



Arbitration CAS 2006/A/1057 Union Cycliste Internationale (UCI) v. Barry Forde & Barbados Cycling Union (BCU), award of 11 September 2006

Panel: Mr Conny Jörneklint (Sweden), President; Mr Beat Hodler (Switzerland); Mr Christian Krähe (Germany)

Cycling

Doping (testosterone)

Independence of the CAS panel

CAS power of review in connection with the translation of documents

Burden and standard of proof in case of an exogenous source of a prohibited substance

Determination of the applicable sanction for a second anti-doping violation

1. Considering that the CAS list of arbitrators is in line with the constitutional demands of independence and impartiality applicable to arbitral tribunals and that the arbitrators selected on said list are experts familiar with both legal and sports-related issues, a party's complaint concerning the unlawful composition of the arbitral tribunal is unfounded.
2. Pursuant to the Code of Sport-related Arbitration, it is up to the arbitration panel to decide what documents need to be translated or not. A panel can choose not to order any further translation than that which is provided by an appellant, especially if the respondents never requested the translation of the disputed documentation before the filing of the answer, never referred to any stipulation which obliges the federation or the accredited laboratory to spontaneously translate the relevant documents and if the panel knows from other CAS procedures that the respondent's counsel is also comfortable with the language of the documents and the largest part of the documentation consists of scientific statistics.
3. According to the applicable anti-doping rules, a federation shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. Furthermore, WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratory analysis. Therefore, the test results conducted by an accredited laboratory indicating an exogenous source of testosterone, shift the burden of adducing exculpatory circumstances to the athlete. When the contentions made by the athlete are not substantiated by anything concrete, his allegations are not established and do not suffice to put into question the quality of the test itself or to reverse the presumption implemented by the anti-doping rules. The result is that at any

concentration, an athlete's sample shall be deemed to contain a prohibited substance and no further investigation is necessary.

4. It is well established that a two-year suspension for a first time doping offence is legally acceptable. The fact that, according to the applicable anti-doping rules, the period of ineligibility imposed for a second anti-doping violation shall be a minimum of two years and a maximum of three years does therefore not appear as disproportionate in the absence of any established exceptional attenuating circumstances. Where an athlete is unable to establish how the prohibited substance entered his system, no elimination of the period of ineligibility or reduction of the period of ineligibility can be applied and a minimum sanction of 2 years (for a first violation) must be imposed according to the rules in force (UCI and WADA). Nevertheless, the circumstances in which the first doping offence occurred i.e. use of ephedrine, its mild sanction, the years which went by and the athlete's presence and testimonies at the hearing are element which should be taken into account to assess the applicable sanction for a second violation.

Union Cycliste Internationale (UCI or the "Appellant") is a non-governmental association of national cycling federations recognized as the international federation governing the sport of cycling under all forms worldwide. Its registered office is in Aigle, Switzerland.

Mr Barry Forde is an Elite category cyclist, who holds a licence issued by the Barbados Cycling Union. In August 2003, he received a warning after he tested positive to ephedrine. The concentration of the banned substance in his urine was 17.1 micrograms per millilitre.

The Barbados Cycling Union (BCU) is the national cycling federation of the Barbados. It has its registered seat in Bridgetown, Barbados and is affiliated with the UCI.

Mr Barry Forde participated in the "6 Jours de Grenoble", a track championship, which took place in the French city of Grenoble from 27 October to 2 November 2005.

On 28 October 2005, Mr Barry Forde was subject to in-competition drug testing. The anti-doping control form gives the following indications:

- Mr Barry Forde confirmed that he had recently taken "Paracetamol" and "ACC 600".
- The urine provided by Mr Barry Forde was dispatched in two bottles. Their code number was A 825675 and B 825675.
- No comment was made on the sample collection procedure.
- Mr Barry Forde signed the following statement: *"I declare of honour that the information I have given above is true and I approve the testing procedure"*.

The Laboratoire National de Dépistage du Dopage (LNDD) in Châtenay-Malabry, France, is a WADA accredited laboratory for doping analysis. On 31 October 2005, it received the collected samples, which were marked with the code number 825675.

In its report dated 16 November 2005, the LNDD confirmed that (as translated from French by the Appellant) ***“Analysis by isotopic ratio mass spectrometry indicates that testosterone or one of its precursors has been taken”***.

On 24 November 2005, the UCI wrote the following to the BCU:

“We inform you that the rider Barry FORDE tested positive (T/E 8.1) at the above-mentioned race according to the report we received from the Laboratory of Paris (FRA), a copy of which we enclose (pursuant to article 187 of the Anti-Doping Rules). According to the laboratory’s result on the A sample and the positive IRMS analysis, the Anti-doping Commission must start from this notion that an offence against the mentioned Regulations has objectively been committed”.

On 7 December 2005, the BCU confirmed to the LNDD that Mr Barry Forde requested:

- a confirmatory analysis to be carried out,
- that his attorney, Mr Michael Lehner, be present at the opening of the B sample,
- the laboratory to provide the full documentation of the A sample prior the opening of the B sample.

It is undisputed that the full documentation of the A sample was in the possession of the Respondents before the opening of the B sample, which took place at the LNDD on 1 February 2006 and was attended by Mr Michael Lehner.

The form regarding the opening of the B sample indicates that the bottle code number was B 825675 and that its seal was not damaged. It was signed by Mr Michael Lehner, who did not make any comment on the course of the analysis.

On 3 February 2006, the LNDD delivered its analysis report of the B sample and confirmed that (as translated from French by the Appellant) ***“Analysis by isotopic ratio mass spectrometry indicates an exogenous origin of the testosterone metabolites, consistent with the taking of testosterone or one of its precursors. – The exogenous origin of the testosterone metabolites was objectified on the basis of an isotopic reduction of -6.33 0/00 and =5.29 0/00 respectively for the 5 beta androstanediol and 5 alpha androstanediol metabolites”***.

On 8 February 2006, the analysis report of the B sample was forwarded to the BCU, which was requested by the UCI *“to instigate disciplinary proceedings in accordance with the chapter IX of the UCI Anti-Doping Rules”*.

On 23 February 2006, the Executive Council of the BCU held a meeting and issued a decision stating as follows in relevant part:

“(…)

AND WHEREAS there is no proof that Mr. Forde ingested, applied or injected any banned substance or any other substance into his body to cause the elevated testosterone/epitestosterone level;

BE IT RESOLVED that the BCU has recommended that no censure or punitive action be taken against Mr. Forde at this time”.

Mr Barry Forde voluntarily put on hold his career as a professional rider after the “6-Daagse van Rotterdam” a track championship, which took place from 6 to 11 January 2006. At the present time, he keeps training in Germany, where his coach lives. He is still in possession of his license.

On 23 March 2006, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (CAS).

On 31 March 2006, the Appellant submitted its Appeal Brief, which contains a statement of the facts and legal arguments accompanied by supporting documents. It challenged the decision of the BCU, requesting the following:

“May it please to the Arbitration Panel,

To annul the contested decision;

To sanction Mr. Barry Forde with a suspension according to article 271 ADR;

To disqualify Mr. Barry Forde from the race “6 Jours de Grenoble” 2005 (art. 259.1 ADR);

To order Mr. Barry Forde to pay to the UCI an amount of CHF 2'000.- for costs under art. 245.2 ADR.

To order Mr. Barry Forde to reimburse to the UCI the Court's Office fee of CHF 500.- and to pay a contribution to the UCI's legal costs”.

On 15 May 2006, the Respondents filed together an answer, with the following motions:

“On these grounds, we plead for

1. Maintaining the BCU's decision and/or

2. Dismissing the UCI's appeal”

LAW

CAS Jurisdiction

1. The jurisdiction of CAS derives from the chapter XI of the Anti-Doping Rules of the UCI (the “Anti-Doping Rules”) and Art. R47 of the Code.

2. In a very detailed judgment of 27 May 2003 (ATF 129 III 445; Digest of CAS Awards III, 2001-2003, Matthieu Reeb, ed. 2004; p. 649 ff), the Swiss Federal Supreme Court recognised the CAS as a true court of Arbitration and confirmed that it is sufficiently independent vis-à-vis the IOC, as well as all other parties that call upon its services. It noted, inter alia, the following:

“An arbitral award, in the sense of Art. 189 LDIP, is a judgement rendered on the basis of an arbitration agreement by a non-State tribunal entrusted by the parties to decide an arbitrable dispute (Art. 177 para. 1 LDIP) of an international nature (Art. 176 para. 1 LDIP); a true award, which is comparable to the judgement of a State tribunal, is dependent on the arbitral tribunal concerned offering sufficient guarantees of impartiality and independence as derived from Article 30 para. 1 of the Constitution (regarding Art. 58 (a) of the Constitution, see ATF 119 II 271 rec. 3b and the quoted judgements). The Federal Supreme Court has accepted that the CAS may be considered a true arbitral tribunal for cases (...) where the CAS is established by an international sports association as the appeals body charged with examining the validity of sanctions imposed by its organs (ATF 119 II 271)”.

3. Regarding the Respondents’ arguments in connection with the list of arbitrators, the Panel finds no reasons to depart from the position expressed comprehensively by the Swiss Federal Supreme Court, which stated more particularly the following (ATF 129 III 445; *ibidem*):

*“In competitive sport, particularly the Olympic Games, it is vital both for athletes and for the smooth running of events, that disputes are resolved quickly, simply, flexibly and inexpensively by experts familiar with both legal and sports-related issues (for more information on the advantages of judicial arbitration in the world of sport, see Zen-Ruffinen, op. cit., note 1420). The idea of a list of arbitrators, as used by the CAS, helps to achieve these objectives. Thanks in particular to the creation of ad hoc divisions, it enables the parties concerned to obtain a decision quickly, following a hearing conducted by persons with legal training and recognised expertise in the field of sport, whilst protecting their right to a fair hearing. Furthermore, since the CAS arbitrators are regularly informed of developments in sports law and CAS case-law, the system in question, which also helps to eliminate the problems linked to the international nature of many sports-related disputes, ensures a degree of consistency in the decisions taken (concerning the latter two points, see Zen-Ruffinen, *ibid.*). Following the changes introduced since the 1994 reforms, the use of a list of arbitrators is now in keeping with the constitutional demands of independence and impartiality applicable to arbitral tribunals. At least 150 names must appear on the list of arbitrators and the CAS currently has around 200. Whatever the plaintiffs may argue, parties therefore have a wide choice of names to choose from, even taking into account the nationality, language and sport practised by athletes who appeal to the CAS”.*

4. The nature of “true court of Arbitration” of the CAS was confirmed most recently by judgments 4P.26/2005 of 23 March 2005 and 4P.149/2003 of 21 February 2006.
5. It follows that the Respondents’ complaint concerning the unlawful composition of this arbitral tribunal is unfounded. Consequently, the CAS has jurisdiction to decide on the present dispute.
6. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel did not therefore examine only the formal aspects of the appealed decision but held a trial *de novo*, evaluating all facts and legal issues involved in the dispute.

Applicable law

7. Art. R58 of the Code provides the following:
“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.
8. Art. 290 of the Anti-doping Rules further specifies 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”.*
9. In the present matter, the parties have not agreed on the application of any particular law. Therefore, the Anti-Doping Rules shall apply primarily and Swiss law shall apply subsidiarily.

Admissibility

10. At the hearing, the Respondents confirmed that the document issued after the meeting held on 23 February 2006 by the Executive Council of the BCU and quoted here-above must be considered as a decision as provided under Art. 280 of the Anti-Doping Rules. Mr Barry Forde confirmed that he had got a copy of the document shortly after it was issued.
11. The appeal was filed within the deadline provided by Art. 284 of the Anti-Doping Rules. It complied with all other requirements of Art. R48 of the Code.
12. It follows that the appeal is admissible, which is not disputed.

Procedural motion

13. The Respondents requested an expert opinion in order to confirm that the high level of testosterone in Mr Barry Forde’s body could possibly be explained by his medical condition.
14. The right to produce evidence likely to influence the final decision emerges from the right to be heard as guaranteed by Art. 29 al. 2 of the Swiss Constitution (ATF 127 I 54 consid. 2b p. 56; 127 III 576 consid. 2c p. 578). As a consequence, the tribunal should normally accept the request of evidence filed correctly and in due time. Nevertheless the said right is not breached, when the offered evidence is excluded because it is irrelevant or has no probative value (ATF 125 I 127 consid. 6c/cc p. 134 s.; 124 I 274 consid. 5b p. 285).
15. At the hearing, the Panel dismissed the motion considering that, the main issue of the case is whether the adverse analytical findings that testosterone or its metabolites are of exogenous origin are based on a reliable method. If so, further investigations are not obligatory to determine whether these findings are due to a physiological or pathological condition. In such

case, and at any concentration, the athlete's sample is deemed to contain a prohibited substance and no further investigation is necessary.

Merits

16. The main issues to be resolved by the Panel are:

- a) Should the analysis report of the A and B samples be disregarded because the full documentation provided by the LNDD has not been translated into English?
- b) Should the analysis report of the A and B samples be disregarded because the Respondents were not informed of the fact that Mr Barry Forde's B sample would be analysed with GC/C/IRMS?
- c) Has UCI established that a doping offence has been committed?
- d) If yes, what is the sanction and how should it be calculated?

A. Should the analysis report of the A and B samples be disregarded because the full documentation provided by the LNDD has not been translated into English?

17. The Respondents claim that they could not understand the results of the analysis conducted by the LNDD since the full documentation was in French. It is only two weeks prior the hearing held on 24 July 2006 that the Appellant provided an English translation of the analysis report and of the counter-analysis report. Those documents consist of four pages in total, while the full documentation is over three hundred pages long. In other words, the Respondents submit that they had not been able to assess the appropriateness of the said analysis. Furthermore, given the fact that UCI chose to proceed in English before the CAS, it should have translated the full documentation into English.

18. According to case-law, the right to be heard confers to the interested person the right to explain his actions before a decision is taken against him, to produce evidence likely to influence the final decision, to access to the file, to participate in the taking of evidence, to inspect it and to determine one's position in that connection (ATF 126 I 15 rec. 2a/aa; 124 I 49 rec. 3a; 241 rec. 2; 124 II 132 rec. 2b; 124 V 180 rec. 1a, 372 rec. 3b). The specific content and extent of the right to be heard varies from a case to another (AUER/MALINVERNI/ HOTTELIER, Droit constitutionnel Suisse, volume II, les droits fondamentaux, Bern 2000, p. 611; ATF 124 I 241).

19. *In casu*, the Panel considers that the Respondents cannot derive any right from the fact that the documentation provided by the LNDD has not been translated into English for the following reasons:

- The Respondents have never requested the translation of the disputed documentation into English. They do not refer to any stipulation which obliges the UCI or the LNDD to spontaneously translate the said analysis.

- It makes sense that a French and WADA accredited laboratory was selected to analyse the samples collected during the “6 Jours de Grenoble”, which took place in France. Furthermore, the LNDD had no indication regarding the name, the nationality and/or the mother tongue of the athlete, whose samples were analysed. Under those circumstances, the fact that the LNDD used the French language cannot be questioned.
 - On 24 November 2005, the BCU was informed of the fact that Mr Barry Forde tested positive to testosterone and received a copy of the report in French issued by the LNDD. Meeting the requirements of the right to be heard, the complete documentation related to the A sample was in the hands of the Respondents before the opening of the B sample, which took place on 1 February 2006. At that time, the Respondents did not make any comment with regards to the language used. The Respondents were represented by Mr Michael Lehner at the opening of the B sample. At that occasion, the latter did not make any comment regarding the language used, either. It is only in their Answer filed jointly with the CAS on 15 May 2006, that the issue of the language has been raised for the first time.
 - Pursuant to Art. 29 par. 3 of the Code, *“The Panel may order that all documents submitted in languages other than that of the procedure be filed together with a certified translation in the language of the procedure”*. It results that it is up to the Panel to decide what documents need to be translated or not. This provision does not confer a right to a party to challenge the validity of documents in its hand and established months before the appeal was lodged with the CAS. The Panel has chosen not to order any further translation than that which was provided by the Appellant, especially since the Panel knows from other CAS procedures that Mr Michael Lehner is also comfortable with the French language and the largest part of the LNDD documentation consists of scientific statistics.
20. For all those reasons, the Panel considers as groundless or inadmissible the complaints of the Respondents in connection with the fact that the Appellant has not translated all the documentation from the LNDD into English.
- B. *Should the analysis report of the A and B samples be disregarded because the Respondents were not informed of the fact that Mr Barry Forde’s B sample would be analysed with GC/C/IRMS?*
21. The Respondents submit that the A sample was not analysed with GC/C/IRMS and that they had therefore no reason to think that this method would be used on the B sample. The UCI should have informed them on the analytical method applied to enable them to make an informed choice as to whether they should request the presence of a witnessing analyst at the confirmatory analysis.
22. The fact that the sample A had been analysed with GC/C/IRMS was expressly mentioned in the LNDD report dated 16 November 2005 as well as in the letter in English sent by the UCI to the BCU on 24 November 2005. The table of contents of the full documentation of the A sample clearly mentions that the exogenous origin of testosterone has been determined with GC/C/IRMS. The results are detailed in over 45 pages. The Respondents cannot seriously submit that they were not aware of the fact that the A sample was measured with GC/C/IRMS.

23. The Respondents also deplore the fact that the UCI did not expressly inform them “*of the significance of the additional IRMS analysis*”. They fail to explain on what basis the UCI or the LNDD should have drawn their attention on the chosen analytical method. The Panel also sees a contradiction between (i) the fact that the Respondents claim that they would have been able to evaluate the method used in order to decide whether they want to designate an expert to attend the B sample analysis and (ii) the allegation that they could not assess the “significance” of the IRMS analysis.
24. Regarding the analysis of the B sample, the Anti-Doping Rules provide:

191. The Rider and/or his National Federation and the Anti-Doping Commission shall be entitled to demand the analysis of the B Sample.

192. The request for the analysis of the B Sample shall indicate whether the Rider wants not only the opening, but also the analysis of the B Sample to be attended by him or a representative. (...)

195. The analysis of the B Sample shall be conducted by the laboratory that conducted the analysis of the A Sample. (...)

197. The opening of the B Sample may be attended by the Rider, an expert designated by him or by his National Federation, a representative of the Rider’s National Federation and a representative of the UCI.

198. The analysis of the B Sample may be attended by the Rider or one representative if such request was made when the B Sample analysis was requested. The laboratory may restrict the attendance in order to avoid any disturbance of the analysis”.
25. On 7 December 2005 and pursuant to the requirements of the above quoted articles, the BCU confirmed to the LNDD that Mr Barry Forde was requesting a counter-analysis and the presence of his attorney, Michael Lehner, at the opening of the B sample. The confirmatory analysis took place on 1 February 2006 and the opening of the B sample was attended by Mr Michael Lehner, who did not make any comment.
26. *In casu*, the Panel considers that the procedure as set in the Anti-Doping Rules was fully complied with. Contrary to what the Respondents suggest without offering any argument to support this point, the right to fair evidence proceedings has not been breached. The Respondents’ complaints regarding the B sample analysis procedure are unfounded.
- C. *Has UCI established that a doping offence has been committed?*
 - a) In general
27. According to Art. 15 of the Anti-Doping Rules compiled in accordance with The World Anti-Doping Code “*The following constitute anti-doping rule violations:*
 1. *presence of a Prohibited Substance or its Metabolites or Markers in a Rider’s bodily Specimen.*

1.1. It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping violation under article 15.1. (...)

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

28. The "Prohibited List" which is published and revised by the World Anti-Doping Agency is incorporated in the Anti-Doping Rules pursuant to their Art. 21.

29. Testosterone is mentioned in the "Prohibited List". Regarding anabolic agents, the said list also provides the following:

"Where a Prohibited Substance (...) is capable of being produced by the body naturally, a Sample will be deemed to contain such Prohibited Substance where the concentration of the Prohibited Substance or its metabolites or markers and/or any other relevant ratio(s) in the Athlete's Sample so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production. A Sample shall not be deemed to contain a Prohibited Substance in any such case where the Athlete proves by evidence that the concentration of the Prohibited Substance or its metabolites or markers and/or the relevant ratio(s) in the Athlete's Sample is attributable to a physiological or pathological condition. In all cases, and at any concentration, the laboratory will report an Adverse Analytical Finding if, based on any reliable analytical method, it can show that the Prohibited Substance is of exogenous origin" (our underlining).

30. According to Art. 16 of the Anti-Doping Rules: *"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 body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Rider or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability".*

31. Art. 18 of the Anti-doping Rules provides that: *"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 laboratory analysis. The Rider may rebut this presumption by establishing that a departure from the International Standard occurred. If the Rider rebuts the preceding presumption by showing that a departure from the International Standard occurred, then the UCI or the National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding".*

- b) Mr Barry Forde's case

32. The LNDD is a WADA-accredited laboratory. It analysed Mr Barry Forde's A and B samples with GC/C/IRMS. The test results indicated an exogenous source of testosterone, shifting the burden of adducing exculpatory circumstances to the athlete.

33. At the hearing, the Respondents' expert, Dr Werner Wilhelm Franke, confirmed that GC/C/IRMS is a reliable method when conducted in a proper way by reliable people. He also confirmed that he had the opportunity to see part of the documentation issued by the LNDD, but could not give an opinion on the consistency of the results as reported. He has neither approved nor questioned in any way the conclusions of the LNDD.
34. The Respondents did not make credible or even plausible that, in Mr Barry Forde's case, the LNDD has not conducted the samples analysis in accordance with the international standards. They limited their argument to the general assertion that according to scientific literature, the GC/C/IRMS analysis is a very complex method, which has been proven to be faulty. At the hearing, they briefly quoted one author.
35. The Panel, based on objective criteria, must be convinced of the occurrence of alleged errors to put into question the reliability of the GC/C/IRMS. In the present case, the exculpatory evidence required could have been disclosed in the form of an expertise enabling to question the entire testing and reporting process, by indicating different indices of inconsistencies in the LNDD testing process, such as errors during transmittal of electronic data to paper, poor record keeping processes, inaccuracies of the testing procedures and reporting procedures. The contentions made by the Respondents were not substantiated by anything concrete. As a result, the Panel considers that their allegations are not established and do not suffice to put into question the quality of the GC/C/IRMS test itself or to reverse the presumption implemented by Art. 18 of the Anti-Doping Rules, according to which WADA-accredited laboratories are presumed to have conducted sample analysis in accordance with the international standards for laboratory analysis.
36. The LNDD found in both the A and B samples that two metabolites of testosterone, namely both 5 beta-androstanediol and 5 alfa-androstanediol, indicated that the origin of the metabolites was exogenous. Based on the foregoing and after careful analysis of the facts and evidence submitted to it by the parties, the Panel finds as beyond doubt that the source of testosterone was exogenous. In such case, and at any concentration, the athlete's sample shall be deemed to contain a prohibited substance and no further investigation is necessary. Accordingly the testosterone presence in the sample cannot be explained by a physiological or pathological condition. Mr Barry Forde must be considered as having committed a doping offence involving a prohibited substance governed by the sanctions in article 261 of the Anti-Doping Rules and must take responsibility for it.

D. What is the sanction and how should it be calculated?

a) In general

37. It is the second time that Mr Barry Forde is found guilty of an Anti-Doping Rule violation. In August 2003, he received a warning after he tested positive to ephedrine. It is undisputed that

the latter case must be considered as involving a “Specified Substance” governed by the sanctions set forth in Art. 262 of the Anti-Doping Rules.

38. According to Art. 264 of the Anti-Doping Rules *“If the Rider establishes in an individual case involving an anti-doping rule violation under article 15.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under article 15.2) or an anti-doping violation under article 15.6 (Possession of Prohibited Substances or Methods) that he bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider’s Specimen in violation of article 15.1 (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 261, 262 and 269-271”*.
39. Art. 265 of the Anti-Doping Rules provides that *“This article 265 applies to anti-doping rule violations involving article 15.1 (presence of a Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under article 15.2, failing to submit to Sample collection under article 15.3, Possession of Prohibited Substances or Methods under article 15.6 or administration of a Prohibited Substance or Prohibited Method under article 15.8. If a License-Holder establishes in an individual case involving such violations 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 minimum 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 Specimen in violation of article 15.1 (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”*.
40. According to Art. 271 of the Anti-Doping Rules, *“Where a Rider is found to have committed 2 (two) separate anti-doping rule violations, one involving a Specified Substance governed by the sanctions set forth in article 262 (Specified Substances) and the other involving a Prohibited Substance or Prohibited Method governed by the sanctions in article 261 or a violation governed by the sanctions in article 263.1, the period of Ineligibility imposed for the second violation shall be at a minimum 2 (two) years’ Ineligibility and at a maximum 3 (three) years’ Ineligibility. Any Rider found to have committed a third anti-doping rule violation involving any combination of Specified Substances under article 262 and any other anti-doping rule violation under article 261 or 263.1 shall receive a sanction of lifetime Ineligibility”*.
41. Art. 259.1 of the Anti-Doping Rules provides that *“If the Event is a stage race, an anti-doping violation committed in connection with any stage, entails Disqualification from the Event, except when (i) the anti-doping violation involves the presence, Use or Attempted Use of a Prohibited Substance or a Prohibited Method, (ii) the Rider establishes that he bears No Fault or Negligence and (iii) his results in no other stage were likely to have been influenced by the Rider’s anti-doping violation”*.
42. Pursuant to Art. 275, *“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. Any period during which provisional measures pursuant to articles 217 through 223 were imposed or voluntarily accepted and any period for which subsequent Competition results have been Disqualified under article 274 shall be*

credited against the total period of Ineligibility to be served. Where required by fairness, such as 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 the anti-doping violation”.

b) In particular

43. At the hearing, the Respondents claimed that Mr Barry Forde’s first positive test should not be taken into consideration for ephedrine as it is not considered as a prohibited substance anymore. According to the WADA 2004, 2005 and 2006 prohibited lists, ephedrine is prohibited when its concentration in urine is greater than 10 micrograms per millilitre. In 2003, the concentration of the banned substance in Mr Barry Forde’s urine was 17.1 micrograms per millilitre and would be considered as a doping offence according to the actual standards. In this context, the Respondents’ argument must be dismissed without further consideration.
44. According to the Respondents, the period of ineligibility provided by the applicable regulations breaches the principle of proportionality and is in conflict with the athlete’s personal rights. Again, they do not offer any argument to support their position.
45. It is well established that a two-year suspension for a first time doping offence is legally acceptable (KAUFMANN-KOHLER/MALINVERNI, Legal opinion on the conformity of certain provisions of the draft World Anti-Doping Code with commonly accepted principles of international law, 2003, N°62 et seq., p. 22; CAS 2001/A/337; TAS 2005/A/923 & 924 & 926). The fact that the period of ineligibility imposed for the second anti-doping violation shall be a minimum of two years and a maximum of three years does therefore not appear as disproportionate in the absence of any established exceptional attenuating circumstances (see also para. 155 et seq. of TAS 2005/A/923 & 924 & 926 with the above mentioned references). In the case at hand, the Respondents have never given any explanation with regards to the presence of exogenous testosterone in Mr Barry Forde’s body. In particular they have not substantiated that the latter bears no fault or negligence for the second violation of the Anti-Doping Rules. At the hearing, the Respondents even confirmed that the existence of the prohibited substance as revealed by the test results could not be explained by the use of contaminated food supplements. As a matter of fact, Mr Barry Forde told the Panel that he is always using the same food supplement, which appeared to be “clean”, according to tests conducted on his request in 2003. In conclusion Mr Forde is unable to establish how the prohibited substance entered his system. Hence articles 264 of the Anti-Doping Rules (elimination of the period of ineligibility) or article 265 (reduction of the period of ineligibility) cannot be applied and a minimum sanction of 2 years (for a first violation) must be imposed according to the rules in force (UCI and WADA).
46. Nevertheless, given the circumstances in which the first doping offence occurred, its mild sanction, the years which went by and taking into account the Respondents’ presence and testimonies at the hearing, the Panel decides to sanction Mr Barry Forde with a 2 years and two months period of suspension.

47. It results from the above that Mr Barry Forde must be disqualified from the “6 jours de Grenoble” which took place from 27 October to 2 November 2005 as well as from all subsequent races.
48. Considering that (i) Mr Barry Forde voluntarily put on hold his career as a professional rider after the “6-Daagse van Rotterdam”, which took place from 6 to 11 January 2006 and that (ii) “*any period for which subsequent Competition results have been Disqualified under article 274 shall be credited against the total period of Ineligibility to be served*”, the Panel deems appropriate to “credit” the 6 days of Grenoble in favour of the athlete and declares that the two years and two months ineligibility be imposed on Mr Barry Forde starting on 31 December 2005 (beginning of the “6-Daagse van Rotterdam” minus the 6 days of the 2005 Grenoble track championship).

The Court of Arbitration for Sport rules:

1. The appeal filed by the Union Cycliste Internationale on 23 March 2006 is upheld.
2. The appealed decision issued on 23 February 2006 by the Barbados Cycling Union is set aside.
3. Mr Barry Forde shall be declared ineligible for two years and two months from 31 December 2005.
4. Mr Barry Forde’s results, points and prizes obtained during the “6 jours de Grenoble” which took place from 27 October to 2 November 2005 as well as during all subsequent races are forfeited.
5. (...).
6. All other motions or prayers of relief are dismissed.