Arbitration CAS 2010/A/2235 Union Cycliste Internationale (UCI) v. T. & Olympic Committee of Slovenia (OCS), award of 21 April 2011

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Prof. Massimo Coccia (Italy); Mr Michele Bernasconi (Switzerland)

Cycling
Doping (Athlete's Biological Passport)
Burden and Standard of Proof
Evaluation of the Experts' Panel report by the CAS Panel
Application of the rules related to the ABP by CAS Panels
Violation of EU competition law
Disqualification in case of a violation found by reference to the ABP
Blood manipulation as aggravating factor for the determination of the ineligibility period
Determination of the amount of the fine according to the UCI ADR

1. **The burden of proof of establishing an anti-doping violation *ex concessis* is imposed on UCI. The applicable standard of proof ("comfortable satisfaction") is a lower standard than the criminal standard (beyond reasonable doubt) but a higher standard than the civil standard (balance of probabilities). Application of the standard to any particular set of facts may produce different results depending on those facts. But the standard itself is uniform, irrespective of the facts. It demands an exercise of judgment.**

2. **Any Tribunal faced with a conflict of expert evidence must approach the evidence with care and self-awareness of its own lack of expertise in the area under examination. Nonetheless, notwithstanding these caveats, it cannot abdicate its adjudicative role. A CAS panel shall apply the standard of proof as an appellate body to determine whether the expert panel's evaluation is soundly based in primary facts, and whether the expert panel's consequent appreciation of the conclusion be derived from those facts is equally sound. It will necessarily take into account, *inter alia*, the impression made on it by the expert witnesses in terms of their standing, experience, and cogency of their evidence together with that evidence' s consistency with any published research.**

3. **A CAS panel is not called to adjudicate on whether some other or better system of longitudinal profiling could be created. WADA has approved the use of ABP and this has been codified in the current UCI rules. A CAS panel must respect and apply the rules as they are and not as they might have been or might become.**

4. **According to the jurisprudence of the European Court of Justice, anti-doping rules and sanctions *"are justified by a legitimate objective"* and any related limitation to the**

athletes' economic freedom *"is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes"*. While it is true that restrictions imposed by anti-doping rules and sanctions *"must be limited to what is necessary to ensure the proper conduct of competitive sport"* and, thus, must be proportionate, the Athlete has to adduce evidence to establish that the anti-doping rules and sanctions at issue are disproportionate and, as a consequence, to establish a violation of Article 101 of the Treaty on the Functioning of the European Union.

5. **Although the provisions as to disqualification are expressly made applicable to violations consisting of use of a prohibited method, they are not easy to apply where the proof of such violation is to be found by reference to the ABP. The provisions are geared to the situation where the violation is an occurrence rather than a process, most obviously where the violation is the presence of a prohibited substance. Article 289 of the UCI ADR provides in its title for disqualification of results in events during which an anti-doping violation occurs. Even though the text enlarges the title to embrace violations occurring "in connection with an event" it is not easy in ABP cases to identify in connection with which events the Athlete's doping violation occurred. Therefore, as Article 313 of the UCI ADR provides in its title for disqualification of results in competitions subsequent to anti-doping rule violation but is applicable only when article 289 of the UCI ADR is not, this article more easily fits ABP cases.**

6. **A submission that blood manipulation constitutes an aggravating factor and that a minimum three-year ban should be imposed upon the Athlete has no foundation in the UCI ADR which does not differentiate between various forms of first offence or suggest that blood manipulation attracts *ratione materiae* a higher sanction than the presence of a prohibited substance.**

7. **Article 326 of the UCI ADR provides a formula for computation of the fine with a proviso allowing for a reduction of up to a half for the financial situation of the licence holder concerned. Reduction from the figure so calculated is available under the same article where the Athlete's financial situation justifies it. It requires a CAS panel to consider the particular facts before it.**

This is an appeal brought by Union Cycliste Internationale (UCI) against a decision ("the Appealed Decision") of the Senate ("the Senate") of the National Anti-Doping Commission of the Olympic Committee of Slovenia (OCS).

Its importance lies in the fact that it raises the issue of whether a doping violation can be established not on the basis of an adverse analytical finding but by reference to the so-called Athletes Biological Passport (ABP) i.e. longitudinal profiling, in this instance said to evidence use of a prohibited

method. The same issue has been previously considered by the Court of Arbitration for Sport in TAS 2010/A/2178.

UCI is a non-governmental association of national cycling federations recognized as the international federation governing the sport of cycling under all forms worldwide. Its registered office is in Aigle, Switzerland.

T., born on 13 April 1977, is of Slovenian nationality ("the Athlete"). He has been a professional rider since 2000 and is an Elite category cyclist, who holds a licence issued by the National Cycling Federation of Slovenia.

OCS was founded in 1991 and achieved International Olympic Committee recognition in 1992. It is the organisation responsible for the coordination, the management and the development of Slovenian sport in all its various forms.

While direct detection methods aim to detect the doping agent itself, the focus of the ABP is not on the detection of prohibited substances but rather on the effect of these substances on the body. Designed, as they are, to create physiological enhancements, biological markers of disease are used in medicine to detect pathological conditions. Biomarkers of doping are used to detect doping. The comment to article 3.2 of the WADA Code which refers to *"conclusions drawn from the profile of a series of the Athlete's blood or urine samples"* gives an authoritative imprimatur to the principle of using such evidence.

The ABP is an individual, electronic record for each athlete, in which the results of all doping tests over a period of time are collated (TAS 2010/A/2178 para. 5). It is the paradigm that uses biomarkers of doping. *"L'ABP est fondé sur un profil hématologique élaboré sur la base de résultats de contrôles sanguins permettant d'établir les limites individuelles de chaque athlète pour trois paramètres hématologiques: la concentration de hémoglobine (…) le pourcentage de réticulocytes (…) et l'index de stimulation on "Off-score" (qui exprime le rapport entre les deux valeurs précédentes)"* (*ditto*, para. 38).

According to the WADA Code, Athlete Biological Passport, Operating Guidelines and Compilation of Required Elements, January 2010 (hereinafter "The Guidelines"), *"In order to establish a systematic and robust longitudinal monitoring program, the list of relevant and significant variables for a specific class of substance (e.g. substances enhancing oxygen transfer, such as EPO) must be identified and then monitored on a regular basis for any given Athlete. The collection and monitoring of values corresponding to these identified variables will constitute an individual and longitudinal profile. Such profiles are the cornerstones of the Athlete Biological Passport with a subject becoming his/her own reference. This contrasts the traditional approach of the Athlete's variables being measured against norms in the Athlete population at large. The variables to be monitored will vary, according to the purpose of the detection. For instance, haematological variables in the blood will be taken into consideration to confirm blood manipulation or aerobic performance enhancement"* [1.0 Introduction and Scope]. At the material time the ABP is based on a blood matrix only, although advances in science may prompt further development.

The first section of The Guidelines explains how the ABP works and how to establish it. It does not contain any mandatory requirements. The second section consists of annexes which are *"a*

compilation of the mandatory protocols which must be followed by the Anti-Doping Organizations choosing to use the Athlete Biological Passport to ensure consistency in application, the sharing of information and the standardization of procedures" [*Ditto*] [UCI is one such organisation]. Those annexes *"must be rigorously applied to ensure the validity of the Athlete Biological Passport"*.

Each collected sample is analysed by a WADA accredited laboratory following the appropriate analytical protocol and the biological results are incorporated into ADAMS, a *"Web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and WADA in their anti-doping operations in conjunction with data protection legislation"* [2.1]. The statistical model developed for the ABP program will then be applied to the results of analyses to determine an abnormal profile score.

According to The Guidelines, the Adaptive Model is the *"Model developed in which evidence or observations are used to update or to newly infer the probability that a hypothesis may be true or to discriminate between conflicting hypotheses. It was designed to identify unusual longitudinal results from Athletes"* [2.2].

The Guidelines further state that the Adaptive Model *"is capable of triggering "alerts" and self-identifying abnormal profiles that warrant further attention and review.(…) A profile in which the Adaptive Model has identified the Hb or Off-hr score abnormal with a 99.9% probability or more shall be reviewed by a panel of three experts. However, individual Anti-Doping Organizations may choose a lower probability score to identify Samples for further results management. Other profiles not flagged by the Adaptive Model should be reviewed by one expert on a systematic basis"*[1] [Annex D.2].

The statistical result for the athlete does not in itself justify a conclusion that an anti-doping rule violation has occurred but rather calls for an explanation by the athlete.

The Panel accepts too that in order to evaluate such explanation a whole range of factors related to the sport as well as to the athlete in question will require consideration.

In January 2008, UCI started its ABP program, which is applicable to all riders competing in UCI ProTeams or UCI Professional Continental Teams with wild card status.

On 3 August 2007, the Athlete and EUSRL France Cyclisme – Parc d'activités de Côte Rousse entered into an employment contract for the period 1 January 2008 to 31 December 2009 ("the Contract"). According to the Contract, UCI Regulations and statutes were applicable to the signatories.

The Athlete was included in the UCI ABP program and subject to 21 in and out-of-competition blood sample collection between March 2008 and August 2009. The data contained in his ABP file were recorded under the following anonymous identifying code: J150L29. The analyses were on all occasions carried out in an accredited laboratory.

[1] The range of experts is identified in 2.2 and Annex D 3.

Date of testing	**Competition**	**Country**	**Hct[2]**	**Hb[3]**	**RET[4]**
21.03.08		France	44	15.3	0.66
19.04.08		Slovenia	45.2	15.6	0.92
24.04.08		Belgium	44.3	15.1	0.81
05.05.08		Slovenia	41.6	14.3	0.61
08.05.08	Pre Giro Italia	Italy	45.2	15.4	0.95
20.05.08 *	Giro Italia	Italy	43.9	15	0.93
12.06.08		Slovenia	39.7	13.8	1.21
03.07.08	Pre Tour France	France	45.6	15.5	1.17
15.07.08 *	Tour France	France	42	14	0.58
27.08.08		Slovenia	43.8	15.2	073
26.09.08		Slovenia	46.8	16.2	1.04
30.09.08		Slovenia	45.1	16.2	0.9
13.12.08		France	47.6	16.4	0.9
15.01.09		France	47.3	16.5	0.75
11.02.09	Pre Tour California	USA	46.1	16.4	0.92
11.03.09	Pre Tirreno Adriatico	Italy	42.1	15.1	0.7
19.04.09		**Slovenia**	**38.9**	**13.3**	**2.1[5]**
07.05.09	Pre Giro Italia	Italy	46.3	15.5	1.13
31.05.09 *	Giro Italia	Italy	42.4	14.3	0.96
27.08.09	Pre Vuelta	Netherlands	45.2	15.2	0.86
29.08.09	**Vuelta**	**Netherlands**	**50**	**16.8**	**0.51[6]**

* in-competition sample collection. The Athlete placed overall 9th in the 2009 Giro.

A further blood sample was collected on 6 September and analysed on 22 September 2009. On 27 December 2009, the results were communicated to the Athlete.

22.09.09			46.5	16.5	1.07

Mr Olaf Yorck Schumacher of UCI Security and Safety Conditions Commission presented to the CAS Panel the following chart, based on the Athlete's own whereabouts information, in order to establish that there were only three occasions where the Athlete spent around 300 consecutive hours at high altitude:

[2] Hematocrit – ratio of blood cells to plasma.
[3] Haemoglobin – molecular carrier transporting oxygen from lungs to body tissue.
[4] Reticulocytes – new blood cells released from bone marrow.
[5] Off-hr score 46 units } An off score is an index of stimulation blood profile score, Guidelines 3.3.
[6] Off-hr score 125 units } stimulation blood profile score, Guidelines 3.3.

Period	Number of days(d) / hours (h)	Altitude	Hb	RET
April 2008	14 (d) / 336 (h)	2'100 m	15.6	0.92
Jan/Feb 2009	11 (d) / 264 (h)	2'100 m	16.4	0.92
Feb/March 2009	21 (d) / 378 (h)	2'500 m	15.1	0.7

At the hearing before the Court of Arbitration for Sport, the Athlete testified that he would log into ADAMS[7] around 3 times a year. Based on his log-in history, it appears rather that between 2 April and 26 June 2009, he actually checked his biological profile on ADAMS 16 times.

In any event, the Athlete asserts that after looking up his biological profile on ADAMS, he was alarmed by his blood values of 19 April 2009 and decided to consult his doctor. It is undisputed that the doctor conducted a medical examination but did not perform a gastroscopy on the Athlete.

On 7 August 2009 – a few months after the medical examination – the doctor signed the following medical certificate:

> *"At the last hemogram blood test on 19th of April 2009 the measured haemoglobin level was around 140g/L. T. usually has values between 150 – 160 g/L.*
>
> *In February this year he stepped down on a race in California because of troubles with his stomach. He was even briefly hospitalised. On his return to homeland he was receiving antibiotics for seven days and proton pump inhibitors afterwards for eradication of Helicobacter pylori bacteria. In the middle of April he again noticed black stool, which was attributed to acute inflammation of gastric mucosa. Aforementioned black stool is a significant sign of haemorrhage from upper intestinal tract and can significantly lover the level of haemoglobin in blood.*
>
> *He was having similar troubles on several occasions from 2001 when gastroscopy was performed for the first time and showed erosive inflammation of the gastric mucosa".*

According to UCI, two abnormal values were identified by the Adaptive Model in that the samples results of 19 April and of 29 August 2009 deviated from the norm by 99.9%. In accordance with The Guidelines, the Athlete's file was anonymously reviewed by a panel of three experts, namely Dr Michael Ashenden, Dr Giuseppe Fischetto and Dr Olaf Yorck Schumacher (the "Expert Panel").

On 6 December 2009, all these members of the Expert Panel signed the following statement ("the Experts' Statement"):

> *"We, the undersigned scientific experts, state that the haematological profile BP_ID J150L29 provides convincing evidence of the use of a prohibited method listed under category M1. Enhancement of Oxygen Transfer of the Prohibited List maintained by the World Anti-Doping Agency.*
>
> *We have reviewed data contained in the Rider's Biological Passport file including the raw haematological results and the graphical profile established by the Athlete Biological Passport software as attached and signed. We have also reviewed the full laboratory documentation packages associated with each sample in the profile.*

[7] Anti-Doping Administration and Management System.

In accordance with Article 3 of Annex D of the Athlete Biological Passport Operating Guidelines, it is the panel's unanimous opinion, absent a satisfactory explanation from the rider, that based on the Haemoglobin (Hb) and OFF-hr Score data, it is highly likely that the rider has used a Prohibited Substance or Prohibited Method.

We therefore recommend that the UCI initiate disciplinary proceedings for a potential anti-doping rule violation under Article 21.2 of the UCI Anti-Doping Rules".

On 1 March 2010, UCI informed the Athlete that abnormal variations were identified in his biological parameters and forwarded him the Experts' Statement accompanied by the raw results of blood variables measured in his blood samples as well as by the graphical representation of his haematological profile generated from the results of his blood variables by the Adaptive Model. UCI invited the Athlete to provide his own clarification for the results within 30 days. The Athlete was informed that if, after reviewing his explanation, the members of the Expert Panel were of the unanimous opinion *"that there is no known reasonable explanation for [his] blood profile information other than the use of a prohibited method, the UCI shall proceed with the case as an asserted anti-doping rule violation"*.

By email dated 5 March 2010, the Athlete noted that UCI did not specify which values were found to be abnormal. Nonetheless, he outlined the various health problems encountered during the first part of the season of 2009:

i) in February 2009, he dropped out of the first stage of the Tour of California due to stomach aches, and suffered vomiting and cramps at night,

ii) he felt "bad again" during the Criterium International as well as during the altitude training for the Giro in Italy,

iii) on 19 April 2009 at the moment of the sample collection he was also in a state of great stress due to his second child's birth, and

iv) on 25 August 2009 he had to be treated for a wasp sting on his tongue with a cortisone injection.

He also explained that, since January 2009, he spent much time at his mountain house which is situated at 1,300 meters and equipped with hypoxic rooms: and that to simulate altitude up to 4200m high from 5 to 26 July 2009 he stayed at an altitude of 2,800 meters and from 13 to 24 August 2009 at one of 3,200 meters.

On 29 April 2010, the members of the Expert Panel unanimously confirmed that they reviewed the Athlete's explanation and concluded that *"there (is) was no known reasonable explanation for his blood profile information other than the use of a prohibited substance or method"*. They recommended UCI to proceed with the case as an asserted Anti-Doping Rule Violation.

On 3 May 2010, UCI informed the Athlete as well as the Slovenian Federation of Cycling that the Athlete was found to have committed a *"potential anti-doping rule violation"* under article 21.2 of the UCI Anti-Doping Rules. It explained that the haematological profile consisting of blood samples collected from the Athlete during 2008 and 2009 provided convincing evidence that he used the prohibited method of enhancement of oxygen transfer. As a consequence, UCI required the

Slovenian Federation of Cycling to instigate disciplinary proceedings in accordance with the applicable UCI Anti-Doping Rules.

On 18 May 2010 the Athlete submitted a written defence.

The Senate of the National Anti-Doping Commission of the OCS ("the Senate") was the competent first instance decision making body to hear the Athlete's case.

On 18 May 2010 and on 8 July 2010 the Senate held two hearings between which UCI filed various additional documents. The second hearing was attended by representatives of the National Anti-Doping Commission, by UCI represented by its attorney, Mr Philippe Verbiest and by the Athlete assisted by his attorney, Mr Pavle Pensa. After it, further documents were submitted on both sides, some of which were disregarded.

On 28 July 2010, after having heard the parties and evaluated the available evidence, the Senate ruled that UCI failed to prove the effective use by the Athlete of a prohibited method. The Senate accepted that the Athlete's blood profile on 19 April 2009 could be explained by his well-documented chronic health problems and was not convinced by *"the opposing statement of the UCI, which arises from the opinion of experts (…) that it is strange that an Athlete being in such a bad heath condition could only 18 days later participate in Giro d'Italia, at which he achieved a very good qualification"*. It found too that the Athlete's success in the race could be explained by the evidence he provided of his *"extreme physiological abilities, which distinguishes him from an average person"* and which allowed him to recover faster. Likewise, the Senate found it credible that the variations of the Athlete's values in August 2009 were caused by his high-altitude training and by his treatment for a wasp sting (administration of corticosteroids methylprednisolonum and heamodilution by drinking of copious draughts of water pursuant to medical advice). In addition and according to the Senate, the Athlete also proved that the abnormal blood profile was *"the consequence of wrongly applied statistical method of biological passport"* and that some irregularities occurred during his sample analysis. As a result, the Senate concluded that the Athlete did not violate the applicable UCI anti-doping regulations and decided not to impose any sanction upon him.On 29 July 2010, UCI was notified of the Decision.

On 17 August 2010 UCI received the Senate's complete file of the case.

On 16 September 2010, UCI filed a statement of appeal with the Court of Arbitration for Sport (CAS).

On 15 October 2010, UCI filed its appeal brief, which contains a statement of the facts and legal arguments accompanied by supporting documents. It challenged the Appealed Decision submitting the following request for relief:

"PRELIMINARILY:

- *Request the Slovenian Olympic Committee to deliver a full copy of the first instance file*

PRINCIPALLY:

- *Annul the decision of the Senate of the National Anti-Doping Commission of the Olympic Committee of Slovenia dated July 28, 2010 in its entirety*

- *State that T. has committed a violation of art. 21.2 ADR (use of a Prohibited Method, specifically a blood manipulation)*
- *Issue a sanction of minimum 3 years of ineligibility in application of art. 293 ADR and 305 ADR against T. starting from the date of the hearing decision in application of art. 314 ADR*
- *Disqualify all the competitive results achieved by T. since April 19, 2009 and order the return of any prize-money earned in competitions held from the same date in application of art. 313 ADR*
- *Condemn T. to pay to UCI a fine amounting to 105'000, 00 Euros in application of art 326 ADR*
- *Order that T. shall bear all the costs of the proceedings*
- *Order that T. shall bear the cost of the results management by the UCI. UCI claims the costs of results management to an amount of 2'500 Swiss Francs*
- *Order that T. shall pay the UCI a contribution to the costs incurred by the UCI in connection with these proceedings, including experts' and attorneys' fees".*

On 11 November 2010, the Athlete submitted his answer, with the following request for relief:

"First Respondent requests that the Court of Arbitration for Sport rules:

1. *The appeal is dismissed.*
2. *The decision of the Disciplinary Commission of the National Anti-Doping Commission of the Olympic Committee of Slovenia Case No. VT 01/2010 of 28 July 2008 is upheld.*
3. *International Cycling Union (UCI) is ordered to pay to T. an amount [to be determined at the end of the procedure] as the full amount of his costs incurred in connection with the present arbitration".*

OCS did not submit a response to UCI submissions.

On 7 December 2010, OCS informed the CAS Court Office that it *"decided not to participate on hearing in this case".*

On 20 January 2011 a hearing was held at the CAS premises in Lausanne, Switzerland.

The following persons attended the hearing:

- For UCI, its doctor, Dr Mario Zorzoli, a member of its anti-doping service, Mr Davide Delfini, assisted by Mr Philippe Verbiest and Mr Jean-Pierre Morand, attorneys.
- For the Athlete, himself assisted by Mr Pavle Pensa, attorney and Ms Andreja Nastassa Terbos, interpreter.

UCI called the following experts to testify:

- Dr Pierre-Edouard Sottas, head of research project, Swiss Laboratory for Doping Analyses, Epalinges, Switzerland.
- Prof. Giuseppe d'Onofrio, professor of haematology and director of the transfusion department, policlinic A. Gemelli in Rome, Italy.

- Dr Michael Ashenden, project coordinator for Science and Industry Against Blood Doping (SIAB), a Brisbane-based organisation that has developed tests to identify blood dopers;
- Dr Olaf Yorck Schumacher, member of the department of sports medicine, University of Freiburg, Germany and member of the UCI Security and Safety Conditions Commission.
- Dr Gian Dorta, head physician and director of the division of gastroenterology and hepatology, University Hospital of Lausanne (CHUV), Switzerland.

The Athlete called the following experts to testify:

- Dr Andrej Gruden, medical doctor and internist-gastroenterologist, University Medical Centre of Ljubljana, Slovenia.
- Dr Maja Pohar Perme, assistant professor of statistics, University of Ljubljana, Slovenia.
- Prof. Gérard Dine, head of the haematology department, Hospital des Hauts-Clos, Troyes, France and head of the biotechnology department, Ecole Centrale de Paris, France.
- Dr Samo Zver, medical doctor specialised in internal medicine and haematology, University Medical Centre of Ljubljana, Slovenia.
- Prof. Robin Henderson, professor of statistics and head of School of Mathematics and Statistics, Newcastle University, United Kingdom.

Prof. Robin Henderson and Dr Michael Ashenden were heard via teleconference, with the agreement of the CAS Panel and pursuant to article R44.2 par. 4 of the Code of Sports-related Arbitration (CAS Code).

At the conclusion of the hearing, all parties accepted that their rights before the CAS Panel had been fully respected. It was agreed that the parties would file simultaneous closing written submissions on 16 February 2011 and that the CAS Panel would render its award after receipt of those complementary documents.

On 15 February 2011, a post hearing brief was sent to the CAS Court Office on behalf of the Athlete and on 16 February 2011 on behalf of UCI.

The UCI ADR applicable to the Athlete as a licence-holder provides, so far as material, as follows:

"Definition of doping

19. Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in article 21.

20. License-Holders shall be responsible for knowing what constitutes and anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

Anti-doping rule violations

21. The following constitute anti-doping rule violations:

(…)

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

2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that he does not Use any Prohibited Method. 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.

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

2.3 The Use or Attempted Use of a Prohibited Substance or a Prohibited Method consistent with the provisions of an applicable Therapeutic Use Exemption issued in accordance with the present Anti-Doping Rules shall not be considered an anti-doping rule violation.

(…)

Proof of doping

Burdens and standards of proof

22. The UCI and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or its National Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the License-Holder alleged to have committed an antidoping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in articles 295 and 305 where the License-Holder must satisfy a higher burden of proof.

Methods of establishing facts and presumptions

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

For example, any of the following shall constitute evidence of oxygen transfer enhancement:

- *An analysis of a blood sample by an UCI-approved laboratory showing a haemoglobin ratio or a stimulation index (as defined in article 13.1.063) higher than the limit based on the rider's test history for a specificity of 99,9 percent following the technical document on the biological passport.*
- *A sequence of six or more haemoglobin ratios and/or stimulation indices (as defined in article 13.1.063) as shown by the analysis of blood samples by an UCI-approved laboratory that deviates from the sequence based on the rider's test history for a specificity of 99,9 percent following the technical document on the biological passport.*

Comment: the above examples refer to the rider's biological passport. The above examples do not exclude other results or sequences from being put forward and accepted as evidence of an anti-doping violation, for example where specificity is lower than 99,9 percent, in particular where other, corroborative evidence is available.

24. *WADA - accredited laboratories or as otherwise approved by WADA are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The License-Holder 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.*

    If the License-Holder rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the UCI or the National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

25. *Departures from any other International Standard, these Anti-Doping Rules, the Procedural Guidelines set by the Anti-Doping Commission or any other applicable anti-doping rule or policy or technical document which did not cause an Adverse Analytical Finding or the factual basis for any other anti-doping rule violation shall not invalidate such findings or results. If the License-Holder establishes that any such departure which could reasonably have caused the Adverse Analytical Finding or factual basis for any other anti-doping rule violation occurred, then the UCI or its National Federation shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".According to Appendix 1 of the UCI ADR, a prohibited method is "Any method so described on the Prohibited List", which is "The List published by WADA and identifying the Prohibited Substances or Prohibited Methods".*

The 2010 Prohibited List published by WADA and which came into effect on 1 January 2010 gives the following material definition of "Prohibited Methods":

"M1. ENHANCEMENT OF OXYGEN TRANSFER

The following are prohibited:

1. *Blood doping, including the use of autologous, homologous or heterologous blood or red blood cell products of any origin.*

2. *Artificially enhancing the uptake, transport or delivery of oxygen, including but not limited to perfluorochemicals, efaproxiral (RSR13) and modified haemoglobin products (e.g. haemoglobin-based blood substitutes, microencapsulated haemoglobin products), excluding supplemental oxygen".*

LAW

CAS Jurisdiction

1. The jurisdiction of CAS derives from articles 74 ff. of the UCI Constitution, articles 278 and 329 ff. of the UCI ADR and article R47 of the CAS Code.

2. According to article 74 of the UCI Constitution, *"The Court of Arbitration for Sport in Lausanne, Switzerland, is the sole competent authority to deal with and judge appeals, in cases stipulated by the rules established by the Management Committee, against sporting, disciplinary and administrative decisions taken in accordance with UCI rules"*.

3. Article 278 par. 1 of the UCI ADR states that *"The decision by the hearing panel of a License-Holder's National Federation shall not be subject to an appeal before another body (appeals board, tribunal, etc.) at National Federation level"*. Article 329 para. 1 of the UCI ADR identifies *"a decision of the hearing body of the National Federation under Article 272"* as the subject of an appeal to CAS.

4. The Appealed Decision was a final decision not subject to an appeal before another body at national level. It was appealed to the CAS in compliance with article 329 of the UCI ADR.

5. CAS jurisdiction is further confirmed by the Appealed Decision, in which it is stated, consistent with article 74 of the UCI Constitution and articles 278 and 329 of the UCI ADR, that *"An appeal is admitted against this decision within 1 (one) month. The Court of Arbitration for Sport (CAS) decides on appeal"*.

6. It follows that CAS has jurisdiction to decide on the present dispute; the technical objection which led the Athlete to decline to sign the order of procedure is dealt with and dismissed at XIII below.

Applicable Law

7. Article R58 of the CAS Code provides the following:

   "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".

8. Article 78 of the UCI Constitution provides that *"In the absence of a choice of applicable law by the parties, the Court of Arbitration for Sport will apply Swiss law"*.

9. In the present matter, the parties have not expressly agreed on the application of any particular law. As a result, subject to the primacy of applicable UCI Regulations, Swiss law applies complementarily.

Admissibility

A. In general

10. Pursuant to article 77 of the UCI Constitution, *"Proceedings with the Court of Arbitration for Sport are governed by UCI rules and for the rest, by the Code of arbitration for sport"*.

11. According to article R51, par. 1 of the CAS Code, *"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely, failing which the appeal shall be deemed withdrawn"*.

12. R32 par. 2 of the CAS Code reads as follows: *"Upon application on justified grounds, either the President of the Panel or, if he has not yet been appointed, the President of the relevant Division, may extend the time limits provided in these Procedural Rules, with the exception of the time limit for the filing of the statement of appeal, if the circumstances so warrant"*.

B. In particular

13. It is undisputed that UCI filed its statement of appeal on 16 September 2010, i.e. within the deadline prescribed by article 334 of the UCI ADR.

14. It is also undisputed that on 16 September 2010, UCI requested *"an extension for the deadline for the statement of appeal until 30 November 2010"* on the grounds that (i) ABP cases were more complex than standard analytical cases as they are based on a high number of samples, (ii) that UCI's legal representative would be absent for a long period, and had other important professional commitments, (iii) that such extension would not impact adversely to the hearing date before the CAS and (iv) that the Athlete would not be disadvantaged since he was eligible to participate in cycling races pending the proceeding before the CAS Panel.

15. According to the Athlete, UCI did not comply with article R51 of the CAS Code as it filed its appeal brief after the expiry of the 10-day deadline. He contends that UCI exclusively applied for a time extension to submit its "statement of appeal" and that this application was moot as the said document was already filed. The Athlete claims that, as UCI has never formally requested for a time extension to submit its "appeal brief" within the limits and requirements of articles R32 and R51 of the CAS Code, its appeal is inadmissible.

16. The CAS Panel notes the following also undisputed facts:

- On 20 September 2010, the Athlete's attorney informed the CAS Court Office that he was opposed to the time extension sought by UCI for filing its "appeal brief".
- On 23 September 2010, i.e. within the 10-day deadline prescribed by article R51 of the CAS Code, the CAS Court Office wrote to OCS with a copy to the Athlete's attorney, and invited it to take position on UCI's request for a time extension on or before 29 September 2010. The CAS Court Office noted that, in the meantime, the deadline to file the "appeal brief" would be suspended.
- On 28 September 2010, OCS confirmed to the CAS Court Office that it did not consent to UCI's request for a time extension to file its "appeal brief".
- On 7 October 2010, before the constitution of the Panel appointed to hear the present case, the Deputy President of the CAS Appeals Arbitration Division extended the time limit for the filing of the appeal brief to 15 October 2010.

17. The CAS Panel concludes that it has always been clear to all parties that the requested extension of time was for the filing of the appeal brief and not for the filing of the statement of appeal. The Athlete cannot in principle derive any argument from UCI's obvious clerical slip.

18. Furthermore, it also appears that UCI applied for the time extension at the very start of the 10-day deadline provided for by article R51 of the CAS Code, which (significantly) does **not** say that any extension of time must itself be granted within the said deadline. This is consistent with Swiss procedural legislation (for instance, DONZALLAZ Y., *Loi sur le Tribunal Fédéral*, Berne 2008, p. 520, par. 1213).

19. In the CAS Panel's judgment, the Deputy President of the CAS Appeals Arbitration Division (DPCAAD) properly did not wish to rule on UCI's application without giving to the Respondents the opportunity to exercise their right to be heard. The parties were informed by the CAS Court Office that the 10-day time limit was suspended in order to allow OCS to indicate the basis for its eventual objections consistently with the requirement that before taking his decision, the DPCAAD must also consider all the facts and circumstances of the case, the behaviour of the parties, the nature of the litigation, and the consequences to the parties of the grant or refusal of the application for an extension.

20. The DPCAAD has a wide discretion in assessing the weight of the relevant grounds supporting the request for a time extension and the respective interests of the parties. It is not up to the Panel to second-guess the decision of the DPCAAD to grant an extension. In any event, in principle applications for time extension should be accepted as long as they are not abusive, do not unduly delay the proceedings and comply with the principle of proportionality. In the case at hand and after having heard all the parties, the DPCAAD determined to extend the deadline to file the appeal brief to 15 October 2010, which was much shorter than the time extension initially applied for. It appears that he correctly took into consideration all the interests at stake.

21. Under such circumstances, the CAS Panel concludes that the appeal brief was timeously filed, i.e. within the extended deadline. The Appellant complied with all other requirements of article R48 of the CAS Code, including the payment of the CAS Court office fees. It follows that the appeal is admissible.

22. The Athlete claims that the CAS Panel should not take into consideration new facts or evidence presented by UCI unless the latter can explain why it was not in a position to submit those facts or evidence at the first instance hearing before the Senate.

23. According to article R57 of the CAS Code, *"The Panel shall have full power to review the facts and the law"*. Under this provision, the CAS Panel's scope of review is unrestricted. It may even request *ex officio* the production of further evidence. In other words, the CAS Panel not only has the power to establish whether the decision of the first instance was or was not lawful, but to issue an independent and free standing decision (CAS 2004/A/607; CAS 2004/A/633; CAS 2005/A/1001; CAS 2006/A/1153). Accordingly, the CAS must be able to examine the formal aspects of the appealed decisions but also, above all, to evaluate all facts and legal issues involved in the dispute (CAS 2008/A/1515*)*.

24. For the above reasons, the CAS Panel holds that the Athlete's submission that the CAS Panel's powers be confined in the manner contended for must be dismissed. To hold otherwise would be to undermine the very purpose of CAS as a *de novo* appellate forum.

Merits

A. Burden and Standard of Proof

25. The burden of proof of establishing an anti-doping violation *ex concessis* is imposed on UCI (Article 22 of the UCI ADR). The standard of proof *"comfortable satisfaction"* is provided in the same article. It is a lower standard than the criminal standard (beyond reasonable doubt) but a higher standard than the civil standard (balance of probabilities).

26. In so far as the Athlete, by invoking the principle in *"in dubio pro reo"* and in seeking to quantify the requisite standard in terms of an equal to or a less than 1 in 1000 chance, seeks to depart from the language of the rules, the CAS Panel rejects his approach. Application of the standard to any particular set of facts may produce different results depending on those facts. But the standard itself is uniform, irrespective of the facts. It demands an exercise of judgment.

27. UCI submits that given the CAS Panel's lack of specific scientific expertise *"it should limit itself to check that the Expert Panel considered the correct issues and exercised its appreciation in a manner which does not appear arbitrary or illogical. In any event it should not substitute its own subjective appreciation to the one of the expert panel"*.

28. The CAS Panel recognises that it does not stand in the shoes of the Expert Panel (or indeed of those of the experts for either side), nor does it seek nor should it in this (or any other case) to repeat the exercises carried out by experts. It also recognises that any Tribunal faced with a conflict of expert evidence must approach the evidence with care and self-awareness of its own lack of expertise in the area under examination. Nonetheless, notwithstanding these caveats, it cannot abdicate its adjudicative role (cf: *Kumho Tire Co. Ltd v Patrick Cormichael* US Supreme Court 23 March 1994); Roman Law put the matter pithily: *"iudex peritus peritorum"* (the judge is the expert on the experts). Bearing in mind the prescribed provisions as to burden and standard of proof, the CAS Panel conceives its function in applying the standard as an appellate body to determine whether the Expert Panel's evaluation (upon which UCI's case rests) is soundly based in primary facts, and whether the Expert Panel's consequent appreciation of the conclusion be derived from those facts is equally sound. It will necessarily take into account, *inter alia*, the impression made on it by the expert witnesses in terms of their standing, experience, and cogency of their evidence together with that evidence' s consistency with any published research: and it has done so in this appeal.

29. The CAS Panel has been alert to ignore reference to cases of other road race cyclists where charges of doping violations by blood doping or otherwise have been established, or to avoid making the lazy assumption that a participant in such a sport is more prone to resort to doping practices than participants in other professional sports. However, this CAS Panel rejects the assertion, not infrequently made, both before it and (previously) before the Senate that the experts produced by UCI acted as advocates, or even accusers. UCI itself has nothing to gain from exaggerating the extent to which its sport is troubled by the scourge of doping.

30. There was some debate before the CAS Panel as to the merits of the ABP as presently devised. In particular Prof. Dine was a critic of the current APB and the markers used. The CAS Panel is not called to adjudicate on whether some other or better system of longitudinal profiling could be created. WADA has approved the use of ABP and this has been codified in the current UCI rules. The CAS Panel must respect and apply the rules as they are and not as they might have been or might become.

31. The first question then is whether the analyses of the Athlete's blood samples were correctly carried out and, in consequence, whether the results of those analyses were reliable. It is to be noted that although the Appealed Decision did not leave the analyses unscathed, the Senate did not consider that any administrative errors affected the results. It said *"With regard to the irregularities in the analysis of the Athlete's blood samples, stated by the Athlete, the Senate DK finds that the Athlete has proven with at least the balance of probability that the irregularities with some analysis have been made. Not even Dr. d'Onofrio, who was of the opinion that these were administrative mistakes when writing the report, opposes to this. Considering the lack of other evidence, which would indicate that the mistakes in the analysis of the Athlete's blood samples actually and significantly influenced the Athlete's blood profile results in the way that they would no longer be "abnormal", the Senate DK finds that the Athlete has not proven with the balance of probability that his blood profile is a consequence of mistakes in the procedure of blood sample analysis. The UCI on the other hand submitted evidence, expert opinion (A30), from which it arises that especially in the case of the most critical results (19 April 2009 and 29 August 2009) there were no irregularities made"*. The CAS Panel sees no reason to depart from that conclusion.

32. The attack on the analysis had two main prongs; in relation to the 19 April 2009 sample the issue was whether it was properly mixed; in relation to the 29 August 2009 sample the issue was whether the external quality controls were effective. The CAS Panel accepts the evidence of Prof. D'Onofrio, an expert in haematology, which, in its judgment, complemented by the disclosed documentary evidence from the laboratory, satisfactorily rebutted that assault. The consistency of the aliquots tested on 29 August repels the first challenges. The internal quality controls repel the second. Pursuant to direction by the CAS Panel, UCI provided (albeit in redacted form) the results of other samples analysed on both 27 April and 29 August 2009, which gave no indication as to any analytical problems. The CAS Panel does not criticise the Athlete's lawyers for taking all reasonable steps to see if some fatal flaw could be found in the analytical procedure. It can only comment that the exercise of the inquiry in the event yielded no forensic fruit. It is not without interest that both in his initial explanation dated 5 March 2010 and in the pre defence email from his lawyer dated 17 May 2010 the Athlete's challenge was not to the accuracy of the results of the blood tests but to the legitimacy of drawing any adverse inference from them. The presumption of regularity enshrined in article 24 of the UCI ADR was not displaced.

33. The second and, accordingly, key question was what conclusions could be drawn from the results. The expert evidence relevant to this question was essentially divided into three sections; statistics, gastroenterology and haematology.

34. The Adaptive Model identifies a specificity threshold of 99.9% for abnormality of an Hb (haemoglobin concentration) or OFF-hr to justify such investigation, ie that only one sample in a thousand would exceed the threshold if the athlete was both healthy and not using prohibited substances and/or methods. This formula itself allows for variations which result either from ordinary biological variability or from imprecisions in sample analysis and provides a protective barrier of some fortitude against unwarranted investigation. The abnormality justifying such investigation had to be assessed by reference to the Athlete's own profile. It seemed to the CAS Panel that the main thrust of the somewhat elusive statistical evidence of Dr Perme (complemented by that of Dr Henderson) called on behalf of the Athlete was that there was no basis for an investigation at all because of the propensity for multiple tests to generate false positive. Dr Sottas satisfied the CAS Panel that he was aware of the risk and had relied in his analysis on other connecting factors. He had also taken into account exposure to altitude, so rebutting another of Dr Perme's complaints about his graphs.

35. The following features of the tests carried out in the Athlete's samples are noteworthy. First the threshold of 99.9% was exceeded on not one only, but on two occasions, ie 19 April 2009 and 29 August 2009. Second on 19 April 2009 the threshold of 99.9% was exceeded both by reference to the Hb score and by reference to the OFF-hr score (on 29 August 2009 only by reference to the latter). Third, as Dr Sottas explained the abnormalities are at a high level: abnormally high reticulocytes and correspondingly abnormally low haemoglobin on 19 April 2009 (as well as an abnormally high increase in haemoglobin from 27 August 2009 to 29 August 2009). Fourth the abnormality on 29 August 2009 had to be assessed not only against the Athlete's general profile but against the (normal) scores of the test of 27 August 2009

("the particular factors"). The abnormal values are (for the purposes of the ABP) a necessary but not a sufficient proof of a doping violation.

36. The results called for explanation, which was unlike the calculations made qualitative and not merely quantitative in nature.

37. In principle such explanation could fall into one or more of five categories

(i) pure chance

(ii) incorrect analysis

(iii) breaches in the chain of custody both to and in the laboratory which tested the samples

(iv) medical condition, physiological or psychological

(v) manipulation of blood.

38. As to these possible explanations:

(i) can be discounted in the light of the particular factors

(ii) the CAS Panel has already dismissed, see above para. 34

(iii) has not been seriously advanced and the documentation which the CAS Panel has studied itself rules it out.

The choice therefore lies between (iv) and (v). The Athlete contended for (iv), UCI for (v).

39. The Athlete's explanations were varied, not singular. That fact does not by itself mean that they were not worthy of consideration. It does, however, at least prompt the thought that, if correct, they identify the Athlete as the victim of a measure of misfortune.

40. The explanation for the 19 April 2009 reading was a combination of a physiological condition (gastric bleeding) enhanced by a psychological condition (stress). The CAS Panel is prepared to accept that the Athlete did suffer from a chronic gastric complaint that manifested itself as far back as 2001; and that a gastroscopy administered on 1 May 2010 provided some evidence of internal lesions. The question however, is not whether the Athlete had such a complaint, but whether it could be explanatory of the 19 April 2009 reading. A chronic (but stable) complaint would have produced a consistent series of values. The Athlete's case depended upon the complaint being acute, even if spread over a few days. The CAS Panel is satisfied from the evidence of Dr Schumacher and Dr Ashenden that the loss of blood through haemorrhage capable of producing such readings would have been of a volume which the Athlete could not have ignored.

41. It is in this context notable that:

(i) the gastric fissures had produced no abnormal values in the recorded tests from 21 March 2008 up to 19 April 2009;

(ii) no mention was made of any such condition by the Athlete to the doping control officer or on the doping control form which permitted (even if it did not solicit) such information;

(iii) the Athlete did not seek any treatment for his gastric condition (said to be evidenced by black stools at the time) or indeed seek any medical advice until many weeks later;

(iv) in the intervening period the Athlete competed with some distinction in a major (and demanding) race;

(v) the significant medical information recorded in the medical certificate of 7 August 2009, i.e. the black stool, was sourced from the Athlete's own statements, prompted by the doctors' questions, and was uncorroborated by medical testimony and did not, it seems, persuade the doctor who provided the certificate to undertake a gastroscopy. The certificate appears rather designed to support the Athlete's version of events than as a precursor of treatment;

(vi) whereas the Athlete's expert, Dr Zver, suggested that the complaint had resolved itself, the more cogent medical opinion of the UCI experts, in particular Dr Schumacher, was that an inflammation causing sufficient blood loss to explain the 19 April 2009 reading could not resolve itself but would require medical treatment.

42. The gastroscopies carried out for the Athlete by Dr Gruden in May and November 2010 demonstrated no contemporary bleeding and were, on the assessment of Dr Dorta (which the CAS Panel accepted), of limited, if any retrospective relevance.

43. The CAS Panel saw and heard no evidence to persuade it that the Athlete's stress connected with his wife's confinement could have itself tipped the balance. It is itself comfortably satisfied, not least by the objective facts relating to the Athlete's own actions at the material times, that the Expert Panel was right to discount the explanation of gastric inflammation.

44. The explanation for the 29 August 2009 reading was actual or simulated altitude exposure. As in the case of the gastric inflammation explanation, the CAS Panel accepts that such exposure could sometimes explain abnormal haemoglobin values. The issue is not, in appropriate circumstances, its capacity to have such effect, but whether in the case of this Athlete it provides such an explanation for the particular values noted. This again raises a question of degree. The area has been the subject of research, not least because the advantages of altitude training and their beneficial impact on blood are well appreciated; indeed were appreciated by the Athlete himself – he had built his house incorporating a device designed artificially to simulate a higher altitude. The research drawn to its attention amply persuades the CAS Panel that at least two to three weeks continuous hypoxic exposure is required to have any significant impact on haemoglobin concentration such as would be evidenced in a test. The Athlete's own evidence shows that he was never the subject of such prolonged exposure at the relevant times. The effect of the July exposure, which was of sufficient duration, would have exhausted itself by 29 August 2009. The August exposure was itself of insufficient duration. The CAS Panel therefore accepts that the Expert Panel was fully justified in concluding that neither a terrestrial nor, *a fortiori*, the less potent simulated exposure could itself explain the reading of 29 August 2009

45. In any event, the Athlete faces a further hurdle in relation to the reading of 29 August 2009, for he has to explain how the hypoxic exposure said to be the cause of the 29 August 2009 reading did not equally manifest itself in the 27 August 2009 reading (which it is common ground it did not). Here the Athlete's explanation lies in the treatment he received for a fortuitous wasp sting on a training ride. It should be noted that what precise aspect of the treatment was responsible for the reading was not advanced with any consistency. In his explanation of 5 March 2010 the Athlete referred only to the cortisone injection; he made no mention of any abnormal ingestion of water. In his pre defence email of 17 May 2010 the Athlete's lawyer made no mention of the injection, but only of heamodilution, something repeated in the defence statement of 19 May 2010 para. 8. The Senate seems to have accepted that both aspects contributed to the reading.

46. It appears from the contemporary medical evidence that the injection administered to the Athlete was far less than that usually administered to prevent an anaphylactic reaction (80mg as against 250mg). The CAS Panel is disposed to accept the Expert Panel's evidence that such an amount would have a *"negligible mitrocordial effect"* in preference to that of Dr Zver's whose counterclaim is made less convincing by his dubious assertion that the dose was *"rather large"*.

47. As to the heamodilution, the expert evidence (itself founded on assumed facts the evidence for which was fragile) fell far short of establishing that it could be responsible for the haemoglobin concentration of 15.2.g/dl shown. Further, according to Dr Sottas it could not explain the decrease in reticulocytes between 27 August and 29 August 2009, since the percentage of reticulocytes *"is independent of any haemodilution"* and this was indeed common ground (see Respondent's answer para. 45). The alternate explanation was that this decrease was a response to altitude training and its cessation. But the published Article relied on (produced, as it happens, by UCI and not the Athlete) does not sustain this explanation, given both the gap between the altitude training and the test, and the rapidity of the decrease in reticulocytes.

48. The CAS Panel should also note that even were the explanation of Dr Zver credible, it would not itself undermine the conclusion drawn from the 29 August 2009 test viewed in isolation.

49. Blood removal produces lower than normal haemoglobin – the molecular carrier that transports oxygen from lung to body tissue – and higher than normal reticulocytes – the red blood cells released from bone marrow to respond to blood loss. The reverse is the position post-EPO.

50. The Athlete's values on 19 April 2009 coincided closely with the average results found, in documented research relied on by Dr Ashenden, when eight healthy male subjects had a substantial volume of blood removed over a 2 week period: and the stabilization of those values by the time of the Giro d'Italia was far more compatible with elaborate replenishment than of natural recovery. By contrast, the Athlete's values on 29 August 2009 were consistent with EPO treatment or blood transfusion or both – again as vouched for by research studies.

51. Although it is not necessary for UCI under the UCI ADR to establish a reason for blood manipulation, the CAS Panel does note the coincidence of the levels with the Athlete's racing programme. As Dr Sottas convincingly explained, in the same way as the weight of DNA evidence said to inculpate a criminal is enhanced if the person whose sample is matched was in the vicinity of the crime, so the inference to be drawn from abnormal blood values is enhanced where the ascertainment of such values occurs at a time when the Athlete in question could benefit from blood manipulation. As Dr Sottas put it *"The observed patterns are typical of blood doping, very likely blood withdrawal in close time, in vicinity of sample 17 (April 19th) and blood reinfusion prior to the Giro d'Italia 2009, and, most prominent, prior to the start of the Vuelta"*.

52. The Athlete has raised arguments based on discrimination and violation of EU competition law (articles 101 and 102 of the Treaty on the Functioning of the European Union, TFEU) by UCI. However, the Athlete has adduced no evidence which could persuade the Panel that UCI held a discriminatory attitude toward him. In this respect the Panel notes that (i) a variety of cyclists with different personal characteristics and status have been lately charged by UCI with anti-doping violations due to their anomalous ABP values, (ii) the Expert Panel's initial review of the Athlete's ABP was carried out on an anonymous basis, and (iii) the Athlete offered no motives for or identity of the UCI's alleged discrimination (nationality? gender? religion?). In addition, the Panel is satisfied that the EU Court of Justice clearly stated in Meca-Medina that anti-doping rules and sanctions *"are justified by a legitimate objective"* and that any related limitation to the athletes' economic freedom *"is inherent in the organisation and proper conduct of competitive sport and its very purpose is to ensure healthy rivalry between athletes"* (Case C-519/04P Meca-Medina and Majcen v Commission, [2006] 5 C.M.L.R. 18, para. 45). While it is true that restrictions imposed by anti-doping rules and sanctions *"must be limited to what is necessary to ensure the proper conduct of competitive sport"* (*ditto*, para. 47) and, thus, they must be proportionate, the Athlete has equally adduced no evidence to establish that the anti-doping rules and sanctions at issue are disproportionate and, as a consequence, has not established a violation of article 101 TFEU. As to article 102 TFEU, the Athlete has offered no market analysis to define the relevant market and submitted no evidence to prove the existence of a dominant position, let alone the perpetration of abuses, by UCI. Accordingly, this submission on behalf of the Athlete also fails.

B. Summary

53. In summary the CAS Panel finds that:

(i) there were no defects in the process of analysis or breaches in the chain of custody such as would make the results of the critical tests unreliable;

(ii) those tests on 19 April and 29 August 2009 revealed abnormalities in the context of the Athlete's ABP such as to excite the need for explanation;

(iii) the explanations given were as scrutinized by the UCI's experts whose testimony, where their evidence conflicted with the evidence of the Athlete's experts, the CAS Panel preferred both because of their (for the most part) greater experience and expertise, and because of the weight of published literature which supported it;

(iv) in any event the factual premise for the Athlete's explanations depended in substantial measure on his say- so uncorroborated by independent testimony, and the CAS Panel was disinclined to accept it where it was manifestly improbable, e.g. the failure to report alarming black stools in April 2009;

(v) the pattern of values under scrutiny was entirely consistent with blood manipulation, not least, but not only, because of the degree of abnormality;

(vi) the coincidence of the blood manipulation asserted by UCI with the Athlete's racing calendar was striking;

(vii) no discrimination against him nor violation of EU competition law was proven by the Athlete.

C. Sanction

a) In general

54. The UCI ADR provide so far as material as follows:

"2. Anti-Doping Rules are part of the competition rules, i.e. sports rules governing the conditions under which sport is played. Riders and other Persons accept these rules as a condition of participation and shall be bound by them. The rules and procedures provided for by these Anti-Doping Rules are sport specific and intended to apply autonomously and not by reference to existing law or statutes. They are based upon the World Anti-Doping Code which represents the consensus of a broad spectrum of sports organizations and anti-doping organizations around the world with an interest in fair sport.

(…)

286. These Anti-Doping Rules concerning sanctions and consequences shall be construed and implemented in compliance with human rights and general principles of law, among which proportionality and individual case management.

(…)

Automatic Disqualification of individual results

288. A violation of these Anti-Doping Rules in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Competition.

(…)

Disqualification of Results in Event during which an Anti-Doping Rule Violation occurs

289. Except as provided in articles 290 and 291, an anti-doping rule violation occurring during or in connection with an Event leads to Disqualification of the Rider's individual results obtained in that Event according to the following rules:

(…).

2. If the violation involves

a) the (…) Use (…) of (…) a Prohibited Method (articles 21.1 and 21.2), (…)

all of the Rider's results are disqualified, except for the results obtained (i) in Competitions prior to the Competition in connection with which the violation occurred and for which the Rider (or the other Rider in case of complicity) was tested with a negative result, and (ii) in Competitions prior to the Competition(s) under point i.

(…).

290. If the anti-doping violation involves the (…) Use of (…) a Prohibited Method (articles 21.1 and 21.2) and the Rider establishes that he bears No Fault or Negligence, his individual results in the other Competitions shall not be disqualified except to the extent that they were likely to have been affected by the Rider's anti-doping violation.

291. 1. If the Event is a stage race, an anti-doping violation committed in connection with any stage, entails Disqualification from the Event, except when (i) the anti-doping violation involves the (…) Use (…) of (…) a Prohibited Method, (ii) the Rider establishes that he bears No Fault or Negligence and (iii) his results in no other stage were likely to have been influenced by the Rider's anti-doping violation.

(…).

292. In those cases that are not considered under articles 289 to 291, the Disqualification of the Rider's individual results obtained on the Event is optional.

Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

293. The period of Ineligibility imposed for a first anti-doping rule violation under (…) article 21.2 (Use of (…) a Prohibited Method)(…) shall be

2 (two) years' Ineligibility

unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of Ineligibility as provided in article 305 are met.

Ineligibility for other Anti-Doping Rule Violations

294. (…)

Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

295. (…)

Elimination or Reduction of Period of Ineligibility based on Exceptional Circumstances

No Fault or Negligence

296. (…)

No significant Fault or Negligence

297. (…)

Substantial Assistance

298. (…)

Admission

303. (…)

Reduction in Sanction under more than one provision

304. (…)

Aggravating Circumstances

305. If in an individual case involving an anti-doping rule violation other than a violation under article 21.7 (Trafficking or Attempted Trafficking) or article 21.8 (Administration or Attempted Administration) it is established that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the License-Holder can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.

A License-Holder can avoid the application of this article by admitting the anti-doping rule violation as asserted promptly after being comforted with the anti-doping rule violation by an Anti-Doping Organisation.

(…)

Disqualification of Results in Competitions subsequent to Anti-Doping Rule Violation

313. In addition to the automatic Disqualification of the results in the Competition pursuant to article 288 and except as provided in articles 289 to 292, all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified.

Comment: 1) it may be considered as unfair to disqualify the results which were not likely to have been affected by the Rider's anti-doping rule violation.

(…).

Commencement of Ineligibility Period

314. Except as provided under articles 315 to 319, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed.

Delays not attributable to the License-Holder

315. Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred.

(…)

Fines

326. In addition to the sanctions provided for under articles 293 to 313 anti-doping violations shall be sanctioned with a fine as follows.

1. The fine is obligatory for a License-Holder exercising a professional activity in cycling and in any event for members of a team registered with the UCI.

a) Where a suspension of two years or more is imposed on a member of a team registered with the UCI, the amount of the fine shall be equal to the net annual income from cycling that the License-Holder normally was entitled to for the whole year in which the anti-doping violation occurred. The amount of this income shall be as assessed by the UCI, provided that the net income shall be assessed at 70 (seventy) % of the corresponding gross income. The License-Holder concerned shall have the burden of proof to the contrary. For the purpose of the implementation of this article the UCI shall have the right to receive a copy of the complete contracts of the License-Holder from the auditor appointed by the UCI. If justified by the financial situation of the License-Holder concerned, the fine imposed under this paragraph may be reduced, but not by more than one-half.

(…).

2. No fine shall be imposed for violations for which article 296 (No Fault or Negligence) is applied.

3. In other cases than those under paragraphs 1 and 2 the imposition of a fine is optional.

4. In observance of paragraphs 1 and 5 the amount of the fine shall be set in line with the gravity of the violation and the financial situation of the License-Holder concerned.

5. Except where paragraph 1a) is applied, no fine may exceed CHF 1'500'000.-.

Comment: No fine may be considered a basis for reducing the period of Ineligibility or other sanction which would otherwise be applicable under these Anti-Doping Rules".

55. The following issues arise:

- for which, if any, events, should the Athletes results be disqualified ('disqualification');
- what, if any, should be the Athlete's period of ineligibility ('ineligibility period');
- when should any such period of ineligibility commence '('ineligibility commencement');
- what, if any, fine should be imposed on the Athlete ('fine').

b) The parties' submissions

56. The Athlete submits that based on the 2009 version of "PART 13 SPORTING SAFETY AND CONDITIONS" of the UCI Cycling Regulations ("PART 13 UCR"), it *"would be highly illogical and contrary to the "lex mitior" principle if atypical values found in ABP program, which even are not atypical in according to Part XIII of UCR would lead to higher sanctions than an atypical value under Articles 13.1.063 or 13.1.063 bis. Lex mitior principle should apply not only if the later law is more favourable for the alleged offender, but also in case that the same facts lead to punishment under two different laws, protecting the same value – fair competition".*

57. The Athlete further submits that in any event, should the CAS Panel hold that he committed a doping offence, the ineligibility period should start in April 2009 as the hearing process has suffered substantial delays, which are not attributable to him. To support his stance, the Athlete makes reference to the situation of D., a professional cyclist who tested positive to r-EPO during the 2009 Giro and who has been cleared to return to competition in January 2011. According to the Athlete, it would be *"highly unjust that a cyclist actually caught using rhEPO is allowed to race and the First Respondent banned"*.

58. The Athlete yet further submits, as regards any fine to be imposed upon him, he is entitled to the maximum possible reduction, in view of his modest income, and considering that he *"has to support his family (unemployed wife and two children) and he would lose all possibilities of earnings from professional cycling"*.

59. UCI submits that blood manipulation constitutes an aggravating factor, which calls for an increase in the standard sanction up to a minimum of three-year period of ineligibility.

60. UCI further submits that, in accordance with article 313 of the UCI ADR, all of the Athlete's competitive results should be disqualified from 19 April 2009 until the commencement of the period of ineligibility.

61. UCI yet further submits that, pursuant to article 326 para. 1 lit a of the UCI ADR, a fine amounting to 70% of the Athlete's 2009 salary should be imposed upon the latter.

c) Analysis of the *lex mitior* principle

62. The CAS Panel considers that the Athlete cannot find any assistance in the 2009 version of articles 13.1.063 or 13.1.063 bis of PART 13 UCR, for his argument that these provisions should prevail over the UCI ADR ("PART 14 ANTI-DOPING") as they are allegedly more favourable to the accused.

63. Articles 13.1.063 or 13.1.063 bis are included in the chapter of PART 13 UCR which imposes the obligation on riders to submit to blood tests organised by the UCI to check their following blood levels: haematocrit, haemoglobin, reticulocytes and free plasma hemoglobin (article 13.1.062). These articles are ex facie not of a disciplinary nature and are not designed to sanction riders. Article 13.1.063 provides for the provisional suspension of the rider whose *"blood analysis shows an atypical blood value"*. Article 13.1.063 bis states that *"If the blood values determined by the analysis, without being atypical following article 13.1.063, denote a situation where a follow-up can be justified, the rider and his team can be informed"*.

64. Those articles therefore do no more than put in place provisional measures where any unusual blood values are identified until further steps may be taken by UCI. Article 23 of the UCI ADR makes a direct reference to article 13.1.063 of PART 13 UCR. It therefore appears that the two bodies of law (articles 13.1.063 or 13.1.063 bis of PART 13 UCR and UCI ADR) are

complementary, not mutually exclusive, so invalidating the Athlete's claim that *"the same facts lead to punishment under two different laws, protecting the same value – fair competition"*. There is therefore no basis in the UCI regulations, read as a whole, for the application of the lex mitior principle.

d) Disqualification

65. The CAS Panel would observe that although the provisions as to disqualification are expressly made applicable to violations consisting of use of a prohibited method, they are not easy to apply where the proof of such violation is to be found by reference to the ABP. The provisions are geared to the situation where the violation is an occurrence rather than a process, most obviously where the violation is the presence of a prohibited substance. Article 289 of the UCI ADR provides in its title for disqualification of results in events during which an anti-doping violation occurs. Even though the text enlarges the title to embrace violations occurring "in connection with an event" it is not easy in a case such as the present to identify in connection with which events the Athlete's doping violation occurred. The prime candidates are the Giro in Italy and the Vuelta in Spain.

66. Article 313 of the UCI ADR provides in its title for disqualification of results in competitions subsequent to anti-doping rule violation but is applicable only when article 289 of the UCI ADR is not (note the words "except as provided" in article 289). The CAS Panel considers that this article more easily fits a case such as the present. Doping violations were established on 19 April and 29 August 2009. The results subsequent to each violation must be disqualified up to the commencement of the period of ineligibility "unless fairness requires otherwise". The comment provides a non exhaustive example of where such proviso is engaged, i.e. where it is not likely that the results were affected by the violation. The CAS Panel sees no basis for concluding that the violations actually established were likely to have affected any results other than from 19 April 2009 through to the end of September 2009 (there being, it must be stressed, no evidence of subsequent violations). This means that the Athlete must suffer disqualification for the following events: Tour de Romandie, Giro in Italy, Tour de Suisse, Tour of Poland and Vuelta in Spain.

e) Ineligibility period

67. The default minimum period of ineligibility is prescribed by article 293 of the UCI ADR, i.e. 2 years. The Athlete has not sought to adduce mitigating circumstances under articles 296 of the UCI ADR ("No Fault or Negligence"*),* 297 ("No significant Fault or Negligence"), 298 ("substantial assistance") or 303 ("Admission") or otherwise and in view the circumstances of the case, the requirements of those provisions are obviously not met.

68. UCI claims that blood manipulation constitutes an aggravating factor and, consequently, that a minimum three-year ban should be imposed upon the Athlete. This submission has no foundation in the UCI ADR which does not under article 293 differentiate between various

forms of first offence or suggest that blood manipulation attracts *ratione materiae* a higher sanction than the presence of a prohibited substance. It is the circumstances of the offence not the commission of the offence itself which may aggravate. Here there is nothing before the CAS Panel to displace the presumption that 2 years ineligibility for a first offence is appropriate in this case.

f) Ineligibility commencement

69. The Article 314 of the UCI ADR provides that prima facie the period of ineligibility should start on the date of the hearing decision providing for ineligibility. Under Article 315 of the UCI ADR this can be displaced where the circumstances so justify. The Panel, after consideration of all specified circumstances of the present case, considers it fair to start the period of ineligibility on 20 January 2011. Obviously, any results obtained by the Athlete after 20 January 2011, including medals, points and prizes are forfeited.

g) Fine

70. The amount of the fine is governed by Article 326 of the UCI ADR. It provides a formula for computation of the fine with a proviso allowing for a reduction of up to a half for the financial situation of the licence holder concerned. Its meaning has been the subject of scrupulous analysis in TAS 2010/A/2063 from a quartet of perspectives, literal, historic, systematic and teleological, leading to the conclusion that the sum to which the 70% discount should be applied should be that to which the cyclist was contractually entitled rather than that which he actually received. The CAS Panel would note that according to CAS jurisprudence the doctrine of proportionality – *"a widely accepted principle of sports law"* – might also require reduction below a stipulated minimum (CAS 2005/A/830, para. 44) but does not need to resort to that doctrine in this case. The Athlete testified that, during the litigious period, his yearly gross income was EUR 150,000, which is the amount mentioned in the employment contract in force at relevant time (and which is moreover accepted by UCI, as it seeks precisely the imposition of a fine of EUR 105'000 (70% of EUR 150,000).

71. Reduction from the figure so calculated is available under the same article where the Athlete's financial situation justifies it. It requires the CAS Panel to consider the particular facts before it (TAS 2010/A/2101, para. 129). In the post hearing brief, the Athlete's lawyer provided written details of the time spent on the present case and of all other legal fees. The expenses incurred by the Athlete in connection with the proceedings before the Senate and the CAS amount to EUR 118,940.71 which the CAS Panel is prepared to accept as plausible and reasonable. In view of i) the significant legal costs incurred, ii) the Athlete's family circumstances, iii) the fact that the Athlete's cycling career will considerably suffer in consequence of the CAS Panels finding's, the CAS Panel holds that a reduction of the fine by 50% from EUR 105,000 to EUR 52,500, is justified by the Athlete's financial situation within the meaning of the proviso to Article 326 para. 1 lit. a. of the UCI ADR (cf. TAS

2010/A/2063, para. 91-95, where the Panel was furnished with no material other than a mere declaration to justify any reduction).

The Court of Arbitration for Sport rules:

1. The appeal filed by UCI against the decision issued on 28 July 2010 by the Senate of the National Anti-Doping Commission of the OCS is upheld.

2. The decision issued on 28 July 2010 by the Senate of the National Anti-Doping Commission of the OCS is annulled in its entirety.

3. T. is found guilty of an anti-doping rule violation and is declared ineligible for a period of two years running from 20 January 2011.

4. T.'s results obtained during the period from 19 April 2009 to end of September 2009 and from 20 January 2011 until the date of notification of this award, including his event medals, his points and prizes are forfeited.

5. T. shall pay to UCI a fine of EUR 52,500, in accordance with article 326 1.a) of the UCI ADR.

6. (…).

7. (…).

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