



**Arbitration CAS 2014/A/3639 Amar Muralidharan v. Indian National Anti-Doping Agency (NADA), Indian National Dope Testing Laboratory, Ministry of Youth Affairs & Sports, award of 8 April 2015**

Panel: Mr Michele Bernasconi (Switzerland), Sole Arbitrator

*Aquatics (swimming)*

*Doping (methylhexanamine)*

*Objection to CAS jurisdiction*

*Standing to appeal*

*Departures of the international testing standards and/or the anti-doping rules*

*Right of the athlete regarding the B sample*

*Requirement regarding the transportation of the sample*

- 1. Under Article R39 of the CAS Code, a panel of arbitrators has express authority to confirm (or reject) CAS jurisdiction. Such authority is reiterated in Article R55 of the CAS Code and confirmed by Article 186(1) of the PILA. According to the Swiss Federal Tribunal, a jurisdictional challenge should be filed in a timely manner (i.e. before entering a defence on the merits (included in – or prior to filing – an answer), failing which the parties are deemed to have accepted jurisdiction. In this respect, waiting until the eve of the hearing to consult with FINA to confirm an athlete’s “legal” status as an Indian swimmer on this threshold jurisdictional issue is careless and cannot stand to overcome the explicit requirements of Article R55 of the CAS Code and Article 186 of the PILA. What is more, if not earlier, the moment a party executes the Order of Procedure without observations or objections on jurisdiction, it also undoubtedly loses its right to raise such a procedural objection.**
- 2. Right to appeal and right to be sued are issues linked to and deriving from the merits of a single case. In case parties to an arbitration mutually agree that such rights are given, they agree on a factual basis that binds an arbitrator. As it is not for an arbitrator to question undisputed facts, it is not for arbitrators to come to a different conclusion than that of the parties.**
- 3. In any doping-related procedure, of critical importance to the adjudication of an appeal is the integrity of the athlete’s test results and corresponding evidentiary data, along with the athlete’s right to defence. In this regard, the existence of certain international testing standards (IST) and anti-doping rules are considered to be so fundamental and central to ensuring the integrity in the administration of sample collection that certain departures therefrom could result in the automatic invalidation of the test results. To demonstrate such departure, the consideration of the evidence presented by the parties concerning the circumstances of the doping test, as well as the transportation, storage, and chain of custody of the sample, should show that**

violations of the IST and/or of the anti-doping rules, if any, could have reasonably caused the prohibited substance to appear in an athlete's sample. Errors which are merely mistakes such as clerical mistakes in preparing the Laboratory Document Package and unnecessary delays in handling the athlete's cases before the Anti-Doping panels are not dispositive on the athlete's test results.

5. It is undisputed that an athlete – at the least – maintains a fundamental right to be notified of, and be given the opportunity to attend, the opening of his B Sample. Such fundamental rights have been laid down in CAS jurisprudence. Nothing contained within the applicable regulations requires that any national federation, national anti-doping organization, etc. appoint an independent observer in the event an athlete is unable to attend the opening of his B Sample. All that is required is that an athlete be given an opportunity to attend such opening, or have his representative attend on his behalf.
6. The IST requirement that the sample be transported “as soon as practicable” is not unreasonable and in the absence of any evidence from the athlete to prove that the sample was tampered with during this period of time (or that there was a physical mix-up of the samples), the time period during which the sample was transported to the Laboratory and the chain of custody that followed do not constitute a reason on which to make a finding that there has been a fundamental violation of the IST.

## **I. PARTIES**

1. Mr. Amar G. Muralidharan (the “Athlete” or “Appellant”) is an Indian swimmer born on 3 August 1984.
2. The Indian National Anti-Doping Agency (“NADA” or the “First Respondent”) is the agency responsible for the implementation of the World Anti-Doping Code (the “WADA Code”), the regulation of anti-doping control programs, and the promotion of anti-doping education and research throughout India.
3. The Indian National Dope Testing Laboratory (the “Laboratory” or “Second Respondent”) is an autonomous body under the Ministry of Skill Development, Entrepreneurship, Youth Affairs and Sports of the Government of India and is in particular responsible for the testing of urine and blood samples in human sports. It was accredited by the World Anti-Doping Agency (“WADA”) in 2008.
4. The Ministry of Youth Affairs & Sports (the “Third Respondent”) is primarily responsible for the promotion of various national sports federations within India on both a national and international level.

5. The First, Second, and Third Respondent are collectively referred to as the “Respondents”.

## II. FACTUAL BACKGROUND

6. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings, and evidence adduced. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence 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 this Award only to the submissions and evidence he considers necessary to explain his reasoning.

### A. *Background Facts*

7. On 24 – 28 August 2010, the Athlete participated in the 64<sup>th</sup> National Aquatic Championships in Jaipur, India (the “National Championships”). On the morning of 26 August 2010, the Athlete was randomly selected by the NADA to provide an in-competition (urine) anti-doping control test. In total, 39 athletes provided in-competition (urine) anti-doping control tests during the National Championships.
8. On 30 August 2010, the Athlete’s sample (along with the other 38 samples) was transported to the Laboratory, which is located in New Delhi, India.
9. On 4 September 2010, the Athlete was notified by the NADA of an adverse analytical finding in his A Sample for the presence of methylhexanamine, or “MHA”. Methylhexanamine is a Prohibited Substance classified under S6 b (Specified Stimulants) on the WADA 2009 Prohibited List. The substance is prohibited in-competition only.
10. On that same day, the Athlete was provisionally suspended from competition by NADA.
11. On 10 September 2010, the Athlete requested that his B Sample be tested and witnessed by an independent observer.
12. Six days later, on 16 September 2010, the Appellant’s B Sample was opened and tested before Dr. V.K. Sharma, an observer appointed by the NADA. The B Sample confirmed the adverse analytical finding in the Athlete’s A Sample and on 20 September 2010, the Appellant was notified accordingly.

### B. *The Proceedings before the Anti-Doping Disciplinary Panel*

13. On 21 September 2012, a hearing was held before the Anti-Doping Disciplinary Panel (the “ADDP”).
14. On 5 November 2012, the ADDP determined that the Athlete committed a violation of Article 2.1 of the NADA Anti-Doping Rules (the “NADA ADR”) (which for purposes of

this violation are synonymous with the 2009 WADA Code). The Athlete was subsequently suspended from competition for two years in accordance with Article 10.2 of the NADA ADR (the “ADDP Decision”).

C. *The Proceedings Before the Anti-Doping Appeal Panel*

15. On 16 November 2012, the Athlete requested a hearing before the Anti-Doping Appeal Panel (the “ADAP”). On 13 February 2013, after a series of adjournments, a third and final hearing for the summation of the arguments was then scheduled. However, for reasons not fully explained, the hearing was postponed indefinitely and the Appellant was informed that a new ADAP panel would be constituted and the hearing would start anew.
16. One year later, on 27 February 2014, the Athlete was informed that a final hearing would take place on 14 March 2014. At the hearing, the new ADAP panel sought to hear the Athlete’s appeal along with eleven other athletes whose cases had been heard by the ADDP. The ADAP panel suggested that the Athlete settle his appeal, but the Athlete rejected this suggestion and requested that his appeal be heard. Nevertheless, the ADAP further adjourned the Athlete’s hearing until 15 May 2014, but that date was again adjourned (this time at the request of the Athlete).
17. On 26 May 2014, the NADA informed the Athlete that his ADAP hearing would take place the next day (i.e. on 27 May 2014) in Dehli (1,500km away from the Athlete’s home in Pune). The Athlete’s father wrote to the NADA explaining that the Athlete’s mother was ill and given the short notice, the Athlete could not attend the hearing the next day.
18. On 27 May 2014, the ADAP hearing took place notwithstanding the absence of the Athlete. On 3 June 2014, the Athlete’s appeal was dismissed and the ADDP Decision was confirmed (the “ADAP Decision”). The ADAP Decision can be summarized as follows:
  - The Athlete does not deny that MHA was found in the sample and no explanation was given as to how it entered the body of the athlete “*so as to manifest itself in the urine sample of the athlete*”. The Athlete’s only defence has been that “[*t*]he initial test finding in my case does not pertain to my sample at all”.
  - The Athlete advanced three principle arguments in support of his position: (1) the lab code for the Athlete’s sample was 10211 whereas the lab code on the document package was 10202; (2) the urine sample pH varies between the A and B Samples; and (3) there were deficiencies in the overall chain of custody, which includes an unusually long transportation time (i.e. four days).
  - The important point to consider is that once the MHA was found in the Athlete’s sample, the burden is on the Athlete to explain how it entered his body. No effort was made by the Athlete in this regard because, according to the Athlete, the positive sample is not his. Such arguments cannot be accepted based upon the documents and witnesses brought before the ADAP panel.

- The ADAP panel determined that there was no such deficiency in the overall chain of custody of the sample, and so accepted the NADA's explanation as to differences in lab code numbers. Moreover, the ADAP panel noted that any variation in pH values cannot lead to any conclusion that the samples do not belong to the Athlete, considering that pH values only pertain to acidity and have nothing to do with the MHA found in the Athlete's sample.
19. It is from the ADAP Decision that the Athlete now appeals to the Court of Arbitration for Sport (the "CAS").

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

20. On 17 June 2014, the Appellant filed his statement of appeal in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). Attached as Exhibit 4 therein was the Appellant's appeal brief in accordance with Article R51 of the Code. In such documents, the Appellant requested that the appeal be referred to a Sole Arbitrator and designated English as the language of the proceeding.
21. On 14 July 2014, the First Respondent agreed to designate English as the language of the proceedings, but objected to the appointment of a Sole Arbitrator and requested that the appeal be referred to a three-member panel. The Second and Third Respondent did not state their preference in this regard.
22. On 22 July 2014, the Respondents collectively filed their answer in accordance with Article R55 of the Code.
23. On 27 August 2014, Mr. Ruchit Patel entered his appearance on behalf of the Appellant and noted that to the extent it relived any burden of the President of the Appeals Arbitration Division to decide the number of arbitrators in accordance with Article R50 of the Code (given the disagreement between the Parties), the Appellant would be willing to waive his request for a Sole Arbitrator and refer the case to a three-member panel. Separately, the Appellant requested leave to amend his Appeal Brief in accordance with Article R56 of the Code.
24. On 28 August 2014, the Respondents objected to the Appellant's request to amend his Appeal Brief.
25. On 9 September 2014, on behalf of the President of the CAS Appeals Arbitration Division and pursuant to Article R54 of the Code, the Parties were advised that Mr. Michele A.R. Bernasconi, attorney-at-law in Zurich, Switzerland was appointed Sole Arbitrator in this appeal.
26. On that same day – 9 September 2014 – the Sole Arbitrator invited the parties to file a second round of submissions in advance of any decision on whether a hearing was necessary.

27. On 29 September 2014, the Appellant filed his supplemental submission.
28. On 21 October 2014, the Respondents filed their reply to the Appellant's supplemental submission.
29. On 22 October 2014, the Parties were informed that the Sole Arbitrator, after considering the Parties' submissions and in accordance with Article R57 of the Code, decided to hold a hearing in this appeal.
30. On 20 November 2014 and 26 November 2014, the Appellant and Respondents, respectively, signed and returned the order of procedure in this appeal without objection and specifically confirming the jurisdiction of the CAS.
31. On 17 December 2014, the Respondents filed a request to dismiss the proceedings on the grounds that the CAS lacked jurisdiction to hear this dispute.
32. On 18 December 2014, the Parties were advised that the Appellant would be invited to respond to the Respondents' objection to CAS jurisdiction at the outset of the hearing.
33. On 16 January 2014, a hearing was held in this appeal at the CAS Alternative Hearing Centre in Abu Dhabi, United Arab Emirates. The Sole Arbitrator was assisted by Brent J. Nowicki, CAS Counsel, and joined by the following:

For the Appellant:

- Mr. Amar Muralidharan (the Appellant)
- Mr. Ruchit Patel (Counsel for the Appellant)
- Ms. Natalie Farmer (Counsel for the Appellant)
- Commander G. Muralidharan (the Appellant's father)

For the Respondents:

- Dr. Saravana Perumal (Senior Project Officer, NADA)
- Dr. Alka Beotra (Scientific Director, NDTL)
- Dr. Francesco Botre (Expert)
- Dr. Ankush Gupta (National Anti-Doping Panel)
- Mr. Gaurang Kanth (Legal Counsel)
- Mrs. Biji Rajesh (assistant to Mr. Kanth)

34. No party objected to the appointment of the Sole Arbitrator and at the conclusion of the hearing all the parties acknowledged that their right to be heard had been fully respected.

#### IV. SUBMISSIONS OF THE PARTIES

35. The Appellant's submission on the merits, in essence, may be summarized as follows:

- The ADAP Decision (and the ADDP Decision) must be annulled because the Respondents cannot establish a violation of the Article 2.1 of the NADA ADR. More specifically, the Laboratory Documentation Package provided to the Appellant shows an adverse analytical finding for MHA in sample 10202 when the Appellant's sample number was 10211. The Respondents do not deny this discrepancy, but instead blame the inconsistency on clerical error as the laboratory was testing 11 samples at one time. Such critical error cannot withstand scrutiny and the Sole Arbitrator should not feel comfortably satisfied that the sample attributed to the Appellant is, indeed, the Appellant's sample.
- Even if the Laboratory allegedly confirmed evidence of a positive test for the Appellant's sample (10211), such information was not properly provided to the Appellant such that he could exercise his right of defense against such allegations, such as, for example, a request that the B Sample be re-tested (as if it were the initial A Sample). The Appellant cannot be condemned on the basis of the B Sample alone.
- The pH of the sample has "huge" variations during the different testing procedures and such variations were ignored by the ADAP panel. Moreover, questions arise over the variations in retention times between the spiked samples and run times. Also, aliquot preparation and injection of the sample was carried out by one operator, with no documentation for chain of custody.
- The results of the B Sample may not be used against the Appellant because the testing of such sample was in violation of the NADA ADR. The Appellant requested that his B Sample be tested, however, given the distance between the testing and his location at the time, he was unable to make the journey to the testing facility. Therefore, he requested that the testing of his B Sample be observed by an independent observer. The Respondents acquiesced, but selected Dr. V.K. Sharma, who was a member of the ADAP panel (and presided over the Appellant's ADAP appeal) and the head of NADA's "legal cell". Consequently, such lack of independence leads to a violation of the Appellant's fundamental rights associated with the testing of his B Sample and therefore, an anti-doping rule violation cannot be established against him.
- The ADAP Decision was adopted in contravention to the NADA ADR as the panel was unlawfully constituted because Dr. V.K. Sharma, the alleged "independent observer", was also a member of the ADAP panel hearing the Appellant's appeal. Therefore, a decision was rendered against the Appellant by a panel that was fatally conflicted and any decision against the Appellant must be annulled.

- The Appellant has been denied access to justice because he has been deprived the prospect of having his suspension, if any, subject to legal review prior to the expiration of the period of ineligibility.
36. In addition to outlining his costs expended in defending this case, the Appellant requests that the *“ADAP and ADDP Decisions [be] annulled forthwith”* and that the *“Honourable Court [] deliver justice on the merits of my case that has been denied for so long”*.
37. The Respondents’ submission on the merits, in essence, may be summarized as follows:
- The Appellant has been given sufficient opportunity to present his case and has been provided with all documents requested. The arguments brought forth in this appeal are repetitive and were already adjudicated by the ADAP panel.
  - The NADA strictly follows the international norms set forth by WADA and due procedure was maintained in the collection of the sample, the chain of custody, and conducting the urine tests pursuant to the WADA guidelines. The integrity of the Athlete’s sample was adequately maintained throughout the collection procedure, transportation to the testing laboratory, and throughout the testing procedure. In this regard, there was no “non-conformity” remarked on the testing documents and no discrepancies were denoted such that the presence of MHA could have automatically appeared in the sample. Any perceived delay of four days to transport the sample from collection to the testing facilities has no bearing on the Athlete’s positive test.
  - Dr. V.K. Sharma is independent and it is vehemently denied that he is or was a member of the ADAP panel that presided over the Athlete’s lower appeal.
  - Samples 10202 and 10211 (as well as 415650) were all included in testing sequence no. 1650 and all tested positive for MHA. The confirmatory analysis for these samples was performed together and the adverse analytical finding for all three samples was properly reported. The confirmatory analysis data for sample 10202 was copied and pasted by mistake in place of the data for sample 12011. Such error was purely clerical as the data was entered during the preparation of 11 documentation packages simultaneously.
  - The pH of the Athlete’s sample was consistent during the analysis in the laboratory and any variations in pH between the doping control form and the laboratory data does not affect the stability or extraction of the MHA from urine.
  - The calibration of the testing equipment was completed within three months of the date of the test and therefore, the testing mechanism was valid.
  - There was no variation in the retention times between quality control and the Athlete’s sample (10211) or between run times would could be substantially deemed “beyond limit”. Moreover, there is no negligence in the analysis and reporting of the sample



results. Any reporting errors in the document package were typographical and occurred during the preparation thereof.

- The aliquot preparation and injection of the Athlete's sample was not carried out by one operator, but was properly aliquoted in the sample reception area after registration and thereafter handed over to a different screening procedure with different analysts/scientists.

38. The Respondents state that the "*Athlete is responsible for [his] alleged costs, the Respondents are in no way responsible for it and the Respondents are not responsible for the cost of any of the litigation initiated by the Athlete*". It is further requested that the Sole Arbitrator "*dismiss the present appeal*".

## V. JURISDICTION

39. Article R47 of the Code provides as follows:

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

40. The Appellant bases the jurisdiction of the CAS on Article 13.2 of the NADA ADR, which provides that appealable decisions include "*a decision that an anti-doping rule violation was committed*" and "*a decision imposing Consequences for an anti-doping rule violation*".

41. Article 13.2.1 of the NADA ADR provides as follows:

*In cases arising from Competition in an International Event or in cases involving International-level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sport (CAS) in accordance with the provisions applicable before such court.*

42. A preliminary objection was raised by the Respondents as to whether the Appellant is an "*International-level Competitor*" such that CAS has jurisdiction under Article 13.2.1 of the NADA ADR to hear this appeal. The Sole Arbitrator must therefore resolve this issue as a threshold matter.

### A. *The Submissions of the Parties on Jurisdiction*

43. At the outset of the hearing, the Appellant moved to submit its written response to the Respondents' objection to jurisdiction. Such response was admitted to the file by the Sole Arbitrator without objection by the Respondents. The Appellant's argument in support of jurisdiction, in summary, is three-fold: First, the Appellant argues that in accordance with Article R39 of the Code, as well as Article 186 of the Swiss Federal Statute on Private international Law ("PILA"), the Sole Arbitrator has the power to decide upon his own

jurisdiction. To the extent the Sole Arbitrator sees something in the merits of the case which warrant further attention (for example, a right to defence), he is free to exercise such discretion and confirm jurisdiction. Second, CAS has jurisdiction if the *Competition* (as defined in Article 21 of the NADA ADR) which gave rise to the appeal is an *International Event* (again, as defined in Article 21). Given that this appeal concerns the 64<sup>th</sup> National Aquatic Championships, which were a qualifier event for the Commonwealth Games, the event was clearly a *Competition* for purposes of the NADA Anti-Doping Rules. Third, notwithstanding the above, the Respondents' waived their right to object to jurisdiction as such objection was not raised in their answer and by this it was not raised in compliance with Section 16 of the Arbitration and Conciliation Act 1996 under Indian procedural law, Article 186 of the PILA, and Article R55 of the Code. Instead, the Respondents raised such objection after two rounds of submissions, after the Respondents signed the Order of Procedure specifically consenting to CAS jurisdiction, and on the eve of the hearing.

44. The Respondents, in essence, argue that there are only two ways to confirm CAS jurisdiction: (1) jurisdiction must be provided by statute; or (2) you must have an arbitration clause providing for recourse to the CAS. In the present case, both avenues are missing. As an initial point, the Appellant is not an *International-level Athlete* for purposes of anti-doping because the NADA ADR and the FINA Doping Control Rules (2009–2013) (“DC Rules”) only define an *International-level Athlete* as an athlete who is designated by FINA as being within its *Registered Testing Pool* (see Appendix 1 to the FINA DC Rules). As the Appellant is not included in the FINA Registered Testing Pool (and has never been), he cannot be considered an *International-level Athlete* for purposes of anti-doping and therefore he has no right of appeal to the CAS. Separately, the National Championships are a national-level event, with no connection to the International Olympic Committee or to FINA. Finally, with respect to the timing of their objection, the Respondents state that they were “wrongly tricked” into believing that the Athlete was an *International-level Athlete* based on the Athlete’s submission to the CAS and it was not until FINA informed the Respondents to the contrary on 10 December 2014 that they realized their mistake. Consequently, they moved to dismiss this case as soon as possible thereafter.

B. *Issues*

45. The Sole Arbitrator determines that in the present case the principle issues on jurisdiction are as follows:
- (a) Have the Respondents waived a defence against CAS jurisdiction by failing to timely raise such an objection at the outset of this appeal and prior to signing the Order of Procedure?
  - (b) If the Respondents did not waive such a defence, were the National Championships a *Competition* for purposes of the NADA Anti-Doping Rules or is the Appellant an *International-level Athlete* such that the Athlete has the automatic right to appeal the ADAP Decision to the CAS?

C. *Jurisdictional Analysis*

- (a) Have the Respondents waived a defence against CAS jurisdiction by failing to timely raise such an objection at the outset of this appeal and prior to signing the Order of Procedure?
46. As a threshold matter, the Sole Arbitrator determines that as to the initial objections concerning jurisdiction, the procedural rules of the Code, supplemented if necessary by Swiss procedural law, shall be applied to the Respondents' preliminary objection to CAS jurisdiction. In this respect, the Sole Arbitrator, relying on such legal authority, determines that the Respondents' objection to jurisdiction was untimely raised.
47. The Sole Arbitrator confirms his express authority under Article R39 of the Code to confirm (or reject) CAS jurisdiction. Such authority is reiterated in Article R55 of the Code and confirmed by Article 186(1) of the PILA. In this regard, the Sole Arbitrator refers to Article R55 of the Code and notes that "[w]ithin twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS Court Office an answer containing ... **Any defence of jurisdiction** ... " (emphasis added). The Sole Arbitrator similarly refers to Article 186 of the PILA wherein it is again explicitly provided that "[a] plea of lack of jurisdiction must be raised **prior to any defence on the merits**" (emphasis added). Consequently, it is evidently clear to the Sole Arbitrator that a jurisdictional challenge should be filed in a timely manner (i.e. before entering a defence on the merits (included in – or prior to filing – an answer), failing which the parties are deemed to have accepted jurisdiction ("Einlassung in das Verfahren") (See e.g. 4A\_314/2012, Federation X; see also the decision no. 4A\_550/2012, X. v. Y.).
48. In response to the procedural rules set forth in Article R55 of the Code and Article 186 of the PILA, the Respondent asserts that they did not waive any such argument against jurisdiction as they only provided responses to the allegations set forth by the Appellant in his Statement of Appeal and Appeal Brief. They did not, according to the Respondents, accept jurisdiction by merely filing an answer and signing the Order of Procedure. The Respondents assert that they were "tricked" into thinking that the Appellant was an *International-level Athlete* based on his submission to the CAS. Indeed, the Respondents argue that they only became aware of the Appellant's actual legal status through their discussions with FINA on 10 December 2014 – long after the Respondents filed two sets of legal submissions (i.e. answers) and after they executed the Order of Procedure in this appeal.
49. The Respondents' assertions are far from convincing. While not explicit in the law, a party (such as a legally represented anti-doping agency) has an inherent obligation, or duty, to internally investigate the claims brought against it in any legal proceeding. It seems disingenuous to point the finger at the Appellant and assert that the Respondents were somehow "tricked" by the Appellant into thinking he was an *International-level Athlete*. There is absolutely no evidence in the record which remotely establishes that the Appellant acted in bad faith (or "tricked" the Respondents) when he filed his appeal at the CAS. Indeed, the Appellant's understanding that he is an *International-level Athlete* is not unfounded – he had throughout his career competed in several international-level and FINA-sanctioned events. The Respondents were in the best position to know and confirm the Appellant's "legal" status

as an Indian swimmer under its applicable rules at the outset of this procedure. Waiting until the eve of the hearing to consult with FINA on this threshold jurisdictional issue is careless and cannot stand to overcome the explicit requirements of Article R55 of the Code and Article 186 of the PILA.

50. Moreover, the Sole Arbitrator notes that it is of no relevance that the Respondents learned of the Appellant's alleged "trickery" after it signed the Order of Procedure (and after they filed their answer). At that juncture, all discoverable information concerning the Appellant's status as an *International-level Athlete* was fully available to the Respondents. There were no new facts or circumstances giving rise to an objection to jurisdiction which were not reasonably evident at the time of signing such document. Consequently, the Sole Arbitrator determines that, if not earlier, the moment a party executes the Order of Procedure without observations or objections on jurisdiction (as is the case here), a party also undoubtedly loses its right to raise such a procedural objection (See 4A\_282/2013 FC X. v. Z.).
51. Consequently, the Respondents' waived any such objection to CAS jurisdiction and the Respondents' request to dismiss this appeal on a lack of jurisdiction is rejected. The Sole Arbitrator shall therefore proceed to render a decision on the merits of the appeal.
- (b) If the Respondents did not waive such a defence, were the National Championships a Competition for purposes of the NADA Anti-Doping Rules or is the Appellant an International-level Athlete such that the Athlete has the automatic right to appeal the ADAP Decision to the CAS.
52. Based on the foregoing, the Sole Arbitrator need not decide whether the National Championships were a *Competition* for purposes of the NADA Anti-Doping Rules or whether the Appellant is an *International-level Athlete* such that he has an automatic right to appeal the ADAP Decision to the CAS as such issues are moot. However, the Sole Arbitrator is not convinced that the "level" of the Athlete could have had an impact on the jurisdiction of CAS had the Respondents not accepted the jurisdiction of CAS, but this does not need to be further analysed, based on the considerations made above.

## VI. ADMISSIBILITY

53. Article R49 of the Code provides as follows:

*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.*

54. The NADA ADR does not contain a specific time limit for appeals of ADAP decisions. In the absence of a time limit, Article R49 of the Code applies.

55. The ADAP Decision was rendered on 3 June 2014. The Appellant's statement of appeal was filed on 17 June 2014. Therefore, the Sole Arbitrator confirms that the appeal is admissible.

## VII. APPLICABLE LAW

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

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

57. Article 20.3 (Governing Law) of the NADA ADR provide as follows:

*National law governs these Anti-Doping Rules.*

58. It is undisputed between the parties that the NADA ADR applies in principle to the merits of this proceeding and where needed, the law of India. As to procedural issues, however, the procedural rules of the CAS Code, supplemented if necessary by Swiss procedural law, shall be applied.

## VIII. MERITS

- A. *Does the Appellant have standing to bring claims against the Second or Third Respondent?*

59. As a threshold matter, the Sole Arbitrator must determine whether the Appellant has standing to assert claims against the Respondents. While the standing against the First Respondent seems rather evident, the one against the Second and Third Respondent could be questionable. In this regard, however, it is noted that neither Respondent objected as to whether they were proper parties to this arbitration. Indeed, both parties participated in this arbitration and were duly represented by counsel at the hearing. Furthermore, even when the Sole Arbitrator raised the question at the hearing, neither party raised any objections.
60. Similarly, the right to be sued of First Respondent seems obvious, while the same right of Second and Third Respondent could be, again, questioned.
61. Right to appeal and right to be sued are issues linked to and deriving from the merits of a single case. In case parties to an arbitration mutually agree that such rights are given, they agree on a factual basis that binds an arbitrator.
62. As it is not for an arbitrator to question undisputed facts, it is not for the Sole Arbitrator to come to a different conclusion than that of the Parties, i.e. that Appellant has the right to appeal and Respondents have the right to be sued in the present proceeding.

B. *The Burden of Proving an Anti-Doping Rule Violation*

63. Under NADA ADR Rule 3.1, the NADA has the burden of establishing that an anti-doping rule violation occurred. For these purposes, “[t]he standard of proof shall be whether the NADA [...] 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”. The standard of proof in such cases is “greater than a mere balance of probability but less than proof beyond a reasonable doubt”.

64. NADA ADR Rule 3.2 provides that: “Facts related to anti-doping rule violations may be established by any reliable means, including admissions”. Rule 3.2 further enumerates four specific rules of proof applicable in doping cases. The first two of those rules concerns proof of doping violations where there has been, as alleged by the Appellant here, a departure from an IST or NADA ADR:

*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 NADA 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 NADA 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.*

[emphasis added]

65. In relation to the above anti-doping provisions, the Appellant raises two arguments which, in his submission, exonerates him from any liability. First, the Appellant argues that the violations of the IST and NADA ADR in collecting and testing his sample and availing him to a right to defence were so fundamental that such departure detrimentally effected the integrity of the sample collection process and his rights thereby automatically invalidating his test results. Second, if the violations were not fundamental, but instead departures from the IST and NADA ADR, the NADA cannot meet its burden that such departure did not cause the anti-doping rule violation and therefore, any anti-doping rule violation should be dismissed.

66. The Sole Arbitrator will address each argument in sequence.

a) If the NADA violated the IST and NADA ADR, were such violations so fundamental that the departure detrimentally effected the integrity of the sample collection and right to defence thereby automatically invalidating the test results?

67. The Sole Arbitrator begins this analysis by summarizing the alleged fundamental violations of the IST and the NADA ADR, as argued by the Appellant:

- **Errors in the Laboratory Documentation Package:** It is undisputed that the Laboratory Documentation Package provided (based on partial data) to the Appellant sets forth a test result for the “A Sample” for a different athlete. More specifically, at least two instances in the laboratory materials (pages 35 and 59), the test results for a positive MHA test are shown for Sample 10202 when in fact the Appellant’s sample number was 102011. Consequently, the alleged results of the Appellant’s “A Sample” are not the results of his sample, but instead relate to the sample of another athlete.
- **(Non) Independent Observer:** Article 7.1.3 of the NADA ADR grants the Appellant a right to attend the opening the “B Sample” and analysis, if requested. The Appellant properly made such a request, but was given only a short time to make arrangements to attend. Given that the opening of the “B Sample” would take place in Pune, India (some 1,400 km from the Appellant’s home), his personal attendance was impossible. He exercised his right of defence to have the “B Sample” test witnessed and requested that an independent observer attend on his behalf. While the Respondents acquiesced with such request, they selected Dr. V.K. Sharma (an individual allegedly associated with NADA and moreover, a member of the ADAP panel that presided over the Appellant’s case) as such observer. This is a clear conflict of interest and the Appellant’s rights of defence have been violated. The “B Sample” results, therefore, cannot be used against the Appellant.
- **No Corresponding A and B Samples Confirming an Anti-Doping Rule Violation:** Given that the results of the “A Sample” do not belong to the Appellant, the only positive test result against the Appellant is the “B Sample”. Even if the Sole Arbitrator would take into account the results of the Appellant’s “B Sample”, the Appellant has never been given an opportunity to request a second test on the “B Sample”. Since no legitimate “A Sample” exists, the Appellant should have a right to confirmation test as the Appellant cannot be condemned on the basis of the “B Sample” results alone.
- **Excessive Delays Denied Access to Justice:** The Appellant has been denied justice because he has been deprived of the prospect of having a final determination made prior to the expiration of any period of ineligibility due to the NADA’s improper delays in the procedure in violation of NADA ADR Rule 8.3.8.2. He was not given sufficient notice to attend the ADAP Hearing in contravention of NADA ADR Rule 13.7.7 and the NADA’s extensions of the procedural timetable in his case were a maneuverer by NADA to immunise its decision from judicial scrutiny, thereby ensuring a de facto lifetime ban on the Appellant.

- **Unlawful Constitution of the ADAP Panel:** The composition of the ADAP Panel was in violation of NADA ADR Article 13.6.2 as it failed to include a “sports administrator” as required therein.
  - **Chain of Custody:** The NADA and Laboratory failed to adhere to the IST transportation protocols during the transportation of the sample from the testing facility to the Laboratory as no chain of custody forms were used by the Laboratory and other practices of the NADA and Laboratory was substandard.
68. The Sole Arbitrator notes that – in fact as for any doping-related procedure – of critical importance to the adjudication of this appeal is the integrity of the Athlete’s test results and corresponding, evidentiary data, along with the Athlete’s right to defence. In this regard, the Sole Arbitrator agrees with the Appellant that the existence of certain international testing standards and ADR rules are considered to be so fundamental and central to ensuring the integrity in the administration of sample collection and the rules that follow that certain departures therefrom could result in the automatic invalidation of the test results. In other words, certain departures will be treated as so serious that, by their very nature, they will be considered to undermine the fairness of the testing and adjudication process to such an extent that it is impossible for the Sole Arbitrator to be comfortably satisfied that a doping violation occurred.
69. However, for the reasons to be explained, this is not the case in this appeal procedure.
- aa) Errors in the Laboratory Documentation Package
70. This discussion begins with Article 7.1 of the IST, which provides that the object of the testing standards is to “conduct the Sample Collection Process in a manner that ensures the integrity, security and identity of the Sample”. In this respect, the Sole Arbitrator concurs with the Panel in CAS 2009/A/1752 & 1753 when it states:
- 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.*
71. Strictness with the rules, however, has its limitations. Such provisions of the IST and the NADA ADR cannot be strictly read in such a fashion where insignificant deviations therefrom (or typographical errors) are interpreted as having a significant or material impact on a testing result simply because a clerical mistake was made.
72. In the present case, it is undisputed that the Laboratory Document Package contained at least two occasions where the Appellant’s sample identifier (Sample No. 10211) was identified as



another athlete's sample identifier (Sample No. 10202). On its face, such errors appear to erode the integrity of the sample. In other words, if a Laboratory Documentation Package for athlete A included the test results from athlete B, a serious question as to the integrity and identity of the sample could be raised. But upon review of the evidence, and hearing the testimony of all the witnesses, such is not the case in this appeal. As Dr. Beotra's testimony made clear, there is nothing in the documentation supporting the Appellant's sample which calls into question the integrity of the Appellant's sample, or whether this was indeed the Athlete's sample.

73. As Dr. Beotra explained, a total of 39 in-competition samples were brought to the Laboratory and tested in one "batch". The samples were each individually given lab code numbers and assigned to lab analysts for testing. Screen tests were conducted on all 39 samples, and the results indicated that 3 samples (including the Appellant's sample) reported an irregularity (i.e. the potential for a positive result). The three suspicious samples were then given "full aliquot tests" and the presence of MHA was confirmed in all three samples (one of which being the Athlete's sample). All quality controls were in place during these tests and there is no evidence in the record that any error occurred during testing. Such testing met the IST protocol in all material respects, and the Sole Arbitrator finds no evidence to the contrary.
74. However, as Dr. Beotra conceded, the Laboratory was extremely "loaded" during this period and they were receiving significant pressure from NADA to produce without any delay document testing packages for several samples (including the Appellant's sample). The burden of turning around such paperwork was more than Dr. Beotra expected and unfortunately, the preparation of such document packages was not computer driven. Instead, it was a lot of data entry done manually by the Laboratory staff. As such, some human "copy and paste" mistakes were made, which explain why the Appellant's documentation testing package contains two typographical errors (pages 35 and 59 of the documentary package) (as well as a few instances where certain samples were identified as belonging to a male when the sample belonged to a female – and vice versa). But according to Dr. Beotra, and as the evidence supports, this is as far as the errors go. The actual sample tests unquestionably confirm not only the Athlete's anti-doping rule violation but also that the data contained therein belonged to the Athlete's sample.
75. The testimony of Dr. Beotra was, in many respects, corroborated by Dr. Francesco Botre, an independent expert who has a close working relationship with the Laboratory. According to Dr. Botre, the technical aspect of the test was well done, however, he suggests that a systematic controlling method be put in place by the Laboratory to correct these types of typographical errors in the future. Such errors, Dr. Botre notes, are unfortunate but not that uncommon in many laboratories across the world.
76. Based on the evidence, the Sole Arbitrator is comfortably satisfied that the errors evident in the Athlete's Laboratory Document Package are purely typographical and have no impact on, and do not question the reliability or integrity of the sample nor the fact that the relevant data is indeed to be attributed to Appellant. The errors, while indeed unfortunate, are not so

fundamental as to call into question the Laboratory's compliance with the IST thereby nullifying the Appellant's positive sample.

77. Nevertheless, the Sole Arbitrator is bound to express his criticism to the data entry procedures used by the Laboratory and notes that while such errors do not disrupt the positive test result, they do raise questions about the Laboratory's ability to provide accurate data reporting in support of their analytical test results, in particular when accepting to process a quite large amount of samples. As such, the fact that an athlete could believe that his or her samples had not been analysed properly is to say, at the least, understandable.

ab) (Non) Independent Observer

78. The Appellant's argument that the appointment of Dr. V.K. Sharma breached his right of defence is also unavailing. As an initial matter, the Appellant asserts that he has a fundamental right that an independent observer witness the opening of his B Sample in accordance with Article 7.1.3 of the NADA ADR. However, the Sole Arbitrator does not find this to be an accurate interpretation of Article 7.1.3, which provides in relevant part as follows:

*7.1.3 If the initial review of an Adverse Analytical Finding under Article 7.1.2 does not reveal an applicable TUE or entitlement to a TUE as provided in the International Standard for Therapeutic Use Exemptions, or departure that caused the Adverse Analytical Finding, NADA shall promptly notify the Athlete, in a the manner set out in Article 14.1.1, of: (a) the adverse Analytical Finding; (b) the anti-doping rule violated; (c) the Athlete's right to promptly request the analysis of the B Sample or, failing such request, that the B Sample analysis may be deemed waived; (d) the scheduled date, time, and place for the B Sample analysis if the Athlete or NADA chooses to request an analysis of the B Sample; (e) **the opportunity for the Athlete and/or the Athlete's representative to attend the B Sample opening and analysis within the time period specified in the International Standard for Laboratories if such analysis is requested ....***

[emphasis added]

79. Nothing contained within Article 7.1.3 requires that any national federation, national anti-doping organization, etc. appoint an independent observer in the event an athlete is unable to attend the opening of his B Sample. All that is required is that an athlete be given an opportunity to attend such opening, or have his representative attend on his behalf. The Appellant has provided no evidence indicating a fundamental obligation of the NADA to appoint an independent observer on the Appellant's behalf and therefore, the Sole Arbitrator determines that no fundamental right of defence was breached. The Sole Arbitrator, mindful of the Panel's reasoning in CAS 2008/A/1607 (interpreting a prior version of the IST), therefore determines that based upon the circumstances and evidence presented in this appeal, the Respondents agreement to appoint an independent observer was not required, but did amount to a reasonable effort to accommodate the Athlete's unavailability to attend in person.

80. Regardless, even if some fundamental obligation existed, the Sole Arbitrator is convinced based on the uncontroverted evidence that while the names are coincidental, the person with the name “V.K. Sharma” who attended the B Sample was not the same “V.K. Sharma” who presided over the Athlete’s ADAP Hearing. Dr. Vijay Kumar Sharma, the observer deployed by the Laboratory, is an Assistant Director at the Sports Authority of India. Dr. Vinod Kumar Sharma, the alleged conflicted observer, is a medical doctor employed by the NADA as a member of the NADA ADAP panel. These two individuals are clearly not the same. However, it is true that Respondents only clarified this issue of homonymy at a later stage of the procedure. The Sole Arbitrator, therefore, cannot refrain from expressing some understanding for the fact that Appellant raised the issue regarding Dr. V.K. Sharma.
81. Finally, the Sole Arbitrator notes that Dr. V.K. Sharma’s employer, the Sports Authority of India, is an autonomous body under the Ministry of Youth Affairs & Sports. He also understands that the Ministry controls (in the loose sense of the word) the NADA and supports the NADA’s budget. But the Appellant’s attempt to draw a lack of independence link between Dr. V.K. Sharma and NADA is too far attenuated to raise serious doubts over his independence. It is not enough, in the Sole Arbitrator’s opinion, that tangential financial or business links between the Ministry (who oversees the autonomous body of the Sports Authority) and the NADA draw any inference of lack of independence on the part of Dr. V.K. Sharma, a mid-level, civil service employee of the Sports Authority, to attend the opening of the Appellant’s B Sample.
- ac) No Corresponding A and B Samples Confirming an Anti-Doping Rule Violation.
82. The Sole Arbitrator notes that Article 3.1 of the NADA ADR makes clear that the NADA has the burden of establishing that an anti-doping rule violation has occurred. To do this, the NADA must establish to the comfortable satisfaction of the Sole Arbitrator that the A Sample conclusively demonstrates an adverse analytical finding and moreover, that the B Sample confirms the findings of the A Sample (or that the Athlete conclusively waived his right to B Sample testing). In this respect, the Sole Arbitrator notes the Appellant’s arguments that as the results of the “A Sample” do not belong to the Appellant, the only positive test result against the Appellant is the “B Sample”. And since a corresponding sample cannot confirm the “B Sample”, the results must be dismissed.
83. It is undisputed that an athlete - at the least - maintains a fundamental right to be notified of, and be given the opportunity to attend, the opening of his B Sample. Such fundamental rights have been laid down in CAS jurisprudence (notably, CAS 2010/A/2161 and CAS 2002/A/385) and the Sole Arbitrator fully subscribes to such line of authority. However, the Sole Arbitrator disagrees that any such fundamental violation of the Appellant’s right to have his B Sample tested (or, have at least two corresponding samples confirm his adverse analytical finding) were violated by the Respondents.
84. First, it is undisputed that the Appellant was duly and properly notified of his right to request the test and observe the testing of his B Sample. Second, the Respondents had no obligation to appoint an independent observer on his behalf, but even if they did, Dr. V.K. Sharma was,

for the reasons explained above, undoubtedly independent. Third, given that the Sole Arbitrator has determined that the Appellant's A Sample was indeed his A Sample (the errors on the documentation package being merely typographical and without any impact on the sample testing), and given that the Appellant was given a full and fair opportunity to test and observe the opening of his B Sample, there are two corresponding samples which conclusively establish that the Appellant committed an anti-doping rule violation. Absolutely no fundamental rights have been taken away from the Appellant during the testing procedure. His "B Sample" confirmed the findings of his "A Sample" and the Sole Arbitrator is comfortably satisfied that an anti-doping rule violation occurred.

ad) Excessive Delays Denied Access to Justice

85. Article 8.3 of the NADA ADR (which, in essence, follows Article 8.1 of the WADA Code) provides *inter alia* for detailed procedural rights of athletes as to being provided fair and timely information of the asserted anti-doping rule violation, an expedited hearing for a provisional suspension, and a fair hearing on whether the asserted anti-doping rule violation has been committed. The Appellant raises, in particular, (i) unfair delays as to the information on the asserted anti-doping rule violation; (ii) the deprivation of the prospect of having a final determination made prior to the expiration of any period of ineligibility; (iii) insufficient notice to attend the ADAP Hearing; (iv) unreasonable extensions of the procedural timetable by the Respondent in an effort to immunise its decision from judicial scrutiny; and (v) a general non-compliance with procedural safeguards emanating from the NADA ADR.

86. More specifically, Article 8.3.8.2 of the NADA ADR provides as follows:

*8.3.8 Unless otherwise agreed between the parties, the Anti-Doping Disciplinary Panel shall:*

*8.3.8.1 Commence the hearing within fourteen (14) days of the notification date;*

*8.3.8.2 Issue a written decision within twenty (20) days of the notification date; and*

*8.3.8.3 Issue written reasons for the decision within thirty (30) days of the notification date....*

87. Moreover, Article 13.6.8 of the NADA ADR provides as follows:

*13.6.8 Hearings pursuant to this Article should be completed expeditiously and in all cases within three (3) months of the date of the decision of the Anti-Doping Disciplinary Panel, save where exceptional circumstances apply.*

88. In the opinion of the Sole Arbitrator, it is obvious that the provisions of Articles 8.3 and 13.6.8 of the NADA ADR (as well as Article 8.1 of the WADA Code) have not been complied with by the NADA. The Appellant was notified of the anti-doping rule violation on 20 September 2010. The Appellant was then heard for the first time *two years later* on 21 September 2012. Moreover, following a series of other delays in the issuance of the award following the ADDP Decision, the Appellant's appeal was heard on 13 March 2014 – more than four months after receiving the complete ADDP Decision and more than 13 months after the

required deadline under the NADA ADR. This means, the Respondents undisputedly violated the Appellant's right to a procedure in line with the timing requirements described above.

89. In evaluating these procedural flaws, the Sole Arbitrator refers to general CAS jurisprudence which, falling in line with the jurisprudence of the Swiss Federal Tribunal, maintains that the virtue of a CAS appeal system is that any such procedural flaws "*relating to the fairness of the hearing before the tribunal of first instance fade to the periphery*" (see e.g. CAS 98/211 citing MOOR P., Droit Administratif, Berne 1991, Vol. II p. 19 citing Swiss Supreme Court Cases ATF 114 Ia 307; ATF 110 Ia 81); see by analogy *Calvin v. Carr* 1980 AC 574 at pp. 592-593). The Appellant's entitlement, which he fully received, was to a system which allowed any defects in the hearing before the ADDP and ADAP to be cured by the hearing before the CAS (see 2012/A/2789).
90. Nevertheless, the Sole Arbitrator could foresee a situation where an athlete's right to a timely and fair hearing in the first instance procedure was so fundamentally violated that such omissions in the underlying procedure results in an automatic dismissal of a violation (see for e.g. in cases where an athlete is not aware at all that a procedure is ongoing (cf. CAS/2009/A/1903)). In this regard, the Sole Arbitrator must, however, determine whether the Appellant – through the nearly four years that passed since his sample collection – lost any chance to demonstrate that no anti-doping violation occurred and, e.g., that the positive samples did not belong to him.
91. In this regard, it is noted that the Appellant has taken a firm defence to his adverse analytical finding since he was notified of the A Sample results, namely that he did not ingest any prohibited substances and that the sample in question did not belong to him. He did not undertake any steps to explore how the prohibited substance *may* have unknowingly entered his body and did not explore any other defences except the adamant denial and identification of procedural defects. Thus, the time which passed and which otherwise might have had an impact on establishing evidence on how the substance may have entered his body, or requesting the re-examination of the A Sample (which undisputedly belonged to the Appellant) was not used by the Appellant for such purpose. At no time did the delay unduly prejudice his right to obtain evidence, interview witnesses, or adequately defend the claims brought against him. The Sole Arbitrator, therefore, holds that while the NADA showed an alarming inability to effectively, timely, and appropriately handle the Appellant's case, such delay did not fundamentally violate the Appellant's procedural rights.

ae) Unlawful Constitution of the ADAP Panel

92. NADA ADR Article 13.6.2 provides as follows:

*The Appeal Panel will consist of the following:*

- (a) *One legal practitioner as Chairman of not less than 7 years standing*  
(b) *One medical practitioner of not less [than] 10 years standing;*

(c) *One sports administrator;*

(d) *One renowned athlete who has retired from active sports.*

93. The Appellant asserts that because the ADAP Panel was comprised of (1) a legal practitioner; (2) a medical practitioner; and (3) a former athlete, the composition of the panel was a fundamental violation of the NADA ADR. More specifically, the Appellant asserts that this provision requires an appeal panel to include all four individuals listed above.

94. While the Sole Arbitrator agrees that the introductory phrase "*The Appeal Panel will consist of the following*" implies that all four individuals shall sit on the panel, the actual implications of such interpretation are impossible. The Sole Arbitrator strains to agree with the Appellant that there was any intent by the NADA that such four-person appeals panel would hear appeals as the possibility for split decisions would be ever-present. Moreover, to the extent there was a deviation from NADA ADR Article 13.6.2 and a four-member panel should have been appointed, such deviation does not by itself, in the Sole Arbitrator's opinion, cast material doubt on the ADAP Decision. Therefore, the Sole Arbitrator concludes that such violation of NADA ADR 13.6.2, if one exists, was not a fundamental breach of the Appellant's right to defence.

af) Chain of Custody

95. Article 9.0 Transport of Samples and documentation of the IST provides, in part, as follows:

### **9.1 Objective**

- a. *To ensure that Samples and related documentation arrive at the WADA-accredited laboratory or as otherwise approved by WADA in proper condition to do the necessary analysis, and*
- b. *To ensure the Sample Collection Session documentation is sent by the DCO to the ADO in a secure and timely manner.*

\* \* \*

### **9.2 Requirements for transport and storage of Samples and documentation**

9.3.1 *The ADO shall authorise a transport system that ensures Samples and documentation will be transported in a manner that protects their integrity, identity, and security.*

\* \* \*

9.3.2 *Samples shall always be transported to the WADA-accredited laboratory (or otherwise approved by WADA), using the ADO's authorised transport method as soon as practicable after the completion of the Sample Collection Session. Samples shall be transported in a manner which minimizes the potential for Sample degradation due to factors such as time delays and extreme temperature variations.*

96. The Appellant asserts various violations of the IST with respect to the chain of custody (receipt and handling) of the Appellant's sample. The facts surrounding the delivery of the Appellant's sample and its receipt by the Laboratory are straightforward: The Appellant's sample was taken on 26 August 2010 without incident or objection, and refrigerated in the NADA offices at the competition venue in accordance with the IST and collection protocol until the end of the competition, which was Saturday 28 August 2010. Because the Laboratory was closed over the weekend, the sample remained refrigerated until Monday 30 August 2010, when it was then transported to the Laboratory by taxi. The sample was not logged on a "*chain of custody form*", but instead was identified on a covering letter which included a complete list of all samples taken from the venue (including information on when and where the samples were taken). Upon delivery, the Laboratory verified that the samples were delivered in good condition. The samples were then handed off to the Laboratory and appropriately stored in anticipation of testing.
97. The Sole Arbitrator notes that the Appellant does not challenge the veracity of the sample itself. He has no objection to how the sample was taken or tested. However, his principle concern was the duration of time it took for the sample to leave the venue and arrive at the Laboratory. This approximate three and one-half day timeframe, according to the Appellant, is a departure from the IST protocols as the time it took to transport the sample was unreasonably long under the circumstances.
98. More specifically, the Appellant alleged that he received no information on the external chain of custody concerning his sample, and moreover, where the sample had gone during this timeframe and how the sample was handled and stored. Much of his concern surrounded the fact that the Laboratory (and presumably the NADA) did not have a chain of custody form for the Appellant's sample, thereby raising questions about the identity of the Athlete's sample.
99. In support of his determination, the Sole Arbitrator refers to CAS 2010/A/2296 wherein a similar period of three and one-half days was taken to store, transport, and deliver the sample in question. In that case, the appellant submitted that this was an unacceptable period and should be characterized as "too long" in terms of the IST. The CAS Panel, however, noted that "[t]his time frame is arguably not ideal but it is in line with common testing practice, especially when sample collection occurs far away from a WADA-accredited laboratory".
100. The Sole Arbitrator is of the view, as was done in CAS 2010/A/2296, that the IST requirement that the sample be transported "as soon as practicable" is not unreasonable and in the absence of any evidence from the Appellant to prove that the sample was tampered with during this period of time (or that, indeed, there was a physical mix-up of the samples 10202 and 102011), the Sole Arbitrator determines that the time period during which the sample was transported to the Laboratory and the chain of custody that followed do not constitute a reason on which to make a finding that there has been a fundamental violation of the IST.
101. Based on the foregoing, the Sole Arbitrator determines that no such fundamental violations of the IST or the NADA ADR are to be admitted.

b) If the violations were not fundamental, but instead merely departures from the IST, were such departures dispositive on the test results?

102. As an alternative submission, the Appellant pleads that to the extent it is determined that the NADA's violations of the IST and NADA ADR are not fundamental, but instead departures from these standards and regulations, then such departures could have reasonably caused the Appellant's adverse analytical finding. As such, the burden shifts to the NADA to establish that such departure did not cause the adverse analytical finding.

103. NADA ADR Rule 3.2 (supra, para. 64) is based on Article 3.2 of the WADA World Anti-Doping Code 2009, which states *inter alia* as follows:

*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 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 as such the results. If the Athlete or other Person establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation occurred, then the Anti-Doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.*

104. The Sole Arbitrator must therefore begin by considering the meaning of NADA ADR Rule 3.2, and in particular the words "*could reasonably have caused the Adverse Analytical Finding*" (see 2014/A/3487). In other words, would it be reasonable for the Sole Arbitrator to conclude that any of the alleged departures from the IST and NADA ADR, as set forth above, could be the cause of the MHA in the Athlete's sample?

105. To succeed in this regard, the Appellant must establish facts from which the Sole Arbitrator can rationally infer a possible causative link between the IST or NADA ADR departure and the presence of the MHA in the Appellant's sample. For these purposes, the suggested causative link must be more than merely hypothetical, but need not be likely, as long as it is sensible based on the facts presented (see e.g. CAS 2014/A/3487).

106. After careful consideration of the evidence presented by the Parties concerning the circumstances of the doping test, as well as the transportation, storage, and chain of custody of the sample (as well as any possible mechanisms through which the sample could have been contaminated), the Sole Arbitrator concludes that violations of the IST and/or the NADA ADR, if any, could not have reasonably (or sensibly, based on the facts presented) caused MHA to appear in the Appellant's sample. Indeed, as Dr. Botre testified, various delays in the transportation and testing of the sample would not create bio transformation of the



Appellant's urine such that MHA would suddenly appear in the sample. Moreover, as Dr. Beotra conceded, typographical errors were made in the Laboratory Document Package, but such errors were merely "copy and paste" errors, not screening errors. The Sole Arbitrator finds no evidence to the contrary.

107. While the NADA and Laboratory can be criticized on one hand for the clerical mistakes in preparing the Laboratory Document Package, and on the other hand for the unnecessary delays in handling the Appellant's cases before the ADDP and ADAP panels, the Appellant has not established to the comfortable satisfaction of the Sole Arbitrator that the Athlete's adverse analytical finding could have been caused by a departure from the IST or NADA ADR and not by ingestion. Such errors were merely mistakes which are not dispositive on the Athlete's test results.
108. Therefore, the Sole Arbitrator concludes that the Athlete undoubtedly sustained an anti-doping rule violation. This conclusion makes unnecessary to consider the other arguments suggested by the Parties. Accordingly, while the anti-doping violation is to be confirmed, all other prayers and requests can be rejected.

## ON THESE GROUNDS

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

1. The appeal filed by Mr. Amar Muralidharan on 17 June 2014 is dismissed.
2. The decision rendered by the NADA Anti-Doping Appeal Panel on 3 June 2014 is upheld.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.