

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2008/A/1515 WADA v/Swiss Olympic Association & Simon Daubney

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Martin Schimke, Attorney-at-law, Düsseldorf, Germany

Arbitrators: Professor Massimo Coccia, Attorney-at-law, Rome, Italy
Mr Michele Bernasconi, Attorney-at-law, Zurich, Switzerland

Ad hoc Clerk: Mr Patrick Grandjean, Attorney-at-law, Lausanne, Switzerland

in the arbitration between:

World Anti-doping Agency (WADA), Montreal, Canada

Represented by Mr François Kaiser and Mr Claude Ramoni, Attorneys-at-law, Lausanne, Switzerland

- Appellant -

and

Swiss Olympic Association (Swiss Olympic), Bern, Switzerland

Represented by its legal counsel, Mr Marco Steiner, Bern, Switzerland

- Respondent 1 -

and

Simon Daubney, Auckland, New Zealand,

Represented by Mr Antonio Rigozzi, Attorney-at-law, Geneva, Switzerland and Mr Howard Jacobs, attorney-at-law, California, United States

- Respondent 2 -

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I. THE PARTIES

1. The World Anti-Doping Agency (hereinafter referred to as "the WADA" or the "Appellant") is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. The WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.
2. The Swiss Olympic Association (hereinafter referred to as "Swiss Olympic") is an association having its headquarters in Bern, Switzerland. It is the National Olympic Committee of Switzerland, functioning as the umbrella organisation for Swiss sporting associations, representing both Olympic and non-Olympic disciplines.
3. Mr Simon Daubney, born on 17 July 1959, is a professional sailor from New Zealand. He is affiliated to the "Société Nautique de Genève" (hereinafter referred to as the "SNG"), which in turn is a member of the Swiss Sailing Federation (hereinafter referred to as "Swiss Sailing"). Swiss Sailing is the body responsible for the administration of the sport of sailing in Switzerland and is subject to the jurisdiction of the International Sailing Federation (hereinafter referred to as the "ISAF") and of Swiss Olympic. Its seat is in Bern, Switzerland.

II. THE FACTS

4. The circumstances stated below are a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion (see below section IV).

II.1 THE 32ND AMERICA'S CUP

5. The America's Cup is a silver cup trophy, which was won for the first time in 1851 by the yacht "America". It was then donated by the owner of the "America" to the New York Yacht Club by Deed of Gift dated 24 October 1887. Under the terms of this document, the holder of the Cup becomes its sole trustee, to be succeeded only by a successful challenger in a race at sea.
6. In 2007, the America's Cup was in the hands of the SNG, which selected Team Alinghi to defend the trophy on its behalf.
7. Mr Simon Daubney participated in the 32nd America's Cup sailing race (hereinafter also referred to as the "Event"), as one of the sail trimmers of Team Alinghi. This sporting event took place in Valencia, Spain and was a "first to five" (best-of-nine) series that opposed the defender to Team New Zealand, the winner of the Louis Vuitton Cup.
8. The Event started on 23 June and ended on 3 July 2007, when Team Alinghi successfully defended its second America's Cup title by winning the best of nine series, 5-2.

II.2 THE FINDINGS IN ANTI-DOPING TESTING

9. On 23 June 2007, Mr Simon Daubney was subject to in-competition drug testing.

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10. The WADA-accredited "Laboratorio de control del dopaje" in Madrid, Spain, was instructed to conduct the analysis of Mr Simon Daubney's urine sample. In its report dated 11 July 2007, it confirmed that it had identified in Mr Simon Daubney's A sample the presence of Ecgonina metil ester and Benzoilecgonina.
11. It is undisputed that Ecgonina metil ester and Benzoilecgonina are metabolites of cocaine, which is a stimulant included in the list of prohibited substances under the World Anti-Doping Code (hereinafter referred to as the "WADAC").
12. On 14 July 2007, the positive results were communicated to Mr Simon Daubney.
13. At the hearing held in Lausanne on 1 September 2008 (see section III.4 below), the Appellant accepted the contention that Mr Simon Daubney voluntarily put on hold his career and has refrained from taking part in any official competitions since 14 July 2007.
14. On 8 August 2007 and at the request of Mr Simon Daubney, a confirmatory analysis was carried out on his B sample. It corroborated the results of the analyses conducted on the A sample.
15. At the hearing held in Lausanne on 1 September 2008 (see section III.4 below), Mr Simon Daubney declared that he was not challenging the laboratory results.
16. On 11 September 2007, Mr Bruce Burgess, a polygraph expert, administered a polygraph examination (so-called lie detector test) to Mr Simon Daubney. During the examination, Mr Daubney gave negative answers to the questions whether he had (i) ever used cocaine, (ii) used cocaine during the 32nd America's Cup, or (iii) used cocaine at all in 2007. On the basis of such polygraph examination, Mr Burgess attested in a letter to Mr Daubney that it was his firm opinion that Mr Daubney had been truthful in his answers to the aforementioned questions.

II.3 THE PROCEEDINGS BEFORE THE AMERICA'S CUP JURY

a) The applicable regulations

17. The America's Cup is notably governed by the Protocol Governing the 32nd America's Cup (the "Protocol"), which is a legal document signed by the defender and the challenger, establishing a more detailed set of rules than those outlined in the original Deed of Gift dated 24 October 1887. It is the broad governing document for the 32nd edition of the Event.
18. According to its article 21, the Protocol created a Jury (hereinafter referred to as the "AC Jury"), a specific body composed of at least five members, acting "*both as a jury under the applicable rules of sailing and also as an arbitration panel*" (article 21.4 of the Protocol). The AC Jury established its own rules of procedure (article 21.7 of the Protocol) and its main purpose was to resolve all the disputes that were referred to it in accordance with the Deed of Gift, the Protocol, the Terms of Challenge, the Racing Rules and such other rules and regulations as were applicable, using general principles of law and the rules of law the application of which it deemed appropriate (article 13.1 of the Jury Rules of Procedure).
19. The "Notice of Race", issued in conformity with article 5.7 of the Protocol, is a set of regulations which sets forth the rules on how the racing is to be conducted and includes, but is

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not limited to, the "Anti-Doping Rules applicable to the 32nd America's Cup" (hereinafter referred to as the "AC Anti-Doping Rules") (see preamble of the AC Anti-Doping Rules).

20. Pursuant to article 7.1 of the AC Anti-Doping Rules:

"The Jury shall have jurisdiction to hear the Competitor's Crew Members and other persons concerned in relation to all Rule violations (including but not limited to the handling of Adverse Analytical Findings) arising in connection with the Event. The right of any Person who may be subject to a measure or sanction to be heard will be exercised before the Jury."

21. Article 7.2.10 of the AC Anti-Doping Rules states as follows:

"Based upon the contents of the hearing and concerned parties' arguments, the Jury shall decide upon the case. Such decision shall be final and binding upon all interested parties and cannot be appealed."

22. Furthermore, article 10.1 of the AC Anti-Doping Rules reads as follows:

"The effects of decisions issued by the Jury in application of these Rules are limited to the Event.

The recognition by ISAF of the results of the Doping Controls and of the Jury decisions made as a consequence thereof within ISAF's own jurisdiction are governed by ISAF rules".

b) The award rendered by the AC Jury

23. On 26 September 2007, the AC Jury held a hearing in London, England to consider Mr Simon Daubney's case. It heard evidence from Mr Simon Daubney's wife, Laurie, from his colleagues Messrs Russell Coutts, Daniel Meyers, Bradley Butterworth and Curtis Blewett, from the polygraph expert Mr Bruce Burgess, from Ms Anne Cappelen, the director of Anti-Doping Control Norway, responsible for carrying out the anti-doping tests for the 32nd America's Cup, from Ms Kari Andreassen, the doping control officer in charge of the sample taken from Mr Simon Daubney and from Mr Jesus Muñoz-Guerra Revilla, the technical manager responsible for the "Laboratorio de control del dopaje" in Madrid, Spain.

24. The WADA was not a party to the proceedings before the AC Jury and was not heard by this authority.

25. On 29 September 2007, the AC Jury concluded unanimously as follows:

"[25] The Jury is satisfied that an Anti-Doping Rule violation has occurred in that there was the presence of two metabolites of a prohibited substance in Simon Daubney's bodily specimen.

[26] The Jury is completely satisfied that Simon Daubney told the truth to the Hearing Body when he stated that he had not knowingly taken cocaine or any other banned substance.

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[27] Having regard to the nature and circumstances of the case, the Jury is satisfied that Simon Daubney bears no fault or negligence with regard to the presence of the two metabolites in the bodily specimen.

[28] There were no claims, nor was there any evidence of organised doping at team level by Alinghi, Simon Daubney's team. The Jury was satisfied that the Alinghi Team provided comprehensive advice and facilities to its sailors regarding anti-doping matters.

[29] In the circumstances of this case, the Jury took into consideration what would be expected of a responsible professional sailor in taking reasonable precautions to ensure that he would not take banned substances without his knowledge in today's America's Cup environment. The Jury considers that during the 32nd America's Cup, it was not reasonable to expect sailors to totally isolate themselves from public areas. In this context, the Jury is satisfied that the Adverse Analytical Finding was not caused by the negligence of Simon Daubney.

[30] The Jury has jurisdiction to assess whether Simon Daubney breached the Anti-Doping Rules and to decide if he committed any fault, but because the 32nd America's Cup has finished and there is no question of Team Alinghi being involved with organised doping, ISAF has the jurisdiction in respect of a penalty.

(...)"

II.4 THE PROCEEDINGS BEFORE SWISS OLYMPIC

26. Based upon article 21.8 of the ISAF Regulations, Mr Simon Daubney had to be brought before the disciplinary panel of his national association, Swiss Sailing, for a hearing to adjudicate whether a violation of the ISAF anti-doping rules occurred.
27. Article 9 par. 3 of the Statutes of Swiss Sailing appoints the Swiss Olympic Disciplinary Committee ("le Conseil de discipline de Swiss Olympic") to deal with doping matters. In this regard, the jurisdiction of the Swiss Olympic Disciplinary Committee has not been disputed by the interested parties.
28. On 17 January 2008, the Swiss Olympic Disciplinary Committee held a hearing. Mr Simon Daubney and his attorneys, Mr Antonio Rigozzi and Mr Howard Jacobs were present. Swiss Olympic was represented by its legal counsel, Mr Marco Steiner, while the WADA was not a party to the proceedings and was not heard by the Swiss Olympic Disciplinary Committee.
29. On 24 January 2008, the Swiss Olympic Disciplinary Committee issued a decision in which it concluded that Mr Simon Daubney did not violate the applicable ISAF anti-doping regulations and decided not to impose any sanction upon him. It ruled that the award of the AC Jury had to be recognized in accordance with article 21.15, first sentence of the applicable ISAF Regulations. As a consequence, it held that Mr Simon Daubney bore no fault or negligence for an anti-doping rule violation. In any case, the Swiss Olympic Disciplinary Committee was of the view that Mr Simon Daubney had convincingly established that the positive test was more likely the result of a sabotage than of an intentional ingestion of cocaine.

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30. The Appellant was notified by fax dated 25 February 2008 of the decision issued by the Swiss Olympic Disciplinary Committee (the "Appealed Decision").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

III.1 THE APPEAL

31. On 17 March 2007, the WADA filed a statement of appeal before the Court of Arbitration for Sport (hereinafter referred to as the "CAS"). It challenged the above-mentioned Appealed Decision, submitting the following prayers for relief:

"WADA hereby respectfully requests the CAS to rule that:

1. The Appeal of WADA is admissible.

2. The decision of Swiss Olympic "Chambre disciplinaire pour les cas de dopage" dated January 17, 2008, in the matter of Mr. Simon Daubney is set aside;

3. Mr. Simon Daubney is sanctioned with a two years period of ineligibility starting on the date on which the CAS award enters into force;

4. All competitive results obtained by Mr. Simon Daubney from June 23, 2007 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.

5. WADA is granted an Award for costs."

32. On 27 March 2008, the WADA filed its appeal brief, containing a statement of the facts and legal arguments accompanied by supporting documents, and in particular, the full transcript of the hearing held before the AC Jury on 26 September 2007 (hereinafter referred to as the "AC hearing transcript").

33. The Appellant's submissions, in essence, may be summarized as follows:

- The appeal of the WADA is admissible and was filed in a timely manner.
- It has been scientifically established that Mr Simon Daubney has violated the applicable anti-doping rule.
- The "Recognition of Decisions by Other Organizations" as set forth by article 21.15 of the ISAF Regulations (see *infra* at 55) does not apply to a decision of the ACJury, as this is not adopted on behalf of a "signatory" to the WADAC and/or as the AC Anti-Doping Rules are not consistent with the WADAC. The CAS Panel shall be entitled to review the case *de novo*.
- The concentration of metabolites found in Mr Simon Daubney's urine is not compatible with his version of the facts according to which his drink was spiked with cocaine by an ill-intentioned person while he was visiting public establishments, respectively seven, three and two days before the urine sample collection procedure. Therefore, he has not given any plausible or valid explanation as to a possible cause for the positive findings

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and, consequently, is not entitled to any exclusion or reduction of the otherwise applicable sanction.

- In any event, *"Mr Simon Daubney did not bring satisfactory evidence showing that he bears no significant fault or negligence or no fault or negligence"* (page 10 par. 57 of the appeal brief). *"The explanations provided by Mr. Simon Daubney demonstrate that he did not exercise any caution when drinking beers and rum and cokes in the "Australia Bar" on the Wednesday night before the race"* (page 11 par. 62 of the appeal brief). There are no exceptional circumstances justifying elimination or reduction of the period of ineligibility, as provided by article 17.4 of the ISAF Regulations.
- Violations of article 12.1 of the ISAF Regulations are sanctioned with a two-year suspension for a first offense.

III.2 THE SUBMISSIONS OF SWISS OLYMPIC

34. On 25 April 2008, Swiss Olympic informed the CAS Court office that it fully endorsed the position of the WADA. It submitted a similar prayer for relief as set out in the statement of appeal, with the exception that it requested the CAS to rule *"5. Swiss Olympic is granted an award for costs"*.

III.3 MR SIMON DAUBNEY'S SUBMISSIONS

35. On 2 May 2008, Mr Simon Daubney submitted an answer containing the following prayers for relief:

"Based on the foregoing developments, Mr. Daubney respectfully requests the CAS to issue an award:

- *Confirming the decision under appeal.*
- *Rejecting WADA's prayers for relief.*
- *Rejecting Swiss Olympic's prayers for relief.*
- *Condemning WADA and/or Swiss Olympic to pay a substantial contribution towards Mr. Daubney's legal fees and other expenses incurred in connection with the proceedings."*

36. Mr Simon Daubney's submissions, in essence, may be summarized as follows:

- Before the sample collection procedure, he visited public establishments, where he accepted drinks from strangers, who must have put cocaine into one of his drinks. In order to corroborate his allegations, he produced a number of statements and documents establishing his good character as well as the very strong hostility of the fans of Team New Zealand. In view of the circumstances, the possibility of an intentionally organised contamination with the intent to harm Mr Simon Daubney and Team Alinghi is credible.
- The AC Jury's finding of no fault or negligence shall be recognized based on article 21.15, first or second sentence of the ISAF Regulations. Accordingly the decision of the Swiss

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Olympic Disciplinary Committee to refrain from imposing any sanction upon Mr Simon Daubney must be upheld.

- Under the principle of deference, considering the fact that Mr Simon Daubney was heard by two independent and highly distinguished panels who found that his explanations were credible and that he bears no fault or negligence, it would be shocking if the CAS Panel would come to another result and impose a sanction upon the sailor. The AC Jury was unquestionably the body best placed to determine if a fault is to be born by Mr Simon Daubney, as its members were in Valencia *"for the duration of the race and were also in close contact with the sailors, the public and the general environment"* (page 32 par. 114 of the answer).
- *"it is an established fact in this arbitration that (i) Mr. Daubney tells the truth when it claims that he never used cocaine and (ii) the sabotage is a credible explanation for the positive findings"* (page 41 par. 155 of the answer). On balance of probability, Mr Simon Daubney therefore established how the prohibited substance entered his body.
- With reference to the circumstantial evidence considered to be credible by two highly respected independent bodies, Mr Simon Daubney bears no fault or negligence or, subordinately, no significant fault or negligence.

III.4 THE HEARING

37. A hearing was held on 1 September 2008 at the CAS premises in Lausanne. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel.
38. The following persons attended the hearing:
 - For the Appellant, its attorney, Mr François Kaiser, assisted by Mr Yvan Henzer, attorney-at-law.
 - Mr Simon Daubney was present and was accompanied by his attorneys, Mr Antonio Rigozzi and Mr Howard Jacobs.
39. Swiss Olympic chose not to be represented.
40. The Panel heard evidence from the following persons:
 - Mr Martial Saugy, director of the Swiss laboratory for doping analyses, in Lausanne, Switzerland;
 - Mr Jesus Muñoz-Guerra, the technical manager responsible for the "Laboratorio de control del dopaje" in Madrid, Spain. He was heard via teleconference, with the agreement of the Panel and pursuant to article R44.2 par. 4 of the Code of Sports-related Arbitration (hereinafter referred to as "the CAS Code").
41. Each person heard by the Panel was invited by its President to tell the truth subject to the consequences provided by the law and was examined and cross-examined by the parties, as well as questioned by the Panel. The parties had then ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Panel. After the parties' final submissions, the Panel closed the hearing and reserved its final award. The Panel heard

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carefully and took into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties even if they have not been summarized herein. Neither during nor after the hearing did the parties raise with the Panel any objection as to the respect of their right to be heard and to be treated equally in these arbitration proceedings.

IV. DISCUSSION

IV.1 APPLICABLE LAW

42. On 2 May 2006, Mr Simon Daubney signed an agreement, which reads as follows where relevant:

"I, as a participating crew member in the 32nd America's Cup (the Event) hereby acknowledge and agree as follows:

1. I have received and had an opportunity to review the International Sailing Federation Anti-Doping Rules and the specific Anti-Doping Rules issued by the Regatta Director.

2. I consent and agree to comply with and be bound by all of the provisions of the International Sailing Federation Anti-Doping Rules and the specific Anti-Doping Rules issued by the Regatta Director. (...)

5. I acknowledge and agree that the International Sailing Federation has jurisdiction to impose sanctions as provided in the International Sailing Federation Anti-Doping Rules".

43. In conformity with article 21.8 of the ISAF Regulations, Mr Simon Daubney had to be brought before the disciplinary panel of his national association, Swiss Sailing, for a hearing to adjudicate whether a violation of the ISAF anti-doping rules occurred.

44. As said, article 9 para. 3 of the Statutes of Swiss Sailing appoints the Swiss Olympic Disciplinary Committee to deal with doping matters. It further provides that the sanctions system is governed by the Swiss Olympic Anti-Doping Statutes ("Statute concernant le dopage"), respectively by the applicable regulations of the concerned international federation. Consequently and in accordance with the CAS jurisprudence (CAS 2005/A/922, 923 and 926; UCI, WADA v. Hondo & Swiss Olympic), the Swiss Olympic Disciplinary Committee decided the dispute applying primarily the ISAF Regulations.

45. Pursuant to article 21.13.1 par. 1 litt. a) of the ISAF Regulations, the cases before the CAS shall be handled in accordance with the provisions applicable before such court.

46. Article R58 of the CAS Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

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47. In the present matter, the Panel is of the opinion that the parties have not agreed on the application of any specific national law. It is comforted in its position by the fact that, in their respective submissions, the parties refer exclusively to the ISAF Regulations.
48. As a result, subject to the primacy of the applicable ISAF Regulations, Swiss Law shall apply complementarily, as Swiss Olympic and Swiss Sailing have their seats in Switzerland.

IV.2 ADMISSIBILITY

49. Based on articles 21.13 and 21.13.1 of the ISAF Regulations, the WADA has standing to file an appeal with the CAS against the Appealed Decision issued by the Swiss Olympic Disciplinary Committee.
50. The appeal was filed within the deadline provided by article 21.13.4 of the ISAF Regulations. Furthermore, it complied with all other requirements of article R48 of the CAS Code.
51. It follows that the appeal is admissible, which is expressly confirmed by Mr Simon Daubney (page 19, par. 61 and page 23, par 74 of the answer).

IV.3 JURISDICTION

52. All the legal remedies available were exhausted prior to the appeal filed by the WADA with the CAS.
53. The jurisdiction of the CAS, which is not disputed, derives from article R47 of the CAS Code, together with articles 21.13 and 21.13.1 of the ISAF Regulations and article 9 par. 3 of the Statutes of Swiss Sailing.
54. It follows that the CAS has jurisdiction to decide on the present dispute.

IV.4 SCOPE OF REVIEW OF THE CAS PANEL

55. Mr Simon Daubney submits that the scope of review of the CAS Panel is limited as it should confirm the decision of the Swiss Olympic Disciplinary Committee, which recognized the award of the AC Jury, on the basis of article 21.15 of the ISAF Regulations. This provision states as follows:

"Subject to the right to appeal provided in Regulation 21.13 through 21.13.4 - (Appeals), the testing, TUEs and hearing results or other final adjudications of any signatory to the [WADAC] which are consistent with the [WADAC] and are within the signatory's authority, shall be recognized and respected by ISAF and its MNAs. ISAF and its MNAs may recognize the same actions of other bodies which have not accepted the [WADAC] if the rules of those bodies are otherwise consistent with the [WADAC]".

56. The above-quoted provision differs depending on whether the decision to be recognized was issued by "any signatory" to the WADAC (first sentence of article 21.15) or by "other bodies which have not accepted" the WADAC (second sentence of article 21.15). According to the Swiss Olympic Disciplinary Committee and Mr Simon Daubney, in the first case, the decision must be automatically recognized, whereas in the second case, the recognition is discretionary on the part of the competent authority.

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57. Prior to reviewing the elements required for invoking article 21.15 of the ISAF Regulations, the issue must first be addressed as to whether there are other (additional) considerations arising from other applicable regulations that affect the scope of the review. If there are, then the next issue arises as to how these regulations interact with article 21.15 ISAF, in particular which of them has priority.

a) Is 21.7.1 of the ISAF Regulations applicable?

58. Article 21.7.1 of the ISAF Regulations establishes - as regards "*sanctions beyond disqualification from the event or the results of the event*" - an independent, inherent decision-making authority on the part of the ISAF or (via article 21.8 of the ISAF Regulations) of the relevant Member National Authority (MNA). This could be interpreted to mean that the ISAF or the MNA may not merely recognize a decision of a lower instance but must make their own, substantive decision on the particular case under review. In the present case, this could have the legal effect of having forced the Swiss Olympic Disciplinary Committee to make its own independent decision and not just recognize the award of the AC Jury. If this were the case, the CAS Panel (as well) would not be restricted to making a review but would, pursuant to R57 of the CAS Code, have "full power to review the facts and the law".
59. However, article 21.7.1 of the ISAF Regulations is not applicable in the case at hand since the event organizer of the America's Cup is not one of the mentioned institutions in the said article. In particular, it is undisputed that the event organizer of the America's Cup is not a "*Major Event Organization*" pursuant to the definitions of the ISAF Regulations.

b) Does article 10.1 of the AC Anti-Doping Rules provide any guidance as to the scope of the review of the CAS Panel?

60. According to article 10.1 of the AC Anti-Doping-Rules, the "*Jury*" is only authorized to make decisions "*limited to the Event*" and may not make decisions on sanctions going beyond the event. This seems to imply that the recognition within the meaning of article 21.15 of the ISAF Regulations refers only to decisions that the issuing authority is empowered to make. Since, in the case at hand, a sanction outside the event is at stake, it could follow that the authority in this respect lies with the ISAF (or MNA) and the CAS Panel respectively.
61. On the other hand, article 21.15 of the ISAF Regulations speaks not only of the recognition of decisions but of the recognition of "*testing, TUEs, and hearing results...*" as well. However, the issue connected to this, i.e. when and to which extent, via article 21.15 of the ISAF Regulations, a decision or a part of a decision (e.g. hearing results, etc.) of a lower instance must be recognized or followed, need not be addressed if the elements required for invoking this regulation do not exist.

c) Can article 21.15 first sentence of the ISAF Regulations apply to the decision of the AC Jury?

62. Mr Simon Daubney alleges that "*irrespective of the meaning of signatory according to the [WADAC], the AC Jury should qualify as a "signatory" within the meaning of Article 21.15 of the ISAF Regulations since it has in fact incorporated the [WADAC]*" (page 26 par. 87 of the answer).
63. According to article 21.17.4 of the ISAF Regulations:

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

64. Article 24.3 of the WADAC states as follows:

"The [WADAC] shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the Signatories or governments".

65. Under the heading "Definitions" of article 21 of the ISAF Regulations, the word "signatories" correspond to:

"Those entities signing the [WADAC] and agreeing to comply with the [WADAC], including the International Olympic Committee, International Federations, International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, National Anti-Doping Organizations, and WADA."

66. The identical definition can be found in the WADAC (page 78 of the WADAC).

67. Article 21.15 of the ISAF Regulations is a word-for-word rendering of article 15.4 of the WADAC. This last provision also opposes the "signatories" to the "other bodies which have not accepted the [WADAC]". This distinction is in line with article 23.1 of the WADAC, which reads as follows:

"23.1 Acceptance of the [WADAC]"

23.1.1 The following entities shall be Signatories accepting the [WADAC]: WADA, The International Olympic Committee, International Federations, The International Paralympic Committee, National Olympic Committees, National Paralympic Committees, Major Event Organizations, and National Anti-Doping Organizations. These entities shall accept the [WADAC] by signing a declaration of acceptance upon approval by each of their respective governing bodies.

23.1.2 Other sport organizations that may not be under the control of a Signatory may, upon WADA's invitation, also accept the [WADAC].

23.1.3 A list of all acceptances will be made public by WADA."

68. In view of the above, the Panel does not accept Mr Simon Daubney's submission that the term "signatory" of article 21.15 of the ISAF Regulations does not correspond to the term "signatory" used in the WADAC.

69. In its decision dated 24 January 2008, the Swiss Olympic Disciplinary Committee confirmed that the organizers of the 32nd America's Cup were not a "signatory" as formally implemented by the WADAC. However, it considered that by adopting the AC Anti-Doping Rules, the said organizers were consistent with the fundamental principles and philosophy of the WADAC. It supported this assertion by referring to the preamble and to article 11.3 of the AC Anti-Doping Rules, according to which *"These rules have been based on the [WADAC]. The*

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comments annotating various provisions of the [WADAC] may, where applicable, assist in the understanding and interpretation of these rules". Furthermore, the Swiss Olympic Disciplinary Committee was of the opinion that there is a significant similarity between the provisions of the WADAC and the ones of the AC Anti-Doping Rules. This authority found that the only important difference between the two regulations lies in the sanctions system as the AC Jury can only decide to impose a penalty with effects limited to the duration of the Event. According to the Swiss Olympic Disciplinary Committee, this difference can be explained by the specific context of the Event and not by a deliberate disregard of the principles set out by the WADAC.

70. Based on the foregoing, the Swiss Olympic Disciplinary Committee stated that the AC Jury may be equated to a judging body of a WADAC signatory for the purposes of article 21.15 of the ISAF Regulations.
71. The CAS Panel does not agree with the Swiss Olympic Disciplinary Committee, relying on the circumstance that the WADAC clearly defines which entity can or cannot be a "Signatory". In order to qualify as a "signatory"; one must notably a) be one of the entities designated under article 23.1.1 of the WADAC, b) accept the WADAC (see also article 23.3 of the WADAC), c) be listed by the WADA as having accepted the WADAC, d) have implemented the WADAC (article 23.2.1 of the WADAC). With the quality of "signatory" come many rights (e.g. the right to be consulted before the revision of the International Standards, before the establishment of the monitoring program, the right to be promptly informed of the revision of the Prohibited list, etc.) but also obligations and responsibilities (see for instance, article 20 of the WADAC).
72. The organizers of the 32nd America's Cup do not fulfil all the above requirements and therefore cannot be put in the same category as the true "signatories". If the definition of "signatory" was to be extended as suggested by the Swiss Olympic Disciplinary Committee and if other entities were to be considered as "signatories" by the CAS or other authorities, despite the fact that they are not listed by the WADA, it would create great uncertainty as to who is or is not a "signatory". It would obviously hinder WADA in monitoring the implementation of and the compliance with the WADAC, if it was up to a private national entity - such as the Swiss Olympic Disciplinary Committee - to decide who must be treated as a "signatory" and if such a decision was binding for other (international) entities such as the CAS or the WADA itself.
73. Furthermore, such interpretation would not respect the principle of equal treatment, as the organizers of the 32nd America's Cup would be able to have the benefit of the rights deriving from provisions such as article 21.15 first sentence of the ISAF Regulations (or article 15.4 of the WADAC) without the constraints imposed by the WADAC on the formal "signatories".
74. Accordingly, the Panel holds that the organizers of the 32nd America's Cup are not "signatories" in the sense of article 21.15 first sentence of the ISAF Regulations, which is therefore not applicable in the present case.

d) Can article 21.15 second sentence of the ISAF Regulations apply to the decision of the AC Jury?

75. In its decision, the Swiss Olympic Disciplinary Committee ruled that the AC Jury's decision should, at any rate, be recognized under article 21.15 second sentence of the ISAF

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Regulations, as the AC Anti-Doping Rules are consistent with the WADAC and as its award was rendered after a serious and meticulous analysis, which took into consideration exonerating as well as incriminating evidence.

76. The purposes of the WADAC are (Introduction of the WADAC, page 1):

- " - To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide; and
- To ensure harmonized, coordinated and effective anti-doping programs on the international and national level with regard to detection, deterrence and prevention of doping."

77. In its Part One, the WADAC reads as follows where relevant:

"While some provisions of Part One of the [WADAC] must be incorporated essentially verbatim by each Anti-Doping Organization in its own anti-doping rules, other provisions of Part One establish mandatory guiding principles that allow flexibility in the formulation of rules by each Anti-Doping Organization or establish requirements that must be followed by each Anti-Doping Organization but need not be repeated in its own anti-doping rules. The following Articles, as applicable to the scope of anti-doping activity which the Anti-Doping Organization performs, must be incorporated into the rules of each Anti-Doping Organization without any substantive changes (allowing for necessary non-substantive editing changes to the language in order to refer to the organization's name, sport, section numbers, etc.); Articles 1 (Definition of Doping), 2 (Anti-Doping Rule Violations), 3 (Proof of Doping), 9 (Automatic Disqualification of individual Results), 10 (Sanctions on Individuals), 11 (Consequences to Teams), 13 (Appeals) with the exception of 13.2.2, 17 (Statute of Limitations) and Definitions".

78. The Panel notes that at least articles 11 and 13 of the WADAC are not incorporated in the AC Anti-Doping Rules.

79. The AC Anti-Doping Rules differs from the WADAC particularly on the following aspects:

- Article 11 of the WADAC sets out the provisions relating to the consequences to team when more than one member is tested positive:

"Where more than one team member in a Team Sport has been notified of a possible anti-doping rule violation under Article 7 in connection with an Event, the Team shall be subject to Target Testing for the Event. If more than one team member in a Team Sport is found to have committed an anti-doping rule violation during the Event, the team may be subject to Disqualification or other disciplinary action. In sports which are not Team Sports but where awards are given to teams, Disqualification or other disciplinary action against the team when one or more team members have committed an anti-doping rule violation shall be as provided in the applicable rules of the International Federation".

The WADAC does not determine specific sanctions when more than one team member is found to have committed a doping offense but gives to the competent authorities the responsibility to decide the appropriate measures to be taken with respect to team sanctions

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(cf. CAS 2005/C/976 & 986, FIFA & WADA, p. 24, par. 62). In this connection, it is to be noted that America's Cup sailing cannot be considered as a "Team Sport" in the sense of the WADAC because the substitution of sailors is not permitted during a single race but only from one race to another. Therefore, in order to comply with article 11 of the WADAC, the AC Anti-Doping Rules must incorporate the ISAF Rules with respect to the sanctions against the team when one or more crew members have committed an anti-doping rule violation.

In this regard, article 21.11 of the ISAF Regulations provides that *"If a crewmember of a boat is found to have committed a violation of these Anti-Doping Rules during an event, the boat shall be disqualified from the whole event. In Team Racing, if a crewmember is found to have committed a violation of these Anti-Doping Rules during an event, the whole team will be disqualified from the whole event. For events with boats with more than 5 persons on board, the boat will be disqualified for that relevant race and the person disqualified for the whole event."*

Article 8.1, par. 1, second sentence, of the AC Anti-Doping Rules states that: *"For the avoidance of doubt, ineligibility of a Competitor's Crew Member shall not lead to disqualification of the Competitor unless based on the application of clause 8.2 below."*

Pursuant to article 8.2 of the AC Anti-Doping Rules *"In the event of a Rule violation by a Competitor's Crew Member, the Jury shall act in accordance with Article 8.1; however, the Competitor shall not be disqualified from or declared ineligible for any part or the whole of the Event, unless the Jury finds there has been organised doping at team level which violates Fundamental Rule 2 (Fair Sailing) of the Racing Rules of Sailing."*

Article 8.1 and 8.2 of the AC Anti-Doping Rules depart from the WADAC insofar as they do not comply with the applicable ISAF Regulations. The consequence could have been that, even if many members of its crew were doped, a boat competing in the 32nd America's Cup could have been anyway the winner of the Event if it was established that there was no *"organised doping at team level"*. This would have been absolutely unfair to the other competitors.

- Article 13 of the WADAC sets forth the appeal process applicable in case of decisions made under the WADAC or rules adopted pursuant to the WADAC. It specifies in great detail which decisions may be subject to appeal, and who is entitled to file an appeal.

Article 7.2.10 of the AC Anti-Doping Rules states that: *"Based upon the contents of the hearing and concerned parties' arguments, the Jury shall decide upon the case. Such decision shall be final and binding upon all interested parties and cannot be appealed."*

As far as the WADA is concerned, its right to appeal under the WADAC is without a question one of the major tools it has at its disposal to properly monitor what is done with anti-doping rule violations and to intervene if it does not think that the WADAC has been properly applied. The absence of any such right to appeal renders inoperative WADA's main purpose, which is to *"ensure harmonized, coordinated and effective anti-doping programs on the international and national level with regard to detection, deterrence and prevention of doping."*

Likewise, it is also important for an athlete to be able to exercise his/her right to appeal against his/her sanction as the purpose of an appeal is to ensure that the court of first

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instance did not make any errors and as appeals may result in the elimination or reduction of a sanction. The WADAC makes such a right to appeal for athletes mandatory, unlike the AC Anti-Doping Rules.

80. For the above reasons, the Panel finds that the AC Anti-Doping Rules are not consistent with the "WADAC" as there is a material deviation in reference to the mandatory articles 11 and 13 of the WADAC. Those discrepancies are such that they substantially impair the purpose of the WADAC and are in conflict with some of the essential principles set forth by the WADAC.
81. As a consequence, the Panel holds that the decision of the AC Jury may not be recognized by ISAF and its MNAs, and thus by a CAS Panel, because the organizers of the 32nd America's Cup did not adopt anti-doping rules which are consistent with the WADAC, as required by article 12.15 second sentence of the ISAF Regulations; as a result, this provision is not applicable in the present case.

e) Res Judicata

82. At the hearing, Mr Simon Daubney submitted that the present dispute had already been dealt with by a competent judicial body which has issued a valid and final decision. He is of the opinion that the Appellant is barred by Res Judicata.
83. This allegation seems to contradict Mr Simon Daubney's own position as he admitted that the WADA's appeal before the CAS was admissible (page 19, par. 61 and page 23, par 74 of the answer) and that the AC Jury can only impose a penalty with effects limited to the duration of the Event (page 26 of the answer). It seems also inconsistent with the AC Jury's own findings according to which the "ISAF has jurisdiction in respect of a penalty", which necessarily implies that Mr Simon Daubney could well be sanctioned by ISAF (and thus by the relevant Member National Authority or, on appeal, by the CAS).
84. Finally, the AC Anti-Doping Rules themselves do not rule out the possibility of the decisions of the AC Jury to be contradicted by an ISAF or CAS decision judging beyond the Event, as they state the following "*In the unlikely event that an ISAF decision or a CAS decision based on the same facts is in contradiction with a prior Jury decision in respect specifically with the principle of the existence or not of a doping violation, the Jury will, to the extent this has still practical relevance in connection with the Event, on its own initiative or upon request of the concerned Competitor's Crew Member or other Person concerned, reopen the case based on the new situation created by such decision and render a new decision drawing the adequate consequences in connection with the Event. In no event shall such new decision have any retroactive effect on the prior Jury decision*" (see article 10.2 par. 2 second sentence of the AC Anti-Doping Rules).
85. Moreover, the WADA's right to appeal is granted by the ISAF Regulations. The WADA had not been allowed to take part in the proceedings before the AC Jury nor before the Swiss Olympic Disciplinary Committee. It was not in a position to review or respond to Mr Simon Daubney's submissions, until the proceeding before the CAS, which is the first chance for the WADA to exercise its right to be heard.
86. For all those reasons and given the recent jurisprudence in the matter (Judgement of the Swiss Federal Court 4A.17/2007 of 8 June 2007), Mr Simon Daubney's challenge for violation of the principle of Res Judicata must be disregarded without further consideration.

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f) Principle of deference

87. Mr Simon Daubney alleges that the CAS Panel should recognize the conclusions of the AC Jury and of the Swiss Olympic Disciplinary Committee, considering the fact that their respective panels were composed of distinguished and qualified persons, who were better placed than the CAS Panel members to evaluate the facts in dispute.
88. However, article R57 of the CAS Code provides that "*the Panel shall have full power to review the facts and the law*". Under this provision, the Panel's scope of review is basically unrestricted. It has the full power to review the facts and the law and may even request *ex officio* the production of further evidence. In other words, the Panel not only has the power to establish whether the decision of a disciplinary body being challenged was lawful or not, but also to issue an independent decision based on the ISAF Regulations (CAS 2004/A/607 Galabin Boevski v/IWF; CAS 2004/A/633 IAAF v/ FFA & Mr Chouki; CAS 2005/A/1001 Fulham FC (1987) Limited v/ FIFA; CAS 2006/A/1153 WADA v/ Portuguese Football Federation & Nuno Assis Lopes de Almeida).
89. The CAS Code contemplates a full hearing de novo of the original matter and grants the CAS Panel the authority to render a new decision superseding that rendered by the previous instance. The fact that the organizers of the 32nd America's Cup put in place an articulated anti-doping sanctioning system – the AC Jury with exclusive anti-doping jurisdiction over the Event and the ISAF (and thus the CAS) with anti-doping jurisdiction beyond the Event – cannot interfere with the scope of review of the CAS Panel, no matter how qualified the members of the previous instances are. The CAS must be able to examine the formal aspects of the appealed decisions but also, above all, to evaluate all facts and legal issues involved in the dispute. The unlimited scope of review is especially justified and fundamental as the WADA has not been able to be a party before the previous instance.
90. For the above reasons, , the Panel holds that it has no duty of deference towards the holdings of the AC Jury and of the Swiss Olympic Disciplinary Committee and has the full power to review the facts and the law of the case.

IV.5 PROCEDURAL MOTIONS

91. In his answer, Mr Simon Daubney raised several procedural issues which have been resolved during the hearing held in Lausanne on 1 September 2008. There is no reason to address them here.

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IV.6 MERITS

92. The main issues to be resolved by the CAS Panel are:

A. Has a doping offense been committed?

B. If a doping offense has been committed, who must take responsibility for it?

C. What is the sanction and how should it be calculated?

A) Has a doping offense been committed?

93. According to article 21.2 of the ISAF Regulations, "*The following constitute anti-doping rule violations:*

21.2 The presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen

(a) It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or its metabolites or markers found to be present in their bodily specimens. Accordingly, 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 Regulation 21.2.

(b) Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the detected presence of any quantity of a prohibited substance or its metabolites or markers in an athlete's sample shall constitute an anti-doping rule violation.

(c) As an exception to the general rule of Regulation 21.2, the Prohibited List may establish special criteria for the evaluation of prohibited substances that can also be produced endogenously."

94. The ISAF Regulations incorporate the prohibited list published and revised by the WADA (article 21.4 of the ISAF Regulations).

95. Cocaine and its metabolites are included in the WADA 2007 list of prohibited substance. It is not a "specified substance" as provided under article 21.10.2 of the ISAF Regulations.

96. It is undisputed that Ecgonina metil ester and Benzoilecgonina are metabolites of cocaine and were detected in the urine sample provided by Mr Simon Daubney on 23 June 2007. In addition, all the parties have accepted that no breach of the chain of custody occurred in the present case.

97. Hence, the Panel finds that, due to the objective presence of cocaine metabolites in his urine samples, WADA has proven to the Panel's comfortable satisfaction, bearing in mind the seriousness of the allegation, that Mr Simon Daubney has committed an anti-doping rule violation pursuant to article 21.2 litt. a) – c) of the ISAF Regulations.

B) As a doping offense has been committed, who must take responsibility for it?

(1) In General

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98. Under the ISAF Regulations, the burden of adducing exculpatory circumstances is on Mr Simon Daubney, who, in order to obtain the elimination or reduction of his sanction, must establish that he bears “no fault or negligence” or “no significant fault or negligence”, in accordance with articles 21.10.1 and 21.10.4 of the ISAF Regulations. This last provision reads as follows where relevant:

"21.10.4 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

(a) If the athlete establishes in an individual case involving an anti-doping rule violation under Regulation 21.2(a) - (c) (Presence of prohibited substance or its metabolites or markers) or use of a prohibited substance or prohibited method under Regulation 21.2.1(a) that he or she bears no fault or negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated. When a prohibited substance or its markers or metabolites is detected in an athlete's specimen in violation of Regulation 21.2(a) - (c) (Presence of prohibited substance), the athlete must also establish how the prohibited substance entered his or her system in order to have the period of ineligibility eliminated. In the event this Regulation is applied and the period of ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of ineligibility for multiple violations under Regulation 21.10.1, 21.10.2 and 21.10.5(a) - (c).

(b) This Regulation 21.10.4(b) applies only to anti-doping rule violations involving Regulation 21.2(a) - (c) (Presence of prohibited substance or its metabolites or markers), use of a prohibited substance or prohibited method under Regulation 21.2.1(a), failing to submit to sample collection under Regulation 21.2.2, or administration of a prohibited substance or prohibited method under Regulation 21.2.7. If an athlete establishes in an individual case involving such violations 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 minimum period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a prohibited substance or its markers or metabolites is detected in an athlete's specimen in violation of Regulation 21.2(a) - (c) (Presence of prohibited substance), the athlete must also establish how the prohibited substance entered his or her system in order to have the period of ineligibility reduced".

- (2) *Mr Simon Daubney's explanations regarding how the prohibited substance entered his body*

Has Mr Simon Daubney willingly taken cocaine?

99. According to the polygraph examination carried out on Mr Simon Daubney, the latter tells the truth when he claims that he has never willingly used cocaine. Mr Bruce Burgess, the polygraph expert, confirmed the reliability of the said examination to the AC Jury during the hearing held on 26 September 2007. Mr Simon Daubney's wife and his colleagues testified before the AC Jury that they have never seen him using cocaine.

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Were there threats against crewmembers of Team Alinghi?

100. Mr Simon Daubney submitted documents and testimonies to prove the fact that some fans of Team New Zealand showed great hostility towards sailors from New Zealand who joined Team Alinghi.
101. Before the AC Jury, Ms Laurie Daubney illustrated with examples the hostility that herself, her family and her husband experienced while in Valencia, Spain and described some of the counter-measures taken for their security (pages 16 ff, of the AC hearing transcript).
102. Mr Russell Coutts, who sailed for Team Alinghi at the 31st America's Cup, confirmed to the AC Jury that the reactions of some hostile fans were very strong and that it "*was an extremely aggressive stance that they took towards some of the New Zealand sailors*". He even had to be under the protection of bodyguards (p. 83 of the AC hearing transcript). He believes that it is credible that a hostile fan could have put cocaine in Mr Simon Daubney's glass to cause him to test positive for a banned substance (page 88 of the AC hearing transcript).
103. Mr Bradley Butterworth, who sailed for Team Alinghi at the 31st and 32nd America's Cup, told the AC Jury that he was exposed to the aggressiveness of hostile fans and that security measures had to be taken (page 107 of the AC hearing transcript). He also thinks that it is possible that somebody could have spiked Mr Simon Daubney's drink to cause him to test positive for a banned substance (page 110 of the AC hearing transcript).
104. Mr Curtis Blewett, who also sailed for Team Alinghi at the 31st and 32nd America's Cup, gave examples to the AC Jury of physical aggressions and verbal abuse by hostile fans (page 125 of the AC hearing transcript).

When could the cocaine have been administered to Mr Simon Daubney?

105. At the hearing held on 1 September 2008, Mr Martial Saugy director of the Swiss laboratory for doping analyses, in Lausanne, Switzerland explained to the CAS Panel that according to the laboratory documentation package, the analysis conducted on Mr Simon Daubney's A sample revealed the presence of Benzoilecgonina at a concentration of 500 ng/ml. Based on his experience and studies, he affirmed that such a high concentration is significant, considering that an ethically acceptable dose of cocaine administered orally, intranasal or intravenous to volunteers does not leave any traces after 7 days and less than 100 ng/ml after 72 hours. Even in case of multiple doses (done during a week on volunteers), cocaine was found at a concentration not higher than 100 ng/ml, that is five times less than what was detected in Mr Simon Daubney's urine sample. Mr Martial Saugy confirmed that he ignores if a massive dose of cocaine absorbed several days before the sample collection procedure could be detected at a concentration of 500 ng/ml, as it would be unethical to administer so much cocaine to somebody for the need of a scientific study.
106. At the hearing held before the CAS Panel on 1 September 2008, Mr Simon Daubney confirmed that the AC hearing transcript reports correctly the statements he made to the AC Jury.
107. Mr Simon Daubney describes as follows the three occasions where cocaine could have been put in his drinks (page 221 of the AC hearing transcript):

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"I think that somebody has seen me when I was at the bar at Palma or someone has seen me when I am the bar, the Australia bar, in the port of America's Cup or somebody has seen me when I was at the local taverna with the family, this is least likely, because we just had a few beers before dinner on the Thursday, and seen an opportunity to either get at me or the team and try to humiliate either me or the team by either trying to screw me up, by poisoning me or contaminating me or somebody knowing that all these teams are getting tested and there is a chance that I am going to get tested and it could show up. I think that there is the time in Palma where I had a rum and coke off a large tray of rum and cokes handed to me or, as I say, the Australia Bar."

108. Mr Simon Daubney had his drinks in Palma, in the Australia Dam Bar and in a local tavern, respectively 7, 3 and 2 days before the sample collection procedure (pages 211 and 221 of the AC hearing transcript).
109. Not much more details are given regarding the drinks in Palma and in the local tavern. However, more information can be found regarding the drinks which Mr Simon Daubney had in the Australia Dam Bar, where he spent two hours on the night in question (page 212 of the AC hearing transcript) :

"The whole team got the Thursday off, so on the Wednesday night I went out with some friends in the teams to this Australia bar and there were some New Zealand friends, some old school friends there. I mean, they support the New Zealand team, but these were my friends (...).

[Question] And what drinks did you have, if any?

[Answer] I can't be specific, but I would have had two beers and two rum and cokes.

[Question] The beers that you had did they come in a bottle or a glass?

[Answer] They were in a bottle.

[Question] who gave you those?

[Answer] Well, I bought the first round myself and then I got handed the second round, probably in both cases with the beer and with the rum.

[Question] Were you handed the drink by somebody with your or somebody that worked at the bar or how did it work?

[Answer] (...) I can't say for sure who handed me the drink or, you know, how many hands it may have gone through, but I do remember that I bought the first round and I stood there and I got the next couple, and then I got my last drink.

[Question] That night you were at that bar, on the Wednesday night, were there Team New Zealand fans out at that bar?

[Answer] Yes, there were.

[Question] Can you describe what they were doing, how they were behaving?

[Answer] I was there to meet old friends and, as I say, friends that I went to school with, people I have known since I was ten or 11. There were comments that I got that evening while I was with them. One of their wives come up to my friend while I was talking to him and said, "what are you doing talking to him for?" I don't know, I mean, he kind of told her off and he apologised, and she walked away. I mean, I still wanted to go out. I didn't

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want to completely shut it down and stay away from these places and that, but I was aware that you were getting looks - I don't know, dirty looks or people noticing you, even though you are not in the...

I made a point of not wearing Alinghi shirts out, but you still get the feeling that people are looking at you. It was the same in Palma. A lot of people thought it was cheeky of Brad and I to go to Palma, they were thinking it was a sign of arrogance or over confidence in our ability at the regatta, it was like what are those guys doing there? You kind of get that a little bit."

110. Mr Simon Daubney was also asked the following question (page 226 of the AC hearing transcript):

"[Question] In the Australia bar, the people you had the second round of drinks with, presumably you have been through it all with them to see if they can throw any light on it or thoughts.

[Answer] There is no way that I could nail down that it was that person or that person. That was at the time that I was in the semi-sort of hostile environment where I was getting handed a drink that I didn't know where specifically it came from. Honestly, I cannot remember whether I left my drink or where. It is hardly likely that I left my drink and went to the bathroom and then came back. I didn't find out that that was positive result until three weeks later or something like that, so I can't recall my exact movement at the bar."

What kind of place was the Australian Dam bar?

111. Mr Simon Daubney (page 209 of the AC hearing transcript):

"I always thought it was foolish for people to go out wearing an Alinghi top, such was the state of the place. In this one particular place, an Australian Bar, first of all in the morning we would have to tow out right past it and they were already in there drinking at that stage when we were towing out. This is like before the cup. We would be going out to do a practise race and Team New Zealand would be going out and doing their round robin race or semi-finals race. Then, when we came back and we had tow right around this corner, they were just - you know. When we towed out there was a lot - I am all for people getting right behind their team and everything like that - when you towed out it wasn't so bad, you know, on the seawall and everything like that, a lot of it was good natured and humoured and everything like that, we would smile and wave back, but you could pick out different people, you could pick out, you know, the nasty sort of element. But then when you came back and they had been drinking all day, and we had to go past this bar, that was when it was all a bit different.

[Question] Different in what way?

[Answer] Well, we were sure that someone was going to throw a bottle or a can, there was just rage coming from out of there, you know."

112. Bradley Butterworth (page 109 of the AC hearing transcript):

"I saw some violence. There was a bar on the corner called the Australia Dam Bar, which was a pretty difficult place, and I sort of got pushed around a couple of times as I walked in there. But I only did it now and again. I didn't see much, but there were a few

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guys had probably. It was a difficult time. We did actually complain to the Marina Authority at the time and they put extra security down there".

113. Mr Curtis Blewett told the AC Jury how one of his friends was tripped and aggressed physically in the Australia Dam Bar because he was wearing an Alinghi shirt. It happened during an evening in the middle of the competition (page 125 of the AC hearing transcript). He elaborated as follows:

Then I realised that, maybe, our team should stay out of there. We were a bit vulnerable in that place. Sometimes you realise things a bit late, because they are already happening. So at breakfast the next day I said to Brad and everybody, "Look, this has happened to a friend of mine last night just wearing one of our shirts down at that bar and I have my concerns. Maybe we had better keep the guys out of there. They should stay out there. It was only ten days". It was after race two or three. It was something that made me really concerned. I felt that the team was vulnerable in there and I was worried about them. (...)

[Question] You felt that the team was vulnerable how?

[Answer] Just causing trouble, someone picking a fight or, you know, it was a negative environment, I just felt like some of those guys - you know, socially, the sailing was not like a car race, where the guys would watch the race and go home and carry on with their lives, the way the social set up was there, they would stay there and watch the race, drink all afternoon, the whole scene, they would stay there and eat there and get drunker and drunker and, with that negative feeling going on, it would just seem to deteriorate throughout the evening, because these guys spent five or six hours in that bar."

(3) The position of the CAS Panel on items (1) and (2) above

114. The presence of a prohibited substance, its metabolites or its markers in Mr Simon Daubney is undisputed. A violation of the applicable anti-doping rules has therefore been established.
115. The sanction for a first offense is a two year suspension (article 21.10.1 of the ISAF Regulations). In order for the sanction to be eliminated or reduced, a finding of exceptional circumstances must be made within the ISAF Regulations.
116. To benefit from the elimination or reduction of the period of suspension, Mr Simon Daubney must first establish how the substance entered his system. Secondly, it will only be possible to eliminate or reduce the period of suspension if Mr Simon Daubney satisfactorily establishes 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 been administered the prohibited substance. A reduction in the duration of the suspension will not be possible unless he establishes that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for "No Fault or Negligence", was not significant in relationship to the anti-doping rule violation (article 21.10.4 litt. a and b, with the definitions of "No Fault or Negligence" and of "No Significant Fault or Negligence" of the ISAF Regulations). Mr Simon Daubney is required to establish the above elements on the "balance of probability". According to several CAS awards, the balance of probability standard entails that the athlete has the burden of persuading the Panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence or more probable than other possible explanations of

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the positive testing (see e.g. CAS 2006/A/1067 IRB v/Keyter, para. 6.8; CAS 2007/A/1370 & 1376 FIFA, WADA v/CBF, STJD, Dodô, para. 127).

117. Article 21.10.4 litt. a) and b) of the ISAF Regulations is a word-for-word rendering of article 10.5 of the WADAC, the comment of which indicates that this provision only applies if the circumstances are truly exceptional, and certainly not in the large majority of cases. This narrow application is easily justified since a different, more permissive, approach would open the door to abuse. An eliminated or reduced sanction would in fact only be justified in exceptional circumstances and if the athlete succeeds in showing that he or she took all the necessary precautions.
118. Mr Simon Daubney claims that he has no idea how the cocaine entered into his body, and presented as the only possible explanation the ingestion of drug through a "spiked drink" during one of the three nights when he visited public establishments. In particular, the three occasions when his drinks might have been tampered are:
- On a Sunday evening, he went to Palma to have a drink with his friend and colleague Bradley Butterworth;
 - On Wednesday, the night before his day off, he went to the Australia Dam Bar with his friends;
 - On Thursday, he had dinner with his family in a local restaurant.
119. In order to corroborate his allegations, he produced an expertise by a polygraph expert, a number of statements and documents establishing his good character as well as the very strong hostility of the fans of Emirates Team New Zealand. A polygraph test is inadmissible as *per se* evidence under Swiss law. Therefore, the CAS Panel may take into consideration the declarations of Mr Simon Daubney in front of Mr Bruce Burgess as mere personal statements, with no additional evidentiary value whatsoever given by the circumstance that they were rendered during a lie detector test (TAS 99/A/246 *Ward v. FEI* par. 4.5; CAS 96/156, *Foschi v. FINA*, par 14.1.1).
120. The CAS Panel observes that Mr Simon Daubney failed to establish if the "sabotage" occurred when he was in Palma, in the Australian Dam Bar or in the local tavern with his family. In fact, the CAS Panel finds it difficult to acknowledge that Mr Simon Daubney offered persuasive evidence of how cocaine entered his body as the evidence is merely indirect and his version of the facts seems incompatible with the testimony of Mr Martial Saugy.
121. In any event, the Panel would be prepared to assume that Mr Daubney's evidence would be sufficient to establish that the prohibited substance entered in his system during the night at the Australian Dam Bar, that is the night out of which he submits more details and provides some circumstantial evidence. Indeed, the Panel finds the scant and indirect evidence concerning the friendly drink in Palma with Mr Butterworth and the family dinner in the local tavern to be utterly unpersuasive, on the balance of probability, as an explanation of how cocaine was found in his system.
122. However, even accepting that Mr Daubney proved on the balance of probability that the cocaine was put in his drinks on Wednesday night at the Australian Dam Bar, the Panel is of the view that Mr Daubney failed both the "No Fault or Negligence" test and the "No Significant Fault or Negligence" test.

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123. Indeed, Mr Simon Daubney went to a risky public establishment, a few days before the beginning of the America's Cup. The Australia Dam Bar was reputed to be not only unfriendly but also dangerous for Alinghi sailors of New Zealand nationality. It can be inferred from the testimonies reported in the AC hearing transcript and quoted here above, that Mr Simon Daubney was well aware of the hostility of the clients of the Australia Dam Bar towards Team Alinghi, its supporters and team members.
124. Despite the fact that it *"is each athlete's personal duty to ensure that no prohibited substance enters his or her body"* (article 21.2 of the ISAF Regulations) and despite the antagonistic environment, Mr Simon Daubney had *"a rum and coke off a large tray of rum and cokes handed to"* him in Palma and in the Australia Dam Bar, he *"can't say for sure who handed [him] the drink or (...) how many hands it may have gone through, but [he remembered] that [he] bought the first round and [] stood there and [] got the next couple, and then [] got [his] last drink."* As he admitted, *"That was at the time that [he] was in the semi-sort of hostile environment where [he] was getting handed a drink that [he] didn't know where specifically it came from"*.
125. Mr Simon Daubney was a leading member of Team Alinghi (see testimony of Mr Bradley Butterworth, page 115, lines 12-13 of the AC hearing transcript) and, as a sail trimmer, he had an important role to play in the competition. He took part in three Olympic Games and six America's Cups. As an experienced athlete, he could not ignore that he should pay attention to what he was drinking and from whom he got the drinks, which he did not. His departure from the required duty of caution ("utmost caution") and his fault is even greater as he went in a very hostile bar and, therefore, accepted to expose himself to the malevolence of any fan, just a few days before the beginning of the competition. In this respect, it must be noted that on that night Mr Daubney was off duty and was not taking part to some mandatory social event organised by a sponsor or partner of his team, requiring his presence: He willingly put himself in an unsure situation and must take the responsibility for it. In the Panel's view, considering the totality of the circumstances, Mr Daubney's fault or negligence has been significant.
126. Even though the Panel is willing to accept that Mr Simon Daubney did not "know or suspect" that the drinks at the Australian Dam Bar had been spiked with a prohibited substance, the Panel cannot accept that Mr Simon Daubney "could not reasonably have known or suspected" (see the "Definitions" section of the ISAF Regulations) such occurrence, given the dangerous situation in which he put himself. As a result, the Panel cannot accept the submission that those circumstances are exceptional and excuse Mr Simon Daubney from his significant fault or negligence.

C) What is the sanction and how should it be calculated?

127. The sanction for a first offense is a two year suspension (article 21.10.1 of the ISAF Regulations) and cannot be reduced or eliminated as Mr Simon Daubney has not established that he bears no significant fault or negligence or no fault or negligence.
128. Considering that (i) Mr Simon Daubney voluntarily put on hold his career and has refrained from taking part in any official competitions since 14 July 2007 and that (ii) *"Any period of provisional suspension (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility to be served"* (article 21.10.7 of the ISAF Regulations), the CAS Panel declares that the two years ineligibility be imposed on Mr Simon Daubney shall start on 14 July 2007.

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V. Costs

129. Articles R65.1 and R65.3 of the CAS Code provide that, subject to articles R65.2 and R65.4, the proceedings shall be free; that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties; and that, in the Award, the Panel shall decide which party shall bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
130. As a general rule the CAS grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. However, in the light of all of the circumstances and of the financial resources of the parties, the Panel concludes that it is reasonable for the parties to bear their own costs and other expenses incurred in connection with this arbitration.

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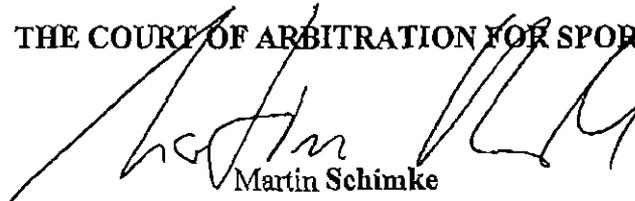
ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal of the WADA against the decision rendered on 24 January 2008 by the Swiss Olympic Disciplinary Committee is admissible.
2. The decision rendered on 24 January 2008 by the Swiss Olympic Disciplinary Committee is set aside.
3. Mr Simon Daubney is found guilty of an anti-doping rule violation and is declared ineligible for a period of two years running from 14 July 2007 until 13 July 2009.
4. This award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid and to be retained by the CAS.
5. Each party shall bear its own legal and other costs.
6. All other motions or prayers for relief are dismissed.

Lausanne, 2 October 2008

THE COURT OF ARBITRATION FOR SPORT



Martin Schimke
President of the Panel