Fédération Internationale de Basketball

FIBA

We Are Basketball

International Basketball Federation

16 January 2006

DECISION

in the matter

N'Sima and WADA vs. FIBA
FIBA AC 2005-5

1. **The appeal by the First Appellant is dismissed. Upon appeal by the Second Appellant the decision by the Respondent of 13th October 2005 is set aside. A period of ineligibility of two years starting 13th October 2005 is imposed on the First Appellant. In application of Art. 6.8.3.1 of the Internal Regulations the Panel orders that the execution of the sanction in excess of one year be suspended.**

2. **The Respondent and the First Appellant shall bear the costs of the proceedings.**

I.

1. The basketball player Joseph N'Sima (hereinafter referred to as "the Player" or "the First Appellant"), born on 14th March 1979, is a French citizen. In August 2004 he signed a player contract with the Norwegian basketball club Ulriken Eagles (hereinafter referred to as "the Club"). The Club is a member of the Norwegian Basketball Federation (hereinafter referred to as "BLNO"). BLNO is in turn a member of the Respondent.

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On 30th September 2004 a doping control test was carried out on the Player following a national competition. The A sample was analysed in the laboratory in Oslo (Aker University Hospital HF) accredited by the World Anti-Doping Agency (hereinafter referred to as "Second Appellant" or "WADA"). According to the analysis report of said laboratory of 19th October 2004 the A sample contained the substance ephedrine in a concentration which lies significantly above the admissible limit of 10 µg/ml. Ephedrine is on WADA's list of prohibited substances (stimulant, group S1).

At the end of October 2004 the Player left Norway. On 16th November 2004 the Player joined the basketball club of Union Sportive Athletique Toulougienne in France. The latter is a member of the French Basketball Federation, which is in turn a member of the Respondent. After the Player had left Norway, the Norwegian Anti-Doping Organisation "Anti-Doping Norway" (hereinafter referred to as "ADN") notified the Respondent by letter of 28th January 2005 that, in view of its own rules and regulations and in view of Norwegian civil law, ADN was not in a position to institute or continue proceedings against the Player because of an alleged anti-doping rule violation. Following this the Respondent instituted proceedings against the Player on the basis of its rules and regulations (Art. 6.8.5.5 of the Internal Regulations). The Respondent's letter of 21st February 2005, in which the Player was notified of the opening of the proceedings, was first served on the Player at the wrong address. Only on 17th March 2005 did the Player eventually receive the Respondent's corresponding letter.

Thereupon, in accordance with the Internal Regulations, the Player by letter of 21st April 2005 requested to be heard before the FIBA Commission responsible for said proceedings. In addition, on 2nd August 2005 the Player requested that the B sample be analysed. By letter of 18th August 2005 the Norwegian laboratory confirmed the finding of the A sample. Having heard the Player the competent FIBA Commission then decided by decision of 13th October 2005 that the Player had committed an anti-doping rule violation and was suspended until 31st December 2005. In addition the decision ordered that the sanction should begin with the date upon which the decision was served. In its reasons the Respondent's competent Commission states, inter alia:

"There can be no doubt that Mr N'Sima acted negligently by ingesting a food supplement without ensuring that this supplement does not contain a prohibited substance. There is established case law both within FIBA and the Court of Arbitration for Sport that it does not exculpate an athlete if he is unaware of the presence of a prohibited substance in a food supplement. On the other hand ephedrine is a substance which is particularly susceptible to unintentional use in connection with food supplements which are generally available in drugstores. For the benefit of Mr N'Sima and on the basis of the explanation given by him the Panel accepts that he did not intend to enhance his sport performance. The Panel also took into account the long period of time which – through no fault of Mr N'Sima – has elapsed since the doping test was taken in 2004. Finally, the Panel considered the cooperative attitude of Mr N'Sima during the proceedings. In the Panel's view, therefore, a period of ineligibility of a period from the date of this decision until 31 December seems appropriate."

The Player received this decision of the Respondent on 5th October 2005 and, by letter of 14th October 2005, filed an appeal against it with the FIBA World Appeals Commission. The Second Appellant received the Respondent's decision on 13th October 2005 and filed an appeal against it by letter of 18th October 2005.

2a) The First Appellant does not dispute the presence of an adverse analytical finding. However, he is of the opinion that the decision by the Respondent's competent Commission is erroneous in terms of the measure of the sanction, i.e. the length of the suspension. The First Appellant points out that he did not ingest the prohibited substance ephedrine with the intention of enhancing his performance. He does not have a conclusive explanation for the adverse analytical finding; rather, there are various events, which are possible causes of the finding. In this regard the First Appellant refers to, inter alia, the medication HUMEX. According to the First Appellant, he took this in the period in question to treat acute nasal herpes from which he has suffered since childhood. A further possible cause was also a nutritional supplement from the company VITAPLEX. He took this in the period in question upon recommendation by the Club's coach. The nutritional supplement did not state on either the package insert or on the packaging itself that ephedrine was a constituent ingredient. However, it is generally known according to the First Appellant that nutritional supplements are often contaminated, i.e. also contain substances that are not expressly listed in the table of contents. On the day of the

urine test he took the nutritional supplement twice, namely the usual dose, the last time approximately 1½ hours before the game began.

In the oral hearing the First Appellant stated further possibilities of the cause for the positive finding, which to date he had not referred to. For instance the Club's coach prepared drinks for him – e.g. during strength training – in which the coach dissolved a powder. He – the First Appellant – could not say what the powder was, for it was no longer in its original packaging. When he asked what sort of a product it was, the coach always replied that the drink was "good for him and perfectly harmless". In this regard, he – the First Appellant – trusted his coach. Moreover, he had little other choice; for in terms of sport he had been brought up not to question the coach as an authority. Furthermore, he was in a foreign country (Norway) where he did not speak the language and whose customs were alien to him. Apart from the coach he hardly had anyone to whom he could relate. Moreover, the Club did not have its own medical staff that he could have asked for advice. He took the drink concerned for the last time on the day before the game, that is to say on 29th September 2004. Finally, the First Appellant would also not like to rule out the possibility of sabotage by contamination of his drinking bottle on the day of the game (30th September 2004). According to the First Appellant the prime possible perpetrator would be the Club's coach. The latter had access to the drinking bottle during the game. Furthermore, the coach had a motive for harming him because of various *"financial problems"* between the First Appellant and the Club.

The First Appellant further argues that the procedure whereby he was chosen for the doping control after the game on 30th September 2004 did not comply with the applicable rules (Art. 6.7.1 of the Internal Regulations). He had not been selected for the taking of a sample by lot. Rather, he – together with three other foreign players – had been chosen for the doping test at random by his coach and the president of the Club. The people responsible at the Club arranged this because there had been the said *"financial problems"* between him and the Club.

The First Appellant further argues that the sanction imposed by the Respondent's competent Commission is excessive. The level of ephedrine found in him was comparatively low and completely unsuitable for enhancing his performance.

Furthermore the First Appellant argues, that there are very controversial findings about the effects of ephedrine on sport performance. That is why it is currently being discussed whether ephedrine should be completely taken off the list of prohibited substances. Moreover, the length of the suspension imposed was disproportionate to the effects thereof on the First Appellant. Furthermore, it had to be taken into account that the First Appellant had been playing basketball for more than 10 years and had never tested positive in this period. The doping samples taken from the First Appellant since 30th September 2004 had also all been negative. Moreover, the FIBA Commission had not taken his current financial situation reasonably into account. He was dependent on participating in competitive sport. He currently earned approximately EUR 1,500 per month. He had no other sources of income.

Finally, the First Appellant pointed out that the Internal Regulations conflicted with the French anti-doping rules. According to L 3634-1 of the French Code of Public Health the national Sporting Federation has sole competence in the matter of disciplinary sanctions on French territory. The French Basketball Federation had, on this basis, already instituted proceedings against the First Appellant. In contrast to the Internal Regulations the French provisions provide, inter alia, that in the case of a first violation, a period of ineligibility can be replaced, with the consent of the player, by work of general interest for the benefit of the sporting federation. In order to therefore avoid conflicting decisions the Respondent had to make its decision in the present case on the basis of the French provisions. For completion, reference is made to the First Appellant's written pleadings of 3rd November 2005.

2b) The Second Appellant is of the opinion that the decision by the FIBA Commission is unsound with regard to the measure of the sanction, i.e. the length of the ban, because it is not in conformity with the prevailing rules (Internal Regulations). Only the latter, not the French rules, were applicable in the present case. As a general rule Article 6.8.2.1 of the Internal Regulations orders a two-year ban for a first-time anti-doping rule violation. Although Art. 6.8.2.2 of the Internal Regulations allows the FIBA Commission to order a milder sanction there are two conditions for this. Firstly, the substance in question must be a so-called *"specified*

substance" within the meaning of the 2004 WADA Prohibited List. Secondly the player must establish that the use of the substance was not intended to enhance his/her sport performance. According to the Second Appellant the Player has at least not shown the latter condition adequately.

Objectively, the substance ephedrine has – according to the Second Appellant – the potential to enhance a player's sport performance. Whether the prohibited substance had the effect of enhancing performance in this specific case was, on the other hand, irrelevant. In particular it was not possible to draw any conclusions from the concentration found in the Player as to his subjective intention at the time of taking the prohibited substance because the time and quantity of the ingestion in question had not been firmly established. Also, the First Appellant had not submitted any facts from which it seemed likely that the ingestion of the prohibited substance was accidental within the meaning of the provision. The adverse analytical finding could not be attributed to the use of the medication HUMEX as this does not contain the substance ephedrine. Insofar as the First Appellant makes the nutritional supplement from the company VITAPLEX responsible for the positive finding, this was also not very likely, for the manufacturer of VITAPLEX does not - at least officially - produce a nutritional supplement which contains the substance ephedrine. "Contamination" in the production process (for instance because the same machines are used for producing different products) could therefore largely be ruled out. Furthermore, VITAPLEX was a Norwegian manufacturer, which has been on the market for a very long time and which produces in accordance with the principles of Good Manufacturing Practices. So far no cases of contamination of VITAPLEX products with ephedrine have become known. Since, therefore, the First Appellant continued to owe an explanation as to how the prohibited substance entered his body there was no basis whatsoever for allowing any conclusion to be drawn about what the First Appellant had in mind when he took the prohibited substance. The elements of Art. 6.8.2.2 of the Internal Regulations were therefore not met from the outset.

Therefore, in the present case, Art. 6.8.2.1 of the Internal Regulations was - according to the Second Appellant - applicable for the measure of the sanction. The provision stipulates a 2-year suspension. It was not possible to depart from this

because the selection procedure for the doping control was (allegedly) wrong, for the latter had no effect whatsoever on the result of the doping test. Furthermore, no reduction of the sanction was possible on the grounds of the principle of proportionality. The Internal Regulations took the principle of proportionality into account in various places. This was so, for example, under Art. 6.8.2.2 Internal Regulations, or in the event that an athlete bears no negligence and no fault (Art. 6.8.2.4 paragraph 1 Internal Regulations), or no significant fault or negligence (Art. 6.8.2.4 paragraph 2 Internal Regulations). Apart from these expressly governed cases there was, however, - in view of the global harmonization of the doping rules which these rules tried to achieve - no scope for taking into account the principle of proportionality.

Subsidiarily, the Second Appellant points out that even if the Player did not want to enhance his performance by taking the prohibited substance, the Respondent had fixed the suspension too low. Even if the adverse analytical findings were attributable to a contaminated supplement, the present case would not be a minor doping case. Rather, the measure of a sanction must take into account that an athlete is responsible for the products he or she ingests. This is particularly so because athletes have generally repeatedly and persistently been warned against the risk of contaminated nutritional supplements. In view of the Player's particularly significant negligence and having due regard for the case law of the CAS on doping suspensions in connection with nutritional supplement contaminations a suspension of 6 months to one year was therefore reasonable also on the basis of Art. 6.8.2.2 of the Internal Regulations. In addition reference is made to the Second Appellant's written pleadings of 3rd November 2005.

3a) The First Appellant is moving *"to declare null and void the decision rendered by FIBA Commission on October 13th 2005, AC 2005-5* [and] *to acquit"* the Player or – subsidiarily – *"to pronounce a warning or a reprimand"* or – very subsidiarily to *"impose a suspended sanction as per art. 6.8.3.1 of the Internal Regulations or to replace the period of ineligibility by work of general interest for the benefit of the French Basketball Federation as per art. 25 par. 2 of the French Doping Regulations."*

3b) The Second Appellant is moving *"to uphold the appeal lodged by WADA* [and] *to dismiss the appeal lodged by Joseph N'Sima* [and] *to pronounce a 2-year suspension against Joseph M'Sima* [and] *to grant WADA a portion of its costs"*.

4. The Respondent is moving that the appeal of the First and Second Appellant be dismissed. The Respondent supports its motion on the argument that the First Appellant submitted sufficient facts which allow conclusions about his inner mind-set at the time he took the prohibited substance, namely that he did not intend to enhance his performance. These include, inter alia, the comparatively low concentration of ephedrine in the sample as well as the surrounding circumstances in connection with the ingestion of the nutritional supplement by the manufacturer VITAPLEX. Said circumstances submitted by the First Appellant were also credible. Insofar as procedural errors were made in the taking of the sample - as submitted by the First Appellant - this had no influence on the result of the sample and therefore the presence of an anti-doping violation. This followed from Art. 6.3 of the Internal Regulations. Insofar as the First Appellant was invoking the application of French law or the regulations of the French Basketball Federation in the context of the measure of the sanction, this also could not be accepted; for the Respondent was only authorized to apply its own rules and regulations, the Internal Regulations, not anyone else's law. The Respondent had reasonably exercised the discretion granted to it under Art. 6.8.2.2 of the Internal Regulations. In so doing the Respondent had taken into account both the circumstances surrounding the act as well as the effects of the suspension on the First Appellant as well as the fact that - without any fault on the part of the First Appellant - a longer period of time had elapsed between the act and the punishment for it.

5. By order of the President of the Appeals Commission, Mr. Antonio Mizzi, of 21st October 2005 Prof. Dr. Ulrich Haas was appointed as a sole arbitrator (hereinafter referred to as "the Chairman") for the present case. Upon application by the Respondent of 22 October 2005, the Chairman summoned ADN, the French Basketball Federation and Union Sportive Athletique Toulougienne to the

proceedings in accordance with Article 12.6 of the Internal Regulations. By letter of 24th October 2004 the First Appellant filed an appeal to confer suspensory effect on the appeal. The Panel dismissed said application for the issue of an interim measure by decision of 27 October 2005. For all other aspects reference is made to the content of the "order of procedure" of 24th October 2005 issued by the Chairman and signed by the parties and by the joined parties. In all other respects reference is made to the parties' written pleadings as well as to the minutes of the oral hearing of 23rd November 2005 in Geneva. The First Appellant was present at the oral hearing and was legally represented by Mr Mr. Martin Ahlström. The Second Appellant was represented by Mr Claude Ramoni and Mr Alain Garnier, Medical Director of WADA. The Respondent was represented in the oral hearing by Dr. Dirk-Reiner Martens. Mr. Jean Torondell, in his function as the President of, Union Sportive Athletique Toulougienne also participated in the hearing on behalf of his club. By letter of 7th December 2005 the Chairman drew the parties' attention to the possibility provided in Art. 6.8.3.1 of the Internal Regulation, whereby it is also possible to impose a suspended sanction on the First Appellant, and requested the parties to comment on this legal aspect by 20th December 2005. The First and Second Appellants and the Respondent complied with said request. In this regard reference is made to the corresponding written submissions.

II.

1. The appeals by the First and Second Appellants against the Respondent's decision of 13th October 2005 are admissible. The Second Appellant also has a right to appeal (see AC 2005-1 *WADA v/ FIBA*).

2. The appeal by the Second Appellant is well-founded in part.

a) The Respondent and the Second Appellant are correct in arguing that only the FIBA Internal Regulations apply to the present case. The Respondent can impose a

disciplinary measure on the First Appellant only in accordance with its own rules and regulations. In addition, the national law of the place where the Respondent has its seat may also apply in some circumstances, particularly to fill any lacunae. However, these questions can be left unanswered here, for the present case is governed fully and exhaustively by the Internal Regulations, so there is from the outset no need to consider recourse to French association law or French national law.

b) In the present case it has been established to the court's satisfaction - and in agreement with the Respondent - that there is an anti-doping rule violation by the First Appellant. In this regard, the First Appellant has asserted that there were irregularities in the taking of the sample; in particular that he was chosen for the taking of a sample not by lot but by his coach at the time. Even if there was a procedural error in selecting the First Appellant, this can only lead to the result of the analysis being ignored if the procedural error is able to influence the result of the analysis (see Art. 6.3.4.2 Internal Regulations). However, this is obviously not so in the present case.

c) If it has therefore been established that there is an anti-doping rule violation, then the only question that still needs to be clarified is the extent of the sanction. Art. 6.8.2.1 of the Internal Regulations provides insofar that for an anti-doping rule violation within the meaning of Art. 6.2.1.1 of the Internal Regulations the sanction is in principle two years of ineligibility for a first offence. By way of exception said ban can be reduced pursuant to Art. 6.8.2.2 of the Internal Regulations. This provision reads as follows:

> *"The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where a player can establish that the use of such a specified substance was not intended to enhance sport performance, the period of ineligibility shall be:*

First violation: at a minimum, a warning and reprimand and no period of ineligibility from future events, and at a maximum one (1) year's ineligibility ..."

The substance detected in the Player's urine, ephedrine, is undeniably a specified substance within the meaning of the above provision. Therefore, whether Art. 6.8.2.2 of the Internal Regulations applies in the present case depends only on whether the player can establish that the use of the specified substance was not intended to enhance sport performance. On the question of the circumstances under which this is the case, the Panel has already expressed its position in another decision (FIBA AC 2005-1 *WADA v/ FIBA*). The Panel sees no reason to deviate from this ruling and here expressly refers to the corresponding passages from the decision.

„Webster's Unabridged Dictionary describes the term 'to establish' by, inter alia, the words 'to prove' or 'to demonstrate'. This implies that the Player must do more than merely 'bring forward' or 'contend'. Rather the Player must convince the sanctioning authority – to a certain degree – of the presence of the inner fact, namely that he did not intend to enhance his performance. ... Although it must be admitted ... that inner facts are not events which can be perceived externally and cannot therefore be proven directly, the legal system considers inner facts as legally significant in many areas; this is so not only in civil law, but equally also in criminal law. Such facts can, in state proceedings in any event, be established by establishing circumstances which according to experience allow one to conclude the presence of facts to be established. Codes of procedure for state proceedings do not, as a general rule, require the express admission of such indirect exploration of the facts by means of circumstantial evidence. This follows from the fact that otherwise there would be a risk of legal protection being diminished. Of course, admitting circumstantial evidence for (indirectly) proving inner facts also involves imponderables. However – state law – takes these imponderables sufficiently into account by means of the rule of freedom in the assessment of circumstantial evidence and by means of the standard of proof and the burden of proof if the fact cannot be proven. These possibilities available under state evidentiary law preclude us from considering inner facts as not being open to a court finding. In the Panel's opinion these principles developed for state proceedings also apply to the present internal proceedings of an association. It is not apparent that the Respondent's rules and regulations wish to exclude the possibility of reviewing the facts on the basis of circumstantial evidence. Just as in the case of state proceedings, there is, in the Panel's opinion, in any event no need for circumstantial evidence to be codified in the rules and regulations governing the internal proceedings of an association This applies all the more in that both forms of determining the facts (direct evidence and circumstantial evidence) are, in principle, equal."

Applying the above principles the Panel must therefore examine whether the First Appellant has in the present case submitted circumstances that allow the conclusion with sufficient probability that he did not ingest the prohibited substance in order to enhance his performance. In this regard the Panel's assessment of the circumstances of the case is different from that of the FIBA Commission. This is of course because the facts, upon which the assessment is based, are - in many aspects very - different from the facts available to the competent FIBA Commission at the time for its decision.

aa) Insofar as the First Appellant invokes the argument that he took the medication HUMEX, this does not allow the conclusion that he did not commit the anti-doping rule violation in order to enhance his performance; for according to Martindale, The Complete Drug Reference, 33.ed. (p. 1903), the medication HUMEX does not contain the substance ephedrine, rather a different substance pseudoephedrine. If, however, the taking of the medication HUMEX cannot explain the adverse analytical finding then no conclusions can be drawn from this about the First Appellant's state of mind at the time he took the prohibited substance.

Insofar as the First Appellant refers to a nutritional supplement from the company VITAPLEX as the cause for the adverse analytical finding, this submission of facts also does not meet the requirements of Art. 6.8.2.2 of the Internal Regulations. The producer VITAPLEX has been on the Norwegian market for some time. According to the table of contents, none of its products contain ephedrine. Furthermore, the products are produced in accordance with the principles of Good Manufacturing Practice. To date no complaints about contaminated nutritional supplements from the company VITAPLEX have become known and were not pleaded by the First Appellant. Finally, the fact that the concentration found in the First Appellant's sample was above the limit of 10 µg/ml, is at least an indication that the product was not - accidentally - contaminated. Of course, it must be conceded to the First Appellant that contamination of a product by VITAPLEX cannot be ruled out with 100% certainty in the present case. However, such an abstract possibility, which is not supported in any way by

submissions of fact, is not sufficient to meet the standard of proof required according to Art 6.3.3 of the Internal Regulations. According thereto the player has only furnished the proof of particular facts when the panel is satisfied that their presence is more probable than their non-presence. However, on the basis of the above-mentioned circumstances, the Panel considers it to be very improbable that the nutritional supplement from the company VITAPLEX was contaminated with the prohibited substance ephedrine. However, if VITAPLEX is ruled out as a cause for the adverse analytical finding, the taking of said nutritional supplement does not allow a conclusion to be drawn about the First Appellant's state of mind at the time he took the prohibited substance.

The same applies to the First Appellant's argument that the team coach could have manipulated his drinking bottle. The First Appellant first raised this as a possibility in the oral hearing and in breach of Art. 12.5 of the Internal Regulations. Nevertheless - in view of the importance of the present proceedings to the Player - the Panel shall take this submission into account. Furthermore, both the Respondent and the Second Appellant did not expressly object to the new submission of facts. The details given by the First Appellant about the background and the circumstances surrounding a possible "act of revenge" by the coach against the First Appellant are extremely vague. The First Appellant was unable to say where his drinking bottle was (locker room or side of the court) or whether it was sealed or not. Also, the First Appellant did not claim that the coach was conspicuous or acted differently from otherwise on the day on which the sample was taken. Although this does not rule out an "act of revenge" by the coach with absolute certainty, it seems very unlikely. In any event, such conduct by the coach has not been established with the certainty required for the Panel by Art. 6.3.3 of the Internal Regulations.

Insofar as the First Appellant states - for the first time in the oral hearing - that he was given other products from his coach at the time as well as products from the company VITAPLEX, in particular in connection with the strength training, this does not appear to the Panel to be a very likely

possible cause for the adverse analytical finding. In this regard the First Appellant says nothing other than that it was a white powder, which the coach usually dissolved in a drink himself. He did not know the name of the product, nor did the coach tell him the name of the product when he asked. The First Appellant also did not know whether other players took this product. He never saw the original packaging. Furthermore, the First Appellant did not mention this product on the doping control form. Altogether it seems very unlikely to the Panel that the coach gave this drink only to the First Appellant and not to the other players who trained together with the First Appellant. If, however, the prohibited substance was really in the powder, then the co-players would sooner or later have had to test positive for ephedrine also. However, this is not the case, so this incident does not explain either the positive finding as such nor can it cast any light on the First Appellant's subjective mind-set at the time he took the prohibited substance.

bb) Unlike under Art. 6.8.2.4 of the Internal Regulations, under Art. 6.8.2.2 of the Internal Regulations the First Appellant - as correctly pointed out by the Respondent - does not have to *"establish how the prohibited substance entered into his or her system"*. Rather, the Panel can satisfy itself on the basis of other circumstances that the First Appellant did not ingest the prohibited substance for the purposes of enhancing sport performance. In this regard, the First Appellant refers, inter alia, to the concentration of ephedrine measured in his sample, which in this specific case is not linked with any enhancement of performance. Furthermore, he asserts that he has taken part in competitive sport for a long time and has not tested positive for a prohibited substance either before or after 30th September 2004. After all, as soon as he first heard of the positive finding at the end of February/beginning of March 2005 he cooperated closely and fully with the Respondent in order to completely resolve the case. However, in the Panel's opinion these facts submitted by the First Appellant are not of such weight that they make the ingestion of the prohibited substance for the purposes of enhancing performance appear unlikely.

cc) To sum up therefore, the First Appellant has not proven the prerequisites of Art. 6.8.2.2 of the Internal Regulations to the Panel's satisfaction with the consequence that Art. 6.8.2.1 of the Internal Regulations applies in the present case, which stipulates a period of ineligibility of two years for a first violation.

c) As a general rule when determining the period of ineligibility the Panel must observe the principle of proportionality (see also the case law of the CAS, see CAS 2005/A/830 *Squizzato v/ FINA*). However, it is open to question which facts, if any, must be taken into consideration. In this regard, the First Appellant claims that, apart from Art 6.8.2.2 and 6.8.2.4 of the Internal Regulations, additional facts must be taken into account in his situation. Accordingly, he refers to facts regarding his person, namely that he has never tested positive throughout his sporting career. Furthermore, he argues that because of his economic situation a ban lasting longer than 2 ½ months poses an exceptional hardship for him and his sporting career. In addition the First Appellant argues that the level of ephedrine measured in his case was not suitable to enhance his performance in any way. Finally, the First Appellant submits that it is controversial in science and practice whether ephedrine should count as a prohibited substance in sport at all.

The World Anti-Doping Code (WADC) and the Internal Regulations of the Respondent, which follow it considerably restrict the application of the principle of proportionality (CAS 2005/A/830 *Squizzato v/ FINA*; CAS 2005/A/847 *Knauss v/ FIS*). Whether an athlete can, for example, look back upon a blameless past, is relevant only for determining the applicable range of sanctions. If, for instance, an athlete has in the past already committed one anti-doping rule violation then according to Art. 6.8.2.1 of the Internal Regulations the regular sanction is not two years, but lifelong ineligibility. By contrast, the WADC does not provide that the athlete's personal history also to be taken into account when fixing the penalty. The same applies to the question of how severe the penalty impacts upon the athlete in his personal life or economic situation. The athlete's age, the question of whether taking the prohibited substance had a performance-enhancing effect or the peculiarities of the particular type of sport are not - according to the WADC or the

Internal Regulations - matters to be weighed when determining the period of ineligibility. Finally, the question whether a particular substance is on the list of prohibited substances rightly or wrongly is - in principle - not a matter that the Panel can review (CAS 2003/A/507 *Strahija v/ FINA*). To be sure, the purpose of introducing the WADC was to harmonise at the time a plethora of doping sanctions to the greatest extent possible and to un-couple them from both the athlete's personal circumstances (amateur or professional, old or young athlete, economic situation of the athlete, etc.) as well as from circumstances relating to the specific type of sport (individual sport or team sport, etc.).

The consequences of this abstract and rigid approach of the WADC when fixing the length of the period of ineligibility in an individual case may be detrimental or (in rare cases) advantageous to the athlete (see for instance CAS 2002/A/396 *Baxter v/ FIS* marg. no 13 *et seq.*, Digest of CAS Awards III, p. 379 *et seq.*). Insofar as the WADC prevents specific circumstances to be taken into account for the benefit of the athlete, the admissibility of such provisions is doubted again and again. In the opinion by Gabrielle Kaufmann-Kohler, Antonio Rigozzi and Giorgio Malinverni[1], the rigid system of fixed sanctions in the WADC considerably restricts the doctrine of proportionality, but is nevertheless compatible with human rights and general legal principles (see notes 175-185). These experts justify this characteristic by citing the legitimate aim of harmonising doping penalties (see notes 171-174). Whether the conclusions to be drawn from these experts are correct in such finality can be left unanswered here (see also CAS 2004/A/690 *Hipperdinger v/ ATP Tour Inc*); for the case at hand does not require an in-depth discussion of the issue. The First Appellant has not convinced the Panel that the Internal Regulations, by failing to take into consideration his age (see also CAS 2003/A/447 *Stylianou v/ FINA*), his personal sporting career, his economic situation, his blameless past or the type and concentration of the prohibited substance detected in his sample inflict such an extraordinary disadvantage upon him in setting the period of his ineligibility that the Panel is justified in departing from the central premise of the WADC and the Internal Regulations, namely the harmonization and standardization of doping

[1] Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, dated 26 February 2003, by Gabrielle Kaufmann-Kohler/Antonio Rigozzi/Giorgio Malinverni, available at http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf.

sanctions across all types of sports and athletes (see the Introduction to the WADC).

d) Art. 6.8.3.1 of the Internal Regulation provides that *"the commission is authorised to impose suspended sanctions"*.

aa) It is questionable whether the provision even applies in the present case. The Second Appellant correctly points out that there is no corresponding Article in the WADC. However, this divergence between the two sets of regulations does not make Art. 6.8.3.1 of the Internal Regulations inapplicable in the relation between the Respondent and the players affiliated to it. The Panel does not thereby fail to appreciate that great importance is attached to the WADC in interpreting the Respondent's regulations. However, this can only apply to the extent that both sources of law coincide with each other literally or in terms of content. However, the situation is different here where the Internal Regulations go beyond the WADC because of the regulatory autonomy, which the Respondent has claimed for itself. In relation between the Respondent and the players affiliated to it, the WADC only applies to the extent that the Respondent adopts its provisions in its rules and regulations (the facts in the present case, therefore, differ considerably from the "Hondo"-case dicided by the CAS, 2005 A/922, 2005 A/923 and CAS 200 A/926). The fact that the Internal Regulations derogate from the WADC does not make the Internal Regulations void.

bb) If Art. 6.8.3.1 of the Internal Regulations therefore applies in the present case the only question is whether and to what extent the provision is to be applied in the present case. As is expressed by the provision, this is a matter, which is at the Panel's discretion. Having weighed up the circumstances of the offence, in particular the substance found in the athlete, its concentration, the degree of guilt, the athlete's financial and personal circumstances, the long period between the taking of the sample and the punishment for the anti-doping rule violation, the fact that it is a so-called

first violation in the case of the First Appellant and in view of the First Appellant's cooperation during the proceedings and his ability to understand the wrongfulness of his act, the Panel makes an order to suspend the sanction in excess of one year. Such a partial suspension of the two-year suspension does not conflict with the purpose pursued by the penalty, namely to deter the athlete himself - and also third parties - from (further) anti-doping rule violations.

III.

Pursuant to Art. 12.11.5 of the Internal Regulations the Panel has – inter alia - to determine whether and to what extent the appealing party is to be reimbursed for the costs advanced by it according to Art. 12.11.2. When making its decision the Panel shall take into account the outcome of the proceedings and the conduct and the financial resources of the appealing party. Since in the present case the Second Appellant's motion succeeded, the Panel orders that the Respondent reimburse the Second Appellant the advance on costs that it paid except the non-reimbursable fee of USD 1,200.

16 January 2006

Prof. Dr. Ulrich Haas

Fédération Internationale de Basketball
FIBA
International Basketball Federation
We Are Basketball

Notice of Right to Further Appeal
(Art. 12.9 of the FIBA Internal Regulations)

A further appeal against the decision by the Appeals Commission can only be lodged with the Court of Arbitration for Sport in Lausanne, Switzerland, within thirty (30) days following receipt of the reasons for the award. The Court of Arbitration for Sport shall act as an arbitration tribunal and there shall be no right to appeal to any other jurisdictional body.