

Cocaine, Doping and the Court of Arbitration for sport
« I don't like the drugs, but the drugs like me »

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Abstract :

Cocaine is one of the most widely consumed drugs in the world. It is also one of the most often detected stimulants by anti-doping authorities. Indeed, cocaine poses serious difficulties to sporting tribunals, as it challenges the legal boundaries of the World Anti Doping Code (WADC) drafted by the World Anti Doping Agency (WADA). Where does the private life of an athlete start and where does it end? Are there any legal mechanisms in place to take in account the specific context that has led to the contamination of an athlete? Is the sporting justice, and especially the Court of Arbitration for sport (CAS), showing clemency in regard to cocaine cases? In order to tackle these concerns, Section 1 will introduce the WADC 2009 rules. Thereafter, we will review the case law of the CAS on cocaine in Section 2 and draw some conclusions on the strict interpretation of the WADC by the CAS in Section 3. The new WADC 2015 and its potential repercussions in the context of cocaine cases will be discussed in Section 4. We will conclude by urging the CAS to make a long-overdue interpretative turn in anti-doping cases, leaving more room for contextual analysis and flexibility in the enforcement phase of the WADC.

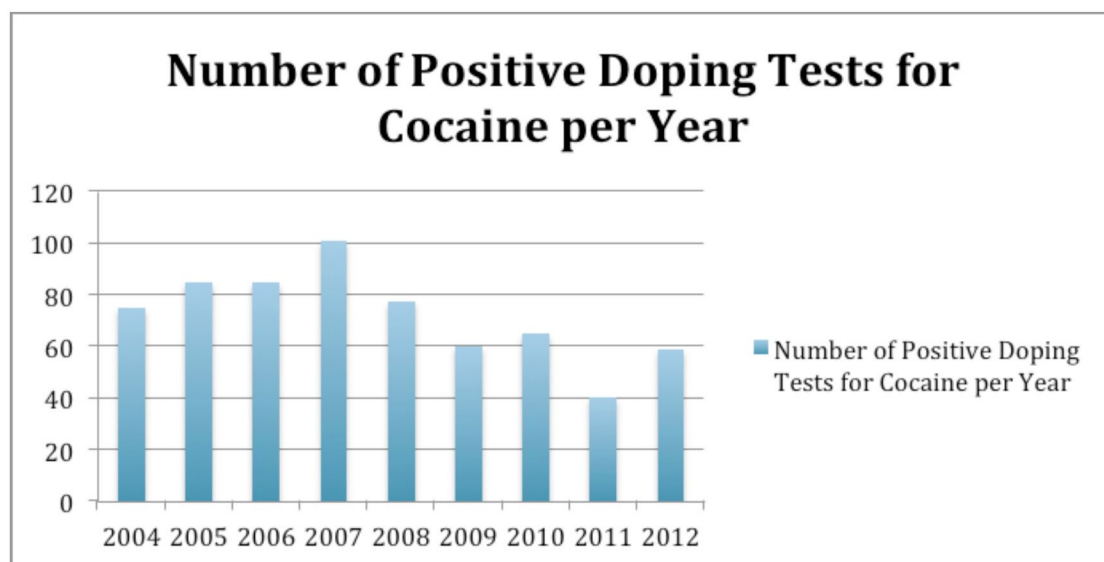
Introduction

In the beginning of April 2014, Omar Pinzon, a Colombian Olympic Swimmer, was cleared by the Court of Arbitration for Sport (CAS) of an adverse finding of Cocaine detected in a urine sample of 2013¹. He got lucky. Indeed, in his case the dramatic mismanagement and dilettante habits of Bogota's anti-doping laboratory saved him from a quasi-inevitable fate: a two-year sporting ban many other athletes have had the bad luck to experience.

Cocaine is a particular case in the doping world. Indeed, contrary to cannabis it is not a specified substance as defined by the World Anti-Doping Agency (WADA)². But, cocaine is not a normal drug either; it is widely consumed in a social and festive context, and in the form of coca leaves in the Andes. How to make the difference between an unlucky fellow and an outright cheat? As a principle, the Court of Arbitration for Sport has adopted a strict interpretation of the World Anti-doping Code (WADC) and places a heavy burden of justification on the athlete's shoulders if he is to be exonerated of a positive Cocaine doping test.

1. The 2009 WADC and Cocaine: The Tortuous Path out of a Ban

Cocaine is a stimulant, in fact one of the most commonly detected in doping tests.



The basic sanction foreseen by article 10.2 of the WADC 2009 in case of an adverse finding is a two-year ban. Cocaine has never been qualified as a specified

¹ CAS 2013/A/3170, Omar Pinzon v. Federacion Colombiana de Natacion

² Specified substances, as defined by art. 4.2 WADC 2009, are subjected to a specific anti-doping regime. In particular, concerning sanctions, art.10.4 WADC 2009 is applicable.

substance and therefore athletes cannot rely on article 10.4 WADC 2009 to obtain a reduction of the ineligibility period in case of specific circumstances.

Hence, in case of an adverse finding of cocaine, the Athlete disposes of only one possibility to obtain the “Elimination or Reduction of Period of *Ineligibility*”: the escape clause provided by article 10.5 WADC 2009. To this end, under the regime of article 10.5.1, an athlete must establish “that he or she bears No Fault or Negligence”. However, as Cocaine is a prohibited substance, “the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* eliminated”. Further, article 10.5.2 foresees that “[i]f an *Athlete* [...] establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the otherwise applicable period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable”. Finally, as Cocaine is a prohibited substance, “the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced”.

Thus, the key to getting a reduction, or removal, of an ineligibility due to a positive cocaine doping test, is to demonstrate a low (or no) degree of fault or negligence in the chain of events leading up to the contamination. In fact, a lot depends on the understanding by the CAS of the notions of “No Fault or Negligence” and of “No Significant Fault or Negligence”. As we will see, the CAS has adopted a very strict interpretation of those notions, rendering it quasi-impossible for an athlete to escape the two-year ban.

2. “I don’t like the drugs, but the drugs like me”: A Review of CAS’ Jurisprudence on Cocaine

Athletes caught with cocaine in their blood or urine have the tendency to blame their social environment, or bad luck, for it entering their system. In short, they don’t like Cocaine, but Cocaine likes them. As we will see in our extensive review of the CAS’s case law, going back in time before the entry into force of the WADC 2009, such excuses have had a very poor rate of success in front of the CAS.

2.1 CAS 2004/A/690

In this peculiar case the athlete “submitted that the consumption was destined to avoid the symptoms of altitude sickness and that he did not know that he was eating coca leaves”. In short, on a trip to visit a friend in the Andean, the athlete fell sick and consumed coca leaves and tisane that then led to the positive test. Despite considering this story credible, the CAS considered that “under the antidoping regulations inspired and influenced by the WADC, every athlete must be considered to be aware of the fact that he is responsible for any substance

found in his body”³. Concretely, the athlete should have inquired about the tea and leaves he was ingesting. Therefore the panel considered that the athlete “did not comply with his duty of care and thereby acted negligently”⁴. Moreover, the panel was of the opinion “that it must be assumed that the Appellant could have, should have, and indeed would have suspected that he was consuming cocaine or a related substance, if he had acted cautiously”⁵ and this negligence was considered as significant by the CAS⁶. The CAS refused to consider that the principle of proportionality could possibly be invoked to reduce the ban⁷. Hence, the athlete was banned for two years, starting the long sequence of cocaine-related cases in front of the CAS.

2.2 WADA v/Darko Stanic & Swiss Olympic⁸

Darko Stanic a professional handball player at Grasshoppers Zurich was tested positive in 2006 for cocaine. He argued that he had never taken cocaine on a voluntary basis and that a spiked cigarette he had gotten from one of his countrymen in a club must have contaminated him. The disciplinary chamber of Swiss Olympic accepted his story and handed him a shortened ban of six months. WADA, however, decided to exercise its right to appeal against this decision in front of the CAS. The first aspect that needs to be clarified is how Cocaine entered the body of the athlete. Indeed, “this precondition is important and necessary otherwise an athlete’s degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up”⁹. This “must be established as being more probable than not”¹⁰. Building on this standard, the panel considered, for a variety of reasons, “that it is improbable that Darko Stanic unknowingly smoked a cigarette containing cocaine or crack given to him in the discotheque by a stranger”¹¹. Hence, Darko Stanic was suspended for a period of two years.

2.3 Adams v/CCES¹²

This very unusual case concerned an elite-level, disabled Canadian track-and-field athlete named Jeffrey Adams. Adams had been tested positive for cocaine at an event, taking place in 2006. To his defense, he argued that a random woman had, against his will, introduced cocaine in his mouth at a bar, one week before the competition started, thereafter, as he is paraplegic, he had to use a catheter to urinate. He, then kept the catheter in the emergency pocket of his wheelchair,

³ CAS 2004/A/690, para.21

⁴ id, para.23

⁵ id, para.28

⁶ id, para.33-47

⁷ id, para.48-55

⁸ CAS 2006/A/1130

⁹ id, para.39

¹⁰ id, para.45

¹¹ id, para.51

¹² CAS 2007/A/1312

and re-used it for the doping test. Thus, he claims that the catheter contaminated with cocaine-tainted urine was the source of the adverse finding. The Canadian doping tribunal did not consider this explanation credible, and sanctioned him with the two-year ban. Thus, Adams appealed against the decision in front of the CAS. The Panel considered that “[t]he circumstances of this case are, in our view, also truly exceptional”¹³. Indeed, “[t]he Appellant was the victim of an assault in the Vatican bar which led to his ingestion of cocaine”, therefore “[h]e cannot be held to have been negligent or otherwise at fault in not preventing that incident from occurring”¹⁴. Moreover, “the Appellant was not at fault because he could not reasonably have appreciated the risks of using a used catheter”¹⁵. Hence, the arbitrators concluded that “[w]hile we still find the Appellant to have committed the strict liability violation of presence of a Prohibited Substance, in the unique circumstances of this case, we must eliminate the Appellant's Ineligibility period under CADP Rule 7.38 because he was not at fault”¹⁶.

2.4 WADA v/ FAW and James¹⁷

Mr James, a football player with the English team Welshpool Town FC, was controlled positive for cocaine in 2007. The disciplinary Panel of the Welsh Football Association suspended him for 6 months and 10 days. However, WADA filed a statement of appeal with the CAS against the decision. The player argued “that he ha[d] never taken drugs before, and that on the occasion at issue, he was acting “under extreme peer pressure in an unfamiliar environment””¹⁸. The panel considered that “Mr. James admittedly ingested cocaine during a night of partying in Liverpool with his friends, knowing that he was taking “some drugs””. Hence, he “acted with fault and negligence in regard to the anti-doping rule violation”¹⁹. Moreover, “Mr. James knew that he was taking drugs, and any peer pressure he may have felt does not make his case “truly exceptional” so as to reduce his responsibility”²⁰. Rather, the panel continued, if it were to accept peer pressure as a mitigating circumstance, it “would create a loophole enabling athletes who have been found guilty of a doping offence to obtain an unwarranted reduction of the sanction provided for by the applicable anti-doping regulations”. Eventually, the ban was raised to the usual two years.

2.5 WADA v. CONI, FPI & Elga Comastri²¹

¹³ id, §157

¹⁴ id, §159

¹⁵id, §160

¹⁶id, §160

¹⁷ CAS 2007/A/1364

¹⁸ id, para. §4.10

¹⁹ id, para. §7.8

²⁰ id, para. §7.11

²¹ CAS 2008/A/1479

Elga Comastri, an Italian boxer, was subjected to a doping test in May 2007, which resulted in a positive finding for cocaine. The Italian Corte d'Appello Federale ruled that she had committed a doping offence and gave her a one-year ban; this decision was later appealed to the CAS by WADA. The athlete admitted "that she ingested cocaine offered to her at a friend's house while out of competition"²². Henceforth, the panel considered that "[w]illfully ingesting drugs offered by a friend, whether the Athlete knew the drugs to be prohibited or not, is an act for which the Athlete is at unmitigated fault"²³, this alone justified that the ban be raised to a two-year period of suspension.

*2.6 WADA v/Swiss Olympic Association & Simon Daubney*²⁴

This case concerned a professional sailor from New Zealand, Simon Daubney, which was tested positive for cocaine in the framework of the America's Cup in July 2007. Upon this finding, the Swiss Olympic Disciplinary Committee, to which Mr. Daubney was affiliated, decided not to impose any sanction against him. The decision was notified to WADA, which in turn exercised its right to appeal the decision to the CAS. Mr. Daubney asserted that cocaine was put in a spiked drink by some New Zealand fans. He even undertook a polygraph test (a lie detector), in order to demonstrate that he had never willingly used cocaine. However, the panel excluded the use of the polygraph "as per se evidence under Swiss law"²⁵. Further, it considered "that Mr Simon Daubney failed to establish if the "sabotage" occurred when he was in Palma, in the Australian Dam Bar or in the local tavern with his family". Moreover, "the Panel is of the view that Mr. Daubney failed both the "No Fault or Negligence" test and the "No significant Fault or Negligence" test"²⁶. Indeed, "[a]s an experienced athlete, he could not ignore that he should pay attention to what he was drinking and from whom he got the drinks, which he did not"²⁷. In fact, "[h]is departure from the required duty of caution ("utmost caution") and his fault is even greater as he went in a very hostile bar and, therefore, accepted to expose himself to the malevolence of any fan, just a few days before the beginning of the competition"²⁸. In short, "[h]e willingly put himself in an unsure situation and must take the responsibility for it"²⁹. Hence, he also faced the two-years ban.

*2.7 WADA v/ CONI, FITET and Piacentini*³⁰

²² id, para.46

²³ id, para.53

²⁴ CAS 2008/A/1515

²⁵ id, para.119

²⁶ id, para.122

²⁷ id, para.125

²⁸ Idem

²⁹ Idem

³⁰ CAS 2008/A/1516

Valentino Piacentini, a professional table tennis player, was tested positive for cocaine in 2007. Thereafter, the disciplinary judge of the Italian Olympic Committee (CONI) suspended him for 1 year and 8 months. Upon receiving the notification of the decision, WADA filed an appeal to the CAS against this decision. Piacentini confessed “to have consumed cocaine...at a party”, saying “that he consumed the cocaine in a moment of euphoria but not with the intention to increase his athletic performance capability”³¹. The Sole arbitrator was unimpressed by Piacentini’s plea and asserted “that the present case corresponds in no way to an exceptional circumstance pursuant to the standard mentioned and its interpretation, as Mr. Piacentini knew prior to consuming the cocaine positively of the character of the substance which he may well have consumed in a state of euphoria but nevertheless in knowledge of the circumstances and finally intentionally”³². Thus, he is also to face a two-years ban.

*2.8 International Tennis Federation (ITF) & World Anti-Doping Agency (WADA) v. Richard Gasquet*³³

Richard Gasquet’s case, due to its intriguing factual circumstances, is probably the most well-known cocaine-related CAS award. Gasquet took a doping test at the Miami Open in March 2009, which turned out to be positive to cocaine. Gasquet’s defence was built on the fact that the night before the test he was invited to a discotheque by a famous French DJ and that during the festivities he had kissed a girl, the mysterious “Pamela”, which had consumed cocaine and thus contaminated him. This story was supported by evidence, especially tests on hair samples showed that Pamela was a usual consumer of cocaine and that Gasquet was not. The ITF tribunal, apparently convinced by Gasquet’s arguments, suspended him for only two months and a half. This decision was appealed to the CAS by WADA and ITF itself. First, the player needed to show how, on a balance of probabilities standard, the cocaine entered his body³⁴. The panel recognized the hair test as a sufficient proof that the player was no usual consumer of cocaine³⁵, nor was it likely that his drink was spiked³⁶. Therefore, the theory involving ‘Pamela’ was to be considered seriously. The panel stated “that it is more likely than not that Pamela ingested cocaine during the night she met the Player”³⁷, that it was possible for the player to be contaminated by a kiss³⁸ and concluded therefore “that it is more likely than not that the Player’s

³¹ id, para.6.2

³² id, para.6.7

³³ CAS 2009/A/1926 & 1930

³⁴ id, para.29-48

³⁵ id, para.34

³⁶ id, para.36-40

³⁷ id, para.45

³⁸ id, para.46

contamination with cocaine resulted from kissing Pamela”³⁹. However, this finding as such was not sufficient to absolve Gasquet, indeed the Panel needed also to consider whether the player acted with no fault or negligence, or with no significant fault or negligence⁴⁰. In this regard, the panel was of the view that “[i]t was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine”⁴¹. And asked rhetorically: “is it the intention of the Programme or of the WADA Code to make a reproach to a player if he kisses an attractive stranger who he met the same evening, under the circumstances such as in the present case?” Before answering clearly that “[t]his can obviously not be the intention of any Anti-doping Programme”⁴². Hence, the Panel “[came] to the conclusion that by kissing Pamela, and thereby accidentally and absolutely unpredictably, even when exercising the utmost caution, getting contaminated with cocaine, the Player acted without fault or negligence”⁴³. Eventually, the initial decision was upheld.

*2.9 Doping Authority Netherlands v. N*⁴⁴

In this case a young Dutch billiard player was tested positive for cocaine in April 2009. The Dutch Appeals Committee (DAC) imposed a one-year ban; the National Anti-Doping Organization (NADO) appealed this decision to the CAS. During the DAC proceedings the athlete explained “that the prohibited stimulant came to be present in his system because he was tempted to take a single joint of cocaine, or actually no more than one or two sniffs at a party four days before the match”⁴⁵. The Sole Arbitrator considered this behaviour as “significantly negligent under the circumstances”⁴⁶ and that the athlete “knowingly and wilfully accepted the risk that a prohibited substance would still be present in his body at the day of the match”⁴⁷. Thus, “the Sole Arbitrator finds that the Athlete’s degree of fault or negligence, viewed in the totality of the circumstances, is clearly “significant” in relation to the anti-doping rule violation”⁴⁸. No reduction of the sanction is available on the basis of the proportionality principle; consequently the athlete was banned for two years.

*2.10 WADA v/RFEF & Mr. Gregorio Ciudad Real Linares*⁴⁹

³⁹ id, para.47

⁴⁰ id, para.48

⁴¹ id, para.53

⁴² id, para.54

⁴³ id, para.55

⁴⁴ CAS 2009/A/2012

⁴⁵ id, para.26

⁴⁶ id, para.29

⁴⁷ id, para.31

⁴⁸ id, para.32

⁴⁹ CAS 2010/A/2062

Gregorio Linares, a Spanish football player, was tested positive for cocaine in June 2009. After the Competition Judge of the RFEF sanctioned him to a one-year ban, the decision was appealed by WADA to the CAS. However, the player did not defend himself, and therefore he was quasi-automatically sanctioned with a two-year ban.

2.11 WADA v/ Jobson Leandro Pereira de Oliveira, CBF and SJTD⁵⁰

Jobson Leandro Pereira de Oliveira is a Brazilian professional football player. He was tested positive for cocaine after a game with Botafogo in December 2009. The Brazilian Superior Tribunal de Justiça desportiva de Futebol suspended him, on appeal, for six months. The decision was communicated to the FIFA and then to WADA, which lodged a final appeal before the CAS. In his defence, the player argued “that he bore no significant fault or negligence because he was suffering from an irresistible coercion caused by his cocaine-dependence syndrome that did not allow him to control the cocaine use at the relevant time”⁵¹. The Panel considered that in order to assert that the player bore no significant fault or negligence, it “will have to consider whether the cocaine-dependency syndrome alleged by the Player can be considered an ‘exceptional circumstance’ which is ‘truly exceptional’; and whether the evidence of the cocaine-dependency syndrome is specific and decisive to explain the Player’s departure from the expected standard of behaviour”⁵². But, “the Panel [found] that the elements offered by the Player are not sufficient to establish, on the balance of probability, that he bore no ‘significant fault or negligence’”⁵³. Indeed, “[t]he Panel is not convinced that the evidence presented by the Player regarding his cocaine-dependency syndrome is specific and decisive to explain the Player’s departure from the expected standard of behavior”⁵⁴. More precisely, the Panel “is not convinced that the Player has proved, on the balance of probability, that he could not have taken precautions to avoid using cocaine during ‘in-competition’ periods while playing for Botafogo and thus follow the expected standard behaviour”⁵⁵. Consequently, the Player faces a two-year ban.

3. Ice-Cold CAS

The national anti-doping judges have a good heart. They are amenable to clemency. Indeed, in many (if not all) of the above-mentioned cases, the first instance anti-doping judges have been receptive to the athletes’ pleas and therefore their decisions were appealed by WADA. As cocaine is usually consumed in a social context, with neither the intention nor the capacity to improve one’s sporting performances, this is quite an understandable feeling:

⁵⁰ CAS 2011/A/2307

⁵¹ id, para.132

⁵² id, para.140

⁵³ id, para.157

⁵⁴ id, para.166

⁵⁵ id, para.167

Anti-doping rules are meant to catch the cheats willing to rig the game, not the lone souls looking for some social warmth⁵⁶. But, no, WADA and the CAS do not care about feelings, the ice-cold strict liability principle dominates, implying that quasi any adverse finding will be considered a doping offence and punished as such, whatever the reasons behind the contamination, unless the athlete can prove that he did not acted negligently⁵⁷. But as we can draw from our review of the case law of the CAS in matters concerning cocaine, and beyond⁵⁸, this is a very high hurdle to pass. Since 2005, to our knowledge, only two athletes caught with cocaine have managed to clear it in front of the CAS: Richard Gasquet and Jeffrey Adams. However, Gasquet was supported by an army of lawyers operating with quasi-unlimited means (hair tests, testimonies, independent experts, public support) and both concerned very atypical factual circumstances (a death kiss and a perfidious assault). In fact, more trivial athletes, with more trivial stories, have had a very hard time proving their innocence, or even just the way the drug entered their body. At this point, it is quite clear that honesty does not pay off, admitting having taken the drug in a social context is a definitive loser, arguing that one did not know the consequences or did not want to enhance his own performances too. To have a chance in case of a positive cocaine finding, an athlete must either contest the testing process, as Omar Pinzon did⁵⁹, or build up a very convincing (and expensive) case explaining how the cocaine entered the body and demonstrating how he or she could not have done anything to avoid it. It is a very difficult and costly endeavour, moreover, unlikely to succeed⁶⁰. For now, the best legal recommendation, one could have for professional athletes would be: beware of cocaine!

4. The New 2015 WADC and Cocaine: A Stairway to heaven?

Is it all about to change with the new WADC 2015? One of the drivers of the reform process was the ambition to better distinguish between the use of drugs in order to enhance the sporting performances and the social recourse to certain drugs outside of the sporting context⁶¹. To this end, the sanctioning framework has been reformed.

⁵⁶ On the need to focus on cheats, see P.A. Czarnota, 'The World Anti-Doping Code, the Athlete's Duty of « Utmost Caution, » and the Elimination of Cheating', 23 *Marq. Sports L. Rev.* 45 2012-2013 and M. Hard, 'Caught in the net: Athletes' Rights and the World Anti-Doping Agency', 19 *S. Cal. Interdisc. L.J.* 533 2009-2010, at 562

⁵⁷ See above discussion on the WADC 2009 Article 10.4 and 10.5

⁵⁸ M. Hard, 'Caught in the net: Athletes' Rights and the World Anti-Doping Agency', 19 *S. Cal. Interdisc. L.J.* 533 2009-2010, at 554 and P.A. Czarnota, 'The World Anti-Doping Code, the Athlete's Duty of « Utmost Caution, » and the Elimination of Cheating', 23 *Marq. Sports L. Rev.* 45 2012-2013 at 57-62

⁵⁹ CAS 2013/A/3170, Omar Pinzon v. Federacion Colombiana de Natacion

⁶⁰ Indeed, despite spending a lot of money on legal fees and scientific test, Mr. Daubney was also sanctioned to a two-year ineligibility by CAS.

⁶¹ A. Rigozzi, M. Viret & E. Wisnosky, 'Does the World Anti-Doping Code Revision Live up to its Promises?' in : *Jusletter* 11 novembre 2013, at Rz 90-91 and Rz 122-127

However, paradoxically, the new code introduces an even harsher, four-year ban, if “[t]he anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional”⁶². Intentional in this context is constituted when an “Athlete [...] engaged in conduct which he or she 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”, furthermore, “[a]n anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not “intentional” if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition”⁶³. Cocaine is prohibited only in-competition, but, as explained above, it is not a specified substance. Hence, to escape the four-year ineligibility athletes caught with cocaine in their blood or urine will have to demonstrate that their contamination was unintentional in the sense of Article 10.2.3 ⁶⁴.

However, if they manage to achieve this, athletes are not out of the woods yet. Indeed, it is far from enough to exonerate them totally from any sanction. Rather, to avoid the normal two-year ineligibility they will have to fulfill the conditions set out in article 10.4 and 10.5. First, 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”⁶⁵. However, this does not seem to alter fundamentally the strict standard set out in the Code 2009, such an assessment is corroborated by the comment included in the WADC 2015 under article 10.4 and 10.5.2. It indicates that “[t]hey will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor”. In practice, unless one has the luck and the investigative means of Richard Gasquet, it is very unlikely that an athlete will be able to establish “No Fault or Negligence” in the light of the aforementioned CAS jurisprudence.

Nevertheless, under the regime of article 10.5 the sanction might possibly be reduced more easily. Indeed, article 10.5.2 states that “[i]f an Athlete or other Person establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person’s

⁶² Article 10 2.1.1 WADC 2015

⁶³ Article 10.2.3 WADC 2015

⁶⁴ On the subtleties of the new intentional criteria, see (A. Rigozzi, M. Viret & E. Wisnosky, 2014 at Rz10-16)

⁶⁵ Article 10.4 WADC 2015

degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable". As pointed out in the previous paragraph, article 10.5.2 is also subject to the very restrictive comment included under article 10.4. Athletes are no longer confronted with the obligation to demonstrate how the substance entered their body, but they must still establish that their behavior meets the standard of "No Significant Fault or Negligence". As we have shown above, the existing case law of the CAS in this regard is not very encouraging for the prospects of an athlete caught in a doping case involving cocaine. In fact, unless the CAS modifies its interpretation of "No Significant Fault or Negligence", potentially relying in this regard on the clear intention of the drafters of the 2015 WADC to focus the Code against the cheater and not against the negligent, there is little hope for relief. Moreover, such a move would imply a radical interpretative shift, supported only by a minimal textual evolution of the rules⁶⁶. Therefore, the safest way to avoid a ban is to ensure that no cocaine enters an athlete's organism before a sporting competition. Eventually, under the WADC 2015, the path to escape a sanction for athletes exposed, in a voluntary or involuntary way, to cocaine, remains a protracted one: a vicious circle rather than a stairway to heaven.

5. Conclusion

The cocaine case-law of the CAS illustrates the failures of the anti-doping system imposed by WADA. Indeed, WADA's repressive apparatus - à la foucault⁶⁷ - catches anything but the big fishes. Even though in the overwhelming majority of cases, cocaine does not improve their performances, athletes face a ban of two years from their work. And two years is a very long time if one has only 10 years to shine⁶⁸. Is it proportionate to the objective pursued by the fight against doping? Is it the least intrusive means to fight against doping? Are there any alternative means to this end? Some start doubting the necessity of the anti-doping system as such⁶⁹. Indeed, the reasons underlying doping might also be considered structural⁷⁰, this would imply that doping could only be tackled by a comprehensive reform of sport, not solely via punitive measures. Finally, reports are emerging, highlighting the fact that the approach adopted so far has been inefficient in reining in the doping epidemic⁷¹, a fact acknowledged by WADA⁷².

⁶⁶ Arguing in favour of such a shift and tracking closely the textual evolution, see A. Rigozzi, M. Viret & E. Wisnosky, 'Does the World Anti-Doping Code Revision Live up to its Promises?' in : *Jusletter* 11 novembre 2013, at Rz 136 - 139

⁶⁷ WADA is very much in line with the Benthamite ideal beautifully described by M. Foucault in *Surveiller et Punir*.

⁶⁸ M. Hard, 'Caught in the net: Athletes' Rights and the World Anti-Doping Agency', 19 S. Cal. Interdisc. L.J. 533 2009-2010, at 535

⁶⁹ D. Bodin & G. Sempé, « Faut-il légaliser le dopage ? », *Revue du MAUSS*, 2012/2 n° 40, p. 321-334

⁷⁰ See the report to the European Commission by KPMG and ASSER Instituut, 'Aren't we all positive' - A (socio) economic analysis of doping in elite sport, 2002 (on file with the author)

⁷¹ 'Study Revealing Doping in Track Strikes Hurdle', *New York Times*, 24 August 2013

Thus, what could be done to save the baby from the bathwater? Indeed, WADA does pursue a legitimate function, which is to provide common standards and control mechanisms to safeguard sport's integrity and competitive fairness. However, and the Code 2015 is a missed opportunity in this regard⁷³, in the future WADA must strive to develop smarter and more flexible rules, enabling a contextual case-by-case approach. In fact, such a flexible assessment could and should be adopted by the CAS when interpreting and applying the 'No Significant Fault or Negligence' criteria⁷⁴. Indeed, it is high time to end the blunt and Manichean approach to doping cases. Where it is obvious that an athlete did not have the intention and the possibility to profit from ingesting a banned substance, he should face a limited penalty, if any. Unless such a turn is initiated, more injustices will be made and more athletes will be angrily contesting the anti-doping system in front of national⁷⁵ and European⁷⁶ courts, until the whole edifice breaks down⁷⁷.

⁷² 'Il y a beaucoup plus de dopés que de sanctionnés', interview with J. Fahey, in *Le Monde*, 12 November 2013; see also the *Report to WADA Executive Committee on Lack of effectiveness of Testing Programs* available at: http://www.wada-ama.org/Documents/World_Anti-Doping_Program/Reports-Assessments/2013-05-12-Lack-of-effectiveness-of-testing-WG-Report-Final.pdf

⁷³ Despite the calls for reform, see P.A. Czarnota, 'The World Anti-Doping Code, the Athlete's Duty of « Utmost Caution, » and the Elimination of Cheating', 23 *Marq. Sports L. Rev.* 45 2012-2013 at 68

⁷⁴ For a similar view, see A. Rigozzi, M. Viret & E. Wisnosky, 'Does the World Anti-Doping Code Revision Live up to its Promises?' in : *Jusletter* 11 novembre 2013, at Rz 136 - 139

⁷⁵ See the recent decision by the LG München, contesting the validity of arbitration clauses imposed on athletes in the framework of the fight against doping. Ruling from the 26 February 2014, 37 O 28331/12, available at <http://openjur.de/u/678775.html>

⁷⁶ For some examples from the Court of Justice of the EU see Case C-519/04 P, *David Meca-Medina, Igor Majcen v Commission of the European Communities*, [2006], ECR I-06991 and Case C-269/12 P, *Guillermo Cañas v European Commission, World Anti-doping Agency, ATP Tour, Inc*, Judgement of 20 June, Not yet published; and from the European Court of Human Rights, ECtHR, *Claudia Pechtein v. Switzerland*, Appl. No. 67474/10, Pending

⁷⁷ Indeed, "If anti-doping laws are seen as arbitrary, hypocritical, and over-inclusive they will lose credibility, thus making the burden they place on athletes questionable." M. Hard, 'Caught in the net: Athletes' Rights and the World Anti-Doping Agency', 19 *S. Cal. Interdisc. L.J.* 533 2009-2010, at 534

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