

FINA Doping Panel 04/14
18 June 2014

FINA Doping Panel

comprised of

Robert Fox (SUI)	Chairman
Peter Kerr (AUS)	Member
Farid Ben Belkacem (ALG)	Member

In the proceedings against

the swimmer **Ivan Alejandro Enderica Ochoa**
affiliated to the Federación Ecuatoriana de
Natación (FENA)

represented by: Mr. Miguel Liétard,
Legal Counsel
Mr. Mauricio Chiriboga Merino,
Legal Counsel

I. THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing disciplines related to 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 FEDERACION ECUATORIANA de NATACION (FENA) is a member of FINA. FENA is required to recognize and

comply with FINA's anti-doping rules which are set out in the FINA Doping Control Rules ("FINA DC"). The FINA DC is directly applicable to, and must be followed by, *Competitors, Competitor Support Personnel*, coaches, physicians, team leaders, and club and Federation representatives under the jurisdiction of the FENA.

1.3 Mr. Ivan Alejandro Enderica Ochoa is a twenty two (22) years old elite international swimmer, a native of ECUADOR. He has enjoyed some success as a swimmer since his middle teens.

1.4 He competed for ECUADOR in various competitions, in 2006 in Chile he won a bronze medal in 400 m freestyle. In September 2007 in the XXVII Copa Del Pacifico de Natacion in Cali (Colombia), he won a bronze medal in 400 m freestyle. In October 2009 in Copa Pacifico (Guayaquil), he won a gold medal in the 5 km open water and a gold medal in 400 m freestyle. In November 2009, in Juegos Deportivos Bolivarianos (Bolivia), he won a gold medal in 1500 m freestyle. In December 2009, in Juegos Suramericanos (Uruguay,) he won a gold medal in the 5 km open water. In March 2010, in Juegos Suramericanos in Medellin (Colombia), he won a gold medal in the 5 km and 10 km open water. In February 2011, in Festival Olimpico the Verano Lima (Peru), he won a gold medal in the 5 km and 10 km open water. In November 2012, in Juegos Deportivos Bolivarianos (Bolivia), he won a gold medal in the 5km and 10 km open water.

II. NATURE OF THE CASE

2.1 The swimmer, representing his country, participated in the XVII JUEGOS DEPORTIVOS BOLIVARIANOS in Trujillo (Peru), held from 21 to 30 November 2013.

2.2 On 21 November 2013, he participated in the 5 km OWS event and on 23 November 2013 he participated in the 10 km OWS event. He won two gold medals in those events.

After having competed in the 5 km event, Mr. Ivan Alejandro Enderica Ochoa was selected for an anti-doping control conducted by the Organización Deportiva Bolivariana (ODEBO). On the doping control form completed by the athlete, he declared that he had taken: "*Vitamin C; Acetaminophen; Pener Bar Gel; Mega men Sports; Performance, Complejo B; Niega transfusiones*" and he declared that he had not taken any another medication in the seven (7) days before the control.

2.3 His sample was received at the World Anti-Doping Agency (WADA) accredited laboratory in Bogota (Colombia) on 4 December 2013.

2.4 On 27 December 2013, the Laboratory reported that Mr. Ivan Alejandro Enderica Ochoa's sample "A" number 2849487 was positive to the substance CLENBUTEROL, a prohibited anabolic agent in Class S.1. 2 of the WADA Prohibited List 2013.

2.5 On 17 February 2014, the Laboratory confirmed the presence of CLENBUTEROL in the sample "B" number 2849487.

III. PROCEEDINGS

3.1 By letter dated 7 January 2014, the FINA Executive Director notified Mr. Francisco Boza Dibos, Secretary General of the Comité Olimpico Peruano of the positive test of Mr. Ivan Alejandro Enderica Ochoa and he requested the documents related to this sample.

3.2 By letter dated 7 March 2014, the Honorary Secretary of FINA notified the swimmer that they had been informed of the results of the analysis of his sample during the doping control of 21 November 2013 and the FINA Executive decided, according to FINA Rule DC 7.1.11 to provisionally suspend him until a further hearing.

The suspension entered in force on 7 March 2014.

3.3 By letter dated 12 March 2014, the FINA Executive Director informed Mr. Jorge Delgado Panchana, President of FENA of the positive test of Mr. Ivan Alejandro Enderica Ochoa and that the case would be submitted to the FINA Doping Control Review Board (DCRB) and subsequently forwarded to the FINA Doping Panel for a decision.

3.4 By letter dated 12 March 2014, the FINA Executive Director informed Ivan Alejandro Enderica Ochoa of further actions in relation with his positive test.

3.5 By letter dated 22 April 2014, the athlete sent a letter to Doctor Julio C. Maglione, the President of FINA, and the FINA Executive Director regarding information on his case.

3.6 By letter dated 24 April 2014, the FINA Executive Director confirmed to Ivan Alejandro Enderica Ochoa further that his matter was before the FINA DCRB and he was waiting for their recommendations as to the further proceedings.

3.7 On 28 April 2014, FINA DCRB recommended that the positive drug test be considered an adverse analytical finding and the case be forwarded to the FINA Doping Panel in the normal manner.

3.8 By letter dated 30 April 2014, the FINA Executive Director confirmed to Ivan Alejandro Enderica Ochoa further that his matter would be forwarded to the FINA Doping Panel in accordance with the FINA Rule C 23.9.

3.9 By letter dated 30 April 2014, the FINA Executive Director sent to the Chairman of FINA Doping Panel, all documents relevant to this case and informed him that the FINA Executive was calling for a hearing before the FINA Doping Panel according to FINA Rule C 23.9.

3.10 By letter dated 2 May 2014, the Chairman of FINA Doping Panel requested Mr. Ivan Alejandro Enderica Ochoa to provide the FINA Doping Panel with a pre-hearing brief with any documentation or argument to defend his case by no later than 15 May 2014.

3.11 By letter dated 6 May 2014, the Chairman of FINA Doping Panel, received a power of attorney delivered to Messrs. Mauricio Chiriboga Merino and Miguel Liétard Fernandez Palacios by the swimmer to represent him for the hearing.

3.12 On the same date, Mr. Mauricio Chiriboga Merino requested and was accorded an extension of the relevant time limit to file his client's position. On 13 May 2014, the Doping Panel granted the extension of deadline, as requested by Mr. Enderica, to 4 June

2014, and set the hearing for 16 June 2014 at FINA's Headquarters in Lausanne.

3.13 By letter dated 13 May 2014, the Chairman of FINA Doping Panel, informed Mr. Mauricio Chiriboga Merino that the hearing has been set for Monday 16 June 2014 at the FINA headquarters in Lausanne.

3.14 By letter dated 15 May 2014, due to scheduling problems of the Athlete and other persons who he wished to have attend the hearing, Mr. Mauricio Chiriboga Merino proposed to the Chairman of the Doping Panel, that the hearing be set on Monday 9 June 2014. He also expressed the Athlete's acceptance of the composition of the Panel.

3.15 By letter dated 15 May 2014, Mr. Robert Fox, the Chairman of the Doping Panel, proposed that the hearing has been set for Monday 16 or Wednesday 18 June 2014 because 9 June was not possible, as it was a public holiday in Switzerland.

3.16 By letter dated 20 May 2014, Mr. Robert Fox, the Chairman of the Doping Panel, informed Mr. Mauricio Chiriboga Merino that the hearing has been set for Wednesday 18 June 2014 at 10 a.m.

3.17 A hearing was held at the Headquarters of FINA in Lausanne on 18 June 2014 at 10 a.m.

In attendance, the following persons were present:

- Ivan Alejandro Enderica Ochoa, athlete;
- Mr. Miguel Liétard, legal counsel;

- Mr. Mauricio Chiriboga Merino, legal counsel;
- Ms. Katarzyna Jozwik, FINA representative at the hearing.
- Mr. Augusto Xavier Moràn, President of the Ecuadorian Olympic Committee representing FENA;
- Mr. José Francisco Cevallos, Minister of Sports of Ecuador, who was heard as a witness;
- Mrs. Elektra Enriquez, Member of Minister of Sports, observer;
- Mr., Gonzalo Salvador, Ambassador of Ecuador in Switzerland, observer;
- Mr. Fabian Davila, Doctor of the Sports Federation of Azuay, who was heard as a witness;
- Mr. Thomas Norton, Interpreter (Spanish/English).

Mr. Ivan Alejandro Enderica Ochoa testified at the hearing and was questioned at some length by all members of the FINA Doping Panel, as were all the witnesses present.

The Athlete and all parties involved accepted that the hearing be recorded.

IV. JURISDICTION AND APPLICABLE RULES

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

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

V. MOTIONS AND CONTENTIONS

MR. IVAN ALEJANDRO ENDERICA OCHOA'S CONTENTIONS

5.1 Mr. Ivan Alejandro Enderica Ochoa accepted that he had violated FINA DC 2.1 through the presence of CLENBUTEROL, a banned anabolic agent, in his urine sample and that a period of ineligibility of between twelve (12) and twenty-four (24) months was required for his first doping offense.

5.2 However, he contended that he did not bear significant fault for his positive test and that pursuant to FINA DC 10.5.2 the minimum possible period of ineligibility of only twelve (12) months should apply.

5.3 The athlete asserted that he had adequately proved the cause of his positive test:
the prohibited substance entered his system through the intake of CLEMBROXIL, a bronchodilator prescribed by the physician of the Federation Deportiva del AZUAY. This medication was prescribed on 11 November 2013, for three (3) days and ten (10) days before the doping control, along with an antibiotic, to treat a respiratory affliction

5.4 Doctor Fabian Davila testified and filed a witness statement that stated the following:

"Santiago, March 6, 2014

I, Fabian Davila Jaramillo, Medical Coordinator of Azuay s Sports Federation and physician who treats IVAN ENDERICA OCHOA certify

that the mentioned sportsman keeps regular sports-related medical check-ups since about ten years ago. On November 11, 2013, he presented a bronchial-respiratory ailment (copious secretion of phlegm, fever, and general discomfort). Due to this condition, and in view of the fact that he had more than ten days prior to his participation in the Bolivarian Games, I prescribed for him Azitromicina 500 mg QD x 3 days as an antibiotic to avoid further infection and Clembroxil syrup 10 ml bid for 3 days, which is a mixture of Ambroxol 15 mg as fluidizer + Clenbuterol 10 mcg which is a light bronchial dilator and when acting in synergy with the indicated medication is beneficial for the prompt recovery of the sportsman. The indicated dosage of Clenbuterol has no anabolic effect which could influence in an incorrect manner the performance of the sportsman. In addition, the excretion and elimination of the medication takes place in a maximum period of 72 hours. Based on this fact and knowing that there was no intention of obtaining any artificial advantage, I prescribed said medication, which represents a pediatric dosage. The traces found in the analysis show that unfortunately, somehow, the medication remained in Ivan's organism. The concentration of the traces found also indicate that there was no desire to resort to the use of substances to enhance the sports performance. I assume any responsibility, which I attribute to my excess of confidence with respect to the average lifespan of the medication. I have been a drug testing officer for more than fifteen years. In addition, I was Drug Testing Coordinator of the South American Games which took place in Cuenca- Ecuador in 1998, and since then I have participated in countless events up to the present moment. Ivan Enderica has undergone many drug tests during his career and has never had any trace of any forbidden substance. In case he would have used Clenbuterol for enhancing his performance, the concentration of traces found would have been much higher.

This is all I can assert truthfully."

(signature)

5.5 Mr. Ivan Alejandro Enderica Ochoa considered, in light of this testimony, that there is no significant negligence in his point of view.

5.6 The swimmer additionally explained to the Panel that Dr. Fabian Davila did not exclusively treat him. The Doctor is the medical coordinator of the Federation Deportiva del AZUAY, the sporting federation of the athlete's home province. He is therefore the head physician for all athletes of AZUAY, and considered an authority in sport medicine. Since the beginning of his career, more than ten years ago, he always consulted and was attended to by Dr. Davila.

5.7 The athlete explained that he was informed that the treatment would consist in antibiotics to treat the infection and bronchodilator to ease his breathing in view of the difficulty to do so caused by the illness. He alleged that Dr. Davila never informed him that the medication contained a prohibited substance, as he considered that the amount of CLENBUTEROL contained in the dosage prescribed was only prescribed to treat the lung infection and allow the patient to breathe properly, insufficient to even remotely improve sporting performance and would not remain in the body after eight days of ending the treatment.

5.8 Mr. Ivan Alejandro Enderica Ochoa bought the medicine in a popular nationwide chain of drugstores called FYBECA, in other words, from a trustworthy source of prescription medication.

5.9 He contended that he did not intend to enhance his athletic performance.

5.10 He was tested on numerous occasions in his career and only this one (1) test in this case was positive.

5.11 Mr. Ivan Alejandro Enderica acknowledged that he is an elite swimmer who had been through numerous doping controls and was aware that he was responsible for what he puts in his body.

VI. LEGAL DISCUSSION

A. THE FACTS

The FINA DP has found that the following facts were established in this case:

6.1 CLENBUTEROL is a prohibited anabolic agent in Class S1.2 of the 2013 WADA Prohibited List and is therefore prohibited at all times, in and out of competition, pursuant to FINA DC 4.1.

6.2 Athletes subject to the WADA Prohibited List may not use CLENBUTEROL without a valid TUE.

6.3 The FINA Doping Panel accepts that Mr. Ivan Alejandro Enderica Ochoa did not intend to use CLENBUTEROL in order to enhance his sport performance.

6.4 He used CLENBUTEROL to treat a respiratory affliction without a valid TUE.

6.5 The athlete was naïve and insufficiently cautioned by his physician.

He was questioned at some length by the members of the FINA Doping Panel on each of the forgoing factual matters. He impressed the FINA Doping Panel as sincere, honest and appropriately remorseful for his mistake. Mr. Ivan Alejandro Enderica Ochoa blamed Doctor Fabian Davila for his rule violation and he accepted responsibility for his action and his duties under the rules.

The FINA Doping Panel considered that Dr Fabian DAVILA committed a big mistake, when he prescribed this medicine to the swimmer. He did not take into account that CLENBUTEROL is a prohibited substance regardless of it being taken in or out of competition.

6.6 The explanations of the athlete were logical and fit well with, and were corroborated by the statement and testimony of Dr. Davila and other documentary evidence in the case. Consequently, the FINA Doping Panel found Mr. Ivan Alejandro Enderica Ochoa's testimony to be credible and persuasive.

B. THE LAW

6.7 The FINA Doping Control Rules are founded on the fundamental premise contained in FINA DC 2.1.1 that:

"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 to be

demonstrated in order to establish an anti-doping violation under DC 2.1.”

6.8 The FINA Doping Panel finds that the athlete has not fulfilled his duty according to FINA DC 2.1.1 to ensure that no Prohibited Substance entered his body. He has not established that he bears no fault or negligence according to DC 10.5.1. Mr. Ivan Alejandro Enderica Ochoa clearly failed to fully uphold his duty to prevent a prohibited substance from entering his body and he bears fault for his positive test. He did not argue otherwise.

6.9 Consequently, Mr. Ivan Alejandro Enderica Ochoa must be sanctioned for his inadvertent use of a medication containing CLENBUTEROL

6.10 Moreover, because CLENBUTEROL is not a specified substance, as provided for in FINA DC 10.2 and 10.5.2, his period of ineligibility must be at least one year.

6.11 The period of ineligibility for the presence of an anabolic agent in an athlete's sample shall be two years unless the athlete can establish: (1) how the prohibited substance entered the athlete's system and (2) that he or she bears "no significant fault or negligence" for the rule violation (cf. FINA DC 10.5.2).

6.12 No significant fault or negligence is generally found, and a reduction of the period of ineligibility given, where the athlete establishes a lack of intent to enhance sport performance. (cf. CAS 2009/A/1870 WADA v *Jessica Hardy & USADA*, (athlete had "no significant fault or negligence" and sanctioned for one year where she established how the prohibited substance had entered her system.

Clenbuterol had entered her body through the intake of a contaminated food supplement); CAS 2005/A/830 *Squizzato v. FINA*, (swimmer had no significant fault or negligence under the FINA DC and was sanctioned for 12 months where she failed to read the label of a topical cream which contained an anabolic agent).

6.13 In addition to his credible testimony, Mr. Ivan Alejandro Enderica Ochoa established using the medicine for three (3) days that he did not intend to enhance sport performance.

6.14 Once it is determined that an athlete bears no significant fault or negligence for his violation and that the standard two year period of ineligibility should be reduced, the athlete's degree of fault is the controlling factor determining where within a range of 12 to 24 months the sanction should be set.

6.15 A variety of factors have been identified as bearing on an athlete's degree of fault, such as:

- a. a lack of intent to cheat or gain competitive advantage;
- b. a mistaken understanding regarding the nature of the substance ingested;
- c. false representations made concerning the product.

In addition, the Panel took into account the fact that it was the Athlete's regular sports physician who prescribed the medication to him. While it can be held against an athlete who does not use sufficient caution and requesting verification when taking medication or a product, in this instance, it is the principle person to whom the Athlete could have turned to for guidance who gave him the prohibited substance and reassured him that there were no risks of taking it. One cannot hold

Athletes to the obligation of verification of the information and instructions that they receive from the persons who are qualified to providing knowledgeable instructions and information. The Panel considered as a result that the Athlete was not in this case obliged to seek out a second opinion to validate his regular sports physician. Although an athlete has the responsibility at all times to ensure he or she does not take forbidden substances, it is understandable that in this case he relied on his doctor.

VII. SANCTION

7.1 As explained above, the Panel has noted that under FINA DC 10.5.2 and similar rules adopted by other International Federations, for athletes who have demonstrated: (1) the cause of their positive test, (2) a lack of intent to enhance performance, and (3) that there existed a sound subjective reason why they failed to fully evaluate or closely examine the product label for a product they used have generally received sanctions in the range of 12-21 months. (*Cf. Squizzato* (12 months), *Hardy* (12 months)). In the opinion of the FINA Doping Panel these circumstances justify the conclusion that the athlete bears no significant fault or negligence as described in FINA DC 10.5.2.

7.2 Mr. Ivan Alejandro Enderica Ochoa is a role model in his country and he contributes for education of the young swimmers. After evaluating the unique circumstances in this case and applying FINA DC 10.5.2, the FINA Doping Panel believes a twelve (12) month period of ineligibility is appropriate.

7.3 Pursuant to FINA DC 10.9.3 Mr. Ivan Alejandro Enderica Ochoa's period of ineligibility shall run from 7 March 2014, the date of a provisional suspension imposed by FINA.

7.4 According to FINA DC 10.8 all competitive results obtained from the date of a positive sample through the commencement of any provisional suspension or ineligibility period shall, unless fairness requires otherwise be disqualified.

7.5 Therefore, all competitive results of Mr. Ivan Alejandro Enderica Ochoa from 21 November 2013, through and including the date of this decision shall be disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

VIII. SUMMARY OF THE DECISION

8.1 Mr. Ivan Alejandro Enderica Ochoa receives a twelve (12) month period of ineligibility commencing on 7 March 2014, and ending at the conclusion of 6 March 2015, for his first anti-doping rule violation.

8.2 All results obtained by Mr. Ivan Alejandro Enderica Ochoa on or after 21 November 2013 and through and including the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

8.3 All costs of this case shall be borne by the FENA in accordance with FINA DC 12.2.

8.4 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 judgement (FINA Rule C 12.10.4 and DC 13.6).

Robert Fox
Chairman

Peter Kerr
Member

Farid Ben Belkacem
Member

Signed on behalf of all three Panel Members

A handwritten signature in black ink, appearing to be 'R. Fox', written over a horizontal line.

Robert Fox