

CAS 2023/A/9926 Kanak Jha v. United States Anti-Doping Agency (USADA)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: The Hon. Hugh L. Fraser, Judge, Ottawa, Canada

in the arbitration between

Mr. Kanak Jha, United States of America

Represented by Mr. Howard Jacobs, and Ms. Katy Freeman, Attorneys-at-Law, Westlake Village, California, United States of America

- Appellant -

and

United States Anti-Doping Agency, United States of America

Represented by Mr. Jeff T. Cook and Mr. Spencer Crowell, Attorneys-at-Law, Colorado Springs, Colorado, United States of America

- Respondent -

I. PARTIES

1. Mr. Kanak Jha (the “Appellant” or Mr. Jha) is a 22-year old American Table Tennis athlete who competed for Team USA at both the 2016 and 2020 Olympic Games. He won four straight national table tennis titles from 2016 to 2019.
2. The United States Anti-Doping Agency (the “Respondent” or “USADA”) is the national anti-doping organization for Olympic, Paralympic, Pan American and Parapan American sports in the United States.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to explain its reasoning.

A. Background Facts

4. The Appellant is currently serving a twelve-month sanction for committing three whereabouts failures within a rolling twelve-month period, which is an anti-doping rule violation (ADRV”) under Article 2.4 of the World Anti-Doping Code (the “WADC”). In its letter of 1 December 2022 notifying the Appellant of the ADRV, USADA imposed a provisional suspension on the Appellant, with the option to “opt out” by 10 December 2022. The Appellant decided not to opt out of the provisional suspension shortly before that 10 December 2022 deadline.
5. Prior to the Appellant’s third missed test and the subsequent investigation into his whereabouts failures, the Appellant had planned to visit his sponsor, PingPod, in New York during his winter break in December 2022. The visit, originally scheduled to take place on 8 December 2022, was intended to strengthen the partnership between the Appellant and PingPod and to fulfill part of his sponsorship agreement, which obligated the Appellant to take part in exhibitions or public appearances on behalf of PingPod. The Appellant’s trip to New York was delayed until 14 December 2022.
6. On 14 December 2022, the Appellant participated in an exhibition at the PingPod location in Williamsburg, New York.
7. Shortly after deciding not to opt out of his provisional suspension, the Appellant sought guidance regarding what he could and could not do during the period of his suspension. He subsequently turned down an invitation to help promote a camp at his US club, 888 TTC, and to attend the US Open in Los Angeles as a spectator and sign autographs at a booth set up by his equipment sponsor.

8. On 17 December 2022, the Appellant’s coach, Mr. Jorg Bitzigeio, contacted USADA employee Ms. Emily Bench, requesting clarification on the specific activities prohibited while the Appellant was under provisional suspension. Ms. Bench replied to Mr. Bitzigeio on 20 December 2022, providing him with the language of Article 10.14 of the WADC.
9. On 21 December 2022, Mr. Bitzigeio responded to Ms. Bench’s email, requesting additional clarification.
10. On 27 December 2022, Ms. Bench replied to Mr. Bitzigeio, suggesting that Mr. Bitzigeio reach out to USADA with any additional questions. Also on 27 December 2022, Mr. Bitzigeio reached out to USADA via email, and spoke to USADA by phone on 4 January 2023, seeking further clarification as to what the Appellant could and could not do during his period of provisional suspension.
11. On 16 February 2023, a hearing was held in the whereabouts matter. The decision of Arbitrator Mr. Gary Johansen was issued on 15 March 2023, imposing a twelve-month sanction beginning on the date that the provisional suspension was imposed – i.e. 1 December 2022. The Appellant was therefore given credit for the period of provisional suspension that had already been served. The sanction was not appealed by any party with the right to appeal.
12. On 27 March 2023, the general counsel for USA Table Tennis (“USATT”) notified USADA via email, that on 14 December 2022, the Appellant participated in an exhibition match organized by an entity called PingPod. PingPod is a registered club with USATT.
13. On 14 April 2023, USADA sent the Appellant a letter informing him that USADA had been made aware of his participation in the 14 December 2022 PingPod event and requested that the Appellant provide an explanation. In his response submitted on 19 April 2023, the Appellant acknowledged participating in the event but asserted that he was unaware of PingPod’s affiliation with USATT.
14. On 24 April 2023, USADA sent the Appellant a letter notifying him that USADA was pursuing his participation in the 14 December 2022 PingPod event as a violation of his provisional suspension.
15. On 28 April 2023, PingPod wrote a letter in support of the Appellant. That letter stated the following:
 - The PingPod autonomous table tennis studios are “*very much intended to be different to the conventional club system and therefore independent of any member association*”;
 - Mr. Jha had advised PingPod of his provisional suspension and “*very clearly wanted to comply with it*”;
 - No one at PingPod advised Mr. Jha that PingPod was affiliated with USATT;
 - PingPod is neither identified as, nor promoted as, a table tennis “club”;

- PingPod locations (and PingPod social media) carry no USATT signage or mention of USATT affiliation; and
- PingPod has never hosted a USATT sanctioned tournament.

B. Proceedings before the American Arbitration Association

17. On 19 May 2023, USADA officially charged the Appellant with violating his provisional suspension (the “Appealed Decision”), and advised inter alia as follows: *“If you choose to contest the sanction proposed by USADA, you have the right to request a hearing. As described in the Protocol, you must inform us in writing by May 29, 2023, if you elect to proceed to a hearing before the American Arbitration Association (“AAA ”)”*.
18. On 29 May 2023, the Appellant timely requested a hearing on USADA’s determination that he had violated his provisional suspension, and USADA immediately requested that the AAA initiate a case.
19. After initiating a case with the AAA, USADA determined that any hearing challenging USADA’s finding that the Appellant violated his provisional suspension, must be heard by the Court of Arbitration for Sport (“CAS”), pursuant to the International Table Tennis Federation (“ITTF”) Anti-Doping Rules (“ADR”) Article 5.13.2 and 5.13.2.1, and Article 13.2.1 of the WADC since the Appellant is classified as an international-level athlete. Mr. Jha subsequently agreed to submit the appeal to CAS.
20. On 10 August 2023, the arbitrator in the AAA case, the Honourable Hugh L. Fraser (Judge in Ottawa, Canada), signed a Consent Order per the agreement of the parties, which inter alia closed the AAA proceeding and granted Mr. Jha a 21-day deadline to file his appeal at CAS (i.e. by 31 August 2023).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. On 23 August 2023, the Appellant filed his Statement of Appeal at CAS pursuant to Article R48 of the Code of Sports-related Arbitration (the “CAS Code”) (2023 edition), in which he requested that the dispute be conducted on an expedited basis further to Article R52 of the CAS Code (including a request that a hearing be held) and requested that the dispute be submitted to a sole arbitrator, particularly Judge Hugh Fraser (who was the arbitrator in the AAA dispute). The Appellant also designated that his Statement of Appeal was to serve as his Appeal Brief, further to Article R51 of the CAS Code. The Appellant also filed an application for legal aid along with his Statement of Appeal.
22. On 25 August 2023, USADA confirmed that it agreed to the admissibility of the Statement of Appeal, particularly that the deadline for the Appellant to file his appeal would be 31 August 2023 (as opposed to the deadline per Article 5.13 of the ITTF ADR, which provides that a decision must be appealed within 21-days of notification of the decision, which in this case would have been 9 June 2023 since the Appealed Decision was notified on 19 May 2023 to the Parties).

23. On 30 August 2023, USADA indicated inter alia that it agreed to conduct the proceeding on an expedited basis, as well as that it agreed to the appointment of a sole arbitrator in this case and particularly the appointment of Judge Fraser as Sole Arbitrator.
24. On 6 September 2023, the Respondent filed its Answer Brief in accordance with Article R55 of the CAS Code.
25. On 20 September 2023, after consultation with the Parties as to their availabilities, the Parties were requested to provisionally reserve 17 October 2023 for the hearing in this case.
26. On 5 October 2023, the Athletes' Commission issued the Order on the Appellant's request for Legal Aid.
27. On 6 October 2023, the CAS Court Office informed the Parties, on behalf of the Deputy President of the CAS Appeals Arbitration Division and further to Article R54 of the CAS Code, that the Sole Arbitrator appointed to decide these cases was constituted as follows:

Sole Arbitrator: The Hon. Hugh L. Fraser, Judge, Ottawa, Canada

28. Also on 6 October 2023, having taken into consideration the positions of the Parties in this regard, the Parties were informed inter alia that the Sole Arbitrator had decided to hold a hearing by video-conference in this case further to Articles R44.2 and R57 of the CAS Code, and the provisional hearing date of 17 October 2023 was confirmed.
29. On 10 October 2023, the Respondent signed and returned the Order of Procedure.
30. On 12 October 2023, the Appellant signed and returned the Order of Procedure.
31. On 17 October 2023, the hearing was held by video-conference. The Sole Arbitrator was assisted by Ms. Kendra Magraw, CAS Counsel, and joined by the following:

For the Appellant: Mr. Kanak Jha, Athlete;
Mr. Howard Jacobs, Counsel;
Ms. Katy Freeman, Counsel;
Mr. Roland Wiley, Observer; and
Mr. Jörg Bitzigeio, Witness.

For the Respondent: Mr. Jeff Cook, Counsel;
Mr. Spencer Crowell, Counsel;
Ms. Muriel Ossif, Witness.

32. At the commencement of the hearing, the Parties confirmed that they had no objection to the appointment of the Sole Arbitrator to preside over this case.
33. The Parties made submissions in support of their respective cases. The witnesses were examined as well. Before being heard, the witnesses were invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury under Swiss law. The Parties and the Sole Arbitrator had full opportunity to examine and cross-examine the witnesses. The witness evidence provided is summarized below.

i. Mr. Jha

34. Mr. Jha testified that he is a former Youth Olympic Bronze medalist in Table Tennis and competed in that sport as part of Team USA at the 2016 and 2020 Olympic Games. He was first sponsored by PingPod in January 2020. At that time, PingPod was a new concept involving table tennis (or ping pong as it is known recreationally) on demand. The Appellant recalled that he first visited a PingPod location in 2021, shortly after the Tokyo Olympic Games had concluded. He played table tennis for a few hours and spoke to some local players at the site. Mr. Jha saw this visit as an opportunity to strengthen the partnership that he had with PingPod.
35. Mr. Jha testified that the 14 December 2022 event was a pre-planned trip that would be similar to the 2021 event that he had attended. He stated that he had never played a tournament at a PingPod location. His understanding of PingPod was that it is geared towards recreational play, where interested players would sign up through an app.
36. When asked whether he considered opting out of the provisional suspension that had been imposed on him, Mr. Jha testified that his main goal was to compete at the Paris Olympic Games in 2024 and as long as he was able to preserve that option, he thought it was the better choice.
37. The Appellant testified that he had discussed the suspension with PingPod prior to attending the 14 December 2022 event. He confirmed that he did not discuss with PingPod whether participating in the event could potentially violate his provisional suspension.
38. When asked what PingPod had told him about what would take place at the event, Mr. Jha replied “*not much*”. As he recalled, he was not given any information about what the expectations were for him until he arrived at the New York location. He testified that he did not see any advertisements about the event prior to his attendance. He estimated that there were fewer than seventy-five people at the event.
39. Mr. Jha testified that he spent approximately two hours at the exhibition event on 14 December 2022, playing with local patrons, 3 to 5 points at a time, taking pictures, and eating food. From his recollection it was very much a social event. He also testified that he had been invited to appear at two other events, one being the US Open in Los Angeles, but after consulting with his lawyer, and learning that the two events were USATT sanctioned events, he chose not to attend.

40. Mr. Jha stated that he would have appealed to CAS if he knew that his suspension was going to end on 14 March 2024, but that the alleged violation was not notified to him until the appeal deadline had passed.
41. The Appellant testified that if his suspension ends on the original date of 1 December 2023, he will be eligible to commence training two months before the end of the suspension date which in this case would have meant that he was eligible to start training on 1 October 2023. He maintains that this preparation time is vital for him to be ready for the qualifying tournaments leading up to the 2024 Olympics.
42. The Appellant testified that he no longer has a world ranking as a result of the suspension and the absence of competitions. He believes that the U.S. Table Tennis Olympic trials will take place in early 2024 and he would have to win the U.S. Championships and the Pan American trials in early May 2024 to have any chance at competing in the Paris Olympics.
43. On cross-examination, Mr. Jha confirmed that he did not contact USATT prior to the 14 December 2022 event because he believed that PingPod was not affiliated with USATT.
44. Mr. Jha also confirmed that he did not contact USADA to seek any clarification of the terms of his suspension prior to the PingPod event, nor did he seek guidance from his legal counsel.

ii. Mr. Jörg Bitzigeio

45. Mr. Jörg Bitzigeio was a table tennis athlete before moving into coaching. He was the USATT High Performance Director from 2017 to 2019. He started to coach Mr. Jha in May 2017 and has known him since 2012.
46. Mr. Bitzigeio described PingPod as being more Ping Pong than Table Tennis. When asked about the distinction, he stated that Ping Pong is more recreational whereas Table Tennis is for the more serious, competitive players. Mr. Bitzigeio had never been to a PingPod location until August of 2023. He observed that the PingPod model is not like any club model. Mr. Bitzigeio recalled that at one point he inquired whether PingPod would be willing to join or become affiliated with USATT but they were not interested at the time. From his understanding, “*we were sure there was no affiliation*”.
47. Mr. Bitzigeio also recalled that PingPod wanted Mr. Jha to make a personal visit to one of their locations at least once a year.
48. After Mr. Jha was provisionally suspended, he and Mr. Bitzigeio discussed his options with regard to the 2024 Olympics. They knew that a twenty-four month suspension would mean that the Appellant would not be able to participate in the Paris Olympics, whereas a twelve-month suspension would allow him to have a chance to qualify for the Olympic Games.
49. Mr. Bitzigeio stated that there was no discussion with PingPod about the Appellant’s suspension because they were confident that PingPod was not a USATT signatory. Mr.

Bitzigeio added that the invitation to participate in the All American Air Table Tennis training camp was a “*no brainer*” in terms of turning down that request because he knew that All American Air Table Tennis was a signatory with USATT. He added that a request from Butterfly, one of Mr. Jha’s sponsors, was turned down for the same reason.

50. Mr. Bitzigeio testified that he and the Appellant wanted to understand what the suspension meant, so they reached out to USADA for some clarification. He found that the letter from USADA which tried to explain the provisional suspension rules, was somewhat complex. Mr. Bitzigeio recalled that he also reached out to the German Table Tennis Federation because German is his first language. He stated that he wanted to gain a better understanding of the long sentence that explained the provisional suspension.
51. Mr. Bitzigeio recalled sending a letter to someone from USADA named Ms. Emily Bench and that Ms. Bench suggested that he contact Mr. Spencer Crowell, a lawyer with USADA. He received two responses from Mr. Crowell: one before the Christmas holidays and one a little later, sometime after the holidays. Mr. Bitzigeio also recalled being very pleased about the decision not to attend the two events with co-signatory sponsors after seeing the word “exhibition” in the commentary at the bottom of the page of the USADA letter.
52. Mr. Bitzigeio echoed the Appellant’s concern over the timing of the end of the suspension. He acknowledged that no date has been set for the 2024 U.S. Olympic Table Tennis trials but believes that they must take place during the first quarter of the year.
53. On cross-examination, Mr. Bitzigeio confirmed that he did not contact USATT prior to 14 December 2022. He also confirmed that he was aware that Mr. Jha was represented by legal counsel experienced in this area.
54. At the close of the hearing, the Parties confirmed that they had received a fair hearing and had been given the opportunity to fully present their cases.

IV. PARTIES' SUBMISSIONS

55. The Sole Arbitrator confirms that he carefully heard and took into account in his decision all of the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

A. The Appellant’s Submissions

56. The basis of the Appellant’s appeal is their submission that: USADA failed to follow the applicable rules and regulations in rendering the Appealed Decision; failed to follow the rules and regulations of the WADC and the ITTF ADR in rendering the Appealed Decision; made improper assumptions in rendering the Appealed Decision; failed to accurately access the evidence submitted in rendering the Appealed Decision; and rendered a sanction that was inconsistent with recent sanctions.
57. The Appellant submits that the wording of the USADA notice of the provisional suspension did not include the word “exhibition” or any reference to Article 10.14 of

the WADC, and as a result the Appellant did not understand that his limited participation in an exhibition by his sponsor would be considered an activity “*under the jurisdiction of ITTF, USA Table Tennis, and the USOPC, or any clubs, member associations or affiliates of these entities, or other Signatories of the [WADC].*”

58. Mr. Jha also submits that the exhibition matches had been set up by PingPod as a private event, and furthermore, he was not aware at the time that PingPod was affiliated with USATT as a club member.
59. The Appellant states that he had no idea that Ping Pod was affiliated in any way with USATT, and had he believed otherwise, he would never have participated in the exhibition event, because his intentions were to always comply with the terms of his provisional suspension.
60. The Appellant submits that his efforts in contacting USADA directly and through his coach further demonstrated his commitment to honouring his suspension.
61. The Appellant highlights the fact that the PingPod website does not identify PingPod as a club, does not mention any affiliation with USATT and none of their locations or social media platforms have any signage or mention of USATT.
62. Furthermore, the Appellant observes that examination of PingPod’s website [<https://pingpod.com>] confirms the information provided by PingPod. The Appellant notes for example that the website does not identify PingPod as a club, and does not mention USATT; instead, PingPod is primarily positioned as a 24 hour a day location where it is easy to rent a table to play ping-pong with friends.
63. The Appellant observes that the “membership details” for PingPod, such as the Pod Time Perks, Additional Perks, or Guest Restrictions, give no indication that it is a competitive club or affiliated in any way with USATT. Neither do the coaching and classes pages on the website give any indication of USATT affiliation.
64. Mr. Jha also observes that while he had advised PingPod of his provisional suspension and “*very clearly wanted to comply with it*”, no one at PingPod mentioned that the entity was affiliated with USATT.
65. The Appellant maintains that he did not fully understand the specifics of the provisional suspension imposed on him, but sought numerous times to clarify his understanding by reaching out to USADA.
66. The Appellant submits that his participation at the PingPod exhibition on 14 December 2022 should not be considered a violation of Article 10.14.3 of the WADC and no sanction should be imposed on him. He maintains that even if he had known that PingPod was a member of USATT, there is no violation because the appearance at the PingPod facility was not a prohibited activity.
67. Alternatively, the Appellant submits that in the interest of fairness and under these unique circumstances, if a violation is found, the start date of his provisional suspension should be adjusted from 1 December 2022 to 15 December 2022 (i.e. the day after his

participation in the PingPod exhibition). He further submits that this alternative request would avoid a disproportionate consequence given his demonstrated attempts to understand the full meaning of his provisional suspension.

68. In support of this submission, the Appellant points to CAS 2005/A/830 where the CAS stated that *“the mere adoption of the WADA Code [...] by a respective Federation does not force the conclusion that there is no other possibility for greater or less reduction of a sanction than allowed by DC 10.5. The mere fact that regulations of a sport federation derive from the World Anti-Doping Code does not change the nature of these rules.”*
69. The Appellant submits that the principle of proportionality can still be applied to the sanction meted out against him, adding that the 2015 and 2021 versions of the WADC now expressly instruct tribunals to ensure that any sanction imposed complies with the principle of proportionality. He also argues that the WADC could not have envisioned every possible outcome or factual iteration of a sanction, in order to ensure proportionality in every instance.
70. The Appellant references a number of CAS cases where proportionality has been applied to reduce sanctions that would otherwise be applied under the WADC, such as *TAS 2007/A/2268, CAS 2010/A/2268, CAS 2006/A/1025, CAS/A4/2016*.
71. The Appellant also submits that when considering the applicability of the proportionality argument in this case, the Sole Arbitrator can obtain guidance from the first instance decision in *ITIA [the International Tennis Integrity Agency] v. Sydney Dorcil (SR/059/2023)*, where the lower level panel adjusted the start of a provisional suspension presumably as a result of proportionality considerations.
72. The Appellant argues that increasing his sanction by 3 months instead of 14 days for a single violation within the first two weeks of a lengthy suspension would be disproportionate; and that a proportionate suspension would start on 15 December 2022, the day after the PingPod exhibition.
73. The Appellant also submits that he would have appealed the CAS whereabouts decision had he known that the USADA complaint was underway.
74. In his Appeal Brief, the Appellant seeks the following relief:
 1. *“That the appeal of Kanak Jha is admissible;*
 2. *That the 19 May 2023 USADA Decision be set aside, or in the alternative, that the sanction imposed therein be reduced; and*
 3. *That the Respondent shall bear all costs of the proceedings including a contribution toward Appellant’s legal costs.”*

B. The Respondent’s Submissions

75. USADA submits that the Appellant was explicitly warned that he was prohibited from participating in activities authorized or organized by WADC signatories and any WADC-signatory member organizations and clubs, but he nevertheless violated his provisional suspension when he participated in PingPod's exhibition event on 14 December 2022.
76. USADA further submits that because the Appellant violated his provisional suspension by participating in this event, the rules require that he receive no credit for the time he spent provisionally suspended.
77. The Respondent submits that the Appellant's situation is governed by Article 10.14.3 of the WADC which prohibits athletes serving a provisional suspension from participating in certain events and activities. That Article states that:

“No Athlete or other Person who has been declared Ineligible or is subject to a Provisional Suspension may, during a period of Ineligibility or Provisional Suspension, participate in any capacity in a Competition or activity (other than authorized anti-doping Education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international – or national – level Event organization or any elite or national-level sporting activity funded by a governmental agency.”
78. The Respondent further submits that Article 10.14.3 of the WADC requires that any person who violated the prohibition against participation during a provisional suspension *“shall receive no credit for any period of Provisional Suspension served...”*
79. The Respondent also maintains that the WADC does not provide for a degree of fault analysis or opportunity for reducing the credit for a provisional suspension in such cases; and that the only issue to be determined, therefore, is whether the Appellant violated his provisional suspension.
80. The Respondent submits that the Appellant bore the sole responsibility to determine whether the events in which he participated were permitted under the WADC. USADA maintains that PingPod's affiliation with USATT was easily discoverable, in that its status as a member club was readily available on USATT's website by clicking on the “Clubs” option which then directed the user to the Club Memberships page. Searching PingPod by typing in the name would return a result of several PingPod locations, thus confirming that PingPod was a USATT-affiliated club.
81. USADA disputes the Appellant's claim that they never warned him that exhibition matches were prohibited, noting that exhibitions are just one example of an “activity”.
82. Furthermore, USADA submits that the word “activity” is incredibly broad and would prohibit participation in any capacity such as signing autographs, taking pictures, or playing in a few matches.

83. The Respondent submits that if the Appellant had questions about whether the PingPod activity might violate the terms of his provisional suspension, he only had to bring his inquiry to USADA in a similar manner to the potential engagement of 17 December 2022 when he and his coach brought questions about permitted activities. The Respondent also observes that the Appellant had legal representation as of 1 December 2022 and could have consulted his legal representative before participating in the PingPod exhibition.
84. The Respondent argues that ignorance of the rules is not an excuse for violating them and the Appellant was responsible for evaluating each activity before participating.
85. The Respondent submits that there are two reasons why any reduction of the Appellant's period of ineligibility based on proportionality would be improper. The first reason is that principles of proportionality have already been incorporated into the WADC at least as far back as 2015, and that this is reflected in the introductory paragraph on page nine of the 2021 Code which reads as follows:
- “The Code is the fundamental and universal document upon which the World Anti-Doping Program in sport is base. The purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The Code has been drafted giving consideration to the principles of proportionality and human rights.”* (2021 World Anti-Doping Code at 9).
86. The Respondent agrees that when there is flexibility in sanctioning, the sanctioning should be applied in a manner which respects the principles of proportionality and human rights. The Respondent argues however that with respect to the consequences for violating a provisional suspension, the WADC, which has incorporated principles of proportionality and human rights, has left no discretion in that only one outcome is permitted; that the Appellant *“shall receive no credit for any period of Provisional Suspension served...”*
87. The second submission made by the Respondent on the issue of proportionality is that the 2015 WADC confirmed that it has already accounted for the principles of proportionality and the cases being referred to by the Appellant are outliers relying on the pre-2015 rules.
88. The Respondent maintains that post 2015 CAS jurisprudence has repeatedly rejected the modification of applicable sanctions based on proportionality. They cite cases such as *CAS 2018/A/5585 (Salmond v. IJHF)*, a 2018 case in which the CAS panel found that no reduction based on proportionality was appropriate because a reduction under proportionality departed from the mandated penalty outlined in the WADC.
89. The Respondent submits that the case of *ITIA v. Dorcil*, a 2023 first instance decision which provided partial credit for time served after a violation of a provisional suspension, should not be relied on because it does not specifically address

proportionality and appears to have disregarded the plain language of Article 10.14.3 of the WADC.

90. The Respondent cites another first instance decision of *UKAD v. Dry*, for additional guidance in asserting that panels do not have the power to substitute their own “subjective views” for the penalties required by the WADC because the WADC’S carefully considered sanctions already “*contain elements of punishment and elements of deterrence.*” (*UKAD v. Dry*, SR/324/2019).
91. The Respondent also submits that the effect on the Appellant’s decision not to appeal the underlying whereabouts violation case should not be a factor in considering any argument about proportionality.
92. Lastly, the Respondent submits that there is no evidence that increasing the Appellant’s sanction by three months would be “*serious and totally disproportionate*”, “*an attack on [his] personal rights*” or would result in “*oppression or injustice*”, dicta relied upon by pre-2015 CAS panels in those very rare cases where sanctions were reduced based on proportionality.
93. In its Answer Brief, the Respondent sought the following relief:
 1. That the appeal be dismissed.
 2. That the Appellant receive no credit for the time he spent provisionally suspended from December 1, 2022 until March 15, 2023.
 3. That the Appellant bear all fees and costs associated with this appeal.

V. JURISDICTION

94. Article R47 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with 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 it prior to the appeal, in accordance with the statutes or regulations of that body.”

95. The Appellant also relies on Articles 5.10 and 5.13 of the ITTF ADR as conferring jurisdiction on CAS.
96. It is also recalled that the Parties specifically agreed in the Consent Award issued in the AAA arbitration relating to the proceeding that CAS would have jurisdiction over the appeal of the Appealed Decision.
97. Thus, the Appellant is an International-Level Athlete and as such his sole recourse regarding USADA’s determination that he violated his provisional suspension is to appeal that decision to CAS.

98. The jurisdiction of the CAS is not contested by the Respondent and is confirmed by the signing of the Order of Procedure.
99. Accordingly, the Sole Arbitrator determines that CAS has jurisdiction to hear this case.

VI. ADMISSIBILITY

100. Article R49 of the Code provides as follows:

“In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly unfair.”

101. It is recalled that while Article 5.13 of the ITTF ADR contains a 21-day deadline, the Parties specifically agreed that a different deadline apply in the AAA Consent Award, namely a deadline that expired on 31 August 2023, which was confirmed by USADA on 25 August 2023.
102. Accordingly, although in the present case the appeal was filed more than twenty-one days after receipt of the Appealed Decision, in light of the Parties’ agreement to apply a different deadline than that specified in the applicable rules, the Sole Arbitrator finds that the Appellant’s appeal is admissible.

VII. APPLICABLE LAW

103. In accordance with Article R58 of the Code, the Sole Arbitrator shall decide the dispute according to the applicable regulations and, subsidiarily, 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 that the Sole Arbitrator deems appropriate. In the latter case, the Sole Arbitrator shall give reasons for its decision.
104. The USADA Protocol for Olympic and Paralympic Movement Testing (“USADA Protocol”) states that:

“The provisions of the United States Anti-Doping (“USADA”) Protocol for Olympic and Paralympic Movement testing, including its Annexes (as amended from time to time, the “Protocol” or “USADA Protocol”), implement the requirements of the World-Anti Doping Code (the “Code”) and its related International Standards on a national basis within the United States. As required by the Code and United States Olympic & Paralympic Committee (“USOPC”) National Anti-Doping Policy (“NADP”), all United States National Governing Bodies (“NGBs”) must comply in all respects with this Protocol and shall be deemed to have incorporated the provisions of this Protocol into their rulebooks as if they had set them out in full therein.”

105. The Parties agree that this case is governed by the USADA Protocol, which has incorporated the provisions of the WADC, and the Sole Arbitrator accordingly confirms this.

VIII. MERITS

106. The Sole Arbitrator observes that the main issues to be resolved are:

- a. Did the Appellant violate his provisional suspension?
- b. And if so, what are the consequences?

107. These issues will be considered in turn.

A. Did the Appellant violate his provisional suspension?

108. It is recalled that it is uncontested that the Appellant was provisionally suspended on 1 December 2022 for a whereabouts violation, and that he was eventually sanctioned with an ADRV with a suspension of 12-months from 1 December 2022 (which took into account the period he had served while provisionally suspended). The issue is whether he violated his provisional suspension by his participation in the PingPod match on 14 December 2022, and if so, whether he must receive no credit for his period of provisional suspension running from 1 December 2022 until the date he was found to have committed an ADRV on 15 March 2023.
109. As indicated above, this matter is governed by the USADA Protocol, which has incorporated the provisions of the WADC. Article 10 of the WADC provides as follows with respect to provisional suspensions:

10.14 Status during Ineligibility or Provisional Suspension

10.14.1 Prohibition against Participation during Ineligibility or Provisional Suspension

“No Athlete or other Person who has been declared Ineligible or is subject to a Provisional Suspension may, during a period of Ineligibility or Provisional Suspension, participate in any capacity in a Competition or activity (other than authorized anti-doping Education or rehabilitation programs) authorized or organized by any Signatory, Signatory’s member organization, or a club or other member organization of a Signatory’s member organization, or in Competitions authorized or organized by any professional league or any international – or national-level Event organization or any elite or national-level sporting activity funded by a governmental agency. An Athlete or other Person subject to a period of Ineligibility longer than four (4) years may, after completing four (4) years of the period of Ineligibility, participate as an Athlete in local sports events not sanctioned or otherwise under the authority of a Code Signatory or member of a Code Signatory, but only so long as the local sport event is not at a level that could otherwise qualify such Athlete or other

Person directly or indirectly to compete in (or accumulate points toward) a national championship of International Event, and does not involve the Athlete or other Person working in any capacity with Protected Persons. An Athlete or other Person subject to a period of Ineligibility shall remain subject to Testing and any requirement by an Anti-Doping Organization to provide whereabouts information.”

“[Comment to Article 10.14.1: For example, subject to Article 10.14.2 below, Ineligible Athletes cannot participate in a training camp, exhibition or practice organized by their National Federation or a club which is a member of that National Federation or which is funded by a governmental agency. Further, an Ineligible Athlete may not compete in a non-Signatory professional league (e.g. the National Hockey League, the National Basketball Association, etc.). Events organized by a non-Signatory International Event organization or a non-Signatory national-level Event organization without triggering the Consequences set forth in Article 10.14.3. The term “activity” also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization described in this Article. Ineligibility imposed in one sport shall also be recognized by other sports (see Article 15.1, Automatic Binding Effect on Decisions). An Athlete or other Person serving a period of Ineligibility is prohibited from coaching or serving as an Athlete Support Person in any other capacity at any time during the period of Ineligibility, and doing so could result in a violation of 2.10 by another Athlete. Any performance standard accomplished during a period of Ineligibility shall not be recognized by a Signatory or its National Federations for any purpose.]”

10.14.3 Violation of the Prohibition of Participation during Ineligibility or Provisional Suspension

“Where an Athlete or other Person who has been declared Ineligible violates the prohibition against participation during Ineligibility described in Article 10.14.1, the results of such participation shall be Disqualified and a new period of Ineligibility equal in length to the original period of Ineligibility shall be added to the end of the original period of Ineligibility. The new period of Ineligibility, including a reprimand and no period of Ineligibility, may be adjusted based on the Athlete or other Person’s degree of Fault and other circumstances of the case. The determination of whether an Athlete or other Person has violated the prohibition against participation, and whether an adjustment is appropriate, shall be made by the Anti-Doping Organization whose Results Management led to the imposition of the initial period of Ineligibility. This decision may be appealed under Article 13.

An Athlete or other Person who violates the prohibition against participation during a Provisional Suspension described in Article 10.14.1 shall receive no credit for any period of Provisional Suspension served and the results of such participation shall be Disqualified.

Where an Athlete Support Person or other Person assists a Person in violating the prohibition against participation during Ineligibility or a Provisional Suspension, an Anti-Doping Organization with authority over such Athlete Support Person or other Person shall impose sanctions for a violation of Article 2.9 for such assistance.”

110. The Sole Arbitrator recalls that one of the Appellant's arguments is that he did not fully understand the specifics of the provisional suspension imposed on him and demonstrated that lack of understanding by reaching out to USADA for clarification. The Sole Arbitrator finds that such argument is flawed for several reasons, the first being that Mr. Jha did not seek clarification of the limits on what he could or could not do while under suspension until he had already taken part in the PingPod exhibition. The time to seek clarification would have been prior to taking part in the PingPod event on 14 December 2022.
111. The Appellant was aware that he would be participating in the PingPod event by the time that his provisional suspension came into effect. According to his testimony, he had taken part in a similar event years earlier while he was still in good standing as an International Table Tennis athlete. It would have been incumbent upon him to make inquiries with USADA or with his legal counsel to determine if the recently imposed suspension would prevent him from taking part in an activity that he considered to be somewhat benign, but which could potentially fall under the ambit of Article 10.14.1 of the WADC.
112. The wording of Article 10.14.1 of the WADC is quite clear. It refers not only to Competitions, but uses the much broader term "activity". Certainly it cannot be argued that a series of matches with recreational Ping Pong players for 3 to 5 points at a time would not be considered an "activity". However, there would have been no violation of Article 10.14.1 of the WADC if the second part of the clause had not applied, i.e. if the activity had not been organized by a club or other member organization of USATT. The commentary to Article 10.14.1 of the WADC uses the word "exhibition" as an example of prohibited activity, but that list was not meant to be inclusive of all prohibited activities. In any event the practice rounds played by the Appellant at the PingPod site would clearly meet the definition of "activity" and one would be hard pressed to argue that such "activity" would not constitute an "exhibition".
113. Mr. Jha argued that he essentially had no way of knowing that his participation in the exhibition matches at PingPod was part of an event organized by club that was a member of USATT, because USATT never mentioned it to him and did not advertise the fact of their membership in anything that he had seen. Therefore, by his own admission, he made an assumption that PingPod operated outside of USATT club affiliation.
114. Even if it is accepted by the Sole Arbitrator that the Appellant had no logical basis to believe that PingPod was affiliated with USATT, due diligence required him to take reasonable steps to satisfy himself that such an assumption was justified and would not bring him into contravention of his provisional suspension. The onus was on Mr. Jha and not on PingPod to seek that confirmation.
115. As the Respondent submitted, it would have taken mere minutes for the Appellant to go to the Internet, get on the USATT website and follow the links to the club listings to verify whether PingPod was in any way affiliated with the governing body. In his submissions, the Appellant makes reference to a number of things that do not appear on the PingPod website in reference to its affiliation with USATT, but it would have taken no more time to review the USATT website than it did to check PingPod's website.

116. There is no intent or knowledge requirement for Mr. Jha to be found in violation of his provisional suspension, per the terms of Article 10.14.1 of the WADC. All that is required is that an athlete take part in impermissible activity during the period of provisional suspension.
117. Therefore, once the Appellant took part in the event on 14 December 2022, he was in violation of his provisional suspension.

B. If the Appellant violated his provisional suspension, what are the consequences?

118. The Sole Arbitrator then turns to the question of what the period of ineligibility should be resulting from the finding that the Appellant violated his provisional suspension. The wording of Article 10.14.3 of the WADC seems quite clear on its face. As cited above, it states that an athlete who violates the prohibition against participation during a Provisional Suspension “*shall receive no credit for any period of Provisional Suspension served.*”
119. The Appellant argues that for the Sole Arbitrator to apply the strict language of Article 10.14.3 of the WADC would lead to an unfair and disproportionate result for Mr. Jha given his attempts after 14 December 2022 to strictly abide by the terms of his suspension and given the short period between the commencement of the provisional suspension and the date of the violation.
120. The Appellant presented case law in support of the Sole Arbitrator’s power to consider proportionality when determining the appropriate length of sanction. Mr. Jha maintains that a sanction of fourteen days could be considered proportionate on the circumstances of his violation (i.e. if his 12-month suspension were to start on 15 December 2022), whereas an increased sanction of three and a half months would be disproportionate for the violation found in this case (i.e. if the 12-month suspension started on 15 March 2023).
121. The Respondent has argued that the Sole Arbitrator does not have the power to substitute his own subjective views on penalties required by the WADC, and any desire to do so would potentially open the floodgates to rule re-writing by arbitrators and erosion of a harmonized sanctioning framework. Furthermore, the Respondent argues that if the Appellant’s sanction is lengthened by three and a half months, the time he spent provisionally suspended would not be disproportionate on the facts and circumstances of this case.
122. The Sole Arbitrator finds that the Appellant’s declaration that he assiduously followed the conditions of his provisional suspension, after his initial violation of that suspension, does not form a basis for the reduction of the sanction mandated under the WADC. The fact that the Appellant was not notified that USADA considered that he had violated his provisional suspension by his participation in the PingPod event until after the deadline for the CAS appeal on the whereabouts case had passed, is also an insufficient reason to make a finding that a three and a half month sanction is disproportionate to the offence committed.

123. Even if the Sole Arbitrator were to find that the WADC as it is currently written did not adequately address the issue of proportionality (a finding that the Sole Arbitrator is not prepared to make), there is nothing egregious, oppressive, or disproportionate about a three and a half month extension of a suspension on the facts in the case before CAS. The application of the requirement that the Appellant receives no credit for any period of Provisional Suspension served could potentially jeopardize his opportunity to qualify in time for the 2024 Olympic Games, but that is no justification to depart from a clearly written rule.
124. Accordingly, the Sole Arbitrator finds that the Appellant can receive no credit for the time he was provisionally suspended.

C. Conclusions

125. For these reasons, the Sole Arbitrator, having regard to all of the evidence accepted in this proceeding, finds that the Appellant violated the terms of his provisional suspension by participating in an event at a PingPod location on 14 December 2022. By application of Article 10.14.3 of the WADC, the Appellant cannot receive credit for any period of Provisional Suspension served, that being the period from 1 December 2022 until 15 March 2023.
126. As a result, the Appellant's appeal is dismissed.

IX. COSTS

(...).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 23 August 2023 by Kanak Jha against the United States Anti-Doping Agency with respect to the decision taken by the United States Anti-Doping Agency on 19 May 2023 is admissible.
2. The appeal filed on 23 August 2023 by Kanak Jha against the United States Anti-Doping Agency with respect to the decision taken by the United States Anti-Doping Agency on 19 May 2023 is dismissed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland

Date: 28 November 2023

THE COURT OF ARBITRATION FOR SPORT

Hon. Hugh L. Fraser, O.C.
Sole Arbitrator