



**Tribunal Arbitral du Sport  
Court of Arbitration for Sport**

**CAS 2011/A/2524 WADA v. Federación Colombiana de Patinaje & Anhly Andrea Perez Moreno**

**AWARD**

**delivered by**

**THE COURT OF ARBITRATION FOR SPORT**

sitting in the following composition:

**President:** Mr. Conny Jörneklint, Chief Judge in Kalmar, Sweden

**Arbitrators:** Mr. Lars Hilliger, Attorney-at-law in Copenhagen, Denmark

Dr. Miguel Angel Fernández-Ballesteros, Professor in Madrid, Spain

in the arbitration between

**WORLD ANTI-DOPING AGENCY, Montreal, Canada**

Represented by Mr. Me François Kaiser, Mr. Olivier Niggli and Mr Ross Wenzel, attorneys-at-law, Lausanne, Switzerland

- Appellant-

and

**FEDERACIÓN COLOMBIANA DE PATINAJE, Bogotá, D.C. Colombia**

-First Respondent-

and

**ANHLLY ANDREA PEREZ MORENO, Bogotá, Colombia**

Represented by Mr. Andrés Charria Sáenz, attorney-at-law, Bogota, Colombia

- Second Respondent -

## 1. THE PARTIES

- 1.1 The World Anti-Doping Agency ("the Appellant" or "WADA") is a Swiss private law Foundation. Its seat is in Lausanne Switzerland, and its headquarters are in Montreal, Canada. WADA is an international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms.
- 1.2 The Federación Colombiana de Patinaje ("the FCP" or "the First Respondent"), is the governing body for rollersports in Colombia and is a member federation of the Fédération Internationale de Rollersports ("FIRS"). The head office of FIRS shall, according to its Statues, be in the country where the President resides or any other place proposed by him and approved by the Federation.
- 1.3 Mrs Anhlly Andrea Perez Moreno ("the Athlete" or "the Second Respondent") is an international-level roller sports athlete, affiliated with the FCP and was born on 22 December 1993.

## 2. FACTUAL BACKGROUND

- 2.1 On 28 October, 2010, the Athlete provided a urine sample during an in-competition test during the World Speed Rollersport Championships ("the Competition") held in Guane, Colombia, between 22 and 30 October 2010. The Athlete tested positive for methylhexanamine.
- 2.2 Methylhexanamine is a prohibited substance under the 2010 WADA Prohibited List, classified under S6 STIMULANTS (a) Non-Specified Stimulants but it was reclassified under S6 (b), Specified Stimulants on the 2011 WADA Prohibited List.
- 2.3 On 10 May 2011, the FCP Disciplinary Commission, following an oral hearing, imposed a 3 months ineligibility sanction on the Appellant and disqualified the results of the Athlete at the Competition ("the Appealed Decision" or "the FCP Decision"). It is the FCP Decision which is the subject of this appeals proceedings.

## 3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

- 3.1 On 9 August 2011, WADA filed its Statement of Appeal with the Court of Arbitration for Sport ("CAS") requesting it to rule:
1. *The Appeal is admissible.*
  2. *The decision by the FCP is set aside*
  3. *The Athlete is sanctioned with a two-year period of ineligibility starting from the date on which the CAS award enters into force and that any ineligibility period shall be credited against the total period of ineligibility to be served*

4. *All competitive results obtained by the Athlete from 28 October 2010 through the commencement of the applicable period of ineligibility shall be annulled*
5. *WADA is granted an award for costs.*

- 3.2 On 12 October 2011, WADA filed its Appeal Brief and Exhibits with the CAS.
- 3.3 On 18 November 2011, the Athlete submitted her Answer Brief. The Athlete made the request for a reduction of the sanction imposed to her by the FCP DC and that she gets a reprimand.
- 3.4 By letter dated 15 December 2011, the CAS informed the parties that the Panel to hear the appeal had been constituted as follows: President: Mr. Conny Jörneklint, Chief Judge in Kalmar, Sweden; Mr. Lars Hilliger, Copenhagen, Denmark as Arbitrator appointed by the Appellant; and Dr. Miguel Ángel Fernández-Ballesteros, Madrid, Spain, Arbitrator appointed by the Athlete and the Respondent. The parties did not raise any objection as to the constitution and composition of the Panel.
- 3.5 Since none of the parties had requested the holding of a hearing and after having reviewed the CAS file, the Panel decided in accordance with Article R57 of the Code of Sports-related Arbitration ("the Code"), to issue an award on the basis of the parties written submissions and to replace the holding of a hearing by final written observations. Consequently, the Appellant and Respondents were given the opportunity to file its final observations, respectively on 7 and 16 February 2012.
- 3.6 On 9 February 2012 WADA confirmed that it did not intend to file any final written submissions and that it confirmed all the arguments, evidence and requests made in the Statement of Appeal and Appeal Brief.
- 3.7 On 23 February 2012 the Athlete confirmed that she was not filing any final written submissions. However, the Athlete submitted that the period of ineligibility logically should start the day the samples were taken. The First Respondent did not file any answer to the request for final submissions.

#### 4. THE PARTIES' SUBMISSIONS

##### A. APPELLANT'S SUBMISSIONS

- 4.1 In summary, the Appellant submits the following in support of his appeal.

- (i) Admissibility of the Appeal

- a. *Applicable rules*

- 4.2 FIRS is the world governing body for rollersports. FIRS is a signatory of the World Anti-doping Code ("WADC"). The Anti-Doping Policy of the FIRS ("FIRS ADP")

was approved by WADA on 18 November 2008. The in-competition tests giving rise to the Appealed Decision took place at the Competition, an International event for the purpose of the FIRS ADP. Furthermore, the Athlete is an International-level athlete. Therefore, the FIRS ADP (December 2009 Edition) is applicable to this dispute.

*b. WADA's Right of Appeal*

- 4.3 According to Art. 13.2.1 of the FIRS ADP: *"In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court."*
- 4.4 In Art. 13.2.3 (f) of the FIRS ADP, WADA is explicitly listed as one of the persons with a right of appeal under Art. 13.2.1.
- 4.5 WADA therefore has a right of appeal to CAS under 13.2.1 of the FIRS ADP.

*c. Compliance with the deadline to appeal*

- 4.6 Art. 13.6 FIRS ADP states inter alia that *"the filing deadline for an appeal or intervention filed by WADA shall be the later of:*
- (a) Twenty-one (21) days after the last day on which any other party in the case could have appealed, or*
- (b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision."*
- 4.7 WADA received the Appealed Decision on 19 July 2011. The Statement of Appeal dated 9 August 2011 was therefore filed within the deadline prescribed by the FIRS ADP. The Appeal Brief was sent on 12 October 2011 and is filed within the time limit fixed by CAS in its letter dated 30 September 2011.

(ii) Anti-Doping Violation

- 4.8 Art. 4.1 of the FIRS ADP states that *"these Anti-Doping Rules incorporate the Prohibited List."*
- 4.9 Methylhexanamine (dimethylpentylamine) is a prohibited substance, which was classified under "S6 (a)" (*Non-specified Stimulants*) of the 2010 WADA Prohibited List but has been re-classified under "S6 (b)" (*Specified Stimulants*) on the 2011 WADA Prohibited List. It is prohibited only in-competition.

- 4.10 Notwithstanding the occurrence of the anti-doping violation in 2010, methylhexaneamine (dimethylpentylamine) shall, in accordance with the doctrine of *lex mitior*, be treated as a Specified Substance for the purposes of these appeal proceedings.
- 4.11 The Athlete did not seek to challenge the presence of the prohibited substance in her bodily samples within the context of the first instance proceedings.
- 4.12 The presence of a prohibited substance in the bodily sample of the Athlete is therefore established.
- 4.13 Consequently, the violation by the Athlete of Art. 2.1 of the FIRS ADP (presence of a prohibited substance or its metabolites or markers in an athlete's sample) is established.

(iii) Determining the Sanction

a. *General*

- 4.14 Pursuant to article 10.5 of FIRS ADP, an athlete can establish that, in view of the exceptional circumstances of his individual case, the otherwise applicable period of ineligibility shall be eliminated (in case of no fault or negligence as per article 10.5.1) or reduced (in case of no significant fault or negligence as per article 10.5.2).
- 4.15 With respect to Specified Substances, Article 10.4 of the FIRS ADP further states:

*"Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:*

*First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility. [...]"*

- 4.16 As a preliminary matter, it is worth recalling that Art. 10.5.1 (no fault) is not relevant to these proceedings. The Athlete has not appealed against the Appealed Decision, which imposed a period of ineligibility of three months. In any event it will be demonstrated below that the Athlete clearly bears fault.

b. *Origin of the prohibited substance in the athlete's bodily specimen*

- 4.17 In order to have the period of ineligibility eliminated or reduced under Art. 10.4 or reduced under Art. 10.5.2 of the FIRS ADP, the Athlete must first establish how the prohibited substance entered her system.

- 4.18 In that respect, the standard of proof imposed upon the athlete pursuant to art. 3.1 of the FIRS ADP is the balance of probability.
- 4.19 Pursuant to CAS precedents (CAS 2008/A/1515) "*the balance of probability standard entails that the athlete has the burden of persuading the Panel that the occurrence of circumstances on which the athlete relies is more probable than their non-occurrence or more probable than other possible explanations of the positive test*".
- 4.20 The Athlete has stated within the context of the first instance disciplinary proceedings that she does not know how the prohibited substance entered her system. In a letter to the FCP DC dated 18 April 2010, the Athlete wrote:
- "[...] I suppose that the medication found, the Methylhexanamine, was the result of some of the substances that I consumed while in the bus before the 500 m competition."*
- 4.21 Her legal counsel, in his submissions to the FCP DC dated 19 April 2011, put forward two possible "hypotheses". The first is that the prohibited substance came from "*some white tablets and a white powder*" given to the Athlete by the team physician, Dr Cerquera. According to this first hypothesis, either the tablets and/or powder must have been contaminated with methylhexanamine/dimethylpentylamine.
- 4.22 The second hypothesis is that the prohibited substance was contained within a white powder given to the Athlete by her fellow team member, Nicolas Bermudez, on the team bus on the way to the Competition venue on 28 October 2010. In the words of the Athlete, "*the truth is that I do not know the name of what he gave me*", which states the assumption of the Athlete and her counsel that this white powder should have been contaminated with methylhexanamine (dimethylpentylamine).
- 4.23 As made clear in the CAS case CAS 99/A/234 and CAS 99/A/235: "*The raising of an unverified hypothesis is not the same as clearly establishing the facts*". Perhaps even more on point is the Final Decision of the IBAF Doping Hearing Panel in the matter of IBAF 09-003, in which the panel makes the following comment (para. 7.12): "*In this case, the Athlete's suggestion that one or more of the medications or supplements that he took must have contained Boldenone is nothing more than speculation, unsupported by any evidence of any kind. He has not shown that Boldenone was an ingredient of any of those substances, nor has he provided any evidence (for example) that the supplements he took were contaminated with Boldenone. Such bare speculation is not nearly sufficient to meet the Athlete's burden under Article 10.5 of establishing how the prohibited substance got into his system*"
- 4.24 The Athlete is guilty of the same evidential shortcomings in the case at hand. Not only are two competing hypotheses put forward; both of those hypotheses rely on the contamination of the relevant products and the Athlete has made no effort to substantiate

the occurrence of such contamination. Furthermore, the Athlete and her representatives have apparently made no effort to even identify the various white powders and tablets which the Athlete unquestioningly consumed prior to her event on 28 October 2010. It is also worth noting that neither Nicolas Bermudez nor Anhlly Perez Moreno seek to attribute the presence of methylhexanamine (dimethylpentylamine) in their samples to any product given to them by the team physician.

- 4.25 In WADA's view this is a clear case of the Athlete failing to establish the origin of the prohibited substance in her bodily sample. The Athlete must therefore be sanctioned with a period of ineligibility of two years.

*c. Fault of the Athlete*

- 4.26 As there is no concrete explanation of the Athlete for the presence of the prohibited substance in her system, it is both unnecessary and impossible to assess (i) whether the Athlete intended to enhance her sport performance (within the context of the applicability of art. 10.4 FIRS ADP) and (ii) the degree of fault/negligence of the Athlete with respect to her ingestion of the prohibited substance.

- 4.27 However WADA will briefly address fault for the sake of completeness. On the basis of the scant and unsubstantiated explanations offered, WADA submits that that Athlete's fault was extremely significant and that no reduction of the standard two year sanction could be considered (even if the Athlete were able to establish origin).

- 4.28 According to art. 2.2.1 FIRS ADP, it is each athlete's personal duty to ensure that no prohibited substance enters his or her body. The fundamental duty of care is to check the composition of any product they ingest (or have it checked, but in any event remaining personally responsible).

- 4.29 The Athlete admits that she consumed an unidentified powder, from an unknown source given to her by her teammate Nicolas Bermudez. She consumed this powder blindly, without asking any questions or insisting on at least seeing the packaging/label. Although the Athlete is young, she competes at an elite level, has been subject to various anti-doping controls in her career and is certainly aware of her responsibility to ensure prohibited substances do not enter her system. She made the following statement during the disciplinary proceedings of the FCP DC:

*"The only thing I know is that when a general physician prescribes any medication to you, one must ask about what components it is made of and whether or not these may cause to mark doping."*

- 4.30 The Athlete knows she has a duty to question and investigate substances even when they are given to her by doctors. However, she blindly consumed an unidentified substance given to her by a sixteen year old member of her team.

(iv) Conclusion

- 4.31 The Athlete concedes herself that she cannot explain the origin of the substance in her sample with any concrete evidence. In short, she recalls various unidentified substances that she consumed prior to the anti-doping control and suggests that one of them must have been contaminated with methylhexaneamine.
- 4.32 The Athlete has failed to establish how the prohibited substance entered her system and must be sanctioned with a period of ineligibility of two years.
- 4.33 Although an analysis of fault is (i) not relevant to this case and (ii) inherently difficult where no concrete explanation is provided, it is abundantly clear that the Athlete completely failed in her duty to verify the source and ingredients of the products she ingested, a duty she was certainly aware of.

**B. THE FIRST RESPONDENT SUBMISSIONS**

- 4.34 The First Respondent remained silent during the present proceedings and, consequently, did not file an answer as requested by the CAS Court Office on 17 October 2011, notification which was correctly delivered by courier to the Respondents.

**C. THE SECOND RESPONDENT'S SUBMISSIONS**

- 4.35 In summary, the Athlete submits the following in defense:

(i) Facts

- 4.36 All facts presented by WADA according to the organization of the sport of rollersport, the Competition, the testing, the analysis of the samples and the classification of the prohibited substances are correct.

(ii) Presence of the prohibited substances in the samples

- 4.37 The presence of methylhexaneamine in the Athletes samples was due to the ingestion of contaminated and poorly labeled product, Pre Surge, given to her by a sportsman colleague Mr. Nicolás Bermudez. This product (the white powder) contained methylhexaneamine but it was impossible for the Athlete or Mr. Bermudez to know of its presence. This fact made it impossible to take any precautionary measures to avoid the presence of these drugs in the body of the Athlete.



a. *Has the Athlete established how the prohibited substance entered his body?*

4.38 It has been established in an irrefutable manner, that the methylhexaneamine was present in the supplement Pre Surge. This supplement was given to her by Mr. Bermudez, and there was no indication in the label about the presence of methylhexaneamine. This supplement, as it was indicated in the process in the first instance for Mr. Bermudez, does not indicate that methylhexaneamine is among its components. The components mentioned on the label of the product Pre Surge were searched by Mr. Bermudez in the databases of the pages of the doping control and none were present in the list of prohibited substances. Mr. Bermudez told this to the Athlete and the Athlete ingested the supplement.

4.39 Therefore the Athlete ingested Pre Surge and this is how methylhexaneamine entered in her system.

b. *Was the substance intended to enhance the Athlete's sport performance?*

4.40 Lack of intention by the Athlete to improve her performance follows logically from the abovementioned; she was reassured and ingested the white powder, Pre Surge, without any intention of enhancing her performance, simply because that powder didn't have the potential of improving the performance. Intention to improve her performance can hardly be proven when there was an intimate conviction that there was no substance to improve performance in the supplement she ingested. The Athlete never intended to improve her performance with methylhexaneamine because she never even suspected that the ingested products contained methylhexaneamine. Thus it can be said that the two situations necessary for a reduction of penalty to a reprimand is met.

c. *The laboratory of Coldeportes*

4.41 The Athlete refers to the results of the study performed by the Doping Control Laboratory of the Colombian Sports Institute of the product Pre Surge. The laboratory of Coldeportes is one of two laboratories accredited by WADA in South America. The laboratory found that the product Pre Surge contains the substance without being listed in their composition and not being mentioned on the label of the product. This fact confirms that it was an insurmountable error made by the Athlete. There was no possibility to avoid the intake of these products, as the laboratory itself indicates in its report.

## 5. LEGAL ANALYSIS

### I. JURISDICTION OF THE CAS

5.1 Article R47 of the CAS Code provides as follows:

*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.*

5.2 Article 13.1 of the Anti-Doping Policy of FIRS ("FIRS ADP") states as follows:

#### *13.1 Decisions Subject to Appeal*

*Decisions made under these Anti-Doping Rules may be appealed as set forth below in Article 13.2 through 13.4 or as otherwise provided in these Anti-Doping Rules.*

5.3 Article 13.2.1 of the FIRS ADP says:

#### *13.2.1 Appeals Involving International-Level Athletes*

*In cases arising from participation in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.*

5.4 In article 13.2.3 it is said that WADA is one of the persons which are entitled to appeal in cases under Article 13.2.1.

5.5 It is not contested that the CAS has jurisdiction in this dispute.

5.6 According to Article R57 of the CAS Code, the Panel has full power to review the facts and the law of the case. Furthermore, 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.

### II. ADMISSIBILITY

5.7 With reference to para. 5.3 above article 13.2.1 of the FIRS ADP states that in cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to the CAS in accordance with the provisions applicable before such court.

5.8 Article 13.6 of the FIRS ADP provides that "*The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party.*"

5.9 It is further said in the same article:

*The above notwithstanding, the filing deadline for an appeal or intervention filed by WADA shall be the later of:*

*(a) Twenty-one (21) days after the last day on which any other party in the case could have appealed, or*

*(b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision.*

5.10 WADA has stated that it received the Appealed Decision on 19 July 2011, which has not been contradicted by the Respondents. WADA filed the Statement of Appeal on 9 August 2011.

5.11 In light of the above, the Panel finds the Appeal admissible.

### III. APPLICABLE LAW

5.12 Article R58 of the CAS Code provides as follows:

*The Panel shall 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.*

5.13 It is common ground between the parties that the applicable regulations of this case are the FIRS ADP which applies to all members and participants in the activities of the FIRS or of its member federations. Therefore, the FIRS ADP shall apply.

### IV. THE PANEL'S FINDINGS ON THE MERITS

(i) Anti-Doping Violation:

5.14 The Athlete has accepted the results of the A Sample analysis and has waived analysis of the B Sample. According to Article 2.1.2 FIRS ADP sufficient proof of an anti-doping rule violation under Article 2.1 is established by presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed.

5.15 In Article 4.1 of the FIRS ADP it is stated that "*These Anti-Doping Rules incorporate the Prohibited List which is published and revised by WADA as described in Article 4.1 of the Code.*"

5.16 The presence of the prohibited substance methylhexanamine in the Athlete's bodily samples is therefore established thus an anti-doping rule violation has also been established.

(ii) Determining the sanction

5.17 According to Art. 10 of the FIRS ADP the following sanctions are applicable.

5.18 As a result, the Panel now has to put under scrutiny whether Art. 10.4 or 10.5 may apply to the present case.

***10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances***

*Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:*

*First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.*

*To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.*

*Comment to Article 10.4: Specified Substances as now defined in Article 4.2.2 are not necessarily less serious agents for purposes of sports doping than other Prohibited Substances (for example, a stimulant that is listed as a Specified Substance could be very effective to an Athlete in competition); for that reason, an Athlete who does not meet the criteria under this Article would receive a two-year period of Ineligibility and could receive up to a four-year period of Ineligibility under Article 10.6. However, there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.*

*This Article applies only in those cases where the hearing panel is comfortably satisfied by the objective circumstances of the case that the Athlete in taking or Possessing a Prohibited Substance did not intend to enhance his or her sport performance. Examples of the type of objective circumstances which in combination might lead a hearing panel to be comfortably satisfied of no performance-enhancing intent would include: the fact that the nature of the Specified Substance or the timing of its ingestion would not have been beneficial to the Athlete; the Athlete's open Use or disclosure of his or her Use of the Specified Substance; and a contemporaneous medical records file substantiating the non-sport-related prescription for the Specified Substance. Generally, the greater the*

*potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance.*

*While the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel, the Athlete may establish how the Specified Substance entered the body by a balance of probability.*

*In assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases.*

### **10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances**

#### **10.5.1 No Fault or Negligence**

*If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample 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 eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.*

#### **10.5.2 No Significant Fault or Negligence**

*If an Athlete or other Person establishes in an individual case 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 not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

*Comment to Articles 10.5.1 and 10.5.2: FIRS' Anti-Doping Rules provide for the possible reduction or elimination of the period of Ineligibility in the unique circumstance where the Athlete can establish that he or she had No Fault or Negligence, or No Significant Fault or Negligence, in connection with the violation.*

*This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Athlete was admittedly at fault. These Articles apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. Article 10.5.2 may be applied to any anti-doping rule violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rule violations where knowledge is an element of the violation.*

*Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.*

*To illustrate the operation of Article 10.5.1, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)*

*For purposes of assessing the Athlete's or other Person's fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the Athlete only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article.*

*While Minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete's or other Person's fault under Article 10.5.2, as well as Articles 10.3.3, 10.4 and 10.5.1.*

*Article 10.5.2 should not be applied in cases where Articles 10.3.3 or 10.4 apply, as those Articles already take into consideration the Athlete or other Person's degree of fault for purposes of establishing the applicable period of Ineligibility.*

- 5.19 To prevail under Art. 10.4 of the FIRS ADP, the Athlete must first (i) establish how the Specified Substance entered her body and then (ii) that such Specified Substance was not intended to enhance the Athlete's sport performance. The Panel shall put both these requirements under scrutiny.
- 5.20 Prior to this analysis, the Panel considers it worth pointing out that it is to be kept in mind that the Anti-Doping Rules adopts the rule of strict liability. From the strict liability principle follows that, once WADA has established that an anti-doping rule violation has occurred, as in the present case, it is up to the Athlete to demonstrate that the requirements foreseen under Art. 10.4 of the FIRS ADP are met. Such a burden of proof is expressly stated under Art. 3.1 second phrase of the FIRS ADP, which provides that: *"where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6, where the Athlete must satisfy a higher burden of proof. [...]"*.
- 5.21 As to the first requirement, i.e. the ingestion of the Prohibited Substance, The Athlete argues that such ingestion probably have occurred when she was taking a white powder provided to her by a teammate of hers Mr. Nicolás Bermudez. The Athlete's suggestion that these supplement that she took probably have contained the Prohibited Substance is mere speculations, unsupported by any evidence of any kind. Consequently it cannot be accepted by the Panel. This means that Art 10.4 cannot be applied in this case.
- 5.22 The conclusion under para. 5.20 means that the Panel has to go on to analyze whether Art. 10.5.1 or 10.5.2 can be applied.
- 5.23 Art. 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases. For purposes of assessing the Athlete's or other person's fault or negligence under either of these articles, the evidence considered must be specific and relevant to explain the Athlete's or other person's departure from the expected standard of behavior. While minors are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the Athlete's or other Person's fault or negligence under Article 10.5.2.
- 5.24 The Comment of Art. 10.5.1 and Art.10.5.2 mentions that a sanction could not be completely eliminated on the basis of No Fault or Negligence in the circumstances when a positive test is resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination). But the Comment adds that depending on the unique facts of a particular case, the referenced illustration could result in a reduced sanction based on No Significant Fault or Negligence. For example, reduction may well be appropriate if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin

- purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements. The Panel finds that this means that the FCP DC was right when it found that the situation is not such that the Athlete has established that she bears No Fault or Negligence. This means also that Art 10.5.1 FIRS ADP cannot be applied in this case.
- 5.25 In this case the Athlete relied on a supplement which was provided to her in the bus which carried the athletes to the competition area just before the Competition. She accepted the explanation from a teammate that he had been convinced that the supplement was okay to use. When she took this supplement, which came from an unknown source to her, she did not take any concrete action to make sure that the supplement was clean.
- 5.26 There is a rich CAS case law concerning the standard of behavior required of the Athlete concerning nutritional supplements. There are examples when a CAS Panel has used Art. 10.5.2 to reduce the sanction when the source of the Adverse Finding has been supplements. In the present case, the Panel cannot even determine if the source of the Adverse Finding was the supplement provided to the Athlete during the bus tour to the competition. The Athlete has ignored the advice from her team doctor not to use other supplements than those acquired by the Federation and under the doctor's prescription.
- 5.27 As already mentioned above the Comment to Art. 10.5.2 clarifies that minors are not given special treatment per se in determining the applicable sanction, but youth and lack of experience are relevant factors to be assessed in determining the Athlete's fault under Art. 10.5.2.
- 5.28 The Athlete in this case is an international-level athlete and she competed in the World Speed Rollersport Championships. From the Appealed Decision it appears that the athletes of the Colombian team to the Championships had got due information about doping and the risks to intake prohibited substances.
- 5.29 According to CAS case law there are several cases concerning young athletes. It is worth citing the award in CAS 2003/A/447 where the Panel found that *"At the age of 16 years, the Appellant was able to discern what constitutes negligent conduct, especially when the applicable standard of caution evidenced in the numerous warnings and instructions regarding vitamins and food supplements of unidentified origin was clearly communicated to athletes by their respective sport federations."*
- 5.30 It is the Panel's view that an athlete, in order to fulfill his or her duty according to Art. 2.1 FIRS ADP, has to be active to ensure that a medication or a supplement that he or she uses does not contain any compound that is on the Prohibited List. In the present case, the Athlete has not done anything to ensure this, even if one considers her youth. The Panel is of the view that the Athlete has not established that she bears No Significant Fault or Negligence. Therefore, the Panel finds no ground to reduce the sanction according to Art. 10.5.2 FIRS ADP.



(iii) What is the starting point of Ineligibility?

- 5.31 Pursuant to Art. 10.9 FIRS ADP *"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 imposed"*.
- 5.32 According to Art. 10.9.1 *"the FIRS or Anti-Doping Organization imposing the sanction may start the period of Ineligibility at an earlier date where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred"*.
- 5.33 According to the Appealed Decision, the start date of the ineligibility period was on 10 May 2011 with a deduction of the 30-day period of provisional suspension.
- 5.34 The panel finds that the period of Ineligibility shall start on 10 May 2011 with deduction of the provisional period served by the Athlete.

(iv) Disqualification of the Results

- 5.35 Art. 9 of FIRS ADP provides that *"An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes"*. Art. 10.8 states *"In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes"*.
- 5.36 Based on Art 9 FIRS ADP the Panel hereby confirms the Appealed Decision with respect to the disqualification of the result of the Athlete obtained in the Competition. FCP DC has not ruled that further results be disqualified. WADA has requested that further results be disqualified. According to Art. 10.8 the Panel finds that all competitive results obtained by the Athlete from 28 October 2010 until the date of this award shall be disqualified with all the resulting consequences including forfeiture of any medals, points and/or prizes.

## 6. COSTS

- 6.1 The Panel notes that the present case is of disciplinary nature and that the appeal has been filed against a decision rendered by a national federation acting by delegation of powers of an international federation (FIRS). Article R65.1 CAS Code provides that:

*"[t]he present Article R65 is applicable to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by [...] a national sports-body acting by delegation of powers of an international federation or sports-body."*

6.2 Article R65.2 CAS Code stipulates:

*"[...] the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS."*

6.3 Art. 65.3 of the CAS Code provides that:

*"The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion that parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties."*

6.4 Since this matter can be assimilated to a disciplinary case of an international nature ruled in appeal, no costs are payable to the CAS beyond the Court Office fee of CHF 1'000 paid by the Appellant prior to its Statement of Appeal, which in any event is kept by the CAS.

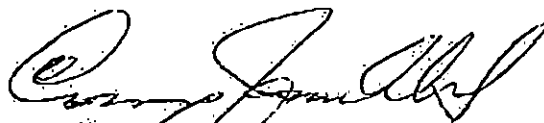
6.5 In the case at hand, the appeal filed by WADA is upheld. As a general rule, the CAS grants the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings. The CAS may however depart from that principle under certain circumstances, in particular when such a burden put on the losing party would put its financial situation at stake. Such appears to be the case here. As a consequence, the Panel takes the view that it is reasonable in the present case to order that each party shall bear its own costs.

\* \* \* \* \*

**ON THESE GROUNDS****The Court of Arbitration for Sport rules that:**

1. The appeal of WADA is admissible.
2. The decision rendered by the Disciplinary Commission of the FCP on 10 May 2011 against Mrs Anhlly Andrea Pérez Moreno is set aside.
3. Anhlly Andrea Pérez Moreno is sanctioned by a two-year period of ineligibility, which started on 10 May 2011. The period of provisional suspension of 30 (thirty) days shall be credited against the total period of ineligibility to be served.
4. All competitive results obtained by Anhlly Andrea Pérez Moreno from 28 October 2010 shall be disqualified with all the resulting consequences including forfeiture of any medals, points and/or prizes.
5. This award is pronounced without costs, except for the Court Office fee of CHF 1'000 (one thousand Swiss Francs) already paid by WADA which is retained by the CAS.
6. Each party shall bear its own costs.
7. All other prayers for relief are dismissed.

Lausanne, 23 August 2012

**THE COURT OF ARBITRATION FOR SPORT**

Conny Jörneklint  
President