



Arbitration CAS 2013/A/3431 P. v. Fédération Internationale de Volleyball (FIVB), award of 25 September 2014

Panel: Mr Juan Pablo Arriagada Aljaro (Chile), President; Mr Roberto Moreno Rodriguez Alcalá (Paraguay); Mr Sofoklis Pilavios (Greece)

Beach Volleyball

Doping (Ecgonine methyl ester)

Burden of proof

Duty of care

1. **The party alleging the existence, termination or modification of an obligation must prove such circumstances. Or in other words, a party claiming the existence of circumstances releasing it from responsibilities resulting from rule violations, based on certain facts or factual propositions, has the burden of proving the effectiveness of such facts, it being insufficient to merely affirm or declare them, without proving them.**
2. **One of the main principles in the context of anti-doping control in sport is that an athlete must be extremely careful with the food contents, fluids, and in general, with any products that he or she may ingest, either for nutrition or therapeutic purposes, as they may contain some substance identified on the WADA Prohibited List. In case an athlete is recommended a certain product to counter a certain effect (e.g. consequences of altitude) and then consumes the product in circumstances different from the ones that it was recommended for (e.g. stomach pain), this constitutes a violation by the athlete of his/her “duty of care” as it is not acceptable that an athlete (here: competing at World Championships level) decides, with no previous medical assistance, to ingest substances that have a therapeutic effect, without analyzing the consequences that it may have on his/her health or of a forbidden substance entering his/her body.**

I. THE PARTIES

1. P. (the “Athlete” or the “Appellant”) is a volleyball player from Paraguay, who during the relevant times, competed in beach volleyball. She is a member of the Paraguayan Volleyball Federation, affiliated to the Fédération Internationale de Volleyball.
2. The Fédération Internationale de Volleyball (the “FIVB” or the “Respondent”) is the governing body of volleyball and beach volleyball in the world.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings and the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.
4. On 2 July 2013, the Appellant provided a urine sample during in-competition testing at the FIVB Beach Volleyball World Championship in Stare Jablonki, Poland.
5. On 25 July 2013, the FIVB was notified of an Adverse Analytical Finding (“AAF”) for the Appellant’s A sample for the prohibited substance “Cocaine metabolite Ecgonine methyl ester”, by the World Anti-Doping Agency (“WADA”) accredited Laboratory in Warsaw, Poland.
6. On the same day, the FIVB informed the Paraguayan Volleyball Federation (the “Federation”) of the Athlete’s AAF and through the Federation, informed the Athlete of her right to request the analysis of the B sample. In the same letter, the FIVB imposed a provisional suspension on the Athlete.
7. By email dated 1 August 2013, the Athlete requested to have her B Sample opened and analyzed. She also sent a written statement to the FIVB in Spanish explaining how the substance entered her body.
8. On 12 September 2013, the FIVB informed the Athlete that the analysis of the B-sample confirmed the A Sample result.
9. On 23 September 2013, a hearing was held before the FIVB Disciplinary Commission. The Athlete and her representative participated in the hearing and had the right to state their position with respect to the AAF.
10. On 19 November 2013, the FIVB Disciplinary Commission rendered a decision (the “Appealed Decision”) finding that the Appellant committed an anti-doping rule violation due to the presence of the prohibited substance “Cocaine metabolite Ecgonine methyl ester” in her sample. The FIVB Disciplinary Commission also ruled that while the Athlete was able to prove how the substance entered her body, she failed to prove “lack of significant fault or negligence” under Article 10.5.2 of the FIVB Medical Regulations and therefore, the Athlete was sanctioned with a two-year period of ineligibility.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

11. On 10 December 2013, the Appellant filed her Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the “Code”). In her submission, the Appellant nominated Mr. Roberto Moreno, attorney-at-law in Asunción, Paraguay, as arbitrator and suggested that this arbitration be conducted in Spanish.

12. On 20 December 2013, the Appellant filed her Appeal Brief in accordance with Article R51 of the Code. This document contained a statement of the facts and legal arguments. The Appellant challenged the Appealed Decision, submitting the following requests for relief:
 - a) To annul the decision of the FIVB Disciplinary Panel in its entirety;*
 - b) In subsidy, to reduce the Period of Ineligibility to one year, starting from the date of the sample collection (i.e. 02 July 2013);*
 - c) To decide that each party shall bear its own costs and legal fees”.*
13. On that same day - 20 December 2013 - the Respondent informed the CAS Court Office that it did not agree to conduct these proceedings in Spanish and that it nominated Mr. Sofoklis Pilavios, attorney-at-law in Athens, Greece, as an arbitrator. Later that day the CAS Court Office acknowledged receipt of the Respondent’s letter and given the parties’ disagreement in the language of the proceeding, confirmed that such appeal would be conducted in English in accordance with Article R29 of the Code.
14. On 27 January 2014, the FIVB filed its Answer in accordance with Article R55 of the Code. The FIVB’s Answer requested the following relief:
 - a To dismiss the present Appellant’s appeal and uphold the decision taken by the FIVB Disciplinary Panel on 19 November in full;*
 - b. to order the Appellant to pay the entire costs of the present arbitration, if any;*
 - c. to order the Appellant to pay the entire costs for the Respondent’s legal representation and assistance as well as other costs incurred by the Respondent in connection with this arbitration, to be submitted by the Respondent at a larger stage in these proceedings.*
15. On 17 March 2014, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter is constituted as follows:
 - Mr. Juan Pablo Arriagada Aljaro, attorney-at-law in Santiago, Chile, as President;
 - Mr. Roberto Moreno Rodriguez Alcalá, attorney-at-law in Asunción, Paraguay, and;
 - Mr. Sofoklis P. Pilavios, attorney-at-law in Athens, Greece, as arbitrators
16. On 1 April 2014, the CAS Court Office, on behalf of the Panel and pursuant to Article R57 of the Code, sent a request for various documents and information to the South American Volleyball Confederation, the Bolivian Volleyball Association, and the Peruvian Volleyball Association.
17. On 3 April 2014, the Peruvian Volleyball Federation provided its response to the Panel’s request.

18. On 4 April 2014, the CAS Court Office, on behalf of the Panel and pursuant to Article R57 of the Code, sent a request for various documents and information to the Peruvian Olympic Committee, the Bolivarian Sports Organization, and the South American Volleyball Confederation. The Panel's request directed to the Peruvian Olympic Committee was ultimately forwarded to Dr. Tyrone Flores Pavon, President of the Anti-Doping Control Commission of the Bolivarian Sports Organization. All these recipients responded to the CAS Court Office in some form, and such responses were duly forwarded to the parties.
19. On 5 May 2014, at the request of the Panel, the Appellant submitted written witness statements for Pedro Paulo Costa Medeiros, Wilfred Ediger, and Larissa Schaerer Castillo.
20. On 12 May 2014, the Respondent notified the CAS Court Office that since Mr. Ediger and Ms. Castillo are "character witnesses", the Panel was free to accept their statements as they would not be presented at a hearing. Mr. Costa, however, would be presented as a witness subject to direct and cross examination at a hearing.
21. On 2 June 2014, the Appellant and FIVB returned a duly signed copy of the Order of Procedure.
22. On 24 June 2014, upon agreement of the parties and Panel, a hearing was held in Buenos Aires, Argentina. At the outset of the hearing both parties confirmed that they had no objection to the constitution and composition of the Panel.
23. In addition to the Panel and Mr. Brent J. Nowicki, Counsel to the CAS, the following persons attended the hearing:

For the Appellant:
 - Dr. Ariel Reck, Counsel;
 - P., Appellant
For the FIVB:
 - Mr. Andreas Zagklis, Counsel;
24. The Panel heard evidence, by telephone, from Mr. Pedro Paulo Costa, who was the Appellant's former coach and called as a witness by the Appellant. Each party and the Panel had the opportunity to examine and cross-examine Mr. Costa. The parties then had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.
25. Before the hearing was concluded, both parties expressly stated that they did not have any objection to the procedure adopted by the Panel and that their right to be heard had been respected.
26. The Panel confirms that it carefully heard and took into account in its discussion and subsequent deliberations all of the submissions, evidence and arguments presented by the parties, even if they have not been specifically summarized or referred to in the present award.

IV. SUBMISSIONS OF THE PARTIES

27. The submissions of the Appellant, in essence, may be summarized as follows:

- As an initial request, the Appellant seeks the annulment of the decision, as it infringes the technical requirements of WADA to report the existence of an AAF.
- According to the Appellant, the FIVB Medical Regulations establish in Article 4 that in the case of Non-Threshold Substances, in classes S6, S7, S8, S9, and P2, should not be reported below 50% of the Minimum Required Performance Level (the “MRPL”). Because the substance detected in the urine’s sample of the Athlete was in a range below of 50% MRPL, such AAF should not have been reported.
- As an alternative claim, the Appellant requests the reduction of the period of ineligibility due to the existence of fault in this case, i.e. lack of significant fault or negligence, pursuant of the provisions in Article 10.52 of the FIVB Medical Regulations.
- The Appellant further argues that before the FIVB Disciplinary Commission, the Athlete explained satisfactorily how the prohibited substance entered her body, which occurred through the ingestion of coca candies; however this commission did not accept that the mentioned ingestion would have been without lack of significant fault or negligence.
- P. argues that she is an almost amateur athlete, that she never played volleyball outside of South America and that she lacks all support from her federation (even to the extent that she had to assume all the expenses from air tickets and accommodations to compete in the World Cup in Poland). Moreover, she adds that she had virtually no formal education in matters of doping control and that only once in her career, before the World Cup, was she subjected to anti-doping control.
- On the other hand, the Appellant recognizes she ingested the coca candies, but notes that they were recommended to her and other athletes by the organizers and doctors of the so called “Bolivarian Games” that took place in Bolivia, a few months before the World Cup in Poland, as a way of reverse the symptoms caused by the altitude, a very common practice in South America, along with coca tea. These products are freely passed to the competitors at the event by the event organizers, without medical prescription needed. Despite the open use of these coca candies, the Appellant did conduct some internet research so as to verify that the product was safe for consumption.
- In regards to the “duty of care”, the Appellant expresses that it is very important to keep in mind that the coca candies had a wrapper that indicated that it was a “100% natural” product and that one leaf of the coca plant was shown, which in no case could have been associated with illegal cocaine, which is the illegal substance.

- She expresses that she did not, under any circumstance, ingest the coca candies to enhance her athletic performance.
- Finally, it is requested that in case the Panel rejects this second petition, the starting date of the ineligibility period becomes the date of the sample collection, i.e., 2 July 2013, instead of the date of the FIVB communication of provisional suspension, which occurred on 25 July 2013.

28. The submissions of the FIVB, in essence, may be summarized as follows:

- As an initial matter, the FIVB argues that the urine sample taken from the Appellant meets the technical requirements of WADA, as it contains the presence of a forbidden substance in a range superior to 50% MRPL. It also adds that in this case an AAF is present, as is the case in the Appellant's A and B samples, presence of the substance "Cocaine metabolite Ecgonine methyl ester" was found in quantities superior to 50 ng/mL. In fact, sample A contained 158,13 ng/mL of the substance and sample B contained 56.24 ng/mL of the substance.
- It expresses that the Appellant's argument is apparently coming from an incorrect interpretation of the Analysis Results Record issued by the Laboratory. This, as in the section titled "Details concerning Finding", the Analysis Results Record states "*Cocaine and Benzoyllecgonine were detected in the range below of 50% MRPL*". And the Appellant interprets this as if the substance encountered in the sample was in a range inferior to 50% of the MRPL, which is a mistake, because she showed doping positive for "cocaine metabolite Ecgonine methyl ester", and not for cocaine or benzoyllecgonine. This refers to only the information that the laboratory delivers in addition to a positive doping test. It is enough to just read the laboratory report to realize that they did actually report an AAF. Therefore, the Appellant's argument cannot prevail on this point.
- Separately, the FIVB maintains that P. did not prove her lack of significant fault or negligence to justify a reduction of the period of ineligibility.
- The Respondent does not dispute how the forbidden substance got into her body (i.e. vis-à-vis the coca candies). However, by application of Articles 10.4 and 10.5 of the FIVB Medical Regulations, it is only possible to reduce the period of ineligibility to the extent that lack of significant fault or negligence can be demonstrated.
- In regards to the lack of international experience and formal anti-doping education, the FIVB indicates that the Athlete did have enough experience to know that she could not ingest coca candies. She played professionally since she was 17 years old and participated at a high level in South America during her career. Moreover, only a few months before participating in the World Cup, she completed modules of the WADA Code, through the "Real Winner" program, so she was aware of her responsibilities as an athlete and her duty of care.

- Regarding the fact that the coca candies may have been recommended by the organizers and doctors of the “Bolivian tournament”, being this argument accepted by the CAS jurisprudence, it was the Appellant who had the burden of proof, but failed to establish any evidence of such recommendation. Moreover, the FIVB states that according to the Appellant she was recommended to ingest coca candies to reverse the symptoms of the altitude; however, she admits that in Poland, which is not a country of high elevation, she ingested the candies because of stomach pains. The difference between why she received the candies (i.e. elevation) and the purpose for ingestion in Poland (i.e. stomach pains) does not match up, and should be disregarded for purposes of the Appellant’s argument for the lack of significant fault or negligence.
- Moreover, it is irrelevant that the coca candies were freely distributed without the need of medical prescription as they still contain forbidden substances.
- Finally, with respect to the deceptive label on the product and the information researched by the Appellant on the internet, the FIVB expresses that the sole fact that the label of the product contained the words “Coca-Candy Leaf” and “Coca flour” states a clear reference that the product is based on the coca plant, which is the source of cocaine. Therefore, the Appellant should have done the obvious connection that the use of the coca plant may lead to a positive result in a doping control.

V. ADMISSIBILITY

29. Article R49 of the Code provides as follows:

In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit of an appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties.

30. Article 13.2 and 13.2.1. of the FIVB Medical Regulations rules:

13.2. A decision that an anti-doping rule violation was committed, a decision imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; a decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons (including, for example, prescription); a decision under Article 10.10.2 (prohibition of participation during Ineligibility); a decision that the FIVB or its National Federation lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences; a decision by any National Federation not to bring forward an Adverse Analytical Finding or an Atypical Finding as an anti-doping rule violation, or a decision not to go forward with an anti-doping rule violation after an investigation under Article 7.4; and a decision to impose a Provisional Suspension as a result of a Provisional Hearing or otherwise in violation of Article 7.4 may be appealed exclusively as provided in this Article 13.2.

13.2.1 Appeals Involving International-Level Athletes In cases arising from competition in an International Event or in cases involving International-Level Athletes, the decision may be appealed exclusively to CAS in accordance with the provisions applicable before such court.

31. In its turn, Article 13.6 states that: *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.*
32. The Appealed Decision was notified to the Appellant on 19 November 2013 and the Statement of Appeal filed on 9 December 2013, thus within the twenty-one (21) day deadline.
33. It follows, therefore, that the appeal is admissible. Furthermore, no objection has been raised by the Respondent.

VI. JURISDICTION

34. The jurisdiction of the CAS, which is not disputed, derives from Article R47 of the CAS Code and Article 13 of the FIVB Medical Regulations.
35. Article R47 of the Code provides as follows:

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

36. As set forth above, Article 13 of the FIVB Medical Regulations provides an international athlete with a right of appeal directly to the CAS.
37. Moreover, the Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure. It therefore follows that the CAS has jurisdiction to decide the dispute.

VII. APPLICABLE LAW

38. Article R58 of the CAS Code provides the following:

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

39. The Appellant states that given the international dimension of the case, the FIVB Regulations must apply on a primary basis, followed by the application of the WADA Code, and Swiss law in subsidiary.

40. The Panel agrees with the Respondent (without objection from the Appellant), and confirms that this dispute shall be resolved in accordance with the FIVB Regulations, with the WADA Code and Swiss law in subsidiary.

VIII. MERITS

A. The Main Issues

41. In view of the above, the main issues to be resolved by the Panel are:
- i. Was the Athlete's AAF properly reported under the technical requirements of the FIVB Medical Regulations?
 - ii. Did the Athlete lack of significant fault or negligence so as to allow a reduction of the period of ineligibility?
- i. Was the Athlete's AAF properly reported under the technical requirements of the FIVB Medical Regulations?*
42. The Appellant requests that the Panel annul the Appealed Decision, as it infringes the technical requirements of WADA to report the existence of an AAF. According to the Appellant, Article 4 of the FIVB Medical Regulations establish that Non-Threshold Substances in classes S6, S7, S8, S9 and P2 should not be reported below 50% of the MRPL. In the case at hand, continues the Appellant, the substance detected in the urine's sample of the Athlete was in a range below of 50% MRPL.
43. In response, the FIVB argues that the Appellant's argument was based on an incorrect understanding of the laboratory report that analyzed the urine samples of the Athlete, since it isn't enough just to read the report in order to realize that a forbidden substance was found in a range superior to the permitted level. Moreover, in the hearing and before presenting their preliminary allegations, Counsel for the FIVB asked Counsel for the Appellant if the Athlete continued to sustain such argument, to which the latter expressly recognized the existence of an AAF but said that the Appealed Decision was invalid, as there was a contradiction in content.
44. In order to resolve this issue, the Panel will consider that the following facts are undisputed, as they were recognized as such by the parties when specifically asked by the President of the Panel:
- i. Article 2.1. of the FIVB Medical Regulations prohibits the presence of a Prohibited Substance or its Metabolites or Markers in an athlete's Sample;
 - ii. Cocaine is a non-specified stimulant (S.6.a) prohibited under the 2013 WADA Prohibited List;
 - iii. Cocaine is a Non-Threshold Substance, i.e. its mere presence is prohibited;

- iv. MRPL values are relevant for the detection and identification of Non-Threshold Substances by a Laboratory;
 - v. AAFs should only be reported if the quantity detected is above 50% of the MRPL;
 - vi. Ecgonine methyl ester is a metabolite of cocaine;
45. Having said the above it corresponds then to analyze the content of the report from the laboratory that analyzed the urine samples of the Athlete and were supported by the evidence in the file.
46. The laboratory report referring to the sample A6055748 indicates in its second page the following:

1.2. Conclusion

Result: Metabolite of Cocaine: Ecgonine methyl ester.

Remarks: According to "The WADA 2013 Prohibited List" Cocaine is included in the group S6-Stimulants and it is prohibited in sport in competition.

Cocaine and Benzoyllecgonine were detected in the range below of 50% MRPL.

Analysis of the sample 6055748 resulted in an adverse analytical finding because we detected metabolite of cocaine methyl ester above 50% MRPL. In this sample we see also cocaine and benzoyllecgonine but in low 50% MRPL, the result of this sample would have a negative status. In this situation, the sample 6055748 has the status of the AAF.

47. Meanwhile, the laboratory report regarding sample B6055748 indicates in its second page the following:

1.2. Conclusion

Result: Metabolite of Cocaine: Ecgonine methyl ester

Remarks: According to "The WADA 2013 Prohibited List" Cocaine is included in the group S6-Stimulants and it is prohibited in sport in competition.

48. From the above it is clearly concluded, first, that the substance detected in the urine samples of the Athlete was a metabolite of cocaine: Ecgonine methyl ester, and second, such substance was detected in an amount exceeding 50% MRPL. It means that we are effectively in presence of an AAF and therefore the laboratory effectively fulfilled its obligation of reporting it.
49. The reference made by the laboratory report to the presence of "Cocaine and Benzoyllecgonine in the range below of 50% MRPL" is just additional information that it is delivered with respect to other substances detected in the urine sample, and it should not lead to the conclusion that we are not in the presence of an AAF. In addition, in spite of the similarity between the nomenclatures of both substances, there is an evident difference: the Appellant tested positive

for the cocaine metabolite Ecgonine methyl ester, not cocaine or Benzoyllecgonine and it was regarding the first substance that it was detected in a range above 50% MRPL.

50. Therefore, the Panel considers that an AAF was correctly reported by the laboratory thus constituting an anti-doping rule violation, sanctioned in accordance with Article 10 of the FIVB Medical Regulations.
 51. Separately, the Panel advises that in the hearing, the Appellant added a new argument to request the annulment of the Appealed Decision on the basis that the Appealed Decision was wrong and made incorrect statements with respect to the nature of the substance (metabolites) and whether it is banned in or out of competition. Because the rule states that an AAF shall not be reported if found below 50% of the minimum threshold, the accredited laboratory should not have mentioned the other substances (metabolites), presumably regardless of whether ingested in or out of competition. Due to the mere fact that this is an argument which was raised for the first time at the hearing, the Panel will not consider such argument. Nevertheless, the Panel notes that the inconsistency in the drafting of the Appealed Decision, if any, was simply a reference error, and as the Athlete's counsel noted, is not enough to annul the Appealed Decision.
 52. Based on the foregoing, the Panel rejects the petition of annulment requested by the Appellant and confirms that she committed an anti-doping rule violation, punishable in accordance with Article 10 of the FIVB Medical Regulations.
- ii. *Did the Athlete lack of significant fault or negligence so as to allow a reduction of the period of ineligibility?***
53. Given that the first petition presented in the appeal has not been granted, the Panel must now address the Appellant's secondary request, namely whether she is entitled to a reduced period of ineligibility applicable to her anti-doping rule violation.
 54. As an initial matter, the Panel notes that the Appellant established, to the satisfaction of the FIVB, how the prohibited substance entered her body. The Athlete recognized from the beginning that she ate the coca candies during her participation at the World Cup, in order to relieve the stomach pains she felt. And after being notified of the existence of the AAF, she has requested to a laboratory the examination of the contents of those candies, showing as a result that they are made of cocaine. The Panel is also satisfied that such coca candies are, indeed, the source of the AAF.
 55. The Appellant, however, seeks to reduce or eliminate any possible sanction based on the following factors:
 - a) The Athlete essentially participates at the amateur level of competition in a sport that is undeveloped in her country Paraguay;
 - b) The Athlete lacks international experience, since she had never competed outside South America;

- c) The Athlete lacks formal anti-doping education;
 - d) The product she ingested – coca candies – was recommended by the organizers of the Bolivarian Games (*“Juegos Bolivarianos”*).
 - e) The product was freely sold in any store, without medical prescription;
 - f) The label of the product and the information obtained from the internet indicated that it was a 100% natural product; and
 - g) When the Athlete felt the stomach pain during the World Cup event, she was unable to request medical assistance from a tournament doctor since neither she nor her coach spoke fluent English.
56. In addition to analyzing these factors, the Panel considers the testimony brought forth by Mr. Pedro Paulo Costa Medeiros during the hearing, as well as the written witness statements which were admitted to the file upon consent of the Respondent, in considering whether the Appellant is eligible for an elimination or reduction in any applicable period of ineligibility.
57. To simplify the analysis of these facts, the Panel will consider that from the sport profile of the Appellant accompanied in the written submissions, it is clear that volleyball is not the primary means of subsistence for the Athlete. In fact, only at the age of 26 she was eligible for the Paraguayan Volleyball Selection, which reflects a late development in the sport as a professional.
58. Also, it is evident to the Panel that beach volleyball in Paraguay is considered as a sport of the second order, which has no relevance, development or professionalization as the case, for example, of football, which entails less attention and dedication of resources for the performance of the sport. And, in that context, it is very possible that the Athlete is self-sufficient in many aspects related to her participation in tournaments, without having the technical or economic assistance from the association or federation, as she submitted to the Panel in her testimony.
59. Nevertheless, the Panel considers that the arguments exposed by the Appellant to require the reduction of the period of ineligibility must be analyzed in the light of the normative standard of “duty of care” which is claimable of all athletes regarding substances that they freely decide to ingest. In this regard, as one of the main principles in the context of anti-doping control in sport, it is abundantly clear that all athletes must be extremely careful with the food contents, fluids, and in general, with any products that he or she may ingest, either for nutrition or therapeutic purposes, as they may contain some substance identified on the WADA Prohibited List. As has been expressly established by CAS jurisprudence: *“In each case, the Athlete’s fault is measured against the fundamental duty which he or she owes under the Program and the WADC to do everything in his or her power to avoid ingesting any Prohibited Substance”* (CAS 2011/A/2518). In the same respect, in case CAS 2003/A/484 the Panel stated: *“We begin with the basic principle, so critical to anti-doping efforts in international sport ... that “[i]t is each Competitor’s personal duty to ensure that no Prohibited Substance enters his or her body” and that “Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present their bodily Specimens”. The essential question is whether [the athlete] has lived up to this duty ...”*. Furthermore, in case CAS 2005/C/976 & 986 a Panel offered the following opinion: *“The WADC imposes on the athlete a duty of utmost caution to avoid that a*

prohibited substance enters his or her body.... The Panel underlines that this standard is rigorous, and must be rigorous, especially in the interest of all other competitors in a fair competition.... It is this standard of utmost care against which the behavior of an athlete is measured if an anti-doping violation has been identified. "No fault" means that the athlete has fully complied with the duty of care".

60. This "duty of care" is explicitly indicated in the modules that were presented by the FIVB and that the Appellant completed in order to participate in the Beach Volley World Championships in Poland and that were attached as Appendix of the FIVB's reply, which was not objected to by the Appellant. As set forth in Module 1 (which contained a summary of the rules to be complied with): *"The following circumstances are taken to be violations of the rules: **As an athlete, you are responsible at all times for whatever enters your body.*** Also, Module 7 ("The Prohibited List"), indicates: ***"The Prohibited List is a fundamental tool for you as an athlete; - The Prohibited List gives all the substances and methods that athletes are forbidden from using in connection with participation in sport; - Go to WADA's "Prohibited List" to check if medication contains banned substances. You won't find the same name of the product so you have to check the declaration of contents to see if any of the substances in the product are banned or not"***.
61. Therefore, there is no doubt that the Appellant was completely aware that she had to fulfill this "duty of care", which implicated being – as is expected of any athlete participating in the highest event of a discipline - extremely careful and rigorous with the type of food she ingested, especially considering that she completed those modules in order to be able to participate in the highest international competition of a sport discipline, as is the case of a World Cup. This acknowledgement of the "duty of care" to which the Athlete was bound, prevails over any lack of sufficient formal education in anti-doping matters, which is one of the arguments used by the Appellant to excuse herself from the responsibility, which is insufficient to accomplish such purpose.
62. Both parties agreed that the forbidden substance detected, which was Ecgonine methyl ester, entered the Athlete's body through the ingestion of coca candies. In what they disagree and what is the object of the analysis to be undertaken by the Panel, is if that ingestion was made with lack of significant fault or negligence.
63. The main argument presented by the Appellant in this regard, is that said candies were recommended by the organizers and medical staff of the *Juegos Bolivarianos* held in Bolivia, to attack the symptoms caused by the altitude in that country. She states specifically in her appeal brief: *"As to (sic) the product, the coca candies, she got them directly from the organizers of the Tournament in Bolivia that was played in May/June 2013 a few months before the WC event. As we will prove with the offered testimonies to combat symptoms caused by altitude, the organizers and doctors from the tournament advised her and many other athletes, to drink coca tea and eat coca candies"*.
64. Being this the main argument on which the Appellant bases her case, it had to be proven during the arbitral procedure, especially considering that CAS jurisprudence has found that an athlete's acceptance of the recommendation of a doctor could under exceptional circumstances lead to a reduction (as admitted by the FIVB). It constitutes a universal legal principle, across all national legal systems, that the party alleging the existence, termination or modification of an

obligation must prove such circumstances. Or in other words, who claims the existence of circumstances disclaiming infringement responsibilities, based on certain facts or factual propositions, has the burden of proving the effectiveness of such facts, being always insufficient merely to affirm or declare them, without proving them. This is the doctrine known as “the burden of proof”.

65. This general principle has been recognized repeatedly by the CAS jurisprudence, in the sense that the party that wishes to prevail in a controversial issue, must comply with the burden of proof, that is, must present suitable and sufficient means of proof to credit the facts which the claims have been based on. The CAS jurisprudence in this matter is vast, and the ruling on the following cases might be cited: CAS 2005/A/968; CAS 2004/A/730; CAS 2012/A/2818; CAS 2007/A/1380; CAS 2009/A/1811 and CAS/2012/A/3009.
66. In this case, the Appellant failed to fulfill this burden of proof, as she did not in any way establish that the coca candies were recommended by the officials and medical staff of the mentioned “*Juegos Bolivarianos*”. None of the witness statements (including the witness testimony from Mr. Costa) presented confirms this fact. The Panel noted that the Appellant should have been more diligent in this regard and have presented as witnesses, for example, the medical staff or the organizers that did actually recommend the ingestion of the coca candies. Or, the testimony of the Appellant’s teammates or other competitors could have been presented to establish that the coca candies were, indeed, provided by the officials and medical staff. However, no evidence of the sort was provided to verify such argument, which prevented the Panel from confirming the veracity of this argument. Had the Appellant done so, a more sustainable argument possibly leading to the reduction in the period of sanction could have been established. In this regard, the Panel notes the Appellant’s argument that the ability to establish such argument is limited due to the lack of evidentiary powers in the arbitral procedure. The Panel disagrees, especially since the Appellant had a full and extensive right to present and request the evidentiary measures that she deemed necessary to have convinced the Panel that she did not actually act with significant fault or negligence (which it failed to do, as set forth below).
67. Notwithstanding the above and without prejudice to the foregoing provisions, in any case, the Panel analyzes the context of the consumption of the coca candies made by the Appellant during the Beach Volley World Championships in Poland. Even assuming, for sake of argument, that such candies were recommended to the Athlete to reduce the effects of the altitude while she was in Bolivia, it was for totally different circumstances than when the Appellant consumed the same candies in Poland, several months after the Bolivian tournament. First of all, it is fair to consider that there were no altitude effects to counteract, from the fact that the city of Stare Jablonki, Poland, is not located in altitude above the sea level, as was the case in Cochabamba, Bolivia. Second, the Appellant acknowledged that she consumed the coca candies to relieve stomach pain she had due to eating spicy food during the competition. Ergo, under the assumption that it was true she was recommended the candies to counteract the altitude effects as they commonly are headaches and dizziness, in Poland the Athlete decided to consume them as “painkiller”, without any medical prescription for it. The Panel observes that the decision adopted by the Appellant of consuming a product to substitute or as replacement of a medicine, in circumstances different from the ones that it was allegedly recommended for, effectively constitutes an infraction to the “duty of care” that was standing

over her, since it is not acceptable that an athlete competing at the World Championships decides, with no previous medical assistance, to ingest substances that have a therapeutic effect, without analyzing the consequences that it may have on his/her health or in a forbidden substance entering his/her body.

68. Therefore, even if one considers merely *ad arguendo* the contention of the Appellant that this was recommended by doctors in the *Juegos Bolivarianos* event, even in this case this is inert since it does not entail that the Appellant acted with lack of significant fault or negligence, as explained in the previous paragraph. Moreover, as will be explained below, the inconsistencies in her statement before the Panel during the hearing further weaken her arguments in this direction.
69. Also, the Panel considers that contrasted against the applicable duty of care standard, it is objectively required from the Appellant that she should have been more diligent in requiring assistance by the medical staff in the tournament in Poland, which was available for that purpose, before ingesting the quantity of 6 coca candies. The fact that she did not speak “English fluently” does not result in a real impediment. Not only because it is common that in these types of tournaments interpreters are available to translate the language of the athletes of the different citizenships participating in the competitions, but that, as established during the testimony of the Athlete’s coach, Mr. Costa, he understands the English language, which could have easily been used to facilitate the access to medical assistance in the tournament, and as the Appellant expressed in the hearing, Mr. Costa was within her reach at the time.
70. Additionally, the argument that the product had been sold freely, “over the counter”, with no need of medical prescription, was also not proven by the Appellant and therefore it cannot be considered as an element in order to reduce the period of ineligibility. In the opinion of the Panel, even if this argument was duly credited, it has no effect in diminishing the Appellant’s responsibility and in reducing the period of ineligibility, due to the fact that even if a product is available over the counter and it contains a prohibited substance then the sanction must apply.
71. In this same respect, the Panel advises that one of the various contradictions in which the Appellant incurred in her statement given during the hearing, when she mentioned that the pain on her stomach she felt on the day she consumed the coca candies, was due to eating fatty food, in circumstances that in the statement of appeal expresses that such sickness was due to eating spicy food, which is obviously different.
72. Another argument exposed by the Appellant to attempt justifying her lack of significant fault or negligence, is referred to the label of the product and the information obtained from the website that indicated that it was a product 100% natural, and in addition, that she never had the intention of increasing her sports performance. The FIVB accompanied the documents presented by the Appellant during the disciplinary procedure, among which a copy of the wrapping of the coca candies highlights, sent by the Appellant on 1 August 2013.
73. In this respect, the Panel reaches a different conclusion from the one sustained by the Appellant after analyzing the Athlete’s “duty of care”. In fact, the image of the candy wrapper indicates that the name of it is “*Menta Coca Candi Leaf*”, and highlights the word “*COCA*”; also, in the whole contour of the wrapper there are drawings of the coca plant leaves, associated directly with

the reference to the word “Leaf”. It is very difficult to sustain that a diligent athlete will fail to make a direct connection between the candies and the Coca plant, especially when it is a 100% natural product, in other words it is the same Coca plant turned into a candy and it expressly mentions that in the native language of the Athlete. Even if it is obvious that the substance in the candy, coca, needs further chemical processes to become cocaine, nonetheless it is hard to maintain that the connection between the candy and the prohibited substance is effortlessly to be established. This is aggravated when considering the number of candies that were ingested, as will be mentioned below. Thus, it is the opinion of this Panel that the fulfilling of the “duty of care” should lead an ordinary athlete to reasonably think that the product in question may have some relation with the cocaine, which is a forbidden substance included in the “WADA Prohibited List” and as a result, abstain from ingesting it.

74. On the other hand, the Panel notes that according to the reading of the aforementioned candy wrapper, as indicated in the print screens of the website <http://samandcans.net> (attached as Appendix 3 and 4 of the statement of appeal), the coca candies have the property of providing energy. Although the FIVB does not consider this element within its arguments, the Panel deems it necessary to analyze it, specifically in the context of the “duty of care”. Energizing products, in general, have the purpose, as the name indicates, of improving the performance of a person at the time of practicing sports, i.e. their purpose is to provide an extra dose of energy when a person performs physical exercise.
75. The Panel noted that in no moment during the proceedings before the FIVB as before the CAS, has the Appellant being charged of having consumed the coca candies in order to improve her sport performance and nothing has been proved to that respect. However, this issue is not under discussion, but whether she exercised or not the required duty of care. Here, the Panel cannot fail to mention that the most significant fault or negligence of the Appellant is that she decided to ingest 6 candies at the same time, one after the other, as she admitted in the hearing, without having self-questioned the effect that it might have in her sport performance from being an energizing product. It must be noted that it is not the same to ingest one or two candies, moments before a game, as six, which is a striking number. It is a minimally required conduct from an athlete that performs in even a semi-professional level, that being aware that a product has the power of being energizing, decides to consume it in higher than normal doses, during her participation in a World Cup sport competition, in a very different milieu from altitude (such as the one present in the *Juegos Bolivarianos* in Bolivia). Therefore, the Panel concludes that such behavior was at best significantly negligent and at worst simply reckless.
76. In addition to the considerations presented above, the Panel considers important to highlight that during the hearing, the statements presented by the Appellant and her witness Mr. Costa, presented new facts, which directly contradicted several of the factual elements presented by the Appellant herself previously during the procedure. Some of them have been indicated in the preceding paragraphs 72 and 75, but most shocking to the Panel was the Appellant’s revelation of the following facts, which were new and contradicted what was said up to this point by the Appellant:

- She suffered from chronic gastritis since she was 23 years old;
 - That given the chronic condition of her disease she had a permanent prescription;
 - That before the match she had to play during the World Championships, she felt stomach pains related to her gastritis and that is why she decided to eat the coca candies, 6 in total, one after the other, instead of using the medication she had been prescribed;
 - When asked why she ate 6 candies at once, she stated that it was because she liked them.
77. First of all, the Panel cannot fail to mention how striking it was to learn only in the hearing that the Appellant suffered from a chronic stomach disease and that she had to take permanent medication, since these facts were never mentioned during the disciplinary proceedings before the FIVB nor during the arbitral procedure before the CAS. Given the transcendence that such element might have had in the result of her appeal and the ample opportunity that the Appellant had to declare such condition, the Panel expresses its doubts about the effectiveness of it, because having being sustained and proven, clearly could have led to a reduction of the sanction applied.
78. It contributes to the previous question the fact that in spite of the Appellant's obligation to declare all the medication and substances that she had ingested to that date in the Doping Control Form, included as Appendix 3 on the FIVB reply, she did not mention that she takes any treatment for her chronic gastritis or that she had this medical condition.
79. Also, it has called the attention of the Panel the fact that the Appellant opted to ingest 6 coca candies when she felt stomach pain, instead of taking the medication that she had been prescribed. Based on her own admission, this seems inexcusable; why did she not take the regular medication that were at hand instead of candies that she was not used to take and that were allegedly given to her for altitude sickness? Along with that, it appears to be inconsistent with the fact that she had explained, in the first instance, that she consumed 6 candies at once, in order to relieve the stomach pain she felt, but when questioned by the Panel in this proceeding, the Athlete states that she consumed such a quantity of candy simply because she liked to consume candies.
80. In sum, not only the arguments that were expounded in her written submissions were not proven at any moment by the Appellant, even though she had the opportunity to do so, but her statements in the hearing (as well as those by Mr. Costa) actually subtracted verisimilitude to her position, as it exposed contradictions and weakened her case. Ultimately, while none of this entails that the Appellant acted in bad faith conduct or cheating – in fact, the FIVB expressly states that *"it does not consider the Appellant to be a cheat"* - it is undisputable that she has failed to submit convincing evidence to the Panel that she lacked significant fault or negligence so as to warrant a reduction in sanction, the only applicable legal condition that may authorize the Panel a transcendent decision to reduce the sanction for ingesting the prohibited substance of cocaine.
81. Finally, it must be insisted that contrary to some of the Appellant's suggestions to other effect, the decision to reduce the sanction according to the applicable rules is not based on an alleged

proportionality principle (e.g. the reference to CAS 2010/A/2307) or intention to cheat by the Athlete or otherwise but on the strict basis of the normative criterion established by art. 10.5.2 of the FIVB Medical Regulations of “no significant fault or negligence”, which as has been explained thoroughly was simply not met by the Appellant. Thus, the fact is that the Appellant has produced no argument to establish that the legal conditions for the reduction of the sanction have been met, and there is thus no other solution available to the Panel other than affirming the decision.

B. Conclusion

82. Based on the foregoing, and after taking into due consideration all the evidence produced and all the arguments made, the Panel finds that:
- i. The Appellant committed an anti-doping rule violation according to Article 2.1. of the FIVB Medical Regulations;
 - ii. The Appellant did not successfully demonstrate her lack of significant fault or negligence to justify a reduction of the 2 years period of ineligibility imposed upon her by the Appealed Decision, the only criterion for reduction of the sanction;
 - iii. The appeal, therefore, is dismissed.
83. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 9 December 2013 by P. against the Decision issued on 19 November 2013 by the FIVB Disciplinary Panel is dismissed.
2. The Decision issued on 19 November 2013 by the FIVB Disciplinary Panel is upheld.
- (...)
5. All other motions or prayers for relief are dismissed.