**CAS 2004/A/748 ROC & Viatcheslav Ekimov v/IOC, USOC & Tyler Hamilton**

**ARBITRAL AWARD**

Pronounced by the

**COURT OF ARBITRATION FOR SPORT**

Sitting in the following composition:

President: Mr Massimo **Coccia**, Professor and Attorney-at-law, Rome, Italy

Arbitrators: Mr Olli **Rauste**, Attorney-at-law, Helsinki, Finland

Mr Peter **Leaver** QC, Barrister-at-law, London, United Kingdom

in the arbitration between

**Russian Olympic Committee (ROC)**, Moscow, Russia
&
**Mr Viatcheslav Ekimov**
Both represented by Mr Stephen Netzle, Attorney-at-law, Küsnacht, Switzerland

**– Appellants –**

and

**International Olympic Committee (IOC)**, Lausanne, Switzerland
Represented by Mr Jan Paulsson and Mr Mark Mangan, Attorneys-at-law, Paris, France

**United States Olympic Committee (USOC)**, Colorado Springs, USA
Represented by Mr Gary L. Johansen, Deputy General Counsel, Colorado Springs, USA

**Mr Tyler Hamilton**
Represented by Mr Howard L. Jacobs, Attorney-at-law, Los Angeles, USA

**– Respondents –**

**Australian Olympic Committee (AOC)**, St Leonards, Australia
&
**Michael Rogers**
Both represented by Mr Simon Rofe, Barrister-at-law, Sidney, Australia

**Union Cycliste Internationale (UCI)**, Aigle, Switzerland
Represented by Mr Philippe Verbiest, Attorney-at-law, Leuven, Belgium

**– Interested Parties –**

# I. THE PARTIES AND INTERESTED PARTIES

## I.1 THE APPELLANTS

1. The Russian Olympic Committee (the "ROC") is the National Olympic Committee of Russia, responsible for the Russian Olympic Teams. It has its seat in Moscow, Russia.

2. Mr Viatcheslav Ekimov ("Mr Ekimov") is a professional cyclist of Russian nationality. He was a member of the Russian Olympic Team that competed in 2004 at the Games of the XXVIII Olympiad in Athens (hereinafter the "Athens Olympic Games").

## I.2 THE RESPONDENTS

3. The International Olympic Committee (the "IOC") is the supreme authority of the Olympic Movement and is responsible for the organisation of the Olympic Games in accordance with the Olympic Charter. It has its seat in Lausanne, Switzerland.

4. The United States Olympic Committee (the "USOC") is the National Olympic Committee of the United States of America, responsible for the US Olympic Teams. It has its seat in Colorado Springs, USA.

5. Mr Tyler Hamilton ("Mr Hamilton") is a professional cyclist of US nationality. He was a member of the US Olympic Team that competed at the Athens Olympic Games.

## I.3 THE INTERESTED PARTIES

6. The Australian Olympic Committee (the "AOC") is the National Olympic Committee of Australia, responsible for the Australian Olympic Teams. It has its seat in St Leonards, Australia.

7. Mr Michael Rogers ("Mr Rogers") is a professional cyclist of Australian nationality. He was a member of the Australian Olympic Team that competed at the Athens Olympic Games.

8. The Union Cycliste Internationale (the "UCI") is the international federation governing the sport of cycling worldwide. It has its seat in Aigle, Switzerland.

# II. BACKGROUND

9. The facts and matters set out below are a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings. Additional facts will be set out, where relevant, in connection with the legal discussion (below, section IV).

## II.1 THE ANTI-DOPING PROCEDURE REGARDING TYLER HAMILTON AT THE ATHENS OLYMPIC GAMES

10. The cycling time-trial race of the Athens Olympic Games took place on 18 August 2004. The medallists in the event were Tyler Hamilton (gold), Viatcheslav Ekimov (silver) and Bobby Julich (bronze). Michael Rogers finished in fourth position.

11. The day after the race, on 19 August 2004, Tyler Hamilton underwent an anti-doping test and provided two blood samples ("A" and "B"). The A sample (code no. A680706) was then analysed by the doping control laboratory of Athens (the "Laboratory"), accredited by both the IOC and the World Anti-Doping Agency ("WADA").

12. On 22 August 2004 the Laboratory issued an analysis report, signed by the Laboratory Director Dr Georgakopoulos, which recorded sample no. A680706 to be negative. However, the report included an annotation stating that this sample was "*suspicious for blood transfusion*". On the same day, the report was transmitted to the IOC Medical Director.

13. The WADA's Independent Observers Report on the Athens Olympic Games (the "WADA Report") recounts that in response to the annotation quoted above the IOC Medical Director immediately contacted the Laboratory Director, who confirmed that he was not in a position to report the sample to be positive.

14. The WADA Report further records that it was "*apparent that at this point the Laboratory froze the athlete's sample. Following an exchange of information between the Medical Director and the WADA Science Director, and in the light of correspondence between scientists from the laboratory involved in the analysis, the Medical Director informed the President of the IOC on 9 September 2004 of the circumstances of the case. The President of the IOC in turn informed the Chairman of the IOC Medical Commission and asked that immediate action be taken to clarify the situation. The review of the case with external experts resulted in a decision on 16 September 2004 to designate the sample as positive*".

15. On 16 September 2004, the IOC President launched a disciplinary procedure, and "*pursuant to Article 7.2.4 of the IOC Anti-Doping Rules (Management of Anti-Doping Rule Violations), relating to an apparent anti-doping rule violation*" appointed a disciplinary commission (the "Disciplinary Commission") composed of Mr Thomas Bach (Chairman of the IOC Juridical Commission) and of Messrs Denis Oswald and Sergey Bubka (Members of the IOC Executive Board).

16. Also on 16 September 2004, the IOC President informed Mr Hamilton, the US Olympic Team, USOC, UCI and WADA that the result of the analysis of the A sample provided by Mr Hamilton had "*given rise to an adverse analytical finding, showing two different red blood cells population*". The IOC President announced that a Disciplinary Commission had been appointed "*pursuant to the Olympic Charter and Article 7.1 of the IOC Anti-Doping Rules applicable to the XXVIII Olympiad in Athens 2004 [...] to hear Mr Tyler Hamilton and other persons concerned*" and to "*investigate as to whether or not an anti-doping rule violation has been committed. [...] It is intended that the*

*hearing take place at the IOC Headquarters at Château de Vidy in Lausanne. The time and date will be communicated to you in the near future*". The IOC President also notified Mr Hamilton that he had the right to request the analysis of his B sample, and that such analysis, if requested, would occur on 21 September 2004 at the "Laboratoire Suisse d'Analyse du Dopage" (the "Lausanne Laboratory"). Mr Hamilton requested the analysis of the B sample.

17. On 22 September 2004, the Lausanne Laboratory informed the IOC that, in relation to the analysis of sample no. B680706 (Mr Hamilton's B sample), "*the result is considered as non conclusive, because of lack of enough intact red blood cells*".

18. On 23 September 2004, the IOC President wrote to all concerned parties the following letter:

> «*Re: Analysis of the "B" blood sample*
>
> *Dear Sirs,*
>
> *This is in follow up to my letter to you of 16 September 2004 regarding the adverse analytical finding of the "A" blood sample from Mr Tyler Hamilton.*
>
> *The IOC hereby informs you that the result of the laboratory analysis of the "B" blood sample was* "considered as non conclusive, because of lack of enough intact red blood cells*". Therefore, the Disciplinary Commission referred to in the above-noted letter is being dissolved, and the IOC will not be pursuing sanctions regarding this matter.*
>
> *Yours sincerely,*
>
> *Jacques Rogge*» (emphasis in the original).

19. On the same date, the IOC issued an announcement entitled "*IOC statement on pending anti-doping procedure*", as a result of which the outcome of Mr Hamilton's case became public.

## II.2 PROCEEDINGS BEFORE THE CAS

20. On 14 October 2004, the Appellants filed a statement of appeal with the Court of Arbitration for Sports ("CAS") against the "*decision of the IOC, made 23 September 2004 not to pursue sanctions to Mr. Tyler Hamilton*". The Appellants requested the following relief:

> «*1) Decision of the Respondent dated September 23, 2004 shall be null and void;*
>
> *2) An Order that Mr. Hamilton be disqualified;*
>
> *3) An Order that Mr. Hamilton return the gold medal and the diploma obtained by him;*
>
> *4) An Order that the results in the Men's 48 km Time Trial event be adjusted accordingly and the gold medal goes to Mr. Ekimov.*»

21. On 22 October 2004 the Appellants requested the CAS to stay the arbitral proceedings *"until there is an enforceable decision in the pending case regarding the positive A- and B-Samples taking from Tyler Hamilton, USA, by occasion of the Spanish road race Vuelta in the first half of September 2004; and to set a new deadline to file the Appeal Brief, once the final decision in above case has become known to the CAS"*. The Appellants contended that the new adverse analytical finding in respect of Mr Hamilton and the outcome of the related case would be relevant for the present procedure.

22. On 27 October 2004, the IOC agreed to the Appellants' application for a stay of these arbitral proceedings.

23. On 14 November 2004, Mr Hamilton applied to intervene in the present arbitration pursuant to Art. R41.3 of the Code of Sports-related Arbitration (the "Code") either as a full party or as an interested party. Mr Hamilton also objected to the stay of these arbitral proceedings.

24. On 28 October 2004, the AOC and Mr Rogers also applied to intervene in these arbitral proceedings.

25. On 23 November 2004, the Appellants stated that they did "*not agree to admit Mr. Tyler Hamilton as a full party to their arbitral proceeding. In particular, Mr. Hamilton shall not be allowed to appoint an additional arbitrator, to file separate requests with regard to substance or procedure or to act in contradiction to any procedural position taken by the Parties*". However, the Appellants agreed to his admission as an "*interested party, [...] allowed to follow the proceedings as an observer, to have access to the record of the case and to receive copies of the parties' submissions. He may file written statements in support of Appellants or Respondent and take part in the hearing*".

26. On 23 November 2004, the IOC agreed to "*the requests by Messrs Hamilton and Rogers, and the AOC, to be joined to these proceedings pursuant to Article R41.3 of the Code of Sports-Related Arbitration, subject to their acceptance of the procedural framework for this appeal that is already in place*".

27. On 2 December 2004, Mr Hamilton confirmed his request that he "*be afforded full party status in this proceeding, with the right to select an arbitrator, and the right to demand that the case proceed according to CAS timelines*".

28. On 6 December 2004, the Appellants confirmed their acceptance that Mr Hamilton, Mr Rogers and the AOC, subject to their agreement on the procedural framework, be considered as interested parties only, thus bound to accept the composition of the Panel and the stay of the arbitral proceedings.

29. On 6 December 2004, Mr Rogers and the AOC confirmed their request to participate in this arbitration as full-fledged parties, regardless of the agreement of the Appellants and the IOC. They maintained that they had an independent right to appeal the decision of the IOC as they were also bound by the arbitration agreement included in Rule 74 of the Olympic Charter.

30. On 6 December 2004, the USOC applied to intervene in the arbitration as a full-fledged party, arguing that it had entered all the US athletes in the Athens Olympic Games and that the future CAS award could affect two US medallists, namely Mr Hamilton and Bobby Julich.

31. On 15 December 2004, the Appellants and the IOC agreed on the participation of the USOC as an interested party on the basis set out in the Appellants' letter of 23 November 2004.

32. On 3 January 2005 the UCI applied to intervene as a full party, arguing that it was "*competent for results management and the conduct of hearings as far as sanctions beyond disqualification from the Olympic Games are concerned*" and, thus, that it had an interest to intervene. The UCI specified that "*the primary aim of the intervention is to allow UCI to take position on any relevant issue including those that might be relevant for the disciplinary proceedings against Mr. Hamilton*".

33. On 5 January 2005, Mr Rogers and the AOC agreed to the participation of the UCI.

34. On 7 January 2005, Mr Hamilton and the USOC also agreed to the participation of the UCI, provided that the latter would not be granted a party status of greater significance than their own.

35. On 14 January 2005, the Appellants stated that they agreed to the participation of the UCI in the arbitral proceedings in the form deemed appropriate by the CAS.

36. On 5 July 2005, the Deputy President of the Appeals Arbitration Division of the CAS published a decision ("Presidential Order") on the several requests for intervention, ruling as follows:

> «*1. Mr Tyler Hamilton and the United States Olympic Committee are allowed to participate as parties, respectively as co-Respondents together with the International Olympic Committee, in the arbitration procedure CAS 2004/A/748 initiated by the Appellants Russian Olympic Committee and Viatcheslav Ekimov.*
>
> *2. Mr Michael Rogers, the Australian Olympic Committee and the Union Cycliste Internationale are allowed to participate as interested parties in the arbitration CAS 2004/A/748 and will be allowed, as such and in accordance with the direction issued by the Panel to be, to follow the proceedings as observers, to have access to the record of the case and to receive copies of the parties' submissions, as well as to file written statements in support of Appellants' or Respondents' positions and to take part in the hearing.*
>
> *[...]*
>
> *4. The application filed by the Appellants, the Russian Olympic Committee and Mr Viatcheslav Ekimov, to stay the present arbitration proceedings is dismissed.*
>
> *[...]*».

37. The Presidential Order explained that Mr Hamilton and the USOC would have had the right to appeal the IOC decision but they "*evidently did not to appeal because such*

*decision was favourable to the athlete. They are now compelled to defend themselves in an arbitration that might lead to the forfeiture of the Tyler Hamilton's gold medal, which shows their clear and concrete interest to take part in these proceedings. Therefore, in accordance with Art. R41.3 and R41.4 of the Code, Mr Tyler Hamilton and USOC shall be entitled to participate in the present arbitration and to be considered as full parties, irrespective of the current parties' disagreement*."

38. As to Mr Rogers and the AOC, the Presidential Order remarked that they shared the Appellants' interests that Mr Hamilton be recognised guilty of a doping offence and, thus, that they were "*entitled to appeal the IOC's decision, but decided not to do it within the time limit for appeal. Should CAS allow them to acquire now the status of full parties, in fact as co-Appellants, CAS would permit them to recover their right to appeal that they have failed to duly exercise*". Hence, the Presidential Order dismissed their applications for participation as full parties in this arbitration; however, they could be admitted as interested parties in view of the fact that the Appellants, the IOC, Mr Hamilton and the USOC had agreed in writing to such limited participation.

39. With regard to the UCI, the Presidential Order explained that, although the UCI was entitled to appeal the decision and had a clear interest in this dispute, the UCI had not challenged the IOC decision within the time limit for the appeal and, therefore, its application to intervene had to be dismissed. However, in view of the explicit or implicit agreement of the other parties, the UCI could be also granted the status of interested party.

40. Resuming the procedure in accordance with the Presidential Order, on 15 July 2005 the Appellants filed their appeal brief, essentially challenging the IOC's decision of 23 September 2004 to dissolve the appointed Disciplinary Commission without pressing any doping charge against Tyler Hamilton. The Appellants submitted the following prayers for relief:

«*1. The procedure shall be stayed until an executable award in the appeal against the AAA Award dated 18 April 2005 in re USADA v/Tyler Hamilton (CAS 2005/A/884) is rendered, upon which a deadline of at least 20 days shall be granted to the Appellants to amend the present Appeal Brief.*

*2. The Appellants maintain their Request for Disclosure of Documents dated 8 July 2005. A deadline of at least 20 days upon receipt of the requested documents shall be granted to the Appellants to supplement their Appeal Brief and to provide expert witness statements.*

*3. The Decision of the IOC dated 23 September 2004 not to pursue disciplinary sanctions against Mr. Tyler Hamilton shall be annulled, and the IOC shall be ordered to disqualify Mr. Tyler Hamilton from, and to change the ranking of, the men's time trial race of 18 August 2004 at the Athens 2004 Summer Olympic Games and consequently to award Mr. Viatcheslav Ekimov the Gold medal.*

*Subsidiarily:*

*The Decision of the IOC dated 23 September 2004 not to pursue disciplinary sanctions against Mr. Tyler Hamilton shall be annulled, and the IOC shall be*

*ordered to re-open disciplinary proceedings, thereby taking all available evidence into account, including the results of UCI health tests and Vuelta samples, and carry out further investigation regarding blood doping committed by Mr. Hamilton in the context of the Athens 2004 Olympic Games.*

4. *The costs of this proceeding shall be borne by the three Respondents. The Respondents shall compensate the Appellants for their legal fees and other expenses incurred in connection with the proceeding.*»

41. On 26 August 2005, Mr Rogers and the AOC jointly filed their submission as interested parties, seeking the following relief:

«*1. A declaration that IOC decision announced on 23 September 2004 be quashed and of no effect.*

*2. A declaration that the result obtained by Hamilton in the Event at the 2004 Olympic Games is void with forfeiture of the gold medal and diploma awarded to him in respect thereof.*

*3. An order that Hamilton be disqualified from the Event at the 2004 Olympic Games due to the commission of an Anti-Doping Rule Violation, namely blood doping, in contravention of Articles 2.2 of each the Code and the IOC Anti-Doping Rules.*

*4. An order that Hamilton return to the IOC the gold medal and diploma received by him as a consequence of his participation in the Men's 48 km Time Trial Event at the 2004 Olympic Games.*

*5. An order that the IOC adjust the results of the Event at the 2004 Olympic Games so that the gold medal be awarded to V Ekimov, the silver medal awarded to B Julich and the bronze medal awarded to M Rogers.*»

42. The IOC filed its response on 2 September 2005, requesting that:

«*1. The Appellants' appeal be dismissed; and*

*2. The Appellants pay all of the First Respondent's costs and expenses arising out of this arbitration.*»

43. On 2 September 2005, the USOC filed an answer and a motion to dismiss, respectively concluding as follows:

«*The USOC respectfully requests that this Panel uphold the IOC Anti-Doping Rules, dismiss this proceeding, and deny Appellants' request for relief. The USOC also requests that the Panel award costs of this proceeding against the Appellants and that the Appellants be ordered to pay the attorneys fees of the USOC.*»

«*Article 12.2.2. of the IOC Anti-Doping Rules does not provide Appellants with the right to appeal a decision of the IOC concerning the alleged anti-doping rule violation by Mr. Hamilton. Accordingly, CAS has no jurisdiction to hear Appellants' case and this matter should be dismissed.*»

44. On 2 September 2005, Mr Hamilton also filed a motion to dismiss, submitting the following conclusion:

> «*For all the foregoing reasons, it is respectfully submitted that under the IOC Anti-Doping Rules Applicable to the Games of the XXVII Olympiad in Athens in 2004, the Russian Olympic Committee and Viatcheslav Ekimov do not have standing to appeal the disciplinary decision made by the IOC; and therefore, the Panel must dismiss the case.*»

45. On 26 September 2005, the CAS informed all parties and interested parties that the Panel was constituted in the present composition: Mr Massimo Coccia as President, and Messrs Olli Rauste and Peter Leaver QC as arbitrators.

46. On 3 October 2005, the UCI filed its brief, submitting the following conclusion:

> «*It is obvious that there are sufficient elements and indications that are serious enough to justify and indeed dictate the reopening of the case by the IOC. However, it is acceptable to await the decision in CAS 2005/A/884 Hamilton v/USADA & UCI.*»

47. On 26 October 2005, the Panel ordered the IOC to disclose any "*resolution, deed or letter – however named – issued and/or adopted by the IOC Executive Board or by the ad hoc IOC Disciplinary Commission composed of Messrs. Bach, Oswald and Bubka, as well as any records, minutes, notes, memoranda, or documents of those IOC bodies, concerning the case of Mr. Tyler Hamilton*".

48. Furthermore, having noted the preliminary objections raised by the Respondents, the Panel determined that, before considering the merits of the case, it should render a partial award on the preliminary issues of jurisdiction and standing only ("the Preliminary Issues"). To this end, in accordance with Art. R56 of the Code, the Panel authorised the parties and interested parties to submit additional briefs on the Preliminary Issues. The Panel invited also all parties and interested parties to specify in their respective submissions whether they deemed it necessary to have a hearing specifically devoted to the Preliminary Issues, or whether they considered that the Panel could decide those issues on the basis of the written submissions only.

49. On 7 November 2005, pursuant to the Panel's order, the IOC disclosed a number of documents and made submissions on certain factual matters.

50. On 30 November 2005, in accordance with the Panel's direction, the Appellants, the Respondents and all interested parties filed their supplementary submissions regarding the Preliminary Issues.

51. On 31 January 2006, having concluded that the parties' submissions had shown that there was no factual dispute material to the Preliminary Issues, the Panel informed the parties and interested parties that it felt sufficiently well informed on the Preliminary Issues. Therefore, pursuant to Art. R57 of the Code, the Panel decided to rule on the Preliminary Issues without holding a hearing.

# III. OVERVIEW OF THE PARTIES' POSITIONS ON THE PRELIMINARY ISSUES

## III.1 THE APPELLANTS

52. The Appellants contend that the IOC handled Mr Hamilton's case in a way that did not result in a "*decision*" in the sense of Art. 12.1 or 12.2 of the IOC Anti-Doping Rules. According to the Appellants, none of the actions performed by the IOC President can be characterised as a "*decision*" within the meaning of Art. 12.2 of the IOC Anti-Doping Rules ("*a decision that no anti-doping rule violation was committed*") because those actions were not the result of proceedings as defined by the applicable anti-doping rules, and the IOC President was not the competent organ to take such a "*decision*".

53. In particular, the Appellants argue that on 23 September 2004, by informing Mr Hamilton that the B sample was not conclusive and dissolving the Disciplinary Commission without pursuing sanctions, the IOC President did not adopt a "*decision*" that no anti-doping violation was committed. Moreover, even if the Panel regarded the actions of the IOC President as a "*decision*", under the Swiss Law of Association, such a decision would be null and void because it was reached by a procedure which did not permit due process.

54. The Appellants further contend that the jurisdiction of the CAS is based on the arbitration clause contained in Rule 74 of the Olympic Charter (Rule 61 since 1 September 2004) as well as on the arbitration agreement contained in the Olympic Entry Form signed by the Appellants; in such a case, the jurisdiction of the CAS would arise as a dispute concerning the IOC's breach of contract, exactly as happened in the *Beckie Scott* case (CAS 2002/O/373, in *CAS Digest III*, 17-35). Alternatively, if the IOC President's actions qualified as a "*decision*", the jurisdiction of the CAS would be based on Art. 12.2.1 of the IOC Anti-Doping Rules.

55. With specific regard to the issue of standing, the Appellants contend that the IOC did not take a true "*decision*" and, therefore, the limitation on standing contained in Art. 12.2.2 of the IOC Anti-Doping Rules (which does not list competitors or their NOCs among the parties having the right to appeal to CAS) would not be applicable. The Appellants claim to have standing to sue the IOC since they are invoking a proper contractual claim, based on the Entry Form, the IOC Anti-Doping Rules and the Olympic Charter.

56. In any event, should the Panel find that the IOC did take a decision within the meaning of Art. 12.2, the Appellants contend that the restriction on standing contained in Art. 12.2.2 of the IOC Anti-Doping Rules is invalid and not applicable because: (i) it is inconsistent with Rule 74 and with the fundamental principles of the Olympic Charter; and (ii) it violates Swiss Law, insofar as it (a) was not mentioned in the Entry Form, (b) is an "*unusual rule*" as defined by Swiss jurisprudence on general terms and conditions incorporated in a contract by reference, (c) constitutes a severe and unlawful violation of an Olympic athlete's personality (i.e. a right which cannot be validly disposed of), and (d) is discriminatory under cartel law in light of the IOC's monopoly over the Olympic Games.

57. The Appellants request that the CAS grant the following relief on the Preliminary Issues:

> «*1. to accept its jurisdiction to hear the case,*
>
> *2. to hold that Mr. Viatcheslav Ekimov and the Russian Olympic Committee both have standing to bring this case against the IOC,*
>
> *3. to impose the costs of this proceeding on to the Respondents and to order the Respondents to compensate the Appellants for their legal fees and other expenses incurred in connection with the proceeding, and*
>
> *4. to resume this proceeding as soon as the CAS has rendered its award in the appeal case of Tyler Hamilton/USADA (CAS 2005 A/884).*»

## III.2 THE RESPONDENTS

### III.2.1 *The IOC*

58. The IOC contends that the Appellants do not have standing under Article 12 of the IOC Anti-Doping Rules. According to the IOC, the President's letter of 23 September 2004 constituted effective notice of the IOC's decision that Mr Hamilton had not committed an anti-doping rule violation; moreover, Art. 12.1 does not distinguish between the different IOC decision makers and, thus, it is irrelevant whether the decision was adopted by the IOC President or the IOC Executive Board.

59. The IOC also submits that, in any event, the IOC President is empowered by the Olympic Charter to act on behalf of the IOC Executive Board, and the Board has implicitly ratified the President's acts.

60. According to the IOC, "*disputes*" are different from "*appeals*". The IOC submits that both the dispute resolution provision of the Entry Form and Rule 74 of the Olympic Charter only allow for the referral of "*disputes*" to the Ordinary Arbitration Division of the CAS, whereas Art. 12 of the IOC Anti-Doping Rules is drafted in terms consistent with the standard clause for the referral of "*appeals*" to the Appeals Arbitration Division. The IOC contends that those provisions are not inconsistent as they relate to different types of proceedings.

61. The IOC also argues that, in any event, the provisions of the IOC Anti-Doping Rules would take precedence as a matter of *lex specialis* in relation to doping matters which arose during the Athens Olympic Games; therefore, the Appellants' right of appeal should be determined pursuant to the IOC Anti-Doping Rules.

62. With regard to the Preliminary Issues, the IOC requests the following relief:

> «*1. The Appellants' appeal be dismissed;*
>
> *2. The UCI pays the IOC's costs and expenses in relation to the preparation of this memorial;*
>
> *3. The Appellants pay the IOC's remaining costs and expenses arising from the appeal.*»

### III.2.2 *The USOC*

63. The USOC stresses that, under the IOC Anti-Doping Rules, there is no private right of action allowing an athlete, or that athlete's National Olympic Committee, to prosecute on their own an anti-doping rule violation against a fellow athlete. Accordingly, the USOC submits that the CAS does not have jurisdiction on the case brought by the Appellants.

64. According to the USOC, this case is to be clearly distinguished from the *Beckie Scott* case, as in that case the applicant was not trying to prosecute an anti-doping rule violation against another athlete, but she was rather seeking to obtain the proper enforcement of the Olympic Charter rule governing the return of Olympic medals after the IOC's determination that a competitor had committed an anti-doping rule violation.

65. The USOC argues that the IOC's 23 September 2004 letter was a true decision closing the anti-doping case against Mr Hamilton, and that decision could be appealed only by the individuals or organizations listed in Art. 12.2.2 (mirroring Art. 13.2.3 of the World Anti-Doping Code). Such provision grants no appeal right to an athlete who may benefit from having another competitor disqualified or to that athlete's National Olympic Committee.

66. The USOC contends that, as the IOC Executive Board did not question nor take action to overrule the determination made by the IOC President, the IOC Executive Board in effect confirmed the IOC President's actions. Therefore, the IOC made a legal and valid decision within the procedural framework of the IOC Anti-Doping Rules that no anti-doping rule violation had occurred. According to the USOC, that IOC decision may not be appealed by Mr Ekimov (or the ROC) because the IOC Anti-Doping Rules do not allow it and neither the Entry Form nor Rule 74 of the Olympic Charter provide athletes with an unfettered right to prosecute any case before the CAS.

67. The USOC also contends that, in any event, this Panel could not render a ruling on whether or not Mr Hamilton committed an anti-doping rule violation at the Athens Olympic Games. According to the USOC, even if the Panel determined that the Appellants have standing and the CAS has jurisdiction, the only relief available to the Appellants would be for the Panel to refer the matter back to the IOC and order the IOC to resume the proceeding against Mr Hamilton.

68. With regard to the Preliminary Issues, the USOC so concludes:

> «*Article 12.2.2 of the IOC Anti-Doping Rules does not provide Appellants with the right to appeal a decision of the IOC concerning the alleged anti-doping rule violation by M Hamilton, nor does any other applicable rule or legal principle. Accordingly, CAS has no jurisdiction to hear Appellants' case and this matter must be dismissed.*»

### III.2.3 *Mr Hamilton*

69. With regard to the Preliminary Issues, Mr Hamilton essentially submits the same arguments as those expressed by the USOC. In his final submission, he puts forward the following statement:

> «*The issue of standing and jurisdiction has been previously addressed at length by Respondent Tyler Hamilton in his initial brief and motion to dismiss filed on September 2, 2005. Respondent Tyler Hamilton hereby joins and incorporates the arguments submitted by The United States Olympic Committee in its Supplemental Brief on Standing and Jurisdiction.*»

## III.3 THE INTERESTED PARTIES

### III.3.1 *The AOC and Mr Rogers*

70. The AOC and Mr Rogers contend that, on 23 September 2004, the IOC made no reference, and in fact made no decision, as to whether an anti-doping violation was or was not committed. Therefore, the IOC made no decision under the IOC Anti-Doping Rules but, rather despite those rules and in violation of them. Therefore, the Appellant's right of appeal should be assessed only under Rule 61 (previously Rule 74) of the Olympic Charter and not under Art. 12 of the IOC Anti-Doping Rules.

71. In any event, according to the AOC and Mr Rogers, the IOC's decision to stop the disciplinary procedure against Tyler Hamilton is not a decision specified in Art. 12.2 of the IOC Anti-Doping Rules; consequently, the Appellants were entitled to appeal.

72. The AOC and Mr Rogers conclude as follows:

> «*the restriction as to who may bring an appeal under clause 12.2 does not apply to this matter. The Appellants, as supported by the AOC, Rogers and the UCI, are, therefore, not barred from appealing the decision*.»

### III.3.2 *The UCI*

73. The UCI submits that the IOC President's letter dated 23 September 2004 is not a decision that no anti-doping violation occurred, because only the IOC Executive Board could have taken that decision in accordance with Art. 7 of the IOC Anti-Doping Rules. That letter is rather a decision to dissolve the Disciplinary Commission and to have no hearing process; accordingly, that letter is part of the IOC's results management process. According to the UCI, a decision as to whether an anti-doping violation was committed is part of the hearing process, not of the results management process.

74. The UCI points out that, as no hearing process took place in the case of Mr Hamilton, the decision to dissolve the Disciplinary Commission was a provisional decision and, thus, the CAS has jurisdiction under Rule 74 of the Olympic Charter to order the IOC to reopen the results management process concerning a possible anti-doping violation by Mr Hamilton at the Athens Olympic Games.

75. The UCI concludes on the Preliminary Issues:

*«The UCI submits that the CAS has jurisdiction and that the Appellants have standing.*

*The UCI refers to its statement of 3 October 2005.»*

# IV. DISCUSSION

76. Article S20 of the Code provides as follows:

*«The CAS is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division.*
*[...]*
*Arbitration proceedings submitted to the CAS are assigned by the Court Office to one of these two Divisions according to their nature. Such assignment may not be contested by the parties or raised by them as a cause of irregularity».*

77. The Panel notes that, pursuant to Article S20 of the Code, the decision of the CAS Court Office as to the assignment of a case to either CAS Division is administrative in nature; no arguments are heard, no reasons are given, no appeal is allowed. The Panel must thus disregard the arguments put forward by the parties with respect to the characterization of this arbitration as an "*appeal*" or an "*ordinary*" arbitration. As the Court Office assigned this case to the Appeals Arbitration Division, the Panel must follow the set of Code provisions applicable to the appeal arbitration procedure.

## IV.1 APPLICABLE REGULATIONS AND RULES OF LAW

78. Article R58 of the Code reads as follows:

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

79. The present case arose in connection with the Athens Olympic Games. The IOC-approved Entry Form for Athens 2004 (the "Entry Form") was signed by both Mr Ekimov and Mr Hamilton, as well as by their respective National Olympic Committees (ROC and USOC), when they were admitted as competitors in the Athens Olympic Games. Thus, in accordance with the second paragraph of the Entry Form, all parties to this case expressly agreed to comply with the Olympic Charter, the World Anti-Doping Code (the "WADA Code") and the International Olympic Committee Anti-Doping Rules applicable to the Games of the XXVIII Olympiad in Athens in 2004 (the "IOC Anti-Doping Rules"). In particular, by signing the Entry Form, the athletes expressly acknowledged that "*the relevant provisions and rules*" were brought to their attention (third paragraph of the Entry Form).

80. Therefore, the Panel finds that in the present case the applicable regulations and rules of law chosen by the parties are the Olympic Charter, the WADA Code and the IOC Anti-Doping Rules. As the IOC is domiciled in Switzerland, Swiss law may apply complementarily for any matter which is not dealt with by those regulations and rules of law.

## IV.2 JURISDICTION OF THE CAS AND STANDING TO APPEAL

81. While the Respondents have objected to the jurisdiction of the CAS over the merits of this case, it is undisputed that the CAS has jurisdiction to determine its own jurisdiction and the *locus standi* of the parties, i.e. the CAS has the power to decide whether it may adjudicate the merits of the appeal. The so-called "*Kompetenz-Kompetenz*" of an international arbitral tribunal sitting in Switzerland is recognized by Art. 186 para. 1 of the Swiss Law on Private International Law and, furthermore, it is a generally accepted principle in international arbitration (see CAS/A/952).

82. As this is an appeal arbitration procedure (see *supra* at paragraph 77), the Panel must address any jurisdictional issue, first by considering Article R47 of the Code, which reads as follows:

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

83. The Panel observes that, in accordance with this provision, the CAS has the power to adjudicate appeals against a sports organization (i.e. a federation, association or sports-related body) only if: (a) that sports organization issued an actual "*decision*"; (b) the decision is final, i.e. any available stages of appeal within that sports organization have been exhausted; (c) the statutes or regulations of that sport organization, or any specific agreements between the concerned parties, set forth an arbitration clause providing for an appeal to the CAS against the said decision (and only within the limits imposed by those statutes or regulations or specific agreements).

84. As a consequence, the CAS does not have the power to adjudicate an appeal if there is no true decision or if the decision is not final, or if the applicable statutes, regulations or agreements do not allow the appellant to bring an appeal against the decision.

85. Accordingly, in order to determine its power to adjudicate the present case upon the merits, the Panel must first decide whether the IOC President's letter of 23 September 2004 can be characterized as a decision (IV.2.1), whether the decision is final (IV.2.2), and whether the applicable rules allow the appellants to bring this appeal (IV.2.3).

### IV.2.1 *The nature of the IOC President's Letter of 23 September 2004*

86. In their appeal brief, the Appellants started this arbitration procedure as an appeal "*directed against a Decision of the International Olympic Committee (IOC) dated 23 September 2004, that the disciplinary procedure against Mr Tyler Hamilton was*

*stopped, the Disciplinary Commission was dissolved and no sanctions would be pursued*" .

87. However, the parties disagree as to whether the IOC President's letter dated 23 September 2004 (the text of which is set out *supra* at paragraph 18) was a true decision. Indeed, the Panel requested the parties to address in their brief the issue of "*the legal nature and validity of the letter by Mr. Jacques Rogge dated 23 September 2004, Ref. no.11087/18-03/2004/HMS/sls*".

88. The Panel notes that the possible characterisation of a letter as a decision was considered in two previous CAS cases (2004/A/659, *Galatasaray v/ FIFA & Club Regatas Vasco da Gama & F. J. Loureiro*; 2005/A/899, *Aris Thessaloniki v/ FIFA & New Panionios*).

89. The Panel agrees with the definition of "*decision*", and of the characteristic features of a "*decision*" stated by those CAS Panels:

> «*In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties*» (CAS 2005/A/899, at paragraph 61);
>
> «*A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects*» (2004/A/659, at paragraph 36).

90. The Panel also agrees with the CAS Panel in *Galatasaray* (*q.v.* at paragraph 63) that:

> «*the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal*».

91. In light of the above CAS precedents, the Panel finds that the IOC President's letter of 23 September 2004 contained in fact a clear statement of the resolution of the disciplinary procedure against Mr Hamilton. That statement had the additional effect of resolving the matter in respect of all interested parties: "*the Disciplinary Commission [...] is being dissolved, and the IOC will not be pursuing sanctions regarding this matter*". As a consequence of this ruling, the anti-doping case against Mr Hamilton was closed and Mr Hamilton could retain his gold medal; at the same time the other competitors (and in particular Mr Ekimov and Mr Rogers) could not benefit from the possible disqualification of Mr Hamilton. In other words, the legal situations of the addressee and of the other concerned athletes were materially affected.

92. It seems also evident from the text of the letter (the "*IOC hereby informs you*" and "*the IOC will not be pursuing sanctions*") that the IOC President intended such communication to be a decision issued on behalf of the IOC.

93. Accordingly, the Panel has no hesitation in finding that the IOC President's letter dated 23 September 2004 – without taking position on whether this Presidential action was within his powers or not – is a true "*decision*" of the IOC (hereinafter referred to as the "Decision of 23 September 2004") and, thus, can be appealed under Art. R47 of the Code.

### **IV.2.2** *Is the Decision of 23 September 2004 final?*

94. The Decision of 23 September 2004 makes reference twice to the IOC President's earlier letter of 16 September 2004 starting the disciplinary procedure against Tyler Hamilton (see *supra* at 16). In that previous letter, it was clearly stated that the disciplinary procedure was launched pursuant to the Olympic Charter and, in particular, to the IOC Anti-Doping Rules. Indeed, the letter of 16 September 2004 specifically indicated that the text of the IOC Anti-Doping Rules could be found on the IOC website "www.olympic.org" and drew "*particular attention to Article 7 of such Rules, which addresses the 'management of anti-doping rule violations' and provides further details regarding the procedures related thereto*".

95. As a consequence, it seems evident to the Panel that the Decision of 23 September 2004 was meant to be a decision within the framework of the IOC Anti-Doping Rules. It also seems evident to the Panel that the IOC meant the Decision of 23 September 2004 to be the final decision closing the anti-doping procedure against Mr Hamilton, because it was clearly so stated in the decision itself ("*the IOC will not be pursuing sanctions regarding this matter*"). The correctness of the Panel's conclusion is confirmed by the consistent conduct of all IOC organs, which never questioned the fact that the IOC disciplinary procedure was closed.

96. The IOC Anti-Doping Rules do not provide any internal stage of appeal and do not set forth any legal remedy other than an appeal to the CAS. In addition, neither the Olympic Charter nor the WADA Code provide for legal remedies other than an appeal to the CAS.

97. Therefore, the Panel finds that the IOC Decision of 23 September 2004 was final, as far as the IOC was concerned, and that the Appellants complied with the requirement of exhaustion of all available legal remedies prior to the appeal.

### **IV.2.3** *Do the Applicable Rules Allow the Appellants to Bring this Appeal?*

98. The Panel has already held (*supra* at paragraph 80) that in this case, in accordance with the Entry Form, the applicable regulations and rules of law chosen by the parties are the Olympic Charter, the WADA Code and the IOC Anti-Doping Rules. Accordingly, in order to determine its jurisdiction, in addition to the Entry Form, the Panel must look at the appeal arbitration clauses included in those regulations and rules of law.

99. The Entry Form contains *inter alia* the following statement:

> «*I agree that any dispute, controversy or claim arising out of, in connection with or on the occasion of the Olympic Games [...] shall be submitted exclusively to the Court of Arbitration for Sport (CAS) for final and binding arbitration [...]*».

100. Rule 74 (in force until 31 August 2004) and Rule 61 (in force since 1 September 2004) of the Olympic Charter are in identical terms, and state as follows:

> «*Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration*».

101. Art. 13 of the WADA Code, in relevant parts, reads as follows:

«*13.1 Decisions Subject to Appeal*

*Decisions made under the Code or rules adopted pursuant to the Code may be appealed as set forth below in Articles 13.2 through 13.4. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. [...]*

*13.1 Comment: The comparable OMADC Article is broader in that it provides that any dispute arising out of the application of the OMADC may be appealed to CAS.*

*13.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions*

*A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that an Anti-Doping Organization lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension as a result of a Provisional Hearing or in violation of Article 7.5 may be appealed exclusively as provided in this Article 13.2.*

*13.2.1 Appeals Involving International-Level Athletes*

*In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.*

*[...]*

*13.2.3 Persons Entitled to Appeal*

*In cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) the relevant International Federation and any other Anti-Doping Organization under whose rules a sanction could have been imposed; (d) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games; and (e) WADA. [...]*

*[...]*

*13.5 Comment: [...] Note, that the definition of interested Persons and organizations with a right to appeal under Article 13 does not include Athletes, or their federations, who might benefit from having another competitor disqualified*».

102. Art. 12 of the IOC Anti-Doping Rules is closely modelled on Art. 13 of the WADA Code and, in relevant parts, reads as follows:

> «*12.1 Decisions Subject to Appeal*
>
> *Decisions made under these Rules may be appealed as set forth below in Article 12.2 through 12.4. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise.*
>
> *12.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions*
>
> *A decision that an anti-doping rule violation was committed, a decision imposing Consequences of an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that the IOC lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension may be appealed exclusively as provided in this Article 12.2.*
> *[...]*
> *12.2.1 In all cases arising from the Olympic Games, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.*
>
> *12.2.2 In cases under Article 12.2.1, only the following parties shall have the right to appeal to CAS:*
>
> *(a) the Athlete or other Person who is the subject of the decision being appealed; (b) the IOC; (c) the relevant International Federation and any other Anti-Doping Organisation under whose rules a sanction could have been imposed; and (d) WADA.*
>
> *12.3 Appeals from Decisions Granting or Denying a Therapeutic Use Exemption*
> *[...]*
> *12.4 Appeal from Decisions Pursuant to Article 11*
>
> *Decisions by IOC pursuant to Article 11 may be appealed exclusively to CAS by the NOC or International Federation.*»

103. The provisions of the WADA Code, including the comments, are also relevant for the interpretation of the IOC Anti-Doping Rules. Indeed, Art. 16.5 of the IOC Anti-Doping Rules expressly states as follows:

> «*These Rules have been adopted pursuant to the applicable provisions of the [WADA] Code and shall be interpreted in a manner that is consistent with applicable provisions of the Code. The comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of these Rules*».

104. All the above mentioned appeal arbitration clauses are consistent in providing that the CAS has jurisdiction to rule on the appellate case brought by the Appellants, which undoubtedly arose on the occasion of or in connection with the Athens Olympic Games.

105. However, the Panel notes that while the Entry Form and the Olympic Charter are silent on the types of decision which can be appealed and on the persons entitled to appeal, both the WADA Code and the IOC Anti-Doping Rules limit the power of the CAS to adjudicate a case both in terms of subject-matter, i.e. the types of decision over which the CAS has power to render an award, and in terms of *locus standi*, *i.e.* the parties having the right to appeal. The Panel notes that the WADA legislators intentionally introduced such limitations to the scope of appellate review previously allowed under the Olympic Movement Anti-Doping Code. Such intention is clearly shown by the Comment to Art. 13.1 of the WADA Code ("*The comparable OMADC Article is broader in that it provides that any dispute arising out of the application of the OMADC may be appealed to CAS*").

106. It seems to the Panel that there is no contradiction between the different arbitration clauses, insofar as the WADA Code and the IOC Anti-Doping Rules apply specifically to anti-doping disputes as a matter of *lex specialis*. By the same token, the IOC Anti-Doping Rules apply specifically to anti-doping disputes arising out of the Olympic Games. The Panel points out that, in fact, in case of different rules applicable to the same matter, the interpretive principle "*lex specialis derogat generali*" requires that a rule specially targeting a specific case prevails over a rule generally encompassing all cases (the rationale being that the *lex specialis* is presumed to have been drafted having in mind particular purposes and taking into account particular circumstances). The Panel takes comfort from the fact that CAS Panels have already applied this interpretive principle on several occasions (for example, see the award CAS 2005/A/878, at paragraph 53). Accordingly, as this case undoubtedly concerns a possible anti-doping rule violation on the occasion of the Athens Olympic Games, the power of the CAS to adjudicate the Appellants' claims upon their merits must be determined on the basis of the IOC Anti-Doping Rules.

107. However, the Appellants contend that the Panel should disregard the arbitration clause included in the IOC Anti-Doping Rules and entertain jurisdiction solely on the basis of Rule 74 (now Rule 61) of the Olympic Charter as if it was a contractual claim, analogously to what happened in the *Beckie Scott* case (CAS 2002/O/373). According to the Appellants, this necessarily flows from the following circumstances: (a) the IOC materially breached the procedural rules set forth by the IOC Anti-Doping Rules for the management of anti-doping violations; (b) the IOC President exceeded his powers since the authority to close the procedure was vested with the IOC Executive Board under Art. 7.2 of the IOC Anti-Doping Rules; (c) the decision of the IOC President is also null and void under Swiss Law since it was reached in consequence of a number of serious formal flaws.

108. The Panel cannot accept the Appellants' submissions. In the Panel's opinion, those submissions subvert and reverse the logical sequence of steps necessary for the proper analysis of this case. In the Panel's view, the procedural flaws and violations alleged against the IOC are relevant to a consideration of the merits of this case and should only be considered and analysed by the Panel after it has determined that the CAS has jurisdiction and that the Appellants have standing to appeal. For this Panel to discuss whether the procedure followed by the IOC was in compliance with the IOC Anti-Doping Rules, whether the IOC President was the competent IOC organ and whether the

Decision of 23 September 2004 is valid under Swiss Law would require it to consider the merits of this case before determining whether it has the power to do it.

109. In a number of cases CAS panels have set aside sports organisations' decisions because of procedural flaws (see e.g. 2004/A/776, *FCP v/ FIRS*; 2004/A/777, *ARcycling v/ UCI*), and this Panel would be ready and willing to do it in this case, if it were appropriate so to do. However, the Panel can only take into account those issues and, if necessary, set aside the Decision of 23 September 2004 after it has decided that the CAS has the power to adjudicate this appeal upon its merits. Accordingly, the Panel declines to address those issues at this preliminary stage and rejects the Appellants' submission that the arbitration clause of the IOC Anti-Doping Rules should be disregarded.

110. The Panel points out that, prior to considering the merits of the case, it can only decide whether the Decision of 23 September 2004, on its face, is subject to appeal and whether the Appellants have *locus standi*. The Panel must thus determine under the IOC Anti-Doping Rules (i) whether the Decision of 23 September 2004 is a type of decision over which the CAS has appellate jurisdiction, and (ii) whether the Appellants are entitled to appeal.

***(i) Does the Decision of 23 September 2004 come within Art. 12.2 of the IOC Anti-Doping Rules?***

111. Art. 12.2 of the IOC Anti-Doping Rules allows the CAS to rule on appeals against the following types of decisions

> «*A decision that an anti-doping rule violation was committed, a decision imposing Consequences of an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that the IOC lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension*».

112. The Panel has already found that the communication sent by the IOC President to Mr Hamilton (as well as to the US team, the UCI, the USOC, the WADA and the WADA-appointed Independent Observer) on 23 September 2004 was in fact a decision (see *supra* at paragraphs 86-93). The Panel has also found that it was a final decision closing the anti-doping procedure against Mr Hamilton (see *supra* at paragraph 95).

113. It remains to be considered whether the Decision of 23 September 2004 comes within the list of decisions amenable to appeal set out by Article 12.2 of the IOC Anti-Doping Rules. As the other types of decisions listed therein are clearly not applicable in the case at stake, the parties have limited their submissions to the question of whether such decision may be categorized as a "*decision that no anti-doping rule violation was committed*". In particular, the Appellants contend that the case-handling of the IOC did not result in a decision that no anti-doping rule violation was committed, in the sense of Art. 12.2 of the IOC Anti-Doping Rules, because the Decision of 23 September 2004 did not truly acquit Mr Hamilton, but simply informed him that the previous adverse analytical finding was not confirmed by the B sample.

114. The Panel is of the opinion that the language used in the Decision of 23 September 2004 is not decisive in assessing its character. In the Panel's view, what matters is the true nature of the decision made and its effects, not its formal designation or the particular words used. Accordingly, it seems evident to the Panel that the IOC decided on 23 September 2004 that Mr Hamilton had not committed an anti-doping rule violation because the B sample did not confirm the A sample. Common sense dictates that the communication to the interested athlete (and the other concerned parties) that "*the IOC will not be pursuing sanctions*" was tantamount to stating that the IOC determined that no anti-doping rule violation had been committed. Indeed, as a consequence of that communication, Mr Hamilton could retain his gold medal. From the evidence on file, it is clear that after 23 September 2004 no IOC body or IOC representative ever questioned the fact that, for all purposes, the anti-doping procedure initiated with the IOC communication of 16 September 2004 was closed with the athlete's acquittal. Hence, this Appellants' submission fails.

115. Therefore, the Panel holds that the Decision of 23 September 2004 falls under Art. 12.2 of the IOC Anti-Doping Rules and, thus, the CAS has jurisdiction to review it. However, a tribunal may have jurisdiction to decide a dispute, but it can only exercise that jurisdiction if the parties in front of it have standing to ask it to make the decision. Accordingly, the Panel must decide whether the Appellants are properly before it, i.e. whether they have *locus standi* to put the matter before the CAS under the IOC Anti-Doping Rules.

***(ii) Do the Appellants have the right to appeal to the CAS under Art. 12.2.2 of the IOC Anti-Doping Rules?***

116. Art. 12.2.2 of the IOC Anti-Doping Rules, corresponding to Art. 13.2.3 of the WADA Code, provides that only the following parties have the right to appeal to the CAS:

> «*(a) the Athlete or other Person who is the subject of the decision being appealed; (b) the IOC; (c) the relevant International Federation and any other Anti-Doping Organisation under whose rules a sanction could have been imposed; and (d) WADA*».

117. The Appellants contend that this provision restricting the standing to appeal is invalid and thus not applicable because it conflicts with the Olympic Charter and Swiss Law (see *supra* at paragraph 56). However, in the Panel's view, the provision does not contradict the Olympic Charter because, first, the Olympic Charter does not have any specific provision on standing to appeal and, second, the IOC Anti-Doping Rules are a *lex specialis* which applies to doping matters at the Olympic Games (see *supra* at paragraph 106).

118. The Panel also finds unpersuasive the Appellants' arguments based on Swiss Law, in light of the following matters: (a) both the IOC Anti-Doping Rules and the WADA Code were incorporated by explicit reference in the Entry Form and were brought to the attention of the Appellants as expressly acknowledged in the third paragraph of the Entry Form; (b) the rule on standing cannot be deemed to be an "*unusual clause*" insofar as the WADA Code, well before the Athens Olympic Games, has become the most widely accepted and known document in the history of the fight against doping; (c) apart

from the fact that the rule on standing applies equally to all competitors and does not amount to an exclusion from or limitation to the Appellants' sporting activity, the restriction to the right of private prosecution against a supposed doping violation may be justified as a policy choice of the WADA (and thus of its constituency, composed both of governments and sports institutions) to be qualified as an "*overriding public interest*" under Art. 28 para. 2 of the Swiss Civil Code; (d) the Appellants did not submit any material or evidence which could satisfy their burden of proving that the IOC abused a dominant position and thus violated Art. 7.1 of the Swiss Cartel Law. Accordingly, the Appellants' submission concerning the validity and applicability of Art. 12.2.2 of the IOC Anti-Doping Rules fails.

119. As a result, the Panel must ascertain whether the Appellants are entitled to appeal under Art. 12.2.2 of the IOC Anti-Doping Rules. It is evident that neither a competitor (of the athlete subject to an anti-doping decision) nor his National Olympic Committee are among the individuals or organisations listed therein. This interpretation is confirmed by the Comment on the WADA Code – particularly relevant in light of Art. 16.5 of the IOC Anti-Doping Rules (quoted *supra* at 103) – which unambiguously states that such list of persons or organizations having standing to appeal "*does not include Athletes, or their federations, who might benefit from having another competitor disqualified*". If the appeal had been brought by parties who were entitled to bring it, the CAS would have adjudicated upon the merits. However, among those parties who did have the right to appeal the Decision of 23 September 2004, the WADA chose not to do it, while the UCI submitted its application to the CAS long after the time limit for the appeal had expired (see *supra* at 32).

120. Accordingly, the Panel holds that both Appellants lack standing to appeal under Art. 12.2.2 of the IOC Anti-Doping Rules. As a result, the Panel may not entertain this appeal and must decline to adjudicate the case upon its merits.

121. In the Panel's view, this decision is fully consistent with the *Beckie Scott* award (CAS 2002/O/373), in which the claimant's *locus standi* was admitted. In that case, the CAS Panel established its jurisdiction on the basis of the Olympic Charter and the Olympic Movement Anti-Doping Code ("OMAC"), at a time when the WADA Code and the current IOC Anti-Doping Rules were not in force yet. The Panel notes that that CAS Panel, cautioning about possible legislative changes, stated as follows:

> «*the fact that this Panel deems admissible the specific claims of a particular athlete in the circumstances of this case does not imply that competitors of sanctioned athletes will necessarily have standing to sue in other cases and circumstances [...]. It is noteworthy in this relation that under article 13.2.3 of the World Anti-Doping Code, version 3.0 of 20 February 2003, the circle of persons with standing to challenge a decision has been limited*» (CAS 2002/O/373, in *CAS Digest III*, at 29-30).

122. After the *Beckie Scott* award, the WADA Code did come into force and, as a consequence, the IOC abolished the OMAC and adopted the IOC Anti-Doping Rules. The new rules do not let athletes (or their NOCs) who might benefit from having another competitor sanctioned have standing to appeal. On this basis, this case is clearly distinguishable from the *Beckie Scott* case.

## V. COSTS

123. (…)

* * * * * * * * * * * * *

**ON THESE GROUNDS**

**The Court of Arbitration for Sport rules:**

1. Mr Viatcheslav Ekimov and the Russian Olympic Committee have no standing to appeal against the decision issued on 23 September 2004 by the International Olympic Committee.
2. The appeal filed by Mr Viatcheslav Ekimov and the Russian Olympic Committee on 14 October 2004 against the decision issued on 23 September 2004 by the International Olympic Committee is dismissed.
3. (…)

Done in Lausanne, 27 June 2006

**THE COURT OF ARBITRATION FOR SPORT**

Massimo **Coccia**
President of the Panel

Olli **Rauste**
Arbitrator

Peter **Leaver QC**
Arbitrator