

Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2010/A/2229 WADA v. FIVB & Gregory Berrios

ARBITRAL AWARD
rendered by
COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Romano **Subiotto** QC, Solicitor-Advocate, Brussels, Belgium, and
London, United Kingdom
Arbitrators: Mr. Quentin **Byrne-Sutton**, Attorney, Geneva, Switzerland
Mr. José A. **Axtmayer**, Attorney, San Juan, Puerto Rico

in the arbitration between

THE WORLD ANTI-DOPING AGENCY (WADA), Montreal, Canada

Represented by Mr. François Kaiser and Mr. Jean-Pierre Morand, Lausanne, Switzerland

-Appellant-

and

FÉDÉRATION INTERNATIONALE DE VOLLEYBALL (FIVB), Lausanne, Switzerland

Represented by Ms. Daniela Piri Joly and Mr. Andreas Zagklis, Lausanne, Switzerland

-First Respondent-

and

GREGORY BERRIOS, San Juan, Puerto Rico

Represented by Mr. Ricardo E. Carrillo Delgado, San Juan, Puerto Rico

-Second Respondent-

I. PARTIES

1. The World Anti-Doping Agency ("WADA"), the Appellant, is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was established in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.
2. The Fédération Internationale de Volleyball ("FIVB"), the First Respondent, is an international sports federation and the world governing body for volleyball based in Lausanne, Switzerland. The FIVB oversees competitive volleyball events internationally, including administration of the 2010 V Men's Pan American Cup held in San Juan, Puerto Rico. The FIVB is a signatory of the World Anti-Doping Code (the "WADA Code"), which rules are implemented in the FIVB Medical Regulations (the "FIVB Rules").
3. Gregory Berrios ("Berrios" or the "Player", together with FIVB the "Respondents"), the Second Respondent, is an international level volleyball player from Puerto Rico who was aged 31 at the time of the in-competition doping control relevant for this case. In the past years, Berrios has regularly competed in international volleyball competitions as a player for the Puerto Rican national team, playing in the position of "libero". WADA, FIVB and Berrios are referred to collectively as the "Parties".

II. FACTUAL BACKGROUND

4. This summary is based on the allegations of the parties and the evidence adduced during this proceeding, which included elements of the record from the procedure leading up to the FIVB Decision that is being appealed. Regardless of whether they are expressly referred to herein, all the parties' allegations, evidence and arguments have been carefully considered by the Panel.
5. In May 2010, Berrios competed with the Puerto Rico national volleyball team on the 2010 V Men's Pan American Cup held in San Juan, Puerto Rico. On May 27, 2010, Berrios was subject to doping control. He signed the doping control form on which he declared that he was not taking any medication or other pharmaceutical substances at the time of the control. Berrios's sample was forwarded to the WADA-accredited UCLA Olympic Analytical Laboratory in Los Angeles.
6. On June 18, 2010, the FIVB received a report of the laboratory that confirmed the presence of N,N-Didesmethyisibutramine, a metabolite of Sibutramine ("Sibutramine"), a substance that is listed as a Specified Stimulant under the Prohibited List of the WADA Code,¹ which forms an integral part of the FIVB Rules on the basis of Article 4.1 of these rules.

¹ N,N-Didesmethyisibutramine is a metabolite of sibutramine, which appears in category S6(b) (Specified Stimulants) on the Prohibited List of the WADA Code, available at www.wada-ama.org

6. On the FDA website Sibutramine is qualified as “... *an appetite suppressant available by prescription only and a controlled substance.*” In the releases on its website, the FDA also warns that: “*The health risks posed by these products can be very serious and include high blood pressure, seizures, tachycardia (rapid heartbeat), palpitations, heart attack, and stroke. Sibutramine, a controlled substance, was found in many of these products [including in the product “Fatloss Slimming”] at levels much higher than the daily dosage of Meridia, the only FDA-approved drug product containing Sibutramine. These higher levels of Sibutramine can increase the incidence and severity of these health risks.*”
7. In a written declaration made to FIVB on July 8, 2010, Berrios explained that prior to the start of the tournament, he had gained some weight as a result of a knee injury and he had decided to ingest a substance that would assist him with weight loss in order to reduce the pressure on his knee. At the hearing in this proceeding, he indicated in substance that the attempt to lose weight was also to help him perform better by getting closer to what he empirically deemed his ideal playing weight, but that to achieve that goal he had never intended to ingest any prohibited substance and thereby enhance his performance in a manner contrary to anti-doping regulations. Without consulting a physician or member of the team’s medical staff, Berrios proceeded to buy a product named “Fat Loss Slimming Beauty” (the “Product”) from an up-market local natural products store named “Freshmart”.
8. At the hearing in this proceeding, Berrios declared that he believed in a healthy life style and for that reason had the custom of also sometimes going to Freshmart to eat in its cafeteria, accompanied by his girlfriend, Ms Yoliann Cabeza Rivera.
9. He said that given the type of up-market natural products store it was, he believed Freshmart would only sell natural products and that upon purchasing the Product he had questioned the employee about a suitable natural product helping with weight loss and had been recommended “Fat Loss Slimming Beauty”.
10. The following is an extract from the website of Freshmart: “*Founded in 1995, Freshmart is the first supermarket fully dedicated to natural products. Puerto Rican company 100% committed to the pursuit of fresh, pure and clear through his careful selection. Product your health through food and products free of preservatives, dyes or artificial flavor additives [...]. The customer can visit Freshmart and find a supermarket where you can enjoy breakfast, lunch and take an afternoon snack in the cafeteria, also can participate in our vegetarian cooking classes are free.*”
11. Berrios added that he had fully trusted the employee’s recommendation and submits that neither the box nor the provided product information revealed that the Product contained a substance that could be compared with or identified as a prohibited substance.
12. Berrios also submits an Internet search of the ingredients listed on the package, which he performed before ingesting the Product and which did not suggest that it contained prohibited substances. He submits that his search did not lead him to the releases of the FDA.

13. After having been informed of his positive analytic results, Berrios provided a sample of the Product to the FIVB hearing panel.
14. On his own initiative, Berrios commissioned NMS Labs in the United States to test the Product for the presence of controlled substances and pharmaceuticals.
15. By letter dated November 3, 2010, the laboratory confirmed the presence of Sibutramine in the Product.
16. Berrios also filed a Freedom of Information Act request with the FDA.

III. PROCEDURAL BACKGROUND

17. After being informed about the positive test, the FIVB provisionally suspended Berrios by letter of July 13, 2010. Following the proceedings, which included a hearing of Berrios, the FIVB issued a decision (the "FIVB Decision") on August 4, 2010, in which Berrios was found to have committed an anti-doping offence contrary to Article 2.1 of the FIVB Rules, which would lead to a sanction of two years of ineligibility on the basis of Article 9.2 of the FIVB Rules. However, the FIVB also found under Article 9.4 of the FIVB Rules that – taking into account the specific circumstances of the case – Berrios had had no intention to enhance his sport performance, and, therefore, the FIVB reduced Berrios' suspension to three months, commencing on July 13, 2010.
18. Article 9.4 of the FIVB Rules provide that:

Article 9.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 9.2 shall be replaced with the following:

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

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

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19. By letter dated September 15, 2010, WADA filed with the CAS a Statement of Appeal against the FIVB Decision, in which it appointed Mr. Quentin Byrne-Sutton as arbitrator.
20. On October 4, 2010, the Player informed the CAS that it proposed to appoint Mr. Jose Alberto Axtmayer as arbitrator with the consent of FIVB although the latter would be adopting an independent position in these proceedings.
21. On October 7, 2010, WADA filed its Appeal Brief, which contained the following Prayer for Relief:

WADA hereby respectfully requests CAS to rule:

1. *The Appeal of WADA is admissible.*
 2. *The decision rendered by the FIVB Anti doping Panel, on August 4, 2010, in the matter of Mr Gregory Berrios is set aside.*
 3. *Mr Gregory Berrios is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by the Player) before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.*
 4. *WADA is granted an award for costs.*
22. On October 29, 2010, FIVB filed its Answer, which contained the following Prayer for Relief:

FIVB requests the CAS:

1. *to reject the Appeal filed by WADA against the decision of the FIVB Anti-Doping Hearing Panel dated 4 August 2010;*
 2. *to order the Appellant to pay the legal fees and expenses of FIVB, to be determined at a later stage of the present arbitration.*
23. By letter dated November 12, 2010, the CAS advised the parties that the President of the CAS Appeals Arbitration Division had nominated Mr. Romano Sublotto QC, as President of the Panel. By letter dated November 12, 2009, the Panel was provided with a copy of the file.
 24. On December 8, 2010, having received an extension for doing so, the Player filed his Answer, which contained the following Prayer for Relief:

We respectfully request the CAS to sustain the determination of the panel from FIVB.

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25. Among the exhibits filed by the Player with his Answer was an analytical report dated 3 November 2010, issued by “NMS Labs”, showing that Sibutramine and Phenolphthalein were identified in the “Fatloss Slimming Beauty” product he alleged to have ingested.
26. By letter of December 9, 2010, the Parties were invited to inform the CAS whether they wished for a hearing to be held. WADA and FIVB both indicated that they did not consider a hearing necessary, while Berrios did not respond within the given deadline.
27. On December 10, 2010, the Player submitted an additional exhibit constituted by a witness statement of Ms Yoliann Cabeza Rivera declaring, among others, that she had been present with the Player at the natural products store named “Freshmart” when he had purchased the product “Fatloss Slimming Beauty”.
28. By letter dated January 11, 2011, the CAS indicated to the parties that, pursuant to Rule 57 of the Code of Sports Related Arbitration (the “Arbitration Code”), the Panel considered it was sufficiently well informed not to hold a hearing.
29. However, after receiving a request for a hearing from Berrios by email of January 11, 2011, the Panel decided to have a hearing.
30. By letter of March 11, 2011, WADA informed the CAS that given the findings of the report of November 3, 2010, of NMS Labs filed by the Player with his Answer - indicating that the product “Fatloss Slimming Beauty” contained Sibutramine - as well as extracts from the website of the United States Food and Drug Administration (the “FDA”) disclosing that the product in question is tainted with Sibutramine, “*WADA accepts the allegations of the Respondent [regarding how the prohibited substance entered his body] are true and that he tested positive to a metabolite of Sibutramine because he ingested a weight loss product.*”
31. In its letter of March 11, 2011, WADA specified that “[i]n order to narrow the issues of this case, the Appellant wanted to inform the CAS Panel and the Respondents before the hearing about the position which is adopted forthwith. In WADA’s opinion, the remaining issues are (1) to determine if the Athlete intended to enhance his performance and (2) to assess his degree of fault.”
32. The hearing took place in Lausanne on March 24, 2011 as scheduled.
33. All Parties were present at the hearing as well as the witness Ms Yoliann Cabeza Rivera called by the Player.
34. During the hearing counsel of each of the Parties submitted oral arguments and the Player was amply heard. Certain of the oral declarations he made are referred to below in sections VII and VIII of this award.
35. Upon hearing the Player’s oral declarations and in light of the evidence adduced, WADA declared at the hearing that (i) it accepted the Player’s allegation that he had not ingested any prohibited substance with the intent of enhancing his sport performance and,

accordingly (ii) it was modifying its Prayer for relief, requesting only that the Player be sanctioned with a one-year period of ineligibility (instead of the two-year period initially requested).

36. In light of WADA's foregoing position, it was deemed unnecessary to hear the testimony of Ms Yoliann Cabeza Rivera and none of the parties objected to such manner of proceeding.

IV. JURISDICTION AND APPLICABLE LAW

37. Rule 47 of the Arbitration Code provides, in part, as follows:

Rule 47 Appeal

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.

38. Article 12.2.1 and Article 12.2.3 of the FIVB Rules provide that WADA may appeal decisions in cases involving an International Event or International-Level Athletes (as defined in the FIVB Rules) exclusively to CAS. The V Men's Pan American Cup is an International Event and Berrios an International-Level Athlete for purposes of the FIVB Rules. The Panel therefore has jurisdiction to consider WADA's appeal, as confirmed by the Parties' signed Order of Procedure, signed by WADA and the FIVB on March 18, 2011, and by Berrios on March 21, 2011.

39. Rule 58 of the Arbitration Code provides as follows:

Rule 58 Law Applicable

This 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.

40. The FIVB Decision, against which the appeal was brought, was issued under the 8th edition of the FIVB Rules (effective as of January 1, 2009), and there is no dispute as to the applicability of the FIVB Rules.

V. ADMISSIBILITY

41. Under article 12.6 of the FIVB Rules, the “*time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party*” and the deadline for WADA to file an appeal is the later of (i) 21 days after the last day on which any other party in the case could have appealed, or (ii) 21 days after WADA’s receipt of the complete file relating to the decision.
42. Berrios submits that the appeal is not admissible, alleging that WADA missed both of the foregoing deadlines.
43. WADA submits that the appeal is admissible since even if one assumes that Berrios received the FIVB Decision on the day it was rendered, i.e. on August 4, 2010, the Player’s appeal would have expired on August 25, 2010, meaning that WADA had another 21 days, until September 15, to file its appeal, which is when CAS received WADA’s statement of appeal.
44. The Panel finds that in view of the documents on record and of the calendar, WADA’s foregoing calculation of the various deadlines is correct and that its appeal was therefore timely.

VI. VIOLATION OF ANTI-DOPING RULE

45. Article 2.1.2 of the FIVB Rules provides, in part, as follows:

Article 2.1.2

Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete’s A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed [...]

46. By email dated July 14, 2010, Berrios waived his right to have the B Sample analyzed.
47. Moreover, Berrios does not contest the fact that a WADA accredited laboratory identified Sibutramine in his urine sample, nor that Sibutramine is a substance appearing on the Prohibited List of the WADA Code.
48. Berrios therefore admits to having committed a doping offence under Article 2.1 of the FIVB Rules.

VII. SUBMISSIONS OF THE PARTIES

49. The summary below refers to the substance of the Parties' allegations and arguments without listing them exhaustively in detail.
50. In its discussion of the case and its findings under section VIII of this award, the Panel has nevertheless examined and taken into account all of the Parties' allegations, arguments and evidence on record, whether or not expressly referred to.

A. WADA'S APPEAL

51. The Panel notes that WADA initially based its submission partly on Article 9.5 of the FIVB Rules, which provides for a reduction of the ineligibility period on the basis of exceptional circumstances, i.e. where an athlete bears no fault or negligence or no significant fault or negligence. WADA acknowledged at the oral hearing that this case concerns a Specified Substance, and that Article 9.4 of the FIVB Rules is therefore the relevant provision.

1. How did the Specified Substance enter the body

52. WADA initially submitted that Berrios failed to show that the prohibited substance entered his body through the Product he allegedly ingested.
53. However, after Berrios provided an analytical report to demonstrate that the Product contained Sibutramine and based on a similar finding announced on the website of the FDA, WADA informed the Panel and the Respondents by letter of March 11, 2011 that it would accept the allegations of Berrios that he tested positive to Sibutramine because he ingested the Product.
54. The remaining issues are therefore (i) whether Berrios intended to enhance his sport performance and (ii) his degree of fault.

2. Intent to Enhance Sport Performance

55. WADA initially submitted that Berrios is not eligible for a reduction because he failed to bring satisfactory evidence proving that he did not intend to improve his performance.
56. However, during the oral hearing on March 24, 2011 and based on the Player's explanations, WADA accepted that Berrios had no intent to enhance his sport performance and therefore could qualify for a reduction of the sanction.
57. Accordingly, WADA revised its request for a sanction to a one-year suspension.

B. FIVB'S RESPONSE

58. This case concerns the first appeal against a decision of an FIVB body.

59. The FIVB stresses that it is participating in the proceedings to explain and support the decision taken by the independent FIVB Anti-Doping Hearing Panel.

1. **How did the Specified Substance enter the Body**

60. The FIVB is of the opinion that Berrios has provided sufficient evidence to make it probable that he ingested the Product. Given that such alleged fact is now uncontested by WADA, the FIVB's submission in this respect need not be further examined.

2. **Intent to Enhance Sport Performance**

61. The FIVB further submits that Berrios did not and could not have intended to enhance his sport performance by ingesting the Product. Here again, since this alleged fact is no longer contested by WADA, the FIVB's submission in this respect need not be examined in more detail.

3. **Applicable Sanction**

62. The conditions of Article 9.4 of the FIVB Rules having been met, the FIVB submits that it has correctly exercised its discretion in determining the sanction, that such discretion is only to a limited extent subject to CAS scrutiny, and that its decision should be respected as long as it "*does not run against the internal rules of the association, the mandatory provisions of the law applicable or even fundamental general principles of law.*"² It follows from CAS precedents that this would be the case if a sanction is "*evidently and grossly disproportionate to the offence.*"³

63. According to the FIVB, the three-month sanction is not disproportionate (i.e. it is not too low). When issuing its decision, the FIVB took account of the fact that Berrios would miss a number of important tournaments, including the 2010 FIVB Men's Volleyball World Championships and the qualification tournament for the 2011 FIVB World League. The gravity of the sanction is further evidenced by the fact that Berrios lost his professional contract with a French volleyball team as a result of the FIVB Decision.

64. On these grounds, the FIVB believes that the sanction it has imposed on Berrios is proportional to the offence he committed, and should not be increased in appeal.

C. **BERRIOS' RESPONSE**

1. **How did the Specified Substance enter his Body**

65. As described above, Berrios claims he ingested the weight loss Product to shed some weight he had gained after suffering from a knee injury.

² CAS 2006/A/1175, D. / *International DanceSport Federation*, at para 47.

³ CAS 2006/A/1175, D. / *International DanceSport Federation*, at para 48.

66. Berrios has provided copies of the Product's package and a product information sheet. Moreover, by letter dated December 12, 2010, Berrios submitted a statement of a witness, who testified that she was with Berrios when he purchased the Product at Freshmart on May 15, 2010. She also testified that he ingested a number of pills in the following week, but not without first having conducted an Internet search on the Product which revealed nothing suspicious.
67. Furthermore, Berrios commissioned NMS Labs in the United States to test "Fat Loss Slimming Beauty" for the presence of controlled substances and pharmaceuticals. The laboratory confirmed that the Product contains Sibutramine.

2. Intent to Enhance the Sport Performance

68. Berrios states that he ingested a weight loss product "*not because he had gained significant weight and neglected his training or athletic activity but because he suffered a knee injury that made it impossible to train and wanted to reduce pressure on the injured knee for the future competition in which he sought to join the National Volleyball Team of Puerto Rico.*"
69. As mentioned above, at the hearing in this proceeding, Berrios recognized in substance that the attempt to lose weight was also to help him perform better by getting closer to what he empirically deemed his ideal playing weight, but that to achieve this goal he had never intended to ingest any prohibited substance and thereby enhance his performance in a manner contrary to anti-doping regulations.
70. Berrios claims that the mere fact that weight loss indirectly leads to certain advantages for an athlete does not establish the intent of a player to enhance his or her sport performance. Berrios' only intention "*was to lose some weight naturally.*"

3. Applicable Sanction

71. Berrios submits that three months is an appropriate/proportionate sanction for an athlete that has inadvertently ingested Sibutramine in the circumstances in which he did. In this respect Berrios underlines that "*he bought the substance in a natural products supermarket, in which he consulted the technician or person responsible for the natural products section and asked for an all natural product for weight loss. The person recommended the product to which the athlete performed a study of the substances that were reported in the information and instructions for the use of the product. All the components suppose to be natural.*"
72. He also invokes the facts that nowhere on the packaging of the Product or on the Product itself was there any mention of Sibutramine and that an Internet search conducted before ingesting the Product did not reveal any indications that the Product contained Sibutramine or that any of the components on the label were problematic. In that connection, Berrios filed an expert report stating, in part, as follows: "*We have reviewed the product 'Fatloss Slimming Beauty', a dietary supplement produced in China by the name of the company,*

from a standpoint of its components in the label. According to the print label of the product, it contains Bamboo leaves, Hawthorne, Polygonum Multiflorum, Licorice root, Saponin, and Oolong tea extracts. All the components are herbs except for saponin, a plant or part of a plant found in abundance in various plant species as natural components in many parts of the world [...] Since sibutramine is a man made synthetic substance, the only way that this compound could be present in the product is by addition of sibutramine during manufacturing of the product.”

73. Berrios also relies on case CAS 2006/A/1175, *D. / International DanceSport Federation*, where the CAS upheld the sanction of three months, and on two decisions of the All Russian Athletic Federation, in which two Russian athletes were sanctioned with a public warning and 3 months ineligibility, respectively.⁴

VIII. LEGAL ANALYSIS

1. Existence of the Anti-Doping Rule Violation

74. It is undisputed that Berrios committed an anti-doping rule violation within the meaning of Article 2 of the FIVB Rules.
75. According to Article 9.2 of the FIVB Rules, such a violation is sanctioned with two years of ineligibility, unless the conditions for eliminating, reducing or increasing this period are met.
76. The FIVB decided that Berrios qualified for a reduction of the period of ineligibility on the basis of Article 9.4 of the FIVB Rules, and it is against this finding that the WADA has appealed. The question that must therefore be decided is whether the conditions of Article 9.4 of the FIVB Rules are met, and what the appropriate sanction is under the relevant circumstances.

2. Fulfillment of the Conditions to Benefit from a Reduced Sanction

77. As indicated above, N,N-Didesmethylsibutramine is a metabolite of Sibutramine, which appears in category S6(b) (Specified Stimulants) on the Prohibited List of the WADA Code (implemented by Article 4.1 of the FIVB Rules). Sibutramine is thus a Specified Substance.
78. The commentary to Article 4.2.2 of the WADA Code, which provides a definition of Specified Substances, (and which is implemented by Article 4.2.2 of the FIVB Rules) explains the reason for providing specific rules for Specified Substances:

⁴ Decision of the All Russian Athletic Federation against Sergey Mironenko, announced by press release by the International Association of Athletics Federations on April 4, 2008, and decision of the All Russian Athletic Federation against *Irina Sorokina*, announced by press release by the International Association of Athletics Federations on December 1, 2008.

In drafting the Code there was considerable debate among stakeholders over the appropriate balance between inflexible sanctions which promote harmonization in the application of the rules and more flexible sanctions which better take into consideration the circumstances of each individual case. This balance continued to be discussed in various CAS decisions interpreting the Code. After three years experience with the Code, the strong consensus of stakeholders is that while the occurrence of an antidoping rule violation under Articles 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers) and 2.2 (Use of a Prohibited Substance or Prohibited Method) should still be based on the principle of strict liability, the Code sanctions should be made more flexible where the Athlete or other Person can clearly demonstrate that he or she did not intend to enhance sport performance. The change to Article 4.2 and related changes to Article 10 provide this additional flexibility for violations involving many Prohibited Substances.

79. Article 4.2.2 of the WADA Code thus sought to introduce some flexibility when determining a sanction for an athlete that has ingested a Specified Substance.

80. Article 10.4 of WADA Code – which is implemented by Article 9.4 of the FIVB Rules – provides for more flexible sanction, and the commentary to article 10.4 further explains why Specified Substances are treated differently to other Prohibited Substances:

[T]here is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.

81. Nevertheless, to benefit from the elimination or reduction of the period of ineligibility under article 9.4 of the FIVB Rules, an athlete must establish:

- a) How a Specified Substance entered his or her body or came into his or her possession; and
- b) That such Specified Substance was not intended to enhance the athlete's sport performance or mask the use of a performance-enhancing substance.

82. Regarding the first condition, the commentary to Article 10.4 of the WADA Code provides that "*the Athlete may establish how the Specified Substance entered the body by a balance of probability*". In other words, a panel should simply find the explanation of an Athlete about the presence of a Specified Substance more probable than not.

83. With respect to the second condition, a panel must be "*comfortably satisfied by the objective circumstances of the case that the Athlete in taking or possessing a Prohibited Substance did not intend to enhance his or her sport performance.*" In case CAS 2010/A/2107, *Oliveira v. USADA* ("Oliveira"), the panel clarified that an athlete only needs to prove that he/she did not take the specified substance with an intent to enhance

sport performance. The athlete does not need to prove that he/she did not take the product (e.g. a weight loss product) with the intent to enhance sport performance.⁵

84. It follows that the second condition is met when an athlete can produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of a panel that he or she ingested a specified substance unknowingly, e.g. by means of ingesting a contaminated product.
85. As already indicated, it is uncontested that Berrios meets the two foregoing conditions, i.e. that he established how the Product entered his body and that he did not ingest the Specified Substance in question, i.e. Sibutramine (contained in the Product), with the intent of enhancing his performance.
86. Consequently, the question that remains to be addressed is what sanction must be applied to the Player in the circumstances of this case.

3. Applicable sanction

Scope of review

87. The WADA is requesting that the Player be sanctioned by an ineligibility period of one year whereas both the FIVB and Berrios are requesting that the period of ineligibility of three months decided in the first instance be confirmed.
88. Furthermore, referring to case CAS 2006/A/1175, *D. / International DanceSport Federation*, the Respondents claim that the applicable sanction set by the FIVB falls within its discretion, and that “*such exercise of discretion is to a very limited extent subject to CAS scrutiny.*”
89. The Panel disagrees that such discretion can be invoked as a matter of law and principle, even if CAS panels may consider that the circumstances warrant it following a disciplinary body’s judgment and if in certain cases CAS has considered that the sanction should only be reviewed if it is evidently and grossly disproportionate to the offence (see e.g. cases CAS 2009/A/1870, *WADA v. Hardy & USADA*, para. 125, CAS 2009/A/1918 *W. v. Hellenic Football Federation*, para. 106 and references therein).
90. Indeed, in determining, as an international appellate body, the correct and proportionate sanction, CAS panels must also seek to preserve some coherence between the decisions of the different federations in comparable cases in order to preserve the principle of equal treatment of athletes in different sports. In that connection the introduction to the WADA Code expressly states that two of its purposes are to promote equality for Athletes worldwide and to ensure harmonization of anti-doping programs. As the panel in Oliveira notes, a sanction must further comply with WADA’s “*objective of proportionate and*

⁵ At para 9.14.

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consistent sanctions for doping offences based on an athlete's level of fault under the totality of circumstances."

91. Moreover, the Panel has full power to review the matter in dispute pursuant to Rule 57 of the Arbitration Code.
92. The Panel will therefore examine with full powers what it deems the appropriate sanction to be within the bounds of the Parties' prayers for relief requesting a one-year period of ineligibility on Appellant's side and a three-month period on the side of both Respondents.
93. As shall now be examined, in making that determination, the Panel must focus on the Player's degree of fault.

The degree of fault

94. In keeping with Article 10.4 of the WADA Code, Article 9.4 of the FIVB Rules provides that "*The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.*"
95. The commentary to Article 10.4 of the WADA Code indicates that "[i]n 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 behavior."
96. The foregoing commentary goes on to underline that "*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 or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article.*"
97. The Panel finds that such circumstances are indeed not relevant for assessing an athlete's degree of fault. Consequently, the Respondents' submission that the sanction under the FIVB Decision is proportional because it has caused Berrios to miss out on a large number of international events and cost him his professional contract in France is rejected.
98. As to the criteria for assessing the degree of fault, in Oliveira, the panel found a reduction to the period of ineligibility appropriate because the athlete had taken steps that "*constitute the exercise of at least some degree of care to ensure she did not take any banned substances.*"
99. In the context of contaminated supplements, the panel in case CAS 2005/A/847, *Knauss v. FIS* highlighted the large number of public warnings and internationally published cases on the risks of mislabeling and/or contamination of nutritional supplements.⁶ In Oliveira, the panel stressed that since these risks "*now are generally known or at least foreseeable,*

⁶ At para. 13-14.

all athletes must exercise reasonable care to ensure a nutrition supplement does not contain a banned substance.”

100. The Panel finds that Berrios has failed to exercise such reasonable care and finds on the contrary that he was quite negligent, notably for the following reasons combined:
- Although dietary weight loss products may not in the strict sense of the term be deemed a “food supplement”, in essence their use requires the same degree of circumspection and care on the part of an athlete as the use of food supplements. Indeed, it is easy to understand for an athlete that in many sports losing weight can in various manners enhance performance and that doing so very fast using natural products is not necessarily easy to achieve, while at the same time it is known that certain substances characterized as stimulants also act as appetite suppressants (as is the case of Sibutramine according to the FDA), meaning that there is a risk that such substances be found in medicaments or health products aimed at accelerated slimming/fast diets.
 - Accordingly, within their responsibilities to take great care to avoid the use of any doping products, athletes in general must be on their guard when considering the ingestion of any weight-losing product, whether in the form of a medicament or a so-called natural dietary product.
 - As a very experienced international athlete required to be knowledgeable of doping issues and risks, Berrios had no excuse not to be very careful in that respect.
 - In addition, Berrios understood this need for caution since he did make some enquiries about the Product rather than simply ingesting it without any forethought.
 - Berrios however overlooked one of the most basic actions of prudence which he could easily and should have taken in the circumstances, which would have been to consult his doctor (or this team’s medical staff) who could have warned him that even if the Product’s label did not mention any form of stimulant or prohibited substance it could be tainted, particularly since at the time he was already consulting a sports doctor for his knee problem.
 - Furthermore, just as it is risky to purchase/ingest food supplements of any type without enquiring directly with the manufacturer and having them analyzed, it was naïve and a lack of diligence on Berrios’ part to trust the recommendation and assurances of a mere employee of a health shop in determining whether the Product was risk-free in terms of its compatibility with anti-doping requirements.
 - Although Berrios did do some research on Internet, the evidence adduced in this proceeding indicates that if he had pushed the research further, e.g. with the advice of his doctor, he would have been able to find the nationwide alerts to consumers by the FDA dating from 2009, in which it warned that “Fatloss Slimming” is among 72

identified weight loss products that contain undeclared, active pharmaceutical ingredients, including Sibutramine.

101. Having found that Berrios' degree of negligence is quite significant for the above reasons and in light of cases mentioned hereafter, the Panel considers it would not be proportionate to reduce the period of ineligibility by more than one half of the maximum sanction of two years stipulated in Article 9.4 of the FIBV Rules, i.e. to reduce the sanction to a period below the one-year suspension being requested by WADA:
- The Respondents argue that the case resembles to case CAS 2006/A/1175, *D. / International DanceSport Federation*, since both cases concern the unintentional ingestion of Sibutramine. However, the panel in that case did not examine the degree of fault of the athlete, and the circumstances of that case cannot therefore be compared to the circumstances of the current case. Berrios also refers to two other cases of athletes who were sanctioned by the All Russian Athletic Federation for using Sibutramine, but those are first-instance cases, i.e. do not offer guidance as to the position of CAS panels as an international appellate body, and in addition the Panel has insufficient information about these cases for it to draw an analogy.
 - Case CAS 2008/A/1490, *WADA v. USADA and Thompson*, and decision No. 77 190 E 00447 08 of the American Arbitration Association, *USADA v. Brunemann*, which are both extensively described in Oliveira, concern cases in which the respective panel took into consideration factors such as inexperience at the professional level, the lack of any formal drug education, and the fact that an athlete inquired about the food supplement with the distributor. In both cases, the total period of ineligibility was reduced by 50%.
 - In Oliveira, the athlete had taken a supplement to help combat fatigue and to maintain her stamina during cycling training sessions, but she had failed to thoroughly research the product, despite the fact that she bought it from a manufacturer that also supplies supplements to bodybuilders; this last fact was clear from a cursory glance at the company's internet site. Moreover, she failed to check carefully the label of a new supply of supplements she received, which listed the specified substance (although under a different name). On the other hand, the panel took into consideration the fact that the athlete had consulted with a physician, was rather inexperienced, had not received any drug education prior to her first in-competition test, did not knowingly ingest a lawful stimulant, and did not receive any formalized anti-doping instruction or training. Comparing these circumstances to other cases in which athletes were granted a reduction in their ineligibility period, the panel found that a period of ineligibility of 18 months was proportional and consistent with similar cases.
102. In conclusion, the Panel would like to underline that it believes that Berrios did not intend to cheat or enhance his sport performance. On the contrary, at the hearing Berrios made a very good impression on the Panel, and it has no doubt he is the role model in his sports environment that some of the statements on record describe him to be. It is therefore

unfortunate that he made this one-time mistake that is inconsistent with his otherwise clean anti-doping record. To be in keeping with the applicable rules and to meet the need of promoting equality of athletes worldwide the panel must nevertheless apply a sanction that is proportionate to the quite significant lack of diligence Berrios demonstrated in purchasing and ingesting the Product. Thus, for the reasons indicated above, Berrios is declared ineligible to compete in all sporting competitions for a period of one year.

Start date of ineligibility period

103. Article 10.9 of the WADA Code and Article 9.9 of the FIVB Rules provide the Panel with some discretion as to when to commence the period of ineligibility. The Panel takes note of the fact that when confronted with the results of the analytic tests Berrios promptly accepted a provisional suspension from the FIVB on July 13, 2010. On the same day, Berrios waived his right to have the B sample tested, thereby acknowledging the anti-doping rule violation, in order to create the opportunity for an expedited hearing. Berrios has not competed since the start of his provisional suspension. Despite Berrios' cooperative attitude in advancing the process, a convenient hearing date could not be found at short notice. In view of these factors and based on article 9.9 of the FIBV Rules which enables to "... *start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection...*," the Panel determines that Berrios' suspension will run from May 27, 2010.

IX. COSTS

104. Rule 65.2 of the Arbitration Code provides that proceedings shall be free in a disciplinary case of an international nature.
105. Rule 65.3 of the Arbitration Code provides that the parties shall advance the costs of the parties, witnesses, experts and interpreters, and that the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
106. Having taken into account the nature of these proceedings, the conduct and financial resources of each of the parties, and the frequent practice of the CAS in doping appeal cases, this Panel pronounces this Award without costs except for the Court Office fee of CHF 500 already paid by WADA. Each party shall bear its own costs.

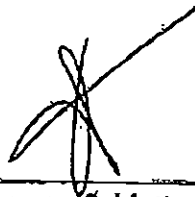
ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency on September 15, 2010 is partially upheld.
2. The decision of the Fédération Internationale de Volleyball of August 4, 2010 is set aside.
3. Mr. G. Berrios is declared ineligible for a period of one year, commencing on May 27, 2010.
4. The award is pronounced without costs, except for the Court Office fee already paid by the World Anti-Doping Agency, which is to be retained by the Court of Arbitration for Sport.
5. Each party will bear its own costs.
6. All other requests for relief are rejected.

Lausanne, Switzerland, April 28, 2011.

THE COURT OF ARBITRATION FOR SPORT



Romano Sublotto QC
President