



Arbitration CAS 2014/A/3685 Evi Sachenbacher-Stehle v. International Biathlon Union (IBU), award of 4 February 2015 (operative part of 14 November 2014)

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Jeffrey Benz (USA); Mr Patrick Lafranchi (Switzerland)

Biathlon

Doping (methylhexaneamine)

Conditions for the application of Article 10.4 of the WADC

Athlete unaware that a prohibited substance is contained in a product and exclusion of intent

Accidental use of a food supplement containing a specified substance

Measurement of an athlete's fault in the CAS jurisprudence

1. For Article 10.4 of the WADC to apply three conditions have to be satisfied: i) the substance found the competitor's sample is a "Specified Substance" according to the Prohibited List; ii) the athlete can establish how the "Specified Substance" entered his or her body; iii) the athlete can establish that such "Specified Substance" was not intended to enhance his or her sport performance.
2. When discussing whether the mere fact that an athlete is unaware that a prohibited substance is contained in a product is sufficient to rule out his intent to enhance sport performance, an athlete's behaviour can be qualified to be indirectly intentional if it is preliminarily focused on one result, but in case a collateral result materializes, the latter would be equally accepted by the athlete.
3. In order to be relevant, the acceptance of risk must be cognizant and specific to the peculiar case, and cannot be generally related to the use of a food supplement. Indeed, the risks associated with food supplements are well known among athletes, years after the first cases of anti-doping rule violations caused by contamination or mislabelled products were detected and considered in the CAS jurisprudence. However, the "Specified Substances" are more likely to be "accidentally" used. Food supplements are at risk of containing undisclosed prohibited specified substances, and by using them the athletes always take the risk of ingesting a prohibited substance: yet, the use of supplements, in whatever doses, is not in itself prohibited. In other words, the simple fact of consuming a food supplement is not per se an "acceptance of risk" excluding the applicability of Article 10.4 of the WADC.
4. An impressive body of jurisprudence has defined the circumstances relevant to the measurement of an athlete's fault, and translated them into the determination of a proper sanction. Although precedents provide helpful guidance, each case must be decided on its own facts and although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions

may set a wrong benchmark inimical to the interests of sport. In order to determine into which category of fault (significant degree, normal degree or light degree of fault) a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities. The objective element should be foremost in determining into which of the three relevant categories a particular case falls. The subjective element can then be used to move a particular athlete up or down within that category.

1. BACKGROUND

1.1 The Parties

1. Ms Evi Sachenbacher-Stehle (the "Athlete" or the "Appellant") is an accomplished German cross-country and biathlon skier of international level, having competed and won medals at multiple Olympic Games and World Championships. She is a member of the German Ski Federation (the *Deutscher Skiverband*, DSV).
2. The International Biathlon Union (IBU or the "Respondent") is the international governing body for the sport of biathlon and has its headquarters in Salzburg (Austria).

1.2 The Dispute between the Parties

3. The circumstances stated below are a summary of the main relevant facts, as submitted by the Parties in their written pleadings or in the evidence offered in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
4. In February 2014, the Athlete competed in biathlon events at the XXII Winter Olympic Games in Sochi, Russian Federation (the "Sochi Games"). More specifically, she competed in the following biathlon Olympic events:
 - i. on 9 February 2014, in the Women's 7.5 km Sprint, ranking 11th;
 - ii. on 11 February 2014, in the Women's 10 km Pursuit, ranking 27th;
 - iii. on 14 February 2014, in the Women's 15 km Individual, ranking 20th;
 - iv. on 17 February 2014, in the Women's 12.5 km Mass Start, ranking 4th;
 - v. on 19 February, in the 2x6 km Women + 2x7.5 km Men Mixed Relay, ranking 4th.

5. On 17 February 2014, the Athlete, after taking part in the biathlon 12.5 km Mass Start Women event of the Sochi Games (the “Event”), underwent an anti-doping control.
6. The A sample provided by the Athlete at the Event was analysed by the laboratory of the Anti-Doping Centre in Sochi (the “Laboratory”), which was accredited by the World Anti-Doping Agency (WADA).
7. On 20 February 2014, the Laboratory reported the presence of methylhexaneamine (MHA). MHA is a prohibited specified substance, also referred to under the name of “dimethylpentylamine”, in class S.6 (stimulants) of the 2014 WADA list of prohibited substances (the “Prohibited List”), pursuant to which, “*All stimulants ... are prohibited. Stimulants include: ... b: Specified Stimulants: ... methylhexaneamine (dimethylpentylamine) ...*”.
8. On 21 February 2014, the analysis of the B sample provided by the Athlete at the Event was conducted by the Laboratory and confirmed the adverse analytical finding reported with respect to the A sample (the “Adverse Analytical Finding”).
9. On the basis of the Adverse Analytical Finding a hearing was convened before the Disciplinary Commission of the International Olympic Committee (“IOC Disciplinary Commission”) on 21 February 2014.
10. On 21 February 2014, the IOC Disciplinary Commission adopted the following decision (the “IOC Decision”):

I. The Athlete, Ms Evi Sachenbacher-Stehle, Germany, Biathlon:

- (i) *is disqualified from the following events:*
 - *Women’s 12.5 km Mass Start Biathlon event, where she placed 4th;*
 - *2x6 km Women + 2x7.5 km Men Mixed Relay Biathlon event, where she placed 4th.*
- (ii) *shall have her diploma in the above-mentioned events withdrawn;*
- (iii) *is excluded from the XXII Olympic Winter Games in Sochi in 2014; and*
- (iv) *shall have her Olympic identity and accreditation card cancelled immediately.*

II. The 2x6 km Women + 2x7.5 km Men Mixed Relay team, composed of Evi Sachenbacher-Stehle, Laura Dahlmeier, Daniel Boehm and Simon Schempp:

- (i) *is disqualified from the 2x6 km Women + 2x7.5 km Men Mixed Relay Biathlon event, where it placed 4th; and*
- (ii) *the diplomas awarded to the members of the team in the above-noted event shall be withdrawn.*

III. The International Biathlon Union is requested to modify the results of the above-mentioned events accordingly and to consider any further action within its own competence.

IV. The DOSB is ordered to return to the IOC, as soon as possible, the diplomas awarded to the Athlete, as well as the members of the 2x6 km Women + 2x7.5 km Men Mixed Relay team, in relation to the events mentioned above.

V. The International Ski Federation is requested to consider any further action within its own competence.

- VI. *The IOC administration is requested to reallocate the diplomas withdrawn from the athletes in accordance with the new ranking provided by the International Biathlon Union.*
- VII. *This decision shall enter into force immediately”.*
11. In accordance with point III of the IOC Decision, the IBU opened disciplinary proceedings against the Athlete and on 22 March 2014 a hearing was held before the IBU Anti-Doping Hearing Panel (ADHP) in accordance with Article 8 of the IBU Anti-Doping Rules (“IBU ADR”).
12. On July 14, the ADHP issued a decision (“ADHP Decision”) as follows:
- “1. *The Athlete, Eva Sachenbacher-Stehle (GER) committed an in-competition doping offense at the 2014 Sochi Olympic Games, as determined (and not contested by the Athlete) by the IOC Disciplinary Commission.*
 2. *Ms. Sachenbacher-Stehle is sanctioned with a period of ineligibility for a period two years, commencing retroactive as of the date of the sample collection, that is, February 17, 2014.*
 3. *All competitive results of Ms. Sachenbacher-Stehle obtained from the date of the sample collection are nullified;*
 4. *Each party shall bear their / its own costs and expenses, including attorneys’ fees, incurred in connection with this matter, and*
 5. *The administrative and other expenses of the IBU in conducting the Hearing, and expenses of the Panel of Arbitration, shall be borne by the IBU”.*
13. In support of such decision, the ADHP noted the following:
- “4.1 *Neither the procedure followed by the IOC for testing the urine sample given by the Athlete at the in-competition test on February 17, 2014, nor the finding of the presence of methylhexaneamine, classified as a Specified Stimulant on the 2014 WADA Prohibited List, is contested by the Athlete.*
 - 4.2 *Under the circumstances of this Adverse Analytical Finding (“AAF”), which is not disputed (and the burden of proof of the IBU having been satisfied), the sanction of a two-year period of ineligibility shall be imposed in accordance with IBU ADR 10.2 unless such sanction is eliminated or reduced by the application of IBU ADR 10.4 or ADR 10.5 ...*
 - 5.1 *The athlete must establish two things, to the comfortable satisfaction of the Hearing Panel, for IBU ADR 10.4 ... to apply:*
 - (a) *First: the athlete must establish how a Specified Substance entered his or her body ... **and***
 - (b) *Second: that the athlete did not intend the Specified Substance found in the athlete’s system to enhance the athlete’s sport performance ...*
 - 5.3 *... the Hearing Panel finds, to its comfortable satisfaction, that the Athlete has established that the source of the specified substance methylhexaneamine ... was the Teepower product, “Schisandra” which was ingested by the Athlete prior to the competition.*
 - 5.4 *This conclusion is reached based on the facts that the products “Schisandra” had been listed by the Athlete*

on her doping control form as one of the products which she had taken prior to the competition and doping control; and because the results of the analysis of the product “Schisandra”, which had been purchased and analysed by the German Sporthochschule subsequent to the AAF, revealed the presence of the substance methylhexanamine in the product.

- 5.5 *Consideration of the second part of the first section IBU ADR 10.4 ... is not without some difficulty. This is because of the possible differing interpretation of the meaning of the words of this section ... as they appear in IBU ADR 10.4 which follows precisely the wording of the corresponding section 10.4 of the WADA Code. ...*
- 5.6 *First, a literal reading of IBU ADR 10.4 (which is preferred) provides that the athlete, to show the applicability of IBU ADR 10.4 must show that the **specified substance** was not intended to enhance the athlete’s sport performance”. (Emphasis added). The Rule does not state that the athlete must show that the food, medicine, or nutritional supplement ingested by the athlete was not intended to enhance the athlete’s sport performance. Rather, the language of IBU ADR 10.4 specifically states that the athlete need only show that the “specified substance” was not intended to enhance the athlete’s sport performance.*
- 5.7 *But what if the athlete had no knowledge that the specified substance was in the nutritional product? In this situation, it follows that if the athlete had no knowledge of the existence of the specified substance in the food or product, then the athlete, necessarily, could have no intent that the “specified substance” would enhance his or her athletic performance. ...*
- 5.15 *In short, the Panel is of the opinion that an athlete should not be precluded from invoking the possible protections of IBU ADR 10.4 simply because the athlete ingested a “good” product with the intention to “enhance sport performance”, but which product unknown to the athlete, contained a specified substance. ...*
- 5.17 *Accordingly, we find that IBU ADR 10.4 (similar to its counterpart in the WADA Code) should not, and cannot, be read to mean, for Rule 10.4 to apply, that the athlete must show that he or she had no intent to enhance his or her performance by ingesting the product (food, medicine, food or nutritional supplement).*
- 5.18 *Rather, the Panel believes that the athlete’s intent (or, as with Rule 10.4, the required lack of intent) must pertain to the “specified substance” (the words in Rule 10.4), as opposed to the athlete being required to show the lack of intent to enhance sport performance by ingesting the food or product which contained the specified substance.*
- 5.19 *What then, what is the outcome when the athlete truly does not know of the presence of the specified substance which has contaminated the “good” product, and therefore can have no specific intent (one way or the other) to enhance his or her sport performance by the ingesting that substance?*
- 5.20 *Can it be that, under such circumstance, IBU ADR 10.4 always applies, and the athlete is permitted to invoke what we have characterized the “safe harbour” protection of Rule 10.4? We think not. If that were the case, then the “exception” of IBU ADR 10.4 permitting the elimination or reduction of a sanction, would, in large measure, negate the general over-arching principle that athletes, particularly experienced athletes training at the international level, are to be held to the strict standard of being responsible for everything that enters their system (See IBU ADR 2.1 *et seq.*).*
- 5.21 *We have found the CAS opinion in [...], CAS 2012/A/2822, quite helpful in our analysis. The*

rules being considered there are identical to the IBU rules we are applying. Having concluded that the issue was whether the athlete had established “to the comfortable satisfaction of the Panel the absence of an intent to enhance sport performance through consuming” the specified substance, the opinion in CAS 2012/A/2822 then goes on to consider whether an athlete who did not know the specified substance was present in the product he consumed, nevertheless may have had the necessary intent to enhance sport performance that would make him ineligible to rely on Article 10.4.

- 5.22 *The Hearing Panel concludes in CAS 2012/A/2822 that Rule 10.4 is not available to an athlete who had “indirect intent” to enhance sport performance, which the Hearing Panel found is present when an athlete acts “in a reckless manner”, but not if the athlete is “only” oblivious”.*
- 5.23 *We have concluded that this reading of Article 10.4 is consistent with the words used in that Rule 10.4; and we therefore follow the reasoning in CAS 2012/A/2822 in this matter.*
- 5.24 *The Athlete herein has submitted sufficient evidence to make this Panel comfortable with the conclusion that she was not aware that the product “Schisandra” contained the specified substance methylhexaneamine. She testified the label on the product did not indicate that it contained any specified substance and, in particular, methylhexaneamine; and it is not controverted that she disclosed in her doping control forms that she had taken the product “Schisandra”. Thus the Panel is comfortably satisfied that the Athlete did not take the product with the direct intent to enhance sport performance by ingesting the specified substance, methylhexaneamine.*
- 5.25 *However, the Athlete has not given the Panel sufficient information to be comfortably satisfied that she did not take the product with indirect intent to enhance her sport performance. First, we note that the commentary to Article 10.4 states that “[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.”*
- 5.26 *The substance involved here is a Specified Stimulant listed in S6b of the WADA 2014 Prohibited List. The comments to Article 10.4 single out Specified Stimulants as possibly being “very effective to an athlete in competition”. Thus the burden of proving lack of intent may be higher in this case than in cases involving other drugs.*
- 5.27 *Regardless of the level of the burden of proof, however, the Panel is not comfortably satisfied that the Athlete did not intend to enhance her sport performance in biathlon by ingesting the Teepower product “Schisandra”, which contained methylhexaneamine.*
- 5.28 *The manufacturer’s website states that the products, “Schisandra” reduces fatigue and that the user “can stand physical efforts longer (e.g. in sports) especially when physical endurance is required (Antoshechkin).” This disclosure, without more, alerts potential users that the product is designed to enhance performance in sports, particularly sports where physical endurance is extremely important, such as biathlon.*
- 5.29 *Any elite biathlete who took the product after reading the aforesaid on the website would be taking the product fully aware that the product was purported to enhance performance.*
- 5.30 *There is no evidence that the Athlete herein read the website for this product. However, that does not mean that she did not have the requisite indirect intent to enhance.*
- 5.31 *The Athlete herein, who had previously competed in three Olympics, and many other international competitions, clearly knew she was subject to doping controls, and was aware of the dangers involved in*

taking food or nutritional supplements. She could simply close her eyes

- 5.32 *The product's website says that one of the purposes of the product is to enhance sports performance. However, she says she took it to strengthen her immune system and for her general well-being, and that, the Athlete argues, means she cannot be found to have taken it to enhance her sport performance. However, the fact that an athlete can characterize her use of a product as being for her "general well-being" is no indication that she did not also intend it to enhance her actual sports performance.*
- 5.33 *In addition, a product with instructions to take it in doses of less than a teaspoon, does not appear, on its face, to be a natural (or fully organic) food supplement, as opposed to a powerful product/supplement intended to boost one's energy (or "reduce fatigue" as stated on the manufacturer's website).*
- 5.34 *The Athlete testified she took precautionary measures before ingesting the product, which should mitigate against any penalty. She testified she consulted with her nutritional expert, Mr. Saxinger, several times. According to the Athlete, he repeatedly assured her the product contained no prohibited substances. She also testified she knew that other athletes advised by Mr. Saxinger took the same product and had not tested positive, and that she also "checked the internet via Google and found no "hits" for combinations of the product name and words like "doping". But she also admitted she did not check the actual website maintained by the manufacturer which would have alerted her to the danger that the product might well contain a specified substance.*
- 5.35 *The Athlete testified that she did not take the product to enhance her sport performance. Yet, at best, in view of all the facts and circumstances, she appears to have deliberately disregarded a high probability that she was consuming a specified substance that would enhance her performance in biathlon. No evidence was submitted that the individual the Athlete consulted had any particular expertise in anti-doping matters. The Athlete failed to check the products' website which claimed the product would enhance sports performance. She testified that she took the product in doses of less than a teaspoon. Anything taken in such small doses is obviously extremely potent, which in itself would indicate to an elite athlete that it may well contain a specific substance that would enhance performance, and that further investigation (for example, looking at the website, or having the product tested) was needed. This dosage also indicates that the product was a supplement regardless of the Athlete's assertion that she did not think it was a supplement, but rather a natural organic tea.*
- 5.36 *The Athlete did not consult a medical doctor about this product nor did she consult the "Cologne list". She took nine supplements but had only 3 of them tested, allegedly because those products were made in countries that were suspected of producing contaminated products. She determined that this product did not come from a suspect country and so she did not have it tested. Such conduct causes this Panel to conclude that the Athlete took the product with at least the indirect intent to enhance her performance, regardless of her lack of knowledge of the specified substance it contained.*
- 5.37 *Wherefore, on account of all the foregoing, the Panel finds that the Athlete has not established, to the comfortable satisfaction of the Panel that, under the facts and circumstances of this case, she has met the standard set forth in the first section of IBU ADR 10.4 which, if applicable, would permit the elimination or reduction of the period of ineligibility imposed by reason of IBU ADR 10.2 ...*
- 6.1 *Were the Athlete to have established to the comfortable satisfaction of the Hearing Panel that she met the requirements of the first section of IBU ADR 10.4 ... she would still also need to satisfy the requirements of the second full section of ADR 10.4, pertaining to the need for "corroborating evidence" for the Rule*

to apply.

- 6.2 *That is, even if the athlete satisfies the requirements of the first section of IBU ADR 10.4, then for the possible elimination or reduction of the called for sanction to apply, the athlete must also “produce corroborating evidence, in addition to her own word, which establishes to the comfortable satisfaction of the Hearing Panel the absence of **any intent** to enhance performance” ...*
- 6.3 *Notably lacking from clause, unlike the clause above in the first section of IBU ADR 10.4, is any reference to either “specified substance” or the product in which the specified substance was found.*
- 6.4 *The only evidence that was offered at the March 22, 2014 Hearing to corroborate Athlete’s own testimony that she did not ingest the Teepower product “Schisandra” with the intent to enhance her sport performance, was the testimony of her husband.*
- 6.4 *Her husband testified that he was a former elite athlete, but that he no longer competes. However, although not an actively competing athlete, he testified that he ingested “Schisandra”, which he described as a “concentrated tea”, on a regular basis. He did so, he testified, as did his wife, not enhance sport performance, but rather to “stay healthy”. The fact that he was not an actively competing athlete, but nonetheless ingested “Schisandra”, was offered as corroborating evidence that the purpose his wife took “Schisandra” was not a enhance athletic performance.*
- 6.5 *Taken as a hole, the Athlete’s husband’s testimony, including his personal belief that his wife was not taking the product with the intent to enhance her sports performance, did not give the Hearing Panel the requisite comfortable satisfaction to conclude that this was the level of evidence necessary needed to corroborate the Athlete’s testimony that she did not have “**any intent** to enhance [her] sport performance.” ...*
7. *Even if the first section of IBU ADR 10.4 were deemed to be applicable, the Panel finds that a two (2) year period of ineligibility is still appropriate. ...*
- 7.4 *The reason a reduction of the sanction would not be justified is because of the “degree of fault” of the athlete in this matter, which ADR 10.4 states must be taken into account in considering to apply any reduction of the two-year sanction called for IBU ADR 2.1.*
- 7.5 *The Athlete’s degree of fault in ingesting a stimulant into her system, in connection with her participation in competition (the Olympic Games, no let) includes reference to (but not necessarily limited to) the following:*
- a. *The Athlete ingested numerous nutritional supplements (including the offending product “Schisandra”) notwithstanding clear (and multiple) warnings by the Athlete’s National Anti-doping Agency that such products have been a continue to be the source of undeclared (on the product’s label) stimulants and other prohibited substances. Indeed, the evidence adducted at the Hearing is that the Athlete ingested a many as nine (9) such nutritional supplements, some twice a day, including just prior to or on race day.*
 - b. *The Athlete did not have the product Schisandra tested to determine if it might be contaminated.*
 - c. *The Athlete claims to have “googled” certain of the nutritional products she ingested; but the record before the Panel is unclear as to the depth of the research she did (if any) with respect to the product “Schisandra”. However, written declarations of the Teepower website for Schisandra disclose that its intents and purposes include increasing athletic performances. English translation “Whoever*

ingests Schisandra reduce fatigue and can stay awake longer; can stand physical efforts longer (e.g. in sports) especially when physical endurance is required.” ...

- d The Athlete’s claimed reliance on the advice of an “expert”, as a way to reduce the time period of the two years sanction, is not credited by the Panel. Indeed, to the contrary, the Panel finds, as a matter of fact based on the testimony offered at the Hearing, that the Athlete’s reliance on the identified individual was unfounded and reckless: No evidence was offered to establish that individual was medically trained, or was an expert in anti-doping matters. The Athlete was unaware of any expertise of the individual she relied upon in anti-doping matters (and none were offered at the Hearing) other than the Athlete’s passing reference at the Hearing to seeing diplomas of unspecified nature on the wall of the individual’s office. Accordingly, the Hearing Panel finds that the Athlete’s reliance upon this individual to be reckless. Furthermore, and more fundamental, it is not a recognized excuse to a doping offence to say that it was to the responsibility of someone else to make sure what the athlete ingests is “clean”. ...*
- e Significantly, the Athlete choose not to consult with the Team Doctor for the national team or any anti-doping official of her sport federation or National Olympic Committee, where undoubtedly she would have been advised not to take nutritional supplements as she did.*
- f Finally, and significantly, the Athlete is not an inexperienced new-comer to a sport*
- 7.6 In short, the Panel finds that the degree of fault of the Athlete is considerable. The Athlete failed, in the judgement of the Panel, to exercise that degree of diligence needed to demonstrate to the Panel that she attempted to avoid ingesting any substance that could result in a positive test. Indeed, to the contrary, she almost blindly took a large number of supplements without undertaking an adequate investigation of their provenance and purity. In that regard, the facts of this case can easily be distinguished from the CAS cases of Squizzato v. FINA, CAS 2005/A/830 and Puerta v. ITF, CAS 2006/A/102, where a lesser sanction was imposed on the grounds of lack of fault.*
- 7.7 Accordingly, even if IBU ADR 10.4 were to apply ..., the Panel would not find, on account of the Athlete’s degree of fault, any basis to eliminate or even reduce the two year period of ineligibility called for by IBU ADR 2.1 ...*
- 8.2 For the same reasons set forth above ... the Panel finds that IBU ADR 10.5 is not applicable in this case as a grounds for any reduction of the period of ineligibility called for by IBU ADR 2.1.*
- 9.1 The Athlete offered a number of other reasons why this Panel should eliminate, or at least reduce the period of ineligibility which otherwise would be imposed.*
- 9.2. The Athlete advanced the argument, through her own testimony and through counsel, that Schisandra was advertised as a natural product, consisting of crushed berries, and that therefore, it could not be suspected that the product contained a specified substance, as it did. However, as has been repeatedly warned by WADA, as well as the National Olympic Committee of the Athlete, experience has shown that the fact that a product is claimed by the manufacturer and/ or distributor to be “pure” “organic” or “natural” does not mean that it is so. Athletes (particularly an experienced athlete competing for a period of time at the international level, such as here), know, and are deemed to know, of the possibility of contamination of so-called “natural” products, and the risks of taking such products Simply reading the label, is not enough.*

- 9.3 *The Athlete, and her counsel, also place great reliance (and now blame) on the Athlete’s nutritional advisor, Stephan Saxinger. During the course of the March 22, 2014 Hearing, the Athlete (or through counsel) stated that:*
- (a) *Mr. Saxinger confirmed to the Athlete that the products were purely herbal, extracted from a purely biological product, and that the ingredients posed no risk in terms of possible doping violations;*
 - (b) *That the Athlete specifically asked Mr. Saxinger if using the Teepower products he recommended, including “Schisandra”, would lead to a positive drug test, and that he advised her that it would not;*
 - (c) *That the Athlete knew other athletes in the testing pool who were advised by Mr. Saxinger and also used the same Teepower products she did, and that they never tested positive for a specified substance.*
- 9.4 *Notwithstanding all the foregoing testimony, which the Hearing Panel credits as true, that still does not relieve the Athlete of the consequences of taking the products in this case. Not only is the athlete personally responsible for the decisions she makes with respect to what she eats and otherwise puts in her system (athletes are responsible for what they ingest, see IBU ADR 2.1), the Athlete is also responsible for their choice of “nutritionist” or “advisor” (if any); and faulty advice by such a self-proclaimed “nutritionist”, especially one of unknown (or doubtful) credentials, cannot serve the basis for the elimination or reduction of a period of ineligibility (see comments to IBU ADR 10.5.1 and 10.5.2 especially paragraph 2 thereof).*
- 9.5 *Accordingly, these additional arguments put forth by the Athlete and her counsel are unavailing to support the elimination or any reduction of the period of ineligibility.*
- 10.1 *The Athlete urges a reduction in any sanction proposed to be imposed on account of the authority of IBU ADR 10.5.3. ...*
- 10.2 *Insufficient evidence has been provided to the Hearing Panel which would permit it to be comfortably satisfied that any of the alternative provisions of IBU ADR 10.5.3 apply.*
- 10.3 *The athlete does not contend that she had provided substantial assistance to the IBU or any other anti-doping organization which has resulted in discovering or establishing an anti-doping violation by another person.*
- 10.4 *The Athlete and her counsel did present evidence (albeit all hearsay) with respect to the involvement of the German authorities in this matter; but it does not appear, at least to the comfortable satisfaction of the Hearing Panel that the athletes’ cooperation with a criminal body has resulted in that criminal body discovering or establishing a criminal offence by some other person.*
- 10.5 *Accordingly, the Hearing Panel does not find any basis for suspending any part of the period of ineligibility imposed on the Athlete.*
- 11.1 *IBU ADR Rule 10.8 ... provides that, in addition to the automatic disqualification of the results in the competition which produced the positive sample (already imposed by the IOC with respect to the Sochi Olympics), the results of any competition in which the athlete may have participated from the date of the sample collection which resulted in the positive test result to the date of the commencement of the period of ineligibility shall also be forfeited.*

12.1 *The Athlete promptly (in any event, before competing again following the Adverse Analytical Finding) acknowledge the commission of the anti-doping violation when confronted with the anti-doping rule violation by the IBU.*

12.2 *Accordingly, the Hearing Panel has determined that, in accordance with the provisions, of IBU ADR 10.9 (“Timely Admission”) the two-year period of ineligibility shall be deemed to have commenced retroactively to the date of the sample collection, that is, February 17, 2014. ...”.*

14. The ADHP Decision was notified to the Athlete on 15 July 2014.

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

15. On 4 August 2014, the Athlete filed a statement of appeal, with 3 exhibits, with the Court of Arbitration for Sport (the “CAS”), pursuant to Article R48 of the Code of Sports-related Arbitration (the “Code”), to challenge the ADHP Decision. In such submission, the Appellant appointed Mr Jeffrey G. Benz as arbitrator and requested that the arbitration procedure be conducted on an expedited basis.

16. In a letter dated 7 August 2014, the Respondent objected to an expedited procedure.

17. On 13 August 2014, the Athlete filed her appeal brief, together with 3 exhibits, comprising several documents.

18. On 15 August 2014, the Respondent appointed Mr Patrick Lafranchi as arbitrator.

19. By communication dated 3 September 2014, the CAS Court Office informed the Parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Jeffrey G. Benz and Mr Patrick Lafranchi, arbitrators.

20. On 4 September 2014, the Respondent filed its answer to the appeal, seeking its dismissal, together with 10 exhibits.

21. On 16 September 2014, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (“Order of Procedure”), which was accepted and countersigned by the Parties.

22. A hearing was held on 11 November 2014 on the basis of the notice given to the Parties in the letter of the CAS Court Office dated 29 September 2014. The Panel was assisted at the hearing by Mr Brent Nowicki, Counsel to the CAS. The following persons attended the hearing:

- i. for the Appellant: the Athlete in person, as well as Dr Joachim Rain and Dr Marc Heinkelein, counsel;

- ii. for the Respondent: Ms Nicole Resch, IBU Secretary General, and Dr Stephan Netzle, counsel.
23. At the hearing, the Panel provided the Parties with copy of a recent award, rendered in a CAS arbitration (CAS 2013/A/3327 & 3335), dealing with the subject matter of the present dispute, inviting the Parties to consider it in their submissions. The Parties pleaded in support of their respective cases, and declarations were rendered by the witnesses, the experts and the Athlete. More specifically, and *inter alia*:
- i. Mr Johannes Stehle, husband of the Athlete, testified about the Internet research conducted on the product Schisandra, at the origin of the Adverse Analytical Finding (“Product”), which did not lead to any result linking it to doping: the “home page” of the Product did not give rise to any concern. He declared that no direct contact was entertained with its producer, since Mr Saxinger, the nutritionist advising the Athlete, had given them assurances with regard to the Product;
 - ii. Dr Douwe de Boer and Dr Guenter Gmeiner, experts appointed respectively by the Appellant and the Respondent, discussed the possibility for the Substance, in the concentration found in the samples provided by the Athlete, to enhance her sporting performance;
 - iii. Dr Franz Steinle, President of DSV, heard on the phone, made declarations about the communication of the Adverse Analytical Finding to the Athlete and the subsequent events, including the cooperative attitude adopted by the Athlete;
 - iv. Dr Heinkelein, counsel to the Appellant, confirmed the Athlete’s collaboration with the public prosecutor in Munich, which led to the opening of a criminal investigation involving Mr Saxinger and the producer of the Product; and
 - v. the Athlete made declarations on her use of the Product and indicated that she did not have it tested, unlike all other supplements she was taking, because she had seen another athlete using it without any doping problem.
24. At the conclusion of the hearing, the Parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings and they had been given the opportunity fully present their cases.
25. On 14 November 2014, the operative part of this award was issued.

2.2 The Position of the Parties

26. The following outline of the Parties’ positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Panel, indeed, has carefully considered all the submissions made by the Parties, even if there is no specific reference to those submissions in the following summary.

a. *The Position of the Appellant*

27. In her statement of appeal against the ADHP Decision, the Athlete requested from the CAS the following relief:

“1. *The before-mentioned decision is modified in section 2 (period of ineligibility) to the extent that the period of ineligibility shall be reduced to 3 months (subsidiary what the Panel deems appropriate) starting from February 17, 2014.*

2 *The Respondent shall bear all costs of the CAS as well as fees of the Appellant’s counsels in the CAS procedure”.*

28. In other words, the Appellant criticizes the ADHP Decision, which she asks the Panel to modify, only with respect to the length of the suspension to be imposed.

29. In her submissions, indeed, the Appellant first criticises the IBU with respect to the way the disciplinary proceedings were conducted and submits that she has been prejudged. In that regard, the Appellant points to a number of factors showing that doubts can be cast as to the objectivity of the IBU and as to whether “*IBU really diligently examined the athlete’s case in an unbiased manner*”, since IBU, “*more or less frankly*”, admitted that it was “*eager and happy to have found a scapegoat they could use to make an example of*”.

30. Turning to the merits of the case, the Appellant preliminarily refers to the CAS precedents concerning cases in which the substance (MHA) found in the Athlete’s body was involved, and underlines that in the majority of those cases CAS imposed a sanction of more or less six month.

31. The Appellant, in fact, while emphasising that she does not challenge the results of the anti-doping tests, and the procedures followed in their regard, submits that the sanction imposed is “*excessive and disproportional by far*”. The ADHP, in fact, in the Appellant’s opinion:

i. was wrong in interpreting Article 10.4 of the IBU ADR. Under such provision, in fact, as underlined by a number of CAS precedents, an athlete can benefit from a reduced sanction if he or she can establish that no intent of enhancing sport performance is given with respect to the “*use of the specified substance*”, as opposed to the “*use of the product*” containing it. While it agreed with such conclusion, the ADHP introduced, by reference to a specific CAS precedent (CAS 2012/A/2822), a reference to an “*indirect intent*”, which is not provided by the rules;

ii. was wrong where it denied that the Appellant had established the lack of intent to entrance her sporting performance and it neglected many aspects submitted by the Athlete, and chiefly the testimony of Dr de Boer, who concluded that the concentration of MHA found in the Athlete’s samples cannot be associated with pharmacological effects;

iii. was wrong where it held that, in any case, the Athlete had not produced corroborating evidence, in addition to her words, establishing to the comfortable satisfaction of the hearing body the absence of an intent to entrance sport performance. Contrary to such

finding, in fact, the Appellant makes reference to a number of elements invoked in the disciplinary proceedings, which include the expert report and deposition of Dr de Boer, the deposition of the Appellant's husband, the anti-doping forms where the use of the product was declared, and her reliance on the advice of a nutritionist expert;

- iv. was wrong in holding that the sanction of two year ineligibility should be imposed even if the conditions for the application of Article 10.4 of the IBU ADR had been established, as it failed to take into account all elements brought by the Athlete in her favour.
32. The Appellant, finally, submits that she should benefit also from the application of Article 10.5.3 of the IBU ADR. In fact, the Athlete has been since the beginning fully cooperating both with the German Ski Federation and the German National Olympic Committee, by explaining, *inter alia*, the use of supplements at the Sochi Games.

b. *The Position of the Respondent*

33. In its answer, IBU submitted the following request for relief:
- “(1) The Appeal shall be rejected and the decision of the IBU Doping Hearing Panel of 14 July 2014 shall be confirmed”.*
34. The Respondent, in other words, asks this Panel to dismiss the appeal brought by the Athlete and to confirm the challenged ADHP Decision.
35. In support of such conclusion, the Respondent underlines that it is not disputed that the Appellant committed an anti-doping rule violation and that the only issue left for the CAS to review is the measure of the sanction, and more exactly whether the Appellant is entitled to a reduction, under Article 10.4 of the IBU ADR, of the otherwise applicable two year ineligibility sanction. The Respondent submits that the Athlete cannot benefit from Article 10.4 IBU ADR, as one of the conditions for its application is not satisfied. In any case, the ordinary sanction should be applied even if Article 10.4 was to be applied.
36. In the Respondent's opinion, Article 10.4 of the IBU ADR is not applicable. In fact, even though IBU accepts that the Appellant may not have had actual knowledge that the product contained MHA, it is sufficient, in order to exclude the applicability of Article 10.4, to qualify her behaviour as intentional, if she acted recklessly when ingesting the product and somehow accepted the risk that the nutritional supplement contained a prohibited substance.
37. Such indirect intent, mentioned in the CAS 2012/A/2822 Award, can be determined by taking into account all the circumstances of the case, which include:
- a. the fact that “Schisandra” was, and still is, advertised on the website of the company Teepower ... for “promoting physical activity” especially in sports;*
- b. the Appellant's age and experience. She should have been aware of her duties relating to keep her body free from prohibited substances;*

- c. *the fact that the Appellant ingested no less than nine (!) different nutritional supplements twice a day;*
 - d. *the Appellant's actual knowledge of the substantial risk that nutritional supplements may contain prohibited substances;*
 - e. *the urgent warnings of the NADA and other ADOs against nutritional supplements because of the contamination risk;*
 - f. *the fact that the Appellant relied on the suggestions of an medically unqualified advisor and did not consult with her team doctor or another medically educated person;*
 - g. *the Appellant did not ask twice when she could not find "Schisandra" on the so called "Kölner Liste" (i.e. a list of products which are recommended as "clean products").*
38. On the other hand, the evidence offered by the Appellant is considered by the Respondent to be definitely not sufficient to allow the application of Article 10.4 IBU ADR,
- i. because the internet search she made was only "*cursor*", because she relied only on an oral statement of an unqualified advisor, and because she believed that "Schisandra" was unsuspecting only since it is a "*pure herbal tea product*", and
 - ii. where she referred to the lack of efficiency of the concentration of MHA, to Dr. de Boer's postulate that the reporting limit of MHA should be higher, and to her co-operation.
39. As a result, the applicable provision for the determination of the sanction is, according to the Respondent, Article 10.2 IBU ADR, which leads to the standard sanction for a first violation of two (2) years' ineligibility, since no exceptional circumstances under Article 10.5 IBU ADR, which might lead to the elimination or a reduction of the standard period of ineligibility, are given.
40. In any case, the Respondent submits that, even if Article 10.4 IBU ADR would apply, the sanction of two years' ineligibility should be imposed, because of the Appellant's careless and reckless behaviour.
41. Finally, the Respondent disputes the requested application of Article 10.5.3 IBU ADR, which contemplates the "*substantial assistance*" for the discovery of anti-doping rule violations, and not the "*timely admission*", which has already been taken into account for the purposes of the determination of the starting date of the sanction.

3. LEGAL ANALYSIS

3.1 Jurisdiction

42. CAS has jurisdiction to decide the present dispute between the Parties.
43. The jurisdiction of CAS is not disputed and has been confirmed by the signature of the Order of Procedure. In addition, it is contemplated, pursuant to Article R47 of the Code, and by

Article 13.2.1 of the IBU ADR.

44. More specifically, the provisions referring to CAS contained in the IBU ADR, which are relevant in these proceedings, are the following:

Article 13.1

“Decisions made under these Anti-Doping Rules may be appealed as set forth below in Article 13.2 to 13.4 or as otherwise provided in these Anti-Doping Rules. Such decisions will remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any post-decision review authorized in these rules must be exhausted (except as provided in Article 13.1.1)”.

Article 13.2.1

“In cases arising from competition in an international event or in cases involving international-level athletes, the decision may be appealed exclusively to the CAS in accordance with the provisions applicable before such court”.

Article 13.6

“The time limit to file an appeal to the CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party ...”.

3.2 Appeal Proceedings

45. As these proceedings involve an appeal against a decision rendered by an international sports federation (IBU) regarding an international level athlete in a disciplinary matter brought on the basis of rules providing for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings, in the meaning and for the purposes of the Code.

3.3 Admissibility of the Appeal

46. The statement of appeal was filed within the deadline set in the Article 13.6 of the IBU ADR. No further internal recourse against the Decision is available to the Appellant within the structure of IBU. Accordingly, the appeal is admissible.

3.4 Scope of the Panel’s Review

47. According to Article R57 of the Code,

“the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance...”.

3.5 Applicable Law

48. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

49. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute

“... according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

50. The Panel notes that the Decision was rendered on the basis of the IBU ADR. Therefore, the Panel considers the IBU ADR to be the “applicable regulations” for the purposes of Article R58 of the Code. Austrian law, being the law of the country in which the IBU is domiciled, applies subsidiarily.

51. The provisions set in the IBU ADR which are relevant in this arbitration include the following:

Article 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 Substances 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 Methods) will 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”.

Article 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 competitor’s sport performance or mask the use of a performance-enhancing substance, the period of ineligibility found in DC 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Competitions, and at a maximum, two 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 or other person’s degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility”.

Article 10.5.3 *“Substantial assistance in discovering or establishing anti-doping rule violations”*

“The IBU Anti-Doping Hearing Panel may, prior to a final appellate decision under Article 13 or the

expiration of the time to appeal, suspend a part of the period of ineligibility imposed in an individual case where the athlete or other person has provided substantial assistance to an anti-doping organization, criminal authority or professional disciplinary body which results in the anti-doping organization discovering or establishing an anti-doping rule violation by another person, or which results in a criminal or disciplinary body discovering or establishing a criminal offense or the breach of professional rules by another person. After a final appellate decision under Article 13 or the expiration of time to appeal, the IBU may only suspend a part of the applicable period of ineligibility with the approval of WADA. The extent to which the otherwise applicable period of ineligibility may be suspended will be based on the seriousness of the anti-doping rule violation committed by the athlete or other person and the significance of the substantial assistance provided by the athlete or other person to the effort to eliminate doping in sport. No more than three-quarters of the otherwise applicable period of ineligibility may be suspended. If the otherwise applicable period of ineligibility is a lifetime, the non-suspended period under this article must be no less than 8 years. If the IBU suspends any part of the period of ineligibility under this article, it must promptly provide a written justification for its decision to each anti-doping organization having a right to appeal the decision. If the IBU subsequently reinstates any part of the suspended period of ineligibility because the athlete or other person has failed to provide the substantial assistance which was anticipated, the athlete or other person may appeal the reinstatement pursuant to Article 13.2”.

3.6 The Dispute

52. On the basis of the relief requested by the Parties, the primary object of these proceedings is the measure of the sanction to be imposed on the Appellant, and chiefly whether the ADHP Decision was correct in imposing a two-year ineligibility period. It is a fact not disputed between the Parties, on the basis of the Adverse Analytical Finding, that the anti-doping rule violation contemplated by Article 2.1 was committed by the Appellant. However, the Appellant, in her appeal, submits that the ineligibility period to be imposed for such anti-doping rule violation is to be set in accordance with Article 10.4 of the IBU ADR – and that under such provision a period of 3 months ineligibility should be applied. On the other hand, the Respondent maintains that Article 10.4 of the IBU ADR does not apply, and that in any case ineligibility for two years is a proper sanction. It therefore requests that the Decision be confirmed.
53. As a result of the above, there are two main questions that the Panel has to examine:
 - i. is Article 10.4 of the IBU ADR applicable to the case of the Athlete?
 - ii. depending on the answer to the first question, what is the appropriate measure of the sanction for the Athlete?
54. The Panel shall examine those two questions separately.
55. The Panel, in fact, does not need to consider the criticism advanced by the Appellant in her submissions with respect to the procedure conducted before the ADHP, allegedly showing that she was not objectively judged. In this respect, the Panel can limit itself to note that, according to Article R57 of the Code, it has full power to review the facts and the law. This Panel, consequently, hears the case *de novo* and is not limited to considerations of the evidence that was adduced before the Disciplinary Commission: the Panel can consider all new evidence produced

before it. This implies that, even if a violation of the principle of due process occurred in prior proceedings, it may be cured by a full appeal to the CAS (CAS 94/129, *CAS Digest I*, p. 187 at 203; CAS 98/211, *CAS Digest II*, p. 255 at 257; CAS 2000/A/274, *CAS Digest II*, p. 398 at 400; CAS 2000/A/281, *CAS Digest II*, p. 410 at 415; CAS 2000/A/317, *CAS Digest III*, p. 159 at 162; CAS 2002/A/378, *CAS Digest III*, p. 311 at 315). In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance “fade to the periphery” (CAS 98/211, *CAS Digest II*, p. 255 at 264, citing Swiss doctrine and case law).

56. The Appellant has had (and used) the opportunity to bring the case before CAS, where all of the Appellant’s fundamental rights have been duly respected. At the end of the hearing, the Appellant’s counsel expressly confirmed that the Appellant had no objections in respect of her right to be heard and to be treated equally in the arbitration proceedings. Accordingly, even if any of the Athlete’s rights had been infringed upon by the ADHP – but without conceding that they had actually been infringed – the *de novo* proceedings before CAS would be deemed to have cured any such infringements.

i. Is Article 10.4 of the IBU ADR applicable to the case of the Athlete?

57. As mentioned, the Athlete, as a result of the Adverse Analytical Finding, was found responsible for an anti-doping rule violation: more exactly for the anti-doping rule violation contemplated by Article 2.1 of the IBU ADR (“*Presence of a Prohibited Substance or its Metabolites or Markers in a Competitor’s Sample*”). The Athlete herself does not (and did not before the ADHP) challenge such finding.
58. Article 10.2 of the IBU ADR provides, for a first anti-doping rule violation of such kind, the sanction of two years’ ineligibility. However, according to Article 10.4 of the IBU ADR, in the event the substance found the competitor’s sample is identified in the Prohibited List as a “Specified Substance”, and additional conditions are met, the sanction applicable under Article 10.2 is replaced by a sanction ranging from a simple warning with no ineligibility (minimum) to two years’ ineligibility (maximum).
59. For Article 10.4 of the IBU ADR to apply three conditions have to be satisfied:
- i. the substance found the competitor’s sample is a “Specified Substance” according to the Prohibited List;
 - ii. the athlete can establish how the “Specified Substance” entered his or her body;
 - iii. the athlete can establish that such “Specified Substance” was not intended to enhance his or her sport performance.
60. In such respect, it is common ground between the Parties that in the case at hand:
- i. MHA, the substance found the Athlete’s samples, is a “Specified Substance” for the purposes of Article 10.4 of IBU ADR. The Prohibited List, in fact, mentions MHA in

Section S.6(b) among the Specified Substances, and refers to it also under the alternative name of “dimethylpentylamine”;

- ii. the Athlete established how the “Specified Substance” entered his or her body. It has been proved, and has been conceded, that the Product, which was ingested by the Athlete prior to the Event, was the source of the “Specified Substance” MHA found in the Athlete’s body.
61. On the other hand, it is disputed whether the third condition is met: in fact, the ADHP Decision held, and the Respondent confirms, that the Athlete failed to establish “*to the comfortable satisfaction of the hearing panel*” that the specified substance found in her body was not intended to enhance her sport performance.
 62. The ADHP came to that conclusion based on a reading of a CAS precedent (the CAS 2012/A/2822 Award) and the consideration of the circumstances of the case:
 - i. the ADHP underlined (§§ 5.21-5.23 of the ADHP Decision) that in the CAS 2012/A/2822 Award the CAS Panel, when discussing whether the mere fact that an athlete is unaware that a prohibited substance is contained in a product is sufficient to rule out his intent to enhance sport performance, indicated that an athlete’s behaviour can be qualified to be indirectly intentional if it “*is preliminarily focused on one result, but in case a collateral result materializes, the latter would be equally accepted by the athlete*”;
 - ii. the ADHP found (§§ 5.27-5.37 of the ADHP Decision) this “indirect intent” to have occurred in the case of the Athlete, essentially because the Product’s website “*says that one of the purposes of the Product is to enhance sports performance*”, and the Athlete “*closed her eyes*” to such indication. In addition, the instruction that the Product should be taken in doses of less than one teaspoon should have warned the Athlete that the Product was a powerful supplement “*intended to boost one’s energy*”.
 63. The Panel notes that according to the second paragraph of Article 10.4 of the IBU ADR, it is for the athlete to provide “*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*”. Such provision shifts to the athlete the burden to prove the absence of intent to enhance sport performance and clarifies the relevant evidentiary standard: evidence cannot consist merely of the athlete’s words and must allow the panel to reach a comfortable satisfaction of the absence of intent to enhance sport performance. As confirmed by Article 3.1 of the IBU ADR, “*this standard of proof... is greater than a mere balance of probability but less than proof beyond a reasonable doubt*”.
 64. In light of the rule, the Panel, contrary to the ADHP Decision, finds that the Athlete has produced evidence sufficient to justify the conclusion, to its comfortable satisfaction, that she did not intend to enhance her sport performance by using the Substance.
 65. It is undisputed that the Athlete, while taking the Product, was not aware that it contained a prohibited substance: the ADHP Decision conceded the point, which was not challenged by the Respondent. This simple fact excludes any direct intent of the Athlete to enhance her

performance through the Substance contained in the Product.

66. Nor is it possible to hold that the Athlete accepted the risk of ingesting a prohibited substance by using the Product, and therefore that an “indirect intention” to use a prohibited substance can be found.
67. In order to be relevant, the acceptance of risk must be cognizant and specific to the peculiar case, and cannot be generally related to the use of a food supplement. Indeed, the risks associated with food supplements are well known among athletes, years after the first cases of anti-doping rule violations caused by contamination or mislabelled products were detected and considered in the CAS jurisprudence. However, Article 10.4 of the IBU ADR was adopted (on the basis of Article 10.4 of the World Anti-Doping Code: “WADC”) exactly because some substances (the “Specified Substances”) are more likely to be “accidentally” used. Food supplements are at risk of containing undisclosed prohibited Specified Substances, and by using them the athletes always take the risk of ingesting a prohibited substance: yet, the use of supplements, in whatever doses, is not in itself prohibited. In other words, the simple fact of consuming a food supplement is not *per se* an “acceptance of risk” excluding the applicability of Article 10.4 of the IBU ADR.
68. In the case at hand, there were no signs linking the Product to the Substance: the description in its Internet website (not in itself a website specifically aimed at athletes) does not appear to be sufficient for a contrary finding, as the benefits therein advertised (reduce fatigue, enhance physical efforts) could be explained by the natural qualities of the berries composing the Product, and were not necessarily to be understood as a warning of the presence as an ingredient of a performance enhancing prohibited substance. The fact, then that the product had to be taken in small doses is irrelevant, as it cannot be in itself related to the possibility that by ingesting it the Athlete accepted, in full awareness, the risk that the Product contained a prohibited substance.
69. In addition, the Panel notes that the Product was suggested to the Athlete by a nutritionist, whom the Athlete had no reason to suspect to be linked to doping; and that the Product was openly used, *i.e.* that its use was declared on the doping control form at the Event: an attitude hardly consistent with a “cheating” intention.
70. On the basis of the foregoing, the Panel concludes, contrary to the ADHP Decision, that Article 10.4 of the IBU ADR is applicable to the case of the Athlete.

ii. What is the appropriate measure of the sanction for the Athlete?

71. As mentioned, under Article 10.4 of the IBU ADR, a first violation is sanctioned “*at a minimum*” with “*a reprimand and no period of ineligibility from future competitions*” and “*at a maximum*” with “*two years’ of ineligibility*”. The closing sentence of Article 10.4, makes clear, then, that the measure of the sanction depends on the assessment of the Athlete’s fault. In that respect, the Panel notes that it is a principle under the WADC, on which the IBU ADR are modelled, that the circumstances to be considered in the assessment of the Athlete’s fault “*must be specific and relevant*

to explain the athlete's ... departure from the expected standard of behavior" (footnote to Article 10.4 of the WADC, edition 2009).

72. The Panel notes that an impressive body of jurisprudence has defined the circumstances relevant to the measurement of an athlete's fault, and translated them into the determination of a proper sanction. Also in this arbitration, the Parties are drawing the Panel's attention to specific decisions, invoked to support their respective cases. The Panel actually agrees with the Parties that precedents provide helpful guidance. However, the Panel underlines that each case must be decided on its own facts and that *"although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport"* (CAS 2011/A/2518, § 10.23 of the award).
73. For instance:
- i. in CAS A2/2011, a professional rugby league player purchased and used a supplement called "Jack3d", which had resulted in an adverse analytical finding for MHA. The use of pre-workout supplements was encouraged by the athlete's club. The athlete himself had received very limited formal anti-doping education. However, the athlete had been assured by the store owner that the product was clean and had consulted his conditioning coach and undertaken research on the ASADA website in respect of the ingredients of Jack3d which had not resulted in the identification of any specified substances. A sanction of **six months** ineligibility was imposed;
 - ii. in *Brunemann v/ USADA*, AAA case of 26 January 2009, an elite collegiate swimmer in the United States took her mother's prescription pill bottle, plainly marked on the bottle as containing two diuretics that were Specified Substances, to relieve her constipation. A sanction of **six months** ineligibility was imposed;
 - iii. in *UKAD v/ Dooler*, UKNADP, 24 November 2010, a semi-professional rugby league player tested positive for the presence of MHA. The source of this result was a product called "Xtreme Nox Pump" which he had taken at half time during a match to alleviate post-match fatigue and muscle pain. The product was in fact more directed towards improving training performance. He did not discuss his use of the product on match days with his team doctor and/or coaches. However, it was accepted that Internet searches would not readily have identified that the product might contain MHA. A sanction of **four months** ineligibility was imposed;
 - iv. in *RFU v/ Steenkamp*, RFU Disciplinary Hearing, 22 March 2011, a semi-professional rugby union player used what he believed to be an energy drink. The drink had been recommended by a qualified fitness instructor who had, after checking, assured him that the product contained no banned substances. He tested positive for MHA. A sanction of **three months** of ineligibility was imposed;
 - v. in *RFU v/ Wihongi*, RFU Disciplinary Hearing, 16 March 2011, a professional rugby union player picked up a green bottle in the team dressing room at half-time during a match, believing it to contain water. He started to drink the contents but quickly realised that it contained a sport drink that had been prepared by team coaching personnel for another

- player and stopped drinking. He subsequently tested positive for MHA. A sanction of **four months** ineligibility was imposed;
- vi. in *NADP v/ Wallader*, UKNADP Hearing, 29 October 2010, a female shot putter received a **four month** ban for testing positive for MHA caused by her use of a supplement called “Endure”. The athlete was 21, a student, and was given the supplement by her very experienced coach, who had received specific assurances from the supplier that it was “legal”. The athlete had, herself, both checked the ingredients against the 2009 Prohibited List and found no matches (because neither MHA nor dimethylpentylamine was included by name on the Prohibited List at that point), and checked against the Global DRO, again without any red flags appearing (this time because the name MHA was used in the database, but not the synonym dimethylpentylamine). The athlete, who it was accepted by the tribunal did not have specialist medical assistance readily available to her – was found to have exercised “considerable diligence”. The tribunal assessed her fault as significantly less than that of an English footballer (Kenny) who had received a nine month ban for a Specified Substance (not MHA) that was an ingredient in a cold remedy;
 - vii. in CAS 2011/A/2495, the athlete was so concerned about everything that he ingested that he hired a medical doctor experienced in sports medicine to supervise his supplement intake, had that doctor prescribe a custom made supplement that contained no prohibited substances at a compounding pharmacy, took the advice of his father who was also the local health inspector who identified the most reputable compounding pharmacy in his locale and chose that one as the pharmacy to provide the supplement, and ingested a supplement that was not labelled as containing nor intended to contain a prohibited substance. Despite the athlete’s efforts, the compounding pharmacy created his supplement shortly after a prescription was filled for another patient that contained a heart medication that was a specified substance and thereby contaminated the athlete’s compounded supplement. The Panel found that a **reprimand** was a reasonable punishment under Article 10.4 of the WADC. As the facts demonstrate, the exceptionally high degree of care exercised by [the athlete] was missing in the Athlete’s case;
 - viii. in CAS 2011/A/2518, the athlete took a supplement in an unmarked, unlabelled foil package he had obtained from a friend of his coach who was the seller of the product under a network marketing scheme, the athlete conducted very rudimentary Internet research on the product that led him to believe the product did not contain prohibited substances; Had the athlete found the online label for the product he would have determined that it contained the specified substance at issue (in that case, MHA as well), but he relied on advice from unqualified personnel, not his coach, in deciding to take the supplement. [The athlete] received an **eight month** sanction after the Panel weighed his conduct under the standards set forth in WADC Article 10.4. As the facts demonstrate, the Athlete’s diligence was higher than the one demonstrated by [the athlete];
 - ix. in the CAS 2012/A/2822 Award, the Albanian weightlifter received a sanction of **fifteen months**, in a case in which he had undertaken only minimal precautionary measures;
 - x. in CAS 2012/A/2747, the Panel found that the [athlete] had shown considerable fault, as

he had not made any inquiry on the product, and sanctioned him with **eighteen months** of ineligibility.

- xi. in CAS 2013/A/3075, the athlete was sanctioned with an ineligibility period of **five months** as his negligence was considered to be low;
 - xii. in CAS 2011/A/2515, the Brazilian swimmer was declared ineligible for **six months**, because she had blindly relied on her past experience with the online retailer that provided her with a nutritional supplement, did not check on the Internet or seek any kind of advice, while the product label disclosed the presence of MHA, mentioned under an alternative name.
74. At the same time, the Panel notes that in the CAS 2013/A/3327 & 3335 Award, the Panel summarized, based on a review of CAS precedents, some principles applicable to the determination of the length of the sanction when Article 10.4 WADC (or provisions corresponding thereto) applies. More specifically, the Panel recognised the following degrees of fault:
- i. significant degree of or considerable fault
 - ii. normal degree of fault
 - iii. light degree of fault.
75. In the CAS 2013/A/3327 & 3335 Award, then, applying these three categories to the possible sanction range of 0-24 months contemplated by Article 10.4 WADC, the Panel arrived at the following sanction ranges:
- i. significant degree of or considerable fault: 16-24 months, with a “standard” significant fault leading to a suspension of 20 months;
 - ii. normal degree of fault: 8-16 months, with a “standard” normal degree of fault leading to a suspension of 12 months;
 - iii. light degree of fault: 0-8 months, with a “standard” light degree of fault leading to a suspension of 4 months.
76. This Panel agrees with the CAS 2013/A/3327 & 3335 Award: in order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete’s situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities. The objective element should be foremost in determining into which of the three relevant categories a particular case falls. The subjective element can then be used to move a particular athlete up or down within that category.
77. In the present case the Athlete took the following precautions:
- MHA, or any associated name thereof, was not mentioned on the packaging of the

Product;

- the packaging of the Product did not contain any indication that could have misled the Athlete (or any reasonable person) as to the presence of a doping risk;
- the Product was purchased from a source (apparently) without connections to prohibited substances;
- the use of the Product was indicated in the doping control form by the Athlete while providing the sample which returned the Adverse Analytical Finding;

78. In contrast, the Athlete lacked diligence in the following points:

- the Athlete failed to contact a doctor or seek any medical or other competent advice with respect to the use of the Product;
- the Athlete did not have any personal contact with the supplier of the Product, or its ingredients, prior to taking it;
- the Athlete was an experienced international level athlete whose career has spanned over many years. She was further subject to regular anti-doping controls. The Athlete thus had perfect knowledge of her anti-doping obligations.
- the Athlete was aware of the risk of food contamination as can be seen in the fact that she, in a laboratory, tested the vast majority of the food supplements she ingested.
- on the homepage whereon the Athlete purchased Shisandra the product was described as a product that would enhance physical performance. This should have led her to further precautions to be taken before ingesting the product.
- the Athlete on her own asked for a sanction not less than 3 month. She herself is therefore aware of not having applied the greatest possible diligence in her case.

79. Having regard to all of the circumstances of the case, that is in light of its objective and subjective elements, the Panel comes to the conclusion that an appropriate sanction for the Athlete is a period of ineligibility of six months. The Panel, in fact, finds a light degree of fault in the Athlete's behaviour. A degree of fault that, in regard of the above mentioned circumstances, allow the imposition of a sanction that is two month longer than the standard measure for such cases.

80. The measure of the sanction so determined cannot be modified, or its application suspended, pursuant to Article 10.5.3 of the IBU ADR, contrary to the Appellant's request. The Panel, in fact, finds that insufficient evidence has been brought to establish that the assistance provided by the Athlete to the German criminal authority was "substantial" for the discovery of criminal offences committed by other persons.

81. The Decision is therefore to be set aside in the portion regarding the measure of the sanction, and replaced by a decision imposing a six months' ineligibility period.

3.7 Conclusion

82. In light of the foregoing, the Panel holds that the appeal brought by the Athlete against the Decision is to be upheld: the Decision is to be set aside in the portion concerning the measure of the sanction imposed and replaced by a decision suspending the Athlete for a period of six months, starting on the date set by the ADHP Decision, which remained unchallenged. The other portions of the Decision, not challenged by the Athlete, are to be confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Ms. Evi Sachenbacher-Stehle on 4 August 2014 against the International Biathlon Union (IBU) concerning the decision of the IBU Anti-Doping Panel of 14 July 2014 is partially upheld.
2. Section II of the decision of the IBU Anti-Doping Panel dated 14 July 2014 is modified as follows:

Ms. Evi Sachenbacher-Stehle is sanctioned with a period of ineligibility of six (6) months, commencing retroactive as of the date of sample, that is, 17 February 2014.
3. All competitive results of Ms. Evi Sachenbacher-Stehle obtained as from 17 February 2014 through the conclusion of her six (6) month period of ineligibility are forfeited.

(...)
6. All other or further requests or motions for relief are dismissed.