



**Arbitration CAS 2015/A/4063 World Anti-Doping Agency (WADA) v. Czech Anti-Doping Committee (CADC) & Remigius Machura Jr., award of 5 November 2015**

Panel: Prof. Martin Schimke (Germany), Sole Arbitrator

*Athletics (shot-put); American Football*

*Doping (human growth hormone – somatotrophin)*

*Notion of appealable decision*

*Conditions to be fulfilled by a retired athlete subject to a period of ineligibility when returning to competition*

*Lis pendens*

*Intent in cases of refusal to submit to doping control*

*Sanction in case of a second anti-doping violation*

1. In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. The form of the communication has no relevance to determine whether there exists a decision or not. A letter by which an anti-doping organisation intends to affect the legal situation of an athlete by informing him that a previous letter by which the athlete was informed that he was being charged with an anti-doping violation was withdrawn and explains that the reason for withdrawal is that the test should not have taken place is to be qualified as a decision.
2. An athlete who retires from sport while subject to a period of ineligibility shall not resume competing in international events or national events until he has given prior written notice to his/her national anti-doping authority and to his/her International Federation of his/her intent to resume competing and has made him/herself available for testing for that notice period. The athlete therefore remains subjected to the out-of-competition testing authority of the national anti-doping authority throughout the whole notice period.
3. The principle of *lis pendens* has been defined as a situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different states at the same time. The principle of *lis pendens* is however not applicable in a matter where, although the parties are the same, the cause of action of the two proceedings clearly differ from each other.
4. A refusal to submit to sample collection is presumed to have been committed intentionally and the burden of proving that the violation was not committed intentionally lies with the athlete. A refusal to submit to sample collection cannot be considered to have happened unintentionally when, after a first notification of the obligation to comply with out-of-competition control by the DCO in front of his house, the athlete returns into his/her house and fails to respond to repeated active attempts

by the DCO to re-establish the contact.

5. In case of a second anti-doping rule violation, the period of ineligibility shall be the greater of a) six months, b) one-half of the period of ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6, or c) two times the period of ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6. In case the period of ineligibility to be imposed is in principle four years, the greater of the abovementioned options is two times the period of ineligibility otherwise applicable, *i.e.* an eight year period of ineligibility.

## I. PARTIES

1. The World Anti-Doping Agency (“WADA” or “Appellant”), is the independent international anti-doping agency, constituted as a private law foundation under Swiss Law with its seat in Lausanne, Switzerland, and having its headquarters in Montreal, Canada, which aim is to promote and coordinate the fight against doping in sport internationally.
2. The Czech Anti-Doping Committee (“CADC” or “First Respondent”) is the highest body and exclusive professional workplace operating nationwide, ensuring the Anti-Doping Program of the Czech Republic and is responsible for the implementation of the World Anti-Doping Code, the collection of samples and conduction of the results management and the hearings at national level.
3. Mr Remigius Machura Jr. (“Athlete” or “Second Respondent” and jointly with the CADC “Respondents”) was a shot-putter who also competed in IAAF World Junior and Youth Championships and represented the Czech Republic at an international-level. Nowadays the Athlete is participating in American Football at an amateur level.

## II. FACTUAL BACKGROUND

4. A summary of the most relevant facts and background giving rise to this appeal will be developed based on the parties’ submissions. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.
5. The Sole Arbitrator observes that a substantial number of the decisions, letters and emails that are relevant for the present matter have not been provided in their original version. Rather, the CADC provided WADA with a description of the procedural history. Although it is

unfortunate that the Sole Arbitrator does not have the originals at his disposal, the Sole Arbitrator is satisfied to rely on the factual submissions of WADA, particularly in light of the fact that the facts were not disputed by the CADC or the Athlete.

**A. First Anti-Doping Rule violation and sanction**

6. The Athlete, as a shot-putter, was tested positive for an inadmissible quantity of human growth hormone (somatotrophin) following an in-competition blood test carried out on 14 July 2010.
7. On 23 September 2010, the Disciplinary Board of Czech Athletic Federation rendered a decision by which the Athlete was sanctioned with a period of ineligibility of two years starting from 12 August 2010 until 11 August 2012.
8. On 3 November 2010, following an appeal lodged by the Athlete, the Arbitration Board of Czech Olympic Committee dismissed the appeal and upheld the decision of the first instance.
9. On 14 February 2011, the Athlete notified the CADC of his termination of competitive sports activity.

**B. The Athlete's undisclosed return to competitive activity and subsequent disciplinary proceedings**

10. On 13 April 2013, the Athlete competed in an American Football match organised under the auspices of the Czech Association of American Football ("CAAF"). After this game, the CADC notified the CAAF of a potential breach by the Athlete of article 10.11 of the Regulations for Doping Control and Sanction in Sport in the Czech Republic ("Regulations").
11. On 31 May 2013, the CAAF Disciplinary Board decided that the Athlete violated article 5.7.2 of the Regulations (rather than article 10.11) "*by not notifying his return to competition and by failing to subject himself to testing for the requisite period of time prior to such return*". The Athlete was fined Czech Koruna ("CZK") 1,000 and was banned from participating in the Czech league of American Football for the remainder of 2013.
12. On 10 July or 10 August 2013, following an appeal lodged by the CADC, the CAAF Council issued a decision ruling that the Athlete a) had violated article 10.11 of the Regulations (rather than article 5.7.2) and b) had to serve the remaining period of ineligibility of 545 days which had not effectively been served by the Athlete.
13. On 21 November 2013, further to an appeal lodged by the Athlete, the Arbitration Board of the Czech Olympic Committee ("COC") decided that the Athlete had indeed violated article 10.11 of the Regulations. The COC specified that the Athlete must subject himself to a further 545 days of out-of-competition testing before returning to competition.

**C. The Athlete's return to competitive activity and his refusal to submit to sample collection**

14. On 22 January 2014, the Athlete filled in a form titled "*Notification of renewal of competitive activity*". This form, *inter alia*, determines that the "*renewal date of your activity will be the date on which the CADC receives this form with the "Athlete's Personal Information" section filled in completely*" and whereby the Athlete declared that "*I hereby confirm that I have decided to renew my competitive activity and thus acknowledge that I shall be included in the register for out-of-competition testing*". The "*Notification of renewal of competitive activity*" contains a section for CADC use. This section is filled in in handwriting. It contains a signature in the section for "*Signature of exec. member*" and the section "*Date notification received*" refers to "*23.1.2014*". This latter section contains an asterisk, the explanation of which reads "*Renewal date of the athlete's competitive activity*".
15. On 23 January 2014, the CADC acknowledged receipt of the Athlete's notification by email.
16. On 27 January 2014, the Athlete sent an email with the following content to the CADC: "*May I ask how shall I proceed on my side? I mean my actual address and if I am as a working person and Athlete amateur obliged to report whereabouts etc. Thank you for information. Remigius Machura*".
17. On 28 January 2014, the CADC replied, *inter alia*, as follows: "*We inform you that we will not register you into the register of monitored Athletes this year. We count that you will be registered in 2015. We will inform you in good time about your obligation to report whereabouts*".
18. One year later, on 29 January 2015, the Athlete filed a second "*Notification of commencement of sports activity*" and a "*Request for reduction of the substitute suspension period [...]*" with the CADC in order to be "*permitted to return to competitive activity without the need to remain in out-of-competition testing mode for 545 days*".
19. On 5 February 2015, the CADC sent a letter to the Athlete via email, informing him, *inter alia*, as follows: "*We would like to inform you that beginning on 9 February 2015 [...] you have been included in the National Registered Testing Pool. Please read the instructions below and complete and sign the Confirmation of Information for Inclusion in the National Registered Testing Pool (RTP) [...]. [...] Athletes included in the registered testing pool are required to notify the CADC of their whereabouts so that they can be subjected to an unscheduled out-of-competition doping test*". The Athlete denies having received this email.
20. On 11 February 2015, Mr Miroslav Dolejs, a CADC doping control officer ("DCO") sought to conduct an out-of-competition doping control at the Athlete's house. The DCO initially sought to carry out the control in the morning but was informed by the Athlete's wife that the Athlete was at work and would not be returning home until the evening. Therefore, the DCO returned to the Athlete's house at 18:50 on the same day. On this occasion, the Athlete answered the door in person. As the Athlete claimed that he had not received the email attaching the letter dated 5 February 2015, the DCO showed him the hard copy of such letter. The Athlete argued that players affiliated to the CAAF are not subjected to out-of-competition doping controls and that, in any event, he was currently suspended and therefore not subject to such controls. The DCO explained that the Athlete was wrong on both counts and asked

the Athlete whether he was willing to sign on the doping control form that he refused to submit to such control. The Athlete answered that he would not sign anything and that he wished to speak to his lawyer beforehand. The DCO told the Athlete that he would wait outside the front door whilst the Athlete contacted his lawyer. The conversation between the Athlete and the Doping Control Officer up until that point had lasted for circa 20 minutes. The DCO waited for the Athlete to return for a further 20 minutes. When the Athlete still failed to reappear, he rang the doorbell several times over the next five minutes including, for the last time, at 19:35. The DCO recorded the details of his unsuccessful attempt to conduct a doping control on the Athlete in a report dated 12 February 2015.

21. On 13 February 2015, the CADC informed the Athlete that he was being charged with a violation of article 2.3 of the Regulations (*i.e.* refusal to submit to doping control).
22. Also on 13 February 2015, the CADC informed the Athlete as follows in respect of his request dated 29 January 2015:

*“[...] Proceedings shall be interrupted until effective conclusion of disciplinary proceedings in case of Article 2.3 of Regulation violation suspicion (denial of sample collection on 11/02/2015)”.*

23. On 18 February 2015, Mr Milos Vrabc, CADC Director, issued a letter to the Athlete (“Appealed Decision”) informing him as follows:

*“To whom it may concern,*

*this letter is to inform you about withdrawal of previous letter dated February 13<sup>th</sup>, 2015 in case of alleged Anti-Doping Rule Violation in American football – refusal to doping control by athlete Remigius Machura, born August 1<sup>st</sup>, 1986 (Czech Republic), type of test – out of competition.*

*The reason for withdrawal is breach of intern procedural rules of Czech Anti-Doping Committee that the test should not take place. We kindly ask, if any step was already made, to cancel it. Steps related to this withdrawal are being made concurrently.*

*You shall be updated in case of any further actions in this case”.*

24. Also on 18 February 2015, the CADC issued a decision in respect of the Athlete’s letter dated 29 January 2015, allowing the Athlete to return to competitive activity without restriction as from 1 March 2015. The operative part of this decision determines the following:

- “1. The applicant Remigius Machura’s application is granted in a way, that applicant is entitled to commence competition activity without any limitation since 01/03/2015.*
- 2. It is decided that applicant shall undergo from 23/01/2015, when he filed an announcement on renewal of competition activity, until 28/02/2015 the regime of testing out of competition and this period of time is to be considered as a period in which was served substitutional sanction of ineligibility decided by Arbitrary Decision of Arbitration Board of COC dated 21/11/2013 Ref. No. 2/2013,*
- 3. It is cancelled notification about doping control result of CADC dated 13/02/2015,*

4. *Applicant is obliged to fill his whereabouts in one week from delivery of this decision”.*
25. On 2 March 2015, WADA informed the CADC as follows:
- “We are writing to you regarding the case of Remigius Machura, against whom the Czech Anti-Doping Committee decided to withdraw its charges on 18 February 2015.*
- In order for us to review the case in view of a potential appeal by WADA, we would ask you to provide us with the full case file on the basis of which the decision was rendered. [...]”.*
26. On 10 March 2015, CADC sent a letter to WADA with the subject *“Information on Athlete’s Exoneration”*. Further, the CADC Director informed WADA that in the case it would request the full documentation of the case, *“it might be difficult to comply due to only five members [...] and due to limited budget”*. Therefore, the CADC provided WADA only with *“the short version of the whole history of the case”*. In this document the CADC, *inter alia*, mentioned the following:
- “To shortly comment, the subordinate employee of Czech ADO has no power to disrupt any proceedings pending on the level of superior level. The right further steps would be first to issue the decision on 18.5.3 application, second prompt the Athlete to fill the whereabouts and if not filled to assume breach of AD rules and if filled to commence testing and on the basis of such proper conduct to assume probable other breach”.*
27. On 11 March 2015, WADA issued an email to the CADC Director by which it clarified, *inter alia*, the following:
- “About the 11/02/2015 doping control attempt, we fail to see how the pending procedure prevented the ADO from testing the athlete. As the athlete was still serving his suspension, in our opinion he was still available for out of competition testing. Is there any other reason that would have prevented the NADO DCO to perform a doping control on this athlete?”*
28. It appears from the file that WADA’s letter dated 11 March 2015 remained unanswered by the CADC Director.
29. On 20 March 2015, the WADA asked the CADC Director again via e-mail for the full case file and elaborated that it was not necessary to translate all the documentation, since WADA needs especially *“the documentation about the 11/02/2015 incident and about the athlete’s request under article 25.3”*.
30. On 20 April 2015, the Director of CADC sent an e-mail to WADA with a document enclosed with the subject *“Full Case Translation Since 2014 – Machura Jr.”*.

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

31. On 11 May 2015, WADA lodged with the Court of Arbitration for Sport (“CAS”) a Statement of Appeal against the Appealed Decision in accordance with Article R47 of the Code of Sports-related Arbitration (2013 edition) (“CAS Code”).
32. On 1 June 2015, WADA filed its Appeal Brief in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments and included the following requests for relief:
  - “1. *The Appeal of WADA is admissible.*
  2. *The decision rendered by the Czech Anti-Doping Committee dated 18 February 2015 in the matter of Mr. Remigius Machura is set aside.*
  3. *Mr. Remigius Machura is sanctioned with a period of ineligibility of eight years commencing on the date of the CAS Award.*
  4. *Any competitive results obtained by Mr. Remigius Machura from and including 11 February 2015 are disqualified, with all resulting consequences (including forfeiture of any medals, points and prizes).*
  5. *WADA is granted an award for costs”.*
33. On 5 June 2015, WADA requested the matter to be adjudicated and decided by a Sole Arbitrator.
34. On 8 June 2015, the CADC filed its Answer in accordance with Article R55 of the CAS Code, with the following requests for relief:
  - “1. *The Appeal of WADA is not admissible.*

*In case the Court of Arbitration for Sport will find admissibility of Appeal, to rule that:*

  2. *The Appeal of WADA is dismissed.*

*And in any kind of Court of Arbitration for Sport’s award to rule that:*

  3. *CADC and Athlete are granted an award for costs”.*
35. On 11 June 2015, the CAS Court Office informed the parties that in view of the Respondents’ failure to provide their positions on (i) the Appellant’s request for a sole arbitrator, (ii) their intent to pay the advance of costs, in accordance with Article R50 of the CAS Code, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide on the number of arbitrators.
36. On 29 June 2015, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided to appoint a Sole Arbitrator. Furthermore, the

parties were informed that the Respondents' deadline to file their answers expired on 23 June 2015, but that no Answer from the Athlete was received. The parties were informed that, in accordance with Article R55 of the CAS Code, the Sole Arbitrator could nevertheless proceed with the arbitration and deliver an award.

37. On 8 July 2015, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted by:
  - Prof. Dr. Martin Schimke, Attorney-at-Law, Düsseldorf, Germany
38. On 30 June 2015, WADA informed the CAS Court Office that it agreed to determine the matter on the basis of the parties' written submissions in view of the fact that the CADC (i) had accepted WADA's description of the facts and (ii) the Athlete had apparently failed to file an Answer.
39. On 6 July 2015, the CADC informed the CAS Court Office that it agreed that the Sole Arbitrator shall issue an award solely on the basis of already written submissions and to close further submissions with an exception to any supplement statement by the Appellant to the Respondent's statement dated 11 June 2015, regarding its full legal argumentation to the "*lis pendens*" issue.
40. On 1 September 2015, upon the request of the Sole Arbitrator pursuant to Article R57 of the CAS Code, the CADC provided the CAS Court Office with a copy of the 2009 Czech Anti-Doping Regulations.
41. On 22 September 2015, the CAS Court Office informed the parties that, in accordance with Article R57 of the CAS Code, the Sole Arbitrator deemed himself sufficiently informed to render an award on the basis of the parties' written submissions.
42. On 21 and 24 September 2015 respectively, WADA, the CADC and the Athlete returned duly signed copies of the Order of Procedure to the CAS Court Office.

#### **IV. SUBMISSIONS OF THE PARTIES**

43. The Sole Arbitrator confirms that he carefully took into account in his decision all of the submissions, evidence and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.
44. WADA's submissions, in essence, may be summarised as follows:
  - As to the jurisdiction of CAS, WADA submits that, pursuant to article 13.2 of the Regulations, it has a right to appeal against a decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons as well as against a decision not to bring forward an anti-doping rule violation. Furthermore, with reference to article



13.1.3 of the Regulations, since no other party has filed an appeal against the Appealed Decision, WADA has a right to appeal a final decision directly to CAS, without having to exhaust other remedies in the CADC's process.

- As to the admissibility of the appeal, WADA submits that if an appeal is filed by a party that is entitled to appeal but which was not a party to the proceedings that led to the decision being appealed, this party shall have, according to article 13.7.1 of the Regulations, 21 days from receipt of the full case file to file an appeal to CAS where that party has requested a copy of the full case file within 15 days of receiving notice of the decision. WADA submits that it complied with these requirements and that the appeal was filed in timely fashion.
- As to the merits of the case, WADA maintains that the Athlete was subject to out-of-competition testing by the CADC, as the Athlete had formally announced his intent to resume competitive activity to the CADC.
- WADA further submits that the Athlete intentionally violated article 2.3 of the Regulations by having evaded and refused to submit to sample collection.
- As to the sanction to be imposed on the Athlete, WADA maintains that the Athlete acted intentionally and must therefore, in principle, be sanctioned with a four year period of ineligibility since no provisions are applicable that would lead to a reduction of the period of ineligibility. However, since the Athlete has already committed an anti-doping rule violation, his current violation constitutes a second anti-doping rule violation for the purposes of article 10.7 of the Regulations. On the basis of article 10.7.1, WADA argues that an eight year period of ineligibility must be imposed, commencing on the date of the CAS Award.

45. The CADC's submissions, in essence, may be summarised as follows:

- The CADC maintains that it *“does agree with jurisdiction of Court of Arbitration for Sport because such situation belongs under World Anti-Doping Code applicability, but we find the Appeal not admissible based on incorrect appeal reason”* and that *“[w]e confirm and agree with the description of facts listed in WADA's Appeal Brief dated 1<sup>st</sup> June 2015 in all points 1-27 of Article I”*.
- As to the admissibility of the appeal, the CADC submits that WADA's reliance on article 13.2 of the Regulations is not correct and maintains that an anti-doping rule could not have been violated because the conditions for an anti-doping control were not met. As a consequence, no anti-doping control could take place and no anti-doping rule violation could occur and any results arising from such *“like-control”* are null and void.
- The CADC further contends that the Athlete's request for reduction of his suspension had to be decided by the Director of the CADC and that *“[p]art of director's superiority is that no lower instance is allowed to commence any proceedings which may be competitive in any way”*.

*to proceedings on the director's level (vertical legal obstacle). On the other hand, no employee is entitled to torpedo proceedings he should respect and wait till the end before any further steps – or to proceed with consent of director. Such rule is not in the Order explicitly written, but arises from the rule of director's superiority”.*

- In addition, the CADC argues that it finds in this case also an “horizontal legal obstacle which means that two proceedings leading to the same answers about in fact the same issues – the result should be in both cases “is or not eligible or partly” – are to each other non-admissibly in competition, because such concurrence has no anti-doping procedural rule to be ruled by, in fact it causes that ADO is parted into two subjects standing against each other with no clear rule how to proceed with each other and finally it breaches general legal principle of procedure expectability when no specific rule on such situation exists, deciding body must proceed pursuant to principle in dubio mitius / in dubio pro libertate. [...] In this case has to be applied ad analogiam the rule of lis pendens, that contradictory decisions should be avoided in proceedings involving same parties and same acts – this case is necessary for understanding to see the “big picture” of case and case's history, following each step by step, while any lifting single step out of context as WADA did, may damage athlete, good name of anti-doping world program and its bodies and may result into never ending litigations on multiple international and national levels, which CADC is desperately trying to prevent”.
  - The CADC further contends that the Athlete's request for reduction of his suspension remained entirely unresolved by WADA. In WADA's request for a closer explanation dated 11 March 2015, “WADA doubted about the correctness of CADC's opinion and procedure, but did not argue or explain the matter of legal obstacles (lis pendens) – WADA stated that it is according to her opinion simple test refusal with no obstacle. [...] We still fail to understand, why principle of lis pendens is not to be applied according to issues settled by Czech law, if Anti-Doping laws do not settle such question down”. The CADC refers to CAS jurisprudence, where CAS allegedly dismissed an appeal in a similar situation.
  - Finally, the CADC maintains that the Athlete's request for reduction of his suspension should have been granted as the decision imposing the initial period of ineligibility was issued prior to the entry into force of the 2015 version of the World Anti-Doping Code. “The important is what does mean the term “in light of 2015 Code”? WADA does not agree, which we understand only as WADA filed an Appeal, but not discussed deeply, as it was necessary”. According to the CADC the provision allows it to “consider specific circumstances – if CADC would not consider specific circumstances and did not interpreted the provision in favour of Athlete's argumentation, while no restrictive provision applies and “around constructed” provisions are not bound directly as following procedure to each other, any other procedure would be strongly against principle of lege artis”.
46. The Athlete did not file any independent written submissions and was represented by the CADC.

## V. JURISDICTION

47. Although the CADC explicitly indicated not to object to the jurisdiction of CAS and confirmed the jurisdiction of CAS by signing the Order of Procedure, the Sole Arbitrator finds that the CADC's argument related to article 13.2 of the Regulations is an issue of jurisdiction and standing to appeal, rather than admissibility. Although a party's standing to appeal is formally related to the merits of an appeal, since WADA's standing to appeal is closely connected to the jurisdiction of CAS in the present case, it is dealt with in this section.
48. The Sole Arbitrator observes that the Appealed Decision refers to a withdrawal "*of previous letter dated February 13<sup>th</sup>, 2015 in case of alleged Anti-Doping Rule Violation in American football – refusal to doping control by athlete Remigius Machura*", but noted that the CADC issued two letters to the Athlete on 13 February 2015.
49. The Sole Arbitrators finds that the wording of the Appealed Decision (*i.e.* "[*t*]he reason for withdrawal is breach of intern procedural rules of Czech Anti-Doping Committee that the test should not take place") is sufficiently clear in determining that the instigation of the disciplinary proceedings is withdrawn because the test should not have taken place. As such, the Sole Arbitrator finds that the Appealed Decision can only be understood as referring to the first letter dated 13 February 2015 since the second letter dated 13 February 2015 concerns an "*interruption*" of the Athlete's request for a reduction of his suspension.
50. The Sole Arbitrator observes that Article R47 of the CAS Code provides as follows:
- "An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body".*
51. Article 13.2 of the Regulations determines the following:
- "A [...] decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons (including, for example, prescription) [...] may be appealed exclusively as provided in Articles 13.2-13.6".*
52. In addition, article 13.1.3 of the Regulations provides as follows:
- "Where WADA has a right to appeal under Article 13 and no other party has appealed a final decision with the Anti-Doping Organization's process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in the Anti-Doping Organization process".*
53. The Sole Arbitrator observes that it remained undisputed that no other party has appealed the Appealed Decision.
54. The Sole Arbitrator finds that, in order for WADA to be allowed to lodge a direct appeal to CAS, the Appealed Decision must in fact be a decision. Indeed, should there be no decision,

CAS would in fact not be competent to adjudicate and decide on the present matter. Consequently, regardless of the fact that this issue was not raised by either of the Respondents, the Sole Arbitrator deems it necessary to examine this issue *ex officio*.

55. The Sole Arbitrator observes that standard CAS jurisprudence determines the following in respect of whether a decision is in fact appealable:

*“In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. [...] The form of the communication has no relevance to determine whether there exists a decision or not”* (CAS 2005/A/899, §61).

56. A legal scholar concluded the following in this respect:

*“What is an appealable decision? We would answer by saying that an appealable decision of a sport association is normally a communication of the association directed to a party and based on an “animus decidendi”, i.e. an intention of a body of the association to decide on a matter, being also only the more decision on its competence (or non-competence). A simple information, which does not contain any ‘ruling’, cannot be considered as a decision”* (BERNASCONI, When is a “decision” an appealable decision?, in: RIGOZZI / BERNASCONI (Eds.), The Proceedings before the Court of Arbitration for Sport, CAS & FSA/SAV Conference Lausanne 2006, Berne 2007, p. 273).

57. Regardless of the fact that the letter of the CADC Director dated 18 February 2015 is addressed “[t]o whom it may concern” and not directly to the Athlete and commences with the words “this letter is to inform you”, the Sole Arbitrator finds that this letter is to be qualified as a decision in that the CADC intends to affect the legal situation of the Athlete by informing him that the letter dated 13 February 2015 – by which the Athlete was informed that he was being charged with a violation of article 2.3 of the Regulations – was withdrawn and explains that “[t]he reason for withdrawal is breach of intern procedural rules of Czech Anti-Doping Committee that the test should not take place”. As a consequence, also WADA’s interests are directly affected.
58. The Sole Arbitrator feels himself comforted in this conclusion by the fact that article 13.2 of the Regulations specifically sets out a number of decisions that are appealable under the Regulations and that “a decision that no antidoping rule violation was committed” and “a decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons” are specifically listed among them.
59. Finally, the Sole Arbitrator points out that he took due note of the fact that WADA has not appealed the other decision of the CADC dated 18 February 2015 (see para. 24 *supra*) the operative part of which, *inter alia*, contains the following: “[...] It is cancelled notification about doping control result of CADC dated 13/02/2015 [...]”.
60. The Sole Arbitrator however finds that the latter decision only reiterates the decision taken in the Appealed Decision and that no other or further conclusive decision is taken in respect of the Athlete’s alleged violation of article 2.3 of the Regulations, but only in respect of the Athlete’s request for reduction of his suspension. The Sole Arbitrator finds the reasoning in

such decision (*i.e.* “*All notifications on suspected Art. 2.3 of Regulations violation were withdrawn and cancelled*”) to be important in the sense that it is drafted in past tense, leading one to the conclusion that the notifications were already withdrawn and cancelled at the time of issuance of this decision and that the actual decision to withdraw the charges against the Athlete was taken in the Appealed Decision.

61. The Sole Arbitrator finds that WADA thus appealed the “correct” decision.
62. It follows that CAS has jurisdiction to adjudicate and decide on the present matter.

## VI. ADMISSIBILITY

63. Although the CADC explicitly indicated to object to the admissibility of the CAS, the Sole Arbitrator finds that the reasons invoked by the CADC do not relate to the admissibility of the appeal, but rather the jurisdiction of CAS – as was discussed *supra* – and to the merits of the case.

64. Article 13.7.1 of the Regulations provides as follows:

*“The time to file an appeal to CAS shall be twenty-one days from the date of receipt of the decision by the appealing party. The above notwithstanding, the following shall apply in connection with appeal filed by a party entitled to appeal but which was not a party to the proceedings that led to the decision being appealed:*

- (a) Within fifteen days from notice of the decision, such party/ies shall have the right to request a copy of the case file from the body that issued the decision;*
- (b) If such a request is made within the fifteen-day period, then the party making such request shall have twenty-one days from receipt of the file to file an appeal to CAS”.*

65. The Sole Arbitrator observes that the Appealed Decision is dated 18 February 2015 and that it was notified to WADA on 19 February 2015.
66. On 2 March 2015, within the deadline of 15 days, WADA requested the full case file from the CADC.
67. On 20 April 2015, the Director of CADC sent an e-mail to WADA with a document enclosed with the subject “*Full Case Translation Since 2014 – Machura Jr.*”.
68. Since it remained undisputed by the Respondents that the email of 20 April 2015 constituted the full case file, the Sole Arbitrator is satisfied to accept that the 21-day limit commenced on 20 April 2015.
69. The Sole Arbitrator observes that WADA filed its statement of appeal with the CAS Court Office on 11 May 2015, the appeal was filed within the deadline of 21 days. The appeal

complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

70. It follows that the appeal is admissible.

## VII. APPLICABLE LAW

71. Article R58 of the Code provides as follows:

*“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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”.*

72. Applicable here are the Czech Anti-Doping Regulations 2015 (“Regulations”) since the appeal was not lodged until after 1 January 2015, *i.e.* it was not “pending” before the date the Regulations came into effect (article 21.1.3 of the Regulations).
73. The Sole Arbitrator observes that the parties agreed to the application of the Regulations to this dispute.
74. According to article 21.3 of the Regulations, Czech law governs the Regulations.
75. Given the foregoing, the Sole Arbitrator is satisfied that the present appeal arbitration proceedings shall be adjudicated and decided on the basis of the Regulations and, subsidiarily, based on the law of the Czech Republic.

## VIII. MERITS

### A. The Main Issues

76. As a result of the above, the main issues to be resolved by the Sole Arbitrator are:
- i. Was the Athlete subject to out-of-competition testing by the CADC on 11 February 2015?
  - ii. Was the CADC prevented from continuing the prosecution because of the Athlete’s pending request for reduction of his suspension?
  - iii. Did the Athlete commit an anti-doping rule violation?
  - iv. If so, what sanction shall be imposed on the Athlete?

*i. Was the Athlete subject to out-of-competition testing by the CADC on 11 February 2015?*

77. WADA is of the view that the Athlete was subject to the testing authority of the CADC pursuant to article 5.8.3 of the Regulations, whereas the CADC purports that the Athlete could not have been submitted to a test because of vertical and horizontal legal obstacles. The CADC argues that because the Athlete was waiting for a decision from the CADC Director on his request for reduction of his suspension, the Athlete should not have been submitted to a test. As to the horizontal legal obstacles, the CADC invokes the principle of *lis pendens*.

78. The Sole Arbitrator observes that article 5.8.3 of the Regulations determines the following:

*“If an Athlete retires from sport while subject to a period of Ineligibility the Athlete shall not resume competing in International Events or National Events until the Athlete has given six months prior written notice (or notice equivalent to the period of Ineligibility remaining as of the date the Athlete retired, if that period was longer than six months) to CADC and to his/ her International Federation of his/ her intent to resume competing and has made him/ herself available for Testing for that notice period, including (if requested) complying with the whereabouts requirements of Annex I to the International Standard for Testing and Investigations”.*

79. The Sole Arbitrator observes that, in accordance with this provision, the Athlete had to serve a remaining suspension of 545 days at the time he retired from competitive activity, *i.e.* on 14 February 2011, before he would be able to resume competing.

80. The Sole Arbitrator observes that it is not in dispute between the parties that the Athlete notified the CADC of his intent to resume competitive activity on 22 January 2014 and that receipt thereof was acknowledged by the CADC on 23 January 2014, triggering the recommencement of the serving of the remaining 545 days period of ineligibility. By filling in the relevant form, the Athlete declared that *“I hereby confirm that I have decided to renew my competitive activity and thus acknowledge that I shall be included in the register for out-of-competition testing”.*

81. The Sole Arbitrator observes that on 28 January 2014, the Athlete was informed by the CADC as follows: *“We inform you that we will not register you into the register of monitored Athletes this year. We count that you will be registered in 2015. We will inform you in good time about your obligation to report whereabouts”.*

82. The Sole Arbitrator finds that, as from 23 January 2014, the Athlete was subjected to the out-of-competition testing authority of the CADC, but that the Athlete was not adopted in the register of monitored athletes, *i.e.* the so-called registered testing pool. The latter however does not take away the fact that the Athlete remained subjected to the out-of-competition testing authority of the CADC throughout this period.

83. The events that occurred in the beginning of 2015 are irrelevant for the CADC’s testing authority over the Athlete, since this authority commenced already on 23 January 2014 and the Athlete never notified the CADC that he no longer wanted to be subjected to this out-of-competition testing authority. As mentioned by WADA, the fact that the Athlete submitted

another notification of renewal of competitive activity on 3 February 2015 was not necessary. As a consequence of this, it is also not relevant whether or not the Athlete received the email of the CADC dated 5 February 2015 informing him that he would be included in the national registered testing pool as from 9 February 2015, also because this letter was in any event handed to the Athlete in person on 11 February 2015.

84. The Sole Arbitrator feels comforted in this conclusion by the fact that article 5.8.3 of the Regulations determines that an athlete only needs to comply with the whereabouts requirements if requested. Being requested to comply with the whereabouts requirements is a consequence of being adopted in the registered testing pool. It derives however from article 5.8.3 of the Regulations that an athlete wishing to resume competitive activity must make himself available for testing, regardless of whether the athlete needs to comply with the whereabouts requirements.
85. In addition, it also derives from the last sentence of article 10.12.1 of the Regulations that “[a]n Athlete or other Person subject to a period of Ineligibility shall remain subject to Testing” (indeed, irrespectively of a belonging to any kind of pool).
86. A situation where an athlete would only recommence to serve his suspension upon being adopted in the registered testing pool would in general be very unfavourable for athletes wishing to resume competitive activity after temporary retirement, since the decision whether to adopt an athlete in the registered testing pool depends on the criteria established by the national anti-doping authority concerned, which would consequently be able to influence whether athletes are able to effectively serve their remaining period of ineligibility.
87. In the present case, this would mean that the Athlete would not have started to serve his remaining suspension on 23 January 2014, but only on 9 February 2015, since the CADC informed the Athlete only on 5 February 2015 that “beginning on 9 February 2015 [...] you have been included in the National Registered Testing Pool”, which would be absurd.
88. Consequently, the Sole Arbitrator finds that the CADC had out-of-competition testing authority over the Athlete on 11 February 2015.

***ii. Was the CADC prevented from continuing the prosecution because of the Athlete’s pending request for reduction of his suspension?***

89. The next question to be answered is whether the CADC rightfully decided on 18 February 2015 that the letter dated 13 February 2015, whereby the Athlete was charged with a violation of article 2.3 of the Regulations, was withdrawn.
90. As to the alleged vertical and horizontal legal obstacles referred to by the CADC, the Sole Arbitrator acknowledges that two proceedings regarding the Athlete were pending before the CADC at the same time. However, the Sole Arbitrator finds that the legal nature of these proceedings were of an entirely different legal nature. Whereas the proceedings following the Athlete’s request for reduction of his suspension are related to the term of the Athlete’s period



of ineligibility, the proceedings regarding the Athlete's alleged refusal or failure to submit to sample collection are related to a new violation of the Regulations.

91. The Sole Arbitrator observes that the principle of *lis pendens* has been defined as follows: “[a] situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different states at the same time” (BORN, *International Commercial Arbitration*, 2<sup>nd</sup> edition, 2014, p. 3792, with further reference to: FAWCETT (ed.), *Declining Jurisdiction in Private International Law* 27, 1995).
92. The Sole Arbitrator finds that the principle of *lis pendens* is not applicable to the matter at hand. Although the parties are the same, the cause of action of the two proceedings clearly differ from each other. Regardless of the CADC's decision in respect of the Athlete's request for reduction of his suspension, the Athlete would in any event remain subject to the testing authority of the CADC. Since there was no possibility of contradicting outcomes, no rights were impaired.
93. The Sole Arbitrator does not deem it relevant that the Athlete's request for reduction of his suspension was to be decided by the CADC Director and that the decision related to the Athlete's alleged refusal or failure to submit to sample collection was taken by an employee of the CADC. In the absence of a regulatory provision determining the contrary or other convincing arguments of the CADC, the Sole Arbitrator finds that the CADC should not have withdrawn the letter dated 13 February 2015 whereby the Athlete was charged with a violation of article 2.3 of the Regulations.
94. Finally, in respect of the CADC's contention that the Athlete's request for reduction of his suspension remained entirely unresolved by WADA, the Sole Arbitrator finds that this issue falls outside the scope of the present appeal. The present appeal is only related to the CADC's decision to withdraw the prosecution of the Athlete in respect of an alleged violation of article 2.3 of the Regulations and not whether the Athlete's initial period of ineligibility shall be reduced. As a consequence of this, also the CAS jurisprudence referred to by the CADC is not considered to be relevant. The Sole Arbitrator therefore refrains from expressing an opinion about the scope of application of article 18.5.3 of the Regulations, which is the equivalent of article 25.3 of the World Anti-Doping Code.
95. Consequently, the Sole Arbitrator finds that the CADC was in no way prevented from continuing the prosecution of the Athlete in respect of the alleged refusal or failure to submit to sample collection and should have continued the prosecution.

***iii. Did the Athlete commit an anti-doping rule violation?***

96. Whereas WADA submits that the Athlete intentionally violated article 2.3 of the Regulations by having evaded and refused to submit to sample collection, the CADC did not put forward any specific arguments as to why the Athlete did not commit an anti-doping rule violation besides the issues already dealt with *supra*.

97. Article 2.3 of the Regulations determines as follows:

*“Evading Sample collection, or without compelling justification refusing or failing to submit to Sample collection after notification as authorized in applicable anti-doping rules”.*

98. As established *supra*, the Sole Arbitrator finds that the Athlete was subject to the out-of-competition testing authority of the CADC on 11 February 2015.

99. The report of the DCO remained undisputed and is clear in determining that the Athlete was notified by the DCO that he had to submit himself to sample collection, but that the Athlete did not immediately want to cooperate because he wanted to contact his lawyer first. The DCO allowed the Athlete to do so and waited for an additional 20 minutes at the Athlete’s front door, following which he rang the doorbell several times over the next five minutes. The Athlete however failed to reappear.

100. The Sole Arbitrator finds that there is no reason to doubt about the truthfulness of the DCO’s report and that the DCO acted in accordance with the Regulations and did what could have been reasonably expected from him. The Sole Arbitrator further notes that neither the CADC or the Athlete have submitted any objections about the notification process for testing and that, in any event, pursuant to article 5.2 of the Regulations “[a]ny Athlete may be required to provide a Sample at any time and at any place by any Anti-Doping Organization with Testing authority over him or her”.

101. In the absence of any compelling justifications brought forward by the Athlete as to why he refused to submit to sample collection, the Sole Arbitrator finds that the Athlete committed an anti-doping rule violation by refusing to submit to sample collection.

***iv. If so, what sanction shall be imposed on the Athlete?***

102. WADA maintains that the Athlete acted intentionally and must therefore, in principle, be sanctioned with a four year period of ineligibility since no provisions are applicable that would lead to a reduction of the period of ineligibility. However, since the Athlete has already committed an anti-doping rule violation, WADA maintains that his current violation constitutes a second anti-doping rule violation for the purposes of article 10.7 of the Regulations. On the basis of article 10.7.1, WADA argues that an eight year period of ineligibility must be imposed, commencing on the date of issuance of the CAS Award.

103. Neither the CADC, nor the Athlete put forward any specific arguments in this respect.

104. The Sole Arbitrator observes that article 10.3.1 of the Regulations determines the following:

*“For violations of Article 2.3 or Article 2.5, the Ineligibility period shall be four years unless, in the case of failing to submit to Sample collection, the Athlete can establish that the commission of the anti-doping rule violation was not intentional (as defined in Article 10.2.3), in which case the period of Ineligibility shall be two years”.*

105. The Sole Arbitrator observes that it derives from the above-mentioned provision that it is presumed that a violation of article 2.3 of the Regulations is committed intentionally and that the burden of proof to establish that the violation was not committed intentionally lies with the Athlete.
106. The Sole Arbitrator is satisfied that the Athlete intentionally refused to submit to sample collection by entering into his house to call his lawyer and by failing to return to the front door to submit to sample collection. Despite the fact that the DCO waited for 20 minutes, following which he rang the doorbell several times over the next five minutes, the Athlete refused to open the door again, while being aware that the DCO was still waiting for him outside. The Sole Arbitrator finds that this could not have happened unintentionally and, more importantly, nor has this been pleaded by the Athlete.
107. The remaining possibilities for a reduction of the period of ineligibility are set out in article 10.5 and 10.6 of the Regulations.
108. The Sole Arbitrator finds that the exception in article 10.5.1 of the Regulations is not applicable since this provision only relates to violations of article 2.1, 2.2 or 2.6 of the Regulations and not to a violation of article 2.3 of the Regulations as in the matter at hand.
109. With reference to the Commentary to article 10.5.2 of the World Anti-Doping Code, WADA submits that article 10.5.2 is not applicable in circumstances where intent is an element of the anti-doping rule violation. Although the Sole Arbitrator finds that this is true, refusing or failing to submit to sample collection (*i.e.* a violation of article 2.3 of the Regulations) is not listed among the violations where intent is an element of the violation. Nevertheless, since the Athlete does not invoke the exception of “no significant fault or negligence”, the Sole Arbitrator finds that the exception is not applicable.
110. Since the Athlete has neither applied for an exemption on the basis of article 10.6.1 (substantial assistance), article 10.6.2 or 10.6.3 of the Regulations (admission), the Sole Arbitrator finds that the Athlete shall in principle be sanctioned with a four year period of ineligibility.
111. However, since the Athlete committed an anti-doping rule violation before, article 10.7.1 of the Regulations is relevant and determines the following:

*‘For an Athlete or other Person’s second anti-doping rule violation, the period of Ineligibility shall be the greater of:*

- (a) six months;*
- (b) one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Article 10.6; or*
- (c) two times the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Article 10.6.*

*The period of Ineligibility established above may then be further reduced by the application of Article 10.6”.*

112. In view of the above, since the period of ineligibility to be imposed for this matter is in principle four years, the greater of the options set out in article 10.7.c of the Regulations, *i.e.* an eight year period of ineligibility (two times a four year period of ineligibility).
113. As to the commencement of the period of ineligibility, the Sole Arbitrator observes that in accordance with article 10.11 of the Regulations “*the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date Ineligibility is accepted or otherwise imposed*”. Since no hearing was held in the present matter, the period of ineligibility shall commence upon communication of the present arbitral award.
114. Consequently, the Sole Arbitrator finds that an eight year period of ineligibility is to be imposed on the Athlete, commencing upon the issuance of the present arbitral award.

## **B. Conclusion**

115. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:
  - i. The CADC had out-of-competition testing authority over the Athlete on 11 February 2015.
  - ii. The CADC was in no way prevented from continuing the prosecution of the Athlete in respect of the alleged refusal or failure to submit to sample collection and should have continued the prosecution.
  - iii. The Athlete committed an anti-doping rule violation by refusing to submit to sample collection.
  - iv. An eight year period of ineligibility is to be imposed on the Athlete, commencing upon the issuance of the present arbitral award.

## **ON THESE GROUNDS**

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

1. The appeal filed on 11 May 2015 by the World Anti-Doping Agency against the Decision issued on 18 February 2015 by the Director of the Czech Anti-Doping Committee is upheld.
  2. The Decision issued on 18 February 2015 by the Director of the Czech Anti-Doping Committee is set aside.
  3. Mr Remigius Machura Jr. is sanctioned with an eight-year period of ineligibility starting from the date of notification of the present award.
- (...).
7. All other prayers or requests for relief are dismissed.