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Mitten, Matthew J.

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A BRIEF REVIEW OF CAS DOPING JURISPRUDENCE ISSUES

Matthew J. Mitten*

This article briefly summarizes several leading, recent Court of Arbitration for Sport arbitration awards interpreting and applying the 2015 World Anti-Doping Code (WADC) and, in a few instances, its 2009 or 2003 prior versions. It provides a primer regarding various issues frequently arising in Olympic and international sports doping cases, including proof of Anti-doping Rule Violations (ADRVs) by nonanalytical positive evidence; rebuttal of presumed intentional ADRVs; proof of an athlete's no fault or no significant fault; determination of an athlete's appropriate period of ineligibility less than the presumptive standard sanction for an ADRV; and determination of the appropriate period of disqualified competition results and period of ineligibility start date. It also identifies and describes other CAS awards resolving important WADC issues, including the International Olympic Committee's broad authority to retest athlete samples from prior Olympic Games for the presence of prohibited substances and to retroactively invalidate athlete competition results.

* Professor of Law and Executive Director, National Sports Law Institute, Marquette University Law School (Milwaukee, Wisconsin USA); Arbitrator, Court of Arbitration for Sport. This article was first published in the 2020 CAS Bulletin following a presentation made at the seminar organized by the CAS in Budapest from October 24, 2019 through October 25, 2019.

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I. INTRODUCTION

Since the 2015 World Anti-Doping Code (WADC) became effective on January 1, 2015, there have been hundreds of published Court of Arbitration for Sport (CAS) awards interpreting and applying its provisions to a wide range of unique factual circumstances. A book or very lengthy article would be required to discuss all of the numerous issues resolved by CAS adjudication; some of the most important ones are summarized in the "Leading Cases" section of the CAS Bulletin or discussed in various articles published in it.[1] This short article briefly discusses recent illustrative CAS jurisprudence regarding the above issues under the 2015 WADC (or, in a few cases, the 2009 or 2003 WADC), which were the subject of the author's presentation during the General

1. *See, e.g.*, Estelle de La Rochefoucauld, *A Brief Review of the Procedural and Substantive Issues in CAS Jurisprudence Related to Some Russian Anti-Doping Cases*, 1 CAS BULL. 21 (2018) (Switz.); Markus Manninen & Brent J. Nowicki, *"Unless Fairness Requires Otherwise," A Review of Exceptions to Retroactive Disqualification of Competitive Results for Doping Offenses*, 2 CAS BULL. 7 (2017); Despina Mavromati, *Application of the 2015 WADA Code Through the Example of a Recent CAS Award* (Sharapova v. ITF), 2 CAS BULL. 7 (2016).

Programme of the CAS Seminar in Budapest, Hungary on October 24, 2019.[2]

II. PROOF OF ANTI-DOPING RULE VIOLATION (ADRV) BY NON-ANALYTICAL POSITIVE (NAP)

Read together, Articles 3.1 and 3.2 of the 2015 WADC provide that an ADRV "may be established by any reliable means, including admissions," to the "comfortable satisfaction" of CAS panel/sole arbitrator.[3]

In *IAAF v. ARAF*, the International Association of Athletics Federations (IAAF)[4] charged Mariya Savinova-Farnosova, a Russian athlete specializing in the 800 meters event,[5] with an ADRV (specifically, use or attempted use of a prohibited substance or method) based on her abnormal Athlete Biological Passport (ABP) values and admissions that she had used Parabolan, testosterone, and rHGH in conversations with Yuliya Stepanova (a Russian athlete whistle blower), which she covertly and illegally recorded.[6] The IAAF brought this ADRV disciplinary action as a first instance CAS Ordinary Division proceeding because there was no Russian entity with jurisdiction to do so after its November 2015 suspension of the All Russia Athletics Federation's membership based on a World Anti-doping Agency (WADA) independent commission report finding extensive doping in Russian athletics.[7]

In her defense, the athlete contended that this evidence is insufficient to establish that she committed an ADRV.[8] None of her twenty-eight blood samples from August 2009-March 2015 tested positive for an Adverse Analytical Finding (AAF) for any prohibited substance or method, and she asserted that the only abnormalities in her ABP were caused by her pregnancy.[9] She also asserted that the unauthorized

2. I want to express my gratitude to Jean Phillipe Dubey, Brent Nowicki, and Jeff Benz for their assistance in identifying the leading CAS awards addressing these issues.

3. WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE §§ 3.1, 3.2 (2015).

4. Press Release, World Athletics, IAAF unveils new name and logo (June 9, 2019), https://www.worldathletics.org/news/press-release/iaaf-unveils-new-name-and-logo (The IAAF changed its name to World Athletics in 2019).

5. Int'l Ass'n of Athletics Fed'ns v. All Russ. Athletics Fed'n, CAS 2016/O/4481, Arbitral Award, 1, 2, ¶ 3 (2017) (Switz.).

6. *Id.* at 2-6, ¶¶ 6-23, 18, ¶ 79.

7. Press Release, World Athletics, IAAF provisionally suspends Russian Member Federation ARAF (Nov. 13, 2015), https://www.worldathletics.org/news/press-release/iaaf-araf-suspended; Press Release, World Anti-Doping Agency, WADA welcomes Independent Commission's Report into Widespread Doping in Sport (Nov. 9, 2015), https://www.wada-ama.org/en/media/news/2015-11/wada-welcomes-independent-commissions-report-into-widespread-doping-in-sport.

8. Int'l Ass'n of Athletics Fed'ns v. All Russ. Athletics Fed'n, CAS 2016/O/4481, Arbitral Award, 17, ¶ 78 (2017) (Switz.).

9. *Id.* at 3-4, ¶ 14, 27-33, ¶¶ 127-130.

recordings of her conversations with Ms. Stepanova were inadmissible as evidence in the CAS proceeding because they were obtained illegally in violation of Russian and Swiss law, the European Convention of Human Rights, her privacy and procedural rights, and the principle of good faith.[10]

The Sole Arbitrator determined that the "reasonably good quality" recordings[11] and transcripts of the athlete's admissions are reliable means of evidence of her ADRV pursuant to Article 3.2.[12] In accordance with the balancing test established by the Swiss Federal Tribunal and European Court of Justice, he ruled that this evidence is admissible even if illegally obtained because "the interest in discerning the truth must prevail over the interest of the Athlete that the covert recordings are not used against her in the present proceedings."[13] He noted that "the interest in discerning the truth concerning systematic doping in Russia was of utmost importance to keep the sport clean and to maintain a level playing field among athletes competing against each other"[14] as well as that "the fight against doping is not only of a private interest, but indeed also of a public interest."[15] Because "doping in Russia is widespread and has been systematically supported by coaches, clubs and government-affiliated organisations . . . , the interest in finding the truth must prevail and the Athlete should not be allowed to invoke the principle of good faith as a defence against gathering illegally obtained evidence."[16]

Following established CAS jurisprudence, the Sole Arbitrator determined that "the ABP is a reliable and accepted means of evidence to assist in establishing anti-doping rule violations," but "that from the mere fact that an athlete cannot provide a credible explanation for the deviations in his or her ABP it cannot automatically be deduced that an anti-doping rule violation has been committed."[17] In other words, "the abnormal doping values may not necessarily be explained by doping" and there must be convincing evidence that "the abnormal values are caused by a 'doping scenario'. . . from a qualitative interpretation of the experts and possible further evidence."[18] He found that the athlete's abnormal ABP was caused by a "doping scenario" because of its "markedly

10. *Id.* at 18, ¶ 79.
11. *Id.* at 23, ¶ 108.
12. *See id.* at 19, ¶ 89.
13. *Id.* at 23, ¶¶ 106-07.
14. Int'l Ass'n of Athletics Fed'ns v. All Russ. Athletics Fed'n, CAS 2016/O/4481, Arbitral Award, 23, ¶ 103 (2017) (Switz.).
15. *Id.* at 23, ¶ 104.
16. *Id.* at 23, ¶ 105.
17. *Id.* at 33-34, ¶¶ 133-137.
18. *Id.* at 34, ¶ 138.

higher HGB values in samples that were taken shortly before three major competitions (the European Championship in Barcelona, the World Championship in Daegu and the Olympic Games in London)," which was corroborated by her admissions in the recorded conversations with Ms. Stepanova.[19] Although none of the evidence was itself sufficient to prove blood doping, he determined that all of the evidence established that the athlete engaged in blood doping to his comfortable satisfaction.[20]

Based on his analysis of all the evidence, the Sole Arbitrator concluded that the athlete used multiple prohibited substances from July 26, 2010 through August 19, 2013 (the day after the World Championship in Moscow) pursuant to a "sophisticated doping plan or scheme over a protracted period of time."[21]

The athlete appealed the Sole Arbitrator's award to the CAS Appeals Division,[22] which upheld his determination regarding her ADRV:

> [E]ven if all scenarios other than doping can be excluded (on a balance of probability), this does not suffice for the Panel to be comfortably satisfied that the Athlete committed blood manipulation. Instead, the use of a prohibited substance or method must—in addition—be a plausible and likely explanation of the values obtained for the Panel to positively assume that the Athlete doped. Such assessment must be made based on all evidence before the Panel.[23]
>
> The Panel finds that all evidence on file points in the direction that blood manipulation by the Athlete is the only remaining and—when assessed individually—also the only plausible and likely explanation for the Athlete's abnormal blood values. Blood manipulation is common in endurance sport. Contrary to what the Appellant submits there is a significant correlation between the sporting calendar of the Athlete and the variances observed in her blood values. This results from a comparison of the in-competition with the out-of-competition testing results. These variances observed support the doping scenario, i.e. that the Athlete submitted to blood manipulation in preparation for the competitions . . . . [B]ased on all the evidence available to this Panel, it is convinced with the required degree of proof that a doping scenario is the only possible cause of the Athlete's abnormal blood values.[24]

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19. *Id.* at 38, ¶ 154.
20. Int'l Ass'n of Athletics Fed'ns v. All Russ. Athletics Fed'n, CAS 2016/O/4481, Arbitral Award, 38, ¶ 154-55 (2017) (Switz.).
21. *See id.* at 42, ¶ 178, 45, ¶¶ 200-01.
22. Farnosova v. Int'l Ass'n of Athletics Fed'ns, CAS 2017/O/5045, Arbitral Award (2018) (Switz.).
23. *See id.* at 33-34, ¶ 120.
24. *See id.* at 34-35, ¶ 123.

> Before this Panel—unlike before the first-instance proceedings—the Athlete has not contested the admissibility of the recordings. For the sake of good order, the Panel would like to state that the recordings are admissible evidence and refers insofar to the grounds exposed in the first-instance proceedings to which it fully adheres.[25]

III. RETESTING OF ATHLETE SAMPLES FROM OLYMPIC GAMES AND FIRST TWO CAS ADD AWARDS

Carter v. IOC[26] illustrates the lawful broad scope of the International Olympic Committee's authority to order retesting of athlete urine or blood samples from prior Olympic Games for the presence of prohibited substances.[27] Nesta Carter, a member of the Jamaican 4x100m relay team that won the gold medal at the Beijing Olympics, provided an August 22, 2008 sample that was tested by the Beijing laboratory and found to be negative for any prohibited substances.[28] In March and June, 2016, his sample was retested by the Lausanne laboratory pursuant to the IOC's request, and on June 3, 2016, he was notified it tested positive for methylhexaneamine (MHA), a stimulant not specifically named in the WADA 2008 Prohibited List that has a similar structure and effects as the listed stimulant tuaminoheptane.[29] On January 25, 2017, the IOC Disciplinary Commission determined that Mr. Carter had committed an ADRV, disqualified him from the Beijing Olympic Games 4x100m relay event, and ordered that he return his gold medal.[30]

In his appeal, the athlete requested that the IOC Disciplinary Commission's decision be set aside because the IOC did not specifically request that his sample be tested for MHA and that the Lausanne laboratory simply used its standard "Dilute and Shoot" sample retesting process.[31] He contended that the ADRV charge against him breached the principle of legal certainty because MHA was not listed in the WADA 2008 Prohibited List.[32] The athlete also contended that this charge should be dismissed because the IOC's "justification for the re-testing regime is to enable re-testing where scientific methods have developed since the time of the original test such that a prohibited substance could be detected by those methods where it could not have been

25. *See id.* at 35, ¶ 125.
26. Carter v. Int'l Olympic Comm., CAS 2017/A/4984, Arbitral Award (2018) (Switz.).
27. *Id.* at 1, ¶ 1.
28. *Id.* at 2, ¶ 1.
29. *See id.* at 1-2, ¶¶ 1-5, 3-4, ¶¶ 10-13.
30. *Id.* at 4-5, ¶ 15.
31. *Id.* at 7-12, ¶ 37.
32. Carter v. Int'l Olympic Comm., CAS 2017/A/4984, Arbitral Award, 7-12, ¶ 37 (2018) (Switz.).

previously" and that Beijing laboratory had the capability to detect MHA in athlete samples in August 2008.[33] In addition, he asserted that because athlete samples have been routinely tested for MHA since 2010, the IOC's delay in retesting Beijing Olympic Games samples for MHA until 2016 prejudiced him and warranted dismissal of the ADRV charge against him.[34]

Ruling that "Article 6.5 of the IOC ADR provides a broad and discretionary power to the IOC to test for any and all prohibited substances at any time within the statute of limitation period" (which is eight years under the 2003 WADC),[35] the CAS Panel upheld the IOC Disciplinary Commission's determination.[36] It confirmed the validity of the laboratory's "Dilute and Shoot" sample screening process and found that the IOC did not intend "to prevent the Lausanne Laboratory [from reporting] any prohibited substance which was part of the in-competition menu" of prohibited substances for the Beijing Olympic Games.[37] The Panel rejected the athlete's breach of legal certainty defense: "[A]ll stimulants were and are prohibited. There is a great number of stimulants, and they cannot all be listed by name. Therefore, the list of prohibited stimulants provides a list of named stimulants, which are typically the ones often detected, as well as a 'hold all basket.' "[38]

The Panel found that the IOC's rules for retesting athlete samples "send a message to all participants at the Olympic Games, that they have the fundamental duty not to use any prohibited substance," which "is an absolute duty and is not linked with the detectability of a substance."[39] "In the end, what truly counts is not whether a substance is detected or not in a specific analysis performed at a given time in a given laboratory but whether it is present or not."[40] It explained that the IOC's Olympic Games'

> re-analysis program is meant to protect the integrity of the competition results and the interests of athletes who participated without any prohibited substance and not the interests of athletes who were initially not detected for any reason and are later and within the statute

33. *See id.* at 29, ¶ 112.
34. *See id.* at 7-12, ¶ 37.
35. *See id.* at 25, ¶ 88.
36. *See id.* at 28-29, ¶ 109.
37. *See id.* at 27, ¶ 99.
38. *See* Carter v. Int'l Olympic Comm., CAS 2017/A/4984, Arbitral Award, 35, ¶ 152 (2018) (Switz.).
39. *See id.* at 31, ¶¶ 123-24.
40. *See id.* at 31, ¶ 127.

> of limitation period found to have competed with a prohibited substance in their bodily systems.[41]

Consistent with *Carter v. IOC*, the first two CAS Anti-doping Division cases concluded that valid laboratory re-analysis of Olympic Games samples finding the presence of prohibited substances supported the determination of an ADRV by the particular athletes resulting in invalidation of their respective competition results. In *Novikau v. IOC*, the Sole Arbitrator found that the October 2018 re-analysis of a Belarusian weightlifter's 2012 London Olympic Games samples revealed the presence of dehydrochlormethyltestosterone (an anabolic steroid), which constitutes an ADRV invalidating his twelfth-place finish in the men's eighty-five kilogram weightlifting event.[42] In *IOC v. Nurudinov*, the same Sole Arbitrator found that the November 2018 re-analysis of an Uzbekistani weightlifter's samples revealed the presence of the same prohibited substance, which constitutes an ADRV invalidating his fourth place finish in men's 105 kg weightlifting event at the London Olympic Games.[43]

IV. Athlete Rebuttal of Presumed Intentional Violation if ADRV Does Not Involve a Specified Substance

Article 10.2.1.1 of the 2015 WADC provides for a Period of Ineligibility of 4 years if the ADRV does not involve a Specified Substance unless the Athlete proves that the ADRV is "not intentional" by "a balance of probability."[44] If the Athlete does so, the presumptive Period of Ineligibility is reduced to two years pursuant to Article 10.2.2.[45] Article 10.2.3 defines "intentional" as "conduct which [an Athlete] knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."[46]

Applying these WADC provisions, in *Taylor v. World Rugby*, the CAS Panel held that a nineteen-year rugby player who tested positive for a metabolite of dehydrochlormethyl-testosterone ("DHCMT") as part of the World Rugby U20 Championship Out of Competition testing

41. *See id.* at 33, ¶ 140.
42. Novikau v. Int'l Olympic Comm., CAS 2019/ADD/1, Arbitral Award, 2-3, ¶¶ 4-11, 6, ¶¶ 40-41 (2019) (Switz.).
43. Int'l Olympic Comm. v. Nurudinov, CAS 2019/ADD/2, Arbitral Award, 2-3, ¶¶ 2-13, 5-6, ¶¶ 37-38 (2019) (Switz.).
44. World Anti-Doping Agency, *supra* note 3, §§ 3.1, 10.2.1.
45. *Id.* § 10.2.2.
46. *Id.* §§ 3.1, 3.2, 10.2.3.

program proved he did not commit an intentional ADRV.[47] He established that the likely source of this prohibited substance was Deca-Plexx, a contaminated product he took for vanity reasons ten months before his positive test.[48] He wanted to look good for a high school beach party and was not playing rugby while recovering from a broken ankle.[49] The Panel observed that "[e]stablishment of source does not by itself prove negative intent although it may be a powerful indicator of the presence or absence of intent."[50] It concluded that the evidence "he took Deca-Plexx to enhance his body image not his sporting performance, […] was entirely convincing"[51] and proves no intent to commit an ADRV.

In contrast, two other cases determined that the athlete failed to rebut the presumption that testing positive for a prohibited non-specified substance constitutes an intentional ADRV.

In *Zieliński v. Polish Anti-Doping Agency*, a professional weightlifter who won the gold medal in the men's eighty-five kilogram category at the 2012 London Olympic Games, tested positive for 19-nandrolone during the 2016 Polish Weightlifting Championships.[52] The athlete was unable to establish the probable source of this prohibited substance, but claimed he "has never knowingly and dishonestly acted to gain an unfair sporting advantage," "would never knowingly use such an easily detectable prohibited substance before the Olympic Games," and "fulfilled his whereabouts obligations and underwent a significant number of anti-doping controls."[53] He also contended that his lack of an intent to use this prohibited substance was proven by a polygraph test and three negative anti-doping tests for nandrolone (which is detectable for a lengthy period of time after its use) soon after his positive test and that if taking it "was done with the aim to gain a sporting advantage [,] one would need multiple doses thus making it detectable for a period of between 18-24 months."[54]

The Sole Arbitrator recognized that "[a] line of CAS cases have held that in order to meet the athlete's burden that the violation was not intentional [,] the athlete must necessarily establish how the substance entered his/her body," but that "a number of other CAS awards held

47. *See* Taylor v. World Rugby, CAS 2018/A/5583, Arbitral Award, 2, ¶¶ 1-5 (2019) (Switz.).
48. *Id.* at 22, ¶ 88.
49. *Id.* at 3-4, ¶ 18-20.
50. *See id.* at 22, ¶ 87.
51. *See id.* at 23, ¶ 88 (vi).
52. Zieliński v. Polish Anti-Doping Agency, CAS 2018/A/5584, Arbitral Award, 2, ¶ 24 (2019) (Switz.).
53. *Id.* at 22.
54. *Id.* at 47-48.

differently, relying in particular on the wording of the new version of the 2015 WADC, the language of which should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent."[55] Regarding the later CAS jurisprudence, he noted that these awards required "truly exceptional circumstances" to prove "lack of intent without establishing the origin of the prohibited substance."[56]

Observing that the athlete "cannot merely rely on protestations of innocence, lack of a demonstrable sporting incentive to dope, diligent attempts to discover the origin of the prohibited substance or [his] clean record,"[57] to do so, the Sole Arbitrator concluded: "The totality of the evidence presented is not sufficient to establish, on the balance of probability, that the Athlete had no intention to cheat whatsoever [and] are not indicative of exceptional circumstances that might negate the presumed intentionality of the violation."[58]

In *WADA v. Chinese Taipei Olympic Committee,* an out-of-competition doping control found the presence of exogenously administered anabolic steroids in a Chinese female weightlifter's system.[59] The athlete asserted she did not commit an intentional ADRV because the prohibited substance was in Flovone, a supplement she took for severe menstrual problems based on her physician's recommendation.[60] Even if this product was its source, the Sole Arbitrator determined that her ADRV was "indirectly intentional within the meaning of Article. 10.2.3 of the [2015] WADC] (viz. the Athlete 'knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk)."[61] She used Flovone, whose label stated "in major letters circled with a golden ring that it contains DHEA", which is an anabolic steroid, for one week without reading it or "making any relevant check" such as an Internet search.[62] The Sole Arbitrator concluded:

> A language barrier is no defense to an athlete meeting the basic standard of conduct of all athletes. If she could not understand the ingredients label[] then she either had to find someone who did or

55. *Id.* at 47.
56. *Id.*
57. *Id.*
58. *See* Zieliński v. Polish Anti-Doping Agency, CAS 2018/A/5584, Arbitral Award, 48, (2019) (Switz.).
59. World Anti-Doping Agency v. Chinese Taipei Olympic Comm., CAS 2018/A/5784, Arbitral Award, 2-3, ¶¶ 4-10 (2018) (Switz.).
60. *Id*. at 5, ¶ 29.
61. *Id*. at 10, ¶ 67.
62. *See id.* at 11, ¶ 69.

> simply not take the substance. She cannot hide behind her native language as a way of avoiding her responsibilities.[63]

V. PROOF OF NO FAULT OR NEGLIGENCE TO ELIMINATE STANDARD PERIOD OF INELIGIBILITY

Article 10.4 of the 2015 WADC provides: "If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Fault* or *Negligence,* then the otherwise applicable period of *Ineligibility* shall be eliminated."[64] The 2015 WADC defines *No Fault or Negligence* as follows:

> The *Athlete* or other *Person's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the case of a *Minor,* for any violation of Article 2.1 [presence in sample], the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.[65]

It is extremely difficult for an athlete to prove no fault or negligence for an ADRV, and *WADA v. Roberts*[66] is one of the rare cases in which it has been proven. Gil Roberts, an American 200 meter and 400 meter sprint athlete who was a member of the 4x400 meter relay team that won the gold medal during the 2016 Rio Olympic Games tested positive for probenecid, a prohibited specified substance in the category of diuretics and masking agents, during an out-of-competition doping control.[67] He alleged his ADRV resulted from passionately kissing his girlfriend, Rebecca "Alex" Salazar, for approximately three hours immediately before providing his urine sample during the doping control, and that he did not know or suspect that kissing her could cause a positive test for probenecid.[68] She was taking Moxylong capsules, which she did not know contained probenecid, that were purchased in India for her sinus infection.[69] Mr. Roberts did not know she was taking Moxylong or see her take any of this medication.[70] A laboratory test of her one remaining Moxylong

63. *See id.* at 11, ¶ 70.
64. *See* WORLD ANTI-DOPING AGENCY, *supra* note 3, § 10.4.
65. *See id.* at 137.
66. World Anti-Doping Agency v. Roberts, CAS 2017/A/5296, Arbitral Award (2018) (Switz.).
67. *Id.* at 1-2, ¶¶ 2-5.
68. *Id.* at 3, ¶¶ 14-19, 16-17, ¶ 63.
69. *Id.* at 3, ¶¶ 14-15.
70. *Id.* at 3, ¶ 18.

capsule established that it contained probenecid.[71] WADA did not contend that his ADRV was intentional, but asserted that "*the Athlete and his lay witnesses have concocted a false story to explain an adverse analytical finding.*"[72] The parties' scientific evidence was conflicting regarding whether the likely source of probenecid in the athlete's system was prolonged contaminated kissing of his girlfriend.[73]

Relying on *Gasquet,*[74] which concluded "[i]t was simply impossible for [a tennis player], even when exercising the utmost caution, to know that in kissing [a previously unknown woman in a nightclub multiple times], he could be contaminated with cocaine*,*"[75] the CAS Panel determined:

> [T]o be satisfied that a means of ingestion, is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.[76]

It found:

> The Panel finds itself faced with compelling factual evidence and, at best, conflicting scientific evidence that acts as a double-edge sword in determining the truth. Put simply, in its assessment, the scientific evidence fails to take this storyline below the requisite of the CAS 2009/A/1926 & 1930 [*Gasquet*] threshold. Therefore, the Panel reverts to the non-expert evidence and finds itself sufficiently satisfied that it is more likely than not that the presence of probenecid in the Athlete's system resulted from kissing his girlfriend Ms. Salazar shortly after she had ingested a medication containing probenecid.[77]

The CAS Panel concluded that:

> [T]he Athlete has established the origin of the prohibited substance on a balance of probabilities . . . [E]ven with the exercise of the utmost caution, [he] could never have envisioned that kissing his girlfriend of three years would lead to an adverse analytical finding for trace amounts of a banned substance that he was not familiar with, . . . [He] acted without fault or negligence.[78]

---

71. *Id.* at 3, ¶ 19, 17, ¶ 64.
72. *See* World Anti-Doping Agency v. Roberts, CAS 2017/A/5296, Arbitral Award, 12, ¶ 55, (2018) (Switz.).
73. *Id.* at 19, ¶ 83.
74. Int'l Tennis Fed'n v. Gasquet, CAS 2009/A/1930 & CAS 2009/A/1926, Arbitral Award, 18, ¶ 53 (2019) (Switz.).
75. *See id.*
76. *See id.* at 18, ¶ 52.
77. *See* World Anti-Doping Agency v. Roberts, CAS 2017/A/5296, Arbitral Award, 19, ¶ 83 (2018) (Switz.).
78. *See id.* at 20, ¶ 84.

VI. PROOF OF NO SIGNIFICANT FAULT OR NEGLIGENCE TO REDUCE STANDARD PERIOD OF INELIGIBILITY AND DETERMINATION OF REDUCED PERIOD

Article 10.5.1.1 ("Specified Substances") of the 2015 WADC provides:

> Where the anti-doping rule violation involves a *Specified Substance,* and the *Athlete* . . . can establish *No Significant Fault or Negligence,* then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility,* and at a maximum, two years of *Ineligibility,* depending on the *Athlete's* or other *Person's* degree of *Fault.*[79]

Article 10.5.1.2 ("Contaminated Products") provides:

> In cases where the *Athlete* . . . can establish *No Significant Fault or Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility,* and at a maximum, two years *Ineligibility,* depending on the *Athlete's* . . . degree of *Fault.*[80]

Article 10.5.2 ("Application of *No Significant Fault or Negligence* beyond the Application of Article 10.5.1") provides:

> If an *Athlete* . . . establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears *No Significant Fault or Negligence,* . . . the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete['s]* . . . degree of *Fault,* but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable.[81]

The 2015 WADC defines *No Significant Fault or Negligence* as follows:

> The *Athlete* or other *Person's* establishing that his or her *Fault* or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence,* was not significant in relationship to the anti-doping rule violation. Except in the case of a *Minor*, for any violation of Article 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.[82]

Pursuant to Article 10.5.1.1, 10.5.1.2, or 10.5.2, an athlete must prove no significant fault or negligence for an ADRV by a balance of probability (as well as the source of the prohibited substance) to obtain

79. WORLD ANTI-DOPING AGENCY, *supra* note 3, § 10.5.1.1.
80. *Id.* § 10.5.1.2.
81. *Id.* § 10.5.2.
82. *Id.* at 138.

any reduction of the standard or otherwise applicable period of ineligibility. The following cases illustrate that determination of whether the athlete's fault or negligence is "significant" requires a detailed fact specific inquiry.

In *USADA v. Bailey*, a "28-year-old experienced elite-level athlete who competed at an international level in both athletics and bobsledding," tested positive for dimethlylbutylamine (DMBA), a stimulant that is a specified substance whose usage is prohibited in-competition.[83] Asserting a "*mistaken assumption that his teammates were as responsible as he had been with respect to their supplement choices,*"[84] the athlete contended he had no significant fault for his ADRV because he took two supplements ("Hyde" and "Weapon X") during a bobsled competition supplied by two similarly situated teammates who also tested positive for DMBA and accepted a sixteenth-month suspension proposed by the United States Anti-doping Agency (USADA).[85]

The CAS Panel found his "fault is significant"[86] because he was "an elite-level international athlete with over 10 years of anti-doping education [who] ought to have mentored the less-experienced athletes, not blindly followed their lead."[87] It determined that his conduct was "well below the standard of expected of such an Athlete," which "demonstrated extreme carelessness or recklessness in failing to take even the most basic steps to avoid an ADRV."[88] For example, he "did not ask anyone for assurances that the substances he ingested were "safe", did not do any research of his own, and in fact, did not even take the most basic step of reading the product label before taking it."[89] It concluded his conduct does not warrant a finding of no significant fault or negligence justifying any reduction of the standard two-year suspension for an ADRV involving a specified substance pursuant to Article 10.5.1.1.[90]

Consistent with *Chinese Taipei Olympic Committee*, the CAS Panel rejected the athlete's contention that his attention deficit hyperactivity disorder, which periodically resulted in a lack of focus, hyperactivity, or impulsivity, warranted a reduction in his sanction:

83. U.S. Anti-Doping Agency v. Bailey, CAS 2017/A/5320, Arbitral Award, 2, ¶ 3, 3, ¶ 12 (2018) (Switz.).
84. *Id.* at 16-17, ¶ 107.
85. *See id.* at 2-3, ¶¶ 8-17.
86. *Id.* at 17, ¶ 111.
87. *Id.* at 16-17, ¶ 107.
88. *Id.* at 17, ¶ 112.
89. *See* U.S. Anti-Doping Agency v. Bailey, CAS 2017/A/5320, Arbitral Award, 17, ¶ 112 (2018) (Switz.).
90. *Id.* at 13, ¶ 81, 17-18, ¶¶ 113-14.

> An athlete who suffers from a disability or impairment that prevents him or her from complying with primary WADC obligations should either not compete at all or ensure that he is accompanied by a responsible adult when he or she takes any supplement or medicine, or take other appropriate measures, including medically recommended measures, to achieve compliance. Mr. Bailey took no such steps.[91]

Taylor v. World Rugby[92] illustrates that an athlete's youth, inexperience playing sport, and lack of doping education are relevant (but not dispositive) factors in determining the existence of no significant fault or negligence for an ADRV. The CAS Panel found that a nineteen-year-old rugby player's "*level of fault is significant or considerable*"[93] for his ADRV; therefore, no reduction of the standard two-year suspension for his unintentional use of a non-specified substance was warranted under Article 10.5.1.2:

> While there is a greater obligation on the part of the experienced high-level athlete who has received anti-doping education on numerous occasions, to undertake due diligence, that does not absolve the young, inexperienced athlete at the other end of the spectrum from taking any steps whatsoever. The Panel is unable to identify any steps that the Appellant took in discharge of his duty to avoid the presence in his system of prohibited substances. In the Panel's view, the Appellant acted in a careless manner in consuming supplements without undertaking any form of research and demonstrated a perplexing lack of curiosity for someone who entertained the prospect of one day playing professional rugby.[94]

In *Lea v. USADA*, the CAS panel was bound to accept an American Arbitration Association anti-doping panel's implicit determination that a professional cyclist did not have significant fault or negligence for an in-competition positive drug test for oxycodone (a specified substance) caused by taking one tablet of Percocet as a sleep aid late at night approximately twelve to twelve and a half hours before a morning race the next day (which was not appealed by either party).[95] A long-time trusted sports medicine physician (who had participated in national cycling competitions) had prescribed Percocet, a permissible out-of-competition medication he knew contained oxycodone, for pain relief on non-riding days during multi-day cycling competitions, which was foreseeably used

91. *Id.* at 16, ¶ 105.
92. Taylor v. World Rugby, CAS 2018/A/5583, Arbitral Award (2019) (Switz.).
93. *See id.* at 25, ¶ 96.
94. *See id.* at 24, ¶ 94.
95. *See* Lea v. U.S. Anti-Doping Agency, CAS 2016/A/4371, Arbitral Award, 2-4, ¶¶ 3-20, 21, ¶ 89 (2016) (Switz.).

by cyclists as a sleep aid.[96] The physician did not warn the athlete about the risk of a positive in-competition drug test even if Percocet was taken "out-of-competition"[97] (defined by the 2015 WADC as "twelve hours [or longer] before a *Competition* in which the *Athlete is scheduled to participate* . . . .").[98]

Witness testimony showed the cyclist was generally aware that metabolites of Percocet's ingredients, including oxycodone, might remain in his system beyond this medication's period of therapeutic effectiveness, which is approximately four hours.[99] USADA's Science Director testified that oxycodone metabolites can remain in one's system twenty-four to seventy-two hours after ingestion, but there was no record evidence that the IF for cycling, USADA, or WADA websites or the GlobalDRO.com (the primary Internet resources athletes should check to obtain information about products or substances before taking them) contained this information.[100] There also was no record evidence that any of these resources warned that oxycodone or its metabolites could remain in an athlete's system longer than twelve hours after ingesting it and result in a positive in-competition test even if medication containing it is taken out-of-competition.[101]

The CAS panel generally adopted and modified the *Cilic*[102] guidelines for determining an athlete's degree of fault based on objective and subjective elements with a corresponding range of sanctions for ADRVs involving specified substances. To promote consistency in applying Article 10.4 of the 2009 WADC to determine sanctions for ADRVs involving specified substances, *Cilic* divided the maximum two-year period of ineligibility into three categories of fault: zero to eight months for a "light degree of fault" with a standard sanction of four months; eight to sixteen months for a "normal degree of fault" with a standard sanction of twelve months; and sixteen to twenty-four months for a "significant or considerable degree of fault" with a standard sanction of twenty months.[103] Because Article 10.5.1.1 of the 2015 WADC requires the athlete to prove "no significant fault or negligence" to obtain any reduced sanction, *Lea* used the following terminology: zero to eight months for a "light degree of fault," eight to sixteen months for a

96. *Id.* at 2, ¶ 5, 11-12, ¶ 50.
97. *Id.* at 11-12, ¶ 50.
98. *See* WORLD ANTI-DOPING AGENCY, *supra* note 3, at 135.
99. *Lea*, CAS 2016/A/4371 at 10-11, ¶ 47, 11-12, ¶¶ 50-51.
100. *Id.* at 10-11, ¶ 47, 12, ¶ 51.
101. *See id.* at 2-4, ¶¶ 3-20, 10-14, ¶¶ 46-55.
102. Cilic v. Int'l Tennis Fed'n, CAS 2013/A/3327 & CAS 2013/A/3335, Arbitral Award (2014) (Switz.).
103. *Id.* at 1, ¶ 1, 18-19, ¶¶ 69-74.

"moderate degree of fault," and sixteen to twenty-four months for a "considerable degree of fault" with the same "standard" sanctions in each category.[104]

The CAS panel determined:

> The dispositive inquiry in determining an appropriate, consistent, and fair sanction is his degree of fault for not taking reasonable steps to determine the length of time oxycodone is likely to remain in his system after ingesting it. There is no evidence that Appellant could have obtained reliable, scientifically accurate information from any of the above-referenced Internet resources normally consulted by athletes. Nor is there record evidence he could have obtained reliable information from a general Internet search because, as Dr. Fedoruk testified, the length of time metabolites of oxycodone are likely to remain in one's system 'is a challenging question' and the length of time for clearance is different based on the particular individual's metabolism and genetics.[105]

Applying the objective element ("what standard of care could have been expected from a reasonable person in the athlete's situation"), the CAS Panel characterized the cyclist's "level of fault for not taking objectively reasonable action such as asking his physician the length of time oxycodone is likely to remain in his system after ingesting it as 'moderate' fault.' "[106] After considering the subjective mitigating factors (particularly that his "level of awareness has been reduced by a careless but understandable mistake" and that he "has taken [Percocet] over a long period of time without incident"),[107] it determined that "the totality of circumstances regarding [the cyclist's ADRV] is an 'exceptional case' in which the 'subjective elements are so significant that they move [him] not only to the extremity of a particular category, but also into a different category altogether.' "[108]

The CAS Panel concluded that the cyclist's level of fault is "light" and after considering CAS anti-doping jurisprudence with similar facts, it imposed a six-month period of ineligibility, which is two months longer than the "standard" four-month suspension in this category of fault.[109]

In *Ibrahim v. West Asia Regional Anti-doping Organization (WARADO)*, during an in-competition doping control, a young Lebanese

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104. *See* Lea v. U.S. Anti-Doping Agency, CAS 2016/A/4371, Arbitral Award, 22, ¶ 90 (2016) (Switz.).
105. *See id.* at 23, ¶ 94.
106. *See id.* at 23-24, ¶ 95.
107. *See id.* at 24-25, ¶ 97.
108. *See id.* at 25, ¶ 96.
109. *Id.* at 25-27, ¶¶ 96-102.

professional basketball player tested positive for a high concentration of THC (a specified substance) from his permissible out-of-competition use of marijuana the evening before the game.[110] It was undisputed that his ADRV was not intentional,[111] so he was subject to the standard two-year period of ineligibility.[112] Pursuant to the WADA Reference Guide, he did not have significant fault or negligence for his marijuana usage because it clearly was unrelated to sports performance.[113] FIBA filed an amicus brief asserting that his two-year suspension imposed by a WARADO Doping Hearing Panel was disproportionate to sanctions imposed on other basketball players for in-competition positive tests for THC (the FIBA Disciplinary Tribunal's average suspension was three months).[114]

Applying Article 10.5.1.1 and relying on *Lea*, the CAS Panel found that the athlete's degree of fault is in the "light degree category which usually leads to a ban of 0-8 months."[115] The CAS Panel concluded:

> [T]he Appellant's age and behavior would show for a ban of three months, however, the proximity of the consumption to the game and the cannabis concentration found in the sample show for a ban of four months. Therefore, the Panel finds that the athlete's fault is a 'standard' case of light degree of fault and the appropriate sanction is a ban of four (4) months.[116]

In *Guerrero v. FIFA*, a professional football player tested positive for the presence of cocaine metabolite, a non-specified substance whose usage is prohibited in-competition, is his system.[117] Its source was coca tea that he drank in the team's Visitors room in the hotel two days before the football competition in which he provided a positive sample.[118] He mistakenly assumed that all food and drink served therein was subject to the same strict protocols as in the private dining room to ensure that nothing contained any prohibited substances.[119] Before drinking the tea, he did not ask team officials about the Visitors room food and drink

110. *See* Ibrahim v. W. Asia Reg'l Anti-Doping Org., CAS 2016/A/4887, Arbitral Award, 2, ¶¶ 1, 4, 5, ¶ 24 (2017) (Switz.).
111. *Id.* at 11, ¶ 44.
112. *Id.* at 2, ¶ 7.
113. *Id.* at 11, ¶ 44.
114. *Id.* at 16, ¶ 59-61.
115. *Id.* at 14, ¶¶ 53-59.
116. See Ibrahim v. W. Asia Reg'l Anti-Doping Org., CAS 2016/A/4887, Arbitral Award, 17, ¶ 62 (2017) (Switz.).
117. Guerrero v. FIFA, CAS 2018/A/5546 & CAS 2018/A/5571, Arbitral Award, 2, ¶ 2, 3, ¶¶ 8-10 (2018) (Switz.).
118. *Id.* at 7, ¶ 43.
119. *Id.*

protocols; nor did he inquire about or inspect the tea bags.[120] It was undisputed that his ingestion of this prohibited substance occurred out-of-competition in a context unrelated to sport performance;[121] therefore, he was subject to being suspended for a maximum period of two years,[122] pursuant to Article 10.2.3 of the 2015 WADC.

The player contended he should serve no period of ineligibility.[123] FIFA asserted a six-month period was appropriate,[124] and WADA requested a twenty-two-month period.[125]

The CAS Panel determined the player's fault for his ADRV "was not significant."[126] It concluded he had "light" fault based on the modified *Cilic* guidelines,[127] which would subject him to a suspension of zero to eight months. However, Article 10.5.2 precluded his otherwise applicable two-year period of ineligibility from being reduced to less than one-half of its length (i.e., one year).[128] The Panel imposed a suspension of fourteen months on the player,[129] but with the following caveat:

> Were the Panel entirely unconstrained by the [2015 WADC] as to sanction and empowered to determine the appropriate period of ineligibility *ex aequo et bono*, it could entertain with some sympathy the argument advanced by FIFA that such period should be no more than 6 months suspension in light of [several mitigating factors in the player's favour, including that his ADRV resulted from his consumption "of an ordinary drink which contained, contrary to his reasonable belief, a prohibited substance"].[130]
>
> [T]he CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC . . . *[because it is] the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end [and] has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction.*[131]

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120. *Id.* at 17, ¶¶ 76-77.
121. *See id.* at 10, ¶ 48.
122. *Id.* at 12, ¶ 62 (2018) (Switz.).
123. Guerrero v. FIFA, CAS 2018/A/5546 & CAS 2018/A/5571, Arbitral Award, 7, ¶ 43 (2018) (Switz.).
124. *Id.* at 9, ¶ 46.
125. *Id.* at 10, ¶ 48.
126. *Id.* at 18, ¶ 81.
127. *See id.* at 18-19, ¶ 82.
128. *See* WORLD ANTI-DOPING AGENCY, *supra* note 3, § 10.5.2.
129. *Guerrero*, CAS 2018/A/5546 at 19, ¶ 83.
130. *See id.* at 19, ¶ 84.
131. *See id.* at 20, ¶ 86-87.

VII. PERIOD OF DISQUALIFIED COMPETITION RESULTS, PERIOD OF INELIGIBILITY START DATE, AND CREDIT FOR A PROVISIONAL SUSPENSION

USADA v. Bailey[132] and *IAAF v. ADAK, AK & Ngandu Ndegwa*[133] provide good examples of the appropriate application of the following 2015 WADC provisions.

Article 9: "[An ADRV] in *Individual Sports* in connection with an *In-Competition* test automatically leads to *Disqualification* of the result obtained in that *Competition* . . . including forfeiture of any medals, points and prizes."[134]

Article 10.8:

> In addition to the automatic *Disqualification* of the results in the *Competition* which produced the positive *Sample* . . . all other competitive results . . . from the date a positive *Sample* was collected . . . through the commencement of any *Provisional Suspension* . . . shall, unless fairness requires otherwise, be *Disqualified* . . . .[135]

Article 10.11: "Except as provided below, the period of *Ineligibility* shall start on the date of the final hearing decision . . . ."[136]

> Article 10.11.2: Where the *Athlete* . . . promptly (which, in all events, for an *Athlete* means before the *Athlete* competes again) admits the [ADRV] after being confronted with [it] by the *Anti-Doping Organization,* the period of *Ineligibility* may start as early as the date of *Sample* collection . . . [W]here this Article is applied, the *Athlete* . . . shall serve at least one-half of the period of *Ineligibility* going forward from the date the *Athlete* . . . accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.[137]

Article 10.11.3.1: "If a *Provisional Suspension* is imposed and respected by the *Athlete* . . . , then the *Athlete* . . . shall receive a credit for such period . . . against any period of *Ineligibility* which may ultimately be imposed."[138]

In *USADA v. Ryan Bailey*, the athlete's January 10, 2017 in-competition sample tested positive for DMBA, a specified substance whose usage is prohibited in-competition, which subjected him to a two-year

132. U.S. Anti-Doping Agency v. Bailey, CAS 2017/A/5320, Arbitral Award (2018) (Switz.).
133. Int'l Ass'n of Athletics Fed'ns v. Anti-Doping Agency of Kenya, CAS 2017/A/5175, Partial Arbitral Award (2017) (Switz.).
134. WORLD ANTI-DOPING AGENCY, *supra* note 3, § 9.
135. *Id.* § 10.8.
136. *Id.* § 10.11.
137. *Id.* § 10.11.2.
138. *Id.* § 10.11.

period of ineligibility.[139] He subsequently competed in two bobsled competitions until being notified that his "A" sample tested positive for DMBA.[140] On January 29, 2017, he admitted his ADRV and accepted a provisional suspension.[141] On August 23, 2017, the AAA anti-doping panel disqualified his competition results from January 10, 2017 through January 29, 2017 and imposed a six-month suspension beginning on January 10, 2017 that ended on July 9, 2017 because it found he had no significant negligence or fault and only a light degree of fault for his ADRV.[142]

Pursuant to Article 10.11.2, the CAS Panel upheld the disqualification of the athlete's competition results from January 10, 2017 to January 29, 2017.[143] Because it found that he did have significant fault for his ADRV, the Panel imposed a two-year suspension.[144] In its November 30, 2017 Operative Award, in accordance with Article 10.11, the Panel determined that his two-year period of ineligibility started on November 30, 2017 and provided credit for the period of the suspension he already served from January 29, 2017 to July 9, 2017 pursuant to Article 10.11.3.1.[145]

In *IAAF v. ADAK, AK & Benjamin Ngandu Ndegwa*, a Kenyan long distance runner's June 6, 2015 in-competition sample tested positive for nandrolone.[146] He accepted a July 6, 2015 provisional suspension, but competed in nine events from February 28, 2016 through February 26, 2017.[147] In its November 17, 2017 Operative Award, the Panel disqualified all of his competition results from June 6, 2015 to date and suspended him for four years beginning on November 17, 2017.[148] It provided "no credit for any time he claimed to have been provisionally suspended"[149] because "where an athlete breaches a period of provisional suspension, he loses the entirety of the credit for such suspension (i.e., both the period before and after any breach."[150] The Panel

139. U.S. Anti-Doping Agency v. Bailey, 2017/A/5320, Arbitral Award, 3, ¶ 12, 4, ¶ 23 (2018) (Switz.).
140. *Id.* at 3, ¶¶ 9-12.
141. *Id.* at 3, ¶ 14.
142. *Id.* at 4, ¶¶ 21, 23.
143. *Id.* at 4, ¶¶ 21, 23, 19, ¶¶ 117-18.
144. *Id.* at 17, ¶¶ 112-113.
145. U.S. Anti-Doping Agency v. Bailey, 2017/A/5320, Arbitral Award, 18, ¶¶ 115-119 (2018) (Switz.).
146. Int'l Ass'n of Athletics Fed'ns v. Ngandu Ndegwa, CAS 2017/A/5175, Arbitral Award, 3, ¶¶ 4-6 (2018) (Switz.).
147. *Id.* at 4, ¶ 14, 9, ¶ 39.
148. *Id.* at 18, ¶¶ 1-5.
149. *See* Int'l Ass'n of Athletics Fed'ns v. Anti-Doping Agency of Kenya, CAS 2017/A/5175, Partial Arbitral Award, 17, ¶ 80 (2017) (Switz.).
150. *See id.* at 16, ¶ 79.

explained: "To permit otherwise, would undermine the purposes of the provisional suspension rule."[151]

IAAF v. ARAF, a first instance CAS Ordinary Division doping case, and its subsequent appeal to the CAS Appeals Division also provide illustrative guidance in determining the appropriate start date for an athlete's period of ineligibility and period of disqualified competition results.

In *IAAF v. ARAF,*[152] in his February 10, 2017 award, the Sole Arbitrator concluded that the athlete used multiple prohibited substances from July 26, 2010 through August 19, 2013, disqualified her competition results during this time period, and imposed the maximum four-year period of ineligibility beginning on August 24, 2015 (the date the IAAF provisionally suspended her).[153] Applying Rule 40.10 of the IAAF Rules (which in relevant part is substantially identical to Article 10.11 of the 2015 WADC), he explained: "for practical reasons and in order to avoid any eventual misunderstanding in the calculation of the period of ineligibility, the period of ineligibility should start on 24 August 2015, the date of commencement the provisional suspension and not of the date of the award."[154]

In *Farnosova v. IAAF,*[155] the CAS Panel upheld the Sole Arbitrator's sanctions and explained why they do not violate the principle of proportionality:

> The combined effects of such sanction[s] are severe, considering that its effective length is close to seven years and that the ADRV in question is a "first violation." However, it must also be kept in mind that disqualification and ineligibility serve different purposes. Disqualification is intended to reinstall a level playing field, i.e. to neutralize the illegal advantage obtained by an athlete in competition over his or her competitor. The period of ineligibility, in contrast, serves as a deterrent for the athlete concerned and for all other potential offenders. Thus, disqualification and period of ineligibility cannot be simply added together when assessing the overall proportionality of the sanction. The more competitions have been distorted, the longer the period of disqualification must be in order to prevent that harm is being done to the (undoped) competitors.[156]

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151. *See id.*
152. Int'l Ass'n of Athletics Fed'ns v. All Russ. Athletics Fed'n, CAS 2016/O/4481, Arbitral Award (2017) (Switz.).
153. *See id.* at 42-45, ¶¶ 178-200.
154. *See id.* at 42, ¶¶ 180-181.
155. Farnosova v. Int'l Ass'n of Athletics Fed'ns, CAS 2017/A/5045, Arbitral Award (2018) (Switz.).
156. *See id.* at 38, ¶ 138.

> In the case at hand, the Panel finds that the overall effects of the sanction are still proportionate considering the specificities of the case. The Athlete has distorted multiple high level competitions, damaged numerous other athletes and has breached the applicable rules on many occasions using multiple different substances and did so in full knowledge of the circumstances. The overall integrity of athletics has suffered heavily from the Athlete's behaviour. Such behaviour, thus, warrants a serious sanction. Therefore, the Panel finds that in light of the specific circumstances of this case the boundaries of public policy are not trespassed, even though technically speaking this is a first ADRV.[157]

VIII. CAS REVIEW OF INTERNATIONAL FEDERATION (IF) RETROACTIVE THERAPEUTIC USE EXEMPTION (TUE) DECISIONS

In *Dominguez v. Fédération Internationale de l'Automobile (FIA)*, despite granting his request for a prospective TUE, the FIA denied a driver's application for a retroactive TUE for two products containing amphetamine after his positive in-competition test for this prohibited substance because it does not satisfy the "*criteria to grant [it] on the basis of fairness.*"[158] But the FIA did not specify any reasons for its refusal to provide a retroactive TUE.[159]

The Panel determined that an IF must provide a reasoned decision for its refusal to grant a retroactive TUE because an athlete has a legitimate expectation to understand the denial, which affects his legal rights and defense of an alleged ADRV, and WADA needs to review its refusal.[160] Concluding that a denial based only on fairness criteria does not provide the required reasoning, the Panel set aside the FIA's decision and referred the driver's application for a retroactive TUE back to the FIA for reconsideration and a reasoned decision in due course.[161]

The Panel held that an athlete's right to CAS review of an IF's retroactive TUE decision under Article 4.4.7 of the 2015 WADC is not violated if the IF's rules effectively preclude *de novo* consideration of the IF's fairness assessment, which provides appropriate deference to the IF's exercise of discretion given its sport-specific expertise and experience.[162] It concluded that "CAS cannot replace its assessment of fairness" for that of an IF's TUE Committee, but that "appeals may still be

157. *See id.* at 38-39, ¶ 139.
158. *See* Dominguez v. Fédération Internationale de l'Automobile, CAS 2016/A/4772, Arbitral Award, 3, ¶¶ 5-14 (2012) (Switz.).
159. *Id.* at 4, ¶¶ 15-16.
160. *See id.* at 26-27, ¶¶ 103-30.
161. *Id.* at 26-27, ¶¶ 124-30.
162. *Id.* at 22, ¶ 99.

permitted on the ground that the decision was arbitrary, grossly disproportionate, irrational or perverse or otherwise outside of the margin of discretion, or taken in bad faith or [violated the athlete's] due process rights."[163]

IX. CONCLUDING REMARKS

The foregoing review of CAS jurisprudence provides a primer regarding several frequent issues in doping cases, including proof of ADRV violations by NAP evidence; rebuttal of presumed intentional ADRVs; proof of no fault or no significant fault; determination of the appropriate period of ineligibility less than a presumptive standard sanction; and determination of the proper period of disqualified competition results and period of ineligibility start date. It also identifies and describes two other CAS awards resolving important WADC issues. *Carter v. IOC* determined that the IOC has broad authority retest athlete samples from prior Olympic Games for the presence of prohibited substances. *Dominguez v. FIA* held that an IF must provide reasons for denying a retroactive TUE and is an example of one of the rare instances in which a CAS panel will not exercise *de novo* review over an IF's decision in a doping matter.

163. *See id.* at 22-23, ¶ 102.