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ARTICLE

Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code

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Abstract An *Athlete's* fault is one of the core issues for determining the applicable period of *Ineligibility* under the sanctioning regime of the World Anti-Doping Code. Nevertheless, the issue is seldom addressed in a detailed and comprehensive manner that would provide a genuine insight into the role of fault in this context. This article proposes a process to determine the length of the initial period of *Ineligibility* associated with the basic sanction for anti-doping rule violations involving the presence of a *Prohibited Substance* under the 2015 World Anti-Doping Code. The authors first examine the interplay between the familiar concept of "*No (Significant) Fault or Negligence*" on the one hand, and the newly introduced concept of "intentional" on the other hand, advocating a mutually exclusive understanding of these two concepts for the purposes of determining a basic sanction. Based on this understanding, the article proposes a process for determining the appropriate length of period of *Ineligibility* for both *Specified* and non-*Specified Substances* under the 2015 World Anti-Doping Code. Throughout the discussion, the article presents comparisons to the approach taken in earlier versions of the World Anti-Doping Code, illustrated through an analysis of past Court of Arbitration for Sport awards, to demonstrate the coherence of the proposed method and evaluate how it will function in practice.

Keywords Anti-doping · Sanctioning · 2015 World Anti-Doping Code · No significant fault or negligence · No fault or negligence

1 Introduction

The guiding philosophy of the sanctioning regime in the 2015 World Anti-Doping Code ("WADC" or the "Code") is meant to be straightforward. Those *Athletes*[1] who commit *intentional*[2] anti-doping rule violations, or in the parlance of the World Anti-Doping Agency ("WADA"), the "real cheats" should receive harsher, less flexible penalties than *Athletes* who inadvertently commit anti-doping rule violations.[3]

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[1] All terms in this article that are both capitalized and italicized are defined in Appendix 1 of the 2015 Code or in the 2015 International Standards.

[2] In this article, the term *intentional* when italicized is used to describe violations that are *intentional* according to the definition in Article 10.2.3 of the 2015 Code.

[3] During the revision process of the 2009 Code and coinciding with the publication of version 4.0 of the 2015 Code, WADA published the Overview Document in which it grouped key amendments under seven revision themes, and an eighth "miscellaneous" category, the first of which was to "provide for longer periods of Ineligibility for real cheats, and more flexibility in sanctioning in other specific circumstances."

Targeting the "real cheats" with harsher penalties was one of the resounding themes in the recent revision of the Code,[4] with much emphasis placed on imposing a 4-year period of *Ineligibility* as a starting point for certain first-time anti-doping rule violations.[5] While this theme stole the limelight, the revision also sought to ensure that the resulting sanctioning regime would be fair and balanced with sufficient flexibility, especially for cases involving inadvertent violations.

The legal and practical realities of sanctioning anti-doping rule violations add many nuances to this guiding philosophy. In particular, hearing panels at the Court of Arbitration for Sport ("CAS") have developed a practice for reducing a sanction through the familiar grounds of *No* (*Significant*) *Fault or Negligence* provided for by the Code since its inception in 2003.[6] It will not be an easy task for these panels to now seamlessly tie into these well-established principles a new concept of *intentional*. This task is especially challenging given the term *intentional* itself carries powerful (and variable) pre-existing legal connotations that do not necessarily implicate a high level of fault[7] or sense of wrongdoing.

That said, the idea that *Athletes* who commit a violation with a high level of *Fault* should be punished more severely than those who do not provides a helpful guiding principle when interpreting the language of the Code and understanding the envisioned relationship among the concepts of *intentional* and *No* (*Significant*) *Fault or Negligence*. More specifically, it supports the notion that the term *intentional*, as defined in the 2015 Code, refers to a category of violations committed with a high level of *Fault*, whereas *non-intentional* corresponds to a distinct category of violations committed with a lower level of *Fault*, the two categories being mutually exclusive.

1.1 Scope of this article

This article supports and discusses this "mutually exclusive" interpretation between these categories of anti-doping rule violations through a focused assessment of the first step required under the sanctioning regime of the 2015 Code: to determine a "basic sanction."[8] In the 2015 Code, the term "basic sanction" describes the initial period of *Ineligibility* determined by a hearing panel to apply to a particular anti-doping rule violation. More specifically, it comprises the periods of *Ineligibility* listed in Articles 10.2, 10.3, 10.4, and 10.5. It therefore represents the period of *Ineligibility* assigned taking into account the *Fault*-related provisions, but not the potential reductions available under Article 10.6, e.g., providing *Substantial Assistance* (Article 10.6.1), or admitting to a violation under certain circumstances (Article 10.6.2 and 10.6.3). In contrast, an "appropriate sanction" (another term that is used in the Comment to Article 10.6.4 and mentioned in this article) is understood as the full and final sanction that is determined by a hearing panel in a particular matter and actually assigned to the *Athlete* or other *Person.*

The subject of this article is the "basic sanction" (as defined above), and only in the context of violations of Article 2.1 (Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample*). In other words, the focus is on the interaction and application of Articles 10.2, 10.4, and 10.5 of the 2015 Code in the context of anti-doping rule violations arising from *Adverse Analytical Findings*. Articles 10.2, 10.4, and 10.5 (and Article 10.3) also consider basic sanctions for types of anti-doping rule violations other than Article 2.1[9] and, while the concepts admittedly overlap a good deal, addressing every possible permutation would complicate the discussion without providing a significant additional level of clarity. For the same reasons, only the basic sanction arising from an *Athlete's* first violation is discussed, allowing for an opportunity to narrow in on the interaction of the *Fault*-related provisions, without distraction by the (again, non-*Fault*-related) consequences to the magnitude of the sanction arising from multiple violations. Reductions to a sanction for reasons other than *Fault* (Article 10.6), such as providing *Substantial Assistance* or making a "prompt"

[4] Unless a specific reference is made when identifying the source of an Article of the Code, we are referring to the relevant provision in the 2015 version of the Code.

[5] For a more comprehensive analysis of the revisions reflected in the 2015 Code, see Rigozzi et al. (2013) and Rigozzi et al. (2014).

[6] See Rigozzi et al. (2003), p. 58, where it is explained that the genesis of these *Fault*-related opportunities for reduction was a legal opinion [commissioned by WADA regarding the 2003 Code, Kaufmann-Kohler et al. (2003)].

[7] As "fault" was not a defined term in the 2009 Code, when it is used in this article in reference to fault under the 2009 Code, or as a general concept, it is not capitalized or italicized. In the 2015 Code, however, *Fault* is newly a defined term so when used in this article in the context of this definition it will be capitalized and in italics. See *supra* note 1.

[8] This first step is set forth in the 2015 Code, Comment to Article 10.6.4 as follows: "the hearing panel determines which of the basic sanctions (Article 10.2, 10.3, 10.4, or 10.5) apply to the particular anti-doping rule violation."

[9] Article 10.2 of the 2015 Code applies to violations of Articles 2.1 (Presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample*), 2.2 (*Use* or *Attempted Use* by an *Athlete* of a *Prohibited Substance* or a *Prohibited Method*), and 2.6 (*Possession* of a *Prohibited Substance* or a *Prohibited Method*). Article 10.3.1 sets forth a period of *Ineligibility* for violations of Article 2.3 (Evading, Refusing or Failing to Submit to *Sample* Collection) and Article 2.5 (*Tampering* or *Attempted Tampering* with any part of *Doping Control*) and references the definition of *intentional* set forth in Article 10.2.3. Accordingly, many of the concepts discussed in this article will also be relevant in the context other anti-doping rule violations, but the nuances of determining a period of *Ineligibility* for any of these other violations will not be specifically addressed.

admission,[10] might also be available and could substantially affect an associated period of *Ineligibility*, but are beyond the scope of this article.

1.2 Interpreting the Code

The legal regime applying to the determination of the basic sanction being new and far from straightforward, the hearing panels will inevitably have to interpret the Code (1.2.2). In doing so, special attention should be given to the "sui generis" nature of the Code (1.2.1) and conceptual uncertainty with which the panels will be confronted after applying the "*Fault*-related" provisions (1.2.3).

1.2.1 Sui generis legal nature of the Code

The greater legal context in which the Code exists influences its interpretation. Formally, the Code is a contractual document arising from private law,[11] drafted by WADA in consultation with various stakeholders and "adopted" in a sui generis process.[12] Article 23 of the Code sets forth which types of organizations may become *Signatories* and under what circumstances, detailing the steps that must be taken to "accept" and implement the Code. WADA itself is a private entity, founded by the International Olympic Committee ("IOC") as a result of an international joint effort between private sports authorities and state governments.[13] Thus, the Code, while technically a product of private law, is an international document with both public and private connotations,[14] so it is not immediately obvious how one should approach the task of interpreting its content.

The Code also has strong links with public law, in particular international public law. As of January 2015, 177 states have ratified, accepted, or acceded to the International Convention against Doping in Sports (the "UNESCO Convention")[15] with a stated purpose to "promote the prevention of and the fight against doping in sport, with a view to its elimination."[16] By ratifying the UNESCO Convention the states "commit themselves to the principles of the Code as the basis"[17] for the "legislation, regulation, policies or administrative practices" they undertake to enact to achieve the objectives of the Convention.[18] Such a reference to the "principles of the Code" is not sufficiently precise to be considered self-executing and thus does not create any enforceable rights or obligations.[19] Nevertheless, the Code itself is not "an integral part" of the UNESCO Convention[20] and therefore does not qualify as an international treaty within the meaning of the Vienna Convention on the Law of Treaties (the "Vienna Convention"),[21] which sets forth binding rules for interpreting treaties.[22]

1.2.2 Interpretation guidelines

Another peculiarity of the Code is its self-proclaimed attempt to protect itself from the influence of both public and private national laws, by declaring that it "shall be interpreted as an independent and autonomous text and not by reference to the existing law or statutes of the *Signatories* or governments" (Article 24.3 of the 2015 Code). Whether and to what extent the Code can truly claim independence from state legal systems for its interpretation is an issue not specifically addressed in this article. Given the special

[10] Note, while the possibilities for the elimination, reduction, or suspension of a period of *Ineligibility* set forth in Article 10.6 of the 2015 Code are specifically referred to as being tied to "[r]easons other than *Fault*," in reality, the degree of *Fault* is expressly considered in Article 10.6.3 (Prompt Admission of an Anti-Doping Rule Violation) in determining the magnitude of the reduction, so the inquiry might not be completely isolated from the concept of *Fault*.

[11] The nature of the Code as a contractual instrument arising from private law has been discussed and confirmed by the CAS. See, e.g., *USOC v. IOC*, para. 8.21 which noted that "[t]he WADA Code is neither a law nor an international treaty. It is rather a contractual instrument binding its signatories in accordance with private international law."

[12] Specifically, it is adopted through the WADA Code Review Process, which most recently culminated in the approval and adoption of the 2015 Code by WADA's Foundation Board at the World Conference on Doping in Sport that took place in Johannesburg, South Africa from November 12 to 15, 2013.

[13] WADA is a foundation organized under Swiss civil law, with its seat in Lausanne, Switzerland. However, its formation and its unique governance structure aims for an "equal partnership between the Olympic Movement and public authorities." WADA Statutes, Articles 1, 2 and 7. See also Lewis and Taylor (2014), paras B1.19–B1.25 for a discussion of the context in which WADA was created, arising from the need for a collaborative approach between the public and private sectors to successfully fight doping in sports.

[14] As described by one legal commentator, "[w]hile the Code operates in an area of significant public interest and importance and might be likened to a private legislative regime for sport, it functions as a contractual arrangement by which sporting organisations and associations regulate themselves in the anti-doping area" (David (2013), p. 122).

[15] UNESCO Convention, List of States.

[16] UNESCO Convention, Article 1.

[17] UNESCO Convention, Article 4(1).

[18] UNESCO Convention, Article 5.

[19] See, e.g., *Pechstein v. DESG*, Part 2 (A)(II)(3)(b)(bb)(1)(aaa).

[20] UNESCO Convention, Article 4(2).

[21] Vienna Convention, Article 2(1)(a). According to Article 2(1)(a) of the Vienna Convention, "'[t]reaty' means an international agreement concluded between States in written form and governed by international law."

[22] Vienna Convention, Part III, Section 3. Consequently, in our opinion, the Code is not directly subject to the interpretational rules outlined in the Vienna Convention.

considerations described in Sect. 1.2.1, our approach to developing interpretation guidelines for determining a basic sanction under the 2015 Code was to rely primarily on the provisions of the Code itself.[23] We endeavored to propose a functional, practical, and coherent framework for determining the basic sanction for violations of Article 2.1 that is aligned with the text of the relevant provisions and to the extent achievable avoids contradiction, redundancy, and ambiguity. When available, we supplemented our interpretation with information regarding the Code drafters' intent,[24] comparisons to the previous version of the Code (both the text of the previous Code and how it has been applied and interpreted in CAS cases), and an analysis of the legal and non-legal terms used within these provisions.

While this article attempts to provide insight and thoughts on how a basic sanction is determined under the 2015 Code, the CAS panels hearing the first cases will carry the onus to interpret the Code in a consistent and fair manner.

1.2.3 Distinguishing the facts and the law

This article aims for a presentation of fault-related issues for determining a basic period of *Ineligibility* that could assist hearing panels in clarifying conceptual uncertainties and act as an aid for judicial decision-making.

In practice, however, the assessment and the line of reasoning followed by hearing panels will also strongly depend on factors specific to the matter before them, such as procedural objections or the manner in which parties choose to present their case. Indeed, at least at the stage of the CAS proceedings, each party will have filed at least one written submission setting forth the facts it relies upon, producing evidence in support and invoking one or several provisions in Article 10 of the Code to back up its legal claims.

This procedural perspective is important when analyzing fault-related aspects of the Code sanctioning regime. Technically speaking, proof required from the parties can only pertain to issues of fact, while issues of law—including legal concepts enshrined in anti-doping regulations—are for CAS panels to interpret. In judicial proceedings, these two types of issues are usually treated separately, since the factual background of the dispute must be determined before the relevant provisions can be applied.

The Code itself, however, does not typically distinguish between the fact-finding process and application of legal rules to the facts. Thus, Article 10 uses throughout the concept whereby *Athletes* or the *ADO* are required to "establish" *No* (*Significant*) *Fault or Negligence* or, newly, *intentional*. The Examples in Appendix 2 of the Code further increase the confusion between fact finding and law (e.g., when stating in Example 1 that "[b]ecause the *Athlete* is deemed to have *No Significant Fault* that would be sufficient corroborating evidence...that the anti-doping rule violation was not intentional"). The Code only explicitly acknowledges the existence of the distinction between fact and law when referring to the *Athlete*'s obligation to "also establish how the *Prohibited Substance* entered his or her system" in the definition of *No* (*Significant*) *Fault or Negligence* in Appendix 1. In reality, however, this precision merely makes explicit a requirement that is inherent to any finding related to the *Athlete*'s fault: the hearing panel cannot make an assessment of the degree of fault or other subjective components without having previously determined the factual circumstances underlying the violation. While this has been characterized as common sense and inevitable by both CAS panels and the Swiss Supreme Court,[25] CAS panels rarely insist on the existence of a two-step process in their reasoning.

For the sake of clarity of presentation, this article relies on the terminology of the Code and will thus also generally refer to "establishing" subjective components, e.g., *No Significant Fault or Negligence* of the violation as a factor determining the sanction. It is useful, however, to do this in awareness that this terminology is only a shortcut to express a two-step process. Indeed, hearing panels may find themselves in a situation in which the factual background is disputed among the parties (e.g., whether the *Athlete* actually did take a particular measure to prevent the violation), or in a situation in which parties agree on the facts, but where the legal implications of these facts still need to be decided by the hearing panel (e.g., whether the measures taken by the *Athlete* were sufficient to justify a finding of *No Significant Fault or Negligence*). When this article describes the Code process for reaching a determination on the applicable basic sanction, this presupposes that the CAS panel determined the factual basis needed to conduct this assessment, taking into account the parties' respective burdens and standards of proof set by the Code regime (Article 3.1 of the 2015 Code).

[23] The following portions of the Code were particularly relevant:

- Article 10: Sanctions on Individuals (especially Articles 10.2, 10.4, 10.5, and 10.6.4);
- Article 24: Interpretation of the *Code* (especially Articles 24.2, 24.3, 24.4, and 24.6);
- Appendix 1: Definitions; and
- Appendix 2: Examples of the Application of Article 10.

[24] In particular, as expressed in the Overview Document and the various WADA Executive Committee Meeting Minutes.

[25] See, e.g., *I. v. FIA*, para 124. See also, *Hondo v. WADA*, para 7.3.2.

1.3 Structure of the article

The next section provides a comparative overview of the process for determining the length of a period of *Ineligibility* under the 2009 and 2015 versions of the Code (2). We also relate the concepts of *Fault* and *intentional* anti-doping rule violations (as newly defined in the 2015 Code) with the traditional anti-doping standard of *No* (*Significant*) *Fault or Negligence* (3). After considering this relationship, we present a process for determining a basic sanction under the 2015 Code for violations involving both non-*Specified* and *Specified Substances* (4). We then turn to the relevant provisions themselves, looking at the interpretation and application of the definition of *intentional* in the sense of Article 10.2 (5) and at the *Fault*-related reductions in Articles 10.4 and 10.5 (6). We highlight the mechanics of each stage of the process and provide examples throughout of how one could expect the revised Articles 10.2, 10.4, and 10.5 to be applied to familiar fact patterns from past cases before the CAS.

2 Comparison of the four steps to determine an appropriate sanction under the 2009 and 2015 versions of the Code

Like the 2009 version, the 2015 version of the Code contemplates a four-step process for determining an appropriate sanction.[26] One of the most notable changes reflected in the 2015 Code is the analysis in step one, as a violation is now immediately classified in broad strokes by determining whether it is *intentional* or not. A violation falling within the category of *intentional* violations is subject to an inflexible 4-year period of *Ineligibility*, while non-*intentional* violations are afforded more flexibility. These types of violations draw a maximum 2-year period of *Ineligibility*, with the possibility open for further *Fault*-related reductions. As mentioned,[27] a major theme of the revision process was to punish "real cheats" harshly and to provide more flexibility in other circumstances.[28] Thus, the mechanism chosen to achieve this somewhat contradictory goal was to revolve the sanctioning regime around this initial assessment of the level of *Fault* (i.e., whether the violation was *intentional* or not), and to afford flexibility only for those violations committed with a relatively low level of *Fault* (i.e., non-*intentional* violations).

This section discusses first each of the four steps from the 2009 version of the Code (2.1) and then from the 2015 version of the Code (2.2), highlighting the novel features in the latter. The full text of each of the key provisions in Articles 10.2, 10.4, 10.5, and 10.6 of the 2009 Code and 10.2, 10.4, 10.5, and 10.6 of the 2015 Code are reproduced in Appendices 1 and 2, respectively, for ease of reference.

2.1 The four steps to determine an appropriate sanction under the 2009 Code

2.1.1 Step one: determine the basic sanction

Under the 2009 Code, the first step in defining an appropriate sanction was determining which basic sanction applies. In the context of violations of Article 2.1, there were three Articles relevant to this task: Articles 10.2, 10.4, and 10.6, which are each summarized below:[29]

(i) Article 10.2 of the 2009 Code provided a starting point of a 2-year period of *Ineligibility* for violations of Article 2.1 (Presence of a *Prohibited Substance* or its *Metabolites* or *Markers*), Article 2.2 (*Use* or *Attempted Use* of a *Prohibited Substance* or *Prohibited Method*), or Article 2.6 (*Possession* of *Prohibited Substances* or *Prohibited Methods*).[30] This 2-year period of *Ineligibility* served as a "default" sanction length for all types of substances, provided that none of the requirements for reducing the period of *Ineligibility* under Articles 10.4 or 10.5, or for increasing the period of *Ineligibility* under 10.6 were present.

(ii) For *Specified Substances* and under certain circumstances, Article 10.4 of the 2009 Code defined the basic sanction ranging from a reprimand and no period of *Ineligibility*, to a maximum of a 2-year period of *Ineligibility* (depending on the degree of fault involved). This Article 10.4 applied if the *Athlete* or other *Person* could establish the following elements: (i) how the substance entered his or her body (or came into his or her *Possession*), by a balance of probability; and (ii) that the *Specified Substance* "was not intended to enhance [his or her] sport performance or mask the *Use* of a performance-enhancing substance," to the comfortable satisfaction of the hearing panel. If this provision was applicable, the panel determined the basic sanction as the appropriate length of period

[26] The four-step process is described in the Comment to Article 10.5.5 of the 2009 Code, and Article 10.6.4 of the 2015 Code and discussed in Sect. 4, below.

[27] See Sect. 1, above.

[28] Overview Document, p.1.

[29] 2009 Code, Comment to Article 10.5.5.

[30] Article 10.3 of the 2015 Code is not discussed in this article, but provides a basic sanction for all other types of anti-doping rule violations.

of *Ineligibility* within this range, depending on the *Athlete's* degree of fault.

(iii) Article 10.6 of the 2009 Code provided a means for the standard sanction of a 2-year period of *Ineligibility* to be increased to a maximum of 4 years when aggravating circumstances were present, unless the *Athlete* or other *Person* "promptly" admitted to the violation or could establish to the comfortable satisfaction of the hearing panel that he or she did not "knowingly commit the anti-doping rule violation." In either case, the maximum length of the period of *Ineligibility* was capped at 2 years.

2.1.2 Step two: apply possible reductions

In the second step to determine an appropriate sanction under the 2009 Code, "the hearing panel establishes whether there is basis for suspension, elimination or reduction of the sanction" under Articles 10.5.1 through 10.5.4. These Articles captured both fault-related reductions, such as *No Fault or Negligence* (Article 10.5.1) and *No Significant Fault or Negligence* (Article 10.5.2) and non-fault-related reductions, including *Substantial Assistance* (Article 10.5.3) and Admission of an Anti-Doping Rule Violation (Article 10.5.4).

2.1.3 Step three: account for multiple reductions

The third step under the 2009 Code was to determine "under Article 10.5.5 whether the *Athlete* or other *Person* is entitled to elimination, reduction or suspension under more than one provision of Article 10.5." The 2009 Code provided that in the event that more than one possibility for reduction or suspension was available under Article 10.5, the resulting sanction could not dip below one-quarter of the otherwise applicable period of *Ineligibility*.

2.1.4 Step four: determine the starting point of the period of Ineligibility

The fourth and final step was determining the starting point of the period of *Ineligibility* according to Article 10.9 of the 2009 Code.

2.2 The four steps to determine an appropriate sanction under the 2015 Code

2.2.1 Step one: determine the basic sanction

The first step in coming to an appropriate sanction under the 2015 Code remains formally the same as under the 2009 Code: determine the basic sanction.[31] However, the sanctioning regime has been reorganized to revolve around the central question of assessing the *Fault* of an *Athlete*. The following is a list of the key innovations associated with determining a basic sanction:

- *New initial phase of classifying a violation as intentional or not*.[32] The Examples in Appendix 2 of the 2015 Code set forth two phases for determining a basic sanction; in a first Phase A[33] the panel is asked to distinguish between *intentional* and non-*intentional* violations. If the violation is not *intentional*, the panel then considers the *Fault*-related reductions in Phase B.
- *Two different default sanctions, depending on the type of substance*.[34] The 2015 Code abandoned the approach taken in the 2009 Code, in which a "standard" 2-year period of *Ineligibility* would be increased to up to 4 years where "aggravating circumstances" were present, unless the *Athlete* or other *Person* could establish that the violation was not committed "knowingly" or a "prompt" admission was made. As this provision was "rarely used,"[35] the sanctioning regime was revised to "force" a panel to consider whether a violation was *intentional* (and thus subject to a 4-year period of *Ineligibility*) at the outset. However, the system does not operate in the same way for all kinds of substances. The revised Article 10.2, for violations of Articles 2.1, [2.2, and 2.6,] sets forth two different "default" sanctions, with different burdens of proof depending on the type of substance involved.
  - For non-*Specified Substances*, a 4-year period of *Ineligibility* is imposed, unless the *Athlete* or other *Person* is able to establish that the violation is not *intentional*.[36]

[31] The first of four steps described in the Comment to Article 10.6.4 of the 2015 Code to determine the appropriate characteristics of a sanction instructs a hearing panel to determine "which of the basic sanctions (Article 10.2, 10.3, 10.4, or 10.5) apply to the particular anti-doping rule violation."

[32] See in particular Sect. 1.1, above and Sect. 4.1, below, for a discussion of the available basic sanctions under the 2015 Code.

[33] The naming convention for these two phases within the first step (Phase A and Phase B) is our own (i.e., not from the Code)—see Sect. 4.2, below for a description of these two phases.

[34] The interpretation and application of these "default" sanctions are discussed for non-*Specified* and *Specified Substances* in Sects. 4.2.1 and 4.2.2, respectively, below. The term "default" describes the length of the period of *Ineligibility* that would be assigned to an *Athlete* in the event that the party carrying the burden of proof to establish a reduced or increased period of *Ineligibility* is unable to discharge this burden.

[35] Overview Document, p. 1.

[36] See Sect. 5.2.1, below, for a more detailed description of the process of establishing that a violation was not *intentional* under the 2015 Code.

  - For *Specified Substances*, the starting point is a 2-year period of *Ineligibility*, unless the *ADO* is able to establish that the violation was *intentional*.[37] An important consequence of this new approach is that the hearing panel no longer has flexibility for determining a basic sanction length for violations that are considered to be *intentional*: all *intentional* violations will draw a 4-year period of *Ineligibility*.[38]

- *Fault is considered under the first step of the four steps to determine an appropriate sanction*. Under the 2015 Code, the *Fault*-related grounds for elimination or reduction of a sanction [i.e., whether *No* (*Significant*) *Fault or Negligence* is present], which were considered under step two in the 2009 Code, are now considered as part of this first step. In other words, whereas in the 2009 Code the concept of *No* (*Significant*) *Fault or Negligence* was applied to *reduce* a basic sanction, in the 2015 Code the ranges of sanction length set forth in Articles 10.4 and 10.5 associated with violations concerning *No* (*Significant*) *Fault or Negligence* are themselves considered basic sanctions.
- *New provision for Contaminated Products.* Consistent with the revision goal to afford "more flexibility...in other specific circumstances,"[39] a new provision specifically for *Contaminated Products*, which are involved in violations that typically entrain a relatively low level of *Fault,* was added.[40]
- *Reworked Specified Substances provision that requires No Significant Fault or Negligence is established.* Just as in the 2009 Code, the 2015 Code also contains a special provision for sanctioning violations involving *Specified Substances*, but the revised approach requires only that an *Athlete* establish *No Significant Fault or Negligence* (which comprises the requirement to establish how the *Prohibited Substance* entered his or her system, save for *Minor Athletes*).
- *Special assessment for substances Used Out-of-Competition but prohibited In-Competition only*.[41] A concept that has been recognized in CAS jurisprudence,[42] but formerly without formal support in the sanctioning regime of the Code is that the "knowing" *Use Out-of-Competition* of substances prohibited *In-Competition* is fundamentally different from the "knowing" *Use* of substances prohibited at all times. For the former, this type of *Use* is only considered an anti-doping rule violation if the substance is still in the *Athlete's* system during an *In-Competition* test. For the latter, any *Use* would be considered an anti-doping rule violation. To account for this difference, the 2015 Code provides two "special assessments" (one for non-*Specified Substances* and one for *Specified* Substances) providing "easier" routes to establish the violation was not *intentional*.
- *Special assessment for drugs typically Used recreationally*.[43] For the first time, a special assessment is provided for one specific type of *Prohibited Substances*: cannabinoids. This special assessment provides a mechanism for an *Athlete* to establish that the violation was committed with *No Significant Fault or Negligence*, even if *Used* knowingly.
- *Minor Athletes are not required to establish the origin of the substance*.[44] An innovative feature of the 2015 Code is that *Minor Athletes* are no longer required to establish the origin of the substance to claim that they have *No* (*Significant*) *Fault or Negligence*, except perhaps when attempting to establish that the *Contaminated Products* provision applies.
- *Added a definition of Fault.* The 2015 Code newly includes a definition of *Fault*.[45]

2.2.2 *Step two: determine the length of the basic sanction*

If the basic sanction described in step one, provides for a range of sanctions (e.g., the *Contaminated Products* provision, which provides for a basic sanction ranging from a reprimand and no period of *Ineligibility* to a maximum period of *Ineligibility* of 2 years), the panel determines in a second step the length of an associated period of *Ineligibility* based on the *Athlete*'s degree of *Fault*. As this second step is beyond the scope of this article, we will not discuss issues that may arise in regard to assessing the degree of *Fault* within an available sanction range.

2.2.3 *Step three: apply non-Fault-related reductions*

In the 2015 Code, in the third step to determine an appropriate sanction, the panel considers whether any of the non-*Fault*-related grounds for elimination, suspension, or reduction of a sanction apply, which includes a look (where relevant) at the provision governing the simultaneous application of multiple grounds for the reduction of a sanction

[37] See Sect. 5.2.2, below, for a more detailed description of the process of establishing *intentional* under the 2015 Code.

[38] The possibility exists for this 4-year period of *Ineligibility* to be eliminated, reduced, or suspended under Article 10.6 of the 2015 Code, which is considered in the third step of determining an appropriate sanction, but is beyond the scope of this article and will not be specifically addressed.

[39] Overview Document, p. 1

[40] See Sect. 6.2.3, below, for an analysis of this new provision on *Contaminated Products*.

[41] See Sect. 5.1, below, for a full discussion regarding substances *Used Out-of-Competition* but prohibited *In-Competition* only.

[42] See, e.g., *WADA v. de Goede*. This case is discussed in Sect. 5.1.2.3, below.

[43] See Sect. 6.2.2, below, for a discussion of this special assessment.

[44] See Sect. 3.1.1, below, for a discussion of this innovation in the 2015 Code.

[45] This new definition of *Fault* is discussed in Sect. 3.1.1, below.

(Article 10.6.4). Under the 2009 Code, these non-fault-related grounds were considered and applied in the second step (except for the presence of a "prompt admission"), which was considered in the first step.

The two main options for non-*Fault*-related reductions under the 2015 Code are as follows: (i) providing *Substantial Assistance* to an *ADO* in discovering or establishing anti-doping rule violations (Article 10.6.1) or (ii) admitting to the anti-doping rule violation under the terms set forth in Articles 10.6.2 or 10.6.3.

Two innovations are worth mentioning:

(i) Under the *Substantial Assistance* provision (Article 10.6.1), a panel can now suspend the full period of *Ineligibility* and other *Consequences* associated with a sanction in exceptional circumstances and with WADA's approval. Under the 2009 Code, the maximum allowable part of a sanction that could be suspended was three-quarters of an otherwise applicable period of *Ineligibility*.

(ii) The effects of a prompt admission have changed considerably in the 2015 Code. In the 2009 Code, a prompt admission made when confronted with an anti-doping rule violation would effectively cap a period of *Ineligibility* at 2 years. In contrast, under the 2015 Code, the prompt admitter needs to obtain approval from both WADA and the relevant *ADO* for any reduction and the extent of the reduction is dependent on the "degree of *Fault*" and the "seriousness" of the violation. Since Article 10.6.3 applies only to anti-doping rule violations "sanctionable" with a 4-year period of *Ineligibility* under Articles 10.2.1 or 10.3.1 of the Code (i.e., *intentional* violations), many cases should by definition involve a high degree of *Fault*, which could reduce the appeal of this provision for the *Athlete*.

2.2.4 *Step four: determine the starting point of the period of Ineligibility*

Like the 2009 version of the Code, the fourth and final step of the 2015 Code is determining the starting point of the period of *Ineligibility* according to Article 10.11 of the 2015 Code (Article 10.9 of the 2009 Code).

2.3 Focus on step one of the 2015 Code

In the following sections, we will focus our analysis on only the first of these four steps: determining a basic sanction. Before stepping through this process (4), it is worth discussing the fundamental concepts of "fault," "negligence," and "intention" as they play a decisive role in determining the basic sanction (3).

3 The interplay among the concepts of *Fault*, negligence, and "intention" under the 2015 Code

A basic assumption in this article is that the 2015 Code treats *intentional* and non-*intentional* as mutually exclusive categories of anti-doping rule violations. This premise, in and of itself, should not be overly controversial. However, we also suggest that violations committed with *No* (*Significant*) *Fault or Negligence* are categorically considered as non-*intentional*. Simply put, if a violation is *intentional* as understood in the 2015 Code, it should not also be considered as committed with *No* (*Significant*) *Fault or Negligence*, and vice versa.

Each of the terms "fault," "negligence," and "intentional" carries legal connotations that are not consistent across the world's various legal traditions. In many jurisdictions, low-fault and intentional violations are not always considered mutually exclusive outside the context of the 2015 Code. Whereas "intention" generally speaks of the (actual or implied) mental state or mental resolution of the person committing the act,[46] "fault" or "negligence" concern the breach of a duty or failure to live up to an expected standard of care. Thus, a set of facts where a person could knowingly engage in certain conduct, but due to mistake, incapacity, or other mitigating circumstances had a low level of fault is conceivable.

Although situations involving an overlap between intentional conduct and conduct that exhibits a low level of fault may be rare, they are not unheard of in anti-doping jurisprudence. Indeed, a finding of *No Significant Fault or Negligence* has not always been necessarily excluded in cases involving intentional (as traditionally understood in a legal context) conduct. As a concrete example, in a CAS matter adjudicated under the 2003 Code, a young *Athlete* willfully declined to submit to *Sample* collection (which is a violation under Article 2.3), yet the panel found her reasons for failing to submit and the circumstances of the case to be truly exceptional and reduced the sanction stemming from her "intentional" violation on the grounds of *No Significant Fault or Negligence*.[47] Whether the reasoning could still be upheld under the new definitions of

[46] See, e.g., Black's Law Dictionary (2004), p. 825, definition of "intent": "[t]he state of mind accompanying an act, especially a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it."

[47] *WADA v. Scherf*, para 9.13: "[t]he Panel finds that exceptional circumstances did exist in this case, and agrees that Ms. Scherf bears No Significant Fault or Negligence, because her fault or negligence when viewed in light of all the circumstances was not significant in relation to her anti-doping rule violation. The Panel would, however, wish to make it clear that this is a rare case in which an athlete who has failed or refused to provide a sample will be able to satisfy a CAS Panel that the sanction is to be reduced on the ground of No Significant Fault or Negligence. Such cases will not often occur."

Fault and *intentional* added to the 2015 Code is questionable.

These new definitions will be discussed in the next subsection. For the purposes of the introductory remarks, it is worth noting that these definitions, along with the stated objective of the sanctioning regime, and the structure of the provisions themselves suggest that the term *intentional* is to be understood as an opposing concept to the traditional anti-doping concept of *No* (*Significant*) *Fault or Negligence*. In other words, a finding that a violation is *intentional* under the 2015 Code would seem to comprise more than acting with knowledge (or recklessness) alone. Rather, it suggests that a full look at the factual circumstances of a case is warranted to confirm that violations involving knowing or reckless conduct truly represent a substantial and inexcusable breach of an *Athlete's* duties under the Code.

3.1 Definitions

3.1.1 Definition of Fault under the 2015 Code

Fault is newly defined in Appendix 1 of the 2015 Code as follows:

> *Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.*

The Comment to the definition of *Fault* is as follows:

> *The criteria for assessing an Athlete's degree of Fault is the same under all Articles where Fault is to be considered. However, under 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.*

The core of the definition of *Fault* is found in the first sentence and points to a rather broad concept. The focus in this definition is on the ideas of "any breach of duty" and "any lack of care" exhibited by *Athletes* or other *Persons*. The phrase "any breach of duty" evokes both violations committed knowingly and violations committed negligently. In the 2015 Code, the term *Fault* is indeed used in association with both violations in the *intentional* range,[48] and at the other end of the spectrum, with violations committed with *No* (*Significant*) *Fault or Negligence*.

The definition of *Fault* also implies that an assessment of an *Athlete's* degree of *Fault* is done in light of the circumstances of a particular case. In other words, *Fault* under the 2015 Code is not a "one-size fits all" concept. Rather, as provided in the definition, the assessment is conducted by evaluating the "specific and relevant" circumstances that could explain "the *Athlete*'s or other *Person*'s departure from the expected standard of behavior." It therefore leaves open the possibility that even significant departures from the expected standard of care or important breaches of duty might be subject to a credible and relevant (non-doping) explanation, which could lead to a relatively low level of *Fault*. This holistic approach is reflected, as well, in the definition of *No Significant Fault or Negligence* in Appendix 1, according to which the *Athlete*'s *Fault* is viewed in the "totality of the circumstances" and in relation to the specific anti-doping rule violation. So, not only is the absolute magnitude of the breach evaluated, but a fact-specific look is taken at the circumstances of the case to assign an appropriate level of *Fault*.

A novel feature of the 2015 Code is that *Minors* are no longer required to establish how the substance entered their system as a prerequisite to establishing that a violation was committed with *No* (*Significant*) *Fault or Negligence*. To reflect this change, the definitions of both *No Fault or Negligence* and *No Significant Fault or Negligence* in Appendix 1 are now guided by the addition of the following sentence: "[e]xcept in the case of a *Minor*, for any violation of Article 2.1, the *Athlete* must

[48] 2015 Code, Article 10.6.3 (Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1), which only applies to potentially *intentional* violations, allows for a reduction from a 4-year period of *Ineligibility* down to a 2-year period of *Ineligibility* depending on the *Athlete*'s degree of *Fault.*

also establish how the *Prohibited Substance* entered his or her system."

The reasons underlying this new policy are well illustrated with the facts of the *I. v. FIA* CAS award. In this matter, a 12-year-old Polish *Athlete* finished second in a *Competition* in the context of the German Junior Karting Championship when he underwent an *In-Competition Doping Control*, which revealed the *Specified Substance* nikethamide in his urine *Sample*. The young driver argued, among other things, that anti-doping regulations should not be applied to *Minors,* generally, nor to him particularly and asked to be "acquitted" of the doping charges. His arguments largely revolved around a complete ignorance surrounding the scope and extent of his obligations under the relevant anti-doping regulations, as well as to the substance itself and how it might have entered his system. The CAS panel categorically rejected his arguments about the prospect of excluding *Minors* from the ambit of anti-doping regulations, finding that this position did not "appear to take into account the need to protect the other athletes' fundamental right to compete in a clean sport," of which an indispensable part was submitting all *Athletes*, even *Minors*, to the same rules.[49] That said, the CAS panel then turned to the violation itself, and found that since the *Athlete* was unable to establish the factual background for the violation (the origin of the substance) the arbitrators were unable to consider any circumstances relevant to fault that could have reduced the period of *Ineligibility* below the default 2 years.[50] However, the panel decided that this was one of the rare cases in which proportionality dictates an exceptional consideration of the specific circumstances of the case beyond the flexibility afforded by the Code.[51] Accordingly, the CAS panel reduced the sanction imposed on the young *Athlete* from a 2-year to an 18-month period of *Ineligibility*.[52]

The revised approach to sanctioning *Minor Athletes* under the 2015 Code remedies the limitations in the 2009 Code identified in the *I. v. FIA* CAS award. This exception allows CAS panels to evaluate the surrounding circumstances of a doping violation involving a *Minor* to grant a reduction even when the origin of the substance in the *Minor's* system is not established, without excluding the application of anti-doping regulations to *Minor Athletes*. Of course, removing the requirement for establishing the origin of the substance for *Minor Athletes* creates a risk of depriving the hearing panel of (at least part of) the factual basis for making an assessment of the *Athlete*'s degree of *Fault* in committing the violation, and thus de facto results in creating a special status for *Minor Athletes* on the sole basis of their age, irrespective of their level of experience or competition. That said, this exception does not deprive panels of the opportunity to take into account the *Athlete's* level of experience or competition when assessing the factual basis of the case; rather, it can be seen as opening the door for a reduction of a sanction in cases where factors related to age (i.e., incapacity, undue influence, or basic notions of fairness) overwhelm those related to the mode of entry. It would be expected that older and more experienced *Minor Athletes*, for example, would still find it very difficult to establish an adequate factual basis for reductions based on *No* (*Significant*) *Fault or Negligence* without establishing how the *Prohibited Substance* entered their system, even if not technically required.[53]

3.1.2 *Definition of intentional in Article 10.2.3 of the 2015 Code*

Article 10.2.3 provides the following general definition of *intentional*:

> *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*

From a legal perspective, the second sentence would appear as the core of the definition and speaks to both the concept of acting with knowledge and with recklessness (or dolus eventualis, in civil law jurisdictions) in the commission of an anti-doping rule violation. This definition evokes certain principles of criminal law, e.g., mistake of law, general or specific intent, mens rea, or dolus eventualis. These principles, however, do not clearly delineate the envisioned scope of situations that the definition should encompass.[54]

In legal doctrine and jurisprudence, the concept of intentional violations generally includes both knowledge and recklessness. These concepts have been sporadically captured in anti-doping jurisprudence by the use of the terms "direct" intent (knowledge) and "indirect" intent

[49] *I. v. FIA*, para 114.

[50] *I. v. FIA*, para 124.

[51] *I. v. FIA*, para 133.

[52] *I. v. FIA*, para 143.

[53] See also Rigozzi et al. (2013), para 137 for a discussion of this new exception for *Minor Athletes*.

[54] See also Rigozzi et al. (2013), Section 4.2.d for a discussion of the definition of *intentional* in Article 10.2.3 of the 2015 Code.

(recklessness),[55] as set forth in the following passage from the *Qerimaj* CAS award:[56]

> *Intent is established – of course – if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete's behaviour as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a "minefield" ignoring all stop signs along his way, he may well have the primary intention of getting through the "minefield" unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent.*

Not all previous CAS panels have supported taking such a broad view of the concept of intentional anti-doping rule violations. In the recent *Bataa* case, the panel declined to accept the reasoning in the above-cited *Qerimaj* award, for several reasons.[57] One reason, which is no longer relevant under the 2015 Code, was a concern that interpreting intent so broadly as to also include "indirect intent" would be difficult to square with the principle of contra proferentem (i.e., "an ambiguity in a regulation must be construed against the drafter of such regulation").[58] Whereas the 2009 Code did not explicitly include a reference to "indirect intent," the definition of *intentional* in Article 10.2.3 of the 2015 Code does expressly include what would have been described as akin to "indirect intent" under the *Qerimaj* award, thus removing any ambiguity and hence any need to resort to this principle. However, some aspects of the other reasons set forth in the *Bataa* award remain relevant in defining the scope of *intentional* violations under the 2015 Code. In particular, the *Bataa* panel echoed observations made in previous awards that the prospect of distinguishing between recklessness (or indirect intent as used in the *Qerimaj* award) and negligence (in its various forms) is "difficult to establish in practice,"[59] and found that attempting to draw this line would run contrary to principles of legal certainty. The panel preferred a narrow definition of *intentional* excluding entirely the possibility of a "reckless" violation being considered as *intentional* (an exclusion that would be less feasible under the new definition of intention in the 2015 Code). The arbitrators were also concerned that applying a concept of recklessness in the context of sports supplements would amount to adopting the reasoning in the *Foggo* and *Kutrovsky* cases,[60] namely that an intention to ingest a product extends to all the ingredients of the product, known or unknown, which they were not prepared to do.[61]

The explicit inclusion in the definition of *intentional* of all violations committed with knowledge or recklessness does point to a rather broad scope of application. That said, the term "cheat" in the first sentence could impact, and even limit, the scope of violations that ought to be considered *intentional*. Its presence in the definition of *intentional* certainly leads one to believe that the inquiry should at least be colored with a sense of wrongdoing.[62] This would be in line with the declared purpose of the revision to focus on the so-called real cheats. Ultimately, the primary use of the reference may evolve in practice to a form of gut check. It would thus remind hearing panels to assess the circumstances of the case and refrain from imposing a 4-year period of *Ineligibility* if they accept that the *Athlete* did not intend to "cheat," even if technically the *Athlete's* violation was committed with knowledge or recklessness. Violations involving the recreational *Use* of drugs immediately come to mind in this respect and will be discussed in more detail in Sect. 6.2.2.

3.1.3 (No) definition of negligence under the 2015 Code

No definition of the "negligence" component of the reduction based on *No* (*Significant*) *Fault or Negligence* is provided in the Code. Thus, how this component is to be understood within the specific context of the Code, namely what its exact bearing is intended to be in the new system, is not clear. As a result, this component is unlikely to play a distinct role in the new sanctioning regime other than as a remnant of the initial 2003 Code, or as a factor in distinguishing between *intentional* and non-*intentional* violations (i.e., insofar as all violations exhibiting a form of negligence fall on the side of not *intentional*). One may legitimately

[55] In this article, we will use the term "recklessness" to signify this concept of "indirect intent" as described in the cited CAS Award, and in reference to this portion of the definition of *intentional*: "knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk." We understand the term *intentional* as encompassing both direct and indirect forms of intent within the meaning of Swiss criminal law. See the definition of "intention" in the Swiss Criminal Code, Article 12(2) as opposed to the definition of "negligence" in Article 12(3).

[56] See *Qerimaj v. IWF*, para 8.14.

[57] *WADA v. Bataa*, para 54.

[58] *WADA v. Bataa*, para 50.

[59] *WADA v. Bataa*, para 55.

[60] See also Rigozzi and Quinn (2013) for a discussion of the reasoning adopted in *Foggo v. NRL* and *Kutrovsky v. ITF*.

[61] *WADA v. Bataa*, para 57.

[62] See Sect. 5.2.1, below for a discussion regarding interpreting the word "cheat" in this definition of *intentional*.

wonder, however, whether the clarity of the system would not have been enhanced by deleting the reference to "negligence" in favor of a more straightforward terminology of *No Fault* and *No Significant Fault*, a wording already adopted at times by commentators and practitioners in everyday usage and actually used in the Code itself.[63]

The above observations about the definitions raise the broader question of how to organize the interplay between intention and the *No* (*Significant*) *Fault or Negligence* exception. The next section deepens the analysis of this interplay.

3.2 The proposed mutually exclusive relationship between *intentional* violations and *No* (*Significant*) *Fault or Negligence* violations

This article suggests that the most coherent interpretation of the sanctioning regime requires viewing *intentional* violations and those committed with *No* (*Significant*) *Fault or Negligence* as mutually exclusive categories of violations. Consequently, *intentional* violations would not be subject to *Fault*-related reductions. This view creates a simple, functional, and comprehensible framework, consistent with WADA's stated revision goal to make the Code clearer and shorter[64] and in line with the stated underlying philosophy of the revised Code. Furthermore, and more importantly, understanding *intentional* as exclusive of *No Significant Fault or Negligence* is consistent with a systematic interpretation of the 2015 Code, for the following reasons:

- Although Articles 10.2, 10.4, and 10.5.1 do not place any explicit limitations on the simultaneous application of the two concepts [*intentional* and *No* (*Significant*) *Fault or Negligence*], Article 10.5.2 does include this type of limitation. In relevant part, the Comment to Article 10.5.2 limits its application to violations where intent is not "part of a particular sanction." It is not inconceivable that this limitation in Article 10.5.2 could be interpreted as applicable to Articles 10.4 and 10.5.1 as well. At a minimum, it certainly supports the notion that a violation that fulfills the requirements for a finding of *intentional* cannot simultaneously qualify for a *Fault*-related reductions—in other words if a violation is *intentional*, it would not be, by definition, committed with *No* (*Significant*) *Fault or Negligence*.
- Punishing "real cheats" (those who committed anti-doping rule violations with a high level of *Fault*) more severely than those who did not is consistent with the underlying philosophy of the revision of the sanctioning regime. Harsher punishment, however, is only available when the violation is considered to be *intentional*.
- The Examples provided in Appendix 2 of the Code also support the view that the concepts of *intentional* and *No* (*Significant*) *Fault or Negligence* are intended to be mutually exclusive. Indeed, all Examples dealing with the relevant provisions seem to preclude a reduction based on *Fault* (i.e., Articles 10.4 and 10.5 are not available) when a violation is considered to be *intentional* and, conversely, exclude a finding of *intentional* in circumstances where the *Athlete* is able to establish *No Significant Fault or Negligence*.[65]

To be clear, we are not suggesting that it would be impossible for violations to both be committed "knowingly" in a traditional legal sense and with *No* (*Significant*) *Fault or Negligence*. We are proposing instead that the best interpretation of *intentional*, as defined and used in the 2015 Code, is as a mutually exclusive category of violations to non-*intentional* violations, including those committed with *No* (*Significant*) *Fault or Negligence.* We are also proposing that the structure and content of the sanctioning regime, and the underlying philosophy of the revision process, support an interpretation of *intentional* violations as those committed with a high level of *Fault*, which comprises an assessment of the circumstances of the case to confirm that knowing (or reckless) *Use* truly demonstrates an intention to cheat. In the next sections, we will show how the suggested interpretation can coherently be used to determine the basic sanction.

[63] For example, the "negligence" limb is left out in the 2015 Code, Appendix 2, Example 1, para 1 and in the Overview Document, p. 2.

[64] Overview Document, p. 6.

[65] 2015 Code, Appendix 2, Example 2, para 2: "[b]ecause the violation was intentional, there is no room for a reduction based on *Fault* (no application of Articles 10.4 and 10.5)." It should be noted, however, that the Examples treat establishing *No Significant Fault or Negligence* as "corroborating evidence" that the violation was not *intentional*. While the use of the term "corroborating" to modify evidence in this sense leaves the door open for the possibility that establishing *No Significant Fault or Negligence* does not necessarily lead to a finding of not *intentional*, it generally supports the notion that in most cases, it would lead to such a finding. See Example 1, para 1: "[b]ecause the *Athlete* is deemed to have *No Significant Fault* that would be sufficient corroborating evidence (Articles 10.2.1.1 and 10.2.3) that the anti-doping rule violation was not intentional." See also, Appendix 2, Example 3, para 1 of the 2015 Code: "[b]ecause the *Athlete* can establish through corroborating evidence that he did not commit the anti-doping rule violation intentionally, i.e., he had *No Significant Fault* in *Using* a *Contaminated Product* (Articles 10.2.1.1 and 10.2.3), the period of *Ineligibility* would be two years (Article 10.2.2)."

4 Overview of the process for determining a basic sanction

As explained in Sect. 2.2, a basic sanction is determined in the first step of a four-step process to determine an "appropriate sanction" under the 2015 Code, as follows: "[f]irst, the hearing panel determines which of the basic sanctions (Article 10.2, 10.3, 10.4, or 10.5) apply to the particular anti-doping rule violation."[66] In the 2015 Code, the term "basic sanction" describes the initial period of *Ineligibility* determined by a hearing panel to apply to a particular anti-doping rule violation. More specifically, it comprises the periods of *Ineligibility* listed in Articles 10.2, 10.4, and 10.5. It therefore represents the period of *Ineligibility* after the consideration of the *Fault*-related provisions, but before the consideration of potential (non-*Fault*-related) reductions available under Article 10.6, e.g., providing *Substantial Assistance* (Article 10.6.1), or admitting to a violation under certain circumstances (Article 10.6.2 and 10.6.3).

At the end of this first step in the overall process toward determining an appropriate sanction, the panel should arrive at only one basic sanction.[67] The 2015 Code provides for different basic sanctions, depending on whether the substance present in the *Athlete's Sample* is a *Specified Substance* (4.1). In both cases, the Code contemplates a two-phase approach (4.2).

4.1 Available basic sanctions

While the term "basic sanction" is not specifically defined under the 2015 Code, the provisions listed (Articles 10.2, 10.4, and 10.5) in step one of the Comment to Article 10.6.4 reveal the basic sanctions potentially available for violations of Article 2.1, distinguishing between non-*Specified Substances* (4.1.1) and *Specified Substances* (4.1.2).

4.1.1 Possible basic sanctions for violations involving non-Specified Substances

The following is a compilation of all potential basic sanctions available in Articles 10.2, 10.4, and 10.5 for violations of Article 2.1, involving non-*Specified Substances.*

Fault-related reductions:

- *No Fault or Negligence* (Article 10.4) (basic sanction: no period of *Ineligibility*) If the *Athlete* is able to establish by a balance of probability "that he or she bears *No Fault or Negligence*," which comprises the requirement to establish the origin of the substance (save for *Minors*), any otherwise applicable period of *Ineligibility* is eliminated.
- *Contaminated Product* (Article 10.5.1.2) (basic sanction: reprimand and no period of *Ineligibility* to a maximum of a 2-year period of *Ineligibility*) If the *Athlete* is able to establish by a balance of probability that he or she bears *No Significant Fault or Negligence* and that the *Prohibited Substance* originated from a *Contaminated Product*, according to the definition in Appendix 1 of the Code, the basic sanction ranges from a reprimand and no period of *Ineligibility* up to a maximum 2-year period of *Ineligibility*, depending on the *Athlete's* degree of *Fault*.
- *No Significant Fault or Negligence* (Article 10.5.2) (basic sanction: 1- to 2-year period of *Ineligibility*) If the violation does not stem from a *Contaminated Product* and the *Athlete* is able to establish by a balance of probability "that he or she bears *No Significant Fault or Negligence*," which comprises the requirement to establish the origin of the *Prohibited Substance* (save for *Minors*), the basic sanction is a period of *Ineligibility* ranging from 1 to 2 years, depending on the *Athlete's* degree of *Fault*.

If no *Fault*-related reductions apply, the basic sanction is as follows:

- *Special assessment for non-Specified Substances prohibited In-Competition only* (Article 10.2.3) (basic sanction: 2-year period of *Ineligibility*). If the *Athlete* is not able to establish *No* (*Significant*) *Fault or Negligence* for the presence of a substance prohibited *In-Competition* only, but is able to "establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance," the basic sanction is a 2-year period of *Ineligibility*.

[66] 2015 Code, Comment to Article 10.6.4.

[67] While the language in the first step as set forth in the Comment to Article 10.6.4 is not clear with regard to whether one or more basic sanctions might be applicable, the language in the second step unambiguously expects only one basic sanction to be determined in the first step. The first step instructs panels to determine "which of the basic sanctions (Article 10.2, 10.3, 10.4, or 10.5) apply" to a particular violation. Two observations arise from this wording: (i) by using the word "apply" rather than "applies" in this phrase, the possibility of multiple basic sanctions cannot be immediately excluded. This grammatical ambiguity is compounded by the change in wording from "applies" to "apply" between the 2009 and 2015 version of the Code, which could be interpreted as a purposeful modification to allow for multiple basic sanctions; (ii) The use of the word "or" in the list of possible sanctions is not conclusive either as to whether only one, or whether multiple Articles listed might be relevant in determining a basic sanction or sanctions. In spite of these observations, the second step of the overall process presented in Sect. 2.2, above, unambiguously takes as its starting point only one basic sanction. Conceptually, choosing one basic sanction over multiple basic sanctions is in any event clearer and more in line with a practical, functional, and proportionate sanctioning regime, leading us to conclude that the hearing panel must select one basic sanction only.

- *Otherwise not intentional* (Article 10.2.3) (basic sanction: 2-year period of *Ineligibility*) If the *Athlete* is not able to establish that he or she bears *No* (*Significant*) *Fault or Negligence*, but is nevertheless able to establish that the violation does not fall within the definition of *intentional* as set forth in Article 10.2.3, the basic sanction is a 2-year period of *Ineligibility*.
- *Default situation* (Article 10.2.1.1) (basic sanction: 4-year period of *Ineligibility*). If the *Athlete* is not able to discharge his or her burden to establish by a balance of probability that the violation was not *intentional* (by any of the Pathways described in Sect. 4.2.1.1), then the basic sanction is a 4-year period of *Ineligibility*. The *ADO* does not bear a burden to establish that a violation was *intentional* for a panel to assign a basic sanction of a 4-year period of *Ineligibility* in the case of non-*Specified Substances*.

4.1.2 *Possible basic sanctions for violations involving Specified Substances*

The following is a compilation of all potential basic sanctions available in Articles 10.2, 10.4, and 10.5 for violations of Article 2.1, involving *Specified Substances.*

Fault-related reductions:

- *No Fault or Negligence* (Article 10.4) (basic sanction: no period of *Ineligibility*) If the *Athlete* is able to establish by a balance of probability "that he or she bears *No Fault or Negligence*," which comprises the requirement to establish the origin of the substance (save for *Minors*), any otherwise applicable period of *Ineligibility* is eliminated.
- *No Significant Fault or Negligence* (Article 10.5.1) (basic sanction: reprimand and no period of *Ineligibility* to a maximum of a 2-year period of *Ineligibility*) If the *Athlete* is able to establish by a balance of probability that he or she bears *No Significant Fault or Negligence*, whether through Article 10.5.1.1 (*Specified Substances*) or in the context of a *Contaminated Product* in Article 10.5.1.2,[68] which comprises the requirement to establish the origin of the substance in both cases (save for *Minors,* at least in the case of *Specified Substances*), the basic sanction ranges from a reprimand and no period of *Ineligibility* to a maximum of a 2-year period of *Ineligibility*, depending on the *Athlete's* degree of *Fault*.
- *Special assessment for cannabinoids* (*No Significant Fault or Negligence*) (Article 10.5.1.1 and Appendix 1) (basic sanction: reprimand and no period of *Ineligibility* to a maximum of a 2-year period of *Ineligibility*) According to the Comment to the definition of *No Significant Fault or Negligence* in Appendix 1, for violations involving cannabinoids, if *Athletes* can establish *No Significant Fault or Negligence* by "clearly demonstrating" that the "context of the *Use* was unrelated to sport performance," the violation is established to be committed with *No Significant Fault or Negligence*.

If no *Fault*-related reductions apply, the basic sanction is as follows:

- *Special assessment for Specified Substances prohibited In-Competition only* (Article 10.2.3) (basic sanction: 2-year period of *Ineligibility*). If the *Athlete* is not able to establish that he or she bears *No* (*Significant*) *Fault or Negligence* and the relevant substance is prohibited *In-Competition* only, but the *Athlete* is able to establish that the substance was *Used Out-of-Competition* the *Athlete* receives a presumption that the violation was not *intentional* and the basic sanction is a 2-year period of *Ineligibility* (unless the *ADO* is able to rebut this presumption by establishing a special understanding of *intentional*; see Sect. 5.1.2)
- *Default situation* (Article 10.2.1.2 and 10.2.2) (basic sanction: 2-year period of *Ineligibility*). If the *ADO* is not able to establish that the violation was *intentional*, no special assessment applies, and if the *Athlete* is not able to discharge his or her burden to establish by a balance of probability that one of the *Fault*-related reductions applies, the basic sanction is a 2-year period of *Ineligibility*.

4.2 Overview of Phases A and B to determine a basic sanction

For both *Specified* and non-*Specified Substances*, the first step to determine an appropriate sanction (deciding on a basic sanction) is approached in the Code as a two-phase process.[69] In the first phase (Phase A), the panel decides whether a violation was *intentional*. Then, in the second phase (Phase B), if the violation is not *intentional* the panel determines if any of the *Fault*-related reductions set forth in Articles 10.4 or 10.5 apply. While these two phases are similar for violations involving both non-*Specified* and *Specified Substances*, the burden of proof in Phase A (distinguishing between *intentional* and non-*intentional*

[68] The interplay between the *Contaminated Products* provision (Article 10.5.1.2) and the *Specified Substances* provision (Article 10.5.1.1) is not entirely clear. However, the possibility of applying the *Contaminated Products* provision that in the context of *Specified Substance* is not excluded in the text of these provisions, as discussed in Sect. 6.2.3.1, below.

[69] See 2015 Code, Appendix 2, Examples 1–4.

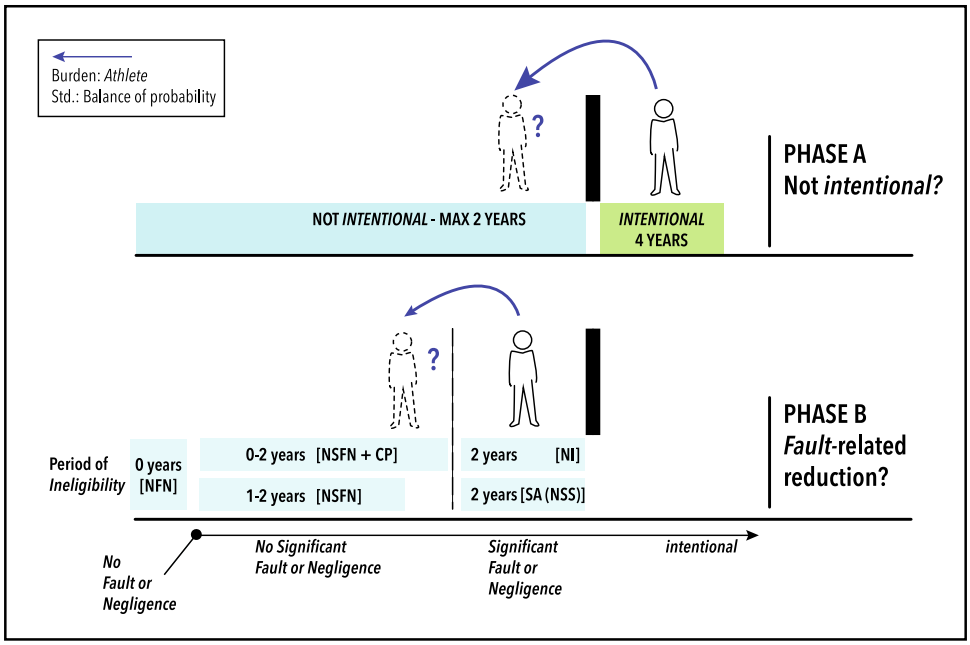

Fig. 1 Two-phase process for determining a basic sanction for non-*Specified Substances*

violations) is different depending on whether the violation involves a *Specified Substance* or not: for non-*Specified Substances*, the burden is on the *Athlete* to establish that the violation was not *intentional*, whereas for *Specified Substances*, the burden rests with the *ADO* to establish that the violation was *intentional*. The divergent allocation of the burden of proof leads to different processes for determining a basic sanction for each of these types of substances, as described in the following subsections. Giving an overview of the process at this stage is essential to understanding how the provisions are applied in practice, as discussed in Sects. 5 and 6.[70]

4.2.1 Non-Specified Substances

As shown in Fig. 1, the two-phased inquiry for determining a basic sanction for violations involving non-*Specified Substances* starts with Article 10.2, i.e. the question of whether the violation was (not) *intentional*.

4.2.1.1 Phase A: can the Athlete establish the violation was not intentional (Article 10.2.1.1)? For non-*Specified Substances*, the first phase for determining a basic sanction is to determine whether the violation was not *intentional*.[71] Article 10.2.1.1 instructs the hearing panel that the period of *Ineligibility* shall be 4 years where "[t]he anti-doping rule violation does not involve a *Specified Substance*, unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional."

As shown in Fig. 2, in practical terms, the *Athlete* starts Phase A with a 4-year period of *Ineligibility*. Then, as depicted by the arrows pointing to the numbers 1, 2, and 3, Phase A asks whether the *Athlete* can establish (by a balance of probability)[72] that the violation was not *intentional*. If so, the *Athlete* is able to escape the 4-year period of *Ineligibility* box, and move over the threshold into the realm of non-*intentional* violations, which means that his or her maximum period of *Ineligibility* would be 2 years. If the *Athlete* cannot establish that the violation was not *intentional*, a 4-year period of *Ineligibility* applies, or in other words, no possibility exists to move to Phase B (i.e., out of the 4-year box). If it can be established that the violation was not *intentional*, Article 10.2.2 applies: the period of *Ineligibility* is a maximum of 2 years, and possibly less if the non-*intentional* character of the violation was established through Article 10.4 (*No Fault or Negligence*),

[70] A note on naming conventions in this article: in the 2015 Code, the numbering and description of the steps to determine an appropriate sanction is not completely consistent as described in the Comment to Article 10.6.4 as compared to the Examples appearing in Appendix 2. In particular, as illustrated in Fig. 1, the Examples break up the first step as described in the Comment to Article 10.6.4 (determining a basic sanction) into two discrete sub-steps: (i) determining whether the violation was intentional, and (ii) assessing the possibility for Fault-related reductions. In this article, we refer to the first sub-step (i) as "Phase A," and the second (ii) as "Phase B."

[71] See 2015 Code, Appendix 2, Examples 1–4, which describe Article 10.2 as the starting point in determining an appropriate sanction.

[72] 2015 Code, Article 3.1 sets forth the standard of proof required by *Athletes* as follows: "[w]here the *Code* places the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability."

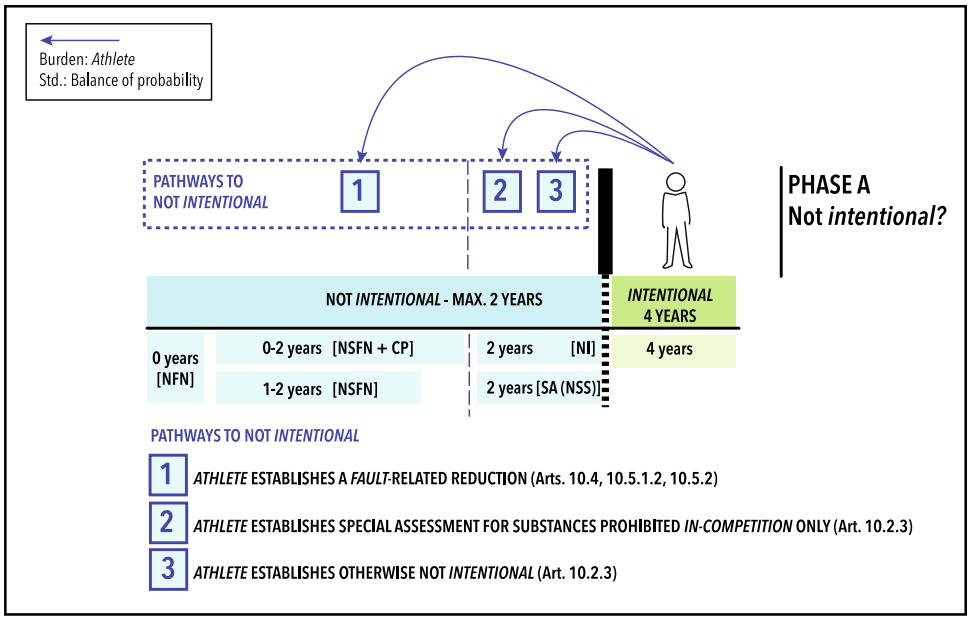

Fig. 2 Phase A: three pathways to establish that a violation involving a non-*Specified Substance* was not *Intentional*

Article 10.5.1.2 (*Contaminated Products*), or Article 10.5.2 (*No Significant Fault or Negligence*).

This basic description of Phase A leads to the question: how can an *Athlete* establish that the violation was not *intentional*? As illustrated in Fig. 2, there are three possible Pathways:

(i) Pathway one: the first option to establish that a violation is not *intentional* is showing that a *Fault*-related reduction applies, which include:
–*No Fault or Negligence* (Article 10.4)[73]; or
–*No Significant Fault or Negligence* (Article 10.5)[74] (either through the special rule for *Contaminated Products* (Article 10.5.1.2) or through the general provision of Article 10.5.2).[75]

(ii) Pathway two (for non-*Specified Substances* prohibited *In-Competition* only): the second option to establish that a violation is not *intentional* is to show that the special assessment for non-*Specified Substances* applies (set forth in Article 10.2.3 in fine), which requires that the *Athlete* establish that the non-*Specified Substance* prohibited *In-Competition* was *Used* (i) *Out-of-Competition*; and (ii) in a context unrelated to sport performance.

(iii) Pathway three: if neither the *Fault*-related reductions nor the special assessment for non-*Specified Substances* prohibited *In-Competition* only applies, the *Athlete* may still be able to establish that the violation does not otherwise fall within the definition of *intentional* as set forth in Article 10.2.3 ab initio.

4.2.1.2 Phase B: do any of the Fault-related reductions (Articles 10.4 or 10.5) apply? As shown in Fig. 3, in Phase B, a hearing panel considers the *Fault*-related reductions.[76] In other words, the panel is asked to determine which basic sanction applies by considering whether the violation was committed with *No Fault or Negligence* (Article 10.4) or *No Significant Fault or Negligence* (Article 10.5). If the panel decides that any of these provisions apply, then the basic sanction is as follows:

- *No Fault or Negligence* (Article 10.4): no period of *Ineligibility*;
- *Contaminated Products* (Article 10.5.1.2): a reprimand and no period of *Ineligibility* up to a maximum 2-year period of *Ineligibility*; or
- *No Significant Fault or Negligence* (Article 10.5.2): a period of *Ineligibility* between 1 and 2 years.

If the violation is established to be not *intentional* but none of the *Fault*-related reductions apply, then the basic sanction remains as determined in Phase A (i.e., a 2-year period of *Ineligibility*). If the *Athlete* is unable to discharge

[73] None of the Examples in Appendix 2 of the 2015 Code specifically provide that by establishing *No Fault or Negligence*, an *Athlete* thereby establishes that the violation was not *intentional*. However, if an *Athlete* can establish that a violation was not *intentional* by establishing *No Significant Fault or Negligence* it would follow that an *Athlete* could likewise establish not *intentional* by establishing *No Fault or Negligence*. See 2015 Code, Appendix 2, Examples 1 and 3.

[74] See 2015 Code, Appendix 2, Example 1, para 1: "[b]ecause the *Athlete* is deemed to have *No Significant Fault* that would be sufficient corroborating evidence (Articles 10.2.1.1 and 10.2.3) that the anti-doping rule violation was not intentional."

[75] The application and interrelation between these two provisions is discussed in Sect. 6.2.3.1, below.

[76] See 2015 Code, Appendix 2, Examples 1–5.

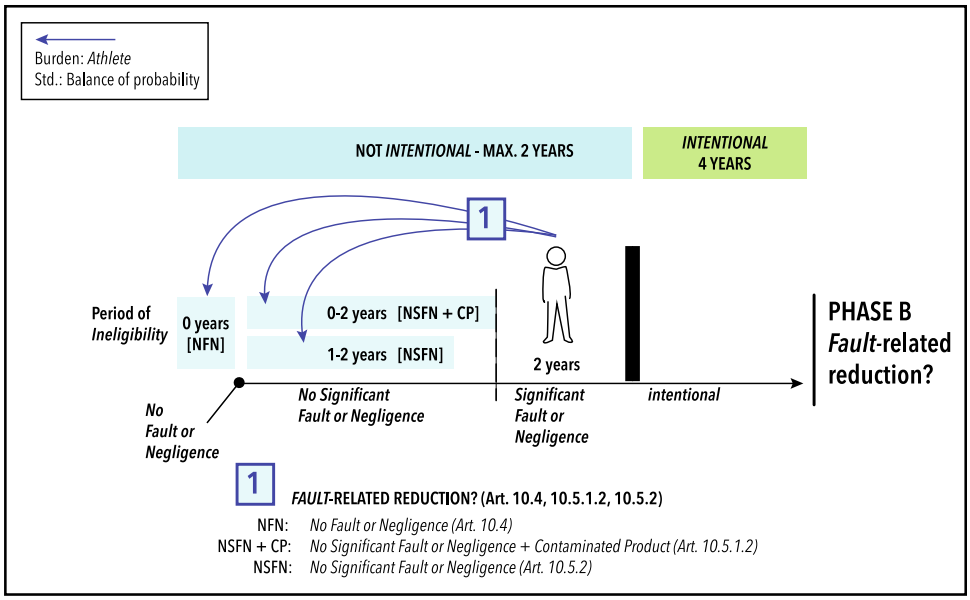

Fig. 3 Phase B: potential *Fault*-related reductions for violations involving non-*Specified Substances*

his or her burden to establish that the violation was not *intentional*, then the basic sanction will be a 4-year period of *Ineligibility*.

4.2.1.3 Process in practice As a conceptual matter, dividing the inquiry into two phases is well aligned with the refocused emphasis on "remedying" the only occasional application of the aggravating circumstances provision (Article 10.6 of the 2009 Code),[77] and on providing harsher penalties for "real cheats."[78] In practice these two phases (Phase A and Phase B) as shown in Fig. 1 will likely serve less as a strict road map for sanctioning violations involving non-*Specified Substances*, and more as a guide to panels that *intentional* violations are subject to a different sanctioning regime than non-*intentional* violations—in other words, *intentional* violations draw a 4-year period of *Ineligibility*, whereas non-*intentional* violations draw a maximum of 2 years, with further possibilities for reduction based upon the *Athlete's* degree of *Fault.*

Once the panel reaches a finding regarding the factual scenario underlying an anti-doping rule violation, the basic sanction can be determined by considering each of the three Pathways described in Phase A and shown in Fig. 2. As a result of the Code Examples presenting the *Fault*-related reductions in Articles 10.4 and 10.5 as "corroborating evidence" that a violation is not *intentional*,[79] Phase B is more efficiently considered in practice before Phase A for non-*Specified Substances.* In other words, a panel should first consider whether a *Fault*-related reduction applies (Phase B/Pathway one), and if not, then consider whether it can be directly established the violation is not *intentional*. This order is proposed to avoid the unnecessary consideration of Pathways two and three, and to present the simplest and most straightforward interpretation of the sanctioning regime in the 2015 Code. Indeed, if an *Athlete* is able to establish that one of the *Fault*-related provisions applies, such proof is sufficient to establish that a violation was not *intentional*. In other words, there is no need to establish as well that the violation is not *intentional* according to either the definition in Article 10.2.3 (Pathway two) or the special assessment for non-*Specified Substances* set forth in Article 10.2.3 (Pathway three), if it is established that one of the basic sanctions under Article 10.4 or 10.5 apply. Within Pathway one, the order depicted is also intended to avoid duplicative consideration of the *Fault*-related provisions. If an *Athlete* is able to establish *No Fault or Negligence* (Article 10.4), for example, there is no need to ask whether the *Athlete* has also fulfilled the provisions of the *Contaminated Products* provision or the *No Significant Fault or Negligence* provision (Article 10.5.2).

Accordingly, we propose that a hearing panel determine a basic sanction by considering the relevant provisions in the following order:

Pathway one:

(i) *No Fault or Negligence* (Article 10.4)

(ii) *Contaminated Products* (Article 10.5.1.2)/*No Significant Fault or Negligence* (Article 10.5.2).

Pathway two:

(iii) Special assessment for non-*Specified Substances* prohibited *In-Competition* only (Article 10.2.3).

Pathway three:

(iv) Otherwise not *intentional* (Article 10.2.3).

[77] See Sect. 2.2.1, above.

[78] Overview Document, p. 1.

[79] See 2015 Code, Appendix 2, Examples 1 and 3.

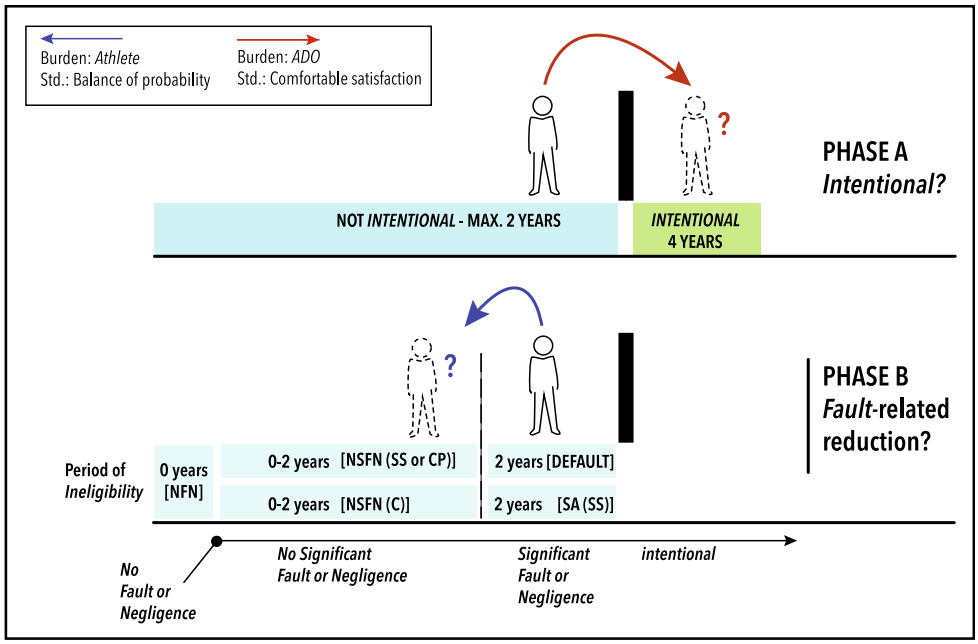

Fig. 4 Two-phase process for determining a basic sanction for violations involving *Specified Substances*

4.2.2 *Specified Substances*

As shown in Fig. 4, similar to the process involving non-*Specified Substances*, the process for determining a basic sanction for violations involving *Specified Substances* is a two-phase inquiry that starts with Article 10.2. The first phase (Phase A), assesses whether a violation was *intentional*, and the second phase (Phase B) assesses whether any of the *Fault*-related reductions set forth in Articles 10.4 or 10.5 apply.[80]

4.2.2.1 Phase A: can the ADO establish to the panel's comfortable satisfaction that the violation was intentional? The goal of Phase A is similar for *Specified Substances* and non-*Specified Substances*, namely to differentiate between *intentional* and non-*intentional* anti-doping rule violations. However for *Specified Substances* under Article 10.2.1.2, the burden is on the *ADO* to establish that a violation was *intentional*.[81]

In contrast to violations involving non-*Specified Substances*, the "default" basic sanction, i.e., the outcome if the *ADO* does not discharge its burden to establish that a violation was *intentional*, is a 2-year period of *Ineligibility*, unless any of the *Fault*-related reductions considered in Phase B apply. In effect, cases involving *Specified Substances* are thus rebuttably presumed to be the result of non-*intentional* violations. More colloquially, as shown in Fig. 5, the *Athlete* "starts" in the realm of non-*intentional* violations and only "moves" over the threshold into the realm of *intentional* violations if the *ADO* discharges its burden.

The Code does not specify the standard of proof to which the *ADO* must establish a violation was *intentional*. It is expected, however, that the standard required by CAS panels would be the same "comfortable satisfaction" standard that *ADO*s are held to establish an anti-doping rule violation,[82] especially since "comfortable satisfaction" has been recognized in CAS awards as the general standard applicable in disciplinary matters.[83] If the *ADO* does not discharge its burden to rebut the presumption that the presence of a non-*Specified Substance* was not intentional, then the panel proceeds to consider the *Fault*-related reductions in Phase B.

4.2.2.2 Phase B: do any of the Fault-related reductions (Articles 10.4 or 10.5) apply? As shown in Fig. 6, in Phase B, hearing panels consider the *Fault*-related reductions.[84] In other words, the panel determines which basic sanction applies by considering whether the violation was committed with *No Fault or Negligence* (Article 10.4) or *No Significant Fault or Negligence* (Article 10.5.1). A special assessment for cannabinoids in the 2015 Code allows an *Athlete* to establish that the violation was committed with *No Significant Fault or Negligence* by establishing that the *Use* was in a context unrelated to sport

[80] Violations involving cannabinoids are subject to a special assessment in Phase B, which is discussed in Sect. 6.2.2.1, below.

[81] See 2015 Code, Appendix 2, Examples 1–4, which describe Article 10.2 as the starting point in determining an appropriate sanction.

[82] Article 3.1 of the 2015 Code only explicitly provides a standard of proof for *ADO*s to establish that an anti-doping rule violation has occurred, not to establish other facts or circumstances.

[83] See, e.g., *de Ridder v. International Sailing Federation*, para 114.

[84] See 2015 Code, Appendix 2, Examples 1 and 3.

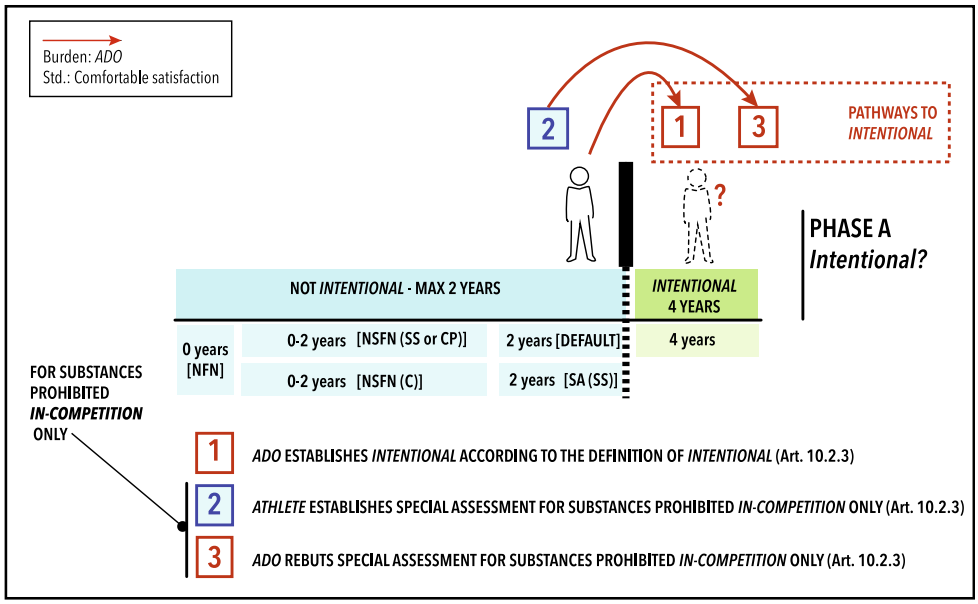

Fig. 5 Phase A: can the *ADO* establish that the violation was *intentional*?

performance. If the panel finds that any of these provisions apply, then the basic sanction is as follows:

- *No Fault or Negligence* (Article 10.4): no period of *Ineligibility*.
- *No Significant Fault or Negligence* (Article 10.5.1): a reprimand and no period of *Ineligibility* up to a maximum of a 2-year period of *Ineligibility* (either through the *Contaminated Products* or the *Specified Substance* provision, see Sect. 6.2).

If the violation is not *intentional*, but none of the *Fault*-related reductions apply, the basic sanction remains as determined in Phase A and is a 2-year period of *Ineligibility*. If the *ADO* is able to discharge its burden to establish that the violation was *intentional*, then the basic sanction is 4 years, unless a special assessment applies.[85]

4.2.2.3 Process in practice As is the case for non-*Specified Substances*, the basic sanction for *Specified Substances* is determined by first differentiating between non-*intentional* and *intentional* violations, and then applying *Fault*-related reductions if the violation is not *intentional*. The way in which this distinction is made in practice is not the same. As explained above, for non-*Specified Substances* there is no compelling practical need to view the process in two separate steps since the burden rests wholly with the *Athlete*. For *Specified Substances*, by contrast, the *ADO* holds the burden to establish *intentional*, whereas the *Athlete* holds the burden to establish the *Fault*-related reductions. Hence, viewing the process to determine a basic sanction in two phases is useful both as a conceptual and a practical matter.

The process for determining a basic sanction in cases involving *Specified Substances* differs in several important ways from the process for determining a basic sanction in cases involving non-*Specified Substances*. Whereas we propose that the process for non-*Specified Substances* should start in practice by considering the *Fault*-related reductions (Articles 10.4 and 10.5), for *Specified Substances* the process for determining a sanction starts with the question of whether the *ADO* is able to establish that a violation was *intentional*, which for these type of substances requires an examination of the provisions of Article 10.2, before Articles 10.4 and 10.5 are considered. Thus, Phase A and Phase B are conducted as follows:

Phase A: distinguishing between *intentional* and non-*intentional* violations

(i) First, consider the special assessment for substances prohibited *In-Competition* only. As set forth in Article 10.2.3, if the *Athlete* is able to establish that the substance was *Used Out-of-Competition*, he or she will receive the benefit of a presumption that the violation was not *intentional*. To rebut this presumption the *ADO* is required to establish a special understanding of *intentional*, as described in Sect. 5.1.2.2. If the *Athlete* is unable to establish the special assessment, then these violations are treated the same as those involving substances prohibited at all times, in terms of evaluating whether the violation was *intentional*.

(ii) If the special assessment for substances prohibited *In-Competition* is not established or not applicable,

[85] See Sect. 5.1, below, for a discussion of the special assessments in Article 10.2.3 of the 2015 Code.

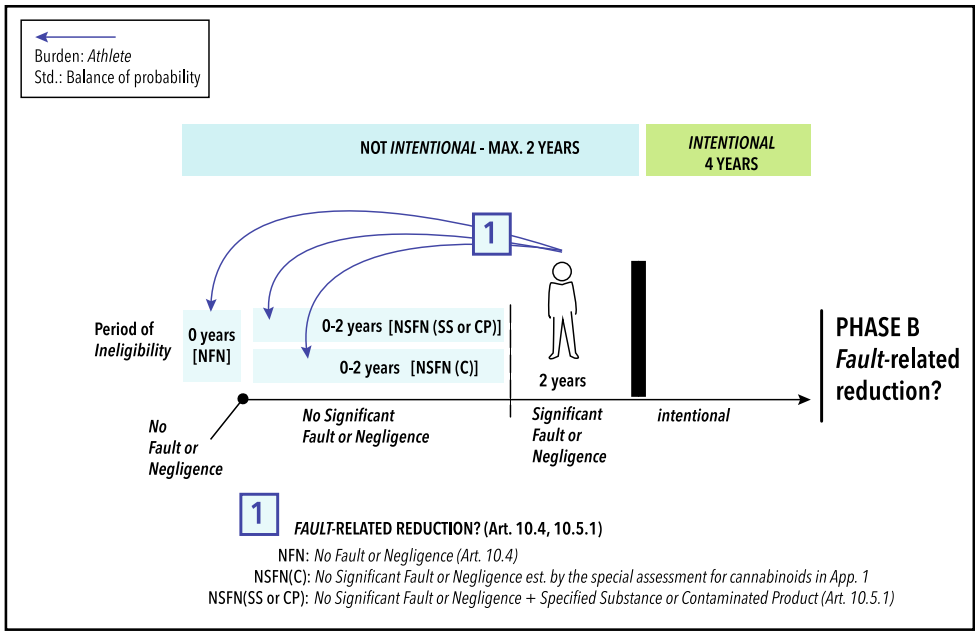

Fig. 6 Phase B: potential *Fault*-related reductions for violations involving *Specified Substances*

consider *intentional* according to the general definition in Article 10.2.3 (i.e., not according to the special assessment for *Specified Substances* prohibited *In-Competition* only). For substances prohibited at all times, the first question is whether the *ADO* can establish *intentional* according to the general definition in Article 10.2.3.

In the first Phase A, if the panel finds that the violation is *intentional*, the basic sanction is a 4-year period of *Ineligibility*, with no possibility for a reduction based on *Fault* under Articles 10.4 and 10.5. If the *ADO* either cannot establish that the violation was *intentional*, or does not allege that the violation was *intentional*, Article 10.2.2 applies, and the period of *Ineligibility* is a maximum of 2 years and the panel should move to Phase B.

Phase B: do any of the *Fault*-related reductions apply? (Article 10.4 or 10.5)

(iii) If the violation is not *intentional*, then the *Fault*-related reductions in Articles 10.4 (*No Fault or Negligence*) (See Sect. 6.1) or Article 10.5 (*No Significant Fault or Negligence*) (See Sect. 6.2) are considered in turn.

As explained in Sect. 4, we advocate that a panel must come to only one basic sanction. If a panel is confronted with a situation in which a violation includes knowing (or reckless) *Use* (e.g., a recreational *Use* of a drug) but a low level of *Fault,* a panel might find resolution by recalling the underlying policy reasons for the revised sanctioning regime, as well as respecting overarching principles of proportionality. One of the key policy drivers underlying the revision of the sanctioning regime was punishing "real cheats" more harshly, yet providing more flexibility in other circumstances.[86] Stated in the terminology of the sanctioning regime, this policy translates into treating *intentional* violations with a strict 4-year period of *Ineligibility* and non-*intentional* violations with more flexibility, i.e., allowing for the *Fault*-related reductions. It would appear aligned with this policy to view *intentional* violations as those committed with a high level of *Fault*, and non-*intentional* violations as those committed with a lower level of *Fault*. From this perspective, a violation would only be *intentional*, if the *Athlete*'s *Fault* was rather high, at a level which can fairly be considered as "cheating," as opposed to a more "technical," albeit possibly knowing, violation of the rules, where perhaps a finding of not *intentional* is proportional and better suited to WADA's policy goals.

In the next sections, we will discuss each of these two phases, Phase A (5) and Phase B (6), in turn.

5 How to distinguish between *intentional* and non-*intentional* violations (Phase A)

This section discusses the provisions of Article 10.2 in the 2015 Code that directly apply to the question of whether a violation was *intentional*.[87] First, the special assessments

[86] See Overview Document, p. 1.

[87] In practice, these provisions will be considered first only for violations involving *Specified Substances*. For non-*Specified Substances*, as explained in Sect. 4.2.1.3, above, a panel should first consider the *Fault*-related reductions described in Sect. 6, below.

for substances prohibited *In-Competition* only, but *Used Out-of-Competition* are discussed (5.1), followed by a discussion on establishing whether a violation was *intentional* or not according to the general definition of *intentional* in Article 10.2.3 (5.2). The discussion comprises a summary of the mechanics of each relevant provision, including guidelines as to their interpretation and application. Comparisons to the 2009 Code are also made where it was considered helpful to illustrate the underlying concepts and mechanisms.

5.1 Special assessment for substances prohibited *In-Competition* only (Article 10.2.3)

Article 10.2.3 includes two forms of special assessment for substances prohibited *In-Competition* only, one for non-*Specified Substances* and one for *Specified Substances*.

The purpose of the special assessment is to provide a "better and fairer" mechanism, given the particular character of the violation, in which the *Athlete*'s conduct is not "unlawful" at the time of the *Use* of the substance.[88] Without this mechanism, *Athletes* might have faced a 4-year period of *Ineligibility* if they ingested a substance prohibited only *In-Competition* during an *Out-of-Competition* period, yet an *In-Competition* test revealed the lingering presence of this substance or its *Metabolites*. Hence, this instrument functions as a facilitated means to obtain a 2-year period of *Ineligibility*, rather than a potential four, even if the substance was knowingly (or recklessly) ingested.

The two forms of the special assessment for non-*Specified* and *Specified Substances* comprise different elements and function in a different manner in light of the structure of the sanctioning regime that places the burden on the *Athlete* to establish that a violation was not *intentional* for non-*Specified Substances* (5.1.1) and on the *ADO* to establish that a violation was *intentional* for *Specified Substances* (5.1.2).

5.1.1 Non-Specified Substances

5.1.1.1 Process in practice For non-*Specified Substances*, if *Athletes* are unable to establish that any of the *Fault*-related reductions apply (Pathway one; see Sect. 4.2.1.3) and the substance is prohibited *In-Competition* only, *Athletes* have the opportunity to establish that the violation was not *intentional* through the special assessment set forth in Article 10.2.3. If the requirements for the special assessment are not realized, the *Athlete* still may establish that the violation was not *intentional*, either under the general definition of *intentional* in Article 10.2.3 or by establishing that a *Fault*-related reduction applies.

5.1.1.2 Mechanics Article 10.2.3 contains the following special assessment:

> *An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.*

Under Article 10.2.3, an *Athlete* must establish two separate elements: (i) that the (non-*Specified*) *Prohibited Substance* was *Used Out-of-Competition* and (ii) that the *Use* was in a context unrelated to sport performance. Both elements must be established by a balance of probability.[89] If an *Athlete* succeeds in establishing these two elements, the basic sanction is a 2-year period of *Ineligibility*.

In practice, a broad interpretation of the second element (establishing that the context of the *Use* was unrelated to sports) could considerably limit the application of this special assessment. As described in a recent award, "when looking at elite athletes most of their behaviour is guided by the sole and single purpose to maintain or enhance their sport performance."[90] The example provided in this award is that even when *Athletes* take a cough syrup, in most circumstances they will do so to recover so they can return to training or competition as quickly as possible. Thus, *Athletes* face a risk that even medications or recreational drugs taken in a context unrelated to sport performance could be considered as *intentional*, which could run counter to the policy reasons for including this assessment in the first place. The

[88] WADA Executive Committee Meeting Minutes (2013a), p. 13. The full passage is as follows: "[t]he second clarification in language had to do with the following unique situation: an athlete was out of competition, used a substance that was not prohibited out of competition, so was not doing anything wrong, it was a specified substance and, lo and behold, the athlete tested positive in a later competition. The athlete could still get four years if it had been intentional, but the team had made it clear in the modified drafting that, under such circumstances, it was presumed to be a two-year violation. If it turned out that the facts were such that it would justify four years, because one could establish intent, then it could be four years but, in that unique situation whereby the athlete had been taking something at a time when it had actually been permitted, the feedback from the stakeholders had been that it would be better and fairer to create a presumption in favour of the two years that the ADO could rebut." For further discussion on this matter, see also Rigozzi et al. (2014), Section III.1.

[89] Article 3.1 of the 2015 Code sets forth the standard of proof required for all elements that must be established by *Athletes* as follows: "[w]here the Code places the burden of proof upon the *Athlete* or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability."

[90] *WADA v. de Goede*, para 7.14.

task of coming to an appropriately tailored and proportional interpretation of this provision will rest with the hearing panels, as the case study in the next section demonstrates.

5.1.1.3 Case example: non-Specified Substances prohibited In-Competition only and Used outside of a context related to sport performance The fact pattern from the *Mellouli* CAS case is recounted to provide an illustration of how this special assessment might be applied under the 2015 Code. In the *Mellouli* case, a Tunisian swimmer submitted to an *In-Competition* test that revealed the presence of amphetamine, a non-*Specified Substance* stimulant prohibited only *In-Competition*. The swimmer, who was also a university student, admitted that he took an Adderall pill from a friend 2 days before the *Competition* to stay concentrated and awake while finishing a university assignment worth a significant percentage of his final grade, without conducting any research as to what substances the pill might contain.[91] The panel held that his level of fault was significant, in part since it was "inconceivable that an athlete like Mr. Mellouli had not thought—not even for a single second—of the risk that he took in ingesting a pill about which he knew absolutely nothing" in light of his obligations to avoid the presence of *Prohibited Substances* in his system.[92] However, the panel also noted that he was very forthcoming with his admission, voluntarily accepted a provisional suspension, committed only an isolated act of negligence (as compared to a repeated, intentional doping program), and that the 2-year period of *Ineligibility* that the anti-doping regulations dictated would force him to miss the next Olympic Games, a particularly harsh consequence.[93] In light of these factors and all other circumstances, and while recognizing the need to maintain a strict system of rules, the panel found that this was one of the very rare cases in which the principle of proportionality calls for a lesser sanction than is available through the Code provisions itself, and decided upon a sanction of an 18-month period of *Ineligibility*.[94]

Under Article 10.2.1.1 of the 2015 Code, as the case involves a non-*Specified Substance*, the starting point is a 4-year period of *Ineligibility* unless the *Athlete* can establish that the violation was not *intentional*. Since the panel found that the swimmer did not establish that he exhibited *No* (*Significant*) *Fault or Negligence*, nor did the case involve a *Contaminated Product,* the next inquiry would be to determine whether he could establish that the violation was not *intentional* under the special assessment for non-*Specified Substances* that are prohibited *In-Competition* only. This special assessment requires that an *Athlete* show that the *Use* was both *Out-of-Competition*, and in a context unrelated to sport performance. The swimmer in this case was able to establish that the *Use* occurred *Out-of-Competition*, and it was also accepted by the CAS panel that such *Use* was intended to enhance his academic performance, rather than his sport performance.[95] Thus, an *Athlete* in a situation similar to Ous Mellouli would likely receive a basic sanction of a 2-year period of *Ineligibility* under Article 10.2.2, via the application of the special assessment in Article 10.2.3.

5.1.1.4 Innovations in the 2015 Code In sum, under the 2015 Code, Ous Mellouli would likely be placed in the same position that he was in under the 2003 Code (and presumably under the 2009 Code, as well), namely starting from a 2-year period of *Ineligibility* according to the rules, with no *Fault*-related opportunities to receive a reduction unless CAS panels were to reduce the severity of their assessment when it comes to granting a finding of *No Significant Fault or Negligence*. If this case were decided under the 2015 Code, the panel would have to take the same approach as they did in the *Mellouli* case to reach an 18-month period of *Ineligibility*: acknowledging that this case is one of those rare circumstances where the principle of proportionality calls for a lower sanction than is technically available under the Code provisions.

From a historical perspective, it is worth explaining that an *Athlete* in Ous Mellouli's position might have faced a 4-year period of *Ineligibility* without the relatively late addition in the 2015 Code review process of this special assessment for non-*Specified Substances* prohibited *In-Competition* only. Indeed, in the logic of the CAS panel that the specific circumstances in which Ous Mellouli took the Adderall pill did not qualify for *No Significant Fault or Negligence*, the swimmer, as an elite *Athlete* who took an unfamiliar pill just 2 days before a *Competition*, might even be found to evidence "reckless" behavior within the meaning of *intentional* in Article 10.2.3, unless perhaps the word "cheat" were construed as incorporating some notion of purpose or motive behind taking the substance.

5.1.2 Specified Substances

5.1.2.1 Process in practice For *Specified Substances* prohibited *In-Competition* only, Article 10.2.3 includes a special assessment that grants an *Athlete* the benefit of a rebuttable presumption that the violation was not *intentional*

[91] *FINA v. Mellouli*, paras 7–10.

[92] *FINA v. Mellouli*, paras 86 & 89. Free translation of: "il n'est pas concevable qu'un athlète tel que M. Mellouli n'ait pas songé—ne serait-ce qu'une seule seconde—au risque qu'il prenait en absorbant un comprimé d'une substance dont il ignorait tout."

[93] *FINA v. Mellouli*, para 97.

[94] *FINA v. Mellouli*, paras 97–98.

[95] *FINA v. Mellouli*, para 88.

(even if the substance was ingested knowingly), provided the *Athlete* is able to establish *Use Out-of-Competition.* For these types of substances, this inquiry is the starting point in determining the basic sanction in cases where an *Athlete* faces a 4-year period of *Ineligibility* (i.e., the *ADO* alleges that a violation was *intentional*). This special assessment can be seen as a privileged pathway for the *Athlete* to establish that a violation was not *intentional*. If *Athletes* are unable to establish *Out-of-Competition Use,* they still have the option to directly contest an *ADO*'s argument that a violation was *intentional* by adducing evidence showing that the violation was not *intentional* according to the general definition in Article 10.2.3 (see Sect. 5.2.1).

Note that, in practice, *Athletes* would adduce evidence for invoking the special assessment and spontaneously make an assertion of *Use Out-of-Competition* only when also seeking to obtain a reduced sanction for a *Fault*-related reduction ground, or when they anticipate that the *ADO* will make of case for an *intentional* violation against them. In all other situations (save for non-*Fault*-related reductions considered in the third step of determining an appropriate sanction, see Sect. 2.2.3), *Athletes* have no incentive to come forward with explanations regarding the factual circumstances surrounding the ingestion of the substance, since the burden of proof is on the *ADO* to establish that a violation was *intentional* (see also, Sect. 5.2.2).

5.1.2.2 Mechanics The special assessment in Article 10.2.3 for *Specified Substances* prohibited *In-Competition* only, but *Used Out-of-Competition,* reads as follows:

> *An anti-doping rule violation resulting from an Adverse Analytical Finding for a* [*Specified*] *substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition.*

An *Athlete* must establish that *Use* of a *Prohibited Substance* was *Out-of-Competition* to trigger this special assessment. If the *Athlete* is able to establish *Use Out-of-Competition* (by a balance of probability), the *Athlete* receives a rebuttable presumption that the violation was not *intentional*. Unless the *ADO* is able to rebut this presumption (as we submit in this article, to the general standard of comfortable satisfaction of the hearing panel), the *Athlete* receives a 2-year period of *Ineligibility* under Article 2.1.

The immediate interpretational challenge that the special assessment for *Specified Substances* prohibited *In-Competition* only presents is as follows: once the basis for the special assessment is established (i.e., the *Athlete* shows *Use Out-of-Competition*), what is requested from an *ADO* to rebut the resulting presumption that the violation was not *intentional*?

A possible interpretation is that the *ADO* could rebut the presumption simply by establishing *intentional* according to the definition in Article 10.2.3.[96] This interpretation, albeit a priori the most straightforward, appears problematic as it would render the special assessment set forth in Article 10.2.3 completely redundant in light of Article 10.2.1.2. Indeed, Article 10.2.1.2 provides that in the context of *Specified Substances*, the *ADO* already has the burden to establish that a violation was *intentional*. Therefore, there would be no consequences whatsoever to the special assessment: regardless of whether the *Athlete* could in fact establish that the substance was *Used Out-of-Competition*, the burden would remain with the *ADO* to establish that the violation was *intentional* according to its definition. In other words, *Specified Substances* prohibited *In-Competition* only would be treated in the same way as all other *Specified Substances*, which contravenes the assumption that the special assessment was added to create a more flexible regime, or an easier path for *Athletes* to contest that a violation was *intentional*.

Hence, we prefer an interpretation based on the underlying policy justification for this special assessment for *Specified Substances* prohibited *In-Competition* only. Even if an *Athlete* knowingly ingested *Out-of-Competition* a substance prohibited *In-Competition* only, this conduct is only of consequence if the analysis for a subsequent *In-Competition* test returns an *Adverse Analytical Finding*. Therefore, to rebut a presumption that a violation was not *intentional* in the context of the special assessment for *Specified Substances* prohibited *In-Competition* only, the *ADO* must establish "something more" in addition to the knowing or reckless *Use* of a *Prohibited Substance*. In our view, the *ADO* must establish that the *Athlete* had the intent to commit an anti-doping rule violation in this context, i.e., that the *Athlete* intended for the effects of the substance taken *Out-of-Competition* to still be present *In-Competition*. Therefore, to nevertheless impose a 4-year period of *Ineligibility*, an *ADO* would need to establish: (i) that the *Athlete* intentionally (knowingly or recklessly) ingested the substance, (ii) that the *Athlete* also intended for the substance to be present *In-Competition*, and (iii) that the substance would still be active, i.e., have an effect during an *In-Competition* period. In this formulation, the concept of *intentional* incorporates some notion of motivation or purpose that is tied to the effect of the substance, such as

[96] For easy reference the definition of *intentional* from Article 10.2.3 of the 2015 Code is as follows: "[a]s used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those *Athletes* who cheat. The term, therefore, requires that the *Athlete* or other *Person* engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."

actively enhancing sport performance *In-Competition* or other undue *In-Competition* advantage (i.e., a masking effect or an enhancement of mental focus or concentration) and is not tied merely to the discrete act of ingesting the substance. Factors that would be important toward establishing this third element would be those that support the existence of this type of intent, such as the timing of the *Use*, or whether the substance detected in the *Sample* was capable of providing the intended effects *In-Competition* (e.g., whether the sample contained active traces of the substance, instead of inactive *Metabolites*).

The interpretation proposed is consistent with both the 2015 Code revision objectives and the particularities of sanctioning violations involving substances that are *Prohibited In-Competition* only, but *Used Out-of-Competition*. First, this interpretation ensures that the "rebuttable presumption" from which *Athletes* benefit remains less easy to rebut by the *ADO* than the general allocation of burden as described in Article 10.2.1 would allow. Second, it adequately reflects the goal of enhancing flexibility in the context of *Specified Substances Used Out-of-Competition*, by providing the *Athlete* with an additional layer of protection against a 4-year period of *Ineligibility*. Finally, it reflects the inherent difficulty of assessing whether a violation was *intentional* in the context of *Out-of-Competition Use* of substances that are prohibited only *In-Competition*, as this *Use* is permitted for any purpose whatsoever provided the substance is no longer detectable (nor intended to be present) in the *Athlete*'s system *In-Competition.*

5.1.2.3 Case example: Specified Substances prohibited In-Competition only but Used Out-Of-Competition To illustrate how the special assessment might function in practice, we refer to the recent *de Goede* CAS award. The judoka in this case, not expecting to participate in any competitions due to an injury, was taking the infamous Jack3d supplement (which contained methylhexaneamine, a *Specified Substance* prohibited *In-Competition* only) to help him overcome tiredness.[97] However, a chain of events unfolded that led to him participating sooner than expected in a *Competition*, whereupon he returned a positive test. Though the substance was not listed explicitly on the supplement, the *Athlete* did not actually check the label, nor did he do any research to find out whether the supplement might contain a *Prohibited Substance*.[98] Though there was a dispute as to when exactly the judoka stopped taking the product, it was accepted by the sole arbitrator that the *Athlete* did not ingest the product in the immediate vicinity of the competition.[99] The sole arbitrator was also satisfied that the *Athlete* did not act intentionally to enhance his performance *In-Competition* by ingesting this supplement, noting in particular that his participation in the *Competition* came as a surprise to the *Athlete*.[100] In coming to this conclusion, the sole arbitrator observed that in the context of *Specified Substances* prohibited *In-Competition* only but *Used Out-of-Competition,* "an athlete only acts intentionally within the above meaning, if his intention covers both, the ingestion of the substance and it being present in-competition."[101] The arbitrator did find that the *Athlete's* level of fault was "considerable" in this case, but nevertheless granted a reduction of the sanction to a period of 18 months based on this level of fault (this 18-month period was assigned given an available range of 0–2 years).[102]

Under the 2015 Code, the inquiry starts with Article 10.2. Since the *Athlete* acted with a "considerable" degree of *Fault* (i.e., a degree that would be unlikely to fall within the "non-significant" range), neither Article 10.4 nor 10.5 is relevant. The inquiry then turns to the special assessment for *Specified Substances* prohibited *In-Competition* only in Article 10.2.3. Considering the above facts, the *Athlete* established *Use Out-of-Competition* and is thus entitled to a rebuttable presumption that the violation was not *intentional*. In attempting to rebut this presumption, the *ADO* would need to cumulatively show the following elements: (i) the *Athlete* intentionally (knowingly or recklessly) ingested the substance, (ii) the *Athlete* intended for the substance to be also present *In-Competition*, and (iii) the *Athlete* intended (or at least anticipated) that the substance would still be active, i.e., have an effect on his or her sport performance *In-Competition*.

Under the set of facts presented above, the *ADO* would likely not be able to establish these elements, as it was accepted that the *Athlete*'s intent to ingest the substance was not tied to a purpose to *Use* the substance to actively enhance his performance *In-Competition*. In other words, the sole arbitrator found that the *Athlete* neither intended for the substance to be present *In-Competition*, nor to actively enhance his performance *In-Competition* in this way. Therefore, under the 2015 Code, the judoka would likely be subject to a basic sanction of a 2-year period of *Ineligibility* with no further *Fault*-related possibilities to reduce the length of his period of *Ineligibility* (i.e., since his *Fault* was found to be "considerable," he would therefore likely not qualify for a reduction based on *No Significant Fault or Negligence* under the new regime).

[97] *WADA v. de Goede*, paras 2.2 & 2.6.

[98] *WADA v. de Goede*, para 2.5.

[99] *WADA v. de Goede*, para 7.17.

[100] *WADA v. de Goede*, para 7.17.

[101] *WADA v. de Goede*, para 7.16.

[102] *WADA v. de Goede*, paras 7.19–7.20.

5.1.2.4 Innovations in the 2015 Code Under the 2009 Code, violations involving *Specified Substances* in which the *Athlete* exhibited a significant level of fault, even verging on what is understood as *intentional* under the 2015 Code could still—at least in theory—qualify for a reduction under Article 10.4. In the new regime, as demonstrated in the case example above, the special assessment does not allow *Athletes* to claim a reduction below the 2-year period of *Ineligibility* unless they can also establish *No Significant Fault or Negligence*.

As many of these violations would likely involve either recreational *Use* of drugs, or mistakes made in connection with medications (or similar situations), this could open an area of vulnerability in the new regime where panels might be tempted to depart from the strict language of the rules to reach a fair sanction length, less than the 2-year period of *Ineligibility* that the Code provides. Alternatively, as discussed in Sect. 6.2.2, the panel might consider applying by analogy the special assessment for cannabinoids included in the Comment to the definition of *No Significant Fault or Negligence* in Appendix 1 of the 2015 Code, in situations that appear consistent with its underlying rationale.

5.2 Definition of *intentional* in Article 10.2.3

In cases where the special assessments described in the previous section (5.1) do not apply, the panel will have to decide whether a violation was *intentional*. Here again, the analysis must distinguish between non-*Specified* (5.2.1) and *Specified Substances* (5.2.2).

5.2.1 Non-Specified Substances: establishing that a violation was not intentional

5.2.1.1 Process in practice As explained in Sect. 4.2.1.3, for cases involving non-*Specified Substances*, if an *Athlete* is unable to establish that a violation was not *intentional* through Pathway one [i.e., none of the *Fault*-related reductions available under Articles 10.4 (*No Fault or Negligence*) or Article 10.5 (*No Significant Fault or Negligence*) apply], or to claim the benefit of a special assessment for substances prohibited *In-Competition* only under Pathway two, the final inquiry (Pathway three) involves looking directly at the general definition of *intentional* provided in Article 10.2.3, to determine whether it can be otherwise demonstrated that the particular circumstances of the case do not fit within this definition. If an *Athlete* succeeds in establishing the violation was not *intentional*, the basic sanction is a 2-year period of *Ineligibility*.

5.2.1.2 Mechanics As in the other Pathways for establishing that a violation was not *intentional*, *Athletes* hold the burden to establish that the violation was not *intentional* according to the definition in Article 10.2.3, by a balance of probability (general rule of Article 3.1 of the 2015 Code). The definition of *intentional* in Article 10.2.3 is as follows:

> *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*

Two main categories of violations fit under the umbrella of non-*intentional*:

(i) Violations for which the origin of the substance is established, but the level of *Fault* exceeds that of *No Significant Fault or Negligence*, yet below the threshold of *intentional*, which would probably be translated as "gross negligence," as opposed to "recklessness" (i.e., in the language of the 2015 Code, the *Athlete* was aware of "a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk").

(ii) Violations for which the *Athlete* cannot establish the origin of the substance (thus precluding the application of a *Fault*-related reduction, unless the *Athlete* is a *Minor*) yet can establish a sufficient factual basis to demonstrate that the violation was not *intentional*.

The 2015 Code does not explicitly require an *Athlete* to show the origin of the substance to establish that the violation was not *intentional*. While the origin of the substance can be expected to represent an important, or even critical, element of the factual basis of the consideration of an *Athlete's* level of *Fault*, in the context of Article 10.2.3, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the violation was not *intentional* is warranted. To illustrate this difference, we refer to the *Contador* award. In this award, the CAS panel accepted on a balance of probability that the *Prohibited Substance* in the *Athlete's* system originated from contaminated supplements, rather than the *Athlete*'s theory of meat contamination. However, since the cyclist neither established which particular supplement was contaminated nor the circumstances surrounding the contamination, the panel found that the fault-related reductions could not apply for lack of sufficient precision regarding the origin of the substance, and the sanction remained a 2-year period of *Ineligibility*.[103] When it comes to a finding that a violation was not *intentional*, by contrast, if the panel accepts that

[103] *UCI v. Contador*, para 493.

the *Athlete* did not intend to cheat and finds that the most probable pathway of ingestion was inadvertent, applying a 4-year period of *Ineligibility* for failure to establish the origin of the substance stricto sensu would inevitably raise proportionality concerns.

Turning to the definition of *intentional* itself, a first observation is that it provides no clear answer as to whether the *Athlete*'s intent is linked to the factual circumstances underlying the violation (i.e., awareness of the conduct itself), to the knowledge of the prohibited nature of these circumstances, or to the underlying purpose and motivation for the conduct. This ambiguity leaves open the possibility for *Athletes* to argue that they were not aware that a given conduct was in fact an anti-doping rule violation (Verbotsirrtum or Erreur de Droit) or presented a significant risk that it might constitute an anti-doping rule violation. Given that *Athletes* have a responsibility under the Code to "be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code," (Article 21.1.1 of the 2015 Code) the threshold would be quite high, and only available under very particular (and rare) circumstances where an *Athlete's* lack of awareness of the prohibited nature of his or her conduct is excusable.[104]

Alternatively, *Athletes* might focus their defense on disputing the underlying conduct or state of mind. In other words, they could potentially argue that they did not knowingly or recklessly engage in the alleged conduct underlying the anti-doping rule violation, which would also establish that the violation was not *intentional*.

As another potential defense it can be predicted that some *Athletes* will seek to rely on the term "cheat" in the definition of *intentional* to show that a violation was not *intentional*, possibly in addition to attempting to disprove the more technical (legally oriented) components of the provision. As "cheating" is not an established concept that carries a pre-existing legal connotation outside of anti-doping, one might be tempted to minimize its significance and dismiss it as a strategic reference of a political rather than legal dimension, introduced to keep WADA's message regarding its focus on "real cheats" at the forefront, or as an effort to add language to the Code more accessible to *Athletes* amidst an otherwise rather technical definition.[105] In this understanding, the term "cheat" might not add additional substance or specific elements to the determination of whether a violation was committed knowingly, thus depriving *Athletes* from the option to argue that the violation was not *intentional* by claiming that they did not cheat.

However, it does seem in line with the underlying policy objectives of the new sanctioning regime—i.e., differentiating non-*intentional* from *intentional* violations—to interpret the term "cheat" along the lines of "exhibiting a high level of fault." It should be noted that cheating, in the context of anti-doping, is not necessarily confined to the purpose of performance enhancement, as other effects sought from substances on the *Prohibited List* can also incorporate a sense of acting against the rules in an unfair manner. For example, some substances could be taken with the intention to mask the use of performance-enhancing substances, or others might have effects on an *Athlete's* focus or concentration that might not traditionally be considered as "performance enhancing." Thus, the term "cheat" can be seen as opening the door for *Athletes* to build an argument around their purpose or motivation for committing a violation. In other words, if "the term 'intentional' is meant to identify those *Athletes* who cheat," then it would follow that if an *Athlete* can convince a panel that he or she did not "cheat" despite knowingly or recklessly ingesting a *Prohibited Substance*, the violation could be considered as not *intentional*. This expectation strikes us as particularly apt given that the term "cheat" is already used within the anti-doping movement to distinguish "serious" from more "technical" violations.[106]

[104] For two examples (both stemming from failure on the part of the relevant authority to communicate the *Athletes*' anti-doping obligations) where the *Athletes'* lack of knowledge regarding their obligations under the Code excused an anti-doping rule violation, see *WADA v. Mannini* and the *Lee & Kim* case.

[105] Indeed, WADA's Athlete Reference Guide, relies on this terminology to explain the consequences of intentional violations, stating that "[i]f you intended to cheat, whatever the substance, the period of Ineligibility is four years" and "[a] strong consensus has emerged worldwide, and in particular among athletes, that intentional cheaters should be ineligible for four years." WADA Athlete Reference Guide (2014a), p. 17.

[106] See, e.g., WADA Executive Committee Meeting Minutes September (2013b), pp. 21–22: "[s]ome of those cases said that that qualified for no significant fault, because the athlete had not meant to cheat, and the other cases said that the athlete had intended to enhance performance and should have known better when taking the substance."; See also WADA Executive Committee Meeting Minutes September (2012), p. 18: "[t]here were some changes that were there to make things clearer and more simple, some that were there to provide more flexibility in dealing with people who violated the rules but were not real drug cheats, and then lots of changes that addressed more effective ways of dealing with those people who were real drug cheats."; WADA Executive Committee Meeting Minutes May (2013c), p. 28: "it was necessary to look at these cases as some athletes were really cheating and deserved a two-year sanction, so the automatic excuse that there was no intent to enhance performance because athletes had been taking supplements did not fly"; *BOA v. WADA*, para 5.54 *quoting* the BOA chairman: "[i]t is the BOA's belief […] that the willful, consistent, and illicit use of banned performance enhancing drugs use [sic] is the most heinous reprehensible form of cheating in sport and so in this specific case the toughest sanctions should apply"; and *A.C. v. FINA* para 30(a): "[h]aving seen and heard the Appellant, we entirely agree that the Appellant should not suffer any suggestion that by reason of what we consider to have been a technical breach of the rules he is therefore a cheat or a liar. We are satisfied he is neither. …There should be no such stigma attaching to him".

As a closing note on the subject of cheating, a particularity of the field of anti-doping is that certain substances will require greater evidentiary efforts from the *Athlete* to establish that a violation was not *intentional*. The concept of *Fault* and cheating in anti-doping may vary along several different axes, including the type of substance involved.[107] For example, the mere presence of some types of substances in an *Athlete's* system, such as synthetic erythropoietin (EPO), in and of itself can suggest a high degree of *Fault*. In other words, it is difficult to conceive a scenario in which synthetic EPO would enter an *Athlete's* body inadvertently, i.e., absent medical intervention or through non-*intentional* pathways. Other non-*Specified Substances* do not carry the same degree of correlation between their presence and the *Athlete*'s level of *Fault*, e.g., clenbuterol, a steroid which has been established in previous cases as a contaminant in supplements,[108] and is now recognized in certain regions of the world as a possible contaminant in meat as well.[109]

5.2.1.3 Case example: non-Specified Substances prohibited at all times To provide a more concrete example of the mechanics of establishing that a violation was not *intentional* the factual circumstances of the *Mellouli* case are recalled, which are detailed in Sect. 5.1.1.3. For the sake of this section, however, the pill will be deemed to contain a substance prohibited at all times instead of *In-Competition* only, so the *Athlete* would not be entitled to the special assessment set forth in Article 10.2.3. The CAS panel would still likely accept that the swimmer's motivation for taking the pill was not related to his sport performance. Under the 2015 Code, however, a panel interpreting Article 10.2.3 in a broad sense might deem Ous Mellouli's behavior reckless (i.e., he knew there was a significant risk that his conduct might constitute a violation but manifestly disregarded it), which would in theory lead to a fixed 4-year period of *Ineligibility*. The prospect of such undesirable outcome lends support to viewing *intentional* as more than simply knowing or reckless *Use*, and instead evaluating the circumstances of the case to avoid assigning a 4-year period of *Ineligibility* for consuming substances in a context wholly unrelated to his sport performance or to cheating in sports.

5.2.1.4 Innovations in the 2015 Code The 2009 Code already included an option for increasing the length of a period of *Ineligibility* to 4 years in cases where the *ADO* could establish that aggravating circumstances were present. Under the 2015 regime, for non-*Specified Substances* at least, the opposite approach has been taken. The default period of *Ineligibility* for non-*Specified Substances* is newly 4 years, with the burden on the *Athlete* to establish entitlement to a reduction by showing that a violation was not *intentional*. The rationale set forth by WADA is that the aggravating circumstances provision was rarely used during the era of the 2009 Code.[110] This rationale appears neither entirely satisfactory nor sufficient, as it seems to downplay the notion that any increase in a length of period of *Ineligibility* must remain compliant with proportionality considerations. Whether the revised structure will truly have the effect of encouraging the imposition of 4-year periods of *Ineligibility* as is impliedly expected, or whether panels will be rather flexible in finding that violations were not *intentional* is yet to be seen.

5.2.2 Specified Substances: establishing that a violation was intentional

5.2.2.1 Process in practice For *Specified Substances,* if the special assessment for substances prohibited *In-Competition* only does not come into play, either because the violation involved a substance prohibited at all times, or because *Use Out-of-Competition* cannot be established, the next question asks whether an *ADO* established *intentional* according to the general definition in Article 10.2.3. As explained in Sect. 5.1.2.1, in practice *Athletes* are unlikely to claim the benefit of the special assessment unless the *ADO* makes—or is expected to make—a case that the violation was *intentional*.

5.2.2.2 Mechanics For *Specified Substances*, the burden rests with the *ADO* to establish that a violation is *intentional* for a 4-year period of *Ineligibility* to apply. The general definition of *intentional* is the same for both *Specified* and non-*Specified Substances,* namely:

> *As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that*

[107] See, e.g., *Qerimaj v. IWF*, para 8.11(3): "[g]enerally, the greater the potential performance-enhancing benefit, the higher the burden on the *Athlete* to prove lack of an intent to enhance sport performance" *quoting* the IWF ADR. See also, *UCI v. Georges*, para 110: "[l]a Formation est consciente que des substances plus dopantes que l'Heptaminol figurent sur la Liste CMA et que leur dépistage entrainerait automatiquement une suspension de deux ans ainsi que l'imposition d'une amende."

[108] See *WADA* v. *Hardy*; See also *UCI v. Contador*, where the panel accepted that the most likely origin of clenbuterol in the cyclist's system was through contaminated supplements.

[109] See, e.g., UKAD (2012), which details WADA's warning to *Athletes* regarding meat potentially contaminated with clenbuterol, especially in China and Mexico.

[110] See the Overview Document, p. 1.

there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

While the standard of proof that would be required by an *ADO* seeking to establish a violation was not *intentional* is not specifically defined in the Code, in comparable situations such as establishing "aggravating circumstances" under Article 10.6 of the 2009 Code, CAS panels have imposed the "comfortable satisfaction" standard.[111] CAS practice in disciplinary matters also points to a general acceptance of the comfortable satisfaction standard on the prosecuting sports organization.[112] That said, comfortable satisfaction is a variable standard, described in the Code as "greater than a mere balance of probability but less than proof beyond a reasonable doubt." In determining the actual standard within this spectrum, the hearing panel will have to "bea[r] in mind the seriousness of the allegation which is made." Since the contemplated violation is more severe and will result in at least a doubling of the sanction, it is submitted that the standard of proof applied should fall at the upper end of the spectrum of comfortable satisfaction.

The concept of *intentional* under the 2015 Code encompasses both direct intent and indirect intent, or "recklessness." To establish "direct" intent, the *ADO* is required to establish the *Athlete's* "knowledge," of either the conduct (or perhaps the prohibited nature of the conduct). To establish recklessness, the *ADO* is required to show both knowledge of a "significant risk" and the further element that the risk was "manifestly disregarded." Both aspects, therefore, require that the *ADO* establish the *Athlete's* mindset in committing the anti-doping rule violation, a hurdle that will often prove challenging, if not insurmountable, for an *ADO*. This is all the more true given that this specific distribution of the burden of proof applies only for *Specified Substances*, which are recognized by the Code as being "more likely to have been consumed by an *Athlete* for a purpose other than the enhancement of sport performance."[113]

Compelling reasons support requiring an *ADO* to establish the origin of the substance, i.e., how the substance entered the *Athlete*'s system, to show the violation was *intentional*. First, the consequences of a finding of *intentional* are quite severe from the perspective of an *Athlete* (i.e., an inflexible doubling of an otherwise applicable default sanction), thus in cases involving an *Adverse Analytical Finding*, concerns of proportionality and fairness will often command a requirement to show the origin of the substance. In cases where the *ADO* seeks to establish that a violation was *intentional* by alleging knowing ingestion of a substance, this could appear to be a self-evident statement. However, an *ADO* would also need to establish the origin of the substance when it is alleging conduct more akin to "reckless," if any assessment of the "recklessness" of the conduct is to be meaningfully undertaken. Second, CAS panels and the Swiss Supreme Court have upheld the importance of establishing the origin of the substance in relation to evaluating an *Athlete's* fault.[114] Third, requiring an *ADO* to show the origin of the substance to establish *intentional* (and not requiring an *Athlete* to establish the origin to demonstrate the violation was not *intentional*) is aligned with the fundamental principle of contra proferentem, where ambiguities in the Code would be interpreted against the drafter. As noted previously, the definition of *intentional* does not explicitly include the requirement to establish the origin of the substance in the *Athlete's* system. However, just as *Athletes* are required to establish the origin of a substance to demonstrate a "low" degree of *Fault* and receive a reduction from a 2-year period of *Ineligibility*, it stands to reason that in most cases *ADOs* would be reciprocally held to establish the origin of a substance to justify an increase in a basic sanction by demonstrating a "high" degree of *Fault*.

On a related note, CAS panels in the past have used the instrument of "Beweisnotstand"—recognized in Swiss law and other jurisdictions—to support a party (more specifically, an *Athlete* party) that is faced with a "serious difficulty in discharging its burden of proof," where this difficulty is inherent in the fact to be established.[115] According to this principle, procedural fairness in this type of situation requires the opposing party to cooperate in the procedure, notably by providing counterevidence to contest the allegations of the party bearing the burden of proof. If the opposing party fails to do so, the panel may conclude that the party has discharged its burden. In connection with the requirement to establish the origin of the substance, this obligation to cooperate has been considered fulfilled when the opposing party provides—in a substantiated manner—

[111] See, e.g., *IAAF v. Kokkinariou*, para 99.

[112] See, e.g., *de Ridder v. International Sailing Federation,* para 114.

[113] 2015 Code, Comment to Article 4.2.2.

[114] See, e.g., *I. v. FIA*, para 124. See also, *Hondo v. WADA*, para 7.3.2: "[o]n ne voit d'ailleurs pas très bien comment un coureur cycliste pourrait démontrer son absence de négligence ou de négligence significative s'il n'est pas en mesure d'établir de quelle manière la substance interdite s'est retrouvée dans son organisme."

[115] *UCI v. Contador*, para 254. The panel in this case described the following two situations where such difficulty may arise: "[a] cause for the latter may be that the relevant information is in the hands or under the control of the contesting party and is not accessible to the party bearing the burden of proof (cf ATF 117 Ib 197, 208 et seq). Another reason may be that, by its very nature, the alleged fact cannot be proven by direct means. This is the case whenever a party needs to prove 'negative facts'."

alternative credible factual scenarios regarding the origin of the substance.[116]

The instrument of "Beweisnotstand" has only been used to the benefit of the *Athlete* so far. While *ADO*s might argue that they are faced with similar "serious difficulties" in discharging their burden of proof to establish that a violation was *intentional* and invite CAS panels to transpose the same obligation of cooperation to *Athletes*, strong policy reasons advise against CAS panels recognizing this type of procedural duty. Given the similarities of the positions of the parties to anti-doping proceedings with public disciplinary or criminal matters, an obligation of this kind could manifest itself as requiring an *Athlete* to divulge potentially self-incriminating information, an obligation that would likely not withstand scrutiny from the angle of the personal rights of the *Athlete*.[117]

The *ADO* will often lack access to evidence surrounding the factual circumstances of the *Use* of a *Prohibited Substance*. Rather, it will often need to rely primarily on results of scientific analysis and expert testimony to establish *intentional Use*. For example, if an *ADO* established that the particular substance involved in a case could provide significant performance-enhancing effects in the concentration found in the *Athlete*'s *Sample*, this circumstance might lend support to a contention that the violation was *intentional*. Incidentally, a concern of preventing the *ADO* from acquiring information surrounding the *Athlete's* activities and mindset could serve as an incentive to an *Athlete* faced with an anti-doping rule violation to be less forthcoming surrounding the details of the possible ingestion, in particular to avoid divulging facts that could potentially be interpreted as an admission in support of *intentional Use*.

If the *ADO* is able to establish that a violation was *intentional*, the period of *Ineligibility* is an inflexible 4-year period. This can be compared to the situation under the 2009 Code in which an *ADO* would establish "aggravating circumstances," opening the door to an increase of the sanction from period of *Ineligibility* of 2 years up to a maximum of 4. The new sanctioning regime, however, does not allow this same flexibility of increasing a sanction to a point within this 2–4 year range. While this regime is very much in line with WADA's stated goal to create "harsher" penalties for "real cheats," especially given that a 4-year sanction will amount to a life ban in many sports, future hearing panels should consider principles of proportionality and fairness in their evaluation of whether a violation was *intentional*, especially given the lack of flexibility that forces them to increase the sanction from 2 to a fixed 4 years.

6 How the sanction can be reduced for *Fault*-related reasons (Phase B)

If a violation is not considered *intentional*, then the panel considers whether the violation can be reduced for *Fault*-related reasons (Phase B), which is discussed in this section.[118] In this Phase B, the hearing panel will be asked to determine which basic sanction applies by considering whether the violation was committed with *No Fault or Negligence* (Article 10.4) or *No Significant Fault or Negligence* (Article 10.5). For non-*Specified Substances*, as explained in Sect. 4.2.1.3, this analysis should come first in practice (i.e., before the consideration of not *intentional* according to Article 10.2.3). For *Specified Substances*, the consideration of these *Fault*-related reductions should take place only if the *ADO* did not establish that a violation was *intentional* (see Sect. 4.2.2.3). Each of the relevant Articles, 10.4 and 10.5, will be discussed in the following Sects. 6.1 and 6.2, respectively.

6.1 *No Fault or Negligence* (Article 10.4)

6.1.1 Process in practice

The first question when evaluating the *Fault*-related reductions for both non-*Specified and Specified Substances* is whether the *Athlete* established the (extremely) demanding requirements of the *No Fault or Negligence* ground that allows for elimination of all sanctions (Article 10.4). The evaluation of whether a violation was committed with *No Fault or Negligence* is practically identical for cases involving *Specified Substances* and non-*Specified Substances*.

For non-*Specified Substances,* if the *Athlete* is able to establish the factual basis underlying a finding of *No Fault or Negligence*, this should be "sufficient corroborating evidence" (in the parlance of the Code)[119] to show ipso facto that a violation is not *intentional*. A finding that the violation was committed with *No Fault or Negligence* obliges the hearing panel (in the case of both *Specified and* non-*Specified Substances*) to eliminate any otherwise applicable period of *Ineligibility* (as per Article 10.4).

[116] See, e.g., *UCI v. Contador*, para 262. The *Contador* Panel held that the *ADO* complied with this obligation of cooperation by "submitting and substantiating two additional (alternative) routes as to how the prohibited substance could have entered the [cyclist's] system."

[117] See Kaufmann-Kohler and Rigozzi (2007), Section III.2 for a discussion of issues relating to the privilege against self-incrimination in anti-doping proceedings.

[118] See 2015 Code, Appendix 2, Examples 1–5.

[119] See *supra* note 65, the Examples in Appendix 2 of the 2015 Code demonstrate that establishing a *Fault*-related reduction, such as Article 10.5.2 (*No Significant Fault or Negligence*) [and presumably Article 10.4 (*No Fault or Negligence* as well)] is "sufficient corroborating evidence" that a violation is not *intentional*. See in particular Appendix 2, Examples 1 and 3 of the 2015 Code.

If Article 10.4 is not established, the next inquiry (for both non-*Specified Substances* and *Specified* is to see whether Article 10.5 can be established (see Sect. 6.2).

6.1.2 Mechanics

The *Athlete* carries the burden of establishing *No Fault or Negligence* to the balance of probability standard.[120] If the *Athlete* is able to discharge this burden, the violation will entail no period of *Ineligibility*, nor any other *Consequence* (except for the automatic *Disqualification* under Article 9 of the Code). Appendix 1 of the Code sets forth the following definition for *No Fault or Negligence.*

> *The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*

According to the Comment to Article 10.4, *No Fault or Negligence* should only apply in "exceptional circumstances." The Comment provides—as an illustration—that an *Athlete* who could establish sabotage by a competitor would qualify for *No Fault or Negligence*, but also provides examples of circumstances that can never be regarded as falling within the scope of this provision.[121]

[120] 2015 Code, Article 3.1: "[w]here the Code places the burden of proof upon the *Athlete* or other *Person* alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability." According to the CAS panel in *WADA v. Gasquet*, para 5.9, this standard is interpreted as follows: "[i]n 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."

[121] 2015 Code, Comment to Article 10.4: "…*No Fault or Negligence* would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (*Athletes* are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the *Administration* of a *Prohibited Substance* by the *Athlete*'s personal physician or trainer without disclosure to the *Athlete* (*Athletes* are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any *Prohibited Substance*); and (c) sabotage of the *Athlete*'s food or drink by a spouse, coach or other *Person* within the *Athlete*'s circle of associates (*Athletes* are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on *No Significant Fault or Negligence*."

Athletes (except *Minor Athletes*) must establish the origin of the substance to benefit from this provision. This requirement can constitute a significant hurdle in particular cases of inadvertent doping, for example where an *Athlete* suspects the substance entered his or her system through external contamination (e.g., environmental contamination), but is unable to determine the exact source.

6.1.3 Innovations in the 2015 Code

All the key components of the *No Fault or Negligence* provision remain consistent with the 2009 Code, even if its structure has been slightly modified. The requirement to show the origin of the substance, which was previously contained in the provision itself, newly appears in the definition of *No Fault or Negligence* in Appendix 1 of the Code (with the new exception of a *Minor Athlete*). In terms of legal consequences, it also remains true that if *Athletes* can establish *No Fault or Negligence*, the period of *Ineligibility* must be eliminated and the violation will not be considered as a violation for the purposes of calculating the period of *Ineligibility* for a second violation, though this stipulation is also newly found in a different provision (specifically in Article 10.7.3).

6.2 *No Significant Fault or Negligence* (Article 10.5)

If Article 10.4 (*No Fault or Negligence*) is not established, the next *Fault*-related reduction considered is whether the violation is committed with *No Significant Fault or Negligence* under Article 10.5. The applicable provision(s) (and therefore resulting basic sanction) is dependent on the type of substance involved, and on the interpretation of the interplay among the different (special and general) provisions that allow for a *Fault*-related reduction. This interplay, including the consequences of both establishing and not establishing each provision, is discussed in this section.

The standard of *No Significant Fault or Negligence* under the 2015 Code is not a one-size fits all concept; rather, it should be applied in a manner tailored to the facts of a given case and depends on the provision invoked. This approach is apparent both in the definition of *No Significant Fault or Negligence* (which urges a consideration of the "totality of the circumstances") and within the provisions of Article 10, which suggest a different application of the standard under Articles 10.5.1 (*Contaminated Products* and *Specified Substances*), as opposed to Article 10.5.2 (*No Significant Fault or Negligence*). The 2015 Code provides for an additional range for flexibility regarding the interpretation of *No Significant Fault or Negligence* in the context of *Contaminated Products* and *Specified Substances* as compared to the standard as set forth in the 2009

Code and as compared to the general Article 10.5.2 of the 2015 Code.[122] In the 2009 Code, the application of the concept of *No Significant Fault or Negligence* was explicitly limited to "exceptional circumstances," a limitation that was regularly referenced and relied upon by CAS panels in their analysis as to whether the *No Significant Fault* or *Negligence* provision should apply to the facts of a case.[123] By contrast, in the 2015 Code, a finding of *No Significant Fault or Negligence* in the context of both *Contaminated Products* and *Specified Substances* is no longer subject to this limitation, whereas Articles 10.4 (*No Fault or Negligence*) and 10.5.2 (*No Significant Fault or Negligence*) still can only be applied in "exceptional circumstances" according to the Comment to Article 10.4.[124] Thus, the concept of *No Significant Fault or Negligence* in these types of cases should offer hearing panels more latitude, as compared to *No Significant Fault or Negligence* in the context of Article 10.5.2 of the 2015 Code.

In the next subsection, we will examine in more detail how the *No Significant Fault or Negligence* provisions operate in practice, distinguishing between *Specified Substances* (6.2.1), *Prohibited Substances Used* recreationally (6.2.2), *Contaminated Products* (6.2.3) and non-*Specified Substances* (6.2.4).

6.2.1 Specified Substances (Article 10.5.1.1)

6.2.1.1 Process in practice If it cannot be established that the violation involves *No Fault or Negligence*, and the violation does not involve a cannabinoid (nor, arguably, a *Contaminated Product,* see the discussion regarding the application of the *Contaminated Product* provision in Sect. 6.2.3), the next question is to ask whether the fully reworked *Specified Substances* provision (Article 10.5.1.1) applies.

- If the violation is found to be committed with *No Significant Fault or Negligence* according to Article 10.5.1.1, the basic sanction would be a period of *Ineligibility* ranging from a reprimand and no period of *Ineligibility* up to a maximum of 2 years *Ineligibility*, depending on the *Athlete*'s degree of *Fault*.
- If the *Athlete* is not able to establish that the violation was committed with *No Significant Fault or Negligence*, the basic sanction would be a period of *Ineligibility* of 2 years (unless the *ADO* established that a violation was *intentional*, in which case the basic sanction would be a period of *Ineligibility* of 4 years). The new formulation of the *Specified Substances* provision clears up an ambiguity from the 2009 Code. Under the 2009 Code there was a discrepancy as to whether Article 10.5.2 (*No Significant Fault or Negligence*) could be applied in cases where Article 10.4 (*Specified Substances*) was considered, but found non-applicable.[125] Under the 2015 Code, however, since the *Specified Substances* provision (Article 10.5.1.1) relies on an arguably more flexible version of the *No Significant Fault or Negligence* standard, no reason supports subsequently turning to Article 10.5.2 if the requirements for obtaining a reduction under the *Specified Substances* provision are not fulfilled, due to the complete overlap between the provisions. Further, the leader of Article 10.5.2 also states that it applies only to those violations "beyond" Article 10.5.1.1.

6.2.1.2 Mechanics To receive a reduction in the relevant period of *Ineligibility* under this Article 10.5.1.1, the *Athlete* bears the burden of establishing *No Significant Fault or Negligence*, by a balance of probability. To establish *No Significant Fault or Negligence*, the *Athlete* needs to establish the origin of the substance (unless the *Athlete* is a *Minor*).

As discussed in Sect. 6.2, the concept of *No Significant Fault or Negligence* in the context of both *Specified Substances* and *Contaminated Products* can be interpreted more generously than the relevant provisions in the 2009 Code or than the general *No Significant Fault or Negligence* under Article 10.5.2 of the 2015 Code, due to the lack of language limiting its application to only "exceptional circumstances."

[122] See Rigozzi et al. (2013), Section 4.3.D for a more detailed discussion of the added flexibility in the *No Significant Fault or Negligence* standard in the context of *Contaminated Products* and *Specified Substances.*

[123] See, e.g., *Wada v. Hardy*, para 117: "[t]wo principles are usually underlined with respect to the possibility to find an athlete's negligence to be "non significant": a period of Ineligibility can be reduced based on no significant fault or negligence only in cases where the circumstances are truly exceptional and not in the vast majority of cases…"; See also *FINA v. Cielo*, para 8.6: "[t]he relevant comments to the Rule are as follows: (a) it is only to have an impact in circumstances 'that are truly exceptional and not in the vast majority of cases'."

[124] The relevant part of the Comment to Article 10.4 of the 2015 Code is as follows: "[t]his Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an *Athlete* could prove that, despite all due care, he or she was sabotaged by a competitor."

[125] See e.g., *Kutrovsky v. ITF*, Section 9.C where the panel applied Article 10.5.2 of the 2009 Code after finding that Article 10.4 did not apply because the *Athlete* was unable to establish a lack of performance enhancing effect. In contrast, see *WADA v. de Goede*, para 7.12 where the single arbitrator noted that Article 10.5.2 should not be available if Article 10.4 does not apply, as follows: "in cases where the prerequisites for a reduction under art. 10.4 WADC are not fulfilled, logically there is no room for a reduction based on the more restrictive provision in art. 10.5.2 WADC."

6.2.1.3 Case example: inadvertent ingestion of a Specified Substance The facts of the *James Armstrong* CAS award can be used to illustrate how the reworked provision addressing *Specified Substances* prohibited at all times might function under the 2015 Code. In this case, a life-long elite curler (a wheelchair curler in the latter part of his career) returned an *Adverse Analytical Finding* from an *Out-of-Competition* test for the *Specified Substance* tamoxifen.[126] It was accepted that the origin of the substances was an accidental ingestion of James Armstrong's late wife's breast cancer medication, which he stored in the same location as his own medications.[127] Since the curler was able to establish both the origin of the substance and a lack of intent to enhance performance, the potential sanction ranged from a reprimand and no period of *Ineligibility* to a maximum 2-year period of *Ineligibility*. The panel found that the curler did not exercise "utmost caution" when he stored his wife's breast cancer medication alongside his own, so that there was some level of fault associated with his actions.[128] Since it was not necessary to specify the precise degree of fault (i.e., whether the violation would qualify for a finding of *No Significant Fault or Negligence*) under Article 10.4 of the 2009 Code, the CAS panel did not come to a conclusion as to whether his degree of fault was non-significant, but placed it somewhere between "more than non-existent," and somewhere less than the fault displayed by the cyclist in a different CAS case whose level of fault was significant[129] (but who nevertheless received a reduction from a period of *Ineligibility* of 2 years down to 18 months),[130] ultimately deciding upon a 6-month period of *Ineligibility* (given the available range of 0–2 years).

Under the 2015 Code, the starting point is Article 10.2. Since the panel concluded that the curler did exhibit some level of fault, he would not be entitled to a reduction under Article 10.4 (*No Fault or Negligence*). The next question would be to determine whether the *Specified Substances* provision applies (Article 10.5.1.1). This Article requires that the *Athlete* both establish the origin of the substance and *No Significant Fault or Negligence.* While the panel was comfortably satisfied in the *Armstrong* case that the origin of the substance was established,[131] it did not find specifically whether the level of *Fault or Negligence* was non-significant, though from the reasoning, this conclusion is not outside of the realm of possibility.[132] If James Armstrong were deemed to have *No Significant Fault or Negligence*, the consequences would be the same under the 2015 Code, namely the curler would be eligible to receive a reduction related to his degree of *Fault*, leaving his ultimate period of *Ineligibility* between 0 and 2 years. However, if he were not deemed to have acted with *No Significant Fault or Negligence*, then Article 10.5.1.1 (*Specified Substances*) would not apply and the length of his period *Ineligibility* would be 2 years according to Article 10.2.2, with his only opportunity for reduction in the Code stemming from non-*Fault*-related reductions in Article 10.6.[133]

6.2.1.4 Innovations in the 2015 Code According to WADA, one of the revision themes was to make the Code more flexible in certain circumstances, such as "where the Athlete can demonstrate that he or she was not cheating."[134] *Specified Substances* would seem to be the poster child of these cases.[135] A side-by-side comparison of the treatment of *Specified Substances* under the 2009 Code and the 2015 Code, however, does not obviously reflect this goal. Under the 2009 Code, *Athletes* were entitled to a sanction ranging from a reprimand and no period of *Ineligibility* to a maximum 2-year period of *Ineligibility*, if they were able to establish a lack of intention to enhance performance and the origin of the substance. In other words, under the 2009 Code, *Athletes* could have conceivably evidenced quite a high level of fault, so long as the level remained below the cutoff of *intentional* violations—even those grossly negligent in their duty to avoid *Prohibited Substances* would still have been eligible for a fault-related reduction to their sanction.

[126] *Armstrong v. World Curling Federation*, paras 1.1 & 2.2.

[127] *Armstrong v. World Curling Federation*, para 8.24.

[128] *Armstrong v. World Curling Federation*, paras 8.17–8.18.

[129] *Armstrong v. World Curling Federation*, para 8.50.

[130] *Oliveira v. USADA*, para 9.60. In the *Oliveira* case, the panel conducted a rather detailed evaluation and held that Ms. Oliveira, an elite cyclist, had a significant level of fault (para 9.27), but due in particular to the steps that she did take and her lack of anti-doping education, she was nevertheless entitled to a reduction in her length of period of *Ineligibility* from 2 years down to 18 months (paras 9.33–9.47).

[131] *Armstrong v. World Curling Federation*, para 8.26. The Panel noted that it was comfortably satisfied, though the relevant standard was a balance of probability.

[132] The possibility that James Armstrong could have acted with *No Significant Fault or Negligence* under the 2015 Code seems especially open given that this new provision (Article 10.5.1) does not require "exceptional circumstances" for a finding of *No Significant Fault or Negligence.*

[133] He would receive a 2-year period of *Ineligibility* because it was clear from the case that his *Use* of the *Prohibited Substance* was by accident, and therefore not *intentional*. We are assuming that under the circumstances of the case, his storage of his medicine alongside his wife's would not qualify as "reckless."

[134] Overview Document, p. 2.

[135] According to the Comment to Article 4.2.2 of the 2015 Code, while *Specified Substances* should not be considered as "less important or less dangerous," they are identified as being "more likely to have been consumed by an *Athlete* for a purpose other than the enhancement of sport performance."

In comparison, under the 2015 Code, to receive a period of *Ineligibility* below the 2-year mark, *Athletes* must establish *No Significant Fault or Negligence.* While the concept of *No Significant Fault or Negligence* can conceivably encompass a broader range of situations under the 2015 Code than it did under the 2009 Code,[136] it would need to be interpreted so broadly as to include even "grossly negligent" violations to achieve the same level of flexibility available in cases involving *Specified Substances* under the 2009 Code. Thus, *Athletes* such as the cyclist in the landmark *Oliveira* case who was able to obtain a certain reduction based on her degree of fault (despite her relatively significant degree of fault) would likely be left with a 2-year period of *Ineligibility* with no possibility for reduction under the 2015 Code.[137]

For *Athletes* with truly non-significant levels of fault associated with a violation involving a *Specified Substance*, by contrast, the available range of sanctions would be almost identical under the two versions of the Code, possibly even more flexible under the 2015 Code. In the new provision, *Athletes* do not need to establish the factual basis for their level of *Fault* to the comfortable satisfaction of the hearing panel as was previously the case for establishing the lack of intent to enhance sport performance, but only to the standard of "balance of probability."

6.2.2 *Prohibited Substances Used recreationally (cannabinoids)*

The 2015 Code newly includes a special assessment for violations involving cannabinoids. The stated purpose of the special assessment was to create a mechanism within the 2015 sanctioning regime that would preserve the perceived status quo regarding the length of the period of *Ineligibility* associated with violations involving this type of substance (which typically falls between 6 and 9 months).[138] Violations involving recreational use of drugs, in particular cannabinoids, count among the most controversial ones, due to the frequency at which they occur, the character of the *Use* of the substance (i.e., in most cases *Athletes* knowingly *Use* these types of substances), and their tenuous link with performance enhancement.[139] As a result, WADA has recently taken technical measures intended to indirectly reduce the number of violations involving the recreational *Use* of drugs,[140] but refrained from removing these substances completely from the purview of anti-doping regulation (in large part due to pressure from public authorities),[141] as some stakeholders initially requested during the review process. The difficulty of settling on a way to treat cannabinoids is evident even just by reviewing the different approaches proposed in the various drafts of the 2015 Code.[142]

The approach to drugs typically *Used* recreationally is conceptually complicated under the new sanctioning regime. Violations involving these drugs more often than not result from knowing ingestion by the *Athlete*, yet are nevertheless generally sought to be treated more leniently, whereas the 2015 Code aims to punish *intentional Use* more harshly than non-*intentional Use.* There are two key mechanisms in the 2015 Code that enable this type of "knowing" *Use* to be distinguished from the type of *intentional Use* that appropriately draws a 4-year period of *Ineligibility*. First, the addition of the word "cheat" to color the definition of *intentional* could provide panels with a legal argument to avoid finding that violations involving recreational *Use* of drugs be systematically—or at least regularly—considered *intentional*. A second legal

[136] See Sect. 6.2, above, for a discussion of the enhanced flexibility of the *No Significant Fault or Negligence* standard in the context of *Specified Substances* and *Contaminated Products* under the 2015 Code.

[137] *Oliveira v. USADA*, para 9.60. Flavia Oliveira received an 18-month period of *Ineligibility* from the CAS panel, a 6-month reduction from the 2-year period of *Ineligibility* she had originally received from the AAA panel, in spite of a finding that her degree of fault was significant (para 9.27).

[138] WADA Executive Meeting Minutes, November (2013a), p. 14. Mr. Gottlieb questioned Mr. Young whether the intent of adding the specific reference to marijuana was preserving the status quo (i.e., a 6–9 month period of *Ineligibility,* as in his view, he did not think there was an "appetite" to increase the associated sanction to a standard 2-year period of *Ineligibility*. Mr. Young confirmed that his understanding was correct.

[139] UNI Global Union & EU Athletes Study, pp. 78–79. According to this European study, cannabinoids are the most frequently used *Prohibited Substance,* accounting for 18.7 % of all violations reported in the study period.

[140] See, e.g., WADA TD2014DL, which reflects an almost tenfold increase in the decision limit for carboxy-THC as compared to the 2012 version of this Technical Document (i.e., 180 ng/mL as compared to 19 ng/mL in the 2014 and 2012 versions, respectively).

[141] See, e.g., WADA Executive Committee Meeting Minutes September (2013b), pp. 23–24 for a discussion on some of the reasons that the Committee had hesitated to remove drugs subject to recreational *Use* (especially marijuana) from WADA's purview.

[142] In the first two versions of the 2015 Code, there was a provision that provided a special sanctioning regime for so-called substances of abuse (including a maximum penalty of a 1-year period of *Ineligibility*). See Rigozzi et al. (2013), Section 4.3.E for a discussion of the treatment of "substances of abuse" in the versions 1.0 through 3.0 of the 2015 Code. This provision was removed completely and permanently in version 3.0 of the 2015 Code. In versions 4.0 and 4.1 of the 2015 Code (which to our knowledge are no longer available on WADA's website) a special assessment was added for substances prohibited *In-Competition* only, which include the most common recreationally-*Used* drugs. Then, in the final version 4.1 of the 2015, the drafters added a Comment to the definition of *No Significant Fault or Negligence* with an aim to provide an easier pathway to establish that violations involving cannabinoids were committed with *No Significant Fault or Negligence*.

argument is available to panels through the special assessment for cannabinoids, an assessment that offers additional flexibility for this particular category of substances.[143]

6.2.2.1 Process in practice The special assessment for cannabinoids appears in the Comment to the definition of *No Significant Fault or Negligence* in Appendix 1 of the Code, rather than in the sanctioning regime set forth in Article 10. It is thus not entirely clear at what point in the determination of the basic sanction this assessment should be considered. The approach most consistent with its placement in the definition of *No Significant Fault or Negligence* and its purpose to provide an easier route for establishing that this standard applies would be considering it alongside the application of the *Fault*-related reductions in Phase B. While these two Phases of the process leading to the determination of a basic sanction are described generally in Sect. 4.2.2., it is useful to consider their application in the special context of cannabinoids.

In Phase A for violations involving cannabinoids (a *Specified Substance* prohibited *In-Competition* only), the *ADO* has the burden to establish the violation was *intentional*. Thus, if the *ADO* argues that a violation should be considered *intentional* the *Athlete* would have several possibilities to contest this allegation. One option would be to establish that the *Use* was *Out-of Competition*, which grants the *Athlete* a rebuttable presumption that the violation was not *intentional* under the special assessment in Article 10.2.3 (see Sect. 5.1.2). If the *Use* was *In-Competition* (or the timing of the *Use* is unknown) then the *Athlete* may still contest that the violation was *intentional* by showing the circumstances of the case do not fall under the definition of *intentional* in Article 10.2.3. In the context of cannabinoids, knowing *Use* should rarely be sufficient to establish that a violation was *intentional* as understood under the 2015 Code. These types of violations are, in the majority of the cases, committed "knowingly," which does not translate directly into "cheating" in the same manner that the "knowing" *Use* of a different type of substance might. A more balanced approach, in line with the purpose of this provision, would be for the panel to consider whether, under the circumstances of the case, the *Athlete* intended to cheat by using the substance or in other words, whether the *Use* represented a high level of *Fault* as understood under the 2015 Code or was intended to provide an undue advantage *In-Competition*.

6.2.2.2 Mechanics The Comment setting forth this special assessment for cannabinoids reads as follows: "[f]or Cannabinoids, an *Athlete* may establish *No Significant Fault or Negligence* by clearly demonstrating that the context of the *Use* was unrelated to sport performance." If an *Athlete* succeeds in establishing this special assessment, a violation is deemed to be committed with *No Significant Fault or Negligence*, and receives a basic sanction ranging from a reprimand and no period of *Ineligibility* up to a maximum 2-year period of *Ineligibility*.

This wording squarely places the burden to establish that the *Use* was unrelated to sport performance on the *Athlete*, but the choice of the language "clearly demonstrate" raises questions as to the intended standard of proof. While the use of the phrase "clearly demonstrate" could conceivably have been envisioned to evoke a higher standard than "balance of probability," we submit that absent a more explicit indication that the standard of proof on the *Athlete* should be raised, the general rule under Article 3.1 requires that the standard remains as "balance of probability."[144]

While the special assessment includes no explicit requirement to establish the origin of the substance, demonstrating that the *Use* was in a context unrelated to sport performance would typically suppose that this origin be established. In any case, since the cases involving cannabinoids typically involve knowing *Use*, the origin of the substance (if not the timing of its *Use*) is at least known to the *Athlete*, if not easy to establish. Importantly, this special assessment does not require the *Athlete* to show that the *Use* was *Out-of-Competition*, even though cannabinoids fall within Category S8 of the *Prohibited List* and are thus prohibited *In-Competition* only. This might play an important role, as the *In-Competition* testing period generally starts 12 h before the *Competition* and often is even longer.[145]

If the provision is envisioned to pave an easier pathway for cannabinoids to be deemed to be conducted with *No Significant Fault or Negligence*, since in almost all circumstances it is used in a recreational manner (i.e., not in a context related to sport performance), it would not be entirely unexpected to see it applied by analogy to other similar substances *Used* in a similar manner and context.

[143] WADA Executive Meeting Minutes November (2013a), p. 13. According to Mr. Young of the 2015 Code drafting team, they had "tried really hard to avoid a direct reference to marijuana" in the 2015 Code, but their attempts to do so had only "messed up the definition of no significant fault." He continued to explain that the difficulty lies in marijuana's unique situation, in that it is something typically taken intentionally, so it was difficult to work within the framework of the definition of *No Significant Fault or Negligence*, without the risk of creating an "automatic" sanction for these types of violations.

[144] See Rigozzi et al. (2014), para 20 for a discussion on these standards in the context of this provision.

[145] 2015 Code, Appendix 1, definition of *In-Competition*. See, e.g., FINA Doping Control Rules, Appendix 1, definition of *Competition* Period, where the *In-Competition* period is defined as the "time between the beginning of the opening ceremonies and the end of the closing ceremonies."

This is all the more true considering that earlier draft versions of the 2015 Code included a specific provision and special treatment for a larger category of "substances of abuse" rather than specifically cannabinoids, recognizing that other substances on the *Prohibited List* might warrant a similar type of treatment.

6.2.2.3 Case example: cannabinoids To illustrate the application of the new special assessment for cannabinoids, we refer to the fact pattern from the 2005 CAS case *P. v. Swiss Olympic*. In this case, a field hockey player tested positive *In-Competition* for a *Metabolite* of cannabis (carboxy-THC at a level of 318.6 ng/mL) that he ingested 12 days before the *Competition*.[146] The sole arbitrator in the case found that the *Athlete* had ingested cannabis knowingly, but without intent to enhance his performance and outside any context related to sport performance.[147] The arbitrator also noted in the hockey player's favor that the fact that his actions took place in another country meant they did not negatively influence any of the youth with whom he regularly worked.[148] In light of these factors, the sole arbitrator decided that 6 months would be an appropriate period of *Ineligibility*.[149]

Under the 2015 Code, Article 10.2 is the starting point for determining the length of a period of *Ineligibility*. In the particular matter, the level of *Metabolites* in the *Athlete's* sample was still considerably higher than the new threshold level for carboxy-THC, which was raised by nearly a factor of 10 in 2013,[150] so that the analytical findings would still be considered as an anti-doping rule violation. The definition of *No Significant Fault or Negligence* provides that for violations involving cannabinoids, *No Significant Fault or Negligence* can be established by clearly demonstrating that the *Use* was in a context unrelated to sport performance. Since the *Athlete* was able to establish this element, his violation would likely be considered not *intentional* and committed with *No Significant Fault or Negligence*. Accordingly, under Article 10.5.1.1 (*Specified Substances*) the length of the period of *Ineligibility* associated with his basic sanction would range from 0 to 2 years, depending on his degree of *Fault*.

[146] *P. v. Swiss Olympic*, p. 2.

[147] *P. v. Swiss Olympic*, para 35.

[148] *P. v. Swiss Olympic*, para 36–37.

[149] This case was decided under the 2003 Code regime. Accordingly, the range of available sanctions was different than it would have been under the 2009 Code (or the 2015 Code), namely a maximum of a 1-year period of *Ineligibility*.

[150] See WADA TD2013DL (as compared to WADA TD2012DL).

6.2.2.4 Innovations in the 2015 Code Adding in the Code itself a mechanism specific to one category of *Prohibited Substances* (beyond the classification of *Specified* and non-*Specified*) is a new approach. The special assessment is expected to function to avoid the application of a 2- or a 4-year period of *Ineligibility* for recreational use of cannabinoids, by providing a straightforward pathway for *Athletes* to reduce the period of *Ineligibility* to a range between 0 and 2 years. This pathway should allow *Athletes* to benefit from a treatment similar to the one afforded in the past under Article 10.4 of the 2009 Code (and 10.3 of the 2003 Code).

Under the 2009 Code, to receive a reduction related to fault for cannabinoids under the *Specified Substances* provision (Article 10.4 of the 2009 Code), an *Athlete* had to establish the origin of the substance (by a balance of probability) and a lack of intent to enhance sport performance (to the comfortable satisfaction of the hearing panel). If *Athletes* were able to establish these two elements, they would receive a period of *Ineligibility* between 0 and 2 years, based on their degree of fault. In comparison, under the 2015 Code, the *Athlete* has to establish that the *Use* was in a context unrelated to sport performance, but only by a balance of probability. Thus, under the 2015 version of the Code, even more than under the 2009 version, the panel will in most cases have discretion to determine the length of a period of *Ineligibility* for a basic sanction in between 0 and 2 years, based on the *Athlete's* degree of *Fault.*

6.2.3 Contaminated Products (Article 10.5.1.2)

6.2.3.1 Process in practice For non-*Specified Substances* (and possibly *Specified Substances* as well), if it cannot be established that a violation was committed with *No Fault or Negligence*, the next possibility to establish that a *Fault*-related reduction applies is to determine whether the facts of the case support the application of the *Contaminated Products* provision [see Sects. 4.2.1.3 (non-*Specified Substances*) and 4.2.2.3 (*Specified Substances*)].

For both non-*Specified* and *Specified Substances*, if the *Contaminated Products* provision is established, the basic sanction ranges from a reprimand and no period of *Ineligibility* to a maximum 2-year period of *Ineligibility*, depending on the *Athlete*'s degree of *Fault*.

Non-*Specified Substances*

If the *Contaminated Products* provision does not apply because the origin of the substance cannot be established to fall within the definition of a *Contaminated Product*, then the panel could then consider whether the violation could qualify for *No Significant Fault or Negligence* under Article 10.5.2. By contrast, if the violation is found to involve

a *Contaminated Product*, but the *Athlete* cannot establish the other prerequisite of *No Significant Fault or Negligence* under Article 10.5.1.2, there is no reason to then consider Article 10.5.2. Indeed, *No Significant Fault or Negligence* is equally a prerequisite under Article 10.5.2 (and an arguably stricter one, see Sect. 6.2), making an assessment under this second provision redundant. In addition, the heading of Article 10.5.2 provides that it applies to only "beyond" the *Contaminated Products* and *Specified Substance* provision.

Specified Substances

Neither Articles 10.5.1.1 (*Specified Substances*) nor 10.5.1.2 (*Contaminated Products*) include guiding language regarding their conceived interplay in case a violation involving a *Specified Substance* could also conceivably fall within the scope of the *Contaminated Products* provision.

First, Article 10.5.1.2 (*Contaminated Products)* could be seen as lex specialis with the consequence that one could not fall back on Article 10.5.1.1 (*Specified Substances*) in a *Contaminated Products* case. Since the *Contaminated Product* provision is more "specific" for these type of violations, its application would prevail over the generally applicable Article 10.5.1.1 for *Specified Substances*.[151]

A second, more pragmatic interpretation is that both provisions are simultaneously applicable. Thus, the *Contaminated Products* provision would typically be bypassed in cases involving *Specified Substances*, since the prerequisites of Article 10.5.1.1 (*Specified Substances*) are likely to be easier to fulfill. Indeed, the *Contaminated Products* provision contains the additional prerequisite of establishing that the origin of was a *Contaminated Product*, even (presumably) for *Minor Athletes.* As a drawback, cases involving *Contaminated Products* under this interpretation would technically still be treated differently (i.e., fall under different provisions) depending on whether a *Specified Substance* or a non-*Specified Substance* was involved, running counter to the intentions of the Code drafters to treat all cases of product contamination alike. That said, neither provision includes language mandating the application of the *Contaminated Products* provision in cases involving both *Contaminated Products* and *Specified Substances*, or preventing the subsequent consideration of the *Specified Substances* provision. From a tactical viewpoint, the extra requirement in the *Contaminated Products* provision should in any event considerably reduce its appeal for violations involving *Specified Substances*, unless counsel for the *Athlete* would find some strategic—perhaps psychological—advantage in emphasizing that the *Athlete's* situation fulfilled the requirements for the *Contaminated Product* provision or successfully claim that the *No Significant Fault or Negligence* standard in this context should be more flexible.

In spite of these ambiguities, there should be no substantial practical consequences to settling on either one of these two potential interpretations. Once it is established that the violation arose from a *Contaminated Product*, the remaining element in both provisions is identical: establishing *No Significant Fault or Negligence*. If it cannot be established that a violation arose from a *Contaminated Product*, Article 10.5.1.1 (*Specified Substances*) is applicable, as the violation then falls outside the scope of Article 10.5.1.2 altogether. If the violation is shown to arise from a *Contaminated Product*, then under both provisions, the relevant question for an *Athlete* to receive a reduction is whether the violation was committed with *No Significant Fault or Negligence*. Whether the analysis of *No Significant Fault or Negligence* would be substantially different under these two provisions, perhaps due to an influence of the definition of *Contaminated Products*, remains to be seen and will depend on the hearing panel's interpretation.

6.2.3.2 Mechanics As per the prerequisites of the *Contaminated Products* provision, *Athletes* must establish two elements by a balance of probability: (i) the origin of the *Prohibited Substance* was a *Contaminated Product* according to the definition provided in Appendix 1 of the Code; and (ii) *No Significant Fault or Negligence*. If *Athletes* are able to establish these two elements, the basic sanction ranges from a reprimand and no period of *Ineligibility* to a maximum 2-year period of *Ineligibility*, depending on the *Athlete*'s degree of *Fault*. The exact length of the period of *Ineligibility* is determined based upon the *Athlete's* degree of *Fault*, and is considered in the second step in the overall process to determine an "appropriate sanction," which is beyond the scope of this article.

The first element amounts to determining whether the case under consideration fits within the definition of *Contaminated Products*, thus falling within the scope of this provision. The definition of *Contaminated Products* found in Appendix 1 of the Code reads as follows:

> *A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search.*

This definition follows a certain trend displayed in the 2015 Code of departing from legally established concepts and developing instead a collection of doping-specific

[151] See *Glaesner v. FINA*, para 78 for an example of a description of lex specialis in the context of anti-doping rule violations: "[a]ccording [to the principle of *lex specialis derogat generali*] the (more) specific rule prevails over the more general rule, since the lex specialis is presumed to have been drafted having in mind particular purposes and taking into account particular circumstances."

standards for determining the length of a period of *Ineligibility*.[152] The version of the definition finally retained is more colloquial than the legally-slanted versions in earlier drafts of the 2015 Code and was intended to define a standard of "obvious care" in matters of *Contaminated Products* to harmonize the jurisprudence and set forth clear and comprehensible guidelines for *Athletes*. However, defining a *Contaminated Product*—and thus the scope of application of the provision—in terms of a standard of care, i.e., the measures that *Athletes* are expected to take to avoid a violation involving a *Contaminated Product*, understandably raises some complications in practice.

For the purposes of determining whether the violation falls within the scope of the *Contaminated Products* provision, it makes sense to view the definition of a *Contaminated Product* from an objective perspective. Simply put, the relevant question should be whether checking the product label or conducting a reasonable Internet search would have revealed the presence of a *Prohibited Substance*, regardless of whether the *Athlete* actually took these steps.[153]

When it comes to the definition of *Contaminated Product*, the rather fact-specific elements in this definition could make it difficult to satisfactorily apply the definition to the various fact patterns that it could potentially cover. The definition raises basic questions of interpretation centering upon the significance of the term "disclosed," both in relation to the product label and in relation to the Internet search. Would a substance be considered "disclosed" if it appears on the label under a name that differs from or is not explicitly mentioned on the *Prohibited List*? What is envisioned if an Internet search would merely have yielded "alarming" information with respect to the possible presence of a *Prohibited Substance* in the product, rather than explicitly disclosing the presence of the *Prohibited Substance* (as in the case example in Sect. 6.2.3.3)? *Athletes* around the world have different levels of Internet access and dexterity, as well as diverging degrees of familiarity with the subject of *Prohibited Substances*, which could also compound the difficulty of applying this definition in a harmonized and consistent manner. This reality supports applying this standard from the perspective of a reasonable person similarly situated to the *Athlete* in question (i.e., an objective but individualized standard). While this approach could lead to the definition of a *Contaminated Product* varying slightly from case to case, it still appears more desirable than excluding *Athletes* from a reduction of their sanction based on contingencies such as their individual Internet savviness.

Since the definition appears tailored to cases involving supplements, another question that arises is how broadly it could be interpreted to apply to other types of "products," such as food and drinks? Indeed, not all "products" vulnerable to contamination will even carry a product label, thus discarding the first half of the inquiry at the outset (e.g., for cases of contaminated ordinary food). If one were to interpret the provision narrowly, this would not greatly impact *Athletes* testing positive for *Specified Substances* (since these cases would fall into the category of Article 10.5.1.1). By contrast, difficulties would arise for cases involving non-*Specified Substances*, since these cases would need to be assessed under Article 10.5.2, with only limited range for reduction (i.e., only half of the otherwise applicable sanction) and a stricter notion of *No Significant Fault or Negligence*.

Once it has been determined that the case falls within the scope of the *Contaminated Product* provision, the second element of Article 10.5.1.2 requires that an *Athlete* establishes *No Significant Fault or Negligence* by a balance of probability. The Code does not contain a specific definition of *No Significant Fault or Negligence* for *Contaminated Products* and the hearing panels will have to refer to the general definition, which is presented in Sect. 6.2.4.2.

However, it is submitted that the particularities of *Contaminated Products* have been overlooked. Indeed in CAS jurisprudence, one of the major themes underlying the interpretation of the *No Significant Fault or Negligence* standard is the reasonable character of actions taken by an *Athlete* with a view to avoiding an anti-doping rule violation. CAS panels have confirmed that an *Athlete* does not need to "exhaust every conceivable step"[154] to establish *No Significant Fault or Negligence*. Rather, panels have tended toward a more measured—albeit still often rather strict—understanding of *No Significant Fault or Negligence*, considering this provision applicable when an *Athlete* can demonstrate that he or she took "the clear and obvious precautions which any human being would take."[155] That said, it does seem likely that the definition will be seen as giving an indication of the minimum standard of care required from *Athletes* in the context of *Contaminated Products*: *Athletes* are expected to look at the product label and conduct an Internet search. Thus, it might be much more difficult to argue in the future that

[152] Another doping-specific standard is the concept of "cheating," see, in particular, Sects. 3.1.2 and 5.2.1, above.

[153] While it is not inconceivable that the definition could be considered through a subjective lens, i.e., asking the question of whether the *Athlete* actually took these two precautions, this approach has complicated implications. For one, it would then become unclear what additional elements would be expected to establish *No Significant Fault or Negligence*.

[154] See, e.g., *Despres v. CCES*, para 7.8.

[155] See, e.g., *Knauss v. FIS*, para 7.3.6.

those who failed to take these two precautions (especially in the case of labeled products, such as supplements) adequately discharged their duty to avoid the presence of a *Prohibited Substance* in this context. To the extent that the definition is intended to evoke a standard of care for *Contaminated Products*, it is submitted that the assessment under this provision should be grounded more in the "reasonableness" of an *Athlete's* efforts rather than a strict adherence to the objective fact-specific components (checking the product label and conducting Internet search), especially in *Contaminated Products* cases that do not involve supplements or other labeled products.

As is illustrated by the recent *Cilic* case, the subjective actions of an *Athlete* can play an important, even decisive, role in the evaluation of the level of *Fault,* even when the objective expectations are not strictly met.[156] In this case, a tennis player committed an anti-doping rule violation due to mistaking a *Prohibited Substance* on the product label (written in French, a language in which the tennis player was not fluent) of an unfamiliar brand of glucose tablets for a vitamin with which he was familiar and that was an ingredient in his normal brand of glucose tablets. The CAS panel in this case outlined a framework for analyzing an *Athlete's* degree of fault that favored first considering the objective side of the evaluation, listing five measures that, if taken, would avoid "almost all" anti-doping rule violations involving a product containing a *Prohibited Substance* (including consulting the product label and conducting an Internet search).[157] The panel emphasized, however, that "an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances,"[158] and proceeded to discuss the subjective elements of an anti-doping rule violation that could impact an *Athlete's* level of fault.[159] Indeed, in this case the subjective elements exerted a considerable—if not decisive—influence. As the CAS panel stated, once it was accepted that the tennis player was reasonable in his mistake regarding the ingredients of the glucose tablet, his "subjective capacity to comply with his objective duty was reduced."[160] This statement describes a pathway for the subjective elements of the case to preempt and affect the objective analysis of the circumstances, a pathway that is also relevant to the application of the *Contaminated Products* provision under the 2015 Code. As explained, the definition of *Contaminated Products* can be expected to prescribe an objective minimum standard of care expected of *Athletes* in this type of situation. However, once the *Contaminated Product* provision has been found to apply, the specific circumstances of the case should be considered when assessing whether an *Athlete* did, in fact, apply an appropriate level of care. This approach ultimately appears an inevitable component of determining a basic sanction in accordance with the proportionality principle.

It should also be noted that while *Minors* no longer have to show the origin of a substance to establish *No Significant Fault or Negligence,* there is no similar explicit exception for the element of establishing that the *Prohibited Substance* originated from a *Contaminated Product.*

6.2.3.3 Case example: Contaminated Products The anticipated mechanics of the *Contaminated Products* provision can be illustrated by using the factual background of the *Hardy* CAS case as an example. In this case, an elite swimmer tested positive for the *Prohibited Substance* clenbuterol that originated from a contaminated supplement.[161] Recognizing the risk that supplements could be contaminated, the swimmer had taken lengths to ensure that they contained no *Prohibited Substances*, including: engaging in conversations with the manufacturer, consulting the product website, confirming that the products were tested for purity, discussing the quality of the brand of supplements with people in the sports industry, and even making an indemnification agreement with the supplement manufacturer to guarantee the absence of *Prohibited Substances*.[162] These efforts notwithstanding, WADA did not accept that she conducted an adequate level of research, noting in particular that a "simple search on the Internet" would have revealed "alarming" descriptions of the food supplements.[163] The CAS panel, however, found that the swimmer's diligence in investigating the supplement did in fact allow for a finding that the violation was committed with *No Significant Fault or Negligence* and the circumstances of the case were "truly exceptional."[164] Thus, under the FINA rule equivalent to Article 10.5.2 of the Code, her associated range of period of *Ineligibility* could be reduced by a maximum of one-half of the otherwise applicable period of *Ineligibility*. In other words, the available range for the swimmer's period of *Ineligibility* was 1–2 years, of which the panel deemed the length of 1 year to be proportionate.

Applying the 2015 Code regime to this situation, the starting point is Article 10.2. According to Article 10.2.1.1, since the *Prohibited Substance* is a non-*Specified*

[156] See Viret and Wisnosky (2014) for a more detailed discussion of the *Cilic* case.

[157] *Cilic v. ITF*, para 74.

[158] *Cilic v. ITF*, para 75.

[159] *Cilic v. ITF*, paras 76–77.

[160] *Cilic v. ITF*, para 97.

[161] *WADA v. Hardy*, para 114.

[162] *WADA v. Hardy*, para 119.

[163] *WADA v. Hardy*, para 112.

[164] *WADA v. Hardy*, para 119.

Substance prohibited at all times, the length of the associated period of *Ineligibility* is 4 years, unless the *Athlete* can establish that the violation was not *intentional*. In determining whether the *Athlete* can establish that the violation was not *intentional*, the first question is whether Article 10.4 (*No Fault or Negligence*) applies. Jessica Hardy did not argue that the violation was committed with *No Fault or Negligence*, and in any event, contaminated supplements are explicitly excluded from a finding of *No Fault or Negligence* in the Comment to Article 10.4 of the 2015 Code. The next inquiry is whether the product originated from a *Contaminated Product*, according to the definition set forth in Appendix 1 of the Code. It was undisputed in the *Hardy* case that clenbuterol did not appear on the product label. The panel also found that Jessica Hardy "made the research and investigation which could be reasonably expected from an informed athlete wishing to avoid risks connected to the use of food supplements."[165] It is less clear from the award, however, whether a "reasonable Internet search" (within the meaning of the new definition of a *Contaminated Product*) was conducted, or whether a reasonable search would have actually "disclosed" the presence of a *Prohibited Substance*. It appears that an Internet search might have only revealed "alarming" information, as WADA submitted. Thus, despite accepting that the origin of the substance was a "contaminated supplement," it does not necessarily follow that the origin of the substance in this case would even fall under the definition of *Contaminated Product* in the 2015 Code. That being said, the panel did find that Jessica Hardy acted reasonably and that there was no indication that an Internet search would have revealed the presence of clenbuterol (though it was not specifically addressed). Thus, in our view, the *Contaminated Product* provision should apply.

Under this assumption, the applicable basic sanction ranges from a reprimand and no period of *Ineligibility* to a maximum 2-year period of *Ineligibility* since the panel accepted that the swimmer acted with *No Significant Fault or Negligence*. The AAA panel that decided the *Hardy* case in first instance found that the "totality of the circumstances" in this case would warrant a reduction in the "maximum possible extent under the applicable rules,"[166] which applying this same statement to the available range of sanction length in the 2015 Code would lead to a reprimand and no associated period of *Ineligibility*. However, even the AAA panel acknowledged that there was some level of negligence present, so a hearing panel might well hesitate before reducing the sanction down to a reprimand, even given the opportunity to do so under the new regime. In any case, as Jessica Hardy was able to establish that she acted with *No Significant Fault or Negligence*, she should therefore be considered to have established that the violation was not *intentional*, and thus, the maximum basic sanction she would face should be a 2-year period of *Ineligibility*, according to Articles 10.2.2 and 10.5.2 of the 2015 Code.

6.2.3.4 Innovations in the 2015 Code As shown in the case example, the new *Contaminated Products* provision would likely grant greater flexibility in cases such as the *Hardy* case, by widening the available basic sanctions from a period of *Ineligibility* ranging from 1 to 2 years (under the 2003 and 2009 Codes) to a period of *Ineligibility* ranging from 0 to 2 years (under the 2015 Code), provided that the provision is found applicable in the first place. This greater flexibility could have led to a shorter sanction length in the *Hardy* case. The Code certainly offers no indication that the new regime would result in a longer period of *Ineligibility*: even if the *Contaminated Products* provision did not apply, Jessica Hardy could still receive a reduction under the *No Significant Fault or Negligence* provision (Article 10.5.2). This latter provision is almost identical in substance to Article 10.5.2 of the 2009 Code and will be discussed in the next section.

6.2.4 Non-Specified Substances (Article 10.5.2)

6.2.4.1 Process in practice If neither Article 10.4 (*No Fault or Negligence*) nor Article 10.5.1.2 (the *Contaminated Product* provision) applies, the third question is whether the general provision regarding *No Significant Fault or Negligence* (Article 10.5.2) can be used to reduce the otherwise applicable sanction length. This Article 10.5.2 should not apply in cases involving *Specified Substances or Contaminated Products*. As stated above, since all three provisions rely on *No Significant Fault or Negligence*, and given that this concept is arguably broader in connection with *Specified Substances* and *Contaminated Products*, it would by all means be meaningless to fall back on Article 10.5.2 and reconsider *No Significant Fault or Negligence* under this general provision. However, if the violation does not involve a *Specified Substance* and the *Contaminated Products* provision is not considered applicable because the origin of the substance does not properly fall within the definition of *Contaminated Products*, then the violation would be altogether outside the scope of the *Contaminated Products* provision, and falls under the purview of Article 10.5.2.

6.2.4.2 Mechanics The *Athlete* carries the burden to establish that the violation was committed with *No Significant Fault or Negligence.* The following is the

[165] *WADA v. Hardy*, para 120.

[166] *WADA v. Hardy*, para 14.

definition of *No Significant Fault or Negligence* found in Appendix 1 of the Code:

> *The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*

To establish *No Significant Fault or Negligence* under the 2015 Code, *Athletes* must—as previously under the 2009 Code—establish the origin of the substance, with the exception of *Minor Athletes.* Additionally, according to the Comment to Article 10.4, this ground for reduction should only apply in "exceptional circumstances." Moreover, the Comment to Article 10.5.2 sets forth the following limitations on its application:

> *Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation* (*e.g., Articles 2.5, 2.7, 2.8 or 2.9*) *or an element of a particular sanction* (*e.g., Article 10.2.1*) *or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.*

6.2.4.3 Innovations in the 2015 Code This provision is very similar in substance to Article 10.5.2 of the 2009 Code, with the exception that *Minor Athletes* no longer have to show the origin of the substance to establish *No Significant Fault or Negligence,* and cases involving *Contaminated Products* that can already benefit from Article 10.5.1.2 are removed from the ambit of the provision.

7 Conclusion

While the new 2015 Code leaves the door open to different possible interpretations with respect to the precise functioning of the sanctioning regime, this article has proposed one construction that seeks to avoid foreseeable pitfalls and conceptual complexities, which might "over-legalize" doping disputes, resulting in raised costs and excessive efforts and diverting resources from other aspects of the fight against doping in sports.

The 2015 version of the Code introduces many new concepts, without the interplay between these concepts being clearly set forth in the Code provisions, which may convey a certain feeling of complexity to *Athletes* as well as lawyers. To understand these complexities, one needs to keep in mind the broader context surrounding the genesis of the term *intentional*, especially during the final rounds of the review process. Indeed, some of the lingering ambiguities likely find an explanation in that mechanisms had to be designed to palliate the failure to take more radical options initially suggested by the Code drafting team, such as abandoning the distinction *Out-of-Competition* versus *In-Competition* prohibition in the *Prohibited List* altogether, or making performance enhancement a mandatory criterion for inclusion of a *Prohibited Substance or Method* onto the *Prohibited List*.

Ultimately, CAS panels will have the mission of coming to a cohesive interpretation of these provisions, to achieve their application in a fair and harmonious fashion.

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Appendix 1: The full text and Comments to Articles 10.2, 10.4, 10.5.1, 10.5.2, 10.5.5 (except the Examples), and 10.6 of the 2009 Code

10.2 *Ineligibility* for Presence, *Use* or *Attempted Use*, or *Possession of Prohibited Substances* and *Prohibited Methods*

The period of *Ineligibility* imposed for a violation of Article 2.1 (Presence of *Prohibited Substance* or its *Metabolites* or *Markers*), Article 2.2 (*Use* or *Attempted Use* of *Prohibited Substance* or *Prohibited Method*) or Article 2.6 (*Possession* of *Prohibited Substances* and *Prohibited Methods*) shall be as follows, unless the conditions for eliminating or reducing the period of *Ineligibility*, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of *Ineligibility*, as provided in Article 10.6, are met:

> First violation: Two (2) years *Ineligibility*.
>
> [*Comment to Article 10.2*: *Harmonization of sanctions has been one of the most discussed and debated areas of anti-doping. Harmonization means that the same rules and criteria are applied to assess the unique facts of each case. Arguments against requiring harmonization of sanctions are based on differences between sports including, for example, the following: in some sports the Athletes are professionals making a sizable income from the sport and in others the Athletes are true amateurs; in those sports where an Athlete's career is short* (*e.g., artistic gymnastics*) *a two-year Disqualification has a much*

more significant effect on the Athlete than in sports where careers are traditionally much longer (*e.g., equestrian and shooting*); *in Individual Sports, the Athlete is better able to maintain competitive skills through solitary practice during Disqualification than in other sports where practice as part of a team is more important. A primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of jurisdictional conflicts between International Federations and National Anti-Doping Organizations.*]

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10.4 Elimination or Reduction of the Period of *Ineligibility* for *Specified Substances* under Specific Circumstances

Where an *Athlete* or other *Person* can establish how a Specified Substance entered his or her body or came into his or her *Possession* and that such Specified Substance was not intended to enhance the *Athlete*'s sport performance or mask the *Use* of a performance-enhancing substance, the period of *Ineligibility* found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of *Ineligibility* from future *Events*, and at a maximum, two (2) years of *Ineligibility*.

To justify any elimination or reduction, the *Athlete* or other *Person* must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the *Use* of a performance-enhancing substance. The *Athlete*'s or other *Person*'s degree of fault shall be the criterion considered in assessing any reduction of the period of *Ineligibility*.

[*Comment to Article 10.4: Specified Substances are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances* (*for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition*); *for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation. This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete in taking or Possessing a Prohibited Substance did not intend to enhance his or her sport performance. Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non sport-related prescription for the Specified Substance. Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance. While the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel, the Athlete may establish how the Specified Substance entered the body by a balance of probability.*

In assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases.]

10.5 Elimination or Reduction of Period of *Ineligibility* Based on Exceptional Circumstances

10.5.1 *No Fault or Negligence*

If an *Athlete* establishes in an individual case that he or she bears *No Fault or Negligence*, the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete*'s *Sample* in violation of Article 2.1 (Presence of *Prohibited Substance*), the *Athlete*

must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* eliminated. In the event this Article is applied and the period of *Ineligibility* otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2 *No Significant Fault or Negligence*

If an *Athlete* or other Person establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the otherwise applicable period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete*'s *Sample* in violation of Article 2.1 (presence of a *Prohibited Substance* or its *Metabolites* or *Markers*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of I*neligibility* reduced.

[*Comment to Articles 10.5.1 and 10.5.2: The Code provides for the possible reduction or elimination of the period of Ineligibility in the unique circumstance where the Athlete can establish that he or she had No Fault or Negligence, or No Significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two-year suspension based on a range of other factors even when the Athlete was admittedly at fault. These Articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. Article 10.5.2 may be applied to any anti-doping rule violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rule violations where knowledge is an element of the violation. Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases. To illustrate the operation of Article 10.5.1, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances:* (*a*) *a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement* (*Athletes are responsible for what they ingest* (*Article 2.1.1*) *and have been warned against the possibility of supplement contamination*); (*b*) *the administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete* (*Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance*); *and* (*c*) *sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates* (*Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink*). *However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence.* (*For example, reduction may well be appropriate in illustration* (*a*) *if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.*) *For purposes of assessing the Athlete's or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. While Minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete's or other Person's fault under Article 10.5.2, as well as Articles 10.3.3, 10.4 and 10.5.1 Article 10.5.2 should not be applied in cases where Articles 10.3.3 or 10.4 apply, as those Articles already take into consideration the Athlete's or other Person's degree of fault for purposes of establishing the applicable period of Ineligibility.*]

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10.5.5 Where an *Athlete* or other *Person* Establishes Entitlement to Reduction in Sanction Under More than One Provision of this Article.

Before applying any reduction or suspension under Articles 10.5.2, 10.5.3 or 10.5.4, the otherwise applicable period of *Ineligibility* shall be determined in accordance with Articles 10.2, 10.3, 10.4 and 10.6. If the A*thlete* or other *Person* establishes entitlement to a reduction or suspension of the period of *Ineligibility* under two or more of Articles 10.5.2, 10.5.3 or 10.5.4, then the period of *Ineligibility* may be reduced or suspended, but not below one-fourth of the otherwise applicable period of *Ineligibility*.

[*Comment to Article 10.5.5: The appropriate sanction is determined in a sequence of four steps. First, the hearing panel determines which of the basic sanctions* (*Article 10.2, Article 10.3, Article 10.4 or Article 10.6*) *applies to the particular anti-doping rule violation. In a second step, the hearing panel establishes whether there is a basis for suspension, elimination or reduction of the sanction* (*Articles 10.5.1 through 10.5.4*). *Note, however, not all grounds for suspension, elimination or reduction may be combined with the provisions on basic sanctions. For example, Article 10.5.2 does not apply in cases involving Articles 10.3.3 or 10.4, since the hearing panel, under Articles 10.3.3 and 10.4, will already have determined the period of Ineligibility based on the Athlete's or other Person's degree of fault. In a third step, the hearing panel determines under Article 10.5.5 whether the Athlete or other Person is entitled to elimination, reduction or suspension under more than one provision of Article 10.5. Finally, the hearing panel decides on the commencement of the period of Ineligibility under Article 10.9…* [*Examples omitted*]]

10.6 Aggravating Circumstances Which May Increase the Period of *Ineligibility*

If the *Anti-Doping Organization* establishes in an individual case involving an anti-doping rule violation other than violations under Articles 2.7 (*Trafficking or Attempted Trafficking*) and 2.8 (Administration or *Attempted* Administration) that aggravating circumstances are present which justify the imposition of a period of *Ineligibility* greater than the standard sanction, then the period of *Ineligibility* otherwise applicable shall be increased up to a maximum of four (4) years unless the *Athlete* or other *Person* can prove to the comfortable satisfaction of the hearing panel that he or she did not knowingly commit the anti-doping rule violation.

An *Athlete* or other *Person* can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by an *Anti-Doping Organization.*

[*Comment to Article 10.6: Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person Used or Possessed multiple Prohibited Substances or Prohibited Methods or Used or Possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation*(*s*) *beyond the otherwise applicable period of Ineligibility; the Athlete or Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.*

For the avoidance of doubt, the examples of aggravating circumstances described in this Comment to Article 10.6 are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility. Violations under Articles 2.7 (*Trafficking or Attempted Trafficking*) *and 2.8* (*Administration or Attempted Administration*) *are not included in the application of Article 10.6 because the sanctions for these violations* (*from four years to lifetime Ineligibility*) *already build in sufficient discretion to allow consideration of any aggravating circumstance.*]

Appendix 2: The full text and Comments to Articles 10.2, 10.4, 10.5, and 10.6.4 of the 2015 Code

10.2 *Ineligibility* for Presence, *Use* or *Attempted Use* or *Possession* of a *Prohibited Substance* or *Prohibited Method*

The period of *Ineligibility* for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance,* unless the

Athlete or other *Person* can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and the *Anti-Doping Organization* can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of *Ineligibility* shall be two years.

10.2.3 As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those *Athletes* who cheat. The term, therefore, requires that the *Athlete* or other *Person* engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall be rebuttably presumed to be not "intentional" if the substance is a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered "intentional" if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

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10.4 Elimination of the Period of *Ineligibility* where there is *No Fault or Negligence*

If an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Fault or Negligence*, then the otherwise applicable period of *Ineligibility* shall be eliminated.

[*Comment to Article 10.4: This Article and Article 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They will only apply in exceptional circumstances, for example, where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, No Fault or Negligence would not apply in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Article 10.5 based on No Significant Fault or Negligence.*]

10.5 Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence*

10.5.1 Reduction of Sanctions for *Specified Substances* or *Contaminated Products* for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.1 *Specified Substances*

Where the anti-doping rule violation involves a *Specified Substance*, and the *Athlete* or other *Person* can establish *No Significant Fault or Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years of *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

10.5.1.2 *Contaminated Products*

In cases where the *Athlete* or other *Person* can establish *No Significant Fault or Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

[*Comment to Article 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form.*]

10.5.2 Application of *No Significant Fault or Negligence* beyond the application of Article 10.5.1

If an *Athlete* or other *Person* establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears *No Significant Fault or Negligence,* then, subject to further reduction or elimination as provided in Article 10.6, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete* or other *Person's* degree of *Fault*, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Article may be no less than eight years.

[*Comment to Article 10.5.2: Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Articles 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.*]

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10.6.4 Application of Multiple Grounds for Reduction of a Sanction

Where an *Athlete* or other *Person* establishes entitlement to reduction in sanction under more than one provision of Article 10.4, 10.5 or 10.6, before applying any reduction or suspension under Article 10.6, the otherwise applicable period of *Ineligibility* shall be determined in accordance with Articles 10.2, 10.3, 10.4, and 10.5. if the *Athlete* or other *Person* establishes entitlement to a reduction or suspension of the period of *Ineligibility* under Article 10.6, then the period of *Ineligibility* may be reduced or suspended, but not below one-fourth of the otherwise applicable period of *Ineligibility*.

[*Comment to Article 10.6.4: The appropriate sanction is determined in a sequence of four steps. First, the hearing panel determines which of the basic sanctions* (*Article 10.2, 10.3, 10.4, or 10.5*) *apply to the particular anti-doping rule violation. Second, if the basic sanction provides for a range of sanctions, the hearing panel must determine the applicable sanction within that range according to the Athlete or other Person's degree of Fault. In a third step, the hearing panel establishes whether there is a basis for elimination, suspension, or reduction of the sanction* (*Article 10.6*). *Finally, the hearing panel decides on the commencement of the period of Ineligibility under Article 10.11.*

Several examples of how Article 10 is to be applied are found in Appendix 2.]

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