Arbitration CAS 2015/A/3925 Traves Smikle v. Jamaica Anti-Doping Commission (JADCO), award of 10 August 2015 (operative part of 22 June 2015)

Panel: Prof. Matthew Mitten (USA); Mr Jeffrey Benz (USA); Prof. Ulrich Haas (Germany)

Athletics (discus)
Doping (hydrochlorothiazide)
Departure from international standards requirements
Non-compliance with IST partial sample collection procedures

1. **Violations of some International Standard for Testing (IST) are so serious that the breach precludes a CAS panel from being comfortably satisfied a doping violation has been committed. On the other hand, it cannot always be assumed that the violation of an IST erodes the integrity of a sample; determination of whether its breach has a *"significant or material impact on a testing result"* generally is a question of fact requiring careful review of all evidence and witness testimony.**

2. **Non-compliance with IST partial sample collection procedures does not automatically invalidates the sample's test results. Doing so would invalidate a positive test result even if the possibility of contamination is factually implausible based on the evidence and conflict with the express language of Article 3.2.2 of the JADCO Anti-Doping Rules and the 2009 WADC, which requires an athlete to establish a departure from an IST *"could reasonably have caused the Adverse Analytical Finding"*.**

I. PARTIES

1. Mr. Traves Smikle ("Mr. Smikle" or the "Appellant") is a Jamaican athlete competing in the sport of athletics in the discipline of discus. Among other notable athletics events, Mr. Smikle competed for Jamaica at the 2012 London Olympic Games as well as the 2010 International Association of Athletics Federation ("IAAF") World Junior Championships and 2009 IAAF World Youth Championships.

2. The Jamaica Anti-Doping Commission ("JADCO" or the "Respondent") is the independent organization responsible for Jamaica's anti-doping programme. JADCO is charged with implementing the World Anti-Doping Code ("WADC"), as well as directing the collection of samples and conducting results management and hearings at the national level. JADCO is the National Anti-Doping Organization for Jamaica, as defined in the WADC, recognized by WADA, and accepted by JADCO, and as designated by the relevant statutes in Jamaica, The

Jamaican Anti-Doping in Sport Act (2008) ("Anti-Doping in Sport Act") and the JADCO Anti-Doping Rules ("Anti-Doping Rules").

II. BACKGROUND FACTS

3. On 21-23 June 2013, Mr. Smikle participated in the Jamaica Athletics Administrative Association ("JAAA") National Senior Championships at the National Stadium in Kingston, Jamaica. After competing in the men's discus competition on 22 June 2013, Mr. Smikle was subjected to an in-competition doping control test (urine).

4. Mr. Smikle's urine sample was then forwarded to the INRS-Institut Armand-Frappier, a doping-control laboratory in Laval, Quebec, Canada. The laboratory's 11 July 2013 analysis of the A sample of Mr. Smikle's urine revealed the presence of hydrochlorothiazide (HCTZ), a prohibited substance under the WADA's List of Prohibited Substances and in violation of the Anti-Doping Rules, in the amount of 5.34 ng/ml.

5. In a 12 July 2013 letter, JADCO informed Mr. Smikle of his A Sample's Adverse Analytical Finding ("AAF") for HCTZ, which constitutes an anti-doping rule violation ("ADRV"), and his right to request analysis of his B Sample within seven days.

6. In a 17 July 2013 letter, Mr. Smikle requested analysis of his B Sample and stated: *"I did not knowingly or wilfully ingest the prohibited substance [HCTZ]. I declared all medication and supplements that I had been taking at or about the time of giving the sample at the National Senior Trials. Some weeks prior to giving the sample I had taken another supplement Animal Pak which had been recommended to me as being safe to use. If my B Sample confirms the presence of the prohibited substance it could only be as a result of contamination of one or more of the medication or supplements"*.

7. On 31 July, 2013, Mr. Smikle's B Sample tested positive for HCTZ in the amount of 1.88 ng/ml.

8. In a 5 August 2013 letter, JADCO informed Mr. Smikle of his B Sample's AAF for HCTZ.

9. On 23 August 2013, JADCO notified the Jamaica Anti-Doping Disciplinary Panel (the "Disciplinary Panel") of Mr. Smikle's AAF for HCTZ and requested it *"take the necessary action pursuant to the Anti-Doping in Sport Act 2008"*.

10. On 16-17 December 2013, the Disciplinary Panel conducted a hearing that was adjourned to a later date for final oral submissions by the parties, which was originally scheduled for 31 January 2014 but subsequently was extended until and occurred on 2 June 2014.

11. On 1 July 2014, the Disciplinary Panel informed Mr. Smikle he was suspended from competition for two (2) years commencing on 22 June 2013 for his ADRV and subsequently provided written reasons for its decision on 26 August 2014.

12. On 15 July 2014, Mr. Smikle filed an appeal with the Jamaica Anti-Doping Appeals Tribunal (the "Appeals Tribunal") challenging the Disciplinary Panel's decision and his two-year suspension on the following grounds: i) the Disciplinary Panel erred in rejecting his contention that his sample collection violated the WADA International Standard for Testing ("IST") and 2011 Regulations; therefore, there was no valid admissible or reliable evidence upon which to find he committed an ADRV; ii) the Disciplinary Panel erred by rejecting and/or failing to follow CAS 2014/A/3487, in which a CAS panel determined that JADCO's breach of this IST in a similar case invalidated the athlete's AAF Adverse Analytical Finding for HCTZ; iii) JADCO failed to satisfy its burden of establishing special circumstances that justified its non-compliance with this IST; iv) the Disciplinary Panel erred by determining he did not establish how HCTZ entered his system; and v) the Disciplinary Panel's imposition of a two-year suspension is excessive when all circumstances are taken into account, including sanctions imposed in similar cases.

13. On 22 July 2104, Mr. Smikle also filed an appeal with the Court of Arbitration for Sport (the "CAS Appeal") challenging the Disciplinary Panel's decision and his two-year suspension.

14. On 4 November 2014, the CAS panel rendered its Operative Award that Mr. Smikle's appeal to the CAS was premature given his pending appeal before the Appeals Tribunal.

15. On 7 February 2015, the Appeals Tribunal conducted a telephonic hearing regarding Mr. Smikle's appeal of the Disciplinary Panel's decision.

16. On 12 February 2015, the Appeals Tribunal orally affirmed the Disciplinary Panel's decision and the imposition of a two-year suspension on Mr. Smikle and dismissed his appeal.

17. On 23 February 2015, the CAS panel issued its Reasoned Award on Mr. Smikle's earlier appeal, concluding that *"[Mr. Smikle] is not an 'international-level athlete' who has the right to appeal the Disciplinary Panel's Decision directly to the CAS. Unless [he] was deprived of his rights to a fair and timely determination of his alleged doping violation and sanction, Sections 21 (1) and 22 of the Anti-Doping in Sport Act and Article 13.2.2 of the Anti-Doping Rules require him to appeal the Disciplinary Panel's Decision to the Appeals Tribunal, whose decision subsequently could be appealed to the CAS"* (CAS/A/3670, *Traves Smikle v. Jamaica Anti-Doping Commission*, para. 60). The Panel determined that, *"although the completion of the hearing process before the Disciplinary Panel significantly exceeded the Anti-Doping in Sport Act's time requirements and the Anti-Doping Rules' requirement that the hearing before the Disciplinary Panel should be completed … within three (3) months of the completion of the results management process, [it] has no authority to assume jurisdiction prior to the resolution of his pending appeal before the Appeals Tribunal, which [Mr. Smikle] does not contend is not an independent and impartial body. Neither the WADC nor the IAAF Competition Rules authorize the Panel to do so"* (Id. at para. 66 [emphasis added]).

18. On 25 March 2015, the Appeals Tribunal provided written reasons for its decision, which in relevant part for purposes of this appeal are as follows:

"5. The Appellant on the completion of his event on June 22 was notified by his chaperone, Mrs. Melecia McLean that he was selected for doping control. He consented to provide a urine sample.

6. The Appellant was taken to the Doping Control station located at the Stadium. The initial sample was insufficient to meet the minimum of 90 mls which was required. This was after he had drunk two bottles of Powerade.

7. A second sample was combined with the first. The sample volume was still not enough to meet the required amount.

8. After waiting for a while, he was asked a third time to pass urine for the sample, using the same container.

9. On the third occasion he was able to produce enough urine to bring the sample to the required amount. It is not in dispute that there was a departure from Partial Sample collection procedure of the International Standard for Testing.

…

16. At the hearing before the Jamaica Anti-Doping Disciplinary Panel, Mr. Smikle did not admit the violation. No issue was taken as to the analysis of the sample however, the process of collecting the urine sample was challenged as being irregular. It was contended that there was a departure from the [IST] and that such departure could reasonably have caused the [AAF]. JADCO conceded that there was such as departure but contended that on the evidence such departure could not have reasonably caused the [AAF] pursuant to Article 3.2.2 of JADCO Anti-Doping Rules.

17. After careful consideration of the evidence, the relevant Articles and cases the Disciplinary Panel found that the Appellant had not adduced sufficient evidence to establish that the departure could reasonably have caused the [AAF].

18. Further, the Panel found that the Appellant had failed to establish to the Panel's comfortable satisfaction how the prohibited substance entered his body.

19. Accordingly, the Panel concluded that the applicable sanction was under Article 10.2 of the JADCO Anti-Doping Rules. Thus the Panel imposed a sanction of two (2) years ineligibility to commence on June 22, 2013.

…

40. It is accepted that JADCO was in breach of the IST requirement that there should have been partial sample kits. We agree with the view expressed in paragraph 88 of the [CAS 2014/A/3487] Case that the failure to provide sample kits would be a breach of a procedural safeguard which was 'an essential counterbalance to the imposition of strict liability for ingestion of prohibited substances'. …

42. The appellate hearing is essentially adversarial. The debate is to be conducted on the evidence which was tendered at the disciplinary hearing or evidence called before us. …

44. [There] are significant differences between the [CAS 2014/A/3487] Case and this one.

a) In paragraph 173 of the [CAS 2014/A/3487] Case, CAS accepted that Professor Sever 'Noted that the partial collection vessel contained a spout with an opening through which contaminated water or sweat could potentially pass' and that 'There was more than a negligible possibility that water and/or sweat containing HCT could have entered in the sample collection vessel in the doping control area.'

CAS accepted Professor Sever's evidence as to the magnitude of this possibility. In this case, the spout was sealed.

b) In paragraph 30 of the [CAS 2014/A/3487] Case there was evidence that during the time between the collection of the first partial sample and the collection of the second sample the collection vessel was not sealed. This was not the situation in this case. In addition the appellant always had the sample container in his possession.

c) In paragraph 90 of the [CAS 2014/A/3487] Case a factor was that the first partial sample was left exposed to the elements and at times unsupervised for over an hour. This was not so in this case, as already said the appellant was always in possession of the sample container.

…

46. Further the appellant sought, based on scientific research, to have us accept that water can be a source of HCTZ. Following on this the appellant made the unwarranted leap of concluding the water in case could have been the source of contamination. However, there is absolutely no evidence that the sample could have been contaminated. Even if we were to take 'judicial notice' of the prevalence of HCTZ in drinking water, as the appellant urged, on the facts of this case there is no causative link between drinking water and the [AAF].

47. For these reasons, the reliance on the [CAS 2014/A/3487] Case … is misplaced.

…

51. Finally since the Appellant had failed to establish how the prohibited substance entered his body, the JADCO Anti-Doping Rules 10.4 and 10.5.1 are not applicable.

52. It was for the above reasons we dismissed the appeal and made the following order: Appeal dismissed. The decision of the Jamaica Anti-Doping Disciplinary Panel is affirmed. The sanction of two years ineligibility to commence on June 22, 2013".

III. CURRENT PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. In accordance with Article R37 of the Code of Sports-related Arbitration (2013 edition) ("Code"), the Appellant filed an urgent request for provisional measures on 14 February 2015.

20. In accordance with Article R47 of the Code, the Appellant filed his Statement of Appeal with the CAS Court Office on 24 February 2014, which requested his appeal be upheld, the Appeals Tribunal's decision be set aside, and costs and damages be awarded. Pursuant to CAS Rule 48, the Athlete designated Mr. Jeffrey Benz as an arbitrator in the appeal.

21. On 26 February 2015, the Respondent filed its response to the Appellant's request for provisional measures.

22. On 13 March 2015, the President of the Appeals Arbitration Division determined that *"the CAS has* prima facie *jurisdiction to decide the Appellant's request for a stay in accordance with Article R52 of the Code"* (para. 4.5); *"the prerequisite of irreparable harm is met in the present case"* (para. 6.9); *"at this stage that the Appellant has made plausible factual arguments as to his [likely] chance of success"* on the merits of his appeal (para. 6.12); and *"that the balance of interests tips decisively in favour of the Appellant"* (para. 6.14). *"After considering the submissions of the parties, the applicable articles of the Code, and the relevant jurisprudence"*, she ordered that *"the execution of the decision of the Jamaica Anti-Doping Appeals Tribunal orally rendered on 12 February 2014, be stayed until such time as the appeal filed by the Appellant has been heard and a decision rendered by a CAS Panel"*. (para. 7.1). She also ruled that *"[t]he costs of the present order will be determined in the final award or in any decision terminating the procedure"*.

23. In accordance with Article R51 of the Code, the Appellant filed his Appeal Brief on 27 March 2015, which requested the relief set forth in his 24 February 2014 Statement of Appeal, including his legal and other costs incurred in filing his appeal and application for provisional relief.

24. On 11 March 2015, the CAS Court Office confirmed the parties' agreement to appoint Professor Matthew J. Mitten (chair), Mr. Jeffrey G. Benz, and Professor G. Ulrich Haas, who jointly constituted the arbitration panel in CAS/A/3670 *Traves Smikle v. Jamaica Anti-Doping Commission*, to serve as the CAS Panel in this case.

25. On 4 May 2015, the Respondent requested leave to file the expert report of Dr. Wilhelm Schanzer after the 5 May 2015 due date of its Answer because his report would not be prepared and ready for filing by this date.

26. On 5 May 2015, the Appellant opposed this request on the grounds the Respondent indicated Dr. Wilhelm Schänzer would be unavailable to testify at the hearing and the submission of his expert report would be untimely.

27. In accordance with Article R55 of the Code, the Respondent filed its Answer on 5 May 2015.

28. In accordance with Article R44.3 of the Code, the Appellant filed his witness statement on 12 May 2015.

29. On 18 May 2015, the Panel confirmed that *"the Respondent's expert witness statement [Dr. Schänzer] is […] admitted to the file subject to the expert [Dr. Schänzer] making himself available for cross examination*

at the hearing". It also ruled *"the Respondent's witness statements are admitted to the file only to the extent that such witnesses also make themselves available for cross examination at the hearing. To the extent such witnesses are not available to testify, the Panel will accept such statements as party submissions in accordance with Swiss law, and the appropriate evidentiary weight will be given to such statements accordingly"*.

30. On 28 May 2015, the Respondent identified the following witnesses that would testify by teleconference during the hearing: Mrs. Melecia Barrett-McLean; Mr. Dorrel Savage; Mr. Dondre Webste; Dr Clyde Morrison; and Professor Christiane Ayotte (Expert). Respondent also submitted a 28 May 2015 letter from Professor Ayotte referencing a January 2015 expert report she prepared (which was not submitted) and Dr. Schänzer's 27 May 2015 expert report and accompanying 2010 scientific paper (which was submitted) as well as a 27 May 2015 letter from Mrs. Nadia Minott Vassell regarding the collection of water samples that are the subject of Dr. Schänzer's expert report.

31. On 30 May 2015, the Appellant objected to the admission of Professor Ayotte's testimony and her 28 May 2015 letter as well as Mrs. Nadia Minott Vassell's 27 May 2015 letter because their admission would contravene Article R56 of the Code. The Appellant also requested that the Panel rule Dr. Schänzer's 27 May 2015 expert report inadmissible because he was not listed as a witness who would be available for cross examination during the hearing.

32. On 29 May 2015, the Appellant and Respondent respectively signed and returned the Order of Procedure to the CAS Court Office.

33. On 4 June 2015, the hearing was held at Arbitration Place in Toronto, Ontario, Canada. The Appellant was represented by Dr. Emir Crowne, Mr. Bryan McCutcheon, and Ms. Miganoush Megardichian. The Respondent was represented by Mr. Lackston L. Robinson.

34. The Panel was assisted at the hearing by Mr. Brent J. Nowicki (Counsel to the CAS).

35. At the beginning of the hearing and after considering the respective arguments of Appellant and Respondent, the Panel determined that the admissibility of Dr. Schänzer's 27 May 2015 expert report is a matter of Swiss procedural law and exercised its discretion to exclude it as evidence because of his unavailability for cross examination during the hearing in accordance with its 18 May 2015 ruling. Because Mrs. Nadia Minott Vassell's 27 May 2015 letter is relevant only in connection with his expert report, the Panel excluded it as evidence. To prevent Dr. Schänzer's inadmissible expert report from being indirectly submitted as evidence, the Panel ruled that the portion of Professor Ayotte's 28 May 2015 letter referencing or discussing it is not admissible evidence and that she would not be permitted to testify regarding his expert report. The Panel also ruled she could not testify regarding her January 2015 expert report because doing so would violate Article R56 of the Code because this was new evidence not identified in Respondent's 5 May 2015 Answer and there are no "exceptional circumstances" justifying such testimony. However, the Panel permitted her to provide rebuttal testimony regarding Professor McLaughlin's 31 October 2013 expert report (which was listed as an exhibit in Respondent's Answer) and his testimony during the hearing as well as to testify

regarding relevant issues within her expertise, all of which was subject to cross examination by the Appellant and questioning by the Panel.

36. The following witnesses testified by teleconference at the hearing:

- Dr. Rachel Irving, Senior Research Fellow in the Faculty of Medical Sciences, University of the West Indies (Mona)
- Professor Wayne McLaughlin, Full Professor of Molecular Biology in the Faculty of Medical Sciences, University of the West Indies (Mona)
- Mrs. Melecia Barrett-McLean, Chaperone, JADCO
- Mr. Dorrel Savage, Chaperone, JADCO
- Professor Christiane Ayotte, Professor and Director of the Doping Control Laboratory, INRS Institute Armand-Frappier, Laval, Quebec

37. The Appellant attended the hearing and testified in-person.

38. Although they were listed as witnesses by the Respondent, Mr. Dondre Webste and Dr Clyde Morrison were not called to testify at the hearing.

39. On 4 June 2015, the Appellant's counsel submitted a letter with an itemized list of costs identified as professional services fees and disbursements in connection with this case that it sought to recover from the Respondent if his appeal is successful.

40. On 5 June 2015, the CAS faxed the Respondent's counsel a copy of this letter and granted Respondent five days from his receipt thereof (which was the same day according to the facsimile delivery report) to comment and/or to provide a statement of its costs, which response therefore was due on 10 June 2015.

41. In a 15 June 2015 letter, the Respondent's counsel asserted the 5 June 2015 CAS facsimile was not received until 11 June 2015. The Respondent asserted the Panel should not consider the Appellant's request to recover his legal fees and other costs, despite acknowledging it was made in his appeal brief, because *"the basis of the claim was not submitted in the brief and no submissions were made thereon"* and this issue *"was not ventilated at the hearing"*. Respondent did not provide any statement of its own costs.

42. In a 17 June 2015 letter, the Appellant noted that the Respondent's 15 June 2015 was untimely, thereby waiving its right to reply because *"there is no discernible reason for such excessive tardiness"*. The Appellant also noted that both its Statement of Appeal and Appeal Brief requested recovery of his legal fees and other costs and, *"Given the tight time constraints that we were all under it was not practical or even appropriate to argue the issue of costs. The hearing day was reserved for the merits*

of the matter. As a logistical matter, it also made 'sense' to submit the Appellant's bill of costs on the morning of the hearing, as the time spent on the matter could not be accurately determined until that very day".

43. On 22 June 2015, the Panel issued the operative part of the Award dismissing the Appellant's appeal and upholding the 12 February 2015 decision of the Jamaica Anti-Doping Appeals Tribunal finding that he committed an anti-doping violation and imposing a two (2) year suspension commencing on 22 June 2013. The Panel invalidated his competition results from 22 June 2013 through the conclusion of his suspension and ordered that his medals, points, and prizes be forfeited. It determined that the costs of this appeal be borne equally by the parties and that each party shall bear his/its own legal and other costs incurred in connection with this proceeding.

IV. JURISDICTION

44. Article R47 of the Code provides:

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

An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

45. Article 13.5.4 of the JADCO Anti-Doping Rules provides:

"No final decision of, or Consequences of Anti-Doping Rule Violations imposed by, the Jamaica Anti-Doping Appeals Tribunal may be quashed, varied or held invalid, by any court, arbitrator, tribunal or other hearing body other than CAS for any reason including for reason of any defect, irregularity, omission or departure from the procedures set out in these Anti-Doping Rules provided there has been no miscarriage of justice".

46. CAS jurisprudence provides:

"According to CAS case law, the three conditions of Article R47 are the following (cf. CAS 2004/A/748 no. 83):

- there must be a 'decision' of a federation, association or another sports-related body,
- the parties must have agreed to the competence of the CAS and
- the (internal) legal remedies available must have been exhausted prior to appealing to CAS".

See CAS 2009/A/1781, para. 5.4[1].

[1] Although the second condition is clearly a necessary requirement for CAS jurisdiction, the Panel observes that the first and third requirements are more relevant to the admissibility of the appeal pursuant to Article R49 of the Code, which are satisfied in this case for the reasons discussed in para. 51, *infra*.

47. In this case, the Appeals Tribunal's 12 February 2015 oral decision and 25 March 2015 written reasons satisfy the first condition of the jurisdictional requirements of Article R47 of the Code.

48. Regarding the second condition, in CAS 2014/A/3670, *Traves Smikle v. Jamaica Anti-Doping Commission* at para. 60, the Panel noted that Respondent's counsel expressly acknowledged that the Appeals Tribunal's decision *"subsequently could be appealed to the CAS"*. Moreover, the parties' counsel have confirmed the CAS's jurisdiction by signing the Order of Procedure and orally acknowledging at the beginning of this hearing that the Panel has jurisdiction to resolve the merits of their dispute.

49. Regarding the third condition, there is no dispute that the Appeals Tribunal's decision constitutes the final resolution of this dispute under the JADCO Anti-Doping Rules and that the Appellant has exhausted all available legal remedies thereunder prior to filing this CAS appeal.

V. ADMISSIBILITY

50. Article R49 of the Code provides:

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

51. Neither the Jamaica Anti-Doping in Sport Act nor the JADCO Anti-Doping Rules establish a time limit within which to file an appeal with the CAS; therefore, Article R49 of the Code, which establishes a 21-day time limit, applies. The Appeals Tribunal's oral decision was provided to the parties on 12 February 2015. The Statement of Appeal was filed on 24 February 2015. Therefore, this appeal is timely and admissible pursuant to Article R49 of the Code.

VI. SCOPE OF THE PANEL'S REVIEW

52. Article R57 of the CAS Code provides:

"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance …".

53. Thus, the Panel has the authority to provide *de novo* review of the issues determined by the Appeals Tribunal, including consideration of the evidence presented in the Appeals Tribunal and Disciplinary Panel proceedings.

VII. APPLICABLE LAW

54. Pursuant to Article R28 of the CAS Code, the seat of the Panel is in Lausanne, Switzerland, which the parties have acknowledged by signing the Order of Procedure. Therefore, Swiss procedural law governs this proceeding.

55. Article R58 of the CAS Code provides:

"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".

56. Accordingly, in deciding the substantive merits of this appeal, the Panel will apply the 2009 WADC, the JADCO Anti-Doping Rules, and the Jamaican Anti-Doping in Sport Act.

VIII. RELEVANT 2009 WADC, JADCO ANTI-DOPING RULES, AND THE JAMAICAN ANTI-DOPING IN SPORT ACT PROVISIONS

WADC

57. The WADC establishes international standards and rules regulating anti-doping testing and enforcement, which are binding on JADCO because it is charged with implementing the WADC as well as directing the collection of samples and conducting results management and hearings at the national level in Jamaica.

58. The Introduction to the WADC identifies the purposes of the World Anti-Doping Program and Code as follows:

"The purposes of the World Anti-Doping Program and the Code are:

- *To protect the Athletes' fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide; and*
- *To ensure harmonized, coordinate and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping".*

59. The WADC's Introduction also identifies the "main elements" of the World Anti-Doping Program, which include "Level 2: International Standards". The Code requires mandatory compliance with International Standards:

"International Standards for different technical and operational areas within the anti-doping program will be developed in consultation with the Signatories and governments and approved by WADA. The purpose of the International Standards is harmonization among Anti-Doping Organizations responsible for specific technical and operational parts of the anti-doping programs. <u>Adherence to the International Standards is mandatory for</u>

compliance with the Code. The International Standards may be revised from time to time by the WADA Executive Committee after reasonable consultation with the Signatories and governments. Unless provided otherwise in the Code, International Standards and all revisions shall become effective on the date specified in the International Standard or revision" (Emphasis added).

60. Article 5.2 of the WADA Code provides that compliance with the IST is mandatory:

*"**5.2. Standards for Testing***

Anti-Doping Organisations with Testing jurisdiction shall conduct such Testing in conformity with the International Standard for Testing".

61. The IST sets out the required practices for the collection, storage, transmission and analysis of anti-doping tests. The Introduction to the IST states:

"The International Standard for Testing, including all annexes, is mandatory for all signatories to the Code".

62. Section 7 of the IST is titled "Conducting the Sample Collection Session". Section 7.1 identifies the objective of this IST as follows:

"7.1 Objective

To conduct the Sample Collection Session in a manner that ensures the integrity, security and identity of the Sample and respects the privacy of the Athlete".

63. Section 7.4.1 requires the Doping Control Officer ("DCO") to collect urine samples from athletes in accordance with the protocol laid down in Annex D ("Collection of urine samples"). Paragraph D.1 of the Annex identifies the underlying objectives of this protocol, which include:

"To collect an Athlete's urine Sample in a manner that ensures: … c) The Sample has not been manipulated, substituted, contaminated or otherwise tampered with in any way".

64. Paragraph D.3 of the Annex explains that:

"The DCO has the responsibility for ensuring that each Sample is properly collected, identified and sealed".

65. Athletes are required to provide a minimum of 90ml of urine when they undergo a mandatory drug test. Paragraph D.4.11 of the Annex prescribes the process that must be followed when an athlete is unable to produce that quantity of urine on a first attempt:

"D.4.11 Where the volume of urine is insufficient, the DCO shall conduct a partial Sample collection procedure as prescribed in Annex F – Urine Samples – insufficient volume".

66. Annex F of the IST prescribes the process that must be followed in collection of a partial urine sample:

"Annex F – Urine Samples – Insufficient Volume

F.1 Objective

To ensure that where a Suitable Volume of Urine for Analysis is not provided, appropriate procedures are followed.

F.2 Scope

The procedure begins with informing the Athlete that the Sample is not of a Suitable Volume of Urine for Analysis and ends with the provision of a Sample of sufficient volume.

F.3 Responsibility

The DCO has the responsibility for declaring the Sample volume sufficient and for collecting the additional Sample/s to obtain a combined Sample of sufficient volume.

F.4 Requirements

F.4.1 If the Sample collected is of insufficient volume, the DCO shall inform the Athlete that a further Sample shall be collected to meet the Suitable Volume of Urine for Analysis requirements.

F.4.2 <u>The DCO shall instruct the Athlete to select partial Sample Collection Equipment in accordance with Clause D.4.4</u>.

F.4.3 <u>The DCO shall then instruct the Athlete to open the relevant equipment, pour the insufficient Sample into the container and seal it as directed by the DCO. The DCO shall check, in full view of the Athlete, that the container has been properly sealed</u>.

F.4.4 <u>The DCO and the Athlete shall check that the equipment code number and the volume and identity of the insufficient Sample are recorded accurately by the DCO</u>. Either the Athlete or the DCO shall retain control of the sealed partial Sample.

F.4.5 <u>While waiting to provide an additional Sample, the Athlete shall remain under continuous observation</u> and be given the opportunity to hydrate.

F.4.6 <u>When the Athlete is able to provide an additional Sample, the procedures for collection of the Sample shall be repeated as prescribed in Annex D</u> – Collection of urine Samples until a sufficient volume of urine will be provided by combining the initial and additional Sample/s.

F.4.7 <u>When the DCO is satisfied that the requirements for Suitable Volume of Urine for Analysis have been met, the DCO and Athlete shall check the integrity of the seal(s) on the partial Sample container(s) containing the previously provided insufficient Sample(s). Any irregularity with the integrity of the seal/s will be recorded by the DCO and investigated according to Annex A – Investigating a Possible Failure to Comply.</u>

F.4.8 The DCO shall then direct the Athlete to break the seal/s and combine the Samples, ensuring that additional Samples are added sequentially to the first entire Sample collected until, as a minimum, the requirement for Suitable Volume of Urine for Analysis is met.

F.4.9 The DCO and Athlete shall then continue with Clause D.4.12 or Clause D.4.14 as appropriate" (Emphasis added).

JADCO Anti-Doping Rules

67. Article 1.2.3 provides:

The Roles and Responsibilities of Athletes are to:

> *1.2.3.1 be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code; …*
>
> *1.2.3.3 take responsibility, in the context of anti-doping, for what they ingest and Use;…*

68. Article 2.1 provides:

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 Samples. 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 rule 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.

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation. …

69. Article 3.1 provides:

Burdens and Standards of Proof

JADCO has the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether JADCO has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof.

70. Article 3.2 provides:

Methods of Establishing Facts and Presumptions

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 have reasonably 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 have reasonably caused the Adverse Analytical Finding, then JADCO 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 JADCO 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.

71. Article 9 provides:

Automatic *Disqualification* of Individual Results

An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes.

72. Article 10.2 provides:

Imposition of *Ineligibility* for *Prohibited Substances and Prohibited Methods*

The period of Ineligibility imposed for a violation of Code Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Code Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and Code Article 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, 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 :
First violation: Two (2) years' Ineligibility.

73. Article 10.4 provides:

Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete 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 Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years' Ineligibility.

To justify any elimination or reduction, the Athlete 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 Athlete or other Person's degree of fault shall be the criteria considered in assessing any reduction of the period of Ineligibility.

74. Article 10.8 provides:

***Disqualification* of Results in *Competitions* Subsequent to *Sample* Collection or Commission of an Anti-Doping Rule Violation**

In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes.

75. Article 10.9 provides:

Commencement of *Ineligibility* Period

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.

10.9.1 Delays Not Attributable to the Athlete or other Person.

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the Jamaica Anti-Doping Disciplinary Panel may start the period

of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred.

Anti-Doping in Sport Act

76. Section 3 provides:

The objects of this Act are to—

(a) promote a drug-free environment for sport and provide athletes and athlete support personnel, with protection of their right to participate in drug-free sport, and thus promote health, fairness and equality for all participants in sports; and

(b) ensure harmonized, coordinated and effective sports antidoping programmes at the national-level and international- level with regard to the detection, deterrence and prevention of doping; and

(c) respect the rights of individuals and national sporting organizations by the application of fair procedures for, and means to oversee, doping control, determination of Anti-Doping Rules Violations and their consequences, and other decisions made in the interest of drug-free sports.

77. Section 6 provides:

(1) The Commission [JADCO] shall perform such functions as are necessary to facilitate the control and prevention of doping in sports, including—

(b) doing all things necessary to comply with and implement any Article of the Code [World Anti-doping Code] …

(e) directing the anti-doping programme of the Government specific to sports including conducting testing of athletes, planning, coordinating, and implementing the collection of samples, the management of test results and conducting hearings in keeping with the mandatory international standards set out in the Code [World Anti-doping Code] …

(p) generally taking all steps necessary or desirable to achieve the purposes of this Act.

(2) In the performance of its functions, the Commission [JADCO]—

(a) shall establish for its use, and for the use of its committees, procedures that are appropriate and fair in the circumstances …

IX. SUBMISSIONS OF THE PARTIES

78. The following summarizes the relevant facts and contentions of the parties based on their respective written submissions, pleadings, witness testimony, and evidence presented at the

CAS hearing. While the Panel has fully considered all the facts, contentions, evidence, witness testimony, and legal arguments submitted by both parties in this proceeding, it refers in its Award only to those it deems material and necessary to resolve the relevant issues and to explain its reasoning.

Appellant

79. The Appellant denies ever knowingly or wilfully taking any substance banned by the WADC, despite his positive test for the *de minimis* presence (5.34 ng/ml in his A sample, 1.88 ng/ml in his B sample) of HCTZ (a diuretic that can be used as a masking agent and provides no competitive benefit to an athlete competing in discus throwing, a sporting event that has no weight classes or requirements) in his 22 June 2013 urine sample. Relying on CAS 2014/A/3639 at para. 68, the Appellant contends that the Respondent's admitted multiple violations of the provisions of Annex F of the IST for partial sample collection procedures in connection with his 22 June 2013 urine sample constitute a fundamental breach so serious that the Panel necessarily cannot be comfortably satisfied that he committed a doping violation by testing positive for HCTZ.

80. Relying on CAS 2014/A/3487, the Appellant contends that the Respondent's violation of the foregoing IST for partial sample collection procedures *"could reasonably have caused"* the presence of HCTZ in his urine sample. In other words, it is "plausible" his urine sample was contaminated by water or sweat containing HCTZ from another person or in the environment at the National Stadium in Kingston, Jamaica on 22 June 2013 during the collection process; therefore, there is insufficient evidence for the Panel to be comfortably satisfied that he committed an anti-doping offense in violation of Article 2.1 of the JADCO Anti-Doping Rules. In particular, his opening and closing the sample collection container six times with wet hands after washing them with water from a faucet in a sink outside the cubicle where he provided the sample and/or from taking beverages from a cooler with ice in the sample collection waiting room at the National Stadium caused the plausible environmental contamination of his urine sample with HCTZ. The Appellant relies on the following expert testimony of Dr. Rachel Irving and Professor Wayne McLaughlin to support his contention that the *de minimis* presence of HCTZ in his urine sample and other factors negates the conclusion he intentionally took this substance or used it as a masking agent and that the presence of HCTZ in his urine sample was plausibly due to environmental contamination occurring during its collection.

81. Relying on SDRCC 13-0206 *Jack Burke v. Cycling Canada Cyclisme & UCI*, the Appellant contends he bears no fault for the presence of HCTZ in his urine sample even if the Panel finds he committed a "technical" anti-doping violation because it was not intended to enhance

his sport performance or to mask use of a banned substance and that his sanction should be only a reprimand and no period of ineligibility from athletic competition[2].

82. In his Appeal Brief, the Appellant requests that the Panel grant the following relief: 1) set aside the 12 February 2015 decision of the Jamaica Anti-Doping Appeals Tribunal that he committed an anti-doping violation and is suspended for a period of two (2) years commencing on 22 June 2013; 2) alternatively, that if the Panel finds he committed an anti-doping violation, set aside the Appeals Tribunal's sanction and substitute a reprimand and no period of ineligibility; 3) award damages for *"the serious injury to his reputation occasioned by this matter"*[3], and 4) award his legal and other costs incurred in filing this appeal and the application for provisional relief.

Respondent

83. The Respondent contends that the Appellant is strictly liable for the presence of any quantity of HCTZ in his system and committed an anti-doping violation pursuant to Article 2.1 of the JADCO Anti-Doping Rules because his 22 June 2013 urine sample tested positive for this banned substance.

84. The Respondent does not dispute that its doping control officials violated the provisions of Annex F of the IST for partial sample collection procedures in connection with Mr. Smikle's 22 June 2013 urine sample collection, but contends Article 3.2.2 of the JADCO Anti-Doping Rules does not provide for automatic invalidation of his positive test result simply because it was violated. Rather, in accordance with Article 3.1 of the JADCO Anti-Doping Rules and contrary to CAS 2014/A/3487 "plausibility" standard, the Appellant must prove by a balance of probability that the violation of this IST *"could reasonably have caused"* his positive test result for HCTZ, which is an objective test to be applied in assessing the evidence in this case. In other words, Mr. Smikle must prove it is more likely than not that his urine sample was contaminated by exposure to water or sweat containing HCTZ from another person or in the environment at the National Stadium in Kingston, Jamaica on 22 June 2013 during the collection process.

85. Even if the Panel applies CAS 2014/A/3487 "plausibility" standard, the Respondent contends the facts in this case are distinguishable because the spout of Mr. Smikle's sample collection container was always sealed and covered, thereby negating any possibility it was contaminated by water or sweat from an external source. The Respondent relies on the following testimony of Mrs. Melecia Barrett-McLean and Mr. Dorrel Savage as well as the expert testimony of Professor Christiane Ayotte to refute the testimony of Dr. Rachel Irving and Professor Wayne

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[2] In his written submissions Appellant did not contend he was relying upon Article 10.5.1 (*No Fault or Negligence)* or 10.5.2 (*No Significant Fault or Negligence)* to support his request for a reduced sanction if the Panel found he committed an anti-doping violation, which his counsel confirmed during the hearing.

[3] At the conclusion of the hearing the Appellant's counsel stated that Appellant withdrew this claim.

McLaughlin that the presence of HCTZ in his urine sample was plausibly due to environmental contamination occurring during its collection.

86. The Respondent contends that *Burke* is distinguishable and inapplicable to the facts of this case because the Appellant has not established by a balance of probability how the HCTZ entered his body; therefore, he is unable to satisfy one of the requirements of Article 10.4 that must be established to justify any reduction of the two (2) period of ineligibility imposed by the Jamaica Anti-Doping Appeals Tribunal.

87. The Respondent requests that the Panel do the following: 1) find that its departure from the IST partial sample collection procedures did not cause and invalidate the Appellant's positive test for HCTZ; 2) uphold the 12 February 2015 decision of the Jamaica Anti-Doping Appeals Tribunal that the Appellant committed an anti-doping violation and is suspended for a period of two (2) years commencing on 22 June 2013; 3) determine that the Appellant has not established how HCTZ entered his body; therefore, he has not satisfied one of the requirements necessary to eliminate or reduce his two (2) year suspension pursuant to Article 10.4 or 10.5.1; 4) determine that the Appellant has not proven he bears no fault or negligence for the presence of HCTZ in his body; therefore, his two (2) year suspension should not be eliminated pursuant to Article 10.5.1; 5) dismiss the Appellant's appeal; and 6) order that the Appellant pay its legal and other costs[4].

Appellant's Testimony

88. Mr. Smikle testified he never tested positive for any substances banned by the WADC from 2009 to 22 June 2013 when he tested positive for HCTZ, which he did not knowingly or wilfully take or ingest. In his 18 November 2013 witness statement, he stated he began taking three supplements (Twin Lab Vitamins, Omega Three Fish Oil, and Animal Pak) in 2012 and also began taking Apo-Picho SR and Apo-Ranitidine, medications for a toe injury based on his physician's advice, in late March 2013 for four-six weeks. In his 14 March 2015 witness statement, he states: *"I have never knowingly or wilfully taken any banned substance. As an athlete I understand well that I have to take responsibility for anything that goes inside my body and was never negligent with what I ingested. I take my responsibilities seriously"*.

89. At approximately 730pm on 22 June 2013, he was informed by a representative of JADCO that he had been selected for an anti-doping test while competing in the JAAA National Senior Championships at the National Stadium in Kingston, Jamaica, where he placed third in the discus throwing event. He immediately accompanied the JADCO representative to the testing area waiting room and drank two bottles of Powerade and one or two bottles of "Wata" brand water, which were in a large igloo ice cooler surrounded by ice. Two other athletes were present, but he could not remember if either of them took any beverages from the cooler. Approximately 15-20 minutes later he was escorted by Dorrel Savage, a JADCO chaperone,

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[4] Respondent did not provide any statement of its costs in response to the Panel's 5 June 2015 letter requesting it to do so, thereby waiving any right it may have had to recover its legal and other costs incurred in connection with this proceeding.

to a public bathroom in the testing area to provide his urine sample. At Mr. Savage's direction, he selected a sample collection kit consisting of a clear plastic container with a cap having a fixed spout that pops on and off in a sealed plastic bag. He testified the cap was yellow, but does not remember if its spout was sealed with clear adhesive tape.

90. Mr. Smikle's was uncertain whether or not he washed his hands in the bathroom sink before opening the sample collection kit and popping the cap off the container in the bathroom stall in which he provided his first partial urine sample under the direct observation of Mr. Savage. After doing so, he popped the cap back on the container, which he placed on the counter top of the sink about five inches from its faucet, where he washed and dried his hands with a paper towel. At Mr. Savage's direction, he placed another paper towel over the container and returned to the waiting room.

91. While in the waiting room, he placed the container on the floor for approximately 10-15 minutes before a JADCO representative instructed him to lift it from the floor, which he did. Soon thereafter, he needed to urinate again and accompanied Mr. Savage to the bathroom for a second time. He washed and dried his hands at the sink before popping the cap off the container in a stall, where he gave a second partial urine sample and popped the cap back on the container. He again placed the container on the counter top of the sink about five inches from its faucet, where he washed and dried his hands with a paper towel. At Mr. Savage's direction, he placed a new paper towel over the container and returned to the waiting room until he needed to urinate again.

92. A short time later he returned to the bathroom with Mr. Savage for a third time to urinate again into the same container. He washed and dried his hands at the sink before popping the cap off the container in a stall, where he gave a third urine sample sufficient to provide a full sample and popped the cap back on the container. He again placed the container on the counter top of the sink about five inches from its faucet, and washed and dried his hands with a paper towel. At Mr. Savage's direction, he placed a new paper towel over the container and returned to the waiting room, where he poured his urine sample into two plastic containers marked "A" and "B".

93. Approximately one hour and forty-five minutes elapsed from the time he initially arrived at the waiting room until he provided a full urine sample, which he divided into an "A" and "B" sample. During this time no one else touched or came into contact with the container containing his urine sample.

94. In his 22 June 2013 Doping Control Form, he did not express any concerns regarding the procedures regarding his sample collection. He stated he was taking "Apo-Picho SR, Apo Ranitidine, Advil, [and] Omega Vitamins", but did not disclose he previously had taken Animal Pak. After being informed his A Sample tested positive for HCTZ, in a 17 July 2013 letter to JADCO, he stated: *"Some weeks prior to giving the sample I had taken another supplement Animal Pak which had been recommended to me as being safe to use. If my B Sample confirms the presence of this prohibited substance it could only be as a result of contamination of one or more of the medication or supplements"*. In his 18 November 2013 witness statement, he stated *"By the time I was notified of*

the Adverse Finding [for HCTZ], I had used up the batch of supplements I was taking prior to the test, and so I was unable to have the supplements tested to determine whether they had been contaminated or there had been any mislabelling of these supplements".

Witness Testimony

Melecia Barrett-McLean

95. Ms. Barrett-McLean, a JADCO chaperone, testified that on 22 June 2013 she notified Mr. Smikle he had been selected for an anti-doping test and escorted him to the doping control waiting room, which was air conditioned and had a large igloo ice cooler with bottles of Powerade and water for athletes to drink while waiting to provide a urine sample. JADCO employees are not permitted to take any beverages from the cooler or to provide them directly to athletes. On this date, she was not taking any medications, was not wearing gloves, and did not have any contact with the container containing his urine sample.

Dorrel Savage

96. Mr. Savage, a JADCO chaperone, testified that he accompanied Mr. Smikle to the bathroom three times on 22 June 2013 to observe him urinate three times in order to provide a full urine sample. Each time he stood approximately two feet away from Mr. Smikle, and he did not touch him or cough or sneeze while he provided his urine sample in a bathroom stall, which was approximately six feet from the sink where he washed his hands. He acknowledged that the IST procedures for partial urine samples were not followed because JADCO did not have any partial sample collection kits on that date. He recalls seeing an adhesive film strip covering the spout of the yellow cap on the container into which Mr. Smikle urinated three times. Another urine collection kit JADCO was using at that time had a red cap, which did not have an adhesive film strip covering its spout. He testified that Mr. Smikle washed his hands before uncapping the container for the first time. His testimony that Mr. Smikle washed his hands before uncapping the container and urinating and then capping the container in the stall after urinating each of the three times is substantially consistent with Mr. Smikle's testimony. However, contrary to Mr. Smikle's testimony, Mr. Savage testified that Mr. Smikle covered the container with a fresh tissue or paper towel in the stall after each of the three times he urinated and before washing his hands in the sink. He did not recall whether Mr. Smikle placed the container cap in his hand or on a paper towel while he urinated, but testified that he did not place the cap on the ground. He did not see any contamination of his urine sample occur, but acknowledged *"anything's possible"*. On this date, he was not taking any medications and did not touch the container containing his urine sample.

Expert Witness Testimony

Professor Wayne McLaughlin

97. Professor McLaughlin testified that HCTZ is a diuretic that increases the frequency and volume of urine excreted by a person. HCTZ does not enhance athletic performance, but it can be used by athletes to excrete water for rapid weight loss and to mask the presence of other banned performance-enhancing substances. In his opinion, an athlete competing in the sport of discuss would not gain a competitive advantage from using HCTZ, but he acknowledged a discus thrower might use this substance as a masking agent.

98. In a 31 October 2013 report analysing the documentation package for Mr. Smikle's 22 June 2013 urine sample, he concluded:

"Our estimated concentration of [HCTZ] in both the A and B samples were 5.34 ng/ml and 1.88 ng/ml, respectively, and the metabolite chloraminophenamide for samples A and B were 0.415 ng/ml and 0.493 ng/ml, respectively.

It is our opinion that [HCTZ] was not ingested close to the time of testing since this was inconsistent with the urine specific gravity which should have been closer to 1.00. A diuretic will increase the volume of urine, diluting it and decreasing the urine specific gravity. The urine specific gravity measurements which are all within the normal range (1.001-1.035) are not consistent with the use of a diuretic.

It is also our opinion that either a very low dose of HCTZ was ingested just before testing or a higher dose of HCTZ was ingested more than 120 hours prior to testing. In the paper published by Deventer et al J. Chromatography: 1216 (2009) 2466-2473, the urinary HCTZ concentration ranged from 4 to 20 ng/mL at 120 h after a 25 mg dose was administered. In the same article it was shown that the metabolite chloraminophenamide concentration ranged between 60 and 287 ng/mL at 120 h.

The levels of HCTZ found in the urine at the time of testing would not be consistent with the use of HCTZ as a diuretic".

99. He testified that published literature shows that the environment, particularly sewerage and potable water supplies, can be contaminated by pharmaceuticals even in countries where effective water treatment is present, and that here is a 30.8% prevalence of hypertension among persons 15 and older in the Jamaican population, which is commonly treated with medication containing HCTZ. Based on these statistics and Jamaica's history of ground water contamination problems, he believes *"the chance of contamination by HCTZ of the environment, such as potable water and cross contamination of medication is higher in Jamaica"*. As a result, the "small amount" of HCTZ in Mr. Smikle's urine sample *"indicates to me that environmental or cross contamination is a real and strong possibility"*. However, he acknowledged there is little scientific data regarding the existence of pharmaceutical products in tap water in Jamaica.

100. He testified that if Mr. Smikle drank two bottles of Powerade and two bottles of water before giving his urine sample, doing so "possibly could" result in the above level of HCTZ in his

body depending on the concentration level of HCTZ contamination in the bottles. However, he was not aware of any scientific studies showing contamination of either Powerade or Wata brand water with HCTZ in Jamaica.

101. He testified that the presence of chloraminophenamide in Mr. Smikle's body conclusively proved he ingested HCTZ, but also testified that this metabolite could be excreted in sweat. In his opinion, it is possible that if one drop of water or sweat containing HCTZ from an environmental source contaminated his urine sample, it would be sufficient to result in the HCTZ and chloraminophenamide levels in his A and B Samples.

Dr. Rachel Irving

102. Dr. Rachel Irving testified it was unlikely Mr. Smikle intentionally took HCTZ based on the amount of it in his urine sample, the partial sample collective procedures, the pH and specific gravity of his urine sample, and because a discus thrower would not gain a performance-enhancing advantage from using it. For HCTZ to be an effective masking agent for anabolic steroid usage, it would have to be used thirty days prior to a doping test, and the substance usually would be out of an athlete's system in one day. She had no knowledge of whether any nutrition supplements sold or generally available in Jamaica, including Animal Pak, have been contaminated with HCTZ.

103. She testified that, according to the 2007-08 Jamaica Lifestyle Survey, more than 20% of the population in Jamaica have hypertension, which HCTZ generally is used to treat. It is a "possibility" that persons involved with the collection of athlete urine samples may suffer from hypertension and take HCTZ, which is insoluable in water, and its residue remains on their hands if not washed after taking blood pressure medication containing HCTZ. She visited National Stadium three times during athletic events (apparently after Mr. Smikle's 22 June 2013 urine sample); based on her informal poll of doping control officers and assistants, some of them take blood pressure medication and most do not wash their hands thereafter.

104. She testified that National Stadium is 0.5 miles from Bustamante Children's Hospital, where photo evidence shows waste has been improperly disposed, and 1.2 miles from the Mona Reservoir, which provides water to National Stadium is sometimes contaminated with waste from sewage. Because Kingston, Jamaica residents do not always dispose of their waste properly and sometimes throw medicine in local dumps, medicinal waste may contaminate ground water and the water system. However, she is not aware of any scientific studies that have collected and analysed tap water samples at National Stadium from the Mona Reservoir and found them to be contaminated.

105. She testified: *"A tablet of sweat leaves residue on people['s] hands and could be passed onto the containers and/or be in water sources, including water taps and/or ice. Further, studies have shown that HCTZ can be found on and in person['s] sweat. This is clearly another possibility of contamination, if a person in the room was taking HCTZ"*.

106. Relying on Professor McLaughlin's 31 October 2013 report, she concluded the *"small amount of HCTZ in Mr. Smikle's urine sample indicates to me that environmental contamination is a real and strong possibility"*. In her opinion, one drop of water or sweat contaminated with HCTZ in his 150 ml urine sample would be sufficient to result in its above quantity of HCTZ.

107. Although she did not know the total number of partial sample collections during this period of time (May-June 2013), she noted that National Stadium *"in a 2 month period had a 100% concordance of partially collected samples and diuretics, this is very high as the rate is about 0.05 elsewhere. This implies something is seriously wrong"*.

108. She concluded:

> *"It is my respectful view that when a container is repeatedly exposed, in the manner in which [Mr. Smikle's] container was exposed at [National Stadium] on 22 June 2013 (i.e., that is constantly reopened and covered in hand towel paper with possibly wet hands), and given the environmental factors outlined above, an environmental contamination cannot be ruled out. In my view, it is in fact highly probable than an environmental contamination did occur"*.

Professor Christiane Ayotte

109. The Panel permitted Professor Ayotte to testify solely to rebut the expert testimony of Professor McLaughlin and Dr. Irving regarding the possibility Mr. Smikle's urine sample was contaminated with HCTZ from an environmental source. In her opinion, it is *"almost impossible"* or at least *"highly unlikely"* that contaminated environmental water or sweat was the source of HCTZ in his urine sample, although the presence of chloraminophenamide in Mr. Smikle's test results did not conclusively prove he ingested HCTZ because it is a by-product of the testing process. She was not aware of any scientific literature or study showing that one drop of water or sweat could have a concentration level of HCTZ high enough to result in the amount of HCTZ in his urine sample, or that the measured concentration level of HCTZ in the Jamaican water supply is that high. Contrary to the testimony of Dr. Irving, she testified that HCTZ is soluble in water, but this is not a relevant factor in determining whether his urine sample was contaminated with HCTZ.

X. ISSUES

110. The issues that must be determined by the Panel to resolve this appeal are as follows:

(a) Has the Respondent established to the comfortable satisfaction of the Panel that the Appellant committed an anti-doping violation based on the presence of HCTZ in his urine sample pursuant to Article 2.1 of the JADCO Anti-Doping Rules?

(b) If so, has the Appellant established he should be given a sanction of less than the standard two (2) year period of ineligibility by satisfying the requirements of Article 10.4 of the JADCO Anti-Doping Rules?

(c) If not, what is the appropriate starting date of the Appellant's two (2) year period of ineligibility pursuant to Article 10.9?

XI. MERITS

A. Did the Appellant Commit an Anti-Doping Violation?

111. The following facts are undisputed: the Respondent violated the IST for partial sample collection procedures in connection with the collection of the Appellant's 22 June 2013 urine sample; the Appellant's A and B urine samples tested positive for HCTZ, a specified substance under WADA's prohibited list; and the laboratory that analysed the Appellant's urine samples is accredited by WADA and did not depart from any IST when it tested them. Thus, the dispositive issue in determining whether the Appellant committed an anti-doping violation is whether he has proven that the Respondent's violation of this IST for partial sample collection *"could reasonably have caused"* his positive test for HCTZ under Article 3.2.2 of the Anti-Doping Rules.

112. The Appellant contends that the Respondent's admitted and multiple (i.e., three) violations of the IST partial sample collection procedures in connection with the collection of his sample constitute a fundamental breach, which is so serious that the Panel necessarily cannot be comfortably satisfied that he committed a doping violation. The Panel notes that a similar issue was raised in CAS 2014/A/3487, which the CAS panel determined was unnecessary to resolve because it concluded the evidence in that case was insufficient to find that the athlete committed a doping violation.

113. The Panel agrees with the following admonition expressed by the panel in CAS 2009/A/1752 and 1753 as well as by the Sole Arbitrator in CAS 2014/A/3639 at para. 70:

"Doping is an offence which requires the application of strict rules. If an athlete is to be sanctioned solely on the basis of the provable presence of a prohibited substance in his body, it is his or her fundamental right to know that the Respondent, as the Testing Authority, including the WADA-accredited laboratory working with it, has strictly observed the mandatory safeguards.

Strict application of the rules is the quid pro quo for the imposition of a regime of strict liability for doping offenses… The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule appliers must begin by being strict with themselves".

114. The Panel recognizes that violations of some ISTs such as an athlete's right to observe the opening and testing of a "B" sample are so serious that the breach precludes a CAS panel from being comfortably satisfied a doping violation has been committed (CAS 2002/A/385; CAS 2008/A/1607; CAS 2010/A/2161). On the other hand, it cannot always be assumed that the violation of an IST erodes the integrity of a sample; determination of whether its breach has a *"significant or material impact on a testing result"* generally is a question of fact requiring careful review of all evidence and witness testimony (CAS 2014/A/3639 at para. 71-72).

115. In CAS 2012/A/2779, the most factually similar prior CAS award cited by the parties[5], the athlete asserted her positive test result should be invalidated because the DCO permitted her to leave the doping control area with her partial urine sample in a container covered only by a white cloth to attend a media interview before returning to provide the remainder of her sample. Rather than concluding that the alleged IST violations required invalidation of the athlete's positive test result, the CAS panel engaged in a factual inquiry regarding the possibility of contamination based on the evidence of record. It concluded there was insufficient proof the unsealed sample collection container could have been contaminated despite being covered with the cloth because the athlete always was in control of the sample during the interview and signed the Doping Control Form after providing a full sample without raising any concerns regarding its collection procedures.

116. Consistent with CAS 2012/A/2779, the Panel declines to establish a *per se* rule that non-compliance with IST partial sample collection procedures automatically invalidates the sample's test results. It rejects the Appellant's assertion that JADCO's breaches of the IST partial sample collection procedures constitutes a fundamental breach so serious that it necessarily cannot be comfortably satisfied he committed a doping violation. Doing so would invalidate a positive test result even if the possibility of contamination is factually implausible based on the evidence and conflict with the express language of Article 3.2.2 of the JADCO Anti-Doping Rules and the 2009 WADC, which requires an athlete to establish a departure from an IST *"could reasonably have caused the Adverse Analytical Finding"*. As the CAS panel in CAS 2014/A/3487 observed, *"[w]hether or not a particular event caused a particular outcome is a matter of fact"* (para. 143).

117. For the following reasons set forth in CAS 2014/A/3487 at para. 155-158, the Panel rejects Respondent's contention that Appellant must prove by a balance of probability that its violation of the IST partial sample collection procedures *"could reasonably have caused"* his positive test result for HCTZ:

> *"[Article 3.2.2 of the JADCO Anti-Doping Rules and the 2009 WADC[6]] requires a shift in the burden of proof whenever an athlete establishes that it would be reasonable to conclude that the IST departure could have caused the Adverse Analytical Finding. In other words, the athlete must establish facts from which a reviewing panel could rationally infer a possible causative link between the IST departure and the presence of a prohibited substance in the athlete's sample. <u>For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is plausible</u>.*

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[5] In its Answer to Appellant's Brief (p. 9), Respondent references *Wilson v UK Anti-Doping* (apparently an arbitration award by a tribunal other than the CAS) for the proposition that Appellant must prove its departure from the IST for partial sample collection procedures could reasonably have caused his positive test for HCTZ because of environmental contamination. Because Respondent failed to provide a copy of this decision or even its full citation as part of its written submission, the Panel is unable to consider it in resolving this issue. Moreover, even if the Panel were able to obtain a copy of this case from another source, it would be inappropriate to consider or rely on it because doing so would deprive Appellant of a fair opportunity to be heard regarding its applicability or relevance regarding this issue.
[6] The language of Article 3.2.2 of the 2015 WADC is materially the same in relevant part.

The Panel considers that this interpretation – which does not set the bar for a shift in the burden of proof to an unduly high threshold – strikes an appropriate balance between the rights of athletes to have their samples collected and tested in accordance with mandatory testing standards, and the legitimate interest in preventing athletes from escaping punishment for doping violations on the basis of inconsequential or minor technical infractions of the IST. In this respect, the Panel agrees with the Athlete that [Article 3.2.2] is the quid pro quo for the imposition of strict liability for anti-doping violations.

Since there is no mens rea requirement for anti-doping violations, a finding that an athlete's sample contains a prohibited substance is ipso facto a finding that the athlete has committed an anti-doping violation [Article 2.1 of the JADCO Anti-Doping Rules]. In these circumstances, any reasonable possibility that the positive finding could be the result of sample contamination rather than ingestion of a prohibited substance must be subjected to the most anxious scrutiny. The mandatory IST are designed to eliminate the possibility of contamination affecting the outcome of anti-doping tests. To ensure that anti-doping bodies strictly adhere to those standards, and to ensure that athletes are not unfairly prejudiced if they failed to do so, [Article 3.2.2] must be interpreted in such a way as to shift the burden of proof onto the anti-doping organisation whenever a departure from an IST gives rise to a material – as opposed to merely theoretical – possibility of sample contamination.

This interpretation gives full effect to the wording of [Article 3.2.2], which requires the Athlete to establish that a reviewing panel would be acting 'reasonably' were it to conclude that the departure 'could' have caused the Adverse Analytical Finding. In this respect the panel emphasises that [Article 3.2.2] uses the word 'could' and not the word 'did', which would certainly impose a higher burden for establishing causation" (emphasis added).

118. The Panel agrees with the Respondent's contention that Article 3.2.2 establishes an objective test to be applied in assessing the evidence in this case and determining whether *"it is plausible"* the Appellant's urine sample was contaminated by exposure to water or sweat containing HCTZ from another person or in the environment when it was collected. In other words, the Appellant's evidence must be sufficient to enable the Panel to reasonably conclude that the Respondent's breach of the IST partial sample collection procedures plausibly caused his positive test for HCTZ. CAS 2014/A/3487 at para. 165 (*"The salient question … is whether it would be reasonable for the Panel to conclude that the JAAA's admitted departure from the partial collection procedure could be the cause of the [HCTZ] presence in the Athlete's urine sample"*).

119. In CAS 2014/A/3487, a majority of the CAS panel concluded it is plausible that a Jamaican female sprinter's 4 May 2013 positive test for HCTZ was caused by environmental contamination during the collection of her urine sample at the National Stadium in Kingston, Jamaica, which resulted from JADCO's breach of the IST partial sample collection procedures. Their conclusion was based on the following evidence at para. 171-178:

"First, the Panel notes the evidence of Professor Sever, who the Panel considered to be a highly experienced and reliable witness. Professor Sever explained that HCT is a commonly prescribed medicine for a very common medical condition (high blood pressure). He described how HCT contamination of drinking water and groundwater can occur as a result of the excretion of HCT by individuals who are taking the substance for therapeutic purposes. Once HCT has entered the water supply it is difficult to remove by normal treatment

processes. It can persist for some time in drinking water and groundwater. In addition, individuals taking HCT for therapeutic purposes will excrete the substance in their sweat.

The evidence establishes that a number of individuals [approximately 8-10 people] were present in the doping control area after the Athlete produced her first partial sample. There is no evidence as to whether any of those individuals had recently consumed HCT. However, in view of its widespread therapeutic use the Panel cannot exclude this possibility. The evidence also establishes that the Athlete's hands made contact with bottles stored in ice in a communal cooler and that she washed her hands at the sink in the adjacent bathroom on several occasions. She therefore came into contact with various water sources that could, potentially, contain quantities of HCT.

Professor Sever noted that the partial collection vessel contained a spout with an opening through which contaminated water or sweat could potentially pass. In these circumstances, Professor Sever stated that, while unlikely, there was a more than negligible possibility that water and/or sweat containing HCT could have entered the Athlete's sample collection vessel in the doping control area. The Panel accepts Professor Sever's evidence as to the existence and magnitude of this possibility.

Second, the statistical evidence is striking and lends support to the possibility that environmental contamination of the Athlete's sample may have occurred in the doping control area.

The Panel notes the significant disparity between the proportion of positive HCT test results worldwide in 2012 (0.05%) and the proportion of positive HCT results amongst athletes competing at the Stadium during a two-month period in 2013 (3%) [100 athletes were tested in May and June; 3 athletes tested positive for HCTZ, the urine samples of 2 of these athletes were collected in violation of the IST partial sample collection procedures]. That sixty-fold disparity is, on its face, as consistent with deliberate substance misuse as with environmental contamination: since most athletes do not take performance-enhancing substances, the detection of deliberate substance misuse in a particular locality will always result in a significantly higher percentage of positive test results in that locality compared with the global average. However, the disparity acquires a probative significance when viewed in light of the IAAF's concession that the Panel could proceed on the basis that at least two of the three positive HCT tests at the Stadium occurred following partial samples which were collected in violation of the mandatory partial collection IST.

It was admitted at the hearing that the JAAA has consistently failed to record the occurrence of partial samples on the mandatory doping control forms. The Athlete must not be prejudiced by the absence of accurate collection data that would enable the Panel to evaluate the significance of this correlation. In these circumstances, the IAAF made an appropriate concession at the hearing, to the effect that the Panel could proceed on the basis that, of the 97 samples which tested negative for HCT, none involved a partial sample. On the basis of the IAAF's concession, the Panel agrees with Professor Sever that the striking correlation between the partial tests and the incidence of positive HCT findings (a 100% positive HCT finding in relation to partial samples taken at a single venue in a two-month period) is significant and cannot reasonably be dismissed as a mere coincidence.

However, an alternative possibility is that there is a greater opportunity for environmental contamination whenever an athlete provides a partial urine sample and (as here) the DCO fails to comply with the partial test procedure. In those circumstances, the partial sample is stored in a collection vessel with a small aperture that is potentially capable of facilitating ingress of contaminated water or sweat. In addition, under the defective

collection procedure adopted in this case, the lid of the partial sample was removed and replaced an additional time when the Athlete attempted to 'top up' the first insufficient sample. This may also have increased the likelihood of introducing contaminated water or sweat, in particular by the athlete herself but also by unidentified others in the room (for example through shared contact with the ice-filled cooler or the sink in the bathroom). In view of Professor Sever's evidence regarding the possibility of water/sweat contamination, the Panel considers that it would be reasonable to conclude that the IST departure could have caused the presence of the HCT in the Athlete's sample.

In these circumstances, the Panel concludes that the Athlete has succeeded in shifting the burden of proving an anti-doping violation under IAAF Rule 33.3(b)".

120. In this case, there are at least four potential theoretical causes of the presence of HCTZ in the Appellant's urine sample: 1) his deliberate or intentional consumption of HCTZ; 2) inadvertent consumption of HCTZ as a result of contaminated or mislabeled food, beverages, or nutrition supplements; 3) deliberate contamination or spiking of his urine sample by a third party; or 4) (inadvertent) environmental contamination of his urine sample by water or sweat containing HCTZ resulting from JADCO's failure to comply with the IST for partial sample collection procedures.

121. Possibilities 1 or 2, either of which would involve voluntary consumption of products containing HCTZ, would result in an anti-doping violation by the Appellant pursuant to Article 2.1, which imposes strict liability for the presence of prohibited substances in an athlete's system. Based on the *de minimis* presence of HCTZ in his system, his testimony that he never knowingly or wilfully took HCTZ, and the expert testimony of Professor McLaughlin and Dr. Irving that a discus thrower would not do so to obtain a performance-enhancing advantage or to mask the use of other prohibited substances, the Panel finds it is unlikely that the Appellant deliberately or intentionally consumed HCTZ. The Panel concludes it is unlikely that either the bottles of Powerade or Wata brand water the Appellant drank in the doping control waiting room contained HCTZ because there was no direct evidence either product was contaminated with HCTZ or any scientific studies establishing contamination of either product in Jamaica. Moreover, although it is likely that many of the 100 athletes who were drug tested during competitions at National Stadium during May and June 2013 drank Powerade or Wata brand water from the cooler in the doping control waiting room, only 3 athletes tested positive for HCTZ, thereby making it unlikely that either product contained HCTZ. Because the Appellant admitted taking three nutritional supplements shortly before or during the time of his 22 June 2013 urine sample, the Panel notes the possibility that one or more of these products contained HCTZ without his knowledge, but the evidence of record does not establish any of them were contaminated or mislabeled and was the source of the HCTZ in his system.

122. Possibility 3 can be excluded because the Appellant does not contend that a third party deliberately contaminated or spiked his urine sample, and there is no evidence this occurred.

123. Regarding possibility 4, the Panel cannot reasonably conclude that the Respondent's breach of the IST partial sample collection procedures plausibly caused his positive test for HCTZ

by environmental contamination of his urine sample from water or sweat containing HCTZ. Even if it is possible that a single drop of water or sweat containing HCTZ could have a concentration level of HCTZ high enough to result in the amount of HCTZ in the Appellant's urine sample (an issue on which the three experts sharply disagreed), the Panel does not find it plausible that the Appellant's urine sample was contaminated based on the evidence of record.

124. There is no evidence that the ice or melted water in the doping control waiting room cooler containing the Powerade and Wata brand water that the Appellant drank and that his hands came into contact with was contaminated with HCTZ. Nor is there any evidence that anyone taking blood pressure medication came into contact with the cooler or its contents. The doping control waiting room was air conditioned, and there is no evidence that anyone therein was sweating and came into contact with the cooler.

125. After washing his hands, the Appellant uncapped and capped his urine sample container in a bathroom stall in the doping control area before and after each of the three times he urinated in order to provide a full sample. Mr. Savage, the JADCO chaperone who observed the Appellant urinate, stood approximately two feet away from him each time and did not touch him or cough or sneeze during any of the three times he urinated. While washing his hands, he placed the container on the counter top of the sink approximately five inches from the faucet that he used to wash his hands. Although the testimony of the Appellant and Mr. Savage is conflicting regarding whether he covered the container with a fresh paper towel each time before leaving the bathroom stall or after washing his hands, this is immaterial because the container's spout was sealed with an adhesive film strip, which negates the possibility it was contaminated with bathroom tap water containing HCTZ.

126. Although the Appellant's two expert witnesses testified that HCTZ is an ingredient of blood pressure medication commonly prescribed in Jamaica and that Jamaica has a history of ground water contamination from sewage and improperly disposed of pharmaceuticals that may contaminate its potable water supply, there is no evidence the bathroom tap water that the Appellant used to wash his hands before and after urinating three times was contaminated with HCTZ. There was no expert testimony that water vapour or humidity in the air of the doping control area may have been contained HCTZ that could possibly have contaminated the Appellant's urine sample during one or more of the three times he opened it in the bathroom stall in which he urinated. Based on its consideration of the expert testimony of Professors McLaughlin and Ayotte, the Panel concludes that the presence of chloraminophenamide in Appellant's body indicates he ingested HCTZ rather than that his urine sample was contaminated by water or sweat containing it.

127. The container with the Appellant's urine sample was sealed, and it was covered with a paper towel while in the doping control waiting room. The Appellant testified that no one other than himself touched or came into contact with the container containing his urine sample. Neither of the two JADCO chaperones who came into close proximity with the Appellant during the doping control process was taking any medication or touched the container

containing his urine sample at any time. In short, the Appellant provided no plausible causative link between the breach of the IST and the presence of HCTZ in his sample.

128. In contrast to the facts of CAS 2014/A/3487, the evidence in this case is sufficient to enable the Respondent to establish to the comfortable satisfaction of the Panel that the Appellant has committed an anti-doping violation. The Panel is unable to reasonably conclude there is *"more than a negligible possibility"* that the Respondent's breach of the IST partial sample collection procedures caused environmental water or sweat containing HCTZ to contaminate his urine sample collection container. It refuses to find that a significant statistical disparity between the percentage of positive HCTZ test results in 2012 worldwide compared to the percentage of positive HCTZ test results from urine samples collected at the National Stadium in Kingston, Jamaica during May and June 2013 (even if at least 2/3rds of them involved partial sample collection procedures non-compliant with the IST) is alone sufficient to reasonably conclude *"it is plausible"* the Appellant's sample was contaminated by environmental HCTZ.

B. Has the Appellant Satisfied the Requirements of Article 10.4 for a Reduced Sanction?

129. Article 10.4 requires the Appellant to *"establish how a Specified Substance entered his or her body"* as a threshold requirement for being given a sanction of less than the standard sanction of two (2) years of ineligibility. Pursuant to Article 3.1, the Appellant must establish this requirement by a *"balance of probability"*. The Appellant's sole contention is that his positive test for HCTZ was caused by the Respondent's violation of the IST for partial sample collection procedures that *"could reasonably have caused"* the presence of HCTZ in his urine sample by environmental contamination, which the Panel rejected. Because the Appellant did not alternatively assert and prove by a balance of probability that the presence of HCTZ in his system was from another source (e.g., a contaminated or mislabelled nutrition supplement he took), he cannot satisfy this requirement. His reliance on *Burke* is misplaced because its facts are distinguishable in that the athlete established *"the HCTZ entered [his] body through contaminated drinking water obtained from the town of Malartic"* (para. 39).

130. The Panel notes that Appellant elected not to proceed on the basis of Article 10.5.2 of the WADC, which permits the standard two (2) year sanction to be reduced based on a showing of no significant fault or negligence of the athlete for the anti-doping violation, and this election was confirmed at the hearing by counsel for the Appellant under questioning from the Panel. Accordingly, the Panel could not and did not consider a reducing the athlete's suspension on this basis.

C. What is the Appropriate Starting Date of the Appellant's Two (2) Year Period of Ineligibility?

131. Article 10.9.1 provides that an athlete's period of ineligibility generally starts on the date of the final hearing decision. However, Article 10.9.3 permits its start date to be earlier, including *"as*

early as the date of Sample collection", if *"there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete"*. The Panel determines that the start date of the Appellant's two (2) year suspension from competition should be 22 June 2013, the date of his urine sample collection that tested positive for HCTZ, for the following reasons. The Respondent's admitted failure to comply with the IST for partial sample collection procedures, which certainly was not attributable to or caused by the Appellant, was the genesis of this second CAS proceeding to resolve the merits of his claims. In addition, the substantial delays of Jamaican tribunals in finally resolving this case at the national level in a timely manner, which clearly and admittedly violated the Anti-Doping in Sport Act and JADCO Anti-Doping Rules, gave rise to an initial CAS proceeding regarding jurisdictional and admissibility issues as well as the need for the Appellant to seek provisional relief from the President of the CAS Appeals Division permitting him to compete during the pendency of this proceeding.

132. In accordance with Articles 9 and 10.8, the Appellant's competition results, prizes, earnings, and awards earned in the 21-23 June 2013 JAAA National Senior Championships and any other athletic events in which he competed from 22 June 2013 through the conclusion of his two (2) year suspension are disqualified and forfeited.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Traves Smikle against the 12 February 2015 decision of the Jamaica Anti-Doping Appeals Tribunal is dismissed.

2. The decision of the Jamaica Anti-Doping Appeals Tribunal that Traves Smikle committed an anti-doping violation and is suspended for a period of two (2) years commencing on 22 June 2013 is upheld.

3. All competitive results, prizes, earnings, and awards earned by Traves Smikle in any athletic event from 22 June 2013 through the conclusion of his suspension are disqualified and forfeited.

(…)

6. All other claims, motions, or prayers for relief are dismissed.