
Doping Cases Before the CAS

Master Thesis

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List of Abbreviations

ATP	Association of Tennis Professionals
CAS	Court of Arbitration for Sport
CBDA	Confederação Brasileira Desportos Aquaticos
FEI	Fédération Equestre Internationale
FIBA	Fédération Internationale de Basketball
FIE	Fédération Internationale d'Esgrime
FIFA	Fédération Internationale de Football Association
FIG	Fédération Internationale de Gymnastique
FILA	Fédération Internationale des Lutttes Associées
FIM	Fédération Internationale de Motocyclisme
FINA	Fédération Internationale de Natation
FIS	Fédération Internationale de Ski
FISA	Fédération Internationale des Sociétés d'Aviron
IAAF	International Association of Athletics Federations
IBU	International Biathlon Union

IIHF	International Ice Hockey Federation
IOC	International Olympic Committee
ISU	International Skating Union
IPC	International Paralympics Committees
ITU	International Triathlon Union
ITF	International Tennis Federation
IWF	International Weightlifting Federation
UCI	Union Cycliste Internationale
UEFA	Union des Associations Européennes de Football
UKA	United Kingdom Athletics
USADA	United States Anti-Doping Agency
WADA	World Anti-Doping Agency
WADC	World Anti-Doping Code
WDSF	World Dance Sport Federation

Doping Cases before the CAS

1. Introduction

The CAS was founded in 1983 with the idea to create a court that has jurisdiction specifically in sports.¹ The CAS first has been an appeal court since 1991, when the FEI in its statutes inserted an arbitration clause allowing its members to appeal against its decisions.² The Code of Sports-related Arbitration and Mediation Rules was adopted in 1994. By the end of 2000, around 43 international federations officially recognized the CAS.³ Doping cases account for a large number of the rulings rendered by the CAS. Through these rulings, the CAS developed some judicial principles such as strict liability, burden and standard of proof and doping sanctions.

The thesis is designed to be a case review. Although all the publicly available doping rulings of the CAS between 1994 and April 2012 is read, critically appraised and referred to during the case review when it is relevant, the thesis will mainly focus on the some of the most debated issues in these rulings, i.e. procedural issues, presumption of guilt, the burden and standard of proof and the sanctions. The cases tried to be listed according to the date of the award and the applicability of the principles after the adoption of the WADC.

2. The Application of Procedural Rules

The CAS is fully recognized as an arbitration court and its jurisdiction excludes the jurisdiction of state courts. It is composed of two divisions, the Ordinary Arbitration Division and the Appeals Arbitration Division. The task of the Ordinary Arbitration Division is to resolve disputes submitted to the ordinary procedure. The task of the Appeals Arbitration Division is to resolve disputes concerning the decisions of federations, associations or other sports-related bodies.⁴

2.1. Jurisdiction

Article R27 of the Code⁵ provides its application whenever the parties of a sports-related dispute have agreed to refer their dispute to the CAS. According to the article, such disputes can arise from the statutes or regulations of a federation containing an arbitration clause, a contract containing an arbitration clause, a later arbitration agreement or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies. Such disputes may involve matters of principle relating to sports or matters of pecuniary or other interests

¹ Digest of CAS Awards 1986-1998 (Matthieu Reeb ed, 1998)

² *ibid*

³ *ibid*

⁴ S20 of the Code

⁵ "An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body. An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance."

brought into play in the practice or the development of sports and any activity related or connected to sports.

In CAS 2004/A/748, ROC & Viatcheslav Ekimov v. IOC, USOC & Tylor Hamilton, Award of 27 June 2006 ('Hamilton Ruling'), the CAS stated,

"it is undisputed that the CAS has jurisdiction to determine its own jurisdiction and the locus standi of the parties, i.e. the CAS has the power to decide whether it may adjudicate the merits of the appeal. The so-called 'Kompetenz-Kompetenz' of an international arbitral tribunal sitting in Switzerland is recognized by Art. 186 para. 1 of the Swiss Law on Private International Law, and furthermore, it is a generally accepted principle in international arbitration (see CAS/A/952)."

The CAS has the power to adjudicate appeals against a sports organization only if three conditions are met.⁶ First, the statutes or regulations of the organization should provide an arbitration clause. Second, there should be an actual decision of a sports organization. Third, all available legal remedies within the adjudicative procedure of the sports organization should have been exhausted.

2.1.1. Valid Arbitration Agreement or Arbitration Clause

Regarding the first condition, the Article R47 of the Code provides that the arbitration agreement may be contained in the statutes or regulations of sports bodies. All members of the Olympic Movement included these kinds of clauses in their statutes.⁷ However, these clauses do not apply automatically. Such clauses must be incorporated in contractual agreements between all parties to arbitration and entered into before or after⁸ a dispute has arisen. Generally, these clauses are incorporated through participation forms for certain competitions⁹, application form for the Olympic Games¹⁰ or license agreements between an athlete and a federation. For instance in Hamilton Ruling, it was the entry form that provided the statement, *"I agree that any dispute, controversy or claim arising out of, in connection with or on the occasion of the Olympic Games [...] shall be submitted exclusively to the Court of Arbitration for Sport (CAS) for final and binding arbitration [...]"* which the CAS accepted as a valid arbitration clause. In CAS 2008/A/1564, WADA v. IJF & Florian Busch, 23 June 2009 ('Busch Ruling'), the CAS evaluated whether the statement below is a valid arbitration clause.

"I agree to abide by and observe the IJF Statutes, By-laws and Regulations (including those related to Medical Doping Control) and the decisions by the IJF and the Championship Directorate in all matters including disciplinary measures, not to involve any third party whatsoever outside of the IJF in the resolution of any dispute whatsoever arising in connection with the IJF Championship and/or the Statutes, By-laws and Regulations and decisions made by the IJF relating thereto excepting where having exhausted the appeal procedures within the IJF in which case I undertake to submit any such dispute to the jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, for definitive and final resolution."

The CAS stated that for an arbitration clause or arbitration agreement to be valid, it has to make clear parties' consent to arbitration, to define the scope and limit of that consent, to cover precisely the subject matter that the parties intend to submit to arbitration and to provide for the designated dispute resolution method and its exclusivity. According to the Code, recommended elements of an

⁶ R47 of the Code

⁷ Ian S Blackshaw, Robert S R Siekmann, Janwillem Soek (eds), *The Court of Arbitration For Sport 1984-2004*, (TMC Asser Instituut, 2006)

⁸ FIBA v. W. & Brandt Hagen e.V., CAS 94 & 123, Award of 12 September 1994.

⁹ USA Shooting & Q. v. UIT, CAS 95/129, Award of 23 May 1995.

¹⁰ Article 49 of the Olympic Charter

arbitration clause are the place of arbitration, the method of selection and number of arbitrators and the language of the arbitration. After evaluating the abovementioned statement, the CAS concluded that the statement fulfilled all the conditions and decided it was a valid arbitration clause.

In the same ruling, the CAS also evaluated the interpretation of arbitration agreements which contain unclear and contradictory provisions with regard to the essential elements of an arbitration agreement.

“The Panel, thereby, considers the fact that due to the seat of IIHF in Switzerland and the applicability of Swiss law arbitration clauses or arbitration agreements must meet the requirements of art 178 of Switzerland’s Federal Code on Private International Law of December 18, 1987, Arbitration agreements which contain provisions with regard to the essential elements of an arbitration agreement which are unclear or contradictory (so called “pathological clauses”) are to be interpreted in an objective manner which provides for neutrality with regard to the results of the interpretation [...]. If a party, like on the case at hand, argues having understood a clause in a different manner, the principle of confidence is to be applied. This means that the respective will of the parties is to be established as it could be and must have been understood bona fide by the respective addressee of a declaration.”

2.1.2. Decision of a Sport Organization

Regarding the requirement of an actual decision of a sport organization, there is a well-established case law of the CAS. The concept of the appealable decision, including an appeal against the failure to make a decision, has a consistent definition.

“The form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal. The form may only be an indication of the intent of the body issuing the communication, which may be taken into consideration. However, the form is not sufficient to find whether there is a decision or not.”¹¹

“A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects”¹²

“In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. However, there can also be a decision where the body issues a ruling as to the admissibility or inadmissibility or a request, without addressing the merits of such request.”¹³

“An appeal for denial of formal justice is possible when the authority refuses without any reason to make a ruling or it delays a ruling beyond a reasonable period”¹⁴

“[I]f a body refuses without reason to issue a decision or delays the issuance of decision beyond a reasonable period of time, there can be a denial of justice, opening the way of an appeal against the absence of a decision”¹⁵

¹¹ ROC & Viatcheslav Ekimov v. IOC, USOC & Tylor Hamilton, CAS 2004/A/748, Award of 27 June 2006; CAS 2005/A/899; FINA v/ CBDA & G., CAS 2007/A/1373, Award of 9 May 2008; WADA v. IIHF & Florian Busch, CAS 2008/A/1564, Award of 23 June 2009

¹² CAS 2004/A/659; FINA v/ CBDA & G., CAS 2007/A/1373, Award of 9 May 2008; WADA v. IIHF & Florian Busch, CAS 2008/A/1564, Award of 23 June 2009

¹³ ROC & Viatcheslav Ekimov v. IOC, USOC & Tylor Hamilton, CAS 2004/A/748, Award of 27 June 2006; CAS 2005/A/899; FINA v/ CBDA & G., CAS 2007/A/1373, Award of 9 May 2008; WADA v. IIHF & Florian Busch, CAS 2008/A/1564, Award of 23 June 2009

¹⁴ CAS 2004/A/659; FINA v/ CBDA & G., CAS 2007/A/1373, Award of 9 May 2008

Furthermore, the decision should be final closing the anti-doping procedure against the athlete. Hamilton Ruling is one of the CAS rulings that the CAS evaluated whether there is a decision, which is final, closing the anti-doping procedure against Mr. Hamilton. Mr. Hamilton was an American professional cyclist and a member of US Olympic Team competed in 2004 Athens Olympic Games took place 18 August 2004. The day after the test, Mr. Hamilton underwent an anti-doping test. The sample he provided was tested negative for the prohibited substances but the laboratory report stated that the sample was “*suspicious for blood transfusion*”. IOC president launched a disciplinary procedure and finally wrote to all concerned parties a letter, stating that IOC would not pursue any sanctions against the athlete. The CAS first evaluated and decided that the letter of the IOC president was a decision. The CAS further evaluated whether this decision is final. The CAS decided that IOC meant the decision to be final because it was explicitly stated in the decision itself that the IOC would not be pursuing sanctions and the consistent conduct of all IOC organs was another indication since they never questioned the fact that the IOC disciplinary procedure was closed.

2.1.3. Exhaustion of Legal Remedies

An appeal to the CAS is only admitted if the appellant has exhausted all internal remedies prior to the appeal.¹⁶ The CAS states that an internal remedy must be readily and effectively available to an aggrieved party and it must grant access to a definite procedure.¹⁷ In CAS 2007/A/1373 FINA v/ CBDA & G., Award of 9 May 2008, FINA filed an appeal before the CAS citing a letter of national federation as evidence of the national federation’s decision. The letter stated that due to bacterial degradation, the analysis results cannot be relied upon and an anti-doping violation cannot be established. Article 8.2.1 of the FINA Doping Control Rules provided that once an anti-doping rule violation has occurred in connection with a member federation’s test, the competitor shall be brought before a disciplinary panel of the competitor Member Federation for a hearing. If such hearing is delayed, then FINA has the opportunity to call the hearing before its own Doping Panel pursuant to Article 8.2.2 of the FINA Doping Control Rules. In the case, no previous hearing was held before the national federation or the FINA Doping Panels prior to the appeal of FINA. The CAS concluded that FINA did not exhaust all the internal remedies and added, “*Especially in doping proceedings which impose a substantial sanction on the athlete such as a suspension for two years, it is procedurally unacceptable to make a decision on merits, if the athlete is not given the opportunity for legal review and reconsideration in an appeals instance.*”¹⁸ In Hamilton Ruling, on the other hand, IOC Anti-Doping Rules did not provide any internal stage of appeal and did not set forth any legal remedy other than an appeal to the CAS. In addition, neither the Olympic Charter nor the WADA Code provided for legal remedies other than an appeal to the CAS. Therefore, the CAS found that IOC Decision was final as IOC was concerned and the exhaustion of legal remedies condition was fulfilled.

2.2. Time Limits

In the absence of a time limit set in the statutes or regulations of the sports organizations or a previous agreement, according to the Article R49 of the Code time limit for appeal is of 21 days from the day of communication of the decision which is appealed against. In other words, time limits set in

¹⁵ ROC & Viatcheslav Ekimov v. IOC, USOC & Tylor Hamilton, CAS 2004/A/748, Award of 27 June 2006; CAS 2005/A/899: FINA v/ CBDA & G., CAS 2007/A/1373, Award of 9 May 2008

¹⁶ R47 of the Code, CAS ad hoc Division OG 06/001, WADA v. USADA, USBSF and Zachery Lund, Award of 10 February 2006

¹⁷ FINA v/ CBDA & G., CAS 2007/A/1373, Award of 9 May 2008

¹⁸ FINA v/ CBDA & G., CAS 2007/A/1373, Award of 9 May 2008

the statutes or regulations of the sports organizations take precedence over the time limit provided by the Article R49 of the Code.¹⁹

WADC does not provide a time limit. In general, the statutes of federations provide such time limits. For instance, in the CAS 2006/A/1165, *Christine Ohuruogu v. UKA & IAAF*, Award of 3 April 2007 ('Ohuruogu Ruling'), the IAAF rules were providing a time limit of 30 days from the date of communication of the written reasons of the decision to be appealed. In CAS 2005/A/830, *S. v. FINA*, Award of 15 July 2005, C 12.8.2. of the FINA Constitution was providing a time limit "*not later than one month after the sanction has been received by the Member or individual sanctioned*" while the FINA Doping Control rules was providing a time limit of 21 days in accordance with the WADC.²⁰

In line with the principle of Swiss procedural law, decisive factor which makes the appeal filed in time is that the written pleadings are handed over to a Swiss postal office before the deadline has expired.²¹ According to the CAS, this is because a plaintiff/appellant has no possibility of influencing the time it takes for a postal delivery to be made.²²

2.3. Procedure

The procedure before the panels is divided into two steps. According to the Code, a written procedure with an exchange of documents is followed by a hearing during which the panel will examine witnesses and discuss the evidence with parties. The panel may also request the production of certain pieces of evidence. According to the Article R28, the seat of arbitration is in Lausanne, Switzerland.

The Article R58 provides that the substantive law applicable to the dispute is the law chosen by the parties. In CAS 2009/A/1752, *Vadim Devyatovskiy v/ IOC & CAS 2009/A/1753, Ivan Tsikhan v/ IOC*, Award of 10 June 2010, the CAS decided that the WADC constitutes "*the applicable regulations and the rules of law chosen by the parties*" referred to in Article R58 of the Code because the athletes signed a declaration stating "*I agree to comply with the World Anti-Doping Code and with the IOC Code of Ethics*" and 2008 IOC Anti-Doping Regulations incorporated the WADC. In the absence of such a choice, the CAS decides the dispute either according to the law of the country in which the federation, association or sports-related body which issued the challenged decisions has its seat or according to the rules of law, the application of which the panel deems appropriate. The CAS mostly does not elaborate on the law governing the arbitration procedure if the parties do not raise any issues in this respect.²³

WADA, IOC, FIFA, FIBA, UCI, FIS, FINA, FILA, FIG, FEI, FIE, FISA, UEFA, ISU, IWF, FIM are all sports-related bodies that have their seats in Switzerland. In cases involving such bodies, if the parties do not specify a governing law, the CAS applies rules and statutes of these sports-related bodies by stating that the panel is required to decide the dispute according to the seat²⁴ and interprets

¹⁹ UCI / H., CAS 2001/A/343, Award of 28 January 2002

²⁰ The CAS did not evaluate which of these provisions were controlling provision in the case since the appellant had met all mentioned deadlines.

²¹ UCI / H., CAS 2001/A/343, Award of 28 January 2002

²² UCI / H., CAS 2001/A/343, Award of 28 January 2002

²³ *Doping Authority Netherlands v. N.*, CAS 2009/A/2012, Award of 11 June 2010; *WADA v. Jessica Hardy & USADA*, CAS 2009/A/1870, Award of 21 May 2010

²⁴ *T. v. FIG*, CAS 2002/A/385, Award of 23 January 2003; *WADA v. Jessica Hardy & USADA*, CAS 2009/A/1870, Award of 21 May 2010

these rules and regulations on the basis of the Swiss law.²⁵ On the other hand, the dispute may involve a sports-related body which does not have its seat in Switzerland such as ITF, ITU, IPC, IAAF, ATP, WDSF and IBU. If the parties do not have a preference about the governing law and one of the parties is a sports-related body as the ones stated above, the CAS mostly prefers an interpretation consistent with the Swiss law. For instance, in CAS 2006/A/1025 Mariano Puerta v. ITF, 12 July 2006 ('Puerta Ruling'), ITF Tennis Anti-Doping Programme was explicitly stated that it was to be governed by and construed in accordance with English law. However, the Programme also had a provision stating that the Programme has to be interpreted "*in a manner that is consistent with the applicable provisions of the [WADC]*". The CAS interpreted those provisions "*as requiring it to construe the WADC in a manner which is consistent with Swiss law, as the law with which the WADC must comply*". Accordingly, it decided the governing law as Swiss law.²⁶ CAS followed the same approach in the CAS 2005/A/847, Hans Knauss v. FIS, Award of 20 July 2005 ('Knauss Ruling') and CAS 2009/A/1926 & 1930, ITF v. Richard Gasquet & WADA & Richard Gasquet, Award of 17 December 2009 ('Gasquet Ruling'). In contrast, in Ohuruogu Ruling, in which IAAF and UK Athletics Limited, governing body for athletics in the UK, were involved, the CAS interpreted the rules in accordance with the English law without considering their consistency with Swiss law.

In reaching a decision, the CAS has full power to review the facts and the law according to the Article R57 of the Code.²⁷ The full power of review means that the CAS procedure entails a *de novo* review, a rehearing of the merits of the case,²⁸ that it is not confined to deciding whether the body that issued the appealed ruling was correct or not.²⁹ In the Knauss Ruling, the CAS evaluated whether it is necessary that the powers of an arbitration court to coincide with the powers of a state court where the power of review is limited than what is provided in the Article R57 of the Code. The CAS concluded,

"Insofar as Article 75 of the Swiss Civil Code (CC) curtails the state courts' power of review, this is not binding on the Panel. Although it is correct that – provided the parties have not agreed otherwise – a court of arbitration generally has the same powers as a state court, this principle is not mandatory. Rather the parties can also agree something else. Thus, they can, as an example, grant a court of arbitration – unlike state courts – the authority to decide the dispute ex aequo et bono, to close gaps in the agreement or to establish and confirm the rights of the parties, but also to alter or modify those rights. Furthermore, the parties can grant an arbitrator the powers of a mediator or an adjudicator as well as the mandate to administer justice. If, therefore, the powers of a court of arbitration do not necessarily coincide with those of a state court, the mandate granted to the Panel by the parties is what

²⁵ Article 58 of the Code; N., J., Y., W. / FINA, CAS 98/208, Award of 22 December 1998; H. / FIM, CAS 2000/A/281, Award of 22 December 2000; L. / FILA, CAS 2000/A/312, Award of 22 October 2001; UCI / H., CAS 2001/A/343, Award of 28 January 2002; L. / IOC, CAS 2000/A/310, Award of 22 October 2002; S. v. FINA, CAS 2005/A/830, Award of 15 July 2005; WADA v. Jessica Hardy & USADA, CAS 2009/A/1870, Award of 21 May 2010

²⁶ Mariano Puerta v. ITF, CAS 2006/A/1025, Award of 12 July 2006

²⁷ H. / FIM, CAS 2000/A/281, Award of 22 December 2000; Mariano Puerta v. ITF, CAS 2006/A/1025, Award of 12 July 2006; WADA v. Jessica Hardy & USADA, CAS 2009/A/1870, Award of 21 May 2010; P. v. ITF, CAS 2008/A/1488, Award of 22 August 2008; IAAF v. All Russia Federation & Olga Yegorova, CAS 2008/A/1718 & IAAF v. All Russia Athletic Federation & Svetlana Cherkasova, CAS 2008/A/1719 & IAAF v. All Russia Athletic Federation & Yuliya Fomenko, CAS 2008/A/1720 & IAAF v. All Russia Athletic Federation & Gulfiya Khanafeyeva, CAS 2008/A/1721 & IAAF v. All Russia Athletic Federation & Tatyana Tomashova, CAS 2008/A/1722 & IAAF v. All Russia Athletic Federation & Yelena Soboleva, CAS 2008/A/1723 & IAAF v. All Russia Athletic Federation & Darya Pishchalnikova, CAS 2008/A/1724, Award of 18 November 2009; WADA & FIFA v. Cyprus Football Association, Carlos Marques, Leonel Medeiros, Edward Eranosian, Angelos Efthymiou, Yiannis Sfakianakis, Dmytro Mykhailenko, Samir Bengeloun, Bernardo Casconcelos, CAS 2009/A/1817 & FIFA v. Cyprus Football Association and Edward Eranosian, CAS 2009/A/1844, Award of 26 October 2010; British Olympic Association v. WADA, CAS 2011/A/2658, Award of 30 April 2012

²⁸ B. v. FINA, CAS 98/211, Award of 7 June 1999

²⁹ WADA v. IIHF & Florian Busch, CAS 2008/A/1564, Award of 23 June 2009; P. v. International Skating Union & Deutsche Eisschnelllauf Gemeinschaft e.V. v. International Skating Union, CAS 2009/A/1912 & CAS 2009/A/1913, Award of 25 November 2009

is relevant in the present case. However, as is demonstrated by Article R57 of the Code, this mandate carries with it “full power to review the facts and the law” of the case.”

In CAS 2009/A/1912 P. v. ISU & CAS 2009/A/1913 Deutsche Eisschnelllauf Gemeinschaft e.V. v. ISU, Award of 25 November 2009, the panel stated that the mission of the CAS is to make its independent determination as to whether the parties’ contentions are inherently correct rather than to assess the correctness of the appealed decision.³⁰ However, it is also stated that the aim of the *de novo* review is to cure any violation of a principle of due process occurred during internal proceedings of federations or in the first instance.³¹ According to the panel in the CAS 2007/A/1396 & 1402 WADA & UCI v. Alejandro Valverde & RFEC, Award of 10 July 2008 (‘Valverde Ruling’),

“... the CAS case law is quite clear that the de novo rule is intended to address and cure “any procedural defect” that occurs at the initial stage, after all relevant parties have been heard. As it was said in CAS 2009/A/1920:

87. According to article R57 of the Code, the CAS has full power to review the facts and the law. The consequences deriving from this provision are described in the consistent CAS jurisprudence, according to which “if the hearing in a given case was insufficient in the first instance (...) the fact is that, as long as there is a possibility of full appeal to the Court of Arbitration for Sport, the deficiency may be cured” (CAS 94/129 award of 23 May 1995, par. 59). Later the CAS has reaffirmed this principle, holding that “the virtue of an appeal system which allows for a rehearing before an appeal body is that issues relating to the fairness of the hearing before the Tribunal of First instance ‘fade to the periphery’” (CAS 98/211, award of 7 June 1999, par.8). More recently, the CAS has further relied on the Swiss Federal Tribunal case law, which held that “any infringement of the right to be heard can be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and in front of which the right to be heard had been properly exercised” (CAS 2006/A/1177, award of May 2009, par. 7.3). For another recent case, see for instance, CAS 2008/A/1594 para. 109, “However, as CAS has complete power to review the facts and the law and to rule the case de novo, the procedural deficiencies which affected the procedures before FILA disciplinary bodies may be cured by virtue of the present arbitration proceedings (see e.g. CAS 2006/A/1175 paras. 61 and 62, CAS 2006/A/1153, para. 53, CAS 2003/O/486, para. 50)”. This CAS jurisprudence is actually in line with European Court of Human Rights decisions, which in par. 41 of the Wickramasinghe Case concluded that “even where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6 (1) [ECHR] in some respect, no violation of the Convention will be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1)”

In the Gasquet ruling, the CAS reaffirmed the aim of a *de novo* review by stating,

Where required in order to do justice (for example to cure procedural errors at the first instance hearing), appeals before CAS pursuant to this Article O shall take the form of a re-hearing de novo of the issues raised by the case. In all other cases such appeals shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being appealed was erroneous.

³⁰ P. v. International Skating Union & Deutsche Eisschnelllauf Gemeinschaft e.V. v. International Skating Union, CAS 2009/A/1912 & CAS 2009/A/1913, Award of 25 November 2009

³¹ USA Shooting & Q v. UIT, CAS 94/129, Award of 23 May 1995; N., J., Y., W. / FINA, CAS 98/208, Award of 22 December 1998; B. / FINA, CAS 98/211, Award of 7 June 1999; A. v. FILA, CAS 2001/A/317, Award of 9 July 2001

The CAS is not bound by the evidence adduced before or the factual or legal findings of any other body or court which has ruled on the case.³² The panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.³³ The panels are not bound to follow the earlier decisions or to obey the rules of *stare decisis*. However, the CAS stated that it is disposed to follow earlier decisions for reasons of comity and in order to strengthen legal predictability in international sports law.³⁴

The CAS may also order provisional measures, such as a stay of the challenged decision. If the order is requested before the panel is constituted, the President of the Division has the competence to issue such orders. Once the panel is constituted then this power lies with the arbitrators. According to the Article R37 of the Code, filing a provisional measure before the CAS means that the parties waive their rights to request such measures from state authorities.

3. CAS Awards Concerning Doping Cases

The objective of the CAS with regard to doping cases is to find the right balance between the protection of the rights of the athlete who is accused of a doping offense and the effective and meaningful fight against doping in order to preserve the credibility of sport.³⁵ The CAS recognizes,

“...in professional sport doping sanctions have the effect of restraining the athlete from carrying out his chosen trade and thus from earning a living for a certain period of time. In addition, doping sanctions clearly affect the honour and social standing of the athlete concerned and are a stigma on his future.”³⁶

Accordingly, it has confirmed that every decision taken by a federation had to respect the principles of national law, international law, rights of personality of the accused athlete and human rights.³⁷ In the fight against doping the CAS considers itself as an observer of the law, the principle of innocence³⁸ and the correct application of the rules of the federation.³⁹

3.1. The WADC

The objective of the WADC is on the one hand to fight effectively against doping and on the other the protection of the rights of athletes.

“The Code [WADC] is the fundamental and universal document upon which the World anti-Doping Program in Sport is based. The purpose of the Code [WADC] is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet generally not in other areas to permit flexibility on how agreed upon anti-doping principles are implemented.”⁴⁰

³² N., J., Y., W. / FINA, CAS 98/208, Award of 22 December 1998; B. / FINA, CAS 98/211, Award of 7 June 1999; H. / FIM, CAS 2000/A/281, Award of 22 December 2000; L. v. IOC, CAS 2000/A/310, Award of 22 October 2002; L. v. FILA, CAS 2000/A/312, Award of 22 October 2001

³³ Hans Knauss v. FIS, CAS 2005/A/847, Award of 20 July 2005; P. v. ITF, CAS 2008/A/1488, Award of 22 August 2008; WADA v. Jessica Hardy & USADA, CAS 2009/A/1870, Award of 21 May 2010

³⁴ A.C. v. FINA, CAS 96/149, Award of 13 March 1997

³⁵ T. v. FIG, CAS 2002/A/385, Award of 23 January 2003

³⁶ A. / FILA, CAS 2001/A/317, Award of 9 July 2001

³⁷ IOC, CAS 86/02, Advisory opinion of 18 November 1986; A. v/FILA, CAS 2001/A/317, Award of 9 July 2001; T. / FIG, CAS 2002/A/385, Award of 23 January 2003

³⁸ N., J., Y., W. / FINA, CAS 98/208, Award of 22 December 1998

³⁹ N. v. FEI, CAS 2001/A/317, Award of 9 July 2001

⁴⁰ Introduction to the WADC

The WADC is not *per se* legally binding.⁴¹ The Signatories of the WADC are required to implement applicable provisions through policies, statutes, rules or regulations according to their authority and within their relevant spheres of responsibility.⁴² In the CAS 2005/A/976 & 986, FIFA & WADA, Advisory Opinion of 21 April 2006, the CAS decided that as an association governed by the Swiss Law, FIFA is free, within the limits of mandatory Swiss law, to adopt anti-doping rules it seems appropriate, whether or not such rules comply with the WADC. However, FIFA is a recognized International Federation under Rule 26 of the Olympic Charter and obliged to implement WADC. Not implementing the WADC does not render it applicable by substitution but may lead to sanctions as provided under Rule 23 of the Olympic Charter. Similarly, in the CAS 2008/A/1461, Justin Gatlin v. USADA & CAS 2008/A/1462 IAAF v. USATF & Justin Gatlin, Award of 6 June 2008 ('Gatlin Ruling') the CAS stated,

“It is stated in the introduction to Part 1 of the WADA Code, that the WADA Code “does not replace, or eliminate the need for, comprehensive anti-doping rules adopted by” organizations such as the IAAF. The WADA Code does not apply as between a signatory organization and its members, unless the signatory organization has expressly incorporated the WADA Code into its own relevant rules. Even though some provisions of the WADA Code have been incorporated into the 2006 IAAF Rules, the WADA Code as a whole has not been expressly incorporated. Therefore, the WADA Code is not directly applicable to this case.”

On the other hand, in Busch Ruling, the CAS stated that IIHF is bound by WADC to adopt and implement anti-doping policies and rules which conform with the WADC. The CAS assumed that IIHF signed the WADC in good faith and adjusted its legal order in accordance with the commitments towards WADA. Accordingly, the CAS decided that if there are no amendments of provisions took place after the IIHF signed the WADC, the rules of the Federation must be interpreted in conformity with the WADC.

3.2. The Doping Offense

Doping within the meaning of WADC is defined as a violation of one or more anti-doping rules as established by the Article 1 of the WADC. Violations of anti-doping rules within the meaning of WADC are not limited to the findings of forbidden substances in the bodily fluids of an athlete. The WADC also covers the attempted use of forbidden substances or methods, the possession of and trafficking in forbidden substances or methods and failure to provide information on an athlete's whereabouts.

According to the CAS, the legal nature of a doping offense depends on the rules and regulations of the respective sport governing body. In H. / FIM Ruling, the CAS stated that rules of each federation must define the doping offense. However, the regulations that may affect the careers of athletes need to be predictable.⁴³ They must emanate from duly authorized bodies and must be adopted in a constitutionally proper manner.⁴⁴ *“Athletes and officials should not be confronted with*

⁴¹ FIFA & WADA, CAS 2005/A/976 & 986, Advisory Opinion of 21 April 2006

⁴² FIFA & WADA, CAS 2005/A/976 & 986, Advisory Opinion of 21 April 2006

⁴³ USA Shooting & Q. v/ UIT, CAS 94/129, Award of 23 May 1995; H. / FIM, CAS 2000/A/281, Award of 22 December 2000

⁴⁴ USA Shooting & Q. v/ UIT, CAS 94/129, Award of 23 May 1995; H. / FIM, CAS 2000/A/281, Award of 22 December 2000

contradictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders.”⁴⁵

In order to determine whether an act constitutes an anti-doping offense, the law in force at the time that the act was committed will be taken into account. This is called the principle of *tempus regit actum*. The principle requires that new regulations do not apply retroactively to facts that occurred prior to their entry into force, but only for the future.⁴⁶ However, the CAS established that according to the *lex mitior* principle, it has the power to apply those rules subsequently entered into force which are more favorable to the athlete.⁴⁷

3.2.1. The Principle of Strict Liability

The CAS has an established case law on the standard of strict liability. In the CAS 95/142, L. / FINA, Award of 14 February 1996 (‘L. / FINA Ruling’), the CAS explained the concept of strict liability.

“The use of the term “strict liability” in the context of doping could be misleading: under the term “strict liability”, one should understand a concept of liability similar to that of civil liability, without fault in tort, or comparable to product liability cases (see, e.g., HONSELL, Schweizerisches Haftpflichtrecht, Zürich 1995, 2 f.). It does not raise the issue of guilt (or the “presumption of guilt”) with respect to the applicability of disciplinary sanctions.

The concept of “strict liability”, as it has been used in doping cases, does not imply an intentional element. (see, e.g., DALLÈVES, Doping, in: International Conference Law and Sport, Lausanne 1993, 111). Like the rules of most sports federations, FINA's MED 4.3 provides that: “The identification of a banned substance and/or any of its metabolites in a competitor's urine or blood sample will constitute an offence, and the offender shall be sanctioned”. There is no tie between sanction and intent. The sanction is an inevitable consequence, if a doping offence has been established. Whether a severe sanction such as a two year ban may be imposed on an athlete without examining the issue of guilt and intent is not undisputed, particularly in view of art. 28 of the Swiss Civil Code (Personality rights) and art. 18 of the Swiss Penal Code (requirement of intent) (see, e.g., BADDELEY, L'association sportive face au droit, Basel and Frankfurt 1994, 240-244; VIEWEG, Doping und Verbandsrecht, NJW 1991, 1515; and DALLÈVES, Questions juridiques relatives au dopage, in Chapitres choisis du droit du sport, Geneva 1993, 119 ff.).”

In the same ruling, the CAS noted that the principle of strict liability does not exempt the federation from establishing a doping offence. It allows the federation to deal with the question of intent once a certain substance or act has been characterized as doping.

When weighing up the interests of both sides, the CAS is of the view that the interests of the athlete take precedence over those of the federation to enforce a strict liability rule since according to the CAS, ‘a strict liability rule is not the only meaningful weapon in the fight against doping’.⁴⁸ However, the CAS also emphasizes,

“... with regard to the subjective elements of a doping offense, when weighing the interests of the federation to combat doping and those of the athlete not to be punished without fault, the scales tip in

⁴⁵ USA Shooting & Q. v/ UIT, CAS 94/129, Award of 23 May 1995

⁴⁶ WADA v. Jessica Hardy & USADA, CAS 2009/A/1870, Award of 21 May 2010

⁴⁷ A.C. v. FINA, CAS 96/149, Award of 13 March 1997; Jakub Wawrzyniak v. HFE, CAS 2009/A/1918, Award of 21 January 2010; WADA v. Jessica Hardy & USADA, CAS 2009/A/1870, Award of 21 May 2010

⁴⁸ A. / FILA, CAS 2001/A/317, Award of 9 July 2001

favour of the fight against doping. In fact, doping only happens in the sphere of the athlete: he/she is in control of his/her body, of what he/she eats and drinks, of who has access to his/her nutrition, of what medication he/she takes, etc.”⁴⁹

The CAS has consistently applied the principle of strict liability as long as the terms of the doping control rules justify its application.⁵⁰ In H. / FIM Ruling, it is stated,

“Federations enjoy discretion in establishing their internal rules. Therefore, they may require an intentional element for an offence to be committed or they may establish that an athlete has already committed a doping offence if a forbidden substance is found in his urine (“strict liability”).

16. As a general rule, in cases of strict liability offences it is sufficient that the federation is able to show that a forbidden substance was found in the urine of the athlete and that the positive test result of the sample was not affected by procedural defects on the laboratory. On the other hand an additional proof of negligence or willful behavior will not be necessary since the question of guilt will not be raised.”

In CAS 94/129, USA Shooting & Q. / UIT, Award of 23 May 1995 (‘USA Shooting Ruling’), in response to the arguments that a strict liability standard is unreasonable and contrary to natural justice because it does not permit the accused to establish moral innocence, the CAS stated,

“It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of Q., where the athlete may have taken medication as the result of mislabelling or faulty advice for which he or she is not responsible – particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense “unfair” for an athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the athlete’s recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable persons, which the law cannot repair.

15. Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those run on modest budgets – in their fight against doping.”

Therefore, the CAS noted that in principle, high objectives and practical necessities of the fight against doping justify the application of strict liability standard.⁵¹ If the federations were required to always establish the intentional nature of the act, the fight against doping would become practically impossible.⁵² However, the CAS also makes a distinction according to the nature of the sanction when it applies the strict liability standard. If the sanction is disqualification, a breach of the relevant anti-doping rule is of strict liability. By contrast, where the sanction to be imposed includes suspension, the subjective circumstances surrounding the athlete’s use of the prohibited substance

⁴⁹ A. / FILA, CAS 2001/A/317, Award of 9 July 2001

⁵⁰ N., J., Y., W. / FINA, CAS 98/208, Award of 22 December 1998; L. / IOC, CAS 2000/A/310, Award of 22 October 2002

⁵¹ USA Shooting & Q. / UIT, CAS 94/129, Award of 23 May 1995; L. / FINA, CAS 95/142, Award of 14 February 1996; H. / FIM, CAS 2000/A/281, Award of 22 December 2000

⁵² L. / FINA, CAS 95/142, Award of 14 February 1996; H. / FIM, CAS 2000/A/281, Award of 22 December 2000

may be taken into account.⁵³ If the strict liability standard is applied, the CAS mostly requires that it must be clearly articulated.⁵⁴ In the USA Shooting Ruling, the CAS evaluated whether the Regulations of UIT provide for strict liability standard. The CAS overturned a disqualification because the federation had acted as though it was implementing a strict liability rule although the applicable rules clearly required intent. The CAS was prepared to apply strict liability test but was not able to do so because of inconsistent provisions. According to the CAS applying strict liability standard when the rules provided otherwise is the violation of legitimate expectations of the athlete. However, if the CAS is satisfied that no one subject to the rules could come to the conclusion that they would excuse the inadvertent ingestion of banned substances, it applies strict liability standard even though there is no clear articulation of the standard in the rules. CAS 95/122, National Wheelchair Basketball Association / IPC, Award of 5 March 1996 is an example of such a ruling.

It is important to note that the Swiss Federal Court has specifically held that doping control rules which provide for strict liability are valid under the Swiss law.⁵⁵ With the adoption of the WADC by the member associations, it is seen in the recent decisions that application of the strict liability standard is not an issue anymore. The anti-doping rule violations described in the Article 2.1 through the Article 2.8 of the WADC do not mention any subjective elements such as intent or negligence. Article 2.1 of the WADC *'adopts the rule of strict liability'* according to which violation *'occurs whether or not the athlete intentionally or unintentionally used a prohibited substance or was negligent or otherwise at fault'*.

3.2.2. The Presumption of Guilt

If a federation is able to establish the objective element of a doping offense, in other words, the presence of a prohibited substance in the body of an athlete, there is a presumption of guilt against the athlete.⁵⁶ Swiss Federal Tribunal has also accepted an interpretation of doping rules to the effect that it is admissible to presume an athlete's guilt if he has been tested positive for a prohibited substance.⁵⁷

The athlete is not without protection against the principle of presumed fault. He is accorded an opportunity to rebut the presumption by establishing that the presence of prohibited substance in his body is not due to any fault or negligence.⁵⁸ The CAS decisions shows that anti-doping regulations do not provide any possibility to introduce exculpatory evidence except for showing mistakes during the identification process. This includes providing proof that the sample was properly taken, there was a complete chain of custody of the sample from the Doping control Centre to the laboratory and the test used was a reliable test for the discovery of the presence of a prohibited substance.⁵⁹ However, according to the CAS, if a federation intends not to allow any defenses at all, it had to express this in a manner which is absolutely clear.⁶⁰

⁵³ L. / IOC, CAS 2002/A/370, Award of 29 November 2002

⁵⁴ USA Shooting & Q. / UIT, CAS 94/129, Award of 23 May 1995; L. / FINA, CAS 95/142, Award of 14 February 1996

⁵⁵ L. / IOC, CAS 2000/A/310, Award of 22 October, Swiss Federal Court, G. v/ FEI, 15 March 1993; Swiss Federal Court, N., J., Y. & W. v/ FINA, 31 March 1999

⁵⁶ G. v. FEI, CAS 91/53, Award of 15 January 1992; UCI v. Bo Hamburger, CAS 2001/A/343, Award of 28 January 2001; A. / FILA, CAS 2001/A/317, Award of 9 July 2001; N., J., Y., W. / FINA, CAS 98/208, Award of 22 December 1998; M. v. FINA, CAS 99/A/235, Award of 29 February 2000; T. / FIG, CAS 2002/A/385, Award of 23 January 2003; S. v. FINA, CAS 2005/A/830, Award of 15 July 2005

⁵⁷ A. / FILA, CAS 2001/A/317, Award of 9 July 2001; Swiss Federal Tribunal, 5P.83/1999

⁵⁸ A. / FILA, CAS 2001/A/317, Award of 9 July 2001

⁵⁹ L. / IOC, CAS 2000/A/310, Award of 22 October 2002

⁶⁰ USA Shooting & Q v. UIT, CAS 94/129, Award of 23 May 1995; F. v. FINA, CAS 96/156, Award of 6 October 1997

3.2.3. The Burden and Standard of Proof

Article 3.1 of the WADC determines the burden of proof and sets the standard which has to be applied. The sport association which accuses the athlete for committing a doping violation has the burden of proof that a violation of an anti-doping rule occurred. This was an established principle even before the adoption of the WADC.⁶¹ The federation has the initial burden of proving the presence of a prohibited substance in the body of the athlete.⁶² This follows from the accepted basic principle of Swiss Law that a person who alleges a fact bears the burden of proof.⁶³ According to the CAS, *‘it would put a definite end to any meaningful fight against doping if the individual federations were required to also prove the necessary subjective elements of the offence, i.e. intent or negligence on the part of the athlete’*.⁶⁴ Therefore, once the federation meets its initial burden of proof, the principle of strict liability creates a presumption that a doping offense has been committed. Then the burden of proof shifts to the athlete. The athlete has to prove the subjective element of the doping offence, meaning whether the presence of the prohibited substance in his body was due to any intentional or negligent act on his part.⁶⁵ The Swiss Federal Tribunal has repeatedly considered the system of reversal of the burden of proof to be compatible with public policy.⁶⁶ In the CAS 2001/A/317, A./FILA, the CAS stated,

“The panel recognizes that the opinions of the courts and legal authorities differ as to whether the reversal of the burden of proof puts too much burden on the athlete. As an example the OLG Frankfurt in its decision of 18 May 2000 (see above) is in favour of a rule pursuant to which the presence of a prohibited substance in an athlete’s body provides prima facie evidence of guilt on the part of the athlete; this leaves the athlete with the burden of proving that, in his/her particular case, the facts were different from the normal sequence of events. In many cases the practical results of both scenarios – a reversal of the burden of proof or the rebuttal of prima facie evidence – will be the same, but the Panel does recognize that the burden is slightly less in the latter case. The Panel does, however, believe that, as a matter of principle, the reversal of the burden of proof and thus the burden being on the athlete to provide full proof of the absence of intent or negligence, is adequate and appropriate when weighing the interests of parties.”

As in the above-mentioned ruling, the CAS often addresses the standard of proof that has to be applied. In order to establish the existence of a prohibited substance in the athlete’s body, the federation has to submit full evidence. In other words, the federation has to show ‘beyond all reasonable doubt and to the satisfaction of law’ that there was a case of administration of a forbidden substance.⁶⁷ On the other hand, in Hamburger Ruling and CAS 2009/A/1752, Vadim Devyatovskiy v/ IOC & CAS 2009/A/1753, Ivan Tsikhan v/ IOC, Award of 10 June 2010, the CAS stated that the federation had to prove the allegation of the doping rule violation *‘to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made’*.⁶⁸ According to the CAS, this meant *“the standard of proof in all cases is greater than a mere balance of probability not less than proof beyond reasonable doubt”*.⁶⁹ In addition, the standard of proof of the federation is,

⁶¹ UCI v. Bo Hamburger, CAS 2001/A/343, Award of 28 January 2001; Article 3.1 of the WADC

⁶² B. / FINA, CAS 98/211, Award of 7 June 1999; L. / IOC, CAS 2000/A/310, Award of 22 October

⁶³ Article 8 of the Swiss Civil Code; CAS 91/56, S. / FEI, Award of 25 June 1992; H. / FIM, CAS 2000/A/281, Award of 22 December 2000; T. / FIG, CAS 2002/A/385, Award of 23 January 2003

⁶⁴ T. / FIG, CAS 2002/A/385, Award of 23 January 2003

⁶⁵ L. / FILA, CAS 2000/A/312, Award of 22 October 2001

⁶⁶ T. / FIG, CAS 2002/A/385, Award of 23 January 2003

⁶⁷ N. FEI, CAS 92/70, Award of 13 August 1992

⁶⁸ Article 3.1 of the WADC

⁶⁹ Vadim Devyatovskiy v/ IOC, CAS 2009/A/1752 & Ivan Tsikhan v/ IOC, CAS 2009/A/1753, Award of 10 June 2010; WADA & FIFA v. Cyprus Football Association, Carlos Marques, Leonel Medeiros, Edward Eranosian, Angelos Efthymiou, Yiannis Sfakianakis, Dmytro

“... less than criminal standard, but more than the ordinary civil standard...to adopt a criminal standard (at any rate where the disciplinary charge is not of one of a criminal offence) is to confuse the public law of the state with the private law of an association”⁷⁰

Once the sample is at the laboratory, there is a presumption that the testing and custodial procedures have been conducted in accordance with prevailing and acceptable standards of scientific practice.⁷¹ The presumption can be rebutted by convincing evidence to the contrary but there is no evidential burden on the laboratory to show that it conducted the procedures according to the customary practices.⁷²

With regard to the standard of proof applies to the rebuttal of the presumption of guilt, the CAS has two different approaches, i.e. ‘balance of probabilities’ or ‘beyond all reasonable doubt and to the satisfaction of law’. In the CAS 2001/A/317, A. /FILA, Award of 9 July 2001 and CAS 2000/A/310, L. / IOC, Award of 29 November 2002 the CAS required full proof.

“An athlete may rebut this presumption by adducing clear evidence to demonstrate, for example, that the requisite procedure for collecting the sample was not followed, the chain of custody of the sample was broken, the sample containers were not properly sealed, or there were laboratory errors which call into question the results of the sample analysis.”

On the other hand, in the CAS 2001/A/343, UCI v. Bo Hamburger, Award of 28 January 2001, (‘Hamburger Ruling’), the CAS stated that criminal principles do not generally apply when reviewing the penalties imposed by associations. If an association imposes a penalty, this is a matter of civil law. Consequently only civil law and civil procedural standards can apply to any review of penalties imposed by associations, which include doping sanctions. However, because the doping sanctions have drastic consequences on the athlete’s exercise of trade, it is appropriate to apply a higher standard than a general standard required in civil procedure, namely having to convince the court on the balance of probabilities.⁷³

WADC adopted the balance of probabilities approach as well. According to the Article 10.5 of the WADC, the athlete has to prove the facts on the basis of which the maximum sanction should not be imposed. This principle has been recognized by the CAS as not being in violation of Swiss law.⁷⁴ The standard is the ‘balance of probabilities’ which is lower than the standard ‘to the comfortable satisfaction of the hearing body’. According to WADA, an adequate subscription of the balance of probability is given in the Daubney Ruling according to which *“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 the positive testing”*.⁷⁵ Accordingly, in order to rebut the presumption, an athlete has to establish the following elements on the balance of probability. First, how the prohibited substance entered in his system.

Mykhailenko, Samir Bengeloun, Bernardo Casconcelos, CAS 2009/A/1817 & FIFA v. Cyprus Football Association and Edward Eranosian, CAS 2009/A/1844, Award of 26 October 2010

⁷⁰ N., J., Y., W. / FINA, CAS 98/208, Award of 22 December 1998; B. / FINA, CAS 98/211, Award of 7 June 1999; H. / FIM, CAS 2000/A/ 281, Award of 22 December 2000; L. / IOC, CAS 2000/A/310, Award of 22 October 2002

⁷¹ L. / IOC, CAS 2000/A/310, Award of 22 October 2002

⁷² L. / IOC, CAS 2000/A/310, Award of 22 October 2002

⁷³ UCI v. Bo Hamburger, CAS 2001/A/343, Award of 28 January 2001; T. / FIG, CAS 2002/A/385, Award of 23 January 2003

⁷⁴ S. v. FINA, CAS 2005/A/830, Award of 15 July 2005; P. v. IJHF, CAS 2005/A/990, Award of 24 August 2006

⁷⁵ WADA v. Swiss Olympic Association & Simon Daubney, CAS 2008/A/1515, Award of 2 October 2008; Doping Authority Netherlands v. N., CAS 2009/A/2012, Award of 11 June 2010

Second, 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.

After the adoption of the WADC, the CAS established in CAS 2002/A/385, T. / FIG, Award of 23 January 2003, CAS 2005/A/990, P. v. IIFH, Award of 24 August 2006, Puerta⁷⁶, Gasquet, CAS 2009/A/1918, Jakub Wawrzyniak v. Hellenic Football Federation, Award of 21 January 2010, CAS 2009/A/2012, Doping Authority Netherlands v. N., Award of 11 June 2010, CAS 2009/A/1752, Vadim Devyatovskiy v/ IOC & CAS 2009/A/1753, Ivan Tsikhan v/ IOC, Award of 10 June 2010, CAS 2009/A/1817, WADA & FIFA v. Cyprus Football Association, Carlos Marques, Leonel Medeiros, Edward Eranosian, Angelos Efthymiou, Yiannis Sfakianakis, Dmytro Mykhailenko, Samir Bengeloun, Bernardo Casconcelos & CAS 2009/A/1844, FIFA v. Cyprus Football Association and Edward Eranosian, Award of 26 October 2010 and Contador⁷⁷ Rulings that the standard of proof that the athlete has to satisfy is the balance of probabilities. Therefore, in light of the established CAS case law, the disputed facts have to be “*established to the comfortable satisfaction of the court having in mind the seriousness of the allegation*”.⁷⁸ In Gasquet Ruling, the CAS evaluated the meaning of balance of probability standard. After evaluating the provisions ITF Anti-doping Programme and the Article 3.1. of the WADC about standard of proof, the CAS stated,

“[...] in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred.”

As mentioned above, one ruling the CAS applied balance of probability standard after the adoption of WADC is the Daubney Ruling. In the ruling, Mr. Daubney, as one of the sail trimmers of Team Alinghi, participated in the 32nd America’s Cup sailing race in Valencia, Spain. The event took place between 23 June and 3 July 2007. Team Alinghi defended its second America’s Cup title by winning the best of nine series. Mr. Daubney was subject to in-competition drug testing in 23 June 2007. The sample was analyzed and it was found to contain Ecgonina metil ester and Benzoilecgonina, prohibited substances under the WADC. The CAS had the polygraph examination of Mr. Daubney which showed that he told the truth when he claimed that he had never willingly used cocaine and the testimonies of Mr. Daubney’s wife and his colleagues testifying that they had never seen him using cocaine, 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. Because a polygraph test was inadmissible as per se evidence under the Swiss law, the CAS evaluated the other evidence. Mr. Daubney claimed that it was possible for a hostile fan to put cocaine in his glass to cause him to test positive for a banned substance. He thought it was possible in three occasions where cocaine could have been put into his drink: in a bar at Palma 7 days before the sample collection, in Australia bar in the port of America’s Cup 3 days before the sample collection or in a

⁷⁶ Mariano Puerta v. ITF, CAS 2006/A/1025, Award of 12 July 2006

⁷⁷ UCI v. Alberto Contador Velasco & RFEC, CAS 2011/A/2384 & WADA v. Alberto Contador Velasco & RFEC, CAS 2011/A/2386, Award of 6 February 2012

⁷⁸ T. / FIG, CAS 2002/A/385, Award of 23 January 2003

local tavern 2 days before the sample collection. The CAS first evaluated how the prohibited substance entered the athlete's system on the balance of probability standard. According to the athlete, as mentioned above, the contamination occurred as a result of a spiked drink during one of the three nights. The CAS stated that the athlete failed to establish if the sabotage occurred when he was in Palma, in the Australian bar or in the local tavern with his family due to the fact that the evidence was indirect and his version of facts seemed incompatible with the testimony of Dr. Martial Saugy,⁷⁹ who was a biologist working at the Lausanne laboratory. In any event, the CAS assumed that the athlete's evidence was sufficient to establish that the prohibited substance entered in his system during the night at the Australian Bar, the night which he submitted more details and provided circumstantial evidence. The CAS found that a friendly drink in Palma and family dinner in the local tavern were unpersuasive on the balance of probability. The CAS further evaluated the evidence on the balance of probability and tried to establish whether the athlete was able to pass the "No Fault or Negligence" test and the "No Significant Fault or Negligence" test. According to the CAS,

"[...]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"."

As a leading member of Team Alinghi and, as a sail trimmer, "he had an important role to play in competition" and 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". Accordingly, he did not meet the requirement of utmost caution and his fault is even greater as he went in "a very hostile bar and, therefore, accepted to expose himself to malevolence of any fan, just a few days before the beginning of competition". In light of these evaluations, the CAS concluded that these circumstances were not exceptional and he had a significant fault or negligence at the occurrence of such an event.

Another example is the CAS 2005/A/990, P. v. IIHF, Award of 24 August 2006. The ruling is about P. who is a Ukrainian professional ice hockey player who participated in the IIHF Senior Ice Hockey Championship 2005 in Ukraine. On 1 May 2005, after the game between Ukraine and Sweden, the player was subject to doping control. The sample was analyzed and found to contain norandrosterone, a prohibited substance under the IIHF anti-doping rules. Player submitted that during a championship game of his team in Belarus on 21 March 2005, he was body checked by a player of the opposite team and hit the boards so hard that he had to be taken off the ice. He had taken to the hospital where he was treated on account of acute heart failure. In the emergency room, he was given injections. He player contends that one of these injections contained the prohibited substance. He submitted that when he arrived at the hospital, he was in a very bad physical and mental condition which was impossible for him to monitor or even ask questions about the treatment which was going to be applied. Following his positive doping test, he requested from the hospital the complete list of treatment and realized he had been administered the prohibited substance. With an explicit reference to the Article 3.1 of the WADC, the CAS evaluated whether the player was able to establish on the balance of probability that he bears either no fault or negligence or

⁷⁹ Kaisa Varis v. IBU, CAS 2008/A/1607, Award of 13 March 2009

no significant fault or negligence for the anti-doping rule violation. On the basis of the evidence provided by the player, the CAS decided,

“[...]sufficient evidence has been provided by the Player that under the unique circumstances of this case he was unable to influence or control the treatment applied to him in an emergency situation. The Panel can find no reason to put into question Ms P.’s testimony that the Player was “in a very bad physical and psychological condition (...). As a result of severe pain (he) was unable even to speak”. In these circumstances he was unable to prevent the treating doctor from administering a prohibited substance. The Panel is thus of the opinion that the Player demonstrated that he was without fault or negligence for the anti-doping rule violation and that the otherwise applicable period of ineligibility must be eliminated.

7. It is irrelevant under the circumstances of this case whether the diagnosis of an “acute heart failure” was accurate or whether – as is stated in the Contested Decision – “the treatment of a heart ailment with Retabolil met the medical standards in the Republic of Belarus” or that of Western Europe or North America. There is clear evidence that Retabolil was administered and that the Player had no means of preventing its administration. This is sufficient reason to discharge the Player’s burden of proof of no fault or negligence in the circumstances of this case.”

In *Puerta Ruling*, Mr. Puerta competed in the final of the French Open at Roland Garros on 5 June 2005 and lost against his opponent, Rafael Nadal. On the same evening, he underwent a doping control and provided a urine sample. The sample was analyzed and it was found to contain etilefrine, a prohibited substance under the WADC. The CAS evaluated how the prohibited substance entered Mr. Puerta’s body on the balance of probabilities. Taking into account all the evidence present, the CAS examined whether the occurrence of the athlete’s allegation about how the prohibited substance entered in his body is more probable than other possibilities. Mr. Puerta asserted that he did not knowingly ingest the prohibited substance and that its presence in his urine could only be explained by the innocent and accidental ingestion of his wife’s medicine. According to his statement, after he warmed for his final match, he entered the cafeteria where his wife, her mother, her brother and her brother’s fiancée had taken lunch. Mr. Puerta drank coffee and mineral water. Shortly before the start of the final, he left the cafeteria and went to the changing room to prepare for the match. When he learnt that his match was canceled, he returned to the cafeteria. During the period of his absence from the cafeteria, Mrs Puerta changed to her husband’s seat and used 20 drops of Effortil which contain the prohibited substance by Mr. Puerta’s glass. She had been using this medication under a doctor’s prescription to ease hypertension and menstrual pain. The medicine was colorless, odorless and tasteless. She left the table after she took the medicine and left her brother behind at the table alone. When Mr. Puerta returned to the table, he used his glass, which was the same glass that Mrs Puerta used to drink her medicine. He poured water to his glass and drank from it. He claimed that the glass appeared to be empty. When the CAS was evaluating Mr. Puerta’s claims regarding how the prohibited substance entered in his system, it took into account the concentration of the prohibited substance. It decided that the concentration found in the body of the athlete is consistent with explanation about how the prohibited substance entered in his body. Accordingly, the CAS believed that this explanation is more probable than other possibilities. It concluded that Mr. Puerta had proved on balance of probabilities how the substance entered his body.

The CAS further evaluated on the balance of probability whether the athlete did not know or suspect and could not reasonably have known or suspected, even with the exercise of utmost caution that he had used or been administered with the prohibited substance. According to the CAS, the requirement

of utmost caution means that the athlete has to establish that he took all of the steps that could reasonably be expected to him to avoid inadvertently ingesting his wife's medication and it would be unreasonable to require him to take any other steps. Mr. Puerta submitted that he is *"the victim of an extraordinary and unpredictable sequence of events: precisely the sort of rare and exceptional case referred to in the commentary to the WADC"*. However, the CAS believed that the circumstances causing the contamination *"cannot be described as being so extraordinary as to exempt Mr Puerta from the duty placed upon all athletes to maintain utmost caution"*. It concluded,

"[...] It is not unreasonable to expect of Mr Puerta, who had been aware for several years of his wife's regular use of colorless, tasteless and odourless Effortil and the manner in which she administered it (10 to 20 drops in a glass of water), to be aware also that residues of the substance could be found in a used glass, even if the glass appears empty. Athletes must be aware at all times that they must drink from clean glasses, especially in the last minutes before a major competition. He should have been particularly ware as he knew that she had taken the medication at 7:30 am that morning. [...] However slight and excusable his negligence may have been in the minutes prior to the start of the final match, Mr Puerta cannot avoid the conclusion that he suffered a momentary lapse of attention and exhibited a momentary lack of care when he used a glass over which he had lost visual control, especially at such a critical and vulnerable time, just hours before he knew that he would have to undergo a doping test[...] In the circumstances, and despite the extraordinary manner in which the contamination with etilefrine occurred, the Panel is forced to conclude that the requirements which might justify a finding of "No Fault or Negligence"(Article M.5.1 of the Programme) have not been met in the present case. Mr Puerta failed to exercise the utmost caution at this critical time."

Regarding "No Significant Fault or Negligence" test, the CAS weighed several factors in order to measure the degree of fault or negligence. First, the substance Mr. Puerta ingested was water, *"not a vitamin, nutritional supplement, medication, tonic or salve"*. In addition, the water Mr. Puerta drank was the water which he brought with him. He could not detect the colorless, odorless and tasteless presence of the substance. He had no reason to know that his wife had taken her medication just before he returned to the table. He left his glass unattended for only few minutes on a table which under out-of-competition circumstances, could be assumed normal for the athlete to use the same glass. The quantity of the prohibited substance was not possibly enhancing his performance. Accordingly, the CAS decided that the degree of the athlete's negligence is so slight that a finding of "No Significant Fault or Negligence" was necessary.

In Gasquet Ruling, the CAS also evaluated ingestion of substance on a balance of probability. Mr. Gasquet, a professional tennis player, intended to attend the Sony Ericsson Event, an ATP Tournament took place on 25 March 2009 in the United States. On 27 March 2009 due to a shoulder injury, he decided to withdraw from the tournament. However he did not withdraw that day. First match of the tournament took place on 25 March 2009 and the player was scheduled to play on 28 March 2009. When he decided to withdraw from the tournament, he went out with his coach and some friends. They decided to go to a club called "Set" to see a French DJ. Before going to the club, they went to an Italian restaurant called "Vita" where they socialized with a group of people among which there was a French sports news presenter and a woman called Pamela. At Set, Pamela and the player kissed. The next day, the player withdraw from the competition and undergone a mandatory doping test. He was charged with a doping offense under Article C1 of the Tennis Anti-Doping Programme when small amount of cocaine was found in his urine sample. He denied that he had ever deliberately taken cocaine. He explained that he either contaminated by touching persons having cocaine dust on them or by kissing Pamela after she had ingested cocaine. According to the CAS,

several possible means of ingestion of the prohibited substance exist such as deliberate spiking, accidental contamination of a drink, accidental contamination by touching contaminated surfaces or people, accidental contamination by breathing cocaine dust or accidental contamination by kissing Pamela after she had ingested cocaine. On 6 May 2009, the player underwent a test which identifies drug use more than 10 mg over a 6 months period, the result of which turned out to be negative. In light of this test, expert opinions and the quantity of cocaine found in player's system, the CAS ruled out the possibility of deliberate ingestion. Due to the small quantity of cocaine, the CAS also decided that deliberate spiking also became less likely than to have occurred. The CAS further found that the contamination by touching contaminated surfaces or breathing in cocaine dust theories are unlikely considering that the cocaine is generally consumed if at all, only in the private areas of any club and in case of the club 'Set', these few places could only be toilet cabins. With regard to the kissing theory, the CAS noted that it was undisputed that the player and Pamela kissed several times at the night and she was an average cocaine user with a trend to increasing quantities. According to the parties' experts, contamination through kissing from a medical point of view was a possibility. The CAS stated that the missing link in the kissing theory was that there was no clear evidence that Pamela consumed cocaine during the night before kissing the player. Considering the daily use of Pamela, the CAS came to the conclusion that it was more likely than not that Pamela also consumed cocaine during the night in question. The CAS further noted that cocaine was a drug used in social environments and the effect on the users to become more sociable and more communicative. Accordingly, the CAS decided,

“The night at “Set” was thus a perfect surrounding for a cocaine user such as Pamela to ingest the substance. In this respect, the fact that no one has effectively seen her consuming cocaine during the night in question does not mean that she did not consume cocaine during that night. As a matter of fact, and as mentioned previously, cocaine might have been ingested predominantly in the toilet cabins at “Set”, which explains why no one would have seen Pamela ingesting the substance. In view of these considerations, the Panel is of the opinion that it is more likely than not that Pamela ingested cocaine during the night she met the Player. The link that was missing, i.e. the question whether Pamela has consumed cocaine during the relevant night, is thus established and proven at a level of probability that is satisfying the Panel.”

The CAS concluded its evaluations by stating that it was satisfied that there was at least a 51% chance of the kissing theory having occurred. According to the CAS, any other source of contamination was either less likely than the kissing theory or it was even entirely impossible.

The CAS further evaluated on the balance of probability whether the player did not know or suspect and could not reasonably have known or suspected, even with the exercise of utmost caution that he had used or been administered with the prohibited substance. The CAS stated,

“53. Considering these facts, the Panel concludes that it cannot find that the Player did not exercise utmost caution when he met Pamela in an unsuspecting environment like an Italian restaurant (“Vita”). He could not have known that she might be inadvertently responsible for administering cocaine to him if he were to kiss her that night. Also, the Panel concludes that it was impossible for the Player to know, still exercising the utmost caution, that when indeed kissing Pamela, she might inadvertently administer cocaine to him. As the Player did not know Pamela’s cocaine history and did not see her, during the entire evening, taking cocaine or appearing to be under its influence, how could he imagine that she had been consuming cocaine? And even more, how should he have been in a position to know that, even assuming that he knew that she had been consuming cocaine, that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine

beforehand? The parties' experts in the present matter concluded only after some study that this is possible. The members of the Panel are not reluctant to admit that they would not have believed, without having seen the statements of these experts that such a means of contamination is possible. The Panel's position is thus clear: even when exercising the utmost caution, the Player could not have been aware of the consequences that kissing Pamela could have on him. It was simply impossible for the Player, even when exercising the utmost caution, to know that in kissing Pamela, he could be contaminated with cocaine."

In view of the above considerations, the CAS concluded that the player satisfied the CAS that he was accidentally and absolutely unpredictably contaminated by kissing Pamela although he exercised the utmost caution and he acted without fault or negligence.

Similarly, in Contador Ruling, the CAS first evaluated how the prohibited substance entered Mr. Contador's body on the balance of probabilities. Mr. Contador, then a member of the ProTeam Astana, participated in the 2010 Tour de France. On the rest day following the 16th stage of the 2010 Tour de France, the UCI submitted Mr. Contador to a urine doping test. The sample was analyzed and it was found to contain clenbuterol, a prohibited substance under WADC. The athlete submitted that the presence of clenbuterol in his system originated from eating contaminated meat. He claimed that it is possible for the meat to be imported from South America. He further alleged that even if the supply chain of the relevant piece of meat can be traced back to Lacio Carabias's farm, it is possible for the meat to be contaminated because the brother of Mr. Lucio Carabias was found guilty of illegally fattening his cattle with clenbuterol. The CAS did not find these explanations plausible and convinced that the theory seems difficult considering that after the implementation of the EU Regulations, severe sanctions included in the Spanish criminal code. The legal framework and statistics were further discussed throughout the ruling. According to the appellants, Mr. Contador's adverse analytical finding was caused by the application of blood transfusion, a doping method. The CAS did not find this theory plausible since no person in the environment of Mr. Contador saw or alleged that Mr. Contador underwent a blood transfusion. According to the CAS, the blood transfusion theory implies that at least a group of people being involved such as the athlete. Donor of plasma, a person harvesting the plasma, a person storing the plasma and blood bags, a person re-injecting the plasma and blood. In the absence of these people, the CAS found that this theory is not likely. Therefore, based on all the evidence before it, the CAS considered that both the blood transfusion and meat contamination theories were equally unlikely. It evaluated whether the contaminated food supplement theory was more likely than the blood transfusion or contaminated meat theory. Considering that the athlete took supplements in considerable amounts, that athletes have frequently tested positive in the past because of contaminated food supplements and an athlete had also tested positive for a food supplement contaminated with clenbuterol, the CAS considered that it is more likely that the athlete's positive test result had been caused by the ingestion of a contaminated food supplement than by a blood transfusion or the ingestion of contaminated meat.

3.3. Sanctions

Article 9 of the WADC establishes that in individual sports, an anti-doping rule violation in connection with an in-competition testing automatically leads to the disqualification of the result obtained in that competition. The result of the athlete who committed an anti-doping rule violation is cancelled due to the potential advantage over the other athletes.

According to the Article 10.1 of the WADC, an anti-doping rule violation in connection with an event may also cause the disqualification of all of the athlete's individual results obtained in that event. The CAS is reluctant to decide on disqualification of the results of all the competitions in an event. In CAS 2000/A/28 H. / FIM ('H. / FIM Ruling'), H. was tested positive for ephedrine. He was using a dietary supplement 'Thermogen' consists mainly of caffeine and the herbal substance MaHuang to support his weight loss from time to time. He took part in a FIM racing event in Kyalami, South Africa consists of 2 races. He finished second in the first race and won the second race. He could not remember whether he took 'Thermogen' before the first race or in between the two races. He was tested for forbidden substances after the second race. The International Disciplinary Court decided to disqualify him from the racing event. In contrast, the CAS decided,

“Respondent has failed to prove that Appellant applied the prohibited substances before he took part in the first race. The positive urine sample was not collected until after the second racing event in Kyalami.

The evidence of this sample thus only covers the second race. The Appellant claims that he did not apply “Thermogen” on a regular basis at the time of the race and could not remember whether he had taken the product on the day of the race and if so when this occurred. Respondent did not provide any additional evidence that Appellant also participated in the first competition of the day with a forbidden substance in his body.

Thus the Panel can only disqualify the Appellant for the second race after which his urine sample was tested positive. The Respondent has failed to prove that a doping offence had been committed also for the first race.”

Article 10.2 WADC provides for a uniform sanction of an ineligibility of two years for first offences. According to the Article 10.5 WADC, the only possibility for an athlete to reduce the fixed sanctions is by evidence of exceptional circumstances. If such exceptional circumstances do not exist, it is not possible to reduce the fixed sanction of two year suspension. According to the CAS, 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.⁸⁰ However, CAS case law and legal opinions that CAS refers confirm that these “*WADC mechanisms are not contrary to human rights legislation.*”

Actually, prior to the adoption of the WADC, in an appeal by the Swiss Federal Court against the CAS 98/208, N., J., Y., W. / FINA, Award of 22 December 1998, the Swiss Federal Court decided that two year suspension handed down without the examination of principle of proportionality did not constitute a violation of the general principles of Swiss law.⁸¹ The ruling involved positive doping tests by four Chinese swimmers. One of the claims raised by the swimmers on appeal was that the CAS award failed to comply with the principle of proportionality. The amount of banned substance found in their system was very low but the suspension had the effect to possibly end the careers of the swimmers. The Swiss Federal Court decided that under the applicable FINA Anti-Doping Rules, the important factor was not whether the sanction was proportionate to the offence but whether the athlete was able to produce evidence of exceptional circumstances. According to the Court, the principle of proportionality could only be a legitimate issue if CAS ruling constituted an

⁸⁰ Doping Authority Netherlands v. N., CAS 2009/A/2012, Award of 11 June 2010

⁸¹ Referred to in the Doping Authority Netherlands v. N., CAS 2009/A/2012, Award of 11 June 2010

infringement of individual rights that was extremely serious and completely disproportionate to the behavior penalized.

Furthermore, the CAS stated in CAS 2005/A/847, Hans Knauss v. FIS, Award of 2005 and CAS 2005/A/830, S. v. FINA, Award of 15 July 2005,

“The Panel recognizes that a mere «uncomfortable feeling» alone that a one year penalty is not the appropriate sanction cannot itself justify a reduction. The individual circumstances of each case must always hold sway in determining any possible reduction. Nevertheless, the implementation of the principle of proportionality as given in the World Anti-Doping Code closes more than ever before the door to reducing fixed sanctions. Therefore, the principle of proportionality would apply if the award were to constitute an attack on personal rights which was serious and totally disproportionate to the behaviour penalised (...).”

Therefore, according to the CAS, the sanction must be proportionate but it does not mean that the CAS can impose a lesser period of ineligibility if the requirements are not met.

4. Conclusion

In light of the foregoing, it can be said that the CAS developed a very wide body of rulings in the area of doping and these rulings form an integral part of the fight against doping. According to the CAS, fight against doping can only be done within the limits of law. Therefore, it seems like the CAS does not create a practice that has no legal basis. Although there are some general evaluations, the CAS has not controlled the validity of the regulations of federations. In addition, the CAS has been very careful not to create a doping offence through its rulings. The approach shows that the work of the arbitrators is limited to the interpretation of the statutes and regulations in force but not to make law. Furthermore, the rulings evaluated shows that the CAS jurisprudence reflects the changes WADC brought. For instance, the consistent application of a different approach in the athlete's standard of proof, i.e. balance of probability standard, after the adoption of the WADC is a clear example of this. Additionally, one would not be mistaken if he assumes that the CAS is careful to apply the provisions of the WADC as long as it is possible.