



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2007/A/1362 **CONI v/ Petacchi & FCI**
CAS 2007/A/1393 **WADA v/ Petacchi & FCI**

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition

President: Mr. Peter **Leaver** QC, Barrister-at-Law, London, England

Arbitrators: Mr. Ulrich **Haas**, Professor, Zurich, Switzerland

 Mr. Michele **Bernasconi**, Attorney-at-law, Zurich, Switzerland

Ad Hoc Clerk: Miss Rachel **Oakeshott**, Barrister-at-Law, London, England

in the arbitration between

**COMITATO OLIMPICO NAZIONALE ITALIANO – UFFICIO PROCURA
ANTIDOPING (UPA-CONI)** represented by Mr. Riccardo La Cognata and Mr. Mario
Vigna, Stadio Olimpico – Curva Nord, Gate 23, 00194 Rome, ITALY

WORLD ANTI-DOPING AGENCY (WADA) represented by Mr. François Kaiser and
Mr. Claude Ramoni, 6 Rue de la Grotte, P.O. Box 5559, 1003 Lausanne, SWITZERLAND

Appellants

v/

ALESSANDRO PETACCHI represented by Mr. Alessandro Facchini and Mrs Maria Laura
Guardamagna, Piazza San Pietro in Gessate 2, 20122 Milano, ITALY

FEDERAZIONE CICLISTICA ITALIANA (FCI) unrepresented, with headquarters in
Stadio Olimpico – Curva Nord, 00194 Rome, ITALY

Respondents

1. **PARTIES**

- 1.1. The First Appellant, Comitato Olimpico Nazionale Italiano – Ufficio Procura Antidoping (“UPA-CONI”) is the Italian National Olympic Committee’s Anti-doping Prosecution Office. It is responsible for investigating and prosecuting breaches of anti-doping rules in Italian sport.
- 1.2. The Second Appellant, the World Anti-Doping Agency (“WADA”), is the international independent organisation created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms. It coordinates the development and implementation of the World Anti-Doping Code (“the WADC”). WADA is a Swiss private law Foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montréal, Canada.
- 1.3. The First Respondent, Mr. Alessandro Petacchi, is a 34 year old Italian international level professional cyclist. He holds a licence from the International Cycling Federation, Union Cycliste Internationale (“UCI”), pursuant to Article 1 of the UCI Cycling Regulations.
- 1.4. The Second Respondent, Federazione Ciclistica Italiana (“FCI”), is the Italian National Cycling Federation. It is affiliated to the Italian National Olympic Committee (“CONI”) and to the UCI. The FCI chose not to participate in the present appeals.

2. **FACTUAL AND PROCEDURAL BACKGROUND**

- 2.1. In January 2007 the UCI granted Mr. Petacchi an Abbreviated Therapeutic Use Exemption (“ATUE”) authorising him to use three doses of 200 mcg of Salbutamol by inhalation per day, and three doses of 0.5 mcg Betamethasone by aerosol per day, for one year, to treat his exercise induced asthma. The medical prescription attached to the ATUE prescribed the use of Ventolin (a medicine containing Salbutamol) three times per day. One puff of Ventolin contains about 100 mcg of Salbutamol so Mr. Petacchi was authorised to take six puffs per day.

- 2.2. On 23 May 2007 Mr. Petacchi won the 11th stage of the Giro d'Italia. At completion of the stage he was asked to undergo a doping control test. At 6:34pm he provided a urine sample, which was divided into sample A and sample B.
- 2.3. On 24 May 2007 the WADA-accredited Rome Anti-doping Laboratory of the Italian Federation of Sports Physicians FMSI (“the Rome Laboratory”) analysed sample A. On 26 May 2007 the Rome Laboratory issued its report. It recorded the concentration of Salbutamol in sample A as 1352 ng/ml. The urine specific gravity was stated to be 1.033.
- 2.4. On 30 May 2007, at the UCI’s request, the Rome Laboratory sent the residual of sample A to the WADA-accredited Anti-Doping Laboratory of Barcelona IMIM Pharmacology Unit (“the Barcelona Laboratory”) for further analysis. The Barcelona Laboratory performed an analysis of the Salbutamol enantiomers in the urine in accordance with a test described in a paper entitled ‘Discrimination of Prohibited Oral Use of Salbutamol from Authorized Inhaled Asthma Treatment’ by Rosa Bergés, Jordi Segura, Kenneth D. Fitch et al, published in Clinical Chemistry 46, No. 9, 2000 (“the Bergés report”). This test was designed to determine whether or not the Salbutamol product used by the athlete had been ingested by inhalation at a therapeutic dose.
- 2.5. On 21 June 2007 the Barcelona Laboratory issued its Anti-doping Analysis Report, concluding (at page 7 of 44) that “*the result of the analysis of salbutamol enantiomers is not compatible with an inhaled therapeutic dose of salbutamol.*” The Barcelona Laboratory sent its report to the Rome Laboratory, the UCI and WADA.
- 2.6. On 26 June 2007 the UCI wrote to the FCI informing them that there had been an adverse analytical finding against Mr. Petacchi (Salbutamol greater than 1000 ng/ml). The FCI then instigated disciplinary proceedings.

- 2.7. On 27 June 2007 Mr. Petacchi was informed of the adverse analytical finding and the start of prosecution and indictment proceedings. Mr. Petacchi informed UPA-CONI that he waived his right to have sample B analysed.
- 2.8. On 4 July 2007 UPA-CONI commenced proceedings against Mr. Petacchi for a breach of the anti-doping rules, pursuant to the WADC, before the Commissione Disciplinare Federale Nazionale, the Disciplinary Commission of the FCI. UPA-CONI requested that the Disciplinary Commission impose a one year suspension, taking into account that there had been no significant fault or negligence by .. Petacchi.
- 2.9. On 24 July 2007 a hearing took place, following which Decision no. 21/2007 of the Disciplinary Commission of the FCI was issued. Mr. Petacchi was found not to have been in breach of the anti-doping rules. This decision was communicated to UPA-CONI by fax on the same day.
- 2.10. On 26 July 2007 UPA-CONI filed an appeal against the Disciplinary Commission's decision no 21/2007 with the Commissione di Appello Federale, the FCI's Appeals Commission. Mr. Petacchi argued that the appeal was inadmissible and that the appellate jurisdiction in the case belonged solely to CAS.
- 2.11. On 11 August 2007 the FCI's Appeals Commission gave its decision. It declared UPA-CONI's appeal inadmissible and declined to adjudicate Mr. Petacchi's case on the merits. The Appeals Commission indicated that CAS was the body with appellate jurisdiction.
- 2.12. On 16 August 2007 WADA was notified by email by the UCI of the decision. The email did not include an attachment containing the decision.
- 2.13. On 23 August 2007 UPA-CONI filed its appeal with CAS by fax.

- 2.14. On 31 August 2007 WADA sent an email to the FCI and the UCI requesting the full case file on Mr. Petacchi. This email was received by the UCI on the same date. WADA never received the full case file.
- 2.15. On 1 October 2007 WADA filed its appeal with CAS.
- 2.16. With the parties' agreement, the appeals by CONI and WADA were consolidated by CAS.
- 2.17. For various reasons which were not attributable to Mr. Petacchi it was not possible to arrange a hearing until 2 April 2008.
- 2.18. At the hearing at the CAS offices in Lausanne on 2 April 2008 UPA-CONI, WADA and Mr. Petacchi were represented. The FCI did not attend and was not represented.

3. APPLICABLE RULES AND LAW

- 3.1. Article R58 of the CAS Code provides:

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

- 3.2. Mr. Petacchi holds a UCI licence pursuant to article 1 of the UCI Cycling Regulations. In order to obtain his UCI licence, Mr. Petacchi had to file a licence application, under which he undertook *“to respect the constitution and regulations of the International Cycling Union”* (Article 1.1.023 of the UCI Cycling Regulations).
- 3.3. The UCI, like all international Olympic federations, is a signatory to the WADC. By its Anti-Doping Rules (“the ADR”), the UCI has incorporated the WADC into its

regulations. Article 1 of the ADR states that the ADR will apply to all UCI licence-holders. Article 2 of the ADR states that riders participating in international events (such as the 2007 Giro d'Italia) shall be subject to in-competition testing under the ADR.

3.4. Article 290 of the ADR provides:

“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.”

3.5. The UCI Cycling Regulations, in particular the ADR, are applicable to this case. The parties have not agreed on the application of any particular rules of law. Therefore, CAS must decide the dispute according to the ADR and Swiss law.

4. JURISDICTION

4.1. Article 280(a) of the ADR and Article 13.2.1 of the WADC give CAS jurisdiction to hear the present appeals.

4.2. Although Mr. Petacchi argued that only the WADC gives CAS jurisdiction, the Panel is satisfied that the UCI Cycling Regulations and the ADR also applied and also gave CAS jurisdiction to hear the present appeals.

4.3. The parties confirmed that CAS has jurisdiction to hear the present appeals by signing the Order of Procedure.

4.4. Article R57 of the CAS Code provides that on an appeal to CAS the Panel has full power to review the facts and the law.

5. ADMISSIBILITY OF THE APPEALS

5.1. Mr. Petacchi argued that both appeals were filed too late and should be barred.

(a) UPA-CONI's appeal

5.2. Article R49 of the CAS Code provides:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.”

5.3. Mr. Petacchi submitted that the ADR do not apply to the procedural issue of the time limit for an appeal by UPA-CONI. Therefore, according to Article R49 of the CAS Code UPA-CONI should have filed its appeal within 21 days from receipt of Decision 21/2007. It failed to do so and so its appeal should be disbarred. Alternatively, if the ADR do apply, under Article 284, UPA-CONI had one month (30 days) from the date of receipt of the decision to file its appeal. UPA-CONI received the decision on 24 July 2007 and filed its appeal on 23 August 2007. This was a day late.

5.4. The Panel is of the view that the ADR do apply to the procedural issue of the time limit for an appeal by UPA-CONI. Mr. Petacchi is a UCI licence holder. He was competing in a UCI international event, the Giro d'Italia. The ADR applied to tests carried out during that race (ADR Regulations 1 and 2). The UCI itself started the anti-doping procedure under the ADR which led to this appeal. Article 284 of the ADR provides a time limit for UPA-CONI's appeal (UPA-CONI being “*the other party to the case*” and “*the License-Holder's National Anti-Doping Organization*”):

“284. The statement of appeal by the License-Holder or the other party to the case must be submitted to the CAS within 1 (one) month of his receiving the full decision as specified in article 247. Failure to respect this time limit shall result in the appeal being disbarred.”

5.5. Article 247 of the ADR provides:

“247. One full copy of the decision, signed at least by the president of the hearing body, shall be sent to the License-Holder and the UCI. These copies shall be sent by registered post with proof of receipt within 3 (three) working days of the decision. The UCI shall send the text of the decision to WADA and to the License-Holder’s National Anti-Doping Organization.”

5.6. The Panel has concluded that UPA-CONI has filed its appeal in time. First, the combined effect of Articles 247 and 284 (which the Panel is satisfied should be read together) is that time only starts to run against UPA-CONI when, within three working days of the decision, a full copy of the decision signed by the president of the hearing body has been sent by registered post (with proof of receipt) to the UCI. The UCI is then required to send the text of the decision to UPA-CONI. This notification procedure was not followed in the present case so that time never started to run against UPA-CONI. Secondly, even if UPA-CONI’s receipt of a copy of the decision by fax on 24 July 2007 counted as proper notification, the Panel notes that for the purpose of calculating the one month period under Swiss law the principle of *tempus continuum* applies. In particular, according to Article 77 paragraph 1 of the Swiss Code of Obligations (“CO”), where an obligation is to be performed or another legal transaction is to be effected within a certain number of months after a contract is concluded, the relevant expiry date is *“the date in the last month corresponding to the date in the month when the contract was concluded.”* The effect of Article 77 paragraph 2 of the CO is that this rule also applies in cases like the present, where *“the period runs from a date other than the conclusion of a contract”* such as the receipt of a certain document.

5.7. In the present case the one month time limit for UPA-CONI started to run on 24 July and ended on 24 August 2007. Therefore the appeal filed by UPA-CONI on 23 August 2007 was filed in time.

(b) WADA's appeal

5.8. Mr. Petacchi argued that WADA's appeal should be disbarred as WADA had failed to comply with Article 285 of the ADR which provides:

"285. The statement of appeal by the UCI, the International Olympic Committee, the International Paralympic Committee or WADA must be submitted to the CAS within 1 (one) month of receipt of the full case file from the hearing body of the National Federation. Failure to respect this time limit shall result in the appeal being disbarred. Should the appellant not request the file within 15 (fifteen) days of receiving the full decision as specified in article 247, the time limit for appeals shall be 1 (one) month from the reception [sic] of that decision."

5.9. WADA was notified of Decision no. 21/2007 by an email from the UCI on 16 August 2007. However, the decision was not attached to the email. Mr. Petacchi submitted that WADA had to ask for the full case file by 30 August 2007; it did not do so and its appeal, therefore, is out of time.

5.10. It is clear to the Panel that by an email to the UCI and the FCI dated 31 August 2007 WADA did ask for a full case file. That request was made within the 15 day limit provided by article 285 ADR. The full case file was never received by WADA. It follows, therefore, that time has never started to run against it and its appeal, filed on 1 October 2007, was not filed too late.

5.11. It is regrettable that the UCI did not follow the notification procedure which it should have done in relation to UPA-CONI. It failed to attach the decision to the email which it sent WADA on 16 August 2007 notifying it of the decision, and failed ever to send the full case file to WADA. The Panel is of the view, however, that, in the circumstances, these failings should not be held against UPA-CONI and/or WADA and, in any event, for the reasons stated above, they have not resulted in any breach of

Mr. Petacchi's procedural rights: see WADA v Portuguese Football Federation & Nuno Assis Lopes de Almeida (CAS 2006/A/1153).

6. THE SUBSTANTIVE DISPUTE

(a) The applicable legal test

6.1. Article 15 (1) of the ADR provides:

"15. The following constitute anti-doping rule violations:

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

1.1. It is each Rider's personal duty to ensure that no Prohibited Substance 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.

Warning:

1) Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.

2) Medical treatment is no excuse for using Prohibited Substances or Prohibited Methods, except where the rules governing Therapeutic Use Exemptions are complied with."

6.2. According to the WADA 2007 Prohibited List, Salbutamol is a Prohibited Substance, both in and out of competition, under Class S3, Beta-2 Agonists. The List provides:

"S3. BETA-2 AGONISTS

All beta-2 agonists including their D- and L-isomers are prohibited.

As an exception, formoterol, salbutamol, salmeterol and terbutaline when administered by inhalation, require an abbreviated Therapeutic Use Exemption.

Despite the granting of any form of Therapeutic Use Exemption, a concentration of salbutamol (free plus glucuronide) greater than 1000 ng/ml will be considered an Adverse Analytical Finding unless the Athlete proves that the abnormal result was the consequence of the therapeutic use of inhaled salbutamol.”

6.3. In summary, the Panel considers that the ordinary and natural meaning of the List is as follows:

- (a) in principle the presence of any quantity of Salbutamol in a rider’s sample constitutes a breach of the anti-doping rules;
- (b) as an exception to this, Salbutamol may be administered by inhalation if an athlete has a ATUE;
- (c) despite the granting of an ATUE, a concentration of Salbutamol (free plus glucuronide) greater than 1000 ng/ml in an athlete’s urine will be considered an adverse analytical finding unless the athlete proves, on a balance of probabilities, that this result was the consequence of the therapeutic use of inhaled Salbutamol which was authorised by his ATUE.

(b) Mr. Petacchi’s position

6.4. The test of Mr. Petacchi’s urine sample by the Rome Laboratory showed a Salbutamol concentration of 1352 ng/ml. In those circumstances the burden shifts to Mr. Petacchi to demonstrate that that concentration was “*the consequence of the therapeutic use of inhaled salbutamol.*” At the hearing Mr. Petacchi sought to discharge that burden by

relying on evidence of his actions on the day of the race and on the expert opinions of Prof. Kenneth Fitch of the School of Sport Science, Exercise and Health of the University of Western Australia, Dr. Ben Sporer of the Canadian sport Centre Pacific, Dr. Giuseppe Pieraccini and Prof. Stefano Centanni of the University of Milan. Prof. Fitch and Dr. Sporer gave their evidence by video-link.

- 6.5. In addition, although they were not specifically referred to during the hearing, the Panel had read the reports of Prof. Claudio Terzano, Prof. Diego Brancaccio, Dr. Laura Pini and Dr. Pierlorenzo Pozzi, which had been included in Mr. Petacchi's submissions together with a number of articles which were also included in those submissions.
- 6.6. Mr. Petacchi stated that he took two puffs of his Ventolin inhaler before the race, two puffs before finishing the race, and two or three puffs after the race had finished, about an hour before he gave the sample – in total 600-700 mcg of Salbutamol. The race lasted about 5 hours 47 minutes. Mr. Petacchi stated that he only took Salbutamol by inhalation and that he did not take Salbutamol orally.
- 6.7. In summary, it was argued on behalf of Mr. Petacchi that:
 - (a) the concentration of Salbutamol found in his sample was the consequence of the inhaled therapeutic use of his Ventolin inhaler broadly in accordance with his ATUE;
 - (b) the concentration of Salbutamol in his sample should have been adjusted to take into account the high specific gravity of his urine that day – if this had been done, the concentration would only have been 819.4 ng/ml, so there would have been no adverse analytical finding;
 - (c) it was hot and humid on the day of the test and in those circumstances it is natural for an asthmatic person to feel the need to make greater use of his Ventolin inhaler. Unusually Mr. Petacchi had felt the need to use the inhaler after the race, only an hour before he gave his sample. The use after the race,

and shortly before he gave his sample, explains why the concentration was higher on that day than on the four other occasions during the Giro d'Italia when samples were taken;

- (d) Mr. Petacchi also used his inhaler during the race and may when he did so have used a sub-optimal inhalation technique and accidentally have swallowed some of the Salbutamol which might also have affected the test results of the Rome and Barcelona Laboratories;
- (e) at most he engaged in a slight excess of therapy justified by the weather;
- (f) as Prof. Fitch points out, occasionally other athletes have been found to have a Salbutamol concentration in their urine of more than 1000 ng/ml. There may be a variety of reasons for this concentration level which are not related to a misuse of an ATUE.

6.8. In summary, Prof. Fitch and Mr. Sporer both expressed the view that it is possible that an athlete could have a concentration of Salbutamol in his urine which exceeds 1000 ng/ml after having inhaled only 600-700 mcg, although neither of them could point to an example of this having been recorded under controlled conditions. They and Dr. Pieraccini pointed out that there may be variability between individuals, and in the same individual, in the response to Salbutamol, in the concentration found in their urine, and in the ratio of Salbutamol enantiomers found in their urine. This may be due to the following factors:

- (a) how Salbutamol has been taken (whether inhaled or orally or both),
- (b) if inhaled, the inhalation technique used,
- (c) when it was taken in relation to when their urine sample was taken,
- (d) the athlete's metabolism,

- (e) how dehydrated the athlete is when the sample is taken,
- (f) the athlete's renal function,
- (g) whether the athlete's epithelium is damaged and the extent of that damage;
- (h) how much and what sort of exercise, if any, the athlete has been doing, and
- (i) whether the athlete has accumulated and/or retained any Salbutamol, particularly the S enantiomer, in his/her body from previous use of it.

(c) UPA-CONI's and WADA's position

- 6.9. UPA-CONI and WADA argued that a concentration of 1352 ng/ml in Mr. Petacchi's urine could not have been achieved if Mr. Petacchi had only used his Ventolin inhaler in accordance with the terms of his ATUE as to the dose, frequency and route of administration of Salbutamol. They relied on the expert opinions of Dr Francesco Botré of the Rome Laboratory, Prof. Jordi Segura of the Barcelona Laboratory and Dr Olivier Rabin of WADA, and the results of the enantiomer analysis done on Mr. Petacchi's urine sample by the Barcelona Laboratory. All of those experts gave evidence during the hearing, either actually at the hearing or by telephone. In addition, the Panel had read the reports of Prof. Leonardo Fabbri, Dr Antonio Todaro and Dr. Anita Greco, which had been submitted with the UPA-CONI brief, together with a number of published articles, which had also been included in that brief.
- 6.10. Dr Botré, who had been Director of the Rome Laboratory since 1999 and Director of the Olympic Laboratory at the 2006 Turin Olympics, gave evidence of the rarity of finding a Salbutamol concentration as high as that found in the present case. He stated that in the last nine years at the Rome Laboratory he had had overall responsibility for checking 60-70,000 samples for Salbutamol, of which about 80% were from athletes in competition. Only about five or six samples had been found to contain a concentration of more than 1000 ng/ml of Salbutamol. At the 2006 Turin Olympics,

he had tested about 1,450 samples from athletes and found Salbutamol in about 16 or 17 samples. All of these had contained less than 300 ng/ml of Salbutamol.

- 6.11. Dr Todaro stated that in over 20 years of activity in asthma treatment and as a consultant at the Olympic Games he had never seen a case in which, after a therapeutic use of inhaled Salbutamol, the concentration of Salbutamol in an athlete's urine exceeded 1000 ng/ml. He considered that a concentration of 1352 ng/ml would indicate that an athlete had taken at least 12 puffs of Ventolin (1200 mcg of Salbutamol), if that was the only route used to administer it.
- 6.12. UPA-CONI and WADA pointed out that none of Mr. Petacchi's expert witnesses had examined him. There was no evidence (only speculation) that Mr. Petacchi's particular metabolism or renal function were unusual and/or were likely to have played a role in causing the concentration of Salbutamol in his urine to be so high and/or were likely to have affected the enantiomer analysis.
- 6.13. There were four other occasions during the 2007 Giro d'Italia on which Mr. Petacchi had given samples. These were both before and after 23 May 2007. The Salbutamol concentration in Mr. Petacchi's urine had never exceeded 537 ng/ml in those samples (although the specific gravity of the urine had been lower on those occasions).
- 6.14. The Barcelona Laboratory had applied the test set out in the Bergés report to determine whether or not the Salbutamol had been ingested by inhalation at a therapeutic dose (which they defined as a dose of 800 mcg of Salbutamol by inhalation within 4 hours or 1600 mcg of Salbutamol by inhalation within 24 hours).
- 6.15. In his witness statement, Prof. Segura, the Director of the Barcelona Laboratory, stated his opinion that,

"The results of the sample coded A926245, which I have been told belongs to Mr. Petacchi, are not compatible with an "accidental" swallowing of a portion of the product in the course of a therapeutic use of Salbutamol by inhalation, i.e within the dosage indicated above.

Possible explanations of the results of the test obtained through the enantiomers method indicate that such results have been caused by a direct oral administration of Salbutamol or the “accidental” swallowing of a part of the product administered by inhalation at a supra therapeutic dose, i.e. a dose, which clearly exceeds the dosage indicated above.”

- 6.16. At the hearing Prof. Segura said that a therapeutic use of 600-700 mcg of Salbutamol by inhalation could not be compatible with the results of the enantiomer analysis. He could not quantify how much Salbutamol Mr. Petacchi must have taken but he thought that the dose would have to be “substantially higher than 800 mcg.” In relation to whether the test results were compatible with an inhaled therapeutic dose of Salbutamol, he said that this was “a clear cut case” in which they were not.
- 6.17. In response to Mr. Petacchi’s argument that the concentration of Salbutamol found in his urine should be adjusted to take into account the high specific gravity of his urine that day, WADA pointed out that the practice of adjusting results to take into account variations in specific gravity is only used by it in relation to endogenous substances. Salbutamol is not an endogenous substance. There is no WADA technical document or other guidance which recommends this practice in relation to it. Dr Rabin stated that WADA does not apply a correction for specific gravity because the 1000 ng/ml threshold is considered high enough generally to take into account all the variables mentioned by Mr. Petacchi, including urine specific gravity.
- 6.18. Further, the specific gravity of the urine is irrelevant to the enantiomer analysis by the Barcelona Laboratory, as admitted by Prof. Fitch.

(d) The Panel’s decision

- 6.19. The Panel is satisfied, for the reasons given by WADA, that it would not be appropriate to adjust the concentration of Salbutamol found in Mr. Petacchi’s sample, to take into account the particular specific gravity of the urine, for the purpose of

determining whether the Salbutamol concentration was over the 1000 ng/ml threshold.

- 6.20. The Panel notes that the decision to maintain the threshold at 1000 ng/ml for Salbutamol in the WADA 2007 Prohibited List was made after a thorough evaluation by the “List Committee”, a group of specialists in the field of doping substances representing all stakeholders in the fight against doping, taking into account the general practice of not adjusting for specific gravity in relation to Salbutamol, and generally taking into account the other variables which might affect the concentration found in the sample such as a suboptimal use of an inhaler.
- 6.21. The Panel is also satisfied that the Rome Laboratory was correct to find that Mr. Petacchi’s sample contained a concentration of Salbutamol (free plus glucuronide) greater than 1000 ng/ml. Thus the burden shifts to Mr. Petacchi to show, on the balance of probabilities, that the Salbutamol concentration of 1352 ng/ml found in his sample was *“the consequence of the therapeutic use of inhaled Salbutamol”*.
- 6.22. The Panel has concluded that Mr. Petacchi has failed to show, on the balance of probabilities, that the Salbutamol concentration of 1352 ng/ml found in his sample was *“the consequence of the therapeutic use of inhaled Salbutamol”*. The Panel is not satisfied, on the balance of probabilities, that that result was the consequence of him inhaling Salbutamol in accordance with his ATUE.
- 6.23. It was submitted on behalf of Mr Petacchi that the results of the analysis by the Barcelona laboratory should be disregarded as that analysis was not provided for by the WADC. Article 3.2 of the WADC provides that *“Facts related to anti-doping rule violations may be established by any reliable means, including admissions.”* The Panel accepts that the analysis performed by the Barcelona Laboratory is an additional *“reliable means”* by which to establish whether or not the concentration of 1352 ng/ml Salbutamol in Mr. Petacchi’s urine was the consequence of Mr. Petacchi inhaling Salbutamol in accordance with the terms of his ATUE. Although it is not

specifically a WADA-accredited test, Dr. Rabin of WADA submitted that this was simply because the method is not routinely used and so it was considered an unnecessary expense to include it in ISO 17025. The test was, however, reported in a leading scientific journal and has been used and approved of since its publication.

- 6.24. The Panel accepts the opinions of Dr. Botré, Prof. Segura, Dr. Todaro and Dr. Rabin that Mr. Petacchi could not only have inhaled a dose of 600 mcg of Salbutamol in accordance with his ATUE, given that his sample was found to have a Salbutamol concentration of 1352 ng/ml, and given the results obtained after analysing the enantiomers in the sample using the Bergés report test.
- 6.25. The Panel is satisfied that the opinions which it prefers have a sound and accepted scientific basis whereas the opinions expressed by Prof. Fitch and Mr. Pieraccini are more theoretical and speculative and are not based on established scientific evidence. In this regard, the Panel notes that Prof. Fitch was a co-author of the Berges report, yet despite this, in his evidence to the Panel he criticised the test and said that he now thinks that it does not sufficiently take into account the sub-optimal inhalation techniques which might be used by cyclists in endurance events and/or other factors. He did, however, admit that the enantiomer test results were still “*a problem*” for Mr. Petacchi and “*very difficult to answer*” and that he thought Mr. Petacchi must accidentally have swallowed some of his medicine. Like Dr. Sporer and all of the other experts on whom Mr. Petacchi relied, Prof. Fitch had not examined Mr. Petacchi or observed how he uses his inhaler.
- 6.26. In the circumstances, the Panel considers that Mr. Petacchi’s experts did not provide sufficient evidence for Mr. Petacchi to show, on the balance of probabilities, that there were any special factors (such as Mr. Petacchi accumulating the S enantiomers, using a sub-optimal inhalation technique, or having an impaired renal function) which caused the results in this case.
- 6.27. In the result, therefore, the Panel is satisfied that that there has been a breach of Article 15.1 of the ADR by Mr. Petacchi.

6.28. The Panel should mention that because there were so many expert witnesses (indeed, the whole evidentiary part of the hearing was taken up with hearing the experts' evidence apart from a brief period when Mr Petacchi explained his position), the evidence was heard by the method of what is called "Witness Conferencing". That method requires the Panel to have studied carefully all of the expert reports before the commencement of the hearing and involves the experts in different areas of expertise expressing their views on various topics identified by the Panel in a discussion format. The method was used with the consent of all parties. If the expert evidence had not been taken in that way, the Panel would not have been able to conclude the hearing in one day.

7. SANCTION

(a) Ineligibility

7.1. According to the WADA 2007 Prohibited List, all inhaled Beta-2 Agonists are listed as Specified Substances, except Salbutamol (free plus glucuronide) greater than 1000 ng/ml. As the concentration of Salbutamol found in Mr. Petacchi's sample was greater than 1000 ng/ml, in this case it is not a Specified Substance. Therefore Mr. Petacchi's sanction is determined by Article 261 ADR.

7.2. Article 261 of the ADR provides:

"261. Except for the specified substances identified in article 262, the period of Ineligibility imposed for a violation of article 15.1 (presence of Prohibited Substance or its Metabolites or Markers), article 15.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and article 15.6 (Possession of Prohibited Substances and Methods) shall be:

First violation: 2 (two) years' Ineligibility

Second violation: Lifetime Ineligibility

However, the License-Holder shall have the opportunity in each case, before a period of Ineligibility is imposed, to

establish the basis for eliminating or reducing this sanction as provided in articles 264 and 265.”

7.3. Article 264 of the ADR provides:

“264. 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.”

7.4. Article 265 of the ADR provides:

“265. 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.”

- 7.5. The Panel is of the view that the results of the analyses of Mr. Petacchi’s sample are not compatible with a targeted oral therapeutic intake of Salbutamol in accordance with his ATUE. The Panel notes, however, that Mr. Petacchi is asthmatic. He was authorised to inhale a particular dose of Salbutamol per day. In circumstances where the heat and humidity of the day made it natural for him to feel the need to make greater use of his inhaler than under normal cycling conditions, the Panel is satisfied that the explanation for the concentration of Salbutamol found in his urine was that he took too many puffs of his Ventolin inhaler on that day, including some after the race. The Panel also notes that Mr. Petacchi had been using his inhaler every day of the Giro d’Italia. It is possible that he had developed a certain resistance so that more puffs might be required for him to feel relief from his condition. The Panel notes that Mr. Petacchi accepts that he may not have complied precisely with the authorised dose of 600 mcg. The Panel further notes that some of the puffs which he took were taken only an hour before he gave his sample. It is also possible, although the Panel expresses no concluded view on this issue, that due to a sub-optimal inhalation technique, Mr. Petacchi may accidentally have swallowed a portion of his medicine.
- 7.6. Mr. Petacchi’s fault can be characterised as administering an excess of therapy by taking more than six puffs of Ventolin and, possibly, accidentally swallowing part of the medicine (rather than inhaling it), in breach of the specific terms of his ATUE which allowed him to take 600 mcg of Salbutamol by inhalation only. As an additional relevant circumstance, the Panel notes that Mr. Petacchi states that he took 2-3 puffs after the race which could support a view that Mr. Petacchi had, in taking the puffs, no intention to enhance his performance.
- 7.7. The Panel is satisfied that Mr. Petacchi is not a cheat, and that the adverse analytical finding in this case is the result of Mr. Petacchi simply, and, possibly, accidentally, taking too much Salbutamol on the day of the test, but that the overdose was not taken with the intention of enhancing his performance. Indeed, it would be an unusual way

of attempting to enhance performance to take the prohibited substance after the particular event had concluded.

7.8. In the circumstances, the Panel is satisfied that Mr. Petacchi bears No Significant Fault or Negligence because his fault or negligence, when viewed in all the circumstances and taking into account the criteria for no fault or negligence, was not significant in relation to this anti-doping rule violation. It follows, therefore, that the Panel can reduce the period of ineligibility which Mr. Petacchi would otherwise have to suffer

7.9. In the light of the specific circumstances of the case the Panel has concluded that it would be just and proportionate to reduce the period of ineligibility to one year. In doing so the Panel has taken into account that the amended WADC, which the International Federations will have to implement by 1 January 2009, would qualify Salbutamol as a “specified substance” and would allow for the sanction to be reduced down to a reprimand (with no period of ineligibility). Even though the new WADC is not yet in force, the Panel takes the view that it is both equitable and fair, and in compliance with Article 255 of the ADR, to take these matters into consideration when exercising the discretion given to it by Art. 275 of the ADR. For the sake of completeness, the Panel should mention that it was submitted that the period of ineligibility should be eliminated as Mr. Petacchi bears No Fault or Negligence. However, as the Panel has made clear, it has concluded that Mr. Petacchi took too much Salbutamol. In order to establish No Fault or Negligence an athlete has to show that he has used the “utmost caution”. Even on his own account, Mr. Petacchi took more than the authorised dose. He cannot establish that he used the utmost caution.

(b) Ineligibility period

7.10. Article 255 of the ADR provides:

“255. These Anti-Doping Rules concerning sanctions and consequences shall be construed and implemented in compliance with human rights and general principles of law,

among which proportionality and individual case management.”

7.11. Article 275 ADR provides:

“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 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.”

7.12. There was no provisional suspension pursuant to Articles 217-223 of the ADR imposed or voluntarily accepted in the present case. It appears, however, that as a result of some pressure from cycling bodies and others which was placed on Mr. Petacchi and his team, Mr. Petacchi was not able to participate in one or more events while the anti-doping proceedings were pending. This is not the same as Mr. Petacchi voluntarily accepting provisional measures, but the Panel is minded to take it into account, bearing in mind the approach which was taken by the Panel in Union Cycliste Internationale v/ Michele Scarponi & Federazione Ciclistica Italiana (TAS 2007/A/1368).

7.13. The Panel also notes that the adverse analytical finding in the present case was made on 27 June 2007, around 10 months before the date of the present Award. Despite Mr. Petacchi waiving his right to have his B sample analysed, the anti-doping proceedings have progressed rather slowly. UPA-CONI filed its appeal with CAS on 23 August 2007. Normally CAS would issue its award within about four months (120 days) from the date on which the appeal is filed, which would have been 20 December 2007 at the latest. Due to certain delays in the hearing process which were not attributable to Mr. Petacchi, the hearing did not take place until 2 April 2008.

- 7.14. However, the Panel is satisfied that in a case of this type the hearing would have taken place and the award would have been issued well within the 4 month period. The Panel is satisfied that, all things being equal, arrangements would have been made for an early hearing so that the award would have been issued by 1 November 2007.
- 7.15. In addition, the Panel also thinks that it would be appropriate, in the particular circumstances of the present case, to take into account the 2 month period when Mr. Petacchi was not participating in competitions, i.e to credit two months against the total period of ineligibility to be served.
- 7.16. In the circumstances, therefore, the Panel considers that fairness requires that the period of ineligibility should start on 1 November 2007 and expire on 31 August 2008.

(c) Disqualification

- 7.17. Article 256 of the ADR provides:

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

- 7.18. Article 259 of the ADR provides:

“259. 1. 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.

2. If the anti-doping violation committed in a stage race involves the presence, Use or Attempted Use of a Specified

Substance and only a warning and reprimand are imposed, Disqualification from the Event is optional.

If the Rider is not Disqualified from the Event, 1% (one percent) of the time recorded by the Rider during the stage on which he tested positive shall be added to the final time on the individual classification.

The number of points scored during that same stage shall be deducted from the final classification.

Any prize won in connection with the stage in which the anti-doping violation occurred shall be forfeited.”

7.19. Article 274 of the ADR provides:

“274. In addition to the automatic Disqualification of the results in the Competition pursuant to article 256, all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other doping violation occurred, through the commencement of any Ineligibility period, shall, unless fairness requires otherwise, be Disqualified.

Comment: it may be considered as unfair to disqualify the results which were not likely to have been affected by the Rider’s anti-doping rule violation.”

7.20. Pursuant to Article 256 ADR the individual results obtained by Mr. Petacchi during the 11th stage of the Giro d’Italia 2007 must be disqualified. As Mr. Petacchi committed his anti-doping violation in connection with a stage race, he must also be disqualified from the whole event – the Giro d’Italia 2007 – with all of the resulting consequences including forfeiture of any medals, points and prizes, unless he can bring himself within the exception in Article 259(1) (see above).

7.21. Mr. Petacchi cannot satisfy all of the conditions (which are cumulative) for that exception to apply. In particular, Mr. Petacchi cannot establish that he bears No Fault or Negligence. Accordingly, the Panel concludes that he must be disqualified from the whole of the Giro d’Italia 2007.

- 7.22. The Panel next considers whether, in addition to the disqualification from the Giro d'Italia 2007, Mr. Petacchi should be disqualified from all other competitive results obtained after 23 May 2007, when the sample was collected. Article 274 of the ADR provides for such disqualification “unless fairness requires otherwise”.
- 7.23. The Panel has already concluded that Mr. Petacchi bears No Significant Fault or Negligence, and that it is satisfied as to the circumstances in which the excessive quantity of Salbutamol was taken which led to the adverse analytical finding. Article 274 of the ADR provides the Panel with a measure of discretion. In this case the Panel takes into account the fact that Mr. Petacchi voluntarily excluded himself from much racing since the Giro d'Italia 2007 and the adverse analytical finding. Each case must be judged on its own facts, and any discretion must be exercised in the context of the facts of the particular case.
- 7.24. When a tribunal is exercising a discretion, no one case can be taken as a precedent for the exercise of that discretion. Absent the application of the principle of binding precedent, the facts of one case can, at best, indicate the factors which it seemed legitimate to the particular tribunal to take into account. But those factors will themselves vary from case to case.
- 7.25. In the present case the Panel has concluded that fairness requires that such competitive results as Mr. Petacchi has achieved between the Giro d'Italia 2007 and 31 October 2007 should not be excluded, but that all competitive results and prizes after 31 October 2007 should be forfeited. The Panel is satisfied that the events of 23 May 2007 were “one-off” and that Mr. Petacchi does not habitually take doses of Salbutamol in excess of the authorised dose. Indeed, the other results at the Giro d'Italia 2007 would seem to justify that view.
- 7.26. This conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the parties to the Panel. Accordingly, all other prayers for relief are rejected.

8. COSTS

8.1. Article R65 of the CAS Code provides:

“R65 Disciplinary cases of an international nature ruled in appeal

R65.1 Subject to Articles R65.2 and R65.4, the proceedings shall be free.

The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.

R65.2 Upon submission of the statement of appeal, the Appellant shall pay a minimum Court Office fee of Swiss francs 500.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.

R65.3 The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.”

8.2. Taking into account the outcome of the proceedings, and the conduct and financial resources of the parties, save for the CAS Court Office fee, which will be retained by the CAS, the Panel orders that each party shall bear its own costs.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

- (1) The appeals by UPA-CONI and WADA against Decision no. 21/2007 issued on 24 July 2007 by the Disciplinary Commission of the FCI are admissible.
- (2) The appeals by UPA-CONI and WADA against Decision no. 21/2007 issued on 24 July 2007 by the Disciplinary Commission of the FCI are allowed. That decision is set aside.
- (3) Mr. Petacchi has breached Article 15.1 of the UCI Anti-Doping Rules.
- (4) In accordance with Articles 261 and 265 of the UCI Anti-Doping Rules Mr. Petacchi is ineligible to compete for a total period of one year, with two months credited against such period in accordance with Articles 255 and 275 of the UCI Anti-Doping Rules. Therefore, the period of ineligibility will start on 1 November 2007 and will expire on 31 August 2008.
- (5) All competitive results obtained by Mr. Petacchi during the 2007 Giro d'Italia shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.
- (6) Mr. Petacchi can retain all competitive results between 23 May 2007 and 31 October 2007, but all competitive results obtained after 31 October 2007 and during the period of ineligibility will be disqualified.
- (7) All other prayers for relief are dismissed.
- (8) Each party shall bear its own costs, save for the CAS Court Office fee, which will be retained by the CAS.

Done in Lausanne, 5 May 2008

THE COURT OF ARBITRATION FOR SPORT

President

Peter Leaver QC

Ulrich Haas

Michele Bernasconi

Arbitrator

Arbitrator

Rachel Oakeshott

Ad Hoc Clerk