TAS 99/A/234 David Meca-Medina v/FINA
TAS 99/A/235 Igor Majcen v/FINA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: The Hon. Michael **Beloff**, Q.C., Barrister, London, England

Arbitrators: Prof. Richard **McLaren**, London, Ontario, Canada
Mr. Denis **Oswald**, Attorney at law, Neuchâtel, Switzerland

in the ARBITRATION

Mr. **David Meca-Medina**, Barcelona, Spain
Mr. **Igor Majcen**, Ljubljana, Slovenia
represented by Mr.Emile N. Vrijman, attorney at law, Rotterdam, Netherlands
and Mr. Jean-Louis Dupont, attorney at law, Bruxelles, Belgium

versus

Fédération Internationale de Natation Amateur (FINA), Switzerland
represented by Mr. Jean-Pierre Morand, attorney at law, Geneva, Switzerland

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1. INTRODUCTION

The decisions appealed against

1.1 David Meca-Medina (hereafter Appellant 1) is affiliated to the Spanish Swimming Federation, member of FINA, the International Federation governing swimming which is domiciled in Switzerland. Igor Majcen (hereafter Appellant 2) is affiliated to the Slovenian Swimming Federation, also a member of FINA. The Appellants were each suspended for four years ("the decision") by the FINA doping panel on 8th August 1999, because they had tested positive for metabolites of Nandrolone, specifically norandrosterone ("NA"), as a result of doping control in a competition test conducted on January 31, 1999, after both Appellants took part in a long distance World Cup race in Salvador di Bahia in Brazil finishing first and second respectively.

1.2 On August 8, 1999, the FINA Doping Panel issued two separate decisions concerning Appellant 1, on the one hand and Appellant 2, on the other hand. In both cases, the Appellants were sentenced to a four-year ban.

Jurisdiction

1.3 On August 19, 1999, both Appellants filed appeals against the decision concerning each of them in a single appeal statement filed on behalf of both Appellant 1 and Appellant 2. The appeal statement included a motion for stay of execution which was rejected on August 26, 1999, by the President of the CAS. A subsequent application made on February 3, 2000, was rejected by the Panel. Both rejections were reasoned.

1.4 On 19th August 1999, both Appellants submitted a timely appeal.[1]

1.5 CAS has jurisdiction in the appeal because of :

- Art. C 10.8.2-3 of the FINA Constitution which provides, so far as material,

  An appeal against a decision by .. the FINA Doping Panel shall be referred to the Court of Arbitration for Sport (CAS) Lausanne, Switzerland, within the same term as in C.10.8.2"

- the FINA Doping Control ("DC Rules") 8.9 which provides :

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[1] i.e. within one month of the decision appealed against.

"Any person affected by a decision of the FINA Doping Panel may appeal from that decision to the Court of Arbitration for Sport (CAS), Lausanne in accordance with FINA Rule C.10.8."

- Art. R47 of the Code of Sports-related Arbitration ("the Code") (as amended on 22nd November 1994) which provides :

"A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body."

- the statements of appeal dated August 19, 1999, lodged by both Appellants.
- the signature by the parties the order of procedure dated 5th October 1998.

Panel

1.6 This Panel was designated to adjudicate the appeal as a Court of Arbitration and to render an award in conformity with the Code. The parties chose an arbitrator and the third arbitrator, - the President - having in turn been designated, the Panel sat in the following composition:

President: The Honourable Michael J. **Beloff** QC
Barrister, President Trinity College, Oxford, UK

Arbitrators: Mr Richard **McLaren**
Professor of Law
London, Ontario, Canada

Mr Denis **Oswald**
Attorney at law
Neuchâtel, Switzerland.

1.7 In accordance with art. R28 of the Code, the seat of the Panel was established at the Secretariat of the CAS, Villa du Centenaire, Avenue de l'Elysée 28-1006 Lausanne.

1.8 In accordance with art. R29 of the Code, the official language of this arbitration was English.

Joinder

1.9 In view of the two statements of appeal, which were similar in many aspects, pursuant to the Order of Procedure dated 5th October 1999, the procedures CAS 99/A/234 and CAS 99/A/235 were conducted jointly. Since that similarity carried forward into the evidence and submissions, we have found it appropriate and consistent with the Order of Procedure to deliver a single determination.

1.10 Art. R58 of the Code provides, so far as material : "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or in the absence of such a choice, according to the law of the country in which the Federation, association or sports body is domiciled.".

In the absence of a choice by the parties, the Panel accordingly had to decide the dispute pursuant to the applicable regulations, being the FINA Regulations in their present incarnation and to Swiss law which forms the legal context in which they are to be interpreted.

Time Limits

1.11 Art. R51 of the Code provides, so far as material : "Within ten days following the expiration of the time limit for the appeal, the appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely, failing which the appeal shall be deemed withdrawn".

1.12 Art. R32 of the Code provides, so far as material : "Upon application on justified grounds, either the President of the Panel or, failing him, the President of the relevant Division, may extend the time limits provided in these Procedural Rules, if the circumstances so warrant".

1.13 Therefore, according to the wording of art. R51 of the Code, the appellant has to file the appeal brief together with all exhibits within the deadline, failing which the appeal shall be deemed withdrawn. Since FINA did not pursue their objection to the Appellants alleged non- compliance with art. R51 of the Code, the Panel did not need to consider whether and to what extent it would have been open to them to allow the appeal to continue or whether they would (if empowered to do so) have in fact done

so. The Panel, however, emphasises the need for parties to comply with these time limits.

Evidence

1.14 The following persons gave evidence to the Panel. Except for Professor Dos Santos, they all gave evidence by telephone only. The Panel made it clear to the parties that such a procedure, was anomalous and that evidence given by telephone would ordinarily be given less weight than evidence given orally since, inter alia, the Panel would be unable to assess the witness's demeanour.

For the Appellants	For FINA
Professor R.W. Stephany[2]	Professor Dos Santos[3]
Professor J. Thijssen[4]	Professor Ayotte[5]

1.15 In addition, documentary evidence was adduced by both sides.

1.16 Art. R51 of the Code provides :

"The Panel shall have full power to review the facts and the law".

1.17 Accordingly, the Panel was not limited to consideration of the evidence that was adduced before FINA either at first instance or at the appellate stage, but had to consider all evidence, oral documentary and real, produced before it; nor could it be restricted in such consideration by the arguments advanced below. The hearing before it was a rehearing.

1.18 By request of January 28, 2000, the Appellants sought, after the hearing, to adduce further evidence. The President of the Panel rejected the application in a reasoned decision.

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2 Head of the Analytical Laboratory for residue analysis of the Netherlands Institute for Public Health and Environment.

3 The Brazilian official in charge of the sample collection.

4 Professor of Medical Faculty, University of Utrecht and Head of Chemical Endocrine Laboratory, University Hospital of Utrecht, the Netherlands.

5 Professor and Director of IOC approved Doping Control Laboratory, Montreal, Canada.

2. SUMMARY OF RELEVANT FACTS

2.1 On 31st January 1999, the Appellants were both chosen for the doping control after the race and their urine samples were accordingly collected from them.

2.2 Both Appellants filled in the usual doping control form currently used for doping controls and approved by FINA.[6] The sample code for Appellants 1 was 135866 and the sample code for Appellant 2 was 135965.

2.3 Both forms carried, inter alia, the passport numbers of both Appellants. Further, both Appellants signed, without any reservation, a declaration on the doping control form that the information given on the form was true, and that the testing procedures were approved.

2.4 After the test, the samples were then stored in a freezer in the office of the doping officer.

2.5 On the next day (February 1 1999) the samples were forwarded from Salvador de Bahia to Sao Paulo.[7]

2.6 On February 3, 1999, the samples were in Sao Paulo with UPS and were then forwarded to the Laboratoire de contrôle du dopage in Pointe-Claire, Canada, and, on February 10, 1999, were delivered to the laboratory by UPS.[8]

2.7 A chain of custody form covering both samples from the time of their arrival in the laboratory documents to their analysis referred to them either under their original code numbers (135865, respectively 135866) or under their laboratory code numbers (135865 = 99DVO110A, respectively 135866 = 99DVO111A). Based on both code systems, the form shows all dealings with the samples on 18 February, 24 February, 1 March, 24 March and 25 March 1999.

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6 The forms have been in use since March 1998. As they are used for several international federations including FINA and IAAF, they carry, for the case of collection under IAAF Rules a reference to the IAAF Rules and for all the other cases (including FINA) a reference to the rules of the concerned sporting body. Communication IDTM to FINA dated November 15, 1999.

7 See Letter Prof. de Rose dated February 1, 1999.

2.8 In any event, both Appellants expressly acknowledge that the urine samples sent to and tested by the laboratory are their own samples. [9]

2.9 On February 18, 24 and on March 1, 1999, the "A" sample analyses was carried out. On March 24 and 25, 1999, the "B" sample analyses was carried out.

2.10 Both the "A" and "B" samples analysis appeared to confirm the presence of NA as follows:

Appellant 1	Appellant 2
"A" sample 13.6 ng/ml - 14.2ng/ml-14.9ng/ml mean: 14.2ng/ml	"A" sample 3.8 ng/ml - 3.1ng/ml-3.9ng/ml mean: 3.6ng/ml
"B" sample 15.0 ng/ml-15.0ng/ml-15.3ng/ml	"B" sample 2.7 ng/ml-3.1ng/ml-3.1ng/ml
"A" sample reanalysis (B-sample time) 9.7ng/ml	"A" sample reanalysis (B-sample time) 3.9ng/ml

In both cases, another metabolite, noretiocholanolone ("NE") was found to be present in approximately equal quantity. [10]

2.11 For endogenous NA in male urine samples, 2 ng/ml was accepted as a safe margin by the IOC. The average value for endogenous production found in all published studies was less than twenty times lower than this level and the highest value found less than one third lower. [11] At a conference of the heads of all the 27 IOC laboratories in October 1999 the validity of the 2ng/ml limit was reaffirmed.

2.12 Both Appellants samples therefore showed the presence of NA above the recognized safe margin; that of Appellant 1 markedly so.

2.13 On March 6 and on March 8, 1999, respectively, the positive results of the "A" samples analysis of both Appellants were notified to their respective national federations. Both notifications refer to the presence of nandrolone metabolites. [12]

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8 See Letter Prof. de Rose dated September 15, 1999 including UPS tracking details showing the whereabouts of the samples from February 3 to February 10, 1999.

9 Appeal brief, p.18, No.5.2.

10 See analysis report sample 135865, analysis report sample 135866 and letter from Prof. Ayotte, dated June 18, 1999, p.3 and 4.

11 Undated Statement on Nandrolone for governing bodies of Sport (see exhibit 80 of the FINA answer)

12 Fax FINA to Spanish Swimming Federation dated March 8, 1999. Fax FINA to Slovenian Swimming Federation dated 8th March 1999.

2.14 Each Appellant was present at his "B" sample analysis. A representative of Appellant 1 and Appellant 2 himself signed the usual form at the 'B' sample opening and agreed "that there is no evidence of tampering".

3. LEGAL INSTRUMENTS

3.1 The rules applicable to this case are primarily the FINA rules and specifically, as regards to doping in the so-called Doping Control Rules ("DC Rules"). Those applicable at the moment of the collection of the samples were in (The Doping Control Rules set forth in the FINA Handbook 1998-2000) (red book). The DC Rules underwent amendments which came into effect on June 1, 1999 [green booklet].

3.2 These rules were then completed by the FINA Guidelines for Doping Control which in particular includes the list of banned substances [yellow booklet].

3.3 The FINA DC Rules, provided at all material times and provide, so far as material, as follows: [13]

"DC 1 Doping is strictly forbidden as a violation of FINA Rules.

DC 1.2 *The offence of doping occurs when*
(a) a banned substance is found to be present within a competitor's body tissues or fluids.

DC 1.6 Any departure from the procedures set out in these Rules and the Guidelines shall not necessarily invalidate a finding that a banned substance was present in a sample, ... unless such departure was such as to cast genuine doubt on the reliability of such a finding.

DC 2 BANNED SUBSTANCES

DC 2.1 Banned substances include those listed in Appendix 1 to the Guidelines,[14]

DC 2.2 It is a competitor's duty to ensure that no banned substance enters his body tissues or fluids. Competitors are responsible for any substance detected in samples given by them.

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13 Amendments introduced w.e.f. 1st June 1999 are italicized.

14 Guidelines Appendix I state Doping consists of "The administration of substances belonging to prohibited classes of pharmacological agents, and/or the use of various prohibited methods.

DC 7 RESPONSIBILITY FOR DOPING CONTROL

DC7.1 FINA shall be responsible for doping control at :
(a) World Championships with the exception for Masters;
(b) World Cups;
(c) All other FINA Events.
At these events a FINA representative or designee shall be present.

DC 7.2 In all other cases (except where doping control is carried out under the rules of another sporting body), the Member conducting the controls or in whose territory an event is held will be responsible for conducting doping control.

DC 7.3 Where the conduct of doping control is the responsibility of, or is carried out by, a Member federation, that Member shall adhere to procedures consistent with those set forth in the Guidelines.

DC 7.4 Where the conduct of doping control results in a positive test on a competitor who is not a member of the Member federation who conducted the doping control, the Member federation who conducted the doping control shall, as soon as possible, report the results of such test to the Member federation which normally exercises jurisdiction over such competitor, which will conduct the appropriate hearing procedures and impose the appropriate sanctions on the competitor. The Member federation who conducted the doping control shall send a copy of its report of the positive test to FINA.

DC 8 DUE PROCESS

DC 8.1 Analysis of all samples shall be done in laboratories accredited by the IOC. Such laboratories shall conclusively be deemed to have conducted tests and analyses of samples in accordance with the highest scientific standards and the results of such analyses shall conclusively be deemed to be scientifically correct. Such laboratories shall be presumed to have conducted custodial procedures in accordance with prevailing and acceptable standards of care; this presumption can be rebutted by evidence to the contrary, but there shall be no burden on the laboratory in the first instance to establish its procedures.

DC 8.2 If there is an adverse report on A sample for a banned substance, FINA shall notify the competitor and the Member federation of the competitor, as well as the Secretary of the FINA Medical Committee. Arrangements for testing the B sample shall be made as soon as possible.

DC 8.3 A competitor for whom there is adverse report on the A sample may be provisionally suspended by the FINA Executive without a hearing until a hearing before the FINA Doping Panel can be made following the test of the B sample.

DC 8.4 It shall be presumed that every competitor will request that the B sample be tested to ascertain whether that sample discloses the presence of the same banned substance detected in the A sample, but a competitor may accept the results of the test on the A sample by so advising FINA within fourteen (14) days of receiving notification that the A sample discloses the presence of a banned substance. A competitor who has neither accepted the results of the test on the A sample nor made arrangements to have the B sample tested within twenty one (21) days of receiving notification that the A sample discloses the presence of a banned substance shall be deemed to accept the results of the test on the A sample. A competitor who has accepted the results of the test on the A sample is nevertheless entitled to a hearing in accordance with DC 8.6.

DC 8.5 If the B sample proves negative, the entire test shall be considered negative and the competitor, his or her federation, and the Bureau shall be so informed.

DC 8.6 If the B sample proves positive and a banned substance clearly identified, the findings shall be reported to the FINA Doping Panel for further considerations according to FINA Rule C 17.5. In case the doping control was conducted under the control of a FINA Member Federation, the findings shall be reported to an appropriate hearing panel controlled pursuant to the national law and rules of the Member Federation to which the competitor belongs.

DC 8.7 When a competitor is notified that there is suspicion or evidence that a doping offence has taken place, the competitor shall also be informed of his or her right to a hearing. If a competitor does not request a hearing within twenty-eight (28) days of being so informed, the competitor will be deemed to have waived the right to a hearing.

In the case of a doping offence as defined in DC 9.1 involving the banned substances referred to in DC 9.2. (a), the competitor shall be informed that the hearing can only involve:

(a) whether the correct body tissue or fluid has been analyzed;
(b) whether the body tissue or fluid has deteriorated or been contaminated;
(c) whether the laboratory analysis was correctly conducted;
(d) whether the minimum suspension for a first offence should be exceeded; and
(e) whether the retroactive sanction for a first offence shall be less than six (6) months.

DC 8.8 If a competitor or other person is found to have violated a doping rule as set forth in these DC Rules, ... the FINA Doping Panel ... that has heard the evidence shall impose sanctions in accordance with DC9.

DC 8.9 Any person affected by a decision of the FINA Doping Panel may appeal from that decision to the Court of Arbitration for Sport (CAS), Lausanne, in accordance with FINA Rule C 10.8.3.

DC 9 SANCTIONS

DC 9.1 For the purpose of these Rules, the following shall be regarded as "doping offences":

(a) the finding in competitor's body tissue or fluids of a banned substance";

The defences are those in DC1 9.1.5.

DC 9.1.5 introduced w.e.f. 1st June 1999

"The right to a hearing related to an offence under DC9.1 can involve only:

(a) whether the correct body tissue or fluid has been analysed;
(b) whether the body tissue or fluid has deteriorated or been contaminated;
(c) whether the laboratory analysis was correctly conducted;
(d) whether the minimum suspension for a first offence should be succeeded; and

(e) *whether a minimum sanction can be lessened in accordance with DC9.10.*[15]

DC 9.2 Sanctions shall include the following

(a) Anabolic androgenic steroids, growth hormones, and chemically or pharmacologically related compounds

The finding in a competitors body tissues or fluids of a banned substance listed in this DC 9.2(a) shall constitute an offence, and the competitor shall be sanctioned in accordance with DC 9.2(a) regardless of whether the competitor can establish that he or she did not knowingly ingest a banned substance.

(b) Amphetamine-related and other stimulants, diuretics, beta-blockers, beta-2 agonists and related substances.
First offence:
up to (2) years suspension

DC 9.3 .... The finding in a competitor's body tissue or fluids of any other banned substance shall shift to the competitor the burden of establishing why he or she should not be sanctioned to the full extent provided for under DC 9.2 (b) - (e).

DC 10.6 Competitors who are taking medications should declare such fact to the relevant authority".

3.4 FINA Guidelines for doping control provided at the material time and provide so far as material:

"PART 1: DOPING CONTROL

5.6 B samples shall be analysed in the same laboratory with alternate personnel or erformed in a second accredited laboratory. Only a commission member, or its designate, is authorised to break the seal of the B sample.

6. Communication of Results

6.1 The results from all analyses must be sent exclusively to FINA in encoded form. The report must be signed by the head of the laboratory designated to do the analyses. All communication must be arranged in such a way that the results of the analyses are confidential.

6.2 When FINA is advised by the laboratory of an adverse report on the A sample, FINA shall inform the competitor and the competitor's federation. Arrangements for testing the B sample should be made as soon as possible.

6.3 It shall be presumed that every competitor will request that the B sample be tested to ascertain whether that sample discloses the presence of the same banned substance detected in the A

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15 The previous Rule DC 8.7 provided : *"(e) whether the retroactive sanction for a first offence shall be less than six (6) months"*.

sample, but a competitor may accept the results of the test on the A sample by so advising FINA within 14 days of receiving notification of an adverse report on the A sample. A competitor who has neither accepted the results of the test on the A sample nor made arrangements to have the B sample tested within a month of receiving notification of an adverse report on the A sample shall be deemed to accept the results of the test on the A sample. Unless otherwise requested by FINA, a laboratory shall not be obliged to keep any B samples after all appeals have been heard and a final decision has been made.

6.4 Once a competitor has requested an analysis of the B sample, a date shall be arranged, convenient both for the competitor and for FINA, within 21 days of the request for the conduct of the analysis. The competitor's federation shall be informed of the date and time of the analysis. Should he wish to do so, the competitor and/or his representative may be present at the analysis, but the competitor may not delay the 21 days by insisting upon his own presence. A representative of the competitor's federation may also be present, as may a representative of FINA.

6.5 If the B sample proves negative, the entire test is considered negative. If the B sample is positive and the substance clearly identified, the Medical Commission, the FINA Executive, the competitor and his federation shall be informed without delay. In the case of a positive B sample in the Olympic Games, a member of the Medical Commission should attend the meeting of the IOC Medical Commission; a similar procedure applies in other events with regard to a representative of the appropriate Medical Commission.

6.6 Once testing on the B sample is complete, the laboratory report shall be sent to FINA along with a copy of all relevant laboratory data.

8. SANCTIONS

8.1. If an athlete is found to have a positive result, the sanctions will be applied by the FINA Doping Panel in accordance with FINA Rules C.17.

8.2. Before a final decision is made in any case of doping control, a fair hearing must be granted to the athlete (and possibly other persons concerned). See DC 8.7, 8.8 and 9.3.

8.3. Sanctions are set forth in DC 9 as follows :

DC 9.1. For the purpose of these Rules, the following shall be regarded as "doping offenses":

a) the finding in an athlete's/competitor's body tissue or fluids of a banned substance;

DC 9.2. Rules regarding "sanctions" are set forth in DC 9 as follows :

a) Anabolic androgenic steroids, growth hormones, and chemically or pharmacologically related compounds:
   - First offence :
   - a minimum of four (4) years' suspension, plus
   - a retroactive sanction involving cancellation of all results achieved in competitions within a period of up to six (6) months before the offence shall be imposed.
   - Second offence :
   - lifetime expulsion; plus

- a retroactive sanction involving cancellation of all results achieved in competition during the athlete's/competitor's career shall be imposed.

The finding in an athlete's/competitor's body tissue or fluids of a banned substance listed in this DC 9.2. (a) shall constitute an offence, and the athlete/competitor shall be sanctioned in accordance with DC 9.2. (a), regardless of whether the athlete/competitor can establish that he did not knowingly ingest the banned substance.

..

DC 9.1.5 (introduced w.e.f. 1st June 1999)

"The right to a hearing related to an offence under DC9.1 can involve only:
(a) whether the correct body tissue or fluid has been analysed;
(b) whether the body tissue or fluid has deteriorated or been contaminated;
(c) whether the laboratory analysis was correctly conducted;
(d) whether the minimum suspension for a first offence should be succeeded;
and
(e) whether a minimum sanction can be lessened in accordance with DC9.10." [16]

DC 9.3. The finding in an athlete's/competitor's body tissue or fluids of a banned substance, or any of its metabolites, shall shift to the athlete/competitor the burden of establishing why he should not be sanctioned to the full extent provided for under DC 9.2b-9.2f.

DC 9.4. As used in DC 9.2. and other DC Rules, "suspension" shall mean that the individual sanctioned shall not participate in any activities of FINA or any of its Member federations, in any discipline, in international competition, including acting as a competitor, delegate, coach, leader, physician or other representative of FINA or a Member federation. Unless otherwise determined by the appropriate body, a suspension shall take effect from the date that the athlete/competitor provides a sample. As used in DC 9.2., and other DC Rules "expulsion" shall mean suspension for life.

...

DC 9.10 (introduced w.e.f. 1st June 1999 : "Where the rules impose a minimum term suspension the minimum may be less than if the competitor can clearly establish how the prohibited substance got into the competitor's body fluids and the prohibited substance did not get there as an 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 technique be used on such competitor's body, and no competitor may rely on any third party's advice in this respect". [17]

3.5 The lex mitior (see CAS 96/149 A.C. v/FINA in Digest of CAS Awards 1986-1998, Stämpfli Editions, Berne, 1998, p. 251 [hereafter "the Digest"]) not only entitles but obliges the Panel to apply the law as it stands at the time of the determination, where more favourable to the Appellants; just as the presumption against retroactivity obliges

16 See footnote N° 15.
17 New Rule

it to apply the law as it stood at the time of the alleged offence, where more favourable to them.

DC9.10 is, accordingly, applicable in the context of sanctions.

4. ANALYSIS: GENERAL

Introduction

4.1 The Panel recognizes the seriousness of the matter from the Appellants' point of view. The fight against doping is no excuse for the conviction of innocent persons (see CAS 92/70 N v/FEI).

Law

4.2 The Panel is in no doubt that the burden of proof lay upon FINA to establish that an offence had been committed. This flows from the language of the doping control provisions as well as general principles of Swiss civil law (Article 8). The presumption of innocence operates in the Appellants' favour until FINA discharged that burden.

4.3 The Panel is equally in no doubt that the standard of proof required of FINA is high: less than criminal standard, but more than the ordinary civil standard. The Panel is content to adopt the test set out in Korneev and Ghouliev v/IOC (CAS OG 1996/003-4) ("Korneev") ingredients *must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made*". To adopt a criminal standard (at any rate where the disciplinary charge is not of one of a criminal offence) is to confuse the public law of the state with the private law of an association (see CAS 98/208 Wang et al v/FINA, para.5.6).

4.4 Resolution of the questions of burden and standard of proof however, does not per se answer the further question of what it is that has to be proved to this standard. The issues require to be disentangled.

4.5 In the Panel's view, it is the presence of a prohibited substance in a competitor's bodily fluid which constitutes the offence under FINA DC, irrespective of whether or not the competitor intended to ingest the prohibited substance.[18] Language, purpose and precedent dictates this conclusion (see generally CAS 98/208 Wang et al v/FINA, para.5.8).

4.6 The Panel rejects with respect the opinion of Dr Niedermann, that the decisions of the FINA Doping Panel as well as FINA's doping control rules, in particular the imposition of strict liability on athletes who otherwise demonstrate their innocence, violates principles of Swiss Law, the Panel notes that the decision of the Swiss Federal Tribunal in the case of Wang Lu Na, decision of March 31, 1999, ref. 5 P. 83/1999, (not published) did not suggest that a strict liability rule in this context was offensive to such principles.

> According to the appellants, the contested award also constitutes a violation of procedural public policy, they say that the FINA's Anti-Doping Rules, applied by the CAS in order to impose what amounts to a criminal law penalty, does not comply with the principle of the presumption of innocence, in so far as it reverses the burden of proof regarding the facts to be taken into account in order to clear an athlete charged with doping. While acknowledging that the penalty imposed in the present case is a private law penalty, the appellants nevertheless believe that the procedure governing its adoption should be subjected to compliance, *mutatis mutandis*, with the minimal procedural guidelines existing at criminal law.
>
> In so arguing, the appellants are futilely endeavouring to challenge Federal Tribunal precedent on penalties for doping imposed by an international sports federation and upheld by the CAS. According to Federal Tribunal case law, the CAS's opinion that it is sufficient for the analyses undertaken to show the presence of a banned substance in order for there to be a presumption of doping and, consequently, a reversal of the burden of proof, relates not to public policy but to the duty of proof and assessment of evidence, problems which cannot be regulated, in private law cases, on the basis of concepts specific to criminal law such as the presumption of innocence and the principle of *in dubio pro reo* and the corresponding safeguards contained in the European Convention on Human Rights (judgment G of 15 March 1993, Recital 8b, not published in ATF 119 II 271 but reproduced in ASA Bulletin 1993, p.409)." (Translation, pp-10-12).

[See also : Margareta Baddeley. L'Association sportive face au droit, Helbing et Lichtenhahn, Basel and Frankfurt, p. 241 and following.]

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18 Whether the FINA DC would be held compatible with general principles of law in so far as they purport to prevent a competitor from establishing his innocence by showing conclusively that the presence of a prohibited substance in his bodily fluid was the product of an ingestion which was neither intentional nor negligent, (e.g. where his drink is 'spiked' with a drug by a rival competitor) is not an issue which falls for decision in this case. In any event, new rule DC9.10 mitigates the penalty.

4.7 If the presence of a prohibited substance is established to the high degree of satisfaction required by the seriousness of the allegation, then the burden shifts to the competitor to show under DC 9.10 why the maximum sanction should not be imposed. She/he will do this only by showing "clearly" (sic) both how the prohibited substance got into his/her body and that there was no negligence on his or her part in allowing it to do so. The adverb "clearly" designedly imports in our view a less stringent standard than the ordinary common law criminal standard of "beyond reasonable doubt" but a more stringent one than the ordinary common law civil standard "on the balance of probability". The perceptible purpose is to prevent a competitor from simply (and sufficiently) asserting ignorance of how such substance got into his/her body (see also para. 10.12 below).

EU Law

4.8 Both Appellants are economic agents. Both carry on a substantial part of their professional activities in the European Union ("EU"). Appellant 1 is a citizen of a member state of the EU - Spain. He is therefore entitled to the legal protection granted by EC law with regard to the competition provisions, and the freedom to provide services under the Treaty of Rome (as amended). Appellant 2 is a citizen of a state which is not a member of the EU - Slovenia. The Panel proceeds on the premise that the same protection Appellant 1 enjoys can be derived in respect of Appellant 2 from the EU- Slovenia Association Agreement.

4.9 In the case CAS 98/200 AEK Athens and Slavia Prague v/UEFA at para 41, the Panel held that EC competition law applied to the case in accordance with Article 19 of the LDIP, in that an arbitration sitting in Switzerland must take into consideration foreign mandatory rules, if there is, inter alia, a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force. The Panel accordingly has taken EC law into account. Although the competition was in Brazil, the ban on both Appellants applies also in the EU.

4.10 In the Panel's judgment, however FINA's anti-doping rules do not violate any rights that either Appellant enjoys directly or indirectly as a result of EU law. In Wilander v. Tobin 1997 2 CMLR 348 the ITF's doping control rules (which were also rules of strict liability) were held to be compatible with EU law (see especially para.(25)-[27] p.354-359). In short, the impediment to the Appellant's freedom to provide services is (if the facts were as found by FINA) justified. By parity of reasoning there would be no abuse by FINA of any dominant position.

5. FINA'S CASE

5.1 For both the Appellants, the confirmed results of the tests constitute evidence of the finding of a banned substance as defined by DC 2.1. The amounts were above 2ng/ml limit, which the Panel accepts to be the appropriate level. [19]

5.2 NAs fall under the classification of anabolic androgenic steroids as a "related substance" to nandrolone.

5.3 Such a finding under the FINA Rules engages the application of a sanction in accordance with DC 9.2(a).

5.4 For a first offence, DC 9.2(a) provides for i.e. a minimum four years suspension, which the Doping Panel accordingly applied.

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19 Doctor Kintz, Head of the French Institute of Forensic Medicine, concluded on the basis of hair testing carried out at Strasbourg on 6th April 1999, that there was no evidence of Nandrolone doping by either appellant prior to or after the competition. However, these tests are not definitive; nor did they deal with the Appellants' situation as at the time of the world championships. The question is what the tests showed in relation to the competition. It is no (and no necessary) part of FINA's case that either Appellant was an habitual doper.

6. THE APPELLANT'S CASE

6.1 The Appellants relied in written submission and oral argument on the following grounds to displace that prima facie position:

(a) the collection and transport procedures were flawed;

(b) the chain of custody was unsound and the testing procedures were flawed.

(c) the substance found was not a banned substance;

(d) the presence of any banned substance was the result of the innocent ingestion of pork offal;

(e) the quantum of the sanctions is too high.

It is to be noted that only (a), (b) and (c) could provide a defence to the original charge or result in the Appellant's entire exculpation. Given that the offence is one of strict liability, (d) and (e) could only go to penalty.

6.2 The Panel deals with each of these arguments in order.

7. THE COLLECTION PROCEDURE AND TRANSPORT

Collection

7.1 The Appellants' statement refers to a large number of alleged violations of the rules and departure from good practice in the collection procedure relating to the selection of competitors at the event, the collection of urine samples, the timing of testing, the layout of the room in which it was carried out, the behaviour of the doping control personnel, the quality of the doping control facilities. The substance of these criticisms was repeated in evidence by the Appellants. Such complaints about the organisation and meeting and the doping control procedures in particular moreover were supported by written witness statements by various chefs, swimmers and coaches supplied to the FINA Panel.

7.2 Such critical factual description of the collection procedure was contradicted by the reports of Dr Santos (for the collection procedure). According to his report,[20] the procedure was conducted under perfectly normal conditions. Dr Santos gave oral evidence to the same effect.

7.3 It is not necessary for the Panel to comment on all these criticisms, some of which at least were palpably ill-founded,[21] nor to resolve such conflicts of evidence. The Panel, is entirely satisfied that (i) the samples collected, (and subsequently analysed) were the Appellants' samples (indeed, the Panel repeat, the Appellants acknowledged as much) [22] (ii) the samples were collected in a manner which guaranteed their integrity.

7.4 Moreover, the Appellants in no instance specify to what extent the many defects they detail, (assuming for the purpose of discussion that they would be established), would cast doubt on the results of the test of samples they expressly admit to be theirs. Only defects which are likely to cast a genuine doubt on the results may be a ground not to rely on sample analysis results (see DC 1.6). The Appellants signed the declaration acknowledging that they "approved the testing procedure" and leaving the box "remarks" just below their signatures completely blank. In the Panel's judgment, this effectively estops them from raising these complaints. The Panel find unconvincing their explanation that they wished to terminate the procedure as soon as possible. Those competitors who do not make use of opportunities designed to provide protection for them have only themselves to blame for the consequences of such failure.

7.5 The Panel also observe that the Appellants' explanation (as to which see below) for the presence of the allegedly prohibited substance in their urine, would be inconsistent with an argument that it was not their urine which was analysed.

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20 Dr Santos, dated November 16, 1999.

21 It is claimed, for example, that the Appellants were not asked to identify themselves: one then wonders how their passport numbers were recorded on the forms.

22 See Appeal Brief, p.18, No.5.2.

Transport

7.6 The time it took to transport the samples was claimed by the Appellant to be excessive and suspicious. However, as the Panel has recorded, the transportation was properly documented from the departure on February 1 1999, via Sao Paulo, on February 3 1999, to Montreal on February 5 1999, and the laboratory on February 10 1999. Brazil is a very large country: the journey from Bahia to Sao Paulo necessarily takes time. Moreover, apparently, some delay occurred in the custom clearance process upon arrival in Canada.

7.7 The Appellants do not identify in what way the time taken for, or means by which, transport was effected could have impacted or did impact upon the validity of the test. Moreover they signed the forms saying that they were satisfied with the integrity of the "B" samples analysed.

7.8 There was, according to Professor Ayotte's oral evidence, no evidence of contamination by bacterial growth in the samples such as would suggest that they had been adversely affected in transit. She said that the admitted absence of gravity/ph records on the doping control forms was not relevant and the Panel neither heard nor read any evidence which undermined that proposition.

8. THE LABORATORY CHAIN OF CUSTODY AND THE ANALYSIS RESULTS

Chain of Custody

8.1 The procedures and results of the IOC accredited laboratories such as Pointe-Claire enjoy a presumption of correctness as provided by Art. DC 8.1 which states :

> "Analysis of all samples shall be done in laboratories accredited by the IOC. Such laboratories shall conclusively be deemed to have conducted tests and analyses of samples in accordance with a higher scientific standard and the results of such analyses shall conclusively be deemed to be scientifically correct. Such laboratories shall be presumed to have conducted custodial procedures in accordance with prevailing acceptable standards of care; this presumption can be rebutted by evidence to the contrary, there shall be no burden on the laboratory in the first instance to establish its procedures."

8.2 The language of this rule which (if read in isolation) would appear to make the analysis of an accredited laboratory impregnable to challenge, it must in the Panel's view be read in the context of the appeal provisions at DC 8.7 which clearly admit of the ability of a competitor to assert that the body fluid has been contaminated, or the laboratory analysis incorrectly conducted. The Panel accordingly next considers the two challenges which have been made to the accuracy of the "A" and "B" samples.

8.3 The Panel have noted that all the dealings of the laboratory are documented for both samples (the samples are referred initially by their lab codes and then by the original sample codes, this not to confuse the parties attending the "B" tests). They detect no inadequacy or impropriety in that documentation. The chain of custody is therefore complete and satisfactory. DC 1.6 is in any event in play and there has been no sufficient identification by the Appellants of how any alleged departure from the procedures cast "genuine doubt" on the reliability of any finding.

Analysis results

8.4 The valid procedure to establish a positive case in the event of presence of N/A in male urine is that described in the IOC recommendations to IOC laboratories issued in August 1998.[23]

8.5 According to these recommendations, the laboratory has only to establish on three different aliquots that the level is in excess of 2ng/ml. It is not required to establish an exact specific level. The results obtained on both samples "A" and "B" analysis on three different are all clearly above the 2ng/ml level.

8.6 The analysis of both "A" and "B" samples was carried out in accordance with the official document sent by the IOC to accredited laboratories in August 1988.

8.7 It was accepted by experts for both sides that in order to show that the value in the aliquot was still higher than 2 ng/ml, the lowest mean concentration of norandrosterone measured in the "B" sample is taken (i.e., 3.0 together with the standard deviation of

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23 Communication of Prof. Ayotte dated August 6, 1999, p.1.

0.27); and the exercise of subtracting three times the standard deviation from the means value is then carried out. This produced a figure for Appellant 2 of 2.2, i.e, above the limit. The same exercise carried out in respect of Appellants 1's samples produced a still more convincing result i.e, 12.3 in ng/ml.

8.8 Professor Ayotte explained to the Panel that the exercise had to be carried out in respect of the "B" as distinct from the "A" sample, because of the different conditions under which those samples were kept. Although Professor Van Rossum in his written evidence,[24] suggested that the same exercise should be carried out in respect of both samples, the Panel accepted Professor Ayotte's explanation as convincing.[25]

8.9 Quantitative discrepancies are not uncommon in cases involving the substance and such discrepancies do not necessarily put a question mark over the results.[26] Examples of such discrepancies are not uncommon and have not been accorded significant weight by other Tribunals, (see CAS 98/214 Bouras v/FIJ, p.18 (summary of results)).

8.10 Finally, the Panel draws attention to DC 1.6 and to the fact that no genuine doubt has been raised on the basis of these analyses.

9. BANNED SUBSTANCE?

9.1 The results of the analysis are indicative of the fact that the source of the presence of the nandrolone metabolites may be nandrolone precursors, such as norandrosténédione, rather than the "classical" nandrolone itself.[27] A precursor is a substance capable of transforming itself into a given substance.

9.2 Because such precursors, as part of nutritional supplements, have been the source for an increase in positive tests in connection with nandrolone metabolites such as NA and

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24 Professor Ayotte explained to the Panel's satisfaction that the variations in the aliquots exemplified in the table could be the result of non-homogenous mixing of the sample prior to its analysis.

25 Memorandum of 6th August 1999.

26 Fax from Fina Office to Dr Segura dated June 16, 1999 Q1 and answer from Dr Segura to FINA dated June 19, 1999, specifically answer to Q1.

27 Letter Prof Ayotte, dated June 18, 1999, p.6 Letter Prof. Segura dated June 29, 1999.

NE over the last years,[28] norandrostènédione and norandrostènédiol have now been expressly included in the newer lists of anabolic androgenic steroids.[29]

9.3 Before their express inclusion, both the above substances were prohibited as part of the so called "related substances". There is a definite chemical relationship - as the IOC amendments suggest.

9.4 It has never been put into question that the presence of nandrolone metabolites was the conclusive proof of the presence of a prohibited substance, be it nandrolone itself or a related substance including in particular the two above mentioned precursors (see CAS 98/214 Bouras v/FII, p17(dd)).

10. EXPLANATIONS FOR THE PRESENCE OF THE BANNED PRODUCT

Endogenous production

10.1 With the confirmation of the limit of 2ng/ml (see above), any discussion of possible endogenous production above that level (which includes a safety margin and was never reached in any controlled experiment) has become moot. In particular, there is no grey area between 2 and 5 ng/ml (which would avail Appellant 2 only) and reference to earlier decisions or statements which made reference thereto have become irrelevant.[30] In any event, the Appellants have produced no evidence that they were naturally high producers of endogenous nandrolone.

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28 See Appellant's brief p.11, third § admitting impact of nandrolone precursors.

29 Doping Control Rules in effect from June 1, 1999, Appendix A [green booklet].

30 The Appellants relied on the case CAS 98/222 Bernhard v/ITU who was acquitted on appeal from a finding of the International Triathlon Union, where there was a concentration of 3 ng/ml. However this ruling pre-dated the latest IOC promulgation and the Panel accordingly distinguishes it.

Meat contaminated by nandrolone injections

10.2 Although the Appellants mention this source, they themselves discount it as a likely source[31]. The use of injected meat is, as Dr Stephany put it a "theoretical possibility" and "extremely low".

10.3 The Panel notes in the case of the Appellants, (N/E) was found along with (N/A) in equal quantities. According to Professor Ayotte (for FINA), this situation is typical of the results which can be expected from the intake of nandrolone precursors. When exogenous supplements are taken, the amount will be 1:1 in NA/NE. With endogenous Nandrolone, by contrast the NE indeed is sometimes wholly untraceable, is much lower than NA by a significant ratio.[32] Professor Van Thijssen (for the Appellants) confirmed that when exogenous nandrolone administration occurs, it is usual to find NA/NE in equal proportions.

Meat containing nandrolone endogenously produced by non castrated pigs

10.4 Both Appellants state that the source of the positive tests is the food they have ingested at the hotel in which they stayed during the competition. The Appellants assert that they both ate during five consecutive days prior to the races a local dish "sarapatell" containing pork meat, liver, kidneys and intestines.[33]

10.5 To lay this necessary foundation for their case, as to why the minimum sanction should not apply, the Appellants have to satisfy the Panel on a number of matters. Failure to do so to a sufficient standard of any one would be fatal to their case. These matters are that :

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31 See Appeal brief, p.33. Small amounts of Nandrolone metabolites were detectible in the urine after consumption of meat generated from Nandrolone treated animals. See articles by G Debruyckere as to "influence of the consumption of meat contaminzted anabolic steroids on doping tests". Analytica Chimica Acta 275 (1993) pp.49 to 56.

32 Answer to Prof. Ayotte to Doping Panel dated June 18, 1999, specifically p.2, with several reference to control test results; see also TAS 98/214 Bouras v/FIJ p.5, para.10 reporting test results.

33 See Appeal brief, p.33 bottom and 34 top.

(i) A local speciality based on pig meat (including kidneys, livers etc) called sarapatell was served at their hotel during five consecutive days at both lunch and dinner (however Appellant 1 allegedly ate more than Appellant 2).

(ii) the dish was made of the flesh/offal of uncastrated boars;

(iii) endogenous nandrolone was present in such flesh/offal;

(iv) this was the source of the presence of metabolites up to the level found ie : one exceeding the limit of 2ng/ml.

(v) The role played by such source was not the result of any direct or indirect negligence on their part.

10.6 As to (i) the Panel has no objective corroborative evidence of the Appellant's account. According to Appellant 2, potatoes, rice, vegetables, and chicken were on the menu as options. It appears from letters of 1 June 1999, from the two vegetarian female swimmers tested negative that thev by contrast were able to feed themselves without eating any pork (or beef) products at the hotel. According to the Appeal Brief, Appellant 1, whose test results are much higher, ate substantially more of this dish (with which he would be culturally more familiar) than Appellant 2, which explains the differences in their respective results.[34] Appellant 2 stated in oral evidence that he ate the dish "maybe once a day at lunch or dinner". Although the evidence could be contrived, because convenient, the Panel shall assume for present purposes that the Appellants can surmount the first hurdle.

10.7 As to (ii), the only evidence adduced at the hearing by the Appellant is of a practice of injecting Nandrolone into boars. Mrs de Menezes Meirles, a Brazlian attorney,[35] said in a statement that it was no longer possible to trace back which producers provided the specific meat that was sold to the hotel at which the swimmers stayed in the days preceding the competition, but mentioned the legal use of growth enhancing hormones including Nandrolone by meat producers in the area. Again, although the evidence is

34 See Appeal Brief, p.33 bottom.
35 of 13th June 1999

sparse, the Panel will assume for present purposes that the sarapatell served at the hotel was concocted from the flesh/offal of uncastrated boars.

10.8 As to (iii) there is evidence before the Panel that endogenous nandrolone may be present in non castrated pigs.[36]

10.9 As to (iv) Dr Stephany in a note to the Appellant's Counsel dated 12th June 1999 said "to consume 10 micrograms of Nandrolone, a person has only to eat 50 grams of all products with a Nandrolone content of 200 micrograms per kilogram". Studies carried out by volunteers showed that the oral intake of only 10 to 20 micrograms of Nandrolone can result in a finding of Nandrolone metabolites in urine in levels of up to 30 ng/ml.

10.10 However, the Panel have been provided with no evidence as to why they should read across from results obtained from oral intake of nandrolone or results obtained by eating meat injected with nandrolone to results which would be obtained by eating meat of an uncastrated boar (which has endogenous nandrolone). There has been no experiment, controlled or otherwise, as Dr. Stephany confirmed, to establish results for nandrolone metabolites above the relevant level of 2ng/ml in the quantities or ratios here in issue (or at all) based on ingestion of meat pork naturally containing nandrolone. Professor Thyssen made the same concession.

10.11 The most that Doctor Stephany's research establishes is (1) that there are levels of Nandrolone naturally present in pig meat; and (2) that athletes who consume Nandrolone produce Nandrolone metabolites.[37] This does not amount to evidence,

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36 There is scientific literature on the endogenous production of Nandrolone in uncastrated male pigs see two articles by L. Van Ginkel submitted by the Appellants. e.g. "Het voorkomen van nortestotesvon in eetbarl delen van niet gecar treerde mannezigke vartkens: tijd schrift Diergeneeski 10 (114) 311-314. Doctor Stephany confirms that the finding of Nandrolone metabolite in pig urine for veterinary control purposes is under Netherlands meat inspection regulations is no longer accepted as proof of treatment of pig with Nandrolone.
The UK Sports Council Report on Nandrolone, published after the hearing advises at para.48 "In the present state of knowledge, it seems prudent to avoid offal from boar and horse". However, the authors were unable to confirm the existence of a causal link between nandrolone positive and consumption of such offal.

37 Moreover, the quantitative indications given by Dr Stephany appear to be in contradiction with the ones cited in Prof. Ayotte report. See Answer of Prof. Ayotte to Doping Panel dated June 18, 1999, p.6 with references cited at the bottom.

however, that athletes who had consumed pig livers or like foods produce Nandrolone metabolites in the amount or with the proportions present in the Appellants urine. As to the NA/NE ratio in Appellant 1's sample, Dr. Stephany could assess the chances of it being Sarapatell-sourced as no more than "theoretically a possibility".

10.12 In the Panel's judgment, even making the assumptions favourable in the Appellants on issues (i)-(iii), they fail at issue (iv). The raising of an unverified hypothesis is not the same as "clearly" establishing facts: DC 9.10 requires the latter. The inadequacy of such isolated hypothesis as a means of disproving the culpable use of a prohibited substance is well recognised in CAS's judgements, see CAS 98/214 Bouras v/FII, top of p.21.

> "... The experts also noted that it was very unlikely that the appellant's positive tests could have been the result of a possible ingestion of food contaminated by nandrolone.
>
> In fact, the scientific committee composed of 11 experts, constituted after the first hearing of the French Judo Federation's anti-doping commission, expressly excluded any causal relationship between the appellant's endocrinal abnormality and the presence of nandrolone in his body in the quantities seen. The Panel could in no way regard as conclusive the isolated experiments of a few scientists, which have not been formally confirmed, as was, moreover, reported by the experts heard during the hearing, and which are in particular in contradiction with the conclusions of the 11 above-mentioned experts. These isolated opinions have not in fact been published, which would, if need be, have allowed a better appreciation of them on the basis of the reactions they produced. At most, they may be regarded as disputable inferences of the possibility that some human bodies could produce higher than average quantities of nandrolone. But in no case can this be equated with evidence allowing it to be established with near certainty that the appellant committed no fault.
>
> ..." (translation).

10.13 It cannot be ignored that it was at all times open to the swimmers to produce a controlled experiment verifying Dr Stephany's theory. For whatever reason they did not do so. Their resources were apparently expended on other matters.

10.14 The Appellants rely on a number of FINA positive nandrolone cases in Brazil as additional circumstantial evidence to verify their Sarapatell theory. The fact that FINA statistics identify nandrolone cases in Brazil cannot be taken as conclusive. The numbers involved are not statistically representative. In fact, if the theory would be right, the number of nandrolone cases emanating from Brazil should be higher not only

in swimming, but in all sports. This is, however, not the case, as the overall proportion of positive cases for nandrolone in Brazil appears to be the same as world-wide. Further, all the tests conducted by the Brazilian Swimming Federation on their own athletes (57 in 1998 and 21 in 1999) as well as all out-of competition tests conducted by FINA on Brazilian athletes during the same period were negative.

10.15 As to (v) it may not have been negligent for the Appellants to eat Sarapatell : but a finding in their favour on that matter would not assist them in the absence of a favourable finding on (iv).

10.16 The Appellants raise in their testimony the following additional points:

- they have clean (and distinguished) records. The head coach of USC Swimming, Mark Schubert, and Head Coach for the 2000 Olympic Games gave a powerful character reference for Appellant 1 - as did the President of the Spanish Olympic Committee, the President of the Union Sports Federation of Catalonia, the President of the Sabadell Swimming Club, the President of the Metropolitan Natation Club, the President of Club Nagi and others, and Hans van Goor, a previous competitor.

- they were persons of honour and integrity.[38] Appellant 2 in a letter to the Director of FINA again stated his innocence, and noted that he was Triple Olympian triple participant in World Championships.

- they had no motive to use a prohibited substance such as a nandrolone precursor (long distance swimmers do not need bulking out). In a letter dated 30th June 1999 to the FINA Panel, Appellant 1 said

> "we all know that Nandrolone is used in sports like body building and weight lifting where the athletes require lots of muscles, but never in sports like marathon swimming where the athlete has to be lean and muscle less to be able to finish with success a race that is 5 to 10 hours long".

- it having been preannounced that the first and second swimmers in the competition would be tested (a fact confirmed by Dr Santos), it would be folly

38 Appellant 1 submitted further copious and compelling proof that he was a national sporting hero, honored, among others by the King of Spain himself.

for either, conscious of a possible breach by them of doping regulations, to have exposed himself to a test by finishing, as each did, in one of the top two positions.

10.17 It is regrettable that the currency of such denial is devalued by the fact that it is the common coin of the guilty as well as of the innocent. Oral testimony as to innocence, however impressively given, cannot trump scientific evidence as to guilt (see CAS 98/208 Wang et al v/FINA quoted above). Strict liability rules do not require investigation of motive or even consideration of what sensible competitors might have done: it can indeed be surmised that those who use prohibited substances are by definition risk takers. Nor is a clean record by itself impressive, when the offence is constituted by the finding of a banned substance on a particular date, not of a reprehensible course of conduct.

10.18 The Panel can take judicial notice of the prevalent view (albeit not yet established as correct) that the worldwide and sports wide phenomenon of nandrolone positives may be linked to ingestion of "food supplements" freely available over the counter, which, however, contrary to the facts, are not advertised or marketed as containing prohibited substances. Both Appellants, however, unequivocally denied that they had taken even food supplements and such "defence" is accordingly, not open to them.

10.19 In short, the analysis of Appellants samples have both produced results which according to prevalent scientific standards are positive tests. Furthermore, the results obtained are consistent with the results which may be expected in the event of ingestion of precursors of nandrolone, an acknowledged cause of numbers of positive tests over the last years. The hypotheses offered by the Appellants to explain their positive tests are inadequate since a sports governing body, FINA, has to rely on acknowledged scientific standards, and cannot sensibly be swayed by unverified facts and unevidenced scientific theories, not least because of its responsibilities to all competitors and to the sport at large.

10.20. As a result, there is no other possible conclusion than that the Appellants have to be sanctioned in accordance with DC 9.2(a).

11. THE QUANTUM OF SANCTIONS

11.1 The criteria for a lesser than minimum sanction under DC 9.10 not being satisfied, the 4 year ban must remain, unless invalid under Swiss law.

11.2 While 2 years is a common minimum, International Federations (including FINA) have chosen to impose higher minimum sanctions in connection with steroids to show their determination and the importance they give to an effective fight against doping.

11.3 The validity in principle of such clearly announced sanctions has never been questioned by either the CAS or even the Swiss Federal Tribunal ruling on CAS decisions (see as the latest example : Wang *LU Na ref* : 5P 83/99).

> "The appellants also claim that the contested award constitutes a serious and unjustified infringement of their personal liberties and personal rights. They state that personal freedom and the protection of personal rights should be regarded as included among the fundamental legal principles protected by the negative public policy clause, in particular with regard to suspensions imposed on athletes by international sports federations. In the present case, they substantially maintain that the penalty upheld by the CAS is an extremely serious violation of their personal liberties and personal rights and that it fails to comply with the principle of proportionality, in so far as the penalty is the maximum one provided for by the Rules although the proportion of banned substance found in their urine samples was very low and a two-year suspension may, having regard to the brief careers of top level athletes, end their careers permanently and prevent any further achievements by them in their field of sports activity.
>
> As has already been stated (Recital b above), the award complained of was made pursuant to a rule which envisages that, if diuretics have been found in the bodily fluids of a competitor, it is for that competitor to show why he should not suffer the maximum penalty of two years' suspension. Under this system, the question is not to determine the penalty proportionate to a given quantity of banned substance found in the competitor's urine but to establish whether that competitor has produced evidence of circumstances mitigating the maximum penalty allowed by the Rules, for example the absence of the intent to indulge in doping (cf. contested award, Section 5.35, pp.33-4). The issue of the proportionality of the penalty could therefore only arise, from the restricted standpoint of incompatibility with public policy, if the arbitration award were to constitute an attack on personal rights which was extremely serious and totally disproportionate to the behaviour penalized. In the present case, whatever the appellants may say - and they declare in grandiloquent tones that "only the most extreme custodial sentences that can be pronounced by the state courts are capable of producing such effects" - the two years' suspension imposed on them involves only a moderate restriction on their freedom of movement, since they can continue to practise their sport freely, apart from participation in international competitions; it is admittedly a serious penalty, liable to restrict their international careers as top-level athletes, but the fact remains that it is restricted to two years and arises from a proven violation of an anti-doping rule whose application the appellants have accepted as members of a national federation affiliated to the FINA. In this respect, again, their appeal is seen to be unfounded (pp 10-12).

(See also Wilander v. Tobin (1997 2 CMLR 348 which takes the same approach from the perspective of EU law).

11.4 The Doping Control Panel expressed the view that a sanction of 4 years suspension in such a case may no longer be commensurate with the quality of the offence committed. They quoted the case CAS 96/156 Foschi v/FINA "the general principle that a penalty must not be disproportionate to the source or guilt must also be observed in doping cases". However, they noted that the FINA Congress had on 6th January 1998 decided unanimously to establish the minimum sanction of 4 years suspension. The Panel shares the view of the Doping Control Panel; but is equally constrained by the law.

ON THESE GROUNDS

I. **The Court of Arbitration for Sport orders with respect to David Meca-Medina :**

1. The appeal is rejected as far as it is filed on behalf of David Meca-Medina.

2. The suspension of David Meca-Medina is confirmed for a duration of four years from August 20, 1999 under deduction of 77 days of provisional suspension (May 14 1999 to July 30 1999).

3. All results achieved by David Meca-Medina between January 31 1999 and August 19 1999 shall be cancelled.

4. The award is pronounced without costs, except for the Court Office fee of CHF 500.– which shall be kept by the CAS (art. R65.2 of the Code).

5. David Meca-Medina is ordered to pay an amount of CHF 4'000.– (together with interest at 5% from the date of the decision) to Respondent FINA as a contribution towards its legal fees and expenses (art. R65.3 of the Code).

II. **The Court of Arbitration for Sport orders with respect to Igor Majcen :**

6. The appeal is rejected as far as it is filed on behalf of Igor Majcen.

7. The suspension of Igor Majcen is confirmed for a duration of four years from August 20, 1999 under deduction of 77 days of provisional suspension (May 14 1999 to July 30 1999).

8. All results achieved by Igor Majcen between January 31 1999 and August 19 1999 shall be cancelled.

9. The award is pronounced without costs, except for the Court Office fee of CHF 500.– which shall be kept by the CAS (art. R65.2 of the Code).

10. Igor Majcen is ordered to pay an amount of CHF 4'000.-- (together with interest at 5% from the date of the decision) to Respondent FINA as a contribution towards its legal fees and expenses (art. R65.3 of the Code).

Pronounced in Lausanne, February 29, 2000

THE COURT OF ARBITRATION FOR SPORT

President of the Panel

The Honourable Michael Beloff, Q.C.

Arbitrators

Richard McLaren

Denis Oswald