Arbitration CAS 2003/A/507 Marko Strahija v. Fédération Internationale de Natation (FINA), award of 9 February 2004

Panel: Prof. Ulrich Haas (Germany); President; Prof. Richard McLaren (Canada); Prof. Denis Oswald (Switzerland)

Swimming
Doping (hCG)
Principle of a fair hearing
Lex mitior
Scope of the Panel review
Integrity and validity of the laboratory testing results
Burden of proving an abnormal concentration
Specified substance
Burden of proving unintentional doping

1. **The principle of a fair hearing guarantees not only the parties' right to be heard by the panel, but also their right to refute the other side's factual submissions by proffering evidence. However, the principle of a fair hearing does not apply without restriction. Rather it is only guaranteed within the framework of the procedural rules and the orders made to manage the proceedings provided said orders are not arbitrary or impartially detrimental to one of the parties.**

2. **Under the *lex mitior*, the sanctions, which are more favourable for the athlete in the most recent DC Rules, must be applied if a doping offence has been committed. As a result, new FINA DC rules entered into force between the alleged doping offence and the hearing of the case are applicable.**

3. **According to a rule that exists in most legal systems, a complete investigation by an appeal authority, which has the power to hear the case, remedies – in principle – any flaws in the procedure at first instance.**

4. **An accredited laboratory has complied with the applicable procedural rules when the suitability of the screening method is evidenced by the fact that the laboratory has been awarded the ISO accreditation 17025 for precisely this method of detection. According to Appendix D of the Olympic Movement Anti-Doping Code, a second different immunoassay is required to confirm the findings of the first one. The use of a chemiluminiscent test ("Immulite test") meets this requirement as it is a different test not only by name but also in terms of its substance; for the two-test procedures look at two different parts of the hCG molecule.**

5. **The burden of proof lies upon the anti-doping organisation to establish that an offence has been committed. This follows from the language of the doping control provisions as well as general principles of the Swiss Civil Code. Equally, the standard of proof required of the anti-doping organisation is high: it is less than the criminal standard, but more than the ordinary civil standard. Only then has the anti-doping organisation discharged his burden of proof. The discharge of the burden of proof is shattered if there is reasonable doubt (as distinct from the highest fanciful doubt) as to the findings of the laboratory.**

6. **DC 10.3 (DC Rules 2003) only applies if the substance is marked in the list of prohibited substances as being one that is susceptible to an unintentional anti-doping violation. However, hCG is listed as a "regular" doping substance which is not particularly susceptible to unintentional doping: ingestion of hCG is likely to increase the level of testosterone as well as the ratio of testosterone/epitestosterone. Therefore, in cases in which hCG is proven to be in the body fluids of an athlete, intentional doping is much more likely than unintentional doping. Therefore, DC 10.3 is not applicable to hCG.**

7. **The burden of submitting and proving unintentional doping lies with the athlete. By merely claiming that he did not take the prohibited substance, the athlete does not make any substantiated submissions on the question of whether hCG is particularly susceptible to unintentional doping. Further, under DC 10.3 the athlete must establish that the use of a specified substance was not intended to enhance sport performance. By merely claiming that he has never used this substance, the athlete has not tried to establish such requirement.**

The Appellant, Marko Strahija, is a male elite class swimmer. He is affiliated to the Croatian Swimming Association (CRO), which is a Member Federation of the Respondent. He has participated in national as well as in international competitions in which he represented his country.

The Respondent, the Fédération Internationale de Natation (FINA) is the international federation governing aquatic sports in the world.

On 26 March 2002 the Appellant underwent an out-of-competition doping test organised under the auspices of the Respondent (the "March 26 Test"). The sample was sent to the IOC accredited laboratory in Dresden, Germany (the "Dresden Lab") for analysis. The Dresden Lab tested the A-urine-sample and reported to the Respondent an amount of human chorionic gonadotrophin (hCG) in a concentration exceeding the range of values normally found in males. The concentrations reported, based on two different immunoassays, were 28 mIU/ml and 38 mIU/ml.

Appendix B, Section I C of FINA's Doping Control Rules in force at that time (the "DC Rules 2002") provide that the presence of an abnormal concentration of hCG in the urine of a competitor

constitutes a doping offence unless it has been proven to be due to a physiological or pathological condition.

After receiving the result of the A-sample of the March 26 Test, FINA's Executive consulted FINA's Doping Control Review Board (DCRB), which, by letter dated 14 June 2002, provided the following recommendation:

> *"1. These results constitute 'an adverse analytical finding' not necessarily a positive doping violation. In order to further investigate the case, the DCRB would like additional laboratory information, specifically the testosterone and epitestosterone concentrations of the A-sample.*
>
> *2. Two additional unannounced samples should be collected in the next two or three weeks and subjected to expedited laboratory analysis (results available within 5 working days). The report of these analyses should specifically describe the levels of hCG, testosterone and epitestosterone present in the samples. If it is not possible to conduct such tests within the time period indicated, the Chairman of the DCRB should be immediately advised.*
>
> *The laboratory be requested to provide details regarding the immunoassay "kits" used in the analysis of the sample. More specifically, the following information should be sought:*
>
> *(i) the specificity of the antibodies contained in the kit (what epitopes are recognised by the antibodies);*
>
> *(ii) the population values for negative results derived using these kits should be provided".*

On 11 July 2002 and 22 July 2002 the Appellant underwent two further out-of-competition tests. Both samples were sent to the IOC accredited laboratory (Institut Municipal d'Investigacion Medica, IMIM) in Barcelona, Spain (the "Barcelona Lab"). The analysis of the 11 July 2002 sample provided a negative result. The sample of the 22 July 2002 test (the "July 22 Test") arrived at the Barcelona Lab on 24 July 2002. The A-sample of the July 22 Test was opened on 25 July 2002. The analysis report states that the integrity of the sample at reception was correct and that the sample showed *"the presence of an abnormally elevated concentration of chorionic gonadotrophin (ß-hCG)"*. Furthermore, the report states that the analysis was effectuated through two different immunoassays that produced mean values of 27 mIU/ml and 30 mIU/ml. The finding was communicated to the Respondent on 4 October 2002.

On 27 November 2002, the FINA Executive, after another consultation with the DCRB, decided to provisionally suspend the Appellant beginning on the same day *"until a hearing before the FINA Doping Panel can be made following the test result of the B sample"*. On request by the Appellant the B-sample of the July 22 Test was analysed on 15 January 2003. Since the Appellant did not wish to attend the opening of the B-sample it was opened and analysed in his absence at the Barcelona Lab. The analysis of the B-sample was again effectuated through two different immunoassays that detected ß-hCG in values of 24.7 mIU/ml and 32.1 mIU/ml respectively. The results of the B-sample were reported to the Respondent on 21 January 2003.

On 29 January 2003 the matter was referred to FINA's Doping Panel (the "FINA DP"). On 1 February 2003 the Appellant was informed by the FINA DP about his right to a hearing. The hearing was scheduled for 7 May 2003 and held in the FINA office in Lausanne. The Appellant attended the hearing together with the General Secretary of the CRO Swimming Association.

In the hearing of 7 May 2003 the Appellant submitted copies of several scientific publications in support of his argument that he had not committed any doping offence. Since the FINA DP felt unable to evaluate the scientific material, the FINA DP rescheduled the hearing and sought further information from the DCRB. The latter provided the information to the FINA DP with a letter dated 30 June 2003. A copy of this letter was sent to the Appellant and received by him on 11 July 2003. The second hearing took place on 15 July 2003 in Barcelona. In this hearing, Dr. Larry Bowers who is a member of the DCRB and the former head of the IOC accredited doping control laboratory of Indianapolis, USA was heard as an expert witness. The Appellant was not informed prior to the hearing that Dr. Larry Bowers would be heard as an expert witness.

The FINA DP issued its decision on the day of the hearing (15 July 2003) and imposed a suspension of four years on the Appellant, starting 27 November 2002 and expiring on 26 November 2006. In addition, the FINA DP imposed a retroactive sanction on the Appellant according to Rule DC 9.1.1. The retroactive sanction cancelled all results achieved by the Appellant in competitions during the period prior to 26 November 2002 and extending back to 22 January 2002.

At the end of its decision the FINA DP states:

> *"The Doping Panel is well aware that the FINA Congress on 11 July 2003 adopted new FINA DC Rules which will become effective only on 11 September 2003 (FINA Rule C 15.10). The minimum four year term of ineligibility pursuant to FINA Rule DC 9.1.1 does not comply with the shorter sanction provided for in the new DC Rules. Also the new DC Rules do not provide a retroactive sanction any more. The Panel has no authority to apply the new DC Rules already now. However, the representative of FINA has stated in the hearing that provisions have been taken already by the FINA Bureau that the four year term of ineligibility now being imposed on the swimmer may be shortened in a way to harmonise with the shorter sanctions provided for in the DC Rules becoming effective on 11 September 2003".*

On 8 October 2003 the Appellant was informed by the Respondent that his suspension would be reduced to a period of two years (expiring 26 November 2004). This is a result of the new DC rules (the "DC Rules 2003") coming into force on 11 September 2003. The retroactive sanction, cancelling all results achieved by the Appellant in competitions during the period prior to 26 November 2002 and extending back to 22 January 2002, would be lifted as well. This position was confirmed by FINA's counsel in the Respondent's Answer of 10 December 2003.

On 11 August 2003 the Appellant filed a Statement of Appeal with the CAS against the decision issued by the FINA DP on 15 July 2003.

The Appellant was accorded numerous extensions of deadlines with the consent of the Respondent to file his appeal brief. The latest deadline was fixed as 3 November 2003. This deadline, however, was not met by the Appellant. On 5 November 2003 the Appellant was contacted by the CAS office to inquire about the appeal brief. In response hereto the Appellant sent a letter to the Secretary General of the CAS stating inter alia: *"… my physician has told me that I could resume working again, tomorrow November 6, 2003. As you may remember, an extension due to my illness has already been requested before in the matter at hand, while my secretary has taken care of follow-up correspondence for the very same reasons. I*

was under the impression that an additional extension had been requested due to my continued absence from the office, but apparently this has not yet happened. … I consequently, would like to ask you respectfully to grant another extension of the deadline for submission of the Appeal Brief in the abovementioned matter until tomorrow, November 6, 2003, at 17:00 hrs, due to my absence from office as a result of my illness". Finally, the appeal brief was received by the CAS office on 10 November 2003.

Article R51 of the Code of Sports-related Arbitration (the "Code") states that: *"… the appellant shall file with CAS a brief stating the facts and legal arguments … failing which the appeal shall be deemed withdrawn"*. At the hearing the Panel asked the Respondent whether it opposed the late filling of the appeal brief. The Respondent stated that, given the circumstances, it was not opposed to the appeal brief being filed late.

By letter of 22 October 2003 the Secretary General of CAS fixed a deadline of 1 December 2003 for the parties to submit its list of witnesses with the CAS. The Respondent complied with this deadline by letter dated 1 December 2003 to the CAS in which he requested Prof. J. Segura head of the Barcelona lab as a witness. The Appellant did not file its list until 10 December 2003. In its letter the Appellant informed the Secretary General of the CAS that two out of the three nominated expert witnesses would not be present in person at the hearing but would be available on the telephone. The letter's enclosure was merely a description of one of the witnesses named by the Appellant, namely L. As regards the other witnesses (A. and J.) no details whatsoever were given on, for instance, their professional background, their qualifications and experience or their current occupations. The letter also does not indicate which facts the Appellant intends to prove with the evidence proffered.

By letter of 30 October 2003 the Secretary General of the CAS fixed 10 December 2003 as the deadline for the Respondent to file its Answer. The Respondent filed its Answer on this date.

The hearing took place in Lausanne, Switzerland on 16 December 2003 at the offices of the CAS. The Appellant was present in person. The Athlete's sister and girlfriend were also permitted to be present with the consent of the parties.

Following a number of questions asked of the parties by the Panel, the Appellant and the Respondent made their oral submissions. The only witness present and questioned at the hearing was for the Respondent, Professor J. Segura (Head of the Barcelona Lab). Prior to giving his testimony, the President of the Panel advised the witness of his duty to tell the truth, subject to the sanction of perjury. The Panel refused to examine the Appellant's witnesses by telephone. In so doing the Panel was well aware of the principle of a fair hearing. The latter guarantees not only the parties' right to be heard by the Panel, but also their right to refute the other side's factual submissions by proffering evidence. However, the principle of a fair hearing does not apply without restriction. Rather it is only guaranteed within the framework of the procedural rules and the orders made to manage the proceedings provided said orders are not arbitrary or impartially detrimental to one of the parties. On 22 October 2003 the Secretary General set the Appellant a deadline of 1 December 2003 to lodge his list of witnesses. The Appellant did not comply with this deadline, which was generous and in no way impaired or even made the Appellant's legal action more difficult. At no point did the Appellant make an advance application for a deadline to be extended

or, after a deadline had expired, an application for reinstatement, nor did he even ever give reasons or apologize for his failure to meet the deadline. The Panel also weighed up the Appellant's interests with those of the Respondent, for the purpose of the deadline in question is also to give the Respondent sufficient opportunity to defend itself. The Appellant lodged his list of witnesses to the CAS on the day upon which the Respondent's deadline to file its Statement of Answer expired. The Respondent therefore no longer had any opportunity to react to the Appellant's letter. In addition, the application for witnesses to be heard was completely unspecific. The letter neither makes clear which facts the Appellant intends to prove with his application nor is it – in the case of two of the witnesses named – apparent what qualifications they have and what relationship they have to the current case. Finally, the value of questioning witnesses by telephone played a role in the Panel's decision. Only if witnesses attend the oral hearing in person is the parties' right to ask questions fully guaranteed and the opportunity given for the Panel to obtain a direct impression of the witnesses' credibility. Hearing a witness by telephone is therefore always an exception for which grounds must be given. It is possible, by way of an exception, if for instance both parties are in agreement with proceeding in this manner or if a witness statement from the witness to be questioned by telephone has already been submitted and the Panel considers it unreasonable to expect the witness to attend in person. However, no such exception applies in the present case.

At the end of the hearing, the parties made their final submissions. None of the parties raised any objections to the way in which the arbitration proceedings were carried out, nor to the composition of the Panel. The Panel then closed the hearing and, after deliberation, rendered its decision.

In the appeal brief dated 10 November 2003, the Appellant requests before CAS that:

- He be exonerated and the doping charges against him be dismissed; or
- Alternatively, that if a doping offence must be found, then no suspension be issued, only a warning or a reprimand; or
- In the further alternative, if a doping offence must be found and a suspension should be issued, this suspension be proportionate in relation to the offence and – taking into account the manner in which this case has been conducted before the FINA Doping Panel as well as the nature of the Prohibited Substance itself – consequently be no longer then the time Appellant already served and subsequently to end on December 16, 2003; and that
- The Appellant recovers his costs in this matter, together with fees of counsel.

In its statement of answer dated 10 December 2003, the Respondent requests CAS:

- To reject the appeal inasmuch as it requests the overturning of the decision made by the FINA DP;
- To confirm the suspension of the Appellant for the reduced duration of two years from November 27, 2002 until November 26, 2004 inclusive;
- To order the Appellant to pay to the Respondent an amount (together with interests at 5 % from the date of the decision) representing an appropriate compensation for the

costs incurred by FINA in the course of the appeal proceedings, in particular attorney's fees; and

- To reject any contrary or other claims of the Appellant.

LAW

CAS Jurisdiction

1. The Appellant filed his appeal under Article R47 of the Code. Article R47 requires either a provision in the statutes or regulations of the respective sports body or a specific arbitration agreement between the parties. The Appellant must, however, first exhaust the legal remedies available to him under the statutes or regulations of the said sports body prior to filing an appeal with the CAS.

2. In the present case the Panel has jurisdiction to decide the case, because the Appellant subjected himself to the rules and regulation of FINA. Article C 12.8.3 of the FINA Constitution (in force at the time of the appeal) provides that an *"appeal against a decision by … the FINA Doping Panel shall be referred to the Court of Arbitration for Sports (CAS) Lausanne, Switzerland, within the same term as in C 12.8.2"*. Finally, both parties signed the Order of Procedure and thereby expressly declared the CAS to be competent to resolve the dispute. They also did not raise any objections to the jurisdiction of the CAS during the entire proceedings.

Applicable Law

3. Pursuant to Article R58 of the Code the *"Panel shall decide the dispute according to the applicable regulations of the Respondent and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled"*. The Respondent is an international federation that has its registered office in Switzerland. Since the parties have not chosen the rules of law of a specific country, pursuant to Article R58 of the Code, any aspects of the dispute, which are not governed by the relevant rules of the Respondent, shall be decided according to Swiss law.

Merits

A. Admissibility of Appeal

4. The appeal is admissible. The Panel does not deem the appeal to be withdrawn in the sense of Article R51 of the Code, since the Respondent did not object to the late filing of the appeal brief. However, in substance the appeal lacks merit.

B. Applicable FINA DC Rules

5. Whether or not the FINA DP's disciplinary decision dated 15 July 2003 is lawful is primarily to be measured in accordance with the Respondent's rules that were in force at the time of the alleged infringement (DC Rules 2002). However, new FINA DC rules came into force between the alleged doping offence and the hearing of this case. The Respondent's new rules (DC Rules 2003) entered into force on 11 September 2003. The amendments were in response to the new World Anti-Doping Code.

6. DC Rules 2003 modified the sanctions for an anti-doping violation. Therefore, the principle of *lex mitior* is applicable to this case. Under *lex mitior*, the sanctions, which are more favourable for the athlete in DC Rules 2003, must be applied if a doping offence has been committed. The Respondent agrees with the application of *lex mitior* and, in order to avoid hardship and unfairness, the Respondent acknowledged that *"in proceedings in which no final decision has been made (i.e. including proceedings in which only a decision by the CAS would be outstanding), the sanctions to be applied have to be based on the new rules"*. To this extent (and to this extent only) are the Respondent's new rules applicable to the present case.

C. Alleged procedural failures in FINA DP Proceedings

7. The Panel's scope of review is basically unrestricted. This follows from Article R57 of the Code. According to this article, *"the Panel shall have the power to review the facts and the law"*. It is widely inferred from the wording of this provision that the Panel has the power to establish not only whether the decision of a disciplinary tribunal being challenged was lawful or not, but also to issue an independent decision based on the Respondent's rules. According to a rule that exists in most legal systems, a complete investigation by an appeal authority, which has the power to hear the case, remedies – in principle – any flaws in the procedure at first instance. In the present case the Appellant has not asserted particular circumstances that would justify a deviation from this established court practice. Hence, if there had been a procedural irregularity in the proceedings before the FINA DP, it would be cured by these arbitration proceedings. Therefore, the Appellant cannot succeed with any argument that there were irregularities in the proceedings before the FINA DP (see CAS 98/211, 7.6.1999, Digest II p. 255, 264).

D. Lawfulness of the July 22 Test

8. Applying the DC rules in force in 2002, a doping offence has been committed if a prohibited substance is found within a competitor's body tissue or fluids (Rule DC 2.1(a) of DC Rules 2002). The Respondent is of the opinion that this condition has been fulfilled in the present case. The Respondent's opinion is based on the results of the A and B-sample analyses of the July 22 Test.

9. By contrast, the Appellant is of the opinion that the July 22 Test cannot substantiate the allegation of a doping offence because the Respondent either was not allowed to order such a test at all or not in the form it took. The Appellant bases its arguments on the letter from the DCRB to the FINA Executive dated 14 June 2002. In this letter, the DCRB, having received the laboratory report for the March 26 Test, recommended to the FINA Executive that the Appellant be subjected to further out-of-competition tests within 2 to 3 weeks. Contrary to the Appellant's opinion, the mere fact that this period was not adhered to in the present case does not, however, make the July 22 Test unlawful. This conclusion is consistent with the wording of the letter, for it was merely a recommendation by the DCRB to the FINA Executive. There is no indication anywhere in the letter that FINA was supposed to be bound by the DCRB's letter in any way or form towards the Appellant. Moreover, the letter was only addressed to the FINA Executive. Another argument in support of the letter not having any binding effect is that the DCRB's function is merely to advise the FINA Executive. Finally, the Panel points out that in the letter itself the DCRB considers the possibility of the doping tests being performed at a later point in time (*"If it is not possible to conduct such tests within the time period indicated …"*).

10. Contrary to the Appellant's opinion, it also does not ensue from the Respondent's rules that the doping test was unlawful. Insofar as the Appellant invokes a breach of Rule DC 7.1.3 (DC Rules 2003), which only entered into force on 11 September 2003, it is even questionable whether the wording of DC 7.1.3 supports the Appellant's claim. However, there is no need to answer this question because this provision was not in force at that time and does not have any retroactive effect.

11. Further, Rule DC 8.3.4 (DC Rules 2002) does not make the July 22 Test unlawful. The provision provides that, *"if there is an adverse report on the A sample suggesting the presence of the prohibited substance or the use of a prohibited method, FINA shall notify the competitor …"*. In the present case it is even doubtful whether the conditions requiring the Respondent to notify the Appellant are met. Although in its letter of 14 June 2002 to the FINA Executive the DCRB assumes that the results of the A-sample of the March 26 Test constitute an *"adverse analytical finding"*, it is not the DCRB which is ultimately competent to bindingly establish an *"adverse analytical finding"* for the purposes of DC 8.3.4 (DC Rules 2002). Moreover, to rule whether a doping action should be instituted or not, is a matter purely for the FINA Executive. The Panel's conclusion that the FINA Executive holds this discretion is supported by the DCRB's advisory function and DC 8.4 (DC Rules 2002). DC 8.4 states that, *"the FINA Executive, upon the recommendation of the DCRB, may determine at any point in time after an adverse analytical finding on an A sample and before the final decision in a doping control case that there is no sufficient scientific or factual*

basis to proceed further with the case against the competitor involved". However, even if the Respondent did perhaps breach its duty to notify the competitor, the consequence of this would merely be that FINA had acted unlawfully with respect to the March 26 Test and that the test results thus obtained cannot perhaps be used. However, it does not follow from DC 8.3.4 (DC Rules 2002) that it is not permissible to order the taking of a further sample, namely that of 22 July 2002.

12. The ordering of the July 22 Test is also not unlawful on the basis of any general legal considerations. If it would have been lawful to institute a doping action against the Appellant already on the basis of the results of the March 26 Test, this authority also covers "less", namely to place the Appellant under observation, tests him further and commence proceedings against him until a later point in time on the basis of new findings. Proceeding in this manner does not interfere with the Appellant's legitimate interests. After all there is no general legal rule obliging the Respondent to disclose to the Appellant the purpose of its investigations and to thereby reduce the purpose of the follow-up investigations to absurdity.

E. Integrity and validity of the laboratory testing results

13. Furthermore, as a further argument for no doping offence having been committed, the Appellant claims that the Barcelona Lab ignored the applicable procedural provisions.

14. To the extent the Appellant bases its legal opinion on the WADA International Standards for Laboratories, there is no possibility of a procedural error from the outset because these rules only entered into force on 1 January 2004. The only test criteria applicable to the case are the provisions of Appendix D (Laboratory Analysis Procedures) of the OMAC. DC 8.3.2 (DC Rules 2002) provides that *"analysis of all samples shall be done in laboratories accredited by the IOC"*.

15. The relevant provisions of OMAC's Appendix D read as follows:

*"**1.1 General aspects***

***d) Screening procedures**:*

…

For hCG: a validated immunoassay to detect and quantitate hCG. For confirmation, a second different immunoassay is required. …

…

f) Specimen processing:

… When conducting either screening or confirmatory testing, every batch shall contain an appropriate number of quality control samples.

1.2 Reporting results

…

The IOC Medical Commission suggests the following reporting format for positive analytical results on sample A.

1.2.1 Administration:

a) Code number

b) Name and date of competition

c) Date of receipt of samples at the laboratory

d) Confirmation that the seal of the container was intact

e) Confirmation that the seal of the bottle (if any) was intact

f) Testing programme (in or out-of-competition)

g) Analytical findings

1.2.2 Analytical results:

a) pH, specific gravity and appearance of the sample, determined by the laboratory at the time of the first aliquoting.

b) Generic name of the identified Prohibited Substance(s) … with indication of the excess above a fixed cut-off, if appropriate.

The laboratory should also be prepared to supply the following information on request by the relevant authority in connection with the identification of the Prohibited Substance(s) recorded in 1.2.2 (b) above.

a) Summary of the analytical procedures performed in the screening and in the identification stages.

b) Copies of the analytical data relevant to establishing the presence of substances. Normally this documentation will include the analytical data of a urine blank, a positive control and the sample".

16. Contrary to the Appellant's opinion, the Barcelona Lab complied with these procedural rules in the present case.

17. As can be seen from the laboratory report of 18 December 2002, the A-sample of the July 22 Test was screened with the immunoassay MEIA. This procedure was conducted twice. Both times the batches of aliquots tested included quality control samples. Although the immunoassay used by the Barcelona Lab (MEIA) was developed by the manufacturer primarily to detect the presence of hCG in serum it cannot follow from this, as alleged by the Appellant, that the test kit is not validated for use with urine. A manufacturer is not the only party who can validate a procedure. The laboratory can validate a procedure in-house. Thus, as ensues from the credible statements made by the witness Prof. Segura, the Barcelona Lab tested the screening method used over a lengthy period of time for its reliability precisely for proving the quantity of hCG present in urine. This was also done, *inter alia,* through a vast number of comparative tests in a multi-laboratory exchange with the other IOC accredited

laboratories. Furthermore, the suitability of this screening method is evidenced by the fact that the Barcelona Lab has been awarded the ISO accreditation 17025 for precisely this method of detection.

18. Insofar as the Appellant disputes that the screening method used by the Barcelona Lab is not "sufficiently" reliable, his arguments have not been adequately substantiated. The scientific essays to which the Appellant refers are either not relevant or do not support the conclusions drawn by him. The essay by STENMAN/UNKILLA-KALLIO/KORHONEN/ALTHAN in Clinical Chemistry 1997, p. 1293 states that: *"Quantitative hCG determinations are mainly performed on serum samples, and very few commercial hCG determinations have been validated for determination of urine samples. Considerable care must therefore be exercised, when utilizing such assays to analyze urines for doping control"*. It cannot be concluded from this statement that the screening method used by the Barcelona Lab is not reliable. Firstly, the essay was written in 1997 and is therefore comparatively old. Secondly, the authors of the essay do not rule out that the presence of hCG in urine can be proven with a method validated by a laboratory. The essay's summary expressly states that, *"if appropriately standardized and validated methods are used, investigators should be able to detect self-administration of hCG in men as reliably as anabolic steroids and testosterone are now being detected by mass-spectrometric methods"*. Since the publication of the article in 1997 precisely this stage has been achieved by the laboratory's internal validation and the ISO certification.

19. The other scientific essay submitted by the Appellant by L. from the year 2002 is irrelevant. In the essay the author points out the problem of so-called *"false positive hCG-tests"*. However, with this the author means something completely different to what the Appellant is claiming. The main focus of L.'s essay is on the application of various test kits to detect illnesses (trophoblastic diseases). In this connection, L. points out that the detection of increased hCG values in the patient's body with the help of certain test kits does not automatically allow the conclusion of this illness. By contrast, L. gives a clearly positive answer to the only question of interest here, namely the extent to which the test kits used are suitable to quantitatively detect hCG. Thus he states in the essay: *"In a blind test of 9 commercial hCG assays, all tests appropriately recognized hCG"*.

20. In addition to using a validated method of detection for screening the urine sample, OMAC's Appendix D provides that, *"for confirmation, a second different immunoassay is required"*. In the present case the Barcelona Lab used a chemiluminiscent test ("Immulite test") for confirmation. This information is found in the laboratory report of 18 December 2002. The batch of aliquots on which the confirmation test was carried out included three quality control samples in addition to the Appellant's urine sample. Unlike the screening test, the confirmation test was carried out only once. The Immulite test is a different test from MEIA, not only by name but also in terms of its substance; for the two-test procedures look at two different parts of the hCG molecule. The different detection methods for screening and confirmation used by the Barcelona Lab therefore complement each other. The B-sample was tested by the Barcelona Lab in the same manner as the A-sample of the July 22 Test. The only difference is that the screening procedure was carried out only once for the B-sample and twice for the A-sample. However, the applicable rules of procedure do not provide for a double screening test on the B-sample.

21. Not only was the prescribed screening and confirmation procedure complied with by the Barcelona Lab, there was also no derogation from the recommendations of the IOC Medical Commission as regards reporting results. This is so both in relation to the anti-doping analysis report of the A-sample of 18 December 2002 and to the anti-doping analysis report of the B-sample of 15 January 2003.

F. Burden of proving of an "abnormal concentration" of hCG

22 The Appellant also claims that the test results obtained by the Barcelona Lab do not support a doping offence within the meaning of DC 2.1(a) (DC Rules 2002). There is no doubt that the burden of proof lies upon the Respondent to establish that an offence has been committed. This follows from the language of the doping control provisions as well as general principles of the Swiss Civil Code. Equally, the Panel agrees that the standard of proof required of the Respondent is high: it is less than the criminal standard, but more than the ordinary civil standard. Only then has the Respondent discharged his burden of proof. The discharge of the burden of proof is shattered if there is reasonable doubt (as distinct from the highest fanciful doubt) as to the findings of the laboratory (see CAS 98/208, 22.12.1998, Digest II, p. 234, 247; CAS 98/211, 7.6.1999, Digest II, p. 255, 256 *et seq.*). In the present case, the Panel is satisfied that the Respondent has completely fulfilled its burden of submitting its case to the Panel and its burden of proof with respect to a doping offence having been committed under DC 2.1(a) (DC Rules 2002).

23 According to the list of Prohibited Substances in Appendix B, Section 1 C (DC Rules 2002), hCG is a substance that is also prohibited "out-of-competition". The Appendix does not state a precise threshold for a positive test. It requires *"the presence of an abnormal concentration"*. However, by way of an exception, an abnormal concentration does not constitute a doping offence if it *"has been proven to be due to a physiological or pathological condition"*.

24. hCG is a hormone that is generally not present in males or only in very low concentrations. An exception applies in the case of certain illnesses. For instance, in the case of a tumour, the hCG level in the afflicted person's urine may rise. The Appellant himself rules out the possibility of his hCG values being increased due to a physiological or pathological condition. The negative doping test of 11 July 2002 supports the ruling out of this possibility.

25. Since the possibility of a physiological or pathological condition has been ruled out, the questions to answer is whether the concentration of hCG found in the Athlete's urine was normal or abnormal. This question depends on a comparison with the values of a reference population. The Barcelona Lab determined this question on the basis of more than 1000 different urine samples. The average concentration of hCG in the male reference population is 0.51 mIU/ml. The range of concentrations found in the reference population is approximately between 0 and 5.5 mIU/ml. However, roughly 96% of the reference population had a value of less than 2.02 mIU/ml and 99% had a value less than 3.22 mIU/ml. The concentration of hCG found in the Appellant's A-sample using the MEIA method had

an average value in the screening test of 27.0 mIU/ml (first test run 27.7 mIU/ml, second test run 26.3 mIU/ml). The concentration found in the A-sample in the confirmation procedure applying the Immulite method was 30.7 mIU/ml. The values of the B-sample were 24.7 and 32.1 mIU/ml respectively. Even if, to the Appellant's benefit, one deducts a very high safety margin from the results measured (confidence factor k3), the values measured in the Appellant's case still exceed 20 mIU/ml. It is therefore beyond any doubt that the values measured in the Appellant's urine are completely outside the values normally found in the male population. The Respondent was therefore right to draw the conclusion that the values measured in the Appellant's urine are "abnormal" for the purposes of Appendix B Section I C.

26. There are no apparent circumstances to indicate that the Barcelona Lab's measuring procedure was wrong and the Appellant has not made any such substantiated submissions. The density of the urine is in the normal range in both the A-sample and the B-sample. Both urine samples were intact when received by the laboratory. The Respondent applied a validated measuring procedure (see above) and, *inter alia,* when analysing the A-sample carried out the screening method twice. All screening results were confirmed by the lab's own confirmation procedures. All of the screening and confirmation procedures included quality control samples in addition to the Appellant's urine samples. None of the analysis results, either in relation to the Appellant's urine or in relation to the quality control samples, is remarkable in any way whatsoever. In particular, all of the measurements taken from the quality control samples fall within the range of tolerance.

G. Sanctions

27. Having thus established that the Respondent has met its burden of proof that a doping offence has been committed, the final issue to be dealt with is the imposition of sanctions on the Appellant. As mentioned above, the *lex mitior* principle applies in this case. The DC Rules which are more favourable sanctions for the Athlete must be applied in this case. The sanctions under DC Rules 2003 will be applied in this case, as they are more favourable to the Athlete than those in DC Rules 2002. Under DC 10.2 (DC Rules 2003), the penalty for a first anti-doping violation is two (2) years of ineligibility.

28 The Respondent's new rules provide for various exceptions to the general rule of a two-year period of ineligibility. The Appellant is claiming that DC 10.3 (DC Rules 2003) should apply. DC 10.3 provides that:

"The prohibited list may identify specified substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be abused as doping agents. Where a competitor can establish that the use of such a specified substance was not intended to enhance sport performance, the period of ineligibility found in DC 10.2 shall be replaced with the following:

First violation: At a minimum warning and reprimand and no period of ineligibility from future competitions, and a maximum, one (1) year's ineligibility".

29. Contrary to the Appellant's opinion the conditions of DC 10.3 (DC Rules 2003) are not met. This provision only applies if the substance is marked in the list of prohibited substances as being one that is susceptible to an unintentional anti-doping rule violation. However, hCG is not on this list. hCG is listed as a "regular" doping substance in the list of prohibited substances printed in the Annex to the Respondent's rules. Whether and to what extent the Panel can insofar supplement or amend the list of prohibited substances is questionable. DC 4.3 (DC Rules 2003) provides that: *"WADA's determination of the prohibited substances and prohibited methods that will be included on the prohibited list shall be final and shall not be subject to challenge by a competitor or other person"*.

30. Even if the Panel were allowed to supplement or amend the list, because the list of prohibited substances currently printed in the Annex to the new doping rules comes from the IOC and not from WADA, there are no reasons to believe that hCG is particularly susceptible to unintentional doping. The credible statements of the witness Prof. Segura and the Appellant's test results indicate that the ingestion of hCG is likely to increase the level of testosterone as well as the ratio of testosterone/epitestosterone. Therefore, in cases in which hCG is proven to be in the body fluids of an athlete, intentional doping is much more likely than unintentional doping. In any event the burden of submitting this to the Panel and the burden of proving this would lie with the Appellant. The Appellant has not made any substantiated submissions on the question of whether hCG is particularly susceptible to unintentional doping. The Appellant merely claims that he did not take the prohibited substance. Further, under DC 10.3 the competitor must establish that the use of such a specified substance was not intended to enhance sport performance. The athlete has not tried to establish this requirement as he still claims that he has never used this substance. Therefore, DC 10.3 is not applicable in this case and the Appellant cannot benefit from its reduced sanctions.

31. The Appellant's doping offence thus triggers a two-year suspension, which the Panel finds appropriate and proportional in view of the given facts of the case. Under DC 10.8 (DC Rules 2003) the period of ineligibility begins, *"on the date of the hearing decision providing for ineligibility"*. The two-year suspension therefore shall start on 15 July 2003. However, DC 10.8 also provides that *"any period of provisional suspension … shall be credited against the total period of ineligibility served"*. Since the Appellant has been under a provisional suspension since 27 November 2002, the period from 27 November 2002 until 15 July 2003 must be credited. Consequently, the period of ineligibility ends upon the expiry of 26 November 2004.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr. Strahija on 11 August 2003 is dismissed.

2. The decision by the FINA Doping Panel dated 15 July 2003 is upheld as amended by the entry into force of the new DC rules on 11 September 2003. Accordingly the period of ineligibility for the Appellant is two (2) years. The suspension shall end upon the expiry of 26 November 2004.

3. (...).