IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS BROUGHT BY THE INTERNATIONAL BASEBALL FEDERATION AGAINST ROGER LUQUE FOR VIOLATION OF THE IBAF ANTI-DOPING RULES (IBAF 10-001)

FINAL AWARD OF THE IBAF ANTI-DOPING TRIBUNAL

The Anti-Doping Tribunal convened to hear and determine the disciplinary charge brought by the International Baseball Federation (the **'IBAF'**) against Mr Roger Luque (the **'Player'**) for violation of the 2009 IBAF Anti-Doping Rules (the **'IBAF ADR'**) hereby issues the following Final Award:

1. <u>Facts</u>

The Parties

1.1 The IBAF, headquartered in Lausanne, Switzerland, is recognised by the IOC as the international governing body for the sport of baseball. In particular, the IBAF sanctions the Baseball World Cup, a baseball tournament contested by the national representative teams of various of the IBAF's member federations. The 2009 version of the Baseball World Cup (the **'2009 BWC'**) took place in Europe in September 2009.

1.2 The Player is a 30 year-old professional baseball player who has played professional baseball for over ten years. He was selected to play for Venezuela in the 2009 BWC.

The IBAF Anti-Doping Rules

1.3 As part of its responsibility to protect the integrity of the sport of baseball, the IBAF has issued the IBAF ADR. Based on the World Anti-Doping Code, they contain detailed provisions that are designed to implement and apply the provisions of that Code to baseball events sanctioned by the IBAF, including the 2009 BWC.[1]

1.4 The 2009 IBAF ADR were approved by the IBAF Executive Committee on 7 November 2008 and came into force as of 1 January 2009.[2] In accordance with the World Anti-Doping Code, they allow for drug-testing of players both

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[1] The IBAF ADR are stated to apply *'to IBAF, each National Federation of IBAF, and each Participant in the activities of IBAF or any of its National Federations by virtue of the Participant's membership, accreditation, or participation in IBAF, its National Federations, or their activities or Events.'* (IBAF ADR. Introduction, p.4). For these purposes, the term '*Event*' encompasses *'IBAF Sanctioned Events'*, i.e., an event played between national teams representing IBAF member federations (IBAF ADR Article 5.4). The 2009 Baseball World Cup falls into this category.

[2] IBAF ADR p.1.

in and out of competition,[3] to check for the presence in the samples collected from the players of evidence of prohibited substances or prohibited methods, as identified in the List of Prohibited Substances and Methods issued by the World Anti-Doping Agency (**'WADA'**).[4]

The sample collected from the Player

1.5 The Player was required to give a urine sample on 19 September 2009 as part of an in-competition test in connection with the second round 2009 BWC match between Venezuela and Puerto Rico played in Haarlem, Netherlands. He provided a sample and signed the doping control form without adverse comment, so indicating his satisfaction with the sample collection procedures followed in conducting the test.

Adverse Analytical Finding

1.6 The Player's urine sample was sent to the WADA-accredited laboratory in Ghent, Belgium for analysis. The Ghent laboratory analysed the sample and on 7 October 2009 it reported an adverse analytical finding for Stanozolol and 4-OH-Stanozolol (a metabolite of Stanozolol). Stanozolol is a potent anabolic steroid and is included on the Prohibited List in category S1, i.e., as an anabolic agent that is banned at all times.

2. Procedural History

2.1 In accordance with IBAF ADR Article 7.1.4, on 15 October 2009 the IBAF sent a 'Notification of a Possible Anti-Doping Rule Violation' to the President of the Venezuelan Baseball Federation, advising of the Adverse Analytical Finding made by the Ghent laboratory in respect of the Player's A sample, confirming the Player's right to request analysis of his B sample, noting that if analysis of the B sample was not requested within 10 days then the right to such analysis would be deemed waived, and asking the President to bring the contents of the notice to the attention of the Player immediately.

2.2 The IBAF did not receive any response from the Venezuelan Baseball Federation. The Player says the Federation did not bring the notice to his attention. The Tribunal recommends that the IBAF introduce into its rules a sanction applicable to national federations who fail to pass on such notices to their players.

2.3 On 25 February 2010, the IBAF sent the Player a letter by email, giving him notice that he was being charged with an anti-doping rule violation under Article 2.1 of the IBAF ADR (presence of a Prohibited Substance or its Metabolites or Markers in athlete's sample).

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[3] IBAF ADR Article 5.

[4] IBAF ADR Article 4.1.

2.4 The Player acknowledged receipt of the Notice of Charge on 25 February 2010 and asked for clarification, which the IBAF duly provided on 3 March 2010. The IBAF subsequently agreed to extend the original deadline for the Player's response from 8 March 2010 until 21 March 2010 to enable the Player to take legal advice.

2.5 On 15 March 2010, the Player advised the IBAF that he had spent some time in hospital earlier in 2009 and the Stanozolol must have been administered to him as part of the treatment he received there, because he had not taken any Stanozolol himself. On 20 March 2010, the Player submitted a more fomal response, with supporting evidence, as follows:

> *I was calmly driving in my car down a street in the city of Caracas when the brakes of an Encava bus failed, crashing into my car from behind and thus causing me to hit another vehicle of the same description. The impact was so strong that I was consequently left with bruises all over my body and an injury to my right leg. As a result, I received first aid services from the capital district fire fighters and was moved to the closest hospital, in this case the military hospital Dr. "Carlos Arvelo" located at San Martin parish San Juan Caracas, Venezuela.*
>
> *I was cared for very well in this institution and was given the medical assistance necessary for my improvement and recovery, during which time I was administered a series of medications for my injuries.*
>
> *After having spent some time in the hospital, the medical personnel of the same institution explained to me the amount of medications they had administered to me, which included Stanozonol, the chemical composition of which I did not recognize. This medication was administered to me for medical purposes only and under the health personnel's supervision, and not to improve my athletic performance, as I have played baseball for 13 years and have never used any type of substance, something I would never do since it would place my professional athletic career at risk, which until now I have performed with dignity and honour.*

2.6 As corroboration of the above, the Player has also provided a statement from the hospital, along with copies of clinical notes, confirming:

2.6.1 that the Player was admitted to the hospital in question on 15 July 2009 following a car accident;

2.6.2 that the Player had *"multiple trauma and contusions to his lower limbs and loss of muscle mass in the lower right limb"*;

2.6.3 that the Player was prescribed Stanozolol for his injuries, which was administered intravenously in three doses of 50 Mg each, the first on 18 July 2009 (it is not clear how soon the other two doses were applied, but it appears it was within days if not hours of the first dose);

2.6.4 that Stanozolol remains in the body long after its administration; and

2.6.5 that the hospital *"assumes responsibility for the administration of this medication ..., knowing that the administration of this medication places his career as an athlete at risk."*

2.7 In response, the IBAF asked the Player for further information in the form of detailed clinical records from the hospital. These were provided on 8 June 2010.

2.8 The IBAF filed a written submission with the Tribunal on 30 June 2010. It did not challenge the Player's explanation of how the Stanozolol came to be in his system on 19 September 2009, nor did it dispute his claim that he did not take Stanozolol in order to enhance his performance. However, it noted that he should have known that Stanozolol was a prohibited substance for a baseball player and therefore (assuming he was conscious when it was administered to him in the hospital – and there is no claim to the contrary) he should have questioned the doctors and made sure they did not administer a prohibited substance to him (there being many better treatments for soft tissue injuries, according to the Chairman of the IBAF Medical Commission, whose report was filed as part of the IBAF's submission). The IBAF also points out that although the Player was subsequently told that Stanozolol had been administered to him, at no point did the Player apply for a retroactive Therapeutic Use Exemption (as the IBAF ADR allowed him to do), even though he was about to compete in the 2009 BWC.

2.9 On instruction from the Tribunal, the IBAF sent a copy of its submission to the Player by email on 25 August 2010, inviting the Player to respond by 8 September 2010. However, no reply was received from the Player.

2.10 It is against this background and on the basis of these submissions that the Tribunal makes its ruling below.

3. Jurisdiction

3.1 This Tribunal's jurisdiction to hear and determine the charge brought by the IBAF against the Player derives from IBAF ADR Article 8, which provides that cases arising out of IBAF Testing and Testing conducted at International Events will be determined by a tribunal convened by the Chairman of the IBAF Anti-Doping Panel from the members of that panel.

3.2 The Chairman of the IBAF Anti-Doping Panel decided to sit alone on the Tribunal convened under IBAF ADR Article 8.2 to hear and determine the charge made against the Player.[5] The Player has not challenged the jurisdiction of this Tribunal to hear and determine this matter.

3.3 It appears that the relevant facts are not disputed. Furthermore, each party had ample opportunity to make such submissions that it wished to make as to the rules and applicable law in writing. Accordingly, the Tribunal feels able to

[5] The Tribunal has been supported in its work by Elizabeth Riley, an associate in the Chairman's law firm, acting as *ad hoc* clerk to the Tribunal.

make the following rulings without a hearing, based solely on the written submissions now before it. It has to decide, first, if the Player has committed an anti-doping rule violation. It deals with that issue at Section 4, below. Having done so, it has to decide what sanctions should be imposed on the Player as a consequence of that violation. It deals with this at Sections 5 and 6, below.

4 The Player's Commission of an Anti-Doping Rule Violation

4.1 Under IBAF ADR Article 3.1, the burden is on the IBAF to prove that the Player committed the anti-doping rule violation with which he has been charged.

4.2 Here the charge is violation of Article 2.1, i.e. *"presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample"*. This is a 'strict liability' offence: baseball players subject to the IBAF ADR are strictly responsible for any Prohibited Substances found in their samples; no proof is required of any intent, fault, negligence or even knowledge on the part of the player charged in order to establish a violation under Article 2.1.[6]

4.3 Therefore, to discharge its burden, the IBAF must prove, to the comfortable satisfaction of the Tribunal,[7] that a Prohibited Substance or its Metabolites or Markers was present in the urine sample collected from the Player on 19 September 2009. The IBAF may prove this *"by any reliable means"*.[8]

4.4 In support of its charge, the IBAF relies on the adverse analytical finding of the WADA-accredited laboratory in Ghent. According to the definition of 'International Standard' in the IBAF ADR, if that finding is a product of procedures that complied with the requirements of the International Standard for Laboratories, then that is sufficient to conclude that the procedures were sound (and therefore the findings are reliable). And IBAF ADR Article 3.2 provides that WADA-accredited laboratories are presumed to have complied with the International Standard for Laboratories and that it is for the athlete to prove otherwise. In other words, it is presumed that adverse analytical findings issued by WADA-accredited laboratories are reliable, and the burden is on the athlete to adduce evidence that suggests otherwise.

4.5 The Player has not disputed the findings of the Ghent laboratory, and nor did he request that his B sample be analysed to confirm the adverse analytical finding made in respect of his A sample. In such circumstances, IBAF ADR Article 7.1.5 provides that the Player is deemed to have accepted the accuracy

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6 See IBAF ADR Article 2.1.1 ('*it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.*') and comment thereto ('*The violation occurs whether or not the Athlete intentionally or unintentionally used a Prohibited Substance or was negligent or otherwise at fault.*'). Instead, issues of fault or negligence become relevant only at the sanctioning stage.

7 IBAF ADR Article 3.1.

8 IBAF ADR Article 3.2.

of the adverse analytical finding made by the Ghent laboratory in respect of his A sample.

4.6 The Tribunal therefore finds that Stanozolol and 4-OH-Stanozolol were present in the urine sample collected from the Player on 19 September 2009. According to the 2009 Prohibited List, Stanozolol is a Prohibited Substance, the use of which is banned at all times, both in-competition and out-of-competition.

4.7 The presence of a Prohibited Substance or its Metabolites or Markers in a player's sample is not considered an anti-doping rule violation if it is consistent with a therapeutic use exemption (**'TUE'**) obtained by the player.[9] However, the Player did not have a TUE for the use of Stanozolol prior to being tested on 19 September 2009; and nor has he applied for one since.

4.8 Accordingly, the Tribunal is comfortably satisfied that the Player has committed an anti-doping rule violation under IBAF ADR Article 2.1.

5 Consequences (1): Disqualification of individual results

Disqualification of the Player's individual results in the 2009 BWC and thereafter

5.1 IBAF ADR Article 10.1 provides: *"An Anti-Doping Rule violation occurring during or in connection with an Event may lead to Disqualification of all of the Athlete's individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes …"*. According to the comments to IBAF ADR Article 10.1, in deciding whether to exercise this discretion, the Tribunal should consider factors such as *"the severity of the Athlete's anti-doping rule violation and whether the Athlete tested negative in the other Competitions"* played as part of the Event.

5.2 Stanozolol is not a stimulant, with performance-enhancing effects that are limited to a short space of time. Rather, it is a powerful steroid whose performance-enhancing effects are long-lasting. Given that his case is that he had the Stanozolol in his system since 18 July 2010, all of the Player's individual results throughout the 2009 BWC are tainted and therefore they should all be disqualified in accordance with IBAF ADR Article 10.1.

5.3 In addition, IBAF ADR Article 10.8 provides: *"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through to the commencement of any Provisional Suspension or Ineligibility period shall, unless fairness requires*

[9] IBAF ADR Article 4.4.1.

otherwise, be Disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes."

5.4 The Tribunal is of the view that the exercise of this Article 10.8 discretion is to be considered *"in the round"*, i.e., taking into account the other consequences that are being imposed on the Player for the anti-doping rule violation in question *"so as to arrive at a result that meets the justice of the case overall."*[10] And given the other consequences that are being imposed on the Player in this case, the Tribunal does not consider that the disqualification of further results under Article 10.8 is required in order to meet the justice of the case overall. Accordingly, no such disqualification is ordered.

6 Consequences (2): Imposition of a period of Ineligibility

6.1 Since this is (as far as the Tribunal is aware) the Player's first anti-doping rule violation, IBAF ADR Article 10.2 provides for a period of Ineligibility of two years, *"unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met."*

6.2 In this case, the only Articles that could apply to vary the two-year ban prescribed by Article 10.2 are Articles 10.5.1 (No Fault or Negligence) or 10.5.2 (No Significant Fault or Negligence):[11]

6.2.1 Article 10.5.1 provides: *'If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (presence of 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.'*

6.2.2 Article 10.5.2 provides: *'If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable... When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the*

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[10] See *ITF v. Koubek*, Anti-Doping Tribunal decision dated 18 January 2005, para 95, appeal dismissed, CAS 2005/A/823, award dated 13 April 2005.

[11] Article 10.4 cannot apply unless the substance found in the athlete's sample is a "Specified Substance", and Stanozolol is not a Specified Substance. Article 10.5.3 can only apply when the athlete provides "Substantial Assistance" in the uncovering of other violations, which is not the case here. Article 10.5.4 only applies where the athlete voluntarily admits the violation before the doping authority is aware of it, which is not the case here. Article 10.6 only applies if there are aggravating circumstances; none are alleged here.

> *Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.'*

6.3 In each case, the burden is on the Player[12] seeking mitigation under these Articles first to show how the substance got into his system, and then to show that it got there with No (or No Significant) Fault or Negligence on his part. The burden is a heavy one, since the comments to Articles 10.5.1 and 10.5.2 make it clear that those Articles are only intended to apply *"where the circumstances are truly exceptional and not in the vast majority of cases."*

Has the Player shown how the Stanozolol got into his system?

6.4 Taking the threshold issue first (how the Prohibited Substance got into the Player's system), as noted above, the Player's case is that the Stanozolol entered into his system through intravenous administration by medical personnel at the military hospital "Dr. Carlos Arvelo" in July 2009 in order to treat his injuries following a car accident.

6.5 The Player's account is supported by the statement from the hospital and the hospital's contemporaneous clinical notes. It is not disputed by the IBAF. The IBAF suggests that there are better ways of treating soft tissue injuries than administration of Stanozolol, but it accepts that Stanozolol is a possible treatment for such injuries, and does not dispute that it was administered to the Player in this case.

6.6 The question becomes, could 150 Mg of Stanozolol administered intravenously in or around 18 July 2009 still be found in a urine sample provided two months later? Neither party specifically answers that question in their submissions. However, the statement from the hospital notes that Stanozolol is a medicine that *'maintains a prolonged pharmacodynamics, which indicates to us that the absorption, distribution, biotransformation and excretion of this medication is slow, remaining in the body long after its administration.'* That is not disputed by the IBAF.

6.7 The Tribunal would have preferred more specific evidence on this issue. In the circumstances, however, and in particular in light of the IBAF's acceptance of the Player's explanation of how the Stanozolol found in his sample got into his system,[13] the Tribunal is able to accept that the Stanozolol found in the Player's sample got into his system by being administered to him in the Caracas hospital in July 2009 to treat his injuries from his car accident (and, therefore, for medical reasons, not for sporting reasons).

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[12] See IBAF ADR Articles 10.5.1 and 10.5.2 and the comments thereto.

[13] IBAF submission p.4.

Was the Player at fault?

6.8 The fact that the Player did not take the substance in question in order to enhance his sport performance does <u>not</u> mean that he was not at fault. To the contrary, if a prohibited substance is in an athlete's system while he is competing, then it taints the integrity of the competition – and prejudices his opponents -- in just the same way no matter how it got there. The athlete is only innocent of this harm he has caused if the substance got into his system through No Fault or Negligence of his own.

6.9 Therefore, in assessing whether the Player was at fault for purposes of Articles 10.5.1 and 10.5.2, the starting-point is the strict requirement on an athlete to ensure that a prohibited substance does not enter his system.[14] This basic requirement encompasses various specific requirements, including that the athlete must make himself aware of what substances are prohibited[15] and must avoid any medical treatment that contains a prohibited substance or involves a prohibited method without first obtaining a TUE for that treatment.[16]

6.10 A plea of No Fault or Negligence under Article 10.5.1, or No Significant Fault or Negligence under Article 10.5.2, is to be assessed by determining to what extent the athlete has discharged those specific responsibilities, and to what extent he has failed to take steps that he could and should have taken to discharge those responsibilities, which steps, if taken, would have led to him avoiding committing the violation in question. The difference between the two, as set out below, is one of degree: to establish No Fault or Negligence, the athlete must show that he took every step available to him to avoid the violation, and could not have done any more; whereas to establish No Significant Fault or Negligence, he must show that, to the extent he failed to

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[14] See *Vencill v USADA*, CAS 2003/A/484, award dated 11 March 2004, para 57 *('We begin with the basic principle, so critical to anti-doping efforts in international sport ... that "[i]t is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body" and that "Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens". The essential question is whether [the athlete] has lived up to this duty. ...'*). See also *WADA v Stauber & Swiss Olympic Committee*, CAS 2006/A/1133, award dated 18 December 2006, para 32 (*'"Negligence" in the context of the application of the anti-doping rules is to be qualified in relation to the personal duty of the athletes not to let any prohibited substance enter their body.*'). The specific IBAF Anti-Doping Rules stating this requirement are Articles 2.1 and 2.2.

[15] See IBAF ADR Article 2: *'Athletes and other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.'* See eg *WADA v. Stauber,* CAS 2006/A/1133, award dated 18 December 2006, para 37 (*'as a sporting elite, Mr Stauber has expressly undertaken in his declaration of submission to keep himself informed of the evolution of the rules and of the lists relating to the prohibited substances and methods. He should thus have known that the consummation of hydrochlorothiazide was forbidden ...'*).

[16] Code Articles 21.1.3 and 21.1.4. See *WADA v. Turrini and CISM,* CAS 2008/A/1565, award dated 4 November 2008, para 67 (*'It is the Panel's view that an Athlete, in order to fulfil his or her duty according to Art. 2.1 of the WADC, has to be active to ensure that a medication that he or she uses does not contain any compound that is on the Prohibited List.*'); *ITF v Neilsen*, Anti-Doping Tribunal decision dated 5 June 2006, para 19 (*'Players have a personal duty to ensure that medication which they are taking does not infringe that Code'*).

take certain steps that were available to him to avoid the violation, the circumstances were exceptional and therefore that failure was not significant.

6.11 Here, the analysis boils down to the following questions:

6.11.1 Was the Player at fault for not stopping the hospital staff administering Stanozolol to him to treat his injuries?

6.11.2 Was the Player at fault for not seeking a retroactive TUE to cover that administration before playing in the 2009 BWC?

6.12 To answer these questions, it is necessary to consider how Articles 10.5.1 and 10.5.2 have been applied in situations where a prohibited substance has been administered to an athlete for therapeutic purposes, i.e., to treat an injury or illness.

6.13 Starting with basic principles:

6.13.1 To establish No Fault or Negligence, an athlete must show that he *"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."*[17]

6.13.2 The requirement of *"utmost caution"* has been noted to be *"a very high standard which will only be met in the most exceptional circumstances"*.[18] The athlete must show that he *"has <u>fully complied</u>"* with this *"duty of utmost caution"*,[19] i.e., that he has *"made every conceivable effort to avoid taking a prohibited substance"*,[20] and that the substance got into his system *"despite all due care"* on his part.

6.13.3 Where the prohibited substance was administered for therapeutic reasons, it is not enough for the athlete simply to blame the doctor who administered it to him, because *"[i]t would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/herself did not know of that substance."*[21]

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17 IBAF ADR p.61, definition of No Fault or Negligence.

18 *ITF v. Koubek,* Anti-Doping Tribunal decision dated 18 January 2005, para 79, affirmed in *Koubek v. ITF,* CAS 2005/A/825, award dated 13 April 2005.

19 CAS advisory opinion, *FIFA & WADA*, CAS 2005/C/976 & 986, rendered on 21 April 2006, para 74.

20 *Knauss v. FIS,* CAS 2005/A/847, award dated 20 July 2005, para 7.3.1.

21 *Edwards v IAAF and USATF*, CAS OG 04/003, award dated 17 August 2004, para 5.12 (attributing to athlete for purposes of assessing athlete's fault under IAAF equivalent of Art 10.5 the failure of athlete's chiropractor to check packaging of glucose tablets he obtained for her). See also *UCI v. Munoz Fernandez*, CAS 2005/A/872, award dated January 30, 2006, citing at para.5.6 from *UCI v. Israel & FCC*, CAS 2004/A/613, paras. 26-28 (*'By virtue of this responsibility [the strict liability to*

6.13.4 Instead, the Player *"must establish that he has done all that is possible, within his medical treatment, to avoid a positive testing result."*[22] This means advising those treating him that he is a professional athlete who is banned from using certain substances.[23] It also means that an athlete should not rely on his doctor to ensure that he does not prescribe any substance that is prohibited. Instead, the athlete should take it upon himself to check whether the medication prescribed to him contained any prohibited substance. This would be so even if the doctor was a sports medicine specialist, and therefore could be expected to be familiar with anti-doping rules and the substances on the Prohibited List. Where the doctor is not such a specialist, however, the responsibility on the athlete is even greater.[24]

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avoid ingestion of prohibited substances], the rider must demonstrate vigilance and verify the contents of the medications he is taking, even if the medications are prescribed by a physician and the physician knows that the rider is subject to doping control. It would be, in effect, too easy for a rider to hide behind the prescription medications ordered by a physician alleging that all that the rider could do was to follow the directions of his physician.') (translation from French by this Tribunal); *D. v FINA*, CAS 2002/A/432, award dated 27 May 2003, para 9.3.11 (*'If an athlete who competes under the influence of a prohibited substance in his body is permitted to exculpate and reinstate himself in competition by merely pleading that he has been made the unwitting victim of his or her physician's (or coach's) mistake, malfeasance or malicious intent, the war against doping in sports will suffer a severe defeat. It is the trust and reliance of clean athletes in clean sports, not the trust and reliance of athletes in their physicians and coaches which merits the highest priority in the weighing of the issues in the case at hand. If such a defense were permitted in the rules of sport competition, it is clear that the majority of doped athletes will seek refuge in the spurious argument that he or she had no control over the condition of his or her body. At the starting line, a doped athlete remains a doped athlete, regardless of whether he or she has been victimized by his physician or coach.'*). See also cases cited at footnote 33, below.

[22] *WADA v. Stauber & Swiss Olympic Committee,* CAS 2006/A/1133, award dated 18 December 2006, para 33.

[23] See the comments to IBAF ADR Article 10.5.1: *"a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances... (b) the administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance)"*.

[24] See *Pous Tio v. ITF*, CAS 2008/A/1488, award dated 22 August 2008, para 7.6 (*'the prescription of a particular medicinal product by the athlete's doctor does not excuse the athlete from investigating to their fullest extent that the medication does not contain prohibited substances'*); *WADA v. Stauber,* CAS 2006/A/1133, award dated 18 December 2006, para 35 (*'In accordance with the constant jurisprudence of CAS, the Athlete cannot hide behind the potential misunderstanding of the antidoping rules by his doctor to escape any sanction. The prescription of a medicine by a doctor does not relieve the Athlete from checking if the medicine in question contains forbidden substances or not.'*); *UCI v. Fernandez & FCC*, CAS 2005/A/872, award dated 30 January 2006, para 5.7 (*'It is not open to an athlete simply to say "I took what I was given by my doctor, who I trusted". At the very least, an athlete who is being given medicines by a doctor should specifically ask to be informed what are the contents of those medicines. He should ask whether the medicines contain any prohibited substance. He should attempt to obtain written confirmation from the doctor that the medicines do not contain any prohibited substances.'*). See also *WADA v. Turrini and CISM,* CAS 2008/A/1565, award dated 4 November 2008, para 66 (*'It is the professional duty of the athlete to consult the rules and to be well aware of the all the duties an athlete has to fulfil, among others to ensure that no Prohibited Substance enters his body. As said in the commentary to the WADC, the Athlete cannot rely on advice from his personal physician in these matters, especially when the doctor is no expert in sports*

6.14 These requirements are tough on the athlete, but necessarily so, since it is all too easy to take a medication that contains a prohibited substance. Again, if the athlete then competes with that substance in his system, the integrity of that competition is tainted, and his competitors cheated, in no less a way than if he had purposely cheated. His moral fault may be less, but the harm he causes is the same, and so he has to take every possible step he can to avoid that harm.

6.15 Does it make a difference, though, if the medicine was not prescribed for a cold, or a skin condition, or other minor and routine ailment, but rather was administered at a hospital after the athlete had been admitted to that hospital with serious injuries suffered in a car accident?

6.16 The Tribunal is aware of the following cases where such circumstances have been considered:

6.16.1 In *Vassilev v. FIBT & BBTF*,[25] the prohibited substance found in the athlete's sample had been administered to him as a part of his post-operative care following an emergency operation for a hernia after he had been admitted to hospital with severe stomach pains. The CAS Panel accepted the athlete's plea of No Fault or Negligence on the following basis:[26]

> *The Panel is satisfied that the Appellant was admitted to the hospital's accident and emergency ward with acute pain, was examined by various doctors and was immediately operated on under anaesthetic. The Appellant had no influence on either "whether" or "how" the surgical intervention would be undertaken. The same applies to the postoperative administration of the drug "Primabulone depot". According to the "discharge summary" this drug was administered to the Appellant by means of an injection once, directly after the surgical intervention. All these events therefore took place beyond the Appellant's control and sphere of influence. Of course the Appellant could - theoretically - have pointed out when he was admitted to emergency that he is an athlete and was therefore subject to sports-specific restrictions in terms of medical treatment. However, it cannot seriously be assumed that the obligation on the*

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medicine. It is rather easy to get information about the components of Keratyl [the eye drop taken by the athlete that led to his Adverse Analytical Finding]. A simple search on the Internet exposes that the active ingredient in Keratyl is Nandrolone sodium sulphate. The Athlete in this case admits that he did nothing to ensure that the medication did not contain any forbidden substance. For example he did not even ask his doctor if Keratyl could be dangerous to use in this respect. He simply relied on his doctor to warn him if the medication did contain anything on the Prohibited List.'); *Squizzato v. FINA*, CAS 2005/A/830, award dated 15 July 2005 (athlete's plea of No Fault or Negligence rejected because *'[w]ith a simple check she could have realised that the cream [that she took to treat a skin condition] was containing a doping agent, as clostebol is indicated on the product itself both on the packaging and on the notice of use.'*).

[25] *Vassilev v. FIBT & BBTF*, CAS 2006/A/1041, award dated 30 June 2006, para 7.2.6.

[26] *Vassilev v. FIBT & BBTF*, CAS 2006/A/1041, award dated 30 June 2006, para 7.2.6.

part of the athlete to point this out - which exists in usual circumstances - was breached intentionally or negligently in the present case, where the athlete was admitted to a hospital with extremely severe pain and a life-threatening condition.

6.16.2 Similarly, in *Pobyedonostsev v IIHF*,[27] the CAS accepted the athlete's plea of No Fault or Negligence where the source of the nandrolone metabolite found in his sample was an injection of Retabolil that had been administered to him by a hospital emergency room doctor while he was experiencing heart failure after crashing into the board on the side of the ice rink. The CAS stated: *'[S]ufficient evidence has been provided by the Player that under the unique circumstances of this case he was unable to influence or control the treatment applied to him in an emergency situation. The Panel can find no reason to question Ms Prischepa's testimony that the Player was "in a very bad physical and psychological condition ... As a result of severe pain he was unable even to speak." In these circumstances he was unable to prevent the treating doctor from administering a prohibited substance. The Panel is thus of the opinion that the Player demonstrated that he was without fault or negligence for the anti-doping rule violation and that the otherwise applicable period of ineligibility must be eliminated.'*

6.17 In this case, the Player was admitted to hospital in emergency circumstances, following a car accident in which he had suffered serious injuries, including "*multiple trauma and contusions to his lower limbs and loss of muscle mass in the lower right limb*". The record does not suggest that he was unconscious at any point, and in particular it does not suggest that he was unconscious on 18 July 2009, three days after his initial admission into hospital, which is when the Stanozolol was first applied to him. And nor does the record suggest that the Player carefully explained to those treating him that he was a professional athlete who was not permitted to use certain substances. However, the Tribunal assumes, from the nature of the Player's injuries as well as the other medicines the hospital was giving him, that he was in a good deal of pain at the time. He was also very much in the hands of the treating doctors, and reliant on them to remove his suffering and to heal his injuries. In the circumstances, while it cannot be said that the Player was unconscious, and therefore literally unable to influence or control what medicines were being prescribed to him, the Tribunal would hesitate long and hard before finding that he was at fault or negligent for failing to stop the doctors from administering the treatment they had decided he needed, and to require them to find an alternative treatment that did not include use of a prohibited substance.

[27] CAS/2005/A/990, award dated 24 August 2006, para 36.

6.18 However, it is a moot point because the Player's anti-doping responsibilities did not stop there. As the CAS Panel stated in *Vassilev*:[28]

> *... an athlete's obligations are not limited to only the period prior to the taking or using of a prohibited substance, rather they also apply in the period thereafter. Firstly, this follows from 10.5 of the FIBT Rule, for these rules are based on whether the athlete is at fault with regard to the presence of a prohibited substance in his bodily specimen. The examination of fault is therefore in relation to a condition, not only to the point in time when a substance was taken. Secondly, this also follows from the reference in Art. 4.3.2 of the FIBTA Rules to the "International Standard for Therapeutic Use Exemptions" ... . According to the ISTUE an athlete must, as a matter of principle, apply for a Therapeutic Use Exemption ... prior to taking or using a prohibited substance. Pursuant to Art 4.7 of the ISTUE the TUE can, as an exception, be applied for ex post facto "in cases where an emergency treatment or treatment of an acute medical condition was necessary", i.e. where the exception was not applied for in advance. The question therefore arises whether in casu the Appellant intentionally or negligently did not apply for the exemption. This can only be assumed if the Appellant knew or ought to have known that a prohibited substance was administered in the course of medical treatment.*

6.19 In *Pobyedonostsev v. IIHF*, the CAS Panel held that the athlete had not been at fault in not applying retroactively for a TUE for the emergency medication he had been given, on the grounds that he did not know or have any reason to suspect he had been treated with a prohibited substance.[29] In *Vassilev*, in contrast, the CAS Panel ruled the athlete was at fault for not applying for a retroactive TUE, because even if he did not know at the time that a prohibited substance had been administered to him, he could have discovered that fact without any great difficulty.[30]

6.20 In this case, in contrast, the Player knew that he had been given Stanozolol in the hospital to help heal his injuries, because the hospital doctors had told him: *'After having spent some time in the hospital, the medical personnel of the same institution explained to me the amount of medications they had administered to me, which included Stanozonol, the chemical composition of which I did not recognize.'* The Player may not have recognised it as a prohibited substance, but that cannot excuse him: it was his responsibility to know what was prohibited, and he could and should have checked if he was not sure.

6.21 Once he came out of the hospital, the Player was apparently fit and well enough six weeks later to travel to Europe and start competing for Venezuela in the 2009 Baseball World Cup. As a result, he was fit and well enough to discharge his anti-doping responsibilities. It is no answer to say that he did not expect that any treatment given to him in hospital in July might still be in

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[28] *Vassilev v. FIBT & BBTF*, CAS 2006/A/1041, award dated 30 June 2006, para 7.2.7.

[29] CAS/2005/A/990, award dated 24 August 2006, para 42.

[30] *Vassilev v. FIBT & BBTF*, CAS 2006/A/1041, award dated 30 June 2006, para 7.2.7.

his system six weeks or two months later. That is not an assumption that a professional athlete is entitled to make. It would have been straightforward for the Player, once he had left hospital and recovered fully from his injuries, to make enquiries of the team doctor as to whether there were any implications under the anti-doping rules for the Stanozolol that had been used to heal him. If he had done so, he would have learned that the Stanozolol was prohibited and could still be in his system, so that he needed to apply for a TUE to cover its presence in his system while he played in the 2009 BWC, as the International Standard for TUEs expressly allowed him to do.

6.22 Accordingly, the Tribunal accepts the IBAF's submission that the Player was at fault for failing to apply for a retroactive TUE for the Stanozolol that had been administered to him in July 2009 before participating in the 2009 BWC in September 2009. As a result, there can be no elimination of the Article 10.2 two-year ban under Article 10.5.1.

Was the Player's fault significant?

6.23 The question becomes whether the Player's fault in failing to apply for the retroactive TUE was or was not 'significant' within the meaning of Article 10.5.2.

6.24 To establish No Significant Fault or Negligence the Player must show that his *"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"*.[31] Again, this Article is to be construed restrictively, not expansively, so as *"to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases."* In other words, if there is nothing out of the ordinary to excuse the athlete's fault or negligence, then it cannot be said to be insignificant for purposes of Article 10.5.2. Instead, Article 10.5.2 applies only where the athlete's degree of fault, when considered in the context of the strict obligations on the athlete under the Code, can truly be said to be insignificant.[32]

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[31] IBAF ADR p.61, definition of No Significant Fault or Negligence.

[32] CAS advisory opinion, *FIFA & WADA*, CAS 2005/C/976 & 986, award dated 21 April 2006, para 75 ('*only if the circumstances indicate that the departure of the athlete from the required conduct under the duty of utmost care was not significant, the sanctioning body may apply art. 10.5.2 of the WADC and depart from the standard sanction.*'). See also *Koubek v. ITF*, CAS 2005/A/823, award dated 13 April 2005, para 54 (this defence '*allows for a degree, albeit small, of fault or negligence*'); *ITF v Neilsen*, Anti-Doping Tribunal decision dated 5 June 2006, paras 16, 18 ('*the circumstances have to be truly exceptional [to sustain a plea of No Significant Fault or Negligence,] so as to prevent the principle of strict liability being eroded.*'). Cf *CCES v Lelievre*, Sport Dispute Resolution Centre of Canada, decision dated 7 February 2005, para 54 ('*Athletes are strictly liable for the substances that are found in their systems and exceptional circumstances mitigating against the consequences of that strict responsibility will not be found to exist where the athlete has failed to exercise appropriate diligence and care.*').

6.25 In the Tribunal's view, a strong argument could be made that the Player's fault in this case – not following up to check whether he needed a retroactive exemption to cover the administration of Stanozolol to him in the hospital -- was significant and therefore Article 10.5.2 could not apply either.[33] However, the CAS Panel in *Vassilev* ruled that the athlete in that case was guilty of No Significant Fault or Negligence, and indeed considered that even with the maximum 50% reduction possible under Article 10.5.2, the remaining ban of twelve months was *'harsh in view of the circumstances of the present case.'* The circumstances of this case are different, in that the Player accepts that he was specifically told at the hospital that he had been given Stanozolol, whereas the athlete in *Vassilev* had not been told what he had been given, but that is a difference of degree, not of principle. The Tribunal therefore feels constrained by the CAS decision in *Vassilev* to find that the Player has established that he was guilty of No Significant Fault or Negligence.

By how much should the Article 10.2 two-year ban be reduced?

6.26 Such a finding does not automatically lead to a 50% reduction in the Article 10.2 two year ban, however; instead, the amount of reduction to be applied (up to the 50% maximum) depends upon the Player's relative fault.[34] And (as noted above) the Tribunal does consider that the Player's fault here is greater than the athlete's fault in *Vassilev*, because the Player was specifically told in the hospital that he had been given Stanozolol. Stanozolol is well-known to be a prohibited substance (having gained notoriety as the drug found in Ben Johnson's sample at the Seoul Olympics) and the Player therefore should have thought to look into whether he needed to do anything under the anti-doping rules to allow him to play in the 2009 BWC notwithstanding the Stanozolol he had been given six weeks previously.

6.27 In the circumstances, the Tribunal considers that the two-year ban applicable under Article 10.2 should be reduced, under Article 10.5.2, to a period of Ineligibility of sixteen months.

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[33] See eg *Pous Tio v. ITF*, CAS 2008/A/1488, award dated 22 August 2008, para 7.10 *('while it is understandable for an athlete to trust his or her medical professional, reliance on others and on one's own ignorance as to the nature of the medication being prescribed does not satisfy the duty of care as set out in the definitions that must be exhibited to benefit from finding No Significant Fault or Negligence'*); *UCI v. Munoz Fernandez*, CAS 2005/A/872, award dated January 30, 2006, para 5.9 (*'If an athlete wants to persuade an anti-doping tribunal, or a CAS Panel, that he has been found to have a prohibited substance in his body, but that he was not at fault or negligent, or that he was not substantially at fault or negligent, he must do more than simply rely on his doctor.'*); *USADA v Sahin*, AAA Case No. 30 190 01080 04, decision dated 25 March 2005, p9-10 (*'We cannot allow an athlete's lack of questioning and lack of investigation to become the standard by which athletes circumvent the anti-doping rules.'*).

[34] See *Knauss v. FIS*, CAS 2005/A.847, award dated 20 July 2005. See also *WADA v. Kurtoglu v. FIBA*, FIBA AC 2005-6, award dated 16 February 2006, p.8: *'Once the scope of application of [FIBA's version of Code Article 10.5.1] has been opened, the period of ineligibility can range between one and tow years. In deciding how this wide range is to be applied in a particular case, one must closely examine and evaluate the athlete's level of fault and negligence.'*

Should the commencement date of the ban be back-dated?

6.28 IBAF ADR Article 10.9 establishes that as a general rule any period of Ineligibility imposed by the Tribunal should start to run from the date the period of Ineligibility is imposed. However, Article 10.9.2 provides as follows:

> *Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the IBAF or Anti-Doping Organization imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred.*

6.29 In this case, there have been substantial delays in the results management process and in the hearing process, none of which has been attributable to the Player. As a result, the period of Ineligibility specified above shall be deemed to have started on the date of collection of the sample from the Player, i.e., on 19 September 2009, so that it ends at midnight on 18 January 2011.

7 Confirmation of Operative Part of Final Award

7.1 For the reasons set out above, the Tribunal rules as follows:

7.1.1 The Player has committed an anti-doping rule violation under IBAF ADR Article 2.1, in that a Prohibited Substance (Stanozolol) was found to be present in the urine sample collected from him on 19 September 2009.

7.1.2 As a consequence:

a. The individual results obtained by the Player in the 2009 BWC are disqualified in accordance with IBAF ADR Article 10.1, with any individual medals, points and prizes that he earned from his participation in those matches to be forfeited.

b. In accordance with IBAF ADR Articles 10.2 and 10.5.2, the Player is ruled Ineligible for a period of sixteen months. In accordance with IBAF ADR Article 10.9, the period of Ineligibility will be deemed to have commenced as of 19 September 2009 and therefore will end at midnight on 18 January 2011.

c. Further to IBAF ADR Article 10.10, during that period of Ineligibility the Player may not *"participate in any capacity in any Event or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by IBAF or any National Federation or a club or other member organization of IBAF or any National Federation, or in Competitions authorized or organized by any professional*

league or any international or national level Event organization."

7.2 In accordance with IBAF ADR Articles 8.2.8 and 13.2, each of the following persons may appeal against this Final Award to the Court of Arbitration for Sport in Lausanne, Switzerland: the Player, the IBAF, WADA, and any other Anti-Doping Organization under whose rules a sanction could have been imposed. The IBAF is directed to disseminate a copy of this Final Award to each such person without delay. IBAF ADR Article 13.6 provides that any such appeal must be filed with the CAS within 21 days from the date of receipt of the decision.

7.3 In accordance with IBAF ADR Article 14.4, the IBAF is to report this decision publicly within 20 days of the date of this decision. To ensure that baseball players are properly informed about the nature and extent of their responsibilities under the IBAF ADR, the IBAF is directed to publish this decision in its entirety on the IBAF's official website.

Dated: 13 December 2010

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Jonathan Taylor, Chairman