Arbitration CAS 2016/A/4534 Maurico Fiol Villanueva v. Fédération Internationale de Natation (FINA), award of 16 March 2017

Panel: The Hon. Michael Beloff QC (United Kingdom), President; Mr Jacques Radoux (Luxembourg); Mr Ken Lalo (Israel)

Aquatics (swimming)
Doping (stanozolol)
Mechanism of proof by an athlete of his/her absence of intent to commit an anti-doping rule violation (ADRV)
Inconclusive evidentiary value of results of polygraph tests

1. **Pursuant to art. 10.2.1.1 of the FINA Doping Control Rules, an athlete found to have committed an ADRV that does not involve a Specified Substance is subject to an ineligibility period of four years, unless the athlete can establish that the ADRV was not intentional. Neither the World Anti-Doping Code nor the applicable FINA Doping Control Rules, however, explicitly require an athlete to show the origin of the substance to establish that the ADRV was not intentional. Accordingly, while the determination of the origin of the prohibited substance undoubtingly represents a crucial element in the analysis of an athlete's degree of Fault, a narrow corridor remains open for the athlete to establish his/her absence of intent to cheat despite being unable to identify the source of the prohibited substance causing the ADRV.**

2. **While others CAS panels may have previously found polygraph evidence to be admissible, such evidence is of limited value. Moreover, the cost involved is disproportionate to any probative value of such test.**

I. INTRODUCTION

1. This appeal is brought by Mr. Mauricio Fiol Villanueva (the "Athlete") against the decision of the Doping Panel of the Federation Internationale de Natation (the "FINA Panel"), which found that he had committed an anti-doping rule violation ("ADRV") pursuant to article 2.1 of the FINA Doping Control Rules ("FINA DC") and thereby imposing a four-year ban on the Athlete commencing 12 July 2015 in accordance with FINA DC 10.2.1, including the disqualification of the results and forfeiture of any medals, points and prizes achieved from that date (the "Appealed Decision").

II. PARTIES

2. The Athlete is a Peruvian swimmer, specializing in the butterfly events. He has competed in several international-level events, including the 2012 Olympic Games.

3. Fédération Internationale de Natation ("FINA") is the international federation governing the sports of swimming and diving, headquartered in Lausanne, Switzerland. Its responsibilities include the regulation of swimming, including enforcement of its anti-doping program in compliance with the World Anti-Doping Code (the "WADC").

III. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion below. While the Panel has considered all the facts, evidence, allegations and legal arguments submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

5. Between 14 and 16 July 2015, the Athlete competed in the 2015 Pan-American Sports Organization (the "PASO") Games (the "Pan-Am Games") in Toronto, Canada. Prior to his competition, on 12 July, 2015, the Athlete underwent a doping control test administered by the PASO.

6. On 14 July 2015, the Athlete competed in the preliminary heats and final for the 200m butterfly race, where he finished 2nd.

7. On 16 July 2015, the Athlete competed in the preliminary heats of the 100m butterfly race and qualified for the finals, which were to take place later that day.

8. In the afternoon of 16 July 2015, before he was due to participate in the 100m butterfly race finals, the Athlete received a notification letter from the PASO Medical Commission informing him that his doping control test on 12 July 2015 resulted in an adverse analytical finding for Stanozolol (which is a prohibited but not a specified substance); that he was withdrawn from competition; and that he was provisionally suspended with immediate effect.

9. On 18 July 2015, the Peruvian Olympic Committee, on behalf of the Athlete, requested that the Athlete's B Sample be tested. The Athlete's B Sample confirmed the A Sample results. In consequence the PASO Medical Commission referred the Athlete's case to FINA.

10. On 4 December 2105, a hearing was held before the FINA Doping Panel.

11. On 14 March 2016, the FINA Doping Panel issued the Appealed Decision.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. On 4 April 2016, the Athlete filed his statement of appeal at the Court of Arbitration for Sport (the "CAS") against FINA in accordance with Article R47 *et seq*. of the Code of Sports-related Arbitration (the "Code") challenging the Appealed Decision. In his statement of appeal, the Athlete nominated Mr. Jacques Radoux as arbitrator.

13. On 8 April 2016, FINA nominated Mr. Ken Lalo as arbitrator.

14. On 5 May 2016, following agreed upon extensions of time in accordance with Article R32 of the Code, the Athlete filed his appeal brief in accordance with Article R51 of the Code.

15. On 31 May 2016, the CAS Court Office, pursuant to Article R54 of the Code, and on behalf of the President of the Appeals Arbitration Division, appointed the Panel in this procedure as follows:

President:	Hon. Michael J. Beloff, MA, QC, Barrister in London, United Kingdom;
Arbitrators:	Mr. Jacques Radoux, Référendaire at the European Court of Justice, Luxembourg;
	Mr. Ken Lalo, Attorney-at-Law in Gan-Yoshiya, Israel.

16. On 8 June 2016, FINA filed its answer in accordance with Article R55 of the Code.

17. On 17 and 22 November 2016, the Athlete and FINA, respectively, signed and returned the order of procedure in the appeal.

18. On 13 December 2016, a hearing was held at the CAS Court Office in Lausanne. The Panel was assisted by Mr. Brent J. Nowicki, Managing Counsel at the CAS, and joined by the following:

For the Athlete:

Mr. Mauricio Fiol Villanueva, athlete
Mr. Howard Jacobs, counsel
Mr. Mike Morgan, counsel
Ms. Giuliana Belaunde, coach
Mr. Eduardo Kahane, interpreter
Mr. Ruben Hinojosa, nutritionist (by telephone)
Mr. Carlos Tabini, Vice President of the Federacion Deportiva Peruana de Natacion (by telephone)
Dr. Carlos Alberto Izaguirre, veterinarian doctor (by telephone)
Dr. Louis Rover, polygraph examiner (by telephone)

For the Respondent:
Mr. Jean-Pierre Morand, counsel

V. SUBMISSIONS OF THE PARTIES

19. The Athlete's submissions, in essence, may be summarized as follows:

- The Athlete neither intended to cheat nor was reckless or negligent in relation to his obligations to avoid an ADRV, or knew that there was a significant risk that his conduct might constitute or result in an ADRV and manifestly disregarded that risk.

- The Athlete did not know or have any reason to believe that he had taken Stanozolol.

- There was no basis in the FINA DC or the WADC on which it was based for the conclusion of the FINA Panel that an athlete must establish the source of a prohibited substance as a prerequisite of establishing lack of intent to cheat.

- Without prejudice to the foregoing, the Athlete had done everything he could to establish the source of the prohibited substance, including the testing of all the supplements he consumed in the months prior to the ADRV.

- The Athlete advanced the theory that the source of the prohibited substance was contaminated horse meat sold as beef which he had consumed in Peru before he travelled to Toronto.

- The Athlete had taken other measures to prove an absence of intent, including a polygraph test and hair sample analysis.

- Irrespective of any inability to identify the source of the Stanozolol, the Athlete had established, on a balance of probability, that he did not knowingly ingest Stanozolol or intend to cheat.

- FINA DC 10.6.3 permits a reduction in the otherwise appropriate period of ineligibility for prompt admission of the asserted violation. The Athlete should enjoy the benefit of such reduction since he (i) promptly admitted the ADRV and accepted the results of his A and B Samples; (ii) has limited his arguments to the issue of sanction; and (iii) has cooperated with the doping control process throughout the proceedings before FINA and the CAS.

- The principle of proportionality should be applied to any period of ineligibility assessed against the Athlete. In the light of all the circumstances of his case, a four-year ban cannot be considered proportionate.

- In consideration of the foregoing, any period of ineligibility assessed against the Athlete should not exceed two years.

20. In his requests for relief, the Athlete seeks the following:

Mr. Fiol respectfully requests the Panel to:

(a) annul the Decision

(b) limit any period of ineligibility imposed on him to a maximum of two years; and

(c) order FINA to:

(i) reimburse Mr. Fiol his legal costs and other expenses pertaining to these Appeal proceedings before the CAS; and
(ii) bear the costs of the arbitration.

21. FINA's submission, in essence, may be summarized as follows:

- The Athlete bears the burden of proof to persuade the Panel that he did not intend to cheat. If he cannot do so, he must be sanctioned with a four-year period of ineligibility.

- For this purpose, the Athlete must first prove how the prohibited substance came to be present in his system. Absent such proof (which the Athlete did not provide), he cannot show that the ADRV was not intentional.

- Without prejudice to the foregoing, the Athlete tested positive for a steroid (Stanozolol) which is notoriously used for doping. The natural inference is that the Athlete used it for that purpose.

- The Athlete cannot rely on polygraph evidence to prove that he did not intentionally take Stanozolol. Such evidence is not admissible under Swiss law and is widely recognized as unreliable.

- The Athlete cannot rely on hair sample analysis which took place four months after the doping control in question to establish that he did not take Stanozolol prior to the Pan-Am Games.

- The analyses carried out on behalf of the Athlete show no more than that the origin of the prohibited substance is not a contaminated supplement and there is no other evidence to the effect that it was so caused.

- The Athlete's theory that the ADRV could have been caused by his consumption of contaminated horse meat was mere speculation, unsupported by any cogent evidence, and, as the Athlete conceded, impossible to prove.

- The Athlete is not entitled to any reduction of his period of ineligibility for "prompt admission" pursuant to FINA DC 10.6.3. The rationale for this provision is the avoidance of lengthy disciplinary proceedings. In this case, the Athlete, by contesting any intentional violation, caused full hearings to take place both before the FINA Panel and before the

CAS. Moreover, the Athlete never sought the approval of the World Anti-Doping Agency ("WADA") to gain credit under this provision, which is a prerequisite to any such reduction.

- There is a consensus in the world of sport that the rule that a first intentional ADRV shall carry a four-year ban is *per se* proportionate and compatible with the principles of international law and human rights.

- Since sanctions are codified, the concept of proportionality cannot be applied to read down the codified sanction by reference to the individual circumstances of any case. An athlete who establishes that he or she did not act with intent and that he or she is guilty of no or insignificant fault or negligence, may pursuant to FINA DC 105.2. obtain a reduction in sanction which sufficiently satisfies that concept.

22. In its requests for relief, FINA seeks the following:

In light of the above, the Respondent respectfully requests that the CAS Panel issue an award holding that:

(a) The Appeal filed by Mr Mauricio Fiol Villanueva is dismissed.

(b) The Fédération Internationale de Natation is granted an award for costs.

VI. JURISDICTION

23. Article R47 of the 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.

24. The Athlete asserts that the jurisdiction of the CAS derives from FINA DC 13.1 and 13.2. FINA expressly consents to jurisdiction in its answer. Moreover, both parties confirmed CAS jurisdiction by execution of the order of procedure. The Panel agrees for those reasons that CAS has jurisdiction in this appeal.

VII. ADMISSIBILITY

25. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

26. FINA DC 13.71.1 provides that *"[t]he deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party. (…)"*. The Athlete received notification of the Appealed Decision on 14 March 2016 and filed his statement of appeal on 4 April 2016. FINA does not dispute that the appeal is therefore admissible.

27. The Panel agrees for those reasons that the appeal is admissible.

VIII. APPLICABLE LAW

28. Article R58 of the 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.*

29. According to FINA DC 13.2.1, *"(…) the decisions may be appealed exclusively to CAS in accordance with the provisions applicable before such court"*.

30. Moreover, FINA DC 20 provides, in relevant part, the following:

> *DC 20.1 Except as provided in DC 20.4, these Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes.*
>
> *(…)*
>
> *DC 20.3 The Code and the International Standards shall be considered integral parts of these Anti-Doping Rules.*

31. Therefore, the applicable law, accordingly to which the Panel will decide the present appeal, is the FINA DC and, subsidiarily, Swiss law given FINA's domicile in Switzerland.

IX. RELEVANT FINA DOPING REGULATIONS AND DEFINITIONS

32. The following provisions of the FINA DC, based on the WADC, are material to this appeal:

FINA DC 2 ("Anti-Doping Rule Violations")

> *The purpose of DC 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules has been violated.*

Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:

DC 2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.

(…).

FINA DC 3.1 ("Burdens and Standards of Proof") provides:

FINA and its Member-Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the Member Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

FINA DC 10.2 ("Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or prohibited Method") provides, so far as material:

The period of Ineligibility imposed for a first violation of DC 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension of sanction pursuant to DC 10.4, 10.5 or 10.6:

DC 10.2.1 The period of Ineligibility shall be four years where:

DC 10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

DC 10.2.1.2 The anti-doping rule violation involves a Specified Substance and FINA or the Member Federation can establish that the anti-doping rule violation was intentional.

DC 10.2.2 If DC 10.2.1 does not apply, the period of Ineligibility shall be two years.

(…)

DC 10.2.3 As used in DC 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. (…).

FINA DC 10.3 ("Ineligibility for other Anti-Doping Rule Violations") provides:

> *The period Ineligibility for anti-doping rule violations other than as provided in DC 10.2 shall be as follows, unless DC 10.5 or 10.6 are applicable*:
>
> *DC 10.3.1 For violations for DC 2.3 or DC 2.5, the Ineligibility period shall be four years unless, in the case of failing to submit to Sample collection the Athlete can establish that the commission of anti-doping rule violation was not intentional (as defined in DC 10.2.3), in which case the period of Ineligibility shall be two years.*
>
> *(…).*

DC 10.5.1.2 Contaminated Products
In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

> *[Comment to DC 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be Contaminated on his or her Doping Control form].*

DC 10.5.2 Application of No Significant Fault or Negligence beyond the Application of DC 10.5.1
If an Athlete or other Person establishes in an individual case where DC 10.5.1 is not applicable that he or she bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in DC 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable (…).

> *[Comment to DC 10.5.2: DC 10.5.2 may be applied to any anti-doping rule violation except those rules where intent is an element of the anti-doping rule violation (e.g., DC 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., DC 10.2.1) or a range of Ineligibility is already provided in a rule based on the Athlete or other Person's degree of Fault].*

FINA DC 10.6.3 ("Prompt Admission of an anti-doping rule violation after being confronted with a violation sanctionable under DC 10.2.1 or 10.3.1") provides:

> *An Athlete or other Person potentially subject to a four-year sanction under DC 10.2.1 (…) by promptly admitting the asserted anti-doping rule violation after being confronted by FINA or Member Federation, and also upon the approval and at the discretion of both WADA and FINA, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the severity of the violation and the Athlete or other Person's degree of fault.*

Appendix 2 (Definitions Applicable to Doping Control Rules)

> **No Significant Fault of Negligence**: The *Athlete* or other *Person's* establishing that his or her *Fault or Negligence*, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation. Except in the case of a *Minor*, for any violation of DC 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.

X. MERITS

A. Common Ground between the Parties

33. It is common ground that (i) the Athlete was guilty of an ADRV under FINA DC 2.1. in that Stanozolol was present in his sample (ii) *prima facie* his period of ineligibility would be 4 years under FINA DC 10.2.1 (iii) in order for the period of ineligibility to be reduced to 2 years, it is for the Athlete to establish on the balance of probabilities that his ADRV was not intentional under FINA DC 10.2.1.1. as defined in DC 10.2.3 (iv) it is for the Athlete to establish to the same standard that he ought to have the benefit of a reduction under DC 10.6.3.

B. Main Issues

34. The following are the main issues which arise in this appeal.

(i) In order to establish absence of intent for the purposes of DC, is it necessary for the Athlete to establish the source of the prohibited substance present in his sample? ("Proof of Source")

(ii) If it is necessary, has the Athlete established the source of the Stanozolol present in his sample? ("Source of Stanozolol")

(iii) If it is not necessary, has the Athlete established his lack of intent? ("Proof of Lack of Intent")

(iv) What is the meaning of FINA DC 10.6.3? ("FINA 10.6.3")

(v) Is the Athlete entitled to a reduction thereunder? ("Reduction for Admission")

(vi) Is the sanction of 4 years ineligibility on the Athlete disproportionate? ("Proportionality").

i. Proof of Source

35. The following factors support the proposition that establishment of the source of the prohibited substance in an athlete's sample **is not** a *sine qua non* of proof of absence of intent:

(i) The relevant provisions, *i.e.* FINA DC 10.2.1.1 and 10.2.3, do not refer to any need to establish such source.

(ii) Establishment of such source is required when an athlete seeks to prove no fault or negligence (FINA DC 10.4) or no significant fault or negligence (FINA DC 10.5.1 and 10.5.2) under the definitions of No Fault or Negligence and No Significant Fault or Negligence. This engages the principle *inclusio unius exclusio alterius:* if such establishment is expressly required in one rule, its omission in another must be treated as deliberate and significant.

(iii) The omission in FINA DC modelled on WADC 2015 of the need to establish source as a precondition of proof of lack of intent must be presumed to be deliberate.

(iv) Any ambiguous provisions of a disciplinary code must in principle be construed *contra proferentem* and in accordance with the hallowed statement in CAS 94/129: *"The fight against doping is arduous and it may require strict rules. But the rule makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable"* (para. 34). This is especially so when on the express language of the code the purpose of the concept of intent is to identify athletes *"who cheat"* (sic).

(v) In an illuminating article by four well recognized experts including Antonio Rigozzi and Ulrich Haas "Breaking Down the Process for Determining a Basic Sanction Under the 2015 World Anti-Doping Code" (*International Sports Law Journal, (2015) 15:3-48)* the view is expressed:

"The 2015 Code does not explicitly require an Athlete to show the origin of the substance to establish that the violation was not intentional. While the origin of the substance can be expected to represent an important, or even critical, element of the factual basis of the consideration of an Athlete's level of Fault, in the context of Article 10.2.3, panels are offered flexibility to examine all the objective and subjective circumstances of the case and decide if a finding that the violation was not intentional".

36. The following factors support the proposition that establishment of the source of a prohibited substance in an athlete's sample is a *sine qua non* of proof of absence of intent:

(i) It is difficult to see how an athlete can establish lack of intent to commit an ADRV demonstrated by presence of a prohibited substance in his sample (*a fortiori* though use of such substance) if s/he cannot even establish the source of such substance.

(ii) The express need to establish lack of intent to commit an ADRV for the purposes of establishing no fault or negligence or no significant fault or negligence is because of the same degree of difficulty does not subsist in this different context. Hence it was necessary to make express what in the context referred to in (i) was necessarily implicit.

(iii) There is a consistent line of jurisprudence that establishment of source is necessary when an athlete seeks to establish absence of fault (see CAS 2013/A/3124 at para. 12.2; quoting

with approval CAS 2006/A/1130, at para. 39: *"Obviously this precondition is important and necessary; otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up. To allow any such speculation as to the circumstances, in which an athlete ingested a prohibited substance would undermine the strict liability rules underlying (…) the [WADC], thereby defeating their purpose"*).

(iv) That jurisprudence is logically applicable *mutatis mutandis* to a case where the athlete needs to establish absence of intent. Indeed, it has already been applied in cases where intent rather than fault was in issue (see CAS 2016/A/4662 where the Sole Arbitrator said at para. 39 by reference to RADO 10.2.3 (adopting the same provision in 2015 WADC *"The Athlete bears the burden of establishing that the violation was not intentional ... and it naturally follows that the athlete must also establish how the substance entered her body"*); (see also CAS 2016/A/4377 at para. 51 to same effect)). However, in CAS 2016/A/4439, the Panel did not appear to have considered it mandatory for the athlete to establish how the prohibited substance got into his system in order for him to show that the ADRV was not intentional. While noting that the athlete was unable to identify the source, the Panel nevertheless went on to consider whether the athlete could show that the ADRV was not intentional, and, in finding that he could not, relied on various reasons other than such inability (para 41. *et seq*.).

37. The Panel finds the factors set out in paragraph 35 more compelling than those set out in paragraph 36. In particular, it is impressed by the fact that the FINA DC, based on WADC 2015, represents a new version of an anti-doping Code whose own language should be strictly construed without reference to case law which considered earlier versions where the versions are inconsistent. Furthermore, the Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history (it is recorded if apocryphally, that the young George Washington admitted chopping down a cherry tree because he could not tell a lie. *Mutatis mutandis* the Panel could find the same fidelity to the truth in the case of an athlete denying a charge of cheating). That said, such a situation would inevitably be extremely rare. Even on the persuasive analysis of Rigozzi, Haas *et al*., proof of source would be *"an important, even critical"* first step in any exculpation of intent. Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.

ii. Source of Stanozolol

38. The Panel is unpersuaded that the Athlete, if contrary to its preferred view he is required to establish the source of the Stanozolol, has been able to do so. The tests of the supplements he had admitted using showed at best that they were not the source of the Stanazolol-although Herbalife could not dismiss the possibility that the tablets he took in the run up to the Pan-Am Games were free from any contamination. No representative of Herbalife for its part gave evidence about its product sources or how they were processed.

39. The foundations of the contaminated horse meat theory were unsound and depended in any event on a series of improbabilities none of which were established to the satisfaction of the Panel. The evidence of Dr Camacho was itself inconsistent. It appears that naturally deceased race horses, said to have been fed with Stanozolol to enhance their performance, were usually buried in the environs of the Peruvian Jockey Club. Some race horses which had retired from the national racing circuit were nonetheless re-engaged in local races which took place near the beach or in the mountains. It was never made clear to the Panel whether it was the bodies in the former or latter category which found their way into the local unregulated meat market and were there mis-described as cattle meat or mixed into sausages. Dr Camacho explicably admitted no knowledge of the niceties of the Peruvian meat market. Nor was there any evidence at all that any such unappetizing product was actually eaten by the Athlete at a time when it could have been responsible for the adverse analytical finding given the days that passed between his departure from Peru and the date of the test.

iii. Proof of Lack of Intent

40. There was, however, no evidence upon which the Athlete could rely to discharge his burden of proving lack of intent. The absence of evidence as to the source of the Stanozolol closed off one avenue. All that was left were his protestations of innocence, the character evidence given by his coach, the lie detector test, the hair sample analysis and his bare assertion that his recent improvements in terms of times for his events achieved prior to the Pan-Am Games were the product of superior conditioning.

41. As to the Appellant's protestations, the Panel reminds itself of a dictum in an earlier case: CAS 99/A/234 and CAS 99/A/235, para. 10.17 *"the currency of such denial is devalued by the fact that it is the common coin of the guilty as well as of the innocent"*. The Appellant's explanation for the recent improvement in his performance, and his coach's sharing of that view is by itself without sufficient weight to discharge the burden upon him; likewise the trust that Mr. Tabini had in the Appellant's character.

42. The *lex fori* (*i.e.* the law of Switzerland) does not reject as inadmissible *in limine* the results of a polygraph test voluntarily undergone. It will evaluate it and exclude it only if it is found by application of restrictive criteria to be objectively "unsuitable" evidence (Article 152 para. 1 Swiss Civil Procedure Code; BGE 124 I 241, E. 2; BK-ZPO-BRÖNNIMANN, 2013, Art. 152 Rn 19; HK-GS-JÄGER, 3. Aufl. 2013, § 136a Rn 35).

43. CAS Panels have in the past considered the suitability of such evidence and in doing so, have never found it dispositive. The high-water mark of its use by a CAS Panel is to be found in CAS 2011/A/2384, where it was stated at para. 384:

> *"In light of the foregoing, the Panel takes good note of the fact that the results of the polygraph corroborate [X]'s own assertions, the credibility of which must nonetheless be verified in light of all the other elements of proof adduced. In other words, the Panel considers that the results of the polygraph add some force to [X]'s declaration of innocence but do not, by nature, trump other elements of evidence".*

44. More circumspectly, in CAS 2014/A/3487, the Panel said, at para. 119, that it did:

"not consider it necessary to consider the admissibility or reliability of the polygraph evidence. In these circumstances, the Panel therefore concludes that it need place no weight on [X]'s oral testimony or written report, and, while noting that previous CAS cases have considered this issue (see, for example, CAS 2011/A/2384 & 2386 and CAS 2008/A/1515) the Panel expresses no view as to the probative value of this testimony or the written report".

45. Even in the original home of the device, the U.S. Supreme Court has held that the rejection of polygraph evidence (said to support an appellant's denial of drug taking) was not unconstitutional *(See US v. Scheffer, 1998 USSC 32)*. Polygraph tests were notoriously passed by [X] and [X], both of whom later admitted use of prohibited substances.

46. In the Panel's view, while CAS Panels may have previously found polygraph evidence to be admissible, such evidence is of limited value. Moreover, the cost involved is disproportionate to any probative value of such test. If, in the future, it were not, as a matter of practice to be entertained by CAS panels, this would have the beneficial consequence that an athlete could not be criticized for failure to submit to such tests as a means of seeking to show lack of intent.

47. The Panel emphasises that it does not need to be satisfied that the Athlete did cheat. The choice before it was not binary. As Lord Brandon, an English Law Lord, said in *The Popi M I 985 I WLR 984 "a judge (or arbitrator) can always say that 'the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden' [p. 955]".*

iv. FINA DC 10.6.3

48. To trigger the possibility of a reduction from what would otherwise be a four-year sanction, the Athlete must (i) admit the asserted ADRV; (ii) do so promptly after being confronted by FINA or a member federation; and (iii) have the approval of both WADA and FINA. Even in such circumstances, (iv) the reduction is discretionary (see the word "**may** receive a reduction" in the context of the reference to the discretion of WADA and FINA, and depends upon the severity of the violation and the Athlete's degree of fault).

49. The perceptible purpose of the provision is to avoid the time and cost involved in a contested dispute and its procedural consequences. For the same reason guilty pleas to criminal charges in England and Wales (and other countries) conventionally attract a discount as to penalty (see Reduction in Sentence for a Guilty Plea Guideline 2016, p 7.). The Panel does not accept that such a provision, so construed, should be a spur to an athlete, otherwise honest, to lie so as to gain the chance of a reduction to which he or she would not ordinarily be entitled with the consequence (as was argued) that such athlete might be better off than one who was genuinely ignorant of the source of the positive test and could not therefore properly make an admission. The latter athlete could, if so minded, make a false admission as easily as the former. In any event, in principle, a construction of a rule otherwise appropriate cannot be discarded on the basis that persons will not act in relation to it in good faith.

v. Reduction for Admission

50. The Athlete sensibly (in the light of the results of the test on the A and B samples) all but inevitably admitted the ADRV (as defined by FINA DC.2.*)* with which he was charged; he contested only the sanction. In contesting the sanction and raising the issue of lack of intent in two hearings, the Athlete did not save cost and time in any significant way. In any event - and decisively - he neither sought nor had the approval of WADA and sought the approval of FINA in so far as he raised the matter in the appeal to CAS. The Panel is unable accordingly - and would not in any event be inclined in the circumstances of these proceedings - to reduce his sanction under FINA DC 10.6.3.

vi. Proportionality

51. The history of sanctions since the creation of WADA can be, if only broadly, summarised in three chapters. Under WADC 2003, the basic sanction for a first offence ADRV was two years. Under WADC 2009, it became two years, subject to increase to four years in circumstances of aggravation. Under WADC 2015, it became four years, subject to decrease in circumstances of mitigation. The sanctions screw was tightened in an effort to rid sport of the scourge of doping. Guarding against doping is so fundamental to the ability to hold fair sporting events and fund them that its presence jeopardizes the existence of sports itself.

52. The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim. At the request of WADA, Jean-Paul Costa, former President of the European Court of Human Rights, wrote a Legal Opinion regarding the draft World Anti-Doping Code, which examines the issue of the compatibility of several provisions of the draft revision of the WADC 2015 with the accepted principles of international law and human rights (published in June 2013). In the Panel's view it would be a wholly exceptional, if any, case to allow particular circumstances to trump the provisions of the WADC 2015 relating to sanctions for an ADRV. However, the Panel considers that there is nothing exceptional about the present case.

vii. Conclusion

53. For these reasons the Panel upholds the four-year sanction, effective from the date of the Athlete's initial suspension and dismisses the appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Mauricio Fiol Villanueva on 4 April 2016 is dismissed.

2. (…).

3. (…).

4. All other motions or prayers for relief are dismissed.