

TAS 2000/A/270 David Meca-Medina & 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 between

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

and

Fédération Internationale de Natation Amateur (FINA), Switzerland

represented by Mr. Jean-Pierre Morand, attorney at law, Geneva, Switzerland

* * * * *

1. **INTRODUCTION**

- 1.1 David Meca-Medina (hereafter Appellant 1) is affiliated with the Spanish Swimming Federation, member of FINA, the International Federation governing swimming which is domiciled in Switzerland. Igor Majcen (hereafter Appellant 2) is affiliated with 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 ("the 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.
- 1.3 By determinations [TAS 99/A/234 & TAS 99/A/235] dated 29 February 2000, the Court of Arbitration for Sport rejected original appeal by both Appellants against the decisions ("the original award").
- 1.4 In January 2000, an experiment was carried out by Professor Dr. Hubert Brabender and others ("the Brabender Experiment") on three volunteers who ate a meal of pork prepared from the flesh of an uncastrated boar, and whose urine was then tested to detect nandrolone metabolites.
- 1.5 The Appellants and FINA agreed that the results of the Brabender Experiment warranted further examination, and in order to avoid unnecessary revision proceedings before the Swiss Supreme Court, agreed by an arbitration agreement dated 20 April 2000 ("the arbitration agreement") to refer the matter directly back to CAS.

1.6. The arbitration agreement proposed that the arbitral Panel should be constituted by the same arbitrators as rendered the original award. The Panel consisted of :

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. The Panel considered that while the arbitration agreement did not fit within any specific CAS procedure, [since the Code of Sports-related Arbitration did not lay down any rules for the review of a CAS award], it considered nonetheless that CAS could, on the basis of that agreement, initiate an ad hoc procedure.

1.8. The Panel duly sat with the above named composition. The seat of the Panel was established at the Secretariat of CAS, Villa du Centenaire, Avenue de l'Elysée 28, 1006 Lausanne. The official language of the arbitration was English, as stipulated in the arbitration agreement that the governing law, apart from FINA rules, was to be Swiss law.¹

1.9. The Panel held a hearing on 9 February 2001 at the CAS Court Office in Lausanne.

1.10 The following gave evidence to the Panel

For the Appellants : Prof. A.W. Stephany;²

Prof. Dr. Hubert Brabender;³

For FINA : Prof. Christiane Ayotte,⁴

¹ cf. art. R45 of the Code of Sports-related Arbitration

² Head of the Analytical Laboratory for Residue Analysis of the Netherlands Institute for Public Health and Environment.

³ of the Laboratory of Chemical Analysis Ghent University, Faculty of Veterinary Medicine, Belgium.

⁴ Professor and Director of IOC Approved Doping Control Laboratory in Montreal, Canada.

The Panel appointed expert Prof. Peter Hemmersbach.⁵

1.11 Except for Professor Hemmersbach, who appeared at the hearing, the witnesses gave evidence by telephone only. The Panel repeats that, as stipulated in the originating award §1.14 "*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*". The Panel appreciates, however, in this instance, the financial constraints imposed, in particular, upon the Appellants. Moreover since all the witnesses were experts, and accordingly could be assumed to be presenting their evidence of fact and opinion in an impartial manner, the disadvantage was less than it might otherwise have been.

1.12 The Panel ruled⁶ and the parties agreed, that, to the extent that it bore on any issues the Panel had now to decide, all evidence, oral and documentary, which had been produced for the purposes of the original award, as well as documentary evidence filed by the parties since that date, either in the context of an unsuccessful application by the Appellants to adduce further evidence in the first case (see the original award § 1.18), or for the specific purpose of the present proceedings, should all be taken into account by the Panel.

2. **THE ARBITRATION AGREEMENT**

2.1 The arbitration agreement provided so far as material, as follows :

WHEREAS on February 29, 2000 an arbitral panel of the Court of Arbitration for Sport in Lausanne has rendered an award in the appeal proceedings filed by Mr Meca-Medina and Mr Majcen against a decision of the FINA Doping Panel i.a. suspending them for a period of four years based on findings of nandrolone metabolites in urine samples of Mr Meca-Medina and Mr Majcen taken at the occasion of a swimming competition in Brasil (TAS 99/A/234 & TAS 99/A/235),

WHEREAS in the course of the proceedings, Mr Meca-Medina and Mr Majcen have offered the explanation that the source of the results of their urine

⁵ Scientific Director Aker University Hospital, Hormone Laboratory Section for Doping Analysis, Oslo, Norway also gave evidence.

⁶ CAS letter to parties 16th August 2000, para.5.

analysis being positive for nandrolone metabolites (NA/NE) was the consumption of meat (including parts such as liver and kidneys) of uncastrated pigs as components of a local dish "sarapatel" which was offered in the buffet served daily at their hotel;

WHEREAS in its decision the panel considered that Mr. Meca-Medina and Majcen, who had the burden of proof in this respect, had, in the absence of any experiment "controlled or otherwise" to this effect, not provided evidence as to the fact that "athletes who has consumed pig livers or like foods produce Nandrolone metabolites in the amount or with the proportions present in [their]urine";

WHEREAS on April 6, 2000, the counsels for Mr Meca-Medina and Mr Majcen have forwarded to the counsel for FINA documentation relating to an experiment conducted jointly by Dr. Bruno Le Bizec, Prof. Dr. François André and Prof Dr Hubert Brabender on three volunteers who ate a meal prepared from a boar and whose urine were then tested to detect nandrolone metabolites;

WHEREAS the documents who results indicating the presence of nandrolone metabolites as follows :

- *NA : up to a maximum level of approx. 8ng/ml*
- *NE : up to a maximum level of approx. 1,2 ng/ml*

WHEREAS the documents also show the relationship NA/NE evolving depending on time and concentrations;

WHEREAS the parties agrees that the results shown by the document warrant further examinations which may lead to a review of the findings on which the award is based and, depending on such review, to a revision thereof;

WHEREAS in order to avoid complex and costly revision proceedings before the Swiss Supreme Court and possibly thereafter retrial before an arbitral panel of the CAS, the parties have agreed to directly refer the matter to arbitration by the CAS;

NOW THEREFORE, the parties agree as follows :

1. Revision Proceedings before CAS

The parties agree to submit the issues as defined under clause 3 below to arbitration before an arbitral panel of the CAS.

Such arbitration shall be conducted in accordance with the terms and conditions of the present arbitration agreement and to the extent, nothing is provided in this agreement with the rules of the Code of Sports-related arbitration.

...

3. Scope of the proceedings

The scope of the proceedings shall be limited to the following issues :

- [I]⁷ given the result of the scientific examination to be conducted in accordance with clause 4 below, does it appear established to the reasonable satisfaction of the panel that the source of the finding of nandrolone metabolites in a) Mr Meca-Medina's urine and b) Mr Majcen's urine may have been consumption of meat from uncastrated pigs,
- [II]⁸ if warranted by the newly available evidence regarding the above element, reconsideration of the award by the panel in application of art. DC 9.10.

4. Evidentiary proceedings

The evidentiary proceedings shall consist of expert examination ordered by the panel of the following elements :

- confirmation of the study submitted by the counsels of Mr Mecca-Medina and Mr Majcen
- to the extent possible by control of such study and its conditions and/or
- by replication of controlled similar experiments
- clarification of results obtained
- in particular, to the extent possible, determination of valid criteria, if any, to distinguish presence of nandrolone metabolites emanating from ingestion of uncastrated boar meat containing nandrolone naturally produced from presence of such metabolites emanating from other sources
- to the extent possible, determination whether under the concrete circumstances of the case the findings of nandrolone metabolites in the urines of both Mr Mecca-Medina and of Mr Majcen may correspond to the ingestion by the same of uncastrated boar meat.

The scope of the examination and the questions to be put to the experts may be clarified and/or completed by the panel after consultation of the parties.

The above examination may be conducted on the basis of any acknowledged scientific method.

It has been agreed that the IOC Medical Commission shall be asked by the panel to organise the examination and to conduct it under its responsibility, this in order to achieve results which may be of general interest for the Olympic Movement at large.

In the unlikely event, the IOC Medical Commission would not accept to conduct the above examination or part thereof, the CAS shall appoint experts to this effect after consultation of the parties.

The parties shall fully co-operate to the examination.

⁷ The number is inserted for convenience. It does not appear in the arbitration agreement itself.

⁸ ditto as above.

Mr Mecca-Medina and Majcen, respectively their counsels shall ask the experts having established the study to provide any material, information or support to the experts in charge of the examination.

FINA, respectively its counsel shall ask the laboratory in charge of the analysis of the urine samples study to provide any material, information or support to the experts in charge of the examination.

...

7. Decision

The decision of the panel shall be either :

- *to maintain the award*
- *to amend the award as the panel will find appropriate in view of new evidence established in the course of the proceedings*

2.2 The proper interpretation of the arbitration agreement, and its impact on the remit of the panel and associated matters, was the subject of debate between the parties. It was evident from the submissions made (as it had been apparent from written submissions filed with the Panel before the hearing)⁹ that the parties had different views both as to what they had agreed to, and as to what they had intended to agree. The Panel considered that it was, as a matter of general principle, inappropriate to have regard to each party's version of the negotiations preceding the arbitration agreement or private perception of its meaning, and preferred to concentrate on the text of what was actually agreed, objectively and purposively construed.

2.3 The three major issues which divided the parties in this context were

- (i) the extent to which, if at all, the Panel had to (or could) reach a decision on issues other than those deposed to by the experts, in order to determine whether or not to revise the original award ("Panel's remit").
- (ii) what standard of proof was applicable to such issues as fell to be so considered ("Standard of Proof").
- (iii) whether it was a condition precedent to the Panel's consideration of the issues that there be before it an IOC Medical Commission report in a particular form, and whether if it lacked such a report, its only option was to invite the

⁹ The Appellants : 6th September 2000 and 30th September 2000.
FINA : 22nd September 2000.

Commission to produce such a report and to adjourn the hearing until they had done so (“Commission Report”).

2.4 We shall deal with these threshold issues in turn.

3. **PANEL’S REMIT**

3.1 It is necessary to have regard to certain passages in the original award.

“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 “Sarapatel” containing pork meat, liver, kidneys and intestines.

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 :

- (i) A local speciality based on pig meat (including kidneys, livers etc) called Sarapatel 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 they 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. 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 Brazilian attorney, 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 sparse, the Panel will assume for present purposes that the Sarapatel 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.

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. This does not amount to evidence, 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 I's sample, Dr. Stephany could assess the chances of it being Sarapatel-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/FIJ, 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 Sarapatel 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 Sarapatel : but a finding in their favour on that matter would not assist them in the absence of a favourable finding on (iv)."

3.2 The Appellants contended that the Panel had made positive findings in their favour on issues (i) to (iii) in listed paragraph 10.5 of the Original Award; and that those matters were, accordingly, res judicata. FINA contended that the Panel had refrained from making positive or any findings on those issues, and had reached its determination solely on the basis of a finding that the Appellants had not established a case on issue (iv) i.e. that endogenous nandrolone, present in the flesh/offal of uncastrated boar, was the source of the presence of the metabolites up to the level found in their urine.

3.3 The Panel is in no doubt that FINA's analysis is correct. The members of the Panel are clear in their own minds that they used the vocabulary of "assumption" to differentiate between issues on which findings were not made and issues on which they were. More importantly the Panel considers that, objectively, it is the proper construction of the paragraphs from the original award quoted above.

3.4 Moreover, Clause 3 of the arbitration agreement, which is in substance, if not in form, divided into two subparagraphs, contemplates that the resolution of issue (iv) (dependent primarily, if not exclusively, upon expert evidence) was merely a first stage in a process, leading to reconsideration of the award by the Panel in application of Art DC 9.10 of the FINA Rules which provides:

"Where the rules impose a minimum term suspension, the minimum may be lessened if the competitor can clearly establish how the prohibited substance got into the competitor's body or fluids and that the prohibited substance did not get there as a direct or indirect result of any negligence of the competitor."

- 3.5 The express reference to that rule suggests compellingly that its elements [the identification of the source of the prohibited substance, and proof of absence of negligence on the competitor's part] had to be established before the Panel before the original award could be reconsidered.
- 3.6 FINA helpfully accepted that, if it were shown that the metabolites in the Appellants' urine were the product of the ingestion of a dish containing the flesh/offal of uncastrated boars, they could not, on the general state of knowledge in the sporting and scientific community at the material time be accused of negligence in eating such dish.¹⁰ Both parties equally helpfully accepted that if the Panel were to come to the conclusion (as it has) that it had to make findings on issues (i)-(iii), they would stand by the evidence presently before the Panel,¹¹ and not seek a further hearing to introduce fresh evidence.

4. **STANDARD OF PROOF**

- 4.1. The Appellants contended that any issues that fell to be decided pursuant to Clause 3 of the arbitration agreement had to be decided by reference to a standard of proof no higher than the balance of probabilities. FINA accepted that such was an appropriate standard for the purpose of issue (iv), but contended that for the remaining factual issues (i.e. (i)-(iii)) the standard imposed by DC 9.10 of the FINA Rules remained in play.
- 4.2 On this issue too the Panel prefers the arguments of FINA. Clause 3 of the arbitration agreement divides the issues to be determined, as the Panel has already held, into two parts. In respect of the first [I] which correlates to issue (iv) the test of "reasonable satisfaction" is applied to describe the degree of possibility ("may") as distinct from certainty, which is a requirement for the Appellants. The term "reasonable satisfaction"

¹⁰ The UK Sports Council Report on Nandrolone, published after the original hearing advises at para. 48 'In the present state of knowledge, it seems prudent to avoid offal from boar and horse'.

¹¹ See paragraph 1.12 above.

is not a term of art, but it appears to the Panel that it requires a lower standard than: (i) the criminal standard of - beyond reasonable doubt; (ii) the standard under DC 9.10 and ("clearly"), from which it is expressly differentiated in clause 3; and (iii) the standard of "comfortable satisfaction" which is referred to in the case of Korneev and Ghouliev v/IOC.¹² The Panel is content to accept balance of probabilities as a synonym for such a test.

4.3 In respect of the second [II] issue which engages the standard required in application of DC 9.10, the Panel repeats and relies on paragraph 4.7 of its original award.

"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".

4.4 The Panel has accordingly applied these different standards to the evidence.

5. COMMISSION REPORT

5.1 Clause 1 of the arbitration agreement specifies the scope of what the parties have agreed to submit to the Panel i.e. the issues as defined under clause 3. Clause 3 assumes that there is a scientific examination conducted in accordance with Clause 4. Clause 4 defines the nature of the expert examination to be ordered.

5.2 The language of clause 4 is not entirely happy, but it appears to contemplate that the expert examination would be devoted to confirming (or, as the case may be, not confirming) the Brabender experiment by one of two methods either, to the extent possible, by control of such study and its conditions or by replication of controlled similar experiments. [The balance of Clause 4 is consequential, inviting the expert "to

¹² CAS OG 96/003-4

the extent possible" to identify how metabolites produced by the ingestion of uncastrated boar meat could be distinguished from metabolites produced by some other source, and "to the extent possible" to determine whether the former was the cause of the metabolites found in the Appellants' urine.]

- 5.3 The Panel certainly anticipated, in consequence of discussions which it was informed had taken place between the IOC Medical Director and the CAS Acting Secretary General, that the expert panel, which the IOC kindly agreed to provide, would actually engage in the second of the methods of confirmation of the Brabender experiment contemplated by the arbitration agreement i.e. the replication of controlled similar experiments.
- 5.4 In particular, it was envisaged that there would be a three stage process, the first of which would be ratification of the Brabender experiment, the second of which would be a scientific test to check whether the NA/NE ratio corresponded to a natural production of nandrolone by human or animal or an artificial production and the third stage of which would be repetition of the tests performed by Dr. Brabender but on a larger scale, with a different time frame envisaged for each stage.¹³
- 5.5 Prof. Hemmersbach, who was to provide expert evidence for the IOC Commission, and who canvassed for that purpose the views of Prof. David Cowen,¹⁴ and Prof. Dr. R.W. Stephany¹⁵ to assist in the matter, and, in particular, to answer certain questions posed by the Panel and by FINA, received, as he told the Panel, no instructions to carry out experiments of his own, and had no awareness of the contemplation of the Panel and the parties that he would do so.

¹³ See CAS letter to parties dated 22nd May 2000.

¹⁴ Head of the IOC Accredited Laboratory in Kings College, London.

¹⁵ See above fn.1.

- 5.6 In any event, his report on behalf of the IOC Commission dated 5 July 2000 did not contain (in consequence) the results of any such controlled experiments, but rather commented on the efficacy and significance of the Brabander experiment, and on the general state of scientific knowledge on the link between the consumption of pork offal and the production of positive samples.
- 5.7 Both parties in correspondence and written submissions¹⁶ recognised the limitations of what had been provided by the IOC Commission, although their reactions to it were different. The Appellants were content to stand by the report, which they contended, confirmed the Brabander experiment, and dispositively answered the outstanding issue (iv) in their favour. FINA for their part considered that the IOC Commission should now be asked to carry out its own research.¹⁷
- 5.8 The Panel would have been much assisted had the IOC Medical Commission been able to do, and done, that which was envisaged that they would do. The Panel stresses that in so saying it is not seeking to blame any particular individual for any misunderstanding. The Panel notes Professor Hemmersbach's willingness, if instructed to do so, to carry out experiments of his own.
- 5.9 However, the Panel has concluded that it is *not* disabled from reaching a determination simply because of the limited form which the IOC Medical Commission report actually took. Clause 4 of the arbitration agreement did not compel that Commission to replicate similar experiments. It gave it the option of, to the extent possible, confirming the Brabander study and its results, and that, it seems to the Panel, the IOC Medical Commission in fact did.
- 5.10 Moreover, the Panel was impressed by the fact that the Appellants, whose interests might have been served by adjournment, argued against one (see para.5.7 above).

¹⁶ e.g. FINA's letter to CAS dated 27th July 2000; appellant's letter to CAS dated 2nd August 2000.

¹⁷ ditto.

6. **ISSUE (IV)**

- 6.1 The Panel has, accordingly, to consider first whether it is established to its reasonable satisfaction that the source of the finding of nandrolone metabolites in the urine of the Appellants may have been consumption of meat from uncastrated pigs.
- 6.2 The boundary line between issue (iv) and the other issues upon which the Panel has to rule is somewhat blurred. Even at this stage the Panel is not asked an entirely theoretical question about whether consumption of pork offal can ever lead to positive samples. It is posed a question about whether such consumption could lead to the Appellant's positive samples. Therefore they have to build in certain facts or findings about the Appellant's tests before providing their answer.
- 6.3 In the Panel's view, it should focus on this first issue on the question of whether, given the results of (i) the athletes' test, (ii) the Brabender experiment, is a read-across possible, so that it is reasonably satisfied (i.e. on the balance of probabilities) that the cause of the NA in the athletes' urine may have been the consumption of such meat.
- 6.4 The Panel start with repeating the findings in respect of the athletes.
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.¹⁸

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

- 6.5 The Panel notes that the sampling was carried out at 2:00pm on the afternoon of the race. Taking for present purposes at face value the Appellant's evidence that they consumed Sarapatel on the day before their race, the Panel finds that such test was likely to have been carried out no earlier than 18 hours after the last meal at which such a dish would have been consumed i.e. dinner at 20.00pm on the evening before. To suggest that experienced athletes would have eaten later on the eve of a strenuous long distance swimming race is contradictory to common sense and experience.
- 6.6 The Brabender experiment has now been published in the journal "Rapid Communications in Mass Spectrometry".¹⁹ It is sufficient to quote from its conclusions²⁰
- "We establish that the consumption of male pigs adipose tissues was able to generate, within a 24 hours period, several n/ml (ppb) of NA and NE in urine. These two steroids, generally to prove the illegal use of 19/notestosterone, was till above 1pp6 15 hours after the boar ingestion, in the three individuals tested."
- 6.7 The Panel notes from the IOC's report that those who carried out the Brabender experiment are "well known and respected scientists who have been active on this field of scientific work for many years ... using accredited and published methods that are well suited for the purposes ..." that the "criteria applied were appropriate ..., and ... the possibility of an erroneous identification is regarded as very small".²¹
- 6.8 Should the Panel then conclude that the metabolites in the athletes urine could have had the same source as the results of the three volunteers in the Brabender experiment? In its view, while such a conclusion is in the realm of possibility, that possibility has not reached the level required by the arbitration agreement of "reasonable satisfaction".

¹⁹ 14 : 1058-1065.

²⁰ at p.1062.

²¹ at p. 2

6.9 The Panel's reasons are as follows

- (i) the Brabender experiment was limited in its scope: only three volunteers were used. As the conclusions in the article suggests "a certain amount of complimentary studies must still be carried out" and as the IOC report says "the experiment would have benefited from a reproduced analysis in a different laboratory in order to get an estimation of the inter-laboratory variation which can be considered".
- (ii) Prof. Ayotte pointed out different methods were used in the Brabender experiment than in the athletes' sample tests.²²
- (iii) The specific gravity of the volunteer's urine was not measured (as Prof. Brabender confirmed to us), whereas that of the athletes' samples was. This can, as Prof. Ayotte [whose analysis is confirmed by IOC Protocols] pointed out,²³ impact upon any sample results e.g. where the urine is particularly concentrated, a higher reading of prohibited substances may occur; by the same token if it is particularly diluted, there may be a lower reading.
- (iv) Nothing was known about the amount of nandrolone endogenously produced by the boar, which was sacrificed in the interest of the Brabender experiment. (The Panel understands from Professor Brabender that the information may be forthcoming in the future as a result of further studies carried out by him and his colleagues, but the material is not presently available.) Prof. Hemmersbach reminded us that the variation in the amount of nandrolone produced by a male boar may vary in the same way as may the amount of testosterone produced by a human male.

²² see Ayotte statement, paragraph 7.

²³ ditto p.2.

- (v) Human metabolism varies from person to person; and the results of drug tests may reflect that feature. In this instance, there is no material about the particular metabolism of either athletes or volunteers.

- (vi) The figures in the two sets of results are discrepant.
 - (a) no volunteer exhibited an amount of NA anywhere near the upper level of the first Appellant, Mr. Meca-Medina.
 - (b) none of the volunteers retained more than traces of N/A after 20 hours, whereas both athletes had (albeit in different amounts) significant quantities of metabolites after the expiry of such period.
 - (c) in each of the volunteers' cases, the proportion of NA was significantly above that of NE. In the case of the athletes, NA and NE were identified in equal proportions.

Professor Ayotte told the Panel on the basis of (1) the work carried out in the Montreal Laboratory, (2) the research of Kintz²⁴ such equality of ratios was the hallmark of oral ingestion of prohibited substance. Prof. Hemmersbach was not himself aware of such research, but in the report said "there may be unpublished evidence based on personal experiences in the laboratory". However, even if the Panel were to approach Prof. Ayotte's statement on this question with caution because of the limitations of the material upon which it was based, it would still remain the position that the read across would have to ignore the difference in the figures. Having regard to the standard of proof required, the Panel cannot be reasonably satisfied that the difference between the ratios of N/A – N/E in the athletes (and the quantity of N/E) and the volunteers is immaterial, even if it were unpersuaded that it is material.

²⁴ P. Kintz et al « Norandrosterone ('NA') et Nortiocholanolone ('NE') – les metabolites révélateur » Toxorama 1998.

- (vii) The volunteers ate 310 grams of meat. Not all of it was offal – [but it has never previously been suggested that Sarapatel is made purely of offal]. 310 grams of meat was, as Dr. Stephany agreed in questions from the Panel, "a square meal and more". It seems to the Panel unreasonable to conclude that, on the eve of a strenuous competition, athletes would eat so large and indigestible a meal. The Panel take the view that they would be likely to have eaten less than the volunteers. The Panel does ignore, in this context, Dr. Stephany's evidence that consumption of a lesser amount of meat from an uncastrated animal than that eaten by the volunteers could produce a volume of endogenous nandrolone which could produce metabolites in the urine of the consumer at a higher level than anything found in the athletes' urine, dependent, of course, on the timing of the sampling.²⁵ However, this statement merely exemplifies the absence of detail which would enable the Panel to make the read across that the Appellants invite it to make.
- (viii) The Panel notes that Prof. Hemmersbach agreed that the athletes samples were entirely consistent with (if not probative of) the oral taking of a prohibited substance.

7. **ISSUES (I)-(III)**

- 7.1 The Panel considers that it ought notwithstanding its finding on issue (iv), which is adverse to the Appellants, indicate its conclusion on the other issues.
- 7.2 As it has already indicated, the question of negligence is no longer in issue, so the question that it has to determine is whether the athletes can "clearly establish how the prohibited substance entered" their body fluids.

²⁵ His figures were confirmed by Professor Hemmersbach.

- 7.3 The first issue is whether Sarapatel was served at the athletes' hotel during five consecutive days at both lunch and dinner, and whether the Appellants ate such Sarapatel. The evidence before the Panel on the first occasion has been enhanced by a letter received from the Manager of the hotel where the athletes resided (PRAIA MARE hotel) dated 3 December 1999, which confirmed that the dish Sarapatel was part of the buffet served to swimmers participating in the championships.
- 7.4 In the absence of any contradictory evidence, the Panel accepts that statement which is confirmatory of the Appellants' own evidence before it during the previous hearing.
- 7.5 Moreover, the Panel is prepared to accept that the Appellants, as they said, ate that dish during their stay in the hotel, although in different amounts, the first Appellant being more familiar with it than the second, reflecting their different cultural origins.
- 7.6 The Panel is not, however, persuaded that the Appellants ate it with the consistency and repetition that they testified to. There was, undoubtedly, other food offered in the buffet (see the Manager's letter, as well as the letter from female competitors produced for the Panel on the last occasion), and, again, taking judicial notice of sporting realities, Sarapatel cannot in its view sensibly have been a diet of choice (if it was not of compulsion) for an athlete shortly before competition.
- 7.7 The Panel is also prepared to accept that endogenous nandrolone is present in the flesh and offal of uncastrated boars.²⁶
- 7.8 However the Appellants failed to produce any evidence, certainly clear evidence *before the conclusion of the hearing* that either (a) Sarapatel is made from the flesh of uncastrated boars, or, (b) that even if it is, that Sarapatel of this type was served at the hotel to the Appellants.

²⁶ See paragraph 10.8 and footnote 36 of the original award which makes reference to the relevant evidence, again uncontradicted. Moreover, the Brabender experiment fortifies the conclusion.

- 7.9 If the Appellants were unaware of the need to produce such evidence in the first hearing, the correspondence from the Panel gave them the clearest possible notice that they would be required to do so for the purposes of this hearing.²⁷
- 7.10 In any event a specific question on this issue put to Prof. Stephany, by Mr Vrijman for the Appellants, upon his re-call to give evidence, palpably failed to elucidate the answer that the Appellants required. Although Prof. Stephany said that he was aware that the flesh of uncastrated boars was used in meat dishes in certain countries, he was entirely ignorant as to whether this was the case in Brazil.
- 7.11 Professor Ayotte who has made enquiries of Canadian Central Meat Distributors and Slaughter Houses, informed us that offal of uncastrated pigs are usually discarded at slaughters houses (in any event in Canada) and continued "there is however an important market for the meat of the uncastrated pigs, which is largely processed by the multi-national meat industry as charcuterie being dried instead of cooked".²⁸
- 7.12 Professor Ayotte's evidence, although it was said by the Appellants optimistically to fortify their case on this issue, is in fact unsupportive of it, since Sarapatel is a stew, not charcuterie.
- 7.13 It seemed to the Panel, if it is indeed the case that Sarapatel, made of the flesh of uncastrated boars, is served in Brazil, the evidence to that effect must surely be available from e.g. a regional cookbook, or a statement from a Brazilian meat distributor. Indeed the manager of the hotel would presumably be sufficiently familiar with local customer practice to be able to make such a point - but it is conspicuously absent from his letter.

²⁷ See e.g. CAS letter to parties of 18th August 2000 para.1.

²⁸ Statement para. 4.

7.14 The Panel quote again paragraph 10.7 of the original award

“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 Brazilian attorney, 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 sparse, the Panel will assume for present purposes that the sarapatel served at the hotel was concocted from the flesh/offal of uncastrated boars.”

7.15 The assumptions there made cannot mature into fact in an evidential vacuum. To use an analogy from a different sport than long distance swimming, by the conclusion of the hearing the Appellants had not even reached first base. They certainly had not reached second base.

7.16 *Since the conclusion of the hearing the Appellants have produced (in a letter from Mr. Dupont to CAS dated 30 March 2001) a statement by Mr. Goncalves, a Brazilian agricultural specialist which states , inter alia :*

"in Brazil Sarapatel is a typical dish of the Salvador Region of Bahia State. The ingredients of Sarapatel include pork meat, especially offal such as liver, kidneys and other items, and it is also public knowledge and well-known that it is not unusual in some regions of Brazil, to use the whole pig carcass, uncastrated for human consumption."

It follows from the above that the Appellants have not succeeded in respect to either of the matters which the Panel is invited by clause 3 of the arbitration agreement to determine.

7.17 Taking it at its face value, it establishes that Sarapatel may be composed of the offal of uncastrated boars. Whether Sarapatel is of that particular type (which as the statement illustrates is **not** universally served in Brazil) was served in the hotel to the Appellants. Point (a) in paragraph 7.8 above. It does not touch upon point (b) in paragraph 7.8 above.

7.18 We have considered this statement de bene esse without prejudice to the issue as to whether it is inadmissible because of the timing of its submission, for the same reason recognizing that it has not been subject to inquiry or challenge.

8. **SUPPLEMENTAL MATTERS**

8.1 Out of respect for the arguments adduced before us, it deals with certain supplementary points.

8.2 It was forcefully argued by Mr. Dupont on behalf of the Appellants that the Brabander experiment undermined the premise upon which the FINA Rules were drafted to the extent that the rules retain no validity, and, that accordingly, there was no offence of which the athletes could be found guilty.

8.3 The Panel rejects this argument.

DC 9.1 provides:

"For the purpose of these Rules, the following should be regarded as "doping offences" : (a) ... the finding in competitors' body tissue or fluids of banned substances."

DC 9.2 repeats that

"the findings in a competitor's body, tissues or fluids of a banned substance listed in this DC 9.2.(a) shall constitute an offence..."

and continues

"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".

8.4 True it is that because it has been recognised that nandrolone can be produced endogenously by human beings, the IOC guidelines²⁹ suggest that there should be a limit for males (2ng/ml) below which (in the absence of an admission by a competitor that he took a prohibited substance) no charge should be brought. This guideline, which affects the prosecuting authority's discretion rather than the substance of the offence, is only relevant where endogenous production is in play. It has no relevance to

²⁹

See IOC list of prohibited classes of substances and prohibited methods

where the presence of the prohibited substance is the result of an exogenous intake, be the source injection, tablet, food supplement, or a meat dish prepared from the flesh of an animal which itself endogenously produces nandrolone.

- 8.5 The Appellants also urged the Panel to review our conclusion in the original award that to interpret FINA Rules as imposing strict liability on athletes was offensive to principles of Swiss law. The Panel see no reason to do so. The Panel refers again to the decision of the Swiss Federal Tribunal in the case of Wang Lu Na decision of 31 March 1999 which suggests otherwise.³⁰ The Panel notes that the circumstance which might require closer consideration of this matter e.g. where a competitor can show conclusively that he was the innocent victim of an external agent (e.g. his drink was spiked by a rival) is far from the facts of these cases.

9. **SANCTIONS**

- 9.1 A number of arguments were addressed to the Panel on the question of sanctions. Bearing in mind that the Panel has rejected the Appellants case of liability, and that the language of DC 9.2 is unambiguous ("Sanctions should include the following (a) Anabolic androgenic steroids ... chemically or pharmacologically related compounds First offence : minimum of four years' suspension ...), the Panel would require a compulsive principle of Swiss law to reduce the sanction even though, as it acknowledged in paragraph 11. 4 of the first award, it is sympathetic to the proposition that a four years' suspension is very severe in a case of a first offence.
- 9.2 The Appellants submitted that even if liability remained established on the appropriate standard of proof, nonetheless the Panel should and could diminish the sentence, if it is felt that the lower standard of proof would or might have held that such liability was no longer established. The Panel knows of no rule of Swiss Law or any sensible principle of natural justice to that effect, and accordingly rejects the submission.

³⁰ Swiss Federal Tribunal 5p. 83/1999

- 9.3 Equally, the Panel rejects the submission that there could ever be circumstances in which, if a competitor were found with a prohibited substance in his urine, disqualification in respect of the competition itself should not be a sanction.
- 9.4 It seems to the Panel that the decision of a CAS Panel in Sydney in Raducan³¹ aptly identified where the innocence (i.e. absence of negligence or intent) of the ingestion of a prohibited substance may be relevant and where it is not. It is not relevant in the case of disqualification, because that would be manifestly unfair to other competitors who did not have the advantage of the prohibited substance. It may be relevant (where the relevant rules permit it to be so) to the existence or extent of any suspension, because of the potential unfairness of suspending an athlete who is without fault.
- 9.5 The Panel cannot take account, as Mr. Dupont invited it to do of, any lack of sophistication in the reporting of the sports press in distinguishing between disqualification and suspension and its implications. If a newspaper labels someone who has innocently taken a prohibited substance "drug cheat", it is the law of defamation, and not the disciplinary law of the sports association which should provide the remedy.
- 9.6 The Panel have considered of its own motion by way of analogy the principle of Swiss criminal law which is set out in art. 64 to Swiss Criminal Code
"Le Juge pourra atténuer la peine
...
lorsqu'un temps relativement long se sera écoulé depuis l'infraction et que le délinquant se sera bien comporté pendant ce temps".

³¹ SYD O11 paras 25-28; see also CAS Awards Sydney 2000, p. 121-122

9.7 The Panel is satisfied from its review of case law and commentary on this provision that it would not be appropriate to exercise such a discretion, even bearing in mind the particular circumstances of the case, and the uncertainty that has prevailed on this matter because of the protracted nature of the proceedings (for which the Appellants themselves bear no significant responsibility) since Swiss law requires for a "temps relativement long" something close to the prescription period of the sanction.

9.8 The Panel have also considered Article 66bis of the same code which provides :

"Si l'auteur a été atteint directement par les conséquences de son acte au point qu'une peine serait inappropriée, l'autorité compétente renoncera à le poursuivre, à le renvoyer devant le tribunal ou à lui infliger une peine".

It does not consider that the facts show that the ban has had any harsh consequential effect on the Appellants over and above that usually sustained by athletes found guilty of doping offences. It therefore declines to apply this provision by analogy either.

9.9 The Panel has considered whether the doctrine of proportionality can be prayed in aid in reduction of the penalty. In general associations such as FINA enjoy broad autonomy according to Swiss law particularly in relation to disciplinary matters:³² see e.g. Article 72 of the Swiss Civil Code allowing such an association to expel a member without providing reasons therefor pursuant to a properly drafted rules.

9.10 Since the hearing the Appellants have supplied the Panel with an opinion of Professor M. Baddeley of the University of Geneva dated 20th February 2000 which confirms the relevance of the doctrine of proportionality in inter alia the Swiss Law of Sports Associations. However the Panel is already alive to that: moreover her views on the applicability of the principles in dubio pro reo and on the transfer of the burden of proof to the athlete are inconsistent with the decision of the Swiss Federal Court in Wang v. FINA (5P. 83/1999) which vindicates the FINA rules in terms of Swiss law.

³² See Perrin, Droit Civil V, Droit de l'association, Ed. Universitaires, 1992, Fribourg, Switzerland.

9.11 The Panel recognizes that (i) a four year ban for an athlete is or may be tantamount to a life ban, given the short span of such a person's sporting career. (ii) Many international sporting federations now stipulate for a two year, not four year minimum suspension.³³ (iii) These appellants are first offenders: (iv) there has been no repetition of the offence since its commission (v) the Panel has not been obliged to find that the Appellants were guilty of negligence or worse,³⁴ (although the Appellants have not proved otherwise.).

9.12 The Panel in those circumstances concludes that the Appellant's sentence can properly be reduced by reference to proportionality considerations. While it bears in mind that in two recent cases³⁵ ban of four years by FINA were upheld, these predated the new Olympic Antidoping Code in force as from 1st January 2000. Moreover, each case turns necessarily on its own facts and in those cases the violations were more blatantly culpable.

10. ENVOI

10.1 It was in 1992 that Dr. Stephany first drew the attention of the IOC and the sporting community to the possibility that nandrolone and its metabolites might appear in a athlete's urine due to the ingestion of the flesh of uncastrated animals. Since that time, and until recently, he has been a voice crying in the wilderness, because the likelihood of such a circumstance actually occurring was considered in the sporting world (so Prof. Ayotte told us), to be so remote so as not to justify the time and the expense of further scientific investigation.

10.2 However, this line of enquiry, one of many provoked by the international rash of nandrolone cases in many sports and many areas of the globe over the last two years, is now being actively pursued. All the experts before us considered that further work in this area was now justified, indeed required. Prof. Ayotte, in particular said

³³ IAAF, FIBA, AIBA, ICF, FIH, FIG; see also Antidoping Code of the Olympic Movement, chap. 2, art. 3

³⁴ See the original award : paras.4.2-4.7.

³⁵ Wang et al v. FINA CAS 98/208 see fn 33 above.

Michelle Smith v. FINA CAS 98/211

"Having read the (report produced by) of Dr. Brabender) on behalf of the athletes involved in this arbitration, my colleagues and myself felt necessary to conduct more complete experiment this time under control "double-blind" conditions i.e. large group of volunteers (10) eating meat from castrated (3) or uncastrated porks (3), that unbeknownst to them. The urine samples collected one day before and two days after will be analysed in three different IOC laboratories: Montreal, Lausanne and Cologne by GC/MS (qualitative and quantitative) and GC/C/IRMS. That project was submitted to a peer-reviewed grant application and is scheduled to be completed in six months".³⁶

- 10.3 The Panel was naturally tempted, to adjourn yet further consideration of this matter (as indeed FINA invited us to do) to await the outcome of such research. It rejected that temptation for two main reasons. The first is that the athletes (who might be the beneficiaries of such research) through their Counsel invited us to reach a conclusion now. They drew attention, in particular, to the requirements of Art. 6 of the European Convention on Human Rights, which are inimical to undue delay in proceedings. The second is that in any event, the outcome of such research cannot assist the athletes in light of the evidential vacuum that we have identified at an earlier stage of this award (para.7.8 above). Nonetheless we note that clause 4 of the arbitration agreement reflected the hope that the IOC Medical Commission report might "achieve results which may of general interest for the Olympic Movement at large".
- 10.4 We have no doubt that further research by experts would be in the interests of the world sporting community. There are, it may be, never any certainties in science, but there is no reason not to seek to limit the uncertainties which may prevail.

ON THESE GROUNDS

I. The Court of Arbitration for Sport rules:

1. The appeal of each Appellant is allowed to the extent of substituting a sentence of two years suspension for one of four years (such period to take account of any period already served, but to ignore the period from 20 April 2000 to date in which the Appellant's, pursuant to the arbitration agreement, have been free to compete).
2. The present award is rendered without costs.
3. Each party shall bear its own costs

Done in Lausanne, May 2001

THE COURT OF ARBITRATION FOR SPORT

President of the Panel

The Honourable Michael **Beloff**, Q.C.

Arbitrators

Prof. Richard **McLaren**

Denis **Oswald**