

**IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE WORLD ATHLETICS
ANTI-DOPING RULES**

Before:

Conny Jörneklint (Chair)
Harveen Thauli
Francisco A. Larios

BETWEEN:

World Athletics

Anti-Doping Organisation

and

Mr VIDAL BASCO MAMANI

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

I. INTRODUCTION

1. The Claimant, World Athletics (“WA”) is the international federation governing the sport of Athletics worldwide. It has its registered seat in Monaco. In these proceedings, WA is represented by the Athletics Integrity Unit (the “AIU”).
2. The Respondent, Mr Vidal Basco Mamani (the “Athlete” or “Mr Basco”) is a 27-year-old athlete from Oruro, Bolivia. Mr Basco has been competing in elite athletics events since 2015.

3. The Claimant and the Respondent are each referred to individually, as a “Party” and collectively, as the “Parties”.

II. JURISDICTION

4. It is accepted by the Parties that the relevant rules are the 2021 Organizacion Deportiva Suramericana Anti-Doping Rules (“the ODESUR ADR”), applicable to the South American Games and the 2021 World Athletics Anti-Doping Rules (the “ADR”).
5. World Athletics has established a Disciplinary and Appeals Tribunal (the “Disciplinary Tribunal”) to hear alleged anti-doping rule violations and other breaches of the ADR (Articles 1.3 and 8.2 ADR).
6. This matter has been referred to the Disciplinary Tribunal in accordance with Article 8.5.5 of the ADR.
7. Pursuant to Article 4.1 of the World Athletics Disciplinary and Appeals Tribunal Rules, World Athletics has determined that the Disciplinary Tribunal shall have a secretariat, which is independent of the World Athletics. Sport Resolutions acts as secretariat to the Disciplinary Tribunal.

III. FACTUAL BACKGROUND

8. On 10 October 2022, in advance of his participation in the XII South American Games, the Athlete provided an Out-of-Competition urine sample.
9. On 26 October 2022, the World Anti-Doping Agency (“WADA”) accredited laboratory in Rio de Janeiro, Brazil, reported that analysis of the sample had resulted in an Atypical Finding (“ATF”) for Clenbuterol.
10. Clenbuterol is a Prohibited Substance under the WADA 2022 Prohibited List under the category, S1.2 Other Anabolic Agents. It is a non-Specified Substance prohibited at all times.

11. The ATF was reviewed by the Organizacion Deportiva Suramericana (“ODESUR”) in accordance with the WADA Stakeholder Notice regarding potential meat contamination cases (the “Stakeholder Notice”) to determine whether the ATF was caused by inadvertent contamination from meat consumed by the Athlete.
12. On 17 November 2022, ODESUR notified the Athlete of the ATF.
13. On 28 November 2022, the Athlete provided a response in which he, in summary, explained the following:

On 2 October 2022, he began to feel cold symptoms when he was in training in Cochabamba. Each day the symptoms got progressively worse until he was finally unable to train on 6 October 2022. He asked the hotel receptionist to provide him with the contact details of a doctor. Contact details were provided, and he got a prescription but because of the distrust he felt for the doctor (that he would give him a wrong prescription) he just purchased azithromycin and paracetamol to treat his symptoms. On 7 October 2022, he trained with a cold, and he also ran on the morning of 8 October and then he and his family, wife and three children, returned to Oruro arriving there at around 14.30. He went to a sauna at around 17.00, to relax and to treat his symptoms. By 18.30, his symptoms had worsened, and he therefore consulted a friend, Gim Jezer Arce Colque, who is a doctor; a general practitioner. Dr Arce invited him to his house, which he visited together with his family, and Dr Arce prescribed him Amoxicillin 1gr (10 tablets), Ambroxol Adult (15 tablets) and Vitamin A (5 tablets) and instructed him to continue taking azithromycin, paracetamol and Berocca as a supplement. On the way home, he visited a pharmacy and purchased the medications in accordance with what Dr Arce had prescribed. He was given everything he ordered along with the instructions of the prescriptions. He immediately ingested the medication and proceeded in continuing on his journey home, when he realized that the drug Ambroxol was not in keeping with what he had ordered. When he read the packaging carefully, he discovered that he had instead been given Ambroterol. He was very worried, so he stopped the car and called Dr Arce, telling him that the drug that the pharmacist had provided him wasn't Ambroxol but Ambroterol. He asked Dr Arce to check if it was legal or if it was prohibited. Dr Arce told him to send a picture of the package by WhatsApp, and he sent him a photo. While Dr Arce checked, time passed on and they returned to the pharmacy. He accused

the pharmacist of giving him Ambroterol instead of Ambroxol, which the doctor had prescribed. The pharmacist told him that *"it's the same composition, it's just another brand or with another name"*. He insisted that he wanted the pharmacy to give him the prescribed medication. He said, *"but my doctor prescribed this, give it to me, because if this medicine you gave me is illegal, I could be sanctioned"*. But the pharmacist reiterated that it was the same, only a little stronger, and that it would help him better to shed phlegm and *"it's going to help you to relieve your cough"*. It seemed that the pharmacist had no idea about doping. Then, as he had already ingested the medication, in desperation, he called Dr Arce again and Dr Arce told him, *"I just saw, it's the same, there is also Ambroxol, and it is legal"*. As he trusted Dr Arce, he calmed down and returned to his home. The next day when he woke up, he still had the same cold, but he had to travel to Asunción for the Championships. He expected to receive help from a doctor once in Asunción. He arrived there and went to the hotel arranged by the organizers. His coach arrived a few minutes earlier and had already informed the doctors of the National Olympic Committee about his condition. When he entered the hotel, he met Dr Helen Sdenka Morales Rodríguez, Dr Amilcar Boris Humacayo Morales and Dr Luis Mauricio Paniagua Portugal. They checked his throat, took his temperature and blood pressure. His coach was informed by the doctors that he had a temperature of 40 degrees. After the examination, he was instantly given some medications. He was assigned a room, he settled in and later he was called to the doctors' room, and they examined his symptoms in more detail, and they also tested him for COVID-19, which was negative. The doctors continued with the treatment and shortly afterwards he was told that he was chosen for a doping control. He submitted without hesitation, but since he was so sick, he did not declare medications on the form that he did not remember and at the time of the doping control test, he could not use electronic devices to assist him in recalling the complete list of medications. He claimed to have consumed Ambroxol and not Ambroterol. Now he can see in detail in his cell phone that Ambroterol, which he had ingested, contains the banned substance Clenbuterol.

14. As the Athlete's explanation was unrelated to any inadvertent consumption of contaminated meat, the ATF was pursued by ODESUR as an Adverse Analytical Finding in accordance with the Stakeholder Notice.

15. On 30 March 2023, the ODESUR Doping Disciplinary Panel in its decision (the “ODESUR Decision”) found that the Athlete had committed an Anti-Doping Rule Violation (“ADRV”) pursuant to Rule 2.1 of the ODESUR ADR and disqualified his results from the XII South American Games with all resulting Consequences. The Athlete did not appeal the ODESUR Decision, which therefore became final and binding upon him.

IV. NOTICE OF CHARGE AND INITIATION OF DISCIPLINARY PROCEEDINGS

16. On 19 July 2023, a Notice of Charge from the AIU confirmed that it was proceeding with Results Management to determine any additional Consequences to be imposed upon the Athlete in accordance with the ADR following the ODESUR Decision.

17. In its Notice of Charge, the AIU elaborated the following:

“In accordance with Article 7.1.1 of the ODESUR ADR, ODESUR is responsible for determining whether an ADRV was committed and the applicable Consequences in relation to the XII South American Games. Responsibility for Results Management with respect to any Consequences that extend beyond the XII South American Games shall be referred to the relevant International Federation, in this case, the AIU on behalf of WA, in accordance with Article 7.1.1 of the ODESUR ADR.

Rule 7.1.3(f)(iv) of the ADR, confirms that the AIU shall have Results Management responsibility in relation to Consequences beyond the International Competition in question including (without limitation) in relation to Provisional Suspension, Public Disclosure and Ineligibility, per the definition of Consequences in the Rules.

This means that following the determination by the ODESUR Panel that [the Athlete has] committed an ADRV and the disqualification of [his] results in the XII South American Games as confirmed by the ODESUR Decision, the AIU must now proceed with Results Management to determine any additional Consequences that should be imposed upon [the Athlete] in accordance with the Rules as further explained below.”

18. In accordance with Rule 7.4.1 of the ADR, the Notice of Charge informed the Athlete that he was subject to a mandatory Provisional Suspension, effective immediately, and barred

him temporarily from participating in any Competition or activity until this matter was fully determined.

19. On 25 July 2023, the Athlete requested a hearing to determine the Consequences to be imposed upon him.

V. PROCEDURE BEFORE THE DISCIPLINARY TRIBUNAL

20. On 4 August 2023, Mr Conny Jörneklint, Sweden, Former Chief Judge of Kalmar District Court, was appointed to chair these proceedings.

21. On 22 August 2023, a Preliminary Meeting took place before the Chair via video conference. In attendance for the AIU was Mr Tony Jackson, Monaco, and for the Athlete, Mr Martín Michel Navia, Attorney-at-Law, Bolivia. The Athlete maintained his request for a hearing. The AIU confirmed that the Notice of Charge and its enclosures would stand as its Brief in this matter. After the meeting, the Chair issued Directions for the Athlete to submit an Answer Brief and the AIU to submit a Reply Brief. A preliminary date for the hearing was set and it was decided that the case should be adjudicated by a Panel of three arbitrators.

22. On 12 October 2023, Ms Harveen Thauli, Barrister & Solicitor, Canada, and Mr Francisco A. Larios, Attorney-at-law, USA, were appointed as members of the Panel to sit alongside the Chair.

23. The Athlete provided his Answer Brief on 1 September 2023. The AIU provided its Reply Brief on 29 September 2023.

24. On 10 November 2023, a hearing was held via video conference. In addition to the Panel and Ms Astrid Mannheim, secretariat to the Disciplinary Tribunal, the following individuals attended the hearing:

For the WA:

Mr Tony Jackson, AIU Deputy Head of Case Management

For the Athlete:

Mr Vidal Basco Mamani, the Athlete

Mr Martín Michel Navia, legal counsel

Dr Gim Jezer Arce Colque, as a witness

Ms Maria Julia Lanza, as translator.

25. During the hearing, testimony was provided by the Athlete and Dr Gim Jezer Arce Colque, the Athlete's witness. The Athlete also called Dr Amilcar Boris Humacayo Morales, Dr Helen Sdenka Morales Rodríguez, and the Legal Advisor of ODESUR, Gerardo Luis Acosta Pérez, as witnesses. However, during the hearing, the Chair asked the Athlete whether it was still necessary to hear from these witnesses given the Panel already had their written statements. The Athlete agreed that their testimony was unnecessary, and the Panel could rely on their written statements, and, in the case of Mr Gerardo Luis Acosta Pérez, on the written answers to questions from the Athlete's legal counsel.

26. The Parties had the opportunity to present their case, comment on the evidence, submit their arguments and answer the questions posed by the Panel. At the end of the hearing, the Parties stated that they did not have any objection in respect of their right to be heard.

The Athlete's testimony

27. In his testimony, on being examined by his counsel, counsel for the AIU and later, in answer to some questions by the Panel, the Athlete stated that:

- 27.1. He started his international career in 2015 at the Pan American Junior Athletics Championships in Edmonton, Alberta, Canada. He competed in two events at the Bolivarian Games 2022 in Colombia, where he won one gold and one silver medal. He sees himself as an athlete on a good international level but not on an elite level. He is an experienced runner. He makes money in some races, but he must fund his own training and trips. He does not receive any financial support from his country. He has a very poor background.

- 27.2. He lives in Oruro, which is 3,400 meters above sea level, so to improve his performance before the ODESUR Championships in Asunción, he travelled to Cochabamba with his family to train for three weeks. Cochabamba is 2,500 meters above sea level.
- 27.3. In the last week of his training camp, on Sunday 2 October 2022, he first displayed symptoms of a cold. He tried to heal himself naturally by drinking herbal teas. He did not consult a physician. He initially did not have serious symptoms, but by 6 October, the cold was so bad that he could not train. He asked the hotel receptionist to give him the contact number of a doctor, which she did. He went on to contact this doctor who ended up giving him a prescription via cell phone (note: during the hearing, the Athlete sent a copy of this prescription to the secretariat of the Disciplinary Tribunal who shared it with all those in attendance). The prescription from a Dr Achaya is dated 6 October 2022, and listed two medications. The Athlete went to the pharmacy in Cochabamba to pick up the prescribed drugs, but the second-prescribed medication was not available. Due to its unavailability, the Athlete reckoned that the medication was not commonly prescribed for colds and that it could contain a prohibited substance. On top of that, he felt a certain level of distrust and lack of confidence in this doctor who could have prescribed him something prohibited. As a result, he decided to buy only azithromycin and paracetamol. He had asked the doctor if azithromycin was prohibited in sport, and the doctor answered that it was an antibiotic.
- 27.4. Before his trip to the ODESUR Championships, he returned to Oruro on Saturday 8 October, to drop off his family. He drove his own car and he was very tired. In the afternoon, he relaxed and went to the sauna. He does not like to go to the doctor or to use medications to recover. He prefers to let the cold run its course naturally.
- 27.5. Since his trip was the next day and he was not feeling better, he decided to consult his friend, Dr Arce. He has known Dr Arce for four to five years. They met as Dr Arce is also an athlete and he trains at the same track as the Athlete. Dr Arce is a general practitioner. The Athlete has taken his family to Dr Arce when they have

had colds or for other treatments. The Athlete has received massages from Dr Arce for muscle pain. Dr Arce is not a specialist in the field of sport or doping.

- 27.6. Dr Arce invited him to his home. The Athlete attended with his family. He told Dr Arce everything about his general discomfort. Dr Arce prescribed him some medication (note: the Athlete did not submit this prescription).
- 27.7. After receiving the prescription he went to the drug store, the Farmagri Farmacia, approximately a ten-minute drive from his house. He had gone to this pharmacy in the past to buy vitamins, medication for his kids or cough syrup for his wife. He did not go there very often, only about every two weeks or once a month.
- 27.8. The drug store attendant sold him a different medication than the one in the prescription. The one in his prescription was Ambroxol but he later learned that the drug store did not have Ambroxol and instead gave him Ambroterol. Adriana Alexandra Ortiz was the pharmacist who filled his prescription. He paid 62 bolivianos in cash. She gave him a receipt (note: the Athlete did not submit this receipt to the record, but he appeared to be reading from it).
- 27.9. He ingested the medication without examining the packaging. Immediately after, he realised that it was not Ambroxol. He held the blister pack in his hand and saw that it was not Ambroxol. Knowing he had taken the wrong drug, he decided to drive home anyway because his children were tired.
- 27.10. While he was driving, he started thinking and became concerned about having taken the wrong drug. For this reason, he parked his car on the side of the road to call Dr Arce. Dr Arce asked him to send a screenshot of the package via WhatsApp, which he did. He still had that screenshot, and, during the hearing, at the request of the AIU, he sent it to the secretariat of the Disciplinary Tribunal who shared it with all those in attendance. He also sent two recorded voicemail messages that he had left for Dr Arce; the first at 19:02 was: *"Dr I am going to be there in about 30 or 40 minutes"* and the second at 20:39 was: *"I have taken two already, what is this used for, for which pain."* Dr Arce had advised the Athlete to take two tablets of Ambroxol when he wrote the prescription. On his advice, the Athlete took two tablets at the same time.

- 27.11. While he was waiting for Dr Arce to check on the medication and get back to him, the Athlete turned around and returned to the drug store to give back the medication. He told the pharmacist that she had made a mistake. She said that she did not have Ambroxol, but that Ambroterol was similar to Ambroxol. She explained that it was just a bit stronger and that it would help him expectorate the phlegm (note: during his testimony, the Athlete claimed to still have the rest of the Ambroterol tablets and showed a package of tablets, only partially opened, with the words Ambroterol written repeatedly in sequence in large lettering, to the camera).
- 27.12. At that point, he did not know that Ambroterol contained a banned substance, so he asked Dr Arce if it was legal or if he would test positive. Dr Arce looked at the generic name of Ambroterol and said that it was almost the same as Ambroxol, but Dr Arce was busy at the time and did not look closely. Dr Arce also told him that he was not very familiar with doping matters – that he is just a general practitioner. Nevertheless, the Athlete trusted Dr Arce and continued his treatment for his cold and he was no longer concerned about Ambroterol containing a prohibited substance. He therefore did not further investigate the medication he had consumed or seek out the assistance of another person to investigate it for him. The Athlete does not own a computer at home and his economic means do not allow him to have Wi-Fi at home.
- 27.13. When he arrived in Asunción on 10 October 2022, his coach had arrived a few minutes earlier and had already informed the doctors of the National Olympic Committee of the Athlete's condition. He had not told his coach what medications he had taken before arriving in Asunción. He met both Dr Morales and Dr Humacayo together at the same time and Dr Humacayo was the one who examined him. Later, Dr Morales checked on him again in his hotel room.
- 27.14. He did not tell either of them that he had taken Ambroterol. He did not do so because at that time, his cold was so bad, he was very depressed and expected the doctors to treat him with a treatment other than the one Dr Arce had prescribed. After this, he no longer continued to take the medications prescribed by Dr Arce.

- 27.15. In total, the Athlete had ingested four or five tablets of Ambroterol before he stopped using it. The treatment was every eight hours according to the Dr Arce's prescription. It was not on his mind to tell the doctors in Asunción about what medications he had already taken, nor did they ask him. In fact, he had stopped worrying about Ambroterol when Dr Arce told him that it was legal.
- 27.16. He completed the Doping Control Form (the "DCF") listing the medications he had taken, which is on page 276 of the Hearing Bundle, on 10 October 2022. The reason he disclosed Ambroxol instead of Ambroterol in the DCF was that in his mind, he had taken Ambroxol. He acknowledged that he was depressed and not thinking clearly, so he only remembered the name Ambroxol. He had the screenshot of the Ambroterol blister pack on his cell phone, but he did not check it and it was not on his mind to note the correct name of the medication he had taken on the DCF.
- 27.17. He was eager to compete in the South American Games even if he did not feel well. He was hoping for a medal even if it was just a bronze. After the treatment from the doctors, he felt a little better, but he had not fully recovered. He finished the first competition in fifth place.
- 27.18. He does not know anything about medications. When he had left the pharmacy, he noticed that he had received something other than Ambroxol and that is why he asked Dr Arce about it. When Dr Arce said it was okay, he trusted the doctor's assessment. He thought that Ambroxol and Ambroterol were the same but with different brand names. Dr Arce confirmed during the phone call that Ambroxol was practically the same as Ambroterol. The Athlete did not conduct any Internet searches for Ambroterol. He trusted Dr Arce and he did not check the ingredients of Ambroterol against the Prohibited List.
- 27.19. Oruro does not have well-trained doctors in the field of doping. Never, in his whole sports career, has he used illegal substances. This was a simple mistake.
- 27.20. He has never been in this situation before. He has been through many doping controls. He has never run away from them nor has he ever been inconvenienced by one.

- 27.21. He was desperate to get better so that he could represent his country in the best way possible.
- 27.22. The pharmacist – Adriana Alexandra Ortiz – refused to be his witness.
- 27.23. He always asks his doctors if the medications or supplements he plans to take are legal. He is always concerned with remaining clean, and, to that end, he always sends pictures to his doctors of the medications or supplements in order to get their approval.

The testimony of Dr Gim Jezer Arce Colque

28. He has been a doctor for more than ten years. Dr Arce has been a sportsman, and he has represented Oruro. He is a trainer in taekwondo, but he has never been a doctor for athletes.
29. As a doctor, he is very careful when writing prescriptions for athletes. He has not received any formal education or training in anti-doping. This specialisation is new to him and he is not aware of the procedures specific to doping controls.
30. He has known Mr Basco for eight years. At that time Mr Basco had already started his career as an athlete.
31. In Bolivia, there are very few athletes and in Oruro, there is just one track. He and Mr Basco met at that track and they became friends. They usually meet each other in the morning, when they are both training. They meet on the track but also in a Martial Arts Centre where there are training facilities.
32. Mr Basco has been known in Bolivia as an athlete who has stood out. He has managed to train and achieve good results for his country and himself. He knows Mr Basco as a humble, quiet person and not as a cheater.
33. Dr Arce has in the past given the Athlete medical assistance for free. He has helped him with specific injuries, and he has also treated his wife and children on a few occasions.

34. On 8 October 2022, it was a Saturday night when Mr Basco came with his family to his home. Mr Basco was sick and very concerned as he had an important competition in a few days. He had a fever, and it was hard for him to swallow. Dr Arce diagnosed symptoms of moderate dehydration, acute bronchitis, and fever and therefore, Mr Basco was treated by rehydration, and prescribed antibiotic therapy: Amoxicillin, 1 gr, every twelve hours for five days; Ambroxol Adult, every eight hours for five days; Vitamin A, one tablet, every day for five days. The Athlete was also advised to continue with Azithromycin, Paracetamol and Berocca, which he already had.
35. After the Athlete had left his house, the Athlete tried to contact the doctor by cell phone. Later on, Dr Arce checked his cell phone and noticed that there were some missed calls from Mr. Basco. He then contacted Mr Basco who asked whether the prescription was okay and further asked Dr Arce to check what the pharmacy had dispensed to him. Dr Arce checked the literature that he had, but he did not find anything on Ambroterol, so he simply assumed that it was the same as Ambroxol. Medications normally include a leaflet of instructions on its use and a description of its ingredients. However, it is common in Bolivia that the medications are sold without a leaflet of instructions. Therefore, he did not have access to any leaflet of instructions for Ambroterol. He had Goodman and Gilman's The Pharmacological Basis of Therapeutics book, but it did not cover every type of medication. He searched in the literature for the name of Ambroterol, but he only found the name of Ambroxol. According to an Internet search he conducted, Ambroterol contained Ambroxol. Ambroterol had another name, but he found that it had the same composition. He searched for indications that Ambroxol was included in other medications.
36. He did not remember if Mr Basco explicitly asked if Ambroterol was illegal. But as a doctor, he was concerned whether this medication would work as well as Ambroxol. So, his concerns were not whether Ambroterol was prohibited for athletes as he was more concerned about Mr Basco's health.
37. When Mr Basco sent him a picture on WhatsApp of the blister pack for Ambroterol, he told him that it was the same as Ambroxol but that it had a higher concentration. He gave Mr Basco the little information he had about Ambroterol.

38. Ambroxol is a medication that helps in the dynamics for the cilia. Cilia are hair-like projections that are found in the bronchial tubes, but also in other organs. In the mucous membranes of the bronchial tubes, cilia transport phlegm and small particles away. Ambroxol helps cilia to work faster and more efficiently. For him, as a doctor, this is a frequently used medication as Oruro is a mining city and it helps the miners when they have a cough. As Mr Basco was so sick, cough medicine was not enough to eliminate the phlegm. Ambroxol helps to eliminate the phlegm faster.

39. He did not know that Ambroterol contained Clenbuterol.

40. He had no idea that Clenbuterol is used as a medication, nor did he know that Clenbuterol is a beta antagonist.

VI. THE PARTIES' SUBMISSIONS

World Athletics

41. WA has made the following requests for relief maintained at the hearing:

41.1. To rule that the Athlete has failed to demonstrate that the ADRV was not intentional and shall therefore be subject to a period of Ineligibility of four (4) years in accordance with Article 10.2.1(a) ADR;

or alternatively, if the Panel is satisfied that the Athlete has demonstrated that the ADRV was not intentional in accordance with Article 10.2.1(a) ADR:

41.2. To rule that the Athlete shall be subject to a period of Ineligibility of two (2) years in accordance with Article 10.2.2 ADR; and

41.3. To find that the Athlete cannot benefit from any reduction in the period of Ineligibility in accordance with Article 10.6.2 ADR for No Significant Fault or Negligence;

41.4. To give credit for the period of Provisional Suspension imposed on the Athlete from 19 July 2023 until the date of the Panel's decision against the period of

Ineligibility imposed, provided that it has been effectively served by the Athlete; and

- 41.5. To order the disqualification of any results obtained by the Athlete between 10 October 2022 and 19 July 2023 (that have not already been disqualified by virtue of the ODESUR Decision) with all resulting Consequences including forfeiture of any medals, titles, points, prize money, and prizes pursuant to Article 10.10 ADR.

The Athlete

42. The Athlete has made the following request for relief:

“We request that the maximum sanction to be applied to Mr. Vidal Basco Mamani be one-year Ineligibility period and that due to the time elapsed since the ATF notification, this sanction begins to be counted from the day the sample was taken, that is, the 10th. October 2022 and is considered fulfilled on October 10, 2023.” [reproduced as written]

VII. THE ATHLETE HAS COMMITTED AN ANTI-DOPING RULE VIOLATION

43. As already described, the ODESUR Doping Disciplinary Panel in the ODESUR Decision found that the Athlete had committed an ADRV pursuant to Rule 2.1 of the ODESUR ADR, applicable to the South American Games, and said Panel also disqualified his results from the XII South American Games with all resulting Consequences. The Athlete did not appeal the ODESUR Decision, which therefore became final and binding upon him.

VIII. WAS THE ANTI-DOPING RULE VIOLATION INTENTIONAL?

Position of the Parties

The Athlete

44. The Athlete's position is that the ADRV corresponds to what is described in Article 2.1 ADR, which is the "Presence of a Prohibited Substance...in an Athlete's Sample", but not the Use of said substance. The ODESUR Decision only ruled on Disqualification from the XII South American Games with all resulting Consequences.
45. It is now for the Disciplinary Tribunal to determine any additional Consequences to be imposed upon the Athlete in accordance with the ADR. The Tribunal has total discretion to analyse the facts following Articles 10.2.2 and 10.6.2 ADR.
46. The Athlete claims that the ADRV was not intentional in accordance with Article 10.2.3 ADR.
47. The Athlete relies on the following facts: He suffered from a respiratory illness and his doctor prescribed him several medications, including one that contained the substance "*Ambroxol*", which is not on the list of prohibited substances. At the pharmacy, he got the "commercial presentation" of the prescribed drug, under the name of "*Ambroterol*". The commercial presentation contained, in addition to the prescribed Ambroxol, the prohibited substance of Clenbuterol.
48. The reason why Clenbuterol is on the prohibited list is the following: Clenbuterol is originally a beta antagonist, that is, a substance that is used in medicine to treat respiratory symptoms. It is similar to salbutamol, salmeterol, and other beta antagonists. It would therefore be logical if Clenbuterol is on the list of prohibited substances in the group of beta antagonists. But, Clenbuterol is included in category S1 as "other anabolic agents" because its continuous and organized consumption causes effects similar to those of exogenous anabolic androgenic drugs.
49. The presence of Clenbuterol in the Athlete's body was not related to its use as an anabolic agent, but rather to its role as beta antagonist to which Clenbuterol has its medical use.
50. The presence of Clenbuterol in the Athlete's Sample was reported as an Atypical Finding (an ATF) by the laboratory for Clenbuterol simply because the concentration of Clenbuterol found in the Sample was very low.
51. Being reported as an ATF, the ODESUR had to carry out an investigation, in accordance with the WADA Stakeholder Notice regarding potential meat contamination cases, to determine whether the ATF was caused by inadvertent contamination of meat consumed

by the Athlete. Clenbuterol is also associated with the consumption of contaminated beef, in countries like Mexico, for example.

52. In this investigation, the ATF became an AAF only because the Athlete, in response to the first notification made by ODESUR, admitted that Clenbuterol was in his system in connection with his treatment for a respiratory illness.

53. To prove the lack of intention, the first requirement is to demonstrate the route of entry of the substance into the body. This is what the comment to Article 10.2.1.1 of the WADA Code says. The Athlete has proven, without a doubt, that the route of entry of the substance was his ingestion of the medication called Ambroterol. The Athlete must also prove that he meets the requirements established in the definition of Article 10.2.3 ADR.

54. The definition set out in Article 10.2.3 ADR is ambiguous and although the 2018 ADR cannot be retroactively invoked, it is easier to understand the first part of the definition of "intentional" from the earlier version of the ADR which states, "[a]s used in Rules 10.2 and 10.3, the term 'intentional' is meant to identify those Athletes who cheat". Although this no longer forms part of the definition, it can still be applied to interpret the lack of intent noted in the opening lines of the 2021 WADA Code:

"The purposes of the World Anti-Doping Code and the World Anti-Doping Program which supports it are:

- *To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide..."*

55. Therefore, the conduct that constitutes an ADRV should be analysed in relation with the original purposes of the Code: to protect clean athletes against cheating athletes.

56. The question to be determined by the Disciplinary Tribunal is whether Article 10.2.1(a) or 10.2.2 ADR applies: did Mr Basco try to cheat or is he cheating in having consumed Clenbuterol?

57. Mr Basco made neither an attempt to, nor in fact cheated. Firstly, the concentration of Clenbuterol was very low, which indicates very recent use. Secondly, the consumption of Clenbuterol was associated with a respiratory condition, that is, in its role as a beta

antagonist, which Clenbuterol also has. Thirdly, Clenbuterol is a Prohibited Substance due to its anabolic effects, which was not the reason for the substance's entry into the Athlete's body. Mr Basco is a distance runner. It makes no sense to use a substance to increase the muscle volume in an athlete who runs 3000 meters or more.

58. Therefore, without a doubt, the Presence of the Prohibited Substance in the body of Mr Basco was not intentional and a maximum sanction of two years must be applied according to Article 10.2.2 ADR.

World Athletics

59. First, the AIU notes that the Athlete submits that Article 10.2.3 ADR is “*ambiguous*” and has attempted to invoke and rely upon the introductory sentence to Article 10.2.3 ADR as it was used in the 2015 WADA Code, which specified that the term intentional (as used at that time) was “*meant to identify those Athletes who cheat*” by reference to the preamble and purpose of the Code.

60. The AIU submits in response that there is nothing ambiguous or unclear about Article 10.2.3 ADR. To the contrary, the Rule clearly describes the specific circumstances in which an ADRV will be considered intentional as that term is used in Article 10.2, i.e., where an athlete (i) engaged in conduct that they knew was an ADRV or (ii) knew that there was a risk that their conduct might constitute or result in an ADRV and manifestly disregarded that risk.

61. It is against this unambiguous language in Article 10.2.3 ADR that the Athlete’s conduct (i.e., his ingestion of medication as he has explained) must be judged to determine whether the ADRV was not intentional. The Athlete’s request for his conduct to be judged against a portion of Article 10.2.3 of the 2015 WADA Code, which is no longer in effect, should be rejected.

Intent and origin: applicable jurisprudence

62. According to Article 10.2.1 ADR, the Athlete bears the burden of establishing that the ADRV was not intentional as that term is defined in Article 10.2.3 ADR.

63. For this purpose, a whole series of CAS cases have held that an athlete must necessarily establish how the prohibited substance entered their body. See for example, (i) CAS 2017/A/5248 WADA v. Africa Zone V RADO & ADAK & Eliud Musumba Ayiro, paragraph 55; (ii) CAS 2017/A/5295 WADA v. ADAK & Athletics Kenya & Sally Chelagat Kipyego, paragraph 105; (iii) CAS 2017/A/5335 WADA v. Mohammad Yaseen Alhasan, paragraph 137; (iv) CAS 2017/A/5392 FINA v. Georgia Anti-Doping Agency & Eastern Europe RADO & Irakli Bolkvadze, paragraph 63; (v) CAS 2018/A/5570 Denislav Dimitrov Ivanov v. IJF, paragraph 51; (vi) CAS 2016/A/4563 WADA v. EgyNADO & Radwa Arafa Abd Elsalam, paragraph 50; (vii) CAS 2016/A/4626 WADA v. Indian NADA & Mhaskar Meghali, paragraph 45.

64. In particular (emphases added):

64.1. CAS 2016/A/4377 WADA v. IWF & Alvarez, paragraph 51:

“The Athlete bears the burden of establishing that the violation was not intentional within the above meaning [of Article 10.2.3], and it naturally follows that the athlete must also establish how the substance entered her body. The Athlete is required to prove her allegations on the “balance of probability”.”

64.2. CAS 2016/A/4585 Fabien Whitfield v. FIVB, paragraph 45:

“Based on CAS (and national anti-doping tribunal) jurisprudence and the provisions of FIVB MADR, to obtain any reduction of his presumptive four-year suspension under Article 10.2.1 for testing positive for a Non-specified Substance pursuant to Article 10.2.2, 10.4 or 10.5, the Appellant is required to prove by a balance of probability the source of the prohibited substances in his system [...]”.

64.3. CAS 2016/A/4662 WADA v. Caribbean RADO & Greaves, paragraph 36:

“The athlete bears the burden of establishing that the violation was not intentional within the above meaning (referring to the previous definition of “intentional” as existed in the 2015 Code), and it naturally follows that the athlete must also establish how the substances entered her

body. The Athlete is required to prove her allegations on the “balance of probability”, a standard long established in CAS jurisprudence.”

65. The principle established in the CAS case law has also been consistently upheld by the World Athletics Disciplinary Tribunal, including, for example, most recently in SR/260/2020 World Athletics v. Youssef Sbaai, paragraphs 65 and 66 (in English):

“65. For the purposes of demonstrating that a violation was unintentional, many CAS panels have established that it is necessarily up to an athlete to first demonstrate how the substance entered their body. If, however, certain panels have considered that it was theoretically possible for an athlete to establish a lack of intention without establishing the origin of the prohibited substance, these panels have also clarified that this can only be possible in the most extraordinary.

66. As submitted by the IAU [sic], it is not sufficient for an athlete to simply find a potential source for the presence of the prohibited substance. As decided by the Panel in CAS OG 16/25 WADA v. Yadav & NADA “found the sabotage(s) theory possible, but not probable and certainly not grounded in real evidence” either in French “has determined the theory of sabotage(s) possible, but improbable and certainly not based on real evidence (...). The nature and quality of the Athlete's defense evidence, in light of the established facts, must be such as to leave the court effectively satisfied (if not comfortably) that it is more likely than not that the athlete's defense is true”.

66. As noted by the Sole Arbitrator in SR/260/2020, certain CAS awards have departed (albeit marginally) from the consistent line of CAS jurisprudence which has found it necessary for an athlete to demonstrate the origin of a prohibited substance to establish that an ADRV was not intentional.

67. In these (minority of) CAS cases, the CAS effectively found that, whereas a lack of intent could theoretically be established without establishing the origin of the Prohibited Substance, this would only happen in the most exceptional cases. For example:

67.1. In CAS 2016/A/4534 Villanueva v. FINA, the Panel held that “[w]here an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him” (paragraph 37).

67.2. In CAS 2016/A/4919 WADA v. WSF & Iqbal, the Panel concluded that *“while this Panel assumes in favour of the Athlete that he does not have to necessarily establish how the prohibited 19-NA entered his system when attempting to prove on a balance of probability the absence of intent, in all but the rarest cases the issue is academic.”* (paragraph 66).

67.3. See also CAS 2017/O/5218 IAAF v. RUSAF & Kopeykin, referring to *“truly exceptional circumstances”* (paragraph 166); CAS 2016/A/4627, 4628, 5283 WADA v. Indian NADA & Rani (paragraphs 47-48); CAS 2017/A/5369 WADA v. SAIDS & Gilbert, referring to *“narrowest of corridors”* (paragraph 146); CAS 2018/A/5584 Zielinski v. POLADA (paragraph 139), referring to *“truly exceptional circumstances”*.

68. The same has been found before the WA Disciplinary Tribunal. For example, in the decision of the WA Disciplinary Tribunal in SR/176/2020 World Athletics v. Marina Arzamasova, paragraph 64, the Panel held:

“In any event, the Panel acknowledges that, apart from the fact that it is difficult to prove a negative fact, it is indeed difficult to establish a non-intentional ADRV if the Athlete fails to establish the origin of the substance”. [emphasis added]

69. While it is accepted that in exceptional cases, an athlete could demonstrate a lack of intent without establishing origin, they still need to meet their burden of proof (i.e., on the balance of probabilities). In CAS 2017/A/5016 & 5036 Abdelrahman v. EgyNADO & WADA v. Abdelrahman & EgyNADO, the Panel, notably reasoned as follows:

“123. [...] it could be de facto difficult for an athlete to establish lack of intent to commit an anti-doping rule violation demonstrated by the presence of a prohibited substance in his sample if he cannot even establish the source of such substance: proof of source would be an important, even critical, first step in any exculpation of intent, because intent, or its lack, are more easily demonstrated and/or verified with respect to an identified “route of ingestion”. However, the Panel can envisage the possibility that it could be persuaded by an athlete’s assertion of lack of intent, where it is sufficiently supported by all the circumstances and context of his or her case, even if, in the opinion of the majority of the Panel, such a situation may inevitably be extremely rare: where an athlete cannot prove source, it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.

124. The foregoing, in fact, does not mean that the Athlete can simply plead his lack of intent without giving any convincing explanations, to prove, by a balance of probability, that he did not engage in a conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that said conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. The Panel repeats that the Athlete, even though he is not bound to prove the source of the prohibited substance, has to show, on the basis of the objective circumstances of the anti-doping rule violation and his behaviour, that specific circumstances exist disproving his intent to dope.” (emphasis added)

70. The CAS case law set out above was specifically reflected in the Comment to Article 10.2.1.1 in the 2021 World Anti-Doping Code:

58 [Comment to Article 10.2.1.1: While it is theoretically possible for an Athlete or other Person to establish that the anti-doping rule violation was not intentional without showing how the Prohibited Substance entered one’s system, it is highly unlikely that in a doping case under Article 2.1 an Athlete will be successful in proving that the Athlete acted unintentionally without establishing the source of the Prohibited Substance.]

71. According to CAS case law, an athlete must produce “*specific, objective and persuasive evidence*” as to their conduct to be able to demonstrate an absence of intent on a balance of probabilities. For the definition of “*specific, objective and persuasive evidence*” see also CAS 2017/A/5369 WADA v. SAIDS & Gilbert, paragraph 148; CAS 2017/A/5016 & 5036 Abdelrahman v. WADA & EgyNADO, paragraph 125; CAS 2017/A/5260 WADA v. SAIDS & Pena, paragraph 153.

72. CAS jurisprudence is clear that actual evidence must be preferred over, for example, simple protestations of innocence and mere speculation. In CAS 2020/A/6978 & 7068 WADA v. FIM & Iannone, the CAS Panel concluded that “[i]t is clear that the Athlete cannot rely on simple protestations of innocence or mere speculation as to what must have happened, but must instead adduce concrete and persuasive evidence establishing, on a balance of probabilities, a lack of intent [...]” (paragraph 134) (emphasis added).

73. In addition, in CAS 2017/A/4962 WADA v. Comitato Permanente Antidoping San Marino NADO (CPA) & Karim Gharbi, the Sole Arbitrator concluded that it is not sufficient for an athlete to simply assert that a Prohibited Substance entered their body via a medicine.

Actual evidence is required to demonstrate that a product that they ingested contained the substance in question:

“51. To establish the origin of the prohibited substance, it is nowhere near enough for an athlete to protest innocence and suggest that the substance must have entered his or her body inadvertently from some supplement, medicine or other product which he or she was taking at the relevant time.

52. Rather, an athlete must adduce actual evidence to demonstrate that a particular product ingested by him or her contained the substance in question, as a preliminary to seeking to prove that it was unintentional, or without fault or negligence.” (emphasis added)

74. Pursuant to the foregoing, to establish that an ADRV was not intentional, in all but the most exceptional and rarest of cases, an athlete must demonstrate (on the balance of probabilities) the origin of the relevant Prohibited Substance. To do so, an athlete cannot rely on mere speculation or a bare assertion as to the source; actual evidence, that is objective, concrete and persuasive must be provided to that effect in order to demonstrate that an ADRV was not intentional.

In the present case

75. The AIU submitted that this case is far from being an exceptional case that is within the narrowest of corridors envisaged in the jurisprudence for the Athlete to be able to demonstrate an absence of intent without demonstrating (to the required standard) the origin of the Clenbuterol in his Sample.

76. The Athlete must therefore demonstrate the origin of the Clenbuterol in the Sample to the required standard and with actual, concrete, objective evidence to that effect.

77. In this case, the Athlete's claim is that Clenbuterol was present in his Sample on 10 October 2022 due to his ingestion of medication that he thought was the medication that had been prescribed to him by a doctor, who is also his friend.

78. Although the Athlete previously filed a copy of a medical certificate from Dr Gim Jezer Arce Colque in the context of the ODESUR proceedings, the AIU notes that this certificate is

dated 27 November 2022 (i.e., it is not contemporaneous evidence of the circumstances that are alleged by the Athlete), and no copy of the original prescription allegedly provided has been produced.

79. Regarding the statement from the Athlete at the hearing, there are several inconsistencies between what he testified and what he stated in his written statement to the ODESUR Panel. The Athlete failed to give a clear answer as to why he did not disclose his use of Ambroterol on the DCF. He also failed to give a clear answer to questions about what he meant when he said that he did not trust the doctor in Cochabamba, whom he had been put in contact with by a hotel receptionist. It was only when he disclosed the WhatsApp messages from the doctor that it became clear that the Athlete meant that there was a risk that the doctor had prescribed medication that could be prohibited for Use in sport. According to the AIU, the Athlete was deliberately evasive and that undermined the credibility of his evidence.
80. The Athlete provided inconsistent testimony about the moment he discovered he had been given Ambroterol instead of Ambroxol. In the Athlete's written statement, he said, "*he was given everything he ordered and with the instructions of the prescription. He immediately ingested the medication and proceeded towards his house, advancing about seven blocks, he fixated on the tablets and realized that the drug Ambroxol was not in keeping with what he had ordered*". He realized that he had been given Ambroterol when he was driving towards his house. During cross-examination by Mr Jackson, however, the Athlete changed his story and said "*no I checked them as soon as I took them*" which he did immediately after he received them from the pharmacy.
81. The Athlete was also inconsistent in response to how many tablets of Ambroterol he took and at what time.
82. Even more concerning about the Athlete's evidence is that he did not say anything at all to his coach that he had ingested the wrong medication. This is surprising, to say the very least, given the nature of the relationship between a coach and an athlete.
83. Even more surprising is that Mr Basco, when treated by two doctors from the National Olympic Committee when arriving in Asunción, did not mention that only two days earlier, he had mistakenly ingested Ambroterol. At one point, the Athlete said that he had simply forgotten, and at another point, he said that he was too sick to tell them. Later, he said that

they did not ask him what he had taken. This is not credible as it is standard practice for doctors to ask all patients if they have recently taken any medications because if those doctors have to prescribe any medication, they need to be aware of any risk associated by mixing the medications.

84. It is also extremely surprising that the Athlete admits that he did not disclose Ambroterol on his DCF. He said that it was because he simply believed that it was the same as Ambroxol, which he had been prescribed. Given the apparent concern that it had caused him two days earlier, this explanation lacks any credibility whatsoever. And even if it was true, this is a glaring oversight by the Athlete not to disclose the medication that he had ingested two days earlier. It also lacks credibility when viewed in the context of the other evidence that he has given.

85. For all those reasons, the AIU believes the Panel should treat the Athlete's evidence and his claims in this case with particular caution.

86. The comments on Dr Arce's testimony are that he changed his evidence on several occasions when answering questions about what he did, what he searched, what he looked at, what he found and what he relied upon in order to tell the Athlete ultimately that the Ambroterol medication that the Athlete was given by the pharmacy was the same as Ambroxol. Dr Arce referred to at least three different sources of literature, as he described it: First, he talked about the leaflet of instructions in the box of tablets, which had not been included; second, it was a clinical pharmacology book; and then he suggested that he looked at other sources on the Internet. Based on those changes in evidence, the AIU believes that the Panel must also treat Dr Arce's evidence with particular caution.

87. The Athlete's case is essentially that he was mistakenly given Ambroterol, which contained Clenbuterol, by a pharmacist and he immediately ingested two tablets. The case remains unconvincing and lacks sufficient objective evidence.

88. The written medical report from Dr Arce about his prescription of Ambroxol to the Athlete is not from the date he saw Mr Basco in October 2022. It is dated November 2022, so there is no contemporaneous documentary evidence that Mr Basco was prescribed Ambroxol by Dr Arce on the critical day of 8 October 2022.

89. The Athlete is apparently in possession of some of the Ambroterol tablets that he obtained; he showed them on the screen. We have seen some messages from the Athlete to Dr Arce where the Athlete sent him a picture of Ambroterol and asked him questions about what it was.
90. But there remain glaring holes in the Athlete's story at critical points in this case, which this Panel must be satisfied, on the balance of probability, to conclude that he has successfully established origin to demonstrate lack of intent.
91. No evidence whatsoever was submitted about the pharmacy or the pharmacist, named for the first time at the hearing, as Ms Ortiz. The Athlete could have called her as a witness as he knows her. He accepted that the pharmacy is a ten-minute drive from his house. In any event, there was nothing stopping Mr Basco from asking Ms Ortiz to provide a written statement to support his claims. He did not even do that.
92. So, the Athlete's claim that he was mistakenly given Ambroterol by the pharmacist rests entirely on his own word. There is no objective evidence, no independent evidence that it happened whatsoever. The AIU had no opportunity to ask questions to Ms Ortiz. The evidence of dispensing Ambroterol is absent.
93. There is also no evidence of the purchase. Mr Basco produced no evidence that he purchased the medication as he said he did; no receipts, no invoice, nothing whatsoever.
94. The Athlete also has not submitted any evidence establishing that Ambroterol contains Clenbuterol, even, generally speaking, let alone any evidence specifically that the Ambroterol medication he ingested contains Clenbuterol itself. In addition, there is no expert evidence confirming that the concentration in the Athlete's Sample of Clenbuterol is consistent with what he ingested in the lead up to the Sample collection on 10 October 2022.
95. The case SR/176/2020 World Athletics v. Marina Arzamasova, paragraph 75, makes it clear that not only is an athlete required to demonstrate the origin of the prohibited substance, but athletes must also produce specific evidence that demonstrates that the concentration in their Sample is consistent with the explanation they are giving.
96. The Athlete's explanation that he did not disclose Ambroterol on the DCF because he was sick is not supported by the evidence from the two doctors, he met that day. Dr Helen

Sdenka Morales Rodríguez stated in her written testimony of 31 August 2023 that the Athlete was oriented in space and time and in a regular state. So, the Athlete's claim that he was so sick that he did not disclose Ambroterol on the DCF is not supported by the doctors.

97. Therefore, there are significant, critical gaps in the Athlete's evidence to support his case that his ingestion of Ambroterol is the source of the Clenbuterol in his Sample. This is fatal to his case to establish the absence of intent. There is no convincing explanation and the Athlete's evidence is manifestly insufficient of any objective evidence beyond his own word of the circumstances that he says occurred for the Panel to conclude that he has demonstrated a lack of intent under Article 10.2.3 ADR.
98. Even if the Panel is content to conclude that Mr Basco has demonstrated origin and has demonstrated the source of the prohibited substance for the purposes of intent, it is clear that this is an example of indirect intent. Mr Basco cannot demonstrate that he did not know there was a risk that his conduct might result in an ADRV. On his own evidence, he accepted that he knew there was a risk that doctors could prescribe him incorrectly. Then the messages produced made it clear that Mr Basco knew to ask Dr Arce if there was anything prohibited in the prescribed medications. So, Mr Basco demonstrably knew that there was a risk that medications may contain Prohibited Substances and that ingestion of those medications might result in an ADRV.
99. CAS case law has consistently upheld the principle that there is an inherent risk that medications can contain Prohibited Substances. The AIU made reference to CAS 2016/A/4609 WADA v Indian NADA & Dane Pereira, paragraph 68.
100. The Athlete's own evidence is that he knew that there was a risk that prescribed medications might result in an ADRV and based on what we heard from the Athlete and Dr Arce, it is clear that he did absolutely nothing to mitigate that risk before he ingested the tablets.
101. Dr Arce confirmed that he does not recall Mr Basco asking him if Ambroterol was prohibited in sports and that is particularly surprising given that only a few days earlier, Mr Basco had asked another doctor the exact same question.

102. CAS case law is similarly clear that athletes are under a very strict duty to fully investigate whether a medication contains a Prohibited Substance. The AIU referred to the aforementioned Pereira Case, CAS 2016/A/4609, paragraph 76; CAS 2012/A/2763 IAAF v. Athletics Federation of India and others; CAS 2017/A/5015 FIS v. Johaug & NIF, paragraph 192; and CAS 2020/A/7536 Kratzer v. ITF. All these cases make it absolutely clear that athletes are under a strict duty to check medications that they are given to determine whether they contain a Prohibited Substance. Mr Basco did nothing like that before he ingested the Ambroterol tablets he said he was given. He therefore manifestly disregarded the risk that he accepts he understood, and he must be found to have acted with indirect intent.
103. The AIU therefore submits that since the Athlete did not demonstrate that the ADRV was not intentional and under those circumstances, he should be sanctioned with a period of Ineligibility of four years under Article 10.2.1(a) ADR.

IX. THE PANEL'S CONSIDERATIONS

Burdens and Standards of Proof

104. Section 3 of the ADR pertains to Proof of Doping and in Article 3.1 ADR, the Burdens and Standards of Proof when applying the ADR are established. This Article reads as follows:

"The Integrity Unit or other Anti-Doping Organisation will have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof will be whether the Integrity Unit or other Anti-Doping Organisation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that has been made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, except as provided in Rules 3.2.3 and 3.2.4, the standard of proof will be by a balance of probability."

105. It is this Rule that the Panel has to apply when assessing the different submissions made by the Parties.

The relevant Rules

106. The Article 10.2 ADR provides the following:

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

The period of Ineligibility for a violation of Rule 2.1, Rule 2.2 or Rule 2.6 will be as follows, subject to potential elimination, reduction or suspension pursuant to Rules 10.5, 10.6 and/or 10.7:

10.2.1 Save where Rule 10.2.4 applies, the period of Ineligibility will be four years where:

- (a) The anti-doping rule violation does not involve a Specified Substance or a Specified Method, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.*

[...]

10.2.2 If Rule 10.2.1 does not apply, then (subject to Rule 10.2.4(a)) the period of Ineligibility will be two years.

10.2.3 As used in Rule 10.2, the term ‘intentional’ is meant to identify those Athletes or other Persons who engage in conduct that they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. [...]

[Comment to Rule 10.2.3: Rule 10.2.3 provides a special definition of ‘intentional’ that is to be applied solely for purposes of Rule 10.2. Beyond Rule 10.2, the term ‘intentional’ as used in these Rules means that the person intended to commit the act(s) based on which the Anti-Doping Rule Violation is asserted, regardless of whether the person knew that such act(s) constituted an anti-doping rule violation.]”

Considerations

The Athlete has established how the Prohibited Substance entered his body

107. According to Article 10.2.1 ADR, it is the Athlete who bears the burden of establishing that the ADRV was not intentional as that term is defined in Article 10.2.3 ADR. As AIU has pointed out, to reach this purpose, the Athlete must first establish how the Prohibited Substance entered his body, something the Athlete has acknowledged he is required to demonstrate.
108. The Athlete's version of the events is that he was mistakenly given Ambroterol by the pharmacy instead of Ambroxol, which his doctor had prescribed, and that he ingested Ambroterol without knowing that it contained Clenbuterol. The first question for the Panel to answer is whether the Athlete by a balance of probability has established his version of the events.
109. The Athlete has shown that he, at 20.39 on 8 October 2022, sent a picture of tablets with the brand name of Ambroterol to Dr Arce on WhatsApp. In direct connection with the picture, he also sent a voicemail message to Dr Arce asking, *"I have taken two already, what is this used for, for which pain"*.
110. Dr Arce has in his testimony confirmed that he was in contact with the Athlete that evening after Mr Basco's visit to him for treatment and Dr Arce has also confirmed that Mr Basco asked him to look into Ambroterol.
111. The voicemail message linked to the picture of Ambroterol gives a relatively strong support to the Athlete's claim that he had ingested Ambroterol on that night. There is also no reason to question Dr Arce's statements about his discussion with the Athlete about Ambroterol.
112. The Panel therefore finds that the Athlete has established on a balance of probability that he ingested Ambroterol before submitting to the sample collection on 10 October 2022.
113. As the AIU has pointed out, there is no evidence in the file that Ambroterol contains the Prohibited Substance of Clenbuterol. But a simple search on the Internet for *"Ambroterol and Clenbuterol"* makes it clear that Ambroterol contains Clenbuterol.

114. The AIU referred to the case SR/176/2020 World Athletics v. Marina Arzamasova, paragraph 75, according to which an athlete is not only required to demonstrate the origin of the Prohibited Substance but must also produce specific evidence that demonstrates that the concentration in the Sample is consistent with the athlete's explanation. The Panel notes that the Arzamasova case pertains to the ingestion of a supplement and not a medication which contains the Prohibited Substance. The Panel's view is that there is a difference between supplements with different concentrations of Prohibited Substances in the same batch and even in the same package and medications that contain a certain amount of a Prohibited Substance. Therefore, the Panel does not find the discussion of concentration in the paragraph referenced to be relevant. In this case, it is very clear that the medication taken contains the Prohibited Substance.

115. The Panel's conclusion is that the Athlete has established how the Prohibited Substance entered his body.

The Athlete has not established that the ADRV was not intentional

116. It is not enough that the Athlete demonstrates how the Prohibited Substance entered his body. He must also establish that the ADRV was not intentional. As already said, there is a definition of the term "*intentional*" in Article 10.2.3 ADR. This term is meant to identify those Athletes, "*who engage in conduct that they knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.*"

117. The AIU referred to CAS case law and argued that the Athlete at least had acted with indirect intent. The Athlete has referred to the 2018 ADR where it was said that the term "*intentional*" is meant to identify those Athletes who cheat.

118. Several CAS cases before the rule in Article 10.2.3 ADR was adopted discussed the different kinds of intent. According to that case law, it is correct to say that the Athlete must have an intent (direct intent, indirect intent, or even a *dolus eventualis*) to ingest the Prohibited Substance. After the adoption of Article 10.2.3 ADR, it is relevant to say that this rule has overruled the older case law and this rule is now a definition of *dolus eventualis*,

solely for purposes of Article 10.2 ADR. It is not a definition of indirect intent because indirect intent requires knowledge from the Athlete that the medication or supplement ingested contained the Prohibited Substance.

119. The rule in Article 10.2.3 ADR first aims to identify those Athletes who engage in conduct that they knew constituted an ADRV. That is not the case here. What AIU has claimed is that the Athlete knew that there was a significant risk that his conduct might constitute or result in an ADRV and manifestly disregarded that risk.

120. It is clear from the Athlete's own statement and his voicemail message to Dr Arce that he had ingested two tablets of Ambroterol without knowing anything about the medication.

121. The AIU referred to the CAS case law which establishes that athletes have a very strict duty to fully investigate whether a medication contains a Prohibited Substance. An athlete bears a personal duty of care in ensuring compliance with anti-doping obligations. The standard of care for professional athletes is very high considering their experience, the expected knowledge of the ADR, and the public impact that they have on their particular sport.

122. It follows that a top athlete must always personally take very rigorous measures to discharge these obligations. The CAS case law has specifically noted that the prescription of medication by a doctor does not relieve the athlete from checking if the medication contains Prohibited Substances or not. Athletes always bear personal responsibility, and the failure of a doctor does not exempt the athlete from personal responsibility. Furthermore, athletes have a duty to cross-check assurances given by a doctor.

123. The Athlete has described that he, in Cochabamba, did not trust the doctor and for that reason refrained from buying a prescribed medication. His behaviour in Oruro is markedly different from what he showed in Cochabamba as he ingested the Ambroterol tablets without showing any caution. The Panel's assessment is that his behaviour in Cochabamba shows that he knew that the use of unknown medications imposed a significant risk that such use might constitute or result in an ADRV.

124. The next question is whether the Athlete manifestly disregarded the risk when he ingested the medication. The Panel notes that before the ingestion of the first two

Ambroterol tablets, the Athlete did not check the ingredients of the medication with anyone, not even with his doctor. It is clear that he did not even look at the label of the packaging; otherwise, he would have noticed that it read “*Ambroterol*” and not “*Ambroxol*” as he was prescribed.

125. The Athlete has said that he cannot afford a computer and that he does not have Wi-Fi at home. However, he does have wireless data, as evident from the fact that he connected to the hearing in that manner. Therefore, the Athlete could have checked on his phone to see whether Ambroterol contained a Prohibited Substance. In fact, the Panel notes that the Athlete in his written response to ODESUR said that “*he can see in detail in his cell phone that Ambroterol, which he had ingested, contains the banned substance Clenbuterol*”. In any case, not owning a computer or lack of access to Wi-Fi does not exempt the Athlete from his responsibility of ensuring compliance with his anti-doping obligations. In a situation where no such access is available, the Athlete must seek assistance in making a thorough investigation into the ingredients of a medication unknown to him before consuming that medication.

126. If an athlete chooses to take an unknown medication without any control at all, it must be considered that he or she “*manifestly disregarded*” the risk that consumption of the medication could result in an ADRV.

127. The Panel notes that the Athlete, even after he realized that he had not taken the prescribed drug, did not take any necessary precautions and still manifestly disregarded the risk of ingesting the medication because he relied blindly in a doctor whom he admitted did not have any real knowledge of anti-doping practices. He also did not consult the National Olympic Committee doctors; instead, he withheld disclosing his ingestion of Ambroterol to them.

128. The Panel's conclusion is that the Athlete manifestly disregarded the significant risk that his ingestion of the unknown medication might constitute or result in an ADRV.

129. The Athlete has therefore not established that the ADRV was not intentional.

X. ARTICLE 10.6.2 ADR CANNOT BE APPLIED

130. The Athlete has submitted that his sanction should be reduced according to Article 10.6.2 ADR as he has established that he bears No Significant Fault or Negligence.

131. The Comment to Article 10.6.2 ADR says the following:

“Rule 10.6.2 may be applied to any anti-doping rule violation except those Rules where intent is an element of the anti-doping rule violation (e.g., Rule 2.5, 2.7, 2.8, 2.9 or 2.11) or an element of a particular sanction (e.g., Rule 10.2.1) or a range of Ineligibility is already provided for in an [sic] Rule based on the Athlete or other Person’s degree of Fault.”

132. Given that this is a case of intent, none of the Fault-based reductions in the ADR are available to the Athlete.

XI. THE SANCTION APPLIED SHOULD BE FOUR YEARS INELIGIBILITY

133. Since intent under Article 10.2.1 ADR is an element of the sanction for the Athlete’s violation of Article 2.1 ADR and since the Athlete has not established that the ADRV was not intentional, which in turn means that Article 10.6.2 ADR is excluded from application, the period of Ineligibility in this case shall be four years.

XII. COMMENCEMENT OF THE PERIOD OF INELIGIBILITY

134. According to Article 10.13 ADR, the period of Ineligibility shall come into effect on the date that the decision to impose the Consequences is issued and the Provisional Suspension served by the Athlete shall be credited towards such a period of Ineligibility.

135. Where there have been substantial delays in the hearing process or other aspects of Doping Control, and the Athlete can establish that such delays are not attributable to him or her, the body imposing the sanction may, according to Article 10.13.1 ADR, start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another ADRV last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, will be Disqualified.

136. The Athlete has requested that the period of Ineligibility commences from the date of Sample collection *“due to the time elapsed since the ATF notification”*.
137. The AIU has set out in detail the chronology of this matter and has submitted that there have been no substantial delays to justify the commencement of the period of Ineligibility from as early as the date of Sample collection on 10 October 2022.
138. The Panel cannot find that there have been substantial delays in the hearing process or other aspects of Doping Control. The period of Ineligibility shall therefore start on the date of this award. The Provisional Suspension served by the Athlete shall be credited towards such a period of Ineligibility.

XIII. DISQUALIFICATION OF RESULTS AND OTHER CONSEQUENCES

139. Article 10.10 ADR provides that:

“10.10 Disqualification of results in Competitions subsequent to Sample collection or commission of an anti-doping rule violation

In addition to the automatic Disqualification of the results in the Competition that produced the positive Sample under Rule 9, all other competitive results obtained by the Athlete from the date a positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through the commencement of any Provisional Suspension or Ineligibility period, will, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, titles, points, prize money, and prizes”.

140. Pursuant to Article 10.10 ADR, the Panel concludes that all competitive results obtained by the Athlete between 10 October 2022 and 19 July 2023, and which have not already been disqualified by virtue of the ODESUR Decision, shall be disqualified, with all resulting Consequences including the forfeiture of any medals, titles, points, and prize and appearance money, if any.

XIV. COSTS

141. Neither Party has made any claims for Costs.

142. Accordingly, the Panel orders that the Parties shall bear their own costs.

XV. DECISION AND ORDERS

143. The Disciplinary Tribunal has jurisdiction to decide on the subject matters of this dispute.

144. The Athlete has committed an ADRV under Article 2.1 ADR.

145. A period of Ineligibility of 4 (four) years is imposed upon the Athlete commencing on the date of this award. The period of Provisional Suspension imposed on the Athlete from 19 July 2023 until the date of the Panel's decision shall be credited against the total period of Ineligibility.

146. The Athlete's results between 10 October 2022 and 19 July 2023, which have not already been disqualified by virtue of the ODESUR Decision, shall be disqualified with all resulting Consequences including the forfeiture of any medals, titles, points, and prize and appearance money.

147. Both Parties shall bear their own costs.

XVI. RIGHT OF APPEAL

148. This decision may be appealed to the Court of Arbitration for Sport ("CAS"), located at Palais de Beaulieu Av. des Bergières 10, CH-1004 Lausanne, Switzerland (procedures@tas-cas.org), in accordance with Article 13 ADR of the 2021 ADR and its relevant subsection(s).

149. In accordance with Article 13.6 ADR, parties shall have 30 days from receipt of this decision to lodge an appeal with the CAS.



Conny Jörneklint, Chair



Harveen Thauli



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London, UK
6 December 2023

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