

The “Official Statement from WADA on the Vrijman Report”: Unintentional Proof to the Contrary?

by Emile Vrijman*

I. Introduction

1.1 It is surely nothing less than remarkable that there has, to date - particularly in view of the media attention which the matter of the alleged use by American cyclist Lance Armstrong of prohibited substances itself received at the time - been little or no substantive response to, let alone criticism of, the findings of what has become known as the “*independent investigation of all facts and circumstances regarding the analyses of the urine samples of the 1999 Tour de France conducted by the French WADA-accredited laboratory, the ‘Laboratoire Nationale de Dépistage du Dopage’* (hereinafter: the ‘LNDD’) in Châtenay - Malabry, France”, as reported in “*the Vrijman report*”¹. In spite of the very strong criticism expressed in this report regarding (the quality of) the research it conducted and its subsequent behaviour in this matter, the LNDD has, to this day, not responded to any of the findings of the investigation, while the French newspaper ‘*L’Equipe*’ - responsible for publishing the relevant article in which Lance Armstrong was accused of using the prohibited substance “*recombinant erythropoietin*” (“*r-EPO*”) during the 1999 Tour de France² - merely stated in an editorial that it continued to support fully the findings of its own investigation.

“*There is nothing to retract from the revelations. [...] For our part, we remain convinced of the need to battle without compromise against mafialike tendencies that still and always threaten the sport of cycling. Both in the method and the substance, L’Equipe stands firm.*”³

1.2 Procedural aspects

Where there has been criticism in respect of the investigation that has been conducted, it usually related to the procedural aspects of that investigation. The premature publication of the most important findings of the investigation in the Netherlands newspaper “*de Volkskrant*” on May 31, 2006, in particular appears to have been the cause of this⁴. For some, also my reputation as being pro-athlete - earned because of the role I allegedly played according to some in the doping affair involving the German athletes Katrin Krabbe, Grit Breuer and Silke Möller - as well as my being acquainted with Mr. Hein Verbruggen, the current Vice-President of the “*Union Cycliste Internationale*” (“*UCI*”), the International Cycling Federation, did already provide sufficient reason to criticise (the results of) the investigation that had been conducted, in particular as far as its “*independence*” and “*impartiality*” were concerned⁵.

1.3 WADA’s response

Apart from Lance Armstrong⁶ and the UCI⁷, the only other party directly involved in this matter that did respond to (the substance of) the findings contained in the “*Vrijman report*” has been the “*World Anti - Doping Agency*” (“*WADA*”).

In its initial response on May 31, 2006, WADA carefully re-iterated its position that, as far as this investigation was concerned:

“*an investigation into the matter must consider all aspects - not limited to how the damaging information regarding the athletes’ urine samples became public, but also addressing the question whether anti - doping rules were violated by athletes*”⁸

and that:

“*WADA will respond in due course once it has fully examined the report*”⁹.

However, on 2 June 2006, barely two days later and almost three weeks before the results of WADA’s examination of the Vrijman report were published, WADA President Richard Pound, already concluded in an interview with the press agency “*Agence France - Presse*” (“*AFP*”) that the investigation report was full of holes. “*They put as facts things that are suppositions, suspicions and possibilities*”, said Pound¹⁰. He also announced that WADA rejected the “*Vrijman report*” and “*will consider legal action against Vrijman and any organizations including the UCI, that may publicly adopt its conclusions*”¹¹. On 19 June 2006, WADA eventually published its so-called “*Official Statement From WADA On The Vrijman Report*” (hereinafter: “*the Statement*”), “*highlighting a number of unprofessional, inaccurate, unfair and misleading elements of the [Vrijman] report*”¹².

1.4 Purpose of this article

Based on a general analysis of (the content of) *the Statement* itself, this article will examine in detail WADA’s criticism regarding (the conduct of) the investigation in general and, more specifically, its results, in particular as far as the assessment of (the extent and nature of) WADA’s involvement in this matter and the legitimacy of that involvement are concerned. Furthermore, this article will show why both the manner of WADA’s response, as well as the arguments it has put forward in *the Statement*, appear to confirm - it must be assumed unintentionally - rather than deny the investigation’s findings and assessment of WADA’s involvement in this matter.

Finally, this article will consider whether, and to what extent, the investigation’s findings regarding WADA might, at the same time, provide a possible explanation for the absence of any response or reaction, let alone action, by the “*International Olympic Committee*” (“*IOC*”), “*International Sports Federations*” (“*IFs*”) and national governments. Given the fact, however, that almost one year has passed since the “*Vrijman report*” was first published, I will begin by briefly summarising the principal facts and events which prompted the (“*UCI*”), the coordinating International Federation responsible for

* Former Director of NeCeDo (The Netherlands Centre for Doping Affairs).

1 The expression “*the Vrijman report*” was first used to describe the report of the “*independent investigation of all facts and circumstances regarding the analyses of the urine samples of the 1999 Tour de France conducted by the French WADA-accredited laboratory, the ‘Laboratoire Nationale de Dépistage du Dopage’ (LNDD) in Châtenay - Malabry, France*”, by the “*World Anti-Doping Agency*” (WADA). See: WADA press release, “*WADA*

Expresses Concern regarding Vrijman Report”, May 31, 2006.

2 Damien Ressayot, “*Le mensonge d’Armstrong*”, *L’Equipe*, August 23, 2005.

3 *L’Equipe*, June 1, 2006.

4 R. Kerckhoffs, “*UCI woedend op advocaat Vrijman*”, *de Telegraaf*, June 1, 2006. See also: J. Macur and S. Abt, “*Investigator and Anti-Doping Group Clash on Armstrong Test*”, *New York Times*, May 31, 2006.

5 Jens Jungermann, “*Der Schatten einer gefallenen Radsportlegende*”, *Die Welt*, July 13, 2006.

6 Associated Press, “*Report clears Armstrong of ’99 doping allegations*”, May 31, 2006.

7 UCI Official Statement, “*Vrijman report: statement of the UCI*”, Aigle, Switzerland, June 2, 2006.

8 WADA Expresses Concern regarding Vrijman Report, supra note 1.

9 WADA Expresses Concern regarding Vrijman Report, supra note 1.

10 Agence France-Presse, “*WADA rejects report that cleared Armstrong*”, June 2, 2006.

11 Id. The response of WADA’s President Pound bears a remarkable resemblance,

both in nature, as well as in wording, to those usually made by athletes reported as having been found guilty of having committed a doping offence. To date however, no legal action has been taken either against the investigator, Lance Armstrong or any organization having adopted the conclusions of the investigation, including the UCI.

12 WADA, “*WADA Official Statement on Inaccuracies of Vrijman Report*”, Montreal, Canada, June 19, 2006.

the sport of cycling, at the time to commission the independent investigation concerned, before proceeding to consider the main findings of the investigation in this matter as contained in the “*Vrijman report*”.

II. The reason for an investigation

2.1 An article in a newspaper

On 23 August 2005, the French (sports) newspaper, *L'Equipe*, published an article headlined “*The Armstrong lie*” written by the French journalist Damien Ressiot¹³. In this article, Ressiot accused the American cyclist and seven times-winner of the Tour de France, Lance Armstrong, of having used the prohibited substance *r-EPO* during the 1999 Tour de France. According to Ressiot, six of Armstrong's urine samples from the 1999 Tour de France allegedly tested positive for *r-EPO* when analysed by the LNDD as part of ongoing research to further improve the existing detection method for *r-EPO*. In addition, Ressiot alleged that six urine samples, from six other riders, had also tested positive for *r-EPO*₁₄.

Ressiot was able to make this accusation against Armstrong because he not only was aware of the contents of the relevant research report of the LNDD, but also had in his possession copies of all doping control forms relating to the urine samples collected from Lance Armstrong during the 1999 Tour de France. According to WADA, Ressiot had, at his own request, obtained the copies of these forms from the UCI itself¹⁵. These copies revealed the original code numbers present on the glass bottles that had been used during the 1999 Tour de France to collect and store the relevant urine samples for each separate doping control that had been carried out at the time on Lance Armstrong. As the LNDD had, at the express and repeated request of WADA, in addition to the analytical findings for each urine sample, also specified in its research report for each of these urine samples - as “*additional information*”¹⁶ - the aforementioned original code numbers, it was simple for Ressiot to establish - by comparing the code numbers appearing on the aforementioned doping control forms with the code numbers reported as such in the LNDD's research report - which of these urine samples from the 1999 Tour de France had been obtained from Lance Armstrong and what the result of the LNDD's analysis that been¹⁷.

Ressiot's article triggered a storm of (widely varying) responses in the international sports world. While Lance Armstrong, in his initial response, expressly denied ever having used any Prohibited Substance and questioned the manner in which the LNDD apparently had conducted the analyses of these urine samples, Tour de France director Jean - Marie Leblanc, by contrast, stated in an interview with *L'Equipe* that, as far as he was concerned, it was a “*proven scientific fact*” that Armstrong had used a banned substance during the 1999 Tour de France¹⁸. WADA chairman Richard Pound also considered that “*doping*” was likely to have been used¹⁹, while Professor de Ceaurriz, director of the LNDD, in an interview with the Netherlands newspaper “*De Volkskrant*” expressed having no doubt whatsoever as far as the results of his laboratory's analyses were concerned²⁰.

Within days, heated debates were conducted in the media regarding the credibility of the article in question, as well as the nature, the reliability and - above all - the purpose of the analyses conducted by the LNDD²¹. All sports organisations and anti-doping bodies, both national and international, that had become involved in this affair in one way or another quickly agreed therefore, in the face of the public commotion that had arisen, on the necessity of conducting an investigation in this matter. The same could not be said, however, or at least to a far lesser degree, with regard to the objective(s) of such an investigation.

2.2 An investigation?

WADA and the UCI in particular strongly disagreed with one another regarding the objectives of the investigation. According to WADA, the only aspect of this matter the UCI was really interested in to investigate was the question of how confidential information in this matter could have been disclosed. WADA however, took the position that such an investigation should be concerned with all aspects of the matter - including such questions as to whether the LNDD's research findings in this matter were correct, if the riders concerned had in fact committed an “*anti-doping rule violation*” as well as the extent of the use of *r-EPO*, during both the 1998 and the 1999 Tours de France, including the identification of those riders implicated in the use of *r-EPO* at the time - and not just one or two aspects only²². WADA therefore informed the UCI in late September 2005 that it did not wish to cooperate (further) in such a one-sided investigation and that it was considering the possibility, if necessary, of conducting its own investigation²³. The UCI responded to this notification from WADA by announcing on 6 October 2006 that it was concerned that “*such an investigation from WADA as an involved party, would be based on aspects out of its [i.e. WADA's] competencies*” and that it had therefore decided to appoint itself an independent investigator: “*to undertake a comprehensive investigation regarding all issues concerning the testing conducted by the French laboratory of urine samples from the 1999 Tour de France*”²⁴.

2.3 Letter of Authority

The UCI explained what it had meant with the preceding words in its so-called “*Letter of Authority*”²⁵. In this letter, the UCI described in detail (the nature and scope of) the mandate the independent investigator had been given. The latter was asked, as part of his investigation, to:

1. determine what the reason(s) has/have been for the LNDD to analyse, in 2004 or 2005, the urine samples collected at the 1998 and 1999 Tours de France, which were being kept within its storage facilities and whether or not Third Parties might have been involved in the decision making process regarding such analyses;
2. determine the manner in which the analyses of the aforementioned urine samples have been conducted by the LNDD, in particular with regard to compliance with any applicable procedures for WADA accredited laboratories regarding research on and the analysis of urine

13 Ressiot, supra note 2.

14 Ressiot, supra note 2.

15 See: Hedwig Kröner & Jeff Jones, “*Pound: Verbruggen was the leak*”, *Cycling News*, September 16, 2005.

16 According to the “*Vrijman report*”, the expression “*additional information*” should be understood to mean: “*as the following information that is normally not included in a routine research report: i.e. the code numbers present on the original glass bottles used for doping controls during the 1998 and the 1999 Tour de France, but also the name of the sport, the name of the race, codes indicating the successive deliveries of samples to the LNDD.*” See: Emile N. Vrijman et al., *Report Independent Investigation Analysis*

Samples from the 1999 Tour de France, Scholten c.s. Advocaten, The Hague, the Netherlands, May 31, 2006, par. 3-5, p. 47

17 Hedwig Kröner, “*The author of it all*”, *Cycling News*, September 7, 2005.

18 “*For the first time, and these are no longer rumours or insinuations, these are proven scientific facts; someone has shown me that in 1999 Armstrong had a banned substance called EPO in his body*”. See: Angela Doland, “*Tour Chief: Armstrong Doping Proven Fact*”, Associated Press, August 24, 2005.

19 Hans - Joachim Seppelt, “*Pound siebt Dopingaktivität bei Armstrong*”, *Netzeitung*, September 5, 2005.

20 Marije Randewijk, “*Een zaak met duidelijke feiten*” [A matter of clear facts],

de Volkskrant, October 23, 2005.

21 Prof. Ayotte, Director of the WADA - accredited doping control laboratory “*INRS-Institut Armand Frappier*”, Pointe-Claire, Quebec, Canada, said they had been extremely surprised at her laboratory that “*urine samples could have been tested in 2004 and have revealed the presence of EPO*”. According to Ayotte, “*EPO - in its natural state or the synthesized version - is not stable in urine, even if stored at minus 20 degrees*”. See: Charles Pelkey, “*Top lab official wonders if delayed testing is possible. We are not that lucky here, says Canada's Christiane Ayotte*”, *VeloNews*, August 23, 2005.

22 Emile N. Vrijman et al., *Report Independent Investigation Analysis*

Samples from the 1999 Tour de France, Scholten c.s. Advocaten, The Hague, the Netherlands, May 31, 2006, n.37.

23 Emile N. Vrijman et al., *Report Independent Investigation Analysis Samples from the 1999 Tour de France*, Scholten c.s. Advocaten, The Hague, the Netherlands, May 31, 2006, n.75.

24 UCI press release, “*Analysis of samples from the 1999 Tour de France: Independent investigator appointed by the UCI*”, UCI, Aigle, Zwitserland, October 6, 2005.

25 Letter from Pat McQuaid, President, UCI, to Emile Vrijman, independent investigator (November 9, 2005).

samples conducted for doping control purposes in general and for the Prohibited Substance EPO in particular;

3. examine the manner in which the LNDD -after having completed the analyses of the aforementioned urine samples- subsequently reported its findings, to whom it did report those findings and why, in particular with regard to the inclusion of data allowing the owner of the sample to be identified;

4. examine allegations that a number of these urine samples should be regarded as constituting a so-called adverse analytical finding under applicable anti-doping rules of the UCI; and, if so

5. give an opinion on whether or not these alleged adverse analytical findings may be considered for an apparent anti-doping rule violation justifying the opening of disciplinary proceedings according to the applicable anti-doping rules, regulations and procedures of the UCI; and

6. examine how confidential research reports and doping control documents came in the possession of an unauthorized Third Party.”²⁶

It is evident from the above list that the investigation the UCI intended to have conducted by the independent investigator, entailed more than just finding the answer to the question how confidential information in this matter - i.e. the analyses results of the urine samples from the 1999 Tour de France and the identity of the riders concerned - could have been leaked and who or which body had been responsible for this. No fewer than four (4) of the six (6) issues that were to be examined relate, either directly or indirectly, to the analyses conducted by the LNDD in this matter and their evaluation, thus making it clear where the focal point of the independent investigation that was to be carried out in this matter would lie, namely on the analysis of the urine samples collected from the 1998 and 1999 Tours de France by the LNDD.

At the same time, UCI chairman, Pat McQuaid, also emphasized in the aforementioned “Letter of Authority” the independent nature of the investigation to be conducted by specifying that:

“Mr. Vrijman is fully authorized by the UCI to make any inquiry he deems necessary and appropriate to fulfil his mission.”;

and, further, that:

“In conducting his investigation and preparing his report, Mr. Vrijman is to be free from control of the UCI, and any person working for, or associated with the UCI and/or its members.”²⁷

McQuaid concluded his “Letter of Authority” by calling explicitly on all persons and bodies associated with the UCI’s doping control programme - including WADA and the LNDD - to cooperate fully and completely with the independent investigation:

“that all persons associated with the UCI and its doping control program -including the LNDD, the World Anti-Doping Agency (WADA), the various WADA accredited doping control laboratories and all officers, directors and staff of those laboratories, national cycling federations, as well as coaches, administrators, officials, cyclists and other individuals associated with international cycling and/or cycling events- shall fully and completely cooperate with Mr. Vrijman and his investigation.”²⁸

III. Findings of the independent investigation

3.1 The investigators²⁹ have, as part of their independent investigation, examined in detail all relevant aspects of the research conducted by the LNDD in this matter and have included such aspects in their final opinion on this matter. As it is impossible to discuss all the aspects in the context of this contribution, I will limit myself in this article to those conclusions relating to the manner in which (i) the research concerned was conducted in terms of the laboratory conditions, (ii) the urine samples were analysed were managed and handled, (iii) the results of the research thus obtained were reported, (iv) other persons and bodies subsequently handled the information thus

obtained, and (v) how the testing results concerned must, finally, be assessed from the perspective of enforcement.

3.2 Analyses LNDD of the urine samples from the 1999 Tour de France

The investigators have taken the position that the analyses results of urine samples from the 1999 Tour de France identified by the LNDD as “positive” in its final research report do not qualify as a “Presumptive Analytical Finding”³⁰, let alone an “Adverse Analytical Finding” as respectively defined in either WADA’s “International Standard for Laboratories” (“ISL”) or “World Anti-Doping Code” (“WADC”)³¹.

This is further compounded by the fact that the “accelerated measurement procedure” used for conducting the analyses of the urine samples from the 1998 and the 1999 Tours de France was not validated and to date never fully disclosed by the LNDD to the investigator. Furthermore, the LNDD has also not disclosed the standards for declaring a sample to be allegedly positive under the research and no assessment has been made as to whether those standards comply with the current WADA rules³² for declaring a *r-EPO* screen to be presumptively positive³³.

Moreover, the LNDD admitted that it is unable to produce any “chain of custody”, making it impossible to link, in a sufficiently reliable manner for doping control purposes, an analysis result to a particular sample. Moreover the fact that the samples were opened previously and used for unknown research purposes means that the “integrity” of the urine samples from the 1998 and the 1999 Tours de France can not be guaranteed as required by the applicable rules³⁴. Consequently, the LNDD is also unable to prove, let alone guarantee, that a strict temperature control with regard to the urine samples from the 1998 and the 1999 Tours de France had been maintained continuously all the way through from receipt, sometime in 1998 or 1999, to their final disposition, let alone that this had been done at a temperature of -20°C, given that the contents of some of these urine samples had already been thawed once before, as some of these had been opened before for unknown research purposes³⁵.

3.3 The LNDD’s report

The investigators are of the opinion that the manner in which the LNDD documented and eventually reported the findings of the research it conducted on the urine samples from the 1999 Tour de France in this matter is contrary to the applicable rules and regulations for WADA-accredited doping control laboratories with regard

26 Id.

27 Id.

28 Id.

29 Although the request to conduct the independent investigation in this matter had been directed at the author only, the actual investigation has been conducted by a team consisting, besides the author, of Dr. Adriaan van der Veen, a scientist currently working for the Dutch Metrology Laboratory, the Nederlands Meetinstituut (NMI), in Delft, the Netherlands and Mr. Paul Scholten, currently heading Scholten c.s. advocaten in The Hague, the Netherlands. Being an internationally renowned expert regarding the application by laboratories in general and doping control laboratories in particular of the international standard “ISO/IEC 17025: 1999”, “General requirements for the competence of testing and calibration laboratories” (hereinafter “ISO/IEC 17025 international standard”), Dr. Van der Veen has been responsible for the evaluation of all of the technical issues of the independent investigation concerning the measurements and related matters such as the application of procedural rules and implementation of

requirements. Mr. Paul Scholten has been responsible for providing the necessary administrative support.

30 A “Presumptive Analytical Finding” is identified as “The status of a Sample test result for which there is an adverse screening test, but a confirmation test has not been performed.”. WADA, “International Standard for Laboratories”, Version 4.0, August 2004, Lausanne, Switzerland, p. 11 [hereinafter ISL].

31 WADA, *World Anti-Doping Code*, Lausanne, Switzerland, 2003, “Definitions”, p. 72 [hereinafter WADC].

32 WADA, supra at 30. See also: WADA, Technical Document - TD2004EPO, “Harmonization of the method for identification of Epoetin alfa and beta (EPO) and Darbepoetin Alfa (NESP) by IEF-double blotting and chemiluminescent detection”, version 1.0, Montreal, Canada, October 15, 2004 (approved January 15, 2005).

33 Vrijman, supra at 16, § 4.58, p. 93.

34 At least not for doping control purposes. Vrijman, supra at 16, § 4.59 - 4.60, p. 93 - 94.

35 Vrijman, supra at 16, § 4.56, p. 91 - 92.

to documenting and reporting, as set out in the relevant laws and rules in this respect³⁶.

The LNDD should - under the aforementioned rules - have made a reservation in its research report with regard both to the (degree of) representativeness of the reported analyses results as well as to the traceability of these results to specific urine samples and, additionally, should have refrained from including in its research report any (additional) information which could possibly be used to link the reported analyses results with the identity of the rider(s) supposedly responsible for having submitted these urine samples at the time³⁷. Finally, the LNDD should have refrained from making any statements in the media which violate the "athlete's confidentiality" which it must necessarily respect in this matter³⁸.

If, on the other hand, the LNDD had stated in its research report that it:

- (i) when testing the urine samples from the 1999 Tour de France, had not used the mandatory analytical methods prescribed in this regard for WADA-accredited doping control laboratories, but instead had used an analytical method which was neither validated, nor approved by WADA and which differed considerably from the mandatory required analytical methods for *r-EPO*;
- (ii) was not able to provide the required "chain - of - custody" for any of the analysed urine samples, in the knowledge that several of these urine samples had previously been opened for other unknown research purposes; and
- (iii) had refrained from including in its report any (additional) information which could possibly be used to link the reported analyses results, on the one hand, with the identity of the rider(s) supposedly responsible for having submitted the urine samples concerned at the time, on the other;

the article in *L'Equipe* could not have been written and there would have been no grounds whatsoever for the commotion and speculation in this matter which have since arisen³⁹. By commenting in public on (various aspects of) this matter in its role as *WADA - laboratory*, however, the LNDD has not only violated the confidentiality in this matter which it was required to observe, but it has, moreover, further aggravated the existing misunderstandings surrounding its analysis of the urine samples from the 1999 Tour de France 1999 and hence caused a (further) increase in the public commotion⁴⁰.

3.4 The UCI's role

The investigators reject the suggestion that it was the UCI itself which, by handing over copies of the doping control forms pertaining to Lance Armstrong from the 1999 Tour de France to the journalist Ressiot, violated the "athlete's confidentiality" which all persons and bodies involved in this matter were required to respect⁴¹.

Firstly, at the time Ressiot submitted his request to the UCI, there was absolutely no question (yet) of a possible "doping affair" relating to Lance Armstrong, or the 1999 Tour de France. The UCI was therefore not acting in the capacity of responsible "Anti-Doping Organization" ("ADO"), as provided for in the applicable regulations⁴². The UCI did not know and could not reasonably have known that "athlete confidentiality" might be an issue for consideration when

it was confronted with Mr. Ressiot's request. Secondly and more importantly, the investigators believe that the copies of the aforementioned doping control forms provided by the UCI to Mr. Ressiot, while perhaps useful for the identification, were not material for identifying Armstrong as having been one of the riders supposedly responsible for having submitted one or more of the urine samples from the 1999 Tour de France which the LNDD alleges tested "positive"⁴³.

3.5 WADA's role

As regards the attitude and conduct of WADA, the investigators have come to the conclusion that the request made by WADA to the LNDD - that it should include in its research report not only the analyses results of each of the urine sample from the 1999 Tour de France, but also the code numbers present on the original glass bottles used to collect and store these urine samples when collected during the 1999 Tour de France - was the condition without which the relevant article in *L'Equipe* could never have been written, let alone that this affair could ever have arisen⁴⁴. The investigators are, furthermore, of the opinion that there was no reason whatsoever for WADA to make any such request to the LNDD and consider the justification(s) (subsequently) given by WADA to be implausible. The above considerations necessarily entail, in the investigators' opinion, that WADA officials should have refrained in this matter from (continually) making statements in the media which appeared to be intended to give weight to the accusations appearing in *L'Equipe* but which were, in actual fact, incorrect and, moreover, violated the "athlete's confidentiality" which they were required to respect in this matter⁴⁵.

3.6 Evaluation of the results of the investigation

In view of the above-mentioned findings, it will come as no surprise that the investigators reached the conclusion that there is no question, nor can there have been any question, that an anti-doping rule violation had occurred in this matter, and that the UCI is therefore recommended:

*"to refrain from initiating any disciplinary actions whatsoever regarding those riders alleged to have been responsible for causing one or more alleged "positive" findings, on the basis of the confidential reports of the LNDD "Recherche EPO Tour de France 1998" and "Recherche EPO Tour de France 1999", and to inform all of the riders involved that no action will be taken based on the research testing by the LNDD."*⁴⁶

IV. The "WADA Statement"

4.1 Structure of the WADA Statement

An initial consideration (of the contents) of the *WADA Statement* confirms the picture outlined above with respect to the criticism that has so far been expressed of the findings of the independent investigation in this matter. Eight (8) of the twelve (12) pages of this response are used to describe certain facts and procedural aspects of the research that was carried out which are considered relevant. WADA reserves no more than four (4) pages for its criticism of the substance of the research that was conducted, and it is worth noting that a substantial part of that criticism is expressed in such general terms that it cannot be linked (any longer) with concrete findings of the investigation.

³⁶ This relates, successively, to the following relevant legislation and regulations:

- WADA, supra at 16, Annex B, "Laboratory Code of Ethics";
- International Standard, "General requirements for the competence of testing and calibration laboratories, ISO/IEC 17025", 1999;
- World Medical Association ("WMA"), "World Medical Association Declaration of Helsinki, Ethical Principles for Medical Research Involving Human Subjects", Helsinki, June, 1964; and
- The "Code Civil", the French Civil Code.

See: Vrijman, supra at 16, § 4.66, p. 99 and § 4.72, p. 101.

³⁷ Vrijman, supra at 16, § 4.73, p. 101 - 102.

³⁸ Vrijman, supra at 16, § 4.86, p. 108.

³⁹ Vrijman, supra at 16, § 4.73, p. 101 - 102, § 4.83, p. 106.

⁴⁰ Vrijman, supra at 16, § 1.17, p. 17.

⁴¹ Vrijman, supra at 16, § 4.91, p. 111.

⁴² WADA, "Result Management Guidelines", version 1.0, February 2004, art. 1.1, p.7.

⁴³ Vrijman, supra at 16, § 4.92, p. 111 - 112.

⁴⁴ "According to Mr Ressiot, the manner in which the LNDD had structured the results table of its report - i.e. listing the

sequence of each of the batches, as well as the exact number of urine samples per batch, in the same (chronological) order as the stages of the 1999 Tour de France they were collected at - was already sufficient to allow him to determine the exact stage these urine samples referred to and subsequently the identity of the riders who were tested at that stage. While it is true that possession of these forms might have confirmed matters for Mr. Ressiot, to permit him to claim that that six (6) of Lance Armstrong's fifteen (15) urine samples were positive, the fact remains that

he did not necessarily need copies of the doping control forms of Lance Armstrong from the 1999 Tour de France to identify Lance Armstrong as having been one of the riders supposedly responsible for having submitted one (1) or more of the alleged positive urine samples." See: Vrijman, supra at 16, § 4.22 - 4.25, p. 65 - 67.

⁴⁴ Vrijman, supra at 16, § 4.95, p. 113.

⁴⁵ Vrijman, supra at 16, § 4.93, p. 112 - 113.

⁴⁶ Vrijman, supra at 16, § 1.15, p. 17.

4.2 WADA's criticism with regard to the findings of the investigation

4.2.1 Factual inaccuracies

The main charge which WADA levels at the investigators in this matter is that in their report the investigators wrongly created the impression that the LNDD should have conducted its research of the urine samples from the 1999 Tour de France in the same manner and using the same analytical procedures as it should have done when examining these urine samples for doping control purposes:

*"The process used by the French laboratory in conducting its research was not the process used for analyzing samples for the purpose of sanctions. Mr. Vrijman, at all times, confuses this fundamental difference and seems to indicate that, in conducting research, the laboratory was required to carry it out in the same manner as for analyzing samples for adverse analytical findings. This is not the case, and Mr. Vrijman, in directing himself to the rules relating to samples collected for analysis rather than understanding the difference for research, has totally misdirected himself in his inquiry."*⁴⁷

Additionally, WADA asserts that it is incorrectly suggested in the investigation report that WADA was not formed until 2003. "As any expert in anti-doping matters knows, WADA was formed in 1999. The Code, for which WADA is responsible, and its allied Standards, have been in place since 1 January 2004", states WADA in the aforementioned Statement⁴⁸.

Finally, WADA says in its Statement that it did not exercise any pressure on the LNDD in this matter and that there was no "leak" from WADA⁴⁹.

*"WADA solely advised the laboratory it would be interested in the findings, and disclosed this in the response WADA gave to Vrijman's questions. There was no other action taken by WADA in relation to the publication of the results of the research."*⁵⁰

4.2.2 Aspects which were wrongly not investigated

Furthermore, WADA is of the opinion that the investigators have wrongly neglected to include the following aspects relating to this matter in their investigation. For example, it states, the investigators neglected:

1. to establish in their report which rules and laws were applicable in 1999 at the time of the events which led to the research being conducted⁵¹; and
2. to inquire into why the UCI sought Armstrong's consent for the release of copies of all the doping control forms relating to him from the 1999 Tour de France as well as into why Armstrong gave his consent to this request⁵².

4.3 Response to WADA's criticisms

4.3.1 Factual inaccuracies

It would appear that WADA has not studied the *Vrijman report*, or at least not fully, before expressing its criticism in relation to it. Firstly, nowhere in their report do the investigators assert that the LNDD was obliged, when conducting its testing of the urine samples from the 1999 Tour de France, to use the same analytical methods and procedures which are mandatory when testing urine samples for doping control purposes. Additionally, the investigators have stated, with respect to the "accelerated measurement procedure" used by the LNDD, that this procedure does not satisfy the relevant requirements, including those relating to conducting of research, and that the reported analytical findings may therefore not be qualified as "analytical findings". This is not just because it concerns a non-validated analytical method, also the criteria the LNDD applied to declare a urine sample "positive" are unknown, and no information has been forwarded as to how these criteria might relate to those normally applied in case of mandatory prescribed analytical methods and procedures.

Additionally, the investigators have been requested explicitly in the "Letter of Authority" to establish:

"the manner in which the analyses of the aforementioned urine samples have been conducted by the LNDD, in particular with regard to compliance with any applicable procedures for WADA accredited laboratories regarding research on and the analysis of urine samples conducted for doping control purposes in general and for the Prohibited Substance EPO in particular";

and, moreover, to investigate the accusations that:

"a number of these urine samples should be regarded as constituting a so-called adverse analytical finding under applicable anti-doping rules of the UCI."

This means that the mandate is to establish not just the manner in which the LNDD conducted its "scientific research" of the urine samples concerned, but also how this "scientific research" and the results thereof relate to the manner in which these urine samples are normally analysed in WADA-accredited doping control laboratories. After all, according to the *WADA Code* and the *UCI Anti - Doping Rules*, there can only be an "Adverse Analytical Finding," or an "anti-doping rule violation" if the urine sample concerned has been analysed according to the mandatory prescribed analytical methods and procedures which are approved by WADA. This makes a comparison between the "accelerated measurement procedure" applied by the LNDD and the mandatory prescribed procedure for the analysis of urine samples for doping purposes unavoidable.

WADA fails to specify on what grounds it has come to the conclusion that it has been suggested in the investigation report that WADA was formed in 2003, and not in 1999. The investigators are in any event unaware of having made any such suggestion in their report. To the extent that this may nonetheless be the case, the investigators fail to see the relevance of this with regard to the correctness of their findings in this matter.

WADA asserts, finally, that it has not acted wrongfully in this matter and has not exercised inappropriate pressure on the LNDD to include (additional) information in its research report, let alone that it was responsible for any leak, and furthermore that it took no other action in relation to the publication of the results of the analysis.

Yet it was the LNDD itself which has stated that it was put under pressure by WADA during a period of almost six (6) months to include the aforementioned "additional information" in its research report, in spite of the fact that the information concerned was not necessary for a better understanding of the research that had been conducted, nor for the interpretation of the analyses results. In the absence of further cooperation and information, no evidence has been found for any leaks from WADA in relation to this matter. It remains nonetheless remarkable that the journalist Ressiot should state in an interview that one of reasons for focusing on Armstrong, while paying little or no attention to the six other riders who might also have submitted positive urine samples during the 1999 Tour de France, was the fact that Armstrong, as "patron of the peloton", "addressed WADA director Dick Pound sharply by writing an open letter which got published in a lot of newspapers."⁵³

Finally, it is incorrect that WADA took no further action in relation to the publication of the results of the research. It was WADA that, less than two days after the publication of Ressiot's article in *L'Equipe*, insisted that the UCI carry out an investigation and it was WADA that commented that the question of whether there might possibly be evidence for a doping violation in this matter should be an integral part of such an investigation, including the identification of the riders who at that time were involved with the use of *r-EPO*⁵⁴.

⁴⁷ WADA, *supra* at 12, p. 8-9.

⁴⁸ WADA, *supra* at 12, p. 10-11.

⁴⁹ WADA, *supra* at 12, p. 11.

⁵⁰ *Id.*

⁵¹ WADA, *supra* at 12, p. 10-11.

⁵² WADA, *supra* at 12, p. 9-10.

⁵³ Hedwig Kröner, *supra* at 17.

⁵⁴ Vrijman, *supra* at 16, § 2.4, p. 25-26.

4.3.2 Aspects which were wrongly not investigated

With regard to this part of its criticism, WADA has also manifestly failed to recognise certain issues. For example, the *Vrijman report* examines in detail the question of which regulations must be deemed relevant in this matter as regards the addressing of the various issues of law in this matter, including the question of who or which body must now be considered as the “owner” or “entitled party” with regard to the urine samples concerned⁵⁵. Perhaps this is the reason why WADA mistakenly designated the so-called “1999 Olympic Movement Anti-Doping Code” as leading in relation to this matter, whereas it is evident from the investigation report that this should be the “1999 IOC Medical Code” because the first code mistakenly referred to by WADA above, the so-called “1999 Olympic Movement Anti-Doping Code”, did not come into force until 1 January 2000.

WADA’s conclusion that the investigators neglected to inquire into why the UCI sought Armstrong’s consent for the release of copies of all the doping control forms relating to him from the 1999 Tour de France as well as into why Armstrong gave his consent to this request is incorrect. This is also the case with regard to the conclusion that there is allegedly evidence of a “serious factual and process deficiency, which cannot be remedied in any fashion” because the investigators are of the opinion that further investigation in relation to this aspect would not serve any purpose since the relevant article in *L’Equipe* could also be published without the relevant copies of the doping control forms of Lance Armstrong from the 1999 Tour de France.

The *Vrijman report* not only specifies in detail why Ressiot had requested the UCI to make the doping control forms of Lance Armstrong from the 1999 Tour de France available to him, but also how the UCI handled this request and the reason(s) for this. The investigators’ conclusion that the release by the UCI of copies of the aforementioned doping control forms to Ressiot must not be deemed material to the publication of the relevant article in *L’Equipe* because Ressiot would have been able to write the article concerned even without these copies follows from the comments on this matter which Ressiot himself made in an interview on September 7, 2005.

Q “How can you know that four of the positive samples in 1999 were taken after the prologue?”

A “When you read the results table of the laboratory, you see that the first series of samples that arrived in Châtenay-Malabry (the four flasks) bear one number that differs from the next number of presumably the first stage, where Lance’s sample also revealed traces of EPO. Therefore we can conclude this.”

Q “But the names of the four riders tested at the prologue 1999 are no secret?”

A “Yes, that is true. If you take the book *L.A. Confidential*, on page 202, the names of the riders that were tested after the prologue are listed. [Cycling news knows of at least one other source which would also reveal those rider’s names] But I don’t want to take the responsibility of publishing them because on the lab results table, there are very technical remarks added to one of the prologue samples, which also tested positive but where some sort of reservations were made by the lab director. So we decided not to publish those names, as we’d need the original 1999 protocols to identify which sample belonged to whom. But the concerns of the lab director weren’t directed at Armstrong’s sample.”⁵⁶

4.4 Conclusions with regard to the WADA Statement

It is evident, in view of the above, that WADA is unable to specify, let alone substantiate, the “holes” which it claims to have identified in the *Vrijman report*. Not a single point of the criticism levelled by WADA of the investigators’ conclusions as set out in the aforementioned report is factually correct, let alone correct at law.

At the same time, it is remarkable that WADA with respect to the main aspects in this matter - in spite of overwhelming evidence to the contrary - nonetheless continues to maintain in full its own interpretation of the facts. For example, WADA maintains, against better

judgement, that the research conducted by the LNDD satisfies all regulatory requirements and that the findings thus obtained are representative, even though the LNDD itself acknowledges that, with regard to the analysis of the urine samples as well as to the storage of such samples, it did not act in accordance with the relevant mandatory procedural requirements and analytical methods prescribed by WADA-accredited doping control laboratories. In spite of a statement from the LNDD to the contrary, WADA maintains that it did not exercise (inappropriate) pressure on the LNDD in this matter also to include in its research report, alongside the analytical findings, (additional) information for each of the urine samples analysed by it, for which, viewed objectively, there is moreover not a single reason, and the relevant statements issued in respect to this are not, or are barely, plausible. The continually repeated accusation that the UCI is itself responsible for the breach of confidentiality in this matter is a further example. WADA claims that no blame can therefore be attached to it in this matter. After all, “Without a breach of rule, there cannot be allegations of misbehavior or wrongdoings. There have not been any”⁵⁷.

That WADA understands very clearly that even without a breach of rule there can be evidence of wrongdoings is evident from the fact that WADA in its *Statement* fails to address in any way the investigators’ observation that its request to the LNDD - to also include (additional) information in the research report - was the condition in this matter without which the relevant article in *L’Equipe* could never have been written, let alone that this affair could ever have occurred. The existence of this recognition, but also the knowledge of having acted inappropriately in this manner, is perhaps most tellingly illustrated by the fact that there is not a single reference to the request concerned in the listing of relevant facts in the *Statement*.

The above might actually explain the absence of any response or reaction, let alone action, from the “International Olympic Committee” (“IOC”), (umbrella) “International Sports Federations” (“IFs”) and national authorities in relation to the findings of the independent investigators in this matter as set out in the aforementioned *Vrijman report*. After all, they were and still are, all “stakeholders” of WADA.

Postscript

However, on January 7, 2007, the IOC Executive Board decided to approve the conclusion and recommendation made by the IOC Ethics Commission concerning the complaint submitted on behalf of Lance Armstrong against WADA and Mr. Richard Pound of WADA and IOC member, which was founded essentially on the *Vrijman report*. According to the IOC Ethics Commission it appears from the press cutting attached to the complaint, that:

“Mr Richard Pound made personal statements which could have been regarded as likely to impugn the probity of an athlete, given the high profile of the sports personalities in question.

The Ethics Commission, like all the Olympic family members, can only approve of and support the unceasing fight against the scourge of doping conducted by Mr Richard Pound, WADA Chairman and IOC member.

Nonetheless, it recalls that, in accordance with the principle set out under point 4 of the Fundamental Principles of Olympism in the Olympic Charter, “the Olympic spirit which inspires the whole Olympic Movement, requires mutual understanding, a spirit of friendship, solidarity and fair play” within the Olympic Family. In this regard, a degree of prudence is indispensable out of respect for the Olympic Spirit. As a result, the Ethics Commission recommends the IOC Executive Board remind Mr Richard Pound of the obligation to exercise greater prudence consistent with the Olympic spirit when making public pronouncements that may affect the reputation of others.”

⁵⁵ *Vrijman*, supra at 16, § 4.47, p. 80-84.

⁵⁷ WADA, supra at 12, p. 10.

⁵⁶ Hedwig Kröner, supra at 17.

Appendix

International Olympic Committee Ethics Commission Decision with Recommendation No. D/01/07 Case No.-03/2006

Mr Lance Armstrong

v/

Richard Pound, IOC member and WADA Chairman,
and the World Anti-Doping Agency (WADA)

Referral:

On 3 July 2006, the Ethics Commission received a complaint from Mr Mark S. Levinstein, an American lawyer, on behalf of Mr Lance Armstrong jointly against Mr Richard Pound, IOC member and Chairman of the World Anti-Doping Agency (WADA), and against WADA itself. Attached to this complaint was a copy of the report on the “independent investigation - analysis samples from the 1999 Tour de France” by Mr Emile Vrijman, a lawyer in The Hague (NL), and the appeal submitted by Mr Levinstein before the IOC Executive Board on 20 June 2006, based on the conclusions of this investigation.

After the validity of the brief which Mr Armstrong had given to his lawyer was established, the parties concerned by the complaint, WADA and Mr Richard Pound, were informed by mail on 7 July 2006 that they had the possibility of submitting observations.

At the same time, the Ethics Commission was informed by the IOC President that the IOC Executive Board had proposed to Mr Armstrong, WADA and its Chairman, the French Laboratoire National de Dépistage du Dopage (LNDD) and the International Cycling Union (UCI), that they make use of the mediation procedure provided before the Court of Arbitration for Sport (CAS) to settle the dispute between them following the publication of a press article in the French newspaper *L'Equipe* on 23 August 2005.

The Ethics Commission members wished to allow the greatest possible scope for mediation to resolve the dispute.

In a letter dated 13 July, WADA asserted that, as an international organisation, it did not fall under the jurisdiction of the IOC Ethics Commission.

In a letter dated the same day, Mr Richard Pound asserted that, as he was involved as the Chairman of WADA, the jurisdiction of the Ethics Commission did not apply to him for the same reasons as those cited by WADA.

After being informed of the official decision regarding the impossibility of implementing the mediation procedure before the CAS, the Ethics Commission Chairman asked Mr Lance Armstrong to refer the case to the Commission once more.

Mr Armstrong confirmed his complaint by return of fax on 25 October 2006 in exactly the same terms as in the complaint filed on 3 July 2006. At his request, Mr Levinstein was allowed a period of time in which to submit any relevant document. On 27 November 2006, it was noted that no new document had been sent. On 9 January 2007, Mr Levinstein sent a copy of a press article dated 7 January 2007.

Mr Richard Pound's observations on these various documents were requested. But the latter did not react.

Facts:

The following facts emerge from the documents sent:

After two editions of the Tour de France cycling race in 1998 and 1999, the leftover samples from those tested as part of the anti-doping controls were preserved, with the agreement of the athletes, for scientific research purposes. The LNDD performed two studies for research purposes on these samples to improve the precision and reliability of the test results, particularly as regards the detection of EPO. The results of the first study (on the samples from 1998) were published in 2000 in the scientific journal *Nature*, without producing any reaction from the media or the athletes. The results of the second study (on the samples from 1999) were made public, not by a scientific publication,

but by a press article published in the French sports daily *L'Equipe* on 23 August 2005, under the title “le mensonge d'Armstrong” (“Armstrong's lie”), revealing that traces of EPO had been found six times in the urine of American cyclist Lance Armstrong, winner of the Tour in 1999.

After noting that the EPO detection tests carried out in December on the leftover samples were not intended to expose anyone cheating during the 1999 Tour, the author of the article explained that he had been able to compare the numbers of the samples taken from the rider Lance Armstrong, recorded on the doping control forms completed by the Tour doctor in 1999, and match these with the number of the samples tested as part of this scientific study, some of which the LNDD described as positive for EPO.

In the months which followed, the UCI tasked a Dutch lawyer, the former Director of the Dutch Anti-Doping Agency, with conducting an investigation. The report from this investigation did not succeed in proving how the journalist had been able to obtain the different information, even though it did wonder for what reason the additional information identifying the samples used had been included with the scientific report. It did however conclude that the research had been performed on a number of samples which had already been opened and analysed previously; that there had been no internal chain of storage; and that the identity and integrity of the samples was not guaranteed. As a result, the report recommended that the UCI take no disciplinary measures against the cyclists, and Mr Armstrong in particular, on the basis of the LNDD study results.

From all the press articles published after this affair, it appears that Mr Richard Pound made statements to the media which were likely to enable journalists to draw negative conclusions concerning the integrity of Mr Armstrong.

Opinion:

a) Regarding the World Anti-Doping Agency (WADA)

The Ethics Commission notes that, because of the International Convention Against Doping in Sport signed under the auspices of UNESCO in Paris on 19 October 2005 by the IOC and various States, WADA is a body with its own status and organisation, which provides *inter alia* for equal representation of the Olympic Movement and governments of States which are party to it, as well as equal responsibility for the funding of it. Consequently, this organisation falls outside the sole sphere of the Olympic Charter.

The IOC Ethics Commission recalls that its mission is to be found exclusively within the framework of the Olympic Charter and finds that it is not able to intervene to evaluate the conduct of an institution which is not bound by the application of Rule 23 of the Olympic Charter.

As a result, the Ethics Commission decides, pursuant to point B.5 of its Regulations, to declare itself to have no jurisdiction with regard to the complaint against WADA.

b) Regarding the personal activity of Mr Richard Pound, IOC member

With regard to Mr Richard Pound, IOC member, the Ethics Commission notes that he is an Olympic party as defined by the Code of Ethics and that, based on the application of the Code of Ethics by the IOC Session and Executive Board, IOC members in their personal activities must respect their obligations vis-à-vis the Olympic Charter and Code of Ethics at all times, including in their activities outside the IOC.

Mr Armstrong's complaint is founded essentially on the report of the “independent investigation - analysis samples from the 1999 Tour de France”. From reading the conclusions of this report, it is clear that there is no personal reproach, against Mr Richard Pound for his activity.

As a result, without having to assess the content of this report, the Ethics Commission may observe that its conclusions do not contain any incriminating element regarding the personal conduct of Mr Pound, IOC member.

However, from the press cuttings attached to the complaint, it appears that Mr Richard Pound made personal statements which

could have been regarded as likely to impugn the probity of an athlete, given the high profile of the sports personalities in question.

The Ethics Commission, like all the Olympic family members, can only approve of and support the unceasing fight against the scourge of doping conducted by Mr Richard Pound, WADA Chairman and IOC member.

Nonetheless, it recalls that, in accordance with the principle set out under point 4 of the Fundamental Principles of Olympism in the Olympic Charter, “the Olympic spirit, which inspires the whole Olympic Movement, requires mutual understanding, a spirit of friendship, solidarity and fair play” within the Olympic Family. In this regard, a degree of prudence is indispensable out of respect for the Olympic spirit.

As a result, the Ethics Commission recommends that the IOC Executive Board remind Mr Richard Pound of the obligation to exercise greater prudence consistent with the Olympic spirit when making public pronouncements that may affect the reputation of others.

Decision:

After deliberating in accordance with its Statutes, the Ethics Commission decides:

1. to declare itself to have no jurisdiction regarding the complaint made against the World Anti-Doping Agency;
2. to recommend that the IOC Executive Board remind Mr Richard Pound, IOC member, of the obligation to exercise greater prudence consistent with the Olympic spirit when making public pronouncements that may affect the reputation of others.

Done in Lausanne, 2nd February 2007

For the Chairman,
Pâquerette Girard Zappelli
Special Representative

