Arbitration CAS 2009/A/1983 Mariana Ohata v. International Triathlon Union (ITU), award of 21 July 2010

Panel: Mrs Corinne Schmidhauser (Switzerland), President; Judge Carole Barbey (Switzerland); Prof. Ulrich Haas (Germany)

Triathlon
Doping (furosemide)
Legal effect of a decision that was not signed and sent by e-mail
Difference between impartiality and independence of the Hearing Panel
Breach of the ISL
Multiple infraction and period of ineligibility

1. **Whether or not a decision has to be signed by the members of a panel is a question as to the form of said decision. There is no provision in the ITU Anti-Doping Rules according to which the decision of the Doping Hearing Panel must bear the signatures of the panel members in order for the decision to enter into force or existence. The only form requirement to be found in the rules and regulations of the ITU is that the decision must be in writing and contain reasons. There are no recognised international law principles as to the form requirements relating to disciplinary decisions of international sports organisations.**

2. **The ITU Anti-Doping Rules do not define the terms "impartial" or "independent". It is, therefore, not easy to distinguish clearly between both prerequisites. In principle, "independence" in Article 8.1.1 of the ITU Anti-Doping Rules concerns an objective situation prohibiting certain relationships, particularly of a financial nature, between a panel member and the ITU. "Impartiality" on the contrary is a more subjective notion referring to the absence of bias in the person acting as a member of the panel resulting from a "privileged" relationship with the matter to be decided.**

3. **According to the 2009 International Standards for Laboratories, the requirement that a different analyst perform the A and B analytical procedures does no longer exist.**

4. **According to the ITU Anti-Doping Rules, anti-doping rule violations committed prior to the entry into force of today's ITU Anti-Doping Rules may be taken into account in cases involving multiple infraction as long as the second violation has taken place within the deadline established in the ITU Anti-Doping Rules.**

The International Triathlon Union (ITU or the "Respondent") is an independent non-profit organization that promotes ethical conduct in all aspects of the sport of triathlon. With the cooperation and support of its member federations, the ITU respects and implements its own Anti-Doping Rules and Program in all international ITU events, and in all national events via its member federations and their members. As an International Summer Olympic Federation and Signatory to the World Anti-Doping Code and its mandatory International Standards, the ITU is committed to fully comply with the World Anti-Doping Rules.

Mrs Mariana Ohata ("the Athlete" or "the Appellant") is an international level triathlon athlete. She is a member of the Brazil Triathlon Federation (Confederação Brasileira de Triathlon, BTF) and the ITU and is included in the ITU's Registered Testing Pool.

In the year 2002 the Appellant was sanctioned with a 60 day period of ineligibility for an anti-doping rule violation.

During an out-of-competition doping control in Iowa, USA, the Appellant has been subject to an anti-doping test on 26 June 2009. She provided a urine sample that has been divided and sealed into "A" and "B" bottles and has been sent to the UCLA laboratory in Los Angeles for doping analysis. The sample number code on her sample collection kit was 1525350.

The "A" sample was analysed by the UCLA laboratory in July 2009. The analysis detected the presence of the substance furosemide in the Appellant's sample. The latter is a prohibited substance under the WADA Prohibited List, section S5 Diuretics and Masking Agents. On 13 July 2009 the UCLA laboratory reported these findings to the Respondent.

On the basis of the adverse analytical findings, the Respondent provided the Appellant and her national federation in Brazil notice of an assertion of an anti-doping rule violation on 21 July 2009. In accordance with the ITU Rules, the Appellant exercised her right to have the "B" sample analysed.

The analysis of the "B" sample, performed by the UCLA laboratory, confirmed the presence of the substance furosemide in sample 1525350. The Appellant and her national federation were so notified.

The Appellant requested full documentation of the "A" and "B" sample analysis. Said documentation was forwarded to the Appellant by the Respondent on 27 August 2009.

After accepting to proceed to a documentary hearing, the Appellant was provided with the opportunity to submit medical documentation along with any other statements necessary for her defence before the ITU Doping Hearing Panel.

In order to let a Brazilian laboratory perform analytical tests of some nutritional supplements she was consuming around the time of the out-of-competition anti-doping test, the Appellant requested with e-mail of 2 September 2009 an extension of the 10-day deadline to present her statement of defence. This extension was granted by the Respondent.

On 5 October 2009, the ITU Anti-Doping Panel rendered its decision ("the Decision") on the basis of all provided documentary evidences of both parties. The Decision reads – *inter alia* – as follows:

"33. The Panel has considered all the evidence submitted and strictly applied the ITU Anti-Doping Rules and the World Code to [the] all the facts of the present case.

34. The Panel finds that the athlete acted negligently and in clear violation of the said Rules. The Panel further finds that the athlete has not presented any corroborating evidence or satisfied the Panel to a comfortable satisfaction that the circumstances of the case provide sufficient elements of proof that could allow the application of the leniency afforded in Articles 10.4, 10.5.1 or 10.5.2 of the ITU Rules.

35. (…)

36. (…)

37. The Panel finds that the athlete has committed an anti-doping rule violation under Article 2.1 of the ITU Rules and hereby imposes the standard sanction imposed by Article 10.2 of the ITU Rules.

38. Since this is the athlete's second anti-doping rule violation in order to impose the proper period of ineligibility attention must be given to Article 10.7 of the ITU Rules dealing with multiple violations.

39. For her first anti-doping rule violation, the athlete's sanction was reduced to 60 weeks [sic!] based on the no significant fault provisions the rules in place at the time. In accordance with the table provided in Article 10.7.1 of the ITU Rules, while imposing a standard sanction for this second violation, the Panel is free to impose a total period of ineligibility between 6-8 years on the athlete. Based on the substance at hand, the Panel is electing to impose a sanction at the lower end of the spectrum.

40. The ITU Anti-Doping Hearing Panel hereby imposes period of ineligibility of 6 years on Ms. Mariana Ohata of Brazil. The athlete is suspended from competing in any triathlon events at the national or international level from date of this decision, October 2, 2009, until October 1, 2015.

41. The decision of the ITU Anti-Doping Hearing Panel is final but may be appealed to the International Court of Arbitration in Sport by Ms. Ohata, the Brazilian Triathlon Federation and/or WADA in accordance with the ITU Anti-Doping Rules".

By fax-simile of 23 October 2009 the Appellant filed a statement of appeal against the decision rendered by the ITU Doping Hearing Panel on 5 October 2009 at the Court of Arbitration for Sport (CAS).

By letter dated 28 October 2009 the CAS Court Office acknowledged receipt of the statement of appeal filed with CAS by the athlete on 23 October 2009. It informed the parties about the imminent procedure before CAS and advised the Appellant to file with CAS a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specifications of other evidence upon which she intends to rely on within 10 days following the expiry of the time limit for the appeal. Furthermore, the CAS Court Office noted the Appellant's nomination of Mrs. Carole Barbey as arbitrator in this present arbitration and advised the Respondent to appoint an arbitrator within 10 days.

By letter of 30 October 2009 the Appellant requested an extension of the deadline to file her appeal brief. As the Respondent had already granted an extension of the deadline in the previous procedure before the ITU Doping Hearing Panel and as it felt that another extension had no legal merit at this point in the proceedings, it did not agree on the requested extension. By letter of 6 November 2009 the CAS Court Office informed the parties, that consequently the President of the CAS Appeals

Arbitration Division will render a decision on this issue and that in the meantime, the deadline to file the appeal brief will remain suspended.

On 11 November 2009, the CAS Court Office informed the parties, that the President of the CAS Appeals Arbitration Division granted the Appellant an extension to file her appeal brief until 30 November 2009.

On 30 November 2009 the Appellant lodged her appeal brief with the CAS.

On 8 December 2009 the CAS Court Office acknowledged the receipt of the appeal brief filed by the Appellant, together with the produced exhibits. A copy of these documents has been enclosed to the Respondents attention. Additionally, in accordance with Article R55 of the Sports-related Arbitration (hereinafter referred to as "the Code"), the CAS Court Office advised the Respondent to submit to the CAS an answer within 20 days upon receipt of the respective correspondence.

By letter of 15 December 2009 the Respondent requested to extend the prescribed deadline to file its answer with CAS for 20 days, due to late reception of the documents sent by DHL and due to the imminent Christmas vacations. With fax-simile of 17 December 2009, the Appellant explicitly agreed to that request.

The Respondent filed its Answer to the Statement of Appeal on 23 December 2009.

With her statement of appeal dated 23 October 2009 the Appellant challenges the decision issued by the Respondent on 5 October 2009. In her written submissions, she requests – *inter alia* – that:

> *"- due to procedural errors, the case against her [the Appellant] be dismissed; or*
>
> *- that no period of ineligibility be imposed to her, according to Article 10.5.1 of the ITU Anti-Doping Rules, as she bears no fault or negligence on how the prohibited substance Furosemide entered her system; or if Article 10.5.1 is not applicable;*
>
> *- that Article 10.4 is applicable, since the Appellant had no intention to enhance her performance or mask the use of a performance-enhancing substance (…) and a minimum sanction of one year is imposed, according to Article 10.7.1 of the ITU Anti-Doping Rules, since the first anti-doping violation was a NSF and the second one a RS, for the purposes of imposing sanctions on multiple violations".*

The Respondent requests the Panel to uphold the sanction issued by the Respondent and, hence, to dismiss the appeal.

The Respondent submits – *inter alia* – that:

> *"- an anti-doping rule violation had occurred,*
>
> *- there were no circumstances justifying the reduction or elimination of the mandatory standard sanction,*
>
> *- because this was the Appellant's second anti-doping rule violation, the ITU Anti-Doping Hearing Panel suspended the Appellant for a period of 6 years commencing on the date of the decision".*
>
> *- "the required sanction for this second anti-doping rule violation is the one decided by the ITU Anti-Doping Hearing Panel: a six year period of ineligibility from sport".*

On 21 April 2010, the Panel decided not to hold a hearing in the present proceeding, in accordance with Article R57 of the Code and in view of the circumstances of the case.

LAW

CAS Jurisdiction

1. The CAS examines its jurisdiction *ex officio*.

2. 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.

   An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance".

A. Final decision

3. Article R47 of the Code requires that the decision of the association or the sport-related body is final in the sense that there is no legal remedy available according to the statutes and regulation of the said association or sport-related body.

4. The appealed ITU Hearing Panel Decision is a *"final decision"* in the sense of Article R47 of the Code. It shall be final and binding upon communication to the parties, unless appealed pursuant to Article 13 and its sub-articles of the ITU Anti-Doping Rules. This is also evidenced by para 41 of the Decision.

B. Arbitration clause provided for in the statutes and regulations of the ITU Anti-Doping Rules

5. In order for the CAS to have jurisdiction, the matter in dispute must be covered by an arbitration clause that binds the parties to the dispute. According to Article R47 of the Code the binding force of the arbitration clause may derive from the *"statutes and regulations of the said (sports-related) body"* or from a specific arbitration agreement concluded between the parties. Since *in casu* no specific arbitration agreement has been concluded, the consent of the parties to arbitrate is expressed in the case at hand through membership in an association or sport-related body whose rules and regulations provide for arbitration. The relevant arbitration clause must, however, be enclosed in the association's or sport-related body's own rules and regulations,

since it is only to these rules and regulations that a person expresses acceptance through its membership.

6. The jurisdiction of the CAS is based on Article 13 and its sub-articles of the ITU Anti-Doping Rules. Article 13.2.1 determines the exclusive jurisdiction of the CAS in all cases involving international level athletes.

C. Conclusion

7. Considering the above, the Panel concludes that it has jurisdiction to decide the present dispute. Furthermore, the Panel notes that in their abundant correspondence with CAS none of the parties has contested CAS jurisdiction.

Scope of the Panel's review

8. Pursuant to Article R57 of the Code, the Panel shall have 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.

9. The scope of the Panel's review is not contested by the parties.

Timeliness of the Appeal

10. According to Article 13.6 of the ITU Anti-Doping Rules, an appeal of a decision rendered by the ITU Hearing Panel must be lodged with the CAS within 21 days from the date of receipt of the decision by the appealing party.

11. The Decision was rendered on 5 October 2009. By submitting the statement of appeal to the CAS on 23 October 2009, the Appellant respected the set time limit. Hence, the appeal was filed within the prescribed deadlines.

Applicable Law

12. Pursuant to Article R28 of the Code, *"The seat of the CAS and of each Arbitration Panel ("Panel") is in Lausanne, Switzerland"*. Hence, this CAS Arbitral proceeding is governed by Chapter 12 of the Swiss Federal Code on International Private Law (PIL, SR 291).

13. With respect to the law governing the merits of the dispute, Article 187(1) PIL provides that the arbitral tribunal must decide the case according to the rules of the law chosen by the parties or, in absence of a choice, according to the law with which the case has the closest connection. The Code's provision on this issue does not contradict this overriding Article of the PIL as can be seen in Article R58.

14. Pursuant to Article R58 of the Code, 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.

15. According to the introduction of the ITU Anti-Doping Rules, its provisions apply to all its members and all participants in the activities of ITU or of its member federations. The Appellant agreed with this provision by being a member of the International Triathlon Union and a member of the Brazil Triathlon Federation.

16. In the present matter, the Arbitration Panel shall consequently decide the dispute according to the applicable regulations provided in the statutes and regulations of ITU Anti-Doping Rules.

Merits

A. Undisputed facts

17. The Arbitration Panel notes that this case is – in essence – related to the differing legal interpretation by the parties of facts that are mostly undisputed. The undisputed facts consist in the following:

- the Appellant, an international level triathlon athlete, is a member of the International Triathlon Union and the Brazil Triathlon Federation;
- all parties acknowledge that the ITU Anti-Doping Rules are applicable to the case at hand;
- the Appellant committed an anti-doping rule violation in 2002 for which she was sanctioned with a period of ineligibility of 60 days. This is clearly evidenced by the letter of the BTF dated 31 October 2002 to the Respondent which the latter has submitted as exhibit 9 of its answer dated 23 December 2009.
- the Appellant has again been subject to an anti-doping control in an out-of-competition test on 26 June 2009 in Iowa, USA;
- the Appellant provided a urine sample with sample number code 1525350 that has been sent to the UCLA laboratory in Los Angeles for doping analysis;
- the sample analysis attributed by the laboratory to the Athlete showed the presence of the prohibited substance furosemide;
- furosemide is a prohibited substance under the WADA Prohibited List, section S5 Diuretics and Masking Agents;
- the same laboratory analyst participated in certain procedures of both, the "A" and "B" sample analysis and

- the Decision by the Respondent does not bear the signatures of the members of the ITU Doping Hearing Panel.

B. The Key Issues

18. The present dispute addresses the following legal issues:

a) Has the Decision any legal effect even though it has not been signed by the members of the ITU Doping Hearing Panel?

b) Was the composition of the ITU Doping Hearing Panel in accordance with the ITU Anti-Doping Rules?

c) Did the laboratory breach mandatory safeguards for the Athlete in the ISL?

d) Has the Respondent established that the Appellant committed an anti-doping rule violation according to the ITU Anti-Doping Rules?

e) In case an anti-doping rule violation is established, what period of ineligibility applies to the case at hand?

a) Legal effect of the Decision

19. The Appellant argues that the decision of the ITU Doping Hearing Panel was sent to the Appellant solely by e-mail and therefore has not been signed by any of the members of the Panel. The Appellant concludes from this that - according to international law principles - the Decision must be considered as nonexistent and without legal effect. Furthermore, the Appellant contests the authenticity of such Decision. Since the Decision bears no signatures there is – according to the Appellant – no proof that it stems from all the members of the ITU Doping Hearing Panel, ie that the decision sent to the Appellant is the aggregate will of all the members of the panel.

20. Whether or not a decision has to be signed by the members of a panel is a question as to the form of said decision. The Appellant has not provided any provisions in the statutes and regulations of the ITU Anti-Doping Rules according to which the decision of the Doping Hearing Panel must bear the signatures of the panel members in order for the decision to enter into force or existence. The only form requirement to be found in the rules and regulations of the ITU is Art 8.3 lit. h of the ITU Anti-Doping Rules. According to said provision the decision must be in writing and must contain reasons. Both prerequisites are met in the case at hand. The Appellant deduces more stringent form requirements from *"international law principles"*. However, the Appellant fails to demonstrate the source and the contents of these principles. The Panel is not aware of any recognised international law principles as to the form requirements relating to disciplinary decisions of international sports organisations. In particular the Panel is of the view that Art 189 (2) of the PIL does neither apply directly nor by analogy in the case at hand, since disciplinary decision by an organ of an international sports organisation do not qualify – according to the PIL – as arbitral awards. Furthermore, the Panel holds that there is no rule preventing an international sports organisation to communicate its decisions via email.

21. The decision in dispute bears the logo of the Respondent on top. At the very bottom of the Decision the names and the function of the members of the ITU Anti-Doping Panel are mentioned. It is evident, therefore, from the contents of the Decision that it originates from an organ of the ITU. Furthermore, the cover letter with which the decision was sent to the Appellant makes it abundantly clear that the Decision was issued by the "Hearing Panel" of the ITU. The Appellant contests that the decision sent to her is supported by all or the majority of the members of the ITU Doping Hearing Panel. In doing so the Appellant contests the authenticity of the Decision. The authenticity of a decision, however, can be proven by various means. In the Panel's view the Respondent has provided sufficient proof as to the authorship of the Decision in dispute (see Dr. Lally's e-mail of 4 October 2009, in which he fully supports the reviewed document, exhibit 6; and Dr. Hiller's affidavit of 17 December 2009, according to which he has been well informed on the facts of the case and after reading the entirety of the Decision has been satisfied with its contents and the sanction of a 6 year period of ineligibility). To conclude, therefore, the Panel holds that the Appellant's submission that the Decision is inexistent and void of any effects has to be rejected.

b) The composition of the ITU Doping Hearing Panel

22. The Appellant challenges the independence and impartiality of two of the members of the ITU Doping Hearing Panel, namely Dr. Doug Hiller and Mrs. Janie Soublière. She submits that the composition of the Panel is incompatible with the principles of a Fair Hearing as provided in Article 8.3 of the ITU-Anti-Doping Rules.

23. The Respondent rejects the Appellant's allegations of impartiality and independence of two of the ITU Doping Hearing Panel's members. It argues that Dr. Doug Hiller, a member of the ITU Medical Committee, is not employed by the ITU nor is he directly involved in the administration of ITU or in any way involved in anti-doping results management or disciplinary procedures. With regard to the impartiality of Mrs. Janie Soublière, the Respondent submits that she had resigned from WADA in May 2007 and has been an independent consultant in anti-doping matters since then. In addition to that, Mrs Janie Soublière is – according to the Respondent – a member of the Law Society of Upper Canada and has sworn to a strict code of ethics.

24. The ITU Anti-Doping Rules require that the ITU Doping Hearing Panel be impartial (Article 8.3 lit. b) and independent (Art. 8.1.1). The relevant articles read as follows:

"8.1.1 The ITU Management Team shall appoint a standing panel consisting of a Chair of four experts with experience in anti-doping ("ITU Doping Hearing Panel"). The Chair shall be a lawyer. Each panel member shall be otherwise independent of the ITU. Each panel member shall serve a term of four (4) years.

...

8.1.3 The Chair of the ITU Doping Hearing Panel shall appoint two other members from the panel to hear the case. The appointed members shall have had no prior involvement with the case and shall not have the same nationality as the Athlete or the other Person alleged to have violated these Anti-Doping Rules.

...

8.3 All hearings pursuant to either Article 8.2 or 8.2 shall respect the following principles:

...

b) Fair and impartial hearing panel;

...".

25. The ITU Anti-Doping Rules do not define the terms "impartial" or "independent". It is, therefore, not easy to distinguish clearly between both prerequisites. However, the Panel is of the view that – in principle – "independence" in Article 8.1.1 of the ITU Anti-Doping Rules concerns an objective situation prohibiting certain relationships, particularly of a financial nature, between a Panel member and the ITU. "Impartiality" on the contrary is a more subjective notion referring to the absence of bias in the person acting as a member of the panel resulting from a "privileged" relationship with the matter to be decided. The latter is – eg – the case if a member of the panel had a prior involvement with the case in the meaning of Article 8.1.3 of the ITU Anti-Doping Rules.

26. In the case at hand the Appellant has failed to submit any facts that show (or might show) a bias of the persons acting as members of the ITU Doping Hearing Panel. It is undisputed that all members of such Panel had no prior involvement with the case and had different nationalities from the Appellant. Furthermore, the fact that Mrs. Janie Soublière used to work for WADA in the past does not render her per se biased in favour of ITU or any other party. The fact that she was employed by WADA might, however, evidence that she has some experience in anti-doping as required in Article 8.1.1 of the ITU Anti-Doping Rules. The question remains whether or not the members of the ITU Doping Hearing Panel are also *"otherwise independent from ITU"* according to Art. 8.1.1 of the ITU Anti-Doping Rules. It is undisputed that no member of the ITU Doping Hearing Penal is or was employed by the ITU. Furthermore, the Panel would like to point out that the ITU Doping Hearing Panel is by definition an organ of a sports organization and – as such – does not need to meet the same level of independence as – eg – a state court or an arbitral tribunal (see Swiss Federal Tribunal 15 March 1993). However, it is also undisputed that Dr. Doug Hiller is at the same time a member of the ITU Medical Committee. If and to what extent Dr Hiller is remunerated for providing his services to the ITU Medical Committee is unknown to this Panel. Depending on the amounts he earns and the tasks entrusted to him by ITU there might be a problem relating to his "independence". However, this Panel holds that the exact nature of the relationship between Dr Hiller and the ITU is of no relevance in the case at hand, since an appeal before CAS is treated as being an appeal by way of a complete re-hearing rather than review. Therefore, this CAS Panel can reconsider the case *de novo* and, thus, cure any possible (procedural) defect in the composition of the original ITU Doping Hearing Panel.

c) Breach of the ISL

27. The Appellant alleges flaws in the chain of custody of the Appellant's sample. The Appellant submits that there is a mismatch of the identification numbers of the samples attributed to the Appellant in the laboratory documentation package. According to the latter the mismatch relates to the documents "USADA Sample Manifest", the document "UCLA Batch Chain of

Custody" and the document "UCLA Sample Custody". However, contrary to the Appellant's allegation the documentation submitted does not give rise to any suspicion that the laboratory lost control over the integrity or the identity of the samples.

28. The document "USADA Sample Manifest" lists the samples (and the sample code numbers) that were shipped together in a box with the "tracking number 1Z1A11V42210365871" to the UCLA Olympic Analytical Laboratory. As can be seen from this document the box contained seven different pairs (A and B) of samples including the samples of the Appellant. The document "UCLA Batch Chain of Custody" proves that the courier at the time did not only deliver the box (with the aforementioned tracking number) to the laboratory but also 2 envelopes with the tracking numbers "1Z1A11V42210328778" and "1Z1A11V42210374272". Furthermore, the document provides that the box and the two envelopes contained a total of nine pairs (A and B) of samples, ie seven (A and B) samples from the box and two (A and B) samples from the two envelopes. Page 10 from the documentation package documents the seal integrity of the samples. The document lists the samples code numbers of the seven samples from the box. In addition the document contains two sample code numbers which are the ones from the two envelopes. Finally, the document lists an additional four samples (only with an internal reference number but without a sample code number). These four samples have not been collected from athletes in the context of doping control. These samples serve – as can been seen from the document – as internal quality control samples when analyzing the athletes' samples. They are internal laboratory samples for which there is no need to proceed to a seal integrity check. To sum up, therefore, there are no circumstances in the case at hand that give rise to a suspicion in relation to the integrity or the identity of the samples.

29. Furthermore the Appellant alleges that the testing procedure was flawed, since the same analyst was involved in both "A" and "B" sample analysis procedures ("A" screening test procedure; "B" confirmation procedure) and that as a result the integrity of the procedure is violated. The Respondent in its submissions denied that a violation of the mandatory laboratory analysis procedure has taken place. It argues that the Appellant failed to prove that a departure from the International Standard occurred and that this departure could have reasonably caused the adverse analytical finding, even though the burden of proof is on her (Article 3.2.1 of the ITU Anti-Doping Rules).

30. As far as the involvement of the same analyst at UCLA laboratory in Los Angeles is c*riticized,* the Panel refers to the recent case CAS 2009/A/1931, dated 12 November 2009 where the CAS has been confronted with an identical case. However, the 2009 ISL no longer requires that a *different analyst* perform the A and B analytical procedures. The legal situation surrounding the analysis of the sample in question here is, therefore, completely different from the one in CAS 2006/A/1191. Therefore, in the Panel's view the Appellant can no longer rely on this CAS jurisprudence. Furthermore, in the Panel's view the former version of article 5.2.4.3.2.2 of the ISL does not contain a mandatory principle that – irrespective of today's wording of the International Standard for Laboratory – still commands to be enforced today. In CAS 2009/A/1931 the Panel relied on the statement of Dr Rabin, WADA Science Director according to which *"… experience has shown that the separation of staff did not add to the correctness and accuracy of the procedure …"*. The Appellant has not submitted any arguments that contradict this finding or which enable this Panel to depart from the clear wording of the ISL.

d) Anti-Doping Rule violation

31. Doping is defined in Article 1 of the ITU Anti-Doping Rules as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.8 of the ITU Rules. The presence of a prohibited substance or its metabolites or markers in an athlete's sample explicitly constitutes an anti-doping rule violation (Article 2.1 ITU Anti-Doping Rules). According to Article 2.1.2 of the ITU Anti-Doping Rules sufficient proof of a violation of Article 2.1 is established if a prohibited sample is found in the athlete's A and B sample. In the case at hand the sample analysis was done by a WADA accredited laboratory. The latter reported the prohibited substance furosemide which is a prohibited substance according to the Prohibited List. Furthermore, the Appellant has failed to demonstrate a departure from the ISL by the laboratory. It follows from that, that this Panel is comfortably satisfied that the Appellant has committed a violation of Article 2.1 of the ITU Anti-Doping Rules.

e) The applicable period of ineligibility

32. In relation to the applicable period of ineligibility the ITU Anti-Doping Rules differentiate between a first and a second infraction (see Article 10.7). In the case at hand it is undisputed between the parties that the positive doping control dated 26 June 2009 constitutes a second violation. This Panel concurs with this interpretation of the rules even though the first infraction from the year 2002 was committed at a time when today's ITU Anti-Doping Rules were not in place. However, Article 18.7.4 of the ITU Anti-Doping Rules provides that anti-doping rule violations committed prior to the entry into force of today's ITU Anti-Doping Rules may be taken into account in the ambit of Article 10.7 ITU Anti-Doping Rules (multiple infraction) as long as the second violation has taken place within the deadline established in Article 10.7.5 of the ITU Anti-Doping Rules (see also CAS, 2006/A/1025, Rn 11.6).

33. In order to determine the applicable range for the period of ineligibility in Art. 10.7.1 of the ITU Anti-Doping Rules the Panel must establish the legal character of the first and the second infraction.

aa) As to the legal character of the second infraction

35. In principle a violation of Article 2.1 of the ITU Anti-Doping qualifies as a standard violation (ST). In the case at hand, however, the Appellant claims that the second anti-doping rule violation be qualified as a reduced sanction violation, ie a RS case. The latter, however, is only possible according to Article 10.4 of the ITU Anti-Doping Rules if three conditions are fulfilled. The substance found in the Athlete's sample must be a specified substance. Furthermore, the Athlete must show how the prohibited substance entered her body and, finally, the Athlete must show to the comfortable satisfaction of the Panel the absence of any intent to enhance her sport performance or to mask the use of a performance enhancing substance.

36. The Panel is of the view that only the first prerequisite is met in the case at hand. Furosemide is a specified substance according to the Prohibited List. However, the Appellant failed to show – with the necessary level of proof according to Art. 3 of the ITU Anti-Doping Rules how the prohibited substance entered into her body. The Appellant submits that she took the substance inadvertedly – either by using a contaminated food supplement (Endurox R4) or, in the alternative, when drinking a natural tea at her hotel. The Appellant did not provide any evidence for her allegations. Contrary to the Appellant's submissions these two possibilities do not constitute *"the only reasonable explanations for the substance to be found in her organism"*. This is also evidenced by the declaration of Dr James Lally submitted by the Respondent. Therefore, on the basis of the pure speculations submitted by the Appellant this Panel is not prepared to accept – on a balance of probability – that the substance entered her body either by taking a food supplement or by drinking a "natural tea".

37. Furthermore, the Appellant failed to provide corroborating evidence in addition to her word that she did not intent to enhance her performance or to mask the use of a performance enhancing substance. It may well be that – as submitted by the Appelant – the use of furosemide itself is not performance enhancing. However, this substance is on the prohibited list because it has the potential of masking the taking of a prohibited substance. The Appellant has not provided any evidence that she did not want to make use of this masking potential. The sheer fact that in the case at hand the concentration of the urine sample collected from the Appellant was high enough – according to her – to detect performance enhancing substances does not contradict this. As evidenced by the letter of Dr James Lally submitted by the Respondent the concentration of the urine sample depends on a variety of factors. Therefore, it does not follow from the level of concentration found in the Athlete's urine sample that she did not take the substance furosemide to mask a performance enhancing substance. According to CAS jurisprudence (CAS 2007/A/1395, para 78), in order to comply with Art. 10.4 of the ITU Anti-Doping Rules an *"athlete must do more than merely 'bring forward' or 'contend'. Rather the ... [the athlete] must convince the sanctioning authority – to a certain degree – of the presence of the inner fact, namely that he did not intend to enhance his performance. While inner facts are not events which can be perceived externally and cannot, therefore, be proven directly various legal systems consider inner facts to be legally significant in many areas. Such facts can, in state court proceedings, be proven by establishing circumstances which according to the experience allow one to conclude the presence of the facts to be established. In the present case there is no circumstantial evidence – other than the mere allegation of the ... [the athletes] – that they did not intend to enhance their performance"*. In view of all of the above the anti-doping rule violation of the Appellant cannot be qualified as a RS violation.

38. The anti-doping rule violation committed by the Appellant does not qualify as a *"No Significant Fault-case"* ("NSF-case") in the meaning of Article 10.5.2 of the ITU Anti-Doping Rules either. According to the latter provision a NSF-case requires that the Athlete *"establishes how the prohibited substance entered his or her system"* and that *"he or she bears no significant fault or negligence"* in relation to the adverse analytical finding. In the case at hand the Athlete has failed to demonstrate – on a balance of probability – how the prohibited substance entered into her body. Even assuming that the adverse analytical finding was caused by the taking of the supplement the Appellant has failed to demonstrate that she had taken the *"clear and obvious precautions which any human being would take in consuming … a nutritional supplement"* that are necessary to qualify her case as a NSF-

case (CAS 2005/A/847, para 7.3.6). To sum up, therefore, the Panel is of the view that the second anti-doping rule violation must be qualified as a standard case.

bb) The legal character of the first infraction

39. At the time when the first anti-doping rule violation occurred the qualification of an infraction as "ST", "NSF" or "RS" was unknown. The question, therefore, arises how to qualify the first anti-doping rule violation retrospectively. The ITU Anti-Doping Rules provide in Article 18.7.4 that *"where such pre-Effective Date anti-doping rule violation involved a substance that would be treated as a Specified Substance under these Anti-Doping Rules, for which a period of Ineligibility of less than two (2) years was imposed, such violation shall be considered a Reduced Sanction violation for purpose of Article 10.7.1"*. The question, therefore, is, whether or not the prohibited substance found in the Athlete's sample in 2002 constitutes under the present rules a Specified Substance. The Prohibited List 2009 valid as of 1 January 2009 provides that all *"Prohibited Substances shall be considered as 'Specified Substances' except Substances in classes S1, S2.1 to S2.5, S.4.4 and S6.a, and Prohibited Methods M1, M2 and M3"*. The prohibited substance found in the Athlete's sample in 2002 was amphetamine. The latter is a prohibited substance according to class S6.a of the Prohibited List. Thus, the violation of 2002 cannot be qualified as a *"Reduced Sanction violation"*. However, since the Appellant was sanctioned with a relatively modest period of ineligibility (60 days) and since this moderate sanction was based on the assumption that the Appellant might have taken contaminated supplements, this Panel is willing – in conformity with the parties' submissions – to qualify the 2002 infraction as a NSF-violation.

cc) Conclusion

40. The Panel concludes that since the Appellant's the first anti-doping rule violation qualifies as a NSF-case and the second anti-rule violation as a ST-case the applicable range for the period of ineligibility is – according to Article 7.1 of the ITU Anti-Doping Rules – 6 to 8 years ineligibility. Since the Appellant has not claimed nor submitted any evidence that would entitle her to a reduction or suspension of her sanction according to Article 10.5.3 or Article 10.5.4 of the ITU Anti-Doping Rules, the Panel is bound by the range for the period of ineligibility set out in Article 10.7.1 of the ITU Anti-Doping Rules. According to this range the period of ineligibility cannot be below six years.

41. It follows from all of the above that the Appellant's request to annul or to reduce the period of ineligibility imposed upon her by the Decision must be rejected together with all other requests and prayers for relief.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mrs Mariana Ohata on 23 October 2009 is dismissed.

2. The decision rendered by the ITU Doping Hearing Panel on 5 October 2009 in the matter of the International Triathlon Union vs. Mrs Mariana Ohata is confirmed.

3. (…).

4. (…).

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