Arbitration CAS 2012/A/2747 World Anti-Doping Agency (WADA) v. Judo Bond Nederland (JBN), Dennis de Goede & Dopingautoriteit (NADO), award of 15 April 2013

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Judo
Doping (methylhexaneamine)
Evidence of the lack of intent to enhance performance under Article 10.4 WADC
Difference between the sanction under Articles 10.5.2 and 10.4 WADC
Rationale of Article 10.4 WADC
Difference between direct and indirect intent
Establishment of intent and prohibited substances in- and out-of-competition

1. **Clause two of Article 10.4 of the World Anti-Doping Code (WADC) does not require the athlete to prove that he did not take the product with the intent to enhance sport performance. Otherwise, an athlete's usage of nutritional supplements, which are generally taken for performance-enhancing purposes, but which is not *per se* prohibited by the WADC, would render Article 10.4 inapplicable even if the particular supplement that is the source of a positive test result contained only a specified substance. Although an athlete assumes the risk that a nutritional supplement may be mislabelled or contaminated and is strictly liable for ingesting any banned substance, Article 10.4 WADC distinguishes between specified and prohibited substances for purposes of determining an athlete's period of ineligibility. Art. 10.4 provides a broader range of flexibility in determining the appropriate sanction for an athlete's use of a specified substance because there is a greater likelihood that specified substances, as opposed to other prohibited substances, could be susceptible to a credible, non-doping explanation.**

2. **According to art. 10.5.2 WADC the standard two-year sanction can only be reduced – at a maximum – down to one year (half of the standard sanction). Art. 10.4 WADC, on the contrary, allows a further reduction. However, in both provisions the decisive criteria to justify any reduction is the concept of fault. It therefore does not come as a surprise that – irrespective of the applicable provision – the length of sanction imposed in CAS jurisprudence in relation to nutritional supplements containing the specified substance methylhexaneamine does not differ dramatically.**

3. **The express language of art. 10.4 WADC is ambiguous and susceptible to more than one interpretation. It seems rather obvious that art. 10.4 WADC was intended by the drafters of the WADC as a *lex specialis*. In cases involving specified substances a reduction of the standard sanction should be contemplated on the basis of art. 10.4 WADC only. This is clearly evidenced when comparing the conditions and the consequences contained in art. 10.4 WADC and art. 10.5.2 WADC. The reason for this**

differentiation is clearly indicated in the comment to art. 10.4 WADC. According thereto, specified substances – unlike other prohibited substances – are particularly susceptible to unintentional anti-doping rule violations. Thus, the drafters of the WADC wanted to exclude reductions of the standard sanction involving a specified substance only where the anti-doping rule violation was committed intentionally. Therefore, in cases where the prerequisites for a reduction under art. 10.4 WADC are not fulfilled, logically there is no room for a reduction based on the more restrictive provision in art. 10.5.2 WADC.

4. **Intent is, in principle, established if an athlete knowingly ingests a prohibited substance. However, an athlete's behaviour may also be qualified as intentional, if the athlete acted with indirect intent only, i.e. if the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. Article 10.4 remains applicable, if the athlete's behaviour was not reckless, but "only" oblivious. In any event, the distinction between indirect intent and the various forms of negligence is difficult to establish in practice.**

5. **The assessment whether or not an athlete acts with (direct or indirect) intent within the meaning of art. 10.4 WADC is further complicated if the substance at stake is prohibited in-competition only, but was ingested by the athlete out-of-competition. In principle, the drafters of the WADC wanted to exclude the applicability of art. 10.4 WADC only if the anti-doping rule violation was committed intentionally. The taking of a substance out-of-competition that is only prohibited in-competition does not constitute, as such, an anti-doping rule violation. The taking of such substance only becomes an anti-doping rule violation, if the substance is still present in the athlete's fluids in-competition. Therefore, an athlete only acts intentionally within the above meaning, if his intention covers both, the ingestion of the substance and it being present in-competition.**

1. PARTIES

1.1 The World Anti-Doping Agency ("WADA" or "Appellant"), is a Swiss private law foundation with seat in Lausanne, Switzerland and its headquarters in Montreal, Canada.

1.2 Judo Bond Nederland ("JBN" or "First Respondent") is the national federation for Judo in the Netherlands.

1.3 Mr Dennis Goede ("the Athlete" or "Second Respondent") is a judoka affiliated to JBN.

1.4 Dopingautoriteit ("NADO" or "Third Respondent") is the national doping agency of the Netherlands. It is responsible for the implementation and application of the World Anti-Doping Code ("WADC").

2. FACTS

2.1 The Second Respondent tested positive for *methylhexaneamine* according to a sample collected further to an in-competition test on the occasion of the final round of the National Judo League in Nijmegen on 28 May 2011. *Methylhexaneamine* is a Prohibited Substance classified under S6 b (Specified Stimulants) on the WADA 2011 Prohibited List. The substance is prohibited in-competition only.

2.2 The Second Respondent was not nor is he currently a member of the national selection and is not included in the First Respondent's testing pool. He had been asked to compete in the final round by his coach Mr Mark van der Ham due to the fact that two of his teammates had been injured and could not compete.

2.3 The Prohibited Substance in the sample can be traced back to the food supplement *Jack3d* (the Supplement) that the Second Respondent took prior to testing positive. The Second Respondent received the Supplement from his brother – who is a medical student – as a gift. The label of the Supplement refers to geranium as an ingredient, but does not explicitly list *methylhexaneamine* as an ingredient. The Explanatory Notes on the 2011 WADA Prohibited List with respect to *methylhexaneamine/dimethylpentylamine* read as follows:

> *"The stimulant "methylhexaneamine" (which may be described, like many other substances, by other chemical names) is now included in the Prohibited List as a Specified Substance. This substance is now often marketed as a nutritional supplement and may frequently be referred to as "geranium oil" or "geranium root extract".*

2.4 Also, the website of a Dutch Online Store, where *Jack3d* can be purchased, lists *"Geranium (1.3-Dimethylamylamine of Methylhexamine)"* as an ingredient. The website furthermore contains a warning that athletes that are subject to doping controls should not use any Supplements that contain geranium.

2.5 The Second Respondent did neither check the label of the product nor did he do any other research as to the contents of *Jack3d*.

2.6 According to the Second Respondent, he used *Jack3d* for the purposes of overcoming tiredness. He took the Supplement for the last time 10 days before testing positive on 28 May 2011.

2.7 At the time of sample collection, the applicable anti-doping rules were to be found in the *"2.05 Dopingreglement"* dated 3 June 2008 (the "Previous JBN Rules")

2.8 On 25 August 2011, the Disciplinary Committee of the First Respondent (the "JBN DC") imposed a period of ineligibility of two years on the athlete.

2.9 On 26 November 2011, a new version of the *"Dopingreglement"* (the "Current JBN Rules") came into effect.

2.10 On 9 December 2011, the Third Respondent appealed against said decision of the JBN DC to the JBN Appeal Board (the "JBN AB").

2.11 By decision dated 29 December 2011 (the "Appealed Decision"), the JBN AB sanctioned the Athlete with a *"warning together with a reprimand"*.

2.12 On 17 January 2012, the Appellant received the Appealed Decision in Dutch as an attachment to an email from the Third Respondent.

2.13 On 10 February 2012, the Appellant requested the complete case file and a translation of the Appealed Decision from the Third Respondent. The Appellant received the file by email on 17 February 2012.

2.14 Subsequently, the Appellant requested a copy of the applicable anti-doping regulations from the Third Respondent. The latter provided the Appellant with the Current JBN Rules with a translation of the provision dealing with WADA's appeal's deadline.

2.15 On 9 March 2012, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS").

2.16 The relevant parts of the Rules and Regulations in the dispute at hand read as follows:

JBN Rules dated 3 June 2008 (Previous JBN Rules; 2.05 Dopingreglement)

Part II Violations

…

Article 3 Presence of prohibited substance(s) and/or evidence of prohibited method(s)

3.1. The presence of a prohibited substance and/or evidence of a prohibited method, the associated metabolites and/or markers in an athlete's sample constitute a violation of these regulations.

3.2. Excepting those substances for which a quantitative threshold is specifically identified in the prohibited list and/or the International Standard for Laboratories, the presence of any quantity of a prohibited substance, evidence of a prohibited method, the associated metabolites and/or markers in an athlete's sample constitute a violation of these regulations.

3.3 (…)

3.4. Presence shall be considered to have been proven when:

- *a. there is a positive test result after the analysis of the A sample when the athlete waives analysis of the B sample; and/or*
- *b. there is positive result when the analysis of the B sample confirms the result of the analysis of the A sample.*

3.5. (…)

3.6. (…)

3.7. It is each athlete's personal duty to ensure that no prohibited substance, metabolite and/or marker enters his or her body, and that no prohibited substances, evidence of prohibited methods, metabolites and/or markers found in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish a violation of article 3.

…

Article 20 Jurisdiction/Application

20.1. In the case of a suspected violation, these regulations continue, for the duration of the procedures/disciplinary procedures associated with the violation including any appeals (…)

20.2- 20.9. (…)

…

Art. 38 Ineligibility

38.1. the ineligibility period imposed for a violation of article 3, article 4 or article 8 shall be two years in the case of a first violation, unless

a. the conditions referred to in article 39, article 40, article 41 and/or article 42 for the reduction of the sanction are met; or

b. the conditions referred to in article 43 for the extension of the sanction are met.

38.2.- 38.6. (…)

Art. 39 Specified Substances

39.1. For the purpose of the application of the provisions stated below in this article, all of the specified substances on the prohibited list, with the exception of:

a. anabolic substances

b. hormones and related substances

c. the hormone antagonists and modulators designated as non- specified substances on the prohibited list; and

d. the stimulants designated as non- specified substances on the prohibited list.

39.2. (…)

39.3. If a member in question demonstrates (i) how the specified substance(s) have entered his or her body (in case of a violation of article 3) (…) and (ii) demonstrates that the administration or ingestion, the use or the possession of that specified substance(s) did not take place with the intention of enhancing sporting performance or of masking the use of any prohibited substance(s) and/or prohibited method(s), the ineligibility period described in article 38.1 shall be replaced by:

a. at least a warning, associated with a reprimand, but no ineligibility period for future events, and

b. a maximum ineligibility period of two years.

39.4. The statement of the member in question alone is not adequate to meet the requirements of article 39.3 relating to proof. In addition to his or her statement, the member in question must provide firm evidence that he or she did not intend to enhance his or her sporting performance or to mask the use of any prohibited substance(s) and/or prohibited method(s).

39.5. When determining the extent to which the ineligibility period referred to in article 38.1. shall be reduced on the basis of article 39, the level of fault of the member in question shall be taken into account.

…

Article 46 Commencement of ineligibility period

46.1 The ineligibility period starts on the day of the decision made in the disciplinary proceedings, unless otherwise stated in these regulations.

46.2 If there is a substantial delay in the procedures referred to in Part VII and/or Part VIII, and if the delay cannot be attributed to the member, the disciplinary body may allow the ineligibility period to start at a point in time before that mentioned in article 46.1 but t the earliest on the date when the most recent violation of these regulation was committed.

46.3. If the member, after the Doping Authority, the federation, the international federation and/or the national sports federation or NADO of another country has informed him or her about the possible suspected violation, immediately (in other words, at least before participating in a later competition) admits to a violation of the kind referred to in Part II, the ineligibility period may start on the last date of the violation in question. At least half of the ineligibility period to be imposed shall, however, start on the day of the disciplinary decision. (…)

46.4 The ineligibility period associated with the imposition of a disciplinary measure shall be deducted from the total ineligibility period that is imposed, unless the member in question has failed to comply strictly with the said disciplinary measure. The same shall apply to a provisional measure, suspension or ineligibility period imposed by a competent body/disciplinary body.

46.5 Contrary to the options set out in article 46, there are no options available for allowing an ineligibility period that is to be imposed to begin before the point of rime referred to in article 46.1.

Article 62 Relationship between regulations

The application of these regulations is not limited to other regulations of the JBN. The disciplinary right of the JBN is therefore applicable only to the provisions of these doping regulations to the extent that the disciplinary right is not contrary to the content and/or tenor of these doping regulations.

JBN Rules dated 26 November 2011 (Current JBN Rules, Doping Reglement Nederland)

Part X Appeals

Article 67 – Interpretation

67.1. In relevant cases the interpretation of these regulations will be based on the English text of the World Anti-Doping Code and/or International Standards at the time of the doping tests.

67.2. (…)

67.3. In the absence of express provision to the contrary of these regulations, these regulations will be interpreted as an independent and autonomous text rather than on the basis of laws or statutes.

67.4. (…)

67.5. (…)

67.6. These regulations have been formulated in accordance with the provisions of the World Anti-Doping Code and should be interpreted in a manner that can be reconciled with these parts of the Code.

67.7. The explanation of the provisions of the World Anti-Doping Code can be used for the interpretation of these regulations. The same shall apply to an explanation of these regulations drawn up by the Anti-Doping authority, if such an explanation is available
67.8. (…).

2.17 Since 28 May 2011 the Second Respondent has not participated in any competitions.

3. PROCEEDINGS BEFORE THE CAS

3.1 The proceedings before the CAS can be summarized in their main parts as follows:

3.2 By Statement of Appeal/Appeal Brief dated 9 March 2012, the Appellant filed its Appeal.

3.3 On 19 March 2012, the CAS Court Office informed the parties, that the case had been assigned to the Appeals Arbitration Division of the CAS and should therefore be dealt with according to Art. R47 *et seq* of the Code of Sports-related Arbitration (the "Code"). The CAS Court Office further invited the Respondents to submit to the CAS an answer containing – *inter alia* – a statement of defence, any defence of lack of jurisdiction, and any exhibits or specification of other evidence upon they intended to rely. The CAS Office further took note of the Appellant's nomination of the Hon. Michael J. Beloff, QC as arbitrator and requested the Respondents to jointly nominate an arbitrator from the list of CAS arbitrators within 10 days of receipt of the letter.

3.4 By letters dated 30 March 2012 the Respondents nominated Prof. Ulrich Haas as arbitrator.

3.5 By letter dated 30 March 2012 the legal representative of the First Respondent informed the CAS of the limited financial resources of the Second Respondent and suggested that Prof. Ulrich Haas should act as sole arbitrator so as to limit the costs of the proceedings. Further, acting in the name of the Second Respondent, he requested financial support for the costs of the appeal procedure for the Second Respondent. Finally, he requested an extension of time of two weeks to file his defence.

3.6 On 3 April 2012, the CAS Court Office requested the Appellant to advise the CAS Court Office whether it agreed to the extensions of the Second Respondent's deadline. Further the CAS Court Office requested the parties to advise the CAS Court Office whether they agreed to submit the matter to a Sole Arbitrator and – in the affirmative – whether they agreed to the appointment of Prof. Ulrich Haas as Sole Arbitrator.

3.7 By letter dated 5 April 2012 the Appellant agreed to the extension of the Second Respondent's deadline as well as to the appointment of Prof. Ulrich Haas as Sole Arbitrator.

3.8 By letters dated 5 April 2012 the First and Third Respondents agreed to the appointment of Prof Ulrich Haas as Sole Arbitrator.

3.9 On 5 April 2012 the CAS Court Office extended the Second Respondent's deadline to file his answer to the Appeal until 23 April 2012. Further the CAS Court Office confirmed that the First and Third Respondents were due to file their answers by 9 April 2012. As this was a public holiday in the Netherlands, the First and Third Respondents were permitted to file their answers by 10 April 2012, pursuant to Article R32 of the CAS Code.

3.10 On 10 April 2012 the First and Third Respondents filed their answers.

3.11 By letter dated 17 April 2012 the Second Respondent informed the CAS Court Office that he was still waiting for a response to his request for legal aid and therefore requested an additional extension of two weeks from receipt of the decision relating to his application for legal aid.

3.12 On 18 April 2012 the CAS Court Office requested the other parties to advise the CAS Court Office within two days of receipt of the letter whether they agreed to the Second Respondent's request for an extension of the deadline.

3.13 By letters dated 18 April 2012, 19 April 2012, 20 April 2012 all other parties agreed to such an extension.

3.14 On 4 May 2012 the CAS Court Office informed the parties that legal aid had been granted to the Second Respondent by the President of the International Council of Arbitration for Sport and that therefore the Second Respondent was granted two weeks from receipt of the letter to file his answer.

3.15 On 16 May 2012 Mr J. M. M. Janssen of De Voort Advocaten informed the CAS Court Office that his firm would now represent the Second Respondent and requested a further extension of the deadline to file an answer to the Appeal until 23 May 2012.

3.16 On 16 May 2012, the CAS Court Office informed the parties that such extension of the deadline had been granted on behalf of the CAS Secretary General pursuant to Article R32 of the Code.

3.17 On 25 May 2012 the parties were invited to inform the CAS Court Office by 1 June 2012 whether their preference was for a hearing to be held in the matter or for the Sole Arbitrator to issue an award based on the parties' written submissions.

3.18 By letters dated 29 May 2012 and 31 May 2012 the Appellant, the First and the Third Respondents did not request a hearing to be held.

3.19 By letter dated 29 May 2012 the Appellant requested to file a short supplementary brief dealing with the sole issue of CAS jurisdiction.

3.20 On 30 May 2012 the CAS Court Office informed the parties that Prof Ulrich Haas had been appointed Sole Arbitrator in the matter.

3.21 By letters dated 31 May 2012 and 1 June 2012, the First and Second Respondents objected to the Appellant's request to file a supplementary brief.

3.22 On 1 June 2012 the CAS Court Office informed the parties that the Sole Arbitrator had decided to issue a decision on jurisdiction/admissibility of the appeal based on the parties' written submissions only. The Appellant was further invited to file a short submission related to the issues of jurisdiction/admissibility.

3.23 On 6 June 2012 the CAS Court Office informed the parties that Ms Anne Hossfeld had been appointed *ad hoc* clerk in the matter.

3.24 By letter dated 7 June 2012 the Appellant submitted its Supplementary Brief.

3.25 By letter dated 8 June 2012 the CAS Court Office informed the Respondents that they were granted two weeks from receipt of the letter to respond to the Appellant's submission on jurisdiction/admissibility.

3.26 On 21 June 2012 the CAS Court Office on behalf of the Sole Arbitrator requested from the Appellant and the First Respondent translations of certain documents they had submitted on file.

3.27 By letter dated 25 June 2012 the First and Third Respondents submitted their responses to the Appellant's Supplementary Brief.

3.28 By email dated 27 June 2012 the Third Respondent submitted a translation of the *2.05 Dopingreglement, dating 3 June 2008*.

3.29 By letter dated 3 July 2012 the Appellant submitted the translations of *2.05 Dopingreglement*, dated 3 June 2008 (exhibit 5 part 1), Titel I, Titel VIII, Titel X, Titel XI, Titel XII and *Dopingreglement Judo Bond Nederland*, dated 26 November 2011 (exhibit 5 part 2), Titel I, Titel VIII, Titel X, Titel XI, Titel XII.

3.30 By letter dated 5 July 2012 the First Respondent submitted a translation of the *Statuten Judo Bond Nederland*, art. 6, 8, 10 and *Tuchtreglement Judo Bond Nederland*, Begripsbepalingen, Hoofdstuk 1, Hoofdstuk 3, Hoofdstuk 8, Hoofdstuk 9, Hoofdstuk 10.

3.31 On 9 July 2012 the CAS Court Office informed the parties that they were granted 7 days to comment on the translations submitted by the other side.

3.32 On 13 July 2012 the First Respondent informed the CAS Court Office that it had no comments on the translations submitted by the Appellant.

3.33 On 16 July 2012 the Appellant informed the CAS Court Office that it had no comments to make on the translations submitted by the First Respondent. It further submitted a Dutch legal opinion on the issue of CAS jurisdiction and the admissibility of the appeal.

3.34 On 3 August 2012 the CAS Court Office advised the parties that the Sole Arbitrator had admitted the Appellant's Dutch legal opinion to the file and that the Respondents were granted two weeks from receipt of the letter to comment on said legal opinion.

3.35 On 17 August 2012 the First Respondent submitted its comments on the Appellant's legal opinion.

3.36 By letter dated 6 September 2012 the CAS Court Office granted the parties seven days to comment on the issue of CAS jurisdiction, pursuant to art. 178 of the Swiss Private International Law Act (PILA). Further, the First and Second Respondents were requested to provide the CAS Court Office within seven days with a copy of the licence or application or any other document proving that the Athlete was a member of the First Respondent.

3.37 By letter dated 13 September 2012 the CAS Court Office granted all parties an extension of the time limit until 27 September 2012 to comment on art. 178 of the PILA.

3.38 By letter dated 25 September 2012 the First Respondent submitted its comments on art. 178 of the PILA.

3.39 By letter dated 27 September 2012 the Appellant submitted its comments on art. 178 of the PILA.

3.40 On 21 November 2012 the Court of Arbitration for Sport rendered an Award on Jurisdiction and ruled:

> 1. *The CAS has jurisdiction to decide on the appeal filed by the World Anti-Doping Agency (WADA) against the decision of the Judo Bond Nederland (JBN) dated 29 December 2011.*
> 2. *The appeal filed by the World Anti-Doping Agency (WADA) against the decision of the Judo Bond Nederland (JBN) dated 29 December 2011 is admissible.*

3.41 By letter dated 21 November 2012 the CAS Court Office invited the parties to confirm within 7 days from receipt of the letter their preference that the Sole Arbitrator decide the matter based on the parties' written submissions only, as previously indicated by the Appellant, as well as the First and Third Respondents. Further, the CAS Court office enclosed copies of several CAS awards and granted the parties 7 days from receipt of the letter to comment on them should they so wish.

3.42 All parties confirmed their preference for the Sole Arbitrator to render an Award based on the papers only.

3.43 By letter dated 15 January 2013 the CAS Court Office advised the parties that the Sole Arbitrator deemed it possible that the circumstances and timing of the ingestion of the Specified Substance might be of relevance and asked for more detailed information further specified in the letter within seven days of its receipt.

3.44 By letter dated 21 January 2013 the Third Respondent submitted its statement.

3.45 By letter dated 22 January 2013 the Appellant submitted its statement.

3.46 By letter dated 22 January 2013 the Second Respondent asked for an extension of the deadline.

3.47 By letter dated 22 January 2013 the Second Respondent was granted an extension of the deadline until 25 January 2013.

3.48 By letter dated 25 January 2013 the Second Respondent submitted his statement.

4. PARTIES' RESPECTIVE REQUESTS FOR RELIEF AND BASIC POSITIONS

This section of the award does not contain an exhaustive list of the parties' contentions, its aim being to provide a summary of the substance of the parties' main arguments. In considering and deciding upon the parties' claims in this award, the Sole Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

4.1 The Appellant

4.1.1 On 9 March 2012, in its Statement of Appeal/Appeal Brief, the Appellant requested – *inter alia*:

1. *That the appeal of WADA is admissible;*
2. *That the decision rendered by the JBN AB on 29 December 2011 in the matter of Mr. de Goede is set aside;*
3. *That Mr. de Goede is sanctioned with a two- year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility, whether imposed on or voluntarily accepted by the Athlete before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
4. *All competitive individual results obtained by the Athlete from 28 May 2011 through the commencement of the applicable period of ineligibility shall be annulled.*
5. *WADA is granted an award for costs.*

4.1.2 The Appellant's submissions in support of its request concerning the merits of the case can be summarized in essence as follows:

4.1.3 The Second Respondent committed an anti-doping violation.

(1) *Methylhexaneamine*, a prohibited substance according to the 2011 WADA Prohibited List, was found in a urine sample of the Second Respondent. This was not challenged by the latter in the proceedings before the JBN DC or the JBN AC.

(2) With respect to the merits, the Previous JBN Rules apply as the sample was collected before the entering into force of the current JBN Rules. Art. 3 of the Previous JBN Rules provide that "the presence of a prohibited substance and/or its breakdown products in a (urine) sample of an athlete" constitute an anti-doping violation. Consequently, the violation by the Second Respondent of art. 3 of the Previous JBN Rules is established.

4.1.4. Appropriate Sanction

(1) The appropriate sanction in the case at hand is a period of ineligibility of 2 years.

(2) The conditions set out in art. 39.3 of the Previous JBN Rules that would allow replacing the otherwise applicable period of ineligibility with at least a warning or a reprimand or a period of ineligibility up to a maximum of two years are not met in the case at hand. The Appellant accepts the explanation of the Second Respondent that the Supplement was the origin of the prohibited substance in his system. However, the Second Respondent cannot claim that he had been unaware that the Supplement contained the Specified Substance. The latter was mentioned on the label as well as on the website cited by the Second Respondent. The Second Respondent has failed to establish his ignorance at the time of the ingestion of the Supplement with corroborating evidence. The Appellant deems it impossible that the Second Respondent did not check the label or do basic internet research even though he was aware that as an athlete he had to take the utmost care and is responsible for what he ingests. At least, the Second Respondent acted with indirect intent as he was reckless as to the safety of the product. In this respect, the *Kutrovsky* decision issued by a CAS Panel states: *"It is counter-intuitive that a code which imposes on an athlete a duty to take responsibility for what he ingests, ignorance alone works to his advantage"*.

(3) But even if one assumed such ignorance with respect to *methylhexaneamine*, art. 39.3 of the Previous JBN Rules would still not apply to the case as this would require that the Second Respondent prove that the ingestion of the Specified Substance was not intended to improve his sport performance. In order to establish intention within the aforementioned meaning it suffices to demonstrate that the Athlete took the Supplement (containing the Specified Substance) with the intent to enhance his sport performance. The Supplement is manifestly a powerful, performance-enhancing product. Whether the Athlete knew that the Supplement contained a prohibited substance is irrelevant. In the case at hand the Second Respondent declared in the proceedings before the JBN DC and JBN AC that he had used *Jack3d* to overcome tiredness and to increase his energy levels. The decision of the JBN DC explicitly states: *"The defendant stated that he uses Jack3d prior to his fitness training sessions in order to acquire more energy"*. In view of this statement it cannot seriously be contended that the ingestion of the Supplement was not to enhance athletic performance.

That "intent" within the meaning of art. 39.3 of the Previous JBN Rules does not require knowledge on the part of the athlete whether or not a prohibited substance is contained in the product is also evidenced by the fact that the commentary to art 10.4 of the WADC does not say otherwise. However, one would have expected to find an explanation of that kind in the commentary to art. 10.4 WADC if an athlete could claim the applicability of said provision in case he did not know that the prohibited substance was contained in the product he ingested. Furthermore, the term "intention to enhance sport performance" in the context of art. 10.4 WADC (art. 39.3 of the Previous JBN Rules) would become redundant if by claiming ignorance an athlete could open the door for a reduction of the sanction according to art. 10.4 WADC (art. 39.3 of the Previous JBN Rules).

The timing of the ingestion of the Specified Substance is of no relevance. Regardless of whether the Athlete took the Supplement shortly or immediately before the competition or only in the days prior to the competition for the purposes of training, it cannot seriously be contended that the ingestion of the Supplement was not to enhance athletic performance. The Appellant further notes that the Athlete's submissions with regard to the timing and the quantities ingested of the Supplement are riddled with inconsistencies. First, *Jack3d* is – contrary to the Athlete's submission - not sold in capsules. Second, contrary to the submissions of the Athlete the latter did not take the Supplement on an irregular basis. The smallest quantity is a box of 45 scoops. Considering that the Second Respondent received the product for his birthday two months before the competition, he must have taken it almost daily as he claims to have taken the last capsule 10 days prior to the competition on 28 May 2011. Finally, the Appellant claims that the Athlete has failed to produce any independent evidence as to his lack of intention to enhance sport performance. Without such independent evidence, however, the Athlete cannot claim a reduction of the period of ineligibility according to art. 39.3 of the Previous JBN Rules (art. 39.4 of the Previous JBN Rules).

(4) As art. 39 of the Previous JBN Rules do not apply to the case, the applicability of art. 41 of the Previous JBN Rules that allow for the reduction of the period of ineligibility is to be determined. But in the end, no exceptional circumstances according to art. 41 of the Previous JBN Rules exist that would allow eliminating or reducing the otherwise applicable period of ineligibility. In order for art. 41 of the Previous JBN Rules to apply, an athlete must establish that he bears no significant fault or negligence. In the case at hand the Second Respondent claims to have not taken any precautionary measures prior to ingesting the Supplement. He did not research the contents, verify the source or consult a doctor. In the cases Lapikov, Kutrovsky and Qerimaj periods of ineligibility between 15 months and 2 years were imposed on the athletes whose precautionary measures exceeded the blind faith that the Second Respondent placed in his brother.

4.2 The First Respondent

4.2.1 In his response to the statement of appeal the First Respondent – *inter alia* – requests:

1. *That the Court of Arbitration for Sport determines that it has no jurisdiction to hear the case;*

alternatively

2. *That the Court of Arbitration for Sport determines that the Appeal is inadmissible;*

in the further alternative,

3. *That the Court of Arbitration for Sport dismisses the claims of WADA on substantive grounds.*
4. *That the Appellant bears all costs.*

4.2.2 With respect to the merits of the case, the First Respondent requests the Sole Arbitrator to dismiss the appeal on substantive grounds.

4.3 The Second Respondent

4.3.1 In his Answer dated 23 May 2012, the Second Respondent – *inter alia* – requests:

1. *That the Court of Arbitration for Sport determines that it has no jurisdiction to hear the case; alternatively*
2. *That the Court of Arbitration for Sport determines that the Appeal is inadmissible;*

in the further alternative,

3. *That the Court of Arbitration for Sport dismisses the claims of WADA on substantive grounds.*
4. *That the Appellant bears all costs.*

4.3.2 The Second Respondent's submissions in support of his requests concerning the merits of the case can be summarized in essence as follows:

4.3.3. The sanction in the case at hand should not be higher than a warning together with a reprimand as the Second Respondent did not take the prohibited substance to improve his athletic performance.

1. According to art. 39.3 of the JBN Rules a warning together with a reprimand may be imposed if the Athlete demonstrates that the prohibited substance was not used to improve his athletic performance. The Second Respondent took the supplement *Jack3d* without checking its contents as his brother had told him it "could not do any harm". The Second Respondent trusted his brother's good intention and assumed the Supplement did not contain any doping-related substances. If he had known otherwise, he would not have taken the Supplement.

2. In the period preceding the competitions the Second Respondent broke his toe. He took *Jack3d* to overcome fatigue during his training in his rehabilitation period. He did not take the Supplement in the context of competitions. He took the last capsule about 10 days before the event on 28 May 2011. He stopped taking the Supplement when the jar of *Jack3d* was finished. He did not purchase any new Supplements thereafter.

3. As the Second Respondent had injured himself in the period preceeding the competition he did not take part in the preliminary rounds of the National Judo

League. He was asked by his coach on 23 May 2011 to substitute for teammates in the final matches after the latter was injured and could not compete. The Second Respondent accepted to substitute for the teammates because he wanted to do his coach a favour. The Second Respondent had never intended to take part in the event of 28 May 2011; therefore the consumption of *Jack3d* cannot have been intended to improve his athletic performance.

4. With respect to the interpretation of art. 39 of the JBN Rules, the Second Respondent further refers to the defence the Third Respondent put forward in paragraphs 5 and 6.

5. It also has to be taken into consideration that the Second Respondent complied with the decision of the DC since 28 May 2011. Any period of ineligibility should therefore only last until 28 May 2013 at the latest.

6. The Court also has to bear in mind that a period of ineligibility of only 3 months was imposed in other cases in which *methyhexaneamine* played a role.

7. As the Second Respondent did not lodge an appeal against the decision of the DC, the Appellant's request for imposing the costs of the proceedings on the Second Respondant must be rejected.

4.4 The Third Respondent

4.4.1 In his Answer dated 10 April 2012, the Third Respondent – *inter alia* – requests:

1. *To dismiss the claims raised by the Appellant in relation to the interpretation of Art. 10.4 of the WADA Code/ Art. 39 of the Previous JBN Rules;*
2. *To order the Appellant to pay the Third Respondent the costs incurred in relation to the appeal*

4.4.2 The Third Respondent's submissions in support of his requests concerning the merits of the case can be summarized in essence as follows:

4.4.3 The Third Respondent limits his submissions to the interpretation and application of the JBN Doping regulations. It does not comment on the Second Respondent's degree of fault or the period of ineligibility.

(1) The Previous JBN Rules apply to the dispute; however, according to the *lex mitior* principle, the current JBN Rules apply in case they are more favourable to the Athlete.

(2) According to art. 39.3 of the Previous JBN Rules, the Athlete's intent with respect to improving his athletic performance refers to the substance itself and not the

product containing the substance. This can be derived from the wording in art. 39.3 of the Previous JBN Rules as well as art. 10.4 of the WADC. The aforementioned has always been the Third Respondent's interpretation of the provision.

(3) There have been various decisions by Dutch Disciplinary Panels in different sports that interpreted art. 10.4 of the WADC just like the AC did in the case at hand with respect to the almost identical art. 39.3 of the Previous JBN Rules. In 2011, the Third Respondent forwarded five such decisions to the Appellant. The latter never informed the Third Respondent that it did not agree with such interpretation.

(4) Until February 2012, the Third Respondent was unaware that there was a dispute over the interpretation of art. 10.4 of the WADC. The Third Respondent had been aware of the *Oliveira* case (CAS 2010/A/2107), but not the *Foggo* decision (CAS A2/2011) that interprets art. 10.4 of the WADC in the Appellant's now presented opinion.

(5) Taking into consideration the drafting of art. 39.3 of the Previous JBN Rules / art. 10.4 of the WADC the Third Respondent considers the circumstances and the timing of the ingestion of the Supplement of relevance to the question whether or not an athlete has the intent to enhance his sport performance. The Third Respondent submits that this had been the legal position of Appellant also in the past.

(6) In the case at hand the Third Respondent submits that there are two circumstances of overriding importance to answering the question whether or not the Athlete had intent to enhance his sport performance: *"was the Athlete at any point aware that he was ingesting a prohibited substance? This question should be separated from the questions to whether he should or could have been aware he was ingesting a prohibited substance … did Second Respondent while he was ingesting the Specified Substance have any intention of participating in any judo competition? The answer to this question has a direct bearing on the question whether or not Second Respondent had intent to enhance his sport performance".*

5. APPLICABLE LAW

5.1 According to Article R58 of the Code, the Court 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 Court deems appropriate. In the latter case the Court shall give reasons for its decision.

5.2 The First Respondent, the federation that has issued the appealed decision, has its seat in the Netherlands

5.3 As a result of the foregoing the Sole Arbitrator considers the JBN Rules, the JBN Statutes and the JBN Disciplinary Regulations to be the applicable regulations. In the absence of an express choice of law by the Parties, the Sole Arbitrator will apply, if warranted, Dutch law (as the law of the First Respondent's seat) subsidiarily.

5.4 As anti-doping matters were regulated in the *"2.05 Dopingreglement"* dated 3 June 2008 (the Previous JBN Rules) at the time of sample collection the latter are, in principle, applicable as to the merits of the case.

6. SCOPE OF THE PANEL

According to Article R57 of the Code the Court has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

In application of the aforementioned rule, the Sole Arbitrator is entitled to hear the present case *de novo* (CAS 2012/A/2107 [6.12.2010] no. 9.1).

7. MERITS OF THE APPEAL

7.1 It is undisputed that Appellant has committed an anti-doping rule violation. What is at stake here are the consequences of this action. The standard sanction for an anti-doping rule violation according to art. 38.1. of the Previous JBN Rules is a two-year period of ineligibility. The Parties are in dispute, whether or not the Appellant is entitled to a reduction of the standard period of ineligibility under art. 39.3 of the Previous JBN Rules. Art. 39.3 of the Previous JBN Rules requires – in line with Art. 10.4 of the WADC - a two-step examination. In a first step the scope of applicability must be examined (see below a). In case the provision is applicable the length of the sanction must be determined according to the criteria in art. 39.5 of the Previous JBN Rules in a second step (see below b).

a) Applicability of art. 39.3. of the Previous JBN Rules

7.2 Art. 39.3 of the Previous JBN Rules is only applicable if

(1) the substance detected in the bodily specimen of the Athlete is a Specified Substance within the meaning of art. 39.1. of the Previous JBN Rules;

(2) the Athlete establishes how the Specified Substance entered his body;

(3) the Athlete establishes that the ingestion of the Specified Substance *"did not take place with the intention of enhancing sporting performance"*.

7.3 In the case at hand it is undisputed that the first two prerequisites are fulfilled. *Methylhexaneamine* is a specified substance and it entered into the Athlete's body through the intake of the product *Jack3d*. The Parties, however, disagree in regard to the third condition (absence of intent). In particular the Parties disagree on how this term should be interpreted. According to the Appellant the term "intent to enhance sport performance" has to be construed widely. Accordingly, for an athlete to have such intent it suffices that the product (containing the prohibited substance) was taken in a sport-related context. In such case – according to the Appellant - not only the products, but also the substances contained therein are ingested by the athlete with the intent to enhance his sporting performance. The Second and Third Respondents, on the contrary, favour a restrictive interpretation of the notion "intent". They submit that the intent (to enhance sport performance) required in art. 39.3 of the Previous JBN Rules (Art. 10.4 WADC) must relate to the prohibited substance in question, i.e. the athlete must have had the intent to enhance his sport performance through and with the help of the prohibited substance contained in the product.

7.4 Appellant as well as Second and Third Respondents claim that the wording of the provision in art. 39.3/art. 39.4 of the Previous JBN Rules (Art. 10.4 WADC) speak in favour of their respective interpretation. In fact, the wording of the provision is somehow ambiguous. Art. 39.3 of the Previous JBN Rules (that deals with the scope of application of the provision) explicitly links the (absence of the) intent to the prohibited substance. The provision reads insofar as relevant:

> *"If a member in question demonstrates (i) how the Specified Substance(s) have entered his or her body (…) and demonstrates that the ingestion (…) of that Specified Substance(s) did not take place with the intention of enhancing sporting performance (…)".*

Art. 39.4 of the Previous JBN Rules (art. 10.4 WADC) that contains an evidentiary rule, however, does not make such link. Insofar as relevant, the provision states that

> *"The Athlete (…) must produce corroborating evidence in addition to his or her word (…) the absence of an intent to enhance sport performance (…)".*

aa) Overview as to the jurisprudence in this matter

7.5 The dispute as to the correct interpretation of art. 39.3 et seq. of the Previous JBN Rules (which are almost identical in content to art. 10.4 of the WADC) has been dealt with by other CAS Panels, in particular in CAS 2012/A/2107 [6.12.2010]. In the latter decision the Panel remarked the following:

> *"The Panel does not read clause two of Article 10.4 as requiring Oliveira to prove that she did not take the product (…) with the intent to enhance sport performance. If the Panel adopted that*

construction, an athlete's usage of nutritional supplements, which are generally taken for performance-enhancing purposes, but which is not per se prohibited by the WADC, would render Article 10.4 inapplicable even if the particular supplement that is the source of a positive test result contained only a specified substance. Although an athlete assumes the risk that a nutritional supplement may be mislabelled or contaminated and is strictly liable for ingesting any banned substance, Article 10.4 of the WADC distinguishes between specified and prohibited substances for purposes of determining an athlete's period of ineligibility. Art. 10.4 provides a broader range of flexibility (i.e., zero to two years ineligibility) in determining the appropriate sanction for an athlete's use of a specified substance because "there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation". See Comment to Article 10.4.

If the Panel adopted USADA's proposed construction of clause two of Article 10.4, the only potential basis for an athlete to eliminate or reduce the presumptive two-year period of ineligibility of ingestion of a specified substance in a nutritional supplement would be satisfying the requirements of Article 10.5, which requires proof of "no fault or negligence" or "no significant fault or negligence" for any reduction. Unless an athlete could satisfy the very exacting requirement for proving that "no fault or negligence", the maximum possible reduction for use of nutritional supplement containing a banned substance would be one year. This consequence would be contrary to the WADC's objective of distinguishing between a specified substance and a prohibited substance in determining whether elimination or reduction of an athlete's period of ineligibility is appropriate under the circumstance".

7.6 This view expressed in the *Oliveira* decision was followed by other CAS Panels, e.g. in the cases CAS 2011/A/2645 [29.2.2012] no 79-81 and CAS 2011/A/2495 [29.7. 2011] no 8.31, CAS 2012/A/2822 [12.9.2012] no. 8.9-8.12.

7.7 In the *Foggo* decision (CAS A2/2011 [3.5.2011] no. 47), the Panel found *"that Oliveira should not be followed"*. However, the Panel in *Foggo* did not give any reasons for its decision, nor did the decision deal with the legal issues and systematic questions raised by *Oliveira*. Also, the Panel in *Foggo* found that it does not establish absence of intent if the athlete did not know that the product contained a prohibited ingredient (CAS A2/2011 [3.5.2011] no. 47). However, when examining whether or not the athlete had produced corroborating evidence to establish the absence of intent to enhance sport performance, the panel took into consideration that the athlete thought that the supplements he used were "legal" (see CAS A2/2011 [3.5.2011] no. 52). As a result, the Panel in *Foggo* applied art. 10.4 WADC and granted the athlete a reduction of the sanction. So, when explaining that the mere fact that the athlete did not know that the supplement contained a prohibited ingredient did not establish the absence of intent to enhance sports performance, the Panel in *Foggo* did not rule out the application of art. 10.4 WADC, but required further evidence of the absence of performance enhancing intent. In *Foggo*, this requirement was satisfied by showing that the athlete thought that the supplements he ingested were "legal". Considering that "legal" can only be understood in the sense that the athlete thought the product did not contain any prohibited ingredients and was therefore in conformity to the Anti-Doping Rules, the Sole Arbitrator only sees minimal differences in the reasoning between *Foggo* and *Oliveira*.

7.8 In the *Kutrovsky* decision (CAS 2012/A/2804 [3.10.2012] no. 9.15 *et seq.*) the Panel held that both parts of art. 10.4 WADC must be read together and that the term "intent", therefore, must refer to the Specified Substance in the form in which it had entered the athlete's body *i.e.* the food supplement. Also, the wording "Specified Substance" in the second part of art. 10.4 WADC takes into account that no distinction shall be drawn between the product and the Specified Substance contained in the product as the Specified Substance may be an ingredient of another product, but need not necessarily be. The Panel further stated that the absence of performance enhancing intent would be made redundant if an athlete could simply, by showing that he was not aware that the product contained a Specified Substance, claim reduction under 10.4 WADC. According to the Panel it was *"counter-intuitive"* that in a code which imposes on an athlete a duty to responsibility for what he ingests, ignorance alone worked to his advantage. However, the Panel still drew the distinction between substances that were generally prohibited and substances that were prohibited in-competition only to determine whether or not the timing of the ingestion of the product could rule out the athlete's intent to enhance sport performance.

bb) The consequences of the different opinions

7.9 The differences as to the consequences of the different views (*Oliveira* and *Kutrovsky*) are – contrary to what may appear at first sight – not tremendous. Also in the *Kutrovsky* decision the Panel did not apply the standard two-year sanction, but imposed a 15 month period of ineligibility. However, the basis for such reduction was not art. 10.4 WADC, but art. 10.5.2 WADC (No Significant Fault). One may wonder why the Panel in *Kutrovsky* went through the lengthy trouble of excluding the application of art. 10.4 WADC only to apply the reduction mechanism contained in art. 10.5.2 WADC. The reason - at the end of the day – probably is that according to art. 10.5.2 WADC the standard two-year sanction can only be reduced – at a maximum – down to one year (half of the standard sanction). Art. 10.4 WADC, on the contrary, allows a further reduction. However, in both provisions the decisive criteria to justify any reduction is the concept of fault. It therefore does not come as a surprise that – irrespective of the applicable provision – the length of sanction imposed in CAS jurisprudence in relation to nutritional supplements containing the Specified Substance *methylhexaneamine* does not differ dramatically.

cc) The jurisprudence in Oliveira is to be followed

7.10 The Panel has read the different decisions, weighted the various arguments and – in principle – finds the approach taken by the arbitral tribunal in *Oliveira* to be more persuasive for the following reasons:

7.11 It is true that the express language of art. 39.3 and art. 39.4 of the Previous JBN Rules (art. 10.4 WADC) is ambiguous and susceptible to more than one interpretation. Art. 39.3 of the previous JBN Rules links the intent to enhance performance to the taking of the (specified) prohibited substance. This link is not repeated in art. 39.4 of the previous JBN Rules.

However, since the scope of application of art. 39.3 of the Previous JBN Rules (art. 10.4 WADC) is in question in the case at stake, it seems rather difficult to give precedence to the wording in art. 39.4 of the Previous JBN Rules that deals with the assessment of evidence only.

7.12 Not only the wording, but also the context of the rules providing for a reduction of the standard sanction speaks in favour of the reasoning in *Oliveira*. The Previous JBN Rules incorporate the WADC and shall, therefore, be interpreted and construed – absence any indication to the contrary – in conformity with the WADC. It seems rather obvious to the Sole Arbitrator that art. 10.4 WADC was intended by the drafters of the WADC as a *lex specialis*. In cases involving Specified Substances a reduction of the standard sanction should be contemplated on the basis of art. 10.4 WADC only. This is clearly evidenced when comparing the conditions and the consequences contained in art. 10.4 WADC and art. 10.5.2 WADC. In particular, the conditions for qualifying for a reduction of the standard sanction in art. 10.4 WADC were intended to be more lenient than the ones in art. 10.5.2 WADC. While the scope of application of the latter requires that the athlete acted with no significant fault (i.e. not intentionally and not grossly negligently), art. 10.4 WADC is already applicable, if the athlete does not act with "intent" (but – e.g. – grossly negligent). The reason for this differentiation is clearly indicated in the comment to art. 10.4 WADC. According thereto, Specified Substances – unlike other prohibited substances (e.g. EPO) – *"are particularly susceptible to unintentional anti-doping rule violations"*. It follows from this comment that – in principle - the drafters of the WADC wanted to exclude reductions of the standard sanction involving a Specified Substance only where the anti-doping rule violation was committed intentionally. Therefore, in cases where the prerequisites for a reduction under art. 10.4 WADC are not fulfilled, logically there is no room for a reduction based on the more restrictive provision in art. 10.5.2 WADC. The interpretation (of the two provisions) followed by the Panel in *Kutrovsky* turns this logic enshrined in the WADC upside down by claiming that it is easier to qualify for a reduction under art. 10.5.2 WADC than under art. 10.4 WADC.

7.13 The reasoning of the Panel in *Kutrovsky* appears not only to be in contradiction with the rationale of the "reduction mechanism" in the Previous JBN Rules (the WADC), but also contradictory in itself. The main argument put forward by the Panel in *Kutrovsky* to justify the non-application of art. 10.4 WADC is that *"[i]t is counter-intuitive that in a code which imposes on an athlete a duty to take responsibility for what he ingests, ignorance alone works to his advantage"*. The reasoning that no reduction of a sanction can be granted in case of "ignorance" is difficult to follow. First, the Sole Arbitrator notes that – in the final analysis – the Panel in *Kutrovksy* did not stick to this principle, since it reduced the standard sanction (on the basis of art. 10.5.2 WADC). Inconsistently with the aforementioned principle, it, therefore, found that – to a certain extent – "ignorance" indeed works in favour of an athlete. Second, the Sole Arbitrator remarks that the concept of "fault" (intent or negligence) in art. 39.1-5 of the Previous JBN Rules (art. 10.4 WADC) is – like in art. 10.5.2 WADC – doubly relevant. At the one hand the degree of fault is important to determine whether the provision providing for a reduction of the sanction is applicable (art. 39.3 of the Previous JBN Rules). On the other hand – if the provision is applicable – the precise length of the period of ineligibility must be assessed on the basis of the degree of fault (art. 39.5 of the Previous JBN Rules). Therefore, if a Panel

comes to the conclusion that an athlete has not acted intentionally (in the context of art. 39.3 of the Previous JBN Rules / art. 10.4 WADC) nothing has "worked in the athlete's favour" yet, since the most important step, i.e. the determination of the length of the sanction on the basis of the athlete's degree of fault is still outstanding.

7.14 Finally, arguments of legal certainty also speak against the jurisprudence in *Kutrovsky*. The latter tries to differentiate between the ingestion of a substance in a sporting and a non-sporting context. In case of the former, the athlete, in principle, always acts intentionally, thus, precluding the possibility of a reduction according to art. 39.1-5 of the Previous JBN Rules (art. 10.4 WADC). The Sole Arbitrator finds it difficult to determine what patterns of behaviour potentially qualify for application of art. 39.1-5 of the Previous JBN Rules (art. 10.4 WADC) and which not. This is – as the Panel in CAS 2012/A/2822 [12.7.2012] no. 8.11 pointed out – all the more true, since in particular when looking at elite athletes most of their behaviour is guided by the sole and single purpose to maintain or enhance their sport performance. If, e.g., an athlete takes a cough medicine he or she will do so in most circumstances to recover quicker in order to train and/or compete again. In consequence if one were to follow the jurisprudence in *Kutrovsky* it would be – in the view of the Sole Arbitrator – nearly impossible to draw an exact (i.e. non-arbitrary) dividing line between products taken by the athlete that qualify for an application of art. 39.1-5 of the Previous JBN Rules (art. 10.4 WADC) and which not.

dd) The Athlete did not act with "intent"

7.15 Following the reasoning of the Panel in *Oliveira*, intent is, in principle, established if an athlete knowingly ingests a prohibited substance. However, the Sole Arbitrator also follows the reasoning in CAS 2012/A/2822 [12.7.2012] no. 8.14 according to which an athlete's behaviour may also be qualified as intentional, if the athlete acted with indirect intent only, i.e. if the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a "minefield" ignoring all stop signs along his way, he may well have the primary intention of getting through the "minefield" unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent. In such case art. 39.3 of the Previous JBN Rules (art. 10.4 WADC) would not be applicable. On the contrary, the provision remains applicable, if the athlete's behaviour was not reckless, but "only" oblivious. Having said this, the Sole Arbitrator is well aware that the distinction between indirect intent (which excludes the applicability of art. 39.3 of the Previous JBN Rules / art. 10.4 WADC) and the various forms of negligence (that allow for the application of the provision) is difficult to establish in practice.

7.16 The assessment whether or not an athlete acts with (direct or indirect) intent within the meaning of art. 39.3 of the Previous JBN Rules (art. 10.4 WADC) is further complicated if the substance at stake is prohibited in-competition only, but was ingested by the athlete out-of-competition. In principle, as stated above, the drafters of the WADC wanted to exclude

the applicability of art. 10.4 WADC only if the anti-doping rule violation was committed intentionally. The taking of a substance out-of-competition that is only prohibited in-competition does not constitute, as such, an anti-doping rule violation. The taking of such substance only becomes an anti-doping rule violation, if the substance is still present in the athlete's fluids in-competition. Therefore, an athlete only acts intentionally within the above meaning, if his intention covers both, the ingestion of the substance and it being present in-competition. The interpretation followed here is also supported by the commentary to art. 10.4 WADC. According thereto the timing of the ingestion can play a role when determining whether or not the athlete had intent to enhance his sport performance. Insofar as relevant, the commentary to art. 10.4 WADC reads as follows:

> *"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 timing of the ingestion would have not been beneficial to the Athlete".*

7.17 In application of the above standard, the Sole Arbitrator finds that the Athlete did not act intentionally. In order to come to this conclusion the Sole Arbitrator cannot rely solely on the Athlete's word that he did not act intentionally, but must draw his conclusions from additional evidence. In the case at hand this additional evidence consists in the fact that the Athlete stopped taking the Supplement (and the Specified Substance contained therein) a couple of days before the competition. There is dispute between the Parties how long before the competition the Athlete stopped taking the Supplement. The Second Respondent states that he had used up the Supplement 10 days prior to the event. The Appellant, on the contrary, submits that this might be theoretically possible, but that it is more likely that the Second Respondent stopped taking the Supplement at a later point in time. What is established, however, is that the Supplement was not taken in the immediate context of the competition and that the Athlete was injured in the period leading up to the competition and that he, therefore, was not planning to participate in any sporting events. In particular the Athlete did not take part in the preliminary rounds of the National Judo League. Furthermore, his participation in the final round of the National Judo League in Nijmegen (in which the sample was taken) came as a surprise to him, since he was asked by his coach on 23 May 2011 to substitute for teammates that had been injured in the preliminary rounds of the competition. In view of all of the above, the Second Respondent could not have planned or intended to take part in the event of 28 May 2011. It follows from this that the Athlete did not act intentionally.

ee) Determining the period of ineligibility

7.18 The fact that the athlete lacks intent according to art. 39.3 of the Previous JBN Rules does not however automatically lead to his exoneration. It still has to be determined in a second step to what extent the Second Respondent is eligible for a reduction of the normal period of ineligibility. The sanction according to art. 39.3 of the Previous JBN Rules ranges between a reprimand and no period of ineligibility as a minimum, to a period of two years of ineligibility as a maximum. According to art. 39.5 of the Previous JBN Rules the athlete's degree of fault

(e.g. light or gross negligence) is the decisive criterion in assessing the appropriate period of ineligibility.

7.19 It is the Sole Arbitrator's view that the Appellant showed considerable fault in the case at hand. The Second Respondent did not make any inquiries on the product and trusted his brother who had only told him that the product *"could do no harm"*. This, however, is not a statement upon which a responsible athlete could rely. The Second Respondent could have easily obtained information on the Supplement by doing some basic internet research. According to the Second Respondent's submissions, he had used up the *Jack3d* package only a couple of days before being asked by his coach to compete in the final round of the National Judo League. At this point he should have been aware that he had used a food supplement during his training period. Considering that food supplements may contain prohibited substances, that sports organisations continuously warn athletes about the danger related to food supplements and considering that the Athlete is an experienced competitor, the lack of diligence of the Second Respondent is hardly comprehensible.

7.20 Having regard to all of the above mentioned criteria the Sole Arbitrator considers it appropriate to impose a period of ineligibility of 18 months. He comes to this conclusion also in light of several CAS decisions related to the taking of Specified Substance contained in food supplements. Among the decisions contemplated are – *inter alia* - :

- CAS 2011/A/2645 [29.2.2012]: reprimand and no period of ineligibility (hydrochlorothiazide);
- *Foggo* (CAS A2/2011 [3.5. 2011]): 6 months of ineligibility (*methylhexaneamine*);
- CAS 2011/A/2518 [10.11.2011]: 8 months of ineligibility (*methylhexaneamine*);
- International Rugby Board, Award of 27.1.2012: 12 months (*methylhexaneamine*);
- International Rugby Board, Award of 16.9.2011: 9 months (*methylhexaneamine*)
- *Oliveira* (CAS 2012/A/2107 [6.12.2010]): 18 months (*methylhexaneamine*)
- CAS 2011/A/2615/2618 [19.4.2012]: 18 months (*tuaminoheptane*)
- *Qerimaj* (CAS 2012/A/2822 [12.7.2012]): 15 months (*methylhexaneamine*)

7.21 The Sole Arbitrator understands that the imposed sanction of 18 months is considerably higher than the sanctions issued in some of the aforementioned cases. And even though decisions rendered by international federations are of limited significance, the same is not true for the above-referenced CAS decisions. Yet, the Panel agrees with the view taken by the Panel in CAS 2011/A/2518 [10.11.2011] were it is stated at no. 10.23:

> *"Although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport".*

8. COMMENCEMENT OF INELIGIBILITY PERIOD

8.1 Art. 46.1 of the Previous JBN Rules provides that the period of ineligibility – in principle – starts on the day of the decision made by "in disciplinary proceedings". Whether this is the day of the first instance, second instance or the CAS decision is not quite clear. In the view of the Sole Arbitrator the decisive point in time is the date on which the respective instance (here CAS) takes its decision. Therefore, in principle, the period of ineligibility must start on the day this decision is issued. Art. 46.4 of the Previous JBN Rules provides that any period of ineligibility associated with the imposition of a disciplinary measure is to be deducted. A period of ineligibility was "imposed" upon the Athlete from 25 August 2011 until 29 December 2011. This period of approximately 4 months, thus, must be credited against the 18-months period of ineligibility. It is true that the Athlete has not participated in sporting events for a much longer time. In essence the Athlete submits that he has not participated in any sporting events since the collection of the sample. However, the applicable provisions provide that only periods of "imposed sanctions" can be deducted. Furthermore, art. 46.5 of the Previous JBN Rules states that "there are no other options available" for allowing the period of ineligibility to start at an earlier time than the ones provided for in the rules. The request of the Appellant is not completely in line with this Previous JBN Rules. Insofar the request of the Appellant provides that *any "period of ineligibility, whether imposed on or voluntarily accepted by the Athlete before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served"*. The applicable rules do not provide for a deduction of a period of ineligibility "voluntarily accepted". In order to know what the Appellant intends by this request, reference must be made to the WADC. The latter provides in art. 10.9.4 that a provisional suspension accepted in writing by an athlete must be credited against the overall period of ineligibility the same way as a provisional sanction. What the WADC, thus, makes clear – in particular also in view of art. 10.9.5 WADC - is that the simple fact that an athlete refrains from participating in sport or competition does not lead – by itself – to a reduction of the sanction. The Sole Arbitrator, therefore, comes to the conclusion also in view of the request of the Appellant, the athlete cannot be given credit *"for a period of ineligibility voluntarily accepted"*, since the prerequisite for the latter are not fulfilled.

8.2 Art. 46.2 of the Previous JBN Rules, however, provides the Sole Arbitrator with some discretion as to the commencement of the period of ineligibility in case there have been substantial delays in the procedure. The Sole Arbitrator acknowledges that the procedure involving several instances took some time and that the Second Respondent never challenged that *methylhexaneamine* was found in his sample collected on 28 May 2011, thus constituting an anti-doping rule violation according to the JBN Rules. In view of all of the above the Sole Arbitrator finds it fair to fix the start of the period of ineligibility of 18 months on the date when the appeal body, i.e. the JBN AB rendered its decision on 29 December 2011. As a consequence of the retroactive commencement of the period of ineligibility all sporting results obtained by the Second Respondent between 29 December 2011 and the date of the issuance of this award must be disqualified.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by the World Anti-Doping Agency against the decision of the Appeal Board of the Judo Bond Nederland dated 29 December 2011 is partially upheld.

2. The decision of the Appeal Board of the Judo Bond Nederland dated 29 December 2011 is set aside and replaced with the following:

   Dennis de Goede is sanctioned with a period of ineligibility of eighteen months, commencing on 29 December 2011.

3. All sporting results obtained by Dennis de Goede between 29 December 2011 and the date of this award shall be disqualified.

4. (…).

5. (…).

6. All other or further claims are dismissed.