



Arbitration CAS 2001/A/337 B. / Fédération Internationale de Natation (FINA), award of 22 March 2002

Panel: Mr. Dirk-Reiner Martens, Germany, President; Mr. Timothy Castle, New Zealand; Mr. Denis Oswald, Switzerland

Swimming

Doping

Decision of a civil court applied by a national federation

Jurisdiction of the international federation

Validity of the testing procedure

Conditions for the storage of urine samples

Proportionality of the sanction

- 1. An international federation cannot be bound by decisions of state courts issued in proceedings to which this federation has not been a party. Thus, FINA enjoys full discretion to issue its own decisions based on a certain set of given facts despite any proceedings on a national level which may also concern these facts but to which this federation was not a party.**
- 2. A pathway from testosterone or androsterone to 19-norandrosoteron outside the human body may be theoretically conceivable, for example in case of degradation of urine samples, but, absent any scientific evidence to this effect, it remains pure speculation.**
- 3. The wording of the FINA Rules clearly shows that FINA itself does allow deviations from the catalogue of fixed sanctions in the light of special circumstances. Thus, CAS has the authority to adjust the sanction against the athlete in the light of the circumstances of the case at stake. A sanction may not be disproportionate and must always reflect the extent of the athlete's guilt. Therefore, CAS in its capacity as an appeals body enjoys the same discretion in fixing the extent of the sanction as do the IF's internal instances. In fact, the Panel would enjoy this discretion even if there were no "exceptional attenuating circumstances".**

On November 22, 1999 B. underwent an out-of-competition doping control. During a training session at the Philips Aquatic Centre, Auckland, New Zealand, urine samples were taken by the New Zealand Sports Drugs Agency, Mt Albert (hereinafter referred to as "NZ-SDA").

Since there is no IOC accredited laboratory in New Zealand the samples were shipped by NZ-SDA to the IOC accredited Australian Sports Drug Testing Laboratory (ASDTL), Pymble, Australia, on

November 25, 1999. The proper documentation regarding the content of the package was not enclosed with it so the delivery of the samples was delayed by Australian customs until December 9, 1999. During this period, which fell within the Australian summer, the samples were held at room temperature.

On December 9, 1999 the samples arrived at the ASDTL, unfrozen and at room temperature. They were stored in a freezer and the A-sample was subsequently analysed beginning on December 10, 1999.

The A-sample showed the presence of metabolites of nandrolone. The test results showed a level of 19-norandrosterone (hereinafter referred to as "NA") of more than 4 ng/ml.

The B-sample was tested at the request of the Appellant and in his presence on January 17, 2000. According to the laboratory report of January 19, 2000 the sample revealed a concentration of approximately 3.5 ng/ml of NA. Both tests were conducted by the same analyst.

The case was first handled by the Board of the New Zealand Sports Drug Agency, a public body. The NZ-SDA notified the Appellant on January 24, 2000 that he had committed a doping offence.

The Appellant appealed this decision before the Auckland District Court. On March 16, 2000 the District Court quashed the decision of the NZ-SDA. The judgment was mainly based on a violation of the New Zealand Sports Drug Agency Act 1994 and the Sports Drug (Urine Testing) Regulations 1994 (hereinafter referred to as NZ-SDA Regulations). These are the statutory provisions governing the work of the Agency. The court held that, firstly, the New Zealand Sport Drug Agency Act 1994 prescribed that only containers are to be used which have been sealed individually before use. This was technically not possible with the "Versapack" system which had been used for the collection of the samples. Secondly, the court held that the NZ-SDA had violated its rules by not sending the samples "as soon as practicable" since the samples were held by customs for several days due to inadequate documentation. The notion of "to send" was interpreted to include also the arrival of the consignment at its destination "as soon as practicable".

On May 18, 2000 the FINA Doping Control Review Board, in accordance with Article 18.5 of the FINA Constitution, reviewed the decision of the District Court and issued an expert opinion to the FINA Bureau which recommended a suspension. Consequently, on May 19, 2000 the FINA Bureau issued a provisional suspension valid until the FINA Doping Panel made its determination.

On July 17, 2000, the New Zealand High Court reversed the decision of the District Court holding that the facts did not materially affect the results of the sample analysis.

The High Court decision was finally overturned by a decision of the Court of Appeal of New Zealand of December 6, 2000. Applying a narrow interpretation of the Statute's text, the Court of Appeal finally held that the delay in the transportation constituted a material flaw which prevented the NZ-SDA from relying on the results of the laboratory analysis. The Court of Appeal held that it was a concern of public policy that the processes under the sports drug testing regime should be

carried out without any undue delay. However, unlike the High Court, the Court of Appeal did not address the issue of whether the delay was, in any way, likely to cause a deterioration of the sample.

Following these court decisions, the national swimming federation of New Zealand declined to institute or continue further proceedings against the Appellant which could have led to sanctions being imposed.

On December 7, 2000 the matter was then referred by the FINA Bureau to the FINA Doping Panel in accordance with Article C19.7 of the FINA Constitution. The provision allows for a hearing to review matters where the applicable FINA rules may not have been properly applied. On June 14, 2001 the FINA Doping Panel issued a decision suspending the Appellant for a period of four years beginning retroactively on May 19, 2000 and cancelling all of the Appellant's swimming results during the six months prior to the sample collection date (November 22, 1999). The decision was based on the results of the urine samples collected on November 22, 1999.

On June 18, 2001 counsel for the Appellant received a fax copy of this decision. On June 21, 2001 the Appellant received a copy and his counsel received the original of the decision of the FINA Doping Panel.

In general, the Appellant claims in his appeal that FINA does not have any power to impose a sanction against him because there has not been any valid or lawful positive doping test. The Appellant is of the opinion that FINA could not rely on the doping test results of the Sydney laboratory and the NZ-SDA. The test result was flawed due to the circumstances of this case.

In conclusion the Appellant requests that: "the finding that he committed a doping infraction, and all of the sanctions and costs imposed as a result, be set aside."

The Respondent requests the CAS:

"Principally,

- to reject the Appeal in as much as it requests the overturning of the decision made by the FINA Doping Panel,
- to confirm the suspension of the Appellant for a duration of 4 years from May 19, 2000,
- to confirm the cancellation of all the results achieved within the period commencing 6 months before November 22, 1999,
- to order the Appellant to pay the Respondent an amount (together with interest at a rate of 5% per annum from the date of the decision) representing an appropriate compensation for the costs incurred by FINA in the course of the appeals proceedings, in particular, attorneys fees,
- to reject any contrary or other claims of the Appellant.

Subsidiarily

- to order any appropriate directions and in particular appoint an expert to submit a report on scientific-technical issues."

According to the Respondent, the scope and effect of the decisions rendered by the courts in New Zealand did not extend to the international level since the courts' decisions are based on national rules to which FINA is by definition not subject.

The Respondent concedes that it was necessary to adjust the minimum value (approximately 2.5 ng/ml instead of 2 ng/ml). However, the Respondent argues that the concentration of nandrolone metabolites was also above this threshold.

On July 17, 2001 the Appellant filed a request for arbitration with the Court of Arbitration for Sport (CAS) against the decision of the FINA Doping Panel.

By letter of September 4, 2001 the Respondent filed its answer.

The hearing was held on December 4, 2001 in Lausanne.

At the hearing the following witnesses were heard:

The Appellant called Prof. Ian M. Holdaway, Academic Head of Department at the Department of Endocrinology at Auckland Hospital, Auckland, New Zealand; Prof. John T. France, Associate Professor, Auckland, New Zealand; Bruce McLeod White, retired Medical Scientist, Auckland, New Zealand; Geoffrey Derrick Beresford, General Manager of the New Zealand Racing Laboratory Services Ltd Avondale, Auckland, New Zealand and John William Honour, Consultant Clinical Scientist, London, Great Britain. All witnesses were present through the video link with Auckland, except for Mr. Honour who joined in by video conference from London.

The Respondent called Prof. R. Kazlauskas, Head of the Australian Sports Drug Testing Laboratory (ASDTL), Pymble, Australia, and Dr. M. Saugy, Laboratoire Suisse de Dopage, Lausanne, Switzerland. While Mr. Saugy was present in Lausanne, Prof. Kazlauskas was present through video link from Sydney.

LAW

1. The CAS jurisdiction is based on FINA Rule C 10.8.3 (FINA Constitution):

"An appeal against a decision by the Bureau or the FINA Doping Panel shall be referred to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, within the same term as in C 10.8.2. The only appeal from a decision of the Doping Panel shall be to CAS. The CAS shall also have exclusive jurisdiction over interlocutory orders and no other court or tribunal shall have authority to issue interlocutory orders relating to matters before the CAS. Decisions by the CAS shall be final and binding, subject only to the provisions of the Swiss Private International Law Act, section 190."

Neither party raised any objection to the jurisdiction of the CAS before or during the hearing.

2. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute according to the applicable regulations of FINA and Swiss law since the Respondent has its seat in Switzerland and the parties did not choose a different governing law.

Since the doping test was carried out on November 22, 1999 the Panel will apply the FINA Doping Control Rules in force at that time. These are the FINA Doping Control Rules as approved by the FINA Congress on March 31, 1999 which entered into force on June 1, 1999.

The FINA Doping Control Rules shall be directly applicable to any competitor affiliated to a FINA Member Federation (FINA Rule DC 1.2). The Appellant is affiliated to the New Zealand Swimming Federation which, in turn, is a member of FINA.

For the interpretation of the FINA rules the Panel will have special regard to Swiss law in accordance with Article R58 of the Code.

3. The Appellant argues that FINA lacked jurisdiction to impose a sanction since the state courts of New Zealand had declared the doping charges void.
4. Pursuant to FINA Rule DC 12.4 the Doping Panel is competent to impose sanctions for violations of the Anti-Doping Rules if the FINA Bureau believes that a Member Federation has not followed FINA Rules relating to doping control within its jurisdiction. The Panels shall have full power to review the facts and the application of the rules.
5. In addition, under FINA Rule DC 12.5 FINA may recognise the results of doping controls carried out under the auspices of other sporting bodies.

These provisions read:

"DC 12 REPORTING AND RECOGNITION

[...]

DC 12.4 If the Bureau believes that a Member Federation has not followed FINA Rules relating to doping control within its jurisdiction, either in a matter reported to the Bureau in accordance with DC 12.3 or in a matter that comes to FINA's attention by other means, the Bureau may refer the matter to the Doping Panel for review, in which case the Doping Panel shall have full power to review the facts and the application of the rules.

DC 12.5 FINA may recognise the results of doping control carried out by a sporting body other than FINA or its Member Federations, or by a member of such sporting body, under rules and procedures different from those of FINA, so long as the testing was properly carried out and the rules of the body conducting these tests afford sufficient protection to competitors. Upon receiving a report from any source regarding such doping control, the Executive shall submit the matter to further consideration upon hearing by the Doping Panel. If the matter is submitted to a Doping Panel, the decision of the Doping Panel will be binding upon FINA and its Member, subject to appeal to CAS in accordance with C 10.8.3."

The Panel considered the application of DC 12.5 FINA Rules, since the actual testing was carried out by the NZ-SDA, a body different from FINA and its members, as has been conceded by the Appellant. The Panel does not need to decide whether the NZ-SDA can be considered as a sporting body within the meaning of this provision. The Panel will instead rely on DC 12.4 FINA Rules.

6. Under DC 1.2 and 12.1 FINA Rules all member federations are obliged to follow the rules laid down in the FINA Doping Control Rules. Thus, these rules do also bind the New Zealand Swimming Federation insofar as this national federation is obliged to impose a sanction against a national athlete who committed a doping offence.
7. Following a judgement of December 6, 2000 of the New Zealand Court of Appeal the New Zealand Swimming Federation decided not to impose any sanction against the Appellant.
8. The Panel is well aware that the decision of the New Zealand Court of Appeal is a decision of a superior Court in New Zealand. The New Zealand Court of Appeal is the ultimate appellate Court situated and adjudicating in New Zealand. Appeals are available in New Zealand against decisions of the Court of Appeal, only with leave, to the Privy Council in London, but absent such leave of appeal, the New Zealand Court of Appeal is the final court in that country.

The Panel is also conscious of the difficult situation of the New Zealand Swimming Federation arising out of such a situation. As a member of FINA the national federation is under the obligation to impose a sanction under the FINA Doping Control Rules. At the same time it is barred from doing so because of a final judgement of the Court of Appeal which determined that the Appellant should not be considered as having committed a doping offence.

9. The CAS has already decided that an international federation may impose a sanction independent from the outcome of the proceedings over sanctions on a national level (see e.g. CAS 96/156 F. v/ FINA, Award of October 6, 1997, p. 38 *et seq.*) The previous Panel reasoned that it was imperative that an international sports federation be permitted to review the decisions of the national sports federations in doping cases in order to prevent any bias of the national federations spoiling fairness in international competition.

It is the purpose of DC 12.4 FINA Rules to ensure coherent application of these Anti-Doping Rules on a world-wide level. This competence is neither inappropriate nor excessive. Under this provision FINA carries out its own investigation of the case and takes its own decision on the basis of the facts discovered during this investigation. The decisions taken by FINA are then subject to the control of the Court of Arbitration for Sport.

10. This is not to say however that FINA can simply ignore the New Zealand appeal court judgment. Even if FINA chose to do so, the CAS would hesitate before determining this case without reference to what the learned Judges said in B.'s civil appeal. The Panel thus will look to the substance of the issues considered by the Court.

It is readily apparent that the courts in New Zealand were dealing with important procedural provisions for independent drug testing by the NZDSA. The particular provisions at issue were directed at maintaining the integrity of the samples for testing. The purpose of protecting the integrity of the sample is to eliminate intervening causes or processes which may threaten the reliability or validity of the test result. This is fundamental to achieving the objectives of anti-doping measures and doping control rules. There is no doubt that the New Zealand courts considered the circumstances in which the samples were left as an irregularity.

11. The issue for the Panel becomes: how is the irregularity to be treated? What the New Zealand Court finally determined is that the lack of expedition or undue delay was a material irregularity – and fatal – for the purposes of the governing statute and regulations. The CAS is entitled to take proper cognizance of that circumstance. But it is not an end to the matter for this CAS Panel. This appeal comes to CAS by a different procedure.

The New Zealand Court was in the fortunate position of considering itself able to reach its decision on the wording of the applicable statutes and regulations alone. The Judges said: “... *on our conclusions on the interpretation and application of the requirements of the Act and the regulations in the case, it is unnecessary and inappropriate to consider ... (the) difficult matters of scientific assessment (which were the subject of scientific expert affidavit evidence sought to be admitted on the hearing of the appeal (in New Zealand)).*”

The Panel does not enjoy such a luxury if it be such. The Panel has had the advantage of hearing a wealth of scientific and medical expert evidence which the New Zealand Court of Appeal did not have. The Panel will have to address the complex expert evidence adduced before the CAS.

12. Finally, the Panel wishes to stress that an international federation cannot be bound by decisions of state courts issued in proceedings to which this federation has not been a party. Thus, FINA continued to enjoy full discretion to issue its own decisions based on a certain set of given facts despite any proceedings on a national level which may also concern these facts but to which this federation was not a party.

In light of the foregoing the case was able to be considered before the instances of FINA itself. It was transferred to the FINA Doping Panel in accordance with FINA Rule DC 12.4.

13. Whether the samples produced actually contained a forbidden substance and whether FINA may rely on the sample collection procedure as carried out by NZ-SDA and the testing procedure as carried out by the ASDTL is a question of the merits and will be addressed *infra*.
14. No objections have been raised with respect to the procedure applied by the FINA Doping Panel.
15. The Panel is satisfied that the Appellant committed a doping offence under the relevant FINA Rules as interpreted pursuant to Swiss law.

16. Provisions on doping can be found in the FINA Doping Control Rules which state:

"DC 1 INTRODUCTION

DC 1.1 Doping is strictly forbidden as a violation of FINA Rules.

[...]

DC 1.4 Any departure from the procedures set out in these Rules shall not necessarily invalidate the finding of the presence of a prohibited substance in a sample or the use of a prohibited method, unless such departure was such as to cast genuine doubt on the reliability of such a finding.

DC 2 DOPING

DC 2.1 Doping offences are:

a) the finding of a prohibited substance (DC 3.1) within a competitor's body tissue or fluids;

[...]

DC 2.3 The success or failure of the use of a prohibited substance or prohibited method is not material. It is sufficient that the said substance or method was used or attempted for the infraction to be considered as committed.

DC 3 PROHIBITED SUBSTANCES

DC 3.1 Except as set forth in DC 3.5, the following classes of substances shall be prohibited in competition:

[...]

and the following classes of substances shall be prohibited at all times:

A. Anabolic agents

B. Diuretics

C. Peptide hormones, mimetics and analogues

[...]

DC 3.3 Appendix B to these Doping Control Rules more specifically identifies the substances and methods prohibited by FINA out of competition.

[...]

DC 8 PROCEDURES

[...]

DC 8.3 Analysis of samples

[...]

DC 8.3.2 Analysis of all samples shall be done in laboratories accredited by the IOC. Such laboratories shall be presumed to have conducted tests and analyses of samples in accordance with the highest scientific standards and the results of such analyses shall be presumed to be scientifically correct. Such laboratories shall be presumed to have conducted custodial procedures in accordance with prevailing and acceptable standards of care; these presumptions may be rebutted by evidence to the contrary.

[...]"

17. According to Appendix A to the FINA Doping Code, which applies to in-competition testing, a sample of a male will be considered positive for a forbidden substance if it reveals a concentration of more than 2 ng/ml for 19-norandrosterone. Appendix B, which applies to out-of-competition testing, does not contain such a clause. However, the Panel considers that this gap was left open unintentionally and may be filled by applying the threshold as established in Appendix A.
18. According to FINA Rule DC 8.3.2, analysis of all samples shall be done in IOC accredited laboratories. By this rule these laboratories are presumed to have conducted tests and analyses of samples in accordance with the highest scientific standards and the results of such analyses shall be presumed to be scientifically correct. Furthermore, such laboratories shall be presumed to have conducted custodial procedures in accordance with prevailing and acceptable standards of care. These presumptions may be rebutted by evidence to the contrary.
19. In addition, FINA Rule DC 1.4 provides that any departure from the procedures set out in these Rules shall not necessarily invalidate the finding of the presence of a prohibited substance in a sample or the use of a prohibited method, unless such departure was such as to cast genuine doubt on the reliability of such a finding. In this respect, the French version refers to "un doute véritable sur la fiabilité". This provision reflects a principle which has frequently been recognised by CAS (see CAS 2000/A/281 H. v/ FIM, p. 18).
20. The Panel is not aware of any legal requirements under Swiss law why this provision should not be valid. In the interpretation of the Panel, the wording indicates that it would not be sufficient that a departure from the rules causes a simple doubt on the outcome of the testing procedure. Only where the Panel is left with some "qualified" doubt over the reliability of the test results, it would consider these departures as material.
21. Pursuant to Rule R58 of the Code of Sports-related Arbitration CAS Panels are bound to apply the regulations of the federation whose decision is under appeal as well as the law of the state where this federation has its seat. However, the arbitrators enjoy the discretion to interpret such regulations in order to avoid a violation of the relevant state law provisions (see CAS 2000/A/317 A. v/ FILA, p. 17).
22. FINA Rules DC 1.1 and 2.1 state that the "finding" of a prohibited substance in an athlete's body tissue or fluids (doping) is strictly forbidden and considered a violation of FINA's rules. According to FINA Rule DC 2.3 there is no need to show that the forbidden substance had any performance enhancing effect.
23. At first sight this definition contains a description of objective elements. It does not provide for any appreciation of subjective elements. However, CAS Panels have previously expressed the view that according to Swiss law a federation was not entitled to impose a suspension – in contrast to a disqualification – for a doping offence against an athlete without any

appreciation of the subjective elements of each case. The distribution of the burden of proof for these objective and subjective elements assured a just and equitable result (CAS 2000/A/317 A. v/ FILA, p. 18 *et seq.*; CAS 2000/A/312 L. v/ FILA, p. 13; CAS 2000/A/310 L. v/ FILA, p. 27 *et seq.*).

24. These Panels held that the burden of proof with respect to the objective elements of the doping offence, i.e. the presence of a forbidden substance in the body of the athlete, lay with the federation alleging the doping offence. The successful proof of the objective elements, then, creates a presumption that the doping offence has been committed either intentionally or negligently. This presumption has to be considered in assessing the appropriateness of disciplinary measures (CAS 2000/A/317 A. v/ FILA, p. 20; CAS 2000/A/312 L. v/ FILA, p. 13). The athlete may rebut this presumption by adducing clear evidence that he acted neither intentionally nor negligently. This presumption may only be rebutted with respect to a disciplinary measure (CAS 2000/A/317 A. v/ FILA, p. 20). In cases where a disqualification is at stake subjective elements will not be taken into account because the interests of all athletes to compete on a level playing field outweigh the interests of an individual athlete who has been found to have a prohibited substance in his body not to be disqualified unless he acted negligently or even intentionally (CAS 2000/A/317 A. v/ FILA, p. 17; CAS 2000/A/310, L. v/ FILA, p. 28).
25. To meet this burden of proof the federation will allege the existence of a forbidden substance in the urine of the athlete. In this respect it may rely on a positive test result issued by a laboratory. The athlete in turn may contest these results. However, it would not be sufficient to advance a number of unspecific allegations. The athlete has to provide the Panel with specific facts that are likely to call into question the reliability of the test results. It is then again up to the federation to show that these circumstances were not material in a way that they would have altered the test result.
26. These elements have to be established to the comfortable satisfaction of the Panel having in mind the seriousness of the allegation which is made (see CAS OG/96/003, CAS OG/96/004 K. & G. v/ IOC; CAS 98/208 N. *et al.* v/ FINA, award of December 22, 1998, p. 23; upheld by the Swiss Federal Tribunal, Judgment of March 31, 1999 [5P.83/1999], unpublished; see also CAS 2000/A/310 L. v/ FILA, p. 27).
27. In this context, the Panel would like to stress that there is no room to apply concepts of criminal law such as the presumption of innocence or the standard of proof of "beyond reasonable doubt". The proceedings are entirely governed by civil law principles (Swiss Federal Tribunal, ASA Bull 1993, p. 398, 409 *et seq.* [G. v/ FEI]; Swiss Federal Tribunal, Judgment of March 31, 1999 [5P. 83/1999], unreported, p. 12; CAS 2001/A/317 A. v/ FILA, award of July 9, 2001, p. 17).
28. The Panel intends to follow this approach as it provides a reasonable and well balanced solution. On the one hand, it allows the federations to ensure an efficient fight against doping and, on the other hand, it takes into account the rights of each athlete, especially his right to personality (Article 28 *et seq.* Swiss Code Civil Code). The Panel also considers it as being a

question of terminology and thus of minor importance whether this interpretation is considered as following the principle of strict liability (see CAS 2000/A/310 L. v/ FILA, p. 27) or rejecting such concept (see CAS 2000/A/317 A. v/ FILA, p. 18).

29. As has been stated above, the Respondent has to establish the objective elements of the doping offence. If the alleged facts which lead to the positive test result are disputed by the Appellant, the Respondent then must be able to prove the presence of a forbidden substance in the Appellant's urine, i.e. the doping offence, to the comfortable satisfaction of the Panel. For this purpose the Panel has carefully reviewed the written and testimonial evidence before it. The Panel is convinced that FINA has met this burden of proof.
30. The Respondent has produced laboratory reports to prove that the A- and the B-sample of the Appellant's urine taken on November 22, 1999 in an out-of-competition test indicated that he ingested a forbidden substance. The Appellant's urine was reported to contain a certain concentration of NA which allows to conclude that the Appellant ingested nandrolone or one of its precursors which are substances prohibited under FINA Rule DC 3.1, 3.3 and Chapter I. A. 1. Appendix B thereto. In addition, the introductory note to Appendix B clearly states that metabolites of forbidden substances are also considered as forbidden.
31. The Appellant in turn alleged a number of deviations from standard practice which, according to the Appellant, lead to the test results being unreliable. In case the Appellant is able to establish such deviations, the question the Panel has to answer in addition is: Do these deviations cast sufficient doubt on the reliability of the test results to an extent that the finding of NA in a concentration above 2 ng/ml in the Appellant's urine was not sufficient to establish to the comfortable satisfaction of the Panel a doping offence by the Appellant?
32. The Panel wishes to stress that it has to consider each deviation individually and to establish whether it was of material influence to the test result. The Panel cannot endorse an approach according to which in the case at hand a certain number of (non-material) deviations taken as a whole may allow the test result to be disregarded (see *infra*).
33. The Appellant alleges a violation of the rules since the samples were not sent "without undue delay". He refers to the IOC Anti-Doping Code Appendix C clause 2.4 (as in force in 1999).
34. The Panel does not see why it should apply the IOC Anti-Doping Code in this case. The only provision in the FINA rules which refers to the IOC Anti-Doping Code is DC 5.3. This provision applies to doping controls carried out at the Olympic Games.
35. DC 8.1.6 FINA Rules provides that "the organising committee of the competition shall be responsible for the secure transport of the container **as soon as possible after doping control**". This rule applies to tests conducted at "FINA competitions" (DC 8.1 FINA Rules) and – by reference – (DC 8.2.1 *in fine*) "as reasonably practicable" to "unannounced testing" (DC 8.2 FINA Rules).

36. The Panel does not have to decide whether the transportation of the samples occurred "as soon as possible" under the given circumstances (see discussion in: NZ Court of Appeal, 2 NZLR [2001], p. 160, 165 [B. v/ NZSDA]). Even if the Panel were to assume a violation of DC 8.1.6 FINA Rules, it would still have to be convinced that exceeding such time-limit would render the test result unreliable. Only where the Appellant was able to establish that this procedural defect affected the outcome of the testing procedure this failure would have to be taken into account (see *supra*).
37. The Appellant has alleged that the delay between the taking of the sample and its analysis was capable of invalidating the test results. He basically contends that the storage at room temperature during more than 2 weeks has led to a degradation of the sample due to bacterial activity.
38. The respondent contested a degradation of the sample. FINA provided evidence showing that the pH level between the time of the taking of the sample and the beginning of the test remained unchanged. Furthermore, no significant alteration of the steroid profile was detectable. Prof. Kazlauskas stated that neither the colour nor the smell of the urine indicated any increased bacterial activity.
39. The Appellant in turn contested that the Respondent could only rely on the pH, steroid profile, colour and smell. He indicated that the laboratory should have applied further testing to discover a degradation. However, the Appellant was not able to indicate further methods for the determination of increased bacterial activity. He mainly relied on the fact that every urine sample would degrade after two weeks at room temperature in summer-time and, thus, would not provide a valid basis for a testing procedure.
40. Finally, the Appellant's witnesses stated that urine stored for more than two weeks at room temperature could (under international standards and common laboratory practice) not be used for clinical purposes. However, the Panel is not prepared to apply the same standards here. Urine samples for the testing of forbidden substances can be provided only one at one time. There is no way, unlike under clinical circumstances, to go back to the athlete in order to get a second sample.
41. In general, the Panel agrees with the Appellant insofar as urine is subject to degradation. However, having reviewed the evidence before it, the Panel is convinced that the level of degradation would depend on the level of bacterial activity. The Panel was not made aware of any method to establish the level of bacterial activity other than indirectly by examination of the pH, steroid profile, colour and smell. In the case of the Appellant the urine examined did not show any such signs of degradation. According to the witness statement of Prof. Kazlauskas and the written laboratory report, there was no sign of increased bacterial activity. Thus, the Panel is satisfied that the urine samples provided a sufficient basis for the tests carried out by the ASDTL.

42. Even if one were to admit an increase in bacterial activity which remained undetected or even was undetectable with the current methods, the Panel is not convinced that such activity could have led to an increase in the level of NA.
43. The Appellant, supported by the statements of his witnesses, suggested that such an increase might have occurred by transformation of a relatively small amount of testosterone or androsterone into norandrosterone (NA). Although such pathways have never been explored by scientists they were, according to the Appellant, likely to occur.
44. The Respondent, on the other hand, contested that such transformation would occur in practice. No scientific evidence existed that would suggest the existence of a pathway from testosterone or androsterone to norandrosterone (NA) in urine. The Respondent's witnesses contended that although these substances were chemically closely related such transformation was only proven for the testosterone to turn into nandrolone inside the human body. This process has been described as complex, involving a number of enzymes. According to the Respondent's witnesses those enzymes are unlikely to be present in human urine.
45. Having carefully reviewed the evidence before it, the Panel reaches the conclusion that to its comfortable satisfaction a transformation from testosterone or androsterone into norandrosterone (NA) is unlikely to occur in urine outside the human body.
46. It is true that testosterone or androsterone are chemically closely related to nandrolone and 19-norandrosterone (NA). Nandrolone is nothing else but 19-nortestosterone. As androsterone is a metabolite of testosterone, NA is a metabolite of nandrolone. As the names already indicate, the two groups of steroids (testosterone and nandrolone) differ "only" to the extent that nandrolone is lacking one group of methyl at the C19 position. It is the removal of this methyl group that would provide the pathway from one substance to the other. The Panel is aware that a pathway exists inside the human body. When testosterone is transferred into oestrogen, a side product of this transformation is nandrolone at, however, fairly low levels. This process, which in itself is very complex, involves an enzyme called aromatase.
47. Scientific studies have shown that transformation of steroids is in fact possible if urine is left at room temperature for several weeks (HEMMERSBACH ET AL., *Urine Storage Conditions and Steroid Profile Analysis*, in: SCHÄNZER ET AL., *Recent Advances in Doping Analysis*, Cologne 1997, p. 99; AYOTTE ET AL., *Validity of Urine Samples: Microbial Degradation*, *ibid.*, p. 127; DE LA TORRE ET AL., *Urine Contamination by micro-organisms and alterations in the endogenous steroid profile. A prospective study*, *ibid.*, p. 223). However, these studies do not indicate any pathways for the transformation into NA and none of the witnesses called by the parties was able to identify a scientifically proven pathway outside the human body. The indications given ranged from "I don't believe that the production ... can be excluded" (Mr. Honour), "... its formation cannot be excluded" (Prof. France), "I am unaware of any evidence to say this cannot happen. ... urine stored in this way might undergo all sorts of metabolic conversion" (Prof. Holdaway) to "highly improbable" (Prof. Kazlauskas) and "only theoretical" (Dr. Saugy).

48. Finally, the differences between the levels of NA detected in the A-sample and in the B-sample suggest the contrary. During the time of the testing of each, they were kept at least refrigerated. However, the level of NA decreased during this period but should have rather increased if the theory advanced by the Appellant were correct.
49. In the final analysis the Panel is left to decide a very complex scientific question, on which highly qualified experts in their statement before this Panel were unable to agree, whether a transformation of testosterone or androsterone into 19-norandrosterone outside the human body is possible and could be the cause for Appellant's positive test. The Panel wishes to add here that it was impressed with and aided immensely by the professionalism and measured approach shown by all experts. The careful evaluation of the evidence before it has led the Panel to the conclusion that a pathway from testosterone or androsterone to 19-norandrosterone outside the human body may be theoretically conceivable but that absent any scientific evidence to this effect it remains pure speculation on which the Panel is unwilling to base its decision.
50. As a result the Panel is not convinced by the evidence presented that the delay between the taking of the sample and its laboratory analysis was the cause for the finding of a concentration of NA in the Appellant's urine samples above the threshold of 2 ng/ml.
51. Furthermore, the Appellant advanced that according to the applicable rules the A-sample and the B-sample should not be examined by the same person if they are processed in the same laboratory. In this regard he relied on the Explanatory Memorandum to the OMAC and stressed that the OMAC and its Explanatory Memorandum should be applied at least to the testing of the B-sample since the OMAC entered into force on January 1, 2000 and thus before the testing of the B-sample. Having regard to the fact that the two laboratory reports were signed by the same person, he claimed a violation of the rules.
52. The Respondent in turn provided evidence to the effect that the Explanatory Memorandum was distributed only in February 2000, i.e. well after the testing of the B-sample. Thus, it could not be applied in this case.
53. Since DC 8.3.4 FINA Rules provides for the same requirement, the Panel will not need to deal with the question when the Explanatory Memorandum was finally issued.
54. However, neither the Appellant nor the Respondent contended that the fact that both samples were analysed by the same person has any influence on the reliability of the test results. Thus, having regard to DC 1.4 FINA Rules the Panel is of the opinion that the violation of DC 8.3.4 FINA Rules was without influence on the test result.
55. The Appellant furthermore added that a threshold of 2 ng/ml was generally unreliable since there were studies which show that under certain conditions NA could be produced endogenously up to a level of 6 ng/ml. In addition, he contended that there was a grey zone between 2 ng/ml and 5 ng/ml with the result that FINA had to prove that the increased level of NA was not due to endogenous production. Finally, the Appellant stressed that it was

necessary to allow for a standard deviation for each signal recorded and a correction factor to be applied to the final result.

The Respondent rejected these arguments by stating that the 2 ng/ml threshold was well established. In several studies it has been shown in controlled experiments that an endogenous production of nandrolone never crossed a maximum of 0,6 ng/ml. Consequently, there was no such thing as a grey zone. There was also no need to apply any standard deviation to the signals or a correction factor to the results. The Respondent stressed that the threshold of 2 ng/ml already provided for a safety margin with four standard deviations for the highest level of endogenously produced levels of NA ever established in controlled experiments.

56. The Panel does not share Appellant's opinion that the threshold of 2 ng/ml of NA in male urine is generally not reliable or that there was a grey zone between 2 ng/ml and 5 ng/ml where endogenous production of such levels of NA was possible. Previous CAS Panels have addressed these questions in great detail (CAS 99/A/234 & CAS 99/A/235 M.M. & M. v/ FINA, award of February 29, 2000, p. 23; CAS 99/A/252 FCLP v/ IWF, award of July 28, 2000, p. 26.). Since no new scientific evidence has been presented by either party in this respect the Panel will follow these decisions.
57. Likewise the Panel is not convinced that the results obtained during the analysis of the samples should be subject to any standard deviation or interassay coefficients. According to the rules the testing for NA does not require to establish the exact concentration of this substance but merely the existence of relative signals which are in excess of the relative signals obtained for a defined standard. If this standard does already contain a concentration of the forbidden substance which cannot be obtained due to endogenous production – as is the case for the concentration of NA – there is already a sufficient safety margin to avoid false positive results.
58. Furthermore, the Appellant alleged that the laboratory did not follow standard practice when examining both the A-sample and the B-sample. These allegations are based on the uncontested fact that the laboratory only partially used fresh samples spiked with a certain concentration of NA for the second gas chromatography. During the examination samples were used which were believed to be spiked with 2 ng/ml and with 5 ng/ml but which subsequently turned out to contain concentrations well below.
59. Prof. Kazlauskas explained that the spiked samples used in the assays had been prepared six months before the test and kept in the freezer. However, they turned out to have degraded to an extent that the level of NA had decreased significantly. However, Prof. Kazlauskas also pointed out that the spiked sample which was used during the initial screening and which contained a concentration of 2 ng/ml had been freshly prepared. The same was true for a sample spiked with 4 ng/ml and used for the second gas chromatography. The estimated concentration was then established by comparing the relative signals of the Appellant's urine against the standard of 4 ng /ml applying a linear formula.

60. The Appellant, supported by statements of his witnesses, contested this procedure. He stressed that for an exact quantification it was necessary to establish a multi-point calibrated curve. Even in case of non-quantification the samples should have been measured against a standard of 2 ng/ml being the actual threshold. In relation to the application of a linear formula he pointed out that a linear formula was not appropriate for gas chromatography.
61. In turn, the Respondent stressed that it was not necessary to make a full quantification. It was fully sufficient to establish an estimated concentration by showing that the relative signals were above a defined standard or to show that the signal was close to a given standard above the threshold.
62. The Panel is convinced that the Sydney laboratory did not fully comply with the requirements set out in the "Additional considerations for the reporting of specific compounds" in that it failed to measure the urine samples against a defined spiked sample of 2 ng/ml. However, the Panel is of the opinion that the results found for both the A-sample and the B-sample do allow to conclude that they contained a concentration of NA in excess of 2 ng/ml.
63. The Panel is aware that the IOC rules require the IOC accredited doping laboratories to adjust the relative signals obtained for a defined 2ng/ml spike and to define whether the relative signals obtained for the urine samples are in excess of these signals in cases where the specific gravity exceeds 1.020. Since the Appellant's urine showed a specific gravity of 1.025 this procedure should have been applied by the laboratory. However, it appears that both the A and the B-sample were not measured against a defined spike of 2 ng/ml of NA. Thus the Panel will have to determine whether it is convinced that both samples showed a relative signal that was in excess of the adapted relative signal presumably obtained for a 2 ng/ml spike.
64. With regard to the A-sample the Panel is fully convinced that the levels of NA found were well above the threshold of 2 ng/ml. The Appellant's urine was measured against a standard which had been spiked with 4 ng/ml of NA. The relative signals for the Appellant's urine were well above the relative signals for the 4 ng/ml spike. The analysis for NA does not require to establish an exact concentration of NA but merely the excess over the threshold of 2 ng/ml of NA for male urine. Thus, the Panel is satisfied that the measurement of a relative signal higher than the relative signal of 4 ng/ml also constitutes an excess over the (adjusted) relative signal of 2 ng/ml although the latter was not measured during the experiment.
65. However, the Panel needs to be more careful with regard to the question whether the B-sample can also be considered as positive, i.e. in excess of 2 ng/ml since the relative signals obtained from the measurement were below the ones obtained for the reference urine spiked with 4 ng/ml.

The parties and their witnesses argued whether the laboratory could apply a linear formula using the 4 ng/ml spike as single reference in order to establish an estimated concentration (one point calibration). The Appellant contended that this was only possible if the curve is linear. This linearity could only be established where the laboratory used a multipoint

calibration for the experiment in order to show the exact course of the curve.

66. The Appellant did not contest the statement of Dr. Saugy that within narrow margins the course of the curve would be almost linear thus allowing the estimation made for the B-sample. Since the relative signals obtained for the B-sample came close to the ones obtained for the 4 ng/ml spike the Panel is convinced that the signals obtained for the B-sample of the Appellant's urine allow to conclude that the concentration of NA exceeded the threshold of 2 ng/ml.
67. In light of the foregoing the Panel is convinced that FINA was able to establish that the Appellant's urine contained a concentration of NA above 2 ng/ml. The evidence provided by the Appellant did not quash this conviction. Since a concentration above 2 ng/ml is prohibited by the FINA Doping Control Rules, the Respondent was able to carry its burden of proof and was successful in establishing the objective elements of the doping offence to the comfortable satisfaction of the Panel.
68. The proceedings in this case have unveiled a number of irregularities in the transportation, testing and analysis of the Appellant's samples which the Panel has examined one by one and with respect to each of which the Panel was not convinced that they were sufficient to discard the Appellant's test results. The Panel is aware that doping control is a complex process susceptible to errors. However, the Panel is concerned about the number of irregularities in this case and wishes to point out that there may well be instances where the number of irregularities (even if insignificant on a stand-alone basis) reaches a level which may call into question the entire doping control process. The Panel is convinced that the number of errors stays below this threshold.
69. Likewise the Panel is persuaded the irregularities in this case are not interlocked, interconnected or linked, to an extent that it was possible for a combination of the deviations to have the result that there is an abiding or overwhelming sense of uncertainty or dissatisfaction as to the reliability of the positive result.
70. The Appellant has not provided the Panel with any piece of evidence which may suggest that the level of NA found in his urine was due to circumstances beyond his control. His mere statement, that he is unable to explain the forbidden substance found in his urine is not sufficient to rebut the presumption of fault.
71. FINA Rule DC 9 provides:
- "DC 9 SANCTIONS*
- DC 9.1 The sanctions for doping offences involving prohibited substances shall be:*
- DC 9.1.1 For a doping offence involving anabolic agents, diuretics, masking agents, peptide hormones, mimetics and analogues, and chemically or pharmacologically related substances:*
- First offence:*
- a minimum of four (4) years' suspension ; plus*

- *a retroactive sanction involving cancellation of all results achieved in competitions during the period prior to the date the suspension takes effect and extending back to six (6) months before the collection of the positive sample, shall be imposed.*

[...]

DC 9.10 Where the rules impose a minimum term suspension, the minimum may be lessened if the competitor can clearly establish how the prohibited substance got into the competitor's body or fluids and that the prohibited substance did not get there as a direct or indirect result of any negligence of the competitor. Every competitor has the personal responsibility to assure that no prohibited substance shall enter his or her body and that no prohibited method be used on such competitor's body, and no competitor may rely on any third party's advice in this respect."

72. Since the Appellant tested positive for nandrolone metabolites falling in the class of anabolic agents, the minimum suspension for a first time offence is 4 years and the cancellation of all results obtained during the six months prior to the suspension. A retroactive cancellation of previously obtained results is arguably tantamount to a suspension with the same duration because the results of the athlete's professional activities are cancelled. Thus, under the applicable FINA Rules the minimum sanction in this case would amount to a 4.5 years suspension.
73. According to FINA Rule DC 9.10 this suspension may only be reduced if the competitor can clearly establish how the prohibited substance got into his body and that the prohibited substance did not get there as a direct or indirect result of any negligence on his part.
74. As a preliminary matter it should again be noted that in case the athlete is able to prove that he acted without any intent or negligence a disciplinary sanction may not be imposed at all (see *supra*). The Panel is of the opinion that under the circumstances described in DC 9.10 FINA Rules the athlete would not even be liable for a doping offence because of the absence of any fault on his part.
75. A minimum sanction of 4.5 years for a first time offence has to be regarded as being inappropriately excessive in this case. In fact there are only two cases where CAS acknowledged that a 4 years suspension could be imposed (CAS 98/208 N. & J. & Y. & W. v/ FINA, p. 33; CAS 2000/A/274 S. v/ FINA, p. 37). In those two decisions the arbitrators felt bound by the rules and regulations of FINA as they stand. They did not see any need to examine whether these sanctions could be regarded as being unjustified.
76. However, the wording of DC 9.10 FINA Rules clearly shows that FINA itself does allow deviations from the catalogue of fixed sanctions in the light of special circumstances. Thus, the Panel has the authority to adjust the sanction against the Appellant in the light of the circumstances of this case.
77. There are also a number of CAS decisions involving FINA rules where the Panels felt prepared to reduce the sanction below the minimum provided for in FINA Rule DC 9.1.1 (CAS 95/141 C. v/ FINA, Digest I, p. 215, 223; CAS 96/150 V. v/ FINA, Digest I, p. 265, 273; see also the reasoning in CAS 96/156 F. v/ FINA, p. 48 *et seq.*).

78. Other CAS decisions stress more generally that a sanction may not be disproportionate and must always reflect the extent of the athlete's guilt (CAS 92/73 N. v/ FEI, Digest I, p. 153, 159; CAS 95/141 C v/ FINA, Digest I, p 215, 222; CAS 96/156 F. v/ FINA, p. 48). Therefore, this Panel in its capacity as an appeals body enjoys the same discretion in fixing the extent of the sanction as do the Respondent's internal instances. In fact, the Panel would enjoy this discretion even if there were no "exceptional attenuating circumstances" (CAS 2000/A/310 A. v/ FILA, p. 25).
79. It is well established that a two-year suspension for a first time doping offence is legally acceptable. This approach is also reflected in the Olympic Movement Anti-Doping Code as well as in the rules and regulations of most of the international federations. However, in the light of the athlete's right to personality it seems to be necessary to always consider the nature of the Appellant's fault in relation to the impact of a two year ban from international competition. In the event that a two year suspension appears disproportionately severe, the Panel has a general discretion to reduce this sanction (CAS 2000/A/312 L. v/ FILA, p. 13 with further reference).
80. Appellant's explanation for the presence of a prohibited substance in his body was mainly founded upon the "external transformation theory" which caused considerable debate between the experts and which the Panel is not prepared to accept.
81. The Panel acknowledges that it would have been inconsistent to the Appellant's case challenging the very existence of the prohibited substance as revealed by the test results, to also argue that the presence of the prohibited substance could be explained by his use of food supplements which he did not know were contaminated. There was evidence before the Panel that there are supplements available internationally which are likely to be contaminated without an athlete knowing of the contamination. However, the Appellant did not raise this issue. In its absence it is not appropriate for the Panel to make any assumptions in this respect. The CAS has consistently determined that today lack of knowledge on the part of an athlete of a contamination of food supplements cannot be accepted as an excuse or a mitigating factor (CAS 2000/A/310 A. v/ FILA, p. 23).
82. When taking into consideration all the elements of this case, in particular the fact that the Appellant is presumed to have acted at least negligently but without intent to indulge in doping, the Panel is of the view that, based on the evidence produced, there are mitigating circumstances which warrant a reduction of the maximum penalty allowed under the rules and regulations of the Respondent. In the absence of any explanation for the presence of the prohibited substance in the Appellant's body, other than the transformation theory which the Panel does not adopt, it must remain a period of suspension which is meaningful in all the circumstances. As a result, the Panel is of the opinion that it is adequate and appropriate to suspend the Appellant for two years. As regards the date upon which the suspension should begin, the Panel takes note of the fact that the sanction imposed by the Respondent started to run on the date the Appellant was provisionally suspended by FINA decision under DC 9.6

FINA Rules (May 19, 2000). The Panel sees no reason why it should change this date. Therefore, the Appellant's suspension will last until May 18, 2002.

83. In accordance with DC 9.1.1 FINA Rules all results obtained by the Appellant 6 months prior to May 19, 2000 are cancelled.

The Court of Arbitration for Sport rules:

1. The appeal is partially upheld.
2. The decision of the FINA Doping Panel of June 14, 2001 is modified as follows:

B. is suspended for a period of two years beginning on May 19, 2000. All results obtained by the Appellant six months prior to May 19, 2000 are cancelled.
3. (...)