



**Arbitration CAS 2011/A/2357 Raphael Menezes Dos Santos v. International Triathlon Union (ITU), award of 30 September 2011**

Panel: Judge Conny Jörneklint (Sweden), President; Judge Carole Barbey (Switzerland); Prof. Richard McLaren (Canada)

*Triathlon*

*Doping (clenbuterol)*

*Right to a fair hearing*

*Effects of a de novo trial on procedural defects*

*Proof of how the prohibited substance entered the athlete's body*

1. An athlete cannot be expected to know that he or she has the right to an oral hearing. If the regulations of the federation give to the athlete the right to such oral hearing but that the federation has developed a practice of having “documentary” hearings and wants to continue with such practice, it must first inform the athlete of his or her right to an oral hearing and secondly, advise the athlete of the option of having the case decided on the papers *in lieu* of holding an oral hearing. Likewise, the practice of having the president of the first-instance panel acting as legal counsel in the matter on appeal, as well as calling a member of the first-instance panel as an “expert witness” in the appeal proceedings does not give the impression that the first-instance decision makers were impartial, when they turn around and act for the entity alleging the anti-doping rule violation on appeal and ultimately “defend” their own decision.
2. The CAS appellate arbitration procedure under Article R57 of the CAS Code of Sports-related Arbitration entails a trial *de novo* which can cure procedural defects at first instance.
3. An athlete does not establish on a balance of probability that the source of the Clenbuterol was meat contamination when submitting that his primary diet prior to the testing was chicken and pasta with meat sauce. Evidence of all experts is that to date, there have been no reports of cases of Clenbuterol contamination from ingesting chicken and that the athlete would have had to have eaten a quantity of beef, which the athlete does not even contend he did on that day, or any day leading up to the competition, abnormally large in order to have the level of Clenbuterol in his system that he did.

The Appellant, Mr. Raphael Menezes dos Santos (“Menezes”, “the Athlete” or “the Appellant”) is a Brazilian athlete participating in the sport of triathlon.

The Respondent, the International Triathlon Union (ITU) is the official governing body for the Olympic sport of Triathlon. Its head office is in North Vancouver, British Columbia, Canada.

On 8 October 2010, Menezes provided a urine sample during an out-of-competition doping control in Huatulco, Mexico. On 28 October 2011, the INRS Laboratoire de Contrôle du dopage Armand Frappier (the “Lab”) reported the A-sample as positive with an adverse analytical finding for the presence of Clenbuterol. Clenbuterol is a prohibited substance under the WADA Prohibited List, classified under S1.2 Anabolic Agents.

On 7 December 2010, the Lab confirmed the B-sample as positive for the presence of Clenbuterol.

On 1 February 2011, following a written hearing, the ITU Anti-Doping Hearing Panel composed of Janie Soublière, Chair; Dr. Doug Hiller, member; and Dr. James Lally, *ad hoc* member, imposed a 2 year ineligibility sanction on the Appellant for a first anti-doping violation under article 10.2 of the ITU Anti-Doping Rules.

It is this decision that is the subject of this appeal.

On 23 February 2011, Menezes filed his Statement of Appeal with the Court of Arbitration for Sport (CAS).

On 4 March 2011, Menezes filed his Appeal Brief and Exhibits with the CAS, requesting *inter alia*,  
*that the Appeal be admitted and that no period of ineligibility be imposed to him due to the serious breach to his rights; or that no period of ineligibility be imposed to him according to Article 10.5.1 of the ITU Anti-Doping Rules, as he bears no fault or negligence on how the prohibited substance entered his system; or, if Article 10.5.1 is not applicable that Article 10.5.2 is applicable and the period of ineligibility be reduced.*

On 2 April 2011, the ITU submitted its Answer Brief and accompanying exhibits. The ITU made the following requests:

- *The Respondent asks for an order finding that the Appellant has committed an anti-doping rule violation as stated in the Notice of Assertion.*
- *The Respondent submits that the CAS Panel maintains the standard sanction imposed for this anti-doping rule violation by the ITU Anti-Doping Hearing Panel.*
- *In all of the circumstances, the ITU seeks a sanction against the Appellant of 2 years sport ineligibility, as decided by the ITU Anti-Doping Panel on February 1, 2011.*
- *The Respondent seeks an order for all its costs and disbursements, legal and administrative in the amount of 8,000 \$(Cdn) at the time of the filing of this Reply Brief and any additional costs and disbursements, legal travel and administrative arising from the potential hearing.*

By way of letter to the CAS on 16 April 2011, Menezes requested an oral hearing, and requested permission to produce a new exhibit regarding a warning from the Nationale Anti Doping Agentur (German Anti-doping Association) to all athletes about the risks of Clenbuterol in Mexico.

On 2 May 2011, the Panel advised the parties that it would hold a hearing in this matter on 27 June 2011.

On 27 May 2011, the ITU advised that it would be calling the following witnesses in the course of the hearing:

- Scientific Expert: Dr. Olivier Rabin
- Medical Expert: Dr. James Lally
- Doping Control Expert: Leslie Buchanan

On 30 May 2011, Menezes requested the Panel disregard the ITU's named witnesses in light of the fact that they were not named in the Respondent's Answer Brief, contrary to Art. R55 of the CAS Code of Sports-related Arbitration (the "CAS Code").

On 9 June 2011, the Panel notified the parties that it would hear the evidence of the ITU's witnesses. In making this decision, the Panel noted that the Respondent referred in its answer to documentary statements from Dr. Olivier Rabin and regarding Dr. Lally, the Panel noted that the Respondent indicated in its submission that Dr. Lally was a member of the Anti-Doping Panel and also indicated in one paragraph what his opinion on the matter was; the Panel also requested Menezes file the witness statement of Mr. Mauro Cavanha Conceição and Mr. Fabio Botelho de Carvalho by no later than 20 June 2011.

Messrs Carvalho and Conceição's statements can be summarized as follows:

- Menezes arrived in Mexico around 6:30 a.m. on October 7<sup>th</sup>, 2010;
- Menezes stayed at the same hotel as they did;
- Menezes ate lunch and dinner at the hotel and ingested cattle and chicken meat while in Mexico – especially a large amount before the competition;
- Menezes was suffering from strong headaches prior to the competition.

The hearing took place at the CAS Headquarters in Lausanne, Switzerland, on 27 June 2011.

In addition to himself, the Athlete called the following witness at the hearing: Dr. Sabino Vieira Loguercio. Dr. Sabino's testimony is summarized as follows:

- There is a "total" likelihood of the possibility of contamination of Clenbuterol by eating meat;
- Human beings metabolize differently from each other. The amount of ingestion is therefore not necessarily correlative to the amount of a substance found in the body.

- Pharmacological books indicate that Clenbuterol is used in livestock, but they do not specify whether it is cattle, chicken or pork.
- The average half life of Clenbuterol is from 36 to 39 hours, but depending on each individual's organism, this may vary.
- There would be no justification for an athlete such as Menezes to use Clenbuterol; it's used by obese people and asthmatics.

On cross-examination Dr. Sabino stated the following:

- He is a gastroenterologist;
- His standpoint against the anti-doping systems is that it can be overly punitive when based on mistaken medical grounds.

Upon questioning by the Panel, Dr. Sabino stated that he had never heard of a situation where Clenbuterol was found in chicken.

Messrs Carvalho and Conceição were not called as witnesses during the hearing.

The Athlete's testimony is summarized as follows:

- He provided a background and history of his career;
- The World Cup in Mexico was only his second World Cup race;
- He had no experience in the collection of samples for anti-doping purposes before this time;
- He arrived in Mexico on 7 October and he ate carbohydrates and protein.
- On 8 October he also ate carbohydrates and protein, but he and his colleagues decided to buy food at the supermarket near the hotel to keep expenses down.
- He explained the anti-doping control process he went through;
- The day after the doping control, he had a bit of a headache and felt a bit hot;
- He had his worst result of the year during that competition;
- Neither of the other two people he ate meat with underwent an anti-doping control.

On cross-examination, Menezes stated:

- Nothing during the anti-doping control procedure gave him reason to believe anything was out of the ordinary;
- The night before the doping control he ate pasta with a Bolognese meat sauce.

In response to questioning by the Panel, Menezes stated:

- On the morning he arrived in Mexico City he ate a meat sandwich at the fast food restaurant Subway;

- He doesn't recall exactly what he had for lunch that day, but it was likely meat, because it was always meat at the hotel restaurant;
- The second day he arrived at the hotel was the day he ate pasta with Bolognese, he doesn't recall what he had the first day, but believes it was the Bolognese because it was the cheapest dish;
- He did not recall what he ate for breakfast on the morning of 8 October, but does not believe it would have been meat.

The ITU called the following as witnesses at the hearing: Leslie Buchanan, Dr. Rabin, and Dr. Lally.

Leslie Buchanan's testimony is summarized as follows:

- She is a qualified anti-doping control officer with the Canadian Centre for Ethics in Sport and the anti-doping director of the ITU;
- The ITU's Anti-doping Rules are approved by WADA and are considered "WADA Code compliant";
- The procedure involved in this case was no different than the procedure used in all other doping cases;
- The notice sent to the Athlete was the template notice that is sent to all athletes;
- WADA is aware that the ITU's hearings are documentary and they have taken no issue with this;
- The Athlete was treated fairly throughout the process and he raised no objection to the fact that the ITU hearing was documentary;
- The Athlete signed the anti-doping control form attesting to the fact that he was comfortable with everything that happened;
- One other athlete who was tested during this competition had a positive Adverse Analytical Finding and it was for EPO;
- No other athlete who submitted samples showed signs of Clenbuterol in their system. The Athlete had over 50 times the limit of detection.

In cross-examination Ms. Buchanan stated:

- The ITU would offer an oral hearing if an athlete asked for it.

The evidence of Dr. Lally is summarized as follows:

- Clenbuterol is a performance-enhancing substance that enhances oxygenation capacity.
- The most common defense of athletes when Clenbuterol is found in the sample is that ingested meat must have been contaminated;
- If a person had any more than 30-40 picograms of Clenbuterol he would get very sick and it would be very difficult to train or compete as he would need to be by a bathroom;

- Dr. Lally has never heard of Clenbuterol contamination from chicken;
- The amount of Clenbuterol in the Athlete's system is impressive. It would imply either ingestion of a medicinal dose of medication, or the Athlete would have eaten an incredible amount of meat.

In cross-examination, Dr. Lally stated:

- For an athlete to have 130pg/mL of Clenbuterol in his or her urine sample, he would have to have eaten about a whole cow.

In response to questions from the Panel, Dr. Lally testified that:

- The most likely reason the Athlete wasn't sick given the high level of Clenbuterol in his system is because he developed a tolerance and/or adapted to it.

The evidence of Dr. Rabin is summarized as follows:

- Clenbuterol was put on the Prohibited List for its use as a muscle building agent, as well as its ability to reduce fat mass.
- Clenbuterol is used in many different sports, particularly sports with body building. It has also been used in athletics;
- The most common defence with Clenbuterol is contamination – generally from dietary supplements;
- Clenbuterol can never be synthesized naturally by the body – it is purely exogenous. 130pg/mL is a very high concentration for a human sample;
- In the case of Clenbuterol, contamination can never be completely excluded;
- For a concentration of around 130pg/mL that would mean the meat was very highly contaminated, or that the animal was killed very quickly following injection;
- He has never heard of poultry contamination;
- In his opinion, it is very unlikely that the pasta with meat would cause such a high contamination.

In cross-examination Dr. Rabin stated:

- If an athlete used Clenbuterol he would be sick. Depending on the sensitivity of the person he may experience different side effects. Likewise, if an athlete is used to taking a substance, he/she may have no side effects.

## LAW

### Jurisdiction of the CAS

1. Article R47 of the CAS Code provides as follows:

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

2. Article 13.3 of the Constitution of the ITU states as follows:

*Disputes between ITU and one or several of its members which are not settled by a decision of ITU, may be submitted for arbitration by either of the parties to the Court of Arbitration for Sport (CAS) (Lausanne), Switzerland, to the exclusion of any other domestic tribunal. Any decision taken by the said court shall be without appeal or recourse to ordinary courts, and is binding on the parties concerned.*

3. Article 13.2.1 of the Anti-Doping Rules of ITU provides:

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

4. On 15 and 13 June 2011, the Appellant and Respondent respectively signed the Order of Procedure, thereby confirming that the CAS has jurisdiction in this matter.
5. According to Article R57 of the CAS Code, the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the challenged decision, or may annul the decision and refer the case back to the previous instance.

### Admissibility

6. Article 13.6 of the ITU Rules provides that *“The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party”*.
7. The Athlete was notified of the decision under appeal on 3 February 2011. The Athlete filed his Statement of Appeal on 23 February 2011.
8. In light of the above, the Panel finds the Appeal is admissible.

### Applicable Law

9. Article R58 of the CAS Code provides as follows:

*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

10. It is common ground between the parties that the applicable regulations of this case are the ITU Rules which applies to all members and participants in the activities of the ITU or of its member federations. The ITU has its seat in Vancouver, Canada, thus leading to the application of Canadian law. Therefore, the ITU Rules shall apply primarily and Canadian Law shall apply complementarily.

## Merits

### A. Failure to Properly Notify

11. The ITU's letter of 29 October 2010 to Menezes provided the following information to the Athlete:
  - It advised him of the Adverse Analytical Finding;
  - It advised him of his right to request the analysis of the B sample.
12. In follow-up communication dated 1 November 2010, Menezes was advised of:
  - When and where the B sample testing would take place; and
  - The fact that he could attend the B sample testing.
13. In a further letter, dated 7 December 2010, Menezes was advised of:
  - The asserted anti-doping rule violation.
14. The relevant rule is the following:

*Article 7.1 Results Management for Tests Initiated by the ITU*

*Article 7.1.4*

*If the initial review of an Adverse Analytical Finding under Article 7.1.2 does not reveal an applicable TUE, or departure from the International Standard for Testing or the International Standard for Laboratories that caused the Adverse Analytical Finding, the ITU shall promptly notify the Athlete of:*

  - (a) *The Adverse Analytical Finding;*
  - (b) *The anti-doping rule violated;*
  - (c) *The Athlete's right to promptly request the analysis of the B Sample, or failing such request, that the B Sample analysis may be deemed waived;*
  - (d) *The scheduled date, time and place for the B sample analysis if the Athlete chooses to request the analysis*



- (e) *The opportunity for the Athlete and/or the Athlete's representative to attend the B sample opening and analysis*
- (f) *The Athlete's right to request copies of the A and B sample laboratory documentation package.*

*If the ITU decides not to bring forward an Adverse Analytical Finding as an anti-doping rule violation, it shall so notify the Athlete, the Athlete's National Anti-Doping Organization and WADA.*

15. In total, the Panel deems that the communications to the Appellant eventually complied with the provision of 7.1.4 albeit, it was not all contained in one letter. In one requirement however, the information from the ITU did not fulfill the rule as it does not appear anywhere that Menezes was advised of his right to request the Laboratory Documentation package. The Panel has been advised however, that the Athlete and his lawyer did eventually receive the Laboratory Documentation package.
16. The Panel finds that the spirit of the Rules was followed and any departure on the ITU's part did not have an impact on the clinical analytical processes which resulted in the Adverse Analytical Finding.

#### B. *Fair Hearing*

17. ITU Anti-Doping Rules state, among other rules, the following:

##### *Article 8 Right to a fair hearing*

##### *8.1. Hearings arising out of ITU Testing or Tests at International Events*

*8.1.1 The ITU Management Team shall appoint a standing panel consisting of a Chair and four other 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.*

*8.1.2 When it appears, following the Results Management process described in Article 7, that these Anti-Doping Rules have been violated in connection with ITU Testing or Testing at an International Event then the case shall be assigned to the ITU Doping Hearing Panel for adjudication.*

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

*8.1.4 Hearings pursuant to this Article shall be completed expeditiously following the completion of the results management process described in Article 7. Hearings held in connection with Events may be conducted on an expedited basis.*

*8.1.5 The National Federation of the Athlete or other Person alleged to have violated these Anti-Doping Rules may attend the hearing as an observer.*

*8.1.6 The ITU shall keep WADA fully apprised as to the status of pending cases and the result of all hearings.*

*8.1.7 An Athlete or other Person may forego a hearing by acknowledging the Anti-Doping Rule violation and accepting Consequences consistent with Articles 9 and 10 as proposed by the ITU. The right to a hearing*

*may be waived either expressly or by the Athlete's or other Person's failure to challenge ITU's assertion that an anti-doping rule violation has occurred within twenty-one (21) days. Where no hearing occurs, the ITU shall submit to the persons described in Article 13.2.3 a reasoned decision explaining the action taken.*

8.1.8 *Decisions of the ITU Doping Hearing Panel may be appealed to Court of Arbitration for Sport as provided in Article 13.*

(...)

### 8.3 *Principles for a Fair Hearing*

*All hearings pursuant to either Article 8.1 or 8.2 shall respect the following principles:*

- a) a timely hearing;*
- b) fair and impartial hearing Panel;*
- c) the right to be represented by counsel at the Person's own expense;*
- d) the right to be informed in a fair and timely manner of the asserted anti-doping rule violation;*
- e) the right to respond to the asserted anti-doping rule violation and resulting Consequences;*
- f) the right of each party to present evidence, including the right to call and question witnesses (subject to the Hearing Panel's discretion to accept testimony by telephone or write submission);*
- g) the Person's right to an interpreter at the hearing, with the Hearing Panel to determine the identity, and responsibility for the cost of the interpreter; and*
- h) a timely, written, reasoned decision, specifically including an explanation of the reason(s) for any period of Ineligibility.*

18. The Panel notes that the rules of ITU provide for an oral hearing unless the hearing is waived under certain circumstances (*see* Art. 8.1.7 of the ITU Rules). It appears that the ITU has developed a practice of deciding cases on the papers – which it refers to as a “*documentary hearing*” – after having given the athlete the opportunity to make written submissions and provide evidence. The testimony of the Athlete is that the ITU did not inform him that he had the option of an oral hearing. It is the ITU's position that it was for the Athlete to request an oral hearing if he wanted one. The ITU also relied on the fact that Menezes' legal counsel had previously acted in an ITU procedure and so was aware of how the system worked.
19. The Panel does not agree that an athlete can be expected to know that he or she has the right to an oral hearing. The Panel is of the view that if the ITU wants to continue with its practice of having “*documentary*” hearings it must first inform the athlete of his or her right to an oral hearing and secondly, advise the athlete of the option of having the case decided on the papers *in lieu* of holding an oral hearing.
20. Furthermore, the Panel considers that the practice of having the President of the first-instance panel (Ms Soublière) acting as legal counsel in the matter on appeal, as well as calling a member of the first-instance panel (Dr Lally) as an “*expert witness*” in the appeal proceedings leaves something to be desired. It simply does not give the impression that the first-instance decision

makers were impartial, when they turn around and act for the entity alleging the anti-doping rule violation on appeal and ultimately “defend” their own decision. The Panel notes that during the hearing, Ms Soublière stated that the decision in CAS 2009/A/1983 “clearly confirmed” that there was no problem with Ms Soublière acting as counsel for the ITU if she was sitting on the first-instance panel. With respect, this Panel does not agree with Ms Soublière’s interpretation of that decision. There, the issue was Ms Soublière’s independence and impartiality *vis à vis* the ITU Doping Hearing Panel and the Panel made no comment regarding Ms Soublière’s double-hat, nor did the Appellant party raise it as an issue.

21. Notwithstanding the issues outlined above, the Panel determines that the CAS appellate arbitration procedure under Article R57 of the CAS Code entails a trial *de novo* which can cure such procedural defects at first instance.
22. Before the CAS Panel, the Appellant was given the opportunity to bring forward witnesses, and make oral representations regarding his case in this hearing and therefore, any alleged departure by the ITU in this respect is made well.

C. *Breach of IST*

23. The relevant provisions of the IST are as follows:

5.4 *Requirements for notification of Athletes*

5.4.1 *When initial contact is made, the ADO, DCO or Chaperone, as applicable, shall ensure that the Athlete and/or a third party (if required in accordance with Clause 5.3.8) is informed:*

- a) *That the Athlete is required to undergo a Sample collection;*
- b) *Of the authority under which the Sample collection is to be conducted;*
- c) *Of the type of Sample collection and any conditions that need to be adhered to prior to the Sample collection;*
- d) *Of the Athlete’s rights, including the right to:*
  - i. *Have a representative and if available, an interpreter;*
  - ii. *Ask for additional information about the Sample collection process;*
  - iii. *Request a delay in reporting to the Doping Control Station for valid reasons; and*
  - iv. *Request modifications as provided for in Annex B – Modifications for Athletes with disabilities.*
- e) *Of the Athlete’s responsibilities, including the requirement to:*
  - i. *Remain within direct observation of the DCO/Chaperone at all times from the point of notification by the DCO/Chaperone until the completion of the Sample collection procedure;*
  - ii. *Produce identification in accordance with Clause 5.3.4;*
  - iii. *Comply with Sample collection procedures (and the Athlete should be advised of the possible consequences of Failure to Comply); and*
  - iv. *Report immediately for a test, unless there are valid reasons for a delay, as determined in accordance with Clause 5.4.4.*

- f) *Of the location of the Doping Control Station.*
- g) *That should the Athlete choose to consume food or fluids prior to providing a Sample, he/she does so at his/her own risk, and should in any event avoid excessive rehydration, having in mind the requirement to produce a Sample with a Suitable Specific Gravity for Analysis.*
- h) *That the Sample provided by the Athlete to the Sample Collection.*

*Personnel should be the first urine passed by the Athlete subsequent to notification, i.e., he/she should not pass urine in the shower or otherwise prior to providing a Sample to the Sample Collection Personnel.*

#### *Article 7.3 Requirements prior to Sample collection*

*7.3.2 The DCO shall ensure that the Athlete has been informed of his/her rights and responsibilities as specified in Clause 5.4.1.*

#### *Article 7.4 Requirements for Sample collection*

*7.4.4 The DCO shall provide the Athlete with the opportunity to document any concerns he/she may have about how the Sample Collection Session was conducted.*

*7.4.5 In conducting the Sample Collection Session the following information shall be recorded as a minimum:*

- a) *Date, time and type of notification (No Advance Notice, advance notice, In-Competition or Out-of-Competition);*
- b) *Arrival time at Doping Control Station;*
- c) *Date and time of Sample provision;*
- d) *The name of the Athlete;*
- e) *The date of birth of the Athlete;*
- f) *The gender of the Athlete;*
- g) *The Athlete's home address and telephone number;*
- h) *The Athlete's sport and discipline;*
- i) *The name of the Athlete's coach and doctor;*
- j) *The Sample code number;*
- k) *The name and signature of the witnessing DCO/Chaperone;*
- l) *The name and signature of the Blood Collection Officer (where applicable);*
- m) *Required laboratory information on the Sample;*
- n) *Medications and supplements taken and recent blood transfusion details (if applicable) within the timeframe specified by the laboratory, as declared by the Athlete;*
- o) *Any irregularities in procedures;*
- p) *Athlete comments or concerns regarding the conduct of the Sample Collection Session, if provided;*
- q) *Athlete consent for the processing of test data in ADAMS;*
- r) *Athlete consent or otherwise for the use of the Sample(s) for research purposes;*
- s) *The name and signature of the Athlete's representative (if applicable), as per Clause 7.4.6;*
- t) *The name and signature of the Athlete; and*

u) *The name and signature of the DCO.*

24. The Panel will determine below, whether there has been any departure from the IST.

D. *Contamination of Meat*

25. The main issues to be resolved here are:

- a) Has there been an AAF with respect to Menezes' urine sample?
- b) If a doping offence has been committed, can Menezes prove, considering the required standard of evidence, how the prohibited substance entered his system?
- c) If Menezes can meet the relevant requirements of evidence of the prior question, was he acting with no fault or negligence or with no significant fault or negligence?

26. The relevant ITU Rules are as follows:

*Article 2.1. The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample*

*2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.*

*2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.*

27. As to the burden of proof, Art. 3.1 of the ITU Rules provides that:

*The ITU and its National Federations shall have the burden of establishing that an anti-doping violation has occurred. The standard of proof shall be whether the ITU or its National Federations has established an anti-doping rule violation to the comfortable satisfaction of the hearing body 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 rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability except as provided in Articles 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.*

28. Art 3.2 of the ITU Rules further adds that:

*Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:*

*3.2.1 WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut*

*this presumption by establishing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding.*

*If the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding then the ITU or its National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*

*3.2.2 Departures from any other International Standard or other anti-doping rule or policy which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete or other Person establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation occurred, then the ITU or its National Federation shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.*

29. In the present case, the ITU has met its burden of proof as prescribed under Art 3.1 of the ITU Rules. The Lab has reported an AAF for Clenbuterol, which is a prohibited substance under the WADA Prohibited List, classified under S1.2 Anabolic Agents. Sufficient proof of an anti-doping rule violation to Art. 2.1 of the ITU Rules have thus been established by the ITU, in compliance with Art. 2.1.2 of the ITU Rules. It remains to be seen whether Menezes has successfully rebutted that finding on a balance of probability, as foreseen under Art. 3.2.1 or 3.2.2 of the ITU Rules.
30. It is not disputed that the Lab is a WADA-accredited laboratory. The Athlete does not allege that the Lab departed from the WADC International Standard for Laboratories as foreseen under Art. 3.2.1 of the ITU Rules. The application of Art. 3.2.1 of the ITU Rules can therefore be ruled out by the Panel.
31. Rather, Menezes argues that the doping control procedure departed from the IST. To prevail on that argument, Menezes has to satisfy the burden of proof foreseen under Art. 3.2.2 of the ITU Rules, i.e. to establish “(...) *a departure from the International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule occurred* (...)”.
32. The Athlete’s allegations regarding the breaches of the IST are not supported by any documentary evidence or any witness. In fact, the documentary evidence the Panel has been provided with by the ITU appears to indicate the contrary. The Appellant’s signature on the Doping Control Notification Form and the Doping Control Form would indicate that the IST was followed.
33. The Panel further finds that even if there were a breach, the breach did not cause or contribute to the AAF.
34. As a result, the Panel holds that Menezes has committed an anti-doping rule violation, in compliance with Art. 2.1 of the ITU Rules. Consequently, the following sanctions are applicable:

According to Art. 10 of the ITU Rules:

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

*An Anti-Doping Rule violation occurring during or in connection with an Event may lead to Disqualification of all of the Athlete's individual results obtained in that Event with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 10.1.1.*

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

*10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods*

*The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be of two (2) years, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met.*

35. As a result, the Panel must now determine whether Art. 10.4 or 10.5 applied to the present case, which leads the Panel to the second and third questions previously raised (see para. 25):

*Accidental Ingestion*

36. The Athlete has relied upon 10.5 of the ITU Rules.

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

*10.5.1 No Fault or Negligence*

*If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.*

*10.5.2 No Significant Fault or Negligence*

*If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites*

*or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

37. To prevail under Art. 10.5 of the ITU Rules, Menezes must first (i) establish how the Prohibited Substance entered his system, and then (ii) demonstrate that he either bears No Fault or Negligence, or No Significant Fault or Negligence. The Panel shall put both these requirements under scrutiny.
38. Prior to this analysis, the Panel considers it worth pointing out that it is to be kept in mind that the Anti-Doping Rules adopts the rule of strict liability. From the strict liability principle follows that, once the ITU has established that an anti-doping rule violation has occurred, as in the present case, it is up to the Athlete to demonstrate that the requirements foreseen under Art. 10.5 of the ITU Rules are met. Such a burden of proof is expressly stated under Art. 3.1 second phrase of the ITU Rules, which provides that: *“where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability (...)”*. In CAS 2007/A/1370 & 1376, the Tribunal held in that regard that *“according to the CAS jurisprudence, the balance of probability standard means that the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence”*. As a result, it is up to Menezes to prove how, on a balance of probability, (i) the Prohibited Substance entered his system, (ii) at No (Significant) Fault or Negligence.
39. As to the first requirement, *i.e.* the ingestion of the Prohibited Substance, The Athlete argues that such ingestion must have occurred when he was eating meat prior to the testing.
40. The Panel acknowledges there is a possibility of meat contamination in Mexico. Indeed even the witnesses of the Respondent agree that a person may eat meat, particularly in Mexico, that has been contaminated with Clenbuterol and subsequently suffer side effects of Clenbuterol intoxication.
41. The evidence of all experts is that to date, there have been no reports of cases of Clenbuterol contamination from ingesting chicken.
42. The evidence of the Athlete is that his primary diet during the time in question was chicken, and pasta with meat sauce.
43. The Panel finds that given the high amount of Clenbuterol in the Athlete’s system, the possibility of meat contamination is simply too improbable. The Panel takes note of the fact that the Athlete although testifying that he complained of a headache, was otherwise rather unaffected by the levels of Clenbuterol in his system. This leads the Panel to the conclusion that it is more likely than not that the Athlete had developed a tolerance to the substance.
44. In making its finding, the Panel also relies on the testimony of Dr. Rabin that the Athlete would have had to have eaten an abnormally large quantity of beef in order to have the level of



Clenbuterol in his system that he did. Given Menezes' participation in a competition the next day, the Panel finds it extremely unlikely that he would have eaten so large an amount of meat. Furthermore, the Athlete does not even contend that he ate a huge amount of beef on that day, or any day leading up to the competition.

45. The argument that the chicken was contaminated with Clenbuterol is simply not supported by the evidence.
46. In light of the above, it is the view of the Panel that the Athlete has not established on a balance of probability that the source of the Clenbuterol was meat contamination.
47. In light of the foregoing, the Athlete cannot avail himself of the Exceptional Circumstances provisions within the ITU Rules. The Athlete has not established how the Prohibited Substance entered his system. Because of that he cannot have the period of Ineligibility reduced or eliminated (see *inter alia* CAS 2009/A/1983; CAS 2009/A/1805 & 1847).

## **Conclusion**

48. The ITU has established that Menezes had committed an anti-doping violation rule according to Art. 2.1 of the ITU Rules, since both A and B Samples have confirmed the presence of Clenbuterol, a prohibited substance under the WADA Prohibited List, classified under S1.2 Anabolic Agents (art. 2.1.2 of the ITU Rules).
49. Menezes has been unable to discharge his burden of proving under Art. 3.1 and 3.2.2 of the ITU Rules that, on a balance of probability, (i) there had been any departure from the IST in the way the doping control procedure was carried out and that (ii) such departure could reasonably have caused the adverse analytical finding.
50. Menezes has been unable to discharge his burden of proving under Art. 10.5 of the ITU Rules how, on a balance of probability the Prohibited Substance had entered his system.
51. As a result, the appeal filed by Menezes has to be dismissed and, taking into account 10.1 and 10.2 of the ITU Rules, the decision issued by the ITU Hearing Panel on 1 February 2011 is affirmed.

**The Court of Arbitration for Sport rules:**

1. The appeal of Raphael Menezes dos Santos against the decision of the ITU Doping Hearing Panel convened under the ITU regulations dated 1 February 2011 is dismissed.
2. Pursuant to Art. 10.2 of the ITU Rules, the two year period of ineligibility of Raphael Menezes dos Santos, running from 8 October 2010 is confirmed.
- (...)
5. All further and other requests for relief are dismissed.