Arbitration CAS 2005/A/847 Hans Knauss v. FIS, award of 20 July 2005

Panel: Ulrich Haas (Germany), President; Stephan Netzle (Switzerland); John A. Faylor (USA)

Alpine skiing
Doping (norandrosterone)
Contaminated nutritional supplements
Reduction of the sanction when the athlete both bears no significant fault or negligence and provides substantial assistance in establishing an anti-doping rule violation by another person
Principle of proportionality

1. **The risk of contamination and/or mislabelling in nutritional supplements cannot and shall not have remained ignored by an experienced athlete who has competed at the highest levels for many years taking into consideration the express warnings of numerous federations and anti-doping organisations that clearly and repeatedly over the past years have emphasized the risk of contamination and/or mislabelling in nutritional supplements. In such case, the standard of care required for *"no fault or negligence"*, namely utmost caution cannot be considered.**

2. **The requirements to be met by the qualifying element *"no significant fault or negligence"* must not be set excessively high. The higher the threshold is set, the less opportunity remains for differentiating meaningfully and fairly within the (rather wide) range of the period of ineligibility sanctioning the fault or negligence. But the low end of the threshold must also not be set too low; for otherwise the period of ineligibility of two years laid down for an anti-doping rule violation would form the exception rather than the general rule.**

3. **Linking the applicability of the rule providing for a reduced period of ineligibility in case of the athlete's substantial assistance in establishing an anti-doping rule violation by another person to a formal criterion such as whether and to what extent a federation may or may not have jurisdiction over this other person or the facts disclosed by the athlete under the anti-doping rules of the federation is an arbitrary and unsuitable criterion for distinguishing conduct which is worthy of preferential treatment from other conduct which does not qualify for such treatment.**

4. **In the opinion of the Swiss Federal Tribunal, sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality. However, the sport associations exceed their autonomy if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviour penalised.**

On 27 November 2004 in the context of the FIS Alpine World Cup Downhill competition in Lake Louise (Canada) a urine sample was collected from Hans Knauss ("the Appellant" or "the Athlete"). The sample was analysed in the WADA-accredited Doping Control Laboratory in Quebec ("the Quebec Laboratory").

On 15 December 2004 the Quebec Laboratory reported to the International Ski Federation (the "Respondent" or "FIS") the findings of the analysis of the Appellant's sample. According to the report the A-sample provided by the Appellant contained the prohibited substance norandrosterone with a concentration measured at 4.2 ng/ml. This finding was confirmed by the analysis of the B-sample. Furthermore, an aliquot of the samples was sent to the WADA-accredited Doping Control Laboratory at the University of Cologne for an additional IRMS analysis. This analysis concluded that the sample was consistent with an exogenous origin of the metabolite and that the sample showed no signs of any type of degradation or activity.

On the basis of the adverse analytical findings and following a written statement by the Athlete's legal counsel dated 8 February 2005, the Respondent held a hearing on 17 February 2005. In the context of this hearing the Appellant's legal counsel submitted – *inter alia* – the following documents:

- A letter from the Austrian Anti-Doping Committee dated 3 February 2005 requesting the accredited doping control laboratory in Seibersdorf (Austria) to undertake an analysis of the product used by the Appellant *"super Complete capsules"* produced by the company "Ultimate Nutrition";
- A report dated 14 February 2005 from the accredited doping control laboratory in Seibersdorf following the analysis of the said product. The report stated inter alia: *"Our experiments and analyses show clearly that: norandostendione is endogenously transformed to norandrosterone after oral intake. Norandrosterone is the substance identified in the urine of … [the Appellant] – the application of the manufacture's daily recommended dose would therefore lead to the intake of about 90 µg of norandrostendione – it is possible to exceed the WADA threshold of 2 µg/ml of norandrosterone with only 1/3 of the daily recommended dose of super complete capsules from Ultimate Nutrition, lot No. 404001"*;
- A letter from the Austrian Anti-Doping Committee dated 4 February 2005 to the state prosecutor's office in Leoben, Austria, enclosing the report from the doping laboratory in Seibersdorf, and
- Confirmation from the Appellant's legal counsel dated 15 February that the state prosecutor has opened a case in Leoben against Daniel Hölzl, a supplier of nutritional supplements to the Athlete.

Following the hearing the Respondent issued a decision dated 1 March 2005, which reads – *inter alia* – as follows:

"… The Panel observes the following circumstances relevant for the application of Articles 10.5 of the Rules:

i. it can be admitted that the source of the presence of the Prohibited Substance is a nutritional supplement ingested by the Athlete

ii. it can be admitted that the Athlete did not know that the nutritional supplement at stake contained a

Prohibited Substance

iii. *the fact that nutritional supplements may contain Prohibited Substances or be contaminated thereby is a widely known and publicised fact. Warnings have been issued to exercise utmost caution and preferably to abstain from using such when no absolute certainty of safeness is secured*

iv. *the Athlete indicates to have personally chosen to use supplements which are not part of the supplements recommended by his Association*

v. *the Athlete indicates to have questioned the supplier (importer) of the supplements*

vi. *the Athlete is an experienced athlete who has taken part in several major international events including the Olympic Games*

vii. *the Athlete has filed a criminal complaint against the importer of the nutritional supplement.*

Based on the above, the Panel finds that while it can be admitted in favour of the Athlete that he did not act intentionally, on the other hand he clearly acted negligently.

(…)

With respect to the possible application of Article 10.5.2 of the Rules, i.e. whether the Fault or Negligence of the Athlete can be considered as not being significant in relation with the violation, the Panel has some hesitations to answer positively. Indeed the Panel observes:

- *that the Athlete is an experienced world-class skier who is aware of the issue of doping and who has access to the relevant information*
- *specifically, the Athlete has been properly informed by the Austrian Ski Association about the risk of using nutritional supplements and about the fact that he had the possibility to use nutritional supplements recommended by his Association. He, however, deliberately chose to use a nutritional supplement he personally chose outside the credible control measures.*

On the other hand, the Panel notes the impeccable reputation of the Athlete, his attitude during the proceedings and in particular the fact that he acknowledged having made a mistake and expressed regrets.

On balance and in view of all the circumstances of the case including the ones discussed below from the perspective of Article 10.5.3 of the Rules, the Panel finds that a reduction in application of Article 10.5.2 may be applied. However such a reduction has to be set with restraint.

Finally, with respect to a reduction pursuant to Article 10.5.3, the Panel observes that this provision refers to situations where the co-operation of the Athlete permits to uncover circumstances which may lead to a decision in application of the Rules.

The rationale behind this provision is typically to encourage athletes to reveal circumstances linked with cases of intentional doping based on hidden supply sources and to help fighting against such.

The fact that nutritional supplements may be contaminated is a fact given and known a priori. Athletes have to exercise caution. The fact that in this case, the Athlete joins a criminal complaint against the importer of the concerned product on a basis of course different from the Rules does not represent the assistance contemplated in Article 10.5.3 of the Rules.

In any event, the Panel has taken into account this fact as part of the overall circumstances on which its decision is based.

Having carefully considered all aspects of the case, the Panel decides to reduce the period of Ineligibility from two (2)

years to 18 (eighteen) months, commencing on the date on which the anti-doping violation occurred, namely from 27th November 2004 until and including 26th May 2006. (…)".

By letter dated 21 March 2005 the Appellant filed both a statement of appeal and an appeal brief concerning the decision by the Respondent dated 1 March 2005 with CAS.

The Appellant requested that the CAS *"considerably reduce[d]"* the term of ineligibility of 18 months imposed on him. In support of his claim, the Appellant contended that the period of ineligibility was disproportionate, *inter alia,* because:

a) in view of the particularities of the ski racing calendar a period of ineligibility of 18 months leads – de facto – to a two year ban from competition,

b) the Respondent failed to reduce the period of ineligibility according to Article 10.5.3 of the FIS Anti-Doping Rules 2004/2005 ("the FIS-Rules") and because

c) the Respondent failed to apply Article 10.5.2 of the FIS-Rules adequately by not granting him a more significant reduction of the period of suspension.

By letter dated 21 April 2005 the Respondent filed its answer in accordance with Article R55 of the Code of Sports-related Arbitration ("the Code").

The Respondent requests the Panel *"to maintain"* the sanction issued by the Respondent and, hence, to dismiss the appeal. In support of its position the Appellant argues – *inter alia* – that

a) the wide powers provided by Article R57 of the Code to the Panel should be exercised with restraint,

b) the sanction system in the FIS-Rules is based on fixed term sanctions which do not depend on the ski racing calendar,

c) the Respondent not only applied Article 10.5.2 of the FIS-Rules incorrectly, but instead applied them very much in favour of the Appellant considering the Appellant's obvious negligence in connection with the nutritional supplement and that

d) a reduction of the sanctioning period according to Article 10.5.3 of the FIS-Rules lies at the discretion of the Respondent and that, furthermore, the conditions for a reduction of the period of ineligibility pursuant to this Article have not been met, because criminal proceedings against the provider of a supplement do not apply to a person who is subject to the Respondent's jurisdiction.

By letter dated 28 April 2005 the World Anti-Doping Agency (WADA) requested that it be permitted to participate as a party in the arbitration proceedings in accordance with article R41.3 of the Code. After consulting the parties the Panel noted that the request had not been filed on time and dismissed it by way of a preliminary decision dated 17 June 2005.

A hearing was held in Lausanne on 27 June 2005.

LAW

Jurisdiction and Mission of the Panel

A. Jurisdiction

1. Article R27 of the Code provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes can arise from the statutes or regulations of a federation containing an arbitration clause, a contract containing an arbitration clause, or be the subject of a later arbitration agreement. *In casu,* the jurisdiction of CAS is based on Article 13.2.1 of the FIS-Rules. Moreover, the Parties have signed the order of procedure. Finally, in their abundant correspondence with the CAS, neither the Appellant nor the Respondent has at any time challenged the general jurisdiction of CAS.

B. Task of the Panel

2. The task of the Panel follows from Article R57 of the Code. Said Article provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

C. Admissibility

3. The Appellant's statement of appeal was filed within the deadline set down in Article 13.5 of the FIS-Rules and in Article R49 of the Code. It complies with the requirements of Article R48 of the Code. In the present case the Appellant's petition is limited. He is not appealing the penalty of ineligibility imposed by the Respondent, *per se*, but only the length of its term. Such a limited petition to review only the term of the ineligibility penalty is admissible and will be respected by the Panel.

Applicable Law

4. According 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".

5. The Panel notes that in this case the FIS-Rules to be applied are based on and are in conformity with the World Ant-Doping Code ("the WADC").

6. The main FIS-Rules to be taken into account in this arbitration are the following:

*"**10.2 Imposition of Ineligibility for Prohibited Substances and Prohibited Methods**. Except for the specified substances identified in Article 10.3, the period of Ineligibility imposed for a violation of Article 2.1 (presence of a Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method) and Article 2.6 (Possession of Prohibited Substances and Methods) shall be:*

First violation: Two (2) years' Ineligibility.

(…)

***10.5.2** This Article 10.5.2 applies only to anti-doping rule violations involving Article 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Use of a Prohibited Substance or Prohibited Method under Article 2.2, failing to submit to Sample collection under Article 2.3, or administration of a Prohibited Substance or Prohibited Method under Article 2.8. If an Athlete establishes in an individual case involving such violations that he or she bears no significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may be not less then one-half of the minimum period of Ineligibility otherwise applicable. … When a prohibited Substance or its Metabolites is detected in an Athlete's Specimen in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

***10.5.3** The FIS Doping Panel may also reduce the period of Ineligibility in an individual case where the Athlete has provided substantial assistance to FIS which results in FIS discovering or establishing an anti-doping rule violation by another Person involving Possession under Article 2.6.2 (Possession by Athlete Support Personnel), Article 2.7 (Trafficking), or Article 2.8 (administration to an Athlete). The reduced period of Ineligibility may not, however, be less than one-half of the minimum period of Ineligibility otherwise applicable. (…)*

Appendix 1 - Definitions

(…)

No Fault or Negligence. The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method.

No Significant Fault or Negligence. The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria of No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. (…)".

6. In the present case the decision taken by the Respondent forms the very subject of the matter in dispute. It is based on the application of the rules and regulations of the Respondent, specifically, the FIS-Rules, which, in turn, are based on the WADC. Because the Respondent is domiciled in Switzerland, the matter in dispute will be governed in a subsidiary capacity by Swiss law. The Panel, therefore, sees no valid grounds to deviate from the rule set out in Article R58 of the Code in adjudicating issues which are not specifically addressed by the FIS-Rules. In this regard, however, the Panel is of the view that the issue of applying any specific

national legal regime subsidiarily is not a question having any significance in terms of fairness or advantage to one or the other party.

The Merits of the Dispute

7. Pursuant to Article R57 of the Code, the Panel has full power to review the matter in dispute. Insofar as Article 75 of the Swiss Civil Code (CC) curtails the state courts' power of review, this is not binding on the Panel. Although it is correct that – provided the parties have not agreed otherwise – a court of arbitration generally has the same powers as a state court, this principle is not mandatory. Rather the parties can also agree something else. Thus, they can, as an example, grant a court of arbitration – unlike state courts – the authority to decide the dispute *ex aequo et bono*, to close gaps in the agreement or to establish and confirm the rights of the parties, but also to alter or modify those rights. Furthermore, the parties can grant an arbitrator the powers of a mediator or an adjudicator as well as the mandate to administer justice. If, therefore, the powers of a court of arbitration do not necessarily coincide with those of a state court, the mandate granted to the Panel by the parties is what is relevant in the present case. However, as is demonstrated by Article R57 of the Code, this mandate carries with it *"full power to review the facts and the law"* of the case. Article 75 CC can then, at most, limit this clear will of the parties if the provision comprises mandatory law, *i.e.*, the law restricting the autonomy of the parties. In the Panel's opinion, however, this is not the case with regard to the settlement of disputes by arbitration, because the basis for the state courts' limited power to review the decisions of sports associations under Article 75 CC is intended mainly to protect the autonomy of associations from state interference. However, since the powers of the present court of arbitration are of a private nature, not of a state nature, there is, in the Panel's opinion, from the very outset, an absence of any legitimate grounds for application of Article 75 CC in the context of the present proceedings.

8. The applicable regulations provide, as a general rule, for a period of ineligibility of two years for a first – and in the present case undisputed – anti-doping rule violation (Article 10.2 FIS-Rules). However, this sanction, which is provided as a general rule, *"may"* be reduced pursuant to Article 10.5.2 and Article 10.5.3 FIS-Rules.

9. On the basis of their respective language, both Article 10.5.2 as well as Article 10.5.3 FIS-Rules place the mitigation of the sanction at the Respondent's discretion.

10. However, in the Panel's opinion the respective language of the provisions must be interpreted in a manner which stands in compliance with the doctrine of proportionality[1] with the consequence that the exercise of any discretion on the part of the Respondent is reduced to nil if the requisite elements under Articles 10.5.2 or 10.5.3 FIS-Rules are met.

[1] For a summary of this doctrine and related case law of CAS see e.g. OSWALD D., Absolute and Strict Liability in the Fight Against Doping, in: CAS Seminar 2001, Lausanne 2002, p. 74-78; MCLAREN R., The Sanctions in Doping Cases, the International Federations & CAS Jurisprudence, in: CAS Seminar 2001, Lausanne 2002, pp. 96-107.

11. Therefore, pursuant to Article 10.5.2 FIS-Rules, the sanction is to be reduced if the athlete establishes that he bears *"no significant fault or negligence"*. In addition, because the present case concerns an anti-doping violation under Article 2.1 FIS-Rules, the athlete must establish how the prohibited substance entered into his system. That the prohibited substance was present in the athlete's body is not disputed by the parties in this dispute. The Appellant admits, firstly, to having taken a nutritional supplement by the producer "Ultimate Nutrition" over a lengthy period of time and concedes, secondly, that the laboratory analyses of the capsules in the Appellant's possession indicated that they were most likely the cause of the adverse analytical findings. In the present case, it remains to be clarified whether, in the context of Art. 10.5.2 FIS-Rules, the Appellant bears *"no significant fault or negligence"*.

12. Whether the qualifying element *"no significant fault or negligence"* is present in the case at hand is questionable. The definition of the term in the Appendix of the FIS-Rules does not aid very much the understanding of the term. It merely provides that the totality of the circumstances must be taken into account when determining whether the athlete bears significant fault or negligence. Furthermore, the definition in the Appendix distinguishes a case of *"no significant fault or negligence"* from a case of *"no fault or negligence"*. The latter is given only if the athlete made every conceivable effort to avoid taking a prohibited substance.

13. In the present case there exists no doubt that the Appellant acted with *"fault and negligence"* with regard to the anti-doping rule violation (see also CAS 2003/A/484, marg. no. 48). The Appellant ingested a nutritional supplement which, according to the parties' uncontested and plausible submissions, was the cause of the Appellant's adverse analytical findings. The Appellant consumed said product despite the express warnings of the national and international sports federations, the Austrian Anti-Doping Committee and WADA, warnings which clearly and repeatedly over the past years have emphasized the risk of contamination and/or mislabelling in nutritional supplements.

14. Furthermore, in the past a great number of cases have become known and have been heavily discussed in the media in which athletes have pleaded that a nutritional supplement was – unbeknownst to them – contaminated. The Appellant, a professional athlete, who has competed at the highest levels for many years with great success, could not and should not have remained ignorant of these warnings. The Appellant's conduct, in particular, his request for written certification from Ultimate Nutrition that its products were clean, indicates that he was cognizant of the risk, but chose instead not to heed the warnings. In the view of the Panel, he clearly failed to exercise the standard of care required for *"no fault or negligence"*, namely utmost caution.

15. However, the question in the present case remains whether the Appellant's fault or negligence is *"significant"* pursuant to Article 10.5.2 FIS-Rules. The (official) comments on the WADC (p. 30 *et seq.*) can be viewed as laying down an initial guideline as to how this qualifying element should be interpreted. Although these comments are not binding upon the Panel in formulating its decision, they form a body of information which can be taken into account when interpreting the rules and regulations in the WADC. The content of the WADC is, in turn, significant for interpreting the FIS-Rules (which are largely identical in content);

pursuant to Article 18.5 FIS-Rules, the latter are to be interpreted in the light of and in compliance with the WADC (see also CAS 2004/A/690, marg. no. 71). According to the official commentary to the WADC, an adverse analytical finding deriving from a mislabelled or contaminated nutritional supplement can indeed meet the requirements of Article 10.5.2 WADC or the FIS-Rules.

16. In the Panel's opinion the requirements to be met by the qualifying element *"no significant fault or negligence"* must not be set excessively high (see also CAS 2004/A/624, marg. no. 81 *et seq*.; by contrast much stricter CAS 2003/A/484, marg. no. 61 *et seq*.). This follows from the language of the provision, the systematics of the rule and the doctrine of proportionality (see also CAS 2004/A/624, marg. no. 82 seq.). Once the scope of application of Art. 10.5.2 FIS-Rules has been opened, the period of ineligibility can range between one and two years. In deciding how this wide range is to be applied in a particular case, one must closely examine and evaluate the athlete's level of fault or negligence. The element of fault or negligence is therefore ultimately "doubly relevant". Firstly it is relevant in deciding whether Article 10.5.2 FIS-Rules applies at all and, secondly, whether, in the specific case, the term of the appropriate sanction should be set somewhere between one and two years. However, the higher the threshold is set for applying the rule, the less opportunity remains for differentiating meaningfully and fairly within the (rather wide) range of the sanction. But the low end of the threshold for the element *"no significant fault"* must also not be set too low; for otherwise the period of ineligibility of two years laid down in Article 10.2 FIS-Rules would form the exception rather than the general rule (see also CAS 2003/A/484, marg. no. 47). It is this tension between the two limits which is precisely what the WADC wishes to reduce. In this regard the (official) comments on the WADC expressly read as follows:

"Article 10.5 is meant to have an impact only, in cases where the circumstances are truly exceptional and not in the vast majority of cases".

17. In the present case the Respondent correctly proceeded in its decision of 1 March 2005 on the assumption that Article 10.5.2 FIS-Rules applied. The Appellant did not take the contaminated or mislabelled nutritional supplement for the purpose of benefiting from the prohibited substance. The Appellant did not know that the nutritional supplement contained the prohibited substance until the adverse findings were made. Furthermore, neither the packet itself nor the leaflet with the packet stated that the product contained a prohibited substance. The athlete therefore did not fail to take the clear and obvious precautions which any human being would take in consuming a food or, in this case a nutritional supplement, namely the reading of the package labelling or the accompanying product description and instructions for use. His direct inquiry with the distributor of the product falls within this category of a precaution. Had he not taken these precautions, his conduct would indeed constitute *"significant fault or negligence"*. In this regard the case to be decided here is significantly different from the facts of the case in CAS OG 04/003, marg. no. 35 *et seq*., in: TAS-CAS (ed.), CAS Awards – Salt Lake City 2002 & Athens 2004, Lausanne 2004, p. 89.

18. One may not conclude from the foregoing, however, that the Appellant was unable, or that he could not reasonably be expected, to undertake further efforts to avoid the prohibited substance from entering his body, tissues or fluids. Of course, the Appellant could have had

the nutritional supplement tested for its content. He could also have avoided the risk associated with nutritional supplements by simply not taking any. However, in the Panel's opinion, these failures give rise to ordinary fault or negligence at most, but do not fit the category of *"significant"* fault or negligence pursuant to Article 10.5.2 FIS-Rules (by contrast the case is different in CAS 2003/A/484, marg. no. 61 *et seq.*; see also the official commentary on Article 10.5.2 WADC). This is all the more the case because the Appellant did not acquire the product illegally on the "grey market" or in some other dubious manner, something which would from the outset have raised the threshold regarding the element *"no significant fault or negligence"* (*re* this argument see CAS 2004/A/690, marg. no. 80 *et seq.*). Rather, the Appellant had consistently procured the nutritional supplement over several years allegedly from a reputable "supplier", whom he even knew and respected personally. The latter was employed by a company domiciled in Austria which distributed the Ultimate Nutrition product throughout the whole of the country.

19. In examining and evaluating the above facts in their totality, the Panel finds that the present case deviates substantially from the "typical doping case" pursuant to Article 10.2 FIS-Rules and thus must be qualified as *"exceptional"* according to Article 10.5 FIS-Rules. The legal opinion argued here is also confirmed by the example contained in the (official) comments on Article 10.5.2 WADC. To sum up it can therefore be stated that – in accordance with the Respondent's decision of 1 March 2005 – the grounds set down under Article 10.5.2 FIS-Rules for mitigating the period of ineligibility apply in favour of the Appellant in the case at hand.

20. Under Article 10.5.3 FIS-Rules the general period of ineligibility in Article 10.2 FIS-Rules must also be reduced where the Athlete has provided substantial assistance to FIS resulting in FIS discovering or establishing an anti-doping rule violation by another person involving possession of a prohibited substance, trafficking or administration of a prohibited substance to an athlete.

21. In the present case the Appellant is citing these grounds as constituting mitigating circumstances. He argues that he has revealed to the Austrian Anti-Doping Committee the source from which he acquired the contaminated nutritional supplement. Furthermore, he has disclosed the name and address of the supplier and has therefore allowed criminal proceedings to be instituted against the latter because of a breach of the Austrian Drug Act *(Arzneimittelgesetz)*. This action resulted in a large amount of (contaminated) nutritional supplements being seized and confiscated. Said seizure prevented greater "damage"; for contaminated products were thus taken off the market and so the products could not be given to other athletes. The Appellant also points out that the criminal proceedings against the supplier and importer have not yet been concluded.

22. The Respondent takes issue with the Appellant's interpretation of Article 10.5.3 FIS-Rules. It points out that the provision grants preferential treatment to an athlete only when the disclosure leads to the discovery of an anti-doping rule violation over which the Respondent has jurisdiction. The Respondent takes the position that the persons so revealed by the

Appellant are not subject to the Respondent's jurisdiction. This fact therefore precludes application of Article 10.5.3 FIS-Rules.

23. In the Panel's opinion, application of Article 10.5.3 FIS-Rules is not determined on the basis of whether and to what extent the Respondent may or may not have jurisdiction over the person or the facts disclosed by the athlete under the FIS-Rules. The purpose of Article 10.5.3 FIS-Rules is primarily to treat an athlete preferentially who contributes to the discovery and elimination of certain prohibited activities. Here, the FIS-Rules include, in particular, the trafficking with prohibited substances. By contrast, the type adjudicative body having jurisdiction to sanction an anti-doping rule violation is of secondary importance. This follows from the fact that the allocation of responsibilities between the various anti-doping organisations can be said to be randomly organized, a fact which cannot be used to the detriment of the athlete.

24. The FIS-Rules do not regulate the granting of jurisdiction if the findings of an anti-doping rule violation are not based on a doping test. If one applies the WADC in a subsidiary capacity in order to fill this lacunae (see Article 18.5 FIS-Rules), jurisdiction would lie with the organisation which discovered the violation. The latter is then responsible for the result management, conducting the hearing and imposing a sanction (if any) (see Article 15.3 WADC). If, for example, an athlete is tested positive by the Respondent in an international event and the athlete then discloses to his national association or a national anti-doping agency that a teammate administered the prohibited substance to him, the jurisdiction for pursuing the two anti-doping rule violations would be split between the international and the national organisations. This would in turn have the disturbing consequence – if one takes Article 10.5.3 FIS-Rules literally – that the athlete could from the very outset be denied the grounds for mitigation under Article 10.5.3 FIS-Rules. As a consequence hereof, it ultimately appears to the Panel that linking the applicability of Article 10.5.3 FIS-Rules to a formal criterion such as jurisdiction by the Respondent is an arbitrary and unsuitable criterion for distinguishing conduct which is worthy of preferential treatment, from other conduct which does not qualify for such treatment.

25. The intention of Article 10.5.3 FIS-Rules is to grant preferential treatment to athletes who, by furnishing information, contribute towards the fight against doping in their immediate environment. The motive for this preferential treatment is the recognition that the instruments for combating and eliminating the acts of trafficking, possession or the administration of prohibited substances are extremely limited. This is due primarily to the inherently clandestine nature of these activities and, secondly, the personal relationships which the athlete usually has developed to the people and athletes in his immediate proximity. The athlete will generally not want to expose these persons to the risk of a sanction. Article 10.5.3 FIS-Rules is intended to create an incentive for the athlete to provide the information which is urgently required for the fight against doping.

26. In the Panel's opinion, and contrary to the Respondent's view, Article 10.5.3 FIS-Rules should indeed find application in the present case. The Appellant disclosed information relating to conduct relevant to doping which caused criminal proceedings to be instituted against the

supplier and resulted in the ultimate seizure of the remaining stocks of the contaminated nutritional supplements. The Appellant thereby – without being obliged to do so – made a helpful contribution towards the fight against doping in his immediate environment. The fact that the information he provided resulted in criminal proceedings against a third party rather than a doping-related procedure instituted by a sports federation does not, in the Panel's opinion, mean that the grounds for treating the Appellant preferentially no longer apply. According to the spirit and legislative background of the WADC anti-doping measures are not reserved solely to the sports bodies. Rather the WADC assumes that state authorities and sports bodies carry out supportive functions that complement each other in the fight against doping. Thus, for instance, Article 22 WADC stipulates the following:

"Each government's commitment to the Code will be evidenced by its signing a Declaration on or before the first day of the Athens Olympic Games to be followed by a process leading to a convention or other obligation to be implemented as appropriate to the constitutional and administrative contexts of each government on or before the first day of the Turin Winter Olympic Games.

It is the expectation of the Signatories that the Declaration and the convention or other obligation will reflect the following major points:

22.1 Affirmative measures will be undertaken by each government in support of anti-doping in at least the following areas:

(…)

- *The availability of Prohibited Substances and Prohibited Methods;*

(…)

- *The problem of nutritional supplements which contain undisclosed Prohibited Substances; and*

(…).

22.2 All other governmental involvement with anti-doping will be brought into harmony with the Code".

27. However, if it is the intention of the WADC that governmental measures and measures by the sports federations mutually complement each other in wide areas, then the application of Article 10.5.3 FIS-Rules cannot effectively be so limited in scope as to depend on the nature of the proceedings instituted against the third party in connection with an anti-doping rule violation. To sum up, therefore, in the Panel's opinion, the grounds for mitigating the penalty under Article 10.5.3 FIS-Rules must also be applied in the present case to the Appellant's benefit.

28. The FIS-Rules do not contain any guidance on how the measure of the penalty is to be determined if mitigating grounds are provided under both Article 10.5.2 and Article 10.5.3 FIS-Rules. In particular, no guidance is provided regarding the question of how the mitigating grounds set out in these provisions may be applied cumulatively. It is particularly unclear whether this lacuna in the rules and regulations has the consequence of working to reduce the penalty below the lower ineligibility limit of one year. Ultimately, however, this question does not require an answer here, because in the case at hand there is a considerable overlap regarding the facts presented by the Appellant for claiming a reduction of the period of ineligibility under Article 10.5.2 FIS-Rules and pursuant to Article 10.5.3 FIS-Rules. In the light of the particularities of the present case and the principle of proportionality, the Panel

therefore considers that the penalty of 18 months imposed by the Respondent is fair and reasonable.

29. As a general rule when determining the period of ineligibility the Respondent must observe the principle of proportionality. However, it is open to question which facts, if any, must be taken into consideration. In this regard, the Appellant claims that, apart from Articles 10.5.2 and 10.5.3 FIS-Rules, additional facts must be taken into account in his situation. Accordingly, he refers to facts regarding his person, namely that he has never tested positive throughout his long sporting career. Furthermore, he argues that due to his age an 18-month ban means the end of his long sporting career. This constitutes a particular hardship for him because he does not wish to end his sporting career as a doping offender. The Appellant also argues that the level of norandrosterone measured in his case did not enhance his performance in any way. Finally, as regards the period of ineligibility, the Appellant requests that circumstances unique to the sport of skiing be considered; due to the particularities of the racing calendar the "sanction felt" in his case was much more severe than the sanction formally imposed.

30. The WADC and the FIS-Rules, which follow it considerably restrict the application of the principle proportionality. Whether an athlete can, for example, look back upon a blameless past, is relevant only for determining the applicable range of sanctions. If, for instance, an athlete has in the past already committed one anti-doping rule violation then according to Article 10.2 FIS-Rules the regular sanction is not two years, but lifelong ineligibility. By contrast, the WADC does not provide that the athlete's personal history also has to be taken into account when fixing the penalty. The same applies to the question of how severe the penalty impacts upon the athlete in his personal life. The athlete's age, the question of whether taking the prohibited substance had a performance-enhancing effect or the peculiarities of the particular type of sport are not – according to the WADC – matters to be weighed when determining the period of ineligibility. To be sure, the purpose of introducing the WADC was to harmonise at the time a plethora of doping sanctions to the greatest extent possible and to un-couple them from both the athlete's personal circumstances (amateur or professional, old or young athlete, etc.) as well as from circumstances relating to the specific type of sport (individual sport or team sport, etc.).

31. The consequences of this abstract and rigid approach of the WADC when fixing the length of the period of ineligibility in an individual case may be detrimental or (in rare cases) advantageous to the athlete (see for instance CAS 2002/A/376, marg. no 13 *et seq.*, in: REEB M. (ed.), Digest of CAS Awards III 2001-2003, The Hague 2004, p. 303 *et seq.*). Insofar as the WADC prevents specific circumstances to be taken into account for the benefit of the athlete, the admissibility of such provisions is doubted again and again. In the opinion by Gabrielle Kaufmann-Kohler, Antonio Rigozzi and Giorgio Malinverni[2], the rigid system of fixed sanctions in the WADC considerably restricts the doctrine of proportionality, but is nevertheless compatible with human rights and general legal principles (see notes 175-185).

[2] KAUFMANN-KOHLER/RIGOZZI/MALINVERNI, Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, dated 26 February 2003, available at http://www.wada-ama.org/rtecontent/document/kaufmann-kohler-full.pdf.

These experts justify this characteristic by citing the legitimate aim of harmonising doping penalties (see notes 171-174).

32. Whether the conclusions to be drawn from these experts are correct in such finality can be left unanswered here (see also CAS 2004/A/690, marg. no. 89); for the case at hand does not require an in-depth discussion of the issue. At least in the opinion of the Swiss Federal Tribunal, sports bodies can limit in their rules the circumstances to be taken into account when fixing sanctions and thereby also restrict the application of the doctrine of proportionality (Decision dated 31 March 1999, in: REEB M. (ed.), Digest of CAS Awards II 1998-2000, The Hague 2002, p. 775, in particular p. 780, cons. 3.c). However, in the opinion of the Federal Tribunal, the sport associations exceed their autonomy if these rules constitute an attack on personal rights, the nature and scope of which is extremely serious and totally disproportionate to the behaviour penalised. In the Panel's opinion, this threshold has not been exceeded in the present case. The Appellant has not convinced the Panel that the FIS-Rules, by failing to take into consideration his age, his personal sporting career or the particularities of the type of sport, inflict such an extraordinary disadvantage upon him in setting the period of his ineligibility that the Panel is justified in departing from the central premise of the WADC, namely the harmonization and standardization of doping sanctions across all types of sports and athletes (see the Introduction to the WADC).

33. In the light of the above, the Panel has concluded that the Respondent has determined the period of ineligibility in accordance with the rules and the doctrine of proportionality.

34. As regards the grounds for mitigating the penalty under Article 10.5.2 FIS-Rules, the Panel concludes that the Appellant indeed undertook the most obvious precautions such as obtaining a written certification from Ultimate Nutrition that their products were clean. This may have satisfied his subjective need for comfort and assurance. Objectively, however, this measure was ill-suited to provide the guarantee which he needed as a professional athlete whose livelihood and reputation depended upon the absence of prohibited substances in his body.

35. In particular, the Appellant did not obtain expert advice from an independent party. The Appellant argues that there was no suitable contact person within the ÖSV whom he could consult. If this were, in fact, the case then this would no doubt constitute a deficiency on the part of the ÖSV. The reality of the matter is, however, that the Appellant did not even try to obtain such advice. To be sure, expert advice was available to him from various sources: the Austrian Anti-Doping Commission headed by the witness, Dr. Karlheinz Demel, from the Respondent, from WADA or from an attendant doctor. The Appellant availed himself of none of these possibilities. The Appellant neither asserted nor submitted at any time that – apart from asking the producer of the supplements – he conducted any other meaningful research of his own regarding the reliability of the product. However, in the present case the Appellant certainly did have reason to conduct further investigations. Had the Appellant performed a minimum amount of investigation, he would have learned that the U.S.-based manufacturer of the capsules, Ultimate Nutrition, was made the subject of a complaint for civil penalty and injunctive relief before the Superior Court of the State of California already

on August 15, 2001 for failure to warn consumers that certain of the bodybuilding products which it distributed contained androstenedione supplements, a form of anabolic steroid which can cause significant health problems. (see also CAS 2003/A/447, marg. no. 10.5).

36. The risk posed by contaminated nutritional supplements was pointed out to the Appellant several times. The supplements he consumed were imported from a controversial supplier based in the USA, a country which has repeatedly been at the center of discussion as a source of "contaminated" or "mislabelled" products. A look at Ultimate Nutrition's advertising literature would have told him to be aware; the target customer of Ultimate Nutrition was, and continues to be to this day, body-builders, not athletes competing in world competition. Moreover, the Appellant ingested the product not just occasionally, but on a daily basis, nine capsules per day, not the three capsules per day which might have lowered the concentration of the norandrosterone below the prohibited threshold.

37. The assertion that, despite taking the product regularly in the past, the Appellant again and again tested negative has little weight. In the case of controversial products such as nutritional supplements, this circumstance can provide no comfort or reliance, especially in light of possible changes in the ingredients and the amounts of those ingredients in the various production charges of the capsules.

38. To sum up, the Panel concludes that the Appellant did less rather than more than could be expected of him to minimise the risk associated with nutritional supplements about which he was warned, in particular, those originating from a company such as Ultimate Nutrition. If one therefore weighs the efforts and precautions undertaken by the Appellant in their totality, they fall just under the threshold of *"no significant fault or negligence"*. In the light of Article 10.5.2 FIS-Rules, the Panel takes the view that the term of ineligibility could lie even closer to two years than one year and still comply with the principle of proportionality.

39. As regards the grounds for mitigating the sanction under Article 10.5.3 FIS-Rules the Panel takes the view that the information provided by the Appellant was useful and supportive in the fight against doping in his immediate sporting environment. Nevertheless, the disclosure of the source of the nutritional supplement by the Appellant to the Respondent barely extended beyond the threshold set out in Article 10.5.2 (*"(…) establish how the Prohibited Substance entered his or her system (…)"*) in order to qualify for a reduced period on ineligibility under that provision. Because of this particularity of the case at hand, *i.e.* the considerable overlap between Articles 10.5.2 FIS-Rules and Article 10.5.3 FIS-Rules the Panel takes the view that Article 10.5.3 FIS-Rules must be applied circumspectively in order to avoid the repeated application of the same set of mitigating circumstances in fixing the fair and proportionate period of ineligibility. After all of the above, the Panel does not wish to modify the sanction imposed by the Respondent in the case at hand.

The Court of Arbitration for Sport rules that:

1. The appeal filed by Hans Knauss on 21 March 2003 is dismissed.

2. The award is pronounced without costs, except for the Court Office fee of CHF 500.- already paid by the Appellant and which is retained by the CAS.

3. Each party shall bear its own costs.