JUDICIAL AWARD BY THE FISA DOPING HEARING PANEL

sitting in the following composition

Members: **John Boultbee**
Tricia Smith
Mike Williams

In the case of
José Alberto Arriaga Gomez

The Facts

FISA conducted out of competition testing in Mexico on 11 December 2014. A urine and a blood sample were collected from José Alberto Arriaga Gomez ("the Athlete").

The urine Sample collected from the Athlete was numbered 3062328 and recorded on the Doping Control Form. The Athlete signed this form and received a copy. José Alberto Arriaga Gomez declared on the doping control form that he had not taken any products during the seven days before the test. He made no comments on the doping control procedure. The WADA accredited laboratory in Mexico received the blood sample, and the Montreal laboratory in Canada, received the "A and B" samples of the urine sample on 17 December 2014.

The Certificate of Analysis from the Montreal Laboratory dated 21 January 2015 indicates that Sample A showed the presence of the metabolite of boldenone and that the IRMS result was consistent with the exogenous metabolite of boldenone. Boldenone is included in the 2014/2015 Prohibited Substances/Methods List of the World Anti-Doping Code. Boldenone is classified in class S1, Anabolic Agents.

The Athlete did not have a valid Therapeutic Use Exemption (TUE) for boldenone and no departures from the International Standard for Testing (ISL) have been established.

The Athlete was suspended from competition by the Executive Director of FISA in a letter dated 29 January 2015.

The Executive Director of FISA appointed a FISA Hearing Panel (the "Panel") under Article 7.6 to hold a Provisional Hearing on 1 May 2015 to determine if the provisional suspension should stand until the final hearing which was scheduled for 20 June 2015.

The Provisional Hearing was held by phone conference on 1 May 2015 with the FISA Hearing Panel and the Athlete. Also present with the Athlete was Pedro Cuervo Aja, the president of the Mexico Rowing Federation.

Hearing on the Provisional Suspension

The Athlete submitted written evidence before this hearing. Written statements as well as doping control forms from both in and out of competition testing by other anti-doping organisations around the time of the positive test and the results of this testing were submitted. Also presented was information received from a source in the food industry in Mexico about the substance boldenone and that it was available in Mexico under a variety of brands and used as a veterinary product. The Athlete also submitted a paper from the IRB called Contaminated Meat Guideline in which it is asserted that certain guidelines should be observed to avoid the risk of athletes eating contaminated meat due to the potential risk of meat being contaminated in China and Mexico by Clenbuterol and other anabolic agents. In addition, anthropometric results were presented by the Athlete to support his claim that there had not been any significant changes in these measurements consistent with systematic use of anabolic steroids. During the hearing into the provisional suspension, the Athlete submitted an article from a review: *Food Additives and Contaminants, 2004, 1–11, preview article, Presence and metabolism of the anabolic steroid boldenone in various animal species: a review*

The Hearing Panel asked the Athlete about the testing procedure. He responded that he told the coach that he was fine with being tested although the doping control officer had not requested him by name to be tested. In effect, he claimed more or less to have volunteered to be tested.

The Panel asked the Athlete about why he believes that the positive result was due to meat contamination. The Athlete claimed that he attended a party on the evening of 9 December 2014 at the house of his girl-friends parents. It was a special party with different types of meat cooked on the barbecue. He said he ate some sweetbreads as well as various other types of meat. The sweetbreads were not his normal type of food. He believes that eating this type of meat is possibly what caused the positive test for boldenone and he raised the possibility that the concentration of such a substance could be greater in this kind of meat.

The Athlete gave evidence in his written statement for the hearing into the provisional suspension of research he had done into the use of boldenone in the meat industry in Mexico “for fattening animals” and the regulations related thereto as well as compliance with those regulations. The evidence was to the effect that whilst the regulations require a significant period of time between the injection of animals with such substances and their slaughter for human consumption, those regulations are often ignored.

The Athlete writes in his statement that*: It is imperative for me to underline to you that after a thorough analysis of the occurrences in the last months, I am convinced that the only possible way for the forbidden substance BOLDENONE to have entered my body was through the intake of contaminated meat. Near December 11th 2014 I had sweetbreads on a barbecue, which now I know that this kind of tissue concentrates a considerable amount of residues of different substances, such as anabolics. I explicitly put emphasis on the fact that by no means and at no time was I aware of the presence of BOLDENONE in meat and that the consumption of it could lead to these consequences.*

I insist that at no time did I act on purpose nor negligent trying to enhance my physical stamina and disguising the usage of a forbidden substance. Therefore, I consider the complete

elimination of my suspension and penalty as legitimate and kindly ask for the exoneration of all kind of guilt."

The Panel decided on 1 May 2015 that on the evidence before it at that time, the provisional suspension should be lifted.

Additional Evidence Provided for the Final Hearing

The Athlete provided further written evidence about contaminated meat in Mexico, and about the barbecue he attended on 9 December. He also provided evidence about the circumstances in which he became available for the doping test on 11 December as did the testing agency and his coach. The Panel requested and received a report from Dr. Ayotte of the Montreal Laboratory, and subsequently asked her additional questions. The report was made available to the Athlete.

In the circumstances, the Panel decided it did not need further evidence for the final hearing, particularly from the Athlete, having heard him examined at the hearing into the provisional suspension and having a considerable volume of documentary evidence from him.

Applicable law

The applicable rules

The applicable rules are the FISA Anti-Doping Rules in force at the time of the test (11 December 2014). These rules are consistent with the World Anti-Doping Code.

The relevant rules

The relevant rules in this case are the FISA Anti-Doping Bye Laws including but not limited to:

- Article 2.1.1 which states it is each Rower's personal duty to ensure no Prohibited Substance enters his body;

- Article 10.2 which sets a period of two years' ineligibility for a first violation for prohibited substances, and which provides that the athlete shall have the opportunity to establish the basis for eliminating or reducing this sanction as provided in Articles 10.5;

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

- 10.5.1. No Fault or Negligence

  If a Rower 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 a Rower's Sample in violation of Article 2.1 (presence of Prohibited Substance), the Rower 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.

In regards to the provisional suspension, the applicable Articles under the 2014 Rules are:

Article 7.6: Provisional Suspensions

7.6.1 If analysis of an A sample has resulted in an Adverse Analytical Finding for a Prohibited Substance that is not a Specified Substance, and a review in accordance with Article 7.1.2 does not reveal an applicable TUE or departure from the International Standard for Testing or the International Standard for Laboratories that caused the Adverse Analytical Finding, the FISA Executive Director shall Provisionally Suspend the Rower pending the hearing panel's determination of whether he has committed an anti-doping rule violation.

7.6.1 In any case not covered by Article 7.6.1 where FISA decides to take the matter forward as an apparent anti-doping rule violation in accordance with the foregoing provisions of this Article 7, the FISA Executive Director may Provisionally Suspend the Rower pending the hearing panel's determination of whether he has committed an anti-doping rule violation.

7.6.2 Where a provisional Suspension is imposed, whether pursuant to Article 7.6.1 or Article 7.6.2 either the hearing in accordance with Article 8 may be advanced to a date which avoids substantial prejudice to the Rower, or the Rower may be given an opportunity for a Provisional Hearing before imposition of the Provisional Suspension or on a timely basis after imposition of the Provisional Suspension at the discretion of the FISA Executive Director. National Federations shall impose Provisional Suspensions in accordance with the principles set forth in this Article 7.6.

Merits

The Panel is satisfied that a positive test result was established by the evidence of the laboratory analysis. The level of the metabolite of boldenone in the A sample according to Christiane Ayotte, director of the Montreal Laboratory, was 4ng/mL. The analysis of the B sample was requested and the positive test result for the B sample was also established. The sanction for an anti-doping rule violation in this case in 2014, is a two year period of ineligibility. Given that the positive test result was established in 2015 from a test in 2014, the principle of lex mitior may be relevant.

In relation to the issue of the contamination of meat in Mexico with anabolic agents, a significant amount of jurisprudence has been established relating to the anabolic agent clenbuterol, which has been widely reported. However the number of cases involving boldenone, another veterinary steroid claimed in the evidence of the Athlete to be also used for "animal fattening", is much fewer. There is considerable evidence of the use of boldenone in animals, but the cases of athletes having established that they tested positive because of ingestion of contaminated meat are nearly all clenbuterol cases. In principle the cases which have involved clenbuterol are relevant for a case alleging meat contaminated with boldenone, if such a practice is established on the evidence.

For the conditions under Article 10.5 to be met, the Athlete must give evidence as to how the Prohibited Substance boldenone entered his body in order to have the period of ineligibility eliminated. The Athlete has provided evidence, both from himself, and others who were with him at the time, that he ate several different types of meat at a barbecue on the evening of 9 December.

The Panel accepts that the evidence establishes that boldenone is a veterinary steroid available in Mexico. It notes that it has been demonstrated in cases involving clenbuterol that the meat industry in Mexico is not well regulated or that regulations are not well applied in relation to observing the stipulated period for ceasing the use of such products before the animal is slaughtered for human consumption. There is nothing in the evidence to suggest that the application of the regulations would differ where boldenone is used rather than clenbuterol products.

For example, the Panel has been provided with audit reports produced by the Food and Veterinary Office of the European Commission's Health and Consumers Directorate-General which has conducted several audits of the meat industry in Mexico to evaluate meat products intended for export to the European Union. Documented audits in 2008, 2011 and 2014 were carried out: "*In order to evaluate the operation of controls over the production of fresh horse meat and meat products intended for export to the European Union, including monitoring of residues and contaminants as well as certification procedures"*

Concerns in these audits are raised in many areas of the production of horse meat and other meat products. In the points specifically relating to boldenone, the 13 February to 21 February 2008 audit report mission team noted on pages 7 and 8 that:

- *"residues of a substantial number of relevant pharmacologically active substances, which are authorised for use in food producing animals, are not tested for under the NRCP* (National Residue Control Plan). *These include for example:.. for equidae: boldenone (A3), ampicillin, ceftriazone, gentamicin, sulphamethoxasole, tylosin (B1), closantel, febantel, imidocarb (B2a), acepromacine (B2d), phenylbutazone, metamizol/dipyrone (B2e), dexamethason(B2f)"*

- *residues of a substantial number of relevant pharmacologically active substances, which are authorised for use in food producing animals, are not tested for under the NRCP. These include for example:*

- *for poultry: amoxicillin, ampicillin, enrofloxacin, florfenicol, gentamicin, lincomycin,norfloxacin,thiamphenicolandnumerousothers(B1);*

- *for pigs: boldenone(A3),numerous antimicrobials(B1), clorsulon(B2a), flumethrin (B2c), acepromacine(B2d),phenylbutazone(B2e)and carbadox(B2f);*

- *on-farm sampling for group A substances is not planned (Council Directive 96/23/EC foresees on-farm sampling for bovines, porcines and poultry).*

In the 2011 audit report on page 6, regarding boldenone, "*the audit team noted that:*
….

- *some substances have been added to the scope of testing under the RMP* (Residue Monitoring Plan*) since the 2008 FVO* (Food and Veterinary Office) *mission e.g. three fluoroquinolones and two amphenicols in equidae and in aquaculture, and dyes (malachite green and leucomalachite green) in aquaculture. Nevertheless, the overall scope of the RMP" remains limited. Residues of a number of substances which are authorised for use in food producing animals are not tested for (several of them were seen also in the pharmacy visited) including the steroids boldenone, methandrostenolone, nandrolone and dexamethasone, the non-steroidal anti-inflammatory drug phenylbutazone, the antimicrobials gentamycin and trimethoprim, and acepromazine and coumaphos in equidae"*

- *a number of discrepancies were noted between the RMP* (Residue Monitoring Plan *submitted to the Commission services and what was actually being tested. In relation to the substances specified, several of those listed are not currently being tested for e.g. boldenone and phenylbutazone in equidae, monensin and salinomycin in eggs – which incidentally were reported to the Commission as having been tested for since 2008, when this was not actually the case. According to CENAPA, tests for some of these substances have been only recently been validated and the last few samples in 2011 RMP are either being tested for them (e.g. levamisole in equidae), or they are planned be included in the 2012 RMP (e.g. phenylbutazone in equidae) (see also Section 5.2.). In contrast, some substances which are not listed in the RMP are actually being tested for e.g. ciprofloxacin and sarafloxacin in equidae and in aquaculture, and thiamphenicol in equidae;*

The final report of the audit carried out in Mexico from 24 June to 4 July 2014, noted in its Executive Summary on page 1 that:

- *"The report describes the outcome of an audit carried out by the Food and Veterinary Office (FVO) in Mexico from 24 June to 4 July 2014. The objective of the audit was to evaluate the measures taken by the Mexican authorities to provide adequate guarantees for food safety and public health in relation to exports of horse meat to the European Union (EU) and to follow-up the recommendations of previous FVO audit reports. The organisation of the Competent Authority (CA), the relevant national legislation and the system of official controls remain largely unchanged since the previous audits.*

- *…Given the availability of veterinary medicinal products prohibited in the EU, the lack of controls on live animals, the unreliability of the food chain information and weaknesses in the traceability systems in place, the CA is not in a position to provide all the necessary guarantees specified in the export certificates."*

In the overall conclusions on page 22, it is noted that:

- *In relation to veterinary medicinal products and residues, there have been no significant improvements since the 2011 FVO audit. Although the official controls on the distribution and use of veterinary medicinal products remain very weak, the level of residue violations is low. The possibility to use anabolic*

- *steroids is, however, at odds with EU requirements. Three recommendations of the 2011 FVO audit report, which are relevant for the current audit, have not been properly implemented.*

In the points in the audit specifically referring to boldenone, the following points are made:

- *(page 11) The FVO audit team noted that the SAGARPA has approved new label texts which include the warning "not to be administered for equines intended for human consumption" for products containing inter alia nandrolone, boldenone, doxapram and phenylbutazone indicated for use in horses.*

The observations made included the following:

- *Of the four outlets of veterinary medicinal products visited by the FVO audit team, two were not registered with the SAGARPA* (Ministry of Agriculture, Livestock, Rural Development, Fisheries and Food) *and three did not employ an approved veterinarian.*

- *At the outlets visited, several presentations of veterinary medicinal products for horses containing hormones and other substances which are not permitted in the EU contained the required warning "not to be administered for equines intended for human consumption". However, a product containing boldenone, indicated inter alia for muscle growth in horses was for sale in an outlet with a label that showed a withdrawal period of 20 days before slaughter. The FVO audit team also found various phenylbutazone containing products for horses with labels that did not indicate the warning.*

- *• The SAGARPA staff explained to the FVO audit team that on a case-by-case basis it could allow companies to sell out existing product stock with old labels (produced before the date the new label text has been approved). The SAGARPA indicated that this would be for a period of approximately six months rather than for several years up to the expiry date of the particular batch, but could not provide a clarification on individual cases on-the-spot.*

- *• The FVO audit team noted in one case that a batch of a product for horses containing boldenone was produced with old labels (without the warning) nine month after the SAGARPA had approved a new label text (with the warning).*

Although the audits by the Food and Veterinary Office of the European Commission were conducted to determine the safety of importing mostly horse meat from Mexico to Europe, the Panel accepts this evidence as demonstrating that there are significant regulatory problems in the meat industry in Mexico and that substances such as boldenone are available for use in the meat industry. Following the widely reported problems regarding meat contaminated with clenbuterol it is open to conclude that there is also the possibility that boldenone could be obtained by meat producers in Mexico and used to promote faster growth in animals to be sold for meat and that the residue of boldenone in the meat would be not be detected before the sale of the meat to the customer. Other evidence adduced by the Athlete confirms that there is veterinary use of boldenone in Mexico, with details of a number of veterinary products containing boldenone put into evidence.

Therefore the Panel accepts that meat eaten in Mexico could be contaminated by boldenone.

The Panel then has to consider whether in this case, it is satisfied that the Athlete has established how the boldenone was present in his body when tested, and that he was without fault or negligence under Article 10.5. The Contador Cases in the CAS (2011/A/2084 and 2011/A/2086) established that in order to rely on contaminated meat justifying the application of Article 10.5, the athlete must show that the ingestion of meat was the only possible means of ingesting the boldenone, or that it is more probable than any other possible explanation. The Panel needs to be satisfied of this on the balance of probabilities and if it is only slightly more probable than other possible explanations, then the Athlete has met the burden and standard of proof required.

In this regard there are two factors which the Panel has taken into account:

(i) The evidence provided by the Athlete is that he was previously tested on 27 November 2014 at the Central American and Caribbean Games, where the sample number was 6126845 and the result was negative. This test was conducted 14 days before the positive test for boldenone, which was on 11 December 2014.

(ii) The Athlete has claimed that the low level of boldenone found in his sample from the test on 11 December 2014, is consistent with contamination, rather than deliberate ingestion of the substance. The level found in the sample is 4ng/mL.

The Athlete submitted that as the test on 27 November was shown to contain no trace of boldenone, and the level of boldenone detected from the sample taken on 11 December was as low as it was, it can be concluded that the ingestion of boldenone occurred on or after 27 November.

The Panel sought some further expert explanation from Professor Dr. Christiane Ayotte of the Montreal laboratory where sample 3062328 was analysed. She provided a formal opinion in which she notes that "*a test done 14 days before was negative and as a consequence, the only source that we can probably rule out is the injection of boldenone undecyclenate by the athlete; the levels of boldenone and its metabolite would be higher. The test results indicate a past use of boldenone, however the exact source is impossible to determine: whether the deliberate use of a pro-hormone, the ingestion of a tainted supplement, or the consumption of meat contaminated with residues of boldenone."*

The Panel was able to question Dr. Ayotte, and she confirmed that nothing in the analysis would assist in determining whether the boldenone in the Athlete's body had its origin from contaminated meat, a tainted supplement or the use of a "pro-hormone". She explained that a pro-hormone is a substance sold as a supplement but which contains anabolic steroid precursors, and as such is a banned substance. All she could say was that the ingestion was recent on the basis of the time since the negative test, and was exogenous. She excluded deliberate injection of the boldenone because of the level found in the sample she tested. She did explain that sweetbreads would not retain exogenous (as opposed to endogenous) steroids more than any other part of the animal which had been injected with such substance and any meat could retain the injected steroid, particularly if the meat came from close to the site of injection.

Given that Dr. Ayotte's evidence that contaminated meat could be an explanation, and the evidence of the poorly regulated use of boldenone in animals in Mexico, the Panel is required to

decide which of the possible explanations mentioned by Dr Ayotte is more probable, and whether the Athlete is truthful in his explanation about not having deliberately taken boldenone,

The Panel is of the opinion that the Athlete was a truthful witness. It also considers that the Athlete's evidence is believable in the circumstances of the negative test just 14 days earlier. Furthermore the Panel is of the view that the Athlete's evidence that the only means of ingesting boldenone was through the meat he ate is corroborated by evidence from the host of the dinner on 9 December that he ate different meats at a barbecue two days before the test. The Panel considers also that the Athlete's submission that he had not taken any pro-hormone or supplement is corroborated by evidence from the national coach, Jesus Alejandro Porras Porras that he effectively volunteered for this test, which is consistent with a non-deliberate explanation for the boldenone in his body. That is to say, if he had deliberately taken a pro-hormone or supplement between the two tests, the Panel is satisfied it is improbable that he would have made himself available for the test on 11 December, when he was not required to do so.

The evidence in this regard from the Athlete and his coach is that the testing agency had one rower listed for testing on 11 December, and asked the coach to provide other rowers as well. The Athlete became available after his training session finished and he volunteered to be one of those other rowers. The testing agency provided a slightly different explanation, but the Panel found the explanation of the coach and the Athlete credible in the circumstances.

Therefore the Panel concludes that the most probable explanation of the ingestion of boldenone by the Athlete is by the eating of contaminated meat on 9 December. It also concludes that the eating of meat which is not known to be contaminated does not constitute either fault or negligence on the part of the Athlete.

FOR THESE REASONS

The FISA Doping Hearing Panel finds:

1. The Athlete has satisfied the Panel that the requirements of Article 10.5 of the FISA Anti-Doping Bye-Laws have been made out and that no period of ineligibility shall apply to the Athlete

2. This award is rendered without costs.

Varese, 22 June 2015

For the FISA Doping Hearing Panel:

John Boultbee Tricia Smith Mike Williams