Arbitration CAS 2012/A/2760 International Cycling Federation (UCI) v. Jana Horakova & Czech Cycling Federation (CCF), award of 2 November 2012 (operative part of 27 June 2012)

Panel: Mr Hans Nater (Switzerland), President; Mr Lars Halgreen (Denmark); Mr Vit Horacek (Czech Republic)

Cycling
Doping (clenbuterol)
Enhancement of the performance with regards to non-specified substances
Duty of cooperation of the contesting party and burden of proof
Threshold requirement of showing how a prohibited substance entered the body
Utmost caution

1. **Clenbuterol is an anabolic agent. Since anabolic agents are not considered as specified substances, the issue to know whether the ingestion of the prohibited substance was aimed at enhancing the performance or not is irrelevant.**

2. **The duty of cooperation of the contesting party (the antidoping organisation or the international federation), in cases in which a party (the rider and/or the national federation) is faced with a difficulty in discharging its burden of proof, is fulfilled when it submits and substantiates two alternative routes as to how the prohibited substance could have entered the rider's system. However the contesting party does not have the burden of establishing that other alternative scenarios caused the adverse analytical finding, as the risk that the scenario of the party having the burden of proof cannot be ascertained remains with this party.**

3. **The requirement of showing how a prohibited substance got into one's system must be enforced quite strictly since, if the manner in which a substance entered an athlete's system is unknown or unclear, it is logically difficult to determine whether precautions have been taken in attempting to prevent such occurrence. The "threshold" requirement is to enable the tribunal to determine the issue of fault on the basis of fact and not mere speculation, in other words, not only the route of administration must be shown but the factual circumstances in which administration occurred must be proven. One hypothetical source of a positive test does not prove to the level of satisfaction required that such explanations are factually or scientifically probable.**

4. **The "utmost care" criterion has to be appraised based upon the diligence exercised when consuming nutritional supplements. The athlete does not demonstrate utmost care if he/she is unable to provide any documented evidence that he/she has requested specific information over the years – and not only a general statement after having been tested – from the companies that the nutritional supplements they are producing are free from any prohibited substance.**

I. FACTS

1. Parties

1.1 The Appellant, the International Cycling Union ("UCI"), is a non-governmental association of national cycling federations, recognized as the international federation governing the sport of cycling in all its forms. The UCI maintains its seat in Aigle, Switzerland.

1.2 The First Respondent, Jana Horakova, a Czech citizen, was born on 4 September 1983. Mrs Horakova is a cyclist of the women elite category with a license delivered by the Second Respondent, and specializes in BMX races.

1.3 The Second Respondent, the Czech Cycling Federation ("CCF"), is the national federation governing the sport of cycling in the Czech Republic and a member of the Appellant. The CCF maintains its seat in Praha, Czech Republic.

2. Facts of the case

2.1 The background facts stated herein are a summary of the main relevant facts. Additional facts will be set out where material, in connection with the discussion of the parties' factual and legal submissions.

2.2 From 29 August to 4 September 2011, the First Respondent competed at the 2011 UCI Mountain Bike and Trials World Championships held in Champéry, Switzerland ("the Event"), as a member of the Czech national team.

2.3 The Appellant conducted doping controls at the Event, in compliance with its Anti-Doping Rules ("UCI ADR").

2.4 On 2 September 2011, the First Respondent was requested by the Appellant to undergo a urine control.

2.5 The First Respondent confirmed on the doping control form that the samples had been taken in accordance with the applicable regulations, and declared on the form to have taken "Anticonception" and "Vitamin C" over the past seven days.

2.6 The sample collected was sent to the WADA-accredited Swiss Laboratory for Doping Analyses in Lausanne, Switzerland (the "Swiss Lab"), for analysis.

2.7 Prior to the Event, the First Respondent had already been tested on 27 August 2011 during the Czech National Track Championships. The sample collected, then analyzed by the WADA-accredited laboratory in Dresden, had proved negative.

2.8 On 29 September 2011, the Swiss Lab reported that the urine sample provided by the First Respondent at the Event revealed the presence of clenbuterol, a prohibited substance appearing

on the WADA 2011 Prohibited List under category S1(1)(2), other anabolic agents, with a concentration estimated at 84 pg/ml.

2.9 On 25 October 2011, the First Respondent was notified by the Appellant of the adverse analytical finding, namely that her "A Sample" had been tested positive, as well as of her provisional suspension from the date of the notification.

2.10 On 1 November 2011, the First Respondent requested the B Sample to be analyzed and requested to receive the documentation package of the A Sample. She, however, neither wished to be present at the opening and analysis of the B Sample, nor requested to have a representative appointed to that effect.

2.11 On 8 November 2011, the Swiss Lab confirmed the adverse analytical finding made in respect of the A Sample, with a concentration estimated at 50 pg/ml.

2.12 On 15 November 2011, the First Respondent was notified of the adverse analytical finding.

2.13 On the same day, the Appellant required the Second Respondent to initiate disciplinary proceedings against the First Respondent.

2.14 On 28 December 2011, a first hearing took place before the CFF Disciplinary Board ("Disciplinary Board") and was attended by the First Respondent and her counsel. The hearing was suspended based on the First Respondent's statement that she could provide further material evidence of her innocence.

2.15 On 20 January 2012, a second hearing took place, during which the First Respondent submitted a hair analysis carried out on 11 January 2012 by the WADA-accredited laboratory in Dresden which proved negative, as well as further explanations as to her dietary regime from her latest doping control that had been held from 27 August 2011 until the Event.

2.16 On the same day, the Disciplinary Board rendered its decision, according to which the First Respondent was acquitted, the provisional suspension imposed on her by the Appellant cancelled with immediate effect and the issuance of her international license Respondent for 2012 allowed. The Disciplinary Board nevertheless disqualified the First Respondent from the race held at the Event.

3. The Disciplinary Board's decision (20 January 2012)

3.1 In its decision, the Disciplinary Board held that:

"The rider, although the doping control discovered presence of prohibited substance in her body fluid, but only in the negligible amount of 0.05 nanograms/ml, she submitted to the Disciplinary Board documents and verbally proved that she has not caused presence of the prohibited substance in her body and this substance has not been presented in her body neither due to her negligence. The rider further pointed out that in 2011 she completed other 3 antidoping controls, of which the last one has taken place on 27.9.2011, all of them has been negative".

3.2 The Minutes of the hearing held on 20 January 2012 further point out that:

"The DB made the decision based on the negative result of the hair analysis carried out by the official accredited laboratory in Dresden (IDAS) on January 11, 2012, and on the technical impossibility to obtain an unambiguous evidence of the source of possible contamination of the commonly available food in the Czech Republic by the substance in question and also based on the fact that the current system of state control of commonly available food ingredients and food products does not guarantee citizens-consumers that the products have not been contaminated".

3.3 Based upon what precedes, the Disciplinary Board ruled in the sense described above under para. 2.17.

4. Procedure before the CAS

4.1 On 5 April 2012, the Appellant filed with the CAS its statement of appeal against the decision of the Disciplinary Board, in which it appointed Mr Lars Halgreen as its arbitrator.

4.2 On 11 April 2012, the CAS acknowledged receipt of the statement of appeal and notified it to both the Respondents, further inviting the Appellant to file its brief within ten days following expiry of the time limit for the appeal.

4.3 On 12 April 2012, the Appellant requested the deadline to file its brief to be extended until ten days after receipt of documents that the First Respondent's counsel had agreed to submit to it.

4.4 On 13 April 2012, the CAS acknowledged receipt of such request, notified it to both Respondents, and assumed that the First Respondent's counsel had no objection to such extension, and set a deadline by 18 April 2012 to the Second Respondent to respond to said request, absent of which the Appellant's request would be deemed granted.

4.5 On 13 April 2012, the Appellant informed the CAS that the First Respondent had agreed to an extension until 16 May 2012.

4.6 Acknowledging receipt of this letter, the CAS informed the parties that, absent any objection from the Second Respondent by 18 April 2012, the requested extension would be granted until 16 May 2012.

4.7 On 19 April 2012, having not heard from the Second Respondent, the requested extension was granted until 16 May 2012.

4.8 On the same day, the First Respondent informed the CAS of its decision to have Dr Vit Horacek appointed as her arbitrator.

4.9 On 23 April 2012, the CAS informed the parties that, since the Respondents had to jointly nominate their arbitrator, the arbitrator nominated by the First Respondent would be considered to be both Respondents' arbitrator absent any objection from the Second Respondent's within two days upon receipt of this communication.

4.10 On 26 April 2012, absent any objection from the Second Respondent, the CAS informed the parties that Dr Vit Horacek would be the Respondent's arbitrator in this case.

4.11 On 16 May 2012, the Appellant filed its appeal brief and its exhibits.

4.12 On 21 May 2012, the CAS notified the appeal brief and its exhibits to the Respondents, inviting them to submit their answer within twenty days from receipt of this communication.

4.13 On 24 May 2012, the Appellant filed two additional exhibits to its appeal brief. On the same day, both exhibits were transmitted by the CAS to the Respondents, inviting them to raise their potential objection on or before 30 May 2012, absent of which these additional exhibits would be taken to the file.

4.14 On 6 June 2012, the First Respondent filed her answer.

4.15 On 13 June 2012, the CAS acknowledged receipt of the First Respondent's answer, took note of the absence of any submission made by the Second Respondent, and invited the parties to inform the CAS Court Office by 20 June 2012 as to whether their preference would be for a hearing to be held or for the Panel to issue an award based on the parties' written submissions, adding that the final decision would in any case be taken by the Panel.

4.16 On 15 June 2012, the CAS informed the parties as to the composition of the Arbitral Panel.

4.17 On the same day, the First Respondent informed the CAS that her preference was for the Panel to issue an award based on the parties' written submissions. On 20 June 2012, the Appellant agreed as to having an award issued based on the parties' written submissions as well.

4.18 On 25 June 2012, the CAS informed the parties that the Panel was of the opinion that a hearing was not necessary and would therefore render an award relying on the parties' written submissions, absent any objection raised by the parties on or before 28 June 2012. On 26 and 27 June 2012, the parties informed the CAS that they had no objection to the absence of a hearing.

4.19 On 27 June 2012, the First Respondent informed the CAS of the urgency of the matter considering that final nomination to the Olympic Games had to be made the next morning, and invited the CAS to provide her with *"[…] any kind of information about possible decision till today afternoon"*.

4.20 On the same day, the CAS communicated the operative part of the award to the parties.

5. Outline of the parties' positions

5.1 The following summaries of the parties' positions are only roughly illustrative and do not purport to include every contention put forward by the parties. However, the Panel has carefully considered all of the arguments advanced by the parties, even if there is no specific reference to those arguments in the following outline of their positions.

A. The Appellant's position

5.2 The Appellant contests the decision that was rendered on 20 January 2012 by the Disciplinary Board and concludes in its brief for the Panel:

> *"1. To set aside the contested decision;*
>
> *2. To sanction Ms. Horakova with a period of ineligibility of two years starting on the date of the Panel's decision;*
>
> *3. To state that the period of provisional suspension from 27 October 2011 until 20 January 2012 shall be credited against the period of ineligibility;*
>
> *4. To disqualify Ms. Horakova from the 2011 UCI Moutain Bike and Trials World Championships and to disqualify any subsequent results;*
>
> *5. To condemn Ms. Horakova to pay to the UCI a fine amounting to CHF 1'500.-, without prejudice in case of eventual new evidence of Ms. Horakova's income from cycling;*
>
> *6. To condemn Ms. Horakova to pay to the UCI the cost of the results management by the UCI, i.e. CHF 2'500.-;*
>
> *7. To condemn Ms. Horakova to pay to the UCI the cost of the B-sample analysis, i.e. CHF 480.-;*
>
> *8. To condemn Ms. Horakova to pay to the UCI the cost of the A-sample laboratory documentation package, i.e. CHF 400.;*
>
> *9. To order Ms. Horakova and CFF to reimburse to the UCI the Court Office fee of CHF 1'000.-;*
>
> *10. To condemn Ms. Horakova and CFF jointly to pay to the UCI a contribution to the costs incurred by the UCI in connection with these proceedings, including experts' and attorneys' fees".*

In substance, the Appellant raises the following points:

a) Burden of proof

5.3 The Appellant argues that it has met its burden of proof by establishing through the adverse analytical findings of the A and B-samples that the First Respondent had committed an anti-doping rule violation, in compliance with Art. 21.1.2 UCI ADR.

5.4 Considering the fact that clenbuterol is not a substance for which a quantitative threshold would be specified in accordance with Art. 21.1.3 UCI ADR, the Appellant alleges that it was up to the First Respondent to ensure that no prohibited substance would enter her body as ruled by Art. 21.1.1 UCI ADR. As a result, it was up to the First Respondent to demonstrate either how the prohibited substance entered her system and that she bore no fault or negligence to that regard in accordance with Art. 296 UCI ADR to eliminate any sanction, or that she bore no significant fault or negligence in accordance with Art. 297 UCI ADR to mitigate such sanction.

5.5 The Appellant considers that the First Respondent did not satisfy her burden of proof. Considering that clenbuterol is not an endogenous substance, there is no doubt that such

substance was ingested by the First Respondent. Consequently, and in accordance with Art. 22 UCI ADR, it was up to the First Respondent to prove by a balance of probability how she ingested the prohibited substance. The First Respondent, however, only speculates that she ingested contaminated meat or milk which, in the Appellant's opinion, would be far from sufficient.

b) Ingestion of contaminated meat/milk

5.6 To try and demonstrate that she would have ingested contaminated meat or milk, the First Respondent merely enumerates her diet from 31 August to 2 September 2011, without providing any evidence which would enable to assess the origin of any meat ingested. Furthermore, even though the traceability of the relevant piece of meat would have been established by the First Respondent, the Appellant considers that the probability that the First Respondent ingested contaminated meat or milk is practically nil for the reasons described below.

5.7 The Appellant argues that, assuming that the contaminated meat would have been bought in France or in the Czech Republic as alleged by the First Respondent, the European Regulatory framework makes it highly improbable that contaminated meat could have been ingested by the First Respondent, as the use of clenbuterol for fattening animals is prohibited by the Directive 96/23/EC, that regular controls are being carried out so as to ensure the enforcement of the Directive and that non-compliant farmers bear the risks of heavy sanctions, up to six months of prison and the destruction of the whole incriminated stock of cattle.

5.8 According to the Appellant, this would be confirmed by empirical studies, which would demonstrate that contaminated samples are extremely rare within the European Union, including in the Czech Republic.

5.9 The Appellant further points out that the ingestion of contaminated meat to explain the presence of clenbuterol in the First Respondent's system is all the more unlikely that, according to Dr Olivier Paul Rabin, who testified in the Contador case where the rider presented a similar level of clenbuterol in his body as the First Respondent, the level presented would require the meat consumed to have been contaminated to a level ten times in excess of the minimum detection levels in the European Union, and to have been slaughtered immediately or shortly after the latest injection of the last dose of clenbuterol. Considering the controls in place and the sanctions resulting from non-compliance, the Appellant considers that it is highly unlikely that a farmer would risk his reputation and trade.

5.10 While the First Respondent speculates that, while purchased in the Czech Republic or in France, the allegedly contaminated meat could have originated from Mexico or China, the Appellant considers that such allegations prove unconvincing. Empirical studies demonstrate that, out of the imports of meat products in the Czech Republic from China, Spain, France and Mexico, only 0.03% would originate from China, respectively 0.0013% from Mexico. If one extends the data to all countries from which the Czech Republic imports meat, the figures would even be lower, with 0.002% from China and 0.000094% from Mexico, and without taking into account

the domestic production of livestock. The probability of purchasing meat coming from China or Mexico in France would even be lower.

5.11 Finally, the Appellant considers that the diet of the First Respondent between 31 August to 2 September 2011 fails to show how she could have ingested a concentration of 84 pg/ml in her A-sample, respectively 50 pg/ml in her B-sample, be it a schnitzel eaten more than two days before the sample taking, the pasta Bolognese eaten more than a day before the sample taking, the ham that would merely have served as a sandwich filling, the risotto with lever whose species is unknown, or even a couple of glasses of milk that make it impossible to ingest such a quantity of clenbuterol.

5.12 In conclusion, the Appellant considers that:

> *"- Ms. Horakova failed to identify one precise source of meat which could have led to the presence of the prohibited substance in the body;*
>
> *- The use of clenbuterol in farming is prohibited in France and Czech Republic by national and EU legislations and veterinary controls are strict and frequent in these countries;*
>
> *- The probability of purchasing meat from Mexico or China in France and Czech Republic is nearly null, let along the probability of such meat being contaminated with clenbuterol.*
>
> *- There are no known cases of clenbuterol contamination resulting from meat or milk sold in France or Republic Czech, […]".*

c) The possibility of intentional doping

5.13 The Appellant contends that one cannot exclude that the First Respondent would have intentionally ingested clenbuterol, and that such a route is more likely than an ingestion of contaminated meat. Dr Radomir Maracek, the First Respondent's expert, having pointed out that the First Respondent would have had "*signs of extreme burden on the muscles of lower limb*", the Appellant considers that the use of clenbuterol to recover and build strength is a plausible hypothesis. The fact that such ingestion may not have led *de facto* to a performance-enhancement as raised by the First Respondent would be completely irrelevant and does not preclude the application of a strict liability principle as foreseen under Art. 21 UCI ADR. Finally, the Appellant contends that the First Respondent's hair analysis undertaken by Dr Detlef Thieme does not exclude the possibility of occasional intake of subtherapeutic amounts or a single administration of clenbuterol between May and December 2011, thus including after the negative test of 27 August 2011.

d) The possibility of a contaminated food supplement

5.14 Finally, the Appellant submits that the presence of clenbuterol in the First Respondent's body may have been ingested with a contaminated food supplement, and that such an ingestion is more likely than the one of contaminated meat. The First Respondent indeed acknowledges to regularly use food supplements, which are well-known to potentially contain prohibited

substances whose presence may not be mentioned in the composition as stated by Art. 21.1.1 UCI ADR.

5.15 The Appellant argues that such a finding would be compatible with the hair analysis carried out by Dr Detlef Thieme mentioned above, as this finding does not exclude occasional intakes of subtherapeutic doses of clenbuterol, and that the presence of the prohibited substance in the First Respondent's body more likely results from the ingestion of a contaminated food supplement than from a meat contamination.

5.16 Considering that the risks associated with the use of nutritional complements have been known for years, the Appellant considers that the First Respondent's negligence cannot be qualified as insignificant under Art. 297 UCI ADR.

e) Conclusion

5.17 In conclusion, the Appellant considers that the possibility that the ingestion of contaminated meat was at the origin of the presence of clenbuterol in the First Respondent's urine is practically nil. The likelihood of this possibility is smaller than the likelihood of any of the other possibilities raised above, *i.e.* intentional doping and/or ingestion of a contaminated food supplement. Even if the CAS was to accept that meat contamination is the most likely possibility, the Appellant adds that the First Respondent still fails in establishing that meat contamination is more likely to have happened than not to have happened. As a result, the First Respondent did not establish by a balance of probability how the prohibited substance entered her system and, consequently, does not show that she bears no fault or negligence, respectively no significant fault or negligence.

B. The First Respondent's position

a) Lack of jurisdiction

5.18 The First Respondent first objects that the appeal was not filed in due time.

5.19 She further alleges that the appeal should in any case have no effect upon her possibility to compete until a final award has been rendered by the CAS, since Art. 343 UCI ADR provides that *"an appeal to the CAS shall not suspend the execution of the contested decision, without prejudice to the right to apply for the CAS for it to be suspended"*.

5.20 The First Respondent finally requests the withdrawal of the following exhibits from the file since they are not written in English, the language of the proceedings: 16, 30, 33, 42 and 54 as well as pages 9, 17, 19, 24, 25, 26, 32, 33, 38 and 39 of exhibit 14 and the last two pages of exhibit 18.

b) Intentional doping

5.21 The First Respondent argues that she would have had to ingest clenbuterol more than once and in more than therapeutic dosage, had she had the intent to use it to grow her muscles or burn fat. As recognized by the Appellant itself – according to the First Respondent –, the hair analysis carried out by Dr Thieme would have excluded such an ingestion, an opinion that would also have been confirmed by Dr Patricia Anielsky, an expert at the Institut für Dopinganalytik und Sportbiochemie in Dresden.

5.22 The First Respondent then asserts that the ingestion of a prohibited substance at an event, namely the 2011 UCI Mountain Bike and Trials World Championships that was secondary for her, would make no sense as her favorite discipline and focus is BMX. As the hair analysis would exclude any potential impact on a future BMX contest, a deliberate ingestion to enhance her performance at an event that had no importance for her would be absurd.

5.23 Since a single use or therapeutic ingestion of clenbuterol as evidenced by the hair analysis would not have enabled the First Respondent to enhance her performance in any case, this would be further clear evidence that she did not ingest clenbuterol intentionally. The First Respondent considers that her situation cannot be compared with the one of CAS 2011/A/2384 and CAS 2011/A/2386, whose body contained other prohibited substances, all the more than male and female bodies would react differently to the ingestion of clenbuterol.

5.24 The First Respondent repeats that she has been tested several times in her career, and has never experienced an adverse analytical finding. Considering that the First Respondent got tested negative on 21 March 2011, 29 July 2011 and 27 August 2011, the short intervals between the tests would confirm that clenbuterol was not present in her body in the long term, not even a few days before the adverse analytical finding. This would be consistent with an accidental ingestion.

c) Nutritional supplement contamination

5.25 While the First Respondent acknowledges to use food supplements, she asserts to only do it on an irregular basis, from very reliable producers, and that such use did never lead to an adverse analytical finding in the past.

5.26 The First Respondent contends that she always is very careful in selecting her food supplements from trustful companies and by making sure that these are used by other athletes. She would provide these supplements herself directly from their business locations and after having obtained a confirmation that these products are free from any prohibited substance.

5.27 The companies she would get these products from, Nutrend D.S. and Kompava, two major producers in this field, have various certificates for quality products and would be used by numerous athletes. The First Respondent points out that she would not have used food supplements from Nutriproduct in year 2011 and would only have been sponsored in year 2010 by that company.

5.28 What precedes would at least make it clear according to the First Respondent that she had no significant fault or negligence, and not even a fault or negligence at all. She argues that food contamination is more likely than the two hypotheses raised by the Appellant, be it intentional doping or contamination through nutritional supplements.

d) Meat/milk contamination

5.29 The First Respondent argues that the Panel should not only focus on empirical studies, which would end up in unfair results without any connection with the "real" life. She further contests that the figures would correctly reflect the real image of food quality in Europe, more particularly in middle Europe, all the more than far less than 1% of the livestock production would actually be tested.

5.30 These figures would not take into account the gray market either, a market that would be particularly significant in the Czech Republic as to imports from Poland. The First Respondent further contends that to monitor the origin of the food on the market would be all the more difficult as the origin of the products is not mentioned on packaging in the Czech Republic.

5.31 The First Respondent adds that these difficulties to control imported products and their origin would also likely exist in France and in Switzerland, so that contaminated meat in these countries cannot be excluded either.

5.32 The First Respondent rejects the opinion of Dr Olivier Paul Rabin raised by the Appellant in its brief, and considers such opinion not to be based upon scientific research and to amount to mere speculations. His opinion would further have been delivered with regards to a male metabolism that differs from a female one.

e) Sample testing

5.33 The First Respondent finally asserts that the difference of more than 40% between the A and the B-sample may also indicate that a false handling of one of the samples took place.

f) Conclusion

5.34 Based upon what precedes, the First Respondent finally concludes that the appeal filed by the Appellant should be dismissed and that the Panel should base its decision upon principles of sport and fair play that are at the root of the anti-doping rules, since she has no realistic way to prove an incidental ingestion of a prohibited substance.

II. LAW

1. Jurisdiction

1.1 The jurisdiction of the CAS to act as an appeal body is based on Art. R47 of the CAS Code of Sports-related Arbitration in the version in force as of January 2012 ("the CAS Code") which provides that:

"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".

1.2 According to Art. 329.1 UCI ADR:

"The following decisions may be appealed to the Court of Arbitration for Sport: 1. a decision of the hearing body of the National Federation under Article 272".

In the present case, the decision of 20 January 2012 was rendered by the CFF Disciplinary Board, which is the hearing panel having jurisdiction under the rules of the Second Respondent, in accordance with Art. 256 UCI ADR.

1.3 In accordance with Art. 330 let. c UCI ADR:

"In cases under article 329.1 to 329.7, the following parties shall have the right to appeal to the CAS: […] c) The UCI".

1.4 As a result, the CAS has jurisdiction in compliance with the aforementioned provisions.

2. Admissibility of the appeal

2.1 The First Respondent submits that the appeal launched by the Appellant would be inadmissible as it would not have been filed to the CAS within one month of receipt of the complete file. This argument proves to be wrong and has to be rejected.

2.2 Art. R49 of the CAS Code provides that:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".

2.3 According to Art. 334 UCI ADR:

"The statement of appeal by the UCI […] must be submitted to the CAS within 1 (one) month of receipt of the full case file from the hearing body of the National Federation in cases under article 329.1 […]. Failure to respect this time limit shall result in the appeal being disbarred. Should the appellant not request the file within

15 (fifteen) days of receiving the full decision as specified in article 277 or the decision by the UCI, the time limit for appeals shall be 1 (one) month from the receipt of that decision".

2.4 The decision of the Disciplinary Body was issued on 20 January 2012 and notified to the Appellant on the same day by email. On 30 January 2012, *i.e.* within fifteen days upon receipt of the decision in accordance with Art. 334 UCI ADR, the Appellant requested the Second Respondent to provide the Appellant with the complete file of the case, which was sent on 1 March 2012, but received by the Appellant on 5 March 2012.

2.5 The Appellant filed its statement of appeal on 5 April 2012. As stated in the commented section of Art. 333 UCI ADR:

"within one month shall mean from such-and-such day of the month until such-and-such day of the following month, regardless of the number of days in a calendar month. For example, if the decision was received on 15 January, the last day of the term of appeal is 15 February […]".

2.6 Considering that the complete file was received by the Appellant on 5 March 2012, and that its appeal was filed on 5 April 2012, the appeal was filed on due time and is therefore admissible.

3. Applicable law

3.1 Art. R58 of the CAS Code provides that:

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

3.2 Art. 1 UCI ADR provides that *"These Anti-Doping Rules shall apply to all License-Holders".* Furthermore, pursuant to Art. 2 UCI ADR: *"Riders participating in International Events shall be subject to In-Competition Testing under these Anti-Doping Rules".*

3.3 The UCI ADR in the version that was in force in 2011 shall be applicable to the present case as the First Respondent was tested on 2 September 2011.

3.4 Art. 345 UCI ADR provides that *"[T]he CAS shall have full power to review the facts and the law. […]",* a provision that echoes Art. R57 of the CAS Code, according to which *"[T]he Panel shall have full power to review the facts and the law. […]".*

3.5 Art. 345 UCI ADR provides that:

"[T]he CAS shall decide the dispute according to these Anti-Doping Rules and for the rest according to Swiss Law".

3.6 It follows that the dispute will be decided according to the UCI ADR and additionally Swiss Law.

4. Procedural defense

4.1 Prior to turning to the merits, the Panel has to address the procedural issues raised by the First Respondent related to her provisional suspension that followed the adverse analytical finding of the A-Sample and the request for the withdrawal of certain exhibits.

4.2 The First Respondent argues that the appeal should not have had any effect on her possibility to compete, as Art. 343 UCI ADR provides that *"an appeal to the CAS shall not suspend the execution of the contested decision, without prejudice to the right to apply to the CAS for it to be suspended"*.

4.3 The reading made by the First Respondent of Art. 343 UCI ADR is correct. In accordance with Art. 235 UCI ADR, *"[I]f analysis of an A Sample has resulted in an Adverse Analytical Finding for a Prohibited Substance […], the Rider shall be Provisionally Suspended pending the hearing panel's determination of whether he has committed an anti-doping rule violation"*. In the present case, such suspension was notified to the First Respondent on 25 October 2011 after the A-Sample has been tested positive (see *supra* para. 2.9). On 20 January 2012, the Disciplinary Board rendered its decision, according to which the First Respondent was acquitted, the provisional suspension imposed on her by the Appellant cancelled with immediate effect and the issuance of her international license Respondent for 2012 allowed.

4.4 As a result, and in accordance with the above mentioned provisions, the First Respondent was suspended until 20 January 2012, but subsequently free to compete until 27 June 2012, when the operative part of the Award was notified to the Parties.

4.5 The Panel further considers that with the parties' consent to issue an award based on their written submissions, the First Respondent's request for the withdrawal of certain exhibits not written in English from the file became obsolete and does not need to be addressed (cf. para. 5.20, 4.17/4.18).

5. Merits

5.1 The main issues to be resolved by the Panel are:

A. Has there been an adverse analytical finding with respect to the First Respondent's urine sample?

B. If a doping offence has been committed, can the First Respondent prove, considering the required standard of evidence, how the prohibited substance entered her system?

C. If the First Respondent can meet the relevant requirements of evidence of the prior question, was she acting with no fault or negligence or with no significant fault or negligence?

A. Adverse analytical finding

(i) Applicable provisions

5.2 According to Art. 21 UCI ADR, entitled "*Anti-doping rule violations*":

"The following constitute anti-doping rule violations:

1. The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen.

1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enter his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping violation under article 21.1.

[…]

1.2 Sufficient proof of an anti-doping rule violation under article 21.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample.

1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample constitute an anti-doping violation".

5.3 As to Prohibited Substances, Art. 29 UCI ADR states that:

"These Anti-Doping Rules incorporate the Prohibited List which is published and revised by WADA as described in article 4.1 of the Code".

5.4 As to the burden of proof, Art. 22 UCI ADR provides that:

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

5.5 Art. 23 and 24 UCI ADR further add that:

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

24. WADA-accredited laboratories or as otherwise approved by WADA are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The License-Holder may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding".

(ii) Present case

5.6 In the present case, the Appellant has met its burden of proof as foreseen under Art. 22 UCI ADR. The Swiss Lab has reported an adverse analytical finding for clenbuterol, classified in the World Anti-Doping Agency 2011 Prohibited List under section S1(1)(2) (other anabolic agents), for both the A and B Samples. Sufficient proof of an anti-doping rule violation under Art. 21.1 UCI ADR has thus been established by the Appellant, in compliance with Art. 21.1.2 UCI ADR.

5.7 While pointing out that this is not her main defense, the First Respondent, however, alleges that the differences of levels of clenbuterol within her body, i.e. at 84 pg/ml for the A-Sample, respectively 50 pg/ml for the B-Sample, would indicate *"[…] minimally a false handling of one of the samples or other possible problems during transportation and analyzing of the samples"*. These allegations, however, amount to mere speculations without any substantiated evidence to support them.

5.8 As stated by Art. 23 UCI ADR, WADA-accredited laboratories are presumed to have conducted sample analysis in accordance with the International Standard for Laboratories. Should a rider consider otherwise, it is up to the rider to *"[…] rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding"*. In the present case, it is not disputed that the Swiss Lab is a WADA-accredited laboratory. The First Respondent does not allege that the Swiss Lab would have departed from these International Standard for Laboratories; far from that, the First Respondent confirmed through her signature on the doping control form that the samples had been taken in accordance with the applicable regulations. In other words, considering that the First Respondent did not rebut the presumption of Art. 23 UCI ADR, that she duly signed the doping control form and that both samples evidenced the presence of clenbuterol in her system, a substance which is not subject to any quantitative threshold to constitute an anti-doping violation in any case, the speculations raised by the First Respondent are of no avail and have to be rejected.

(iii) Conclusion

5.9 As a result, the Panel holds that the First Respondent has committed an anti-doping rule violation, in compliance with Art. 21.1 UCI ADR. Consequently, the following sanctions are applicable:

5.10 According to Art. 288 UCI ADR:

"Automatic Disqualification of Individual Results

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

5.11 Art. 293 UCI ADR adds that:

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

The period of Ineligibility imposed for a first anti-doping rule violation under article 21.1 […] shall be 2 (two) years' Ineligibility, unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 […] are met".

5.12 As a result, it remains to be seen whether the First Respondent has been able to demonstrate, on a balance of probability as foreseen under Art. 22 UCI ADR, that one of the circumstances described under articles 295 to 297 UCI ADR may apply to the present case.

(iv) Means of defense

5.13 According to Art. 295 UCI ADR:

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

Where a Rider or Rider Support Personnel can establish how a Specified Substance entered his body or came into his Possession and that such Specified Substance was not intended to enhance the Rider's performance or mask the use of a performance-enhancing substance, the period of Ineligibility for a first violation found in article 293 shall be replaced with the following: at a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.

To justify any elimination or reduction, the License-Holder must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing body the absence of an intent to enhance sport performance or mask the use of a performance-enhancing substance".

5.14 The Panel, however, has no hesitation to rule out the application of this provision to the present case. Art. 295 UCI ADR does not relate to "Prohibited Substances", but to "Specified Substances".

5.15 According to Art. 32 UCI ADR:

"For purposes of the application of Chapter VIII (Provisional Suspension and provisional measures) and Chapter X (Sanctions and Consequences), all Prohibited Substances shall be "Specified Substances" except (a) substances in the classes of anabolic agents and hormones and (b) those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Prohibited Methods shall not be Specified Substances".

5.16 In the present case, the First Respondent has been convicted with an adverse analytical finding for clenbuterol. These substances are classified in the World Anti-Doping Agency 2011 Prohibited List under section S1(1)(2) (other anabolic agents). Considering that anabolic agents are not considered "Specified Substances" within the meaning of Art. 32 UCI ADR, Art. 295 UCI ADR cannot apply to the present case. As a result, the issue raised by the First Respondent to know whether the ingestion of the prohibited substance was aimed at enhancing her performance or not is irrelevant, as this issue only proves relevant with regards to Art. 295 UCI ADR, at the exclusion of Art. 296 and 297 UCI ADR.

5.17 The Panel shall therefore focus its analysis upon Art. 296 and 297 UCI ADR and treat them in parallel.

5.18 These provisions read as follows:

"Elimination or Reduction of Period of Ineligibility for Based on Exceptional Circumstances

296. No Fault or Negligence.

If the Rider establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of a Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under articles 306 to 312.

297. No significant Fault or Negligence.

If a License-Holder establishes in an individual case that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 (eight) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Rider's Sample as referred to in article 21.1 (presence of Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced".

5.19 To prevail under Art. 296 or 297 UCI ADR, the First Respondent must first (i) establish how the Prohibited Substance entered her system, and then (ii) demonstrate that she bears No Fault or Negligence, respectively No Significant Fault or Negligence. The Panel shall therefore now turn to its second and third questions as described above (see *supra* at para. 5.1).

B. Accidental Ingestion

a) The strict liability principle

5.20 Prior to analyzing whether the Respondents have managed to establish on a balance of probability how the prohibited substance entered the First Respondent's system, the Panel considers it worth pointing out that, unlike what the First Respondent asserts, it is to be kept in mind that anti-doping violations are submitted to the rule of strict liability. Under the strict liability principle, a rider is responsible, and an anti-doping violation occurs, whenever a Prohibited Substance is found in a rider's sample. From the strict liability principle follows that, once the Appellant has established that an anti-doping rule violation has occurred, it is up to the rider to demonstrate that the requirements foreseen under Art. 296 or 297 UCI ADR are met.

5.21 In the present case, the Panel finds that the Appellant has not only established that an anti-doping rule violation had occurred (see *infra* paras 5.6 *et seq.*), but also fully fulfilled its obligation of cooperation by submitting and substantiating two alternative routes as to how the prohibited

substance could have enter the First Respondent's system, *i.e.* either through intentional doping or contaminated nutrition supplement, in spite of the fact that the Appellant does not have the burden of establishing that other alternative scenarios caused the adverse analytical finding, since the risk that the Respondents' scenario could not be ascertained, remains with them (CAS 2011/A/2384 & 2386, 6 February 2012, paras 262 and 263).

5.22 The Appellant having evidenced that an anti-doping rule violation had occurred, the burden of proof shifts to the Respondents, in accordance with Art. 22 UCI ADR, which provides that: *"[…] where these Anti-Doping Rules place the burden of proof upon the License-Holder alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability […]"*. In CAS 2007/1370 & 1376, 11 September 2008, the Tribunal held on that regard that *"according to the CAS jurisprudence, the balance of probability standard means that the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence"*.

5.23 The Panel will therefore have to appraise whether, in view of all of the parties' submissions and evidence, (i) the ingestion of contaminated meat by the First Respondent was possible and (ii) whether such contamination was, on a balance of probability, the more likely source of ingestion of the prohibited substance out of the three suggested scenarios. As argued by the Panel in CAS 2011/A/2384 & 2386, *"[…] it is only if the theory put forward by the Athlete is deemed the most likely to have occurred among several scenarios, or if it is the only possible scenario, that the Athlete shall be considered to have established, on a balance of probability how the substance entered into his system, since in such situations the scenario he is invoking will have met the necessary 51% chance of it having occurred"*.

b) The present case

5.24 The First Respondent argues that such an ingestion must have occurred through contaminated meat, which may have had its origin in China or Mexico. In her opinion, such a contamination would be possible due to the fact that, in spite of any figure to the contrary, the gray market of livestock production would be quite significant in the Czech Republic, particularly from Poland, and impossible to detect as the origin of the meat is not mentioned on packaging in the Czech Republic. Having regularly eaten meat in her diet between 31 August and 2 September 2011 that she would have taken with her from the Czech Republic, the First Respondent assumes that the substance must have been ingested in her system through such contaminated meat. Such a contamination would be consistent with her hair analysis, whose result would demonstrate a unique or subtherapeutic intake.

5.25 The Panel is not satisfied with the First Respondent's explanations. The mere assumptions raised by the First Respondent as to how the substance would have entered her system prove unconvincing. In spite of the First Respondent's assertion that *"[…] In this case UCI is presuming, if I am a professional athlete, then I should also be chemist, biologist and so on. UCI is also presuming that if I want to prove my fairness, then I have to keep the samples of everything I ingest, because if incidentally I ingest a prohibited substance I have no other way to prove it. This is not just absurd, this is also unrealizable"*, such a line of arguments is unpersuasive.

5.26 The CAS has constantly repeated that the requirement of showing how the prohibited substance got into one's system must be enforced quite strictly since, if the manner in which a substance entered an athlete's system is unknown or unclear, it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent such occurrence (CAS 2007/A/1399, 17 July 2008). Consequently, the Tribunal made it clear in CAS 2006/A/1140 that the "threshold" requirement of showing how the substance entered the player's system was to enable the Tribunal to determine the issue of fault on the basis of fact and not mere speculation. In other words, the threshold requirement of proof of how the substance got into the system *"meant not only that the player must show the route of administration – in this case probably oral ingestion – but that he must be able to prove the factual circumstances in which administration occurred"* (CAS 2006/A/1140, 4 January 2007).

5.27 In the present case, the First Respondent's explanations only amount to a speculative guess or explanations uncorroborated in any manner. One hypothetical source of a positive test does not prove to the level of satisfaction required that such explanations are factually or scientifically probable. The First Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. In line with the CAS jurisprudence (see for instance CAS 2006/A/1067, 13 October 2006), the Panel is of the opinion that, unfortunately, apart from her own words, and unlike others cases where the athlete has managed such burden of proof (see, for instance: CAS 2006/A/1025, 12 July 2006; CAS 2009/A/1296, 17 December 2009), the First Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of the Prohibited Substance would have occurred.

5.28 While the First Respondent considers that *"[…] it is not possible to focus just on the statistic numbers, because considering just statistics will end up in unfair result without connection to real life"*, the Panel nevertheless considers that empirical studies certainly are a way among others to try and demonstrate whether the alleged ingestion through contaminated meat is plausible or not, when such studies are conducted in a scientific way. Such is the case here. These figures tend to show that only 0.002% of the meat sold in the Czech Republic where the First Respondent alleges to have bought her meat comes from China, respectively 0.000094% from Mexico, two countries where meat contaminated by clenbuterol has undoubtedly been found in the past.

5.29 True, not all livestock production sold in the Czech Republic is tested; however, absent any convincing rebuttal of the methodology used to conduct such empirical studies, the Panel has no reason to doubt the validity of the sample selected. Considering the very limited amount of livestock production imported from China or Mexico in the European Union, the Panel finds it highly unlikely that the meat consumed by the First Respondent might have come from any of these countries.

5.30 True again, these studies do not take into account Poland, where arguably significant amounts of meat are imported from the gray market into the Czech Republic. The First Respondent does, however, not establish that any piece of meat she ate might have come from Poland on a balance of probability and that, assuming such evidence would have been brought which is not the case, such piece of meat might have been contaminated on a balance of probability. While the First Respondent argues that *"[L]ately was Poland dealing with many problems with food quality, like technical salt in food products, formic acid in pickles and sauerkraft, dangerous bacteria in rotten eggs, lead in*

rice and many more", there is no scientific evidence that such meat could have been contaminated by clenbuterol, and no factual circumstance that could lead the Panel believe on a balance on probability that the First Respondent might have bought and consumed meat contaminated by clenbuterol coming from Poland. The same holds true for any meat that might have been purchased in France or Switzerland.

5.31 The First Respondent also contests the findings of Dr Olivier Paul Rabin who testified in CAS 2011/A/2384 & 2386, a dispute where the rider presented an even smaller similar level of clenbuterol in his body as the First Respondent. According to Dr Rabin, the level presented would require the meat consumed to have been contaminated to a level ten times in excess of the minimum detection levels in the European Union, and to have been slaughtered immediately or shortly after the latest injection of the last dose of clenbuterol. The First Respondent asserts that *"[I]t is only an opinion based on speculations how the metabolism can work. The opinion is not based on any test or scientific research. Even that Dr Olivier Paul Rabin can be a very elite specialist (I do not know his specialization), he did not count with differences of different metabolisms and also this statement is done for a male body, that have quite a different metabolism than a female body"*. Such arguments prove unconvincing. The First Respondent first has to be remembered that it is not up to the Appellant to prove that an ingestion by contaminated meat is impossible, but rather for the First Respondent to demonstrate that such a contamination is, on a balance of probability, the most likely way the Prohibited Substance got ingested. Second, the First Respondent also has to bear in mind that the expertise provided by Dr Rabin was supported by Boehringer Ingelheim which had conducted a study related to the intravenous infusion of clenbuterol, and which concluded that *"[…] the calculations contained in the report of Dr Rabin are compatible with the scientific information published on clenbuterol's pharmacokinetics by our company as well as with the unpublished data generated by our company as a developer and manufacturer of this substance"* (CAS 2011/A/2384 & 2386, at para. 413). While the First Respondent's assertions that the male and female metabolism may react differently may be true, such assertions are once again mere speculations uncorroborated by any scientific evidence. Such evidence would also need to explain how such a level of clenbuterol can be found in a female body considering the First Respondent's diet. Truth, however, is that such evidence is non-existent in this case, and that the First Respondent only relies upon mere assertions. As a result, the criticisms raised by the First Respondent as to Dr Olivier Paul Rabin's expertise have to be disregarded.

5.32 Ultimately, the First Respondent argues that the hair analysis carried out in January 2012 would clearly demonstrate that her ingestion of the prohibited substance would have been unique or prove only subtherapeutic intakes. Without putting it under scrutiny, the Panel considers that this question might have been relevant with regards to Art. 295 UCI ADR and potentially play a role as to know whether such substance was ingested to enhance performance or not, a factor to be taken into account under Art. 295 UCI ADR. Considering, however, that this provision does not apply in the present case (see *supra* at paras 5.13 *et seq.*), this argument bears no role with regards to the potential application of Art. 296 or 297 UCI ADR. The First Respondent has to be reminded of the fact that clenbuterol is a prohibited substance which is not submitted to any quantitative threshold according to Art. 21.1.3 UCI ADR. Accordingly, its mere presence in one's system suffices to constitute an anti-doping rule violation, and the question to know whether its intake aimed at enhancing the athlete's performance or not is irrelevant. The First Respondent's arguments thus have to be disregarded.

5.33 As a result, the Panel finds that the First Respondent's explanations lack in corroborating evidence and prove unsatisfactory, thereby failing the balance of probability test. The Panel's opinion is in line with CAS 2009/A/1805 & 1847, which states at paras 87 and 88:

> *"The mere assertion that the low concentration of clenbuterol found could potentially have been caused by the ingestion of contaminated meat is inadequate. Without any scientific or factual evidence to back up the chain that in this instance the source of clenbuterol was contaminated meat eaten by the Athlete, she was unable to discharge the onus on her on the balance of probabilities and it was not open to the RFEA to hold her blameless.*
>
> *The decision of the RFEA Committee showed that the Athlete was not able to establish the origin of the finding of clenbuterol in her Stuttgart samples. There is no provision in the rules which enables an athlete to escape from the burden of proof in this regard merely by asserting that he or she has eaten in many different places and is therefore unable to determine whether the clenbuterol entered his or her body".*

5.34 Similarly here, the Panel is not persuaded that the occurrence of the alleged ingestion of the prohibited substance through contaminated meat is more probable than its non-occurrence, and certainly no less than ingestion in particular through contaminated nutritional supplement, an ingestion that had been considered the most plausible scenario in CAS 2011/A/2384 & 2386, at para. 487. The First Respondent has therefore failed on the first hurdle, so that the exceptional circumstances foreseen under Art. 296 and 297 UCI ADR have not been established at the Panel's satisfaction.

C. Absence of Fault or Negligence

5.35 Should the Panel have ruled differently and considered that the First Respondent had proved, on a balance of probability, how the Prohibited Substance had entered her system, in particular through ingestion by nutritional supplements, the result would be no different. The First Respondent has in any case failed on the second hurdle, i.e. to establish that such ingestion occurred without any (Significant) Fault or Negligence.

5.36 It is to be remembered that, according to Art. 21.1.1 UCI ADR, *"it is each Athlete's personal duty to ensure that no Prohibited Substance enter his or her body"*. In other words, Athletes are responsible for what they ingest. Once again, taking into account the strict liability principle resulting therefrom, the CAS has ruled in CAS 2006/A/1025, 12 July 2006, that, *"in order to establish No Fault or Negligence, [the Athlete] must prove that he did not know or suspect, and could not reasonably have known or suspected, even with the exercise of utmost care, that he had used or been administered with the prohibited substance".*

5.37 Such "utmost care" has obviously not been exercised in the present case. While the First Respondent tries to argue that *"[I]n this case UCI is presuming, if I am a professional athlete, then I should also be chemist, biologist and so on"*, Art. 21.1.1 UCI ADR expressly warns the riders that *"[R]iders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the composition indicated a product is not always complete. The product may contain Prohibited Substances not listed in the composition".*

5.38 The "utmost care" criterion thus has to be appraised based upon the diligence exercised by the athlete when consuming nutritional supplements.

5.39. In the present case, while submitting that she requires confirmation from the nutrition companies that the nutritional supplements she uses are free from any Prohibited Substance, the First Respondent only provides the Panel with a general statement delivered by Nutrend DS on 13 January 2012, *i.e.* after having been tested and provisionally suspended. Such a document obviously is unconvincing and rather points out that the First Respondent does not usually take such precautions. As a result, in being unable to provide any documented evidence that she would have indeed requested such information from these companies over the years – and not after having been tested –, the First Respondent is unable to demonstrate that she would have acted with "utmost care".

5.40 The First Respondent's behavior can therefore not be compared to the one of the athlete in CAS 2009/A/1870, 21 May 2012, at para. 42 to whom she tries to be compared. In this case, the athlete had substantially demonstrated that:

- she had personal conversations with the company at stake,
- she had received assurance and an indemnity from the company as to the purity of its products,
- she had obtained the products directly from the company,
- she had taken them for an eight months period, and
- she had consulted with various swimmers, including the team nutritionist and the USOC sports psychologist and her coach about the concerned products.

The case submitted to the Panel is entirely true. True, trying to take advantage of this case, the First Respondent alleges the same means of defense. She, however, does not corroborate her allegations with any substantiated evidence. There again, these are mere unsupported assertions which can obviously not be taken into account by the Panel and which shall therefore be disregarded. As a result, the Panel has no difficulty in ruling that the First Respondent has to bear the consequences of her negligence and, consequently, to rule out the application of Art. 296 and 297 UCI ADR to the present case.

6. Conclusion

6.1 The Appellant has established that the First Respondent had committed an anti-doping violation rule according to Art. 21.1 UCI ADR, since both A and B Samples have confirmed the presence of clenbuterol, a prohibited substance appearing on the WADA 2011 Prohibited List under category S1(1)(2) (other anabolic agents) (Art. 21.1.2 UCI ADR).

6.2 The First Respondent has been unable to discharge her burden of proving under Art. 22, respectively 296 to 297 UCI ADR, on a balance of probability, (i) how the Prohibited Substance

had entered her system and (ii) that such ingestion had occurred without any (Significant) Fault or Negligence.

6.3 As a result, the appeal filed by the Appellant is admitted and the decision issued by the Disciplinary Board on 20 January 2012 is set aside.

7. Costs

7.1 In accordance with Art. 64.5 of the CAS Code, the Panel must determine how the costs of the arbitration are to be borne. In addition as a general rule the award will grant the successful party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. The amount of the costs of the arbitration are to be decided by the CAS Court office pursuant to Art. R64.4 of the CAS Code.

7.2 In the case at hand, the appeal filed by the Appellant was admitted. As a result, and according to Art. 275 UCI ADR:

"If the License-holder is found guilty of an anti-doping rule violation, he shall bear:

1. The costs of the proceedings as determined by the hearing panel;

2. The costs for the result management by the UCI; the amount of this cost shall be CHF 2'500, unless a higher amount is claimed by the UCI and determined by the hearing body;

3. The cost of the B Sample analysis, where applicable;

[…]

5. The cost for the A and/or B Sample laboratory documentation package where requested by the rider".

7.3 As a result, the First Respondent shall have to bear the costs for the result management for an amount of CHF 2'500 (two thousand and five hundred Swiss francs), as the Appellant did not claim a higher amount, as well as an amount of CHF 480 (four hundred and eighty Swiss francs) for the B Sample, respectively CHF 400 (four hundred Swiss francs) as to the A-sample laboratory documentation package.

7.4 Art. 326 UCI ADR further adds that:

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

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

a) Where a period of ineligibility of two years or more is imposed on a member of a team registered with the UCI, the amount of the fine shall be equal to the net annual income from cycling that the License-Holder normally was entitled to for the whole year in which the anti-doping violation occurred. The amount of this income shall be as assessed by the UCI, provided that the net income shall be assessed at 70 (seventy) % of the corresponding gross income".

7.5 In the present case, the First Respondent is a member of the Second Respondent, which is a national federation and a member of the Appellant. As a result, a fine has to be pronounced by the Panel. In its appeal, the Appellant has concluded to a fine amounting to CHF 1'500 (one thousand and five hundred Swiss Francs), without prejudice in case of eventual new evidence of the First Respondent's income from cycling. Absent any additional information, the Panel sees no reason to depart from such conclusion and shall rule accordingly.

7.6 (…).

ON THESE GROUNDS

The Court of Arbitration for Sports rules:

1. The appeal filed by the Union Cycliste Internationale on 5 April 2012 against the decision of the Disciplinary Board of the Czech Cycling Federation issued on 20 January 2012 is upheld.

2. The decision dated 20 January 2012 rendered by the Disciplinary Board of the Czech Cycling Federation is set aside.

3. Ms Jana Horakova is sanctioned with a period of two (2) years of ineligibility starting on the day of this Award. The period of provisional suspension from 27 October 2011 until 20 January 2012, i.e. 2 months and 25 days, shall be credited against the total period of two years.

4. Ms Jana Horakova is disqualified from the 2011 UCI Mountain Bike and Trials World Championships.

5. Ms Jana Horakova shall pay to the Union Cycliste Internationale (i) a fine of CHF 1,500 (one thousand five hundred Swiss Francs), (ii) an amount of CHF 2,500 (two thousand five hundred Swiss Francs) for the costs of the results management incurred by the Union Cycliste Internationale, (iii) an amount of CHF 480 (four hundred eighty Swiss Francs) for the costs of the B-sample analysis and (iv) an amount of CHF 400 (four hundred Swiss Francs) for the costs of the A-sample laboratory documentation package.

(…)

8. All other or further claims are dismissed.