Arbitration CAS 2010/A/2083 Union Cycliste Internationale (UCI) v. Jan Ullrich & Swiss Olympic, award of 9 February 2012

Panel: Mr. Romano Subiotto QC (United Kingdom), President; Prof. Ulrich Haas (Germany); Mr. Hans Nater (Switzerland)

Cycling
Blood doping
Disciplinary proceedings against a rider and Article 75 Swiss Civil Code
Initiation of disciplinary proceedings against a rider who is no longer a UCI licence-holder
Probative value of the evidence leading to the conclusion that the rider engaged in blood doping
Determination of the first or the second infraction according to the 2009 WADC
First or second violation for the calculation of the period of ineligibility
Commencement of the Period of Ineligibility according to the UCI Rules

1. **A case of disciplinary proceedings against a rider is not – strictly speaking – one that is situated within the scope of applicability of Article 75 of the Swiss Civil Code, since it is not a member of an association that lodges the appeal against a decision/resolution of an association, but a non-member (that is, however, equally affected by it). Such recourse in favour of a third party is covered by the parties' autonomy and is not restricted or prevented by Article 75 of the Swiss Code. The parties, therefore, are free to rule and determine who are the proper respondents in a case in which an appeal is lodged by a non-member. The fact that according to Article 282 of the UCI Rules the appeal must be lodged also against the "license-holder" is not arbitrary. If the position under Article 75 of the Swiss Civil Code were otherwise, sporting rules like the UCI Rules and the WADC would not be capable of enforcement under domestic Swiss law, because the athlete could never be a proper defendant. Furthermore, only by being made a party to the proceedings will the athlete's basic rights be guaranteed.**

2. **Upon the rider's resignation, the question arises whether or not such rider can still be considered a "license-holder" within the meaning of the UCI Rules Article 282 of the UCI Rules. According to a judgment of the Supreme Court there is no impediment against actions against former members of an association when there is an interest in doing so. License holders remain subject to the jurisdiction of the relevant disciplinary bodies for acts committed while applying for or while holding a license, even if proceedings are started or continue after they cease to hold a license.**

3. **The 2009 version of the WADC gives certain guidance as to how certain pre-2009 WADC violations are to be treated when determining a sanction under the 2009 WADC. In principle, pre-2009 violations of antidoping rules may be treated as prior violations for the purposes of determining a period of ineligibility under the 2009**

WADC. Under the CAS case law, the purpose of the sporting regulations under which the athlete had been sanctioned in 2003 and the applicable WADC were the same, i.e. the fight against doping in sports. Such objective would be entirely thwarted if one were to ignore the existence of a first offence under the pre-WADC rules in setting the sanction for a second offence under the current rules. Moreover, the fact that the athlete's first violation may have taken place almost six years subsequent to the second offence has no relevance for the qualification of the latter as a second offense. It is clear from the 2009 WADC and from prior decisions of the CAS that in principle, decisions issued prior to the creation of the WADC can be treated as first violations when assessing the period of ineligibility following an antidoping violation sanctioned under the current WADC or its equivalents.

4. **A case where the first violation occurred for ingesting a substance out of competition, which under the current prohibited list are prohibited only in-competition, has not yet been considered by other CAS Panels: Should a previous infraction, which has been finally determined by a sports arbitration tribunal, be treated as a first violation where the same conduct would not constitute a violation under existing antidoping rules? In legal terms, periods of ineligibility involve the application of the substantive law, and the principle of lex mitior requires that the athlete benefit from the least lenient penalty applicable, even if enacted after the commission of the original offence.**

5. **According to the UCI Rules, where there has been no acceptance or acknowledgement of an athlete's culpability, periods of ineligibility are set to run from the date of a hearing in an antidoping case. The first instance hearing has to be the one who entered into the merits of the case and not the one that might have dismissed the case for lack of competence. This Panel, however, is of the view that – in principle – the period of ineligibility should only start to run from such hearing date on which a first instance panel looked into the substance of the alleged doping offence.**

The Appellant, the International Cycling Union (UCI), is an international sporting federation and the world governing body for cycling, headquartered in Aigle, Switzerland. The UCI oversees competitive cycling events internationally and maintains a calendar of races in which its license-holders compete. Part 14 of the UCI Cycling Regulations that entered into force on August 13, 2004 were the Anti-Doping Cycling Rules of the UCI (the "UCI Rules") in force throughout 2006[1]. The UCI Rules adopt and implement the World Anti-Doping Code (WADC), as it stood at the time.

The First Respondent, Jan Ullrich ("Ullrich"), is a German former professional road cyclist resident in Switzerland. Among other achievements, Ullrich was the winner of the 1997 Tour de France and the gold medallist in the men's individual road race at the Sydney 2000 Summer Olympic Games.

[1] The UCI enacted new anti-doping rules that came into force January 1, 2009. According to Article 373 of those rules, they do not apply retrospectively, subject to the principle of *lex mitior*.

Prior to the events in question in 2006, Ullrich was a member of the T-Mobile professional cycling team, a member of Swiss Cycling, and a UCI license-holder.

The Second Respondent, Swiss Olympic, is the National Olympic Committee of Switzerland. An independent body within Swiss Olympic, the Disciplinary Chamber, issued the first instance award against which the UCI appeals (the "Decision"). In a letter from its Deputy Director, Hans Babst, dated December 15, 2010, Swiss Olympic advised that it "*does not wish to be actively involved in the present procedure*," and "*confirms that it will abide by any decision the Panel will reach in the present procedure*".

Ullrich is a retired professional cyclist who has been resident in Switzerland since 2003. Prior to taking up residence in Switzerland, Ullrich was a resident of his native Germany. The UCI has provided evidence that in 2002, Ullrich tested positive for amphetamines out of competition. At the time of his original infraction the UCI and the German national cycling federation (BDR), of which Ullrich was a member, both banned the presence of amphetamines in athletes in all circumstances.

This ban extended to out of competition testing. As a result of the positive test, Ullrich was subject to antidoping disciplinary proceedings by the BDR and suspended by its association tribunal ("BDR Bundessportgericht") by a decision dated July 23, 2002. The BDR Bundessportgericht at the time took into account that Ullrich was at the time of the infraction in hospital, suffering from depression, and did not take amphetamines to improve his sporting performance. In addition, Ullrich at the time admitted taking amphetamines. Given Ullrich's antidoping violation, the BDR Bundessportgericht was obligated to impose a sanction of ineligibility of between six and 12 months under the rules applicable to that case; in view of the circumstances already described, it imposed the minimum period of ineligibility – a six month suspension. The BDR Bundessportgericht's decision was not appealed at the time, and the time-limit for any appeal has long expired.

Upon Ullrich's relocation to Switzerland until the events in question, he was a member of the Swiss Cycling Federation ("Swiss Cycling"), and through the auspices of Swiss Cycling was a UCI-license holder. By a form signed and dated November 24, 2005, Ullrich applied for and obtained a UCI license for the 2006 calendar year.

In 2004, the Spanish Guardia Civil and the Investigating magistrate no. 31 of Madrid opened an investigation that has come to be known as "*Operation Puerto*". Pursuant to this investigation, on May 23, 2006 searches were carried out on two Madrid apartments belonging to a Spanish physician, Dr. Eufemiano Fuentes. Documents and other materials were seized from the apartments, including evidence of possible doping offences by athletes. The Guardia Civil drafted a report ("Report no 116") dated June 27, 2006, which made reference to certain of the materials seized from the apartments.

Media reports at the time connected Ullrich to Operation Puerto. In the aftermath of those media reports, on June 30, 2006, Ullrich was suspended by his professional cycling team, T-Mobile, and withdrawn from the 2006 Tour de France. On July 21, 2006, T-Mobile dismissed Ullrich.

A copy of Report no 116 was provided to the umbrella Spanish sport organization, the Consejo Superior de Desportes (CSD), which in turn forwarded Report no 116 to the Real Federacion Espanola de Cyclismo (RFEC), the UCI and the World Anti-Doping Agency (WADA).

Having examined Report no 116, by letter dated August 11, 2006, the UCI requested that Swiss Cycling open disciplinary proceedings against Jan Ullrich pursuant to Articles *"182 à 185 et 224 et suivants"* of the UCI Rules.

On October 19, 2006, Ullrich resigned his membership from Swiss Cycling.

On February 26, 2007, Ullrich publicly announced his retirement from professional cycling.

Sometime after August 11, 2006, Swiss Cycling forwarded the UCI's letter and its attachments to the Commission for the Fight Against Doping (FDB). The FDB was the body charged, under the version of Swiss Olympic's doping statutes effective at the time, with the organization of the non-governmental fight against doping in sports. The FDB also represented Swiss Olympic in proceedings before the Disciplinary Chamber. The latter is an independent organ within Swiss Olympic entrusted with the resolution of doping-related disputes.

As of July 1, 2008, the FDB's anti-doping responsibilities, including the responsibility to appear on behalf of Swiss Olympic before the Disciplinary Chamber, were transferred to Antidoping Schweiz. The statutes and regulations of Swiss Olympic were adapted accordingly.

On May 20, 2009, based on the files received from the FDB, Antidoping Schweiz initiated proceedings before the Disciplinary Chamber. These proceedings resulted in the Decision, which was dated January 30, 2010, in which the Disciplinary Chamber held that Swiss Olympic's statute in force in 2006 did not permit Swiss Olympic (or its nominated anti-doping prosecutor) to initiate new proceedings against an athlete who had previously terminated his membership. The Disciplinary Chamber made no ruling as to whether or not the UCI, which was not an active party to the proceedings, might itself have standing.

On March 22, 2010, the UCI lodged a Statement of Appeal with the Court of Arbitration for Sport (CAS), requesting that the Decision be set aside and, among other requests, that Ullrich be declared to have committed an antidoping offence under the UCI Rules.

Following correspondence between the parties and counsel for the CAS, this Panel issued procedural directions dated November 24, 2010, stipulating among other things that (1) English would be the language of this arbitration, and (2) a partial award on jurisdiction would be issued prior to a consideration of the substantive issues.

Following the exchange of pleadings on jurisdiction, this Panel issued a Partial Award on March 2, 2011. The Partial Award sets out in detail the reasons for the validity of the arbitration agreement between Ullrich and UCI. The Panel reserved costs associated with the Partial Award for determination in this Final Award.

As the Partial Award was limited to narrow questions of jurisdiction, a number of procedural questions still require adjudication in this matter. Those and other issues were addressed in a further round of pleadings by the parties, comprised of the Appeal Brief and the Answer, as well as at a hearing on August 22, 2011 in Lausanne, Switzerland.

In its Appeal Brief dated 8 April 2011, the UCI made in particular the following requests for relief:

> *"1. Annul and reform the decision of the Disziplinarkammer für Dopingfälle von Swiss Olympic;*
>
> *2. Find Jan Ullrich guilty of anti-doping rule violations under articles 15.1, 15.2 and 15.5 ADR;*
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> *3. Sanction Jan Ullrich in accordance with Art. 261 of the anti-doping rules of the UCI with a lifetime ineligibility;*
>
> *4. Disqualify Jan Ullrich from all sporting results as from the date of the earliest anti-doping violation and at least as from 29 May 2002;*
>
> *5. Condemn Jan Ullrich and Swiss Olympic Association jointly and severally to the cost of the proceedings;*
>
> *6. Condemn Jan Ullrich and Swiss Olympic Association jointly and severally to participate in UCI's costs".*

On 16 May 2011, Jan Ullrich submitted his Answer with the following prayers for relief:

> *"- dismiss the appeal filed by the International Cycling Union in its entirety;*
>
> *- confirm the Decision of the Disciplinary Chamber of Swiss Olympic dated 30 January 2010;*
>
> *- order the International Cycling Union to pay any and all costs of these appeal arbitration proceedings, including all legal costs incurred by Mr Jan Ullrich;*
>
> *- dismiss any other relief sought by the International Cycling Union".*

Although Ullrich's representatives elected not to participate in that hearing, the parties were provided with a recording of the hearing and invited to submit additional observations about a number of areas where the Panel requested their views. Ullrich and the UCI submitted their observations accordingly.

While the UCI mainly confirmed its requests for relief mentioned in its appeal, Jan Ullrich made the following prayers for relief:

> *"- dismiss the appeal filed by the Union Cycliste Internationale in its entirety;*
>
> *- confirm the Decision of the Disziplinarkammer of the Schweizerische Olympische Verband dated of 30 January 2010;*
>
> *- order the Union Cycliste Interantionale to pay any and all costs of these arbitration proceedings, including all legal costs incurred by Mr Jan Ullrich;*
>
> *- dismiss any other or further relief sought by the Union Cycliste Internationale,*
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> *And should the CAS Panel decide that it may examine the merits:*

- *invite the Parties to make further submissions thereon;*

and, should the CAS Panel decide that it has the authority and power to pronounce a sanction against Mr Jan Ullrich:

- *declare that no doping violation was committed by Mr Jan Ullrich;*

and, should the CAS Panel decide otherwise:

- *declare that no earlier doping violation within the meaning of the UCI Antidoping Rules was committed by Mr Jan Ullrich;*
- *take into account that Mr Jan Ullrich has actually been banned since July 2006".*

LAW

Applicable law

A. Basic Application of Rules

1. Article R58 of the Code of sports-related disputes of the CAS (the "Code") provides that, *"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In this latter case, the Panel shall give reasons for its decision".*

2. In its Partial Award, this Panel found that Ullrich agreed to be bound by the UCI Rules[2]. The UCI Rules at Article 290 provide that *"The CAS shall decide the dispute according to these Anti-Doping Rules and the rules of law chosen by the parties, or in the absence of such a choice, according to Swiss law".*

3. The Panel takes comfort in the fact that Article 9 of the UCI Rules provides that they are to apply to *"any anti-doping violation committed by a License-Holder where no Sample collection is involved and that is discovered: (i) by the UCI, by one of its constituents or member Federations…; or (ii) by a body or individual that is not an Anti-Doping Organization".* The Panel accepts the Disciplinary Chamber's holding that *"the events that have triggered the present proceedings were discovered by the Spanish Guardia Civil, which is not an anti-doping organization"*[3]. The terms of Article 9 of the UCI Rules are thus met, and the UCI Rules are confirmed as applicable to these proceedings.

4. As explained in the Partial Award, the parties to this arbitration are domiciled in Switzerland, and the seat of this arbitration is also located in Switzerland. As a domestic arbitration filed

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2 See para. 47 of the Partial Award.
3 See Decision, para. 8.5.

before January 1, 2011, the Swiss Intercantonal Concordat on Arbitration (ICA) applies to these proceedings.

5. It thus appears that (1) the parties have agreed to be bound by the UCI Rules, and (2) the parties are also bound by the provisions of the ICA.

B. Ullrich's Objections to the Application of the UCI Rules

6. In Ullrich's submission, Article 31(3) of the ICA, which provides that the arbitral tribunal is to decide the arbitration according to the rules of the applicable law, requires that the applicable law be a national law. Although Ullrich concedes that there is still scope for application of the rules of a private association under Art. 31(3) of the ICA, he submits that *"the articles of association and regulations of the sports organisations apply only to the extent that they are compliant with the mandatory provisions of Swiss law. In other words: in case of conflicting provisions, Swiss law has priority over private regulations…"*[4].

7. The UCI submits that the UCI Rules apply in this case, Article 290 itself refers to Swiss law, absent an express choice made by the parties, which is the case here, and that nothing turns on the wording of Article 31(3): according to the UCI, Swiss law must be applied correctly, regardless of whether the arbitration is international or domestic[5].

8. Ullrich submits that in fact there is no possible conflict between the UCI Rules and Swiss law in this case, because despite the plain result of the Partial Award – that Ullrich agreed to be bound by the UCI Rules – the UCI Rules do not apply. This argument is based on the claim that there have been alleged procedural defects in the way that the UCI and the Swiss authorities have prosecuted this case; that is, Ullrich submits that the UCI Rules cannot apply because procedural aspects of the rules were not followed[6]. The basis for the alleged procedural defects can be summarized thus:

9. Ullrich notes that the UCI has brought this case before the CAS, claiming the right of standing under the UCI Rules. The right of appeal to the CAS in the UCI Rules is found in Chapter XI.

10. Article 280, also contained within Chapter XI of the UCI Rules, limits the types of disputes that can be appealed to the CAS. Subparagraph (a) of that article specifies that *"decisions of the hearing body of the National Federation under Article 242"* of the UCI Rules can be appealed to the CAS.

11. Article 242 of the UCI Rules is found within Chapter IX of the UCI Rules, where a procedural framework for hearings before the National Federation is set out. Article 242 of the UCI Rules specifies the basic substantive requirements that decisions by National

4 See Ullrich submission of May 16, 2011, para. 87.
5 See UCI submission of September 8, 2011, paras. 20-23.
6 See Ullrich submission of May 16, 2011, para. 97.

Federations must contain. A decision under Article 242 must follow a hearing, unless the athlete elects to forego the hearing.

12. Article 224, also contained within Chapter IX, explains how those hearings before National Federations are to be initiated. It reads, *"When, following the results management process described in Chapter VII, the Anti-Doping Commission makes an assertion that these Anti-Doping Rules have been violated, it shall notify the License-Holder's National Federation and request it to instigate disciplinary proceedings"*. Chapter VII of the UCI Rules, which is entitled *"Results Management"*, contains Articles 182 to 185, upon which the UCI originally requested that Swiss Cycling institute disciplinary proceedings against Ullrich.

13. It is in the context of this framework that Ullrich alleges the UCI Rules have not been followed. The conclusion he draws from these alleged deviations is that these proceedings could not have possibly been brought under the UCI Rules in the first place. Ullrich's objections and the Panel's assessment of those objections are presented below:

14. First, Ullrich maintains that in order to initiate a hearing under Article 224 of the UCI Rules, the UCI Anti-Doping Commission must first make an assertion that there has been a violation by an athlete. Ullrich submits that the request from the UCI Anti-Doping Commission to Swiss Cycling contained in the letter of August 11, 2006, quoted at paragraph 9, above, was ambiguous. Ullrich notes that the UCI refers to Article 185 of the UCI Rules in particular, and explains that under that Article, the Anti-Doping Commission may order additional investigation by the national federation. In Ullrich's submission, because of the permissive nature of Article 185, it is not clear that in fact the UCI intended to initiate proceedings under its rules. Moreover, any possibility that such proceedings were initiated under its rules was vitiated by the delay associated with the actual commencement of proceedings. Accordingly, the UCI Rules cannot be applicable.

15. The Panel rejects Ullrich's submission. The panel does not accept that the UCI Rules do not apply merely due to an imprecise reference in a single sentence fragment in a letter between sporting agencies. Despite the ambiguity of the language referred to in Ullrich's submission, the preceding paragraph makes the position of the UCI Anti-Doping Commission extremely clear. It reads *"La Commission antidopage a conclu qu'il résulte de ce dossier que Jan Ullrich a apparemment commis des violations antidopage, dont notamment l'utilisation de substance et méthodes interdites"*. This paragraph leaves little room for doubt and shows that the UCI's antidoping commission had in fact reached a conclusion as to whether Ullrich had violated the UCI Rules, and the UCI asserted as much in very clear language[7]. This assertion is in accordance with the requirements of Articles 224 of the UCI Rules, which the August 11, 2006 letter also cited. The Panel's conclusion in this regard is consistent with the letter's framework, which expressly requested that disciplinary hearings be initiated against Ullrich, and appended the documentation upon which the UCI based its conclusions (as also required by Articles 224 of the UCI Rules).

7 See UCI submission of September 8, 2011, at para. 96.

16. Second, Ullrich submits that even if the August 11, 2006 letter did initiate proceedings under the UCI Rules, the UCI Rules are not applicable because certain procedures specified by the UCI Rules were not subsequently followed. In particular, Ullrich contends that upon receipt of the UCI's letter, Swiss Cycling failed to send him a notice of summons within two days, as required by Article 225 of the UCI Rules. As this procedural step was not taken, Ullrich infers that the proceedings were not brought under the UCI Rules[8].

17. Ullrich has indeed identified a procedural defect. As a general matter, the summons procedure contained in Article 225 of the UCI Rules is designed to alert athletes at the earliest possible moment of the allegations against them. Such knowledge permits athletes to, among other things, accept voluntary ineligibility and otherwise organize their defense. However, these policy considerations are less important in the present circumstances. In fact, Ullrich had been removed from the 2006 Tour de France and his contract with his team was terminated three weeks prior to the UCI's notice to Swiss Cycling. Without a team with which to race, Ullrich faced no dilemma about whether or not to participate in further UCI calendar events, as he was unable to do so. Moreover, he would have been well aware of the legal risks he faced, given the publicity surrounding his case at the time (which has been well documented by Ullrich's counsel in the course of this appeal). The failure of Swiss Cycling to issue a summons was precisely that and unfortunate. Absent express direction in the UCI Rules as to what course to take in the event of such a failure, the substantive question for this Panel must be whether the failure to provide Ullrich with a summons resulted in any prejudice to Ullrich that will affect these proceedings. This Panel concludes that Ullrich did not suffer prejudice in this regard, not least because he was fully aware of the UCI's investigation at the time, in particular by reason of his dismissal from his team for suspicion of involvement in Operation Puerto. There is no evidence that Ullrich's ability to mount a defence has not been compromised, and Ullrich's procedural objections to the UCI Rules have not featured any factual allegation that his ability to put forward any facts or arguments or otherwise mount his defence has been compromised. In any event, proceedings before the CAS represent a trial de novo, and the Panel is capable of curing procedural defects that occurred at first instance. In no circumstances, however, does the failure of Swiss Olympic to provide proper notice to Ullrich vitiate the application of the UCI Rules – this is neither a logical nor a necessary inference.

18. In summary, this Panel is not persuaded that the UCI Rules are not applicable to these proceedings.

19. Concerning the relationship between Article 31(3) of the ICA and the UCI Rules, the Panel considers that UCI Rules are only applicable inasmuch as they are not in violation of mandatory provisions of Swiss Law. However, in view of the Panel there is no contradiction between (mandatory) Swiss law and the UCI Rules, as explained further below.

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8 See Ullrich submission of May 16, 2011, para. 106.

Remaining procedural issues

20. A number of outstanding procedural issues require resolution. In the context of these issues, Ullrich has raised a number of objections. Ullrich's objections are predicated on the assumption that the UCI Rules do not apply, which is an assertion we have already dealt with. Nevertheless, for the sake of completeness Ullrich's objections are addressed below. For the purposes of concision, we have grouped and consolidated Ullrich's multiple objections as coherently as possible.

A. Timeframe for Appeal

21. Article 285 of the UCI Rules, which apply to this case, provides the UCI with one month of receipt of the full case file from the hearing body of the national federation to appeal decisions of national federations to the CAS. There appears to be agreement among the parties that the UCI's appeal was filed within 30 days. For these reasons, the Panel considers the UCI's appeal to have been filed in time.

22. However, Ullrich submits that the UCI's appeal was filed out of time. In particular, he submits that because the UCI Rules do not apply, the applicable time period is as set out in the Doping Statute of Swiss Olympic and as specified in the Decision – namely, 21 days. Ullrich acknowledges that under his interpretation of Article 31 of the ICA – where the UCI Rules are subsidiary to Swiss law – Article 75 of the Swiss Civil Code would apply, which provides for a 30 day appeal period. He argues, however, that the UCI is not entitled to the benefits of these protections, because it is not a member of Swiss Cycling or Swiss Olympic[9].

23. The Panel has already rejected Ullrich's submission about the applicable law, and it finds that the 30-day period under the UCI Rules applies. There is thus no reason at this stage to provide any views about the operation of Article 75 of the Swiss Civil Code.

B. Proper Appellant

24. Article 75 of the Swiss Civil Code provides that members of an association are entitled to appeal decisions/resolutions passed by the association. In the case at hand UCI brought the appeal against the Decision. Obviously UCI is not a member of the sports organization to which the Decision must be attributed. However, this is not in contradiction with Article 75 of the Swiss Civil Code. The provision provides for certain standards for the protection of members of an association, but does not forbid that a third party be given – on a contractual basis – comparable rights of appeal like a member. This is all the more true in cases in which the third party belongs to the respective sports family and is affected by the decision/resolution in a similar way as a member. In the case at hand UCI's right to bring the appeal is based upon the Article 281(c) of the UCI Rules. This rule provides that the UCI has

9 See Ullrich submission of May 16, 2011, para. 111.

the right to bring an appeal against a decision pursuant to Article 242 of the UCI Rules to the CAS. The Decision in the case at hand was issued pursuant to Article 242 of the UCI Rules; thus, the UCI has standing to bring this appeal.

25. Ullrich objects to this conclusion. He asserts that a decision under Article 242 can only be taken "following the results management process" described in Article 224 of the UCI Rules. Because the Decision did not assess the substantive merits of the case, Ullrich asserts that the Decision was not based on the results management process, and is therefore not a decision under Article 242 of the UCI Rules. Separately, he argues that because the Decision was issued based on written pleadings alone, the Decision does not identify the parties "called or heard", as required by Article 242 of the UCI Rules (there were no parties called or heard because the Decision was issued based on written submissions only).

26. The UCI says simply that this objection is without merit[10], and this Panel agrees. The results management process that Ullrich references from Article 224 is the process that is necessary to initiate the proceedings at the national level – there is no requirement that this process be considered substantively when issuing an award under the UCI Rules. Moreover, the fact that the parties were not called or heard is of no relevance to the fact that the Decision was issued pursuant to Article 242. The UCI Rules themselves make provision for the fact that cases may be decided in writing (e.g., Article 229). The fact that no parties were called or heard, as is permissible under the UCI Rules, is no impediment to the Decision being classified as having been issued pursuant to Article 242 of the UCI Rules.

27. Accordingly, the Panel rejects Ullrich`s submission as to whether the Decision is issued pursuant to Article 242 of the UCI Rules. It therefore follows that the UCI is a proper Appellant to bring this appeal under Article 281(c) of the UCI Rules.

C. Proper Defendants

28. Article 282 of the UCI Rules provides that "The appeal of the UCI shall be made against the License-Holder and against the National Federation that made the contested decision and/or the body that acted on its behalf". The UCI brought its appeal against Jan Ullrich and against Swiss Olympic, the body to whom Ullrich's national sporting federation (Swiss Cycling) has delegated its authority for prosecuting antidoping violations.

29. Ullrich contends that in fact he and Swiss Olympic are not proper defendants to these proceedings, despite Article 282 of the UCI Rules. Ullrich characterizes the UCI's challenge of the Decision as one covered by Article 75 of the Swiss Civil Code, which provides that *"any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof"*. Under Article 75 of the Swiss Civil Code, Ullrich contends that the only proper defendant was Swiss Cycling[11]. In this

10 See UCI submission of September 8, 2011, para. 142.
11 See Ullrich submission of May 16, 2011, para. 121.

regard Ullrich argues that there is a conflict between Article 75 of the Swiss Civil Code and Article 282 of the UCI Rules, and that domestic Swiss law must prevail.

30. The UCI recognizes the application of Article 75 of the Swiss Civil Code, but rejects the implications that Ullrich contends must flow from it. The UCI explains that the purpose of Article 75 of the Swiss Civil Code is to protect members in associations by giving them a minimum right to seek judicial intervention against decisions made by their associations[12].

31. The Panel firstly notes that the present case is not – strictly speaking – one that is situated within the scope of applicability of Article 75 of the Swiss Civil Code, since in the case at hand it is not a member of an association that has lodged the appeal against a decision/resolution of an association, but a non-member (that is, however, equally affected by it). Such recourse in favor of a third party is covered by the parties' autonomy and is not – as stated above – restricted or prevented by Article 75 of the Swiss Code. The parties, therefore, are free to rule and determine who are the proper respondents in a case in which an appeal is lodged by a non-member. In the case at hand the applicable rule (Article 282 of the UCI Rules) provides that the appeal must be filed *"against the License-Holder and against the National Federation that made the contested decision and/or the body that acted on its behalf"*.

a) "License-Holder"

32. The fact that according to Article 282 of the UCI Rules the appeal must be lodged also against the "license-holder" is not arbitrary. As the UCI points out, if the position under Article 75 of the Swiss Civil Code were otherwise, sporting rules like the UCI Rules and the WADC would not be capable of enforcement under domestic Swiss law, because the athlete could never be a proper defendant[13]. This would clearly be an absurd result. Furthermore, only by being made a party to these proceedings will Ullrich's basic rights be guaranteed. It is only through Article 282 of the UCI Rules that Ullrich is in a position to know about the appeal affecting his rights and obligations, to present his view of the facts and the law and to avail himself of all procedural rights. Accordingly, the Panel cannot adopt the narrow reading of Article 75 that Ullrich urges upon the Panel. Instead, the Panel holds that Ullrich is, in principle, a proper defendant in the case at hand.

b) "National Federation" / "Body"

33. Article 282 of the UCI Rules further provides that the appeal must be filed also *"against … the National Federation that made the contested decision and/or the body that acted on its behalf"*. In the Panel's understanding the term "National Federation" in Article 282 of the UCI Rules refers to the Swiss Cycling. In the case at hand, however, Swiss Cycling did not "make" the contested decision, since none of its association organs were involved in passing the Decision. Instead, Swiss Cycling has outsourced its (original) competence to deal with doping disputes

12 See UCI submission of September 8, 2011, para. 46.
13 See UCI submission of September 8, 2011, para. 58.

between itself and its members to Swiss Olympic which in turn has entrusted the Disciplinary Chamber (an independent organ within Swiss Olympic) with this task. The organ acting "on the National Federation's behalf", therefore, is the Disciplinary Chamber. Hence, the UCI was – in principle – correct in directing the appeal also against Swiss Olympic.

34. The question arises, however, whether or not the UCI has a protected legal interest to pursue the appeal against Swiss Olympic as well. In the case at hand Swiss Olympic has – from the outset – declared that it will not take an active part in these proceedings and that it considers itself bound by an award issued by CAS irrespective of the outcome of these proceedings. In other words, it is clear that Swiss Olympic has attorned to the jurisdiction of the CAS. Ullrich has no personal jurisdiction to object to the inclusion of Swiss Olympic as a defendant, and given Swiss Olympic's attornment, this Panel finds the question of whether Swiss Olympic is a proper defendant to be moot.

D. Ullrich's Resignation

35. Ullrich resigned his membership in Swiss Cycling on October 19, 2006. The question, therefore, arises whether or not Ullrich can still be considered a "license-holder" within the meaning of Article 282 of the UCI Rules. Ullrich contests this. First, he submits that because of his resignation Antidoping Schweiz could not have initiated proceedings against him because Antidoping Schweiz was not established at the time of his resignation and he did not consent to the changes in the FDB`s articles that assigned anti-doping cases to Antidoping Schweiz. Second, Ullrich quit Swiss Cycling due to its alleged "repeated violations of his basic personal rights" and that resignation was voluntarily accepted by Swiss Cycling[14]. Under Swiss law, in Ullrich's submission, the power to discipline members ceases upon their resignation. Third, as a related matter, Ullrich submits that the UCI's disciplinary power over Ullrich flowed from its relationship with Swiss Cycling and is not autonomous; as Ullrich's resignation severed Swiss Cycling's powers in this regard, the UCI had no powers to bring an appeal to discipline Ullrich[15].

36. In response, the UCI submits that the Swiss Supreme Court's case law recognizes that a member of an association may still be sued after that person's membership terminates, when there is a direct personal interest in obtaining a decision[16]. The UCI then places reliance on Article 1.1.004 §3 of the UCI Rules, which provides that UCI license holders remain subject to the jurisdiction of the relevant disciplinary bodies for acts committed while holding a license, even if proceedings are started or continue after the license holder ceases to hold a license[17].

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14 See Ullrich submission of May 16, 2011, para. 154.
15 See Ullrich submission of May 16, 2011, para. 168.
16 Citing the Swiss Supreme Court's judgment ATF of September 1, 2009, 5A_10/2009 (see UCI submission of September 8, 2011, para. 87.
17 See UCI submission of September 8, 2011, para. 101.

37. Ullrich raised a series of similar objections before the Disciplinary Chamber. The Disciplinary Chamber ultimately found that Antidoping Schweiz was not competent to prosecute Ullrich because, in its view, (1) the rules of Swiss Olympic in force at the time cannot be applied to proceedings initiated against athletes after their resignations[18], and (2) the UCI Rules contain nothing to the contrary, and, having examined Article 1.1.004 in particular, the Disciplinary Chamber noted that the UCI Rules lack *"a rule that provides for its application to licensed athletes even after their resignation"*[19]. The Disciplinary Chamber issued no ruling as to whether the UCI might have the right to exercise subsidiary jurisdiction to prosecute the alleged offence under the latest version of the UCI Rules (which are not applicable to this case in any event) where the national antidoping organization lacks competence to impose sanctions. It is against this outcome that the UCI appeals.

38. The Panel agrees with the UCI's interpretation of the Swiss Supreme Court's judgment mentioned above, namely that it places no impediment against actions against former members of an association when there is an interest in doing so. Furthermore and more particularly, as noted above, the UCI Rules are applicable to these proceedings. The Panel will therefore address at first instance the competence of the UCI under the UCI Rules to pursue cases on appeal that were initiated against athletes following the resignation of their memberships. This is consistent with the UCI's submission, which submits that Article 1.1.004 of the UCI Rules is a complete answer to Ullrich's objections.

39. Contrary to Ullrich's assertion, the Disciplinary Chamber was correct to consider the issue through the lens of Article 1.1.004 of the UCI Rules. It provides:

> *"License holders remain subject to the jurisdiction of the relevant disciplinary bodies for acts committed while applying for or while holding a license, even if proceedings are started or continue after they cease to hold a license"*[20] [emphasis added].

40. The Disciplinary Chamber's view was that under this Article, proceedings could only be pursued against an athlete who resigned his license if those proceedings had been initiated prior to the resignation. This Panel disagrees. Article 1.1.004 states very clearly that proceedings can be "started" even "after" an athlete ceases to hold a license. This Panel sees no reason why Ullrich's resignation of his license would not fit within the category of circumstances where an athlete *"cease[s] to hold a license"*. While the Disciplinary Chamber was correct that the latest version of the UCI Rules spells out with additional clarity the application of the anti-doping obligations to retired athletes, the fact of those amendments to the newest version of the UCI Rules does not negate the plain language of the applicable UCI Rules.

41. It was therefore, in principle, possible to initiate proceedings under the UCI Rules following Ullrich's resignation of his UCI license. As the UCI Rules are applicable, the UCI enjoys a right of appeal against the Decision[21]. Its competence to appeal and continue the proceedings

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18 See Decision, para. 10.4.
19 See Decision, para. 10.6.
20 See UCI Cycling Regulations, Article 1.1.004.
21 See UCI Rules, Article 281.

against Ullrich derives from the UCI Rules. Moreover, the Panel takes note of the third paragraph of Article 283 of the UCI Rules, which expressly entitles the UCI on appeal to participate and *"demand that a sanction [be] imposed"*. This is an additional basis for the UCI's competence to pursue the requests listed in its Statement of Appeal.

42. It is also open to the Panel for the purposes of determining the applicability of the UCI Rules in light of Ullrich's resignation to consider as a factual matter whether Ullrich's resignation was motivated by a desire to escape sanction. However, given the legal conclusions reached above, such an assessment is not required at this time.

E. Scope for Appeal Proceedings

43. Article R57 of the Code provides that *"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*.

44. Ullrich submits that under Article R57 of the Code, this Panel's right of review is limited to the matters at issue in the Decision – namely, the jurisdictional question upon which the Decision turned. Accordingly, Ullrich submits that should the Panel reverse the Decision, the case should be referred back to Swiss Olympic and its Disciplinary Chamber for further deliberation. Ullrich bases his reasoning on Article 75 of the Swiss Civil Code, according to which an appeal is limited in that it does not permit courts to replace the decisions of associations that were taken illegally – it requires that such decisions be sent back for reconsideration by the association, in order to protect the association's autonomy. By contrast, the UCI requests that the Panel consider and finally pronounce upon the merits of this case. According to the UCI, Article 75 of the Swiss Civil Code is no impediment to an association's providing more rights to its members: an association should be entitled to invest additional rights into a procedure which otherwise respects the precepts of Article 75 of the Swiss Civil Code. In other words, Article 75 of the Swiss Civil Code operates as a minimum guarantee of the rights of members of an association, and not as a straightjacket, within which an association and its members must operate[22]. It follows, according to the UCI, that Article 75 of the Swiss Civil Code cannot be infringed if an arbitral tribunal adopts a new decision on appeal, insofar as the association has expressly authorized this in its rules[23]. The UCI refers in this respect to the jurisprudence of the Swiss Supreme Court in which the latter has recognized, within the framework of Article 75 of the Swiss Civil Code, that an appeal body may adopt a full decision, even if the first level body has not taken a decision on the merits[24].

45. While it is open to the Panel to adopt the procedural path proposed by Ullrich, it is not necessary. First, the Panel notes that the appeal lodged by the UCI is not – strictly speaking – falling within the scope of application of Article 75 of the Swiss Civil Code, since – as mentioned previously – UCI is neither a member of Swiss Cycling nor of Swiss Olympic.

22 See UCI submission of September 8, 2001, para. 49-59..
23 See UCI submission of September 8, 2001, para. 69.
24 See UCI submission of September 8, 2011, paras. 176-179.

Article R57 of the Code in the case at hand is, therefore, not limited by Article 75 of the Swiss Civil Code. Furthermore, the Panel notes that even if Article 75 of the Swiss Civil Code were applicable the fact that this provision provides for cassatory powers of the adjudicating body would not prevent this Panel from deciding the dispute on the merits. In the view of the Panel the main reason why Article 75 of the Swiss Civil Code confers only cassatory powers upon state courts when deciding on appeals against resolutions/decisions of an association is to protect the association's autonomy (Article 23 BV). The contents of this constitutional right is designed to protect the association – within certain boundaries - from all kinds of state interference (including interference by state courts) with the association life[25]. In the case at hand no such danger exists, since here a private arbitral tribunal is called upon to decide the dispute between the parties. Lastly, the Panel holds that the Swiss Federal Tribunal has been very clear about the jurisdiction of CAS panels operating under Article R57 of the Code. As the court found in the context of Article R57 of the Code, it is *"a characteristic of an appeal that the higher body may decide the merits itself"*. As a policy matter, the decision by a panel to assess the merits, even if not considered at first instance, *"is apt to facilitate quick disposition of disputes"*[26].

46. Given the scope for proceedings provided by Article R57 of the Code, the Panel has concluded that for reasons of procedural economy it would be in the interests of all parties for this matter to be resolved without the need for further proceedings. Accordingly, having addressed the outstanding procedural issues in this case, and on the basis of the evidence submitted, the Panel will assess the substantive merits of this case.

Merits of the Case

A. UCI's Allegations of Doping Violations

47. The UCI alleges that Ullrich violated Article 15.2 of the UCI Rules, which prohibits the *"use or attempted use of a prohibited substance or a prohibited method"*. In particular, the UCI alleges that Ullrich engaged in blood doping (a prohibited method) and used several prohibited substances, including growth hormones, IGF-1, testosterone patches (PCH), EPO and a masking substance referred to as "magic power" that is said to destroy EPO in urine samples.

48. The UCI also alleges that through the same actions, Ullrich violated Article 15.5 of the UCI Rules, which prohibits *"Tampering, or Attempted to tamper, with any part of Doping Control"*.

B. Evidence in Support of the UCI's Allegations

49. The UCI has submitted a number of different pieces of evidence that allegedly show that Ullrich engaged in doping violations. Each of these pieces of evidence stem from the aforementioned 2004 Operation Puerto investigation. A short, non-exhaustive summary of that evidence is as follows:

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25 See HEINI/PORTMANN/SEEMANN, Grundriss des Vereinsrechts, 2009, marg. no. 35.

26 See generally, Case 4A_386/2010, *Valverde v. WADA, UCI and RFEC*, judgment of January 3, 2011 at 5.3.4.

- **Report No. 116**. The UCI submitted Report No. 116. Report No. 116 is a report prepared by the Spanish Civil Guard dated June 27, 2006. The report describes the organization and operations of Dr. Fuentes' doping network, and describes with some detail the evidence recovered in connection with Operation Puerto. Section 9 of Report No. 116 references and summarizes the documents and physical evidence that the Spanish Civil Guard allege related to doping by Jan Ullrich.
- **Documents recovered from Operation Puerto and other sources**. The UCI has offered into evidence documents obtained from the Spanish Civil Guard, which the Spanish Civil Guard seized or otherwise obtained as part of its Operation Puerto investigation or from other sources. These documents include: (1) Documents evidencing travel by Ullrich to Madrid for reasons that are not known to be related to cycling events[27]. (2) Calendars seized from Dr. Fuentes that use a code to record the withdrawal of blood from athletes on specified dates, and inventories of fridges and freezers containing blood bearing the date of extraction – since the blood samples can be associated to particular individuals, read together the inventory and the calendar are a guide to the dates when Ullrich is alleged to have provided blood to Dr. Fuentes for storage[28]. (3) Ullrich's bank statements that show a payment to Dr. Fuentes in 2004 in the amount of €25,003.20, and a second payment in 2006 to a numbered Swiss HSBC bank account in the amount of €55,000 which HSBC has confirmed was also associated with Dr. Fuentes during that time period[29].
- **Analytic evidence**. The UCI has submitted a 2007 report prepared by a Dusseldorf lab comparing DNA materials taken from Ullrich by the German police against nine so-called "Spanish" samples provided by the Spanish Civil Guard. The report, prepared by Dr. Dirk Porstendörfer, concluded that the samples provided by Ullrich matched the genetic materials provided by the Spanish Civil Guard with an extremely high degree of probability (one in six billion)[30].

50. In summary, the documentary evidence presented by the UCI shows that (1) Dr. Fuentes was engaged in the provision of doping services to athletes, (2) Ullrich travelled in the vicinity of Dr. Fuentes' operations on multiple occasions, and evidence in Dr. Fuentes' possession suggested that Ullrich was in personal contact with him on certain of those occasions, (3) Ullrich paid Dr. Fuentes very substantial sums of money for services that have not been particularized, and (4) a DNA analysis has confirmed that Ullrich's genetic profile matches blood bags that appear to have been for doping purposes found in the possession of Dr. Fuentes. The evidence has been obtained from multiple sources and is internally consistent despite differences in its provenance. The evidence is probative and directly related to the question of whether an antidoping violation has occurred.

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27 See, for example, exhibits 14 and 60.

28 See exhibits 18 and 27. Ullrich is alleged to have provided blood on May 25, 2005; June 8, 2005; December 22, 2005; February 21, 2005; May 1, 2006; and June 20, 2006.

29 See exhibit 61.

30 See exhibits 57 and 16.

C. Evidence in Support of the UCI's Allegations

51. Ullrich has not questioned the veracity of the evidence or any other substantive aspect of this case. Indeed, despite the fact that this appeal has been ongoing for well over twelve months and pleadings and other submissions and correspondence now extend to volumes of binders, not including the substantive evidence introduced by the UCI, Ullrich has maintained a steadfast focus on procedural objections to the exclusion of all other submissions. Ullrich's silence in this respect is both notable and surprising, given the vigour with which he has otherwise contested the UCI's allegations. Despite the Panel's surprise in this respect, it is of no consequence to its ultimate decision; the UCI rules do not contain a provision that would permit a negative inference to be drawn from efforts to avoid addressing the substance of an allegation of an antidoping rule violation[31].

D. Conclusions on the Allegations

52. Given the volume, consistency and probative value of the evidence presented by the UCI, and the failure of Ullrich to raise any doubt about the veracity or reliability of such evidence, this Panel is satisfied beyond its comfortable satisfaction that Ullrich engaged at least in blood doping in violation of Article 15.2 of the UCI Rules.

Sanction

53. In its Appeal Brief UCI requests that Ullrich be sanctioned with *"a lifetime ineligibility in accordance with Article 261 of the anti-doping rules of the UCI"*. Ullrich on the contrary requests, should the Panel come to the conclusion that he committed a doping violation, that *"no earlier doping violation"* be taken into account.

A. Applicable Law

54. The 2004 iteration of the UCI Rules, applicable to these proceedings, were replaced on January 1, 2009 (the "new UCI Rules"). The new UCI Rules provide that cases brought after January 1, 2009, such as the present matter, are governed by the predecessor *"rules in force at the time of the anti-doping rule violation, subject to any application of the principle of lex mitior by the hearing panel determining the case"*[32]. On account of the operation of the principle of lex mitior, the Panel will apply the new UCI Rules should the latter be more advantageous for Ullrich.

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31 There are no provisions equivalent to Art. 3.2.4 of the current WADC in the 2004 version of the UCI Rules.

32 See Art. 373(a) of the new UCI Rules.

B. Period of Ineligibility

a) First or Second Infraction?

55. Under the new UCI Rules an athlete's prior antidoping record is relevant to the time period in which he or she will be declared ineligible following an antidoping rule violation.

56. As noted above, the UCI has provided evidence that in 2002, Ullrich tested positive for amphetamines out of competition. The BDR Bundessportgericht entered a final judgment for this infraction, and Ullrich was suspended by the BDR Bundessportgericht for a six month period by a decision dated July 23, 2002. This decision was not appealed at the time, and the time-limit for any appeal has long expired. The question is, therefore, whether this original antidoping violation, which occurred before the WADC 2003 (and the UCI Rules implementing the WADC) entered into force, can be taken into account when determining the period of ineligibility under the UCI Rules applicable to the second infraction.

57. This issue is not explicitly addressed in the 2004 UCI Rules or the new version of the UCI Rules, where the period of applicable sanction is set out. However, the Panel notes that the 2009 version of the WADC, which are implemented by the new UCI Rules, gives certain guidance as to how certain pre-2009 WADC violations are to be treated when determining a sanction under the 2009 WADC[33]. It is therefore clear from the 2009 WADC that in principle, pre-2009 violations of antidoping rules may be treated as prior violations for the purposes of determining a period of ineligibility under the 2009 WADC.

58. This issue has also received some attention in previous cases before the CAS.

59. In CAS 2006/A/1025, an athlete had committed an antidoping violation that the panel classified as having been committed with "no significant fault or negligence". The athlete had also committed a previous antidoping violation in 2003, prior to the promulgation of the original WADC. The panel in CAS 2006/A/1025 was obligated to assess whether the 2004 violation constituted a first offence for the purposes of assessing whether the athlete was a recidivist (which would have resulted in an additional period of ineligibility). The panel in CAS 2006/A/1025 found that the purpose of the sporting regulations under which the athlete had been sanctioned in 2003 and the applicable WADC were *"the same, i.e., the fight against doping in sports. To achieve this objective, the sanctions under both sets of rules are intended to deter athletes from the use of prohibited substances and prohibited methods… The Panel accepts the reasoning… that the fight against doping would be entirely thwarted if one were to ignore the existence of a first offence under the pre-WADC [rules] in setting the sanction for a second offence under the [current rules]. In both cases [the athlete] uses a Prohibited Substance. As the ITF correctly points out, it would be contrary to the spirit of the rules and would seriously undermine the fight against doping in sport if the 'slate were to be wiped clean' on entry into force of*

[33] See Article 24.5 of the WADC, which concerns Specified Substances, and which as such is not relevant to the facts of this case.

the [new rules]. The fight against doping must be a long term campaign if it is to succeed. The adoption of the [new rules] did not provide for an amnesty for all athletes previously sanctioned who commit a second offence"[34].

60. In CAS 2008/A/1577, an athlete had abused marijuana – a "Specified Substance" – for non-performance enhancing purposes. The athlete had also tested positive for a performance enhancing steroid in 2001, prior to the entry into force of the original WADC. Given the 2001 violation, the panel found that the ingestion of marijuana *"must be considered a second offence. The fact that the applicable pre-WADC anti-doping rules at the time of the first offense may have provided for a more lenient sanction in the event of a second offence is of no relevance in adjudicating the [second offence]… The fact that [the athlete's] 2nd violation took place almost 6 years subsequent to the androstenedione offense has no relevance, therefore, for the qualification of the latter as a 2nd offense"*[35].

61. It is clear from the 2009 WADC and from prior decisions of the CAS that in principle, decisions issued prior to the creation of the WADC can be treated as first violations when assessing the period of ineligibility following an antidoping violation sanctioned under the current WADC or its equivalents.

62. The distinction in the case at hand is related to the substance of Ullrich's 2002 violation, where Ullrich was sanctioned for ingesting amphetamines out of competition. Since 2002 and the adoption of a single Prohibited List by WADA, amphetamines have been re-classified, such that their presence results in an antidoping violation only where they are found in an athlete's system in-competition. In short, were Ullrich to be found to have ingested amphetamines out of competition today, he would not have committed an anti-doping violation. It appears that the question that faces this Panel has not yet been considered: should a previous infraction, which has been finally determined by a sports arbitration tribunal, be treated as a first violation where the same conduct would not constitute a violation under existing antidoping rules?

63. This Panel is of the view that treating the decision of the BDR Bundessportgericht as it stands – in other words, as a first violation – without any examination of the underlying substance in determining the appropriate sanction in this case would not serve the ends of justice. Inattention on the part of the Panel to evolving scientific thinking about the nature of substances since the time of the BDR Bundessportgericht's decision, which have been reflected in updates to the Prohibited List, would result in the condemnation of prior conduct that is not itself condemnable under the current UCI Rules. In legal terms, periods of ineligibility involve the application of the substantive law, and the principle of lex mitior – applicable under the UCI Rules – requires that Ullrich benefit from the least lenient penalty applicable, even if enacted after the commission of the original offence.[36]

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34 See CAS 2006/A/1025, at paras. 11.6.7 and 11.6.8.

35 See CAS 2008/A/1577, at paras. 56 and 59.

36 See in particular *Scoppola v. Italy (No. 2)*, European Court of Human Rights, Application no. 10249/03, at para. 106: *"a concensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law".*

64. Separately, this Panel notes that if it were to accept the decision of the BDR Bundessportgericht as a first violation, it would be obligated to "transpose" this first antidoping violation into the categories of the UCI Rules in force in 2009. In other words, this panel would have to (re-)qualify the BDR Bundessportgericht's decision under the 2009 UCI Rules either as a St-, NSF- or RS-violation. Such a "transposition" would necessarily involve an examination of the substance of the BDR Bundessportgericht's decision. Moreover, such a "transposition" would require that this Panel make decisions about matters of substance for which it has not examined the underlying evidence. It would not be appropriate for this Panel to examine the substance of the BDR Bundessportgericht's decision for the purposes of "transposing" the award without also remarking that such a decision would not constitute a violation under the new UCI Rules.

b) Period of Ineligibility

65. Given the foregoing findings about the decision of the BDR Bundessportgericht, the present infraction is Ullrich's first antidoping violation. The old as well as the new UCI Rules provide that the mandatory sanction in the event of an antidoping violation is a two year period of ineligibility. Accordingly, it is the decision of this Panel that Ullrich is ineligible to participate in sports for a period of two years. Since the old UCI rules apply here in principle, there is no room for Article 305 of the (new) UCI Rules which provides for a period of ineligibility from two to four years in case of aggravating circumstances.

c) Commencement of the Period of Ineligibility

66. According to Article 314 of the UCI Rules, where there has been no acceptance or acknowledgement of an athlete's culpability, periods of ineligibility are set to run from the date of a hearing in an antidoping case. The first instance hearing took place in 2009/2010. As a result, the question is whether this first instance hearing is the one from which the period of ineligibility is set to run. The Panel finds this not appropriate, since the first instance panel did not look at the merits of the case but dismissed the case for lack of competence. This Panel, however, is of the view that – in principle – the period of ineligibility should only start to run from such hearing date on which a first instance panel looked into the substance of the alleged doping offence. This hearing date is the one that took place on 22 August, 2011 (see above). In view of Article 314 of the UCI Rules, the Panel has decided to start the period of ineligibility on 22 August 2011.

d) Other Ancillary Orders

67. Article 313 of the new UCI Rules provides that in addition to a period of ineligibility, *"all other competitive results obtained from the date a positive Sample was collected… or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified"*.

68. The evidence presented by the UCI shows that Ullrich's intensive involvement with Dr. Fuentes' doping program goes back to at least 2004, and likely substantially earlier. Although the date at which Ullrich's doping cannot be determined, there is clear evidence Ullrich was fully engaged with Dr. Fuentes' doping program by the spring of 2005.

69. In view of Article 313 of the new UCI Rules, this Panel disqualifies the results of Jan Ullrich from all sporting events in which he competed from May 1, 2005 until the time of his retirement.

C. Other Arguments and Prayers for Relief

70. The preceding discussions of the procedural questions and matters of substance may not purport and include every contention put forward by the parties. However, this Panel has carefully considered and taken into account in its discussions and subsequent deliberations all of the evidence and arguments submitted by the parties, even if there is no specific reference to those arguments in the above analysis. In conclusion the Panel finds that the present appeal is to be partially upheld. All other prayers of relief are dismissed.

The Court of Arbitration for Sport rules:

1. The appeal filed on 22 March 2010 by the International Cycling Union is partially upheld.

2. The decision of the Disciplinary Chamber of Swiss Olympic dated January 30, 2010 is annulled.

3. All cycling results achieved by Mr. Jan Ullrich on or after May 1, 2005 until his retirement are disqualified.

4. Mr. Jan Ullrich shall be declared ineligible for a period of two (2) years to participate in any Event, as more particularly described in Article 320 of Part 14 (Anti-Doping) of the International Cycling Union's Cycling Regulations, starting from August 22, 2011.

5. (…)

6. (…)

7. All other motions or prayers for relief are dismissed.