

**UCI Anti-Doping Tribunal**

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**Judgment**

**case ADT 03.2018**

**UCI v. Mr Juan José Cobo Acebo**

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**Single Judge:**

**Mr. Julien Zylberstein (France)**

**Aigle, 13 June 2019**

## I. INTRODUCTION

1. The present Judgment is issued by the UCI Anti-Doping Tribunal (“the Tribunal”) in accordance with the *UCI Anti-Doping Tribunal Procedural Rules* (the “ADT Rules”) in order to decide whether Mr. Juan José Cobo Acebo has violated the *UCI Anti-Doping Rules* (the “ADR”). The allegation against the Rider is made by the Union Cycliste Internationale (the “UCI” and, together with the Rider, the “Parties”).

## II. 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 (who did not participate in the proceedings before the Tribunal), 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 professional cyclist, affiliated to the Real Federación Española de Ciclismo (the “RFEC”) and a Licence-Holder within the meaning of the ADR.

### B. The ABP

5. The Rider was part of the UCI’s Athlete Biological Passport Program (the “ABP”). The ABP is based on longitudinal monitoring of the athlete and is designed to be an “indirect” method of doping detection. It focuses on the effect of prohibited substances and methods on the athlete’s haematological values rather than the identification of a specific substance or method in the athlete’s specimen.
6. The Adaptive Model is a statistic tool which was developed to identify atypical values or profiles that warrant further investigation. It predicts – for the individual athlete – an expected range within which the athlete’s biological markers will fall, assuming a normal physiological condition.
7. Haematological data is considered atypical if 1) a haemoglobin (HGB) and/or OFF-score (OFFS) marker value falls outside the expected intra-individual ranges, with outliers corresponding to values out of the 99%-range (0,5 – 99,5 percentiles) (1:100 chance or less that this result is due to normal physiological variation) or 2) when *sequence deviations* (a longitudinal profile or marker values) are present at specificity of 99,9% (1:1000 chance or less that this is due to normal physiological variation).

8. The OFF-score value is a haematological marker which is a combination of HGB and the percentage of reticulocytes (RET%).

**C. The alleged anti-doping rule violation**

9. The UCI alleges that the Rider committed a violation of Article 21.2 UCI ADR 2009 based on abnormalities detected in the haematological values contained in the Rider's ABP.
10. The following table summarizes the key parameters reported in the Rider's ABP:

No.	Sample code	Date of test	HCT%	HGB (g/dL)	OFF-score	RET# 10 <sup>6</sup> /uL	RET %	RBC 10 <sup>6</sup> /uL	MCHC g/dL
1	029384	02.12.2007	47.03	16.1	110.08	0.0368	0.72	5.12	34.0
2	008941	23.02.2008	42.4	14.4	86.80	0.0422	0.91	4.64	34.0
3	040496	19.05.2008	48.2	16.9	129.66	0.0228	0.43	5.31	35.1
4	751793	08.06.2008	49.9	16.8	97.77	0.0736	1.37	5.37	33.7
5	283992	04.07.2008	48.7	16.1	111.90	0.0341	0.67	5.09	33.1
6	283884	15.07.2008	45.5	15.3	110.20	0.0245	0.51	4.80	33.6
7	751924	13.08.2008	47.6	16.4	114.20	0.0351	0.69	5.09	34.5
8	040413	26.08.2008	47.8	15.9	115.90	0.0252	0.51	5.00	33.2
9	271363	16.10.2008	46.0	16.2	100.52	0.0514	1.05	4.92	35.2
10	753145	30.10.2008	46.8	16.7	97.54	0.0686	1.34	5.12	35.8
11	271396	29.01.2009	46.4	16.2	112.73	0.0340	0.68	5.03	35.0
12	752373	07.04.2009	46.5	15.7	111.30	0.0294	0.58	5.07	33.8
13	763992	19.04.2009	44.0	14.8	102.30	0.0271	0.58	4.67	33.6
14	276870	13.06.2009	47.5	15.9	101.80	0.0460	0.91	5.06	33.5
15	296242	27.08.2009	46.3	15.4	97.40	0.0431	0.89	4.84	33.3
16	296053	11.09.2009	48.2	16.0	117.20	0.0260	0.51	5.10	33.2
17	296854	24.09.2009	48.5	16.2	121.30	0.0236	0.46	5.14	33.4
18	296878	26.09.2009	45.7	15.2	120.30	0.0136	0.28	4.85	33.3
19	753230	15.10.2009	50.2	16.7	104.10	0.0585	1.10	5.32	33.3
20	767702	16.10.2009	47.9	15.9	106.70	0.0388	0.76	5.11	33.2
21	753234	18.11.2009	48.4	16.7	107.00	0.0518	1.00	5.18	34.5
22	298896	16.02.2010	48.8	15.6	107.26	0.0333	0.66	5.05	32.0
23	760087	17.03.2010	48.1	15.8	106.04	0.0384	0.75	5.12	32.8
24	760079	31.03.2010	46.6	15.5	102.35	0.0385	0.77	5.00	33.3
25	760058	09.04.2010	46.1	15.3	100.35	0.0383	0.77	4.98	33.2
26	760070	18.05.2010	46.5	15.7	101.36	0.0428	0.86	4.98	33.8
27	431532	12.06.2010	43.4	14.6	97.30	0.0305	0.66	4.62	33.6
28	298224	22.06.2010	48.5	16.3	113.89	0.0344	0.67	5.14	33.6
29	298222	29.06.2010	45.1	15.1	104.52	0.0286	0.60	4.77	33.5
30	437706	24.08.2010	48.0	16.2	104.14	0.0486	0.93	5.23	33.8
31	431668	21.07.2011	48.8	16.8	117.44	0.0370	0.71	5.21	34.4
32	538798	18.08.2011	47.6	16.0	88.30	0.0729	1.43	5.10	33.6
33	538870	01.09.2011	45.9	15.8	102.00	0.0431	0.87	4.95	34.4
34	524838	07.09.2011	47.4	16.0	113.10	0.0311	0.61	5.10	33.8
35	538886	11.09.2011	44.3	15.4	109.10	0.0270	0.56	4.83	34.8
36	540536	13.03.2012	46.3	16.2	108.70	0.0406	0.79	5.14	35.0

37	549820	17.04.2012	43.1	14.8	90.50	0.0431	0.92	4.68	34.3
38	553602	30.05.2012	49.3	17.0	117.00	0.0416	0.78	5.30	34.5
39	560192	20.06.2012	43.9	15.8	107.80	0.0342	0.70	4.89	36.0
40	565372	28.06.2012	46.0	15.8	106.70	0.0371	0.73	5.08	34.3
41	565160	16.07.2012	41.9	14.1	99.10	0.0328	0.72	4.56	33.7
42	443220	09.08.2012	47.6	16.6	117.26	0.0343	0.66	5.20	34.9
43	569384	16.08.2012	45.5	15.4	106.80	0.0308	0.62	4.96	33.8
44	569102	25.08.2012	41.7	14.5	85.90	0.0431	0.97	4.44	34.8
45	569232	04.12.2012	41.3	14.6	85.40	0.0465	1.02	4.56	35.4
46	574800	11.02.2013	47.9	16.4	122.00	0.0254	0.49	5.18	34.2
47	565102	06.03.2013	45.7	15.8	117.30	0.0226	0.46	4.91	34.6
48	830660	02.05.2013	48.5	16.7	107.60	0.0510	0.98	5.20	34.4

11. Following an initial review, according to which the ABP contained abnormal values, the Athlete's Passport Management Unit submitted the Rider's ABP to an Expert Panel, consisting of three experienced anti-doping specialists (Prof. Giuseppe d'Onofrio, Prof. Michel Audran, and Prof. Yorck Olaf Schumacher) for independent evaluation.
12. The Expert Panel conducted a review of the Rider's ABP and competition schedule, and in a joint expert opinion dated 17 July 2014 (Expert Report #1) set forth their unanimous opinion on the Rider's haematological profile as follows:

*In summary, in consideration of the repeatedly observed suppression of the erythropoietic system and of the increase of HGB in time vicinity to important races, we believe that it is highly unlikely that the longitudinal profile X145P6 is the result of a normal physiological or pathological condition, and that, in the absence of a satisfactory explanation of the athlete, it is the highly likely result of the use of a prohibited substance and/or prohibited method, such as blood transfusions and/or the use of erythropoietic stimulants, in 2009 and in 2011.*

13. On 23 September 2014, upon invitation and after all relevant documentation had been to the Rider, the Rider sent an explanation to the UCI (Rider's explanation #1). The Rider submitted that "[t]he comments made in the report issued on 17 July 2014 are completely inconsistent as the arguments used to demonstrate the abnormality are also used in support of what is deemed normal". The Rider further questioned the reference population used to interpret his ABP and suggested there was a lack of bibliographic reference for the Expert Panel's conclusions. With regards to the variance in the haemoglobin concentration, the Rider suggested that this could be due to "[...] the laboratory where the analyses were conducted" and the relevant season of the year. The Rider also argued, with regards to his OFF-score values, that "[...] at no time do these values cross the upper limit of normal that was calculated with the adaptive software models known as ABP" and, hence, that "[...] if the values obtained from the OFF-hr SCORE do not cross the limits calculated for the individual himself and [he does not have] access to the population on which the differences are based [...], [he is] unable to understand the role played by the medical and scientific analysis in this case,

*which is not impartial". The Rider also argued that the RET values were consistent with publically available data on cyclists and that "[t]he samples obtained during the Road World Championships were affected by a fractured humerus caused by a bad fall on 19 August 2009 [...]". The Rider highlighted the "[...] absence of any documented control of the temperature at which the samples were transported is striking throughout the documentation", as well as the "absence of duplicates in many samples or the combination of strange events which are oddly well documented", to suggest that they could have impacted his profile. Finally, the Rider concluded by stating that "[...] his profile in the race, namely in the 2011 [Vuelta] Tour, is similar to the profile described in large sample of cyclists".*

14. On 10 December 2014, the Expert Panel issued a follow-up report (Expert Report #2), in which it considered the Rider's explanations. The opinion of the Expert Panel was as follows:

*Explanation for the atypical pattern in samples 17 and 18:*

*[...] the alleged bleeding due to the fracture would hypothetically have caused a decrease in haemoglobin with reactive increase in reticulocytes and relatively low OFF score, while in sample 17 and 18 we are dealing with the opposite constellation of relatively high HGB, with very lowered reticulocytes and increased OFF score, which cannot be explained by "bleeding and bruising"; the reticulocyte percentage of 0,28%, in particular, observed in sample 18, is extremely low, and suggests that the Athlete had artificially increased his red blood cell mass in the preceding weeks, thus suppressing red blood cell production;*

*Any (unlikely) haematological alteration caused by humerus fracture would have subsided with complete haematological normalization in approximately 30 days, as it happens even after lesions of even more perfused and larger bone of the body. [...]*

*[...] We thus confirm that the atypical finding in samples 17 and 18 is suspicious for blood manipulation. The arguments provided by the athlete do not explain by any means the abnormalities observed in the profile. [...]*

*Explanation for the abnormal sequence of samples 32 to 35:*

*[...] The percentage of the Athlete's reticulocytes during 2011 Vuelta was progressively and continuously decreasing, with an initial value of 1.43% final value of 0.56%: this behaviour cannot be considered "stable", nor was it ever mentioned as "stable" in other sections of our "Initial evaluation". [...] The pattern observed in the Athlete is in line with a trailing erythropoietic stimulation in the preparation phase of the race [...] and progressive erythropoietic suppression during the race [...].*

*Reply to "comments on the report of 17/7/2014":*

*[...] a number of statements in the Athlete's explanations are not correct and should be dismissed. For instance, we never mentioned "evolving patterns of haemoglobin concentration...which are abnormal in 2009 and 2011 compared with the patterns observed in 2008 and 2012". We never used arbitrary criteria to define differences, nor mentioned stability parameters or a range of normality to assess the Athlete's profile. As for the reticulocytes on the other hand, although we have not considered any single result as evidence of doping in this case, scientific literature confirms that reticulocyte percentages lower than 0.4% (like the 0.28% in sample 18) are below the lower limit of the population reference values: such result, becomes specifically relevant within the scenario of the suspicious erythropoietic suppression which we have pointed out for samples 17 and 18. [...]*

*Interlaboratory variation:*

*[...] 1) The interlaboratory quality in the ABP process is ensured by participation of all WADA-accredited laboratories to a strict program of an external, independent interlaboratory Quality Assessment (EQA). The performance of laboratories in such EQA assessments is certified by complete result reports in the Laboratory Documentation Packages or by declarations of the Laboratory Director in the Certificates of analysis. All samples were analysed in laboratories that participated in such recognized EQA scheme for blood cell counting, namely the "Centre Suisse de Controle de Qualité (CSCQ), whose results do not show any deviation from the expected quality standards for any sample. [...]*

*3) Most importantly, all the samples that we have considered suspicious for the utilization of prohibited substances and/or methods [...] have been analysed in the Lausanne laboratory, so that any issue concerning interlaboratory variability is irrelevant anyway. [...]*

*Presumed lack of duplicate analysis:*

*[...] several samples have been excluded from the profile for technical reasons (single analysis or analysis in non-WADA accredited laboratories). Thus the lack of duplicate analysis is one of the causes of sample invalidation and all the valid samples of the profiles have been analysed twice. [...]*

*Temperature storage:*

*[...] As a premise, it is important to note that to find a simple formal inaccuracy in the documentation package is not an evidence that a test result is wrong or not valid. [...]*

*All blood samples collected for the X145P6 hematologic passports, indeed, show a remarkable stability of MCV (mean 93.1, range 89.8-95.7fL, CV 1.6%) over years in different laboratories. This behaviour permits to dismiss the hypothesis of inappropriate storage or handling, which would have caused red cell abnormalities flagged by abnormal indices behaviour. Thus, to sum up, the minimal inaccuracies in concerning temperature recording do not affect the analytical outcome and certainly do not influence the profile to the disadvantage of the Athlete.*

*Conclusion:*

*In conclusion, the Athlete's arguments do not offer, in our opinion, any suitable explanation for his abnormal Blood Passport profile. Thereafter, it is the unanimous opinion of the Panel that, based on the information in the Passport, it is highly likely that the Athlete used a Prohibited Substance or Prohibited Method, and that it is unlikely to find the Passport abnormal assuming any other cause".*

15. On 27 March 2015, the Rider, who had retired in the meantime, was informed of the Expert Panel's conclusion and was provided with the relevant documentation. In the same communication, the Rider was notified by the UCI that a violation of Article 21.2 UCI ADR 2009 was asserted against him and was thus offered an Acceptance of Consequences pursuant to Article 8.4 UCI ADR 2015.
16. On 16 October 2015, upon his request, the Rider submitted a new explanation (Rider's explanation #2). The Rider compared his ABP values with the alleged haematological data of a "model cyclist" and used such comparison to conclude that his results were normal. The Rider further noted that, in addition to the humerus fracture, he had been treated with corticosteroids in 2009 following a tendon injury and that he underwent "intermittent hypoxic training". The Rider thus argued that these factors could have "caused the increase in erythropoietic activity".
17. On 19 November 2015, the Expert Panel, following the examination of the Rider's second explanation, submitted a follow-up report (Expert Report #3), according to which:

*Explanation for samples 32 to 35:*

*[...] The Panel refrains from commenting on the sequence of blood results from the purported "model cyclist", which is a single example of longitudinal monitoring of an unknown individual and cannot represent an absolute, apodictic model of normal haematological variations in cyclists. This argument can thus be promptly dismissed.*

*Explanation for samples 17 and 18:*

*[...] any effect of the fracture on the blood parameters in samples 17 and 18 can be excluded, for the following reasons:*

- i) The natural erythropoietic reaction to any type of blood loss is never a supraphysiological increase of red cell mass (such as observed in the present sample sequence), but a reestablishment of the previous, physiologic composition of the blood;*
- ii) There is no evidence of significant haemorrhage due to the fracture: a few days after the fracture, the Athlete started his participation in the 2009 Vuelta of Spain and the pre-competition blood sample (n. 15 on 27.8.2009) showed values of HB and reticulocytes which were normal for the Athlete;*

*iii) As mentioned in our previous Response, any hypothetical hematologic alteration caused by humerus fracture would have subsided with complete haematological normalization in approximately 30 days [...].*

*As for the intermittent hypoxic training (“finished 25 days before sample 18”, as the letter indicates), any effect of this practice on the blood values at the end of September can be excluded. [...] hematologic changes produced by artificial hypoxia are very mild and disappear rapidly after its cessation. Even after real altitude training such extreme picture as visible in the profile has never been described in any study. The marked reticulocyte suppression (0.46% and 0.28%) and the high OFF scores (121.3 and 120.3) observed in samples 17 and 18 are therefore highly unlikely to be related by any means to the hypoxic training stopped on month before.*

*A possible effect of corticosteroids on red blood cell parameters is mentioned citing undefined sources. However, such effect is not confirmed by any recent experimental study in humans. Glucocorticoids can promote red cell formation during stress erythropoiesis, such as in haemorrhage or haemolytic anemia, and can enhance in vitro the survival of red cell progenitors. [...] The hypothesis of an even minimal effect of two infiltrations of glucocorticoids about six weeks before the collection of samples 17 and 18 is medically wrong and scientifically nonsensical.*

*Conclusion:*

*In conclusion, it is our opinion that the further arguments advanced by the Athlete in his second letter dated 15.10.2015 do not offer any suitable explanation for his abnormal Blood Passport profile. Thereafter we confirm that it is the unanimous opinion of the Panel that it is highly likely the Athlete used a prohibited substance or prohibited method, and that it is unlikely to find such Passport abnormalities assuming any other cause.*

18. On 1 December 2015, the Rider was informed of the Expert Panel’s third opinion. Thus, the UCI maintained that the Rider had committed an ADRV of Article 21.2 ADR and invited the Rider to attend a conference call regarding a possible agreement on the consequences on 9 or 11 December 2015.
19. On 16 December 2015, the UCI and the Rider discussed a possible Acceptance of Consequences during a conference call. The UCI requested the Rider to discuss this proposal with his lawyer and to revert by 23 December 2015.
20. Having not heard from the Rider following these exchanges, the UCI requested him, on 21 January 2016, to confirm whether he agreed to the discussed Acceptance of Consequences or whether he wished to see his case tried.
21. On 25 and 28 January 2016, M. José Rodriguez informed the UCI that he had been appointed by the Rider and that the latter contested the ADRV and wished to open disciplinary proceedings.



22. On 11 March 2016, the UCI and Mr. Rodriguez had a new telephone conversation to discuss the Acceptance of Consequences, followed by an email from the UCI, requesting M. Rodriguez to convert with his client and to revert by no later than 17 March 2016.
23. On 22 April 2016, upon the Rider's lawyer's request, the Rider was granted a deadline until 9 May 2016 to submit a supplementary explanation.
24. On 10 May 2016, the Rider submitted a new explanation (Rider's explanation #3), in which the Rider suggested again that the haemoglobin variation could be due to inter-laboratory variation, that the experts had arbitrarily analysed the ABP and that the Expert Panel had not relied on appropriate studies with regards to the variability of haemoglobin concentration. The Rider further argued that "*as there is not any paper evaluating a 3-week race, expert support their statements in very low quality data from very small studies dealing with races lasting less than a week, usually published by them*" and that one of the samples, namely sample 32, had been affected by high temperature variations. The Rider concluded his explanation by stating that "[i]n summary, experts are unable to support any statement about haemoglobin variability, both over the entire passport period and, specifically, over samples 32-35. In addition sample 32 was uncontrolled for more than 4 hours, exposed to very high temperature variations (more than 30 degrees of variation) and should be invalidated".
25. The Expert Panel was invited to provide its opinion following the Rider's explanation. Thus, the Expert Panel issued a fourth report on 27 May 2016 (Expert Report #4) and dismissed the Rider's explanation as follows:

*Variability in haemoglobin measurements:*

*[...] We refer to our previous expertise (10.12.2014, page 6 "interlaboratory variation"), where these issues are discussed at length.*

*Unacceptable methods to analyse haemoglobin patterns:*

*[...] we had shown in our initial review that there were some inconsistencies between the physiologically expected behaviour and the pattern visible in the athlete (see report dated 17.7.2014, "General description of the profile" page 1-2). Contrasting the statement of the athlete (page 2, first paragraph), no statistical calculations performed and the analyses were used purely for descriptive purposes.*

*[...] As of the WADA guidelines, the initial evaluation whether a profile represents normal or abnormal variability is not done by the expert, but by an adaptive Bayesian model based on population studies from large number of athletes. These models and the population studies have been published and are widely available. The model flagged the profile of the athlete to have abnormal sequence variability in haemoglobin at 95%, at 92% for the OFF score and at 99% for reticulocyte%. The athlete has several reticulocyte values beyond his individually calculated reference ranges, which thereby classify as "abnormal".*

*Selective literature citation in the previous expert report describing the stage race patterns:*

*[...] the, in the view of the authors, most “robust” paper on the topic is not specified. We can only speculate that it might be the report of Corsetti et al. on the Giro d’Italia. In fact, this article is very well cited in our report dated 10.12.2015 (see literature collection at the end of the document, position 4, Corsetti et al.), and so by no means ignored. We further cite a comprehensive summary on all studies on the subject published in connection with the latter, which critically discuss its content and gives an overview of the scientific opinion on the topic.*

*Possible impact of heat on measures in sample 32:*

*[...] Again, this issue has been discussed extensively in our previous report dated 10.12.2014, page 8/9. [...] the claims by the athlete have no substance.*

*Conclusion:*

*[...] the additional arguments provided by the athlete do not offer, in our opinion, any suitable explanation for his abnormal profile. Therefore, it is our unanimous opinion that, based on the information available at this stage, it is highly likely that the Athlete used a Prohibited Substance or Prohibited Method, and that it is unlikely to find the Passport abnormal assuming any other cause.*

26. On 8 June 2016, the Rider was again informed of the Expert Panel’s conclusion and was invited to communicate his intention to agree on the Acceptance of Consequences by no later than 17 June 2016, past which date the UCI would refer the case to the UCI ADT.
27. Between 2016 and 2017, protracted discussion took place between the UCI/the UCI’s legal representative and the Rider/the Rider’s legal representative.
28. In March 2018, Mr. Rodriguez informed the UCI’s external legal counsel that he was no longer authorized to represent the Rider in relation to the ADRV.
29. On 9 May 2018, the UCI’s external legal counsel sent an email directly to the Rider, granting him a deadline until 16 May 2018 to inform them whether he agrees to the terms of the Acceptance of Consequences.
30. Following the Rider’s failure to respond to this correspondence, the UCI tried to receive reliable information about the Rider’s exact mailing address. In this respect, the UCI tried to verify, not only with the Rider’s federation but also with his manager, his current mailing address.
31. On 28 September 2018, following an information according to which Mr. Rodriguez was representing the Rider with regards to a bank guarantee proceeding against the UCI, the UCI’s external legal counsel sent a letter to Mr. Rodriguez and the Rider, to inform them that proceedings would be filed with the UCI ADT against the Rider, and

inviting the Rider to contact the UCI's external legal counsel if he wished to discuss the matter further.

32. Having not heard from the Rider nor from Mr. Rodriguez, the UCI referred the case to the Tribunal. In its referral to the Tribunal, the UCI requested the following:

- *Declaring that Mr. Cobo has committed and Anti-Doping Rule Violation.*
- *Imposing on Mr. Cobo a period of ineligibility of between 2 and 4 years, starting on the date of notification of the Tribunal's decision.*
- *Disqualifying all the results obtained by Mr. Cobo in the Vuelta a España 2009 and 2011 and in the 2009 UCI World Championships.*
- *Disqualifying all other results the Single Judge deems appropriate.*
- *Imposing on Mr. Cobo the payment of a fine of [REDACTED] EUR.*
- *Condemning Mr. Cobo to pay the costs of results management by the UCI (2'500 CHF) and the costs incurred for the documentation packages of the blood samples analysed for the Biological Passport (9'500 EUR).*
- *Ordering Mr. Cobo to pay a contribution to the legal and other costs incurred by the UCI in these proceedings.*

### **III. PROCEDURE BEFORE THE TRIBUNAL**

33. In accordance with Article 13(1) ADT Rules the UCI initiated proceedings before the Tribunal through the filing of a petition to the Secretariat on 10 October 2018. Before referring the case to the Tribunal, the UCI offered the Rider an Acceptance of Consequences within the meaning of Article 8(4) UCI ADR and Article 2 ADT Rules by letter dated 1 December 2015. Protracted discussions took place between the UCI and the Rider in this respect and the Rider was given many opportunities to agree to the proposed Consequences. The Rider however did not respond to the proposed Consequences.

34. On 25 October 2018, the Secretariat of the Tribunal appointed Mr. Julien Zylberstein to act as Single Judge in the present proceedings in application of Article 14.1 ADT Rules.

35. On the same day, in application of Article 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 9 November 2018 was granted to submit his answer. In the same communication, the Rider was alerted that Article 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”.

36. On 30 October 2018, Mr. Rodriguez confirmed, following his 28 March 2018 email, that he was not representing the Rider in this matter and was thus not authorized to speak on his behalf.
37. The Rider, on his side, did not submit an answer, nor respond in any way to this communication.
38. On 14 November 2018, in light of the Rider’s failure to submit an answer, the Single Judge exceptionally granted the Rider additional time to submit an answer, setting a new deadline of 21 November 2018. In the same communication, the Rider was informed that if no answer were received, the Single Judge would render his Judgment based on the documents on file.
39. On the same day, the UCI informed the Secretariat of the Tribunal that it took no issue with granting the Rider an extension of the deadline.
40. The Rider, again, did not submit an answer, nor respond to this communication.
41. On 30 November 2018, the Single Judge thus declared the proceedings closed and confirmed that he would render his Judgment based on the documents on file.

#### **IV. JURISDICTION OF THE TRIBUNAL**

42. Article 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 the time limit, the Parties are deemed to have accepted the Tribunal’s jurisdiction”.*

43. 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.

44. Articles 8.1 of the UCI ADR 2015 provides that:

*“The UCI shall establish an UCI Anti-Doping Tribunal to hear anti-doping rule violation asserted after 1st January 2015 under these Anti-Doping Rules.”*

45. Article 8.2 of the UCI ADR 2015 further notes that:

*“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;”*

46. Moreover, Article 7.11 of the UCI ADR 2015, respectively Article 16 of the UCI ADR 2009, provides that:

*7.11 Retirement from Sport*

*If a Rider or other Person retires while a results management process is underway, the UCI retains jurisdiction to complete its results management process. If a Rider or other Person retires before any results management process has begun, the UCI retains authority to conduct results management if it would have had results management authority over the Rider or other Person at the time the Rider or other Person committed the asserted anti-doping rule violation”.*

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

## **V. APPLICABLE RULES**

48. Article 25 ADT Rules reads as follows:

*In rendering his Judgment, 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.*

49. With regards to the application of the respective versions of the UCI ADR, Article 25.1 of the UCI ADR 2015 provides that:

*These Anti-Doping Rules shall apply in full as of 1 January 2015 (the “Effective Date”).*

50. Article 25.2 of the UCI ADR 2015 further clarifies that:

*“[...] with respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of “lex mitior” appropriately applies under the circumstances of the case.”*

51. Thus, since the alleged anti-doping rule violations took place in 2009 and 2011, the present matter shall be governed respectively by the 2009 and the 2011 versions of the UCI ADR. It should be noted that the UCI ADR in force in 2009 and 2011 were the same in all material aspect.

### **A. Anti-doping rule violation**

52. Article 21 of the UCI ADR 2009 lists all the various anti-doping rule violations.

53. In particular, Article 21.2 UCI ADR 2009 provides that:

*Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method.*

*2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that he does not Use any Prohibited Method. 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 for Use of a Prohibited Substance or a Prohibited Method.*

*2.2 The success or failure of the 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.*

*2.3 The Use or Attempted Use of a Prohibited Substance or a Prohibited Method consistent with the provisions of an applicable Therapeutic Use Exemption issued in accordance with the present Anti-Doping Rules shall not be considered an anti-doping rule violation.*

54. The comment to the equivalent of Article 21.2 UCI ADR in the UCI ADR 2015 reads as follows:

*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.*

**B. Burden and Standards of proof**

55. As for the burden and standard of proof, Article 22 UCI ADR 2009 provides that:

*The UCI and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or its National Federation 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 License-Holder alleged to have committed an antidoping 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.*

56. As to the methods of establishing facts and presumptions, Articles 23 and seq. UCI ADR 2009 read as follows:

*23. Facts related to anti-doping rule violations may be established by any reliable means, including admissions. For example, any of the following shall constitute evidence of oxygen transfer enhancement:*

- *An analysis of a blood sample by an UCI-approved laboratory showing a haemoglobin ratio or a stimulation index (as defined in article 13.1.063) higher than the limit based on the rider's test history for a specificity of 99,9 percent following the technical document on the biological passport.*
- *A sequence of six or more haemoglobin ratios and/or stimulation indices (as defined in article 13.1.063) as shown by the analysis of blood samples by an UCI-approved laboratory that deviates from the sequence based on the rider's test history for a specificity of 99,9 percent following the technical document on the biological passport.*

[...]

*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. If the License-Holder 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 or the National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*

*25. Departures from any other International Standard, these Anti-Doping Rules, the Procedural Guidelines set by the Anti-Doping Commission or any other applicable anti-doping rule or policy or technical document which did not cause an Adverse Analytical Finding or the factual basis for any other anti-doping rule violation shall not invalidate such findings or results. If the License-Holder establishes that any such departure which could reasonably have caused the Adverse Analytical Finding or factual basis for any other anti-doping rule violation occurred, then the UCI or its National Federation shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.*

### **C. Sanctions and Consequences**

57. As for the standard period of ineligibility, Article 293 UCI ADR 2009 provides as follows:

*The period of Ineligibility imposed for a first anti-doping rule violation under article 21.1 (Presence of a Prohibited Substance or its Metabolites or Markers), article 21.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or article 21.6 (Possession of a Prohibited Substance or Prohibited Method) shall be 2 (two) years' Ineligibility unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of Ineligibility as provided in article 305 are met.*

58. Article 305 UCI ADR 2009 provides for an increased sanction if aggravating circumstances exist, namely:

*If in an individual case involving an anti-doping rule violation other than a violation under article 21.7 (Trafficking or Attempted Trafficking) or article 21.8 (Administration or Attempted Administration) it is established that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the License-Holder can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.*

*A License-Holder can avoid the application of this article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by an Anti-Doping Organization.*

59. Article 296 and 297 UCI ADR 2009 provide for an elimination or reduction of the sanction in the following cases:

*296. 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 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. 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 a 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.*

60. In relation to the commencement of the period of Ineligibility, Article 314 UCI ADR 2009 provides that:



*Except as provided under articles 315 to 319, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed.*

61. In relation to the automatic Disqualification, Article 313 UCI ADR 2009 reads as follows:

*In addition to the automatic Disqualification of the results in the Competition pursuant to article 288 and except as provided in articles 289 to 292, all other competitive results 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.*

**D. Mandatory fine and costs**

62. With regards to the financial consequences, Article 326 UCI ADR 2009 provides 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 in cycling and in any event for members of a team registered with the UCI.*

*a) Where a suspension 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. The License-Holder concerned shall have the burden of proof to the contrary. For the purpose of the implementation of this article the UCI shall have the right to receive a copy of the complete contracts of the License-Holder from the auditor appointed by the UCI. If justified by the financial situation of the License-Holder concerned, the fine imposed under this paragraph may be reduced, but not by more than one-half.*

*b) In other cases than those under a) the minimum fine shall be CHF 3'000.- for elite men, CHF 1'500.- for elite women and CHF 750,- for under 23 Riders. These minima shall be doubled in the event of a violation under article 21.5 (Tampering or Attempted Tampering), article 21.7 (Trafficking or Attempted Trafficking), or 21.8 (Administration or Attempted Administration), in the event of an evasion or refusal under article 21.3 and in the event of a second or third violation. These minima are reduced by half for violations for which article 295 (Specified Substances) or article 297 (No Significant Fault or Negligence) is applied. Minima may be further reduced for License-Holders resident in Africa, Asia and South-America in line with incomes and cost of living.*

*2. No fine shall be imposed for violations for which article 296 (No Fault or Negligence) is applied.*

3. In other cases than those under paragraphs 1 and 2 the imposition of a fine is optional.

4. In observance of paragraphs 1 and 5 the amount of the fine shall be set in line with the gravity of the violation and the financial situation of the License-Holder concerned.

5. Except where paragraph 1a) is applied, no fine may exceed CHF 1'500'000.-.

63. As for the liability for costs of the procedures, Article 275 provides as follows:

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

1. *The cost of the proceedings as determined by the hearing panel.*

2. *The cost of the result management by the UCI; the amount of this cost shall be CHF 1'000, 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. The National Federation shall be jointly and severally liable for its payment to the UCI.*

*The License-Holder shall owe the costs under 2) and 3) also if they were not awarded in the decision.*

64. In this respect, Article 28 ADT Rules further provides that:

1. *The Tribunal shall determine in its judgment the costs of the proceedings as provided under Article 10.10.2 para. 1 ADR.*

2. *As a matter of principle the Judgment is rendered without costs.*

3. *Notwithstanding para. 1 above, the Tribunal may order the Defendant to pay a contribution toward the costs of the Tribunal. Whenever the hearing is held by videoconference, the maximum participation is CHF 7'500.*

4. *The Tribunal 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. If the prevailing Party was represented by a legal representative the contribution shall also cover legal costs.*

## **VI. FACTUAL AND LEGAL APPRECIATION BY THE TRIBUNAL**

65. This case presents the following main issues:

A. Does the Rider's non-participation in these proceedings pose a problem?

B. Did the Rider violate Article 21.2 UCI ADR 2009?

C. If so, what are the consequences?

**A. Does the Rider's non-participation in these proceedings pose a problem?**

66. The Rider did not respond, communicate directly, nor make any submissions to the Tribunal during the current proceeding. The UCI submitted that the Rider had stopped any communication regarding this case in 2017. In March 2018, the Rider's legal representative further informed the UCI that he was no longer authorized to represent the Rider in this case, however, he was still acting as legal counsel regarding financial proceedings between the Rider and the UCI.
67. The ADT Rules do not require a response from a Rider in order to issue a decision. According to Article 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 in the proceedings before the Tribunal 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 (Article 10.1 ADT Rules).
68. The ADR also does not 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 Article 14.1.1 UCI ADR 2015, the UCI may provide notice *inter alia* to the Rider by "registered or ordinary mail by post" or by "electronic mail". In addition, Article 6.3 ADT Rules provides that "notification and communication shall be sent to the email address indicated by the Parties". The UCI and the 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. The UCI further contacted the RFEC, the Rider's manager and the Rider's former legal representative in this case, in order to verify the Rider's current mailing address. Likewise, the Tribunal attempted to contact the Rider both by electronic and registered mail, relying on the same contact information.
69. While proper notification need not necessarily comprise actual knowledge,<sup>1</sup> the Rider did have actual knowledge of the proceedings. Indeed, the Rider submitted explanations on three different occasions, i.e. on 23 September 2014, on 16 October 2015 and on 10 May 2016, before the UCI filed the proceedings with the Tribunal. Moreover, between 2016 and 2017, extensive discussions took place between the Rider and the UCI regarding the proposed Acceptance of Consequences. However, as soon as the proceedings were filed with the Tribunal, the Rider ceased all communication.

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<sup>1</sup> Article 14.1.1 UCI ADR 2015, see also for a confirmation of this a recent CAS award, CAS 2017/A/4996, *IAAF v. Guerfi*, Award of 20 October 2017, para. 14, which (like the UCI ADR) considered that notification is properly given once it enters the "sphere of control" of the recipient, giving the recipient possibility to become aware of the contents of the notice.

70. The UCI and the Tribunal also gave the Rider ample opportunity to respond. During the results management process, the UCI extended deadline on several occasions. The UCI also allowed the Rider to submit his explanations following each of the Expert Panel's reports.
71. During the hearing phase, the Tribunal also granted the Rider additional time to submit his Answer.
72. Thus, in view of the above and the evidence before it, the Single Judge concludes that the Rider's procedural rights were not breached, including the right to be heard. The Rider had knowledge of the proceedings before the Tribunal and submitted three explanations to the UCI before the filing with the Tribunal. He has been enabled by both the UCI and the Tribunal to defend himself and his legal interests, including the chance to express his views on all relevant facts, so submit further written observations to the Tribunal 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.
73. The Single Judge remains obliged to ensure that the Judgment is both factually and legally well-founded. In doing so, the Single Judge will limit himself to the case file, having in mind that he is not in any case bound by the Parties' prayers for relief (Article 26 ADT Rules).

**B. Did the Rider violate Article 21.2 UCI ADR 2009?**

74. The UCI submits that the Rider committed an anti-doping rule violation within the meaning of Article 21.2 UCI ADR 2009, which conclusion the UCI derives from the analytical data in the Rider's ABP as well the interpretation of said data by the Expert Panel.
75. During the results management process, the Rider objected to this conclusion and submitted various explanations to explain the abnormalities in his profile (see sections ii below).
76. During the hearing procedure before the Tribunal, as stated above, the Rider did not submit any Answer or respond in any way to the UCI's petition.
77. It follows from Article 22 UCI ADR 2009 that the UCI bears the burden of proof to establish that the Rider committed a violation of Article 21.2 UCI ADR 2009. The standard of proof is *"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"*.

**i) The ABP as reliable evidence**

78. It is not disputed that the ABP is a reliable means for the purpose of establishing the use of a prohibited substance or prohibited method within the meaning of Article 21.2 UCI ADR 2009. That the ABP constitutes a reliable means of evidence has been confirmed by numerous CAS awards<sup>2</sup> and by this Tribunal<sup>3</sup>.

**ii) The Rider's explanation submitted to the UCI**

79. The Rider submitted a first explanation on 23 September 2014 regarding the ADRV.

80. In substance, as already mentioned, he argued that:

- The Expert Panel had made inconsistent definitions of what was normal and abnormal;
- The ABP assessment was based on a *“comparison with an unknown population of athletes”*;
- The variances in his blood values could be due to inter-laboratory variation;
- His OFF-score marker did not breach his individual limits and that the variances in the RET values were in line with publically available data on cyclists;
- The samples taken during the 2009 World Championships could have been affected by a traumatic humerus fracture which occurred in August 2009;
- General analytical issues (such as absence of duplicate analyses and temperature variation) could have impacted his profile; and
- His profile during the 2011 Vuelta was *“similar to the profile described in large samples of cyclists”*.

81. On 16 October 2016, the Rider submitted an additional explanation, which can be summarized as follows:

- The Rider compared his ABP with the alleged haematological data of a *“model cyclist”*, in order to conclude that his profile was normal;
- The Rider further argued that in addition to his humerus fracture, he had been treated with corticosteroids in 2009, following a tendon injury and that prior to the World Championships, he underwent intermittent hypoxic training.

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<sup>2</sup> See e.g. CAS 2015/A/4006, para. 103; CAS 2016/O/4481, para. 133; CAS 2016/O/4464, para. 148; CAS 2010/A/2174, para. 9.8; CAS 2010/A/2176; CAS 2010/A/2235.

<sup>3</sup> UCI ADT 02.2018, *UCI v. Jaime Roson Garcia*, para. 55; UCI ADT 03.2017, *UCI v. Isabelle Moreira Lacerda*, para. 60; UCI ADT 06.2017, *UCI v. Alex Correia Diniz*, para. 54.

82. Finally, on 10 May 2016, the Rider sent the UCI a third and final explanation, according to which:

- As argued in his first explanation, the haemoglobin variation could be due to inter-laboratory variation;
- The Expert Panel had arbitrarily analysed the ABP and had not relied on appropriate studies to do so;
- That one of his samples, sample 32, had been affected by high temperature variations.

### **iii) The position of the UCI**

83. The UCI submitted the Rider's three explanations to the Expert Panel, for review.

84. The Expert Panel thus carefully addressed all of the arguments raised by the Rider in his explanation and dismissed them in full.

85. The fourth and final Report sent in by the Expert Panel was concluded as follows:

*In analysing the newly presented facts, we therefore conclude that the additional arguments provided by the athlete do not offer, in our opinion, any suitable explanation for his abnormal profile. Therefore, it is our unanimous opinion that, based on the information available at this stage, it is highly likely that the athlete used a Prohibited Substance or a Prohibited Method, and that it is unlikely to find the Passport abnormal assuming any other cause.*

### **iv) The position of the Tribunal**

86. It appears that the arguments raised by the Rider during the results management process before the UCI have been correctly addressed by the Expert Panel.

87. Therefore, based on the UCI's petition and on the Rider's explanations submitted to the UCI, and taking into consideration that the Rider failed to dispute the Expert Panel's fourth and final Report and/or answer to the UCI's petition in any way, the Single Judge concludes that the Rider did not set forth any legal basis on which his arguments may rely.

88. Therefore, the Single Judge does not find any evidence allowing him to depart from the Expert Panel's four reports on file.

### **v) Requirements of the ABP data**

89. As set forth in the UCI Petition, the fundamental requirement of establishing an anti-doping rule violation on the basis of a longitudinal profile is that:

*“[...] all experts – independent from each other – come to the conclusion that doping is a plausible and likely explanation for the abnormal variation and that there is no other plausible cause ascertained with a significant degree of probability”.<sup>4</sup>*

90. As previously emphasized by this Tribunal<sup>5</sup> in quoting CAS:<sup>6</sup>

*“a pitfall to be avoided [in the context of the ABP] is the fallacy that if the probability of observing values that assume a normal or pathological condition is low, then the probability of doping is automatically high”. Concretely this has been said in legal literature to mean that “if the ADO is not able to produce a ‘doping scenario’ with a minimum degree of credibility (‘density’), the abnormality is simply unexplained, the burden of proof enters into play and the ADO’s case must be dismissed since there is no evidence pleading in favour of the hypothesis of ‘doping’ any more than for another cause.”<sup>7</sup>*

91. It has further been stated by this Tribunal, that since the mere fact that the Rider’s haematological values are abnormal is no proof of doping, the UCI must both demonstrate that doping is a plausible source for the abnormal ABP values, as well as *“establish – in principle – that all other alternative explanations for these values can be excluded. This puts the UCI in a difficult evidentiary position”*.<sup>8</sup> As previously emphasized by this Tribunal,<sup>9</sup> this position has been described, and solved, by a CAS Panel as follows (CAS 2011/A/2384 & 2386, UCI & WADA v. Alberto Contador Velasco & RFEC, para. 252 et seq.):

*“The exceptions concern cases in which a party is faced with a serious difficulty in discharging its burden of proof (“état de nécessité en matière de preuve”, “Beweisnotstand”). A cause for the latter may be that the relevant information is in the hands or under the control of the contesting party and is not accessible to the party bearing the burden of proof (cf. ATF 117 Ib 197, 208 et seq.). Another reason may be that, by its nature, the alleged fact cannot be proven by direct means. This is the case whenever a party needs to prove ‘negative facts’. According to the Swiss Federal Tribunal, in such cases of “Beweisnotstand”, principles of procedural fairness demand that the contesting party must substantiate and explain in detail why it deems the facts submitted by the other party to be wrong (ATF 106 II 29, 31 E. 2; 95 II 231, 234; 81 II 50, 54 E 3; FT 5P.1/2007 E. 3.1; KuKo-ZGB/Marro, 2012, Art. 8, no 14; CPC-Haldy, 2011, Art. 55, no 6). The Swiss Federal Tribunal has described in the following manner (ATF 119 II 305, 306 E 1b) this obligation of the (contesting) party to cooperate in elucidating the facts of the case:*

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<sup>4</sup> CAS 2010/A/2174, *Francesco De Bonis c. CONI & UCI*, para. 4.4.2 (b).

<sup>5</sup> UCI ADT 03.2017, *UCI v. Isabella Moreira Lacerda*, para 64 and UCI ADT 06.2017, *UCI v. Alex Correia Diniz*, para. 82.

<sup>6</sup> CAS 2016/O/4464, *IAAF v. ARAF & Ekaterina Sharmina*, para. 150.

<sup>7</sup> Id. quoting Marjolaine Viret (2016), *Evidence in Anti-Doping in the Intersection of Science and Law*, T.M.C Asser Press, The Hague, p. 774.

<sup>8</sup> UCI ADT 06.2017, *UCI v. Alex Correia Diniz*, para. 68.

<sup>9</sup> *Ibid.*

*“Dans une jurisprudence constante, le Tribunal fédéral a précisé que la règle de l’art. 8 CC s’applique en principe également lorsque la preuve porte sur des faits négatifs. Cette exigence est toutefois tempérée par les règles de la bonne foi qui obligent le défendeur à coopérer à la procédure probatoire, notamment en offrant la preuve du contraire (ATF 106 II 31, consid. 2 et les arrêts cités). L’obligation, faite à la partie adverse, de collaborer à l’administration de la preuve, même si elle découle du principe général de la bonne foi (art. 2 CC), est de nature procédurale et est donc exorbitante du droit fédéral – singulièrement de l’art. 8 CC –, car elle ne touche pas au fardeau de la preuve et n’implique nullement un renversement de celui-ci. C’est dans le cadre de l’appréciation des preuves que le juge se prononcera sur le résultat de la collaboration de la partie adverse ou qu’il tirera les conséquences d’un refus de collaborer à l’administration de la preuve.”*

92. As previously stated by this Tribunal *“it follows from the above that difficulties in proving “negative facts” result in a duty for the party not bearing the onus of proof to cooperate in establishing the facts. That party – i.e. the Rider – must cooperate in the investigation and clarification of the facts of the case. It is up to him to submit and substantiate other plausible sources for the abnormal values. It will then be up to the UCI to contest those other alternatives and, ultimately, for the Single Judge to evaluate the evidence before him in relation to the various scenarios. Nonetheless, the burden of proof, i.e. the risk that a certain scenario cannot be established or discarded, remains with the UCI.”*<sup>10</sup> This means, as stated in the Diniz-case cited above, that the standard of proof on the Rider’s part is that the Rider shall *“submit and substantiate other plausible sources for the abnormal values”*. Then, *“It will be up to the UCI to contest those other alternatives and, ultimately, for the Single Judge to evaluate the evidence before him in relation to the various scenarios.”*<sup>11</sup> At the end of the day, it is for the Single Judge to decide, if the UCI has fulfilled its burden of proving, to the comfortable satisfaction of the Single Judge, that the Rider has committed a violation of the anti-doping rules.

#### **vi) Were the abnormalities in the Rider’s ABP established?**

93. The ABP in the case at hand is based on the Expert Panel’s initial evaluation of 38 valid samples,<sup>12</sup> the documentation of which was included as evidence in the UCI’s submissions. As reported by the Expert Panel, the main important abnormalities in the Rider’s profile are (i) the significant variability of haemoglobin concentration (HGB) with a 95% sequence abnormality, (ii) the variability of reticulocytes (0.28-1.43%), which, according to the Expert Panel, is *“above the physiological range, with 99% sequence abnormality”* and (iii) the 92% sequence abnormality of the OFF-score values, including several high values (122 in sample 46, 121 in sample 17, 120 in sample 18, 117 in samples 16, 31, 38, 42 and 47).
94. The Expert Panel thus went on stating in its Expert Report #1 that: *“in consideration of the repeatedly observed suppression of the erythropoietic system and of the increase of HGB in time vicinity to important races, we believe that it is highly unlikely that the longitudinal profile*

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<sup>10</sup> *Ibid.*, para. 68-69.

<sup>11</sup> *Ibid.*, para. 69.

<sup>12</sup> The Expert Panel in Expert Report #1 mentioned that *« ten additional samples (nn. 1-4, 7, 12, 22-25) have been invalidated, and not considered in the present report, owing to pre-analytical inadequacies (such excessive time of storage, inconsistencies in the transport and refrigeration conditions, analysis in non-WADA accredited laboratories)”*.



*X145P6 is the result of a normal physiological or pathological condition, and that, in the absence of a satisfactory explanation of the athlete, it is the highly likely result of the use of a prohibited substance and/or prohibited method, such as blood transfusions and/or the use of erythropoietic stimulants, in 2009 and 2011”.*

95. In light of the above, and after examining the documentation in the case at hand, the Single Judge finds the Expert Panel’s opinions to be well-founded, logical and compelling, thus the Single Judge concludes that important abnormalities did exist in the Rider’s haematological profile.

**vii) Were the abnormalities in the Rider’s ABP caused by the Use of a Prohibited Substance or Prohibited Method?**

96. As stated above, it is not enough to establish that abnormalities exist in the Rider’s haematological profile. The UCI must also establish that the abnormalities are caused by the Use of a Prohibited Substance and/or Prohibited Method, and not by any other cause.
97. As previously exposed, the Rider argued that the abnormalities could be due to a number of reasons (see paras 79 to 82 above).
98. The Expert Panel, however, addressed all the arguments raised by the Rider and came to the conclusion that these arguments did not offer any suitable explanation to the abnormalities.
99. As the Rider did not submit any further evidence to support his allegations, the Single Judge finds that it was perfectly demonstrated in the four logical and compelling Expert Reports that it is very likely that the abnormalities in the Rider’s ABP were caused by the use of a Prohibited Substance and/or Prohibited Method.
100. In conclusion, the Single Judge is of the opinion that there is no evidence in the case at hand that renders the doping scenario implausible.

**viii) Has the UCI proven to the comfortable satisfaction of the Single Judge that the Rider committed an anti-doping rule violation?**

101. In evaluating the Rider’s explanation and the UCI’s petition and all the evidence before him, and applying said standard of proof in the context of the assessment of evidence before him, the Single Judge is comfortably satisfied that the Rider committed an anti-doping rule violation of Article 21.2. UCI ADR 2009 in the form of the Use of a Prohibited Substance or a Prohibited Method.

**C. Consequences**

102. Having established that the Rider committed an anti-doping rule violation, the Tribunal has to determine the applicable sanction(s).

**i) Period of Ineligibility**

103. The UCI submitted that the Tribunal must impose a period of ineligibility of between two and four years.

104. The Rider failed to submit an Answer in this proceeding, thus the Tribunal does not know what the Rider's position is with regards to the period of ineligibility.
105. The Tribunal also notes that the UCI specifically highlighted in its 27 March 2015 letter to the Rider (Exhibit 21), that "[i]n the event that an agreement cannot be reached on the consequences and costs of [the Rider's] anti-doping rule violation, [...], the UCI reserves its right to review the case, including without limitation the increase of the ineligibility period up to the maximum of 4 years".
106. Article 293 UCI ADR 2009 provides for a period of ineligibility of two years, unless the conditions for eliminating or reducing this period of ineligibility, or the conditions for increasing the period of ineligibility are met.
107. In the case at hand, the Rider clearly failed to discharge his burden of proof to establish that he bears No Fault or Negligence (Article 296 UCI ADR 2009) or No Significant Fault or Negligence (Article 297 UCI ADR 2009).
108. Therefore, the Single Judge holds that the conditions for eliminating or reducing the period of ineligibility are not met in the present case.
109. The question remains whether there are aggravating circumstances within the meaning of Article 305 UCI ADR 2009.
110. As mentioned above, Article 305 UCI ADR 2009 provides that:
- If in an individual case involving an anti-doping rule violation other than a violation under article 21.7 (Trafficking or Attempted Trafficking) or article 21.8 (Administration or Attempted Administration) it is established that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the License-Holder can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.*
- A License-Holder can avoid the application of this article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by an Anti-Doping Organization.*
111. First of all, the Single Judge notes, based on the Petition of the UCI and the evidence on file, that the Rider did not admit the anti-doping rule promptly. Thus, the application of Article 305 UCI ADR 2009 remains possible.
112. The UCI submits that the Rider's profile indicates two aggravating circumstances, i.e. a doping plan or scheme<sup>13</sup> and the use of multiple substances on multiple occasions.
113. In this regard, a CAS Panel held the following:<sup>14</sup>

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<sup>13</sup> CAS 2012/A/2773, IAAF v. SEGAS and Irini Kokkinariou.

<sup>14</sup> CAS 2013/A/3080, Alemitu Bekele Degfa v. TAF and IAAF, paras 73-83.

*The Panel, however, does reiterate its finding that Ms Bekele did demonstrate certain behaviours that lend themselves to the existence of aggravating circumstances. As previously mentioned, her course of conduct over at least a period of several months amounted to a doping plan or scheme, as well as her use or possession of a Prohibited Substance or Method on multiple occasions, thereby justifying the imposition of a period of ineligibility greater than the standard sanction of two-years ineligibility.*

*The question then is what greater period of ineligibility shall be imposed. The words of the Rule are "shall be increased up to a maximum of four (4) years." These words impose a maximum. They do not mean that in every case in which there are aggravating circumstances a period of ineligibility of four years must be imposed.*

[...]

*CAS 2012/A/2773 IAAF and Hellenic Amateur Athletic Association v Kokkinariou, on which the IAAF placed great reliance, was a case in which neither Respondent filed an Answer and the Sole Arbitrator did not have the advantage of any argument on behalf of the athlete. The Sole Arbitrator found that the athlete used a Prohibited Substance as part of a structured regime between 2006 and 2009 and again in 2011. Further the athlete had used ferretin in concert with rhEPO or another ESA. The use of the additional substance to enhance the effects of a Prohibited Substance demonstrated a considerable degree of forethought and was an additional element of planning in what was already a methodical and drawn out doping scheme. In those circumstances, the Sole Arbitrator found that there was a multiple triggering of Rule 40.6 and that the Ineligibility Period should be extended to four years. That decision reflected a greater culpability than that of Ms Bekele in the present case in which the period over which doping has been established is one year, but that fact does not of itself mean that the sanction in this case should be a lesser one. It is well arguable that the athlete in the Kokkinariou case cleared the bar for the imposition of the maximum penalty by a considerable margin.*

[...]

*In the present case, the established culpability of the athlete relates only to a single year and to the targeting of two competitions within that year, though by the repeated use of a Prohibited Substance or Method. This is offending on a substantially lesser scale than that of Ms Kokkinariou whose career over five of six years appears to have been built on blood doping. It is also true that although Ms Bekele has been shown to have used a Prohibited Substance or Method repeatedly in targeting two competitions, in the great majority of cases in which an athlete tests positive for a Prohibited Substance, the athlete will not have indulged in a single one-off breach of the rules and in many cases will have been targeting a specific competition or series of competitions.*

*In all these circumstances of the cases, and having taken account of all the matters placed before the Panel, the Panel's view is this is not a case in which the period of ineligibility should be increased to the maximum available. To do so would be to*

*suggest that in all cases of blood doping a four-year period of ineligibility would under the rules as they stand be almost de rigueur, when the rules do not make specific provision for a more severe penalty in blood doping cases. Again, each case has to be considered on its own merits and in the particular circumstances of this case, taking account of the gravity of the aggravating circumstances which have been established. As such, the Panel takes view that the appropriate period of ineligibility in this case is two years and nine months.*

114. The Tribunal notes that the Expert Panel's reports concluded that the use of Prohibited Substances or Prohibited Methods are likely both in 2009 and 2011. The Expert Report #1 further highlights "*the increase of HGB in time vicinity to important races*", indicating the existence of a doping plan.
115. Thus, in light of the above cited case law and considering the fact the Rider appears to have been targeting specific important races, the Single Judge considers that the conditions for increasing the period of ineligibility are met in the present case and that a period of ineligibility of three years deems appropriate.

## **ii) Commencement of the period of ineligibility**

116. Article 314 UCI ADR 2009 provides that:

*Except as provided under articles 315 to 319, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed.*

117. Article 315 UCI ADR 2009 goes on to clarify that:

*Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction 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.*

118. The Single Judge notes that the Rider was first informed of the Expert Panel's unanimous opinion regarding a potential anti-doping rule violation on 11 August 2014.
119. The Rider was formally notified of the anti-doping rule violation on 27 March 2015. Since he had not participated in international races since May of 2014 and was not registered with any UCI teams, the UCI decided not to impose a provisional suspension.
120. The date of this Judgment thus comes almost five years after the notification of the ADRV to the Rider, which could be considered as a substantial delay. However, as submitted by the UCI in its Petition, Article 315 UCI ADR 2009 only applies where the relevant delays are not attributable to the Rider.
121. As previously mentioned, the Rider was granted multiple extension of deadlines, both from the UCI and the Tribunal and failed to respond to the UCI and the Tribunal on numerous occasions.

122. Therefore, in light of the above, the Single Judge considers that an application of Article 315 UCI ADR 2009 is not justified in the case at hand.

### iii) Disqualification

123. In its Petition, the UCI requests the Tribunal to “*at a(n absolute) minimum*”, disqualify “*the Rider’s results in these competitions [i.e. the 2009 World Championships and the 2009 and 2011 Vuelta a España]*” but, at the same time, “*leaves the ultimate decision on disqualification of additional results to the Single Judge*”.

124. As previously stated, Article 288 UCI ADR 2009 provides that an anti-doping rule violation in connection with an In-Competition test automatically leads to disqualification of the results obtained in that competition.

125. Article 313 UCI ADR 2009 further states that that all other competitive results obtained from the date the anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period shall, unless fairness requires otherwise, be disqualified.

126. The Single Judge takes into account the UCI ADT Judgment in case 06.2017, *UCI v. Mr. Alex Correia Diniz*, para. 108, where the Single Judge in that case and in line with CAS case law (CAS 2015/A/4006, *IAAF v. ARAF, Yuliya Zaripova & RUSADA*) conducted an overall evaluation of the elements in the case at hand in determining the meaning of “*fairness require[d] otherwise*”.

127. In the CAS case law mentioned above, the Panel held that:

*“As a preliminary matter, the Panel notes that ‘fairness’ is a broad concept (CAS 2013/A/3274, para. 85), covering a number of elements that the deciding body can take into account in its decision not to disqualify some results. The CAS precedents (in general terms, inter alia, CAS 2007/A/1283, para. 53; CAS 2013/A/3274, para. 85-88) took into account a number of factors, such as the nature and severity of the infringement (CAS 2010/A/2083, para. 81), the length of time between the anti-doping rule violation, the result to be disqualified and the disciplinary decision, the presence of negative tests between the anti-doping rule violation and the competition at which the result to be disqualified was achieved, and the effect of the infringement on the result at stake (CAS 2008/A/1744, para. 76; CAS 2007/A/1362&1393, para 7.22). The Panel underlines that no single element is decisive alone: an overall evaluation of them is necessary.”*

128. Based on the Expert Panel’s four reports, the abnormalities in the Rider’s profile suggest the use of Prohibited Substances and/or Prohibited Methods during the 2009 World Championships and the 2009 and 2011 Vuelta a España.

129. The Single Judge takes into account that blood manipulation is not committed inadvertently, but intentionally and purposefully in order to enhance sports performance.

130. The Single Judge also takes into account that, according to the Expert Panel’s initial report, the Rider’s profile shows “*normal physiological decrease in HGB*” in “*other stage races, such as [...] the 2012 Tour of France 2012 Vuelta*”.

131. Thus, the Single Judge, in exercising his discretion, finds that only the results obtained in the 2009 World Championships and the 2009 and 2011 Vuelta a España shall be disqualified.

#### **iv) Mandatory Fine and Costs**

##### **a. Application of the mandatory fine**

132. According to Article 10.10.1.1 ADR, which applies in this case based on the *lex mitior* principle, a fine shall be imposed in case a Rider 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. This prerequisite is fulfilled in the case at hand.

133. With respect to the calculation of the fine, the UCI submits that the Rider was entitled to an annual gross income from cycling of EUR ██████████ in 2009 and EUR ██████████ in 2011. Therefore, according to the UCI, a mandatory fine of EUR ██████████ (i.e. 70% of EUR ██████████) should be imposed unless the Rider can establish that a reduction of the fine would be justified in application of the criteria set out in Article 10.10.1.1 ADR.

134. The Rider, by failing to submit an Answer in this proceeding, has not contested the above figures and not put forward any arguments for reduction of the fine.

135. The Single Judge therefore confirms that a monetary fine in the amount of EUR ██████████ shall be payable by the Rider to the UCI.

##### **b. Liability for costs of the proceedings**

136. In application of Article 28.2 ADT Rules, the Tribunal decides that the present Judgment is rendered without costs.

137. Notwithstanding the above, the Tribunal may 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 (Article 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. In light of all of the circumstances of this case, especially that the UCI (as the prevailing party) was represented by external counsels and that the UCI referred to further opinions from the Expert Panel following receipt of the Rider's various lines of argument, the fact that the Tribunal relied in its finding in particular on the Expert Panel's written opinions, the Tribunal finds that the Rider (as the unsuccessful party) must pay a contribution towards the UCI's costs and expenses in the amount of CHF 5'000.-.

138. In application of Article 275 UCI ADR 2009, the Single Judge holds that the Rider shall reimburse to the UCI the following amounts:

- CHF 2'500.- for the costs of the results management by the UCI; and
- EUR 9'500.- for the costs of the documentation packages of the blood samples analysed for the ABP.

## VII. OPERATIVE PART

139. In light of the above, the Tribunal decides as follows:

1. Mr. Juan José Cobo Acebo has committed an Anti-Doping Rule Violation (Article 21.2 UCI ADR 2009).
2. Mr. Juan José Cobo Acebo is suspended for a period of ineligibility of 3 (three) years. The period of ineligibility shall commence on the date of this decision, i.e. 13 June 2019.
3. The results obtained by Mr. Juan José Cobo Acebo during the 2009 World Championships and the 2009 and 2011 Vuelta a España are disqualified.
4. Mr. Juan José Cobo Acebo is ordered to pay to the UCI the amount of EUR [REDACTED] as monetary fine.
5. Mr. Juan José Cobo Acebo is ordered to pay to the UCI: a) the amount of CHF 2'500 for the costs of the results management; and b) the amount of EUR 9'500.- for costs of the documentation packages of the blood samples analysed for the Biological Passport.
6. Mr. Juan José Cobo Acebo is ordered to pay a contribution in the amount of CHF 5'000.- towards UCI's costs and expenses incurred in connection with these proceedings.
7. All other and/or further reaching requests are dismissed.
8. This Judgment is final and will be notified to:
  - a) Mr. Juan José Cobo Acebo;
  - b) The Agencia Española de Protección de la Salud en el Deporte;
  - c) the UCI; and
  - d) WADA.

140. This Judgment may be appealed before the CAS pursuant to Article 30.2 ADT Rules and Article 74 of the UCI Constitution. The time limit to file the appeal is governed by the provisions in Article 13.2.5 UCI ADR 2015.

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**Julien ZYLBERSTEIN**  
Single Judge