

IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE ANTI-DOPING RULES OF THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS

Before:

Lucas Ferrer

BETWEEN:

WORLD ATHLETICS

Anti-Doping Organisation

and

KENNETH KIPROP KIPKEMOI

Respondent

DECISION OF THE DISCIPLINARY TRIBUNAL

I. INTRODUCTION

1. The Claimant, World Athletics (“**WA**”) (formerly International Association of Athletics Federation (“**IAAF**”)), is the international federation governing the sport of athletics worldwide. It has its registered seat in Monaco. World Athletics is represented in these proceeding by the Athletics Integrity Unit (“**AIU**”) which has delegated authority for results management and hearings, amongst other functions relating to the implementation of the IAAF Anti-Doping Rules (“**ADR**”), on behalf of WA pursuant Article 1.2 of the ADR.
2. The Respondent, Mr. Kenneth Kiprop Kipkemoi (“**Mr. Kipkemoi**” or “**the Athlete**”) is a 35-year old long-distance runner from Kenya.
3. The alleged Anti-Doping Rule Violations (“**ADR Violations**”) relate to alleged violations of Articles 2.1 and 2.2 of the ADR. Mr. Kipkemoi faces the following charges: the presence of a Prohibited Substance or its Metabolites or Markers (Terbutaline) in the Sample collected from

him on 12 September 2019, and the use of a Prohibited Substance (Terbutaline). Terbutaline is a Prohibited Substance, prohibited at all times under the WADA 2019 Prohibited List under the category S3, Beta-2-Agonists.

4. What follows below is the decision of the WA Disciplinary Tribunal convened under Article 8.4 of the ADR to determine the ADR violations alleged against Mr. Kipkemoi.

II. FACTUAL BACKGROUND

5. On 12 September 2019, the Athlete participated in an Out-Of-Competition doping control in Kaptagat, Kenya, and provided a urine sample (“**the Sample**”) coded 3142239. Such Sample was then sent for analysis to a WADA-accredited laboratory in Lausanne, Switzerland (the “**Laboratory**”).
6. On 21 October 2019, the AIU notified the Athlete that the Laboratory recorded an Adverse Analytical Finding (“**AAF**”) with the presence of the Prohibited Substance Terbutaline and requested that the Athlete provide an explanation by no later than 28 October 2019.
7. On 27 October 2019, the Athlete provided his response including an explanation for the AAF:
 - The Athlete indicated that he was recovering from an illness at his home in Kaptagat at the time the Sample was collected. The Athlete confirmed that he had visited the Zaito Medical Centre in Eldoret, Kenya on 10, 11, 12, 13 September and been diagnosed with pneumonia, malaria and associated coughing and then treated by a Dr. Leonard Silver Okwemba.
 - The Athlete confirmed that Dr. Silver knew that he was a professional Athlete, therefore he needed to ensure that the Athlete did not violate the ADR. Likewise, the Athlete avers that Dr. Silver prescribed several medications only to treat his symptoms and that he was advised at some point (it is not specified exactly when) that some of the substances in the medicines were on the WADA Prohibited List and could not be used close to competitions.
 - The Athlete confirmed that he had explained the above circumstances to the Doping Control Officer (“**DCO**”) and that the DCO had asked if he could see the medicines. The Athlete therefore contacted a friend because he had left empty packets of the medicines at his training camp and asked his friend to find them and send pictures to the Athlete by WhatsApp. The Athlete also affirms that he showed the photo of the medicines and the doctor’s prescriptions to the DCO.
 - The Athlete enclosed with the explanation a letter from Dr. Silver, copies of two prescriptions dated 10 September 2019 and 12 September 2019 and photographs of the medication that were allegedly shown to the DCO.
 - The prescription dated 10 September 2019 included a prescription for “Syrup Terbutaline” and “Grilinctus BM”. The photographs of the medication include a photograph of a bottle of Grilinctus BM indicating that this product contains Terbutaline Sulphate and Bromhexine Hydrochloride.
 - The letter from Dr. Silver stated that he gave the Athlete Grilinctus BM, a cough syrup with a substance that is prohibited for athletes, to assist the Athlete in opening his lung tissue so as to prevent a pneumonic attack, highlighting that this bronchodilator was important to assist in the Athlete’s medical situation.

8. On 28 October 2019, the AIU requested further information from the Athlete concerning the Athlete's prescription and ingestion of Grilinctus BM Cough Syrup by no later than 30 October 2019.
9. On 29 October 2019, the Athlete responded, confirming that the prescribed dosage of the Grilinctus BM medication was 10 ml, three times per day, for five days and that he took the medication per the prescribed regimen.
10. Between the end of October and mid-February, the Parties engaged in a negotiation concerning the determination of this matter. The Parties have raised the disclosure of these negotiations as an issue to be resolved by the Sole Arbitrator in light of the fact that the Athlete believes they are evidence of bad faith, but WA considers these were settlement negotiations to propose consequences for the Athlete without the need to pursue a disciplinary procedure, therefore they were without prejudice and should not have been disclosed.
11. The result of the aforementioned exchange was that, on 14 February 2020, the Athlete informed the AIU that his position on the subject had not changed, noting that he "*found it mischievous*" that he kept on receiving proposed consequences, and requesting information on how to proceed with the matter. To this, the AIU wrote one last time to the Athlete on 19 February 2020 informing him that if the Parties did not reach an agreement on the proposed consequences, the AIU would issue a Notice of Charge setting out the options for proceeding, including the Athlete's right to request a hearing before the Disciplinary Tribunal.
12. On 25 February 2020, the AIU issued the Athlete with a Notice of Charge (with a copy to the Disciplinary Tribunal Secretariat, Sport Resolutions) for violations of Article 2.1 and Article 2.2 ADR. The Athlete was also provisionally suspended in accordance with Article 7.10.2 ADR.
13. On 4 March 2020, the AIU received confirmation from Mr. Reece Mwani that he had been appointed by the Athlete to represent him in this matter.
14. On 9 March 2020, the AIU requested that Mr. Mwani confirm how the Athlete wished to proceed with the Charge by no later than 13 March 2020.
15. On 12 March 2020, Mr. Mwani sent an e-mail to the AIU stating the following:

"Dear Jackson,

Kindly note that the athlete herein denies the charges as contained in your letter dated 25/02/2020.

This is because the DCO and/or BCO failed to indicate/disclose in the Doping Control Form (DCF) and Declaration of Use (and blood transfusion) all the information the athlete gave/provided to him including medication the athlete was using and the race he had cancelled. It is the athlete's position that the mistake by the DCO/BCO led to AIU arriving at a decision to charge him. The Athlete thus requests to be accorded a fair hearing".
16. The matter was therefore referred to the Disciplinary Tribunal (the "**Tribunal**") for determination.

III. PROCEDURE BEFORE THE DISCIPLINARY TRIBUNAL

17. On 30 March 2020, a Preliminary Meeting was convened before the appointed Chair of the Disciplinary Tribunal Panel, Mr. Lucas Ferrer, who would act as Sole Arbitrator. After consulting with the parties during the Preliminary Meeting, the Sole Arbitrator issued Directions for the present procedure, which stated in relevant part:

“1.2. By 5pm GMT on Thursday 9 April 2020, the AIU shall submit a brief with arguments on all issues that World Athletics wishes to raise at the hearing and written witness statements from each fact and/or expert witness that the AIU intends to call at the hearing, setting out the evidence that World Athletics wishes the Disciplinary Tribunal to hear from the witness, and enclosing copies of the documents that the AIU intends to introduce at the hearing, as prescribed in art. 8.7.2(d)(i) ADR;

1.3. By 5pm GMT on Monday 20 April 2020, the Athlete shall submit an answer brief, addressing the AIU’s arguments and setting out any arguments on the issues that the Athlete wishes to raise at the hearing, as well as written witness statements from the Athlete and/or from each other witness (fact and/or expert) that the Athlete intends to call at the hearing, setting out the evidence that the Athlete wishes the Disciplinary Tribunal to hear from the witness, and enclosing copies of the documents that the Athlete intends to introduce at the hearing, as prescribed in art. 8.7.2(d)(ii) ADR;

1.4. By 5pm GMT on Monday 27 April 2020, the AIU may submit a reply brief, responding to the Athlete’s answer brief and producing any rebuttal witness statements and/or documents, as prescribed art. 8.7.2(d)(iii) ADR;

1.5. The hearing shall be held via video conference on Tuesday 12 May 2020.”

18. On 9 April 2020, the AIU filed its brief on behalf of WA in accordance with paragraph 1.2 of the Directions dated 30 March 2020.

19. The Athlete requested an extension on the deadline to file his Answer of 10 days, which the Sole Arbitrator granted on 17 April 2020. The Sole Arbitrator also extended the subsequent deadline for the AIU’s reply by 10 days. The Athlete submitted his answer brief on 30 April 2020.

20. On 30 April 2020, Mr. Jackson sent an email directed to the Sole Arbitrator (copying the Athlete and his lawyer) concerning the comments in the Athlete’s Answer regarding the correspondence between the parties on 13 December 2019 and 23 January 2020. The AIU advised that these communications, as indicated in (i) the correspondence dated 13 December 2019 and (ii) the Acceptance of Anti-Doping Rule Violation and Acceptance of Consequences Form, were sent without prejudice and attached the relevant email correspondence. The AIU requested that due to the foregoing, paragraphs 14-15 of the Athlete’s Answer should be disregarded entirely and submitted that no evidentiary weight whatsoever should be attached to the contents of any correspondence without prejudice.

21. On 7 May 2020, the AIU requested an additional 7 days to file its Reply Brief, which the Sole Arbitrator granted.

22. On 8 May 2020, Mr. Mwani sent an email whereby he expressed his objections to the AIU’s email from 30 April 2020 regarding the correspondence exchanged between the Parties from 13 December 2019 to 23 January 2020, alleging the introduction of new documents and evidence in this fashion was prejudicial to the Athlete and requesting Directions on this matter. That same day, Mr. Jackson, on behalf of the AIU, responded via email, providing further explanations as

to the “without prejudice” nature of the correspondence cited by the Athlete and clarifying that this latest correspondence from the AIU did not constitute its Reply Brief.

23. On 13 May 2020, the Sole Arbitrator issued an Order whereby he decided not to consider the AIU’s latest correspondence and invited the AIU to present all of its comments, requests and further evidence in its Reply Brief due on 14 May 2020. The Sole Arbitrator also reminded the Parties that they would have an opportunity to properly address all of the issues raised in their respective submissions at the hearing.
24. On 14 May 2020, the AIU submitted its Reply Brief.
25. Considering the extensions granted on the time limits for the Parties to file their written submissions, the hearing was re-scheduled for 2 June 2020.
26. On 15 May 2020, Mr. Mwani, on behalf of the Athlete, sent an email in response to some of the matters raised in the AIU’s Reply Brief; namely, Mr. Mwani voiced his objection to the inclusion of a witness statement in the Reply Brief, claiming this was improper and prejudicial to the Athlete, and asked for clarification as to what the Athlete should do in view of the AIU’s request that Dr. Silver be made available for questioning at the hearing. That same day, Mr. Jackson, on behalf of the AIU, responded to Mr. Mwani’s email and indicated that the arguments and evidence adduced in the Reply Brief were in line with the Directions issued by the Sole Arbitrator for that submission.
27. On 19 May 2020, the Sole Arbitrator issued an Order whereby he determined that the new evidence contained in the Reply Brief appeared to be in line with the Directions and art. 8.7(2)(d)(iii) ADR. Furthermore, the Sole Arbitrator requested that the Athlete provide his assistance by notifying Dr. Silver of his being called as a witness and taking steps to ensure Dr. Silver’s availability at the hearing. Finally, the Sole Arbitrator reiterated that the Parties would be able to address all the issues raised in their respective submissions at the hearing.
28. The hearing was initiated via video conference on 2 June 2020. Unfortunately, the Athlete and his Counsel had issues with their Internet connection which made it impossible to proceed with the hearing. For this reason, the Sole Arbitrator decided to postpone the hearing until a new date could be found as soon as possible.
29. The rescheduled hearing was held via video conference on 3 July 2020. The Disciplinary Tribunal was composed of Mr. Lucas Ferrer as Sole Arbitrator and assisted by Mr. Joshua Ingham-Headland of Sport Resolutions.
30. The following individuals were present:

For WA:	Mr. Tony Jackson, Case Manager
	Mr. Ross Wenzel, Legal Counsel
	Mr. Cornelius Magut, DCO, Witness
	Dr. Leonard Silver Okwemba, Witness
For the Athlete:	Mr. Reece Mwani, Legal Counsel
	Mr. Kenneth Kiprop Kipkemoi, the Athlete

IV. JURISDICTION

31. The Parties do not dispute the jurisdiction of this Tribunal to hear this case.

32. In any case, the Sole Arbitrator notes the establishment of the Disciplinary Tribunal's jurisdiction over this particular matter begins with Article 1.2 ADR, which states as follows:

"In accordance with Article 16.1 of the 2017 IAAF Constitution, the IAAF established an Athletics Integrity Unit ("Integrity Unit") with effect from 3 April 2017 whose role is to protect the integrity of Athletics, including fulfilling the IAAF's obligations as a Signatory to the Code. The IAAF has delegated implementation of these Anti-Doping Rules to the Integrity Unit, including but not limited to the following activities in respect of International-Level Athletes and Athlete Support Personnel: Education, Testing, Investigations, Results Management, Hearings, Sanctions and Appeals. The references in these Anti-Doping Rules to the IAAF shall, where applicable, be references to the Integrity Unit (or to the relevant person, body or functional area within the Unit)".

33. The application of the ADR to the Athlete is set out in Article 1.6 ADR:

*"1.6 **These Anti-Doping Rules also apply to** the following Athletes, Athlete Support Personnel and other Persons, each of whom is deemed, by condition of his membership, accreditation and/or participation in the sport, to have agreed to be bound by these Anti-Doping Rules, and to have submitted to the authority of the Integrity Unit to enforce these Anti-Doping Rules:*

*a) **all Athletes**, Athlete Support Personnel and other Persons **who are members of a National Federation** or of any affiliate organisation of a National Federation (including any clubs, teams associations or leagues);*

*b) **all Athletes**, Athlete Support Personnel and other Persons **participating in such capacity in Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or affiliate organization of any National Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held; (...)**"*

34. Additionally, Article 1.8 ADR specifies those athletes that are classified as International-Level Athletes for the purpose of the ADR as follows:

*"1.8 Within the overall pool of Athletes set out above who are bound by and required to comply with these Anti-Doping Rules, **each of the following Athletes shall be considered to be an International-Level Athlete ("International-Level Athlete") for the purposes of these Anti-Doping Rules and therefore the specific provisions in these Anti-Doping Rules applicable to International-Level Athletes shall apply to such Athletes:***

*(a) **An Athlete who is in the International Registered Testing Pool; (...)***

*(c) **Any other Athlete whose asserted Anti-Doping Rule Violation results from (i) Testing conducted under the Testing Authority of the IAAF; (...)**".*

35. In line with Articles 1.6 and 1.8 ADR, at all material times the Athlete was a registered member of the Athletics Federation of Kenya ("AK") and he competed in the Boston Marathon, an IAAF Gold Label Road Race, on 15 April 2019, a Competition authorized and recognized by the IAAF, in which the Athlete finished third. The Athlete was also part of the International Registered Testing Pool at the time the Sample was collected on 12 September 2019. Hence, the Athlete is an International-Level Athlete subject to, and bound to comply with, the ADR.

36. The AIU has jurisdiction over the results management in this case because the Athlete's Sample giving rise to the AAF was collected pursuant to testing undertaken by the AIU, on behalf of WA, as foreseen in Article 7.2 ADR.
37. Finally, the Disciplinary Tribunal has jurisdiction by virtue of Article 8.1(a) ADR, which establishes the Tribunal's jurisdiction where "*an Anti-Doping Rule Violation is asserted by the Integrity Unit against an International-Level Athlete.*"

V. APPLICABLE LAW

38. The Parties do not dispute the applicability of the ADR, specifically the 2019 version in force at the time the ADR Violations occurred.
39. Article 2 ADR specifies the circumstances and conduct that constitute ADR Violations. This includes Article 2.1 which provides:

"2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is each Athlete's duty to ensure that no Prohibited Substance enters his body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence, or knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping Rule Violation under Article 2.1"

40. Article 2.2 ADR also establishes that use of a Prohibited Substance or Prohibited Method constitutes an ADR Violation:

2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method

2.2.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his body and that no Prohibited Substance is Used. Accordingly, it is not necessary that intent, Fault, negligence, or knowing Use on the Athlete's part be demonstrated in order to establish an Anti-Doping Rule Violation for Use of a Prohibited Substance or a Prohibited Method."

41. With regards to the presence of a Prohibited Substance or its Metabolites or Markers in an athlete's Sample, Article 2.1.2 ADR states:

*2.1.2 Sufficient proof of an Anti-Doping Rule Violation under Article 2.1 is established by any of the following: **presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed;** or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.*

42. In relation to an athlete's use of a Prohibited Substance or Prohibited Method, Article 2.2.2 ADR provides:

"2.2.2 The success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an Anti-Doping Rule Violation to be committed."

43. Article 3.1 ADR provides that WA shall have the burden of establishing that an Anti-Doping Rule Violation has occurred to the comfortable satisfaction of the Tribunal:

"3.1 The IAAF or other Anti-Doping Organisation shall have the burden of establishing that an Anti-Doping Rule Violation has been committed. The standard of proof shall be whether the IAAF has

established the commission of the alleged Anti-Doping Rule Violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt [...].”

44. Article 3.2 ADR states that facts relating to ADR Violation may be established by any reliable means. In that regard, Article 3.2 ADR also states:

“3.2. 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 at hearings in doping cases under these Anti-Doping Rules:

(...)

*3.2.2 **Compliance with an International Standard** (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly.*

*3.2.3 **WADA-accredited laboratories, and other laboratories approved by WADA, are presumed to have conducted Sample analysis and custodial procedures in compliance with the International Standard for Laboratories.** The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred that could reasonably have caused the Adverse Analytical Finding. In such an event, the IAAF shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*

3.2.4 Departures from any other International Standard, or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that did not cause the facts alleged or evidence cited in support of a charge (e.g., an Adverse Analytical Finding) shall not invalidate such facts or evidence. If the Athlete or other Person establishes the occurrence of a departure from an International Standard or other anti-doping rule or policy set out in the Code or these Anti-Doping Rules that could reasonably have caused the Adverse Analytical Finding or other facts alleged to constitute an Anti-Doping Rule Violation, then the IAAF or other Anti-Doping Organisation shall have the burden to establish that such departure did not cause such Adverse Analytical Finding or the factual basis for the Anti-Doping Rule Violation.”

45. Article 10.2 ADR provides the sanction to be imposed for Violations under Article 2.1 ADR (presence) and Article 2.2 ADR (use):

“10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility to be imposed for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete or other Person’s first anti-doping rule violation shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the Anti-Doping Rule Violation was not intentional.

(b) The Anti-Doping Rule Violation involves a Specified Substance and the Integrity Unit establishes that the Anti-Doping Rule Violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.”

46. Finally, the sanctions described above may be eliminated or reduced based on a finding of No Fault or Negligence pursuant to Article 10.4 ADR or No Significant Fault or Negligence pursuant to Article 10.5 ADR. The pertinent language for each of these articles will be reproduced, where relevant, in the subsections below.

VI. POSITIONS OF THE PARTIES

47. The principal submissions of WA may be summarized as follows:

a. AIU Brief

- The AIU, on behalf of WA, asks the Tribunal:
 - to rule that the Tribunal has jurisdiction to decide on the subject matter of this dispute;
 - to find that the Athlete has committed Anti-Doping Rule Violations pursuant to Article 2.1 ADR and Article 2.2 ADR;
 - to impose a period of Ineligibility of two (2) years pursuant to Article 10.2.2 ADR commencing on the date of the Tribunal’s Award with credit for the period of Provisional Suspension imposed on the Athlete from 25 February 2020 until the date of the Tribunal’s Award against the total period of Ineligibility, provided it has been effectively served by the Athlete;
 - to order the disqualification of any results obtained by the Athlete between 10 September 2019 and 25 February 2020 with all resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money pursuant to Article 10.8 ADR;
 - to award World Athletics a contribution to its legal costs in relation to this matter.
- The AIU maintains the Athlete’s position regarding the omission of a certain medication from the Doping Control Form is fundamentally flawed because the alleged lack of disclosures can have no impact on the presence of a Prohibited Substance in the Athlete’s Sample, and the Charge is based on the presence of Terbutaline detected by the Laboratory in the Athlete’s Sample.
- According to Articles 2.1 and 2.2 ADR, it is not necessary that intent, fault, negligence or knowing use on the Athlete’s part be demonstrated in order to establish an ADR Violation. Furthermore, it is each athlete’s personal duty to ensure that no Prohibited Substance enters his body and that no Prohibited Substance is used; an athlete is strictly liable for the presence and use of Prohibited Substances.
- Moreover, article 2.1.2 ADR provides that the “*presence of a Prohibited Substance or its Metabolites or Markers in the Athlete’s A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed*” is sufficient proof of an ADR Violation.
- Here, the Laboratory’s analysis of the Athlete’s Sample resulted in findings for Terbutaline and the Laboratory reported an AAF for the Sample based on such findings, and the Athlete did not request analysis of the B Sample.

- The AIU reviewed the AAF in accordance with Article 7.3 ADR and found the Athlete did not have a valid Therapeutic Use Exemption (“TUE”) on file. Additionally, no apparent departures from the International Standard for Testing and Investigations (“ISTI”) or International Standard for Laboratories (“ISL”) were identified.
- In view of the foregoing, the AIU concluded the Athlete committed an ADR violation under Articles 2.1 and 2.2 ADR.
- The AIU argues that the period of Ineligibility shall be two years pursuant to Article 10.2.2 because this matter involves the presence and use of Terbutaline, a Specified Substance, and the AIU does not contend that the ADR Violations were intentional per Article 10.2.1(b).
- The AIU highlights that Article 10.5.1(a) ADR allows for a reduction in the applicable period of Ineligibility of two years in matters involving Specified Substances, depending on the Athlete’s degree of Fault.
- However, the AIU also highlights that, from the terms of Article 10.5.1(a) ADR, an athlete must demonstrate No Significant Fault or Negligence in order to avail himself of a potential reduction, beginning with the threshold requirement of demonstrating how the Prohibited Substance entered his system.
- In this sense, the AIU is not able to accept that the Athlete meets his burden (on the balance of probabilities) to demonstrate the origin of the Terbutaline in the Sample. Specifically, the AIU underscores the fact that the Athlete stated he received a prescription for Grilinctus BM on 10 September 2019 after receiving a diagnosis, yet two days later, when he indicated he was at home recovering from his illness, he did not have his medication with him, having left it at his training camp at a different location than the Athlete’s home.
- The AIU also considers that even if the Athlete were able to meet his burden of proof in establishing the origin of the Prohibited Substance, the Athlete still fails to establish that he has acted with No Significant Fault or Negligence.
- First, the AIU highlights the Comment to Article 10.4 of the World Anti-Doping Code, which states that No Significant Fault “*will only apply in exceptional circumstances*”, and points out that this is when an athlete can show the degree of fault or negligence in the totality of the circumstances, which “*is measured against the fundamental duty which he or she owes under the Programme and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance.*”
- Second, the AIU cites the definition of “fault” as found in the ADR, and the specific factors to be considered when assessing the Athlete’s level of fault.
- Third, the AIU refers to the fact that athletes have a higher duty of care and should therefore be particularly vigilant when it comes to taking medication because of the inherent risk that they may contain Prohibited Substances.
- Turning to the facts at hand, the AIU makes note of the fact that the Athlete alleged in his statement that he was specifically advised that the medication contained Prohibited Substances. It also makes note of the fact that, while the Athlete was aware that the medication he was prescribed contained a Prohibited Substance, he apparently did not conduct even the most basic diligence with respect to the medication:

- There was no evidence that the Athlete read the product label. If he had, he would have noted the large text indicating “Terbutaline Sulfate” as an active ingredient of the Grilinctus BM syrup medication.
 - The Athlete has not claimed to have cross-checked the ingredients of the medicine with the WADA 2019 Prohibited List, which includes Terbutaline.
 - The Athlete has presented no evidence to suggest that he searched the medicine on the internet. A Google search of “Grilinctus BM” provides clear information in the second result that the medication contains Terbutaline.
 - The Athlete does not appear to have entered the ingredient into GlobalDro. If he had, he would have been on notice that the substance was prohibited at all times.
- The AIU also refers to CAS case law, which holds that athletes cannot benefit from No Significant Fault or Negligence merely because they consult with, and rely on the advice of, a doctor, and that athletes must cross check assurances given by the doctor, even where such a doctor is a sports specialist (though it is noted that there is no evidence that Dr. Silver is a sports specialist).
 - Finally, the AIU notes the Athlete is a highly experienced Athlete who has been competing at the highest level in Athletics for almost 10 years (second in Valencia Half Marathon in 2011, fourth in the Chicago Marathon, first in the Rotterdam Marathon in 2008, and third in the Boston Marathon in 2019).
 - Therefore, the AIU concludes that since the Athlete was aware that the medication contained a Prohibited Substance and conducted little or no due diligence, the Athlete cannot benefit from a finding of No Significant Fault or Negligence such that Article 10.5.1(a) ADR is not applicable. Hence, the period of Ineligibility to be imposed in the matter at hand, must be two years pursuant to Article 10.2.2 ADR.

b. Athlete’s Answer

- In his Answer to the AIU Brief, the Athlete requests that the Disciplinary Tribunal eliminate the period of Ineligibility.
- The Athlete first submits that since he does not dispute the existence of Terbutaline in his Sample and waived the right to have his B Sample tested, and considering that he has admitted to the use of Grilinctus BM, which contains a Prohibited Substance, the burden of proof shifts to him to demonstrate, by a balance of probabilities, how the substance entered his body per Article 3.1 WADA Code. In this respect, the Athlete contends that the explanation he provides makes it crystal clear that he bears no fault as he was not negligent at all.
- The Athlete’s principal submission is that the DCO who conducted the doping control on 12 September 2020, failed to indicate or disclose in the Doping Control Form all of the information the Athlete provided to him, including the medication he was using at the time and the upcoming races he intended to cancel due to injury and illness, and that this mistake by the DCO led the AIU to the erroneous decision to charge the Athlete with ADR Violations.
- The Athlete alleges that on 10 September 2019, Dr. Silver diagnosed the Athlete severe pneumonia, malaria accompanied with coughing. The Athlete also indicates that the doctor was

well aware that he was an International-Level Athlete and prescribed a cough syrup (i.e. Grilinctus BM) to open lung tissues so as to prevent a pneumonic attack to his alveoli.

- The Athlete further alleges that when the DCO arrived at the Athlete's home on 12 September 2019 to conduct the anti-doping control, the Athlete explained his illness to Mr. Magut and showed him photographs of the medications he had been using. The Athlete indicates he had to ask a friend to send the photographs because he had left the medications at his training camp. The Athlete alleges that the DCO recorded his findings on his iPad but could not let the Athlete go due to his iPad having turned off because of a lack of power.
- The Athlete states that he visited Dr. Silver the day after the doping control, on 13 September 2020, and explained the anti-doping control to the doctor. In his submission, the Athlete also states that Dr. Silver then conducted some research and informed the Athlete that the Grilinctus BM Syrup contained a banned substance which could not be used close to competition as its half-life is about 6-8 hours, but that it was essential to treat the severe condition in his lungs.
- The Athlete also provides details on the parallel treatment he was receiving at the time of the doping control for an injury suffered in mid-September 2019. The Athlete highlights that he would not be able to participate in the Chicago Marathon scheduled for 13 October 2019 as a result and that he cancelled his participation in it. Thus, the Athlete maintains that it would make no sense for him to use Terbutaline to enhance his performance in the race and that this serves to confirm that he only used the Grilinctus BM syrup for legitimate medical treatment because he was ill.
- The Athlete also cites Article 10.5 WADA Code (elimination or reduction of period of Ineligibility based on exceptional circumstances) and Article 10.5.1(a) ADR (elimination or reduction of period of Ineligibility based on No Significant Fault or Negligence) and submits that he has already explained the truth of how the substance got into his body and has satisfactorily shown that he bears No Fault or Negligence for the ADR Violations, thereby justifying the elimination of the period of Ineligibility.
- Finally, the Athlete adds that he has never committed an ADR Violation during his sporting career, and that had the DCO noted in the form that he was contemplating the cancellation of his upcoming race as he had not healed and was also ill, he could not have been charged with the current charges.
- The Athlete also refers to the correspondences exchanged with the AIU between 13 December 2019 and 14 February 2020, indicating that he found it inappropriate that the AIU sent him communications with proposed periods of Ineligibility, and that he found it mischievous that the AIU kept sending him this.

c. AIU Reply

- In its Reply to the Athlete's Answer, the AIU, on behalf of WA, confirms its request for relief as submitted in its Brief.
- Regarding the ADR Violations, the AIU reiterates its position as outlined in its Brief that the charges are based on the presence and use of Terbutaline in the Athlete's Sample, and therefore, any disclosures on the Doping Control Form have no impact. Hence, the Athlete's position remains fundamentally flawed.

- Additionally, the AIU also states that it is difficult to reconcile the Athlete's denial of the charges with the fact that he has expressly admitted/not disputed them, having admitted to the use of Terbutaline and not disputed its presence in his Sample.
- Regarding the consequences of the ADR Violations, the AIU considers that the Athlete's position that he bears No Fault or Negligence for the ADR Violations is untenable and has no basis in the applicable rules or case law.
- Moreover, the AIU considers the Athlete falls well short of establishing that he bears No Significant Fault or Negligence, highlighting in particular that the Athlete appears to have taken medication without so much as asking what it contained, checking the ingredients against the Prohibited List, or conducting any other checks or searches. The AIU also highlights that both the product label/packaging and the prescription dated 10 September 2019 refer explicitly to Terbutaline, which is included in the WADA Prohibited List and can be identified through the most cursory of internet checks as a Prohibited Substance.
- Regarding the communications between the Parties cited in the Athlete's Answer, the AIU maintains that the conversations and negotiation held with the Athlete between the end of October 2019 and mid-February 2020 were without prejudice negotiations concerning the settlement of this matter on the basis that the Athlete had admitted to ingesting Terbutaline in his explanation dated 27 October 2019.
- The AIU notes that it had proposed consequences between December 2019 and January 2020 but was informed by the Athlete on 20 January 2020 that his previous legal representative had acted without instructions in his attempts to agree on consequences on the Athlete's behalf.
- The AIU also notes that the fact that a party might be willing to agree to an outcome in order to dispose of a matter and avoid litigation does not imply that he will agree to the same outcome within the context of litigation. Furthermore, the AIU avers that the very nature of without prejudice correspondence is that it is not intended to bind the parties in any way. As such, the AIU submits the Athlete is unable to rely on the contents of the without prejudice correspondence referenced in his Answer (also enclosed in the Athlete's exhibits).
- Finally, as further evidentiary measures, the AIU submits a witness statement from Mr. Magut, the DCO, speaking to the events that transpired during the doping control, specifically denying that there were any issues during the doping control and stating that the Athlete had a chance to review the Doping Control Form before signing and submitting it, thereby having an opportunity to identify any omissions or missing information. The AIU also requests that the Athlete make Dr. Silver available for questioning at the hearing.

VII. ISSUES

48. The issues that the Sole Arbitrator must determine in this case may be summarized as follows:
- a. Are the communications referenced by the Athlete regarding settlement negotiations with the AIU admissible?
 - b. Is the Sole Arbitrator comfortably satisfied that the Athlete has committed the ADR Violations at issue?

- c. If the answer to the second question is in the affirmative, what are the appropriate consequences and has the Athlete satisfactorily demonstrated that the applicable period of Ineligibility may be reduced or altogether eliminated based on the particular circumstances of the case?

VIII. MERITS

49. At the outset, the Sole Arbitrator notes that the Athlete put forward his explanations for the origin of the Prohibited Substance identified in the AAF in his prior written statements and correspondence exchanged with the AIU and expanded upon them during the hearing. However, the crux of the Athlete's position lies in his contention that the DCO omitted his disclosure of the Grilinctus BM cough syrup he had been prescribed, the alleged source of the Prohibited Substance, and thus the Athlete should bear No Fault or Negligence for the ADR Violations at issue here; the Athlete maintains that had the Grilinctus BM been included in the Doping Control Form, no charges would have been issued.
50. The Sole Arbitrator now turns to the analysis of the arguments and evidence as put forward by the Parties. In doing so, the Sole Arbitrator has considered all of the allegations set forth and refers below only to those elements which are deemed pertinent to decide the matter at hand.

A. Communications Between the Parties Prior to Disciplinary Tribunal Procedure

51. The Sole Arbitrator first turns to consider the arguments set forth by the Athlete with regards to the communications exchanged between him and the AIU between 13 December 2019 and 14 February 2020.
52. The Athlete maintains that it was inappropriate for the AIU to send him several letters with varying lengths of proposed periods of Ineligibility, which were less than the two years now sought before the Disciplinary Tribunal, and that nowhere in that correspondence is it established that they were sent without prejudice. From the Athlete's point of view, this not only is an indication of bad faith, but is also a clear violation of the principle of *venire contra factum proprium* and violates the legitimate expectation of the Athlete in terms of the sanction.
53. In response, the AIU maintains that the conversations and negotiation held with the Athlete between December 2019 and mid-February 2020 were without prejudice negotiations concerning the settlement of this matter on the basis that the Athlete had admitted to ingesting Terbutaline in his explanation dated 27 October 2019. Specifically, the AIU noted that it had proposed consequences for the Athlete between December 2019 and January 2020, but was informed by the Athlete on 20 January 2020 that his previous legal representative had acted without instructions in his attempts to agree on consequences on the Athlete's behalf. Furthermore, the AIU states that the fact that a party might be willing to agree to an outcome in order to dispose of a matter and avoid litigation (and all the costs derived therefrom) does not imply that the party will agree to the same outcome within the context of litigation; the very nature of without prejudice correspondence is that it is not intended to bind the parties in any way.
54. In short, the Athlete submits the disputed correspondence to demonstrate the AIU, and by extension, WA, were willing to accept a lower sanction than the two-year period of Ineligibility

they are currently requesting, whereas the AIU maintains that the Athlete is unable to rely on this correspondence and it should be disregarded by the Disciplinary Tribunal.

55. The Sole Arbitrator is inclined to agree with the AIU's submissions on this point. The email dated 13 December 2019 between the AIU and the Athlete attaching a Notice and Acceptance of Consequences clearly indicates, both in the subject line and in the body of the email, that the aforementioned was sent without prejudice. It can be reasonably concluded that this "without prejudice" disclaimer extended to the subsequent correspondence exchanged on the same subject of possible settlement negotiations and proposed consequences.
56. Additionally, the Sole Arbitrator agrees that without prejudice means, as a general rule, that it is not intended to bind the parties in any way. Indeed, as WA pointed out in its submissions, this type of negotiation, whose aim is to agree on consequences for an ADR Violation without the need to engage in disciplinary proceedings and thereby minimize the legal and administrative costs that such proceedings entail, is a common practice for WA and other sporting and anti-doping bodies.
57. In sum, given the clear "without prejudice" nature of the correspondence referenced by the Athlete in paragraphs 14-15 of his Answer Brief should not be understood as a willingness by the AIU to accept a lesser period of Ineligibility in the course of these disciplinary proceedings, nor should it be understood as evidence of bad faith on the AIU's part.
58. As such, paragraphs 14-15 of the Athlete's Answer and the corresponding exhibits shall be disregarded.

B. The ADR Violations

59. In order to establish whether an ADR Violation has been committed, the AIU shall have the burden of establishing that an ADR Violation has occurred to the comfortable satisfaction of the Tribunal. (Article 3.1 ADR) The AIU may establish this through any reliable means, as described in Article 3.2 ADR cited above.
60. The specific ADR Violations at issue here pertain to the presence of a Prohibited Substance (Article 2.1 ADR) and the use of a Prohibited Substance (Article 2.2. ADR).
61. Considering the language of Articles 2.1, 2.2 and 3.2 ADR cited in the Applicable Law section above, the Sole Arbitrator highlights the following facts:
 - a. The Laboratory's analysis of the Athlete's Sample yielded an AAF for Terbutaline Sulphate, a S.3.Beta-2-Agonist substance prohibited at all times,
 - b. The Athlete admitted to using Grilinctus BM Syrup, which contains the Prohibited Substance at issue, and waived his right to have his B Sample analyzed,
 - c. The AIU reviewed the AAF in accordance with Article 7.3 ADR and concluded the Athlete did not have a valid TUE on file, and
 - d. No apparent departures from the ISTI or the ISL were identified or even alleged by the Athlete.

62. In view of the above, the Sole Arbitrator is comfortably satisfied that the ADR Violations with which the Athlete has been charged, i.e. the presence and use of a Prohibited Substance, have been established.
63. Notably, both cited offenses under Articles 2.1 and 2.2 ADR are not dependent upon the Athlete's intent, knowledge, negligence (or lack thereof). Furthermore, neither of the cited offenses are affected by any failure to provide adequate disclosures on the Doping Control Form, as they are simply based on the presence of the Prohibited Substance in the Athlete's Sample and use of said Substance by the Athlete.
64. Here, both ADR Violations have been established through objective and unchallenged evidence, in addition to the Athlete's own admission.
65. Thus, the Sole Arbitrator is comfortably satisfied that the Athlete has violated Articles 2.1 and 2.2 ADR.

C. The Consequences of the ADR Violations

66. As mentioned above, Article 10.2 ADR provides the sanction to be imposed for Violations under Article 2.1 ADR (presence) and Article 2.2 ADR (use).
67. In this respect, the Sole Arbitrator first notes that this is the Athlete's first ADR Violation.
68. Moreover, as Terbutaline is a Specified Substance, it falls upon the AIU to establish whether the ADR Violations were intentional. In its Brief, the AIU, on behalf of WA, did not contend that the Violations were intentional, though the Sole Arbitrator notes that the Legal Counsel for WA indicated more than once during the hearing that there were sufficient indications in this matter to suggest the ADR Violations in this matter were indeed intentional. Nonetheless, the aforementioned comments were not accompanied by any change to WA's allegations or requests for relief in its written submissions.
69. Thus, in view of the foregoing, the applicable period of Ineligibility is, in principle, two years in accordance with article 10.2.2. ADR.

1) No Fault or Negligence

70. In arguing for a departure from the applicable period of Ineligibility, the Athlete alleges he bears No Fault or Negligence, thereby warranting the elimination of the applicable period of Ineligibility pursuant to Article 10.4 ADR.
71. In this sense, the Sole Arbitrator notes that for Article 10.4 ADR to apply in this case, the Athlete must not only demonstrate that he did not and could not reasonably know or suspect that he was ingesting a Prohibited Substance, but he must also satisfy the threshold requirement of establishing how the Prohibited Substance entered his system by a balance of probability (Article 3.1 ADR):

"No Fault or No Negligence: The Athlete's or other Person's establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must establish how the Prohibited Substance entered his system." (Definitions, ADR)

72. Here, the Athlete has adduced evidence supporting his allegations that he suffered from severe pneumonia, malaria and cough when he went to see Dr. Silver on 10 September 2019 and was prescribed medication in one of his visits to Dr. Silver that week, which included the Grilinctus BM syrup. He has also provided photographs of the Grilinctus BM syrup, which lists Terbutaline Sulfate as an active ingredient on its label and packaging. Moreover, the Athlete's and Dr Silver's respective oral testimonies also sought to establish that the Athlete had been prescribed the aforementioned cough syrup.
73. The Sole Arbitrator finds there are some inconsistencies in the explanations offered that undermine the reliability of the evidence and testimony offered.
74. For one, it is not clear why on 12 September 2019, when the Athlete was in principle, and according to his updated Whereabouts information on ADAMS, supposed to be at home recovering from his illness and was subjected to the doping control, he did not have all of the prescribed medications with him, especially when the Athlete himself described his condition as severe. The Athlete indicated in his written submissions and at the hearing that he left the medication in the training camp, even though in his Answer he also states that the Grilinctus BM Syrup was precisely prescribed because it was vital for his treatment, and had previously informed the AIU that the medication had been prescribed on 10 September 2019 to be taken over the course of 5 days (which he affirmed he took). In his testimony before the Disciplinary Tribunal, the Athlete appeared to modify this explanation and stated that the reason why he did not have the Grilinctus BM syrup with him during the doping control was because he had spent the night of 11 September 2020 at the training camp, visited Dr. Silver at the Zaito Medical Center on the afternoon of 12 September 2020, then went to the Zion Mall in the evening, and at some point thereafter was alerted of the DCO's presence at his home and returned to his home. None of this information was contained in any of the Athlete's prior written submissions or statements and therefore raises some concerns and doubts for the Sole Arbitrator.
75. Also, it is noted that Dr. Silver provided conflicting statements during the hearing as to the exact date of the prescription for Grilinctus BM (initially stating the first prescription the Athlete received was on 12 September 2020, then stating the Grilinctus BM was prescribed on 10 September 2020, and later returning to his original statement of 12 September 2020). The foregoing is contrasted with the photograph of the prescription provided by the Athlete (p. 210 of the Hearing Bundle), which appears to be dated 10 September 2020. It is possible that Dr. Silver could have confused the date on the prescription for Grilinctus BM with the date on the prescription for the other medications, but this is, in any case, to no avail.
76. Furthermore, the Sole Arbitrator considers it necessary to reflect on the fact that, in their oral testimony, both the Athlete and Dr. Silver made reference to a telephone call between them that purportedly took place the evening of the doping control, despite there being no mention of this call at any point prior to the hearing. According to the oral testimony provided, the Athlete called Dr. Silver while at his home on the evening of 12 September 2020 prior to participating in the doping control and, it would appear, in the presence of the DCO. In his testimony, Dr. Silver stated that in this conversation he told the Athlete to be open about the medications he was taking and encouraged him to provide pictures. However, it strikes the Sole Arbitrator as odd that if there was such a call between the Athlete and Dr. Silver, Mr. Magut would not have noted this occurrence in his statement or testimony and that the Grilinctus BM would not have been

mentioned somehow in that conversation such that it would have been included in the Doping Control Form. This testimony is also completely contradictory with paragraph 8 of the Athlete's Answer in which the Athlete affirms that he went to visit Dr. Silver the day after the doping control, on 13 September 2020, and that it was at that point that the Athlete explained the anti-doping control to the doctor and the doctor then researched the medications and informed the Athlete that one of them contained a Prohibited Substance.

77. Hence, the Sole Arbitrator concludes that, though it seems plausible that the source of the Prohibited Substance could have been the Grilinctus BM Syrup, there is insufficient credible and consistent evidence provided to establish, on the balance of probabilities, that it was indeed the source of the Prohibited Substance in his Sample.
78. In any event, aside from not being able to satisfy the above-described threshold requirement, the Sole Arbitrator does not find it possible to conclude on the facts and evidence provided in the file and at the hearing that the Athlete did not know or suspect and could not reasonably have known or suspected, even with the exercise of utmost caution, that he had used the Prohibited Substance.
79. According to Articles 2.1.1 and 2.2.1 ADR and the consistent jurisprudence pertaining to doping matters, the Athlete has a fundamental duty to do everything in his power to avoid ingesting any Prohibited Substance. Such duty is unquestionably heightened in circumstances where an athlete takes medication because of the significant risk that such medication may contain Prohibited Substances. (see, *inter alia*, CAS 2008/A/1488, CAS 2011/A/2518, CAS 2012/A/2959, CAS 2013/A/3327, CAS 2015/A/3899)
80. Yet in this case the Athlete admits to having ingested a prescription medication containing the Prohibited Substance with nothing on the record to indicate he investigated what he was ingesting or that he even read the label prior to purportedly taking this medication. In his testimony, the Athlete confirmed more than once that he did not inquire about the nature of the medications he was prescribed with his doctor because he trusted his doctor and, apparently, relied on the assumption that Dr. Silver already knew he was an International-Level Athlete subject to doping controls. However, Dr. Silver provided conflicting testimony as to the point in time in which he was aware that the Athlete was an International-Level Athlete, as well as the point in time in which he was aware that Grilinctus BM contained a Prohibited Substance.
81. Even if the Sole Arbitrator were to (i) accept that the Grilinctus BM was the source of the Prohibited Substance, and (ii) decide the controversy of whether Dr. Silver was aware of the Athlete's status as an International-Level Athlete when he prescribed the medication in favour of the Athlete, what remains undisputed is that the Athlete never verified the name or the ingredients of any of the medications he prescribed, never consulted with his training partner, coach or representative, and does not seem to have taken any anti-doping-related precaution before, during or after taking the cough syrup submitted as the source of the Prohibited Substance in his Sample. (CAS 2015/A/3899) It appears that, from the Athlete's point of view, it was sufficient that his doctor had prescribed it.
82. However, the jurisprudence on this particular point makes it clear that simply placing one's trust in the prescribing physician, even in the case where the prescribing physician is a sports specialist, is generally insufficient to support a finding of No Significant Fault or Negligence, let

alone a finding of No Fault or Negligence. (CAS 2008/A/1488, CAS 2012/A/2959, CAS 2016/A/4609)

83. Additionally, the Athlete's principal submissions in support of a finding of No Fault or Negligence, i.e. that the DCO failed to disclose in the Doping Control Form all of the information the Athlete provided to him, including the medication he was using at the time and the upcoming races he intended to cancel due to injury and illness, even if accepted as true – *quod non* – are inadequate grounds for a finding of No Fault or Negligence. Such allegations do not serve to establish that the Athlete did not know or suspect, and could not have reasonably known or suspected, that he had ingested a Prohibited Substance, nor do they have any bearing on the ADR Violations at issue.
84. In sum, the Sole Arbitrator concludes that the foregoing falls considerably short of the high bar that is exercising "utmost caution" and No Fault or Negligence. Therefore, the Athlete has not met his burden to justify the application of Article 10.4 ADR.

2) No Significant Fault or Negligence

85. In light of the foregoing, the only other possible grounds to consider a reduction of the period of Ineligibility provided for in the ADR are based on No Significant Fault or Negligence.
86. The Sole Arbitrator notes that the Athlete was not entirely clear in his submissions whether he was submitting a subsidiary request for a reduction of the applicable sanction on the basis of No Significant Fault or Negligence. However, the AIU Brief sets forth its case for sanctioning the Athlete on the basis of art. 10.5.1(a) ADR, not to mention the fact that the Athlete mentioned this precise article in his Answer Brief and at the hearing, which leads the Sole Arbitrator to consider whether the Athlete's allegations satisfy a finding of No Significant Fault or Negligence.
87. According to the ADR, an athlete may have the applicable period of Ineligibility reduced on the basis of No Significant Fault or Negligence:

"10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence:

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6:

(a) Specified Substances:

Where the Anti-Doping Rule Violation involves a Specified Substance, and the Athlete or the Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the degree of Fault of the Athlete or other Person".

88. No Significant Fault or Negligence is defined in the ADR as *"The Athlete's or other Person's establishing that his Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the Anti-Doping Rule Violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must establish how the Prohibited Substance entered his system."*
89. Fault is defined in the ADR as *"any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or*

other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2.”

90. Thus, the period of Ineligibility may be reduced when the Athlete establishes that he bears No Significant Fault or Negligence, for which it is necessary to (i) establish how the Prohibited Substance entered his system (which the Athlete has not done satisfactorily), and (ii) consider what the Athlete could and should have done to prevent the respective substance from entering his body.
91. In line with well-established CAS jurisprudence, the Sole Arbitrator notes that an athlete's failure to inquire or ascertain whether a product contains a Prohibited Substance can be considered Significant Fault (or at least Negligence) in and of itself in light of the high duty of care he is expected to employ, thus excluding any reduction of the applicable period of Ineligibility. (CAS 2013/A/3327)
92. Moreover, as established above, mere reliance on a doctor is not enough to excuse the Athlete from investigating to the fullest extent whether the medication contains Prohibited Substances. In fact, the negligence of a doctor who prescribed a Prohibited Substance to an athlete can be attributed to the athlete himself if he was officially warned about the care and diligence that was expected from an International-Level Athlete.
93. Here, even assuming – *quod non* – that the source of the Prohibited Substance was the Grilinctus BM Syrup, the Athlete admits he ingested the Grilinctus BM syrup because Dr. Silver prescribed it, and in doing so, failed to observe his duty of care. As an experienced International-Level Athlete affiliated with AK, the Athlete could have been expected to employ the tools at his disposal (*inter alia* consulting with the prescribing doctor or even a coach or team member before taking any medication, reading the label of the product, searching for the product on the internet, cross-checking the medication on GlobalDro) before ingesting any medication, but there is nothing to suggest he did anything of the sort and the Athlete recognizes that fact. (CAS 2015/A/3899)
94. Additionally, in situations such as this one, where the Athlete's health is at stake and the treatment plan necessarily involves the use of Prohibited Substances, there are established procedures to disclose these circumstances to the relevant doping authorities in order to avoid subsequent ADR Violations (e.g., applying for a TUE). While the Athlete admitted in his oral testimony that he did not know what a TUE was, the Sole Arbitrator must nonetheless note that: i) the Athlete is a 35-year-old International-Level Athlete who, by his own admission, has been subjected to numerous anti-doping controls over the course of his career, who owes a duty to the World Anti-Doping Program, and who therefore should be expected to, at this stage in his career, have sufficient anti-doping education and experience to know what a TUE is; and ii) for the same reasons, it was incumbent upon the Athlete to, at the very least, consult with a more

knowledgeable source about any doping-related questions in light of the fact that he was prescribed medication, which carries an inherent risk of containing Prohibited Substances and, therefore, a higher duty of care. (CAS 2011/A/4615, CAS 2016/A/4609). However, the Athlete did not directly or indirectly seek out information on a potential TUE prior to or even after ingesting the medication.

95. Finally, the Sole Arbitrator notes once more that any disclosures that may or may not have been included in the Doping Control Form do not justify or excuse the Athlete's failure to take any steps at all to ensure that his behaviour did not incur a potential ADR violation in the first place. Furthermore, despite the contradicting statements made, on one hand by the Athlete, and on the other, by the DCO, regarding the doping control as to whether pictures of the different medications were shown to the DCO, whether only names of medications were shared, who the Athlete consulted during the doping control, the fact remains that the Athlete signed the Doping Control Form. By signing the form, the Sole Arbitrator is satisfied that the Athlete had an opportunity to review the form and explicitly confirmed that *"the information on this form set out accurately reflects the details of the doping control session"* (see last page of Doping Control Form), and is therefore not convinced by the Athlete's allegations in this respect.
96. Thus, the Athlete's conduct also falls short of the expected standard of behaviour for an athlete in his position and fails to establish that he bore No Significant Fault or Negligence. In light of the foregoing, and considering the absence of any circumstances that would mitigate the degree of fault or negligence attributable to the Athlete, the Sole Arbitrator concludes that the period of Ineligibility to be imposed in the matter at hand must be two years.
97. The foregoing period of Ineligibility shall take into account and, if applicable, be reduced by any period of time the Athlete has effectively served under Provisional Suspension, which was imposed on 25 February 2020.
98. Furthermore, any results obtained by the Athlete between 12 September 2019 and 25 February 2020 shall be disqualified, with all resulting consequences including the forfeiture of any titles, awards, medals, points, and prize and appearance money pursuant to Article 10.8 ADR.

IX. CONCLUSIONS

99. Considering all of the above, the Sole Arbitrator concludes that the Athlete has infringed Articles 2.1 and 2.2 ADR and that, in view of the Athlete's failure to exercise even the most minimal duty of care as an International-Level Athlete, the Sole Arbitrator shall impose a period of Ineligibility of two years.

X. COSTS

100. Article 8.9.3 ADR states:

"The Disciplinary Tribunal has the power to make a costs order against any party where it is proportionate to do so. If it does not exercise that power, each party shall bear its own costs, legal, expert and otherwise. No recovery of costs shall be considered a basis for reducing the period of Ineligibility or other sanction that would otherwise be applicable."

101. The Sole Arbitrator notes WA's request to be awarded a contribution on the legal costs of these proceedings. However, despite the fact that the Athlete is the unsuccessful party, the Sole Arbitrator is inclined to reject such request. Considering all the circumstances, including the Parties' behaviour throughout the proceedings, the Sole Arbitrator does not consider this measure is justified. Moreover, the period of Ineligibility of two years and the forfeiture of medals, titles, ranking points, and prize and appearance money is sufficient punishment without the need to burden the Athlete with such a contribution.

XI. ORDER

102. In light of the above, the Sole Arbitrator:

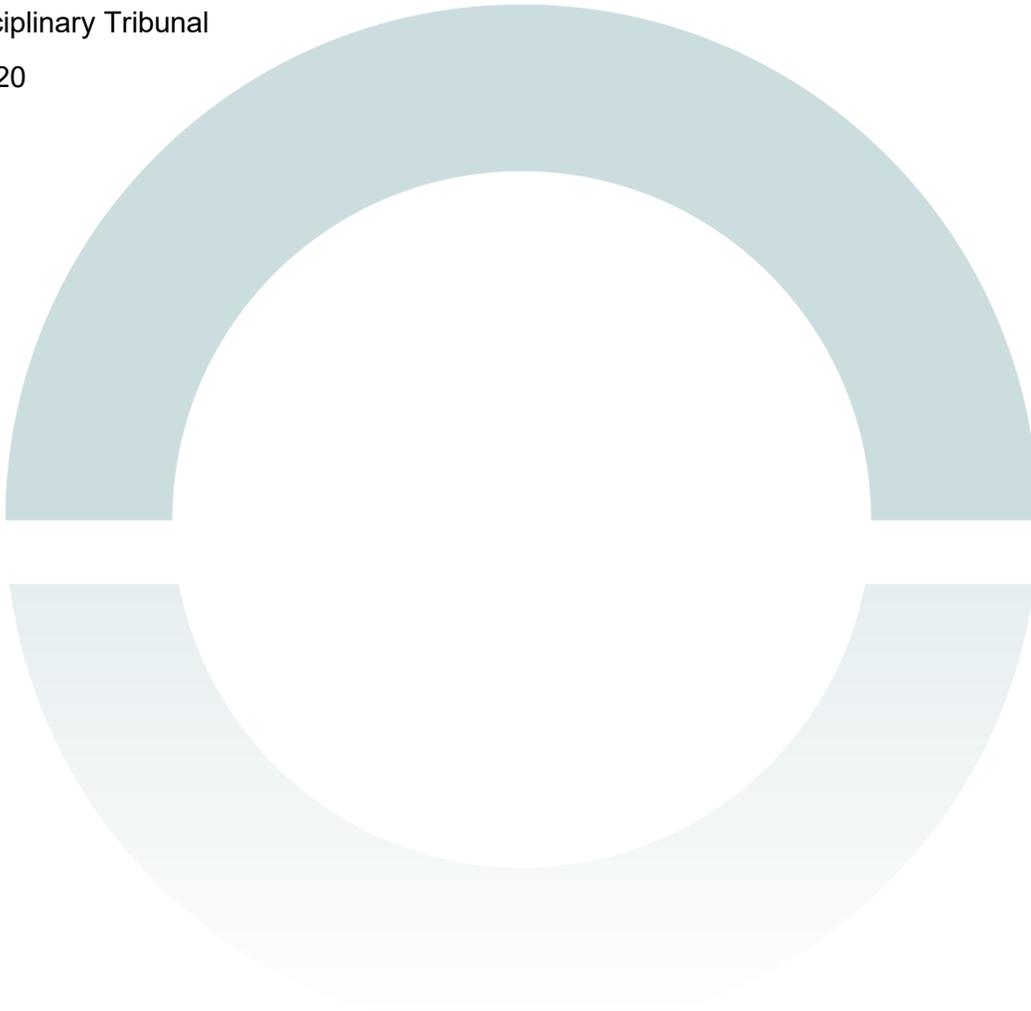
- a. Rules that the Disciplinary Tribunal has jurisdiction to decide on the subject matter of this dispute.
- b. Finds that the Athlete has committed Anti-Doping Rule Violations pursuant to Articles 2.1 and 2.2 ADR.
- c. Imposes a period of Ineligibility of two years upon the Athlete, commencing on the date of this Award in accordance with Article 10.2.2 ADR. The period of Provisional Suspension imposed on the Athlete from 25 February 2020 until the date of the Tribunal's Award shall be credited against the total period of Ineligibility, provided it has been effectively served by the Athlete.
- d. Orders the disqualification of any results obtained by the Athlete between 12 September 2019 and 25 February 2020, with all resulting consequences including the forfeiture of any titles, awards, medals, points, and prize and appearance money pursuant to Article 10.8 ADR.
- e. Dismisses all other prayers for relief.

XII. RIGHT TO APPEAL

103. This decision may be appealed to the Court of Arbitration for Sport (CAS) in accordance with Article 13 ADR.



Lucas Ferrer
Chair, Disciplinary Tribunal
17 July 2020



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