

**IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS BROUGHT BY  
THE INTERNATIONAL BASEBALL FEDERATION AGAINST AGUSTIN  
MURILLO FOR VIOLATION OF THE IBAF ANTI-DOPING RULES  
(IBAF 09-005)**

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**FINAL AWARD OF THE IBAF ANTI-DOPING TRIBUNAL**

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The IBAF Anti-Doping Tribunal convened to hear and determine the disciplinary proceedings brought by the International Baseball Federation (the 'IBAF') against Agustin Murillo (the 'Player') for violation of the IBAF Anti-Doping Rules (the 'IBAF ADR'), having considered the submissions of the parties, hereby issues the following Final Award:

**1. Introduction**

- 1.1 The World Baseball Classic is an international baseball tournament sanctioned by the IBAF and contested by the national representative teams of various of IBAF's member federations. The 2009 version of the World Baseball Classic (the '2009 Classic') took place in March 2009. The IBAF ADR<sup>1</sup> applied at the 2009 Classic, binding each participating baseball player and team.
- 1.2 The Player, an infielder, participated in the 2009 Classic on behalf of his national team, Mexico, including in its match against Cuba on 12 March 2009. He was subjected to drug-testing immediately following that match, and the laboratory that analysed the sample collected from him reported that it contained Clenbuterol, which is a powerful anabolic agent that is prohibited under the IBAF ADR.
- 1.3 In May 2009, the IBAF charged the Player with the commission of an anti-doping rule violation under Article 2.1 of the IBAF ADR, on the basis of that finding. In response, the Player denied knowingly taking Clenbuterol and therefore raised the possibility that there had been a mistake, failing which he queried whether there could have been Clenbuterol in supplements that he regularly takes, or in medicine that he took during the 2009 Classic to treat flu and a stomach ache.
- 1.4 Therefore, the questions for this Tribunal are (a) whether the Player has committed the Article 2.1 anti-doping rule violation charged, and (b) if so, what Consequences (if any) should be imposed as a result of that violation.

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<sup>1</sup> The IBAF ADR in issue are the rules that were adopted by the IBAF Executive Committee on 7 November 2008 and came into force as of 1 January 2009. Terms used in this Final Award that begin with capital letters but are not defined in this Award bear the meaning given to them in the IBAF ADR.

2. **Facts**

***The Parties***

- 2.2 The IBAF, headquartered in Lausanne, Switzerland, is recognised by the IOC as the international governing body for the sport of baseball. It sanctions the World Baseball Classic, an international event between the national representative teams of certain of its member federations that is organised by Major League Baseball ('MLB') and the MLB Players Association through a joint venture known as World Baseball Classic Inc.
- 2.3 The Player is a 27 year-old professional baseball player. He has played minor league baseball in the US for 7 years, usually with teams affiliated to the Arizona Diamondbacks.<sup>2</sup> He is Mexican and was selected to participate for Mexico in the 2009 Classic in March 2009.

***The IBAF Anti-Doping Rules***

- 2.4 As part of its responsibility to protect the integrity of the sport of baseball, the IBAF has issued the IBAF ADR, which are based on the World Anti-Doping Code and contain detailed provisions that are designed to implement and apply the provisions of that Code to baseball events sanctioned by the IBAF, including the World Baseball Classic.<sup>3</sup>
- 2.5 The current IBAF ADR were approved by the IBAF Executive Committee on 7 November 2008 and came into force as of 1 January 2009.<sup>4</sup> The cornerstone of those rules is the 2009 List of Prohibited Substances and Methods issued by the World Anti-Doping Agency ('WADA'), which is incorporated by reference into the IBAF ADR (the '**2009 Prohibited List**').<sup>5</sup>
- 2.6 On 30 January 2009, World Baseball Classic Inc. issued a memorandum to 'All Players on World Baseball Classic Provisional Rosters', entitled '*2009 World Baseball Classic Drug Testing*'. That memorandum put the players on notice that (a) drug-testing would be conducted before and during the 2009

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<sup>2</sup> See <http://web.minorleaguebaseball.com/milb/stats>.

<sup>3</sup> 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. ... These Anti-Doping Rules shall apply to all Doping Controls over which IBAF and its National Federations have jurisdiction.*' (IBAF ADR. Introduction, p.4). And Article 5.1 of the IBAF ADR provides: '*[a]ll Athletes under the jurisdiction of a National Federation shall be subject to In-Competition Testing by IBAF, the Athlete's National Federation, and any other Anti-Doping Organization responsible for Testing at a Competition or Event in which they participate.*' For these purposes, the term '*Event*' encompasses '*IBAF Sanctioned Events*', i.e., an event played between national teams representing IBAF member federations (IBAF ADR 5.4). The 2009 World Baseball Classic falls into this category.

<sup>4</sup> IBAF ADR p.1.

<sup>5</sup> IBAF ADR 4.1.

Classic under the auspices of the IBAF; and (b) the IBAF's anti-doping rules prohibit the substances listed on the 2009 Prohibited List.

***Collection of the urine sample from the Player***

- 2.8 On 12 March 2009, the Player played in Mexico's 2009 Classic match against Cuba in Mexico City. He was required to submit to drug-testing after the match under the IBAF ADR, and a urine sample was duly collected from him. In accordance with standard procedures, that sample was poured into two bottles, to create the 'A Sample' and the 'B Sample.'
- 2.9 In the section of the Doping Control Form that asks for a declaration of medications or supplements taken in the past seven days, the Player declared that he had taken '*Creatin, Protien, Omega.*'

***Adverse Analytical Finding in respect of A Sample***

- 2.10 The Player's sample was sent to the WADA-accredited laboratory in Montreal, Canada, where the A Sample was analysed and found to contain Clenbuterol.
- 2.11 Clenbuterol is a potent anabolic agent that promotes muscle growth, and specifically increases the proportion of muscle to fat tissue. It therefore has the potential to be abused by athletes seeking illicitly to enhance their performance. As a result, it is included in the 2009 Prohibited List in category S1, i.e., as an anabolic agent use of which is banned at any time.

***Analysis of the B Sample***

- 3.1 On 7 April 2009, the IBAF Anti-Doping Manager sent a 'Notification of a Possible Anti-Doping Rule Violation' to the Player through the Mexican Baseball Federation, advising of the Adverse Analytical Finding made by the Montreal laboratory in respect of the Player's A sample, and confirming the Player's right to request analysis of his B sample to see if it confirmed the results of analysis of the A sample.<sup>6</sup>
- 3.2 According to the IBAF, on 17 April 2009, the Player informed the IBAF (through the Mexican Baseball Federation) that he did want his B Sample to be analysed, and requested the full laboratory documentation relating to the analysis of his A and B Samples.
- 3.3 The Player's B Sample was analysed by the Montreal laboratory on 6 May 2009, and was also found to contain Clenbuterol.

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<sup>6</sup> IBAF ADR 7.1.4.

3. **Disciplinary Proceedings**

*The IBAF's Notice of Charge*

- 3.4 By letter dated 11 May 2009, in accordance with Article 7.2.1 of the IBAF ADR the IBAF charged the Player with an anti-doping rule violation under Article 2.1 of the IBAF ADR, based on the presence of Clenbuterol in the urine sample collected from him on 12 March 2009.
- 3.5 The Notice of Charge also stated: *'In accordance with Article 7.8 of the [IBAF Anti-Doping] Rules, you are hereby provisionally suspended from any competition under IBAF Anti-Doping Rules.'*<sup>7</sup>
- 3.6 The IBAF sent a copy of the Notice of Charge to the Chairman of the IBAF Anti-Doping Panel, who appointed himself to sit alone on the Tribunal convened under Article 8 of the IBAF ADR to hear and determine the charge made against the Player.<sup>8</sup>

*Submissions by the IBAF*

- 3.7 In support of the charge, the IBAF has submitted a written memorandum *'with its submissions on all issues the IBAF wishes to raise at the hearing, together with copies of all evidence and of all cases that the IBAF wishes to refer to the hearing'*, referring to various documents, including the WBC Anti-Doping Memorandum dated 30 January 2009; the laboratory's Certificates of Analysis and documentation pack in relation to its analysis of the Player's A Sample

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<sup>7</sup> The Tribunal notes in passing that the procedure followed by the IBAF in this aspect of the case does not appear to conform with its own Anti-Doping Rules. As Clenbuterol is not a Specified Substance, the IBAF ADR require the imposition of a Provisional Suspension once an Adverse Analytical Finding is returned in respect of the A sample, i.e., without waiting first to see if the player wants to have the B sample analysed. (See IBAF ADR 7.8.1; 7.8.4).

Furthermore, the Tribunal queries whether the IBAF is correct to say the Provisional Suspension only relates to competitions to which the IBAF ADR apply. The IBAF ADR prescribe that during any period of Provisional Suspension the player *'is barred temporarily from participating in any Competition prior to the final decision at a hearing conducted under Article 8 (Right to a Fair Hearing)'*, where *'Competition'* means a match or game. (See IBAF ADR p.59, definitions of *'Consequences'* and *'Competition'*). That definition does not exclude any category of match (e.g., MLB or Minor League Baseball matches). Furthermore, the comment to IBAF ADR 7.8 states that *'Athletes shall receive credit for a Provisional Suspension against any period of Ineligibility which is ultimately imposed as provided in Article 10.9.3.'* Since the period of Ineligibility itself clearly covers MLB and MiLB matches (see IBAF ADR 10.10.1 and comment thereto), that strongly suggests that the Provisional Suspension itself should also extend to MLB and MiLB matches. This is not because the IBAF has any direct authority over MLB/MiLB or participation in their matches, but because participation in MLB/MiLB matches during a period of Ineligibility imposed under the IBAF ADR amounts to a further violation of the IBAF ADR (see IBAF ADR 10.10.2 - Violation of the Prohibition of Participation during Ineligibility) and therefore has a bearing on the ultimate duration of a sanction imposed under the IBAF ADR relating to participation in baseball competitions played under the jurisdiction of the IBAF.

<sup>8</sup> 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.

and B Sample, dated 3 April 2009 and 8 May 2009 respectively; and the Notice of Charge sent by the IBAF to the Player dated 11 May 2009.

***Submissions of the Player***

3.8 In response to the charge, in an email dated 8 May 2009 to the IBAF the Player stated:

*I have been playing professional baseball for 7 years and I never had any problem with doping, this is the first time and I cannot believe it, I have been taking the same supplements for 3 or 4 years and I had doping controls in international championships and nothing. According to the results, they found a substance called clenbuterol and I looked in internet and it's written that it's used as fat burner and for people who have asthma. I don't have asthma and I am not fat. To the contrary, I have always been very slim. I have been thinking a lot and there are 3 options:*

- 1) *There was a mistake.*
- 2) *One of the supplement was contaminated (no explode, isopure, omega 3-6-9).*
- 3) *During the WBC, I had flu and was sick with the stomach and I took Imodium and Advil Sinus.*

3.9 Following a direction from the undersigned Chairman of the Tribunal, by email from the IBAF dated 17 June 2009, the Player was informed as follows:

*We were directed by the chair of the IBAF Anti-Doping Tribunal that you should be offered two weeks from the date of the present e-mail to provide any response [to the IBAF's case that] you may care to make, and that you should advise us asap if you intend to take advantage of that opportunity. You may want to request to have an oral hearing but should you not want such a hearing to take place, you are entitled to make any written submissions you wish. Should you need more time to respond, a request for more time, explaining how much more time you need and why should be addressed to us.*

3.10 In response, by email dated 20 June 2009, the Player stated that 'he would like to have a hearing, he would like that [the Tribunal] know about his case and he would like to know what made him fail the test. He would like to know with whom he should communicate and what he has to present.'

3.11 By email dated 29 June 2009, the undersigned Chairman of the Tribunal responded as follows:

*The tribunal will happily hear anything that the player wishes to say in his defence, whether disputing the IBAF's case that a prohibited substance was present in his sample, or in establishing grounds for mitigating the consequences that would follow from such a finding, eg showing how the substance got into his system and that the substance got into his system with no (or no significant) fault or negligence on his part. However, the tribunal cannot advise the player on what issues to raise in his defence, or on 'what*

*made him fail the test.' If he wishes to pursue these issues, he needs to instruct lawyers (and perhaps other experts) to assist him with that analysis. I recommend that he do so urgently. I will wait until 13 July 2009 to receive a full written submission from the player or lawyers instructed on his behalf, raising any issues in his defence and/or in mitigation of sanction. In that submission, it should also be stated whether an oral hearing is requested, whether to hear evidence or to make submissions, and why it is said that such a hearing is necessary. If such a submission is received, I will then rule on whether a hearing will take place. If I decide a hearing should take place, I will provide a date for the hearing at that point. If I decide a hearing should not take place, I will proceed to decide the case on the papers. The player should please acknowledge receipt of this communication.*

- 3.12 The Player responded on 29 June 2009, stating that *'he read it but that he doesn't have money to pay a legal counsel so he will let things as they are.'*
- 3.13 The Tribunal considers that it is well within the broad procedural discretion conferred on it by Article 8.1 of the IBAF ADR to determine the charge without a hearing.<sup>9</sup>

#### 4. **Jurisdiction**

- 4.1 This Tribunal's jurisdiction to hear and determine the charge brought by the IBAF against the Player derives from Article 8 of the IBAF ADR, 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.<sup>10</sup>
- 4.2 This Tribunal was convened in accordance with Article 8.2 of the IBAF ADR.
- 4.3 The Player has not disputed the jurisdiction of this Tribunal to hear and determine this matter.

#### 5. **Applicable Law**

- 5.1 The IBAF ADR do not contain a provision specifying that a particular country's laws should govern proceedings brought for violation of those rules. To the contrary, they provide as follows:

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<sup>9</sup> See IBAF ADR 8.1, which gives the Tribunal discretion to accept testimony by written submission. See also paragraph 11 of the Standing Directions for Cases Referred to the IBAF Anti-Doping Panel in connection with the World Baseball Classic 2009 issued by the Chairman of the IBAF Anti-Doping Panel (*'The procedure followed at the hearing shall be at the discretion of the Tribunal Chairman, provided that the hearing is conducted in a fair manner with a reasonable opportunity for each party to present evidence (including the right to call and question witnesses), address the Tribunal, and present its/his case. In accordance with Article 8.1 of the IBAF Anti-Doping Rules, the Tribunal shall have discretion to receive evidence and submissions by telephone and/or in writing.'*).

<sup>10</sup> See also footnote 3, above.

18.3 Except as provided in Article 18.6, these Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes.

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18.6 These Anti-Doping Rules have been adopted pursuant to the applicable provisions of the Code and shall be interpreted in a manner that is consistent with applicable provisions of the Code. The comments annotating various provisions of the Code may, where applicable, assist in the understanding and interpretation of these Anti-Doping Rules.

5.2 Therefore, in its interpretation and application of the IBAF ADR, the Tribunal is guided by the World Anti-Doping Code and the comments to that Code, and is charged with ensuring consistency with the Code and its objectives.

5.3 In addition, Article 13 of the IBAF ADR establishes the Court of Arbitration for Sport in Switzerland ('CAS') as the ultimate appellate authority in relation to proceedings brought under the rules, including these proceedings. This is mandated by Article 13 of the Code, and is a fundamental part of the framework that the Code establishes for the harmonisation of anti-doping standards across all sports: not only must all international federations that sign the Code adopt and implement Code-compliant anti-doping rules; they must also make the CAS the ultimate appellate authority in respect of the adjudication of violations of those rules, so that the rules are interpreted and applied consistently across all sports. As a consequence, in determining how to interpret and apply the provisions of the IBAF ADR at issue in this case that are derived from the Code, where the CAS has taken a clear and consistent line in interpreting and applying the same Code-derived provisions in other cases, involving other sports, the Tribunal considers itself bound to follow the same approach.<sup>11</sup>

## 6. **The Player's Commission of an Anti-Doping Rule Violation**

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

6.2 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, so that no

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<sup>11</sup> See *Hipperdinger v. ATP*, CAS 2004/A/690, award dated 24 March 2005, para 71 ('*The ATP Rules have been established by the Respondent on the basis of the WADC. One of the main intentions of the WADC is the harmonisation of the worldwide fight against doping. In order to achieve that goal, it is necessary to interpret anti-doping rules that have been established on the basis of the WADC in harmony with the WADC, the respective set of rules of other international sports federations and the respective CAS case law.*').

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.<sup>12</sup>

- 6.3 Therefore, to discharge its burden, the IBAF must prove, to the comfortable satisfaction of the Tribunal,<sup>13</sup> that a Prohibited Substance was present in the urine sample collected from the Player on 12 March 2009. The IBAF may prove this *'by any reliable means.'*<sup>14</sup>
- 6.4 In support of its allegation that Clenbuterol was present in the Player's Sample, the IBAF relies on the findings of the WADA-accredited laboratory on Montreal, as set out in its certificates of analysis of the Player's A Sample and B Sample, and supported by the documents in the full laboratory documentation packs.
- 6.5 In his email of 8 May 2009, the Player raises the possibility that there may have been a *'mistake.'* He does not specify what the mistake might have been, or indeed even that it may have been a mistake by the laboratory during the analysis of his Sample, as opposed to (say) a mistake made during collection of his sample. In any event, the Player has since produced no evidence suggesting any mistake on the part of the laboratory in analysing his sample.
- 6.6 The International Standard for Laboratories issued by WADA sets out detailed provisions to be followed in the analysis of samples to detect the presence of Prohibited Substance. The IBAF ADR state (see page 60) that *'[c]ompliance with an International Standard (as opposed to another alternative, standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly.'* Pursuant to IBAF ADR 3.2.1, it is presumed that WADA-accredited laboratories such as the Montreal laboratory have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories, and the burden is placed on the Player to rebut this presumption by establishing that the laboratory departed from the International Standard in a manner that could reasonably have caused the Adverse Analytical Finding in question. Given that the Player has not even identified any alleged departure from the International Standard by the laboratory that might have caused its finding of Clenbuterol in his Sample, let alone produced any evidence in support of that allegation, the Tribunal has no difficulty in finding that the presumption established by IBAF ADR 3.2.1 has not been rebutted.
- 6.7 Accordingly, the Tribunal finds that Clenbuterol was present in the urine sample collected from the Player on 12 March 2009. There is no dispute that

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<sup>12</sup> IBAF ADR 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.

<sup>13</sup> IBAF ADR 3.1.

<sup>14</sup> IBAF ADR 3.2.



Clenbuterol is a Prohibited Substance, the use of which is banned at all times, including In-Competition. The Clenbuterol present in the Player's sample therefore constitutes a Prohibited Substance for the purposes of IBAF ADR Article 2.1.

- 6.8 The presence of a Prohibited Substance in a player's sample is not considered an anti-doping rule violation if it is consistent with a therapeutic use exemption ('TUE') previously obtained by the player.<sup>15</sup> However, there is no suggestion here that the Player had a TUE for the use of Clenbuterol prior to being tested on 12 March 2009; and nor has he applied for one since, which is understandable since it is the Player's case that he is not taking Clenbuterol. In any event, the Tribunal's understanding is that it is highly unlikely that a TUE would be granted for the use of Clenbuterol, since such a grant would be inconsistent with the criteria for the grant of a TUE set out in the International Standard for Therapeutic Use Exemptions.
- 6.9 Accordingly, the Tribunal is comfortably satisfied that the Player has committed an anti-doping rule violation under Article 2.1 of the IBAF ADR, in that a Prohibited Substance (Clenbuterol) was found to be present in the urine sample collected from the Player on 12 March 2009.
- 6.10 It therefore falls on the Tribunal to determine what Consequences (if any) should be imposed on the Player for this anti-doping rule violation. The IBAF ADR provide for two types of potential consequence: (1) Disqualification of individual results obtained by the Player; and (2) imposition of a period of future Ineligibility on the Player. Each of these potential consequences is considered in turn below.

## 7. **Consequences (1): Disqualification of individual results**

### ***Disqualification of the Player's individual results in the match in question***

- 7.1 Article 9 of the IBAF ADR provides: '*A violation of these Anti-Doping Rules in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting consequences, including forfeiture of any medals, points and prizes.*' A '*Competition*', for purposes of Article 9, is a single match.<sup>16</sup> Accordingly, the automatic consequence of the Tribunal's finding that the Player has committed an Article 2.1 violation in connection with his In-Competition test after the 2009 Classic match between Mexico and Cuba on 12 March 2009 is the disqualification of the results he obtained in that match, and forfeiture of any individual medals, points and prizes that the Player was awarded as a result of his participation in that match.

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<sup>15</sup> IBAF ADR 4.4.1.

<sup>16</sup> IBAF ADR, p.59, definition of '*Competition*'.

***Disqualification of the Player's results in other matches in the 2009 Classic***

- 7.2 Article 10.1 of the IBAF ADR 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 ...'*<sup>17</sup>
- 7.3 According to the comments to IBAF ADR 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'*.
- 7.4 The Tribunal does not know whether the Player was tested at any other time during the 2009 Classic. However, Clenbuterol is a substance whose effects are long-acting, which is why its use is banned not only In-Competition but also Out-of-Competition. As a result, the presence of Clenbuterol in the Player's Sample on 12 March 2009 is also likely to have tainted his other performances in the 2009 Classic. Accordingly, his individual results obtained in other matches in the 2009 Classic should also be Disqualified, and any individual medals, points or prizes that the Player was awarded as a result of his participation in those matches should be forfeited.

***No Disqualification of results obtained by the Player in matches since the 2009 Classic***

- 7.5 Article 10.8 of the IBAF ADR 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 the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.'*
- 7.6 The Tribunal understands that since competing in the 2009 Classic the Player has been playing for the Reno Aces in the Pacific Coast League.<sup>18</sup>
- 7.7 This raises the same question as was discussed in *IBAF v. Ponson*, IBAF 09-001, Final Award dated 8 June 2009, para 7.7, namely: does the phrase *'all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition)'* in Article 10.8 encompass results obtained in matches played as part of events that are outside the jurisdiction of the IBAF? As noted in *Ponson*, this is not a straightforward

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<sup>17</sup> IBAF ADR 10.1.1 creates an exception to this rule where the Player establishes No Fault or Negligence. As set out below, however, the Tribunal has found that the Player cannot sustain a plea of No Fault or Negligence in this case, and therefore Article 10.1.1 does not apply.

<sup>18</sup> See [www.minorleaguebaseball.com/milb/stats/stats.jsp?pos=3B&sid=milb&t=p\\_pbp&pid=473242](http://www.minorleaguebaseball.com/milb/stats/stats.jsp?pos=3B&sid=milb&t=p_pbp&pid=473242).

issue: on the one hand, it could be argued from the framework established by the Code that such matches were intended to be covered;<sup>19</sup> but on the other hand it might be argued (with some force, in the view of the Tribunal) that a broad interpretation should be avoided because it would be futile (as the IBAF has no power to order disqualification of MLB/MiLB results), and instead the only proper option would be to bring the issue to the attention of Major and Minor League Baseball for it to consider and resolve as it saw fit. In the circumstances of this case, where the Player is not represented by counsel and therefore would not be able to make meaningful submissions on the point, the Tribunal does not consider it appropriate to rule on the issue. Instead, in all of the circumstances of this case, including the fact that the Player has apparently been banned from playing in MiLB for 50 matches as a result of the Adverse Analytical Finding now under consideration,<sup>20</sup> the Tribunal declines to rule that any individual results should be disqualified under IBAF ADR Article 10.8.

## 8. **Consequences (2): Imposition of a Period of Ineligibility**

- 8.1 Since this Article 2.1 anti-doping rule violation is (as far as the Tribunal is aware) the Player's first doping offence, Article 10.2 of the IBAF ADR 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.*'

### ***Article 10.4 does not apply***

- 8.2 Article 10.4 cannot be used to eliminate or reduce the two-year period of Ineligibility under Article 10.2, because Article 10.4 only applies where the Prohibited Substance found in the Player's sample is categorised in the Prohibited List as a 'Specified Substance',<sup>21</sup> and Clenbuterol is not so categorised in the 2009 Prohibited List.

### ***Article 10.6 does not apply***

- 8.3 Article 10.6 permits a Tribunal to increase the basic sanction where '*aggravating circumstances*' are established. However, in its submissions to the Tribunal the IBAF has stated that it does not believe there to be any aggravating circumstances in the present case. Nor is there any suggestion of

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<sup>19</sup> In particular, under the IBAF ADR a period of Ineligibility is intended to extend to MLB/MiLB matches, in the sense that if the Player plays in the MLB/MiLB during that period, it starts his full period of Ineligibility from IBAF-sanctioned baseball running again, and his individual results from such participation are to be Disqualified. (See IBAF ADR 10.10.1, 10.10.2).

<sup>20</sup> See [http://web.minorleaguebaseball.com/news/article.jsp?ymd=20090515&content\\_id=585721&vkey=pr\\_milb&fext=.jsp](http://web.minorleaguebaseball.com/news/article.jsp?ymd=20090515&content_id=585721&vkey=pr_milb&fext=.jsp).

<sup>21</sup> IBAF ADR 4.2.2.

aggravating circumstances in the factual record before this Tribunal. Accordingly therefore there is no question of applying Article 10.6 in this case.

**Articles 10.5.3 and 10.5.4 do not apply**

- 8.4 Article 10.5.3 permits the suspension of a period of Ineligibility where the Player *'has provided Substantial Assistance to an Anti-Doping Organization, criminal authority or professional disciplinary body which results in the Anti-Doping Organization discovering or establishing an anti-doping rule violation by another Person or which results in a criminal or disciplinary body discovering or establishing a criminal offense or the breach of professional rules by another Person.'* There is no plea of Substantial Assistance in this case and therefore Article 10.5.3 has no application.
- 8.5 Article 10.5.4 provides that a period of Ineligibility may be reduced by up to one half where the Player *'voluntarily admits the commission of an anti-doping rule violation before having received notice of a Sample collection which could establish an anti-doping rule violation ... and that admission is the only reliable evidence of the violation at the time of admission ...'* Again there is no plea of voluntary admission and the Tribunal finds that there is no such admission on the facts; Article 10.5.4 accordingly has no application.

**Articles 10.5.1 and 10.5.2**

- 8.6 As a result, unless the Player can establish the conditions for eliminating the otherwise-applicable period of Ineligibility under Article 10.5.1 (No Fault or Negligence) or for reducing the two-year period of Ineligibility under Article 10.5.2 (No Significant Fault or Negligence),<sup>22</sup> then the Tribunal is required to impose a two-year period of Ineligibility on the Player in accordance with Article 10.2.
- 8.7 Articles 10.5.1 and 10.5.2 provide as follows:
- 8.7.1 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.'*
- 8.7.2 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*

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<sup>22</sup> It being his burden on this point. See IBAF ADR 10.5.1 and 10.5.2 and the comments to those Articles.

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

- 8.8 Accordingly, before one looks at whether the Player can establish No Fault or Negligence or No Significant Fault or Negligence, the Player must satisfy the threshold requirement of establishing, on the balance of probabilities, how the Clenbuterol entered into his system.<sup>23</sup>
- 8.9 This is not just a formal requirement; without it, any claim that a substance got into an athlete's system without any, or any significant, fault or negligence on his part would be meaningless.<sup>24</sup> Accordingly, a mere denial of wrongdoing coupled with the advancement of a theoretical or speculative innocent explanation is insufficient to meet the athlete's burden of proof under Articles 10.5.1 and 10.5.2.<sup>25</sup>

<sup>23</sup> See *Puerta v. ITF*, CAS 2006/A/1025, award dated 12 July 2006, para 11.2.5 (to rely on Article 10.5, the athlete 'must first establish how the Prohibited Substance entered his body').

<sup>24</sup> See eg *Karatantcheva v. ITF*, CAS 2006/A/1032, award dated 3 July 2006, para 117 ('Obviously this precondition to establishing the no fault or no significant fault must be applied quite strictly, since if the manner in which a substance entered an athlete's system is unknown or unclear it is logically difficult to determine whether the athlete has taken precautions in attempting to prevent any such occurrence. '); *WADA v. Stanic & Swiss Olympic Association*, CAS 2006/A/1130, award dated 4 January 2007, para 39 ('Obviously 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. To allow any such speculation as to the circumstances in which an athlete ingested a prohibited substance would undermine the strict liability rules underlying Swiss Olympic's doping Statute and the World Anti-Doping Code, thereby defeating their purpose. '); *ITF v. Beck*, Anti-Doping Tribunal decision dated 13 February 2006, para 12 ('A precondition to the application of Article M.5.2 is that the player must be able to establish how the prohibited substance entered his system. The purpose of this provision is to confine the circumstances in which the automatic sanctions may be reduced to truly exceptional circumstances in which the player can show, the burden of proof lying upon him, how the substance did indeed enter his body. That burden of proof must be discharged on the balance of probability. The provision thus ensures that mere protestations of innocence, and disavowal of motive or opportunity, by a player, however persuasively asserted, will not serve to engage these provisions if there remains any doubt as to how the prohibited substance entered his body. This provision is necessary to ensure that the fundamental principle that the player is personally responsible for ensuring that no prohibited substance enters his body is not undermined by an application of the mitigating provisions in the normal run of cases.')

<sup>25</sup> See *ITF v. Beck*, Anti-Doping Tribunal decision dated 13 February 2006, paras 21, 23 and 24 ('The fact that the player advanced two possible explanations for the ingestion illustrates the difficulty of his case. In order to prove the circumstances of ingestion he needs to be able to prove on the balance of probabilities that one of the suggested explanations was in fact the cause of the presence of Clenbuterol in his body 9 days' later on 25 September, and thus that the other was not...On all the evidence the tribunal finds that the player has clearly failed to discharge the burden of proving how the substance entered his body. The explanations put forward are no more than theoretical possibilities. Regrettably this is not a case where exceptional circumstances are proved, but a conventional case in which the player asserts his moral innocence but is unable to prove how the prohibited substance entered his body. On that basis the tribunal is not able to make any finding as to the player's lack of fault. In the absence of proof of how the substance entered the player's body it is unrealistic and

### ***The Player's Case***

- 8.10 The Player's entire case is set out in an email dated 8 May 2009 to the IBAF, as follows:

*I have been playing professional baseball for 7 years and I never had any problem with doping, this is the first time and I cannot believe it, I have been taking the same supplements for 3 or 4 years and I had doping controls in international championships and nothing. According to the results, they found a substance called clenbuterol and I looked in internet and it's written that it's used as fat burner and for people who have asthma. I don't have asthma and I am not fat. At the contrary, I have always been very slim. I have been thinking a lot and there are 3 options:*

- 1) *There was a mistake*
- 2) *One of the supplement was contaminated (no explode, isopure, omega 3-6-9)*
- 3) *During the WBC, I had flu and was sick with the stomach and I took Imodium and Advil Sinus.*

### ***Threshold test is not satisfied***

- 8.11 The Tribunal finds that the Player has clearly failed to discharge his burden of proving how the Clenbuterol entered into his system. The explanations put

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*impossible to decide whether in those unknown circumstances he did, or did not, exercise all proper precautions to avoid the commission of a doping offence.');* IRB v. Keyter, CAS 2006/A/1067, award dated 13 October 2006, paras 6.10 – 6.11 (*'even if the Panel were to accept that the Respondent did go to a night club and did drink something offered by strangers (quod non), the Panel must in any event underscore that cocaine contamination through a "spiked drink" is only a speculative guess or explanation uncorroborated in any manner. One hypothetical source of a positive test does not prove to the level of satisfaction required that factor (a) (see supra at 6.8) is factually or scientifically probable. Mere speculation is not proof that it did actually occur. The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred. The Panel, therefore, finds that the Respondent's explanation was lacking in corroborating evidence and unsatisfactory, thereby failing the balance of probability test. In other terms, the Panel is not persuaded that the occurrence of the alleged ingestion of cocaine though a "spiked drink" is more probable than its non-occurrence.');*); Karatancheva v. ITF, CAS 2006/A/1032, award dated 3 July 2006, para 98 (*'to prove that the concentrations of 19-NA found in her sample supplied during the Paris test were caused in part by the ingestion of nutritional supplements, and in what proportion, the player would need to adduce very specific evidence regarding what type of supplement was taken, in what doses and intervals and during what periods - the Panel considers the player has not established to what degree, if any, the ingestion of nutritional supplements influenced the concentrations of 19-NA found in her Paris sample.');*); Meca-Medina v. FINA, CAS 99/A/234 and 235, awards dated 29 February 2000, paras 4.7 and 10.12 (*'The perceptible purpose is to prevent a competitor from simply (and sufficiently) asserting ignorance of how such substance got into his/her body... The raising of an unverified hypothesis is not the same as "clearly" establishing the facts... The inadequacy of such isolated hypothesis as a means of disproving the culpable use of a prohibited substance is well recognised in CAS's judgements'*).

forward by the Player are merely speculative and are not supported by any corroborating evidence. In particular, the Player has not adduced any evidence to suggest that the medication he was taking (Imodium and Advil Sinus) contained Clenbuterol, but the Tribunal would find this extremely unlikely, since these are licensed, branded medical treatments sold by reputable companies, which do not list Clenbuterol among their ingredients, and for which the risk of contamination would seem vanishingly small.

- 8.12 That leaves the supplements that the Player admits he was taking, i.e., ‘no explode’, ‘isopure’, and ‘omega 3-6-9’. The supplements industry in the United States is not regulated in the same way as the medicines industry, and there is substantial evidence that supplements may contain substances that are not mentioned in the list of ingredients. But the Player has not produced any such evidence in this case, but instead is merely speculating.<sup>26</sup>
- 8.13 Such speculation is clearly not sufficient to prove that any of the particular substances that the Player says he took was the source of the Clenbuterol found in his system, and therefore he fails to meet the threshold requirement. But even if he had proved a supplement was the source, the CAS authorities are absolutely clear that, given the amount of warnings that have been provided about supplements containing Prohibited Substances, then in the absence of truly exceptional circumstances (none of which are present in this case) any claim of No (or No Significant) Fault or Negligence in such circumstances is hopeless.

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<sup>26</sup> As noted above, in the section of the Doping Control Form that asks for a declaration of medications or supplements taken in the past seven days, the Player declared that he had taken ‘Creatin, Protien, Omega.’ This suggests that the supplement branded ‘no explode’ contains creatine, whereas the ‘isopure’ supplement contains protein, and the ‘omega 3-6-9’ is omega fatty acids. It does not suggest that any of them contains Clenbuterol. And obviously the fact that the Player says he has been taking these supplements for several years, during which time he has been drug-tested without ever testing positive, suggests that these supplements are not the source of the Clenbuterol found in his system in March.

<sup>27</sup> See *V. v. FINA*, CAS 2003/A/493, award dated 22 March 2004, *FINA Doping Panel Judgments 2001-2005* (FINA 2006), p 17, at pp. 23-24 (*‘The Panel remarks that, by now, it has been known for years in the sports world that nutritional supplements are risky. Firstly, they are sometimes intentionally “spiked” by the producers, who avoid mentioning on the product’s containers or leaflets all the substances contained therein. Secondly, and mainly, supplements are sometimes unintentionally contaminated. Indeed, they are usually made by companies producing at the same time products containing prohibited substances, and those companies often use the same equipments to produce both. As a result, even if such equipments are cleaned correctly, it happens that the first containers of the supplement produced afterwards still contain some very small amounts of prohibited substances, without any bad faith of the producer. Consequently, in the Panel’s view, a diligent athlete should refrain from using nutritional supplements or accept the risk of positive doping results related to such use’*). So, for example, in

***Commencement date of the period of Ineligibility***

- 8.14 Article 10.9 of the IBAF ADR establishes that as a general rule any period of Ineligibility imposed by the Tribunal should start to run from the date that the Ineligibility is imposed. None of the exceptions to that rule set out in IBAF ADR 10.9 apply in this case. Accordingly, the period of Ineligibility shall commence as of the date of this Final Award and shall therefore end at midnight on 25 July 2011.

9. **Confirmation of Operative Part of Final Award**

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

9.1.1 The Player has committed an anti-doping rule violation under Article 2.1 of the IBAF ADR in that Clenbuterol, a Prohibited Substance, was present in the sample collected from him after the 2009 World Baseball Classic match between Mexico and Cuba on 12 March 2009.

9.1.2 As a consequence:

- a. The Player's individual results from the 2009 World Baseball Classic matches in which he played are Disqualified in accordance with Articles 9.1 and 10.1 of the IBAF ADR, with any medals, points and prizes that he earned from his participation in those matches to be forfeited.
- b. In accordance with Article 10.2 of the IBAF ADR, the Player is ruled Ineligible for a period of two years. Further to Article 10.10 of the IBAF ADR, 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.'* This includes Major and Minor League Baseball. If the Player does continue to participate in Major or Minor League Baseball, then Article 10.10.2 of the IBAF ADR will apply to push back the commencement date of the period of Ineligibility imposed in this Award to the date of his last MLB or MiLB match.
- c. In accordance with Article 10.9 of the IBAF ADR, the two-year period of Ineligibility shall commence as of the date of this Final Award and shall therefore end at midnight on 25 July 2011.



- 9.2 There is no provision in the IBAF ADR conferring on this Tribunal the power to award a party its costs of proceedings taken under these rules. Therefore, as set out at paragraph 15 of the Standing Directions for cases referred to the IBAF Anti-Doping Panel in connection with the World Baseball Classic 2009, each of the parties shall bear its own costs of these proceedings.
- 9.3 In accordance with Article 8.2.8 and Article 13.2 of the IBAF ADR, 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.
- 9.4 In accordance with Article 14.4 of the IBAF ADR, 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 entirety of this decision should be published on the IBAF's official website.

Dated: 26 July 2009



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Jonathan Taylor, Chairman