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Tribunal Arbitral du Sport  
Court of Arbitration for Sport

**CAS 2014/A/3496 Anti-Doping Autoriteit Nederland v.**

**ARBITRAL AWARD**

**delivered by the**

**COURT OF ARBITRATION FOR SPORT**

**sitting in the following composition:**

Sole Arbitrator: **Mr Manfred Nan**, attorney-at-law, Arnhem, the Netherlands

**in the arbitration between**

**ANTI-DOPING AUTORITEIT NEDERLAND**, Capelle aan den IJssel, the Netherlands

Represented by

**as Appellant**

**and**

, the Netherlands

**as Respondent**

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**I. PARTIES**

1. The Anti-Doping Autoriteit Nederland (*Netherlands Anti-Doping Authority* - hereinafter: the “Appellant” or the “NADO”) is the national anti-doping organisation in the Netherlands, a foundation under Dutch private law responsible for promoting, coordinating and monitoring the doping control programme in sport in all its forms in the country, under the auspices of the World Anti-Doping Agency (hereinafter: “WADA”). The NADO has its registered office in Capelle aan den IJssel, the Netherlands.
2. (hereinafter: the “Respondent” or the “Athlete”) is a cricket player of Dutch nationality. The Athlete is not an International Level Athlete and has never been part of the national or international Registered Testing Pool. The Athlete is a member of the (hereinafter: the “Club”), a cricket club with its registered office in Den Haag, the Netherlands. The Athlete is registered with the Royal Netherlands Cricket Federation (hereinafter: the “KNCB”), the national governing body of cricket in the Netherlands, which in turn is affiliated to the International Cricket Council (hereinafter: the “ICC”), which is the international governing body of cricket at worldwide level.

**II. FACTUAL BACKGROUND****A. Background Facts**

3. Below is 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 and the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.
4. (hereinafter: the “Athlete”), the Athlete was submitted to an in-competition test conducted by the NADO.
5. On 5 June 2013, the NADO received the analytical report, dated 27 May 2014, from the WADA-accredited laboratory in (hereinafter: the “Lab”), which identified the presence of the prohibited substances *methylenedioxymethamphetamine* and *benzoylecgonine* (metabolite of cocaine). Both substances are listed in category “S6. Stimulants” of WADA’s Prohibited List. It is undisputed that the two substances are not Specified Substances in the sense of article 40 of the KNCB Disciplinary Regulations (hereinafter: the “KNCB DR”).
6. On 13 June 2013, the NADO informed the Athlete and the KNCB of the analytical result. Pursuant to article 3(4)(a) of the KNCB DR, because the Athlete did not exercise his right to have the B-sample analysed<sup>1</sup>, and since it is not in dispute that the Athlete

<sup>1</sup> The Sole Arbitrator observes that the file does not contain any evidence of the Athlete’s waiver of his right to have the B-sample analysed or that he was correctly and timely informed of his right to do so in accordance with article 28 of the KNCB DR.

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does not have a Therapeutic Use Exemption for the presence of these substances, the Athlete committed a violation of article 3 of the KNCB DR.

7. On 2013, the KNCB provisionally suspended the Athlete.

**B. Proceedings before the KNCB Disciplinary Committee**

8. On 2 August 2013, the board of the KNCB lodged an indictment with the KNCB Disciplinary Committee. Based on this indictment the KNCB Disciplinary Committee instigated disciplinary proceedings against the Athlete.<sup>2</sup>
9. On 6 November 2013, the KNCB Disciplinary Committee rendered its decision (hereinafter: the "KNCB DC Decision"), finding the Athlete guilty of violating article 3 of the KNCB DR and issued the following operative part:

*"De Tuchtcommissie verklaart de heer [redacted] schuldig aan het onder punt 1 ten laste gelegde feit, en legt hem als sanctie op uitsluiting van deelname aan cricketactiviteiten binnen de KNCB gedurende een periode van twee jaar, aanvangend op 2013 en eindigend op 2015."*

Which can be freely translated as follows:

*"The Disciplinary Committee declares [redacted] guilty of violating point 1 of the indictment and imposes a sanction of a two-year period of ineligibility from any cricket-related activities within the KNCB, commencing on 18 June 2013 and ending on 17 June 2015."*<sup>3</sup>

**C. Proceedings before the KNCB Appeals Committee**

10. On 20 November 2013, the Athlete filed an appeal with the KNCB Appeals Committee against the KNCB DC Decision.
11. On 27 January 2014, the KNCB Appeals Committee rendered its decision (hereinafter: the "Appealed Decision"), confirming the KNCB DC Decision regarding its finding that the Athlete violated article 3 of the KNCB DR, but reducing the period of ineligibility to one year. The operative part of the Appealed Decision, in a translation filed by the NADO, reads as follows:

<sup>2</sup> The Sole Arbitrator observes that article 34.2 in conjunction with article 34.2(a) of the KNCB DR require that an indictment is filed with the competent disciplinary committee within six weeks upon the result of the doping test having become definite and upon notification in writing of the concerning federation. Whereas it appears that the result of the doping test became definite on 5 June 2013 and the NADO notified the KNCB of the positive test on 13 June 2013, the board of the KNCB only filed an indictment with the KNCB Disciplinary Committee on 2 August 2013, i.e. outside the deadline for filing an indictment within six weeks upon being informed of the positive test. Nevertheless, since the Athlete did not file an independent appeal against the Appealed Decision, the Sole Arbitrator finds that this issue falls outside the scope of the present appeal.

<sup>3</sup> The file does not contain the indictment of the board of the KNCB and the KNCB DC Decision does not contain a reference to different accusations. From the grounds of the KNCB DC Decision it appears however that the Athlete was found guilty of violating article 3 of the KNCB DR.

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*"The Appeals Committee rescinds decision number 2013-006 of the Disciplinary Committee dated 1 November 2013 and sent on 6 November 2013, and subjects to a sanction of suspension from cricket activities under the auspices of the KNCB for a period of one year starting on 2013 and ending on 2014."*

12. The grounds of the Appealed Decision read as follows:

- *In the [KNCB DC Decision], [the Athlete] was found guilty of a violation of article 3.1 and 3.2 of the Dutch National Doping Regulations and a sanction was imposed of a suspension from cricket activities under the auspices of the KNCB for a period of two years starting on 2013 and ending on 2015.*
- *That decision was based on the results of a positive doping control, with that result being set out in the Doping Authority's report of 1 August 2013.*
- *In response to notification given by the Doping Authority, the KNCB board imposed a disciplinary measure on 2013, that, in brief, amounted to a complete suspension from cricket activities under the auspices of the KNCB for a period of two years.*
- *did not dispute the binding result of the doping control.*
- *On the basis of the above, the Committee must decide whether there is cause, in the light of personal circumstances, as explained during the hearing, to confirm or amend the suspension of two years imposed by the Disciplinary Committee.*

*The Committee is of the opinion that the strict nature of the Dutch National Doping Regulations and sanctions for which it provides should constitute the guiding principles for the sanctions to be imposed for doping, given the fact that doping in sport should be considered to be a highly reprehensible phenomenon, the fact that doping may corrupt sport and the fact that doping can also undermine the health of athletes, all of which facts have served as the basis for the KNCB to decide to incorporate this system in its regulations.*

*On the other hand, Committee sees, in part in the light of the statements made by the Doping Authority at the hearing, reasons to take into consideration the extent to which, in given circumstances, an exception to the system of minimum sanctions could be applicable.*

*To answer this question, the Committee turned to the International jurisprudence of the Court of Arbitration for Sport (CAS).*

*In arbitration CAS 2001/A/317 A. / Fédération Internationale de Lutttes Associées (FILA), award of 9 July 2001, the following grounds are stated :*

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37. (...)

*On this basis, the Panel considers that the Appellant is responsible for what happened. One cannot not reasonably think that she does not bear no Fault of Negligence in the sense of article DC 10.5.1. S Therefore, the elimination of Period of Ineligibility is not possible.*

38. *As the Appellant appears to have no intention whatsoever to gain an advantage towards her competitors, her negligence in forgetting to check the content of a medical cream can be considered as mild in comparison with an athlete that is using doping products in order to gain such advantage. Accordingly, the Appellant appears to bear . [sic]*
39. *Therefore, the applicable sanction in this case is a reduced period of ineligibility but no less than one-half of the minimum period. As the minimum period of ineligibility is of two years, the sanction shall be a suspension of one year at least. The question to be answered is to [sic] whether this rule is consistent with the principle of proportionality, in the sense provided for by article DC 10.5.2. -4 [sic]*
40. *The question to be answered is to [sic] whether this rule is consistent with the principle of proportionality [sic]*
41. *The Panel believes that DC 10.5 does not violate general and fundamental principles of law like the doctrine of proportionality. In this connection the panel refers to an expert legal opinion from Prof. Kaufmann-Kohler, which confirmed that the WADA-Code mechanisms are not contrary to human rights legislation (see CAS 2004/A/690 notes 86 and 88, citing Kaufmann-Kohler and with reference to a decision of the Swiss Federal Supreme Court).*
42. *However, the question remains: is a CAS Panel bound in any single case to reduce a suspension only by "one-half" according to DC 10.5.2, when a finding of "no significant fault CAS 2005/A/830 S. v. FINA, award of 15 J44. [sic] In many cases, the CAS Panels had been confronted with Anti-doping rules which do not grant the authority to take into consideration circumstances that would lead to a reduction of the sanction. However, the CAS, in many cases, reduces the sanction despite the applicable rules provide for a strict period of ineligibility (CAS 1996/56; CAS 2002/A/396; CAS 2000/A/270). The criteria for the application of such measure are laid i.a. in the case CAS 1999/A/246.*

*The main principle is the following:*

*"The Panel notes that it is a widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringements. The CAS has evidenced the existence and the importance of the principle of proportionality on several occasions".*

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[.....]

45. *Besides those rules, also Swiss law provides for the principle of proportionality (see AUER/MALINVERNI/HOTTELIER, Droit constitutionnel suisse, T. II, Berne 2000, p. 109 and also p. 112 and the jurisprudence quoted ATF 116 Ia 420, ATF 115 Ia 207).*
46. *In particular, when the restriction lies in the rule itself, the principle of proportionality imposes that the rule provides for exceptions and gives the opportunity to the judge to apply those exceptions when the circumstances of the case make it necessary.*

*The Committee considers this argument to be a recognition that a general rule, such as the principle of proportionality, may also apply in given circumstances in the legal order of international and national regulations prevailing in the area of the issue of doping sport, even in a situation characterised by the absence of: "No Significant Fault or Negligence".*

*The Committee assumes, on the one hand, that the present case involves the use of drugs by a young athlete who has not previously been caught using doping and who has used the drugs in question under the influence of unfortunate family circumstances, and assumes, on the other hand, that the amount of drugs was small and cannot be proven to have had an effect on the sporting performance of the athlete a few days later.*

*The Committee decides, given the above, that the suspension imposed by the Disciplinary Committee for a period of two years was correct but that it is no longer appropriate in the light of the circumstances that have now emerged during the hearing and that a suspension of one year shall be imposed, with that suspension starting on . . . . . the date upon which the KNCB disciplinary measure came into effect."*

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 17 February 2014, the NADO filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter: "CAS"), pursuant to Article R48 of the CAS Code of Sports-related Arbitration (hereinafter: the "CAS Code"). In this submission, the NADO requested the CAS Court Office to assign the arbitration to a Sole Arbitrator and nominated Mr Manfred Nan, attorney-at-law in Arnhem, the Netherlands, as arbitrator.
14. On 23 February 2014, the Athlete confirmed his agreement to the NADO's request to assign the arbitration to a Sole Arbitrator and confirmed to have no objections to the appointment of Mr Nan.
15. On 26 February 2014, the KNCB informed the CAS Court Office that it did not want to intervene in the arbitration.

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16. On 27 February 2014, the NADO filed its Appeal Brief, pursuant to Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments. The NADO challenged the Appealed Decision, submitting the following requests for relief:
- "a. Annulment of the Decision dated 27 January 2014 (case number 02/2013).*
  - b. Confirmation that the Respondent committed a violation of Article 3 KNCB DR.*
  - c. Declaration that Respondent has established 'No Significant Fault or Negligence' in accordance with Article 42 KNCB DR.*
  - d. Declaration that a sanction of one-year ineligibility is imposed on Respondent in accordance with Article 42.2 KNCB DR.*
  - e. Confirmation that the period of suspension already served by respondent shall be credited against any period of ineligibility imposed on him.*
  - f. Confirmation of 18 June 2013 as the commencement date of any imposed period of ineligibility."*
17. On 27 March 2014, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter had been constituted as follows:
- Mr Manfred Nan, attorney-at-law in Arnhem, the Netherlands, as Sole Arbitrator.
18. On 7 April 2014, the Athlete filed his Answer, pursuant to Article R55 of the CAS Code, whereby he requested the CAS to decide the following:
- "If the Panel grants [the NADO] the relief asked for and decides to annul the Decision dated 27 January 2014 (case number 02/2013) I agree with the considerations made by [the NADO] under 10. till 24. and ask the Panel to reduce the standard sanction in accordance with the relief sought by [the NADO] as written down in the appeal brief under 25. sub b. till f.*
- For the reason why I think a one-year ineligibility in accordance with Article 42.2 KNCB DR is suitable, I refer to the facts and circumstances as stated in my additional statement in the appeal before the KNCB Committee of Appeal as summarised under 2.4.3 in the appeal brief."*
19. On 10 April 2014, the NADO informed the CAS Court Office that it did not deem it necessary to hold a hearing.
20. On 29 and 30 April 2014 respectively, further to a request of the Sole Arbitrator, the NADO and the Athlete filed their comments with regard to the NADO's standing to appeal, as well as the Athlete's standing to be sued.

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21. On 20 May 2014, considering the NADO's preference for the Sole Arbitrator to decide on the basis of the parties' written submissions and the Athlete's silence regarding the need to hold a hearing, the CAS Court Office, on behalf of the Sole Arbitrator, advised the parties that the Sole Arbitrator considered himself sufficiently well-informed to render an award on the basis of the parties' written submissions only.
22. On 22 and 25 May 2014 respectively, the NADO and the Athlete duly signed and returned copies of the Order of Procedure.
23. The Sole Arbitrator confirms that he carefully took into account all of the submissions, evidence and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

**IV. SUBMISSIONS OF THE PARTIES**

24. The submissions of the NADO, in essence, may be summarized as follows:
  - The NADO maintains that this appeal procedure before CAS is expressly aimed at setting aside the Appealed Decision as far as the grounds and motivations are concerned. The appeal is not aimed at contesting:
    - a. The decision by the KNCB Committee of Appeal that the Athlete committed a violation of Article 3 KNCB DR;
    - b. the period of ineligibility imposed by the KNCB Committee of Appeal; nor
    - c. the commencement date of the period of ineligibility.
  - As such, *"this appeal can be characterized as cassation in the interest of the uniform application of the law"*.
  - The NADO maintains that the Appealed Decision is incorrect and fundamentally flawed for the following reasons:



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- a. It is based on a single decision by CAS, which the KNCB Committee of Appeal completely misinterprets and misapplies.
  - b. Without providing any justification or grounds in either the applicable rules or relevant (CAS) case law, the Appealed Decision goes directly against the mandatory requirements and provisions of the KNCB DR and the Code.
  - c. The Appealed Decision suffers from a fundamental lack of motivation and is drafted almost without a single reference to the KNCB DR. Moreover, there is no evidence that the KNCB Committee of Appeal even considered the relevant sections in the KNCB DR when reaching the Decision.
  - d. Not only does the KNCB Committee of Appeal circumvent the closed system of sanction reduction entrenched in the KNCB DR and the World Anti-Doping Code. In addition, in direct contravention of the applicable rules, the Appealed Decision refers to the lack of proof of performance enhancement as a ground for reducing the standard period of ineligibility.
- According to the NADO, there are two fundamental problems with the Appealed Decision:
- a. The KNCB Committee of Appeal claims that there are circumstances in which an exception could be made to the system of standard sanctions under the applicable rules, and that such circumstances exist in the case at hand; and
  - b. The KNCB Committee of Appeal claims that the standard two year period of ineligibility can be reduced by one-half also in cases where “No Significant Fault or Negligence” cannot be established.
- In short, the KNCB Committee of Appeal in its Appealed Decision goes directly against the closed system of imposing sanctions for doping violation, which system has been established in the World Anti-Doping Code as well as in the KNCB DR.
- The NADO concludes that the KNCB Committee of Appeal “*refers to the wrong CAS decision, makes a mess of the citations from the Squizzato decision and completely misinterprets ‘Squizzato’, yet (ab)uses it for its own purposes*”.
- As such, the NADO finds that the Appealed Decision is incompatible with the World Anti-Doping Code and the KNCB DR. This in itself would already justify an appeal according to the NADO.
25. The submissions of the Athlete, in essence, may be summarized as follows:
- The Athlete argues that “[i]f the Panel grants [the NADO] the relief asked for and decides to annul the [Appealed Decision] I agree with the considerations made by [the NADO] under 10. till 24. [the section of the Appeal Brief where the NADO explains how the KNCB Committee of Appeal should have assessed the matter according to the NADO] and ask the Panel to reduce the standard

*sanction in accordance with the relief sought by [the NADO] as written down in the appeal brief under 25. sub b till f."*

- The Athlete further maintained that *"For the reasons why I think a one-year ineligibility in accordance with Article 42.2 KNCB DR is suitable, I refer to the facts and circumstances as stated in my additional statement in the appeal before the KNCB Committee of Appeal as summarized under 2.4.3 in the appeal brief.*
- *My mother died on [redacted] 2012. The following year has been very difficult for me. As I see it afterwards I was depressed and in a state of mental shock. Nothing came out of my hands and I was mostly in a lethargic state sitting on the couch for whole days. Trying to escape from my feelings I was going out as much as possible in the evenings, drinking more than I ever did. But of course this behavior did not diminish my feelings of sadness and anger. The way I was acting in fact was destructive. In April 2013, the new cricket season was starting and, while normally I was very looking forward to the new season, this made me miss my mother even more because she never missed one of my matches and was always there for me. This made my state of mind even worse and it was in that state that I used cocaine and XTC during Koninginnenacht, the night of 29/30 April 2013. I knew it was wrong, but it was as if I did not care anymore. I really was in a destructive mood, trying to forget everything. I am sure that I would never have done such a thing when my mother would still have been alive.*
- The Athlete concluded his Answer by stating that *"[a]fterwards I see how stupid and wrong it was to use the drugs that night. I am still often very sad that my mother is not here anymore and I still miss her very much, but I learned to cope better with the situation as it is. I will never touch drugs again. Last but not least, I want to state again how very sorry I am for what my behaviour did to my team, my club and to the cricket sport".*

## V. APPLICABLE LAW

26. In keeping with article 176 of the Switzerland's Private International Law Act (hereinafter: the "PILA"), Chapter 12 of the PILA governs this arbitration as the *lex arbitri*, i.e. the law governing the arbitral proceedings. As such, Swiss law is the law governing the arbitral proceedings. With respect to the *lex causae*, i.e. the substantive rules and/or laws to be applied to the merits of the dispute, article 187(1) of the PILA provides:

*"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected."*

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

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*"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

28. The Sole Arbitrator observes that it is not in dispute between the parties that, since the present doping case took place in a national dimension, the applicable regulations are the KNCB DR, that are an exact copy of the National Doping Regulations developed by the NADO.
29. Article 67(1) of the KNCB DR provides that:

*"In relevante gevallen geschiedt interpretatie van dit reglement aan de hand van de Engelstalige tekst van de ten tijde van de dopingcontrole van kracht zijnde World Anti-Doping Code en/of International Standards."*

Which can be freely translated as follows:

*"In relevant cases interpretation of these regulations shall be interpreted in accordance with the English text of the World Anti-Doping Code and/or the International Standards in place at the time of the doping control."*

30. In addition, article 67.3 of the KNCB DR provides that:

*"Dit reglement [sic] te worden geïnterpreteerd als een onafhankelijke en autonome tekst, en niet aan de hand van wetten of statuten, tenzij dit reglement uitdrukkelijk anders bepaalt."*

Which can be freely translated as follows:

*"These regulations [...] be interpreted as an independent and autonomous text, and not by laws or statutes, unless these regulations specifically determine otherwise."*

31. In the absence of any rules of law chosen by the parties, the Sole Arbitrator has to decide on the rules of law to be applied in case of any *lacuna* in the applicable regulations.
32. Primarily, the Sole Arbitrator observes that neither of the parties requested for the application of any particular national law.
33. Furthermore, in order to preserve a certain level of conformity in CAS jurisprudence regarding doping matters, the Sole Arbitrator finds that Swiss law shall be subsidiarily applied, regardless of the nationality of the parties involved.
34. Consequently, the Sole Arbitrator concludes that Swiss law shall be subsidiarily applied as the most appropriate rules of law, in case of any *lacuna* in the applicable regulations.

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**VI. JURISDICTION**

35. The Appellant relies on articles 1.17, 15.2(j) and 55.1 of the KNCB DR as conferring jurisdiction to the CAS.
36. The Sole Arbitrator notes that CAS jurisdiction has been expressly accepted by the Respondent by signing the Order of Procedure.
37. Therefore the Sole Arbitrator considers that CAS is competent to decide over this case. More specifically, the Sole Arbitrator is satisfied to accept that CAS has jurisdiction *ratione personae* over the NADO.
38. The Sole Arbitrator specifically refers to jurisdiction *ratione personae* over the NADO since legal commentators have maintained that “[e]ven if the terminology is often confusing, the issue of the scope of the arbitration agreement *ratione personae* must be distinguished from that of standing to appeal (*locus standi*)” (Rigozzi/Hasler, Article R47 CAS Code, in: ARROYO, Arbitration in Switzerland, The Practitioner’s Guide, p. 988, which the authors explain by the following example: “Art. 62(2) of the UEFA Statutes provides that “only parties directly affected by a decision may appeal to the CAS”. All the clubs participating in the UEFA Champions League are bound by the CAS arbitration agreement contained in the UEFA Statutes. Accordingly, the CAS will have jurisdiction to hear appeals brought against UEFA decisions by any of the participant clubs, but it will declare such an appeal to be inadmissible for lack of standing to appeal if the appellant club is not directly affected by the decision at issue”).
39. Regarding this standing to appeal, the Sole Arbitrator observes that in legal literature it is maintained that “[s]ome CAS cases have treated the issue of standing to sue/standing to be sued as a procedural matter (e.g., CAS 2007/A/1329, 1330, Award of 15 December 2007, para. 3), while others treated it as a matter of substantive law (CAS 2008/A/1517, Award of 23 February 2009, paras. 19-27). However, the Federal Supreme Court has clearly established that this issue is a matter of substantive law, cf. BGE 126 III 59 para. 1a.” (Noth, Article R45 CAS Code, in: ARROYO, Arbitration in Switzerland, The Practitioner’s Guide, p. 976).
40. This view is supported by another commentator: “The question is whether the standing to sue issue is related to the admissibility of the appeal or whether it belongs to the material conditions of the claim. In the first case, the issue is a procedural one: without any standing to sue, that is without any interest worthy of protection, the appeal will be dismissed as inadmissible. In the second case, without any standing to sue, the appeal will be dismissed as unfounded. The Swiss Federal Tribunal has clearly established that the standing to sue together with the standing to be sued belong to the material conditions of the claim. As a result, the lack of quality to sue leads to the dismissal of the claim as unfounded.” (Estelle De La Rochefoucauld, Standing to sue, a procedural issue before the CAS, CAS Bulletin 1/2011, p. 19; with reference to TAS 2008/A/1764, §58 *et seq.* and ATF 114 II consid. 3a; 126 III 59 consid. 1a.)
41. The Sole Arbitrator agrees that the issue of standing to sue (or standing to appeal) in general belongs to the material conditions of the claim. This is indeed the case in

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situations such as the example mentioned *supra*, *i.e.* where an appellant has *jurisdiction ratione personae*, but would have no standing to appeal because the appeal does not comply with the regulatory requirements of the associations concerned.

42. In light of the above, the Sole Arbitrator is satisfied that a possible lack of standing to appeal of the NADO, or a lack of standing to be sued of the Athlete, does not prevent the Sole Arbitrator from accepting jurisdiction.

**VII. ADMISSIBILITY**

43. Since the appeal was filed within the deadline of 21 days set by article 59(1) of the KNCB DR and the appeal complied with all other requirements of article R48 of the CAS Code, including the payment of the CAS Court Office fees, it follows that the appeal is admissible.

**VIII. MERITS****A. The Main Issues**

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

- i. Is there standing to appeal for the NADO and standing to be sued for the Athlete?
- ii. If so, is the Athlete guilty of violating article 3 of the KNCB DR?
- iii. If so, is the standard two-year period of ineligibility to be reduced to one year?

*i. Is there standing to appeal for the NADO and standing to be sued for the Athlete?*

45. Upon receipt of the NADO's Appeal Brief, the Sole Arbitrator observed that the NADO requested CAS to confirm the one-year period of ineligibility imposed on the Athlete because of violating article 3 of the KNCB DR, *i.e.* it requested CAS to confirm the conclusion reached in the Appealed Decision, but to only amend the reasoning underlying such conclusion. In the wording of the NADO, "*this appeal can be characterized as cassation in the interest of the uniform application of the law*".
46. On this basis the Sole Arbitrator had doubts whether the NADO had a sufficient legal interest in the present matter being appealed, for even if CAS were to adopt the reasoning suggested by the NADO, the period of ineligibility imposed on the Athlete would remain the same. The Sole Arbitrator cannot go beyond the requests for relief of the parties, which in the present case do not divert from the conclusion reached in the Appealed Decision.
47. Furthermore, it was not clear to the Sole Arbitrator what the NADO was exactly seeking from the Athlete in the present appeal arbitration proceedings.
48. It was in light of these doubts that the Sole Arbitrator invited both parties to comment on these issues, which was subsequently done by the NADO.

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49. In its supplementary brief, the NADO maintained that 1) the Appealed Decision is a decision that may be appealed on the basis of article 55.1(a) of the KNCB DR; 2) the NADO is an organisation holding the right to appeal on the basis of article 56.1 of the KNCB DR; 3) CAS is the highest appeal court in doping cases on the basis of article 1.17 KNCB DR; 4) the right of the NADO to appeal is in no shape or form restricted on the basis of article 55.3 of the KNCB DR, *i.e.* in national appeals only this right is not subject to any limitations or conditions; and 5) also article 57 of the KNCB DR provides for the right to appeal to CAS for the NADO.
50. The Athlete did not submit any position in this respect.
51. The Sole Arbitrator observes that article 55.3 of the KNCB DR provides the following:

*“In aanvulling op het in artikel 55 lid 1 gestelde is de Dopingautoriteit gerechtigd beroep in te stellen tegen elk in het kader van het resultaatmanagement en/of de tuchtrechtelijke behandeling genomen besluit, uitgezonderd de ordemaatregel. Dit beroepsrecht is niet gebonden aan enige voorwaarde, anders dan het gestelde in artikel 56.1. De Dopingautoriteit hoeft derhalve geen belang voor het instellen van beroep aan te tonen.”*

Which can be freely translated as follows:

*“In addition to what has been determined in article 55(1), the [NADO] is competent to lodge an appeal against any decision taken in respect of the result management and/or the decision taken in the disciplinary proceedings, except the preliminary suspension. This right to appeal is not subject to any condition, except as determined in article 56.1. **The [NADO] does not have to prove interest in lodging an appeal.**” (emphasis added)*

52. The Sole Arbitrator observes that the NADO does not argue that it has any concrete legal interest in challenging the Appealed Decision. To the contrary, the NADO merely relies on article 55.3 of the KNCB DR in arguing that it is not required to prove interest in appealing a decision on the basis of the applicable regulations.
53. The Sole Arbitrator observes that the World Anti-Doping Code does not contain any provision similar to the last sentence of article 55.3 of the KNCB DR.
54. According to CAS jurisprudence, the question whether a party has standing to appeal is subject to the “aggrievement requirement”, *i.e.* “only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against that decision. [...] A party has no standing if it “is not directly affected by the decision appealed from” [CAS 2006/A/1206, §31]. [...] [T]he above described “aggrievement requirement” is an essential element to determine the legal interest and the standing of a party to appeal before the CAS a sports body’s decision, because the duty assigned to a panel by the CAS Code rules governing the appeal arbitration procedure is that of solving an actual dispute and not that of delivering an advisory opinion to a party that has not been aggrieved by the appealed decision (in fact, the “consultation proceedings”, yielding CAS advisory

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*opinions, are governed by different provisions of the CAS Code)*" (CAS 2009/A/1880-1881, §29-30).

55. The Sole Arbitrator finds that the "aggravement requirement" is indeed an essential element to determine the legal interest and the standing of a party to lodge an appeal before CAS. Although the NADO might have a general interest in well-reasoned decisions of national disciplinary bodies, in the absence of a concrete interest in an actual case, such party has no standing to appeal before CAS.
56. This is particularly true because the NADO did not name the KNCB, with whom it might have an actual dispute, as a respondent and because the NADO's contention that it is necessary for an appeal to be lodged with CAS "*in the interest of the uniform application of the law*" was not substantiated.
57. The Sole Arbitrator finds that article 55.3 of the KNCB DR is of no relevance in this respect; the "aggravement requirement" cannot be circumvented by means of a regulatory or contractual provision to the contrary.
58. Consequently, the Sole Arbitrator finds that the appeal shall be dismissed.
59. Even if the Sole Arbitrator would come to the conclusion that the NADO had legal interest in challenging the Appealed Decision, and thus had standing to appeal, still the appeal would have to be dismissed since the Sole Arbitrator finds that the Athlete lacks standing to be sued.
60. The Sole Arbitrator observes that the NADO only named the Athlete as a respondent and that CAS jurisprudence provides that "*in the CAS system for a statement of appeal against a given respondent to be admissible it is necessary not only that it names that respondent, but also that it contains an actual claim against the subject indicates as respondent. The simple indication of the respondent does not mean per se that arbitration can proceed against that respondent, unless a specific claim is brought against it*". (Estelle de La Rochefoucauld, Standing to be sued, a procedural issue before the Court of Arbitration for Sport (CAS), CAS Bulletin 1/2010, p. 54, with reference to CAS 2005/A/835 & 942, §§85-88)
61. The Sole Arbitrator observes that the positions of the NADO and the Athlete fully align with the conclusion reached by the KNCB Appeals Committee in the Appealed Decision, *i.e.* both request (1) to confirm the one-year period of ineligibility imposed on the Athlete, (2) to confirm that the period of suspension already served by the Athlete shall be credited against any period of ineligibility imposed on him and (3) to confirm 18 June 2013 as the commencement date of any imposed period of ineligibility.
62. The positions of the NADO and the Athlete also align regarding the reasoning that should allegedly have been applied by the KNCB Appeals Committee in its Appealed Decision. In fact, the Athlete specifically confirmed his agreement to requests for relief lit. b) until lit. f) of the NADO. The only request for relief not specifically adhered to, being lit. a) (*i.e.* "[a]nnulment of the Decision dated . . . 2014 (case number 02/2013)". The Sole Arbitrator however finds that the annulment of the Appealed

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Decision is an immediate consequence of the Athlete's agreement to lit. b) until lit. f) of the NADO's requests for relief and that the Athlete's position therefore fully corresponds to the NADO's requests for relief.

63. As such, the Sole Arbitrator observes that the NADO is not seeking anything from the Athlete, for the NADO is seeking something from CAS only in respect of the KNCB, *i.e.* that CAS determines that the reasoning applied by the disciplinary bodies of the KNCB was incorrect and to apply the "correct" legal reasoning. As such, the relief requested only affects the KNCB – and the NADO – but not the Athlete. The NADO did however mistakenly not involve the KNCB in the proceedings before CAS.
64. The Sole Arbitrator finds that, although the Athlete would have standing to be sued in respect of the determination of whether or not he committed an anti-doping rule violation or the determination of the sanction to be imposed as a consequence of this violation (which both remained unchallenged by the NADO), the Athlete has no standing to be sued in respect of the reasoning adopted by the relevant disciplinary body leading to the sanction imposed.
65. This would have been different if the NADO would have argued that if the KNCB Appeals Committee would have applied a "correct" reasoning, it should have led to a different period of ineligibility being imposed on the Athlete, for this would clearly affect the interests of the Athlete.
66. In light of this conclusion, the Sole Arbitrator finds that NADO's appeal must be dismissed, leaving the remaining issues without merit. This shall however in no event be interpreted as a determination that the Sole Arbitrator supports the reasoning adopted by the Appeals Committee of the KNCB.

**B. Conclusion**

67. Based on the foregoing, and after taking into due consideration all the evidence produced and all the arguments made, the Panel finds that:
  - i. The NADO has no standing to appeal and the Athlete has no standing to be sued.
68. Any further claims or requests for relief are dismissed.

**IX. COSTS**

69. Article R64.4 of the CAS Code provides as follows:

*"At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators, the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the*



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*arbitration costs may either be included in the award or communicated separately to the parties."*

70. Article R64.5 of the CAS Code reads as follows:

*"In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties."*

71. Having taken into account the outcome of the arbitration, in particular the fact that the NADO's appeal has been dismissed, the Panel finds it reasonable and fair that the NADO shall bear the arbitration costs, in an amount that will be determined and notified to the parties by the CAS Court Office.

72. Furthermore, pursuant to Article R64.5 of the CAS Code and in consideration of the complexity and outcome of the proceedings as well as the conduct and the financial resources of the parties, the Panel rules that each party shall bear its own costs and expenses incurred in connection with these proceedings.

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**ON THESE GROUNDS****The Court of Arbitration for Sport rules that:**

1. The appeal filed on 17 February 2014 by the Anti-Doping Autoriteit Nederland against the Decision issued on 27 January 2014 by the Appeals Committee of the KNCB is dismissed.
2. The Decision issued on 27 January 2014 by the Appeals Committee of the KNCB is confirmed.
3. The costs of the arbitration, to be determined and served to the parties by the CAS Court Office, shall be borne in their entirety by the Anti-Doping Autoriteit Nederland.
4. Each party shall bear its/his own legal fees and other expenses incurred in connection with this procedure.
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 6 March 2015

**THE COURT OF ARBITRATION FOR SPORT**  
Manfred Yan  
Sole Arbitrator