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## FINA Doping Panel 01/11

### FINA Doping Panel

comprised of

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(NED)

Chairman

Peter Kerr

(AUS)

Member

Robert Fox

(SUI)

Member

In the proceedings against

the swimmer **Albert Subirats**

affiliated to the **Venezuelan Swimming Federation**

## NATURE OF THE CASE

Mr. Subirats is a professional swimmer from Venezuela (two times Olympian 2004 and 2008, a World Championships medallist). FINA has concluded three filing failures in 18 months period. Mr. Subirats does not contend the conclusion, but states he has never failed to send in time the relevant whereabouts information to his Federation.

## I THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing disciplines related to swimming. FINA has established and is carrying out, inter alia, a doping control program, both for in-competition as well as out-of-competition testing.

1.2. The VENEZUELAN SWIMMING FEDERATION (VSF) is a member of FINA. VSF is required to recognize and comply with FINA's anti-doping rules which are set out in the FINA Doping Code ("FINA DC"). The FINA DC is directly applicable to and must be followed by Competitors, Competitor Support Personnel, coaches, physicians, team leaders, and club and representatives under the jurisdiction of the VSF.

1.3 Mr. Albert Subirats, born on the 25 September 1986 is a 24 year old swimmer. He has been part of the Venezuelan national swimming team since 1999. He is a two times Olympian and won, inter alia, medals on 100 m butterfly at 2006 Shanghai World Championships (25m), 100 m butterfly at 2007 World Aquatic Championships, Melbourne Australia, 50 m and 100 butterfly in 2010 Dubai World Championships (25m).

## **II PROCEEDINGS**

2.1 The FINA Executive Director informed Mr. Subirats by letter dated 2 February 2011 about the conclusion of a third filing failure and the decision to forward his case to the Doping Panel for consideration.

2.2 Mr. Subirats requested an administrative review of the third filing failure according to article 11.6.3 of the International Standard for Testing dated January 2009.

2.3 The FINA Legal Commission reassessed whether the relevant requirements were met and came on 4 April 2011 to the conclusion that there had been a filing failure.

2.4 By letter dated 7 April 2011, the FINA Executive Director asked the Chairman of the FINA Doping Panel to examine the case of Mr Subirats in relation to three filing failures.

2.5 The FINA Doping Panel was formed pursuant to FINA Rule C 21.6.

2.6 By letter dated 11 April 2011, the chairman of the FINA Doping Panel informed Mr. Subirats of his right to a fair hearing as per FINA DC 8.1. Mr. Subirats asked for a hearing.

2.7 The FINA Doping Panel hearing was held on 7 May 2011 at 14.00 hrs in FINA Headquarters, Lausanne (SUI).

2.8 Mr. Subirats was present himself, accompanied by:

- Mr. Tulio Sanchez, attorney from Venezuela ;
- Mr. Silvio Fernandez Guerra, attorney from Venezuela ;
- Mr. Silvio Fernandez Guerra Jr., envoy and representative of Venezuelan Ministry of Sport, 1st Secretary of the Venezuelan Embassy to France.

### **III JURISDICTION AND APPLICABLE RULES**

3.1 The jurisdiction of the FINA Doping Panel arises out of the provisions of the FINA Rules C 21.5., C 21.6 and FINA DC 8.1.

3.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since January 1, 2009 (amended on the occasion of the FINA General Congress on 24 July 2009).

## **IV LEGAL DISCUSSION**

### **THE FACTS**

4.1 Mr. Subirats belongs to the FINA Registered Testing Pool (FINA RTP). He has not sent FINA his whereabouts information for the first quarter of 2010 (Q1 2010), fourth quarter of 2010 (Q4 2010) and first quarter of 2011 (Q1 2011).

4.2 Mr. Subirats was informed of his three (3) filing failures by letters of FINA dated respectively 25 February 2010 (Q1 2010), 19 October 2010 (Q4 2010) and 2 February 2011 (Q1 2011).

4.3 Mr. Subirats has been a member of the Venezuelan national team since 1999. He is a two times Olympian. He is a medalist on 100 m butterfly at 2006 Shanghai World Championships (25m), 100 m butterfly at 2007 World Aquatic Championships, Melbourne Australia, 50 m and 100 butterfly in 2010 Dubai World Championships (25m).

### **MOTIONS AND CONTENTIONS**

4.4 Mr. Subirats has stated he has always sent in time the relevant whereabouts information to his Federation. He was taught to follow this procedure by his Federation. Ever since he was obliged to send whereabouts information he has been acting like this, thinking this was the proper way. He trusted his Federation.

4.5 He has supplied the FINA Doping Panel with copies of emails to the President of the VSF dated respectively 11 January 2010, 23 September 2010 and 27 December 2010 as a prove he indeed has sent information with the intention to send whereabouts information through the Federation to FINA.

4.6 Mr. Subirats has argued he has never had any intention to mislead FINA, on the contrary, he has nothing to hide. He has pointed out his emails to the President of the VSF in which he shows concern for sending the information in time to FINA.

4.7 Furthermore he has explained he has never been aware of two filing failures in the past. The VSF has never informed him. Letters from FINA have only been addressed to the VSF, which has never forwarded them to him.

4.8 Mr. Subirats is deeply disappointed about the behavior of the VSF. If he would have known this before, he would have organized the process of sending whereabouts information to FINA himself. He has trusted the VSF, assuming the information was adequately forwarded to FINA. He could not have foreseen such an incompetence of his Federation.

4.9 He has never had any instruction to import data in complex systems like Adams. The VSF or the Venezuelan ministry of sport has never regarded it a priority to offer introduction to its athletes.

4.10 He has until now never been aware of eventual consequences of not sending in time whereabouts information to FINA.

#### **THE LAW**

4.11 FINA DC 2.4 reads:

*"Violation of applicable requirements regarding Competitor availability for Out-of-Competition Testing, including failure to file required whereabouts information and missed tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three missed tests and/or filing failures within an eighteen-month period*

*as determined by Anti-Doping Organizations with jurisdiction over the Competitor shall constitute an anti-doping rule violation."*

**FINA DC 5.4.3:**

*"FINA shall establish a FINA Registered Testing Pool of Competitors. The criteria for the inclusion in the Registered Testing Pool shall be revised yearly by FINA and be known to the Member Federations. Four (4) times a year the FINA Registered Testing Pool of Competitors shall be updated. All competitors included or removed from the Registered Testing Pool and the Member Federations to which they belong shall receive written information about the inclusion or exclusion of a Competitor in the FINA Registered Testing Pool no later than the first day of the months of March, June, September and December."*

**FINA DC 5.4.4:**

*"It shall be the obligation of each Competitor in the Registered Testing Pool as well as that Competitor's Member Federation, to keep FINA informed about where the Competitor can be met for unannounced Testing. It is the responsibility of each Competitor in the Registered Testing Pool to report the required whereabouts information to the FINA office no later than the first Monday of the months January, April, July and October. (...)"*

**FINA DC 10.3.3:**

*"For violations of DC 2.4 (Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years based on the Competitor's degree of fault."*

4.12 World Anti-Doping Code International Standard for Testing (ISF) is a mandatory International Standard (Level 2) developed as part of the World Anti-Doping Program.

Relevant paragraphs read as follows.

#### ISF 11.3.6

*An Athlete in a Registered Testing Pool may choose to delegate the making of some or all of his/her Whereabouts Filings required under Clauses 11.3.1 and 11.3.2 (and/or any updates to his/her Whereabouts Filings required under Clause 11.4.3) to a third party, such as (for example, and depending on the rules of the Responsible ADO (Anti-Doping Organization)) a coach, a manager or a National Federation, provided that the third party agrees to such delegation.*

*[11.3.6 Comment part of the ISF: See Clause 11.5.4 for a discussion of the application of this Clause 11.3.6 in the specific context of a Team Sport. For the avoidance of doubt, however, an Athlete in a sport that is not a Team Sport may also delegate the making of his/her Whereabouts Filings to a third party for some or all relevant periods, provided that the third party agrees.*

*The Responsible ADO – Anti-Doping Organization - may require written notice of any agreed delegation pursuant to Clause 11.3.6 to be filed with it, signed by both the Athlete in question and the third party delegate.]*

#### ISF 11.3.7

*In all cases, however, including in Team Sports:*

*a. each Athlete in an Registered Testing Pool remains ultimately responsible at all times for making accurate and complete Whereabouts Filings as required by this Clause 11.3, whether he/she makes each filing personally or delegates it to a third party (or a mixture of the two). It shall not be a defence to an allegation of a Filing Failure under Code Article 2.4 that the Athlete delegated such responsibility to a third party and that third party failed to comply with the applicable requirements; and*

*b. such Athlete remains personally responsible at all times for ensuring he/she is available for Testing at the whereabouts declared on his/her Whereabouts Filings, whether he/she made that filing personally or delegated it to a third party (or a mixture of the two). It shall not be a defence to an allegation of a Missed Test under Code Article 2.4 that the Athlete had delegated responsibility for filing his/her whereabouts information for the relevant period to a third party and that third party had failed to file the correct information or failed to update previously filed information so as to ensure that the whereabouts information in the Whereabouts Filing for the day in question was current and accurate.*

#### **DOPING RULE VIOLATION**

4.13 The FINA Doping Panel finds that it has been established that the athlete, being a member of the RTP since long, has not sent or has not timely sent his whereabouts information to FINA for the quarters Q1 2010, Q4 2010 and Q1 2011. These facts constitute an anti-doping rule violation pursuant to FINA DC 2.4.

4.14 Whereabouts information should, according to the system as laid out in the FINA Doping Control Rules, based on the World Anti-Doping Code, and described in detail in the ISF, be, in the case of swimming, sent to FINA. As so far Mr. Subirats has argued he has fulfilled his duty as an athlete by sending in time the relevant whereabouts information to his Federation, the argument fails.

4.15 In the opinion of the FINA Doping Panel Mr. Subirats himself has committed a violation of DC 2.4. As described in DC 5.4.4 it is the responsibility of the athlete to inform FINA about his whereabouts. The range of this obligation has been explained by ISF 11.3.7: it is the ultimate responsibility of the athlete himself to make complete and accurate whereabouts filings. Logically this means the athlete is also



responsible the whereabouts information will be indeed sent to and received by the responsible authority.

4.16 The argument of Mr. Subirats according to which he was not fully aware of his obligation fails too. Pursuant to DC 2 a competitor shall be responsible for knowing what constitutes a doping rule violation. Furthermore Mr. Subirats, being a professional athlete for so many years and in the ranks of other professional athletes, possessing proper education and language skills, has not convinced the FINA Doping Panel of exceptional circumstances which prevented him from knowing and understanding this rule.

## **V THE SANCTION**

5.1 Unannounced testing is an essential part of the anti-doping policy of FINA. Competitors belonging to the RTP have the obligation and responsibility to strictly follow the procedures as described in DC 5.4.3 and 5.4.4. The rules exist to deter doping, help ensure a level playing field and promote confidence in the integrity of swimming competitions. Withholding the whereabouts information has to be regarded as a serious obstruction of the necessary control on the use of prohibited substances or methods.

5.2 The mandatory sanction range of one (1) to two (2) years set forth in FINA DC 10.3.3 for violation of athlete whereabouts requirements reflects the important duty of athletes and national federations to ensure that all swimmers under the purview of FINA's rules be available for out-of-competition drug testing. The FINA Doping Panel is of the opinion that in principal a sanction of two years ineligibility has to be applied to athletes committing a doping rule violation through three filing failures as mentioned in DC 2.4.

5.3 The athlete has explained that the VSF has been sending the official whereabouts information to FINA for many years, by using the information he always has supplied his Federation with, either by sending emails, from different places on the world or bringing it to the office of the Federation in person when he happened to be in Venezuela.

5.4 The FINA Doping Panel can understand Mr. Subirats has got used to this habit, especially because of the many years of this practice. From his explanation and the copies of his emails, which show the personal communication with the President of the FDP, the FINA Doping Panel can derive the conclusion Mr. Subirats has not had the intention to escape from doping control. The negative doping controls during his career as professional swimmer are also in his favour in this regard.

5.5 Apparently the VSF has not made a clear agreement of delegation between the athlete and Federation, underlining the ultimate responsibility of the athlete himself. Apart from this, the communication between the President of the VSF on the one hand and the athlete and FINA on the other hand show a lack of discipline as well as respect for anti-doping rules and procedures which clearly has contributed to the present position of the athlete and ultimately inevitable FINA Doping Panel conclusion of three filing failures and therefore a doping rule violation.

5.6 These facts and circumstances justify the conclusion Mr. Subirats personally has put regular effort in making up whereabouts information and forwarding this to the VSF with the intention to inform FINA officially.

5.7 Therefore, weighing the degree of fault of the athlete, the FINA Doping Panel is of the opinion he deserves the minimum sanction

paragraph DC 10.3 allows, which is a period of ineligibility of one (1) year, starting 7 May 2011 and ending at the conclusion of 6 May 2012.

5.8 All results achieved by Mr. Subirats from the date of the third filing failure, i.e. 3 January 2011, are disqualified and any medals, points and prizes achieved during that period shall be forfeited pursuant to FINA DC 10.1 and 10.8.

## **VI. SUMMARY OF THE DECISIONS**

6.1 Mr. Subirats receives a one year period of ineligibility commencing on 7 May 2011, and ending at the conclusion of 6 May 2012, for his first anti-doping rule violation.

6.2 All results obtained by Mr. Subirats after 3 January 2011 and through the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

6.3 All costs of this case shall be borne by the Venezuelan Swimming Federation in accordance with FINA DC 12.2.


6.4 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this judgment (FINA Rule C 12.9.3).

F.D. van Heijningen  
Chairman

Peter Kerr  
Member

Robert Fox  
Member

Signed on behalf of all three Panel Members



F.D. van Heijningen