially not in an altitude of only 2300 meters.

114. Dr. Saugy gave evidence that that the variations observed in the present case correspond to the variations occurring shortly after the injection, for example of EPO. He further explained that when FG-4592 has been developed, it has been considered as the *"EPO of the future"* as it was combining the advantages of the latter without having its negative effects.

IX. MERITS

115. As an initial matter, it has to be noted that the question of standing to be sued, raised by the UCI, is a matter related to the merits. This follows from jurisprudence of the Swiss Federal Tribunal [SFT 128 II 50 E.2 b) bb)] as well as from the constant CAS jurisprudence (CAS 2013/A/3047, para. 52, and CAS 2015/A/3910, para. 129 ff.).

116. In the present case, the Panel notes, first, that the UCI-ADT is an organ of the UCI and does not, as such, have a legal personality. Second, neither the PASO nor the CNOC were parties in the procedure in front of the UCI-ADT and no relief is being asked against them. In the light of the foregoing, the Panel finds that the Second, Third and Fourth Respondent have no standing to be sued in the present proceedings and that the Appeal must be dismissed in so far as they are concerned.

A. Discussion of the Evidence and Decision on Liability

117. Regarding the validity, admissibility and reliability of the evidence submitted by the Parties, the Panel, first, points out that the fact that the Appellant did not attend the opening of his urine B Sample does not, as such, affect the validity of the results of the urine B Sample analysis. Indeed, in absence of any arguments or evidence establishing that the results of the analysis were wrong or flawed by departures from the ISL, the analytical findings must be considered valid. Moreover, the Appellant acknowledged, at the hearing, that he does not contest that the urine B Sample contained the prohibited substance FG-4592 and that the Laboratory did not commit any departures that could explain how the substance entered the urine B Sample.

118. The Panel, second, holds that, in view of the fact that the analytical results of the urine A Sample are not put into doubt, given that the Appellant acknowledged that, for the reasons explained by the Köln Laboratory, the alleged departures from the ISL standards could not have caused the positive finding, these results have equally to be considered valid.

119. The Panel, third, notes that the validity of the analysis of the blood sample taken from the Appellant on 15 July as well as the Appellant's ABP are not put into doubt by the Appellant.

120. The Panel, fourth, rejects the Appellant's argument that Prof. d'Onofrio's reports were biased through the communication of inadmissible evidence and are, therefore, invalid. Indeed, it follows from the evidence submitted by the parties that Prof. d'Onofrio, when establishing his first report, did not have any knowledge of the existence of the urine samples. Further, in his first report he considered the haematological variations in the blood profile to be "suspicious" and required further data. In his second report, he then considered that the "suspicious changes" observed were "fully consistent" with the use of FG-4592. In the Panel's view, the information that the Appellant's urine samples contained FG-4592 can be considered as confirmation of Prof. d'Onofrio's evaluation of the blood profile but by no means as having biased said evaluation. Finally, the use of valid, although potentially inadmissible evidence for corroborating purposes by Prof. d'Onofrio cannot affect the validity of his second report but could, at best, affect the admissibility of this report as evidence.

121. Concerning the admissibility of the evidence, the Panel, first, notes that according to Article 7.3 (d) of the UCI-ADR, riders shall be notified of *"the scheduled date, time and place for the B Sample analysis if the Rider (…) chooses to request an analysis of the B Sample"* and that pursuant to Article 7.3 (e) of the UCI-ADR the *"Rider and/or his representative"* have the right *"to attend the B-sample opening and analysis within the time period specified in the [ISL] if such analysis is requested"*. The Panel finds that in the present case, the rights conferred to Mr Oyarzun by Article 7.3 (d) and (e) of the UCI-ADR have been breached.

122. In this regard, the Panel recalls that according to well-established CAS jurisprudence, the athlete's right to attend the opening and analysis of the B Sample is of fundamental importance and if not respected, the B Sample results may be disregarded (e.g. CAS 2010/A/2161, para. 9.8). Given that, in the present case, the testing of the urine B Sample was requested by the Appellant, the absence of any admissible urine B Sample testing to corroborate the finding of the urine A Sample inevitably has an effect on the possibility to use the latter to establish an ADRV.

123. The Panel, however, believes that this jurisprudence should not be overstretched and applied in such a way as to incite athletes to render themselves unavailable to attend the opening of their B Sample so as to deprive an A Sample of its evidentiary value. In other words, the Panel is cautious to prevent future athletes from becoming "unavailable" in an attempt to circumvent a possible sanction. In the present case, it is not proven that the Appellant ever received notification of his right to attend the opening of the urine B Sample. Moreover, reasonable accommodation should be made in this regard and an athlete should not be put in an almost impossible situation when it comes to attending such event. The failure to properly notify the Appellant with sufficient, reasonable reaction time to secure his attendance affects the admissibility of the analytical results of both samples for establishing an ADRV for "Presence" under article 2.1 of the UCI-ADR.

124. That conclusion does not, however, apply to article 2.2 of the UCI-ADR. Indeed, first, it equally follows from CAS jurisprudence, that the fact that the analytical results of a B Sample cannot be used to establish an ADRV for "Presence" of the prohibited substance because it was obtained in breach of the athlete's fundamental right to attend the opening and analysis of said sample does not preclude the competent authorities to take this sample into account for a "Use" violation. In such a situation, the sample in question must be regarded with particular care and cannot by itself be sufficient to establish a "Use" violation (CAS 2015/A/3977, para. 173).

125. Second, according to the comment to Article 2.2 of the UCI-ADR, *"unlike the proof required to establish an anti-doping rule violation under Article 2.1 of the UCI-ADR, Use or Attempted Use may also be established by other reliable means such as documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Rider Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish 'Presence' of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample"*. Given that, in the present case, both urine samples exist and are considered valid, the simple fact they have to be disregarded for establishing an ADRV under Article 2.1 of the UCI-ADR does not, in the view of the Panel, affect their admissibility for establishing an ADRV under Article 2.2 of the same rules.

126. It is clear from the comment to Article 2.1 of the UCI-ADR that the same conclusion has to be drawn regarding the admissibility of the blood sample as well as the blood profile and the conclusions drawn from them by Prof. d'Onofrio. This is in particular so because as the UCI rightly pointed out, the blood profile and the correlating reports are just being used as corroborating evidence.

127. Regarding the reliability of the evidence brought forward by the UCI, the Panel recalls that pursuant to Article 3.2.2 of the UCI-ADR, *"WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Rider or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding"*.

128. In the present case, the Appellant has not been able to rebut this presumption, as he did not establish that the alleged departures, if any, could have caused the positive analytical findings. On the contrary, he had to acknowledge that the urine A and B Samples contained the substance FG-4592.

129. Regarding the reports of Prof. d'Onofrio, the expert evidence given by Prof. d'Onofrio himself and by Dr. Cameron at the hearing leaves hardly any room to question the reliability of these reports as both experts agreed that the variations observed in the blood profile could be due to the use of FG-4592, EPO or another prohibited substance as well as to a stay in high altitude combined with other physiological factors. However, with regard to this second

alternative, the Panel notes that the Appellant neither brought forward evidence or elements suggesting that such physiological factors were present nor alleged that he suffered, at the time of the sample taking or thereafter, a pathological condition that could have caused the observed variations in the blood profile. Thus, the Panel finds that Prof. d'Onofrio's reports and testimony are reliable evidence.

130. Moreover, the Panel notes that its position is supported by Dr Cameron's evaluation that the variations in haemoglobin could be due to high altitude only when under the assumption that other physiological factors did co-exist. But, no other physiological factor has been brought forward by the Appellant.

131. According to the UCI-ADT "Use" is defined as *"[t]he utilization, application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method"*. Pursuant to Article 2.2.1 of the UCI-ADT, it is each Rider's personal duty to *"ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. 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 rule violation for Use of a Prohibited Substance or a Prohibited Method"*.

132. In the present case, in view of the fact that it is not contested that the urine A and B Samples contained FG-4592 and of the circumstance that there is reliable evidence that the variations in the blood profile of the Appellant are fully consistent, on temporal, physiological and scientific bases, with the use of FG-4592, the Panel is comfortably satisfied that the Appellant used FG-4592 and, thus, breached Article 2.2 of the UCI-ADT.

B. Sanction

133. According to Article 10.2.1.1 of the UCI-ADT, the period of Ineligibility shall be four (4) years where the ADRV does *"not involve a Specified Substance, unless the Rider or other Person can establish that the [ADRV] was not intentional"*.

134. With regard to the term *"intentional"*, Article 10.2.3 of the UCI-ADT clarifies that this term is *"meant to identify those Riders who cheat. The term therefore requires that the Rider or other Person engaged in conduct which he or she knew constituted an [ADRV] or knew that there was a significant risk that the conduct might constitute or result in an [ADRV] and manifestly disregarded that risk"*.

135. The Appellant bears the burden of establishing that the ADRV was not intentional within the meaning of Article 10.2.3 of the UCI-ADT. The standard of proof imposed on the Appellant is a "balance of probability", as provided by the Article 3.1 of the UCI-ADR.

136. In this regard, the Panel notes that, as the UCI acknowledged, there could be cases, although extremely rare ones, in which a Panel may be willing to accept that an ADRV was not intentional although the source of the substance had not been established. But, as a general matter, proof of source must be considered an important and even critical first step in any exculpation of intent (CAS 2016/A/4534, para. 37). Alongside the example cited in CAS 2016/A/4534, one could imagine, for example, the case of an athlete affected by a

pathological condition for whom the use of a prohibited substance would not, because of his or her medical condition, be recommended for doping purposes or could even be life-threatening. This being said, the Panel is well aware of the fact that other CAS Panels have considered that in order to establish that the ADRV was not intentional, an athlete must establish how the substance entered his body (CAS 2016/A/4377, para. 50), and it fully adheres to this jurisprudence as a general benchmark.

137. In any event, in the present case, the Appellant, in the opinion of the Panel, clearly failed to rebut the legal presumption of having committed the ADRV intentionally.

138. In the Panel's view, the mere assertions of the Appellant that he did not deliberately or knowingly take FG-4592, that he has always been very careful to ensure that he did not inadvertently take FG-4592 and that he always submitted himself to all In- and Out-of-Competition doping controls is not sufficient to demonstrate that he ingested the substance unintentionally. The same conclusion has to be drawn with regards the alleged cross-contamination through the Appellant's medications or vitamins. First, the Appellant did not give any explanation on how such cross-contamination could have occurred. Second, he did not submit any analysis of the said medications and vitamins showing that such cross-contamination had ever occurred.

139. Moreover, given that FG-4592 was, at the time of the ADRV, still in clinical trial and, thus, not available on the market, the Panel finds that the Appellant did not demonstrate by a balance of probabilities as required in Article 3.1 of the UCI-ADR that the prohibited substance could have unintentionally entered his body.

140. Consequently, the period of ineligibility to be imposed on Mr Oyarzun should be four (4) years.

141. With regard to the request for reduction of the period of ineligibility raised by the Appellant based on Articles 10.4 and 10.5 of the UCI-ADT, the Panel notes that given the athlete's failure to rebut the legal presumption of having acted intentionally, it cannot grant the requested reductions because these reductions are based on the assumption that the ADRV did not occur with the intention to cheat.

142. This interpretation of the UCI-ADT is corroborated by the comment to Article 10.5.2 of the UCI-ADR, according to which *"Article 10.5.2 may be applied to any* [ADRV] *except those Articles where intent is an element of the* [ADRV] *(e.g. Article 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g. Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Rider or other Person's degree of Fault"*. Thus, in view of the fact that intention is already considered as an element of the sanction under Article 10.2.1 of the UCI-ADT and that, in the present case, the Panel has held that the Appellant did not establish lack of intent to cheat, the Panel cannot consider the application of Article 10.5.2 of the UCI-ADT to reduce the Appellant's sanction.

143. Similarly, the Panel holds that, in the present matter, no reduction of the sanction based on No Fault or Negligence can be applied on basis of Article 10.4 of the UCI-ADT as the finding

that the Appellant could not establish lack of intent to cheat logically precludes the Panel from concluding that said Appellant did not commit any fault or was simply negligent. In any event, contrary to the circumstances described in the comment to Article 10.4 of the UCI-ADT, the case at hand, in the view of the Panel, does not present any "exceptional circumstances" as the Appellant's argumentation concerning No Fault or Negligence is solely based on the assumption that FG-4592 could have entered his body through the cross-contamination of medications or vitamins he had ingested and that this assumption has not been substantiated by any analysis or other evidence.

144. In light of the foregoing, the Panel concludes that it sees no room for reducing the period of ineligibility set out in the Appealed Decision. As a result, the Appeal has to be dismissed and the Appealed Decision confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Carlos Iván Oyarzun Guiñez on 16 October 2016 is dismissed.

2. The decision rendered by the UCI Anti-Doping Tribunal on 26 August 2016 is confirmed.

3. (…).

4. (…).

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