



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2007/A/1284 – WADA v/ Federación Colombiana de Natación & Lina Maria Prieto
CAS 2007/A/1308 - WADA v/ Federación Colombiana de Natación & Lina Maria Prieto

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

Sole Arbitrator: Mr Martin Schimke, Attorney-at-law, Düsseldorf, Germany

Ad hoc Clerk: Mr Patrick Grandjean, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

World Anti-Doping Agency, Montreal, Canada

Represented by Mr François Kaiser, Attorney-at-law, Lausanne, Switzerland

Appellant

and

Federación Colombiana de Natación, Cali, Colombia

Represented by its President, Edgar Ivan Ortiz Lizcano, Cali, Colombia

Respondent 1

Ms Lina Maria Prieto, c/o Federación Colombiana de Natación, Cali, Colombia

Respondent 2

* * * * *

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I. PARTIES

1. The World Anti-Doping Agency (hereinafter referred to as "the WADA" or the "Appellant") is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms.
2. The Federación Colombiana de Natación (hereinafter referred to as "the FECNA") is a national federation governing aquatic sports in Colombia. Its registered seat is in Cali, Colombia, and it is affiliated with the Fédération Internationale de Natation (hereinafter referred to as "the FINA"), the organization governing aquatic sports world-wide.
3. Ms Lina María Prieto is a swimmer and a registered member of the FECNA.

II. BACKGROUND FACTS

4. The details set out below are a summary of the key relevant facts as established by the Sole Arbitrator on the basis of the written submissions of the parties. Additional facts may be set out, where relevant, in connection with the legal discussion (see below section IV).

II.1 THE FINDINGS IN ANTI-DOPING TESTING

5. Ms Lina María Prieto participated in the Campeonato Internacional Ciudad De Cali, which took place in April 2006 in Cali, Colombia. This international swimming competition was organized under the supervision of the FECNA.
6. Between 7 and 9 April 2006, Ms Lina María Prieto was subject to in-competition drug testing. She tested positive to the prohibited substance Norandrosterone and for a too-high ratio of testosterone to epitestosterone.
7. On 3 May 2006, the WADA-accredited Laboratory for Doping Control of Coldeportes Nacional sent its report to the FECNA and a copy to the FINA and the WADA.

II.2 THE PROCEEDINGS BEFORE THE FECNA

8. On 18 May 2006, Ms Lina María Prieto was heard by the FECNA Executive Committee, consisting of Mr Edgar Iván Ortiz Lizcano (FECNA President), Mr Lester R. Florillo (FECNA Member), Mr Pedro Pérez Velásquez (FECNA Logistical Director) and Mr Julio César Echeverry (FECNA Executive Director). Were also present Mr Hernán Javier Alzate Ortiz (President of the Quindío Swimming League) and Mr Diego Vargas Uribe (the athlete's coach). According to the minutes of the meeting:
 - Ms Lina María Prieto alleged that certain nutritional supplements she ingested must have lead to the positive test results. This came as a surprise to her as she relied entirely on indication gleaned from the internet, according to which the content of her nutritional supplements were free of any banned substance.

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- The athlete accepted the laboratory results and renounced to have the "B" samples analysed.
 - The FECNA Executive Committee informed Ms Lina Maria Prieto that as of 18 May 2006, *"she was forbidden to take part in any kind of competition and that the times achieved at the Championships of the City of Cali would be withdrawn from the national ranking and would not be considered for any form of reference."*
9. On 5 July 2006, the FINA informed the WADA that Ms Lina Maria Prieto had been provisionally suspended by the FECNA and that a decision of a Disciplinary Commission was still to be rendered.
 10. On 28 November 2006, the FECNA Disciplinary Commission held a meeting and heard evidence from Ms Lina Maria Prieto as well as from her coach, Mr Diego Vargas Uribe. They both confirmed the submissions made by the athlete to the FECNA Executive Committee on 18 May 2006.
 11. On 1 December 2006, Mr Hernán Javier Alzate Ortiz, President of the Quindío Swimming League, and Mr Mario Andrés Villalobos Trejos, physical training instructor, wrote a letter to the FECNA Disciplinary Commission to confirm Ms Lina Maria Prieto's reputation of a serious and hard working athlete, incapable of taking intentionally doping substances in order to enhance her sportive performance.
 12. Sometime during 2006, Ms Lina Maria Prieto was allegedly sanctioned by the FECNA with a one-year period of ineligibility.
 13. On 28 February 2007, the FECNA wrote to the FINA the following (as translated into English by the FECNA):

"Reference: Failure Description of Lina Maria Raga Prieto's Case.

In answer to its office of 6 of February of 2007, and according to its request, we sent the required documents and explained the declared failure.

In reference to the case, it is necessary to explain the following elements to determine the reach of the failure, and meaning of the final sanction.

In order to transact the case, it was taken according to the established in the Colombian Law identified with the number 49 of 1993, made by the Senate of the Colombian Republic. In this Law the procedures explain that it is due to respect the duties and rights of the parts (This establishes the Right Judgment). Also, Agreement 02 of 1993, welcomes the FECNA's Discipline Code and this as well, it leans in the mentioned Law that in this case, we take refuge; not without establishing before that we totally know the FINA Rules, in special, in which it makes reference to rule DC2.1, following DC10.2 and so.

For this case, the Failed (Document sent to you and translated to English) displayed the following stages that correspond to the due process, that is to say:

1. *Object of the uprising: that is, the identification or committed violation.*
2. *Identity of the Investigated one: Personal data.*

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3. *Summary of the facts: Report from the Control Doping laboratory that showed the analyses of taken samples, with adverse results.*
4. *Qualification of the fault: related to what is established in the FINA disciplinary codes, the FECNA and the Colombian Law related to the subject.*
5. *Analysis of the tests: five tests appeared:*
 - *Report contributed by the control doping laboratory which considers analytical adverse finding for anabolic steroid.*
 - *Act of Diligence (interview) of free version, where the sportswoman accepts to consumed a medicine called "tribulus" as vitamin, and in which she did not know that such vitamine had the component for what she is being accused.*
 - *Sport Trainer version of the sportswoman.*
 - *President of Quindío Swimming League written version.*
 - *Disciplinary report of the FECNA, on the antecedents of the sportswoman.*
6. *Considerations where the probatory is valued, it settles down the fault of the sportswoman and the extenuating ones of the fact.*
7. *It solves: Resolving act by which proffered the sanction.*

With the stages of the fault described before, it is necessary to establish that the Disciplinary Commission considered what it is established in the FINA and FECNA Code, in relation to the times of eligibility. In this, both parts consider FINA DC 10.2 by 2 years and FECNA literal Art. 9. G, between 2 and 5 years of eligibility. For the attenuation circumstances the FINA considers the established in DC 10.3 and DC 10.5.2; the WADA Code numeral 10.5.2.

In this order it was considered the proves the sportswoman gave (container of Tribulus), it did not have the description of the components that appear in the test of the control doping laboratory; once well-known the sample, and listened to the free version of the sportswoman, she later contributed with two studies, in which it appears the anabolic steroid, fact that the sportswoman did not know, nor its trainer and people who train her in her university.

With the contributed arguments, it is referred that the sportswoman consumed the substance under the knowledge the fraud publicity of the label product had. Also, the product is of easy acquisition in the market since it is sold like nutritional supplement.

In this case, the Disciplinary Commission of the FECNA considers that Absence of Fault appears or Significant Negligence in the measurement that the sportswoman acted under fraud publicity when she committed the violation, that does not exonerate it of the fault, but it is considered extenuating, fact that adjusts in the established in the WADA Code (10.5.2) and FINA (DC 10.3.).

Since the Sportswoman collaborated in the process as she describes herself in the considerations of the failure and considering the norms of both Associations, the

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fault adjusts to the established norms to reduce half of the period of eligibility, or a year (12 months) as it were failed.

According to the established by the same rules the resources for replenishment and appeal in consideration of the judgment established by WADA, FINA and the Colombian Laws.

For your collaboration thank you very much."

14. On 2 April 2007, the FINA wrote to the WADA in relation with the decision of the FECNA sanctioning Ms Lina Maria Prieto for the anti-doping rule violation committed during the Campeonato Internacional Ciudad De Cali, which took place in April 2006 in Cali, Colombia. It explained to the WADA why it did not intend to file an appeal against the said decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

III.1 CAS 2007/A/1284 WADA v/ FEDERACIÓN COLOMBIANA DE NATACIÓN & LINA MARIA PRIETO

15. On 16 April 2007, the WADA wrote to the FECNA the following:

"Case PRIETO Lina Maria

Dear Sir,

We have been notified on 10 April 2007 by FINA of the decision rendered by the FECNA Disciplinary Commission in the above-mentioned case and inform you that the World Anti-doping Agency (WADA) is willing to appeal against this decision.

(...)

Due to the above, WADA considers that the decision rendered in the case of Mrs Prieto is much too lenient and not in line with CAS case law.

(...)

This letter serves as a formal declaration of appeal which we ask you to transmit to the relevant authority. As soon as we receive the requested information, we will file a detailed brief in the matter.

Unless the matter is resolved before 21 days, we will also appeal to CAS to preserve our right of appeal."

16. On 26 April 2007, the FECNA confirmed to the WADA that its appeal was forwarded to the FECNA Disciplinary Commission.
17. On 27 April 2007, the WADA filed a statement of appeal with the Court of Arbitration for Sport (hereinafter referred to as "CAS").

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18. On 15 June 2007, the WADA submitted to the CAS its appeal brief, which contains a statement of facts, legal arguments and is accompanied by supporting documents. It requested the following:

"WADA hereby respectfully requests that the CAS rule that:

1. *The Appeal of WADA is admissible.*
2. *The Decision of the FECNA in the matter of Ms. Lina Maria Prieto is set aside;*
3. *Ms Lina Maria Prieto is sanctioned with a two-year period of ineligibility.*
4. *All competitive results obtained by Ms Lina Maria Prieto from April 8, 2006, through the commencement of the applicable period of ineligibility shall be disqualified with all the resulting consequences including forfeiture of any medals, points and prizes.*
5. *WADA is granted an award of costs."*

III.2 CAS 2007/A/1308 WADA v/ FEDERACIÓN COLOMBIANA DE NATACIÓN & LINA MARIA PRIETO

19. On 3 May 2007, the WADA filed with the FECNA a detailed appeal brief against its decision delivered in the case of Ms Lina Maria Prieto.
20. On 16 May 2007, the FECNA Disciplinary Commission issued the following document (as translated into English by the FECNA):

Re.: Clarification regarding the conduct of the Disciplinary Commission concerning the case of the athlete Lina Raga.

In relation to the WADA communication of 3 May 2007, we should like to make the following clarifications:

Chapter III of agreement 002 of 1993, which revises the Disciplinary Code of the Colombian Swimming Federation (FECNA), establishes the procedure to be followed regarding disciplinary investigation, whilst chapter II establishes the description of the ruling and related punishment, constituting, in accordance with the legal and constitutional laws, the due process of the respective disciplinary proceedings.

Such agreement also contains articles that establish extenuating circumstances and aggravating circumstances respectively in relation to the sanction.

The extenuating circumstances were taken into account in relation to the present case. According to the dictionary of the Real Academia Espanola, extenuating circumstances are: "Facts that reduce criminal responsibility and consequently the sanction" (Larousse Illustrated Dictionary). As such, since her conduct fell under the provisions of article 17 of agreement 002 of 1993, Ms LINA MARIA RAGA PRIETO was granted a reduced sanction, based on the minimum sanction set forth in article 9 G of the aforementioned agreement.

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We should also like to inform you that article 34 of agreement 002 of 1993 establishes the possibility and form of recourse to appeal rulings issued by the FECNA Disciplinary Commission. Such appeal must be lodged within five (5) days subsequent to notification.

For those sentences or rulings issued when there is no recourse pending because the law does not provide for one or because the term during which one may be lodged has expired, there is another concept, that of the res judicata, which, in the field of sanctions, relates to the fact that one person cannot be tried twice for the same crime, regardless of whether such person was found guilty or innocent, and is based on the fundamental impediment imposed on judges and civil servants invested with punitive authority by the principle of NON BIS IN IDEM.

When relating this impediment to the case at hand, we find that no recourse is possible since the term of such recourse fully expired and the ruling has the quality of a res judicata.

Finally, it should be noted that certain sections in article 29 of the Political Constitution of Colombia, referring to due process, state the following: "... a person may be tried only in accordance with the laws existing at the time of the crime of which such person is accused, before a judge or competent court and in observance of all of the forms that befit each case".

"... to a due process with no unjustified delays ... and not to be tried twice for the same crime".

Due process is a whole set of guarantees that protect people, in order to ensure that reliable justice is administered without delay during such process.

Article 4 of our Political Constitution states the following: "The Constitution is the law of laws. In the event of incompatibility between the Constitution and the law or other legal regulation, the constitutional provisions shall apply. It is the duty of nationals and foreigners in Colombia to comply with the Constitution and the laws, and respect and obey the authorities".

Furthermore, we, the members of the Disciplinary Commission, can guarantee good faith and transparency in the conduct of the disciplinary proceedings, having given the opportunity to the person involved and her coach to be heard, having sought a fair and equitable decision, and also having based our decision on the report of the Coldeportes National Doping Control Laboratory.

Finally, in the future, we shall endeavour to rely on the support of international control bodies before we apply any sanctions."

21. By fax dated 24 May 2007, the FECNA sent the above quoted "clarification" to the WADA. It also confirmed that its Administration Board and its Disciplinary Commission held a meeting on 12 May 2007 and were expecting the WADA to make "observations, suggestions and instructions (...) in relation to what [FECNA] should do about the case of the athlete Lina Raga, in order to come up with a definitive solution in keeping with current regulations and Colombian law."

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22. On 14 June 2007, the WADA filed another statement of appeal with the CAS. It challenged the "clarification" dated 16 May 2007.
23. On 22 June 2007, the Appellant filed its appeal brief, which contains a statement of the facts and legal arguments accompanied by documents as evidence. It submitted the following request for relief:

"WADA hereby respectfully requests that the CAS rule that:

- 1. The Appeal of WADA is admissible.*
 - 2. The Decision of the FECNA of May 16, 2007 in the matter of Ms. Lina Maria Prieto is set aside;*
 - 3. Ms Lina Maria Prieto is sanctioned with a two-year period of ineligibility.*
 - 4. All competitive results obtained by Ms Lina Maria Prieto from April 8, 2006, through the commencement of the applicable period of ineligibility shall be disqualified with all the resulting consequences including forfeiture of any medals, points and prizes.*
 - 5. WADA is granted an award of costs."*
24. The WADA refers to the legal arguments and petitions made in its first appeal brief of 15 June 2007.

III.3 THE PARTIES' SUBMISSIONS

25. The essence of the Appellant's submissions can be summarized as follows:
- The appeal of the WADA is admissible and was filed in a timely manner.
 - It has been scientifically established that Ms Lina Maria Prieto has violated an anti-doping rule.
 - Considering the fact that Ms Lina Maria Prieto has never given any plausible or valid explanation as to a possible cause for the positive findings, she is not entitled to any exclusion or reduction of the otherwise applicable sanction.
 - *"The ordinary two-year sanction provided for by article DC 10.2 of the FINA Rules is therefore applicable"* (Appeal brief of 15 June 2007, par. 49).
 - All competitive results obtained by Ms Lina Maria Prieto from April 8, 2006, through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.
26. The Respondents failed to submit a response to the aforementioned submissions of the Appellant either within the given time limit or subsequent to the expiry of it.

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III.4 THE EVIDENTIARY PROCEEDINGS ORDERED BY THE SOLE ARBITRATOR

27. On 30 August 2007, and upon the instructions of the Sole Arbitrator, the CAS Court Office invited the FECNA to answer the following questions:

- i. *What was the nature of the competition CAMPEONATO INTERNACIONAL CIUDAD DE CALI, which took place in Cali on April 2006?*
- ii. *Was this Championship a FINA competition or a FECNA competition?*
- iii. *Which sportive authority was responsible for the doping tests?*
- iv. *How did FECNA keep FINA and WADA informed about the evolutions of the Lina Maria Prieto's case, since 3 May 2006, that is when the WADA accredited laboratory sent its report to FECNA with a copy to FINA and WADA?*
- v. *When did FINA establish the first contact with FECNA regarding this case?*

(...) I hereby invite FECNA to furnish the CAS Court Office with the formal decision imposing a one-year period of ineligibility on Ms Lina Maria Prieto and with all details related to the sanction already imposed (for example beginning of the suspension, provisional suspension, return of any medal, etc...)."

28. In the same letter, the Sole Arbitrator invited the WADA to answer the following questions:

- i. *How did WADA react to the positive findings communicated by the WADA accredited laboratory on 3 May 2006 and how did WADA keep up to date regarding the said positive findings?*
- ii. *On 2 April 2007 FINA wrote to WADA regarding Lina Maria Prieto's case. Was this the first contact between FINA and WADA regarding the said case? If not, WADA is requested to indicate exactly when it first discussed of Lina Maria Prieto's case with FINA and to what extent."*

29. By fax dated 7 September 2007, the FECNA confirmed to the CAS Court Office the following:

- The Campeonato Internacional Ciudad De Cali is a FECNA competition. It is an international event open to South American swimming clubs.
- The organ responsible for the doping tests was the Laboratory for Doping Control of Coldeportes Nacional.
- From the moment it heard about the positive findings, the FECNA had "maintained permanent written communication with FINA, and later on with WADA and CAS, regarding the development of the case".
- The FECNA had "answered all the questions and inquiries that [had] been posed [...] in relation to this case and [had] included copies of all the documentation related to the case".

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- The first contact the FECNA had with the FINA was on 7 June 2006. On that date, it informed the latter international federation of the name of the athlete who was found guilty of a doping violation.
30. The FECNA has neither provided the formal decision imposing the one-year period of ineligibility on Ms Lina Maria Prieto nor the details related to the sanction already imposed, such as the beginning of the suspension or the return of any medals, etc.
31. On 12 September 2007, the WADA confirmed to the CAS Court Office, that:
- after the notification of May 2006 by the WADA-accredited laboratory, it wrote to the FINA to find out whether disciplinary proceedings had commenced;
 - on 5 July 2006, it received the name of the interested athlete and the confirmation of the fact that the latter had been provisionally suspended;
 - *"FINA did not provide WADA with other information or documentation on this case before its letter dated April 2, 2007."*

III.5 THE HEARING

32. Both the WADA and the FECNA confirmed to the CAS Court Office that they agreed to waive a hearing.
33. Ms Lina Maria Prieto was formally invited to inform the CAS Court Office whether she preferred a hearing to be held or whether the Sole Arbitrator should issue an award on the basis of the written submissions. She failed to communicate her position in this regard.
34. In the above circumstances and pursuant to article R57 of the Code of Sport-related Arbitration (hereinafter "Code"), the Sole Arbitrator decided to refrain from holding a hearing.

IV. DISCUSSION

IV.1 JOINDER

35. As both appeals (CAS 2007/A/1284 and CAS 2007/A/1308) concern the same doping case and the parties to these proceedings are identical, the Sole Arbitrator decided to join the two appeal procedures and to render one common award. This was explicitly requested by the Appellant (see statement of appeal of 14 June 2007, par. 12, CAS 2007/A/1308) and impliedly agreed by both Respondents due to their failure to respond to the letter dated 7 August 2007 sent to the parties by the Counsel to the CAS, which stated:

"Unless I hear otherwise from the parties within a deadline of 10 August 2007, it will be assumed that the parties agree to such joinder."

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IV.2 CAS JURISDICTION

36. The main issues to be resolved by the Sole Arbitrator in deciding the question of the jurisdiction of the CAS are:

- a) Is there an "arbitration clause"?
- b) Is there a "decision"?

a) Is there an "arbitration clause"?

The FINA Constitution

37. As far as can be seen, the Regulations of the FECNA contain no formal provisions granting jurisdiction to the CAS. However, it is obvious and undisputed that the FECNA is the body in Colombia governing aquatic sports and is a member federation of the FINA.

38. Article C 7.2 of the FINA Constitution states that:

"The Constitution and rules of a Member must not be in conflict with those of FINA. Where there is a conflict, FINA rules shall prevail."

39. Pursuant to article C 25 of the FINA Constitution, "*Disputes between FINA and any of its Members or Members of Members, individual members of Members or between Members of FINA that are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the Court of Arbitration for Sports (CAS), Lausanne. Any decision made by the Arbitration Court shall be final and binding on the parties concerned*".

The FINA Doping Control Rules

40. The FINA Doping Control Rules provide at the beginning (under the heading "Scope") the following:

"These Anti-Doping Rules shall apply to each Participant in the activities of FINA or any of its Member Federations by virtue of the Participant's membership, accreditation, or participation in FINA, its Member Federations, or their Competitions.

These Anti-Doping Rules shall apply to all Doping Controls over which FINA has jurisdiction.

All Member Federations shall comply with these Anti-Doping Rules. The regulations of Member Federations shall indicate that all FINA Rules including Anti-Doping Rules shall be deemed as incorporated into and shall be directly applicable to and shall be followed by Competitors, Competitor Support Personnel, coaches, physicians, team leaders, and club and Federation representatives under the jurisdiction of the respective Member Federations (...)"

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41. Likewise, article DC 14.1 of the FINA Doping Control Rules states the following:

"All Member Federations shall comply with these Anti-Doping Rules. The regulations of Member Federations shall indicate that all FINA Rules including Anti-Doping Rules shall be deemed as incorporated into and shall be directly applicable to and shall be followed by Competitors, Competitor Support Personnel, coaches, physicians, team leaders, and club and Federation representatives under the jurisdiction of the respective Member Federations."

42. Furthermore and according to article DC 14.6 of the FINA Doping Control Rules, *"When a Member Federation has received an Adverse Analytical Finding on one of its Competitors (...), it shall report the following information to FINA and WADA within fourteen (14) days of the process described in DC 7.1.2 and 7.1.3: the Competitor's name, country, sport and discipline within the sport, whether the test was In-Competition or Out-of-Competition, the date of Sample collection and the analytical result reported by the laboratory."*
43. Finally and as developed hereafter, the jurisdiction of the CAS derives expressly from article DC 13 of the FINA Doping Control Rules.

In casu

44. The FECNA pointedly makes reference to the FINA Doping Control Rules in several letters sent to the FINA as well as to Ms Lina Maria Prieto (see for example the letters of 28 February 2007 and of 11 May 2006, appendixes 1 and 13 to the appeal brief dated 15 June 2007). Its Disciplinary Commission even mitigated the minimum penalty of a two-year suspension - provided by article 9 lit. g) of the agreement 002 of 1993 of the FECNA Disciplinary Regulations - on the basis of articles DC 10.3 and DC 10.5.2 of the FINA Doping Control Rules (see the letter of FECNA to the FINA dated 28 February 2007).
45. Additionally, the WADA-accredited laboratory sent its positive results to the FECNA and a copy to the WADA and to the FINA as required by article DC 14.6 of the FINA Doping Control Rules.
46. In its fax dated 7 September 2007, the FECNA confirmed to the CAS Court Office that it had *"maintained permanent written communication with FINA, and later on with WADA and CAS, regarding the development of the case"*.
47. It results from the foregoing that the FECNA is and considers itself subject to the FINA Rules and Regulations. Therefore, the Sole Arbitrator has no doubt that the FINA regulations, in particular the FINA Doping Control Rules, can be deemed directly applicable to Ms Lina Maria Prieto (either through an agreement/license/"swimming passport" or through her accreditation for the competition at hand, pursuant to which the competitor acquiesced to the FINA Rules, or through a chain of references to the FINA Rules in by-laws or other regulations commencing with the competitor's swim club). This kind of factual assumption - based on experience and the fact that competitors generally submit themselves to all applicable regulations of the relevant competition (including doping rules) by their participation in the competition has also already been

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confirmed by CAS precedents (see CAS 2002/A/399 Poll v/FINA and CAS 2005/A/830 Squizzato v/FINA).

48. The CAS therefore has jurisdiction to decide on the present dispute. Moreover, its jurisdiction in the present case is not being disputed by any of the parties.

b) Is there a "decision"?

49. Despite the request of the Sole Arbitrator, the FECNA has neither provided the formal decision imposing the one-year period of ineligibility on Ms Lina Maria Prieto nor the details related to the sanction already imposed, such as the beginning of the suspension or the return of any medals, etc.
50. In its appeal brief dated 15 June 2007, the WADA asked "*that the CAS orders FECNA to provide to the CAS all details related to the sanction already imposed to Lina Maria Prieto (beginning of the suspension period, provisional suspension, etc.)*". It implies that the WADA also ignores the content and details of the formal decision issued by the FECNA in Ms Lina Maria Prieto's case. This is also illustrated by the fact that the Appellant directed its proceedings and submissions at various letters sent and actions taken by the FECNA.
51. As a result, the Sole Arbitrator has to resolve the issue as to which of the actions of the FECNA can be considered as a decision and be subject to his review. As a matter of fact, both the FINA Doping Control Rules (Articles DC 13.2.2 and DC 13.2.3) and article R 47 of the Code refer to "decisions".
52. The concept of an appealable decision (including an appeal against the failure to make a decision) has been defined in the well-established case law of the CAS as follows:
- "*The form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal. The form may only be an indication of the intent of the body issuing the communication, which may be taken into consideration. However, the form is not sufficient to find whether there is a decision or not*" (CAS 2005/A/899 FC Aris Thessaloniki v/ FIFA & New Panionios N.F.C)
 - "*A decision is thus a unilateral act, sent to one or more determined recipients and is intend to produce legal effects*" (CAS 2004/A/659, Galatasaray case)
 - "*In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. However, there can also be a decision where the body issue a ruling as to the admissibility or inadmissibility or a request, without addressing the merits of such request*" (CAS 2005/A/899 FC Aris Thessaloniki v/ FIFA & New Panionios N.F.C Aris case)
 - "*An appeal for denial of format justice is possible when the authority refuses without reason to make a ruling or its delay a ruling beyond a reasonable period*" (CAS 2004/A/659, Galatasaray case); "*If a body refuses without reason to issue a*

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decision or delays the issuance of a decision beyond a reasonable period of time, there can be a denial of justice, opening the way of an appeal against the absence of a decision" (CAS 2005/A/899 FC Arts Thessaloniki v/ FIFA & New Panionios N.F.C, see also CAS 2004/A/748, ROC, Ekimov vs. IOC, USOC, Hamilton)

Letter of the FECNA to the FINA dated 28 February 2007

53. In its statement of appeal dated 27 April 2007 (CAS 2007/A/1284) and in its statement of appeal dated 14 June 2007 (CAS 2007/A/1308), the WADA makes several references to "Appendix 1" in connection with the "decision rendered by the Colombian Swimming Federation (FECNA)" or "the decision attacked". Appendix 1 consists of the letter of 28 February 2007 from the FECNA Executive Director to the FINA (see par. 13 here above). In no way does this letter contain an appealable ruling affecting the legal situation of the athlete concerned, Ms Lina Maria Prieto, or of anyone else. As indicated at the beginning of said letter, it (merely) contains an answer to and information on a decision that had obviously already been rendered by the FECNA Disciplinary Commission.

Letter of the FINA to the WADA dated 2 April 2007

54. The letter from the FINA to the WADA dated 2 April 2007 (Appendix 4 to the appeal brief dated 15 June 2007 – see also par. 14 here above) is presented by the Appellant as "FINA notice of decision" issued by the FECNA with regard to Ms Lina Maria Prieto's case. This letter is certainly not a decision of the FECNA, nor is it a decision of the FINA; it merely sets out the reasons why the FINA decided not to appeal against the said decision delivered by the FECNA.

Letter of the FECNA to the WADA dated 26 April 2007

55. The answer of the FECNA dated 26 April 2007 (Appendix 7 to the appeal brief of 15 June 2007) in response to the letter of WADA dated 16 April 2007 (Appendix 3 to the appeal brief dated 15 June 2007 – see also par. 16 here above) only contains two things:
- a) The confirmation of the transmission of the petition of the WADA ("solicitud") to the FECNA Disciplinary Commission.
 - b) The transmission of the documents on which the FECNA Disciplinary Commission had based its decision (but without its actual decision!) and the FECNA Disciplinary Regulation "Acuerdo Numero 002 de 1993".
56. The letter of the FECNA dated 26 April 2007 is not a decision and an appeal against it cannot be filed by the WADA with the CAS.

Clarification of the FECNA dated 16 May 2007 and letter to the WADA dated 24 May 2007

57. The statement of appeal of 14 June 2007 (CAS 2007/A/1308), together with the appeal brief of 22 June 2007, is directed against the "clarification" of the FECNA dated 16 May 2007. This document was attached to the letter of the FECNA dated 24 May 2007, received by the WADA on 25 May 2007.

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58. The said letter of 24 May 2007 (Appendix 11 to the appeal brief dated 15 June 2007) refers to the "*clarification*" issued on 16 May 2007 by the FECNA Disciplinary Commission to the attention of the FECNA President. In this document, the Disciplinary Commission explains that, in its opinion, the athlete's case had been correctly dealt by a competent judicial body which had issued a valid and final decision. Pursuant to Columbian constitutional law, the case cannot be adjudicated on again and the Appellant is barred by *res judicata*. This "*clarification*" does not constitute a (new) "decision"; it is only an internal statement made within the FECNA.
59. Even the FECNA itself does not regard the "*clarification*" of its Disciplinary Commission as being conclusive. As a matter of fact, in its letter dated 24 May 2007, it asks the WADA to give the FECNA the "*instructions necessary*" and to provide it with "*observations, suggestions and instructions*" on how the FECNA should proceed ("*in order to come up with a definite solution in keeping with current regulations and Columbian Law*"). At the end of its letter, the FECNA also makes a renewed request for "*any guidance (...) in order to deal with this case appropriately*". Therefore the appealed letter of 24 May 2007 is also not a (new and independent) final "decision".

Conclusion

60. Although no letter or document referred to by the Appellant constitutes a separate appealable decision, the communication that took place in the case at hand makes it very clear (in particular the letter of FECNA dated 28 February 2007) that the FECNA Disciplinary Commission sanctioned the swimmer Lina Maria Prieto with a one-year period of ineligibility. Neither the lack of knowledge of the form in which the official decision has been rendered nor the fact that a formal (written) decision with reasons has not yet been handed in, changes this in any way. Therefore even though the form and the exact content of the "decision" are uncertain, the question put forward at the beginning ("Is there a decision?") must nevertheless be answered in the affirmative.
61. As recognized by the FECNA Disciplinary Commission in its "*clarification*" dated 16 May 2007 (Appendix 11 to the appeal brief dated 15 June 2007) and in the absence of any evidence to the contrary, the appealed decision of the FECNA must also be deemed to be final within the meaning of R 47 of the Code.

IV.3 Applicable Law

62. It is generally accepted that the choice of the place of arbitration also determines the law to be applied to arbitration proceedings. The Swiss Code of Private International Law (hereinafter "CPIL") is the relevant arbitration law (Bernard Dutoit, *Droit international privé Suisse, commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, N. 1* on article 176 CPIL). Article 176 par. 1 CPIL provides that the provisions of Chapter 12 of the CPIL regarding international arbitration shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland.

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63. On many occasions, the Swiss Federal Tribunal recognised the CAS as a true court of Arbitration. The CAS has its seat in Switzerland. Chapter 12 of the CPIL shall therefore apply, the Respondents in the present matter having neither their domicile nor their usual residence in Switzerland.
64. Pursuant to article 176 par. 2 CPIL, the provisions of Chapter 12 do not apply where the parties have excluded its application in writing and agreed to the exclusive application of the procedural provisions of cantonal law regarding arbitration. There is no such agreement in this case. Therefore, articles 176 ff. CPIL are applicable.
65. Article 187 CPIL is of particular relevance. It provides that the arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.
66. Likewise, article R58 of the Code provides the following:
- "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*
67. The election of governing law by tacit agreement is possible. For instance, by their behaviour, the parties could have clearly given their assent to the application of a specific law. Nevertheless, to admit this, it must undoubtedly emerge through the parties' conclusive acts, that they agreed on the applicable law when they entered into the disputed contractual relationship (see CAS 2005/A/896 Fulham FC (1987) Ltd. v/ FC Metz).
68. In the present matter, the parties have not expressly agreed on the application of any particular law. For the reasons already exposed here above (see par. 44 ff), the Sole Arbitrator has already observed that the Respondents are subject to the FINA Rules and Regulations. Article C 7.2 of the FINA Constitution states that: *"The Constitution and rules of a Member must not be in conflict with those of FINA. Where there is a conflict, FINA rules shall prevail."*
69. Therefore, the regulations of the FINA shall apply primarily and the FECNA regulations as well as the Colombian law shall apply subsidiarily.

IV.4 ADMISSIBILITY

IV.4.1 Valid legal procedural-relationship between the parties to the proceedings

70. According to article R 31 (1) of the Code, all notifications made by the CAS are to be made to the address set out in the statement of appeal. In the present case, although the WADA did give an address for Ms Lina Maria Prieto, it was the address of the FECNA and not her private address. The problem here is that the WADA itself obviously does

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not know the athlete's private address. This is because it does not even have the FECNA's decision imposing the sanction - which is actually the most interesting one and the one being appealed - that should/must contain the athlete's address. In a case such as this, the Sole Arbitrator considers it rather odd in terms of procedural law that a party conducting an appeal would be satisfied with the address of the national federation only, particularly in light of the fact that the procedural laws of many countries demand that the correct naming of the parties in a proper legal suit/appeal also includes the address of the defendant/respondent. As far as can be seen, there is also no rule pursuant to which the FECNA is the official recipient for service (of procedural documents) for its athletes.

71. Mandatory to an appeal proceeding in any case is the participation of the respondent. Otherwise the appeal would be inadmissible due to the absence of a valid legal procedural-relationship between the parties to the proceedings. Especially in doping proceedings that involve - as does the case at hand - the magnification of the sanction (here: suspension for one year) imposed on the athlete, it would be procedurally unacceptable to make a decision on the merits if the athlete concerned has not been properly included in the proceedings; at the very least, he/she should receive knowledge of the proceedings in such a way that enables the person to legally defend him/herself.
72. A careful examination of the official CAS file showed that one personal letter to the WADA was directly signed by Ms Lina Maria Prieto on 16 May 2007 in which she confirmed that she is aware of the proceedings involving her before the CAS. Based on this and on the fact that national federations generally transmit any official correspondence and decisions concerning their athletes to them without undue delay, the Sole Arbitrator finds - albeit with a certain degree of hesitation - that a validly established legal relationship exists between the parties to the proceedings, i.e. between the WADA and Ms Lina Maria Prieto.

IV.4.2 Timely appeal?

73. In its "clarification" dated 16 May 2007, the FECNA Disciplinary Commission alleged the following:

"We should also like to inform you that article 34 of agreement 002 of 1993 establishes the possibility and form of recourse to appeal rulings issued by the FECNA Disciplinary Commission. Such appeal must be lodged within five (5) days subsequent to notification.

For those sentences or rulings issued when there is no recourse pending because the law does not provide for one or because the term during which one may be lodged has expired, there is another concept, that of the res judicata, which, in the field of sanctions, relates to the fact that one person cannot be tried twice for the same crime, regardless of whether such person was found guilty or innocent, and is based on the fundamental impediment imposed on judges and civil servants invested with punitive authority by the principle of NON BIS IN IDEM.

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When relating this impediment to the case at hand, we find that no recourse is possible since the term of such recourse fully expired and the ruling has the quality of a res judicata."

74. Article 34 paragraph 1 of the agreement 002 of 1993 of the FECNA Disciplinary Regulations, reads as follows (As translated into English by the Appellant):

"The appeal may be lodged before the tribunal which has pronounced the sanction in the notification act or in writing within five (5) days and may be lodged either directly or as appended to the replacement appeal."

75. With regard to appeals, the FINA Doping Control Rules read as follows:

DC 13.2.1 In cases arising from an Event in an International Competition or in cases involving International-Level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.

DC 13.2.2 In cases involving Competitors that do not have a right to appeal under DC 13.2.1, each Member Federation shall have in place an appeal procedure that respects the following principles: a timely hearing, a fair and impartial hearing body; the right to be represented by a counsel at the person's expense; and a timely, written, reasoned decision. FINA's rights to appeal from hearing decisions by Member Federations are set forth in DC 13.2.3 below.

DC 13.2.3 In cases under DC 13.2.1, the following parties shall have the right to appeal to CAS: (a) the Competitor or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) FINA and any other Anti-Doping Organization under whose rules a sanction could have been imposed; (d) the International Olympic Committee, as applicable, where the decision may have an effect in relation to the Olympic Games, including decisions affecting eligibility for the Olympic Games; and (e) WADA. In cases under DC 13.2.2, the parties having the right to appeal to the national-level reviewing body shall be as provided in the Member Federation's rules but, at a minimum, shall include: (a) the Competitor or other Person who is the subject of the decision being appealed; (b) the other party to the case in which the decision was rendered; (c) FINA; and (d) WADA. For cases under Article 13.2.2, WADA and FINA shall also have the right to appeal to CAS with respect to the decision of the national-level reviewing body.

(...)

DC 13.5 The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party and FINA. The above notwithstanding, the following shall apply in connection with appeals filed by a party entitled to appeal but which was not a party to the proceedings having lead to a decision subject to appeal:

- Within a deadline of ten (10) days from receipt of the decision, such party/tes shall have the right to request from the body having issued the decision a copy of the file on which such body relied.*

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- *If such request is raised within the above deadline, then a new appeal deadline will run for the concerned party from the day the copy of the file is received."*

76. It appears that in the FECNA and in the FINA Regulations, the deadline to file an appeal starts the day after the petitioner is notified of the decision and has received it respectively. In both regulations, the date of the issuance of the decision is actually irrelevant.
77. In the present case, the Appellant was not a party to the proceedings having led to the litigious decision. However, it is entitled to appeal the decision, in accordance with article 13.2.1 ff of the FINA Doping Control Rules.
78. The main issues to be resolved by the Sole Arbitrator in deciding whether the appeal is admissible are:
- a) When does the time limit to appeal start to run?
 - b) Was the appeal filed in a timely manner?
- a) When does the time limit to appeal start to run?
79. As already put in evidence, the FECNA has neither made available the formal decision imposing the one-year period of ineligibility on Ms Lina Maria Prieto nor the details related to the sanction imposed, such as the beginning of the suspension or the return of any medals, etc. Moreover, the FECNA has never specified when the said decision had been issued.
80. However, based on the documents provided by the FECNA itself, it appears that Ms Lina Maria Prieto was heard by the members of the FECNA Executive Committee on 18 May 2006. On 28 November 2006, the FECNA Disciplinary Commission held a meeting in the presence of the athlete and of her coach. On 1 December 2006, Mr Hernán Javier Alzate Ortiz, President of the Quindío Swimming League and Mr Mario Andrés Villalobos Trejos, physical training instructor, sent a written witness statement to the FECNA Disciplinary Commission to confirm Ms Lina Maria Prieto's qualities as an athlete.
81. Under such circumstances, the Sole Arbitrator has no reason to think that a decision was issued by the FECNA Disciplinary Commission before 1 December 2006. As a matter of fact and according to its letter to the FINA dated 28 February 2007, the FECNA declared that the decision was taken notably on "*President of Quindío Swimming League written version*", which is dated 1 December 2006.
82. In its letter dated 28 February 2007, the FECNA gave to the FINA an account of the content of the decision rendered by the FECNA Disciplinary Commission in Ms Lina Maria Prieto's case. The decision itself was not attached to this communication.
83. For its part, the WADA stated that "*FINA did not provide WADA with other information or documentation on this case before its letter dated April 2, 2007.*" The said letter was

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received by the WADA on 10 April 2007 (Appendix 6 to the appeal brief dated 15 June 2007).

84. In the present case, Article 13.5 of the FINA Doping Control Rules provides that the time limit to appeal a decision starts to run from the date of the "receipt of the decision" and not – according to the FECNA-Rules (see para. 74 above) or other regulations of sport associations – from the "notification" or "notice" of the decision in question (see for example CAS 2006/A/1153 WADA v/ Portugusse Football Federation & Nuno Assis Lopes de Almeida, para. 33 and CAS 2007/A/1413/ WADA v/FIG & N. Vysotskaya, para. 57). This also applies to a party which were not a party to the proceedings, such as the Appellant in the case at hand (see Article 13.5 1st "dash" of the FINA Doping Control Rules).
85. According to CAS case law, provisions contained in the rules governing sports associations may derogate from provisions of national law (as the case may be here with Colombian law). In particular, they may provide for a different statute of limitations or they may provide that the time limit starts to run when the appellant has been formally notified of the decision (see e.g. CAS 2002/A/432, in Reeb, Rec. II, p. 419 ss.; CAS 2002/A/399, in Reeb, Rec. III, p. 383 ss.; CAS 2005/A/487; CAS 2007/A/1413/ WADA v/FIG & N. Vysotskaya, para. 56; see also Rigozzi, *L'arbitrage international en matière sportive*, Helbing & Lichtenhahn, Basle 2005, p. 541; see, however, Riemer, p. 359 s.). Thus, the "dies a quo" of the time limit is – according to Article 13.5 1st "dash" of the FINA Doping Control Rules – the "receipt of the decision".
86. In the present case, WADA had not received a common formal decision in the form of a "physical" document. At the most, WADA was notified by FECNA of the decision with its letter of 28 February 2007.
87. Thus, the question arises whether the wording "receipt of the decision" (in contrast to the term "notification/notice of the decision") must be interpreted in a sense that the party entitled to appeal must have the relevant formal decision in a traditional written form actually in "its hands" before the decision can be appealed.
88. The present case shows that such an interpretation can certainly make sense not least in the interest of a due process of law and in order to have a solid basis for the further review of the upcoming instances. In particular, it could motivate or force the party entitled to appeal (here: WADA) – in addition to what are certainly efficient pre-procedural means of intervening in and making requests to national and/or international sport federations – to bring an action to force the surrender of the official decision and the reasons for the decision.
89. However, the Sole Arbitrator is of the opinion that there are no indications for such an (extensive) interpretation of the term "receipt of the decision" in the said Article 13.5 1st "dash" of the FINA Doping Control Rules. It is evident that this provision is a mere and common "time limit provision". It in no way indicates a requirement of admissibility to the effect that a party entitled to appeal cannot lodge an appeal before the actual receipt of the relevant formal decision. Rather, if there are no doubts as regards the existence of a decision – like in the case at hand (see para. 60 above) – the

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term "receipt" in Article 13.5 of the FINA Doping Control Rules has to be interpreted in a way that the "dies a quo" of the time limit is at least – as "a minus" of a receipt – the notice of the decision.

90. In the case at hand, the Sole Arbitrator observes the following:

- It is undisputed that between 7 and 9 April 2006, Ms Lina Maria Prieto was subject to in-competition drug testing and that her positive results were communicated by the WADA-accredited laboratory to the FECNA, the FINA and the WADA on 3 May 2006.
- Pursuant to DC 8.2.3 of the FINA Doping Control Rules "*Member Federations shall keep FINA fully apprised as to the status of pending cases and the results of all hearing*".
- Additionally and according to DC 14.6 of the FINA Doping Control Rules "(...). *The Member Federation shall also regularly update FINA and WADA on the status and findings of any review or proceedings conducted pursuant to DC 7 (results Management), DC 8 (Right to a Fair Hearing) or DC 13 (Appeals).*"
- On 5 July 2006, the FINA informed the WADA that Ms Lina Maria Prieto had been provisionally suspended by the FECNA and that a decision of a Disciplinary Commission was still to be rendered.
- It has been established that the litigious decision has not been issued before December 2006.
- In its fax dated 7 September 2007 to the CAS Court Office, the FECNA affirmed that from the moment it heard about the positive findings, it had "*maintained permanent written communication with FINA, and later on with WADA and CAS, regarding the development of the case*" (emphasis added).

91. The letter sent by the FECNA to the FINA on 28 February 2007 is the only written piece of evidence regarding the first communication of the actual existence of the decision sanctioning Ms Lina Maria Prieto. The Respondents did not make plausible nor demonstrate that an earlier notification of the existence of the decision was made to the FINA and/or to the WADA.
92. Based on the foregoing, the Sole Arbitrator is of the opinion that the WADA was not aware of the existence of the litigious decision before 10 April 2007. The question remains whether WADA had the possibility to know about the decision any earlier or – in other words – whether WADA should have enquired about the decision based on good faith principles.
93. Whether are not the wording and interpretation of Article 13.5 of the FINA Doping Control Rules leave room for such principles the Sole Arbitrator finds there are no elements on record that would warrant such finding. In this respect, the Panel notes that the Respondents did not submit anything that indicates that WADA should have known about the decision before it was notified of it on 10th April 2007. In addition, the Panel considers that the mere facts that WADA made some enquiries regarding the positive testing some time before 5th July 2006, and that WADA was informed by FINA on 5th July 2006 that the Athlete, Ms. Prieto, was provisionally suspended and was waiting for

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the judgement, is not sufficient to impose a good faith obligation on WADA to enquire about a decision issued by such federation. Indeed, this would defeat the purpose of article 13.5 of the FINA Doping Control Rules, which specifically provides that a time limit to appeal the decision only starts to run after receipt of the same. It would also, in the Sole Arbitrator's opinion, impose an unreasonable burden on WADA, which would have to constantly inform themselves about the current status of the pending proceedings to avoid the risk of losing its right to appeal decisions. One can expect from the relevant international federation (here :FINA) that it keeps track of the national disciplinary procedures initiated under its supervision, like in the present matter, and that it notifies its decisions to WADA in accordance with its own Rules. Furthermore, the FINA is responsible for the Results Management in accordance with Article 7 of the FINA Doping Control rules and the relevant articles of the World Anti Doping Code respectively (see a similar situation: CAS 2007/A/1413 WADA v/ FIG & Ms N. Vysotskaya, para. 59 sec.).

94. The fact that the FINA waited over a month to pass to the WADA the information of the existence of the decision, is regrettable. Nevertheless such a delay cannot be held against the WADA. Should it be otherwise, it would imply for the WADA to intervene in national cases and take measures or make inquiries, which obviously fall into the competence of the FECNA or the FINA. (see also regarding a similar problem: CAS 2004/A/574 Associação Portuguesa de Desportos v. Club Valencia C. F. S.A.D; CAS 2006/A/1153 WADA v/ Portuguese Football Federation & Nuno Assis Lopes de Almeida, para. 42).
95. Besides, and as a national federation which represents the interests of all its members in general and of Ms Lina Maria Prieto in particular, the FECNA should have dealt with her situation in a much more expeditious manner. Between the moment Ms Lina Maria Prieto's positive findings were known on 3 May 2006 and the moment she was heard by the FECNA Disciplinary Commission on 28 November 2006, more than 6 months passed by. This is much longer than the period of time provided under article DC 8.2.2 of the FINA Doping Control Rules, according to which "*Hearings pursuant to Article 8.2 shall be completed expeditiously and in all cases within three (3) months of the completion of the results management process described in DC 7. Hearings held in connection with Competitions may be conducted by an expedited process. If the completion of the hearing is delayed beyond three months, FINA may elect to bring the case directly before the FINA Doping Panel at the responsibility and at the expense of the Member Federation.*" Based on that last provision and on the circumstances, both the FECNA and the FINA should have been more diligent for the sake of the athlete's interests. As a matter of fact, the appeal of the WADA is filed nearly one year after the positive findings of Ms Lina Maria Prieto. This could prove far too harsh for the athlete, especially if she has already served her one-year suspension and has been reintegrated into her team. The Sole Arbitrator is of the view that the negligence committed by both FECNA and FINA in the management of this case could have been easily avoided with a better communication. It is the responsibility and duty of all international sports federations to conduct themselves in a fashion which is beyond reproach and is scrupulously in accordance with their anti-doping rules and policies contained within their organization's rulebook.

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b) Was the appeal filed in a timely manner?

96. For the reasons exposed here above, the WADA was notified of the existence of the decision issued by the FECNA on 10 April 2007.
97. On 16 April 2007, i.e. within the five-day time limit provided for in the agreement 002 of 1993 of the FECNA Disciplinary Regulations and within the ten-day limit provided for by article DC 13.5 of the FINA Doping Control Rules, the WADA lodged an appeal with the FECNA against the decision rendered in the matter of Ms Lina Maria Prieto. By fax dated 24 May 2007, the FECNA informed the WADA that according to its Disciplinary Commission the said decision acquired "res judicata" and was therefore final.
98. The request for arbitration was filed with the CAS on 27 April 2007, that is within twenty-one days after notification of the existence of the decision. Therefore it complies with the requirements of article DC 13.5 of the FINA Doping Control Rules.
99. Considering the above, the request for arbitration is admissible. It follows that the Sole Arbitrator does not need to address the issues of "res judicata" and of the principle "ne bis in idem" raised by the FECNA Disciplinary Commission in its "clarification" dated 16 May 2007.

IV.5 MERITS

100. The issues to be resolved by the Sole Arbitrator are:

- a) Has a doping offence been committed?
b) If yes, what is the sanction and how should it be calculated?

a) Has a doping offence been committed?

In General

101. According to article DC 2 of the FINA Doping Control Rules, "*The following constitute anti-doping rule violations:*

DC 2.1 The presence of a Prohibited Substance or its Metabolites or Markers in a Competitor's bodily Specimen.

DC 2.1.1 It is each Competitor's personal duty to ensure that no Prohibited Substance enters his or her body. Competitors are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Competitor's part be demonstrated in order to establish an anti-doping violation under DC 2.1.

(...)

DC 2.2.1 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited

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Method was Used or Attempted to be Used for an anti-doping rule violation to be committed".

102. The "*Prohibited List*" which is published and revised by the WADA is incorporated in the FINA Doping Control Rules pursuant to their article DC 4.
103. Norandrosterone is mentioned in the "*Prohibited List*".
104. According to article DC 3.1 of the FINA Doping Control Rules "*FINA and its Member Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the Member Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. (...).*"
105. Article 3.2.1 of the FINA Doping Control Rules provides that "*WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Competitor may rebut this presumption by establishing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding (...)*"

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106. It is undisputed that the Laboratory for Doping Control of Coldeportes Nacional is a WADA-accredited laboratory.
107. In Ms Lina Maria Prieto's "A" sample, 19-norandrosterone was detected at a concentration of 10.05 ng/ml. This value is higher than the allowed limit by WADA, which is 2ng/ml. In addition, she tested for a too-high ratio of testosterone to epitestosterone.
108. On 18 May 2006, Ms Lina Maria Prieto accepted the laboratories results and renounced to have the "B" sample analysed.
109. As a result, the Sole Arbitrator has no reason to put into question the quality and the results of the sample analysis conducted by the WADA-accredited laboratory. Based on the foregoing, Ms Lina Maria Prieto must be considered as having committed a doping offence involving a prohibited substance governed by the sanctions in article DC 10 of the FINA Doping Control Rules and must take responsibility for it.

b) What is the sanction and how should it be calculated?

110. It is the first time that Ms Lina Maria Prieto is found guilty of an Anti-Doping Rule violation.
111. According to its communication dated 28 February 2007 to the FINA, the FECNA applied article 9 lit. g) of the agreement 002 of 1993 of its Disciplinary Regulations in parallel with article DC 10 of the FINA Doping Control Rules.

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112. Article 9 lit. g) of the of the agreement 002 of 1993 of the FECNA Disciplinary Regulations states that (as translated into English by the Appellant) "*Promotion, incitation, use of sports prohibited substances or methods, such as "doping" as well as refusal to submit to the controls requested by competent organs and persons or any act of commission which prevents or disturbs the correct realisation of the said controls: SUSPENSION FROM TWO (2) TO FIVE (5) YEARS, without any prejudice as regards any further civil or penal responsibilities.*"
113. Pursuant to article DC 9 of the FINA Doping Control Rules, "*An anti-doping rule violation in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Event with all resulting consequences, including forfeiture of any medals, points and prizes.*"
114. Article DC 10 of the FINA Doping Control Rules reads as follows:

"DC 10.1 An anti-doping rule violation occurring during or in connection with a Competition may lead to Disqualification of all of the Competitor's individual results obtained in that Competition with all Consequences, including forfeiture of all medals, points and prizes, except as provided in DC 10.1.1.

DC 10.1.1 If the Competitor establishes that he or she bears No Fault or Negligence for the violation, the Competitor's individual results in the other Events shall not be Disqualified unless the Competitor's results in Events other than the Event in which the anti-doping rule violation occurred were likely to have been affected by the Competitor's anti-doping rule violation.

DC 10.2 Except for the specified substances identifies in DC 10.3, the period of Ineligibility imposed for a violation of DC 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), DC 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) and DC 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be:

First violation: Two (2) years' Ineligibility.

(...)

DC 10.5.1 If the Competitor establishes in an individual case involving an anti-doping rule violation under DC 2.1 (presence of Prohibited Substance or its Metabolites or Markers) or Use of a Prohibited Substance or Prohibited Method under DC 2.2 that he or she bears No Fault or Negligence for the violation, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Specimen in violation of DC 2.1 (presence of Prohibited Substance), the Competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under DC 10.2, 10.3 and 10.6.

DC 10.5.2 This DC 10.5.2 applies only to anti-doping rule violations involving DC 2.1 (presence of Prohibited Substance or its Metabolites or Markers), Use of a

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Prohibited Substance or Prohibited Method under DC 2.2, failing to submit to Sample collection under DC 2.3, or administration of a Prohibited Substance or Prohibited Method under DC 2.8. If a Competitor establishes in an individual case involving such violations that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Specimen in violation of DC 2.1 (presence of Prohibited Substance), the Competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced. "

115. The presence of a prohibited substance in the athlete's urine was established. Therefore, the burden of adducing exculpatory circumstances is shifted to Ms Maria Lina Prieto.
116. At the hearing before the FECNA Disciplinary Commission, Ms Maria Lina Prieto just explained that the ingestion of a vitamin called Tribulus must have been at the origin of her positive findings. She submitted that she took that food supplement after she made researches on the internet, according to which Tribulus was a natural vitamin. Based on the opinion of Mr Gustavo Mendoza, the sport scientist of the Quindio League, she was convinced that the existence of the prohibited substance as revealed by the test results could be explained by the combination of Tribulus and her contraceptive pills.
117. The Sole Arbitrator, based on objective criteria, must be convinced of the occurrence of the alleged effects of tribulus on the concentration of the norandrosterone found in the athlete's urine. In the present case, the exculpatory evidence required could have been disclosed in the form of scientific literature recognized as authoritative or in the form of a complete scientific expertise. The assertions made by Ms Maria Lina Prieto were not substantiated by anything concrete. As a result, the Sole Arbitrator considers that her allegations are not credible and do not suffice to justify the application of article DC 10.5 of the FINA Doping Control Rules (elimination or reduction of the period of ineligibility based on exceptional circumstances).
118. Not only did the athlete not begin to make credible or even plausible that, in her case, the high concentration of 19-norandrosterone can be explained by an endogenous production, caused by the absorption of authorized substances but she has also not established that she bears no fault or negligence for the anti-doping rule violation. According to article DC 2.1.1 of the FINA Doping Control Rules, it is each competitor's personal duty to ensure that no prohibited substance enters his or her body. In her various statements, Ms Lina Maria Prieto alleged that she made a few researches on the internet before she ingested the nutritional supplements, which allegedly lead to the positive test results. She told to the FECNA Disciplinary Commission that she should have made more researches and thus admitted her own negligence. When taking unknown food supplements for the first time, Ms Lina Maria Prieto did not apply the standard of care to be expected of a top-level athlete, i.e. obtain assurances from her physician, pharmacist or team doctor that the supplements did not contain a prohibited substance.

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119. In conclusion, Ms Lina Maria Prieto is unable to establish how the prohibited substance entered her system. Hence, article DC 10.5 of the FINA Doping Control Rules (elimination or reduction of the period of ineligibility based on exceptional circumstances) can not be applied and a minimum sanction of 2 years (for a first violation) must be imposed according to the rules in force.
120. It is well established that a two-year suspension for a first time doping offence is legally acceptable (Gabrielle Kaufmann-Kohler, Giorgio Malinverni, Legal opinion on the conformity of certain provisions of the draft World Anti-Doping Code with commonly accepted principles of international law, 2003, N°62 et seq., p. 22; CAS 2001/A/337; TAS 2005/A/922 Danilo Hondo c/Swiss Cycling & Swiss Olympic; TAS 2005/A/923 WADA c/Danilo Hondo & Swiss Olympic; TAS 2005/A/926 UCI c/Danilo Hondo & Swiss Olympic; CAS 2006/A/1153 WADA v/ Portuguese Football Federation & Nuno Assis Lopes de Almeida; CAS 2005/A/997 ISU v/ Anzhelika Kotiuga & Skating Union of Belarus).
121. Pursuant to article DC 10.8 of the FINA Doping Control Rules, "*The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Competitor, the period of Ineligibility may start at an earlier date commencing as early as the date of Sample collection.*"
122. According to the minutes of its meeting, the FECNA executive committee heard and suspended Ms Lina Maria Prieto as of 18 May 2006. There is no indication on whether the athlete has been taking part in official competitions since then.
123. Considering that (i) Ms Lina Maria Prieto has been suspended as of 18 May 2006, that (ii) "*Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served*", that (iii) the FECNA Disciplinary Commission did not complete the hearing process expeditiously (within three months of the completion of the results management process – see article DC 8.2.2 of the FINA Doping Control Rules), the Sole Arbitrator deems appropriate to declare that the two years ineligibility be imposed on Ms Lina Maria Prieto starting on 18 May 2006 rather than 8 April 2006, as claimed by WADA.

V. COSTS

124. Articles R65.1 and R65.3 of the Code of Sports-Related Arbitration provide that, subject to articles R65.2 and R65.4, the proceedings shall be free; that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties; and that, in the Award, the Sole Arbitrator shall decide which party shall bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.
125. As a general rule the CAS grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. In the present matter,

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the Appellant was assisted by a professional legal adviser. It incurred costs to present evidence or counter-evidence. However, in the light of all of the circumstances surrounding this case and of the financial resources of the parties, the Sole Arbitrator finds reasonable to order the Respondent FECNA to contribute to the costs incurred by the Appellant in a reduced amount of CHF 3'000.

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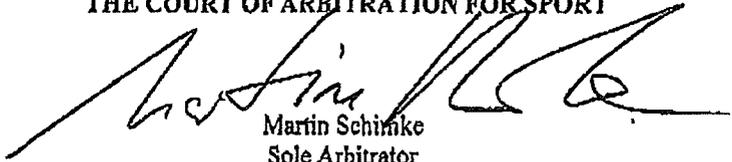
ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeals filed by the World Anti-Doping Agency in the present matter are partially upheld.
2. The appealed decision of the FECNA in the present matter is set aside.
3. Ms Lina Maria Prieto is guilty of an Anti-Doping Rule violation committed during the Campeonato Internacional Ciudad De Cali, which took place between 7 and 9 April 2006 in Cali, Colombia.
4. Ms Lina Maria Prieto shall be declared ineligible for two years. The period of ineligibility to be imposed upon her shall commence on 18 May 2006.
5. Ms Lina Maria Prieto's results obtained during the 2006 Campeonato Internacional Ciudad De Cali and or/during the above-mentioned period of ineligibility, her eventual medals, her points and prizes are forfeited.
6. This award is pronounced without cost, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid and to be retained by the CAS.
7. The Federación Colombiana de Natación is ordered to pay to the World Anti-Doping Agency a contribution towards all its costs incurred in connection with the present arbitration procedure in an amount of CHF 3,000 (three thousand Swiss Francs) within 30 days as from the notification of the present award.
8. If FECNA fails to comply with the above-mentioned deadline, an interest rate of 5% per year will apply.
9. All other motions or prayers for relief are dismissed.

Done in Lausanne, 8 July 2008

THE COURT OF ARBITRATION FOR SPORT



Martin Schimke
Sole Arbitrator