



FEDERATION
INTERNATIONALE
DE NATATION

FINA OFFICE
Avenue de l'Avant-Poste 4
1005 Lausanne
Switzerland

Phone: 41-21 / 310 47 10
Fax: 41-21 / 312 66 10
<http://www.fina.org>

FINA Doping Panel 9/08

The

FINA Doping Panel,

BUREAU 2005 - 2009

PRESIDENT

MUSTAPHA LARFAOUI
Algeria

HONORARY SECRETARY

BARTOLO CONSOLO
Italy

HONORARY TREASURER

JULIO MAGLIONE
Uruguay

VICE PRESIDENTS

HIRONOSHIN FURUHASHI
Japan

NORY KRUCHTEN
Luxembourg

BILL MATSON
New Zealand

DALE NEUBURGER
USA

SAM RAMSAMY
South Africa

MEMBERS

HUSSAIN AL-MUSALLAM
Kuwait

GENNADY ALESHIN
Russia

ABD EL RAHMAN AMIN
Egypt

LYNNE BATES
Australia

RAFAEL BLANCO
Spain

SVEN EGIL FOLVIK
Norway

ELDON C. GODFREY
Canada

FRANCIS LUYCE
France

GUILLERMO MARTINEZ
Cuba

ORBAN MENDOZA
Puerto Rico

COARACY NUNES FILHO
Brazil

PIPAT PANIANGVAIT
Thailand

CHIEF OLATOKUNBO THOMAS
Nigeria

QIUPING ZHANG
China

HONORARY LIFE PRESIDENT

LIC. JAVIER OSTOS MORA
Mexico

comprised of

Harm Beyer	(GER)	Chairman
Jean Lob	(SUI)	Member,
Ben Belkacem Farid	(ALG)	Member

in the proceedings against

the swimmer

Ms Rebecca Gusmao

affiliated to the

Brazilian Swimming Confederation

represented by:

Breno Costa Ramos Tannuri, Attorney-at-law

André O. de Meira Ribeiro, Attorney-at-law

on 3rd September 2008 decided:

The athlete is found to have committed an anti-doping rule violation under
FINA Rules DC 2.5, DC 10.2, DC10,4, DC 10.6.3.

She shall be

ineligible for lifetime.

All results achieved by the athlete since 18 July 2007 shall be annulled
together with the consequence thereof (hand-back of medals / prizes,
reimbursement of prize-money).

This judgement shall become effective immediately.

The Brazilian Swimming Federation shall be responsible for all costs related to
this case.

SPORT IN
THE OLYMPIC
PROGRAMME



SPORT AU
PROGRAMME
OLYMPIQUE

I THE PARTIES INVOLVED

01. The Fédération Internationale de Natation (FINA) is the International Federation governing world wide disciplines related to swimming. FINA, inter alia, has the objective of *"promoting the development of Swimming in all possible manifestations throughout the world and providing a drug free sport"* (FINA Constitution Rule C 5.11 and 2)
02. The World Anti-Doping Agency (WADA) is the international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms. WADA has established a uniform set of anti-doping rules, the World Anti-Doping Code (Code). FINA is one of the signatories of the WADA Code.
03. The Confederação Brasileira de Desportivos Aquáticos (CBDA) is a federation affiliated to FINA. As a Member Federation CBDA shall comply with FINA Anti-Doping Rules. (FINA Rule DC 14.1) The constitution and regulations of CBDA are indicating that all FINA Anti-Doping Rules are deemed as incorporated and shall be directly applicable to and followed by any competitor being under the jurisdiction of CBDA.
04. Ms Rebeca Braga Gusmão, borne on 24 August 1984, is a female elite class swimmer affiliated to CBDA. She has been involved in national and international competitions since 1998, representing her country. Ms Gusmão is an International Level Athlete included in FINA's Testing Pool.

II **FACTS and PROCEEDINGS**

05. From 13 to 29 July 2007 the XV Pan American Games were held in Rio de Janeiro (BRA). During the Games Ms Gusmão competed in the events 50m Freestyle, 100m Freestyle, 4 x 100m Freestyle relay and 4 x 100 m Individual Medley relay.

06. On 12 July 2007 she had to undergo a doping control test, conducted by the Organizing Committee of the XV Pan American Games. The urine sample got the code number 1804068 and later on another code number by the laboratory (lab code) BN 538/07-39. On 28 July 2007 the Wada accredited laboratory LADETEC in Rio de Janeiro reported the test to be negative.

07. On 18 July 2007 Ms Gusmao again had to undergo a doping control test, conducted by the Organizing Committee of the XV Pan American Games. The urine sample got the code number 1803229 and later on the lab code BN944/07-40. On 24 July 2007 the LADETEC laboratory in Rio de Janeiro reported the test to be negative.

08. The XV Pan American Games in Rio de Janeiro were attended by a WADA Independent Observer Team (IO Team). The WADA Independent Observer Team program helps to enhance athlete and public confidence at major events by randomly monitoring and reporting on all phases of the doping control and results management processes in a neutral and unbiased manner. The IO program was launched at the 2000 Olympic Games in Sydney, at the invitation of the International Olympic Committee.

09. The IO Team, attending the XV Pan American Games in Rio de Janeiro on 23 July 2007 reported to FINA, that Ms Gusmão has been tested on multiple occasions over the course of the Games as well as prior to the Games. These tests have yielded some suspicious results suggestive of possible manipulation. The IO Team further reported that the IO Chair on 20 July 2007 visited the laboratory in Rio de Janeiro and requested among others the steroid profile, that was collected on 12 July 2007 and was reported negative as well as the steroid profile for the In-Competition sample that was collected on 18 July 2007. Upon review of the steroid profiles it appeared that the samples were from two different people as the endogenous steroid profile was very different.
10. Following the report, received from the IO Team on 25 July 2007 the A samples collected from the swimmer on 12 July 2007 and on 18 July 2007 were transferred to the SONDA Laboratory in Rio de Janeiro (BRA). Such laboratory was accredited by the Justice and is very much used by the Federal Police in Brazil for DNA samples.
And on 30 August 2007 the "B" Sample collected on 18 July 2007 was also transferred to the SONDA Laboratory.
11. The LADETEC Lab codes were changed for the analyses in the SONDA Laboratory:
- Code number BN 538/07-39 for the "A" sample collected on 12.07.2007
became Code number B0469/07-43,
 - Code number BN944/07-40 for the "A" Sample collected on 18.07.2008
became Code number B0468/07-42,

- and the "B" Sample collected on 18.07.2007 got the SONDA Code number BP806/07-39.

12. The SONDA Laboratory was requested to analyse the samples transferred and to compare the genotypes of the samples and identify if they belong to the same donator.
13. On 29 October 2007 the SONDA Laboratory reported:

"The DNA was extracted through the phenol-chloroform technique, described by Vu et al. (1998).

The investigated locos were: F13B, CD4, D5S818, FGA, D3S1358, D18S51, D12S391 and Amelogenin. Other locos used for human identification were also tested, however, due to the low volume of cells present, particularly in the sample BO468/07-42 (the A sample collected on 18 JULY 2007) and the high degree of degradation of the DNA obtained, the amplification in such locos was not possible.

The amplification of the locos mentioned above and Amelogenin revealed that in only three regions were obtained well defined patterns in sample BP806/07-39 (the B sample collected on 18 July 2007), however, even with the small number of amplified locos, it was possible to observe genotypes different from the sample, when compared to the "aleli" found in sample BO469/07-43 (the A sample collected on 12 July 2007).

The formula $p^2 + 2pq + q^2$ was used for calculating the genotypes frequency of each region.

Based on such values, we conclude that the samples BP806/07-39 (the B sample collected on 18 July 2007) and BO469/07-43 (the A sample collected on 12 July 2007) belong to different donators."

14. On 3 November 2007 Ms Gusmão was informed about the findings of the SONDA Laboratory. And on 7 November 2007 a meeting was held at the headquarters of the Brazilian Olympic Committee to consider the findings of the SONDA Laboratory. The meeting was attended by
 - Dr. Eduardo de Rose, - President of the Medical Committee of the Pan American-Sports Organization
 - Ms Rebeca Gusmão, - Athlete
 - Mr. Breno Costa Ramos Tannuri, - Attorney-at-Law
 - Mr. André O. de Meira Ribeiro – Attorney-at-Law
 - Mr. Marcus F. Bernoef – Brazilian Delegation Physician
15. By correspondence of 13 December 2007 the Pan American Sports Organisation informed FINA in regard to the findings of the SONDA Laboratory for further disciplinary measures.
16. The FINA Executive, by correspondence of 3 April 2008 forwarded the matter to the FINA Doping Panel to follow up the case.
17. By correspondence of 24 May 2008 the FINA Doping Panel informed Ms Gusmão with copy to her Legal Counsel in regard to the suspicion, that she had committed an anti-doping-rule violation under FINA Rule DC 2.5 (*Tampering, or Attempting to tamper, with any part of Doping*

Control).. And a hearing before the FINA Doping Panel was announced to be held.

18. The hearing was then held on Monday, 17 July 2008, in the FINA Headquarters in Lausanne (SUI). The hearing was attended by
- Ms Rebeca Gusmão
 - Mr. Breno Tannuri, Attorney-at-Law
 - Mr. André Ribeiro, Attorney-at-Law, both representing Ms Gusmão, and
 - Ms Renata Castro, nominated as an expert witness

III Motions and Contentions

19. Ms. Gusmao denies having made any kind of tampering or attempt of tampering with a part of the Doping Control.
20. She and her legal counsel
- a) are claiming the invalidity of the test performed by the SONDA Laboratory,
 - b) are challenging that the athlete was not permitted a “B” sample to be analysed and to attend the analysis of the “B” sample, and they
 - c) are referring to a criminal investigation conducted by the Brazilian Police which did not result in any proof of Ms Gusmão having tampered or attempted to tamper with a part of the doping control.

Invalidity of the test performed by the SONDA Laboratory

21. In the opinion of Ms Gusmão’s Legal Counsel only WADA-accredited laboratories are permitted to perform the analysis of doping control samples. The analytical results, achieved by the SONDA Laboratory

cannot be taken into consideration, as the SONDA Laboratory is not WADA accredited.

22. According to WADA Code No 5.2.2.9 the Laboratory shall maintain custody information on the transfer of Samples. However, there is a total lack of information about the chain of custody during the whole analysis process. The only document, which Ms Gusmão has received is some e-mail exchanged between Dr. de Rose and Dr. Francisco Radler from the LADETEC Laboratory. It is unknown how the sample was transported from LADETEC to SONDA Laboratory. Serious doubts on the validity of the proceedings are arising from the lack of any knowledge about the chain of custody..

23. FINA violated its own Medical Rule 3.6 which states:

“The consent of the athletes is required for the collection, preservation, analysis and use of any biological sample.”

Ms Gusmão was never requested by any authorisation to agree that a DNA test on her urine samples was performed.

The right to a “B” Sample analysis

24. Ms Gusmão’s Legal Counsel further argue that in case the DNA test is understood as a valid method for anti-doping control, the athlete concerned should have been allowed the right to perform a second DNA test on the B Sample in order to confirm the DNA present in both samples, the “A” and the “B” Ms Gusmão, however, has never been allowed to perform a “B” Sample analysis. This is a clear breach of WADA rules, which would necessarily make the whole process disregarded.

The criminal investigation by the Brazilian Police

25. Ms Gusmão's Legal Counsel inform that on request of the Brazilian Olympic Committee the Police Department of Rio de Janeiro conducted an investigation to gather information on the facts. Brazilian law defines false statements on private or public documents as a crime. This criminal investigation, which lasted several months verified that Ms Gusmão had not any connection to the alleged change of the urine in the samples collected on 12 and 18 July 2007. Taking into account that a detailed and long investigation has been made, and since after all the proceedings the police could not evidence any fault of Ms Gusmão the FINA Doping Panel cannot ignore the results of the investigations by the Brazilian Police.

IV LEGAL ANALYSIS

26. The jurisdiction of the FINA Doping Panel arises out of the provisions of the FINA Constitutional Rules.
27. The hearing in the case at stake is the jurisdiction of the FINA Doping Panel. In case an anti-doping-rule violation has been committed at a competition conducted by a regional organisation, consisting of Member Federations of FINA, sanctions shall be heard by the FINA Doping Panel (FINA Rule DC 5.5). The case at stake occurred during the swimming competitions of the XV Pan American Games, held from 13 to 29 July 2007 in Rio de Janeiro (BRA). In the Pan American Games Organisation many FINA affiliated federations are members

28. The applicable Rules in the case at stake are the FINA Doping Control Rules, in force since 11 September 2003..
29. The anti-doping-rule violation at issue is *“Tampering, or Attempting to tamper, with any part of Doping Control” (FINA Rule DC 2.5)*. FINA bears the burden of establishing that Ms Gusmão committed an anti-doping-rule violation according to FINA Rule DC 2.5.
30. The FINA Doping Panel has concluded that FINA has satisfied its burden of proving that Ms Gusmão committed an anti-doping-rule violation under FINA Rule DC 2.5).

Invalidity of the test performed by the SONDA Laboratory

31. The Rules provided for in the WADA Code and the FINA Anti-Doping Rules are established in relation to the investigation of whether urine samples or blood samples, collected from competitors, do contain a prohibited substance. The Rules are providing measurements for collection, transport, analysis and report of samples. The Rules are not established for DNA research or for DNA comparison of samples.
32. The Organising Committee of the XV Pan American Games was authorised, to give order that a DNA analysis of the urine samples collected by Ms Gusmão was conducted. As there was suspicion, that Ms Gusmão had been tampering or attempting to tamper with a part of the doping control, further investigation was necessary and permitted.

33. This investigation was not violating FINA Medical Rule 3.6. By accepting to undergo a doping control the athlete is approving in general that the sample delivered to be analysed in any possible kind. Also the Organisation, conducting the Doping Control, becomes the owner of the sample collected from a competitor.
34. The evidence for a case of Tampering or attempting to tamper with any part of the Doping Control cannot be established by applying exclusively the regulations established in the WADA Code or in the FINA DC Rules. If FINA would be restricted to FINA DC Rules only to bring evidence that a case of Tampering or Attempting to tamper occurred, FINA probably never would be able to bring such proof. The evidence for such anti-doping-violation must and can also be sought outside of the Regulations of the WADA Code and the FINA DC Rules..
35. In the case at stake the DNA analysis made by the SONDA Laboratory provides direct and conclusive evidence that the two urine samples delivered by Ms Gusmão on 12 and 18 July 2007 were not delivered by the same person. Of course, the SONDA Laboratory is not accredited by WADA. However, it is a Laboratory, accredited by the Brazilian Justice and of high competence, well reputed and reliable. The Brazilian Justice is very often making use of it, especially for research in criminal cases. There is no reason for the FINA Doping Panel not to rely on the report of this reputed laboratory.
36. FINA DC Rules in regard to the "B" sample procedures cannot be applied. As mentioned above already, FINA DC Rules are not applicable and not binding for DNA research. Also, there is no general obligation, based on common laws that a defendant must always be included in

every step of research, which is undertaken to find evidence for an illegal acting, committed by the defendant.

37. The FINA Doping Panel also is not concerned in regard to the chain of custody, when the urine samples were transferred from the LADETEC Laboratory to the SONDA Laboratory. In SONDA's analytical report of 29 October 2007, signed by Prof. Franklin David Rumjaneck, Ph.D, it is stated that Prof. Rumjaneck himself appeared before and received from the LADETEC Laboratory on 25 July 2007 two flasks of frozen urine and on 30 August 2007 another flask with frozen urine. These urine samples later on were analysed by Prof. Rumjaneck himself. There is not the slightest hint, that any manipulation on the urine samples was done while they were transferred from the LADETEC Laboratory to the SONDA Laboratory or within the SONDA Laboratory. Ms Gusmão's Counsel in this regard can only submit speculations.

The criminal investigation by the Brazilian Police

38. The result of the investigations, made by the Brazilian Police, cannot have any influence on the case at issue. The Brazilian Police did not find any proof or evidence that Ms Gusmão was involved in any kind of falsification in regard to the urine samples collected from her on 12 and 18 July 2007. However, on the other hand, the police also did not find any proof or evidence that Ms Gusmão in the case at stake was not involved..

V THE SANCTION

39. In a case of an anti-doping rule violation under FINA Rule DC 2.5 (*Tampering, or Attempting to tamper, with any part of Doping Control*) the sanction to be imposed according to FINA Rules DC 10.4.1 and 10.2 is for a

first violation: Two (2) years' ineligibility

second violation: Lifetime ineligibility.

40. The FINA Doping Panel has already issued two judgements related to Ms Gusmão. In each of the judgements it is stated that Ms Gusmão committed an anti-doping rule violation.

- a) On 12 May 2008 the FINA Doping Panel imposed a sanction of two (2) years ineligibility on Ms Gusmão for an anti-doping-rule violation under FINA Rules DC 2.1 and DC 2.1.2, committed on 13 July 2007. The judgement, issued by the FINA Doping Panel, has been appealed by Ms Gusmão. The further proceedings are pending before the Court of Arbitration for Sport (CAS).
- b) On 17 July 2008 the FINA Doping Panel imposed a sanction of two (2) years ineligibility on Ms Gusmão for an anti-doping-rule violation under FINA DC Rules DC 2.1 and DC 2.1.2, committed on 25 / 26 May 2006. Also this judgement, issued by the FINA Doping Panel, has been appealed by Ms Gusmão. The further proceedings are pending before CAS.
- c) The case at stake is a third anti-doping-rule violation, committed by Ms Gusmão on 12 and / or 18 July 2007.

41. For purposes of imposing sanctions under FINA Rules DC 10.2 and 10.4.1 a second rule violation may be considered only if FINA can establish that the Competitor committed the second anti-doping rule violation after the Competitor received notice, or after FINA made reasonable attempt to give notice of the first anti-doping rule violation (FINA Rule DC 10.6.1) In this regard “notification” does not mean notification of the decision confirming the violation. It means the notification of the factual circumstances, i.e. the identified presence of a prohibited substance in the A Sample of a Competitor.
42. When Ms Gusmão committed the anti-doping rule violation on 12 / 18 July 2007 she had already been notified in regard to the anti-doping-rule violation committed on 25 / 26 May 2006. In this regard a hearing was conducted before the “Provisional Panel for Doping Control of CBDA” On 11 May 2007. According to the minutes of this hearing it was attended by Ms Gusmão in person. The exact date, on which Ms Gusmão received the notification for the first time is unknown However, latest on 11 May 2006, the date of the a.m. hearing, she got the notification.
43. The proceedings conducted in regard to the case of 25 / 26 May 2006 were CBDA proceedings, not direct FINA proceedings, with the consequence that the notification did not occur through FINA but through CBDA. However, the CBDA proceedings were conducted according to FINA Rules (FINA Rule DC 14.1). Therefore it has no effect for the case at stake that the notification was made through CBDA
44. At the occasion of the hearing held by the “Provisional Panel for Doping Control of CBDA” a final decision was not taken. The case was not dismissed. And no sanction was imposed. It was only decided not

to impose a provisional suspension on Ms Gusmão but to proceed with the B Sample.

45. Summarising the above the case at stake is a second anti-doping rule violation committed by Ms Gusmão. Therefore a

Lifetime ineligibility

was to be imposed on Ms. Gusmão according to FINA Rules DC 10.2 and 10.4.1.

VI THE COSTS

46. Confederação Brasileira de Desportivos Aquáticos (CBDA) shall be obliged to reimburse FINA for all costs (including laboratory fees and travel) related to the doping offence, committed by Ms Gusmão. (FINA Rule DC 12.2).

Harm Beyer

Ben Belkacem Farid

Jean Lob

signed on behalf of all three Panel Members



Harm Beyer

Appeal Instruction

An appeal may be submitted against this judgement at the Court of Arbitration for Sport, Lausanne, Switzerland (FINA Rule DC 13.2) within twenty-one (21) days after receipt of this judgement (FINA Rule DC 13.5).