Arbitration CAS 2008/A/1577 USADA v. R., award of 15 December 2008

Panel: Mr John A. Faylor (USA), President; Prof. Ulrich Haas (Germany); Mr Olivier Carrard (Switzerland)

Table Tennis
Doping (Carboxy THC)
Status of marijuana under the law and under the WADC
Legitimacy of the medical diagnosis for the prescription of a prohibited substance
Applicable rules in case of a second offence occurring after the entry into force of the WADC
Multiple violations involving a prohibited substance and a specified substance
Sanctioning discretion for "mixed multiple violations"

1. **Cannabinoids, among them hashish and marijuana, are listed under as a Prohibited Substance. Marijuana is, however, not a prohibited substance if taken out-of-competition. The issue of legality of the use of marijuana under another legal system is of no relevance to a dispute before CAS; even if such use had been illegal, there would have been no conflict with the WADA Code as long as the substance was not present in the athlete's body "in competition".**

2. **The issue of legitimacy of the medical diagnosis which formed the basis for a prescription of a prohibited substance is not an issue in a CAS-dispute, since even if the prescribing physician was not properly licensed, erroneously diagnosed the athlete's pathological condition or incorrectly prescribed the use of a prohibited substance as treatment of that condition, such a finding would have no relevance to the issue of whether the athlete committed an anti-doping violation.**

3. **According to the CAS jurisprudence, the fact that the applicable pre-WADC anti-doping rules at the time of the first offense may have provided for a more lenient sanction in the event of a second offense is of no relevance in adjudicating a doping offense committed in 2007 (where the new rules apply).**

4. **In case of multiple, but separate violations involving a Prohibited Substance and a specified substance the sanctioning body has a range of discretion in setting a separate and independent penalty for a repeated offense. The opportunity for eliminating or reducing the ineligibility sanction pursuant to "exceptional circumstances" is granted only "in the case of a second or third violation" which involve exclusively specified substances, and not within the context of a first violation where the ineligibility penalty may be eliminated entirely or within the context of a multiple violation offense involving both a Prohibited Substance offense and a specified substance offense.**

5. The WADC does not specify the criteria for the exercise of the sanctioning discretion granted to the Panel with regard to "mixed multiple violations", i.e., where both a Prohibited Substance violation and a specified substance violation have been committed. However, the deciding issue is that the athlete is granted no "opportunity" to resort to an elimination or reduction of the ineligibility period for "Exceptional Circumstances". The Panel has thus no discretion to reduce the penalty for such cases below the two year minimum term.

In 2001, R. tested positive in drug tests for the Prohibited Substance 19-norandrosterone which he inadvertently ingested by taking an "over-the-counter" vitamin supplement containing androstenedione.

In adjudicating R's positive test results, USADA referred the dispute to arbitration before the American Arbitration Association / North American Court of Arbitration for Sport (AAA). The latter applied Section 5.5.1 of the Anti-Doping Code of the International Table Tennis Federation (ITTF) which mandated at that time a two year suspension commencing at the date of sampling for the offense in dispute.

The AAA Panel noted in the Award that the Prohibited Substance was "regularly used by R. over a protracted period". R. testified in the proceedings that he did not cease taking the supplement, clearly marked as to contents, until he belatedly called the USADA Drug Reference Line ("Hotline") and learned that he was in violation.

The AAA Panel stated in its reasoning and conclusions that

> *"R. knowingly took a supplement containing androstenedione in reliance, he states, on the fact that it was available "over the counter". As an athlete competing at a level requiring submission to drug testing, he did so "at his peril". At the very least, failure to take note of a banned substance constitutes negligence on R's part".*

In this first offence, R. was issued a two year term of ineligibility which ended in July 2003 **(**see R. v. USADA, AAA 30 190 00701 01).

Between 1 – 3 March 2007, R. competed at the Table Tennis U.S. Trials ("U.S. Trials") held in San Diego, California and qualified to be named to the U.S. Table Tennis Team that would compete at the 2007 World Championships to be held in Zagreb, Croatia, in May of that year.

On 3 March 2007, in the course of the competition, R. provided a urine specimen. On 19 April 2007, he was notified by USADA that his A Sample tested positive for Carboxy-THC ("THCA"), a metabolite of marijuana, at a "concentration significantly greater than 15 ng/ml". The testing of the B Sample confirmed the values found in the A Sample. There is no dispute between the parties that R. tested positive, nor that marijuana, as a Cannabinoid, is a prohibited substance.

R. pleaded in the proceedings leading up to the AAA's decision of 21 May 2008 that he suffered from a clinically diagnosed and documented medical condition best described as chronic insomnia, stress and anxiety. Since December 2005, a licensed physician, Dr. A., had prescribed therapeutic marijuana for his condition as permitted under the Compassionate Use Act of California, a statute that permits the use of medicinal Cannabinoids when prescribed by a licensed medical doctor.

In the hearing before the AAA Panel, USADA argued that R. did not have a properly diagnosed condition and either knew or should have known that the use of Cannabinoids was likely to cause a positive test.

Following an unsuccessful attempt to obtain a subsequent Therapeutic Use Exemption (TUE) from the ITTF in April 2007, R. signed an Acceptance of Provisional Suspension on 10 May 2007 having immediate effect. R., without admitting fault, voluntarily withdrew from participation in the World Championships.

On 17 September 2007, in anticipation of an arbitral proceeding before the AAA Panel, R. entered into a "Stipulation of Uncontested Facts and Issues with USADA" (the "Stipulation") in which he confirmed the findings of THCA in both the A and B samples and the correctness and accuracy of the collection, processing and testing procedures.

In addition, USADA and R. agreed in the Stipulation that

> *"… the potential period of ineligibility for R. for this second doping offense will be a maximum of two (2) years beginning on the date of the hearing panel's decision with credit being given to R. for the time he has served a provisional suspension beginning on May 10, 2007, until the date of the hearing panel's decision, so long as R. does abide by terms of the provisional suspension".*

In the Stipulation, R. expressly reserved the right to argue before the AAA Panel, *inter alia*, exceptional circumstances, no fault or negligence, or any other doctrine of mitigation or reduced culpability under the applicable rules.

The AAA Panel held that R. *"is an athlete suffering from a serious medical condition for which he was seeking and obtained medical treatment appropriate under California law"*. Moreover, the Panel held that the prescribing physician was a properly licensed physician under California law. R. was therefore permitted to take therapeutic marijuana out-of-competition.

The Panel further found on the basis of the expert testimony taken at the hearing that R's ingestion of medicinal marijuana did not have any effect upon his performance at the U.S. Trials. R., according to the Panel, did not apply for a TUE exemption *"because he was not aware of the process"*. Although aware of the USADA Hotline from his earlier offense, R. did not call the USADA Hotline to inquire about the steps which could be taken to prevent him from testing positive because of his medication.

The AAA Panel cited Article 2.1 of the World Anti-Doping Code ("WADC") and found that *"the plain meaning of these provisions is as USADA has argued"*.

> *"It does not matter when the athlete took the Prohibited Substance, for a doping violation to occur. All that is required is that the Prohibited Substance is in the athlete's sample at the time of testing (CAS 2007/A/1312)".*

The AAA Panel rejected R's Article 10.5 defence of "No Fault or Negligence" by referring to the fact that he had been told by a friend *"to stop taking marijuana at the 15 day mark [prior to the competition], but that he kept taking it until 9 days before the competition where he tested positive"*. As a result, the Panel concluded that *"R. bears at least some fault for negligence in taking marijuana too close in time to the event where he knew he could be tested in-competition"*.

Citing the CAS 2005/A/830, the AAA Panel confirmed that R. had sustained his burden of proof for a reduced sanction under Article 10.5.2 on the basis of "No Significant Fault or Negligence". Not only had the parties agreed on how the prohibited substance had entered. R.'s system, but agreement had also been reached between them that

> *"… this medication was not taken for the purpose of enhancing his sports performance and in fact did not enhance his sports performance. R. was taking his medication to deal with a very serious medical condition".*

The Panel further held that, in view of R's previous experience with his prior offense for the inadvertent use of anabolic steroids, he should have consulted the USADA Hotline. In consequence of this oversight, the Panel refused to reduce R's sanction by a full year as CAS precedent (CAS 2005/A/830, CAS OG 06/001 and CAS 2006/A/1025) had done for the majority of athletes testing positive for a Prohibited Substance as a result of taking medicine for a legitimate medical condition.

In the view of the AAA Panel, however, taking his medicinal marijuana up to nine days prior to the event so that he could sleep did not evidence significant negligence. R. did not intend to enhance his performance and there is no issue regarding a level playing field for other competitors and there is no concern for protecting the athlete's health or the welfare of fellow competitors.

After considering "the totality of the circumstances", the Panel therefore concluded:

> *"The Parties stipulated that the maximum penalty would be two years. Given these parameters, the Panel reviewed CAS cases involving athletes being treated for legitimate medical conditions who were faced with the possibility of a maximum two-year period of ineligibility. In those cases, the athletes' periods of ineligibility were reduced to between 12 to 15 months under the category of "No Significant Fault or Negligence" [CAS 2005/A/951, at 9.4 (citing CAS 2005/A/830, CAS OG 06/001 and CAS 2005/A/873)]. In addition, the Panel considered the fact that the penalty for a first offense for marijuana could include as little as a warning".*

Upon finding that R. was not significantly negligent within the meaning of Article 10.5.2, the AAA Panel reduced the stipulated two-year period of ineligibility to 15 months commencing on 10 May 2007, the date of R.'s acceptance of the suspension, through 10 August 2008. It further cancelled and annulled all competitive results in the sport of table tennis which were achieved by R. on or after 3 March 2007 until the date of the Panel's decision on 21 May 2008.

In its Appeal Brief to the CAS dated 26 June 2008, USADA asserts that the AAA Panel erred (1) in concluding that the Respondent had proved that *"exceptional circumstances"* justified a reduction of the period of ineligibility from the stipulated maximum of two years and (2) in issuing him a fifteen (15) month period of ineligibility instead of the two year period sought by USADA.

USADA furthermore submits that the AAA Panel *"improperly gave substantial weight"* to the testimony of Dr. A., the licensed physician who had prescribed the treatment with medicinal marijuana since December 2005. The diagnosis of Dr. A., in the opinion of USADA, is based on the

> *"… inaccurate understanding that R. had been previously diagnosed with ADD [Attention Deficit Disorder] and despite the fact that Dr. A.'s decision to provide marijuana to R. was against the weight of the medical evidence presented in the case".*

In the view of USADA, as confirmed by the testimony of R. before the AAA Panel, Dr. A.'s diagnosis and recommendation of marijuana was based on a two minute visitation. Most of the time was spent with Dr. A.'s assistants and the filling out of a questionnaire. Without even having seen the medical records of R., he left the office with a prescription for the use of marijuana.

USADA cites the testimony of R. before the AAA Panel that, prior to the U.S. Trials, he had been warned by his parents and his friend to cease using marijuana in due time to avoid a positive test. Moreover, his testimony was contradictory with regard to knowing about applying for a TUE. Whereas he first testified that "*I didn't know what a TUE was before the failed test",* he later stated that the *"reason I didn't apply for a TUE is I didn't want to be branded".*

USADA points out further contradictory testimony of R. regarding the submission of his medical records. R., according to USADA, has *"largely elected to ignore the requests [for his medical records] and failed to produce a number of documents apparently in Dr. A.'s possession and virtually all of the records that would be in the possession of the other physicians who saw Respondent during the relevant period".* Even Dr. A. testified, in contraction of R., that no one had ever requested that his office make copies of his medical records.

In the view of USADA, the diagnosis of Dr. A. is all the more dubious in light of the fact that he confirmed that he had never performed a test upon R. to evaluate him for mood disorders, but relied merely upon a written comment made in the questionnaire by R. indicating that he had ADD. During his testimony, R. conceded, however, that he had never been diagnosed with ADD and that he reached the conclusion he had ADD from reading a flyer from Dr. A.'s office about ADD and the use of marijuana to treat it.

Lastly, USADA cites the testimony of two other medical experts at the AAA hearing. Both of these experts, Dr. An. and Dr. C., confirmed that the medical evidence submitted by R. did not support or justify his use of marijuana. Dr. C. testified that, while marijuana might be perceived to have a calming effect for some individuals in some circumstances, there exists no scientific evidence to this effect and it is not accepted psychiatric practice to use marijuana to treat any established psychiatric disorder.

USADA further asserts that in raising an "exceptional circumstances" defence under Article 10.5, the athlete bears the burden of proof that the facts and circumstances surrounding his/her offense

are "truly exceptional". R., despite the express requests of USADA to submit his medical records, has refused to submit such records. These records "are critical to test the legitimacy of Respondent's claim to have a medical need for marijuana".

Citing the Article 5.10.06.03 of the ITTF Anti-Doping Regulation, USADA points out that, when a prior doping offense with a non-specified substance is combined with a second offense which is for a substance on the specified substance list, the range for the period of ineligibility is from a maximum of three (3) years to a minimum of two (2) years. USADA and R. stipulated that the maximum period of ineligibility that USADA would seek in this case is two years.

USADA asserts that, in order to obtain a reduction in the presumptive sanction set forth in the rules, it is R.'s burden to "rebut the presumption" that the maximum sanction should be applied. The "no fault or negligence" defence is, however, not available to R. in the case at hand, because the fault of the prescribing physician must be attributed to the athlete.

The evidence at the hearing, in the view of USADA, clearly established that R. was not appropriately prescribed marijuana to treat a properly diagnosed medical condition. Moreover, R. is unable to establish that he is without "significant fault" because he did not attempt to obtain a TUE prior to his positive drug test.

USADA further submits that R. "inappropriately asked" the AAA Panel to supplant the TUE process and to substitute its judgment for a TUE committee ("TUEC") even though a TUEC had apparently rejected his application for a TUE without R. attempting to appeal that decision.

Use of anti-doping appeals, in the view of USADA, to obtain, in effect, a retroactive TUE (eliminating penalties for past use) having also prospective effect (permitting future use without penalty) such as R. has done could radically undermine the TUE process and is grossly unfair to other competitors in sport who must abide by the established TUE rules. The TUE process is based upon a decision of medical professionals. Arbitral panels should not be asked to act in place of medical professionals. It is not the role of the CAS to supplant a TUEC.

USADA requests that the Panel vacate the decision of the AAA Panel and to impose the agreed maximum two-year sanction against the Respondent and to disqualify all of his competitive results since the date of his positive drug test on 3 March 2007.

In his Answer to USADA's Brief dated 22 July 2008, R. incorporates by reference the pleadings and argumentation contained in the briefs which he submitted to the AAA Panel. He requests that the decision of the AAA Panel be affirmed.

R. submits that his use of medicinal marijuana was "legal, recommended, and administered pursuant to California law". As a "Specified Substance" it is eligible for reduced sanctions by the Prohibited List.

R. asserts that, while the WADC and the Prohibited List, "which are often unclear", can at least be accurately characterized as listing some substances which are always banned, and other substances

which are only banned in-competition, marijuana clearly belongs to the latter group. In this regard, it is not unlike alcohol, the use of which is obviously not banned out-of-competition. Marijuana, like alcohol, is permitted to be used out-of-competition.

In the view of the Respondent, the "Exceptional Circumstances" defences (No Fault or Negligence and No Significant Fault or Negligence) both apply to the case at hand. R. did not know or suspect that metabolites of his medicinal marijuana would remain in his system at levels significantly higher than 15 ng/mL after this period, and he could not have known such even with the exercise of utmost caution. He abided at all times by his doctor's orders.

R. cites the fact that prior to past competitions, he had ceased using his medicinal marijuana 15 days prior to the respective competition. He had never tested positive for Cannabinoids following the tests taken during those competitions. In the case at hand, he had stopped using the substance 9 days prior to the start of the U.S. Trials. The effects of his use of the substance were "long gone" by the date of the U.S. Trials and he did not intend to enhance his performance by using it.

R. avers that he acted "eminently reasonably, with due care for himself and others, and could not have reasonably known or suspected that the metabolites of his medicine would still be in his bodily samples during the U.S. Trials". He therefore acted with no fault or negligence and satisfied this Exceptional Circumstance test.

But even if he fails to clear "the higher hurdle of No Fault or Negligence", R. asserts that he satisfies the less restrictive test of "No Significant Fault or Negligence", especially in view of the totality of the circumstances and the commentary to Article 10.5.2 of the WADC.

R. states that "he did not know, and was not informed, of the TUE process until after the Event". Neither his father, who had been deeply involved in competitive table tennis, nor his friend, M., who is likewise a highly-ranked table tennis athlete, knew of the TUE procedure.

Neither his failure to apply for a TUE prior to the U.S. Trials, nor the subsequent rejection of his TUE by the ITTF renders the AAA Panel an appellate body in the TUE process. The Panel is charged with determining "whether or not a doping offense was committed, and if so, whether Exceptional Circumstances apply".

Finally, R. asserts that he did not engage in a delay of his defence proceedings in order to gain advantage; he voluntarily accepted a provisional suspension, and he never used medicinal marijuana with the intent or effect of enhancing his performance.

By letter dated 11 July 2008, CAS requested the parties to indicate on or before 17 July 2008 whether their current preference is for an oral hearing to be convened or for this case to be decided on the basis of the parties written submissions only.

By letter dated 17 July 2008, counsel for R. stated his preference for USADA's appeal to be decided on the basis of the parties written submissions only, stating that

> *"R. expressly disfavors the convening of an oral hearing, and submits that the comprehensive opinion from which USADA appeals furnishes adequate information from which the arbitration panel may reach its decision".*

By letter of the same date, 17 July 2008, USADA cited a conference with R.'s counsel on the previous day in which counsel for USADA *"articulated five key factual matters which USADA believes would be essential to establish in order to eliminate the need for a hearing".* Alleging the unwillingness of R. and his counsel *"to enter into a stipulation of uncontested facts",* USADA responded that it *"believes it will be necessary to have an oral hearing in this matter".*

By letter dated 4 August 2008, counsel for R. challenged USADA's allegation that he and R. were *"unwilling to enter into a stipulation of uncontested fact".* Counsel for R. stated:

> *"Indeed, in the spirit of cooperation and to narrow the issues, R. did enter into such a negotiated stipulation, which is attached as an exhibit to USADA's submission in this matter. Furthermore, a full-blown evidentiary hearing was already held in this matter, wherein USADA had every opportunity to adduce evidence on its behalf".*

In response to the above, counsel for USADA reiterated by letter of the same date that *"because R. and his counsel are unwilling to enter into a stipulation of uncontested facts, USADA believes it will be necessary to have an oral hearing".*

By letter dated 25 August 2008, Counsel to the CAS informed the parties that the Panel had reviewed the file and had determined that it was sufficiently informed to render an award without the need to hold a hearing. It wished, however, to consult with the parties on this issue before issuing a corresponding decision. Specifically citing the conflicting content of the letters of the Appellant dated 17 July 2008 and the Respondent's answer dated 4 August 2008, the Panel specifically requested confirmation from the parties by no later than 2 September 2008 that

> *"(1) a stipulation of uncontested fact remains in effect between them as set out in Exhibit 8 of Appellant's Appeal Brief and (2) whether the parties continue to maintain their respective positions regarding the holding of a hearing, – the Appellant electing to hold a hearing, the Respondent expressly disfavoring a hearing".*

In his response to the Panel's request dated 31 August 2008, counsel for R. stated unequivocally that *"the stipulation of uncontested facts as set out in Exhibit 8 of Appellant's Appeal Brief remains in effect…".*

In its response dated 2 September 2008 to CAS's request for confirmation which was received by CAS one day after the deadline set by the Panel, counsel for USADA challenged the testimony of Dr. A. during the hearing before the AAA Panel on 21 May 2008 regarding the medical justification for the authorization given to R. to use marijuana and cited the AAA Panel's reliance on this testimony as being *"in error".* Counsel for USADA submitted:

> *"In the event the Panel finds the testimony of Dr. A. or the issue of Respondent's alleged medical need for marijuana relevant to the issues to be decided USADA respectfully request an evidentiary hearing be held in this matter".*

By letter dated 3 September 2008, counsel for R. protested the untimely receipt of USADA's response, pointing out that "USADA chose to attempt to brief the panel yet again, instead of responding to the two issues raised by the Request". It requested the CAS Panel to strike the *"Untimely Brief"*.

Following the above exchange, the parties were informed on 4 September by CAS that an oral hearing would take place in Lausanne on 10 October 2008 at 9.30am. Citing art. R 44.2 and art. R 57 CAS Code, the parties where informed that they were to call to be heard "such witnesses and experts which they have specified in their written submissions".

By letter dated 5 September 2008, counsel for USADA cited Article 10(c) of the USADA Protocol which provides in relevant part that in any appeal under the USADA Protocol "the CAS hearing will automatically take place in the U.S". Counsel also cited the inability of counsel for R. to attend a hearing on 10 October 2008.

In its letter dated 17 September 2008, counsel for the CAS informed the parties that the CAS Panel had decided to conduct the hearing via video-conference.

In the same letter, Counsel for the CAS noted on behalf of the President of the Panel that the Panel continued to assume (1) that the "Stipulation" of 17 September 2007 contained in Exhibit 8 of the Appellant's Appeal Brief remains in effect between the parties, and (2) that the Appellant, contrary to the Respondent, wishes to hold a hearing.

On 23 September 2008, counsel for R. informed the Panel that the parties had agreed to convene in San Francisco for any video conference and that the dates of 30 and 31 October 2008 are feasible for both parties. Counsel for R. explicitly reserved his right to argue any and all potential objections and/or defenses in the matter.

On 20 October 2008, counsel for USADA informed CAS that, following the Panel's letter of 9 October 2008 setting the hearing for 30 October 2009,

> *"… we contacted R.'s counsel to arrange the scheduling of the witnesses and were surprised that R. did not intend to call Dr. A. to testify… . We requested that Dr. A. attend the hearing to testify but we understand that he will not be testifying. Given this, there is no need for there to be a live hearing in this matter and thus we agree with R.'s motion to submit this case to the CAS Panel on the written submission only".*

On 20 October 2008, R. submitted a *"Motion to Dismiss the Appeal"* on the grounds that pursuant to art. R59 CAS Code, CAS has a limited time in which to hand down an award. CAS had until and including October 12, 2008 four months from the date upon which the statement of appeal was filed, to communicate the operative part of the award to the parties. Because no "operative part" of the award was communicated to the parties by the deadline date, and because the parties have been informed of neither a decision extending the deadline date nor the submission of a reasoned request for such extension, the appeal was to be dismissed.

By letter dated 21 October 2008, counsel for USADA further clarified its decision for withdrawing its objection to R.'s request for CAS to decide this case *"on the written submissions only"*. Citing the

Panel's ordering of the hearing in its letter of 4 September 2008, counsel claimed that *"it was USADA's understanding that that decision was based on the Panel's desire to hear medical testimony from Dr. A."*.

By letter to the parties dated 22 October 2008, the parties were informed by CAS with regard to R.'s Motion to Dismiss for non-observance of the 4 month award deadline:

> *"With respect to the respondent's "Motion to dismiss the Appeal", I inform the parties that the time limit to issue the arbitral award has been duly extended by the President of the CAS Appeals Arbitration Division, pursuant to Article R 59 of the Code of Sports-related Arbitration. Obviously without such an extension, the Panel would not have had the possibility to hold a hearing in this matter on 30 October 2008. I inform the parties that the new deadline fixed by the President is 30 November 2008".*

On 12 November 2008, the parties were informed by the Secretary General of CAS that the time limit to communicate the operative part of the award to the parties, pursuant to Article R 59 CAS Code has been further extended until 15 December 2008.

On 17 November 2008, counsel for R. requested inclusion of Respondent's Motion to Dismiss in the Order of Procedure and for the forwarding of a copy of the decision by the President of the Appeals Arbitration Division of CAS to extend the time limit pursuant to art. R59 CAS Code and a copy of the reasoned request sent to the President from the President of the Panel.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS and this Panel as the appellate body for decisions of the AAA rests on Article 10 (c) of the USADA Protocol. This provision provides as follows:

   "The final decision by the AAA/CAS arbitrator(s) may be appealed to the court of Arbitration for Sport (CAS) as set forth in Article 13 of Annex A. The appeal procedure set forth in Article 13 of Annex A shall apply to all appeals not just appeals by International-Level athletes or other persons. A CAS appeal shall be filed with the CAS administrator, the CAS hearing will automatically take place in the U.S. and CAS shall conduct a de novo review of the matter on appeal which, among other things, shall specifically include the power to increase, decrease or void the sanctions imposed by the previous AAA/CAS Panel. Otherwise the regular CAS appellate rules apply. The decision of CAS shall be final and binding on all parties and shall not be subject to further review or appeal".

2. Article 13.2.1 of Annex A of the USADA Protocol, the language of which has been incorporated verbatim from Article 13.2.1 of the WADC, provides as follows:

   "Appeals Involving International-Level Athletes

In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the Court of Arbitration for Sport (CAS) in accordance with the provisions applicable before such court".

3. The Panel has no cause to question the jurisdiction of the AAA in rendering its award in the matter USADA v. R. AAA No. 30 190 000548 07 on 21 May 2008.

4. Consistent with the terms of the Ted Stevens Olympic and Amateur Sports Act (36 U.S.C. § 220521) and the USADA Protocol, USATT as the National Governing Body (NGB) for the sport of Table Tennis in the United States has submitted to binding arbitration in any controversy involving the opportunity of any amateur athlete to participate in amateur athletic competition in Table Tennis (Section 4.1 (l) of the USATT Bylaws dated October 3rd, 2007). Such binding arbitration is to be conducted in accordance with the Commercial Rules of the AAA or as modified pursuant to the Act.

5. R., by virtue of his membership in USATT and by participation in the U.S. Trials organized by USATT, agreed to be bound by the USOC National Anti-Doping Policies and, specifically, the USADA Protocol. Accordingly, he submitted to binding arbitration before the AAA and to appeal any decision of the AAA Panel to CAS. This award now forms the subject matter of the appeal at hand.

6. Adjudicative hearings deriving from USADA's management of test results take place in the United States before the AAA. The parties to such hearing are USADA and the athlete. USADA also invites the applicable IF, in the instant case, the ITTF, and WADA to participate either as a party or as an observer in such arbitrations (Article 10 (b) of the USADA Protocol).

7. Notwithstanding the above, USADA and R. have confirmed the jurisdiction of the CAS by executing the Order of Procedure dated 4 November 2008 on 7 November 2008 and 10 November 2008, respectively.

Law Applicable to the Merits

8. Art. R 58 of the CAS Code provides:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such choice, according to the law of the country in which the federation, association or sports 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".

9. The above provision was expressly mentioned in the Order of Procedure signed by the parties.

10. Annex A of the USADA Protocol has transcribed those Articles from the WADC which must be incorporated into the rules of every Anti-Doping Organization (Article 3 (a) of the

USADA Protocol). The USADA Protocol does not commit to the application of any specific national or state law in supplementation or interpretation of the provisions of the Protocol.

11. With regard to the supplementation or interpretation of the WADC by national law, CAS has stated in CAS 2006/A/1025 at 10.7:

"As most of the International Sports Federations have now resolved in their respective rules to refer sports related disputes to the Court of Arbitration for Sport, this appellate body is striving to achieve, despite differing governing laws of the Federations, a consistent and uniform application of the WADC throughout the world and for all sports disciplines. All of the case law developed by the CAS is based primarily on the rules issued by those federations. A large number of these federations are domiciled in Switzerland, thus enabling in the absence of a specific choice of law in their respective statues the application of Swiss law".

12. The Panel notes that WADA is itself a Swiss private law foundation with its seat in Lausanne. Its headquarters are located in Montréal, Canada. As noted in the above-cited CAS 2006/A/1025 decision, the rules of a Swiss private law entity should comply with Swiss law. If they do not do so, there is a risk that the Swiss Courts will declare them to be non-compliant.

13. The Panel also notes that the ITTF as the IOC-recognized International Federation for the sport of Table Tennis maintains its registered domicile in Lausanne, Switzerland.

14. Accordingly, in adjudicating this appeal, the Panel shall apply the USADA Protocol, provided that any issues of law requiring supplementation, interpretation or construction shall be subject to the rules and principles of Swiss law.

Procedural Issues

A. Admissibility

15. The decision of the AAA Panel was rendered on 21 May 2008. USADA's Statement of Appeal dated 11 June 2008 was received by the CAS within the 21 day time limit provided in Art. R49 CAS Code.

16. USADA requested an extension of the 10-day period for filing the Appeal Brief until 26 June 2008. The requested extension was agreed by counsel for R. by letter of 18 June 2008.

17. On 26 June 2008, USADA filed its Appeal Brief with CAS, receipt of which was made by telefax after the CAS close of business on that day. Date of receipt was recorded by CAS as 27 June 2008. The Appeal Brief was forwarded to R.'s counsel on 1 July 2008. R. has filed no objection to the timely receipt of the USADA's Appeal Brief.

18. On 22 July 2008, R. filed his Answer with CAS, receipt of which was made by telefax after the CAS close of business on that day. Date of receipt was recorded by CAS as 23 July 2008. USADA has filed no objection to the timely receipt of Respondent's Answer.

19. By letter dated 13 August 2008, Counsel to the CAS informed the parties that following the nomination of Prof. Dr. Ulrich Haas by USADA as arbitrator and the nomination of Attorney Olivier Carrard by R. as arbitrator, the President of the CAS Appeals Arbitration Division appointed Attorney John A. Faylor as president of the CAS Panel.

B The Holding of a Hearing

20. The Panel has provided above a lengthy rendition of the correspondence from the parties regarding the holding of a hearing in order to demonstrate that substantial delay resulted from (1) USADA's belated clarification that it was not referring to the Stipulation of 17 September 2007, but rather to a 2nd set of stipulations subsequent to the AAA hearing on 21 May 2008 and (2) USADA's decision that, if R. would not call Dr. A. to testify at the hearing, it would withdraw its objection to a decision on the written submissions.

21. USADA would have the Panel believe that the reasons for its desire to hold the hearing rest on R.'s refusal to enter a stipulation regarding the relevance of Dr. A.'s testimony and the Panel's decision to hold a hearing which, in the eyes of USADA, indicated that it considered such testimony relevant to the decision at hand.

22. The Panel's decision to proceed with a hearing was made prior to receipt of USADA's letter dated 2 September 2008 which has been referred to by Respondent's counsel as the "Untimely Brief". It was the unanimous decision of the Panel at that time that, although it felt itself sufficiently informed to render a decision without a hearing, if one of the parties insisted upon a hearing, a hearing should be ordered.

23. Although USADA could have clarified the misunderstanding regarding the Stipulations of 17 September 2007 already on 4 August 2008, it was counsel for R. who established for the first time in his letter of 31 August 2008 that the Appellant was referring to a 2nd set of stipulations discussed between them on or about 16 July 2008, subsequent to the AAA decision.

24. The confusion regarding the relevance of Dr. A.'s testimony persisted and was not clarified until receipt of USADA's letter of 20 October 2008, in which counsel for USADA stated:

"Given that R. has indicated to USADA that he is not calling his medical doctor, Dr. A., as a witness in this proceeding, we are writing to withdraw our objection to R.'s request to have this matter be decided on the briefs without the need for a live hearing".

25. In further explanation of USADA's decision, counsel stated:

"… we requested that Dr. A. attend the hearing, but we understand that he will not be testifying. Given this, there is no need for there to be a live hearing in this matter and thus we agree with R.'s motion to submit this case to the CAS Panel on the written submission only".

26. The Panel wishes to note that it is troubled by USADA's delay in not withdrawing its objection to a decision on the written submissions until 20 October 2008. Even prior to the

full constitution of the Panel in mid-August, the parties were asked by Counsel to the CAS whether they wished to hold a hearing in the matter. R.'s position in this regard was clear from his counsel's letter of 17 July 2008 and it never changed in the following correspondence.

27. If R. repeatedly stated that it wished to forego a hearing, how could USADA have concluded, at any time, even after the Panel announced that it was sufficiently informed, that R. intended or desired to call Dr. A. to testify at a hearing? And if the Panel stated already on 25 August 2008 that it considered itself sufficiently informed, why did USADA state in its letter of 4 September 2008 that it wished to hold the hearing because *"it was unable to get the Respondent to agree to an additional stipulation of facts"*, only to abandon this position and to agree to a decision on the *"written submission only"* more than six weeks later, on 20 October, after allegedly learning that R. would not be calling Dr. A. to testify in a hearing which he never requested from the beginning?

28. Counsel for USADA indicated in his letter of 21 October 2008 to CAS that he assumed R. would call Dr. A. to testify because *"without Dr. A.'s testimony, R. will not be able to meet his burden of establishing Exceptional Circumstances"*. This submission raises more questions than it answers in the eyes of the Panel.

29. Notwithstanding the fact that it is not for USADA to determine how R. will meet his burden of proof, the absence of any need to re-hear Dr. A. at a hearing on appeal was implicit in Respondent's various letters informing that Panel that he did not wish to hold a hearing and in the Panel's statement that it felt itself sufficiently informed to decide the dispute on the written submissions.

30. If USADA wished to address the issue of whether Dr. A.'s diagnosis was legitimate or invented, the Appeal Brief provided sufficient opportunity for USADA to state its arguments. The relevance of Dr. A.'s testimony before the AAA Panel would have been left for the Panel to evaluate on the basis of its *de novo* power to review the facts and the law applicable to the dispute and to replace the AAA Award with a different one.

31. Notwithstanding the unavailability of the parties to attend a hearing until 30 October 2008 (the Panel originally proposed a hearing date for 10 October 2008), the Panel cites the above issues only to demonstrate that the delay in reaching a speedy decision of this dispute lies with the parties, and particularly on the misunderstandings which arose from the Appellant's clouded and inconsistent explanation of why it wished to hold a hearing.

C. R.'s Motion to Dismiss

32. The decision of the President of the CAS Appeals Arbitration Division to extend the time limit for rendering the award pursuant to art. R59 CAS Code was initiated by the president of the Panel on 12 September 2008 in the course of internal correspondence with the CAS Court Office.

33. The grounds stated for the requested extension were the responses of the parties on 5 September 2008 which stated that the announced hearing date of 10 October could not be met. Both of the parties requested a re-scheduling of the hearing date far beyond 12 October 2008, the date of expiration of the 4 month period. For this reason, the Panel chose 30 October 2008.

34. As the Secretary General pointed out to the parties in its letter of 22 October 2008, if the extension had not been granted, the Panel would not have had the possibility to hold a hearing in this matter on 30 October 2008. The parties were informed that the new deadline would expire on 30 November 2008.

35. R. has repeated his request for a ruling on his "Motion to Dismiss". The Panel hereby declares that Appellant's Motion is dismissed for the reasons stated. The extension of the deadline was implicit in the letter of the Secretary General dated 9 October 2008 in which the re-scheduled hearing on 30 October 2008 is announced to both parties. The fact that the administrative communication from the CAS confirming the extension of time was not received by the parties before 12 October 2008 does not affect the status of the present arbitration.

36. The CAS Code does not require the submission of copies of the internal administrative correspondence between the Panel, the Secretary General and the President of the Appeals Division of CAS to the parties.

The Merits of the Appeal

A. R.'s admitted use of the Cannabinoid marijuana

37. R. has admitted in the Stipulations dated 17 September 2007 to the findings of the accredited testing laboratory that the urine samples which he provided on 3 March 2007 as part of an *"in-competition"* test at the U.S. Trials were found to contain the substance THCA in a concentration *"significantly greater"* than 15 ng/ml.

38. R. also stipulated in the same document to the appropriateness and accuracy of the collection and processing procedure. The presence of the Cannabinoid in his body "in-competition" during the U.S. Trials is undisputed.

39. Cannabinoids, among them hashish and marijuana, are listed under Category S.8 in the 2007 Prohibited List as a Prohibited Substance.

40. Marijuana is, however, not a prohibited substance if taken out-of-competition. Especially under California law, R.'s use of the substance is deemed to be legal, if he has obtained a Medical Recommendation in accordance with applicable California law. R. was in possession of such a Medical Recommendation issued by Dr. A.

41. The issue of the legality of R.'s use of marijuana under California law or any law is of no relevance to this dispute. Even if R.'s use of the substance had been illegal, he would not have stood in conflict with the WADC, ITTF Anti-Doping Rules and the USADA Protocol as long as the substance was not present in is body *"in-competition"*.

42. The purpose of the WADC, the ITTF Anti-Doping Rules and the USADA Protocol is not to facilitate doping-unrelated law enforcement. The WADC states in its Introduction:

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

- *To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide; and*
- *To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping".*

43. The same conclusion applies, in particular, to USADA's challenge to the legitimacy of the medical diagnosis which formed the basis for Dr. A.'s prescription of marijuana. This is not an issue in this dispute. Even if USADA had shown that Dr. A. as the prescribing physician was not properly licensed, erroneously diagnosed R.'s pathological condition or incorrectly prescribed the use of marijuana as treatment of that condition, such a finding would have no relevance to the issue of whether the Respondent committed an anti-doping violation.

44. It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. In the case at hand, it was the personal duty of R. to ensure that Cannabinoids would not be present in his urine while participating in competition. It is not necessary for USADA to demonstrate that intent, fault, negligence or knowing use of R. was present in order to establish a doping violation under Article 2.1.

45. The Panel therefore concludes that the fact of the presence of Cannabinoids in the form of marijuana which is listed as a Prohibited Substance under S8 of the 2007 Prohibited List in the R.'s bodily specimens during an "in-competition" test constitutes a violation of Article 2.1 of Annex A of the USADA Protocol. The wording of this provision is identical to the language of Article 2.1 of the WADC and Article 5.2.1 of the ITTF Anti-Doping Rules:

"The following constitute anti-doping violations:

2.1 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Specimen".

46. The sanctions prescribed by the USADA Protocol for violations of Article 2.1 are found in Article 10 which is identical in wording to the provisions of Article 10 of the WADC and Article 5.10.1 of the ITTF Anti-Doping Rules:

Article 10: Sanctions on Individuals

10.1 Disqualification of Results in Event During which an Anti-Doping Rule Violation Occurs

An anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, lead to Disqualification of all of the Athletes individual

results obtained in that Event with all consequences, including forfeiture of all medals, points and prices, except as provided in Article 10.1.1.

10.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competitions shall not be Disqualified unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation

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 Articles 2.1 (presence of Prohibited Substance or its Metabolites or Markers). 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and 2.6 (possession of Prohibited Substances and Methods) shall be:

- First violation: Two (2) years' Ineligibility

- Second violation: Lifetime Ineligibility

However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article 10.5.

47. On the basis of the above findings, the Panel concludes that R. has committed a doping violation pursuant to Article 2.1 of the USADA Protocol and the equivalent provisions of the WADC and the ITTF Anti-Doping Rules. It must be determined, however, whether the sanction to be applied can be reduced pursuant to the remaining provisions of Article 10, in particular, whether the marijuana ingested by R. qualifies as a "Specified Substance".

B. Cannabinoids are listed as a "Specified Substance" permitting the Imposition of a Milder Sanction

48. Cannabinoids are also listed as a "Specified Substance" in the 2007 Prohibited List. Article 5.10.3 of the USADA Protocol, Article 10.3 of the WADC and Article 10.3 of the ITTF Anti-Doping Rules state as follows:

10.3 Specified Substances

The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where an Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance, the period of ineligibility found in Article 10.2 shall be replaced with the following:

- First Violation: At a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year's Ineligibility

- Second violation: Two (2) years' Ineligibility

- Third violation: Lifetime Ineligibility

However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in Article 10.5.

49. A doping violation involving specified substances may result in a reduced sanction provided that the *"… Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance".*

50. In the case at hand, and based on the testimony of the witnesses who were heard during the AAA Panel hearing, the Panel in the instant case finds that R. was not taking marijuana to enhance his performance. As the AAA Panel noted at Pts. 8.6.3 and 9.9 of its Decision of 21 May 2008,

"R.'s prior ingestion of medicinal marijuana did not have any effect upon his performance at the Event and R. was not taking medicinal marijuana to enhance his performance. This fact was conceded by all of the witnesses, including USADA's expert witness, Dr. C.".

51. This finding is supported by the statement of USADA's other expert, Dr. R. H., Science Director for USADA, at the hearing. Dr. R. H. testified that the laboratory results analyzing R.'s samples were consistent with R.'s sworn testimony regarding when he stopped using marijuana, namely 9 days prior to the competition (see Pt. 8.5.1 in the award of 21 May 2008).

52. Indeed, the Respondent's own testimony which is quoted by USADA in its Appeal Brief that he feared that *"marijuana slows my reaction considerably and gives my competitors and advantage"* appears credible to the Panel.

53. Based on the above, the Panel concludes that R.'s use of marijuana allegedly to treat a medical ailment was not intended to enhance his sport performance. Consequently, the presence of the Prohibited Substance THCA in the A and B samples is to be treated as a "specified substance" within the meaning of Article 10.3 of the USADA Protocol. In arriving at this finding, the Panel renders no opinion on the issue whether Dr. A. correctly diagnosed R.'s alleged condition and whether his prescription of marijuana for medicinal purposes was legitimate or illegitimate.

C. The Respondent's 2nd Offense

54. As noted in I. B. 3 above, R. tested positive in drug tests in 2001 for the Prohibited Substance 19-norandrosterone which he inadvertently ingested by taking an *"over-the-counter"* vitamin supplement containing the anabolic steriod androstenedione.

55. Under the WADC effective as of 1 January 2004 and the 2007 Prohibited List, androstenedione is a substance prohibited at all times (in- and out-of-competition) and is subject to the following sanctions set out in Art. 10.2:

- *First violation: 2 years*
- *Second violation: Lifetime ineligibility*

56. The sanction imposed at that time was a two year period of ineligibility which ended in July 2003. The positive finding made on 3 March 2007 must be considered as a second offence. The fact that the applicable pre-WADC anti-doping rules at the time of the first offense may have provided for a more lenient sanction in the event of a second offense is of no relevance in adjudicating the offense committed on 3 March 2007 (see CAS 2006/A/1025).

57. Although R. has not stipulated to having committed a second violation by reason of the admitted presence of marijuana in A and B Samples taken during competition on 3 March 2008, no grounds have been cited by R. as to why this admitted offense should not be qualified as his 2nd offense. The AAA Panel holds the positive test of 3 March 2007 to have constituted a second offense (see Pt. 11.5 of the AAA Award).

58. The official commentary to Article 17 of the WADC which lays down a limitations period of 8 years for commencing action against an athlete for an anti-doping violation provides the following clarification with regard to 2nd offenses:

"This does not restrict the Anti-Doping Organization from considering an earlier anti-doping violation for purposes of the sanction for a subsequent violation that occurs more than eight years later. In other words, a second violation ten years after a first violation is considered a second violation for sanction purposes".

59. R. was tested positive on 6 July 2001 for the presence of the Prohibited Substance androstenedione. The fact that his 2nd violation took place almost 6 years subsequent to the androstenedione offense has no relevance, therefore, for the qualification of the latter as a 2nd offense.

D. Rules for Certain Potential Multiple Violations

60. Article 10.6.3 of the USADA Protocol, which is identical in language to Article 10.6.3 of the WADC and Article 5.10.6.3 of the ITTF Anti-Doping Rules, states as follows:

"Where an Athlete is found to have committed two separate anti-doping rule violations, one involving a specified substance governed by the sanctions set forth in Article 10.3 (Specified Substances) and the other involving a Prohibited Substance or Prohibited Method governed by the sanctions set forth in Article 10.2 or a violation governed by the sanctions in Article 10.4.1, the period of Ineligibility imposed for the second offense shall be at a minimum two years' ineligibility and at a maximum three years' Ineligibility. Any Athlete found to have committed a third anti-doping rule violation involving any combination of specified substances under Article 10.3 and any other anti-doping rule violation under 10.2 or 10.4.1 shall receive a sanction of lifetime ineligibility".

61. In the official commentary to Article 10.6.3 of the WADC, the following statement is made:

"Article 10.6.3 deals with the situation where an Athlete commits two separate anti-doping rule violations, but one of the violations involves a specified substance governed by the lesser sanctions of Article 10.3. Without this Article in the Code, the second offense arguably could be governed by: the sanction applicable to a second violation for the Prohibited Substance involved in the second violation, the sanction applicable to a second

offense for the substance involved in the first violation, or a combination of the sanctions applicable in the two offenses. This Article imposes a combined sanction calculated by adding together the sanctions for a first offense under 10.2 (two years) and a first offense under 10.3 (up to one year). This provides the same sanction to the athlete that commits a first violation under 10.2 followed by a second violation involving a specified substance, and the Athlete that commits a first violation involving a specified substance followed by a second violation under 10.2. In both cases, the sanction shall be from two years to three year' ineligibility".

62. In light of the above, it is clear that the intent of the WADC is to deal with multiple, but separate violations involving a Prohibited Substance under Art. 10.2 and a specified substance under Art. 10.3 by providing the sanctioning body a range of discretion in setting a separate and independent penalty for a repeated offense.

63. It is important to note that, under Article 10.3, the opportunity for eliminating or reducing the ineligibility sanction pursuant to Article 10.5 ("Exceptional Circumstances") for an Article 2.1 violation is granted only "in the case of a second or third violation" which involve exclusively specified substances. It is not granted within the context of a first violation where the ineligibility penalty may be eliminated entirely ("no period of Ineligibility from future Events") or within the context of a multiple violation offense involving both a Prohibited Substance (Art. 10.2) offense and a specified substance (Art. 10.3) offense. With regard to the latter, the WADC has developed a separate sanction set forth in Article 10.6.3.

E. The AAA Panel erred in permitting the Respondent to raise the "Exceptional Circumstances Defense" under Article 10.5 of the USADA Protocol, Article 10.5 of the WADC and Article 5.10.5 of the ITTF Anti-Doping Rules

64. The Panel has taken note that R. reserved the right to argue, among others, exceptional circumstances, no fault or negligence, no significant fault or negligence, or another doctrine of mitigation or reduced culpability under the applicable rules.

65. As explained in the official commentary to Art. 10.6.3 of the WADC, the sanctioning body is provided a range of discretion in setting the ineligibility penalty in the event the Athlete has committed two separate anti-doping rule violations, one involving a specified substance governed by Art. 10.3 and the other involving a Prohibited Substance governed by Art. 10.2.

66. This discretion permits the sanctioning body to add together the prescribed maximum penalty for the Art. 10.2 violation (2 years) with the maximum Art. 10.3 penalty (1 year), regardless of the sequence of the offenses, in setting a maximum penalty of 3 years of ineligibility.

67. Alternatively, the sanctioning body is granted under Article 10.6.3 a minimum limit of two (2) years for an ineligibility penalty. This minimum takes into consideration the possibility that the Art. 10.2 violation (Prohibited Substances) may already have been reduced for Exceptional Circumstances (no significant fault or negligence) under Art. 10.5 from two years to one year. In this case, and regardless of the isolated circumstances of the Art. 10.3 violation (specified

substance), the sanctioning body is compelled to treat the 10.3 offense as if it merited the maximum one year ineligibility sanction.

68. Conversely, if the 1st offense violation were to be an Art. 10.3 offense (specified substance) for which only a warning penalty was imposed, the sanctioning body would still be compelled to impose a minimum 2 year ineligibility penalty for the multiple violation, even if Exceptional Circumstances were present which merited a lesser penalty than two years for the Art. 10.2 offense. The combined term of ineligibility will be, in both cases, two years.

69. In effect, the intent of the WADC is to place a separate sanctioning value on the fact of the multiple violation, even if the combined terms of the ineligibility period would not total two years when considered separately and apart from each other. This principle was best described in CAS 2006/A/1025 at pt. 11.7.2 with the crude expression "*two strikes and you are out*".

"It is to be noted that, for the purpose of imposing a sanction for a second offence, the WADC does not distinguish between more significant and less significant breaches. This failure to distinguish may be justified in the overwhelming majority of cases, but may lead to injustice in a very small number of cases. The point can be shortly illustrated. A first breach may attract a reduced sanction in consequence of a find of No Significant Fault or Negligence. But under the WADC that finding of No Significant Fault or Negligence is irrelevant if there is a second breach. For the purposes of the second breach, a tribunal is required to treat the first breach in exactly the same way as if there had been no finding of No Significant Fault or Negligence in relation to the first breach. The WADC treats an offence as an offence, whatever the circumstances when deciding on the sanction".

70. Under this principle, it is irrelevant for applying the sanctioning limits (two years minimum, three years maximum) under Article 10.6.3 that R.'s second offence may itself attract a reduced sanction because there has been No Significant Fault or Negligence.

71. To be sure, Art. 10.6.3 fails to set out the criteria under which the sanctioning discretion granted the Panel (2 year minimum; 3 years maximum) is to be exercised. The deciding issue in the eyes of the Panel is the fact that with regard to "mixed multiple violations", i.e., where both an Article 10.2 (Prohibited Substance) violation and a specified substance (Art. 10.3) violation have been committed, the athlete is granted no "opportunity" to resort to an elimination or reduction of the ineligibility period under Article 10.5 (Exceptional Circumstances).

72. On the basis of the above, the Panel concludes that the AAA Panel erred in permitting R. to argue "Exceptional Circumstances" under Art. 10.5 in the case at hand and by reducing the ineligibility sanction to 15 months.

73. The minimum term of the ineligibility sanction to be imposed in this case is two (2) years pursuant to Art. 10.6.3. The Panel holds that the provisions of Art. 10.6.3 of the USADA Protocol (Art. 10.6.3 of the WADC and Article 5.10.6.3 of the ITTF Anti-Doping Rules) grant no discretion to reduce the penalty below the two year minimum term.

F. The Panel's Discretion under Art. 10.6.3; the maximum penalty agreed by the Parties in the Stipulation dated 17 September 2007

74. By being denied application of Article 10.5. with regard to an Article 10.6.3 offense, the Code does not imply that R. is now exposed to the arbitrary discretion of the Panel in setting an ineligibility penalty somewhere between a two year minimum and a three year maximum. Under Article 10.5 of the USADA Protocol, the athlete is entitled to establish his Exceptional Circumstances defenses using a standard of proof based on the "balance of probability" (Article 3.1 of the USADA Protocol).

75. Because the WADC is silent in laying out criteria and guidelines on how an adjudicating body should exercise its discretion in setting the ineligibility penalty under Art. 10.6.3, it is only obvious in the eyes of the Panel that the factors to be taken into consideration should follow similar criteria applicable to the Exceptional Circumstances defense of Article 10.5. This means that the athlete should be permitted to establish that, taking into consideration the totality of the facts and circumstances of the individual violation, his or her level of fault or negligence does not merit the imposition of the maximum three year term of ineligibility under Article 10.6.3.

76. In taking the above position, the Panel renders no opinion with regard to consequential issues such as the penalty to be imposed if the athlete succeeds (analogously) in establishing No Fault or Negligence, although the Panel notes the content of the last sentence Article 10.5.1 of the WADC. This issue can be addressed in future rulings of the CAS in future sport arbitration cases. In the case at hand, and as further discussed below, the Panel takes the view that R. acted with negligence in continuing his use of marijuana until nine days prior to the commencement of the U.S. Trials.

77. In addition, the Panel recognizes that the agreement of the parties in the Stipulation of 17 September 2007 has established a maximum penalty of two years. This penalty lies within the Panel's sanctioning discretion under Article 10.6.3 (minimum 2 years, maximum 3 years).

G. R.'s Negligence in committing this 2nd Offense

78. As discussed above, the Panel considers the issues raised by USADA regarding the legitimacy of Dr. A.'s diagnosis and recommended treatment of R.'s condition to be irrelevant to this case. This applies also to USADA's allegation that R. has not provided sufficient and credible medical records which document his alleged ailment.

79. The primary issue of relevance in rendering this award is the fact that R.'s bodily specimens, when analyzed by the accredited laboratory, were shown to contain the Prohibited Substance Carboxy-THC. This fact is admitted by R. Because this violation represents a 2nd offense on the part of R., the Panel is bound by Article 10.6.3 of the USADA Protocol to impose a term of ineligibility between a minimum of two (2) years and a maximum of three (3) years. In addition, the violation automatically leads to Disqualification of the individual results obtained

by R. at the U.S. Trials with all resulting consequences, including forfeiture of any medals, points and prizes.

80. R. has voluntarily disclosed that marijuana residues entered his body and were present at the sample collection. He contends, however, that he did not know or suspect, even after using utmost caution, that the metabolites of his medicinal marijuana would remain in his system at levels significantly higher than 15 ng/ml after ceasing to use the substance nine days prior to competition. For this reason he should be exonerated or, at least, be eligible for a milder sanction.

81. The Panel cannot accept this defense. R. knew that no reliable scientific evidence existed regarding the disappearance of marijuana residues from his system. This was clearly readable from the "2007 USADA Guide to Prohibited Substances and Prohibited Methods of Doping". There it is stated:

"Marijuana and related products are prohibited in-competition for all sports. The metabolite of marijuana detected in the urine in testing is THC carboxylic acid (11-nor-tetrahydrocannibinol carboxylic acid) and is subject to a 15 ng/mL threshold. Remember that the marijuana metabolite can be detected for a long period of time after administration, and thus can be detected by an "in-competition" test even though the drug was not used at the competition.

How Long does Marijuana stay in the Body? *THC (the active substance in marijuana) can accumulate in fatty tissues of the user during long periods and heavy use. Thus the clearance of marijuana is more variable than for many other drugs. The clearance depends on the individual metabolism, body fat, THC content of the marijuana, and how frequently and how heavily the marijuana was used. Thus, there is not a way to predict how long THC metabolite can be detected in a given individual athlete".*

82. If R. never tested positive in previous years when stopping his use of marijuana 15 days prior to the respective competition, he should have known that he was acting at his peril in pushing the cut-off date closer to start of competition. His father and his friend, both of whom know the sport of Table Tennis, expressed their concern and worry that waiting to long to stop would result in a positive test.

83. As a user of a Prohibited Substance "out-of-competition" for medical reasons, it was R.'s personal duty to inform himself, not only by consulting the administering physician, but also by reading the 2007 USADA Guide regarding the risks of using the substance. If in further doubt, he should have used the USADA Hotline. R. was aware of the Hotline. He stated in a 2003 interview published on the website of the USATT following his return to play after his 1st two year sanction:

"Be very careful with anything that you put in your body. "Over the counter" does not mean that it is OK to take, especially not for Olympic events. Please call everything in to the USADA Hotline and check it out with the authorities, no matter what it is".

84. Although it is difficult for the Panel to believe that an experienced, highly-ranked international athlete such as R. would not have been aware of the TUEC application procedure, he would

have been informed of it if he had read the USADA Guide to Prohibited Substances or used the Hotline. These omissions reflect significant negligence on the part of R.

85. To R.'s benefit must be taken into consideration that the marijuana which remained in his system on 3 March 2007, the date of the sample collection, could not and did not enhance his performance. To the contrary, the Panel is led to believe on the basis of the witness testimony at the AAA hearing, that a slowing of his "head to hand" reaction time would be the more likely result.

86. The Panel underscores the position taken by USADA regarding R.'s attempt to obtain a retroactive TUE. The use of an anti-doping appeals procedure to obtain a retroactive TUE in order to eliminate penalties for past use which also has prospective effect permitting future use would undermine the TUE process and disadvantage those competitors who abide by established TUE rules. TUE procedures remain open to R. and the rules governing the granting of a TUE for ADD/ADHD disorders are set down in the 2007 USADA Guide. These, however, can have only prospective effect.

87. After all of the above, the Panel holds that a two (2) year term of ineligibility is both a fair and appropriate sanction in the case at hand. In setting the sanction at the minimum term laid down in Article 6.3.2, the Panel has taken into consideration the fact that the quantity of marijuana detected in R.'s system, although exceeding the threshold level, could not have enhanced his athletic performance. It also notes, without being bound by its terms, that both parties have agreed to a maximum two (2) year term in the Stipulations dated 17 September 2007.

Commencement of the Two-Year Term of Ineligibility

88. With regard to the commencement of the sanction, Article 10.8 of the USADA Protocol states as follows:

"The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection".

89. The Panel is cognizant that the AAA Award sets the starting date of R.'s ineligibility from the date of his acceptance of the Provisional Suspension agreed on 10 May 2007. The 15 month term of R.'s ineligibility as decided by the AAA Panel therefore terminated as of 10 August 2008. The Panel has noted that R. returned immediately to competition and has participated since then in six competitive events through 19 October 2008.

90. The extension of the ineligibility period from 15 months to 2 years pursuant to Article 10.6.3 will result in the forfeiture of all medals, points and prizes obtained in competitive events through to the date of this Award.

91. R.'s ineligibility ends on 10 May 2009.

The Court of Arbitration for Sport rules:

1. The appeal filed by the United States Anti-Doping Agency in the matter United States Anti-Doping Agency v. R. (AAA No. 30 190 000548 07) is upheld.

2. The decision of the American Arbitration Association / North American Court of Arbitration for Sport dated 21 May 2008 is partially annulled.

3. R. is declared ineligible for competition for two years commencing as of 10 May 2007, including his ineligibility from participating in U.S. Olympic, Pan American or Paralympic Games, trials or qualifying events, being a member of an U.S. Olympic, Pan American or Paralympic Games team and having access to the training facilities of the United States Olympic Committee (USOC) Training Centers or other programs and activities of the USOC, including, but not limited to grants, awards, or employment pursuant to the USOC Anti-Doping Policies.

4. All competitive results achieved by R. in the sport of Table Tennis commencing on or after 3 March 2007, in particular, all medals, points and prizes obtained in competitive events between 10 August 2008 and the date of this Award, if any, are hereby declared retroactively cancelled and rendered null and void.

5. All remaining points of the Decision and Award of the American Arbitration Association / North American Court of Arbitration dated 21 May 2008 are confirmed.

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