



Fédération Internationale
de Natation

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FINA Doping Panel

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In the proceedings against

the swimmer **Gunawan Indra**,
affiliated to the Indonesian Swimming Federation

I THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing the sport of Aquatics. 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 Indonesian Swimming Federation is a member of FINA. The Indonesian Swimming Federation is required to recognize and comply with FINA Doping Control Rules ("FINA DC"). The FINA DC Rules are 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 Indonesian Swimming Federation.

1.3 Mr. Gunawan Indra is a swimmer born on [REDACTED] and is part of the national Indonesian swimming team. He swims breaststroke.

II PROCEEDINGS

2.1 Mr. Gunawan Indra competed in the men's 50m Breaststroke during the 4th Asian Indoor and Martial Arts Games in Incheon Korea, in which he was awarded a gold medal for placing first. On 5 July 2013, the Olympic Council of Asia (OCA) wrote to the Chef de Mission of the National Olympic Committee (NOC) of Indonesia with the information that the swimmer Gunawan Indra was found to have an Adverse Analytical Finding in his

urine sample taken on 1 July 2013. The substance detected was Methylhexanamine, a prohibited specified stimulant (S6.b) in accordance with WADA Prohibited list 2013. At this occasion, the Chef de Mission was informed that the athlete had a right to a fair hearing by the OCA Disciplinary Commission, that he had a right to request the analysis of the B sample at his cost, that he had the right to attend personally or send a representative to witness the B sample opening and analysis and that he had the right to request copies of the A sample and if analysed the B sample laboratory documentation packages. Finally, the OCA Disciplinary Commission requested the attendance of the Chef de Mission, the athlete, plus the team physician or any other person concerned for a hearing session.

2.2 The hearing session took place on 5 July 2013. The athlete attended accompanied by the Chef de Mission of the NOC of Indonesia, the team doctor and legal support.

2.3 The athlete at the hearing exercised his right to have his B sample tested.

2.4 The B sample test was conducted on 6 July 2013, and it was found to have an Adverse Analytical Finding in his urine sample taken on 1 July 2013. The substance detected was Methylhexanamine. The laboratory report was received by the OCA Disciplinary Commission on 7 July 2013.

2.5 On 9 July 2013, the Indonesian NOC was informed about the B sample result and provided with a copy of the laboratory report.

2.6 By decision dated 13 July 2013, the OCA Disciplinary Commission decided that the report of the findings of the laboratory constituted a violation of OCA Doping rules as per 2.1 of the rules; that the athlete be disqualified from the 4th Asian Indoor and Martial Arts Games 2013 and the results be nullified, and all attained medals and any other prizes or certificates be withdrawn starting from the date where the athlete was tested positive and the gold medal be withdrawn.

2.7 On 7 August 2013, the athlete was called to a hearing before the Anti-Doping Agency of Indonesia. The Disciplinary Commission of the Lembaga-Anti-Doping Indonesia (LADI) imposed a sanction of 3 months ineligibility on the mentioned athlete starting on 13 August 2013, upon issuance of the LADI decree.

2.8 The FINA Executive Director asked the Chairman of the FINA Doping Panel to examine the case of Mr Gunawan Indra in relation to an adverse analytical finding failures by letter dated 13 November 2013.

2.9 By letter dated 19 November 2013, the chairman of the FINA Doping Panel informed Mr Gunawan Indra of his right to a fair hearing as per FINA DC 8.1. The athlete replied by email dated 20 November 2013

that he did not wish to use his right to a B sample analysis and that he accepted the penalty which was given to him.

2.10 By subsequent letter dated 28 November the FINA Doping Panel Chairman informed the athlete once again of his right to a hearing or of the possibility of filing his defence arguments.

2.11. In response the Indonesian Swimming Federation responded to this letter by letter dated 16 December 2013, stating that the swimmer did not wish a hearing nor would he present a written defence.

2.12 The FINA Doping Panel was formed pursuant to FINA Rule C 23.10 on 15 January 2014.

III JURISDICTION AND APPLICABLE RULES

3.1 According to the OCA Anti-Doping rules applicable to Asian Games Series states that a prohibited specified stimulant detected in an athlete's sample constitutes an anti-doping rule violation. Pursuant to the OCA Anti-Doping Rule 9.3:

"The management of anti-doping rule violations and the conduct of additional hearings as a consequence of hearings and decisions of the OCA, including with regard to the imposition of sanctions over and above those relating to the Asian Games, shall be managed by the relevant international Federations".

3.2 The jurisdiction of the FINA Doping Panel arises out of the provisions of the FINA Rules C 23.9, C 23.10 and FINA DC 8.1.

3.3 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

a) THE FACTS

4.1 The substance found in the body of the swimmer is Methylhexanamine, a prohibited specified stimulant (S6.b) in accordance with WADA Prohibited List 2013.

4.2 According to the decision rendered by LADI, on which the Panel rely on for facts in this case, Mr. Gunawan Indra saw his roommate taking supplement of Jack 3D and asked to try it. Before he did so, the Athlete asked whether taking the supplement is safe or not, and the roommate said it is safe. The Athlete was not doubtful about the roommate's information, because they were in the same swim team.

After taking the supplement, the athlete felt the effect, *i.e.* he became sleepy. It apparently did not affect his performance. He did not know that there was an older version of Jack 3D which is already prohibited as it contains Methylhexamine and that there may be a new form of Jack 3D which does not contain this substance.

The coach, who was heard by LADI apparently explained that since 2010, all members of the swimming team took Jack 3D which is a supplement that contains nitric oxide which is useful to widen blood vessels which in turn makes the heart capable of pumping more blood and strengthens the swimmers.

The LADI decision also exposes that since 2011, many countries such as USA, Canada, New Zealand and some European countries prohibit free distribution of Jack 3D and that the manufacturers issued a new for Jack 3D micro, which does not contain the prohibited substance.

b) THE LAW

4.3 FINA DC 2.1.1 reads:

"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 Samples. 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 2.1.2

"Sufficient proof of an anti-doping rule violation under Article 2.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Competitor's A Sample where the Competitor waives analysis of the B Sample and the B Sample is not analysed; or, where the Competitor's B Sample is analysed and the analysis of the Competitor's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Competitor's A Sample."

DC 10.2

"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) or DC 2.6 (Possession of Prohibited Substances and Prohibited Methods) shall be as follows, unless the conditions for eliminating or reducing the period of ineligibility, as provided in DC 10.4 and 10.5, or the conditions for increasing the period of ineligibility, as provided in DC 10.6, are met: First violation: Two (2) years' ineligibility."

DC 10.4

"When a competitor or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and

that such Specified Substance was not intended to enhance the Competitor's sport performance or mask the Use of a performance-enhancing substance, the period of ineligibility found in DC 10.2 shall be replaced by the following:

First violation: At a minimum, a reprimand and no period of ineligibility from future Competitions, and at a maximum, two years' of Ineligibility.

To justify any elimination or reduction, the Competitor or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance. The Competitor's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of ineligibility."

DC 10.5.2

"If a Competitor or other Person establishes in an individual Case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Sample in violation of DC 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers), the competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of ineligibility reduced."

DC 9

"A violation of these Anti-Doping Rules in individual Sports in connection with an in-Competition test automatically leads to Disqualification of the result obtained in that Event with all resulting consequences, including forfeiture of any medals, points and prizes."

DC 10.1

"An anti-doping rule violation occurring during or in competition with a Competition may, upon the decision of the ruling body of the Competition, 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 (...)."

c) THE SANCTION

4.4 The sanction provided for by FINA DC Rules for a first anti-doping rule violation is a two (2) year's ineligibility (FINA Rule DC 10.2). None of the rules allowing for a reduction of this sanction can be applied. Methylhexaneamine is a Prohibited Substance classified under S6 Stimulants (Specified Stimulants) on the WADA 2013 Prohibited List. The substance is prohibited in-competition only. It is undisputed that the athlete tested positive for this substance.

4.5 Any mitigating circumstances put forward on behalf of an athlete should be considered in the context of the standards which are expected of the athlete. To succeed with a plea of "No Fault or Negligence", an athlete must show that he or she used "*utmost caution*" to keep him- or herself clean of any prohibited substances, *i.e.*, that the athlete did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had ingested the prohibited substance (Puerta v. ITF, CAS 2006/A/1025, para. 11.25; FIFA & WADA, CAS 2005/C/976 & 986, para. 74. The athlete must show that he or she "*has fully complied*" with this "*duty of utmost caution*" (FJFA v WADA, CAS 2005/C/976 & 986 at para, 74), that is, that he or she has "*made every conceivable effort to avoid taking a prohibited substance*" (Knauss v. FJS CAS 2005/A/847 at para. 7.3.1) and that the substance got into his or her system "*despite all due care*" on his or her part (commentary to WADC Article 10.5). If the athlete cannot surmount that evidential hurdle, then provided that he or she can meet the preconditions to Article M.4 of the Programme/Article 10.4 WADC (Specified Substances), he or she can get the period of Ineligibility reduced to between zero and 24 months, based on his or her relative fault (cf. Robert Kendrick v ITF CAS 2011/A/2518). The reasoning is the same in applying FINA anti-doping rules.

In this matter, the athlete never entered such a plea and gave no substantial explanation to mitigate his circumstances in such a way that the Panel could consider application of FINA Rule DC 10.5.2.

4.6 A defence or circumstances under FINA Rule DC 10.4 will not be entertained either. In this case, not only did the athlete not establish that performance-enhancement was not his endeavour, but the examination of facts by the Indonesian authorities established that he knew that all athletes used the substance to strengthen themselves. In addition, the Panel considers that reference made in the LADI decision to the Mads Glaesner matter which was decided on by the FINA Doping Panel and subsequently by CAS (CAS 2013/A/3274) is of no relevance in this matter. In the Mads Glaesner matter, the athlete was able to provide a defence which allowed him to plea for the application of FINA Rule DC 10.4. The factors which must be established in order for an athlete to qualify for treatment under FINA DC 10.4 are:

- a. The athlete must establish how the Specified Substance entered his or her body or came into his or her Possession; and
- b. The athlete must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance.

If the foregoing factors are proved by the athlete, then his degree of fault is the criterion considered in assessing any reduction of the period of

ineligibility. In this matter, the athlete has established how the Specified Substance entered his body. However, there is no evidence of an absence of intent to enhance sport performance. The athlete did not allege before any of the jurisdictions before which this case was presented any therapeutic or health reasons which would have lead him to use this product. On the basis of lack of evidence to the contrary, the Panel therefore decides that a defence based on FINA Rule DC 10.4 is not applicable in this case,

VI. CONCLUSION

5.1 Mr. Gunawan Indra receives a two years period of ineligibility commencing on 1 July 2013 and ending at the conclusion of 30 June 2015 for his first anti-doping rule violation.

5.2 All results obtained by Mr. Gunawan Indra after 1 July 2013 and through the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

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

5.4 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).

Robert Fox

Raymond Hack

Toshiro Ueyanagi

Signed on behalf of all three Panel Members



Robert Fox, Chairman