Arbitration CAS 2019/A/6226 World Anti-Doping Agency (WADA) v. Spanish Anti-Doping Agency (Spanish Agency for Health Protection in Sport) & Ibai Salas Zorrozua, award of 4 August 2020

Panel: Prof. Luigi Fumagalli (Italy), President; Prof. Massimo Coccia (Italy); Mr Vladimir Novak (Slovakia)

Cycling
Doping (Athlete's Biological Passport (ABP))
CAS Jurisdiction
Denial of an evidentiary request for failure to satisfy the relevancy requirement
Standing to be sued
Lis pendens
Athlete Biological Passport as a reliable and accepted means of evidence in establishing an ADRV
Legality and predictability of the sanction

1. Article R47 of the CAS Code explicitly provides that, in the context of sport, consent to arbitrate can be based on an arbitration clause contained in the applicable regulations. An arbitration clause may be incorporated and accepted by reference; it does not have to be fully incorporated in the applicable rules or regulations. The applicable rules or regulations – here the Organic Law of Spain No. 3/2013 of 20 June *"On the protection of the health of sportspeople and the fight against doping in sport activities"* as modified by the Royal Decree-Law 3/2017 of 17 February *"to adapt to the changes introduced in the 2015 WADC"* (the Spanish ADA) – do contain a CAS arbitration clause which incorporates by reference the arbitration clause contained in the World Anti-Doping Code (WADC). In this respect, Article 40.6 of the Spanish ADA grants WADA the right to appeal *"Tribunal Administrativo del Deporte"* (TAD) decisions to the CAS and Article 13.2.3 WADC clearly states that in cases where a decision is taken by a national-level appeal body (such as the TAD), WADA has the right to appeal to the CAS. The athlete consented to Article 40.6 of the Spanish ADA and the incorporated Article 13.2.3 WADC when he applied for and obtained a license to compete at national level. The asymmetric nature of Article 40.6 of the Spanish ADA does not invalidate the arbitration clause or preclude WADA from bringing an appeal to the CAS as it has a right to do so under that provision and the incorporated Article 13.2.3 WADC, to which the athlete has consented. Moreover, there is a clear justification for granting WADA a right to appeal decisions of a national-level appeal body i.e. to give WADA the avenue to ensure that WADC signatories are properly and uniformly enforcing the WADC. The CAS does also have jurisdiction *rationae personae* over the national anti-doping organization (NADO) which did not issue the appealed decision but did issue a decision imposing sanctions on the athlete for committing an anti-doping rule violation (ADRV) and subsequently participated as a party in the national appeal proceeding before the TAD. Furthermore, the NADO, as

a signatory to the WADC, is bound by the arbitration clause contained in Article 13.2.3 WADC, which was incorporated to the Spanish ADA by reference through its Article 40.6 and clearly grants to WADA the right to appeal to the CAS against a decision of the TAD stemming from an underlying NADO decision. Finally, the CAS' jurisdiction is unaffected by the parties' position on the merits.

2. **Pursuant to Article R44.3 of the CAS Code, a party requesting the production of documents must show that said documents are (i) likely to exist and to be relevant; and (ii) in the custody of the other party. An Adaptive Model (and its underlying software) is only a statistical model which triggers alerts identifying abnormal profiles that warrant further attention and review; it does not in itself constitute evidence of doping. Therefore, the relevancy requirement of Article R44.3 of the CAS Code is not satisfied.**

3. **A party has standing to be sued (*"légitimation passive"*) only if it has some stake in the dispute because something is sought against it. A NADO has standing to be sued if it was affected by the appealed decision, in that the appealed decision overturned its own findings that the athlete had committed an ADRV, and the appeal involves an essential interest of the NADO (in particular, its disciplinary powers) and its resulting award will be enforceable and have a binding effect towards both respondents. The fact that the Spanish NADO does not dispute WADA's position on the merits, or cannot respond for the TAD nor assume the appealed decision as its own is irrelevant to the issue of whether or not it is affected by the appeal.**

4. **According to Article 186.1bis of the Swiss Federal Act on Private International Law (PILA), there is *lis pendens* if three cumulative conditions are met: (i) a proceeding at a State court or another arbitral tribunal and the CAS arbitration are between the same parties and concern the same matter; (ii) said other proceeding is "already pending" before the CAS arbitration started; and (iii) the party claiming *lis pendens* proves the existence of "serious reasons" requiring the stay of the CAS proceedings. Absent the "already pending" requirement, there is no *lis pendens* within the meaning of Article 186.1bis PILA.**

5. **According to Article 3.2 WADC, an ADRV can be proved by any "reliable means", including by the use of an ABP. It is undisputed that the ABP profile is a method of proving blood doping and not an ADRV in and of itself under the WADC. However, an ABP profile is a reliable and accepted means of evidence in establishing an ADRV. As such, if, in interpreting abnormal values in an ABP and any other evidence from a quantitative and qualitative standpoint, a panel is convinced that the abnormal values were caused by a "doping scenario", an ADRV can thereby be properly established, even without establishing a specific reason for the blood manipulation. The inference drawn from abnormal blood values is enhanced where the ascertainment of such values occurred at a time when the athlete could benefit from blood doping (i.e., if the levels coincide with the athlete's racing schedule). A request for an athlete to provide an alternative explanation to the abnormal values in his or her ABP does not create a**

presumption of guilt nor a shift in the burden of proof; the burden continually remains on the anti-doping agency pursuant to Article 3.1 WADC to prove that the abnormal values in the ABP were caused by a "doping scenario" as opposed to any of the hypothesis put forward by the athlete. This is in full keeping with the legal principle of the presumption of innocence. Indeed, if an athlete submits explanations for abnormal results, it is the anti-doping agency's burden to establish that those explanations do not rebut the high likelihood of an ADRV established through the assessment of the ABP.

6. **For a sanction to be imposed, a sports regulation must prescribe the misconduct with which the subject is charged, *i.e.*, *nulla poena sine lege* (principle of legality), and the rule must be clear and precise, *i.e.*, *nulla poena sine lege clara* (principle of predictability). Under the applicable regulations, the utilization, use or consumption of prohibited substances and methods including blood doping is a serious offense sanctionable with a period of ineligibility. This is a sufficiently clear, precise and unambiguous rule that provides a sufficient legal basis to find an ADRV and sanction the athlete. It is unnecessary to establish the exact type of blood doping to find an ADRV and sanction an athlete. The fact that the ABP can only show that there has been blood manipulation but not the exact type of blood doping practice does not violate the principle of legality or any other fundamental principle.**

I. THE PARTIES

1. The Appellant, the World Anti-Doping Agency ("WADA"), is a Swiss private law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms on the basis of the World Anti-Doping Code (the "WADC"), the core document that harmonizes anti-doping policies, rules and regulations around the world.

2. The First Respondent, the Spanish Agency for Health Protection in Sport or, in Spanish, the *"Agencia Española de Protección de la Salud en el Deporte"* (the "AEPSAD"), is the national anti-doping organization ("NADO") in Spain and a signatory of the WADC. It holds disciplinary powers and is in charge of enforcing the applicable anti-doping rules in Spain.

3. The Second Respondent, Mr. Ibai Salas Zorrozua (the "Athlete"), is a national-level professional cyclist of Spanish nationality.

4. The Appellant and the Respondents are collectively referred to as the "Parties".

II. BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties' written

submissions and evidence. Additional facts and allegations found in the Parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has thoroughly 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.

6. Blood doping is strictly prohibited under the WADC and is defined by WADA as *"the misuse of certain techniques and/or substances to increase one's red blood cell mass, which allows the body to transport more Oxygen to muscles and therefore increase stamina and performance"*[1].

7. Three widely known substances or methods are used for blood doping, namely (i) administering recombinant human erythropoietin ("rEPO") (*e.g.,* by injection or patch to trigger erythropoiesis, the stimulation of red blood cells); (ii) the use of synthetic oxygen carriers (*i.e.*, infusing blood substitutes such as haemoglobin-based oxygen carrier or perfluorocarbons to increase haemoglobin ("HGB") concentration well above normal levels); and (iii) blood transfusions (*i.e.*, infusing a matching donor's or an athlete's own (previously extracted) red blood cells to increase the HGB well above normal[2]. In particular, rEPO is a Prohibited Substance included in class *"S.2 Hormones and related substances"* on the WADA Prohibited List. Synthetic oxygen carriers and blood transfusions are Prohibited Methods under class *"M1. Enhancement of oxygen transfer"* on the WADA Prohibited List.

8. The Athlete Biological Passport (the "ABP") – developed and refined by WADA since it was first introduced in 2009 – consists of an individual, electronic record for each athlete that compiles and collates his or her test results and other data over time. The ABP involves regular monitoring of biological markers on a longitudinal basis to facilitate the indirect detection of prohibited substances and methods (*i.e.*, it focuses on the effect of prohibited substances or methods on the body).

9. The values collected and recorded in the Anti-Doping Administration & Management System ("ADAMS")[3] include *inter alia* HGB[4] concentration, percentage of reticulocytes[5] ("RET%"), the statistical combination of which is used to calculate the "OFF-score"[6], a value sensitive to changes in erythropoiesis. Each collected sample is analysed following the appropriate analytical protocol and the biological results are incorporated into ADAMS. The statistical model developed for the ABP programme is then applied to the results of analyses to determine an abnormal profile score.

10. More specifically, once the new biological data are entered in ADAMS, a notification is sent to the Athlete Passport Management Unit ("APMU"), which updates the ABP and applies the Adaptive Model, which is a *"[a] mathematical model that was designed to identify unusual longitudinal*

[1] *See* WADA Questions & Answers on the Athlete Biological Passport.
[2] *See* WADA Questions & Answers on Blood Doping.
[3] The Anti-Doping Administration & Management System is a web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and WADA in their anti-doping operations.
[4] A molecular carrier in red blood cells transporting oxygen from the lungs to body tissue.
[5] New blood cells released from bone marrow.
[6] An index of stimulation blood profile score.

results from Athletes. The model calculates the probability of a longitudinal profile of Marker values assuming that the Athlete has a normal physiological condition" (see section 2.5.3 of the Athlete Biological Passport Operating Guidelines (2017 edition), the "ABP Guidelines"). The Adaptive Model uses an algorithm which takes into account (i) the variability of such values within the population generally (*i.e.*, blood values reported in a large population of non-doped athletes); and (ii) factors affecting the variability of the athlete's individual values (including gender, ethnic origin, age, altitude, type of sport, and instrument-related technology). The selected markers are monitored over a period of time and a longitudinal profile is created that establishes an athlete's upper and lower limits within which the athlete's values are expected to fall, assuming normal physiological conditions (*i.e.*, the athlete is healthy and has not been doping). The athlete becomes his or her own point of reference, and each time a blood sample is recorded, the Adaptive Model calculates where the reported HGB, RET% and OFF-score values fall within the athlete's expected distribution. Following a new test, a new range of expected results for the athlete is determined.

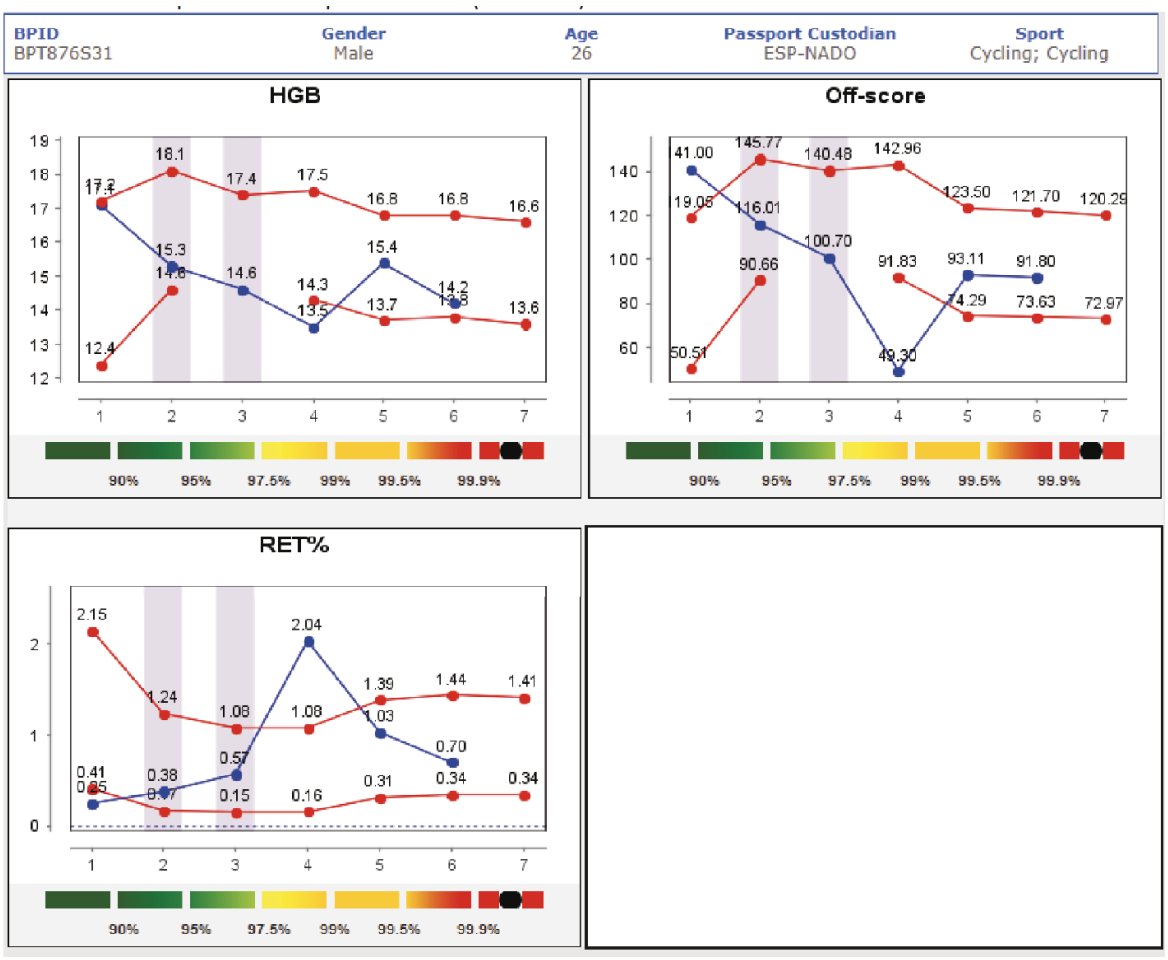
11. The main goal of assessing the ABP data is to differentiate between normal and abnormal profiles and assess possible causes for abnormalities. The assessment is performed by an automated software system that provides a probability for each ABP profile to be normal (*i.e.*, a profile found in a healthy, undoped population of athletes). If the Adaptive Model determines that an athlete's values fall outside his or her expected individual range, the results are considered to be atypical and require further investigation and/or analysis. The "specificity" of the limits generated by the Adaptive Model (*i.e.*, the software's ability to identify clean athletes) is 99%, in accordance with the WADA ABP Operating Guidelines (*i.e.*, at most, only one in 100 athletes who are not doping and with normal physiological conditions would produce values outside the range by chance). The further the value lies outside the limits of the range predicted by the Adaptive Model, the less likely it is that the value reflects normal physiological conditions.

12. Once the blood samples are fed into the Adaptive Model, the APMU proceeds with the mandatory steps outlined in the ABP Guidelines, which includes liaising with a three-member expert panel established by the AEPSAD. In the case of a "likely doping" consensus by the expert panel, an ABP Documentation Package is created and the Adverse Passport Finding is notified to the athlete who is offered an opportunity to provide an explanation (see section 3.4 of the ABP Guidelines). If after review of the athlete's explanation, the expert panel maintains a unanimous conclusion that it is highly likely he or she used a Prohibited Substance or Prohibited Method, an anti-doping rule violation (an "ADRV") is asserted against the athlete and proceedings are initiated (*Idem*). Accordingly, an ADRV finding results from both quantitative and qualitative assessment of the ABP values.

13. From 25 January 2017 until 3 August 2017, the Athlete provided six blood samples. The Barcelona Anti-doping Laboratory, a WADA-accredited laboratory, analysed these samples and logged them into ADAMS using the Adaptive Model. The detected HGB, RET% and OFF-score values are shown in the table below:

Sample Number	Collection Date	HGB (g/dL)	Ret%	OFF-score
No. 1	25 January 2017	17.1	0.25	141.00
No. 2	1 April 2017	15.3	0.38	116.01
No. 3	1 May 2017	14.6	0.57	100.70
No. 4	20 June 2017	13.5	2.04	49.30
No. 5	3 July 2017	15.4	1.03	93.11
No. 6	3 August 2017	14.2	0.70	91.80

14. The Athlete's ABP sample results were also produced in the following chart, which compares the detected HGB, RET% and OFF-score values to the individual limits as calculated by the Adaptive Model:



15. The Athlete's ABP was then submitted to a panel of experts for review on an anonymous basis. The panel was comprised of Dr. Yorck Olaf Schumacher, Professor Giuseppe d'Onofrio and Professor Michel Audran, renowned experts in the field of clinical haematology (*i.e.*, diagnosis of blood pathological conditions), laboratory medicine and haematology (*i.e.*, assessment of quality control data, analytical and biological variability and instrument

calibration), and sports medicine and exercise physiology, who have acted as experts before the CAS in other doping cases, including related to the ABP.

16. The panel of experts unanimously concluded on 28 February 2018 in a joint report that the Athlete's ABP revealed multiple abnormalities: *"In the automated analysis by the adaptive model, which determines whether fluctuations in the biomarkers of the Athlete Biological Passport are within the expected individual reference ranges for an athlete or not, the profile was flagged with abnormalities at 99.0% specificity twice for sample 1 (lower limit reticulocytes, upper limit OFF score) and three times for sample 4 (upper limit reticulocytes, lower limit haemoglobin, lower limit OFF score). The sequences for haemoglobin concentration, reticulocytes and OFF score are abnormal at >99.9%".*

17. The panel of experts concluded that, based on the above, it was *"highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause"* (the "First Joint Expert Report").

18. More specifically, the panel of experts made the following observations as to the Sample 1 and Sample 4 of the Athlete's ABP:

Sample 1:

"This test displays the highest haemoglobin value of the profile and the lowest reticulocytes. The level of both markers is outside the population reference ranges, which serve as individual limits for the first test of each profile. Conversely, the OFF score (calculated from haemoglobin concentration and reticulocytes) is very high.

A high OFF score is typically observed when the red cell mass of the organism has been supraphysiologically increased (high haemoglobin) and the body's own red cell production was reduced (low reticulocytes) as a consequence to downregulate the excess in red blood cells. This constellation is pathognomonic for the use and recent discontinuation of an erythropoiesis stimulating agent (ESA) or the application of a blood transfusion.

The athlete declares an altitude sojourn (6 days at 1246m until 5 days before collection of sample 1). He also mentions the use of an altitude simulation device stimulating 2000 meters until 15.1.2017, thus 10 days prior to sample 1.

The impact of altitude on markers used in the ABP has extensively been studied. There is agreement that altitude of sufficient duration and height will cause mild changes in the ABP: As main feature, a mild increase in the OFF score is visible within 7 to 10 days upon return to sea level. The magnitude of these changes range between 10 and 20 points from baseline. In theory, altitude simulation will cause the same changes provided that the same 'hypoxic dose' (degree of hypoxia/ height and duration of exposure) has been administered.

In the present case, it appears that the erythropoietic suppression, expressed through the OFF score, is much more important in magnitude: The OFF score in sample 1 is 141, whereas the true OFF score baseline of the athlete ranges probably between 90 and 100 (see for example samples 3,5,6). The likelihood of observing an OFF score of 141 in an undoped male athlete even considering a 'worst case scenario' (i.e. all confounding factors such as altitude in favour of the athlete) is about 1:10 000. It should also be mentioned that the athlete declared short sojourns at altitude for other samples which are not followed by any similar changes (see for example samples 2 and 3). It is thus highly unlikely that altitude alone has caused changes in the OFF score visible in the profile".

Sample 4:

"Sample 4 displays the lowest haemoglobin and the highest reticulocyte% of the profile. While the low

haemoglobin can be caused by plasma volume shifts (haemodilution) triggered by the multiple races in the previous days/ weeks, it is highly unlikely that the high reticulocytes are related to this confounding factor. Reticulocytes are not measured as a concentration and are thus not influenced by any plasma volume shifts. Furthermore, it has been demonstrated that neither short nor long term exercise causes relevant changes in reticulocytes.

On the contrary, it is likely that the elevated reticulocyte value in sample 4 has been caused by external stimulation in view of important upcoming competitions (Spanish Road Cycling Championships)".

19. The panel of experts did not analyse the four ABP blood samples which the Athlete provided between 3 October 2017 and 31 January 2018 (Samples 7, 8, 9 and 10).

20. Following the First Joint Expert Report, the AEPSAD found that the Athlete committed an ADRV.

21. Upon receipt of the Adverse Passport Finding, the Athlete challenged the panel of experts' findings of the ABP abnormalities by alleging the following:

(i) the statement of the First Joint Expert Report that found the data of the Athlete for Sample 1 to be outside the population reference ranges was incorrect;

(ii) Sample 1 was affected by hypoxic exposure to natural and artificial altitude;

(iii) the Reticulocyte count in Sample 4 was affected by plasma volume changes;

(iv) the quality control for Sample 4 was done with an infected sample which might have impacted the analyser; and

(v) there was no documentation for the chain of custody of Samples 3, 5 and 6.

22. On 10 July 2018, the same panel of experts unanimously dismissed the Athlete's challenges in a second joint report (the "Second Joint Expert Report"). It found that *"the various points raised by the athlete in his explanations do not explain the abnormalities in his profile any further"* and concluded that *"based on the data available at th[at] stage, it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of the causes highlighted by the athlete in his submission"*. The panel of experts reasoned as follows:

(i) <u>On the reference ranges for the ABP</u>:

"Reference values in any context are usually obtained from a reference population and often determined as the interval in which 95% of all values of the given population are found…. [R]eference ranges are often stratified to certain traits to better picture the targeted population…

[…]

… [T]h population references used for the evaluation of the first sample of an athlete by the adaptive model must be slightly different from the general population references, as the population to be assessed is different (athletes vs. normal subjects). The ranges used in the adaptive model (to assess mostly young athletes) have been stratified for gender and age, both of which are well quantified confounding factors for many laboratory values, notably haemoglobin concentration…

To further overcome the difficult of numerous individual and confounding factors and the challenges

described above, an individualised approach taking into account the athlete's own previous data, thus building individual reference ranges, is the task of the adaptive model. These individual reference ranges are indicated by the blue lines in the corresponding ABF graphs for each marker. They develop as more data are collected.

In the present case it is obvious that any value (haemoglobin, reticulocytes, OFF score) of the first sample would be beyond the individual reference limits of the athlete later in the profile (i.e. when his true individual baseline has been established through a number of samples). This assessment is of course heavily biased in favour of the athlete, as the abnormally high first sample is taken into account for the calculation of the subsequence reference range limits.

It is therefore not true that the reference ranges established by the adaptive model are wrong. They have been specifically adapted to the population of athletes and the individual that is to be tested".

(ii) On the altitude exposure and the ABP:

"[I]t is highly unlikely that altitude exposure alone has caused the changes visible in the profile, as the changes do not match the timeline of the expected effects and the magnitude of the alterations is too important. The changes observed in sample 1 of the athlete are beyond even the most remote and unlikely outliers reported in the various scientific studies that have been published on the topic to date".

More specifically:

- *"From a scientific perspective, it is of course well recognised in the literature that the hypoxia of altitude can cause measurable changes in the haematological system, which are of relevance for the athlete biological passport. For this to take effect, altitude exposure needs to be sufficient in height and duration. Meta-analysis has shown that a measurable increase in total red cell mass is visible after about 400-500 kmh.'Kilometer hours' (kmh) is a measure of the hypoxic dose induced by altitude or hypoxic training, combining the exposure height and duration by the simple formula of exposure height (km) x exposure (hours). There is also evidence that a certain 'threshold' of hypoxia needs to be reached to trigger measurable adaptations, as even life-long residence at 1800m does not cause significant changes in blood volumes when compared to sea level residents.*

  Relating these facts to the profile, a basic point must be clarified. It is unknown how long the athlete was actually exposed to hypoxia. On the doping control form for sample 1, it is stated that he was at 1246m from 14-20.1.2017 and that he used a hypoxic device set at 2200m every night until 15/1/2017 (until 25/1/2017 noted in ADAMS). In his submission to AEPSAD, he states that '…the use of this kind of legal (hypoxia) training concluded the day prior to obtaining the sample from the athlete', which would be on the 24.1.2017 (sample 1 was obtained on 25.1.2017). We therefore assume that the latest statement is true and that he used the device until 24.1.2017.

  As of the scientific data cited above, the exposure to 1246m is negligible when it comes to erythropoietic adaptation. The artificial hypoxia using the hypoxic device "all nights" until 24.1.2017 (assuming a usage of 10h per night for 1 month) would result in a total exposure of around 680kmh. Of note, these are assumptions very much in favour of the athlete, as a continuous exposure to artificial hypoxia for 10h a day/night is, in practice, rather difficult. There is also evidence suggesting that the use of hypoxic devices even at significant duration does not trigger any relevant haematological changes. For the sake of argument, we will nevertheless assume that the artificial hypoxic dose of the athlete was around 660kmh, thus possibly

meaningful and high enough to trigger haematological changes (Of note, the dose is nevertheless low in comparison to most studies on the topic. Thus, the response of hypoxia of the athlete is probably also lighter).

Magnitude of the OFF score effect

The athlete alludes to the investigations cited in our first report and compares his data to the athletes in the study, stating that no comparison is possible (due to different gender or sport) or highlighting the fact that high OFF scores (similar to his own) were also observed in the study groups.

Numerous attitude training studies have been conducted in athletes of both genders, many different sports and disciplines. There was no obvious difference in the observed effect attributed to the type of sport. Rather, differences depended on the altitude dose and possibly iron availability, which are limiting factors of the erythropoietic response in altitude. This is also highlighted in the metanalysis cited by the athlete.

[…]

It is clear that the data of the athlete (OFF score 141) is so abnormal it is not even on the scale, irrespective of the timing of the test. Table 1 illustrates the likelihood of observing a certain OFF score in view of confounding factors such as altitude or gender. The likelihood of observing an OFF score of 141 (such as in sample 1) in a healthy, undoped male athlete has been determined as less than 1:10,000, even when considering a 'worst case scenario' (all confounding factors such as altitude in favour of the athlete).

Lastly, the data from the meta-analysis by Lobigs et al (cited by the athlete in his defence) confirms these findings. Table 2 in the article summarizes the most extreme changes observed in the entire dataset (these data represent only 1% of the total data of hundreds of athletes). For the OFF score, the most extreme change observed in the entire dataset after altitude was an increase of 37 from the baseline. The athlete's OFF score increased by about 50 from his likely baseline of 90 to the 141 observed in sample 1. It has to be noticed that these data are again heavily biased in favour of the athlete, as in the research samples, there was not standardization of pre-analytical and analytical procedures at the same level than the ones in place for Anti Doping samples (some of the observed extremes might be caused by analytical issues) and a significant confounding factor (the baseline level of each athlete) was disregarded in the interpretation.

Timing of the OFF-score effect in relation to hypoxic exposure

*As described briefly above, when a subject with a previously altitude induced red cell mass returns to sea level, the haematological system adapts to the new environment by downregulating the amount of red blood cells: Less cells are now required to provide sufficient oxygen transfer, given the oxygen content per volume of the ambient air at sea level is higher compared to altitude. Typically, erythropoiesis (the production of red blood cells) is reduced and there are indications that new, recently released young red blood cells are selectively destroyed ("***neocytolysis***") to adjust the elevated red mass to a new (lower) level.*

From the ABP perspective, the cell picture typically seen in such situations is characterized by a reduced reticulocyte% (mirroring the reduced production) with normalised or still slightly elevated haemoglobin concentration, which will result in increased OFF scores. This characteristic picture becomes apparent usually around 5-6 days after return to sea level and has been described to

remain visible for about 1-2 weeks while gradually normalising.

The abnormalities in sample 1 are not matching [the normal] physiological mechanism: According to his written deposition to AEPSAD, the exposure to hypoxia ended the day prior to sample 1. Thus,… any hypoxia-induced increased in OFF score is unlikely to be observed at that time in point. Changes in OFF score after prolonged hypoxic exposure only become apparent after about 1 week upon return to sea level/normoxia. Therefore it is highly unlikely that the changes in the OFF score observed in sample 1 of the profile on the day after the last hypoxic exposure have been caused by hypoxia alone".

(iii) On reticulocyte count and plasma volume changes:

"In his statement to AEPSAD, the athlete questions the fact that reticulocyte% is independent of plasma volume shifts. He uses as example multiple measurements of the same sample, where variations in opposite direction are visible, which he interprets as proof that plasma volume shifts do affect reticulocyte%.

From the pure definition of any percentage (meaning 'for/per hundred'), it is clear that the percentage of any number of items in a total is independent of the total. It is in fact a fraction of the total normalised to one hundred. It is therefore also clear that if a total is diluted (f ex. by plasma volume expansion), this dilution affects all fractions of the total (which will be diluted to the same extent). The athlete acknowledges this in the first paragraph of page 4.

Confusingly, the athlete presents a table with repetitive measures of the same sample. In any quality control procedure, such data is usually used to assess the precision of an instrument. This is also required for anti-doping samples by the WADA Technical Documents, which are part of the Athlete Biological Passport Guidelines. The difference observed between the seven measures of the same parameter in the same sample illustrated in the table reflects the analytical variability of the instrument for each marker and has nothing to do with any plasma volume shifts. In fact, the sample (and thus plasma volume) remains unchanged between the seven measurements. The measurements can, of course, vary independently in opposite ways, as their variables might be assessed separately in the cell counter. Haemoglobin is measured by light absorption at a certain wavelength in a haemolysed volume of blood. Erythrocytes (RBC) are measure in an electrical field through which a certain volume of blood is channeled. The machine counts the number of 'pulses' by cells passing through the opening. Reticulocytes are identified by means of their fluorescence (due to their remaining RNA content and added staining). This is represented in the typical scattergrams that are part of the documentation packages and certificates of analysis. Thus, analytical variance exists in all markers and is independent between different markers measured in separate analytical channels.

It therefore escapes our understanding what the athlete wanted to demonstrate with the presented data".

(iv) On quality control for Sample 4:

"The athlete contests the validity of the quality control (QC) for sample 4. He explains that the quality control sample displays very abnormal values and likely origins from a patient with an infectious disease. He suggests that this might have an impact on the performance of the analyser.

The athlete seems to refer to the precision testing, where one sample is measured several times to assess the precision of the analyser (i.e. the ability of the machine to reproduce the same result). In quality control, this process complements the testing for accuracy, where the ability of the analyser to measure the true value in a sample is assessed (done via standardized QC samples, usually named QC-

XXXXX….).

The level of the values measured in the precision testing sample itself is usually irrelevant. It is important that the machine is able to reproduce the same result with a low variance in each of the repetitive measurements, a challenge achieved in the QC testing for sample 4 in an excellent manner, with the coefficient of variation for the relevant ABP markers being well within the accepted ranges (…). It is of note that the markers relevant for the ABP are very normal in the sample (haemoglobin concentration 15.54 g/dl, reticulocyte% 1.23) and by no means pathological.

Thus, the concerns of the athlete regarding quality control for sample 4 are unfounded".

(v) On the chain of custody for Samples 3, 5 and 6:

"In his last point, the athlete highlights the absence of documentation for the chain of custody for samples 3, 5 and 6. The absence of these documents is in line with ABP Guidelines v6.0, which stipulate that the experts can request either full documentation packages (containing all analytical and pre analytical information on a sample, including the chain of custody log) or certificates of analysis (which contain only basic information on each sample to assess the quality of the analytical process, such as the scattergrams) (...). It has to be mentioned that samples 3, 5 and 6 are of minor importance in the profile (establishment of the baseline for the athlete), therefore only basis information is required. The concern of the athlete regarding the chain of custody of samples 3, 5 and 6 is therefore irrelevant for the abnormalities visible in the profile, which concern mainly samples 1 and 4".

23. On 3 October 2018, the AEPSAD issued a decision (the "AEPSAD Decision") imposing on the Athlete a four-year period of ineligibility and a fine of EUR 3,001 for committing an ADRV, in particular a breach of Article 22.1(b) of the Organic Law of Spain No. 3/2013 of 20 June *"On the protection of the health of sportspeople and the fight against doping in sport activities"*[7], as modified by the Royal Decree-Law 3/2017 of 17 February *"to adapt to the changes introduced in the 2015 WADC"*[8] (together the "Spanish ADA").

24. On 8 February 2019, the Administrative Court of Sport in Spain or the *"Tribunal Administrativo del Deporte"* in Spanish (the "TAD") issued Decision No. 217/2018 (the "Appealed Decision"), setting aside the AEPSAD Decision and nullifying the sanction imposed on the Athlete. The TAD reasoned that:

(i) to discipline an athlete there must be a law which describes an action or omission as a sanctionable offense, and sufficient evidence to meet the burden of proof that the athlete committed such action or omission;

(ii) the AEPSAD Decision, as well as the letter initiating the proceeding, lacked substance. The terms of the indictment were vague or undetermined, lacking certainty about the facts charged and the sanctions applied. Based on the First and Second Joint Expert Reports and the letter initiating the proceeding, the Athlete was seemingly charged with and sanctioned for a *"high likelihood of use of a prohibited substance or method"* and the *"non-likelihood of any other cause"*. However, likelihood of use is not classed as an infringement

[7] *Ley Orgánica 3/2013, de 20 de junio, de protección de la salud del deportista y lucha contra el dopaje en la actividad deportiva.*
[8] *Real Decreto-ley 3/2017, de 17 de febrero, por el que se modifica la Ley Orgánica 3/2013, de 20 de junio, de protección de la salud del deportista y lucha contra el dopaje en la actividad deportiva, y se adapta a las modificaciones introducidas por el Código Mundial Antidopaje de 2015.*

under the Spanish ADA. Since no such infringement exists in the Spanish ADA, it must be concluded that the charge and sanction against the Athlete was the *"usage, use, or consumption of a prohibited substance or method"*. In any event, the AEPSAD failed to specify the exact prohibited substance or method allegedly used which gives rise to the imposed sanction. This is a violation of Article 9.3 of the Spanish Constitution which enshrines the principle of legal certainty: *"[t]he Constitution guarantees the principle of legality, the hierarchy of regulations, the publishing of norms, the non-retroactivity of the sanctioning provisions not favorable or restrictive of an individual's rights, legal certainty, responsibility and the prohibition of arbitrariness by the public authorities"* (translated[9] from the Spanish original: *"La Constitución garantiza el principio de legalidad, la jerarquía normativa, la publicidad de las normas, la irretroactividad de las disposiciones sancionadoras no favorables o restrictivas de derechos individuales, la seguridad jurídica, la responsabilidad y la interdicción de la arbitrariedad de los poderes públicos"*).

(iii) it has not been established that the Athlete committed an ADRV, as an ABP profile is not, on its own, sufficient proof thereof:

"Neither the likelihood of use nor, certainly, the existence of an adverse biological passport of a sportsperson are classified as infringements. The biological passport was conceived under Spanish regulations solely as a method of proof. We reiterate that an adverse biological passport is not classified as an infringement in itself, it is a method of proof of what does constitute the actual infringement: the usage, use of consumption of prohibited substances or methods.

[…]

[T]he biological passport in our administrative sanction law is no other than an additional method of proof. This does not, in any way, mean that it enjoys presumption or truthfulness, or any reality, not even iuris tantum, that can eliminate the presumption of innocence enjoyed by any alleged offender. As such presumption remains intact it is the task of the sanctioning body to dismantle it. It is not acceptable in legal terms even to suggest that the alleged offender needs to prove his innocence.

[…]

Following the conclusion set out in the ground above, that is, that the biological passport does not benefit, according to Law 3/2013, of the presumption of any truth and that it, therefore, is solely an additional method of proof, we must now examine how it is regulated.

[…]

[In accordance with Article 33bis] if the biological passport contains no anomalous or adverse results, that would be a method of proof in itself, not needing to be supplemented by other proof. However, where the result is, so to speak, negative, this is not enough in itself to prove that an infringement has been committed. Instead, it obliges AEPSAD to carry out investigation actions. [Article 33bis of Law 3/2013] literally says: 'gathering evidence to establish whether an infringement of the anti-doping rules has taken place'.

[…]

The fact is that, in this case, there is no record of any actions of AEPSAD consisting of investigation actions that have been completed 'gathering evidence', the result of which, in compliance with the Organic

[9] The translations contained in the present Award were made by Panel and the *ad hoc* Clerk and are of an informal nature and only for guidance.

Law, would be what could actually prove that the infringement has been committed.

[…]

[T]he Agency – instead of completing an investigation activity, as mandated under Article 39bis – has expected the alleged offender himself to provide the facts, documents, reports and analysis. Such action has not only failed to comply with the provisions of this article, but it has also used the biological passport as if it were supported by one of the assumptions of 39.6, with the aspiration being that the sportsperson is burdened with proving his innocence. This way of proceeding violates Article 24 of the Constitution and, therefore, renders the order fully null and void by operation of law, as provided under Article 47.1a) of Law 39/2015".

Translated from the Spanish original:

"Ni la probabilidad de uso, ni por supuesto, la existencia de un pasaporte biológico en el ordenamiento jurídico español esta concebido, tan solo como un medio de prueba. Se reitera, un pasaporte biológico adverso no es un hecho tipificado. Es un medio de prueba de lo que sí esta tipificado: la utilización, el uso o el consumo de sustancias o métodos prohibidos.

[…]

[E]l pasaporte biológico en nuestro ordenamiento sancionador no constituye sino un medio de prueba más, pero que en modo alguno goza de presunción ni de veracidad, ni de realidad alguna, ni siquiera iuris tantum, que pueda ser capaz de eliminar la presunción de inocencia de la que goza cualquier expedientado, la cual, al mantenerse intacta, determina que corresponda al órgano sancionador destruirla, sin que sea admisible en términos jurídicos, ni siquiera sugerir que ha de ser el expedientado quien ha de probar su inocencia.

[…]

Concluido en el fundamento anterior que el pasaporte biológico no goza, según la Ley 3/2013 de presunción alguna de veracidad, y que, por ello, no constituye sino un medio de prueba más, corresponde examinar su regulación.

[…]

[De acuerdo con el artículo 33bis] el pasaporte biológico, cuando no contenga resultados anómalos o adversos, es un medio de prueba por si mismo, que no necesita completarse con otros. Sin embargo, cuando su resultado es, por así decirlo negativo, por si mismo no es suficiente para probar la comisión de una infracción, sino que lo que obliga es una actuación investigadora de la AEPSAD. Dice textualmente la norma [en el artículo 33bis]: 'recogiendo pruebas a fin de determinar si se ha producido la infracción'.

[…]

[E]n el presente caso, no consta actuación alguna de la AEPSAD de actuaciones de investigación que haya realizado 'recogiendo pruebas', cuyo resultado, conforme a la Ley Orgánica, seria el que podría probar la comisión de la infracción.

[…]

Por tanto, en vez de realizar una actividad investigadora la Agencia, tal y como le impone el artículo 39 bis, ha pretendido que sea el imputado el que le aporte hechos, documentos, informes y análisis. Con tal actuación no solo ha incumplido lo dispuesto en el citado articulo, sino que ha utilizado el pasaporte biológico como si estuviera amparado por una de las presunciones del 39.6, aspirando a que fuera el deportista el que tenia que demonstrar su inocencia. Esta actuación vulnera el artículo 24 de la

Constitución, y, por tanto, determina la nulidad de pleno derecho de la resolución, de conformidad con lo establecido en el artículo 47.1 a/ de la Ley 39/2015".

25. On 18 February 2019, WADA requested from the AEPSAD the TAD case file to review it for a potential appeal to the Court of Arbitration for Sport (the "CAS"). The AEPSAD declined to provide said file citing data protection and privacy reasons and advised WADA to request it directly from the TAD.

26. On 8 March 2019, WADA requested the case file from the TAD. On 22 March 2019, the TAD also refused to provide the TAD case file.

27. On 27 March 2019, WADA filed an appeal before the CAS against the Athlete and AEPSAD.

28. On 12 April 2019, the Athlete filed an appeal against the Appealed Decision before the Central Administrative Court of Spain, in Spanish, the *"Juzgado Central Contencioso Administrativo"* (the "JCCA"), naming the TAD as the sole respondent.

29. On 22 April 2019, WADA also filed an appeal against the Appealed Decision before the JCCA, naming the TAD as the sole respondent. The Athlete and the AEPSAD subsequently requested to be, and were admitted by the court as, parties to that proceeding, before the AEPSAD ultimately decided to withdraw itself.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

30. On 27 March 2019, the Appellant filed with the CAS a Statement of Appeal, in accordance with Article R47 and R48 of the Code of Sport-related Arbitration (the "CAS Code"), challenging the Appealed Decision and requesting the production by the First Respondent of the TAD case file. The Statement of Appeal filed by the Appellant indicated the Athlete's physical address and email address (*ibaisalaszorrua@gmail.com*).

31. On 3 April 2019, the CAS Court Office transmitted to the Respondents the Statement of Appeal. For the Second Respondent, the Statement of Appeal was sent to the physical address and email address indicated by the Appellant.

32. On 5 April 2019, the First Respondent objected to producing the TAD case file claiming that (i) the file was no longer in the possession of the First Respondent; and (ii) doing so would violate data protection and privacy law. On 8 April 2019, the CAS Court Office forwarded the First Respondent's objection to the other Parties (including by email to the Second Respondent) inviting them to state their positions thereon.

33. On 10 April 2019, the Appellant reiterated its request to have the First Respondent produce a copy of the TAD case file. Additionally, it requested that the Second Respondent produce all the documents in his possession or control that related to the case. On 11 April 2019, the CAS Court Office forwarded the Appellant's communication to the Respondents (including by email to the Second Respondent) and asked them whether they agreed to submit a copy of the TAD case file.

34. On 15 April 2019, the First Respondent (i) *"refused"* and *"renounced"* its participation in the present arbitration and explicitly declared that it agreed with the appeal filed; (ii) refused to pay any procedural costs in relation to the appeal based on said refusal/renouncement; and (iii) reiterated its objection to produce the TAD case file claiming data protection and privacy reasons. The First Respondent subsequently reiterated, on numerous occasions, its refusal to be a party to the present arbitration (*e.g.*, by letters of 26 April and 16 May 2019).

35. On 17 April 2019, the CAS Court Office forwarded the First Respondent's communication to the other Parties (including by email to the Second Respondent). It took note of the First Respondent's wish to renounce its participation in the present arbitration, but informed it that it was nevertheless still a party in the CAS proceedings. The CAS Court Office further indicated that the Panel would decide the issue of the Appellant's request for the TAD case file.

36. On 24 April 2019, in light of the First Respondent's refusal to produce a copy of the TAD case file and the Second Respondent's failure to respond to the Appellant's request for production, the Appellant requested the CAS to invite the TAD, as a third party, to provide such copy. On 25 April 2019, the CAS Court Office forwarded this communication to the Respondents (including by email to the Second Respondent).

37. On 9 May 2019, the Appellant submitted an Application for Provisional Measures pursuant to Article R37 of the CAS Code.

38. On 10 May 2019, the CAS Court Office, in accordance with Article R37 of the CAS Code, invited the Respondents to state their respective positions with regard to the Appellant's Application for Provisional Measures. This communication was sent to the Second Respondent at the physical address and email address indicated by the Appellant in the Statement of Appeal. The Respondents, however, did not file any response.

39. On 27 May 2019, the CAS Court Office notified the Parties that, on behalf of the President of the CAS Appeals Arbitration Division and pursuant to Article R54 of the CAS Code, the Panel appointed to decide the matter would be constituted by Prof. Luigi Fumagalli as chairman, Prof. Massimo Coccia designated by the Appellant, and Mr. Vladimir Novak nominated by the President of the CAS Appeals Arbitration Division *in lieu* of the Respondents after their failure to jointly nominate an arbitrator within the prescribed deadline.

40. On 31 May 2019, the Panel granted the Second Respondent a new deadline to file his position on the Appellant's Application for Provisional Measures. Additionally, it invited the Second Respondent to submit to the CAS the TAD case file and/or to declare whether he consented that the TAD submits it. The Panel further declared that the Second Respondent's failure to cooperate in this matter might result in the Panel drawing adverse inferences against him, consistent with CAS practice and, more in general, with international arbitration practice. The courier service was unable to deliver this CAS communication to the Second Respondent (recorded as *"delivery attempted, recipient not home"*). This CAS communication was also sent to the Second Respondent by email.

41. On 24 June 2019, in accordance with Article R51 of the CAS Code, the Appellant filed its Appeal Brief. The CAS Court Office forwarded the Appeal Brief to the Parties on 27 June 2019 (including by mail and email to the Second Respondent), and granted them 20 days to submit their respective Answers.

42. On 24 June 2019, the CAS Court Office informed the Parties (including by email to the Second Respondent) that in view of the fact that it was not possible to deliver to the Second Respondent the letter of 31 May 2019 despite several attempts, the Panel invited (i) the Appellant and the First Respondent to provide a new address for notification to the Second Respondent, if they had or could obtain one; and (ii) the Appellant to declare whether it wished to proceed with the Application for Provisional Measures despite the failed attempts of delivery.

43. On 27 June 2019, the Appellant replied by (i) confirming that according to its information, the attempted delivery address for the Second Respondent was correct (it pointed out that the DHL reports indicated nobody was home during the delivery attempt, and not that the address was invalid or attributable to another person); and (ii) maintaining its Application for Provisional Measures. This communication was forwarded by the CAS Court Office to the Respondents (including by email to the Second Respondent).

44. On 8 July 2019, the CAS Court Office informed the Parties (including by email to the Second Respondent) that the Panel (i) would render a decision on its Request for Provisional Measures in due course; and (ii) understood the Appellant to be satisfied that the arbitration proceed on the basis of the notifications for the Second Respondent sent to the address used until then. The CAS Court Office also invited the Appellant to inform whether it maintained its request for production of the TAD case file.

45. On 15 July 2019, the Appellant indicated that it would not maintain its request for the TAD case file at this juncture of the proceeding, since it had already filed both a Request for Provisional Measures and an Appeal Brief, and had obtained sufficient documents to make its case before CAS. The Appellant nonetheless reserved its right to request production of specific documents and for additional evidentiary measures. This communication was forwarded by the CAS Court Office to the Respondents (including by email to the Second Respondent).

46. On 18 July 2019, the First Respondent replied by reiterating *inter alia* that for data protection and privacy reasons it could not transfer the TAD case file, which was exclusively in the hands of the TAD. The CAS Court Office forwarded this communication to the other Parties (including by email to the Second Respondent).

47. On 26 July 2019, the Panel dismissed the Appellant's Application for Provisional Measures pursuant to Article R37 of the CAS Code.

48. On 29 July 2019, the CAS Court Office announced to the Parties (including to the Second Respondent by email) that, in accordance with Article R55 of the CAS Code, the Panel would proceed with the arbitration and deliver an award, as the Respondents failed to submit their

Answers within 20 days from receipt of the Appeal Brief. The CAS Court Office noted that (i) despite several attempts, DHL was unable to contact the Second Respondent; and (ii) it had not received the Respondents' Answers nor any communication from them in that regard. The CAS Court Office also invited the Parties' to indicate whether they preferred a hearing to be held in this case.

49. On 29 July 2019, the Appellant informed the CAS Court Office that it did not consider a hearing necessary.

50. On 6 September 2019, the CAS Court Office advised the Parties (including the Second Respondent by email) that the Panel deemed itself sufficiently well-informed to decide the present case based solely on the Parties' written submissions, without the need to hold a hearing. It also sent out a first Order of Procedure, which the Appellant signed on 11 September 2019 and which the Respondents did not sign.

51. On 24 September 2019, Mr. José Rodríguez García wrote to the CAS Court Office on behalf of the Second Respondent requesting to confirm whether the Appellant had filed an appeal at the CAS against the Appealed Decision, as he had received contradictory information on the matter (alleging the CAS had indicated on 6 August 2019 that *"no such procedure has been filed at the CAS"*, whereas the Spanish newspapers published on 10 September 2019 an article indicating the contrary).

52. On 25 and 30 September and 4 October 2019, the CAS Court Office confirmed that notwithstanding the email from the CAS Procedures account of 5 August 2019, the Appellant had filed an appeal against the Appealed Decision on 27 March 2019, which was notified to the Parties on 3 April 2019. The CAS Court Office requested a power of attorney signed by the Second Respondent should Mr. Rodríguez Garcia wish to receive additional information regarding the case.

53. On 8 October 2019, Mr. Rodríguez García provided a power of attorney and requested further information on the appeal.

54. Accordingly, on 8 October, 2019, the CAS Court Office informed the Second Respondent that (i) the filing of the appeal was notified on 3 April 2019 (including to the Second Respondent who had received the notification on 8 April 2019); (ii) the Appellant had filed its Appeal Brief in accordance with Article R51 of the CAS Code; and (iii) on 6 September 2019, the Parties were informed that the Panel determined to be sufficiently well informed to issue a decision on the basis of the Parties' written submissions.

55. On 15 October 2019, Mr. Rodríguez García sent a letter to the CAS Court Office that:

- declared that the Second Respondent *"does not accept the arbitration. [He] has not voluntarily accepted the arbitration, he is not a member of WADA and the World Anti-Doping Code is not binding on [him]. In addition, CAS has no jurisdiction in this case, without discussing the jurisdiction being interpreted as submission to arbitration"*;
- claimed that the Second Respondent had never received the Statement of Appeal or

Appeal Brief or signed for proof of their delivery;

- requested that the DHL proof of delivery be sent to him in order to check for possible forgery;
- stated that the Second Respondent never informed the CAS nor WADA that the email address *ibaisalaszorrozua@gmail.com* was valid to receive correspondence.

56. On 16 October 2019, the CAS Court Office provided the Second Respondent with the requested DHL proof of delivery which contained what appeared to be the signature of the Second Respondent.

57. On 23 October 2019, the Second Respondent claimed that the signature on the DHL proof of delivery was not his. In support, he produced (i) a copy of his Spanish ID card showing his signature; and (ii) two statements from individuals claiming that the Second Respondent was not at home during the alleged delivery time. The first statement is from Ms. Elisa Ruiz Manterola, the owner of a bar in Mungia, who claimed that on 8 April 2019, the Second Respondent was in that bar drinking coffee until 17:00 and then went to *Decoración Equis* (a family store owned by the Second Respondent's family) until 20:30. The second statement is from Mr. Eva María Zorrozua Elejaga, the Second Respondent's mother, who declared that the Second Respondent was in *Decoración Equis* during business hours on 8 April 2019 and not at home.

58. On 25 October 2019, the CAS Court Office, on behalf of the Panel, notified the Statement of Appeal and Appeal Brief to the Second Respondent and invited him to submit an Answer within twenty days.

59. On 29 October 2019, the Second Respondent requested (i) information on the composition of the Panel and the circumstances of their appointment; and (ii) whether the First Respondent has *"submitted any defense of lack of jurisdiction"*.

60. On 30 October 2019, the CAS Court Office provided the Second Respondent with information about the composition of the Panel and informed him that the First Respondent had indeed objected to the CAS jurisdiction.

61. On 1 November 2019, the Second Respondent requested the Panel to order the Appellant to produce the Adaptive Model pursuant to Articles R57 and R44.2 of the CAS Code.

62. On 6 November 2019, the Appellant objected to the Second Respondent's request for the production of the Adaptive Model.

63. On 7 November 2019, the Panel denied the Second Respondent's request for the order of production of the Adaptive Model.

64. On 14 November 2019, in accordance with Article R55 of the CAS Code, the Second Respondent filed his Answer, in which it *inter alia* objected to the jurisdiction of the CAS.

65. On 9 December 2019, as invited to do so by the CAS, the Appellant filed its response to the

Second Respondent's objection to jurisdiction.

66. On 18 December 2019, the CAS Court Office asked the Parties whether they wished for a hearing to take place.

67. On 27 December 2019, the Appellant expressed its preference for the Panel to issue an award solely on the basis of their written submissions.

68. On 14 January 2020, the Second Respondent agreed. However, he requested that the Panel first ask the First Respondent to answer the following three questions: (i) whether the TAD had exercised disciplinary powers when it issued the Appealed Decision; (ii) whether the Appealed Decision can be "attributed" to the First Respondent; and (iii) whether the First Respondent can file appeals against TAD decisions without the relevant athlete being named a party to the appeal.

69. On 31 January 2020, as invited to do so by the CAS, the Appellant and Second Respondent provided their comments to the questions raised by the Second Respondent in his letter of 14 January 2020. Although also invited to do so, the First Respondent made no such submission.

70. On 18 March 2020, the CAS Court Office, on behalf of the President of the Panel, sent a new Order of Procedure to the Parties, which only the Appellant signed and retuned. The Second Respondent refused to sign the Order of Procedure claiming in an email of 23 March 2020 that doing so would *"have implications in the proceedings before the Spanish Courts that Mr. Salas does not want to assume"*.

IV. SUMMARY OF THE PARTIES' SUBMISSIONS

A. The Appellant: WADA

71. The Appellant requests the Panel to rule as follows:

> *"1. The Appeal of WADA is admissible.*
>
> *2. The decision rendered by the Administrative Sport Court of Spain on 8 February 2019 in the matter of Ibai Salas Zorrozua (case no. 217/2018) is set aside.*
>
> *3. Ibai Salas Zorrozua is found to have committed an anti-doping rule violation.*
>
> *4. Ibai Salas Zorrozua is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Ibai Salas Zorrozua before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
>
> *5. All competitive results obtained by Ibai Salas Zorrozua from and including 25 January 2017 until the date when the CAS award enters into force are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).*
>
> *6. The arbitration costs shall be borne by AEPSAD or, in the alternative, by the Respondents jointly and severally.*

7. WADA is granted a significant contribution to its legal and other costs".

72. In support of its motions for relief, the Appellant submits as follows:

- The Athlete violated Article 2.2 WADC. This is proven by the Athlete's ABP, which, according to Article 3.2 WADC and well-established CAS jurisprudence, is a "reliable means" of establishing an ADRV.
- The Athlete's ABP profile clearly evidences that he committed an ADRV in breach of Article 2.2 WADC. First, as explained by the panel of experts, the values of Sample 1 – a high HGB value (17.1 g/dL) and low RET% (0.25), resulting in a high OFF-score value (141.00) – is symptomatic of the use and discontinuation of an erythropoietic stimulant ("ESA") or the application of a blood transfusion. Second, as explained by the same panel, the values of Sample 4 – displaying the lowest HGB value (13.5 g/dL) and the highest RET% (2.04) haemoglobin – were likely caused by external stimulation in view of an important upcoming competition, the Spanish Road Cycling Championships. Third, the Athlete's ABP contains multiple abnormalities for different parameters at both a 99.0% and 99.9% specificity, while the probability of sequence abnormality is in excess of 99.9% for both the OFF-score and RET% profiles.
- The TAD erred in annulling the sanction because it did so on the ground that the ABP was not a reliable means of establishing an ADRV (without assessing the merits of the Athlete's individual ABP), which blatantly contradicts well-established CAS jurisprudence that has accepted the validity of ABP as a reliable means of detecting blood doping.

73. In response to the Second Respondent's objection to the CAS jurisdiction, the Appellant submits as follows:

- The CAS has jurisdiction because there is a valid arbitration clause by reference. The Appellant has the right to appeal the Appealed Decision pursuant to Article 13.2.3 WADC, which is incorporated by reference in Article 40.6 of the Spanish ADA. Unilateral appeal rights to the CAS – such as that granted in Article 13.2.3 WADC – for parties that were not involved in the previous proceedings are nothing unusual and, in any case, the athletes have a right to cross-appeal pursuant to Article 13.2.4 WADC.
- Not having named the TAD as a party to the present arbitration (which it was not required to do and could not do) does not preclude the CAS from accepting jurisdiction because:

  (i) The TAD was not a party to the TAD proceeding that gave rise to the Appealed Decision;

  (ii) There is no requirement in the WADC that the body that rendered the decision must be named as a co-respondent in an appeal before the CAS;

  (iii) The TAD would not have standing to be sued because the Appealed Decision does not establish any rights and/or obligations on the TAD and does not affect the TAD's interests;

(iv) It is well-established under CAS jurisprudence that in "horizontal" disputes there is no need to name the tribunal as a (co-)respondent;

(v) In the context of doping, the CAS has explicitly held that even where a second-instance national decision is rendered by an independent tribunal, the decision is attributed to the NADO with results management responsibility and that the NADO is therefore the proper respondent;

(vi) The Appellant cannot bind the TAD to arbitration, given that it is not a party to any arbitration agreement.

- The appeals filed by the Appellant and the Second Respondent before the Spanish courts do not impede the Panel from proceeding with the present arbitration and issuing a final decision on the merits. Such appeals do not create a *lis pendens* situation. First, the CAS appeal was filed before the Spanish appeal. Second, the "triple identity" test is not satisfied, since (i) the scope and purpose of the CAS appeal are different to those of the WADA's appeal before the Spanish courts (the WADA's appeal to the CAS is its primary appeal and is aimed at securing a sanction against the Athlete with international effect, whereas the appeal before the Spanish courts is effectively a defensive appeal aimed at ensuring that the sanction against the Athlete is enforceable in Spain and, more generally, that the ABP remains a valid evidentiary tool to establish doping in Spain); and (ii) the parties are not the same. Furthermore, parallel jurisdiction is actually allowed and contemplated in the Spanish ADA.

B. The First Respondent: AEPSAD

74. Although duly and repeatedly invited to do so, the First Respondent did not submit an Answer to the Appellant's Appeal Brief nor any motions for relief. Nevertheless, the First Respondent did express by letters submitted in the context of this proceeding that it:

(i) objects to CAS jurisdiction *ratione personae* over it (see *infra* at para. 90);

(ii) fully agrees with the appeal (see *supra* at para. 34). Indeed, in its letter of 15 April 2019, it declared that *"[w]e want to clearly and categorically state our acquiescence to the appeal filed… Acting differently would mean accepting that AEPSAD was wrong in its resolution and as we have said several times, this agency is ratified in its decision of October 2018, which it understood then and understands now was adjusted to Spanish law and according to the code World Anti-Doping"*. Furthermore, in its letter of 5 April 2019 the First Respondent *"ratifie[d] the decision"* of the AEPSAD and in its letters of 26 April and 16 May 2019, it wrote that it *"has no dispute with WADA… and… is fully in accordance with the claim and purpose of the claim"*.

C. The Second Respondent: Mr Salas

75. The Second Respondent requests that the CAS rule as follows:

"1. The appeal filed by WADA against the decision rendered by the Administrative Sport Court of Spain on 8 February 2019 in the matter of Ibai Salas Zorrozua (case no. 217/2018) is dismissed.

2. CAS has no jurisdiction to deal with the appeal filed by WADA against the decision rendered by the Administrative Sport Court of Spain on 8 February 2019 in the matter of Ibai Salas Zorrozua (case no. 217/2018).

3. The arbitration costs shall be borne by WADA.

4. Mr. Salas is granted a significant contribution to its legal and other costs".

76. In support of its motions for relief, the Second Respondent submits as follows:

- Article 40.6 of the Spanish ADA is invalid because it breaches the principle of equality of arms embodied in Article 6.1 ECHR as it grants WADA the right to appeal a TAD decision to the CAS without affording the same right to the athletes.

- The CAS does not have jurisdiction to hear the present appeal because:

  (i) the Athlete did not consent to CAS arbitration. The Athlete's consent was necessary because, as a "national-level athlete", he was not subject under the WADC to the exclusive jurisdiction of the CAS, but rather to an *"independent and impartial body in accordance with rules established by the national anti-doping organization"* (see Article 13.2.2 WADC).

  (ii) The CAS cannot issue a decision that affects the TAD. The Appellant did not name the TAD as a respondent. Issuing a decision "setting aside" the TAD decision would thus violate the TAD's right to be heard and would not be enforceable in Spain. The AEPSAD is a completely separate and independent body from the TAD (which exercised its own disciplinary powers when it rendered the Appealed Decision) and, as such, neither represents nor has the capacity to defend the TAD in the present arbitration. This is proven by the fact that (i) Spanish law states the AEPSAD does not have to be named as a party whenever an athlete appeals a doping decision of the TAD to the Spanish courts, *i.e.*, the JCCA, and the *"Audiencia Nacional"* (in English, the "National Court"); and (ii) the Appellant has only named the TAD and the Athlete as parties in its appeal before the JCCA. Moreover, the CAS cannot issue a decision that affects the TAD because the TAD has not entered into a CAS arbitration agreement with the Appellant.

  (iii) The Appellant has appealed the Appealed Decision before the JCCA which precludes it, in accordance with Article 13.1.3 WADC, from appealing the same decision before the CAS.

- In denying the Second Respondent's request for the Adaptive Model, the Panel has violated Article 6.1 ECHR, in particular his right to a fair trial, the principle of equality of arms and the adversarial principle. The Appellant has placed itself in a privileged position by using the result of the Adaptive Model to accuse the Second Respondent while at the same time not affording him the opportunity to challenge the Adaptive Model.

- The AEPSAD and the panel of experts that analysed the Athlete's ABP acted arbitrarily

by not taking into consideration the Athlete's blood samples taken between 3 October 2019 and 31 January 2018. These four blood samples changed the Athlete's expected distribution and the upper and lower limits within which his values would be expected to fall. The results of the Adaptive Model and the opinion of the panel of experts who arbitrarily excluded four blood samples cannot substantiate the sanction imposed on the Athlete.

V. JURISDICTION

77. The question of whether the CAS has jurisdiction over the present dispute must be assessed on the basis of Chapter 12 of the Swiss Federal Act on Private International Law ("PILA"), which applies pursuant to Article 176 PILA because (i) the seat of the Panel is Lausanne, Switzerland (Article R28 of the CAS Code); and (ii) at least one of the Parties (the Respondents) have never been domiciled or habitually resided in Switzerland. It is well-accepted under Swiss and CAS jurisprudence that, in accordance with Articles 186 PILA, the Panel is to decide on its own jurisdiction in accordance with the principle of *"kompetenz-kompetenz"*.

78. Pursuant to Article R47 of the CAS Code, *"[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body"*. Accordingly, the Panel must determine whether there is a CAS arbitration clause in the Spanish ADA.

79. Article 40 of the Spanish ADA provides:

> *"5. The special appeal relating to doping in sport shall be dealt in accordance to the rules stipulated for the appeals in Law 39/2015 of 1 October 2015 regarding the Common Administrative Procedure of the Public Administrations, with the following particularities:*
>
> *[…]*
>
> *d) The resolutions of the Administrative Court for Sport in this matter are immediately enforceable, exhausting the administrative channel, and against these resolutions, the persons enumerated in the fourth paragraph of this article may file a Contentious-Administrative appeal.*
>
> *6. Without prejudice to the provisions of the preceding paragraph, the resolutions referred thereto [of the TAD] may be appealed by the World Anti-Doping Agency, the corresponding International Sports Federation and the International Olympic Committee or the International Paralympic Committee before the body and in accordance with the dispute resolution system foreseen in their respective regulatory regulations"* (emphasis added).
>
> Translated from the Spanish original:
>
> *"5. El recurso especial en materia de dopaje en el deporte se tramitará conforme a las reglas establecidas en la Ley 39/2015, de 1 de octubre del Procedimiento Administrativo Común de las Administraciones Publicas para el recurso de alzada con las siguientes especialidades:*
>
> *[…]*

d) Las resoluciones del Tribunal Administrativo del Deporte en esta materia son inmediatamente ejecutivas, agotan la vía administrativa, y contra las mismas las personas legitimadas mencionadas en el apartado cuarto de este artículo podrán interponer recurso contencioso-administrativo.

6. Sin perjuicio de lo dispuesto en el apartado anterior, las resoluciones que en él se refieren [del TAD] podrán ser recurridas por la Agencia Mundial Antidopaje, las correspondiente Federación deportiva internacional y el Comité Olímpico Internacional o el Comité Paralímpico Internacional ante el órgano y con arreglo al sistema de resolución de conflictos previsto en sus respectivas normativas reguladoras".

80. The Parties disagree as to whether this provision grants the CAS jurisdiction to hear the present dispute.

A. CAS jurisdiction over the appeal against the Second Respondent

81. The Second Respondent argues that the CAS does not have jurisdiction to hear the present dispute because he did not consent to CAS arbitration.

82. As a starting point, it must be determined how consent to CAS arbitration may be given. In this respect, the Panel notes that Article R47 of the CAS Code explicitly provides that, in the context of sport, consent can be based on an arbitration clause contained in the applicable regulations. Second, the Panel notes that it is well-established under the jurisprudence of the CAS and the Swiss Federal Tribunal (the "SFT") that an arbitration clause may be incorporated and accepted by reference; it does not have to be fully incorporated in the applicable regulations. Indeed, the SFT has held that:

"With respect to formal requirements (Article 178, paragraph 1, PILA) in sport cases, the Federal Tribunal reviews the agreement of the parties to submit disputes to an arbitral tribunal with benevolence; this aims at promoting swift resolution of disputes by specialized panels which, as the CAS, meet appropriate requirements of independence and impartiality (ATF 133 III 235, Nr. 4.3.2.3 p. 244 et seq. with references). The liberal approach that characterizes federal case law in this respect appears, in particular, in the fact that arbitration clauses integrated by reference are considered as valid (decision of the Federal Tribunal 4A_460/2010 of 18 April 2011, Nr. 3.2.2; 4A_548/2009 of 20 January 2010, Nr. 4.1; 4A_460/2008 of 9 January 2009, Nr. 6.2 with references)".

83. In the present case, the applicable regulations – the Spanish ADA – does contain a CAS arbitration clause which incorporates by reference the arbitration clause contained in the WADC.

84. Article 40.6 of the Spanish ADA grants WADA the right to appeal TAD decisions to the CAS and incorporates by reference the dispute resolution system of the WADC. It unequivocally provides that *"Without prejudice to the provisions of the preceding paragraph [e.g., to filing an appeal before the Spanish courts], the resolutions referred thereto [of the TAD] may be appealed by the World Anti-Doping Agency… before the body and in accordance with the dispute resolution system foreseen in their respective regulatory regulations".*

85. The dispute resolution system of the WADC includes Article 13.2.3 WADC, which clearly states that in cases where a decision is taken by a national-level appeal body (such as the TAD),

WADA has the right to appeal to the CAS: *"For cases under Article 13.2.2, WADA… shall also have the right to appeal to the CAS with respect to the decision of the national-level appeal body…". Among the decisions that the Appellant may appeal to the CAS are "decision[s] that no anti-doping rule violation was committed"* (see Article 13.2 WADC).

86. The Athlete consented to Article 40.6 of the Spanish ADA and the incorporated Article 13.2.3 WADC when he applied for and obtained a license to compete at national level. Indeed, as stated in the relevant part of Article 10 of the Spanish ADA: *"The subjective scope of application of this chapter and chapter II of this title extends to sportsmen and women who are in possession of, have been in possession of, or have applied for the approved state or autonomous community federation license…"* (in the Spanish original: *"El ámbito subjetivo de aplicación de este capítulo y del capítulo II del presente título se extiende a deportistas que se encuentren en posesión, lo hubieran estado con carácter previo, o hayan solicitado la licencia federativa estatal o autonómica homologada…"*).

87. Pursuant to the above provisions of the Spanish ADA and the WADC, the Second Respondent has consented to arbitration at the CAS, in relation to an appeal of a TAD decision acquitting an athlete of a doping charge. Accordingly, the Panel concludes that it has jurisdiction to hear the appeal brought by the Appellant against the Second Respondent.

88. The Panel's conclusion is unaffected by the Athlete's argument that Article 40.6 of the Spanish ADA must be deemed invalid because it allegedly violates the principle of equality of arms embodied in Article 6.1 ECHR by granting only WADA and not the Athlete the right to appeal a TAD decision to the CAS.

89. In the Panel's view, the Athlete's argument does not hold ground under the present scenario, in which WADA (as opposed to the Athlete) is the party filing an appeal of the TAD decision to the CAS. The purported asymmetric nature of Article 40.6 of the Spanish ADA would only open the door for the Athlete to argue that he is also entitled, like WADA, to appeal a TAD decision to the CAS under that provision – something which is not at issue in the present case and, therefore, which the Panel does not have to assess. The asymmetric nature of Article 40.6 of the Spanish ADA does not, on the other hand, invalidate the arbitration clause or preclude WADA from bringing an appeal to the CAS as it has a right to do under that provision and the incorporated Article 13.2.3 WADC, to which the Athlete has consented. Moreover, the Panel finds that there is a clear justification for granting WADA a right to appeal decisions of a national-level appeal body – to give WADA the avenue to ensure that WADC signatories are properly and uniformly enforcing the WADC, particularly in order to avoid that NADOs and national judging bodies adopt a protectionist attitude and give preferential treatment to their own athletes when it comes to the assessment of anti-doping offenses.

B. CAS jurisdiction over the appeal against the First Respondent

90. The First Respondent seems to contest that the CAS has jurisdiction *ratione personae* over it. Indeed, in its letters dated 15 April 2019, 16 May 2019, and 18 June 2019, the First Respondent submitted – in the context of an objection to the payment of advance of costs – that (i) it refused to be considered a party in this proceeding and renounced to participate in it *"in any quality"*; (ii) it has *"no dispute with WADA"*; and (iii) *"there can be no arbitration where there is no*

conflict or dispute". The First Respondent reiterated this position in its letter of 18 July 2019, by declaring – in the context of the issue of the production of the TAD file – that it "*refus[ed] to be considered a party in this proceeding"*. Moreover, as argued in its letter of 26 April 2019, the First Respondent is of the view that it cannot be forced to be a party to the present arbitration because it did not issue the Appealed Decision: *"The appeal is not for a decision rendered by the AEPSAD, but by the Administrative Court for Sport, which is completely independent and outside the Agency, so we can neither respond in its place nor assume as our own its decisions"* (as will be discussed *infra* at para. 113, this may also be interpreted as an objection to standing to be sued).

91. The Panel finds, for the reasons to follow, that the CAS does have jurisdiction *ratione personae* over the First Respondent.

92. First, while the First Respondent did not issue the Appealed Decision, it did issue the underlying AEPSAD Decision and subsequently participated as a party in the national appeal proceeding before the TAD. Indeed, the Second Respondent's appeal to the TAD against the AEPSAD Decision was duly communicated to the First Respondent, who was given the opportunity to comment thereon. This is confirmed in the Appealed Decision, which states that *"The Administrative Sport Court sent AEPSAD the appeal and asked this agency to furnish a report from the body issuing the order being appealed against and the original case file, and this request was fulfilled"* (translated from the Spanish original: *"El [TAD] remitió a la AEPSAD el recurso y solicitó de la misma informe elaborado por el órgano que dictó el acto recurrido, así como el expediente original, lo que fue cumplido"*).

93. Second, the First Respondent, as a signatory to the WADC, is bound by the arbitration clause contained in Article 13.2.3 WADC, which was incorporated to the Spanish ADA by reference through Article 40.6 of the Spanish ADA (see *supra* at para. 84) and clearly grants to WADA the right to appeal to the CAS against a decision of the TAD stemming from an underlying AEPSAD decision.

94. Third, the CAS's jurisdiction is unaffected by the Parties' position on the merits. The fact that the First Respondent accepts the Appellant's position or states that it has no dispute with WADA only means that it is not opposing the merits of WADA's appeal but is irrelevant in deciding whether or not the CAS has jurisdiction *ratione personae* over it. In fact, this Panel's jurisdiction only depends on the circumstance (shown in the previous paragraph) that the First Respondent and the Appellant are bound by an arbitration agreement in favour of the CAS.

95. In light of the above, the Panel concludes that it has jurisdiction to hear the appeal brought by the Appellant against the First Respondent.

C. CAS jurisdiction is not precluded by the Appellant not naming the TAD as a party

96. The Second Respondent argues that the CAS does not have jurisdiction because the Appellant did not name the TAD as a party in the present appeal (see *supra* at para. 76(ii) for a more detailed summary of the Appellant's position).

97. For the reasons summarized below, the Panel finds that the jurisdiction of the CAS in the

present case is unaffected by the fact that the Appellant has not named the TAD as a respondent:

- First, neither Article 40.6 of the Spanish ADA nor any other provision under Spanish law requires that the TAD be named as a co-respondent in an appeal of a TAD decision to the CAS or specifies who exactly is required to be a respondent to such an appeal.
- Second, the appeal relates to whether or not the Athlete committed an ADRV, which is the object of the sanctioning power of the AEPSAD as the Spanish NADO and not of the TAD. The Panel finds that, in issuing the Appealed Decision, the TAD was simply exercising its power to review the sanction imposed by the AEPSAD. The TAD does not have disciplinary powers of its own, rather it is an independent tribunal which has the power to review the decisions of sporting bodies in Spain. Indeed, according to Article 84.1 of the Law 10/1990 of 15 October *"On Sports"*, *"The Administrative Court of Sport [TAD] is a state-level body, organically attached to the High Council for Sport, which, acting independently of the latter, assumes the following functions: a) Decides, through administrative channels and as a last instance, on sports disciplinary matters within its competence, including those set out in the Organic Law on the Protection of the Health of Sportspeople and the Fight Against Doping in Sport Activities"* (in the Spanish original: *"El Tribunal Administrativo del Deporte es un órgano de ámbito estatal, adscrito orgánicamente al Consejo Superior de Deportes que, actuando con independencia de éste, asume las siguientes funciones: a) Decidir en vía administrativa y en última instancia, las cuestiones disciplinarias deportivas de su competencia, incluidas las señaladas en la Ley Orgánica de Protección de la Salud del Deportista y Lucha contra el Dopaje en la Actividad Deportiva*…).
- Third, the Athlete is unaffected by the fact that the TAD is not a party to the present arbitration. In fact, the circumstance that the TAD was not summoned to participate in the present proceedings does not prevent the Panel from exercising its powers to review the facts and the law under Article R57 of the CAS Code and issue a binding decision on the respondents who have been named, *i.e.*, the Athlete and the AEPSAD. That is, even in the absence of the TAD as a party to the present arbitration, the Panel can affect the rights and obligations of the Athlete and the AEPSAD and confirm whether or not the Athlete committed an ADRV and, if so, impose what it deems to be the proper sanction.
- Fourth, the TAD, as an independent adjudicatory body, is not a signatory to the WADC and thus is not subject to the arbitration clause of the WADC. Nor has it signed an arbitration agreement with the Appellant. Therefore, had the Appellant named the TAD as a party, its appeal against that body would have failed for lack of jurisdiction anyway. Under such circumstances, finding that the present appeal cannot proceed without the TAD as a party would thus deprive Article 40.6 of the Spanish ADA of any meaning and, in particular, deprive WADA of its right under that provision to appeal decisions of the TAD to the CAS.
- Finally, the issue of whether or not, in the absence of the TAD in the present arbitration, a CAS award would be enforceable in Spain does not prevent the Panel from exercising its jurisdiction and issuing an award.

VI. ADMISSIBILITY

98. Pursuant to Article 13.2.3 WADC, *"the filing deadline for an appeal filed by WADA shall be the later of: (a) twenty-one days after the last day on which any other party in the case could have appealed, or (b) twenty-one days after WADA's receipt of the complete file relating to the decision"*.

99. At the time of filing the Statement of Appeal the Appellant was not in the possession of the complete file relating to the Appealed Decision, because (i) the First Respondent claimed it no longer had possession of the file (see *supra* at para. 31); (ii) the Second Respondent did not reply to the relevant communication on this matter (see *supra* at para. 40); and (iii) the First Respondent and the TAD have both refused to provide the file by claiming data protection and privacy reasons (see *supra* at paras. 26 and 34). As a consequence, the twenty-one-day deadline for the Appellant to appeal had not started to run by the time the Appellant filed its Statement of Appeal.

100. It follows that the Appellant's appeal is admissible.

VII. APPLICABLE LAW

101. The Second Respondent submits that the applicable law is the Spanish ADA and, subsidiarily, Spanish law. In his view, WADA's International Standards and the ABP Guidelines are inapplicable because they have not been incorporated by the Spanish Legislative Power or the Spanish Government into Spanish law.

102. Article R58 of the CAS Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

103. As a starting point, the Panel agrees with the Second Respondent that in the present case the applicable regulations for the purposes of Article R58 of the CAS Code are those contained in the Spanish ADA (which are based on the mandatory WADC), because the appeal is directed against a decision which applied the Spanish ADA. In addition, the Panel also agrees that, Spanish law applies subsidiarily as it is the law of the country in which the TAD is domiciled.

104. The Panel disagrees, however, with the Second Respondent's contention that WADA's International Standards and the ABP Guidelines are inapplicable. The Panel finds, first and foremost, that the ABP Guidelines and WADA's International Standards related to the ABP must be considered as "applicable regulations" pursuant to the governing Article R58 of the CAS Code because the Appealed Decision concerns an alleged abnormality of the Athlete's ABP. Second, and in any case, the Panel notes that said regulations are explicitly incorporated into Spanish law by reference in the Spanish ADA. Indeed, the Royal Decree-Law 3/2017 of

17 February *"to adapt to the changes introduced in the 2015"* expressly integrates and endorses the control and investigation procedures that WADA has in place at any given time (see the introductory statement of the Spanish ADA, *"Exposición de Motivos"*) and includes in the definition of *"Atypical Passport Finding"*[10] and *"Adverse Passport Finding"*[11] an express reference to the effective and direct application of the WADA International Standards, which establish the procedure for developing the ABP and results management.

105. It follows from the above that the Panel must decide the present dispute in accordance with the Spanish ADA, WADA's International Standards related to the ABP, and the ABP Guidelines, as well as, subsidiarily, Spanish law. The Panel finds that the WADC is also applicable where and to the extent it has been incorporated by reference into the Spanish ADA (*e.g.*, the arbitration clause of Article 13.2.3 WADC – see *supra* at para. 83).

VIII. EVIDENTIARY REQUEST

106. On 1 November 2019, the Second Respondent requested the disclosure of the Adaptive Model, arguing that it was necessary for him to defend himself. The Second Respondent contended that he has a due process right to know how the Adaptive Model calculated his haematological profile to be abnormal and, more specifically, the right to know (i) the algorithm used by the Adaptive Model; (ii) the values of the general population that uses the Adaptive Model; (iii) the variability of such values within the population generally used by the Adaptive Model; (iv) the factors considered to know the variability of the Athlete's values; (v) how all factors interrelate in the Adaptive Model in this case, (vi) how the Adaptive Model establishes the Athlete's upper and lower limits; and (vii) how the Adaptive Model calculated the probability of abnormality of the sequence of values in his ABP.

107. The Appellant objected to the Second Respondent's request, arguing that it is irrelevant and unnecessary to the case at hand. In particular, the Appellant contended that the Adaptive Model (i) has been validated in peer-reviewed studies; (ii) has never been ordered to be produced; and (iii) only generates statistics that serve to trigger a review and not as the basis of a conviction. Moreover, the Appellant asserted that disclosing the Adaptive Model would jeopardize the entire ABP system by exposing it to abuse and manipulation (in particular, a doped athlete could seek to manipulate his values to fall within his individual limits so as to avoid triggering an expert review of their ABP).

108. On 7 November 2019, the Panel denied the Second Respondent's request for the Adaptive Model and indicated that it would provide its reasoning in this Award, which it shall do in the following paragraphs.

109. As a starting point, the Panel recalls that, pursuant to Article R44.3 of the CAS Code (applicable through Article R57 in the appeals proceedings), a party requesting the production

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[10] *"Resultado Anómalo en el Pasaporte: Un informe identificado como un Resultado Anómalo en el Pasaporte descrito en los Estándares Internacionales de la Agencia Mundial Antidopaje,* ***aplicables****".*

[11] *"Resultado Adverso en el Pasaporte: Un informe identificado como un Resultado Adverso en el Pasaporte descrito en los Estándares Internacionales de la Agencia Mundial Antidopaje,* ***aplicables****".*

of documents must show that said documents are (i) likely to exist and to be relevant; and (ii) in the custody of the other party.

110. The Panel denied the Second Respondent's request for the Adaptive Model, because the Second Respondent failed to satisfy the relevancy requirement of Article R44.3 of the CAS Code.

111. In the Panel's view, the Second Respondent's request did not meet said requirement because the Adaptive Model (and its underlying software) is only a statistical model which triggers alerts identifying abnormal profiles that warrant further attention and review; it does not in itself constitute evidence of doping. Indeed, as explained above in paras. 8–12, the case against an athlete is based on a review by a three-member panel of experts of the athlete's haematological parameters (together with other pertinent information, such as the athlete's whereabouts and competition schedule), data to which the athlete has access and which are not dependent on the Adaptive Model. Moreover, the athlete has the opportunity to challenge the findings of the of panel of experts and, in particular, explain the allegedly abnormal values.

112. In reaching its decision on this request for disclosure, the Panel was comforted by the fact that the CAS previously denied a request of this kind in the *Marta Domínguez Azpeleta* case (CAS 2014/A/3561 & 3614). In that case, the panel, in denying the request for the Adaptive Model and its underlying software, held as follows:

> *"268.* Transparency and the ABP model. *The First Respondent submitted that the data on which the ABP Model was based were not public, and thus athletes are not able to validate the reliability of the ABP methodology and software. Accordingly, the First Respondent requested that the Panel compel the Appellants to disclose the underlying data to a reputable third-party institution for validation purposes.*
>
> *[…]*
>
> *278. […] the Panel appreciates that numerous peer-reviewed applications have confirmed the ABP's reliability.*
>
> *[…]*
>
> *280.* Transparency and the ABP model. *The Panel notes that the Adaptive Model was peer-reviewed and has been repeatedly validated. The Panel also notes that the Adaptive Model is essentially public and may thus be replicated if needed.*
>
> *281. Importantly, given the relation between the Adaptive Model and the ABP Software (i.e. the former being akin to a formula and the latter being akin to a software implementation), the Panel deems it unnecessary to make the ABP Software available in order to assess the ABP model's reliability. In finding so, the Panel further recalls the ECJ ruling in the Unitrading case. Indeed, as in Unitrading, Ms. Domínguez Azpeleta* 'knew of the grounds on which the [present] decision is based, […] was aware of all the documents and observations submitted to the [CAS] with a view to influence its decision and […] was able to comment on them before [the CAS]'. *Accordingly,* 'in those circumstances, [the analytical results] provided by the [ABP Software] merely constitute evidence which [the CAS], also taking account of the arguments and evidence submitted […] w[as] able to regard as adequate to establish the [ADRV]'. *In turn,* '[t]he admissibility of such evidence, even if it is important or decisive

for the outcome of the dispute concerned, cannot be called into question by the sole fact that th[e] [ABP Software] cannot fully be verified by [Ms. Domínguez Azpeleta]'".

IX. MERITS

A. First Respondent's Standing to be sued

113. In accordance with Article R48 of the CAS Code, the Appellant named the First Respondent as a respondent in the present appeal. However, as mentioned *supra* at para. B of Section V, the First Respondent seemingly denies that it has standing to be sued. The First Respondent argues that while the Appellant brings a case against the First Respondent, its claims are directed against the body that issued the Appealed Decision, the TAD, and not against the First Respondent. In the First Respondent's view, it can neither respond in the TAD's place nor assume the TAD's decision as its own, since the TAD is completely independent and outside the First Respondent's control.

114. As a starting point, the Panel recalls that pursuant to well-established CAS jurisprudence a party has standing to be sued (*"légitimation passive"*) only if it has some stake in the dispute because something is sought against it (*ex. multis*: CAS 2007/A/1329 & 1330, para. 27; CAS 2012/A/3032 at para. 42 and 43; and CAS 2014/A/3831 at para. 6.10 *et seq.*).

115. The Panel concurs with this jurisprudence and concludes that the First Respondent does have standing to be sued because:

(i) the Spanish ADA and the WADC do not limit which Parties may be named as respondents in an appeal (they only specify which Parties are entitled to bring an appeal and not against whom the appeal must be directed);

(ii) the First Respondent issued the underlying AEPSAD Decision which led to the appeal before the TAD;

(iii) the First Respondent was a party in the proceeding before the TAD (see *supra* at para. 92);

(iv) the First Respondent was affected by the Appealed Decision, as this decision overturned its finding in the AEPSAD Decision that the Athlete had committed an ADRV and, consequently, would be affected again in case the Appealed Decision were to be set aside; and

(v) the First Respondent is affected by the present appeal because the Appellant seeks full compliance with the Spanish ADA, the rules which the First Respondent, as the institution responsible for anti-doping enforcement in Spain, is responsible to protect and enforce. The appeal involves an essential interest of the AEPSAD (in particular, its disciplinary powers under the Spanish ADA) and its resulting award will be enforceable and have a binding effect towards both Respondents. The fact that the First Respondent does not dispute the Appellant's position on the merits, or cannot respond for the TAD nor assume the Appealed Decision as its own is irrelevant to the issue of whether or not the First Respondent is affected by the present appeal.

116. In light of the foregoing reasons, coupled with those stated at paragraph 97 above, the Panel rejects the First Respondent's submission on its lack of standing to be sued.

B. No *lis pendens*

117. The Second Respondent argues that the Panel is precluded from proceeding with the present arbitration because the Appellant and the Second Respondent have filed appeals before the Spanish courts. In other words, the Second Respondent claims that there is a *lis pendens*.

118. According to Article 186.1*bis* PILA, the Arbitral Tribunal *"shall decide on its jurisdiction without regard to an action having the same subject matter already pending between the same parties before a state court or another arbitral tribunal, unless serious reasons require to stay the proceedings"*. Thus, there is a *lis pendens* if three *cumulative* conditions are met: (i) a proceeding at a State court or another arbitral tribunal and the present CAS arbitration are between the same parties and concern the same matter; (ii) said other proceeding is "already pending" (*"déjà pendante"*) before the present CAS arbitration started; and (iii) the party claiming *lis pendens* proves the existence of "serious reasons" requiring the stay of the CAS proceedings (CAS 2009/A/1881, Partial Award).

119. With regard to the second condition, the Panel notes that the Appellant and the Second Respondent did not file their respective appeals before the JCCA until after the Appellant had already filed its appeal before the CAS. Indeed, the CAS appeal was filed on 27 March 2019, whereas the Appellant did not file a claim before the JCCA until 22 April 2019 and the Second Respondent did not file a claim until 12 April 2019 (see *supra* at para. 40). Therefore, the "already pending" requirement has not been satisfied. As a result, the Panel concludes that there is no *lis pendens* within the meaning of Article 186.1*bis* PILA and determines it shall proceed with this arbitration notwithstanding the parallel procedure before the Spanish courts.

120. For completeness, the Panel adds that it has anyway not identified any "serious reasons" mandating the stay of the present proceedings. The Panel recalls the award in CAS 2009/A/1881 holding as follows: *"With regard to the third test, the Panel is of the view that, in order to demonstrate the existence of 'serious reasons', the Appellant should prove that the stay is necessary to protect his rights and that the continuance of the arbitration would cause him some serious inconvenience"*.

121. In the present proceedings, the Second Respondent merely argued that the Panel is precluded from proceeding because the Appellant and the Second Respondent have filed appeals before the Spanish courts. In the Panel's view, this alone does not demonstrate "serious reasons". Indeed, such situation would arise in every case of parallel proceedings involving an arbitration tribunal and a civil court.

122. Considering the relevant facts at hand, the Panel notes that the Appealed Decision of the TAD primarily disputed the validity of the ABP as a reliable evidence of an ADRV. However, as explained in detail in this award, and consistent with the CAS jurisprudence, the Panel is convinced that the ABP model is a reliable and valid means of establishing an ADRV. And, in accordance with the principle of judicial non-interference in arbitral proceedings, the Panel is anyway not bound by any future rulings of the Spanish courts on that matter. Accordingly, the Panel does not see any pressing need to await the outcome of the Spanish court

proceedings, which further demonstrate the lack of any serious concerns *in casu*.

C. The Anti-Doping Rule Violation

i. General regulatory framework

123. The following general regulatory framework is relevant as to the merits of the case at hand.

124. Article 22.1(b) of the Spanish ADA provides that *"For the purposes of the present Law, the following are considered as very serious infractions:… (b) The utilization, use or consumption of substances or methods prohibited in sport"* (translated from the Spanish original: *"A los efectos de la presente Ley, se consideran como infracciones muy graves:… b) La utilización, uso o consumo de sustancias o métodos prohibidos en el deporte"*.

125. This provision corresponds to Article 2.2.1 WADC, which reads in the relevant part: *"It is each Athlete'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 Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method"*.

126. Pursuant to Article 4.1 WADC, *"WADA shall, as often as necessary and no less often than annually, publish the Prohibited List as an International Standard. The proposed content of the Prohibited List and all revisions shall be provided in writing promptly to all Signatories and governments for comment and consultation. Each annual version of the Prohibited List and all revisions shall be distributed promptly by WADA to each Signatory, WADA-accredited or approved laboratory, and government, and shall be published on WADA's website, and each Signatory shall take appropriate steps to distribute the Prohibited List to its members and constituents. The rules of each Anti-Doping Organization shall specify that, unless provided otherwise in the Prohibited List or a revision, the Prohibited List and revisions shall go into effect under the Anti-Doping Organization's rules three months after publication of the Prohibited List by WADA without requiring any further action by the Anti-Doping Organization"*.

127. Accordingly, WADA published the WADC Prohibited List (2017 edition) and, in turn, the Spanish ADA published it as *"Resolution of 30 December 2016 of the Presidency of the Higher Sports Council, which approves the list of substances and methods prohibited in sport"*[12] (the "Spanish ADA Prohibited List").

128. The WADC Prohibited List and the Spanish ADA Prohibited List ban the use of "blood doping", defined by WADA as *"the misuse of certain techniques and/or substances to increase one's red blood cell mass, which allows the body to transport more Oxygen to muscles and therefore increase stamina and performance"* (see WADA Questions and Answers on the Athlete Biological Passport). Blood doping is prohibited in the following forms:

(i) the administration of rEPO, which is a Prohibited Substance under class *"S2. Peptide*

[12] *Resolución de 30 de diciembre de 2016, de la Presidencia del Consejo Superior de Deportes, por la que se aprueba la lista de sustancias y métodos prohibidos en el deporte.*

Hormones, Growth Factors, Related Substances, and Mimetics" (in the Spanish ADA: *"S2. Hormonas peptídicas, factores de crecimiento, sustancias afines y miméticos"*); and

(ii) infusion of synthetic oxygen carriers, such as haemoglobin-based oxygen carriers ("HBOC") or perfluorocarbons ("PFC") to increase HGB above normal levels, and blood transfusions, both of which are Prohibited Methods under class *"M.1. Manipulation of Blood and Blood Components"* (in the Spanish ADA: *"M.1. Manipulación de la sangre o de los componentes sanguíneos"*), which reads:

"The following are prohibited:

1. The Administration or reintroduction of any quantity of autologous, allogenic (homologous) or heterologous blood, or red blood cell products of any origin into the circulatory system.

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 and microencapsulated haemoglobin products, excluding supplemental oxygen by inhalation.

3. Any form of intravascular manipulation of the blood or blood components by physical or chemical means".

In the Spanish ADA:

"Se prohíbe lo siguiente:

1. La administración o reintroducción de cualquier cantidad de sangre autóloga, alogénica (homóloga) o heteróloga, o de productos de hematíes de cualquier origen en el sistema circulatorio.

2. La mejora artificial de la captación, el transporte o la transferencia de oxígeno. Incluidos, entre otros: Productos químicos perfluorados; efaproxiral (RSR13) y los productos de hemoglobina modificada, por ejemplo, los sustitutos de la sangre basados en la hemoglobina y los productos basados en hemoglobinas microencapsuladas, excluido el oxígeno suplementario por inhalación.

3. Cualquier forma de manipulación intravascular de la sangre o de los componentes sanguíneos por medios físicos o químicos".

129. The Appellant bears the burden to prove to the "comfortable satisfaction" of the Panel that the Athlete committed an ADRV. Indeed, Article 3.1 WADC provides: *"The Anti-Doping Organization shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the Anti-Doping Organization 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".*

130. The Panel recalls that the "comfortable satisfaction" test is well-known in the CAS practice and withstood the scrutiny of the SFT[13]. Moreover, the Panel underlines that this test is in the public interest in preserving the integrity of sports, as also supported by the honorable Judge (and former President of the ECtHR) Jean-Paul Costa, who in his opinion explained that *"I would favor that a higher freedom is given to a jurisdiction such as CAS in terms of standard of proof"*[14].

[13] Swiss Federal Tribunal, 2nd Civil Division, Judgment of 31 March 1999, 5P.83/1999, c. 3.d. See also CAS 2009/A/1912-1913, award of 25 November 2009, para. 54.

[14] See Judge Jean-Paul Costa, "*Opinion for the World Anti-Doping Agency (WADA), September-October 2017*", December 14, 2017, p. 11.

Accordingly, the Panel will apply the "comfortable satisfaction" standard as provided in the WADC and consistently applied in many cases concerning allegations of blood manipulation or other serious form of doping[15].

131. According to Article 3.2 WADC, an ADRV can be proved by any *"reliable means"*. The commentary to that provision specifies that *"[f]or example, an Anti-Doping Organization may establish an anti-doping rule violation under Article 2.2 based on the Athlete's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Athlete's blood or urine Samples, such as data from the Athlete Biological Passport"* (emphasis added).

132. Article 39, para. 4 of the Spanish ADA confirms the use of ABP as a method of proving an ADRV: *"In the disciplinary proceeding in the area of doping, the authorities and the person affected by it may use any methods of proof acceptable under the law, including the biological passport, if there are data on it. This evidence must be assessed collectively, in compliance with the rules of sound criticism"* (translated from the Spanish original: *"En el procedimiento sancionador en materia de dopaje la Administración y la persona afectada por aquél podrán servirse de todos los medios de prueba admisibles en derecho, incluido el pasaporte biológico si existiesen datos sobre el mismo. Dichas pruebas deberán valorarse de modo conjunto de acuerdo con las reglas de la sana crítica"*).

133. Notwithstanding the foregoing, in the Appealed Decision the TAD seemed to downplay the reliability of the ABP. It held that the ABP is not an infringement in and of itself (which is undisputed); rather, it is only an *"additional method of proof"* to evidence the use of a prohibited substance or method, which *"must be assessed collectively, in compliance with the rules of sound criticism"* and which does not enjoy *"presumption or truthfulness, or any reality, not even iuris tantum, that can eliminate the presumption of innocence enjoyed by any alleged offender"*. In other words, the TAD considers the ABP as unreliable evidence which requires additional corroborative evidence to establish an ADRV (see *supra* at para. 24(iii)).

134. In this respect, the TAD referred to Article 39 *bis* of the Spanish ADA, which reads as follows: *"In the case of abnormal results and abnormal results in the biological passport, the Spanish Agency for the Protection of Health in Sports will carry out the corresponding investigations gathering evidence to establish whether an infringement of the anti-doping rules has taken place"* (translated from the Spanish original: *"En el caso de resultados anómalos y resultados anómalos en el pasaporte biológico, la Agencia Española de Protección de la Salud en el Deporte realizará las investigaciones correspondientes recogiendo pruebas a fin de determinar si se ha producido una infracción de las normas antidopaje"*).

135. In the TAD's view, in the present case no corroborative evidence was found by the AEPSAD; instead of conducting an investigation for such evidence, the AEPSAD requested the Athlete to provide any facts, documents, reports and analysis to explain the abnormal values in the ABP, thereby wrongfully burdening him with proving his innocence in violation of Article 24 of the Spanish Constitution, which reads *"… everyone has the right… to the presumption of innocence"* (translated from the Spanish original: *"todos tienen derecho… a la presunción de inocencia"*).

[15] See also CAS 2009/A/1912-1913, award of 25 November 2009, para. 56.

136. The Panel acknowledges as undisputed that the ABP profile is a method of proving blood doping and not an ADRV in and of itself under the WADC.

137. However, the Panel is convinced that, as has been well-established under the comments of Article 3.2 WADC (see *supra* at para. 42) and CAS jurisprudence (*ex multis*: CAS 2010/A/2174, para. 9.8; CAS 2010/A/2235 at para. 81, CAS 2012/A/2773 at para.13, CAS 2014/A/3614 & 3561 at para. 278 and 279, CAS 2016/O/4469 at para. 137), an ABP profile is a reliable and accepted means of evidence in establishing an ADRV. As such, if, in interpreting abnormal values in an ABP and any other evidence from a quantitative and qualitative standpoint, a panel is convinced that the abnormal values were caused by a "doping scenario", an ADRV can thereby be properly established, even without establishing a specific reason for the blood manipulation (CAS 2016/O/4464, CAS 2016/O/4469, CAS 2016/O/4481). The inference drawn from abnormal blood values is enhanced where the ascertainment of such values occurred at a time when the athlete in question could benefit from blood doping (*i.e.*, if the levels coincide with the athlete's racing schedule) (*Idem*).

138. The Panel further finds that a request for an athlete to provide an alternative explanation to the abnormal values in his or her ABP does not create a presumption of guilt nor a shift in the burden of proof; the burden continually remains on the anti-doping agency pursuant to Article 3.1 WADC to prove that the abnormal values in the ABP were caused by a "doping scenario" as opposed to any of the hypothesis put forward by the athlete. This is in full keeping with the legal principle of the presumption of innocence. Indeed, if an athlete submits explanations for abnormal results, it is the anti-doping agency's burden to establish that those explanations do not rebut the high likelihood of an ADRV established through the assessment of the ABP.

139. It is against this background that the Panel must assess whether the Appellant has established that the Athlete committed an ADRV.

ii. Specific charge against the Athlete

140. At the outset, the Panel must address what is the specific charge brought against the Athlete, as the TAD questioned whether it was properly specified in accordance with Article 9.3 of the Spanish Constitution (see *supra* at para. 24(ii)).

141. In this respect, the Panel first observes that, as reflected in Section 5 of the Appealed Decision, *"in the first paragraph of the operative part of the [AEPSAD Decision] there is an order to 'Sanction [the Athlete] as the person responsible for a gross infringement, described under Article 22.1(b) of Organic Law 3/2013, of 20 June…"*. Further, from the First and Second Joint Expert Reports, on which the AEPSAD's finding of a violation of Article 22.1(b) of the Spanish ADA is based, it is clear that the specific conduct giving rise to said violation is blood doping.

142. The Panel thus concludes that the specific ADRV charge brought against the Athlete is a violation of Article 22.1(b) of the Spanish ADA (corresponding to Article 2.2.1 WADC) for blood doping.

143. Contrary to the Athlete's allegation before the TAD, Article 9.3 of the Spanish Constitution (which enshrines the principles of legality and legal certainty, among others; see law *supra* at para. 24(ii)) is not violated in the present case. It is well-established under the CAS jurisprudence that for a sanction to be imposed, a sports regulation must prescribe the misconduct with which the subject is charged, *i.e.*, *nulla poena sine lege* (principle of legality), and the rule must be clear and precise, *i.e.*, *nulla poena sine lege clara* (principle of predictability; *ex multis*: CAS 2017/A/5086 at para. 149, CAS 2014/A/3832 & 3833 at paras. 84-86, CAS 2008/A/1545 at paras. 93-97, etc.).

144. The Panel finds that, in accordance with that jurisprudence, Articles 22.1(b) and 23, para. 1 of the Spanish ADA (see *supra* at para. 124 and *infra* at para. 177, respectively), in conjunction with the references in the Spanish ADA List to blood doping at S.2 and M.1 (see *supra* at para. 128), prescribe that the utilization, use or consumption of prohibited substances and methods including blood doping is a serious offense sanctionable with a period of ineligibility. This is a sufficiently clear, precise and unambiguous rule that provides a sufficient legal basis to find an ADRV and sanction the Athlete. In the Panel's view, it is unnecessary to establish the exact type of blood doping to find an ADRV and sanction an athlete. The Panel is persuaded that the fact that the ABP can only show that there has been blood manipulation but not the exact type of blood doping practice does not violate the principle of legality or any other fundamental principle. In fact, comparable circumstances occur even in criminal cases; for example, in a case where an offender strikes someone on the head but the hitting tool is not found, if there is anyway evidence to convict the accused person (due, e.g., to DNA left at the scene of the crime) it is irrelevant to know if the injured party was hit with a baseball bat or an hockey stick. In any event, the Panel notes that the First Joint Expert Report explicitly cited rEPO or blood transfusion as possible methods of blood doping used by the Athlete (see *supra* at para. 18).

iii. Athlete's commission of an ADRV

145. Preliminarily, the Panel notes that the TAD in the Appealed Decision did not review the merits of the AEPSAD Decision; it simply set aside said decision on the ground that the ABP was, in and of itself, insufficient to establish an ADRV. Having established reliability of the ABP as evidentiary means of an ADRV, the Panel will assess the merits of the Athlete's case in the following paragraphs.

146. The Panel first observes that the Athlete's ABP values obtained in Sample 1 and Sample 4 of the Athlete's blood profile were highly abnormal. Sample 1 reveals high HGB (17.1) and low RET% (0.25) resulting in a very high OFF-score value of 141.00, while Sample 4 reveals low HGB (13.5) and high RET% (2.04), resulting in a very low OFF-score of 49.30. As explained by the panel of experts, the Athlete's ABP profile reveals abnormalities for different parameters at both the 99.0% and 99.9% specificity and a probability of sequence abnormality in excess of 99.9% for both the OFF-score and RET% profiles. The panel of experts concluded in their First Joint Expert Report (and later confirmed in their Second Joint Expert Report) that based on such abnormality it was *"highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause"* (see *supra* at

paras. 18 and 22).

147. The Panel also observes that the abnormal levels in the ABP coincide with the Athlete's competition schedule and thus occurred at a time when he could benefit from blood doping. Indeed, the Athlete's Sample 1 and Sample 4 were taken respectively on 25 January 2017, right before he competed at the *Challenge Ciclista a Mallorca* on 26–29 January 2017 and the *Volta a la Comunitat Valenciana* on 31 January 2017, and on 20 June 2017, right before he competed at the Spanish Road Cycling Championships on 23–25 June 2017.

148. Upon receipt of the Adverse Passport Finding, the Athlete challenged the panel of expert's findings of the ABP abnormalities in the First Joint Expert Report on several grounds (see *supra* at para. 21), none of which have been raised by the Athlete in the present arbitration. In addition, the Athlete now argues that the panel of experts acted arbitrarily by not taking into consideration, in its analysis of the Athlete's ABP, the blood samples taken between 3 October 2017 and 31 January 2018. The Panel will assess each of these grounds separately below:

a. Abnormality of the Samples

149. The Athlete argued before the AEPSAD that Sample 1, which was taken on 25 January 2017, did not fall outside of the general population reference ranges, and, therefore, was not abnormal.

150. The Panel first notes, however, that as explained by the panel of experts in the Second Joint Expert Report, the reference ranges used were not of the general population; rather, they were stratified to better fit the Athlete's profile: *"[t]he ranges used in the adaptive model (to assess mostly young athletes) have been stratified for gender and age, both of which are well quantified confounding factors for many laboratory values"*.

151. Moreover, the Panel notes that Sample 1 anyway fell outside of the Athlete's own individual reference values established during a six-month period. As explained in detail *supra* at para. 6, as values are collected and recorded in the ADAMS, an athlete becomes his or her own point of reference. At the end of the six-month period, the Athlete's individual reference limit values were between 13.6 to 16.6 for HGB, between 0.34 to 1.41 for RET% and between 72.97 to 120.29 for OFF-score (see chart *supra* at para. 14). Sample 1's values of HGB (17.1), RET% (0.25) and OFF-score value (141.00) all fell well outside these personalized limits.

152. The Panel concurs with the experts explanation in their Second Joint Expert Report that: *"[t]o further overcome the difficult of numerous individual and confounding factors and the challenges described above, an individualised approach taking into account the athlete's own previous data, thus building individual reference ranges, is the task of the adaptive model…. In the present case it is obvious that any value (haemoglobin, reticulocytes, OFF score) of the first sample would be beyond the individual reference limits of the athlete later in the profile (i.e. when his true individual baseline has been established through a number of samples). This assessment is of source heavily biased in favour of the athlete, as the abnormally high first sample is taken into account for the calculation of the subsequence reference range limits"*.

153. Given that the assessment of a sample against the athlete's own individual reference values is

far more precise and conclusive than the general population reference ranges and even the stratified reference ranges, the Panel is left comfortably satisfied that these values revealed in Sample 1 are abnormal.

154. While the Athlete has not contested it, the Panel also confirms that the same is true of Sample 4.

b. Hypoxic exposure is not a credible explanation for abnormality

155. The Athlete argued before the AEPSAD that his Sample 1 was affected by hypoxic exposure (he allegedly spent 14-20 January 2017 at an altitude of 1246m) and artificial altitude (he allegedly used a hypoxic device set at 2200m every night for an extended period until 24 January 2017, *i.e.*, the day before taking Sample 1).

156. While the panel of experts acknowledges hypoxia of altitude can cause measurable changes in the haematological system, it clearly indicates that, for such changes to take effect, a certain level of altitude exposure is required. The panel of experts, noting lack of clarity as regards the duration of the Athlete's exposure to hypoxia, gave the Athlete the benefit of doubt by assuming that his dose was around 680 kmh, which would be possibly meaningful and high enough to trigger haematological changes. Notwithstanding, the panel of experts concluded that even at such a dosage, the magnitude of the OFF-score revealed in the Athlete's ABP was so abnormal that it was highly unlikely it caused that result. The panel of experts explained that the chances of observing an OFF-score of 141 in a healthy, undoped male athlete, even considering a "worst case scenario" (where factors such as hypoxic exposure are considered in favour of the Athlete) was 1:10,000. The panel of experts also observed that the timing of the OFF-score effect in relation to hypoxic exposure did not match the normal physiological mechanism. Changes in OFF-score from prolonged hypoxia exposure are not visible until about one week after return to normoxia; as a result, the hypoxic exposure, which allegedly did not conclude until 24 January 2017, would not have been visible in Sample 1 which was taken the next day.

157. Absent credible evidence to the contrary, the Panel finds no reason to depart from the above scientific findings of the well-established panel of experts. Therefore, it concludes the hypoxic exposure is not a credible explanation for the abnormality in the Athlete's Sample 1.

158. The Panel further observes that, apart from hypoxic exposure (which is disproved), the Athlete has neither alluded to any physiological or pathological reason nor to any condition (*e.g.*, an illness or surgery) that could have resulted in said abnormalities. There is thus no credible explanation for the highly abnormal values of Samples 1 and 4 to contradict the panel of expert's findings that it was highly likely caused by blood doping.

c. No indication that the Reticulocyte count in Sample 4 affected by plasma volume changes

159. The Athlete argued before the AEPSAD that the Reticulocyte count in Sample 4 was affected by plasma volume changes. In particular, it questioned whether Reticulocyte percentage is

independent of plasma volume shifts (see *supra* at para. 22(iii)).

160. In their Second Joint Expert Report, the panel of experts rejected the Athlete's position, reasoning *inter alia* that the Athlete presented irrelevant data in support of his claim, and *"analytical variance exists in all markers and is independent between different markers measured in separate analytical channels"* (*Idem*). The Panel also takes comfort from the award CAS 2009/A/1912-1913 – an award that famously withstood the scrutiny of the SFT (judgment of 10 February 2010, case 4A_612-2009), the German *Bundesgerichtshof* (judgment 7 June 2016, case KZR 6/15) and the ECtHR (judgment 2 October 2018, joined cases nos. 40575/10 and 67474/10) – which so stated at paras. 100 and 118: *"all experts agreed that the [Reticulocyte percentage] is a very robust parameter because it cannot be influenced by artificial hemodilution – i.e. an increase in the fluid content of blood and thus in the volume of plasma, resulting in a reduced concentration of red blood cells in blood – or by other unnatural ways of reducing the values of hemoglobin, hematocrit and absolute reticulocytes. In other terms, according to the current scientific research, a cheating athlete has no way of hiding the increase in [Reticulocyte percentage] deriving from blood doping"*; and *"all experts acknowledged that, as confirmed by several laboratory tests, the hemoglobin and hematocrit levels may be manipulated quickly and effectively by quite simple methods of hemodilution, whereas the [Reticulocyte percentage] count is very robust and remains unaffected by such methods"*.

161. Absent credible evidence to the contrary, the Panel finds no reason to depart from the above scientific findings of the well-established panel of experts.

d. No indication that the quality control for Sample 4 was carried out with an infected sample

162. The Athlete argued before the AEPSAD that the quality control for Sample 4 was carried out with an infected sample which might have impacted the analyses.

163. In their Second Joint Expert Report, the panel of experts rejected the Athlete's concerns on quality control reasoning that *"[t]he level of the values measured in the precision testing sample itself is usually irrelevant. It is important that the machine is able to reproduce the same result with a low variance in each of the repetitive measurements, a challenge achieved in the QC testing for sample 4 in an excellent manner, with the coefficient of variation for the relevant ABP markers being well within the accepted ranges (…). It is of note that the markers relevant for the ABP are very normal in the sample (haemoglobin concentration 15.54 g/dl, reticulocyte% 1.23) and by no means pathological"* (see *supra* at para. 22(iv)).

164. Absent credible evidence to the contrary, the Panel finds no reason to depart from the above scientific findings of the well-established panel of experts.

e. No lack of documentation for the chain of custody of samples 3, 5 and 6

165. The Athlete argued before the AEPSAD that there was no documentation for the chain of custody of samples 3, 5 and 6.

166. The panel of experts concluded in their Second Joint Expert Report that the absence of these documents was in line with the ABP Guidelines, which allows for experts to simply request a Certificate of Analysis for non-essential tests (see *supra* at para. 22(v)).

167. This Panel confirms that (i) pursuant to Section 3.4, part L.4, *"It is only mandatory to have a full Laboratory Documentation Package for those tests that are deemed essential by the APMU and Expert panel. The other tests, for example those that confirm the baseline levels of a Marker, only require a Certificate of Analysis"*; and (ii) the ABP Documentation Package contained a Certificate of Analysis for samples 3, 5 and 6.

168. The Panel thus finds that the ABP Documentation Package was not lacking documentation for the chain of custody of those samples.

169. For completeness, the Panel also recalls previous CAS jurisprudence holding that even if the Athlete were to prove a departure from the guidelines, this would, in and if itself, not be capable of invalidating the results: *"[t]herefore, the Panel deems a mere reference to a departure from the ISL insufficient, in the absence of a credible link of such departure to a resulting Adverse Analytical Finding. In other words, […] the athlete must establish, on the balance of probabilities, (i) that there is a specific (not hypothetical) departure from the ISL; and (ii) that such departure could have reasonably, and thus credibly, caused a misreading of the analysis. Further, the Panel remarks that such athlete's rebuttal functions only to shift the burden of proof to the anti-doping organization, which may then show, to the Panel's comfortable satisfaction, that the departure did not cause a misreading of the analysis"*[16].

f. Lack of relevance of Samples 7, 8, 9, and 10 for establishment of an ADRV

170. In its Answer, the Athlete argues that the panel of experts acted arbitrarily by not taking into consideration blood samples 7 to 10 in their analysis of his ABP and, as a result, that the First and Second Expert Reports cannot substantiate the sanction imposed on him.

171. The Panel first notes that neither the WADC, the WADA International Standards nor the ABP Guidelines establish the minimum number of samples from an athlete's ABP profile which must be analysed in order to find an ADRV, although, naturally in order to establish the individual reference values of an athlete, multiple samples must be used.

172. The Panel observes that the panel of experts analysed six samples taken during a six-month period (*i.e.*, Samples 1 to 6) which firmly established the Athlete's individual reference values. Indeed, as calculated by the Adaptive Model, by the last two samples the Athlete's individual reference values had reached practically identical numbers for the Athlete of HGB, RET% and OFF-score (see chart *supra* at para. 14):

- Sample 5 established the limits of 13.7 to 16.8 for HGB, between 0.31 to 1.39 for RET% and between 74.29 to 123.50 for OFF-score; and

- Sample 6 established the limits of 13.8 to 16.8 for HGB, between 0.34 to 1.44 for RET% and between 73.63 to 121.70 for OFF-score.

173. As stated *supra* at para. 151, the Athlete's ABP values obtained in Sample 1 and Sample 4 of the Athlete's blood profile fell far outside of these individual limits. With respect to Sample 1,

[16] CAS 2013/A/3112, para. 85.

the panel of experts even considered it a 1:10,000 chance of observing an OFF-score that would be high in a healthy, undoped male athlete (even accepting the Athlete's claim that his sample was altered by hypoxic exposure).

174. The Panel notes that the Athlete, though he had the opportunity to do so, has failed to prove the relevance of Samples 7 to 10. Indeed, the Athlete has not shown, with specific data, how the results of Samples 7 to 10 would have brought the highly abnormal Samples 1 and 4 within the Athlete's individual limits, which, as mentioned above, were firmly established through the analysis of Samples 1 to 6. In fact, the Athlete only asserted in the most general manner that those samples would have *"changed the Athlete's expected distribution and the upper and lower limits within [which] the values would [be] expected to fall"*. Absent credible evidence to the contrary, the Panel finds no reason to depart from the scientific findings of the well-established panel of experts.

175. In light of the above, the Panel concludes that an ADRV can be found on the basis of an analysis of Samples 1 to 6 only, and that not taking into account Samples 7 to 10 is neither arbitrary nor in violation of Article 9.3 of the Spanish Constitution.

g. Conclusion

176. In conclusion, the Panel – taking into account that (i) the values detected in the Athlete's ABP were highly abnormal and indicated a high probability of doping; (ii) no contradictory evidence exists (*i.e.*, that the Athlete has not provided any credible, physiological or pathological reason or condition to explain the abnormality in the ABP values); and (iii) the timing of the detection relative to his competitions – is comfortably satisfied that the abnormal values were caused by a blood doping scenario. Therefore, the Panel holds that the Athlete violated Article 22.1(b) of the Spanish ADA.

D. Sanction

i. Period of ineligibility

177. Article 23, para. 1 of the Spanish ADA, which corresponds to Article 10.2.1 WADC, provides as follows:

> *"The commission of very serious infringements cited under Article 22.1.a), b) and f) shall be sanctioned with the suspension of the federation license for a period of two years, and a fine of 3,001 to 12,000 euros. However, such a suspension will be imposed for a period of four years when the infraction has not been committed with a specified substance…. If the infraction had not been committed with a specified substance, the athlete may prove that the infraction was not intentional, in which case the suspension will last two years".*
>
> Translated from the Spanish original: *"La comisión de las infracciones muy graves previstas en el artículo 22.1.a), b) y f) se sancionará con la imposición de la suspensión de licencia federativa por un período de dos años, y multa de 3.001 a 12.000 euros. Esto no obstante, se impondrá una suspensión de la licencia por un periodo de cuatro años cuando la infracción no se haya cometido con una sustancia específica... Si la infracción no se hubiera cometido con una sustancia específica el deportista podrá demostrar que la infracción no fue*

intencionada, en cuyo caso la suspensión tendrá una duración de dos años".

178. In light of this provision, given that the Athlete has committed an ADRV with a non-specified substance and that the Athlete has not established negligence nor is there any indication that the ADRV was not intentional, the Panel decides to impose on the Athlete a sanction of four years of ineligibility.

ii. Commencement of the ineligibility period

179. Article 39.9 of the Spanish ADA, which corresponds to Article 10.11 WADC, provides in the relevant parts:

"The sanctions imposed by the competent disciplinary bodies are immediately enforceable, from the date on which the sanctioning decision is notified ... In the event of a relevant delay in the procedure, not attributable to the athlete or another person, the competent body may order that the period of suspension be counted from an earlier date, including the date of doping control or commission of the offense".

Translated from the Spanish original: *"Las sanciones impuestas por los órganos disciplinarios competentes son inmediatamente ejecutivas, desde la fecha en que se notifique la resolución sancionadora… En caso de que se produzca una demora relevante en el procedimiento, no imputable al deportista u otra persona, el órgano competente podrá ordenar motivadamente que el período de suspensión se compute desde una fecha anterior, incluida la fecha del control de dopaje o de comisión de la infracción".*

180. In light of this provision, and given that the Athlete was free to compete pending the outcome of this case as the request for Provisional Measures was dismissed by the Panel, the Panel determines that the four-year period of ineligibility shall commence from the date of this Award.

iii. Ancillary orders

181. Article 30 of the Spanish ADA, which corresponds to Article 10.8 WADC, provides as follows:

"In addition… , all other results from competitions in which the athlete participates from the date of the doping control which resulted in the sanction … until the date the sanction is applied… shall be disqualified. Such disqualification will mean the loss of all medals, points, prizes and all those consequences necessary to eliminate any result obtained in said sporting event".

Translated from the Spanish original: *"Además…, serán anulados todos los demás resultados obtenidos en las competiciones celebradas desde la fecha en que se produjo el control de dopaje del que se derive la sanción… hasta que recaiga la sanción… Dicha anulación supondrá la pérdida de todas las medallas, puntos, premios y todas aquellas consecuencias necesarias para eliminar cualquier resultado obtenido en dicho evento deportivo"*).

182. In light of this provision, in addition to the ineligibility sanction, the Panel finds that all results from the date of collection of Sample Number 1 (*i.e.*, 25 January 2017) through the commencement of the sanction must be automatically disqualified (with all the resulting consequences including forfeiture of any medals, points and prizes awarded). There are no

considerations of fairness that would require otherwise.

E. Further or different motions

183. All further or different motions or requests of the Parties are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The CAS has jurisdiction and the Appeal filed on 27 March 2020 by WADA against the Spanish Agency for Health Protection in Sport and Mr Ibai Salas Zorrozua is admissible.

2. The appeal filed by WADA on 27 March 2019 against the Spanish Agency for Health Protection in Sport and Mr Ibai Salas Zorrozua is upheld.

3. Mr Ibai Salas Zorrozua is guilty of an anti-doping rule violation.

4. Mr Ibai Salas Zorrozua is sanctioned with a four-year (4) period of ineligibility starting on the date of this Award.

5. All competitive results obtained by Mr Ibai Salas Zorrozua from the date of 25 January 2017 through to the commencement of his period of ineligibility shall be disqualified, with all of the resulting consequences, including the forfeiture of any medals, points, and prizes.

6. (…).

7. (…).

8. All further or different motions or prayers for relief are dismissed.