UNION CYCLISTE INTERNATIONALE

Anti-Doping Tribunal

UCI Anti-Doping Tribunal

Judgment

case ADT 11.2017

UCI v. Mr. Sergio Perez Gutierrez

Single Judge:

Ms. Emily Wisnosky (United States)

Aigle, 25 April 2018

INTRODUCTION

1. The UCI Anti-Doping Tribunal ("the Tribunal") issues the present Judgment in application of the Tribunal Procedural Rules (the "ADT Rules") in order to decide upon a violation of the UCI Anti-Doping Rules (the "ADR") committed by Mr. Sergio Perez Gutierrez (the "Rider") as asserted by the UCI (collectively, the "Parties").

I. FACTUAL BACKGROUND

2. The following section summarises the main relevant facts, established based on the submissions of the UCI and not contested by the Rider (as set forth in Section V.A, below, the Rider did not participate in this proceeding) to provide an overview of the matter in dispute. Additional facts may be set out where relevant in the legal discussion that follows.

A. The Parties

3. The UCI is the association of national cycling federations and a non-governmental international association with a non-profit-making purpose of international interest, having legal personality in accordance with arts 60 ff. of the Swiss Civil Code according to arts 1.1 and 1.2 of the UCI Constitution.
4. At the time of the alleged anti-doping rule violation, the Rider was a Spanish cyclist, who was affiliated to the Real Federación Española de Ciclismo ("RFEC") and a License-Holder within the meaning of the ADR.

B. The alleged anti-doping rule violation

5. On 18 September 2016, the Rider provided an In-Competition urine Sample (number 3804439, split into an A Sample and a B Sample) in connection with the Vuelta Ciclista a Galicia, a road stage race which took place from 14 to 18 September 2016. The Rider declared on the Doping Control Form that an intra-articular injection of 40mg/ml of a "Trigon Deport" had been administered to his right knee on 14 September 2016 and signed the Form, which included an acknowledgment that the Sample had been taken in accordance with the applicable regulations.
6. On 18 November 2016, after having performed the Initial Testing (screening) Procedure of sample A-3804439 and following the reporting of the results into the Anti-Doping Administration and Management System ("ADAMS"), the World Anti-Doping Agency ("WADA") accredited laboratory of Barcelona, Spain (the "Laboratory") received an automatic ADAMS Suspicious Steroid Profile Confirmation Procedure Request.[1] Insufficient urine remained to conduct the confirmation analysis, thus it was considered necessary to "split" the B Sample.

[1] As set forth by the UCI in its submissions

"The Athlete Biological Passport Steroidal Module monitors an athlete's steroidal variables over time that may be indicative of steroid abuse. These steroidal variables form a 'steroid profile' that is established from an athlete's urine samples.

In the past (from 2004 to 2013), isotope ratio mass spectrometry (IRMS) analysis was required when an Athlete had a testosterone to epitestosterone (T/E) ratio greater than 4:1. Today with the implementation of the Steroidal Module, once the Laboratory has entered the new biological data in ADAMS, the Adaptive Model (an

7. On 20 January 2017, the Cycling Anti-Doping Foundation (the "CADF")[2] notified the Rider by letter[3] of this further analysis that would be conducted on his B Sample. The letter also set a deadline of 6 February for the Rider to instruct the CADF whether he wished to accept the invitation to attend the opening, splitting, and resealing of his B Sample, scheduled for 13 February 2017 or to appoint a representative to attend on his behalf. The letter advised the Rider that otherwise the Barcelona Laboratory would be asked to select an independent witness to attend. Finally, the letter set forth that should the Rider fail to provide instructions by the 6 February 2017 deadline, the CADF would consider that the Rider waived his "right" to be present at the procedure.

8. On 3 February 2017, the CADF sent the Rider a reminder of the upcoming 6 February 2017 deadline to state his attendance preferences for the opening, splitting, and resealing of the B Sample.

9. On 8 February 2017, following the Rider's failure to respond by the 6 February deadline, the CADF proposed by an email written in both English and Spanish a new date (27 February 2017) for the opening, splitting, and resealing of the Rider's B Sample, with a new deadline to respond set for 22 February 2017.

10. On 9 March 2017, following the Rider's failure to respond by the second deadline of 22 February, the CADF contacted the Rider by email and letter. The email (written in English and Spanish) acknowledged the Rider's failure to respond to the previous emails sent on 20 January, 3 February, and 8 February 2017 and confirmed a new deadline to respond of 19 March 2017. In the letter, it proposed 28 March 2017 as the new and final date for the opening, splitting, and resealing of his B Sample, again confirming that a failure to respond by the new 19 March 2017 deadline would be interpreted as a waiver of his "right" to be present, and that if he declined to

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algorithm that calculates whether the result, or results over time in the case of a longitudinal profile, is likely the result of a normal physiological condition), automatically updates the Athlete's Passport. In other words, the Adaptive Model used by the Athlete Steroid profile replaces this 'population reference' approach with an 'intra-individual' approach, which allows for a more refined evaluation.

More specifically, Endogenous Anabolic Androgenic Steroids Testing and reporting follows a two-step procedure. First, an Initial Testing Procedure of the sample is conducted to estimate the "steroid profile" of the Athlete's Sample. Then, a subsequent Confirmation Procedure is performed when the estimated "steroid profile" constitutes an Atypical Passport Finding (ATPF), as determined by the Adaptive Model, or represents a "suspicious steroid profile" (SSP) finding.

In the event that the Laboratory receives a "Suspicious Steroid Profile Confirmation Procedure Request," (as in the case at stake), the Laboratory shall proceed with the Confirmation Procedure(s), including the GC-C-IRMS analysis, unless, after contacting the Testing Authority, the Testing Authority can justify within 7 calendar days that the Confirmation Procedure(s) is/are not necessary (WADA Athlete Biological Passport Operating Guidelines, in section 3.3, https://www.wada-ama.org/en/resources/athlete-biological-passport/athlete-biological-passport-abp-operating-guidelines)".

[2] As set forth by the UCI in its submissions, "*CADF is mandated by UCI for the purpose of managing its anti-doping activities, i.e., in particular: Planning effective Testing, Registered Testing Pool ("RTP") management, Biological Passport Program (Haematological and Steroidal) management, Results Management (Initial review) and administrative support for the management of Therapeutic Use Exemptions ("TUE"). Detailed information on CADF activities is available at http://www.cadf.ch/*".

[3] In all cases in which the CADF or UCI attempted to contact the Rider by a letter, the letters noted that the communication was first sent via email, and later followed by post.

attend and declined to appoint a representative to attend, the CADF would ask the Laboratory to appoint an independent witness.

11. Also on 9 March 2017, the CADF contacted the Spanish National Anti-Doping Organization, Agencia Española de Protección de la Salud en el Deporte ("AEPSAD"), to communicate with the Rider. AEPSAD forwarded the CADF's email to the Rider, including the CADF in copy. In the email (written in Spanish), AEPSAD noted that, per their earlier telephone conversation, the Rider was requested to respond as soon as possible to all of the email addresses listed in copy.

12. On 21 March 2017, AEPSAD again sent the Rider an email (in Spanish), requesting his instructions on how to proceed with the analysis of his B Sample, stating that the Rider could respond directly to AEPSAD, and confirming that AEPSAD would pass along his response to the International Federation, emphasizing the urgency of the matter.

13. On 27 March 2017, having received no response from the Rider, the CADF authorized the Laboratory to conduct the opening, splitting, and resealing of the Rider's B Sample.

14. On 3 April 2017, the Laboratory opened the Rider's B Sample, splitting the contents into two bottles, and resealed the B Samples in the presence of an independent witness appointed by the Laboratory (for the sake of simplicity, these Samples will hereinafter be referred to as the New A and New B Samples – or "NA" and "NB" Samples).

15. On 12 April 2017, the Laboratory reported an Adverse Analytical Finding for Androsterone and Etiocholanolone.

16. On 3 May 2017, the UCI notified the Rider by letter of (i) the Adverse Analytical Findings, and (ii) the mandatory Provisional Suspension imposed on him starting from the date of the notification. In the same communication, he was informed of his right to request the analysis of the NB Sample and was also informed that in the absence of instruction within the set 7-day deadline, the UCI would assume that he waived his right to the analysis of the NB Sample.

17. On 11 May 2017, the UCI notified the Rider by letter that due to his failure to communicate his intent with respect to the NB Sample within the set deadline, it assumed that the Rider waived his right to the analysis of the NB Sample. In the same communication, the UCI (i) asserted that the Rider committed an anti-doping rule violation under art. 2.1 and/or art. 2.2 of the ADR; (ii) informed the Rider that in the interest of expediency he was afforded the opportunity to provide an explanation for the asserted violation within 14 days, following which the UCI would propose an Acceptance of Consequences to put an end to the proceeding; (iii) informed the Rider of the potential Consequences of the asserted violation; (iv) invited the Rider to contact it immediately if he was willing and able to provide Substantial Assistance, and (v) if no agreement were to be reached on the Acceptance of Consequences, the UCI would refer the matter to the Tribunal.

18. The Rider did not respond within the 7-day deadline.

19. On 30 May 2017, the UCI offered the Rider by letter an Acceptance of Consequences in the sense of art. 8.4 ADR and notified the Rider that while he was under no obligation to do so, if he did not accept the proposed Consequences, the UCI would refer the matter to the Tribunal for resolution.

20. On 2 June 2017, AEPSAD informed the UCI by email that it had a telephone conversation with the Rider, during which he contested the validity of the B-Sample splitting procedure, admitted the intake of testosterone, and questioned the reasons underlying a 4-year period of Ineligibility.

21. On 6 June 2017, the UCI addressed by letter to the Rider, the two issues he reportedly raised with AEPSAD. First, the UCI emphasized that the Rider failed to respond several times to an invitation to the opening, splitting, and resealing of his B Sample, thus none of his "*basic and fundamental rights*" were violated. Second, the UCI explained (in short) that per art. 10.2 ADR, the Rider's failure to prove that the violation was not intentional mandated a four-year period of Ineligibility, given that the Prohibited Substances at stake are not Specified Substances. In the same communication, the UCI reiterated its proposal for an Acceptance of Consequences in the sense of art. 8.4 ADR, setting a new deadline of 13 June 2017 for the Rider to respond.

22. On 22 August 2017, following no response from the Rider, further (unsuccessful) efforts to receive a response from him, and reports from the AEPSAD that the Rider now alleged that the presence of the Prohibited Substances in his Sample resulted from medication prescribed by his doctor, the UCI again attempted to contact the Rider by letter. In this communication, the UCI offered the Rider a further 14-day period to provide details on the alleged prescription, and if applicable, adjust the proposed Consequences accordingly.

23. The Rider did not respond within the 14-day deadline.

24. On 5 October 2017, via email, the UCI informed the Rider that in light of his lack of response, the Acceptance of Consequences as proposed on 6 June 2017 remained in effect and set a deadline of 16 October 2017 for him to accept or reject the proposed Consequences, confirming that a failure to respond would result in the matter being referred to the Tribunal.

25. The Rider did not respond to the UCI by the 16 October 2017 deadline, or indeed at all.

II. PROCEDURE BEFORE THE TRIBUNAL

26. In compliance with art. 13.1 ADT Rules the UCI initiated proceedings before the Tribunal through the filing of a petition to the Secretariat of the Tribunal on 16 November 2017.

27. In the UCI Petition, the UCI requested the following relief:

- "*Declaring that Mr. Perez Gutierrez has committed an Anti-Doping Rule Violation.*
- *Imposing on Mr. Perez Gutierrez a Period of Ineligibility of 4 years starting from the date of the Tribunal's decision.*
- *Holding that the period of provisional suspension served by Mr. Perez Gutierrez since 3 May 2017 shall be deducted from the period of ineligibility imposed by the Tribunal.*
- *Disqualifying the results obtained by Mr. Perez Gutierrez on 18 September 2016 and until he was provisionally suspended.*
- *Condemning Mr. Perez Gutierrez to pay the costs of results management by the UCI (2'500.- CHF)*".

28. Before referring the case to the Tribunal, the UCI offered the Rider an Acceptance of Consequences within the meaning of art. 8.4 ADR and art. 2 ADT Rules by letter dated 6 June 2017. The Rider did not respond to the proposed Consequences.

29. On 21 November 2017, the Secretariat of the Tribunal appointed Ms. Emily Wisnosky to act as Single Judge in the present proceedings in application of art. 14.1 ADT Rules.

30. On 22 November 2017, in application of art. 14.4 ADT Rules, the Rider was informed that disciplinary proceedings had been initiated against him before the Tribunal. The Rider was also informed that any challenge to the Single Judge or objection to the jurisdiction of the Tribunal shall be brought to the Secretariat within 7 days of the receipt of the correspondence and that a deadline of 7 December 2017 was granted to submit his answer. In the same communication, the Rider was alerted that art. 16.2 ADT Rules provides that "*[i]f the Defendant fails to submit its answer within the set deadline, the Single Judge may nevertheless proceed with the case and render his Judgment*".

31. The Rider did not submit an answer, nor respond in any way to this communication.

32. On 8 December 2017, in light of the Rider's failure to submit an answer, the Single Judge granted the Rider additional time to submit an answer, setting a new deadline of 15 December 2017. In the same communication, the Rider was informed that if no answer were received, the Single Judge would render her Judgment based on the documents on file.

33. The Rider, again, did not submit an answer, nor respond to this communication.

34. On 20 December 2017, the Single Judge declared the proceedings closed and confirmed that she would render her Judgment based on the documents on file.

III. JURISDICTION OF THE TRIBUNAL

35. Art. 3.2 ADT Rules provides the following: "*Any objection to the jurisdiction of the Tribunal shall be brought to the Tribunal's attention within 7 days upon notification of the initiation of the proceedings. If no objection is filed within this time limit, the Parties are deemed to have accepted the Tribunal's jurisdiction*".

36. Neither party objected to the jurisdiction of the Tribunal, thus the Single Judge confirms the jurisdiction of the Tribunal. For the sake of completeness, especially in light of the Rider's failure to participate in this proceeding, the Single Judge confirms that the Tribunal's jurisdiction complies with the applicable provisions of the ADR.

37. Part C of the Introduction of the ADR addresses its scope of application, as follows:

> *"These Anti-Doping Rules shall apply to the UCI and to each of its National Federations. They shall also apply to the following Riders, Rider Support Personnel and other Persons: a) any License-Holder, …".*

38. The Rider was therefore bound by the ADR. He was a License-Holder within the meaning of the ADR since he was affiliated to the RFEC and held a license in 2016.

39. Art. 8.2 ADR provides in relevant part as follows:

> *"The UCI Anti-Doping Tribunal shall have jurisdiction over all matters in which*
>
> - *An anti-doping rule violation is asserted by the UCI based on a results management or investigation process under Article 7".*

40. In this case, the UCI asserted the anti-doping rule violation following a results management process under art. 7 ADR, and thus it follows that the Tribunal has jurisdiction in this matter.

IV. RULES OF LAW APPLICABLE TO THE MERITS

41. The ADT Rules provide that "*the Single Judge shall apply the ADR and the standards referenced therein as well as the UCI Constitution, the UCI Regulations and, subsidiarily, Swiss law*" (art. 25 ADR). The alleged anti-doping rule violations took place on 18 September 2016 (the relevant point of time being that of Sample collection). Thus, the 2015 edition of the ADR applies to the current matter.

42. As to the other "*standards referenced therein*" mentioned in art. 25 ADT Rules, the Tribunal notes that Part E of the Introduction of the ADR provides as follows:

> *"Under the World Anti-Doping Program, WADA may release various types of documents, including (a) International Standards and related Technical Documents, and (b) Guidelines and Models of Best Practices.*
>
> *The UCI may, consistent with its responsibilities under the Code, choose to (a) directly incorporate some of these documents by reference into these Anti-Doping Rules, and/or (b) adopt Regulations implementing all or certain aspects of these documents for the sport of cycling.*
>
> *Compliance with an International Standard incorporated in these Anti-Doping Rules or with UCI Regulations (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard or UCI Regulations were performed properly.*
>
> *All documents binding upon Riders or other Persons subject to these Anti-Doping Rules are made available on the UCI Website, in their version effective and as amended from time to time".*

43. The Tribunal also notes that art. 6.5.2 ADR provides as follows:

> *"Further analysis of Samples shall conform with the requirements of the International Standard for Laboratories and the UCI Testing & Investigations Regulations".*

44. The Tribunal also notes that art. 7.5 ADR provides as follows:

> *"Review of Atypical Passport Findings and Adverse Passport Findings shall take place as provided in the UCI Testing & Investigations Regulations, the International Standard for Laboratories, WADA Athlete Biological Passport Operating Guidelines and respectively related Technical Documents".*

45. The Single Judge holds that art. 7.5 ADR is also relevant in the matter at stake, which involves the related review for a suspicious steroid profile finding that led to an Adverse Analytical Finding. The regulations and guidelines set forth in art. 7.5 ADR provide relevant and important instructions for Sample analysis in this context. Accordingly, in addition to the ADR, the Tribunal will take into consideration the UCI Testing & Investigation Regulations, WADA's International Standard for Laboratories (dated June 2016), WADA's Athlete Biological Passport Operating Guidelines ("WADA ABP Guidelines")[4], and the related Technical Documents to the extent relevant or necessary.

[4] Note, on 1 January 2017, the new version 6.0 of the WADA ABP Guidelines came into effect. To the extent necessary, the Tribunal references the version in effect at the relevant time, in line with the principle that rules that are procedural in nature apply immediately upon entering into force (See, for a restatement of this principle by this Tribunal, ADT 01.2017, *UCI v. Caruso*, Judgment of 16 June 2017, para. 44). As is explicit in 5.2.2.12.9 ISL, the Tribunal will consider the version of

46. With respect to notices in general, arts 14.1.1 and 14.1.2 ADR provide in relevant part as follows:

> *"14.1.1 In General*
> *Unless otherwise specified, notice by and to the UCI under these Anti-Doping Rules, UCI Regulations, procedures or other document adopted in connection therewith, may be given by any means permitting proof of receipt, including registered or ordinary mail by post or private courier services, electronic mail or facsimile.*
> *…*
> *Notice shall be deemed to have occurred when delivered within the addressee's sphere of control. Proof that the addressee was, without his or her Fault, not in a position to have knowledge of a notice so delivered shall be on the addressee.*
> *14.1.2 Notice to Riders and other Persons under these Anti-Doping Rules*
> *Notice to a Rider or other Person may be accomplished by delivery of the notice to his or her National Federation or Team".*

47. Art. 2.1 ADR sets forth the violation for the presence of a Prohibited Substance, as follows:

> *"2.1* ***Presence of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample***
> *2.1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.*
> *2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any 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; or, where the Rider's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.*
> *[Comment to Article 2.1.2: The Anti-Doping Organization with results management responsibility may, at its discretion, choose to have the B Sample analyzed even if the Rider does not request the analysis of the B Sample.]"*

48. The ADR defines a violation of art. 2.2 as follows:

> *"**2.2** **Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method***
> *2.2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part be demonstrated in order to*

the ISL and the Technical Documents (to the extent necessary) in effect at the time of the Further Analysis on the Rider's Sample, i.e. April 2017.

establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

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

[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Rider, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Rider Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.]"

49. Art. 3.1 ADR reads as follows:

"The UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Rider or other Person 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".

50. Art. 3.2.2 ADR reads as follows:

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

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

[Comment to Article 3.2.2: The burden is on the Rider or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Rider or other Person does so, the burden shifts to the UCI to prove to the comfortable satisfaction

of the hearing panel that the departure did not cause the Adverse Analytical Finding]".

51. Art. 3.2.3 ADR reads as follows:

> *"Departures from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Rider or other Person establishes a departure from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation".*

52. The ISL defines Further Analysis as follows: "*Any analysis for any substance or method except where an Athlete has previously been notified of an asserted anti-doping rule violation based on an Adverse Analytical Finding for that substance or method*".

53. As for the possibility to perform "*further analysis*" on Samples, art. 6.5 ADR provides as follows:

> *"6.5* ***Further Analysis of Samples***
>
> *6.5.1 Any Sample may be subject to further analysis by the UCI at any time before both the A and B Sample analytical results (or A Sample result where B Sample analysis has been waived or will not be performed) have been communicated by the UCI to the Rider as the asserted basis for an Article 2.1 anti-doping rule violation.*
>
> *6.5.2 Samples may be stored and subjected to further analyses for the purpose of Article 6.2 at any time exclusively at the direction of the UCI or WADA. Any Sample storage or further analysis initiated by WADA shall be at WADA's expense. Further analysis of Samples shall conform with the requirements of the International Standard for Laboratories and the UCI Testing & Investigations Regulations".*

54. Art. 6.2 ADR provides the purposes for which Sample analysis, including "*further analysis*", is permissible:

> *"6.2* ***Purpose of Analysis of Samples***
> *Samples shall be analyzed to detect Prohibited Substances and Prohibited Methods identified on the Prohibited List and other substances as may be directed by WADA under the Monitoring Program pursuant to Article 4.5, or to assist an Anti-Doping Organization in profiling relevant parameters in a Rider's urine, blood or other matrix, including DNA or genomic profiling, or for any other legitimate anti-doping purpose. Samples may be collected and stored for future analysis.*
> *[Comment to Article 6.2: For example, relevant profile information could be used to direct Target Testing or to support an anti-doping rule violation proceeding under Article 2.2, or both.]"*

55. Art. 5.2.2.12.10 ISL sets forth the following procedure for the further analysis of long-term stored Samples:

"5.2.2.12.10 Further Analysis on long-term stored Samples shall proceed as follows:

- *At the discretion of the Testing Authority, the "A" Sample may not be used or it may be used for initial testing (as described in Article 5.2.4.2) only, or for both initial testing and confirmation (as described in Article 5.2.4.3.1). Where confirmation is not completed in the A Sample the Laboratory, at the direction of the Testing Authority shall appoint an independent witness to verify the opening and splitting of the sealed "B" Sample (which shall occur without requirement that the Athlete be notified or present) and then proceed to analysis based on the "B" Sample which has been split into 2 bottles.*
- *At the opening of the "B" Sample, the Laboratory shall ensure that the Sample is adequately homogenized (e.g. invert bottle several times) before splitting the "B" Sample. The Laboratory shall divide the volume of the "B" Sample into two bottles (using Sample collection equipment compliant to ISTI provision 6.3.4) in the presence of the independent witness. The splitting of the "B" Sample shall be documented in the chain of custody. The independent witness will be invited to seal one of the bottles using a tamper evident method. If the analysis of the first bottle reveals an Adverse Analytical Finding, the Testing Authority shall use reasonable efforts to notify the Athlete as provided in Article 7.3 of the Code. A confirmation shall be undertaken, using the second sealed bottle, if requested by the Athlete or his/her representative, or if the Testing Authority's reasonable efforts to notify the Athlete have not been successful or at the Testing Authority's election. If the Athlete or his/her representative is not present for the confirmation, then the Laboratory shall appoint an independent witness to observe the opening of the second sealed bottle".*

56. As for the rules governing the B Sample confirmation in the ISL, art. 5.2.4.3.2 provides in relevant part as follows:

"5.2.4.3.2 "B" Sample Confirmation

5.2.4.3.2.1 The "B" Sample analysis should occur as soon as possible and should take place no later than seven working days starting the first working day following notification of an "A" Sample Adverse Analytical Finding by the Laboratory, unless the Laboratory is informed that the Athlete has waived his/her right to the "B" confirmation analysis and therefore accepts the findings of the "A" confirmation analysis.

…

5.2.4.3.2.6 The Athlete and/or his/her representative, a representative of the entity responsible for Sample collection or results management, a representative of the National Olympic Committee, National Sport Federation, International Federation, and a translator shall be authorized to attend the "B" confirmation.

If the Athlete declines to be present or the Athlete's representative does not respond to the invitation or if the Athlete or the Athlete's representative continuously claims not to be available on the date of the opening, despite reasonable attempts by the Laboratory to accommodate their dates, the Testing Authority or the Laboratory shall proceed regardless and appoint an independent witness to verify that the "B"

Sample container shows no signs of Tampering and that the identifying numbers match that on the collection documentation. At a minimum, the Laboratory Director or representative and the Athlete or his/her representative or the independent witness shall sign Laboratory documentation attesting to the above.

57. As for the standard period of Ineligibility art. 10.2 ADR provides as follows:

"The period of Ineligibility for a violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional.

…

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term 'intentional' is meant to identify those Riders who cheat. The term therefore requires that the Rider or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Rider can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Rider can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance".

58. As for the possibilities to reduce the aforementioned periods of Ineligibility based on Fault, the ADR state as follows:

"10.4 ***Elimination of the Period of Ineligibility where there is No Fault or Negligence***

If a Rider or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

…

10.5 ***Reduction of the Period of Ineligibility based on No Significant Fault or Negligence***

…

10.5.2 Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1

If a Rider or other Person establishes in an individual case where Article 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Rider or other

Person's degree of Fault, 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 Article may be no less than eight years".

59. The definitions of No Fault or Negligence and No Significant Fault or Negligence are as follows:

> *"No Fault or Negligence: The Rider or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Rider must also establish how the Prohibited Substance entered his or her system.*
>
> *No Significant Fault or Negligence: The Rider or other Person's establishing that his or her Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Rider must also establish how the Prohibited Substance entered his or her system.*
>
> *[Comment to No Significant Fault or Negligence: For Cannabinoids, a Rider may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.]"*

60. As for the Disqualification of results obtained in connection with an In-Competition test, art. 9 ADR provides as follows.

> *"An anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes".*

61. As for the Disqualification of results in Competitions following the Sample collection, art. 10.8 ADR provides as follows:

> *"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9, all other competitive results of the Rider obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes".*

62. In relation to the commencement of the period of Ineligibility art. 10.11 ADR provides (in relevant part) as follows:

> *"Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed. …*
>
> *10.11.1 Delays Not Attributable to the Rider or other Person*
>
> *Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Rider or other Person, the UCI may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during*

the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified.

…

10.11.3.1 If a Provisional Suspension is imposed and respected by the Rider or other Person, then the Rider or other Person shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Rider or other Person shall receive a credit for such period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal".

63. As for the liability for costs of the procedures, art. 10.10.2 ADR provides as follows:

"If the Rider or other Person is found to have committed an anti-doping rule violation, he or she shall bear, unless the UCI Tribunal determines otherwise:

1. *The cost of the proceedings as determined by the UCI Anti-Doping Tribunal, if any.*
2. *The cost of the results 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 UCI Anti-Doping Tribunal.*
3. *The cost of the B Sample analysis, where applicable.*

…

The National Federation of the Rider or other Person shall be jointly and severally liable for its payment to the UCI".

V. THE FINDINGS ON THE MERITS

64. This case presents three main issues:

- Does the Rider's non-participation in this proceeding pose a problem? (A.)
- Did the Rider violate art. 2.1 and/or art. 2.2 ADR? (B.)
- If so, what are the Consequences? (C.)

A. Does the Rider's non-participation in this proceeding pose a problem?

65. The Rider did not respond, communicate directly, nor make any submissions, neither to the UCI nor to the Tribunal during the current proceeding. The UCI submitted that AEPSAD had been in contact with the Rider with respect to this case on multiple occasions.

66. The ADT Rules do not require a response from a Rider in order to issue a decision. According to art. 16.2 ADT Rules, the Tribunal may proceed with the case and render a Judgment if a Defendant fails to submit an Answer. Thus, the Rider's failure to participate does not prevent the Single Judge from resolving this case, so long as the proceeding was conducted in a way which ensures due process, and in particular the Rider's right to be heard (art. 10.1 ADT Rules).

67. Nor does the ADR require a response from the Rider in order to pursue an anti-doping rule violation. Instead, it provides specific rules to ensure proper notification. According to art. 14.1.1 ADR, the UCI may provide notice *inter alia* to the Rider by "*registered or ordinary mail by post*"

or by "*electronic mail*". According to art. 6.3 ADT Rules, "*notifications and communications shall be sent to the email address indicated by the Parties*". The UCI and this Tribunal respected these specific rules throughout the course of the proceeding. As set forth above, the UCI made numerous attempts to contact the Rider, both by post and email, using the information provided by the Rider himself on both his license enrolment form (UCI Exhibit 4) and his Doping Control Form (UCI Exhibit 5). Likewise, this Tribunal attempted to contact the Rider by post and email, relying on this same contact information.

68. While proper notification need not necessarily comprise actual knowledge,[5] the Rider did have actual knowledge of the proceedings. The UCI submitted that AEPSAD communicated directly with the Rider with respect to the current proceeding on at least three occasions. No information on the record calls into question the credibility of the AEPSAD's statements to the UCI.

69. The UCI and this Tribunal also gave the Rider ample opportunity to respond. During the results management phase, the CADF and the UCI both extended the key deadlines on several occasions. During the hearing phase, the Tribunal likewise granted the Rider additional time to submit an Answer or otherwise respond to the UCI's petition.

70. Thus, on the basis of the evidence before it, the Single Judge concludes that the procedural rights of the Athlete were not breached, including his right to be heard. The Rider had knowledge of the proceedings and the knowledge he had enabled him to defend himself and his legal interests, including the chance to express his views on all relevant facts, to submit written observations, and to present his own evidence. Instead, the Single Judge considers that the Rider voluntarily waived his right to present his position regarding the alleged anti-doping rule violations and its Consequences.

71. The Single Judge remains obliged to ensure that the Judgment is both factually and legally well-founded. In performing this exercise, the Single Judge will limit herself to the case file, remaining mindful that she is in any case not bound by the Parties' prayers for relief (art. 26 ADT Rules).

B. Did the Rider violate art. 2.1 and/or art. 2.2 ADR?

72. Art. 2.1 ADR prohibits the presence of Prohibited Substances in a Rider's Sample, listing three constellations of analytical evidence that may serve as "*sufficient proof*" to establish this violation. Art. 2.2 ADR prohibits the Use of a Prohibited Substance, permitting the violation to be established "*by any reliable means*" of proof, including analytical evidence "*which does not otherwise satisfy all the requirements to establish 'Presence' of a Prohibited Substance under Article 2.1*" (Comment to art. 2.2 ADR, art. 3.2 ADR). The analytical evidence derived from the Rider's Sample does not mesh perfectly with any of the three constellations to establish a violation of art. 2.1 ADR, although it does confirm the presence of two Prohibited Substances in the Rider's Samples.

73. Thus, the key question in this case becomes as follows: Does the analytical evidence derived from the Rider's Sample constitute "*sufficient proof*" of a violation of art. 2.1 ADR (1.), and/or should it be considered as "*any reliable means*" of proof, and therefore constitute a violation of art. 2.2 ADR (2.)?

[5] See art. 14.1.1 ADR, see also for a confirmation of this in a recent CAS award, CAS 2017/A/4996, *IAAF v. Guerfi*, Award of 20 October 2017, para. 14, which (like the ADR) considered that notification is properly given once it enters the "sphere of control" of the recipient, giving the recipient a reasonable possibility to become aware of the contents of the notice.

1. Did the Rider violate art. 2.1 ADR?

a. Parties' positions

74. The UCI submitted that the Rider having "*waived his right to analyse the B-Sample, the positive A-Sample is sufficient proof of the 'presence of a prohibited substance' under Article 2.1.2 of the UCI ADR and therefore sufficient to establish the ADRV*".

75. As already mentioned, the Rider did not make any submissions in this proceeding. According to the UCI's petition, however, AEPSAD reported that the Rider in a telephone conversation "*apparently contested the validity of the B-Sample splitting procedure but admitted to the intake of testosterone*".

b. The position of the Tribunal

76. Neither the Rider's intent, Fault, negligence or knowing Use; nor the quantity of the Prohibited Substances in the Rider's Sample play a role in establishing a violation of art. 2.1 ADR. Art. 2.1 ADR sets forth a Rider's "*personal duty to ensure that no Prohibited Substance enters his or her body"* emphasizing that "*Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples*". In addition, art. 2.1.3 ADR makes clear that any quantity of a Prohibited Substance or its Metabolites or Markers constitutes a violation of art. 2.1 ADR, unless the substance is subject to a "*quantitative threshold*". Neither of the Prohibited Substances at stake are subject to a quantitative threshold.

77. Art. 2.1.2 ADR describes three specific constellations of evidence that comprise "*sufficient proof*" of the presence of a Prohibited Substance in a Rider's Sample. In short:

- The first constellation allows for a violation to be established on the A Sample alone, where the Rider waives the analysis of the B Sample, and the Laboratory does not analyse the B Sample;
- The second constellation provides that a violation may be established if the Laboratory analyses the B Sample and this analysis confirms the presence of the Prohibited Substance in the A Sample; and
- A third constellation newly provides that a violation may be established if "*the Rider's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle*".

78. In this case, the Laboratory's analysis of the Rider's Samples produced an Adverse Analytical Finding for Androsterone and Etiocholanone in connection with the steroid module of his Athlete Biological Passport. As set forth in the relevant Technical Document (TD2016EAAS), for the steroidal module, "*[a]n Initial Testing Procedure is conducted to estimate the 'steroid profile' of the Athlete's Sample. A subsequent Confirmation Procedure is performed when the estimated 'steroid profile' constitutes an ATPF, as determined by the Adaptive Model, or represents a 'suspicious steroid profile' (SSP) finding*". The Rider's Sample resulted in a suspicious steroid profile finding. Insufficient urine remained in the A Sample to conduct the required Confirmation Procedure. Thus, the Laboratory split the Rider's B Sample into two bottles (referred to herein as the NA and NB Samples) and confirmed the presence of the Prohibited Substances through its analysis of the first bottle – or the NA Sample. The NB Sample was not analysed.

79. This evidence does not perfectly align with any of the three constellations set forth in art. 2.1.2 ADR, raising the question of whether the evidence in this case supports a violation of art. 2.1 ADR. Neither party provided any case law on the matter. This is a novel issue: The circumstances of this case fall between the more common situations of a traditional analysis of an A and B Sample and the re-testing of long-term stored Samples. Previous cases in involving a split B Sample usually involved Samples that were collected years earlier, and then were selected for re-testing, and therefore were decided under earlier versions of the applicable rules.[6] It is therefore necessary to employ tools of interpretation to determine whether the Rider has committed a violation of art. 2.1 ADR.

80. The wording of the provision – especially since the wording at stake defines an anti-doping rule violation – obviously plays an important role. However, the wording must be placed within a systematic view of the applicable rules before reaching a conclusion as to its best interpretation, being mindful of whether the Sample analysis at stake was conducted in respect of the fundamental safeguards these rules provide. Thus, the Single Judge will start with the wording of art. 2.1.2 ADR.

81. The wording of art. 2.1.2 ADR is inconclusive. The first two constellations of evidence set forth above are (at least superficially) directed towards cases involving an A and a B Sample, and not the "first" and "second" bottle of the split B sample. The third constellation addresses the situation of a "split'' B Sample, using different terminology to refer to the resulting bottles, i.e. the "first bottle" and the "second bottle". This different terminology supports the notion that in cases involving a split B Sample the third constellation is the starting point. But, this is problematic here. The third constellation — at least on its face — requires that the second bottle confirms the analysis of the first bottle, implying that both bottles should be analysed in order to establish a violation of art. 2.1 ADR. In this case, only the first bottle – i.e. the NA Sample – was analysed. Thus, this wording must be placed within a broader view of the other applicable rules to determine whether the evidence in the case at hand constitutes "*sufficient proof*" of a violation of art. 2.1 ADR.

82. Consulting the ISL raises further interpretational issues. The ISL only describes the process for opening and splitting an Athlete's original B Sample under the general heading "*Long-term storage of Samples*" (art. 5.2.2.12 ISL), detailed under the sub-heading directed at "*Further Analysis on long-term stored Samples*" (art. 5.2.2.12.10 ISL). The safeguards surrounding the process described to split the B Sample are less exacting than the safeguards set forth in art. 5.2.4.3.2.6 ISL for a "normal" B Sample analysis. Most importantly, art. 5.2.2.12.10 ISL does not require that the Athlete is notified or present for the opening and splitting of the B Sample. Art. 5.2.4.3.2.6 ISL, by contrast, states that the Athlete "*shall be authorized*" to attend (or to appoint a representative to attend) the B Sample confirmation analysis (which includes the opening of the B Sample). Thus, two more questions are raised: Does the ISL permit an Athlete's B Sample to be split outside the context of long-term storage, and more specifically, under the circumstances of this case? And if so, must the relevant Anti-Doping Organization follow the more stringent procedural safeguards associated with a "normal" Sample analysis in art. 5.2.4.3.2.6 ISL or the alternative rules associated with a split B Sample in art. 5.2.2.12.10 ISL?

[6] See, e.g. CAS 2015/A/3977, *WADA v. Devyatovskiy*, Award of 31 March 2016; CAS 2016/A/4648, *Klemenčič v. UCI*, Award of 7 March 2017; CAS 2017/A/4973, *Liu v. IOC*, Award of 31 July 2017; CAS 2016/A/4839, *Chicherova v. IOC*, Award of 6 October 2017.

83. In the view of the Single Judge, under the facts of this case the applicable rules permitted the Laboratory to split a B Sample outside the context of long-term storage. Sec. 3.0 TD2016EAAS requires the Laboratory to conduct a confirmation analysis. While art. 5.2.4.3.1.1 ISL sets forth that a Confirmation Procedure for a suspicious result in the Initial Testing procedure,[7] is as a general rule, to be conducted on an additional aliquot taken from the A Sample, it is silent on what must be done if insufficient urine remains in the A Sample. By contrast, art. 5.2.2.12.10 ISL anticipates that initial testing may exhaust the volume of urine from the A Sample and offers as a solution splitting the B Sample to perform a confirmation analysis. Two main options emerge. On one hand, this situation could be viewed as an impasse: The rules both require the analysis to be performed but provide no means by which to conduct the analysis. On the other hand, the rules can be read to permit a Laboratory to split a B Sample to perform the required analysis.

84. For the reasons that follow, the Single Judge prefers the latter interpretation:

- The wording of art. 2.1.2 ADR does not state that only long-term stored split B Samples may constitute sufficient proof of a violation of art. 2.1 ADR;
- The confirmation procedure conducted on the Rider's Sample falls within the definition of "*Further Analysis*" in the ISL.[8] While the ISL only provides instructions for Further Analysis under the heading "*long-term stored Samples*", the ADR provides *inter alia* that further analysis may be conducted at any time before both the A Sample and B Sample (if applicable) results are communicated to a Rider as the asserted basis for a violation of art. 2.1 ADR (art. 6.5 ADR), and not only on long-term stored Samples. This suggests that the split B Sample may also be appropriate for more situations than those involving long-term storage;
- The reason for the placement of the possibility to split a B Sample under the heading of long-term storage is understandable in light of the background of the provision. Looking back at the ISL 2012, it appears that the process to split a B Sample was previously correlated to Sample re-testing, which usually takes place on long-term stored Samples. The ISL 2015 removed the specific reference to "*re-testing*" here and added the broader term "*Further Analysis*". A reasonable explanation for this revision would be to facilitate more "novel" methods and analyses processes, such as those associated with the steroidal module of the Athlete Biological Passport program;
- No indication has been presented to the Single Judge that a confirmation analysis based on the first bottle of a split B Sample is less reliable than one conducted on only the A Sample.[9] To the contrary, the CAS and this Tribunal have viewed a split B Sample as substantively comparable to a traditional A and a B Sample, where the Rider's procedural safeguards provided in the ISL were respected in splitting the B Sample.[10] Moreover, without any compelling arguments to take into consideration and absent any precision in the rules, the

[7] Specifically, art. 5.2.4.3.1 ISL refers to the A Sample Confirmation for a Presumptive Adverse Analytical Finding, which the ISL defines as follows: "*The status of a Sample test result for which there is a suspicious result in the Initial Testing Procedure, but for which a confirmation test has not yet been performed*".

[8] The ISL defines Further Analysis as follows: "*Any analysis for any substance or method except where an Athlete has previously been notified of an asserted anti-doping rule violation based on an Adverse Analytical Finding for that substance or method*".

[9] The Single Judge is further comforted that the panel in CAS 2017/A/4973, *Liu v. IOC*, Award of 31 July 2017 confirmed the athlete's commission of a violation of (the equivalent to art. 2.1 ADR) based on an initial analysis of the athlete's A sample, with a confirmation analysis completed on the first bottle of the athlete's split B Sample.

[10] See ADT 05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017; CAS 2016/A/4648, *Klemenčič v. UCI*, Award of 7 March 2017.

Single Judge fails to see an obvious correlation between the intended duration of the storage and the acceptability of splitting a B Sample;

- Splitting a B Sample to perform this confirmation analysis in this case was not out of sync with the interest of the Rider, since it provided the possibility for a second independent analysis; and
- The Single Judge is also comforted by the fact that, as a general principle of interpretation (at least for the ADR), the headings of the provisions are "*for convenience only*" and should not be read to impact the substance of the provisions themselves. [11]

85. In light of the above, the Single Judge takes the view that the placement of the option to split a B Sample under the heading "*Further Analysis on long-term storage of Samples*" appears more as a matter of convenience than a deliberate limitation of its use to only situations involving long-term storage.

86. Satisfied that the applicable rules permitted the Laboratory to split the Rider's B Sample in this case, the Single Judge turns to the next question: Which rules (i.e. the more stringent procedural safeguards associated with a "normal" Sample analysis in art. 5.2.4.3.2 ISL or the alternative rules in art. 5.2.2.12.10 ISL) apply, and were they respected in this case?

87. In this case, the UCI offered the Rider fundamental safeguards akin to a "traditional" Sample analysis as set forth in art. 5.2.4.3.2 ISL. The UCI gave the Rider a reasonable opportunity to attend the opening, splitting, and re-sealing of his B Sample. Not only did the UCI properly notify the Rider of the time and date, it reminded the Rider of the deadline, informed the Rider that a failure to respond would amount to a waiver of the right to be present or appoint a representative, and then proceeded to extend the deadline and postpone the analysis on two occasions, even seeking the help of AEPSAD to contact the Rider. Moreover, the analysis was performed in the presence of an independent witness. The UCI also offered the Rider a reasonable opportunity to request the analysis of the NB Sample. Thus, the Single Judge sees no breach of the Rider's "right" to request the confirmation analysis of the NB Sample, nor of any right he may have to attend the opening, splitting, and re-sealing of his B Sample.

88. This conclusion relieves the Single Judge of the need to determine which rules would be applicable in this case. The Single Judge would only note that the UCI's choice to invite the Athlete to attend the opening, splitting and re-sealing of the B Sample appears especially well-founded in light of the consistent CAS case law that confirms the fundamental nature of the Rider's right to attend the opening of the B Sample. [12] Indeed, even in cases involving long-term storage, no obvious reasons appear to derogate from this as a general practice. [13]

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[11] While the ISL is silent as to the manner in which it shall be interpreted, to the extent that the instructions in art. 24.4 ADR may be relevant here, it provides as follows: "*The headings used for the various Parts and Articles of these Anti-Doping Rules are for convenience only and shall not be deemed part of the substance of these Anti-Doping Rules or to affect in any way the language of the provisions to which they refer*".

[12] See, e.g. CAS 2010/A/2161, *Wen Tong v. IJF*, Award of 23 February 2011, para. 9.18; CAS 2015/A/3977, *WADA v. Devyatovskiy*, Award of 31 March 2016, para. 167; and CAS 2016/A/4828, *Oyarzun v. UCI,* Award of 31 May 2017, para. 122.

[13] A similar notion is set forth in CAS 2016/A/4839, *Chicherova v. IOC*, Award of 6 October 2017, para. 36 in which the CAS panel noted the following: "*Further, the IOC made a policy decision that it would, in principle, not use that possibility [that the Athlete would not be notified or present] unless in situations in which the athlete concerned could not be found or would not participate in the process in good faith*".

89. Turning back to art. 2.1.2 ADR in light of the foregoing, the Single Judge is comfortably satisfied that the UCI established a violation of art. 2.1 ADR. Reading the third constellation together with the other applicable rules suggest that the best interpretation of art. 2.1.2 ADR under the circumstances of the case would also accept as "*sufficient proof*" of an anti-doping rule violation the Adverse Analytical Finding produced through the initial testing on the Rider's A Sample, with the confirmation analysis performed on the NA Sample – or first bottle of the split B Sample – without the confirmation of the second bottle (or NB Sample). The Rider did not request this analysis, nor was the competent Anti-Doping Organization obligated to request the Laboratory to perform it according to the applicable rules. Moreover, reading the third constellation to render the analysis of the second bottle mandatory is misaligned with the nature of this analysis. The role of a second opportunity for an independent analysis has not been to serve as a necessary ingredient to confirm the validity of the original analysis,[14] but as an important procedural safeguard, a safeguard that the Rider waived in this case. Thus, to the Single Judge, a more harmonious reading of the applicable rules renders the evidence in this case "*sufficient proof*" of a violation of art. 2.1 ADR.

90. Finally, the Single Judge notes that in line with the UCI's submission, another possible interpretation of art. 2.1.2 ADR is to consider that the two bottles resulting from a split B Sample (the "NA" and "NB" Samples) can nevertheless be considered as an A and B Sample for the purposes of establishing a violation of art. 2.1. ADR, and therefore the evidence would fall under the first constellation of evidence described in art. 2.1.2 ADR. While this meshes with the approach taken by past case law of the CAS and this Tribunal decided under an earlier version of the ADR,[15] this would require overlooking the different terminology used in the newly added third constellation of evidence for the "first" and "second" bottle of the split B Sample. That being said, the Single Judge agrees that from a substantive perspective, the two situations are similar, and therefore, she takes further comfort in her conclusion from this.

91. It should also be confirmed that the Single Judge does not consider that any procedural departures occurred that would disturb this conclusion. The analysis of the Rider's Sample is presumed to have complied with the ISL. Art. 3.2.2 ADR provides a presumption of procedural regularity for Sample analysis and custodial procedures conducted by WADA-accredited Laboratories. There is no question in this case the Laboratory was WADA-accredited at the relevant time, therefore the Sample analysis enjoys a presumption of procedural regularity.

92. Art. 3.2.2 ADR sets out a step-by-step procedure for rebutting a presumption of procedural regularity, and thereby challenging the results of a Sample analysis. A Rider must establish by a balance of probability "*that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding*". If he or she accomplishes this, the burden shifts to the UCI to prove that the departure did not cause the Adverse Analytical Finding.[16] The Rider's burden to establish a procedural departure comprises

[14] See, for a recent confirmation of this, CAS 2016/A/4828, *Oyarzun v. UCI,* Award of 31 May 2017, para. 117; see also CAS 2015/A/3977, *WADA v. Devyatovskiy*, Award of 31 March 2016, para. 167.

[15] See, e.g. CAS 2016/A/4648, *Klemenčič v. UCI*, Award of 3 March 2017. See also ADT 05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017, ADT 01.2017 *UCI v. Caruso*, Judgment of 16 June 2017.

[16] Art. 3.2.3 ADR provides a similar framework for departures from any other rule set forth in the ADR, or any International Standard or UCI Regulation incorporated in the ADR, providing in short that if the Rider establishes that a departure occurred from any of these rules which could reasonably have caused an anti-doping rule violation, the burden shifts to the UCI to prove that the departure did not cause the Adverse Analytical Finding.

a burden of presentation. Taking inspiration from the Swiss Federal Tribunal, this Tribunal has described this burden as requiring "*factual submissions [that] are detailed enough to determine and assess the applicability of the legal position derived from a particular provision*".[17]

93. In this case, according to the UCI's petition, AEPSAD reported to UCI that the Rider "*contested the validity of the B-Sample splitting procedure but admitted to the intake of testosterone*". The Rider's conversation with AEPSAD falls short of any minimum threshold for discharging this burden of presentation. Putting aside the fact that the challenge was raised in a phone conversation with a third party, and not in a submission to this Tribunal, the statement leaves open which legal provision may have been violated. Did the Rider take issue with a specific aspect of the procedure? Or as the UCI seemed to understand, did the Rider believe the UCI breached his "right" to attend the splitting of the B Sample? Moreover, as set forth above, the Single Judge has not been presented with any evidence or arguments that this analysis was misaligned with the applicable rules.

94. Thus, for all the reasons set forth above, the Single Judge holds that the UCI established a violation of art. 2.1 ADR to the comfortable satisfaction of this Tribunal.

2. Did the Rider violate art. 2.2 ADR?

95. The UCI also alleged that the Rider committed a violation of art. 2.2 ADR (Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method). In the UCI's view "*it is self-evident*" that the Rider also committed a violation of art. 2.2 ADR, in light of "*the (uncontested) analytical results of the Laboratory*" that obviously comprise "*reliable means*" of establishing that the Rider Used Prohibited Substances.

96. The Single Judge observes that the interaction between art. 2.1 ADR and art. 2.2 ADR is not clear cut. Some CAS panels have found that a violation of art. 2.1 ADR is subsumed by art. 2.2 ADR. In other words, if a violation of art. 2.1 ADR is established, this obviously also qualifies as "*any reliable means*" of proof and may also be used to establish a violation of Use.[18] It is equally possible that rules could be read such that if sufficient proof of a presence of a Prohibited Substance is established, a violation of art. 2.1 ADR is established, and not art. 2.2 ADR. In this conception, Art. 2.2 ADR serves more as a "backstop" to art. 2.1 ADR, providing an Anti-Doping Organization the means to establish a violation in situations in which the analytical data may fall short of the strict requirements of a violation of art. 2.1 ADR, but is nevertheless reliable and sufficient to comfortably satisfy a hearing body that a violation of Use of a Prohibited Substance was committed.

97. In any case, the question of whether the Rider also committed a violation of art. 2.2 ADR is of no practical consequence in this case. A violation of art. 2.2 ADR would not be considered as a "*multiple violation*" according to art. 10.7 ADR, instead they would be considered together as "*one single first violation*" for the purposes of sanctioning. Both violations carry identical sanctions. So, art. 10.7.4.1 ADR's instructions that the "*sanction imposed shall be based on the*

[17] ADT 05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017, para. 67.

[18] See, e.g. CAS 2016/A/4648, *Klemenčič v. UCI*, Award of 3 March 2017, para. 120.

violation that carries the more severe sanction" means that from this perspective, whether a violation of art. 2.2 ADR was also committed is irrelevant.[19]

98. For the reasons stated above, the issue of whether the Rider also committed a violation of art. 2.2 ADR need not be addressed, since even if it were to be established that this violation occurred, it would not change the outcome of this decision.

C. Consequences of the Rider's anti-doping rule violation

1. Period of Ineligibility

99. For first time violations of art. 2.1 ADR, the starting point is art. 10.2 ADR. According to art. 10.2.1.1 ADR, the period of Ineligibility to be imposed shall be four (4) years where "*[t]he anti-doping rule violation does not involve a Specified Substance, unless the Rider or other Person can establish that the anti-doping rule violation was not intentional*".

100. As set forth above, the Rider's violation involves the Prohibited Substances Androsterone and Etiocholanone. Both of these substances are listed under "*S.1b Endogenous Anabolic Androgenic Steroids*" of the Prohibited List and are not Specified Substances.

101. For violations that do not involve Specified Substances (such as the violation at stake), art. 10.2.1.1 ADR allows for a reduction of a four-year period of Ineligibility to two years if a Rider establishes that the violation was not "*intentional*" within the meaning of the ADR. Thus, the Rider bears the burden of proof to establish that a violation was not intentional, and according to the general rule set forth in art. 3.1 ADR, the standard of proof is by a balance of probability.

102. The Rider may be entitled to a further reduction – or even elimination – of his period of Ineligibility if he establishes that one of the Fault-related reductions enshrined in arts 10.4 ADR or 10.5 apply. Finally, the Rider may also reduce or suspend his period of Ineligibility by establishing that one of the non-Fault related reductions in art. 10.6 ADR apply.

103. Thus, the threshold question in setting the period of Ineligibility is whether the Rider discharged his burden of proof to establish that the violation was not intentional (a.), followed by the question of whether any Fault-related (b.) or non-Fault-related (c.) reductions apply.

a. Was the violation intentional?

104. In this case, the Rider clearly failed to discharge his burden of proof to establish that the violation was not intentional in the sense of art. 10.2.3 ADR.

105. According to the case file, the Rider made two representations to AEPSAD, which were then communicated by AEPSAD to the UCI, of how the substances may have entered his system. First, he admitted to AEPSAD that he Used Testosterone. Second, he proposed that the presence of the Prohibited Substances in his Sample resulted from medication prescribed by his doctor. Despite numerous attempts and invitations from the UCI, the Rider did not produce any evidence nor provide any further details. Putting aside the issue of the reliability of these

[19] For easy reference, art. 10.7.4.1 ADR provides as follows: "*For purposes of imposing sanctions under Article 10.7, an anti-doping rule violation will only be considered a second violation if the UCI can establish that the Rider or other Person committed the second anti-doping rule violation after the Rider or other Person received notice pursuant to Article 7, or after the UCI made reasonable efforts to give notice of the first anti-doping rule violation. If the UCI cannot establish this, the violations shall be considered together as one single first violation, and the sanction imposed shall be based on the violation that carries the more severe sanction*".

statements and without the benefit of further submissions or explanations from the Rider, the Single Judge can see this possibility as at most mere speculation. Mere speculation and unfounded allegations fall short of the threshold the Rider would need to cross to establish the facts upon which the Single Judge could hold the violation was not intentional.[20] Importantly, even if the Single Judge were willing to go so far as to accept that the origin of the substance was a medication prescribed by a doctor, this alone does not necessarily exclude that the violation was committed intentionally.

106. In the absence of any submissions or arguments to the contrary and in application of the burden of proof, the Single Judge holds that the Rider failed to establish by a balance of probability that the violation was not intentional, nor did he successfully establish the origin of the Prohibited Substances in his system.

b. Fault-related reductions

107. In order to establish a Fault-related reduction within the meaning of art. 10.4 or 10.5 ADR, the Rider must establish that the violation was committed with No Fault or Negligence or No Significant Fault or Negligence. Both require that the Rider establish how the Prohibited Substance entered his or her system (Appendix 1 ADR). As set forth above, the Single Judge finds that the Rider did not establish how the Prohibited Substance entered his system, and therefore no Fault-related reductions are available.

c. Non-Fault-related reductions

108. For the sake of thoroughness, the Single Judge notes that the non-Fault-related reductions available under art. 10.6 ADR do not apply in this case.

d. Conclusion

109. In conclusion, the Rider failed to establish that the violation was not intentional, nor did he establish that any of the Fault- or non-Fault-related reductions in arts 10.4, 10.5, or 10.6 ADR apply. Therefore, according to art. 10.2.1.2 ADR his period of Ineligibility is four years.

2. Commencement of the period of Ineligibility

110. Art. 10.11 ADR provides as a general rule that the period of Ineligibility shall start on the date of the final hearing decision. Art. 10.11.11 ADR creates an exception to this general rule: If "*substantial delays in the hearing process or other aspects of Doping Control not attributable to the Rider or other Person*" occurred, UCI has discretion to start the period of Ineligibility as early as the date of Sample collection. In addition, art. 10.11.3.1 ADR also provides that the Rider receives credit for any Provisional Suspension that was imposed on him, provided that he respected the terms of the Provisional Suspension. UCI presented no reason to deviate from this general rule.

111. In application of the above provisions, the Rider's period of Ineligibility would in principle commence on the date of this Judgment, i.e. 25 April 2018. The Single Judge notes that the

[20] See for a similar stance set forth by a CAS panel in a recent case, CAS 2016/A/4439, *Hamerlak v. IPC*, Award of 4 July 2016, para. 47; see also CAS 2014/A/3615; CAS 2016/A/4626, *WADA v. Meghali*, Award of 20 September 2016, para. 45.

Rider's Sample was collected on 18 September 2016, and he was notified of the Adverse Analytical Finding on 3 May 2017. Under the present circumstances the Single Judge sees no reason to consider this as a substantial delay. Thus, absent any further arguments or evidence to the contrary, the Single Judge sees no reason to stray from the general rule of art. 10.11.11 ADR.

112. The Rider in the present case has been Provisionally Suspended since 3 May 2017. The UCI submitted no evidence that the Rider breached this Provisional Suspension. Accordingly, the Single Judge holds that the Rider shall receive a credit for the period of the Provisional Suspension, i.e. from 3 May 2017 until the date of the present Judgment.

113. The Single Judge also takes note that the date of this Judgment is more than one year after the date of Sample collection. For the sake of thoroughness, the Single Judge notes that if any portion of this period amounted to a substantial delay in these proceedings not attributable to the Rider within the meaning of art. 10.11.11 ADR, it is accounted and compensated for by the fact that the Rider receives credit for the Provisional Suspension served since 3 May 2017.

114. Thus, considering the backdating of the commencement of the Rider's period of Ineligibility and the credit for the period of the Provisional Suspension served by the Rider, the effective date of the period of Ineligibility is 3 May 2017, and will extend for a period of four years from this date, i.e. until 2 May 2021.

3. Disqualification

115. In application of art. 9 ADR, which provides that *"[a]n anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes*", all of the Rider's results during the Competition in which the Sample collection took place, i.e. the Vuelta a Ciclista a Galicia are hereby Disqualified, with all resulting Consequences, including forfeiture of any medals, points and prizes.

116. According to art. 10.8 ADR, "*all other competitive results of the Rider obtained from the date a positive Sample was collected…shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences, including the forfeiture of any medals, points and prizes*". The UCI saw no reason to derogate from the general rule of Disqualifying all competitive results from the date of the Rider's positive Samples until the start date of the Rider's Provisional Suspension.

117. In applying this "fairness exception", the case law of CAS and this Tribunal reflects a high degree of discretion taken by the hearing body, in consideration of factors such as the similarity of a sanction of Disqualification of results to a retroactive period of Ineligibility,[21] seriousness of the violation (including the nature of the substance[22]) and the likelihood that the anti-doping rule violation impacted subsequent results.[23] In some instances, CAS panels have Disqualified up to

[21] CAS 2017/O/5039, *IAAF v. Pyatykh*, Award of 18 August 2017, para. 131 *quoting* CAS 2016/A/4469, *IAAF v. Chernova*, Award of 29 November 2016, para. 176.

[22] See, e.g. ADT 05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017, para. 115, considering the nature of EPO, in particular that it is not a substance that is taken non-intentionally, and that generally speaking, it needs to be taken more than once to achieve performance enhancing effects.

[23] See, e.g. UCI ADT CAS 2016/A/4707, *Schwazer v. IAAF*, Award of 30 January 2017, para. 106, in which the CAS panel Disqualified approximately six months of results, in consideration of the fact that the substance was not a Specified Substance,

three years of results in addition to the standard period of Ineligibility,[24] and this Tribunal has Disqualified up to two years of results.[25]

118. Granting the UCI's request would mean that the Rider would be deprived of sporting results for an additional eight months to the four-year period of Ineligibility. Taking into account all the factors mentioned above, and in particular the nature of the Prohibited Substance and the severity of the effects of Disqualification, as well as the fact that no arguments were submitted by the Rider that would call for the application of the "fairness exception" in this case, the Single Judge does not see any reason that would justify a derogation from the principle set forth in art. 10.8 ADR.

119. Thus, the Single Judge holds that all results obtained by the Rider between the date of the Sample collection (18 September 2016) and the date of the commencement of the Provisional Suspension (3 May 2017) shall be Disqualified with all of the resulting Consequences, including the forfeiture of any medals, points, and prizes.

4. Mandatory fine and costs

a. Application of the mandatory fine

120. In accordance with art. 10.10.1.1 ADR: "*[a] fine shall be imposed in case a Rider or other Person exercising a professional activity in cycling is found to have committed an intentional anti-doping rule violation within the meaning of Article 10.2.3 [ADR]*".

121. In this case, the Rider was an amateur, and therefore not exercising a professional activity in cycling.

122. Therefore, the Single Judge holds that the Rider is not subject to a mandatory fine.

b. Amount of the costs

123. In application of art. 28.1 ADT Rules, the Single Judge must determine the cost of the proceedings as provided under art. 10.10.2.1 ADR. Per art. 28.2 ADT Rules, as a matter of principle, the Judgment is rendered without costs.

124. Notwithstanding the above, the Single Judge may also order the unsuccessful party to pay a contribution toward the prevailing party's costs and expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and experts (art. 28.4 ADT Rules). The provision states that if the prevailing party was represented by a legal representative the contribution shall also cover legal costs.

125. In application of art. 10.10.2 ADR, and in light of all of the circumstances of this case, especially the fact that the prevailing party, i.e. the UCI was not represented by external counsel and the non-participation of the Rider in the proceeding, the Single Judge finds it appropriate to refrain from ordering the Rider (as the unsuccessful party) to pay a contribution towards the UCI's costs.

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that the use of a Prohibited Substance on multiple occasions could not be excluded, and long-term benefits could be achieved through the use of the substance.

[24] CAS 2016/O/4481, *IAAF v. Savinova-Farnosova*, Award of 10 February 2017, para. 200.

[25] See, e.g. ADT05.2016, *UCI v. Kocjan*, Judgment of 28 June 2017, para. 115.

126. As a result of being found to have committed an anti-doping rule violation, the Rider shall, however, bear the cost of results management set at an amount of CHF 2'500 (art. 10.10.2.2 ADR).

VI. RULING

1. In light of the above, the Single Judge decides as follows:
   - Mr. Perez Gutierrez has committed a violation of art. 2.1 ADR.
   - Mr. Perez Gutierrez is subject to a period of Ineligibility of four years. The period of Ineligibility shall commence on the date of the decision, i.e. 25 April 2018. However, considering the credit for the period of the Provisional Suspension already served by Mr. Perez Gutierrez since 3 May 2017 the Rider's period of Ineligibility effectively began on 3 May 2017, and will end four years from this date.
   - All results obtained by Mr. Perez Gutierrez in the period between the date of his Sample collection (18 September 2016) and the date his Provisional Suspension began (3 May 2017), are Disqualified, including forfeiture of any medals, points and prizes.
   - Mr. Perez Gutierrez shall pay the costs of the results management by the UCI (CHF 2'500).
2. All other and/or further reaching requests are dismissed.
3. This Judgment is final and will be notified to:
   a) Mr. Perez Gutierrez;
   b) Agencia Española de Protección de la Salud en el Deporte (AEPSAD);
   c) WADA; and
   d) UCI.
4. This Judgment may be appealed before the CAS pursuant art. 30.2 ADT Rules and art. 74 of the UCI Constitution. The time limit to file the appeal is governed by the provisions in art. 13.2.5 ADR.

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Emily WISNOSKY
Single Judge