

**IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS BROUGHT BY  
THE INTERNATIONAL BASEBALL FEDERATION AGAINST SIDNEY  
PONSON FOR VIOLATION OF THE IBAF ANTI-DOPING RULES  
(IBAF 09-001)**

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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 Sidney Ponson (the 'Player') for violation of the IBAF Anti-Doping Rules, 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 Anti-Doping Rules<sup>1</sup> applied at the 2009 Classic, binding each participating baseball player and team.
- 1.2 The Player, a pitcher, participated in the 2009 Classic for his national team, the Netherlands. He was the starting pitcher in its first match, a win against the Dominican Republic on 7 March 2009, and in its fifth match, a loss to Venezuela on 14 March 2009.<sup>2</sup>
- 1.3 In April 2009, the IBAF charged the Player with the commission of an anti-doping rule violation under Article 2.1 of the IBAF Anti-Doping Rules, on the basis that a prohibited substance, phentermine, was present in the urine sample provided by the Player immediately following the match against the Dominican Republic.
- 1.4 In response to the charge, the Player has admitted that he was taking phentermine at the relevant time, on prescription from his doctor, to help him lose weight. He has therefore not disputed that phentermine was present in his sample collected at the 2009 Classic on 7 March 2009. This amounts to an admission that he committed the Article 2.1 anti-doping rule violation charged.
- 1.5 Therefore, the only question for this Tribunal is what Consequences, if any, should flow (i.e., what sanctions, if any, should be imposed) as a result of the Player's admitted anti-doping rule violation. In particular, the Tribunal has to

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<sup>1</sup> The IBAF Anti-Doping Rules 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 ('IBAF ADR'). 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 Anti-Doping Rules.

<sup>2</sup> See box scores posted on [www.worldbaseballclassic.com](http://www.worldbaseballclassic.com).

rule on the Player's submission that no sanctions should be imposed on him because he was not trying to cheat but instead was only taking phentermine for valid therapeutic purposes, and further that the prescribing doctor had told him that phentermine was not a prohibited substance in Major League Baseball.

- 1.6 The IBAF is represented in this matter by its Anti-Doping Manager, Jean-Pierre Moser, while the Player is represented by his agent, Barry Praver Esq. of Praver Shapiro Sports Management, a certified agent and qualified attorney. The Tribunal is grateful to each of them for their helpful submissions on behalf of the parties.

2. **Facts**

- 2.1 The following factual account is derived from the written submissions made in these proceedings on behalf of the IBAF and the Player respectively, including the sworn affidavits of the Player ('Player Aff.') and his doctor, Dr Bell ('Bell Aff.'). There appears to be no dispute between the parties as to those facts, and for the most part (i.e., save as specifically indicated below) the Tribunal finds no reason to query them. Documents referred to below were provided by the IBAF as part of its submissions.

***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 does not have any jurisdiction over Major League Baseball ('MLB'), but it gives its sanction to the World Baseball Classic, an international event between the national representative teams of certain of its member federations that is organised by MLB and the MLB Players Association through a joint venture known as World Baseball Classic Inc.
- 2.3 The Player is a 32 year-old professional baseball player. He has played Major League Baseball in the United States on and off for more than 10 years, most recently (starting in March 2009) for the Kansas City Royals.<sup>3</sup> He is qualified to represent the Netherlands, and he was selected by the Royal Dutch Baseball & Softball Federation to play for the Netherlands in the 2009 World Baseball Classic, which was staged in March 2009, i.e., in the month prior to the start of the 2009 Major League Baseball season.

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

- 2.4 As part of its governance role, the IBAF has issued the IBAF Anti-Doping Rules, which are based on the World Anti-Doping Code and contain detailed provisions that are designed to implement and apply the provisions of that

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<sup>3</sup> Player Aff. para 1.

Code to baseball events sanctioned by the IBAF, including the World Baseball Classic.<sup>4</sup>

- 2.5 The current IBAF Anti-Doping Rules were approved by the IBAF Executive Committee on 7 November 2008 and came into force as of 1 January 2009.<sup>5</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 Anti-Doping Rules (the '2009 Prohibited List').<sup>6</sup>
- 2.6 Phentermine is included on the 2009 Prohibited List in category S6a, as a stimulant that is banned In-Competition. It is a potent amphetamine-type stimulant, operative on the central nervous system, and is known to be abused by athletes because of its performance-enhancing effects. Whereas certain of the stimulants on the Prohibited List are classified as 'Specified Substances', because of the *'greater likelihood that [they] ... could be susceptible to a credible, non-doping explanation'*,<sup>7</sup> phentermine is not one of them, presumably (at least in part) because of its potent performance-enhancing effect.
- 2.7 On 30 January 2009, World Baseball Classic Inc. issued a memorandum addressed to 'All Players on World Baseball Classic Provisional Rosters', entitled '2009 World Baseball Classic Drug Testing'. This memorandum (the 'WBC Anti-Doping Memorandum') stated (in relevant part) as follows:

This memorandum outlines the drug testing policies to which players participating in the 2009 World Baseball Classic (the "Classic") will be subject.

#### Testing

*Pre-competition* – All players included on a National Team's Provisional Roster will be subject to Olympic style pre-competition drug-testing under

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<sup>4</sup> The IBAF Anti-Doping Rules 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 Anti-Doping Rules 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>5</sup> IBAF Anti-Doping Rules p.1.

<sup>6</sup> See IBAF ADR 4.1. Most of the anti-doping rule violations set out at Article 2 of the IBAF Anti-Doping Rules are based on the 2009 Prohibited List, proscribing the presence of such substances in a player's sample (Article 2.1), the Use of such substances or methods (Article 2.2), and their Possession (Article 2.6), Trafficking (Article 2.7), or Administration (Article 2.8).

<sup>7</sup> See comment to IBAF ADR 10.4.

the auspices of the International Baseball Federation (“IBAF”). For pre-competition testing, the IBAF will randomly select players on Provisional Rosters to be tested for all prohibited substances included on the 2009 WADA Prohibited List. A copy of this list is attached as Addendum A. This list is the applicable prohibited list for the Classic. Please be aware that the list of banned substances for the Classic is more extensive than the one for Major League Baseball. If a player is removed from a Provisional Roster or not included on a National Team’s Final Roster, he will no longer be subject to drug testing by the IBAF.

*In-competition* – If a player is included on a National Team’s Final Roster, he will be subject to in-competition testing by the IBAF during the Classic. For in-competition testing, the IBAF will randomly select two players from each National Team to be tested from one game played at each Classic venue each day. All testing will take place after the conclusion of the game.

#### Therapeutic Use Exemption

If you are a player under contract with a Major League organization (regardless of whether you are on a 40-man roster) and you currently have a prescription for a medication that is included on the 2009 WADA Prohibited List, you should immediately complete the TUE process under the Major League or Minor League Drug Program, noting on the TUE application that you are a participant in the Classic. Under the IBAF drug testing rules that will be in effect for the Classic, supplemental information may be required. In any event, a TUE must be approved prior to a drug test or sanctions may be imposed.

If you are not subject to Major League Baseball’s Drug Testing Programs (Major or Minor League) but are on a Provisional Roster and you desire a TUE, you will need to complete the IBAF TUE application form that is attached to this memorandum as Addendum B. A completed form with the required supporting documents should be forwarded to Dr Bryan Smith, the Recording Secretary of the TUE Committee for the Classic, by fax ... or by email ... . Once the application and supporting documentation is received, a decision will be made by the TUE Committee and written notice of that decision will be sent to you. If you have any questions regarding the TUE process for the Classic you should contact Dr Smith ... .

If you have any questions regarding the above information, please do not hesitate to contact Dr Smith.

- 2.8 The WBC Anti-Doping Memorandum therefore put the players who were on the provisional rosters for the 2009 World Baseball Classic on notice that (a) drug-testing would be conducted before and during the 2009 Classic under the auspices of the IBAF; (b) the IBAF’s anti-doping rules prohibit the substances listed on the 2009 Prohibited List; and (c) to avoid violating those rules, anyone who wants to make therapeutic use of a substance that is on the 2009 Prohibited List (including a prescribed medication) has to apply (either to MLB or IBAF) for a therapeutic use exemption (or ‘TUE’).<sup>8</sup> And the memorandum reproduces in full the entire 2009 Prohibited List (including

<sup>8</sup>

See IBAF ADR 4.4.

category S6a and its listing of phentermine as a stimulant that is prohibited in-competition).

- 2.9 As the IBAF notes in its written submission to the Tribunal, the WBC Anti-Doping Memorandum specifically highlights that the 2009 Prohibited List bans substances that are not banned in Major League Baseball. However, it is the Tribunal's understanding that the use of phentermine during the season (i.e., in-competition) is also prohibited under the MLB's Joint Drug Prevention and Treatment Program in effect until 11 December 2011 (the 'MLB Anti-Doping Program').<sup>9</sup> The Tribunal is not suggesting in any way that the Player may have violated the Program. Instead, the point is that the Player knew or should have known that the use of phentermine during competition is banned by Major League Baseball.<sup>10</sup>
- 2.10 In any event, the Tribunal understands that the Player was on the Netherlands team's provisional roster<sup>11</sup> as well as on its final roster. He joined up with the Netherlands squad to prepare for the Classic in Florida in February 2009.<sup>12</sup> Therefore, it would appear that the Player received a copy of the WBC Anti-Doping Memorandum issued to all players participating in the 2009 World Baseball Classic. The IBAF referred to and relied upon that memorandum in its written submissions, and in response the Player did not deny that he received the memorandum. Nor does the Player deny that the IBAF Anti-Doping Rules (including the 2009 Prohibited List) apply to his participation in the 2009 World Baseball Classic.<sup>13</sup> Therefore, the Tribunal finds that the Player did receive a copy of the memorandum and so was on notice of the matters it addressed, including the fact that the IBAF Anti-Doping Rules applicable to the 2009 Classic prohibited the use of phentermine during that event.

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

- 2.11 On 7 March 2009, the Player was the starting (and winning) pitcher for the Netherlands in its opening 2009 World Baseball Classic match, played against

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<sup>9</sup> See MLB Anti-Doping Program Section 2C, although it is only prohibited if it is found to be present at a concentration of more than 500 ng/ml. (See MLB Anti-Doping Program p.40). There is no similar threshold for declaration of Adverse Analytical Findings for phentermine under the IBAF Anti-Doping Rules. (See IBAF ADR 2.1.3).

<sup>10</sup> The MLB Anti-Doping Program also contemplates that a player may be granted permission to use an otherwise-prohibited substance for therapeutic reasons, including where such substance is prescribed to him by a licensed physician, but only if he applies for and is granted a TUE by the Independent Program Administrator. (MLB Anti-Doping Program, Section 3G).

<sup>11</sup> See <http://mlb.mlb.com/wbc/2009/rosters/index.jsp?season=2009&roster=provisional>.

<sup>12</sup> Player Aff. para 6.

<sup>13</sup> To the contrary, the Player accepts this point. See Player 2<sup>nd</sup> Sub., fn 2: 'Both the overarching agreement between the IBAF, MLB and the MLBPA, as well as the January 30 memorandum from Mr Orza and Mr Manfred, notify Mr Ponson that he will be tested in accordance with IBAF rules and procedures.'

the Dominican Republic in San Juan, Puerto Rico. As part of the drug-testing programme that the IBAF had put in place for the event, the Player was selected for testing after the match, and duly provided a urine sample for testing.<sup>14</sup>

- 2.12 As discussed in further detail below, since December 2008 the Player had been taking 37.5 mg of phentermine each day, on prescription from his doctor, as part of a weight loss programme. Accordingly, he says, '*[d]uring the preliminary part of the test, I volunteered to the WBC doctor that I was taking phentermine on the advice and supervision of a doctor.*'<sup>15</sup> And in the part of the doping control form that asks for a declaration of medications or supplements taken in the past seven days, the Player declares '*Arcoxia, Phentermine [sic] and Chromimun [sic].*'<sup>16</sup>

### ***Adverse Analytical Finding***

- 2.13 The Player's sample was transported to the WADA-accredited laboratory in Montreal, Canada, where the A sample<sup>17</sup> was analysed and duly found to contain phentermine. This Adverse Analytical Finding was reported by the laboratory to the IBAF in a Certificate of Analysis dated 20 March 2009.

## **3. Disciplinary Proceedings**

### ***The Player's waiver of his right to analysis of his B sample***

- 3.1 On 23 March 2009, the IBAF Anti-Doping Manager sent a 'Notification of a Possible Anti-Doping Rule Violation' to the President of the Royal Dutch Baseball & Softball Federation, advising of the Adverse Analytical Finding made by the Montreal laboratory in respect of the Player's A sample, 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>18</sup> 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.

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<sup>14</sup> In fact, the Player provided two samples, as the first sample was measured at the collection site as having a low specific gravity (1.002) (as indeed was the second sample). The laboratory to which the samples were sent for analysis, with its more precise instruments, measured the specific gravity of the first sample at 1.005 and the specific gravity of the second sample at 1.004. (See Certificates of Analysis dated 20 March 2009).

<sup>15</sup> Player Aff. para 7.

<sup>16</sup> Doping Control Form, box 3.

<sup>17</sup> Upon collection, in accordance with the standard procedures set out in WADA's International Standard for Testing, the Player's urine sample was split between two bottles, labelled 'A' and 'B' respectively, hence 'A sample' and 'B sample'.

<sup>18</sup> See IBAF ADR 7.1.4.

- 3.2 By letter dated 25 March 2009, the President of the Royal Dutch Baseball & Softball Federation wrote to the Player, enclosing a copy of the aforementioned 'Notification of Possible Anti-Doping Rule Violation' and asking the Player to give notice by 31 March 2009 if he wanted to exercise his right to have the B sample analysed.
- 3.3 The IBAF did not receive any response from the Player to this notice, either by the specified deadline or otherwise. Instead, the Player confirms that he chose not to exercise his right to have his B sample analysed because he did not dispute that phentermine was present in that sample.<sup>19</sup>

#### ***The IBAF's Notice of Charge***

- 3.4 By letter dated 7 April 2009, in accordance with Article 7.2.1 of the IBAF Anti-Doping Rules the IBAF charged the Player with an anti-doping rule violation under Article 2.1 of the IBAF Anti-Doping Rules, based on the presence of phentermine in the sample he provided on 7 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 participating in any competition under IBAF anti-doping rules.'* (Notice of Charge, p.1).<sup>20</sup>

#### ***Submissions of the Parties***

- 3.6 On 28 April 2009, the Player's representative filed the following documents:
- 3.6.1 A letter dated 28 April 2009, which he said should be treated as *'our entire submission with regard to the matter under review'* (which he identified as *'the sanctions, if any, which should be imposed on Mr*

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<sup>19</sup> Player Aff. para 9.

<sup>20</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. First, because phentermine is not a Specified Substance, the IBAF Anti-Doping Rules 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). Second, the IBAF Anti-Doping Rules 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 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 matches (see IBAF ADR 10.10.1 and comment thereto), that strongly suggests that the Provisional Suspension itself should also extend to MLB matches. This is not because the IBAF has any direct authority over MLB and participation in its matches, but because participation in MLB matches during a period of Ineligibility imposed under the IBAF Anti-Doping Rules amounts to a further violation of the IBAF Anti-Doping Rules (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.

*Ponson as a result of the Adverse Analytical Finding for phentermine*) ('Player 1st Sub.').

- 3.6.2 A sworn affidavit from the Player dated April 2009.
- 3.6.3 A sworn affidavit from the Player's doctor, Dr Robert Bell, dated 28 April 2009.
- 3.7 On 30 April 2009, the IBAF submitted the following documents:
  - 3.7.1 A 'brief 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.'
  - 3.7.2 The doping control form for the Player's test on 7 March 2009.
  - 3.7.3 The Montreal laboratory's certificate of analysis of the Player's sample dated 20 March 2009.
  - 3.7.4 The notification of possible anti-doping rule violation sent by the IBAF to the Royal Dutch Baseball & Softball Federation dated 23 March 2009.
  - 3.7.5 The notification of possible anti-doping rule violation sent by the Royal Dutch Baseball & Softball Federation to the Player dated 25 March 2009.
  - 3.7.6 The Notice of Charge sent by the IBAF to the Player dated 7 April 2009.
- 3.8 Subsequently, at the request of the Tribunal, the IBAF also submitted copies of (1) the WBC Anti-Doping Memorandum discussed at paragraphs 2.7-2.8, above; and (2) the MLB Anti-Doping Program discussed at paragraph 2.9, above.
- 3.9 On 19 May 2009, at the invitation of the Tribunal (see para 3.12, below), the Player submitted a further letter in response to the IBAF's submission ('Player 2<sup>nd</sup> Sub.').

#### ***Waiver of Hearing***

- 3.10 In his letter submission sent to the IBAF dated 28 April 2009, the Player's representative stated:

*Pursuant to Paragraph 10 of your letter to Mr Ponson dated April 7, 2009, I wish to request, on Mr Ponson's behalf, that a hearing be held before a tribunal in order to address the sanctions, if any, which should be imposed on Mr. Ponson as a result of the Adverse Analytical Finding for phentermine. It is my understanding that the desired hearing can be conducted wholly on the basis of written submissions, and that is my initial request. You may treat this letter, with the accompanying documents, as our entire submission with*



*regard to the matter under review and ask that you forward it to the reviewing tribunal for its consideration.*

- 3.11 By email dated 5 May 2009, the Chairman of the Tribunal asked the Player's representative whether, having seen the IBAF's written submissions, the Player was still content to have the issues determined on the papers, i.e., to waive his right to appear in person (himself and/or through his representatives) before the Tribunal to defend the charge, or alternatively whether he would prefer to appear at the hearing. The Player's representative was also invited to respond, if he saw fit, to the written submissions made by the IBAF in response to his original response to the Notice of Charge.
- 3.12 In response, in his letter dated 18 May 2009, the Player's representative confirmed that the Player *'is content to have the tribunal deal with this matter based solely on the papers submitted by the parties and that he waives his right to appear in person.'*
- 3.13 The Tribunal considers that it is well within the broad procedural discretion conferred on it by Article 8.1 of the IBAF Anti-Doping Rules to permit this approach. In circumstances where there appears to be no dispute about any relevant fact, or at least no fact that is material to the Tribunal's decision, the Tribunal is happy to determine the charge based on the sworn affidavit evidence of the witnesses and the written submissions of the parties, rather than insisting on an in-person hearing.<sup>21</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 Anti-Doping Rules, 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.
- 4.2 This Tribunal was convened in accordance with Article 8.2 of the IBAF Anti-Doping Rules. The IBAF sent a copy of the Notice of Charge to the Chairman of the IBAF Anti-Doping Panel, who appointed the three undersigned members of that Panel to sit as the Tribunal convened under Article 8 of the

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<sup>21</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.*). The Tribunal notes that a similar approach was taken in the CAS case of *WADA v Stauber & Swiss Olympic Committee*, CAS 2006/A/1133, award dated 18 December 2006, which dealt with factual and legal issues similar to those before the Tribunal in this case.

IBAF Anti-Doping Rules to hear and determine the charge made against the Player, including (where the violation charged is admitted or found to have been committed) determining what consequences should be imposed under Articles 9 and/or 10 of the IBAF Anti-Doping Rules.<sup>22</sup>

- 4.3 The Player has not disputed the jurisdiction of this Tribunal to hear and determine this matter; to the contrary, he has submitted himself to the jurisdiction of this Tribunal. In addition, the Player's representative was given notice of the composition of the Tribunal by email dated 5 May 2009, and was invited to raise any objection. In his response, dated 18 May 2009, he confirmed that he had no objection to the composition of the Tribunal, *'and waives whatever rights he might have to question its composition.'*

## 5. Applicable Law

- 5.1 The IBAF Anti-Doping Rules 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:

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.

...

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 Anti-Doping Rules, 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 Anti-Doping Rules 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

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<sup>22</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.

IBAF Anti-Doping Rules 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>23</sup>

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

6.1 Under Article 3.1 of the IBAF Anti-Doping Rules, 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 Anti-Doping Rules are strictly responsible for any Prohibited Substances found in their samples, so that 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.<sup>24</sup>

6.3 Therefore, to carry its burden, the IBAF must prove, to the comfortable satisfaction of the Tribunal,<sup>25</sup> that a Prohibited Substance was present in the urine sample collected from the Player on 7 March 2009. The IBAF may prove this '*by any reliable means, including admissions.*'<sup>26</sup>

6.4 In his submissions to this Tribunal, the Player has admitting using phentermine during the Classic and therefore has not disputed the presence of phentermine in the sample collected from him on 7 March 2009.<sup>27</sup> Indeed, by waiving the analysis of his B sample, the Player accepted the accuracy of the laboratory's Adverse Analytical Finding for phentermine in his sample.<sup>28</sup>

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<sup>23</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.*').

<sup>24</sup> See 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: see para 8.6 et seq.

<sup>25</sup> See IBAF ADR 3.1.

<sup>26</sup> IBAF ADR 3.2.

<sup>27</sup> Player 1st Sub. p.2.

<sup>28</sup> IBAF ADR 7.1.5.

- 6.5 Phentermine is only prohibited In-Competition. The sample containing the phentermine was collected from the Player in an In-Competition test, immediately after the match between the Netherlands and the Dominican Republic.<sup>29</sup> Therefore, the phentermine in the Player's sample constitutes a Prohibited Substance for the purposes of Article 2.1.
- 6.6 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 TUE previously obtained by the player.<sup>30</sup> However, there is no suggestion here that the Player had a TUE for the use of phentermine prior to being tested on 7 March 2009; and nor, it appears, has he applied for one since. Indeed, the Tribunal notes its understanding that a TUE would never be granted for the use of phentermine, because it does not meet the criteria for the grant of a TUE set out in the International Standard for Therapeutic Use Exemptions: the use of phentermine would definitely enhance performance, even if not intended to do so; there are alternative therapeutic methods that could be used instead that do not involve any prohibited substance or method; and withholding phentermine would not pose a significant impairment to the Player's health.
- 6.7 Accordingly, the Tribunal is comfortably satisfied that the Player has committed an anti-doping rule violation under Article 2.1 of the IBAF Anti-Doping Rules, in that the prohibited substance phentermine was found to be present in the urine sample collected from the Player on 7 March 2009.
- 6.8 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 Anti-Doping Rules 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 results in the match in question***

- 7.1 Article 9 of the IBAF Anti-Doping Rules, entitled 'Automatic Disqualification of Individual Results', provides as follows: '*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 or prizes.*' As the title to the Article makes clear, the '*result obtained*' in this context is the

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<sup>29</sup> The IBAF Anti-Doping Rules define 'In-Competition' as follows: '*Unless provided otherwise in the rules of an International Federation or other relevant Anti-Doping Organization, "In-Competition" means the period commencing twelve hours before a Competition in which the Athlete is scheduled to participate through the end of such Competition and the Sample collection process related to such Competition.*'

<sup>30</sup> See IBAF ADR 4.4.1.

individual result (or results) obtained by the Player (as opposed to, for example the result obtained by his team.

- 7.2 A 'Competition', for purposes of Article 9, is a single match.<sup>31</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 the Netherlands and the Dominican Republic on 7 March 2009 is the disqualification of the results he obtained in that match, and forfeiture of any individual medals, points or prizes that the Player was awarded as a result of his participation in that match.

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

- 7.3 The Player also played one other match in the Classic, against Venezuela on 14 March 2009. Article 10.1 of the IBAF Anti-Doping Rules 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>[32]</sup>

- 7.4 In other words, in contrast to the position under Article 9, under Article 10.1 Disqualification of the Player's results obtained in the match against Venezuela is not automatic, but instead lies in the discretion of this Tribunal. 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.*' The Athlete was not tested after the match against Venezuela, but he has admitted that he was taking phentermine daily during this period,<sup>33</sup> and that he did not stop taking it until he received notice of his potential anti-doping rule violation in late March 2009.<sup>34</sup> Accordingly, the Tribunal is comfortably satisfied that the Player had phentermine in his system when he played for the Netherlands in its match against Venezuela on 14 March 2009. As a consequence, his performance in that match is tainted, and therefore the Tribunal finds that the results he obtained in that match should be Disqualified in accordance with Article 10.1, with any medals, points and/or prizes that the Player was awarded as a result of his participation in that match forfeited.

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<sup>31</sup> See IBAF ADR, p.59, definition of 'Competition.'

<sup>32</sup> IBAF ADR 10.1.1 creates an exception to this rule where the athlete establishes No Fault or Negligence. As set out below, however (see para 8.21), 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>33</sup> Player Aff. paras 3 and 8.

<sup>34</sup> Player Aff. para 8.

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

7.5 Article 10.8 of the IBAF Anti-Doping Rules 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 Classic the Player has been playing in Major League Baseball for the Kansas City Royals, his first game being on 10 April 2009.<sup>35</sup>

7.7 This raises the following question: 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? This is not a straightforward 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>36</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 results), and instead the only proper option would be to bring the issue to the attention of Major League Baseball for it to consider and resolve as it saw fit. If the Tribunal was required to rule on this issue, given its significance the Tribunal would first ask for submissions from the parties on this specific point. But the Tribunal is not required to rule on this issue, because the undisputed evidence is that the Player stopped taking phentermine at the end of March 2009,<sup>37</sup> i.e., well before his first MLB match for the Kansas City Royals, and therefore, notwithstanding that the starting-point under Article 10.8 is that Disqualification of subsequent results is the norm, not the exception,<sup>38</sup> the Tribunal finds that '*fairness requires*' that his results in subsequent matches should not be Disqualified in any event.<sup>39</sup>

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<sup>35</sup> See <http://sports.espn.go.com/mlb/players/profile?playerId=3823>.

<sup>36</sup> In particular, under the IBAF Anti-Doping Rules a period of Ineligibility is intended to extend to MLB matches, in the sense that if he plays in the MLB 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>37</sup> Player Aff. para 8.

<sup>38</sup> *ITF v. Bogomolov*, Anti-Doping Tribunal decision dated 26 September 2005, para 109 ('*The question is one of fairness on the facts of each case, but the starting point is indeed ... that disqualification is the norm and not the exception. Otherwise the rule would have been drafted the other way round, so as to make non-disqualification the norm unless the Tribunal considers that fairness requires disqualification.*').

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

8.1 The Tribunal now moves to the question of whether a period of Ineligibility should be imposed, and if so then what period. The answer lies within the provisions of Article 10 of the IBAF Anti-Doping Rules.

8.2 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 Anti-Doping Rules 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***

8.3 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 athlete's sample is categorised in the Prohibited List as a 'Specified Substance', and phentermine is not so categorised in the 2009 Prohibited List.<sup>40</sup>

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<sup>39</sup> See *WADA v. ASADA, AWF & Karapatyn*, CAS 2007/A/1283, award dated 15 November 2007, para 54 (upholding decision that fairness required no disqualification of subsequent results where evidence demonstrated prior use of stimulant had not tainted those results).

<sup>40</sup> This was conceded by the Player's representative in his second written submission, dated 18 May 2009 (at page 1). However, he submits that *'[t]he language of Article 10.4 and the comment thereto ... is instructive in considering whether and how Article 10.5.1 or Article 10.5.2 should [be] applied to Mr Ponson's case.'* In particular, he notes the crucial role that proof of lack of performance-enhancing intent plays under Article 10.4, triggering a discretion to reduce the sanction to as little as a reprimand and no period of Ineligibility. He contends that the Tribunal should find here that the Player had no performance-enhancing intent. He also notes that Specified Substances are not necessarily less serious doping agents than non-Specified Substances such as phentermine. He therefore submits that there is only a *'slight'* difference between this case and a case under Article 10.4. Consequently, emphasising the fact that the Player did not know that phentermine was banned, and his doctor told him it was not banned, the Player's representative argues that *'the better course of action for the tribunal would be to find that Mr Ponson has met the burden of Article 10.5.1 because he has shown that he bears no fault or negligence. His period of Ineligibility should be eliminated.'* (Player 2<sup>nd</sup> Sub. pp.2-3).

The Tribunal does not agree with this analysis. First, even if the conditions for the application of Article 10.4 were satisfied, this would not automatically mean that the sanction would be a mere reprimand. To the contrary, satisfaction of those conditions would trigger a broad discretion on the part of the Tribunal to impose a sanction of up to two years, depending on its assessment of the Player's degree of fault. Second, as the Tribunal discusses further below (see para 8.28), proof of lack of performance-enhancing intent for purposes of Article 10.4 does not equate to lack of fault or negligence for purposes of Article 10.5. To the contrary, to establish No Fault or Negligence under Article 10.5.1, or No Significant Fault or Negligence under Article 10.5.2, the Player must establish that he did not act intentionally, recklessly or negligently, the latter to be assessed by reference to the stringent requirements placed on elite athletes who are subject to Code-compliant anti-doping rules to ensure that no Prohibited Substances come into their systems. (See below, para 8.15).

**Article 10.6 does not apply**

- 8.4 Article 10.6 permits a Tribunal to increase the basic sanction where ‘*aggravating circumstances*’ are established,<sup>41</sup> but the IBAF has not alleged that any aggravating circumstances exist in this case, nor is there any suggestion of aggravating circumstances in the factual record before this Tribunal, and therefore there is no question of applying Article 10.6 in this case.

**Articles 10.5.3 and 10.5.4 do not apply**

- 8.5 That leaves Article 10.5, which provides four separate potential grounds for departing from the two-year period of Ineligibility otherwise prescribed by Article 10.2. Two of those grounds can be quickly discounted in this case:

8.5.1 Article 10.5.3 permits suspension of a period of Ineligibility applicable in a particular case where the athlete ‘*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 here.

8.5.2 Article 10.5.4 provides that a period of Ineligibility may be reduced by up to one half where an athlete ‘*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 ...*’ The Player asserts that ‘*[d]uring the preliminary part of the test, I volunteered to the WBC doctor that I was taking phentermine on the advice and supervision of a doctor*’ (Player Aff. para 7), but he does not submit that this amounts to a voluntary admission for purposes of Article 10.5.4, and the Tribunal finds that it does not do so, first because the Player apparently did not volunteer that information until he had been notified that he was required to provide a sample, and second because he was not at that time making an ‘admission’ in the true sense of that word. The Tribunal considers that ‘admission’ in Article 10.5.4 means an admission, in terms, of liability for commission of an anti-doping rule violation, not an

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<sup>41</sup> The comment to IBAF ADR 10.6 provides the following examples of ‘aggravating circumstances’ for these purposes: ‘*the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.*’



acknowledgement (for other purposes) of facts that together reflect the commission of an anti-doping rule violation.<sup>42</sup> The Player could not have made an admission in the former sense, since (according to his testimony) at the time he took the test he was not aware that phentermine was a prohibited substance. Instead (it appears), he was simply listing the medication and supplements he had taken in the past seven days, as required by the doping control form.

**Articles 10.5.1 and Article 10.5.2**

8.6 That leaves only Articles 10.5.1 and 10.5.2. Unless the Player can establish<sup>43</sup> 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), then the Tribunal will be required to impose a two-year period of Ineligibility on the Player in accordance with Article 10.2. This reflects the fundamental principle of the IBAF ADR addressed in paragraph 6.2, above: the Player is strictly responsible for any Prohibited Substance found in his sample.

8.7 Articles 10.5.1 and 10.5.2 of the IBAF Anti-Doping Rules track Articles 10.5.1 and 10.5.2 respectively of the Code:

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. ... .'* To establish 'No Fault or Negligence' within the meaning of Article 10.5.1, the Player 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... .'*<sup>44</sup>

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 reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. ... .'* To establish 'No Significant Fault or Negligence' within the meaning of Article 10.5.2, 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*

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<sup>42</sup> The Tribunal is fortified in this interpretation of Article 10.5.4 by the comment to that article, which states: *'This Article is intended to apply when an Athlete or other Person comes forward and admits to an anti-doping rule violation in circumstances where no Anti-Doping Organization is aware that an anti-doping rule violation might have been committed. It is not intended to apply to circumstances where the admission occurs after the Athlete or other Person knows he or she is about to be caught.'*

<sup>43</sup> It being his burden on this point: see IBAF ADR 10.5.1 and 10.5.2 and the comments to those Articles.

<sup>44</sup> See definition of 'No Fault or Negligence', IBAF ADR p.61.

*Fault or Negligence, was not significant in relation to the anti-doping rule violation.*<sup>45</sup>

- 8.8 Each of Article 10.5.1 and 10.5.2 also provides as follows: *'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 ... .'* This is not just a formal requirement; without it, any claim that the substance got into the athlete's system without any of fault or negligence on his part would be meaningless.<sup>46</sup>
- 8.9 In the opinion of this Tribunal, when considering the application of Articles 10.5.1 and 10.5.2 it is very important to keep in mind the nature and scope of the sanctioning scheme established by the World Anti-Doping Code, and the intended functions of Article 10.5.1 and 10.5.2 within that overall scheme.
- 8.9.1 The Code aims for harmonisation and consistency of treatment from athlete to athlete and from sport to sport by establishing fixed sanctions (or a fixed range of sanctions) for each anti-doping rule violation recognised by the Code. But it also aims to respect the principle of proportionality ('the sanction must fit the offence') by conferring discretion on a hearing panel to reduce or eliminate (or indeed increase) those sanctions when specified conditions are satisfied.<sup>47</sup>
- 8.9.2 Articles 10.5.1 and 10.5.2 provide two of the most important opportunities for reduction of the otherwise applicable sanction, based on the athlete's relative fault in all of the circumstances of the case. The comments to these Articles state: *'The Code provides for the possible reduction or elimination of the period of Ineligibility in the unique circumstance where the Athlete can establish that he or she had*

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<sup>45</sup> See definition of 'No Significant Fault or Negligence', IBAF ADR p.61.

<sup>46</sup> See *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.'*).

<sup>47</sup> The tension between the two principles is well-reflected in the comment to Article 10.2 of the Code (reproduced in the comment to IBAF ADR 10.2): *'Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization are based on differences between sports ... . A primary argument in favour of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting bodies to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of jurisdictional conflicts between IFs and National Anti-Doping Organizations.'*

*No Fault or Negligence, or No Significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Athlete was admittedly at fault. ... Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.'*

8.9.3 In assessing whether the Athlete was at fault (whether negligent or otherwise)<sup>48</sup> for purposes of Articles 10.5.1 and 10.5.2, the CAS has made clear that the starting-point is the strict requirement on an athlete who is subject to Code-compliant rules to ensure that a prohibited substance does not enter his system.<sup>49</sup> This basic requirement encompasses various specific requirements, including that the athlete make himself aware of what substances are prohibited,<sup>50</sup> that he takes care not to ingest any food or supplement that contains a prohibited substance, and that he avoids any medical treatment that contains a prohibited substance or involves a prohibited method without first obtaining a TUE for that treatment.<sup>51</sup>

8.9.4 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

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<sup>48</sup> The juxtaposition of, and apparent distinction between, 'Fault' and 'Negligence' in Articles 10.5.1 and 10.5.2 is on its face slightly confusing, since negligence is not distinct from but instead is one type (or sub-category) of fault. The Tribunal does not understand the Code to be suggesting otherwise.

<sup>49</sup> 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.

<sup>50</sup> See IBAF ADR Art. 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 ...').

<sup>51</sup> 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').

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

- 8.9.5 The comments to Articles 10.5.1 and 10.5.2 of the IBAF ADR also authorise this Tribunal to consider the experience of the athlete in determining if exceptional circumstances exist. The more experienced the athlete, the more he or she should be aware of anti-doping issues, and the higher the standard of care that may be expected of him.<sup>52</sup>

### *The Player's case*

- 8.10 The Player's case is as follows:

8.10.1 Having '*struggled with weight issues for some time*', on the recommendation of his fiancée and her family the Player met with Dr Robert Bell, a licensed physician based in Fort Lauderdale, Florida, who '*specializes in assisting patients with weight issues*.'<sup>53</sup>

8.10.2 At the first consultation, which took place in December 2008, '*Dr. Bell, after giving me a comprehensive physical examination, put me on a low glycemic diet and prescribed the daily use of phentermine. He explained that phentermine would help suppress my appetite*.'<sup>54</sup>

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<sup>52</sup> Anti-doping tribunals including CAS have taken the experience of the athlete into account in this way in assessing pleas of exceptional circumstances in decisions involving elite international athletes in tennis (*Canas v. ATP Tour*, CAS 2005/A/951, revised award dated May 23, 2007, para. 8.6; *Puerta v. ITF*, CAS 2006/A/1250, award dated July 12, 2006, para. 11.4.8; *Hipperdinger v. ATP Tour*, CAS 2004/A/490, award dated March 24, 2005, paras. 55, 62), wrestling (*WADA v. FILA and Abdelfattah*, CAS 2008/A/1470, award dated September 3, 2008, para. 70), bobsleigh (*CCES and others v. Darsingy*, SDRCC DT 05-0020, award dated April 17, 2005, pages 5 and 7; affirmed SDRCC DAT-05-0001, award dated July 8, 2005, para. 48), and athletics (*WADA v. USADA and Thompson*, CAS 2008/A/1490, award dated June 25, 2008, paras. 8.8, 8.20 and 8.21).

<sup>53</sup> Player Aff. para 3. This is corroborated by Dr Bell, who says the Player consulted him '*to seek assistance in losing weight in preparation for the 2009 baseball season*.' (Bell Aff. para 1).

<sup>54</sup> Player Aff. para 3. Again, Dr Bell corroborates this, confirming that he '*placed Sidney on a low glycemic diet and prescribed the use of 37.5 mg per day of Phentermine. Phentermine is the most widely used appetite suppressant prescribed in the United States today*.' (Bell Aff. para 4). The Tribunal notes in passing that this appears to be a relatively high dose, greater than the standard recommended daily dose of 15-30 mg per day. Without the opportunity to question the doctor about the dose prescribed, however, the Tribunal draws no negative inference from this point.

8.10.3 *'I specifically remember reminding Dr. Bell when I first received the prescription that I am a professional athlete and needed to make sure that I would not be taking any substances banned by Major League Baseball. He advised me that that would not be the case.'*<sup>55</sup>

8.10.4 From then until March 2009, the Player visited Dr. Bell every 1-2 weeks. *'During each appointment, Dr. Bell re-examined me and continued my phentermine prescription.'*<sup>56</sup>

8.10.5 The treatment was a success: the Player lost 20 pounds in weight between December 2008 and March 2009.<sup>57</sup>

8.11 The Player affirms: *'I was taking phentermine solely to address my weight problem and not to seek or gain any advantage or assistance in any baseball competition.'*<sup>58</sup> As evidence of his good faith, he notes that he declared his use of phentermine at the time he was tested, orally to the IBAF doctor overseeing the testing, and in writing (on his Doping Control Form), and at no point sought to hide or deny such use.<sup>59</sup>

8.12 Based on these facts, the Player submits that he *'should not be sanctioned under the IBAF Rules because he exercised reasonable, in fact more than reasonable, care with respect to the ingestion of the phentermine, and should be regarded as without fault or negligence in this matter.'*<sup>60</sup> The argument, in summary, is as follows:

8.12.1 The Player took the phentermine on the advice of a licensed medical physician, not to enhance his performance but to help him lose weight, after seeking and obtaining the physician's assurance that phentermine was not banned by Major League Baseball.

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<sup>55</sup> Player Aff. para 4. Here, Dr Bell's corroboration of the Player's testimony is not quite so clear. Dr Bell states: *'I was not aware that Phentermine was a banned substance under the Major League program. Accordingly, I did not tell Sidney that the use of this prescription would cause him to fail such a test. Rather, I was previously under the impression that anabolic steroids were the only substances banned in baseball.'* (Bell Aff. para 5). What is very noticeable is that Dr Bell does not corroborate the Player's claim that he specifically told the doctor that he *'needed to make sure that I would not be taking any substances banned by Major League Baseball.'* Clearly that is the intended inference, and it appears from what Dr Bell does say that he at least knew the Player was a MLB player, but in the circumstances the Tribunal finds it quite surprising, and telling, that Dr Bell does not specifically corroborate the Player's claim that he specifically sought assurance that any medication prescribed was not banned by Major League Baseball. For the reasons set out below, however (see para 8.16.2), the Tribunal considers this point to be moot.

<sup>56</sup> Player Aff. para 5. Dr Bell corroborates this (at Bell Aff. para 6).

<sup>57</sup> Bell Aff. para 7.

<sup>58</sup> Player Aff. para 10.

<sup>59</sup> Player 1<sup>st</sup> Sub., p.2; Player 2<sup>nd</sup> Sub., p.2.

<sup>60</sup> Player 1<sup>st</sup> Sub, p.2.

- 8.12.2 This was sufficient to discharge his responsibilities under the IBAF Anti-Doping Rules, so that he is not guilty of any fault or negligence for purposes of Articles 10.5.1 and 10.5.2.
- 8.13 Taking the threshold issue first (how did the prohibited substance get into the Player's system?), the claim is that the phentermine got into the Player's system through his ingestion of phentermine as a weight loss medication prescribed to him by a physician. In the view of the Tribunal, such claims should be approached very cautiously, and tested very thoroughly. In the usual course, the Tribunal would have expected to see copies of the doctor's contemporaneous notes of his treatment of the Player, and ideally to have a chance to question him itself. But in the circumstances of this case, where the doctor in question has provided a sworn affidavit, acknowledging his serious mistake, the Tribunal is not prepared to find that a licensed professional would lie under oath, but instead finds it is more likely than not that the Player's explanation of how the phentermine got into his system is correct.
- 8.14 Therefore, the question becomes: can it be said that the Player bears No (or No Significant) Fault or Negligence for taking the Prohibited Substance prescribed by his doctor?

***Article 10.5.1 (No Fault or Negligence) does not apply***

- 8.15 As noted above (see paragraph 8.7.1), to sustain a plea of No Fault or Negligence the Player 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 had used or been administered the prohibited substance.'* This requirement of *'utmost caution'* has been noted to be *'a very high standard which will only be met in the most exceptional circumstances.'*<sup>61</sup> The Player must show that he *'has fully complied'* with this *'duty of utmost caution'*,<sup>62</sup> i.e., that he has *'made every conceivable effort to avoid taking a prohibited substance'*,<sup>63</sup> and therefore that the substance got into his system *'despite all due care'* on his part.<sup>64</sup> In the specific context of a case where the

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<sup>61</sup> *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.

<sup>62</sup> CAS advisory opinion, *FIFA & WADA*, CAS 2005/C/976 & 986, rendered on 21 April 2006, para 74.

<sup>63</sup> *Knauss v. FIS*, CAS 2005/A/847, award dated 20 July 2005, para 7.3.1. In *Knauss*, the athlete had tested positive because of a contaminated supplement. He had checked the label and packaging of the supplement and had gone as far as obtaining written confirmation from the distributor that the supplement contained no prohibited substances. Despite this, the CAS Panel rejected the athlete's plea of No Fault or Negligence on the basis that he could and should have done more: he could have made further inquiries about the safeness of the product; he could have had the product tested for prohibited substances; or he could simply not have taken the product, thereby avoiding the risk altogether. This case illustrates clearly how stringently the CAS construes the standard of No Fault or Negligence.

<sup>64</sup> See comment to IBAF ADR 10.5: *'To illustrate the operation of Article 10.5.1, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor.'*

prohibited substance came from medical treatment, the Player *'must establish that he has done all that is possible, within his medical treatment, to avoid a positive testing result.'*<sup>65</sup>

8.16 In this Tribunal's view, it is absolutely clear that the Player has not come close to meeting this standard:

8.16.1 It is true that the Player did not ingest supplements,<sup>66</sup> or chew coca leaves,<sup>67</sup> or take some other substance of dubious provenance or composition,<sup>68</sup> but instead got the phentermine on prescription from a licensed physician. But this in itself is obviously not sufficient to discharge his duty of utmost caution. That duty is a personal one that cannot be delegated to third parties, even professional advisors, 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.'*<sup>69</sup>

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<sup>65</sup> *WADA v. Stauber & Swiss Olympic Committee*, CAS 2006/A/1133, award dated 18 December 2006, para 33.

<sup>66</sup> As in *Knauss v. FIS*, CAS 2005/A/847, award dated 20 July 2005, discussed in footnote 63, above (so many warnings have been given about contaminated supplements that it is by definition reckless for an athlete to use them).

<sup>67</sup> As in *Hipperdinger v. ATP*, CAS 2004/A/690, award dated 24 March 2005 (whereas drinking tea for therapeutic purposes might not have raised too many questions, chewing coca leaves was *'a rather unusual way to cure illnesses'* and therefore should have caused the athlete to make further enquiries as to the nature and source of the leaves).

<sup>68</sup> See eg *USADA v. Sahin*, AAA Case No. 30 190 01080 04, decision dated 25 March 2005, pp. 9-10 (*'By definition it is not reasonable to take an unlabelled pill that did not come from its original package without at least trying to verify what is in the pill.'*).

<sup>69</sup> *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 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,*

8.16.2 The Player claims that he told Dr Bell *'that I am a professional athlete and needed to make sure that I would not be taking any substances banned by Major League Baseball.'*<sup>70</sup> But even if that is so,<sup>71</sup> in the Tribunal's view that in itself would still not come anywhere close to discharging the Player's duty of utmost caution, i.e., to do all that was in his power to avoid his medical treatment leading to an Adverse Analytical Finding. Instead, in the Tribunal's judgement, to satisfy that duty the Player could and should have done at least the following:

- a. Rather than simply go for treatment to a physician recommended by his fiancée's family, he should have consulted a doctor that he knew was a sports medicine specialist, and therefore familiar with the requirements of the World Anti-Doping Code, with the concept of the Prohibited List, and with what medications contained substances that were on that list.<sup>72</sup> The Tribunal does not know if the Player was attached to any Major League Baseball team during the relevant period (December 2008 to March 2009), such that he could have consulted with the team doctor. If so, then his lack of care would be even more stark, since certainly the team doctor should have been his first port of call. However, even if not, an athlete with the Player's experience and resource could and should have sought out a sports medicine specialist who could be relied upon to be fully familiar with the requirements of the anti-doping rules to which the Player was subject. If the Player had done so, then unlike Dr Bell the doctor he consulted would not have thought that Major League Baseball only banned the use of steroids,<sup>73</sup> and so the Player would not have been assured that phentermine was not banned by Major League Baseball.
- b. In any event, the Player could and should have brought a copy of the MLB Anti-Doping Program with him and shown it to the doctor, so that the doctor would be absolutely clear about the

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*regardless of whether he or she has been victimized by his physician or coach.').* See also cases cited at footnote 74.

<sup>70</sup> Player Aff. para 4.

<sup>71</sup> As noted above (see footnote 55), Dr Bell noticeably fails to corroborate the Player's testimony that he specifically raised the question of having to avoid banned substances, an omission that the Tribunal finds very troubling. Given the reasoning followed above, the point is moot, but if it had been crucial, the Tribunal would have felt compelled to hear the witnesses' testimony in person, and to test the Player's claim further with the doctor.

<sup>72</sup> See comment to IBAF ADR 10.5 (*'Athletes are responsible for their choice of medical personnel'*).

<sup>73</sup> Bell Aff. para 5.



requirements on the Player and would be able to check (if he did not already know) whether phentermine was prohibited.

- c. Indeed, the Player could and should have checked for himself whether phentermine was banned by the MLB Program or on the Prohibited List in the IBAF Anti-Doping Rules.<sup>74</sup> Phentermine is not one of those prohibited substances that is marketed under a different brand name that does not appear on the Prohibited List.<sup>75</sup> Instead, phentermine is mentioned by name not only on the Prohibited List (i.e., the list of substances banned by the IBAF) but also in the MLB Anti-Doping Program (which lists the substances banned by Major League Baseball). The Player was required to be familiar with the contents of these rules. He certainly had a copy of the Prohibited List prior to his positive test, because it was appended in full to the WBC Anti-Doping Memorandum dated 30 January 2009 distributed by the organisers of the 2009 World Baseball Classic to all players on a provisional roster for the 2009 Classic. (See paragraph 2.8, above). But even if he had not, it would have been a simple matter to find a copy on the Internet.<sup>76</sup>

<sup>74</sup> 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.'). 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. In this case, however, Dr Bell was not such a specialist, but instead was a weight loss specialist with no apparent experience or expertise in treating athletes, or at least professional athletes. Therefore, the Player had no proper basis to assume that Dr Bell would be knowledgeable of the special obligations on professional athletes to avoid medications that included prohibited substances, and (even if it is accepted that the Player specifically brought those obligations to the attention of the doctor) there was certainly no basis to assume that the doctor would be familiar with what substances were on the Prohibited List.

<sup>75</sup> For example, salbutamol is a banned substance, mentioned by name on the Prohibited List, but Ventolin, the brand name for the asthma inhaler that contains salbutamol, is not on the Prohibited List. Of course, salbutamol is listed as an ingredient of Ventolin, and therefore the fact that Ventolin is not mentioned by name on the Prohibited List would be no excuse for an athlete who failed to identify that it contained a prohibited substance. But the Player does not even have this excuse, inadequate though it is, because the medication he was prescribed, phentermine, is listed by name on the Prohibited List.

<sup>76</sup> *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 medicine. It is rather easy to get information

- d. In the Tribunal's view, then, the Player had no excuse for not ascertaining for himself that phentermine was banned by both Major League Baseball and by the IBAF for the 2009 World Baseball Classic.<sup>77</sup> But even if he thought (improperly) that it was his doctor's job to check these points for him, when he got the WBC Anti-Doping Memorandum from the organisers of World Baseball Classic (see paragraph 2.7, above), (1) warning him that the anti-doping requirements for the 2009 Classic would be those of the IBAF, not Major League Baseball,<sup>78</sup> (2) specifically warning him that *'the list of banned substances for the Classic is more extensive than the one for Major League Baseball'*; and (3) advising that he would need a TUE to take any medication that contained a substance banned for the Classic, even if a doctor had prescribed it for him,<sup>79</sup> then at the

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*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.'*) See also *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.').

<sup>77</sup> Cf *WADA v. Stauber*, CAS 2006/A/1133, award dated 18 December 2006, para 37 (rejecting plea of No Fault or Negligence where '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. ...').

<sup>78</sup> See WBC Anti-Doping Memorandum at p.1: *'All players included on a National Team's Provisional Roster will be subject to Olympic style pre-competition drug-testing under the auspices of the International Baseball Federation ("IBAF"). For pre-competition testing, the IBAF will randomly select players on Provisional Rosters to be tested for all prohibited substances included on the 2009 WADA Prohibited List. A copy of this list is attached as Addendum A. This list is the applicable prohibited list for the Classic. Please be aware that the list of banned substances for the Classic is more extensive than the one for Major League Baseball. ... If a player is included on a National Team's Final Roster, he will be subject to in-competition testing by the IBAF during the Classic. ...'*

<sup>79</sup> See WBC Anti-Doping Memorandum at p.2: *'Therapeutic Use Exemption If you are a player under contract with a Major League organization (regardless of whether you are on a 40-man roster) and you currently have a prescription for a medication that is included on the 2009 WADA Prohibited List, you should immediately complete the TUE process under the Major League or Minor League Drug Program, noting on the TUE application that you are a participant in the Classic. Under the IBAF drug testing rules that will be in effect for the Classic, supplemental information may be required. In any event, a TUE must be approved prior to a drug test or sanctions may be imposed. If you are not subject to Major League baseball's Drug Testing Programs (Major or Minor League) but are on a Provisional Roster and you desire a TUE, you will need to complete the IBAF TUE application form that is attached to this memorandum as Addendum B. A completed form with the required supporting documents should be forwarded to Dr Bryan Smith, the Recording Secretary of the TUE Committee for the Classic, by fax ... or by email ... . Once the application and supporting documentation is received, a decision will be made by the TUE Committee and written notice of that decision will be sent to you. If you have any questions regarding the TUE process for the Classic you should contact Dr Smith ... . If you have any questions regarding the above information, please do not hesitate to contact Dr Smith.'*

very least the Player should have gone back to Dr Bell and asked him to check whether phentermine was allowed under these new rules as well as under Major League Baseball's rules.<sup>80</sup>

- e. In fact, however, notwithstanding the warnings set out in the WBC Anti-Doping Memorandum, the Player did not make any inquiries about the compatibility of his medical treatment with these new IBAF anti-doping requirements, either with Dr Bell, or with the IBAF, or with the organisers of the 2009 Classic, or indeed with Dr Byran Smith, the Recording Secretary of the TUE Committee for the Classic, despite the fact that Dr Smith's fax and email details were set out in the WBC memorandum with the following comment: *'If you have any questions regarding the TUE process for the Classic you should contact Dr Smith ... . If you have any questions regarding the above information, please do not hesitate to contact Dr Smith.'* According to his own testimony, the Player had obviously thought it important enough to ask Dr Bell specifically whether phentermine was banned by Major League Baseball; so why did he not think it important enough, when it was specifically flagged for him that more substances were banned in the World Baseball Classic than in MLB, to ask Dr Bell to check whether phentermine was banned for the World Baseball Classic?

8.17 It would not have been difficult for the Player to take any of these further steps. And if he had taken any of them, he would have ascertained that phentermine was prohibited in the World Baseball Classic, and so could have stopped taking the medication prior to competing, and so avoided his anti-doping rule violation. His failure to do so means that he has not come close to satisfying his duty of utmost caution, and so his plea of No Fault or Negligence has to be rejected.

8.18 The Tribunal is aware of only one CAS case where the Panel accepted an athlete's plea that he bore No Fault or Negligence because the prohibited substance in his sample came from medication administered to him by a physician. In *Pobyedonostsev v. IIHF*, the source of the nandrolone metabolite found in the athlete's sample was an injection of Retabolil that had been administered to the athlete 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 Panel found that *'under the unique circumstances of this case [the athlete] was unable to influence or control the treatment applied to*

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<sup>80</sup> Cf *WADA v. Stauber*, CAS 2006/A/1133, award dated 18 December 2006, para 36 (rejecting plea of No Fault or Negligence where *'notwithstanding the fact that (a) the list of prohibited substance is published annually and therefore changed several times since 2003 and that (b) Mr Stauber changed twice doctors – he never made any check in connection with the original prescription or with the renewed prescription, either by himself or by asking questions to either one of the Doctors who prescribed the medicine.'*).

*him in an emergency situation. ... As a result of severe pain he was even unable 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.*<sup>81</sup>

8.19 This Tribunal can see why the CAS Panel upheld the athlete's plea of No Fault or Negligence in the 'unique circumstances' of that case. But those circumstances are very different from the circumstances of this case, where the Player was well able to influence and control the treatment being given to him, and in particular was well able to prevent the treating doctor from prescribing a prohibited substance to him, but wholly failed to do so.

8.20 Instead, in the Tribunal's view, this case is much more akin to the case of *WADA v Stauber*.<sup>82</sup> In that case, the athlete's sample tested positive for hydrochlorothiazid, a banned diuretic, as a result of his use of a medication called Co-Diavan, which had been prescribed for him by his doctor to treat his high blood pressure. After the test, the athlete sought and was granted a TUE for Co-Diavan. The CAS rejected his plea of No Fault or Negligence, reasoning as follows:

35. All Athletes being responsible for that what they ingest ... - whether within a medical treatment or not – the elimination of a period of suspension must not be found except in exceptional circumstances. 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 [*citing Edwards, discussed at footnote [69], above*]. Indeed, the personal, strict and proactive duty imposed on the athletes by the antidoping rules requires that an athlete who relies on third party advice (medically trained or trustworthy person) effectively raises the question whether a prohibited substance is contained or not.

36. In the present case – notwithstanding the fact that (a) the list of prohibited substance is published annually and therefore changed several times since 2003 and that (b) Mr Stauber changed twice doctors – he never made any check in connection with the original prescription or with the renewed prescription, either by himself or by asking questions to either one of the Doctors who prescribed the medicine.

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<sup>81</sup> CAS 2005/A/990, award dated 24 August 2006.

<sup>82</sup> CAS 2006/A/1133, award dated 18 December 2006. In addition to *Stauber* and the other CAS cases cited in this Award to the same effect, the Tribunal also cites in support of its conclusion the following decisions that did not reduce or eliminate a period of ineligibility for exceptional circumstances due to an athlete's reliance on a physician: *UCI v. Munoz Fernandez*, CAS 2005/A/872, award dated January 30, 2006, citing *UCI v. Israel & FCC*, CAS 2004/A/613; *USADA v. Hartman*, AAA-CAS 190 00900 05, award dated June 19, 2006; *WADA v. Qatar Football Association & Alanezi*, CAS 2008/A/1446, award dated August 21, 2008; *WADA v. CISM & Turinni*, CAS 2008/A/1565, award dated November 4, 2008; *Pavlov v. UEFA* (UEFA Appeals Body) award dated December 28, 2008.

37. Therefore, he has not exercised “the greatest vigilance” or “the utmost caution” and committed a fault. In addition, 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. ...

8.21 Like the athlete in *Stauber*, in this case the Player did not exercise ‘*the greatest vigilance*’ or ‘*the utmost caution*’ to ensure that his medical treatment did not cause him to violate the IBAF Anti-Doping Rules. Therefore, he cannot sustain a plea of No Fault or Negligence under Article 10.5.1 of the IBAF Anti-Doping Rules.

***Article 10.5.2 (No Significant Fault or Negligence) does not apply***

8.22 That leaves Article 10.5.2 as the only possibility for avoiding the two-year period of Ineligibility mandated by Article 10.2. Where an athlete satisfies the conditions set out in Article 10.5.2, a discretion is triggered on the part of the hearing panel to reduce the otherwise-applicable sanction by up to one-half, i.e. (in this case) to as little as one year. But one of the conditions to be satisfied is a showing by the athlete 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 relation to the anti-doping rule violation.*’<sup>83</sup>

8.23 Again, the Tribunal reminds itself that 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.*’<sup>84</sup> 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.<sup>85</sup>

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<sup>83</sup> See paragraph 8.7.2, above.

<sup>84</sup> See comment to IBAF ADR 10.5.

<sup>85</sup> 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.*’).

- 8.24 So the question for this Tribunal is whether it can agree that this is one of those exceptional cases where the Player's departure from the duty of utmost care required of him was 'not significant.'
- 8.25 The CAS Panel in *WADA v. Stauber*<sup>86</sup> upheld the athlete's plea of No Significant Fault or Negligence, based on the following reasoning:
39. In the present case, the Panel finds that the following elements plead in favor of Mr Stauber:
- a. Mr Stauber has exclusively consumed Co-Diovan, medicine containing a forbidden substance, for medical reasons. On 13 November 2003, Dr Busser decided to prescribe Co-Diovan since it had been observed that notwithstanding the taking of Diovan, the blood pressure of Mr Stauber was still too high. There was indeed a continuity in the taking of a medicine containing no prohibited substance (Diovan) to the taking of another one bearing a very close name (Co-Diovan) containing a prohibited substance.
  - b. The Athlete has never had the desire to improve his performance. Moreover, hydrochlorothiazide is a "masking" agent which involves no improvement in performance (no "doping intent").
  - c. Dr Busser, a trustworthy person, presents himself as a specialist in sport medicine and was at the time of the prescription of Co-Diovan the official doctor of Mr Stauber's team. In his letter of 18 August 2006, Dr Busser expressly recognized having committed an error in not making any check concerning said medicine, in not requesting immediately a "TUE", as well as in failing to inform his patient of the potential risks being run.
  - d. Even though the request to use Co-Diovan for therapeutic purposes ("TUE") occurred only after the Athlete had been tested positive and it can not have a retroactive effect, it remains nonetheless that said authorization has been granted and thus that it fulfils the requirements for it.
- 8.26 In the Tribunal's view, however, this case is clearly distinguishable from *Stauber*. In particular, none of these factors relied upon by the CAS Panel to uphold Stauber's plea of No Significant Fault or Negligence is present in this case:
- 8.26.1 This is not a case where the Player had been taking one medication for a long time, which did not contain a prohibited substance, and then was switched to a very similar-sounding medication, which did contain a prohibited substance.
- 8.26.2 Like Stauber, the Player professes that he did not take the phentermine with the intent to improve his performance. On the other hand, unlike hydrochlorothiazide, phentermine cannot be said to be non-

<sup>86</sup>

CAS 2006/A/1133, award dated 18 December 2006.

performance-enhancing. Indeed, its potency as a stimulant is reflected in its designation in the Prohibited List as a non-Specified Substance.<sup>87</sup>

8.26.3 Like Stauber's doctor, the Player's doctor also confesses to committing an error, in not advising the Player that the medication being prescribed contained a substance prohibited by Major League Baseball. But Stauber's doctor held himself out as a sports medicine specialist, and indeed was the official doctor of Stauber's team, so that Stauber's reliance on his assurances was not unreasonable. The opposite is true in this case: the Player's doctor did not hold himself out as a sports medicine specialist, nor did he hold any position that would suggest any specialist knowledge. It was therefore not reasonable to rely on his assurance that phentermine was not a banned substance.

8.26.4 The Player has not sought any TUE for the use of phentermine to help the Player to lose weight, and the Tribunal believes that no TUE would be granted in any event.<sup>88</sup>

8.27 Given that the Player did so little to discharge his duty of utmost caution, and failed to take any of a series of simple steps, easily open to him, any one of which would have enabled him to avoid this violation,<sup>89</sup> in the Tribunal's view this is not an exceptional case and therefore the Player's fault or negligence cannot be said to be insignificant.<sup>90</sup>

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<sup>87</sup> See paragraph 2.6, above.

<sup>88</sup> See paragraph 6.6, above.

<sup>89</sup> See paragraph 8.16, above.

<sup>90</sup> 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.').

Compare *Vlasov v. ATP*, CAS 2005/A/873, award dated 23 August 2005, where the CAS Panel refused to interfere with the decision of the first instance tribunal to accept the athlete's plea of No Significant Fault or Negligence in testing positive for the prohibited substance pemoline, notwithstanding that the doctor who had prescribed it to him was not a specialist in sports medicine and the athlete did not inform him that he was a professional athlete subject to doping control. But the key to that decision was the tribunal's finding that the athlete's ability to meet his anti-doping responsibilities had been undermined by his depression (the very condition for which the pemoline had been prescribed). The CAS made it plain that but for that medical condition, which could affect cognitive functioning, the athlete's plea of No Significant Fault or Negligence would have been rejected. See *id.*, para 11.12 ('The Tribunal found that in this case there is a proven medical diagnosis of depression which can impact a person's cognitive functioning and continued: "His (i.e. the Player's) conduct would amount to significant fault were it not for his medical condition probably impairing his personal judgment. Although his judgment would have improved over the course of

8.28 In *Squizzato v. FINA*, a 17 year-old swimmer tested positive for the prohibited substance clostebol that came from a foot cream purchased for the athlete by her mother to treat a skin infection. Notwithstanding that the athlete did not seek the advice of her coach or a licensed physician, and further failed to check the packaging for the foot cream, which specifically listed the prohibited substance, nevertheless the CAS Panel found No Significant Fault or Negligence on the part of the swimmer, reasoning as follows: *'As the Appellant appears to have no intention whatsoever to gain an advantage towards her competitors, her negligence in forgetting to check the content of a medical cream can be considered as mild in comparison with an athlete that is using doping products in order to gain such advantage. Accordingly, the Appellant appears to bear no significant fault or negligence.'*<sup>91</sup> With the greatest respect, the Tribunal does not agree with this reasoning. It may be true, as the CAS Panel emphasised, that the athlete did not intend to cheat, and therefore is not culpable in the same way as an athlete who does intend to cheat. But that is simply not the issue under Article 10.5. The Code does not require proof of doping intent in order to trigger the application of the two-year sanction mandated by Article 10.2; nor does it permit an athlete to avoid the two-year sanction mandated by Article 10.2 simply by proving a lack of doping intent. To the contrary, the Code requires proof of No Fault or Negligence, or at least of No Significant Fault or Negligence, to depart from that two-year sanction. If No Significant Fault or Negligence is established, then that triggers a broad discretion on the part of the hearing panel to depart from the two-year sanction, in the exercise of which it is entitled to take into account the fact that the athlete lacked doping intent.<sup>92</sup> But that discretion is not triggered unless and until No Significant Fault or Negligence is established. With its focus on the athlete's asserted lack of doping intent, the CAS Panel in *Squizzato* failed to take into adequate account the duty of utmost caution on elite athletes that requires them to take every step within their power to avoid their medicine causing a positive test. Any athlete who takes an 'over-the-counter' medication without first checking with her coach or a physician, or even reading the packaging for herself to ensure there are no prohibited substances in the medication, cannot be said to be without significant fault, and therefore is not entitled to the benefit of a reduced sanction under Article 10.5.2. The Tribunal therefore considers the *Squizzato*

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*treatment which was very effective for him, in all of the circumstances and particularly because of the medical diagnosis, the line ought to be drawn in favour of the Player to say that there is no significant fault... " ... While the Tribunal's verdict may be thought to err, if at all, on the side of generosity, the Panel is not disposed to disagree with it ').*

<sup>91</sup> CAS 2005/A/830, award dated 15 July 2006, para 10.14.

<sup>92</sup> For a discussion of the distinction between the two separate steps in the analysis, see *Knauss v. FIS*, CAS 2005/A/847, award dated 20 July 2005 (*'In deciding how this wide range [of discretion under Article 10.5.2] is to be applied in a particular case, one must closely examine and evaluate the athlete's level of fault or negligence. The element of fault or negligence is therefore ultimately "doubly relevant". Firstly it is relevant in deciding whether Article 10.5.2 ... applies at all and, secondly, whether, in the second case, the term of the appropriate sanction should be set somewhere between one and two years. ')*



decision, on this point, to be out of line with the other CAS decisions discussed in this Award.<sup>93</sup> It therefore respectfully declines to follow it.

- 8.29 The Tribunal notes that the IBAF, in its written submissions, took the position that the Tribunal could find, on the facts of this case, that the Player bore No Significant Fault or Negligence in this case. That position is obviously not binding on the Tribunal, which acts independently of both parties, including the IBAF. Nor was it based on analysis of the relevant IBAF ADR Articles and interpreting case-law. For the reasons set out above, the Tribunal disagrees with the IBAF and finds that the Player cannot sustain a plea of No Significant Fault or Negligence under Article 10.5.2 of the IBAF Anti-Doping Rules on the facts of this case. Accordingly, no basis exists under the IBAF Anti-Doping Rules for the Tribunal to depart from the two-year period of Ineligibility prescribed by Article 10.2.

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

- 8.30 Article 10.9 of the IBAF Anti-Doping Rules 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. However, Article 10.9.2 provides as follows:

Where the Athlete promptly (which, in all events, means before the Athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by IBAF, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed.

- 8.31 Therefore, the pre-condition to the exercise of discretion in favour of the Player under Article 10.9.2 is a showing that he admitted his anti-doping rule

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<sup>93</sup> Compare, for example, *Pous Tio v. ITF*, CAS 2008/A/1488, award dated 22 August 2008, paras 7.10-7.11 (*'Ms Pous relies on the argument that her doping violation was unintentional. The player's Appeal Brief directs the Panel to consider the violation's unintentional nature and Ms Pous' lack of awareness as to the constituents of the administered medication, which she argues, reflects her intention to treat her physical ailments, and not to enhance her performance. The Panel is unable to accept these assertions in these circumstances as the basis that Ms Pous bore No Significant Fault or Negligence. First, 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 according to TADP Article M.5.2. Secondly, it is of little relevance to the determination of fault that the product was prescribed with "professional diligence" and "with a clear therapeutic intention" as submitted by the Appellant. Ms Pous' fault cannot be considered insignificant given that she did not conduct a thorough investigation into the composition of the drug and did not take even the most elementary of steps and advise her medical professional that she cannot ingest any Prohibited Substances. To allow athletes to shirk their responsibilities under the anti-doping rules by not questioning or investigating substances entering their body would result in the erosion of the established strict regulatory standard and increased circumvention of anti-doping rules.'*).

violation promptly upon being confronted with it, and in any event before he competed again. Here, the Player was first confronted with his anti-doping rule violation when his federation wrote to him on 25 March 2009, enclosing the IBAF's 'Notification of a Possible Anti-Doping Rule Violation.'<sup>94</sup> In response, by waiving his right to analysis of his B sample,<sup>95</sup> the Player accepted that there was a Prohibited Substance in his sample and so effectively admitted his anti-doping rule violation.<sup>96</sup> This was before the start of the 2009 MLB season and therefore this Tribunal does not have to decide whether playing in an MLB match prior to admitting the violation would preclude the application of Article 10.9.2. On the facts of this case, the Tribunal finds that the pre-condition to the exercise of discretion under Article 10.9.2 is satisfied.

- 8.32 In light of the Player's prompt admission of his anti-doping rule violation, the period of Ineligibility shall commence as of 7 March 2009 (the date of sample collection), and therefore shall end at midnight on 6 March 2011. Such back-dating is permitted under Article 10.9.2 as there is still more than half of the Ineligibility period to run from the date of this decision.

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

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

9.1.1 The Player has committed an anti-doping rule violation under Article 2.1 of the IBAF Anti-Doping Rules in that phentermine, a Prohibited Substance, was present in the sample collected from him after the 2009 World Baseball Classic match between the Netherlands and the Dominican Republic on 7 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 Anti-Doping Rules, with any medals, points or prizes that he earned from his participation in those matches to be forfeited.
- b. In accordance with Article 10.2 of the IBAF Anti-Doping Rules, the Player is ruled Ineligible for a period of two years. In accordance with Article 10.10 of the IBAF Anti-Doping Rules, during that period of Ineligibility the Player may not '*participate in any capacity in any Event or activity (other than*

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<sup>94</sup> See paragraph 3.3, above.

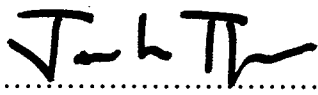
<sup>95</sup> *Ibid.*

<sup>96</sup> See IBAF ADR 2.1.1: '*Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed ...*'

*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 League Baseball. If the Player does continue to participate in Major League Baseball, then Article 10.10.2 of the IBAF Anti-Doping Rules will apply to push back the commencement date of the period of Ineligibility imposed in this Award to the date of his last MLB match.

- c. In accordance with Article 10.9.2 of the IBAF Anti-Doping Rules, the two-year period of Ineligibility shall be deemed to have commenced on 7 March 2009 and therefore shall end at midnight on 6 March 2011.
- 9.2 There is no provision in the IBAF Anti-Doping Rules 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 Anti-Doping Rules, 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. 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 Anti-Doping Rules, 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 Anti-Doping Rules, the entirety of this decision should be published on the IBAF's official website.

Dated: 8 June 2009

  
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Jonathan Taylor, Chairman

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Dr. Julian Chang

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Joseph de Pencier

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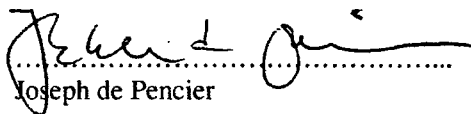
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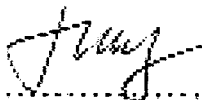
  
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