



Arbitration CAS 2011/A/2515 Fédération Internationale de Natation (FINA) v. Fabiola Molina & Confederação Brasileira de Desportos Aquaticos (CBDA), award of 10 April 2012 (operative part of 20 December 2011)

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Otto de Witt Wijnen (The Netherlands); Mr Jeffrey Benz (USA)

Aquatic sports (swimming)

Doping (methylhexaneamine)

Sanctions applicable under the FINA DC Rules for “specified substances”

Power of the CAS panel to review a decision imposing a sanction on an athlete

Circumstances to be considered in the assessment of the athlete’s fault

Correctness and consistency of sanctions

Athlete’s negligence when purchasing online nutritional supplements

CAS power of review and commencement of the ineligibility period

Credit for periods of provisional suspension under FINA DC Rule 10.9

1. According to FINA DC Rule 10.4, in the event the substance found the competitor’s sample is identified in the Prohibited List as a “Specified Substance”, and additional conditions are met (the athlete can establish how the Specified Substance entered his or her body and that such Specified Substance was not intended to enhance his or her sport performance), the sanction applicable under FINA DC Rule 10.2 is replaced by a sanction ranging from a simple warning with no ineligibility (minimum) to a two years’ ineligibility (maximum).
2. The measure of a sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence. Far from excluding, or limiting, the power of a CAS panel to review the facts and the law involved in the dispute heard (pursuant to Article R57 of the Code), such indication only means that a CAS panel *“would not easily ‘tinker’ with a well-reasoned sanction, ie to substitute a sanction of 17 or 19 months’ suspension for one of 18”*.
3. According to the World Anti-Doping Code (WADC), the circumstances to be considered in the assessment of the athlete’s fault must be specific and relevant to explain the athlete’s departure from the expected standard of behavior. The athlete’s fault has therefore to be measured on the basis of specific circumstances and against the fundamental duty the athlete had to do everything possible to avoid ingesting any prohibited substance. Such duty is particularly significant if the infringement has occurred years after which the risks connected to the use of nutritional supplements became widely known to athletes and the sports community.

4. Although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport. Each case, in addition, must be decided on its own facts. As a result, the decisions taken with respect to other athletes do not set any binding point of reference.
5. An athlete's negligence is not inconsequential if, far from doing everything possible, the athlete blindly relied on past experience with the online retailer that provided a nutritional supplement without seeking any kind of advice, while the product label disclosed the presence of MHA.
6. Under Article R57 of the CAS Code, the CAS Panel has the power to issue a new decision that replaces the decision challenged. As a result, in the event the CAS award imposes a sanction to an athlete that had not been found responsible of an anti-doping rule violation, the ineligibility would be imposed only by CAS: therefore, for the purposes of Article 10.9 of the 2009 WADC, the date of the CAS award would be the starting moment of the ineligibility. Conversely, the date of the decision of the disciplinary body is the starting date of the ineligibility in the event the CAS decision does not replace, but entirely confirms, the sanction imposed by the disciplinary body: in such event, ineligibility finds its foundation only in, and is therefore imposed only by, the lower level decision.
7. FINA DC Rule 10.9, while providing for the obligation to give credit for periods of provisional suspension, does not exclude (but logically requires) credit for periods of suspension imposed and served on the basis of "final" disciplinary decisions subsequently set aside.

1. BACKGROUND

1.1 The Parties

1. The Fédération Internationale de Natation ("FINA") (hereinafter also referred to as "FINA" or the "Appellant") is the international governing body for the sport of swimming. FINA is an association under Swiss law and has its headquarters in Lausanne (Switzerland).
2. Ms Fabiola Molina (hereinafter also referred to as "Molina" or the "First Respondent") is an accomplished Brazilian swimmer of international level, having competed at multiple Olympic and Pan American Games and won multiple Brazilian national championships in swimming, and a member of the Confederação Brasileira de Desportos Aquaticos.
3. The Confederação Brasileira de Desportos Aquaticos (hereinafter also referred to as "CBDA" or the "Second Respondent") is the Brazilian National Federation in respect of swimming. As

such, CBDA is affiliated to FINA.

4. Molina and CBDA are hereinafter jointly referred to as the “Respondents”.

1.2 The Dispute between the Parties

5. The circumstances stated below are a summary of the main relevant facts, as submitted by the parties in their written pleadings or in the evidence offered in the course of the proceedings. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
6. On 22 April 2011, Molina took part in a swimming event (the *Seletiva Mundial*) in Rio de Janeiro, Brazil (hereinafter also referred to as the “Event”). On that occasion, Molina underwent an anti-doping control.
7. The A sample provided by Molina at the Event was analysed by the Laboratory for Doping Analyses of Laval, Quebec, Canada (hereinafter also referred to as the “Laboratory”), which is accredited by the World Anti-Doping Agency (hereinafter also referred to as the “WADA”).
8. On 7 June 2011, the Laboratory reported the presence of methylhexaneamine (hereinafter also referred to as “MHA”). MHA is a prohibited specified substance, also referred to under the name of “dimethylpentylamine”, in class S.6 (stimulants) of the 2011 WADA list of prohibited substances (hereinafter also referred to as the “Prohibited List”), pursuant to which, “*All stimulants ... are prohibited. Stimulants include: ... b: Specified Stimulants: ... methylhexaneamine (dimethylpentylamine) ...*”.
9. On the basis of this analytical finding (hereinafter also referred to as the “Adverse Analytical Finding”) a hearing was convened before the CBDA Doping Control Panel (hereinafter also referred to as the “Doping Control Panel”).
10. On 20 June 2011, the hearing before the Doping Control Panel took place. At such hearing, Molina confirmed her waiver of her right to have the B sample tested and explained that the presence of the prohibited substance in the sample she had provided had its origin in a dietary supplement (named *1.M.R.* manufactured by BPI Sports: hereinafter also referred to as the “Supplement”) that she had received as a free sample while buying online at www.bodybuilding.com other products during a trip to compete in the USA. Molina, at the same time, indicated that she usually checked the products she was ingesting and that the results at the Event were not important to her: the Event, in fact, was meant to give the swimmers an opportunity to obtain the qualifying time for the 2011 Shanghai FINA World Championship, which she had already obtained.
11. At the conclusion of the hearing, the Doping Control Panel, “*considering the history of athlete Fabiola Pulga Molina, of exemplary conduct, and that this was her first offense and that there was no intention of gaining performance*”, decided that:

- “- *in compliance with rule DC 10.4, the athlete shall receive the sanction of ineligibility for two (2) months counted from the last competition, i.e., May 8, 2011;*
- *in compliance with what is determined by Rule DC 9, the athlete will lose the results achieved in the competitions in which she participated after April 22 and until the receipt of the adverse analytical result notification on June 8, 2011”⁽¹⁾.*
12. As a result, on 21 June 2011, the CBDA President, acting “*on recommendation of the Doping Control Panel*”, adopted the following decision (hereinafter referred to as the “Decision”):
- “- *... to suspend the athlete FABIOLA PULGA MOLINA, as specified by FINA Rule 10.4, for the period of two (2) months, counted from May 8, 2011*
- *annul all of the results, medals, awards, and diplomas obtained by the above-mentioned athlete during the Brazilian Swimming Championship – Maria Lenk Award, held from May 2 to May 8, 2011, in the city of Rio de Janeiro, RJ, in compliance with FINA Rule DC9”⁽²⁾.*
13. The Decision was notified to FINA by the CBDA on 12 July 2011.

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

14. On 28 July 2011, FINA filed a statement of appeal, with 8 exhibits, with the Court of Arbitration for Sport (hereinafter also referred to as the “CAS”), pursuant to Article R48 of the Code of Sports-related Arbitration (hereinafter also referred to as the “Code”), to challenge the Decision. In such submission, the Appellant indicated, for the purposes of Article R51 of the Code, that the statement of appeal would also serve as appeal brief, and appointed Mr Otto L.O. De Witt Wijnen as arbitrator.
15. In letters dated 29 July 2011 and 12 August 2011, Mr Jeffrey G. Benz was appointed as arbitrator by the CBDA and Molina.
16. Answers to the appeal, seeking its dismissal, were filed as follow:
- i. on 24 August 2011 by the Second Respondent, together with 8 exhibits, comprising several documents; and
 - ii. on 25 August 2011 by the First Respondent, together with 16 exhibits.
17. By communication dated 2 September 2011, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Otto L.O. De Witt

¹ Translation from the original Brazilian text provided by the Appellant.

² Translation from the original Brazilian text provided by the Appellant.

Wijnen and Mr Jeffrey G. Benz, arbitrators.

18. In a letter of 7 September 2011, the CAS Court Office, writing on behalf of the Panel, advised the parties that the Panel would be available to hold a hearing on 14 or 15 November 2011. However, such hearing date had to be rescheduled at the request of the First Respondent.
19. On 7 December 2011, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter referred to as the “Order of Procedure”), which was accepted and countersigned by the parties.
20. In a letter of 7 December 2011, the Panel requested the Second Respondent to provide the CAS Court Office with copy of some documents referred to in the exhibits submitted by the Second Respondent together with its answer.
21. On 9 December 2011, the Second Respondent lodged with the CAS Court Office some documents intended to answer the Panel’s request of 7 December 2011, as well as an English translation of other documents submitted together with the answer.
22. A hearing was held on 13 December 2011 on the basis of the notice given to the parties in the letter of the CAS Court Office dated 4 October 2011. The Panel was assisted at the hearing by Ms Andrea Zimmermann, Counsel to the CAS. The following persons attended the hearing:
 - i. for the Appellant: Mr Jean-Pierre Morand and Mr Ross Wenzel, counsel, and Ms Katarzyna Jozwik of FINA;
 - ii. for the First Respondent: Mr Howard L. Jacobs, counsel, and Ms Fabiola Molina in person; and
 - ii. for the Second Respondent: Mr Marcelo Franklin, counsel.
23. At the hearing, the parties made submissions in support of their respective cases, Dr Sandra Soldan was heard as a witness upon request of the Respondents, and Molina rendered some declarations. More specifically, and *inter alia*:
 - i. FINA modified its request for relief (§ 28 below);
 - ii. Dr Soldan, a medical doctor employee of the Second Respondent since 2007, explained that she acted as doping control officer at the Event, that she collected the sample provided by Molina and that she learned about the use of the Supplement by the First Respondent while filling in the doping control form and inquiring about the medication products taken by Molina; and
 - iii. Molina made declarations on her sporting career, on the circumstances of her purchase and use of the Supplement, that she had a practice in the past of discussing new supplements she would take with Dr Soldan before ingesting them but that in this case she had not followed her prior practice, and confirmed that Dr Soldan, when learning about the use of the Supplement, warned her about the problems with the anti-doping that such use could cause.

24. At the conclusion of the hearing, the parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings and they had been given the opportunity fully present their cases.
25. On 20 December 2001, the operative part of this award was issued.

2.2 The Position of the Parties

26. The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

(a) *The Position of the Appellant*

27. In its statement of appeal, FINA requested the CAS

“to rule as follows:

- *The Appeal of FINA is admissible.*
- *The Athlete is sanctioned with a period of ineligibility of no less than six months consistent with the application of DC 10.4 and the degree of fault at stake. Any period of ineligibility already served shall be credited against the ineligibility period imposed by the Panel.*
- *All competitive individual results obtained by the Athlete from 22 April 2011 through the commencement of the applicable period of ineligibility (including the results of the Athlete at the Competition) shall be annulled.*
- *The Respondents shall bear all costs of the proceedings including a contribution to Appellant's legal fees”.*

28. At the hearing FINA, however, declared that, in light of the circumstances of the case, its request for the disqualification of *“all competitive individual results obtained by the Athlete from 22 April 2011 through the commencement of the applicable period of ineligibility”* (second bullet point of the relief requested) had to be considered withdrawn. FINA also stated that disqualification of results was requested only for the additional period of ineligibility to be served by the First Respondent, and as a result of that sanction.
29. As a result of the above, the Appellant criticizes the Decision, which it asks the Panel to modify, only with respect to the length of the suspension to be imposed.
30. In its submission, indeed, the Appellant refers to Rule 10.4 of the FINA Doping Control Rules 2009-2013 (hereinafter referred to as the “FINA DC”), and underlines, for the purposes of such provision, to be *“prepared to accept that (i) the ... Supplement is the source of the prohibited substances in the Athlete's sample and (ii) that the athlete did not intend to use the relevant prohibited substance to enhance her sporting performance”*. As a result, the Appellant agrees with the findings of the Decision that the case of Molina falls within the scope of application of FINA DC Rule 10.4.

31. The Appellant, however, disagrees with the Decision with respect to the measure of the sanction imposed, and contends that *“the sanction appears to be outside [an] acceptable range”* of exercise of appreciation by the first instance body in the identification of the measure of sanction, which can go from a simple reprimand to a two year period of ineligibility.
32. In that respect, the Appellant underlines that FINA DC Rule 10.4 *“is applicable to unintentional doping and therefore has to relate to the measure of negligence of the Athlete which led to the presence of Prohibited Substance”*, and alleges that Molina *“fell short of the required standard of behaviour. ... the Athlete could and should have taken further measures to satisfy herself that the Free Supplement did not contain any prohibited substances. Such measures should have included a basic internet search with respect to the ingredients and a thorough checking of the label and packaging of the Free Supplement; in the event of doubt, the Athlete should have had recourse to medical advice”*. In other words, the Athlete’s case should be considered as *“a case of not insignificant fault”*.
33. As a result of the above, in the Appellant’s opinion, the imposition of a two month sanction is *“so low as to be outside the exercise of reasonable discretion”*: therefore, the ineligibility to be imposed should amount *“to not less than six months”*. In such regard, the Appellant maintains that the cases concerning other athletes referred to by the Respondents are not comparable to the case of the First Respondent, and that the measure of the sanction adopted by domestic hearing bodies (including of the CBDA) cannot be taken as “benchmark” for future decisions: more specifically, according to the Appellant, the failure of FINA to challenge domestic decisions does not amount to a recognition of their accuracy and does not prevent FINA from successfully taking other cases to CAS.
34. With respect to the starting date of the ineligibility period that FINA requests the Panel to impose on the First Respondent, the Appellant submits that it should be set at *“the date of the hearing decision providing for ineligibility”* in accordance with Rule 10.9 of the FINA DC: therefore, from the date of the CAS award imposing the sanction, with credit given for the period of suspension already served by Molina on the basis of the Decision. In the Appellant’s opinion, a different solution, backdating the starting date of the additional period of ineligibility to continue the period imposed by the Decision, would create many problems, as it would impact the competitions attended by Molina upon her return after the ineligibility period already served, and would be contrary to fairness.

(b) *The Position of the Respondents*

b.1 The Position of the First Respondent

35. In her answer, Molina submitted the following request for relief:

“that FINA’s appeal should be denied;

that the two-month sanction issued by the CBDA Doping Panel be maintained; and

that FINA be condemned to contribute to the costs of this Answering Respondent in connection with this appeal”.

36. Molina, in other words, asks this Panel to dismiss the appeal brought by FINA and to confirm the Decision challenged by the Appellant.
37. In her submissions, the First Respondent preliminarily refers to FINA's appeal and underlines that the Panel is limited by the relief sought by the Appellant. Therefore, *"it is submitted that this Tribunal may only change the sanction in this case if it finds that a 2 month sanction ... is outside of the range of a reasonable sanction in this case"*.
38. In light of the foregoing, Molina contends that *"the penalty issued by the CBDA Doping Panel was within the range of reasonable sanctions in this case under WADC / FINA DC 10.4"*. In that respect, the First Respondent refers to the cases involving other athletes and notes that
- i. the sanction applied to Molina falls *"squarely in the middle of the prior sanctions"* imposed on three other athletes (S., L. and B.) by decisions of the Doping Control Panel which were not challenged by FINA;
 - ii. the sanction imposed on Molina *"is within the range of sanctions issued to other, non-Brazilian athletes who tested positive for methylhexanamine"*;
 - iii. *"athletes have received suspensions of 6 months or less in cases of other Specified Substances in cases where, as in this case, the banned substance was listed on the label"*;
 - iv. *"athletes who have tested positive for Specified Substances, who have shown some degree of diligence, have received sanctions that are within the range of the two-month sanction received by Fabiola Molina"*.
39. At the same time, the First Respondent submits that *"increasing the sanction would effectively result in a second sanction to Fabiola Molina for her one and only positive test"*, and *"such a scenario ... would result in a sanction that is excessive"*.
40. In this respect, the First Respondent challenges the Appellant's contentions also under a different perspective and maintains that the Panel cannot grant the FINA's request that a period of ineligibility be imposed starting from the date of the CAS award, with credit given for the period already served. The First Respondent refers to a CAS precedent (award of 21 May 2010, CAS 2009/A/1870) to underline that the sanction should start, pursuant to FINA DC Rule 10.9, from the date of the Doping Control Panel's decision: however, the setting of the commencement of the ineligibility period from such date has not been requested by FINA and would not be fair, and therefore cannot be granted. In the same way, the starting of the ineligibility period from the date of the CAS award, along the Appellant's request, cannot be granted, since it is not allowed by the applicable rules and it would result in a second sanction (§ 39 above and CAS 2009/A/1870, § 128), with no possibility to grant a credit for the period already served, since FINA DC Rule 10.9 allows such credit only in the event of a provisional suspension.

b.2 *The Position of the Second Respondent*

41. In its answer, CBDA requested:

*“... the dismissal of the FINA’s Appeal and ... that the decision taken by the CBDA is fully sustained.
... to condemn FINA to pay a substantial contribution towards CBDA’s legal fees and other expenses incurred
in connection with the proceedings”.*

42. In other words, in the opinion of the Second Respondent, the Decision *“is correct and should be sustained”*.

43. In support of its position, CBDA underlines that

- i. *“Molina made use of the substance because she has been led to mistake due to the name on the label of the supplement and only used the product once”;*
- ii. *“Molina had no intention to enhance her performance”;*
- iii. Molina *“on the moment of filling in the doping control forms, ... (in good faith) informed all the substances she used to take, inclusive the 1 M.R.”;*
- iv. the Decision *“is in conformity with a series of other cases in the Brazilian swimming in which FINA did not appeal to CAS”;*
- v. *“Molina has only one year ahead in her career, which attributes a greater weight to any kind of ineligibility to be imposed”;*
- vi. some *“mitigating circumstances”* have to be considered, which include the fact that:
 - the label of the Supplement did not mention the exact name of the substance included in the Prohibited List;
 - such substance is only prohibited *“In-Competition”*;
 - Molina purchased the Supplement from a *“reputable website”*;
 - in 20 years of career, it was the first time that Molina did not seek medical advice;
 - Molina made a *“quick verification of the substances on the reverse side of the packing and ... did not notice the presence of any prohibited substance”*.

3. LEGAL ANALYSIS

3.1 Jurisdiction

44. CAS has jurisdiction to decide the present dispute between the parties.

45. The jurisdiction of CAS is not disputed and has been confirmed by the signing of the Order of Procedure. In addition, it is contemplated, pursuant to Article R47 of the Code, by FINA DC Rule 13.2.1.

46. More specifically, the provisions referring to CAS contained in the FINA DC, which are relevant in these proceedings, are the following:

Rule 13.2.1

“A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed ... may be appealed exclusively as provided in this DC 13.2 ...”.

Rule 13.2.3

“In cases under DC 13.2.1, the following parties shall have the right to appeal to CAS: ... (c) FINA and any other Anti-Doping Organization under whose rules a sanction could have been imposed ...”.

Rule 13.6

“The 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 and FINA. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having lead to a decision subject to appeal: ...

- *Twenty-one days from the day of receipt of the full file including translations to the extent applicable”.*

3.2 Appeal Proceedings

47. As these proceedings involve an appeal against a decision rendered by a national federation (CBDA) acting by delegation of powers of an international federation (FINA) regarding an international level athlete in a disciplinary matter brought on the basis of rules providing for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary case of international nature, in the meaning and for the purposes of the Code.

3.3 Admissibility of the Appeal

48. The statement of appeal was filed within the deadline set in the FINA DC Rule 13.6. No further internal recourse against the Decision is available to the Appellant within the structure of CBDA. Accordingly, the appeal is admissible.

3.4 Scope of the Panel’s Review

49. According 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...”.

3.5 Applicable Law

50. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

51. Pursuant to Article R58 of the Code, the Panel is required to 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”.

52. The Panel notes that the Decision was rendered on the basis of the FINA DC. Therefore, the Panel considers the FINA DC to be the “applicable regulations” for the purposes of Article R58 of the Code. Brazilian law, being the law of the country in which the CBDA is domiciled, applies subsidiarily. However, no party led any evidence of the content of relevant Brazilian law, nor was the Panel asked to consider or apply any provision of Brazilian law.

53. The provisions set in the FINA DC which are relevant in this arbitration include the following:

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

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

First violation: At a minimum, a reprimand and no period of Ineligibility from future Competitions, and at a maximum, two years’ of Ineligibility.

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

Rule 10.9 *“Commencement of Ineligibility”*

“Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility imposed”.

3.6 The Dispute

54. On the basis of the relief requested by the parties, primary object of these proceedings is the measure of the sanction to be imposed on the First Respondent under FINA DC Rule 10.4. In

its appeal, in fact, FINA requested this Panel to increase the sanction of ineligibility imposed by the Decision on Molina. On the other hand, Molina and the CBDA request that the Decision be confirmed. At the same time, disputed is also the starting date of the sanction, should this Panel decide to increase the measure set by the Decision.

55. As a result of the above, there are two main questions that the Panel has to examine:
- i. the first concerns the appropriate measure of the sanction for Molina, and chiefly whether the Decision was correct in imposing a two-month ineligibility period;
 - ii. the second, to be addressed in the event the Panel decides that a sanction has to be imposed on Molina exceeding the two-month ineligibility period set by the Decision, concerns the starting date of the sanction found to be proper by this Panel.

56. The Panel shall consider each of said questions separately.

i. Was the Decision correct in imposing on Molina a two-month ineligibility period? What is the appropriate measure of the sanction for Molina?

57. As mentioned, Molina, as a result of the Adverse Analytical Finding, was found responsible for an anti-doping rule violation: more exactly for the anti-doping rule violation contemplated by FINA DC Rule 2.1 (*“Presence of a Prohibited Substance or its Metabolites or Markers in a Competitor’s Sample”*). Molina herself does not (and did not before the Doping Control Panel) challenge such finding.

58. FINA DC Rule 10.2 provides, for a first anti-doping rule violation of such kind, the sanction of two years’ ineligibility. However, according to FINA DC Rule 10.4, in the event the substance found the competitor’s sample is identified in the Prohibited List as a “Specified Substance”, and additional conditions are met (the athlete can establish how the Specified Substance entered his or her body and that such Specified Substance was not intended to enhance his or her sport performance), the sanction applicable under FINA DC Rule 10.2 is replaced by a sanction ranging from a simple warning with no ineligibility (minimum), to two years’ ineligibility (maximum).

59. In such respect, it is common ground between the Parties that:

- i. MHA, the substance found the Molina’s sample, is a Specified Substance for the purposes of FINA DC Rule 10.4. The Prohibited List, in fact, mentions MHA in Section S.6(b) among the Specified Substances, and refers to it also under the alternative name of “dimethylpentylamine”;
- ii. the additional conditions for the application of FINA DC Rule 10.4 are met; and therefore
- iii. the sanction applicable to Molina is to be decided, according to FINA DC Rule 10.4, in a range from a warning to two years’ ineligibility.

60. Against that background, the Doping Control Panel decided to set the sanction at two months: elements deemed to be relevant were the history of Molina, defined to be of exemplary conduct, the fact that Molina was confronted with her first offense and the fact that Molina had no intention of gaining a competitive advantage. FINA disputes this conclusion, and maintains, in short, that the sanction on Molina was “*so low as to be outside the exercise of reasonable discretion*” by the Doping Control Panel, and that the level of negligence shown by the First Respondent is such as to command a sanction of no less than six months’ ineligibility.
61. The first question to be examined by the Panel, therefore, concerns the measure of the sanction for Molina’s anti-doping rule violation: as such, it implies a review of the accuracy of the Decision in that respect.
62. In such regard a preliminary issue is however raised by the First Respondent. In her submissions, in fact, Molina refers to the FINA’s appeal and underlines that the Panel is limited by the relief sought by the Appellant: therefore, “*this Tribunal may only change the sanction in this case if it finds that a 2 month sanction ... is outside of the range of a reasonable sanction in this case*”, as requested by FINA.
63. The First Respondent’s contention, that this Panel has limited ability to decide on the Appellant’s request to review the Decision, indeed, touches two distinct points.
64. The first point corresponds to the arbitral nature of the CAS proceedings and follows the principle under which an arbitral tribunal can grant relief only within the parties’ petitions.
65. The Panel notes, however, that, in its requests for relief (§ 27 above), the Appellant asked the Panel to set the Decision aside and impose a sanction of at least 6 months under FINA DC Rule 10.4. Therefore, the review of the Decision squarely falls within this Panel’s jurisdiction, as defined by the Appellant’s requests. The only limit to the Panel’s capacity is that it cannot grant a different relief or relief outside the bounds of the arbitration proceedings (in other words, it is a fundamental principle of international arbitration that the Panel cannot act *ultra petita*): for instance, this Panel cannot impose a sanction outside the scope of FINA DC Rule 10.4 or find that no anti-doping rule violation was committed (because it had been admitted here).
66. The second point concerns the scope of a CAS panel’s powers of review of the disputed facts and law in the exercise of its jurisdiction. In that regard, the parties discuss some principles enounced in the CAS jurisprudence: more specifically, the *dictum* in CAS 2009/A/1870 (§ 125) under which “*the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules can be reviewed only when the sanction is evidently and grossly disproportionate to the offence (see TAS 2004/A/547, [...], §§ 66, 124; CAS 2004/A/690, [...], § 86; CAS 2005/A/830, [...], § 10.26; CAS 2005/C/976 & 986, [...], § 143; 2006/A/1175, [...], § 90; CAS 2007/A/1217, [...], § 12.4)*”.
67. This Panel accepts and subscribes, indeed, to such jurisprudence: far from excluding, or limiting, the power of a CAS panel to review the facts and the law involved in the dispute heard (pursuant

- to Article R57 of the Code), such indication only means that a CAS panel “*would not easily ‘tinker’ with a well-reasoned sanction, ie to substitute a sanction of 17 or 19 months’ suspension for one of 18*” (award of 10 November 2011, CAS 2011/A/2518, § 10.7, with reference to CAS 2010/A/2283, § 14.36).
68. In light of such jurisprudence, the fact that this Panel might not lightly interfere with the Decision rendered by the Doping Control Panel, challenged by FINA, does not mean that there is in principle any inhibition to its power to do so. As a result, in the exercise of the power granted by Article R57 of the Code, and within the scope of its jurisdiction (§ 65 above), this Panel is entitled to review the Decision without any limit.
 69. The main question in this arbitration is indeed whether the Doping Control Panel applied to Molina the sanction of ineligibility in a proper measure: the Appellant denies this and requests that a longer ineligibility period be imposed.
 70. As mentioned, the period of ineligibility which, under FINA DC Rule 10.4, could be imposed on Molina ranges from 0 to 24 months. The closing sentence of FINA DC Rule 10.4, makes clear, then, that the measure of the sanction depends on the assessment of Molina’s fault. In that respect, the Panel notes that it is a principle under the WADA World Anti-Doping Code (hereinafter referred to as the “WADC”) (on which the FINA DC rules are modelled), that the circumstances to be considered in the assessment of the athlete’s fault “*must be specific and relevant to explain the athlete’s ... departure from the expected standard of behavior*” (footnote to Article 10.4 of the WADC, edition 2009). Therefore, Molina’s fault has to be measured, on the basis of specific circumstances, against the fundamental duty she had to do everything in her power to avoid ingesting any prohibited substance. Such duty, in the Panel’s opinion, is particularly significant, considering that her infringement occurred years after which the risks connected to the use of nutritional supplements became widely known to athletes and the sports community (CAS 2010/A/2107, § 9.28).
 71. The Panel notes that an impressive body of jurisprudence exists, at international and national levels, defining the circumstances relevant to the measurement of an athlete’s fault, and translating them into the determination of a proper sanction. Also in this arbitration, the parties are drawing the Panel’s attention to specific decisions, invoked to support their respective cases. The Panel actually agrees with the parties that the decisions of national and international doping tribunals provide helpful guidance. However, the Panel agrees with the holding in CAS 2011/A/2518 (§10.23 of the award) that “*although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport*”. Each case, in addition, must be decided on its own facts. As a result, the decisions taken by the Doping Control Panel with respect to other athletes do not set any binding point of reference for this CAS Panel.
 72. Against that background is therefore the applicable sanction for the First Respondent’s case to be determined, weighing the circumstances adverse and the circumstances favourable to Molina’s position.

73. In the Panel's view, the circumstances favourable to Molina's position include the following:
- she had already bought products, and received free samples, from the online retailer that provided her with the Supplement and she had used such products and samples in the past over many years without incident or any positive anti-doping control;
 - she did not buy the Supplement, but received it as a free sample;
 - MHA was directly mentioned on the packaging of the Supplement but only under an associated name;
 - Molina indicated the use of the Supplement in the doping control form;
 - Molina's personal history and clean anti-doping record spanning many years shows that she had always paid attention to anti-doping issues; and
 - she accepted the Adverse Analytical Finding, waiving her right to the B-sample analysis.
74. On the other hand, the circumstances adverse to Molina's position are the following:
- Molina's check of the ingredients of the Supplement was only cursory;
 - "1,3 Dimethylpentylamine" is expressly mentioned on the packaging and ingredients label of the Supplement;
 - "dimethylpentylamine" is an alternative name of MHA, and is mentioned in the Prohibited List (§ 8 above);
 - Molina did not make any research (in the Internet or otherwise) on the Supplement or its ingredients: even the simplest Internet search shows results confirming "dimethylpentylamine" to be a prohibited substance;
 - there is no indication on the packaging of the Supplement that could have misled Molina as to the "absence of a doping risk";
 - Molina's case is not a case of contamination in a common multiple vitamin purchased from a source with no connections to prohibited substance, and Molina had in fact acquired the product from *www.bodybuilding.com*, which is a source of a wide range of nutritional supplements and which appears to make no claims about its products being safe for athletes subject to anti-doping controls;
 - the circumstances of the use of the Supplement are not extraordinary and were not time-pressured or the result of obfuscation by packaging or third parties: Molina had much time to calmly make substantial control and research with respect to the Supplement which was clearly marked;
 - Molina did not contact a doctor or seek any medical advice with respect to the use of the Supplement, despite testifying that she had contacted Dr. Soldan in the past with respect to ingestion of supplements before she had taken them;
 - Molina did not have personal contact with the supplier about the Supplement, or its ingredients, prior to taking it;

- Molina did not consult with other swimming personnel about the Supplement, or its ingredients; and
- Molina is an older, experienced, and accomplished international level athlete whose career has spanned many years and who was the subject of regular anti-doping controls, with perfect knowledge of her anti-doping obligations.

75. In light of the foregoing, the Panel holds that Molina's negligence was not inconsequential: far from doing everything in her power, she blindly relied on her past experience with the online retailer that provided her with the Supplement, did not check on the Internet or seek any kind of advice, and the product label disclosed the presence of MHA, yet she took the risk of ingesting a prohibited substance.

76. The Panel considered prior cases involving Specified Substances, including the conduct of the athletes involved and the sanction issued by the panels, most notably the following which were raised by the parties or otherwise known by the Panel, and the Panel found all of them instructive on the issue of the appropriate sanction for Molina based on her conduct:

- i. in CAS A2/2011 – a professional rugby league player purchased and used a supplement called “Jack3d”, which had resulted in an adverse analytical finding for MHA. The use of pre-workout supplements was encouraged by the athlete's club. The athlete himself had received very limited formal anti-doping education. However, the athlete had been assured by the store owner that the product was clean and had consulted his conditioning coach and undertaken research on the ASADA website in respect of the ingredients of Jack3d which had not resulted in the identification of any specified substances. A sanction of **six months** ineligibility was imposed;
- ii. in *Brunemann v/ USADA*, AAA case of 26 January 2009 – an elite collegiate swimmer in the United States took her mother's prescription pill bottle, plainly marked on the bottle as containing two diuretics that were Specified Substances, to relieve her constipation. A sanction of **six months** ineligibility was imposed. The Panel finds the facts of this case to be very similar to the facts of Molina's case;
- iii. in *UKAD v/ Dooler*, UKNADP, 24 November 2010 – a semi-professional rugby league player tested positive for the presence of MHA. The source of this result was a product called “Xtreme Nox Pump” which he had taken at half time during a match to alleviate post-match fatigue and muscle pain. The product was in fact more directed towards improving training performance. He did not discuss his use of the product on match days with his team doctor and/or coaches. However, it was accepted that Internet searches would not readily have identified that the product might contain MHA. A sanction of **four months** ineligibility was imposed;
- iv. in *RFU v/ Steenkamp*, RFU Disciplinary Hearing, 22 March 2011 – a semi-professional rugby union player used what he believed to be an energy drink. The drink had been recommended by a qualified fitness instructor who had, after checking, assured him that the product contained no banned substances. He tested positive for MHA. A sanction of **three months** of ineligibility was imposed;

- v. in *RFU v/ Wihongi*, RFU Disciplinary Hearing, 16 March 2011 – a professional rugby union player picked up a green bottle in the team dressing room at half-time during a match, believing it to contain water. He started to drink the contents but quickly realised that it contained a sport drink that had been prepared by team coaching personnel for another player and stopped drinking. He subsequently tested positive for MHA. A sanction of **four months** ineligibility was imposed;
- vi. in *NADP v/ Wallader*, UKNADP Hearing, 29 October 2010 – a female shot putter received a **four month** ban for testing positive for MHA caused by her use of a supplement called “Endure”. The athlete was 21, a student, and was given the supplement by her very experienced coach, who had received specific assurances from the supplier that it was “legal”. The athlete had, herself, both checked the ingredients against the 2009 Prohibited List and found no matches (because neither MHA nor Dimethylpentylamine was included by name on the Prohibited List at that point), and checked against the Global DRO, again without any red flags appearing (this time because the name MHA was used in the database, but not the synonym Dimethylpentylamine). The athlete, who it was accepted by the tribunal did not have specialist medical assistance readily available to her – was found to have exercised “considerable diligence”. The tribunal assessed her fault as significantly less than that of an English footballer (Kenny) who had received a nine month ban for a Specified Substance (not MHA) that was an ingredient in a cold remedy;
- vii. in CAS 2011/A/2495 – the athlete was so concerned about everything that he ingested that he hired a medical doctor experienced in sports medicine to supervise his supplement intake, had that doctor prescribe a custom made supplement that contained no prohibited substances at a compounding pharmacy, took the advice of his father who was also the local health inspector who identified the most reputable compounding pharmacy in his locale and chose that one as the pharmacy to provide the supplement, and ingested a supplement that was not labelled as containing nor intended to contain a prohibited substance. Despite the athlete’s efforts, the compounding pharmacy created his supplement shortly after a prescription was filled for another patient that contained a heart medication that was a specified substance and thereby contaminated the athlete’s compounded supplement. The Panel found that a **reprimand** was a reasonable punishment under Article 10.4 of the WADC. As the facts demonstrate, the exceptionally high degree of care exercised by [the athlete] was completely missing in Molina’s case;
- viii. in CAS 2011/A/2518 – the athlete took a supplement in an unmarked, unlabelled foil package he had obtained from a friend of his coach who was the seller of the product under a network marketing scheme, the athlete conducted very rudimentary Internet research on the product that led him to believe the product did not contain prohibited substances; Had the athlete found the online label for the product he would have determined that it contained the specified substance at issue (in that case, MHA as well), but he relied on advice from unqualified personnel, not his coach, in deciding to take the supplement. [The athlete] received an **eight month** sanction after the Panel weighed his conduct under the standards set forth in WADC Article 10.4. As the facts demonstrate,

Molina was only slightly better in her exercise of her degree of care in handling ingestion of the product that gave rise to her positive test.

77. Having regard to all of the circumstances, and the prior cases involving Specified Substances as identified by the Parties, the Panel comes to the conclusion that the sanction of two months imposed by the Decision is too lenient. On the basis of Molina's degree of fault and weighing all the relevant specific factors, the Panel concludes that an appropriate sanction would be a period of ineligibility of **six months**. The Panel wishes to emphasize that, much like the Doping Control Panel, the Panel found no evidence of an intention on the part of Molina to cheat or commit a doping offense; rather the Panel finds that Molina failed to exercise the degree of care required of international athletes to avoid ingesting a prohibited substance.
 78. The Decision is therefore to be set aside in the portion regarding the measure of the sanction, and replaced by a decision imposing a six months' ineligibility period.
- ii. What is the starting date of the six months' ineligibility period imposed on Molina by this Panel?*
79. The above conclusion prompts another issue, consisting in the determination of the starting moment of such period and the place to be given in that context to the circumstance that the First Respondent already served two months of suspension, between 8 May 2011 and 8 July 2011.
 80. The rule applicable for the determination of the starting moment of the ineligibility period is to be found in FINA DC Rule 10.9 (corresponding to Article 10.9 of the 2009 WADC), which for that purpose refers to "*the date of the hearing decision providing for Ineligibility*" and provides for a credit "*against the total period of Ineligibility imposed*" to be given for "*any period of Provisional Suspension (whether imposed or voluntarily accepted)*" served.
 81. Such provision therefore raises an additional question, concerning the identification of the "*bearing decision*" whose date is the starting date of the ineligibility period: more exactly, the question is whether such "*bearing decision*" is the one adopted by CBDA (i.e., the Decision) or the CAS decision.
 82. The Panel finds a solution to such question in Article R57 of the Code. Under this provision, in fact, the CAS Panel has the power to issue a new decision that replaces the decision challenged: such power was indeed declared by the Swiss Federal Tribunal (in a judgment of 3 January 2011, 4A_386/2010, at § 5.3.4) to be consistent with the mission of arbitral jurisdiction exercised by the CAS. As a result, in the event the CAS award imposes a sanction to an athlete that had not been found responsible of an anti-doping rule violation, the ineligibility would be imposed only by CAS: therefore, for the purposes of Article 10.9 of the 2009 WADC, the date of the CAS award would be the starting moment of the ineligibility (see CAS 2010/A/2062, § 54, stating that "*the Panel decides that the period of ineligibility shall start as soon as the period of ineligibility is communicated to the Player ...*"). Conversely, the date of the decision of the disciplinary body is the starting date of the ineligibility in the event the CAS decision does not replace, but entirely

confirms, the sanction imposed by the disciplinary body: in such event, ineligibility finds its foundation only in, and is therefore imposed only by, the lower level decision.

83. The exercise by a CAS Panel of its power under Article R57 of the Code offers, in this Panel's opinion, also the solution for the different case, corresponding to Molina's situation, in which the disciplinary body has imposed a sanction, by a decision that is set aside by a CAS award, in a measure found too lenient. In that case, indeed, the CAS has the option, in this Panel's opinion, both to extend the original sanction, so that the ineligibility period would run from the date of the decision that first imposed it, or to issue a new decision, entirely replacing the challenged decision and imposing afresh the longer sanction. This Panel submits that the election of either solutions under such option (in any case open to a CAS panel confronted with the issue) has to be exercised taking in mind the peculiarities of the case: for instance, a simple extension of the original sanction would be the obvious choice in the event the ineligibility period imposed by the disciplinary body has not yet come to an end at the time of the CAS award.
84. In the current case, this Panel holds that the starting date of Molina's ineligibility is the date of this award: more exactly, the date of its operative part, whereby the decision to impose an ineligibility period of six months was announced to the parties. Such solution is consistent with this Panel's decision to set aside the Decision with respect to the length of the ineligibility period: ineligibility (in the measure indicated) is therefore in this case a sanction imposed by this Panel. In addition, a different solution, consisting in the simple extension of the period of suspension imposed by the Decision, would appear unfair, impacting on the competitions attended by Molina in good faith after the end of the ineligibility imposed by the Decision set aside, with no possibility for this Panel not to disqualify the results achieved, since disqualification would in that case be an unavoidable consequence of ineligibility (award of 27 July 2009, CAS 2008/A/1744, §§ 79-80).
85. The Panel holds that the application by this Panel of the sanction of ineligibility does not constitute a second sanction imposed on the First Respondent, additional to that adopted by the Decision: the Decision is in fact set aside and Molina is to serve a single sanction, i.e. a suspension for six months from the date of the CAS decision.
86. However, in the actual determination of the exact period that Molina has to serve of the six months hereby imposed, account is to be taken of the two months' period already served pursuant to the Decision. Even though the Decision is set aside, the fact remains that Molina was not eligible to compete for two months after the finding of her commission of an anti-doping rule violation: it would be unfair and result *de facto* in a total suspension of eight months not to give her credit for that period. The fact that such prior period was not served as a provisional suspension is no impediment to that conclusion. The Panel, in fact, remarks that FINA DC Rule 10.9, while providing for the obligation to give credit for periods of provisional suspension, does not exclude (but logically requires) credit for periods of suspension imposed and served on the basis of "final" disciplinary decisions subsequently set aside.
87. In light of the foregoing, the Panel concludes that the ineligibility period imposed on Molina

starts on the date on which the operative part of this CAS award was issued, with credit given to Molina for the period of suspension already served. In other words, the remaining portion of Molina's suspension is 4 months commencing on 20 December 2011.

3.7 Conclusion

88. In light of the foregoing, the Panel holds that the appeal brought by FINA against the Decision is to be upheld: the Decision is to be set aside in the portion concerning the measure of the sanction imposed and replaced by a decision suspending Molina for a period of six months, starting on date on which the operative part of this CAS award was issued, with credit given to Molina for the period of suspension already served. The other portions of the Decision, not challenged by FINA, are to be confirmed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the Fédération Internationale de Natation (FINA) on 28 July 2011 against the decision taken by the President of the Confederação Brasileira de Desportos Aquaticos (CBDA) on 21 June 2011 is upheld.
 2. The decision taken by the President of the Confederação Brasileira de Desportos Aquaticos (CBDA) on 21 June 2011, in the portion where it was decided "*to suspend the athlete FABIOLA PULGA MOLINA, as specified by FINA Rule 10.4, for the period of two (2) months ...*", is set aside and replaced by the following:
 3. Fabiola Molina is suspended for a period of six months starting on 20 December 2011. Credit is given to Fabiola Molina for the period of suspension already served.
 4. The decision taken by the President of the Confederação Brasileira de Desportos Aquaticos (CBDA) on 21 June 2011 is confirmed for the remaining portions.
- (...)
7. All other prayers for relief are dismissed.