Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2007/A/1434 IOC v/FIS & Jürgen Pinter
CAS 2007/A/1435 WADA v/FIS & Jürgen Pinter

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Luigi **Fumagalli**, Professor and Attorney-at-law, Milan, Italy

Arbitrators: Mr Martin **Schimke**, Attorney-at-law, Düsseldorf, Germany
Mr Malcolm **Holmes QC**, Barrister, Sydney, Australia

Ad hoc Clerk: Mr Patrick **Grandjean**, Attorney-at-law, Lausanne, Switzerland

in the arbitration between

International Olympic Committee (IOC), Lausanne, Switzerland

Represented by Mr Jan **Paulsson**, Mr Mark **Mangan** and Mr Thomas **Moxham**, Attorneys-at-law, Paris, France

Appellant 1

World Anti-doping Agency (WADA), Montreal, Canada

Represented by Mr François **Kaiser** and Mr Claude **Ramoni**, Attorneys-at-law, Lausanne, Switzerland

Appellant 2

and

Fédération Internationale de Ski (FIS), Oberhofen, Switzerland

Represented by Mr Jean-Pierre **Morand**, Attorney-at-law, Geneva, Switzerland

Respondent 1

Mr Jürgen Pinter, Finkenstein, Austria

Represented by Mr Günther **Riess**, Attorney-at-law, Innsbruck, Austria

Respondent 2

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I. PARTIES

1. The International Olympic Committee (hereinafter referred to as the "IOC") is an international not-for-profit nongovernmental organisation, established as an association under Swiss law, with its headquarters in Lausanne, Switzerland. According to the Olympic Charter, it is responsible for managing the Olympic Movement, which comprises, in addition to the IOC, the International Federations, the National Olympic Committees, the Organising Committees of the Olympic Games, the national associations, clubs, and the persons belonging to them, particularly athletes, as well as other organisations and institutions recognised by the IOC. The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised in the conditions described in the Olympic Charter. The Olympic Games represent the peak of its activity. It was the organizer of the 2006 Winter Olympic Games held in Torino, Italy (hereinafter referred to as the "Torino Olympic Games").

2. The World Anti-Doping Agency (hereinafter referred to as the "WADA") is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. The WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.

3. The "Fédération Internationale de Ski" (hereinafter referred to as the "FIS") is the international governing body in all matters concerning the sport of skiing. It has its registered seat in Oberhofen, Switzerland.

4. Mr Jürgen Pinter, born on 30 March 1979, is of Austrian nationality. He is a member of the Austrian Ski Federation and was selected by the Austrian National Olympic Committee to compete as a cross-country skier for the Austrian national team at the Torino Olympic Games.

II. BACKGROUND FACTS

5. The circumstances stated below are a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings. Additional facts may be set out, where relevant.

II.1 THE SO-CALLED "BLOOD BAG AFFAIR" IN SALT LAKE CITY

6. On 26 February 2002, shortly after the end of the 2002 Olympic Winter Games held in Salt Lake City, USA, a cleaning team discovered several bags containing blood transfusion equipment in the chalet that had been rented out to the Austrian cross-country skiing team and accompanying staff. It was later established that in-between 30 January and 25 February 2002, Mr Walter Mayer, the Austrian cross-country ski head coach, performed medical acts for which he had no medical training, certification and authorisation. He notably extracted blood from two athletes, irradiated it with ultraviolet light and re-injected it into the athletes' body. Allegedly, this procedure was carried out exclusively to help the said athletes overcome infections and improve their immune systems.

7. Both athletes were disqualified and, on 26 May 2002, the IOC Executive Board declared Mr Walter Mayer "*ineligible to participate in all Olympic Games up to and including the Olympic Games held in 2010*". This decision was upheld by the Court of Arbitration for Sport (hereinafter referred to as the "CAS") (CAS 2002/A/389, 390, 391, 392 & 393 A., B., C., D. & E. / International Olympic Committee; award of 20 March 2003).

II.2 THE ITALIAN POLICE RAID DURING THE TORINO OLYMPIC GAMES

8. Despite the sanction of the IOC, Mr Walter Mayer was present in Torino during the Olympic Games. His name appears on the accommodation list submitted by the Austrian Ski Federation, according to which he was staying in a chalet in Pragelato, Italy.

9. Mr Jürgen Pinter, along with his team-mates, Mr Johannes Eder, Mr Martin Tauber and Mr Roland Diethart, was also accommodated in the village of Pragelato, in a small and open concept chalet, with joint dining and kitchen facilities. Mr Pinter was sharing a room with Mr Eder on the ground floor, whereas the other two athletes were on the first floor. In order to access his room, Mr Diethart had to go through Mr Tauber's.

10. Mr Emil Hoch, the official Austrian cross-country skiing team trainer for the Torino Olympic Games and Mr Markus Gandler, the sports director, as well as other staff members, were also staying in the village of Pragelato, at approximately 500 hundred meters from the premises occupied by Mr Jürgen Pinter and his team-mates.

11. The members of the Austrian biathlon team took residence in another village, San Sicario, about 40 kilometres from Pragelato.

12. On the night of 18 February 2006, the Italian police acting on a search warrant raided the Austrian team's housing at the Torino Olympic Games.

13. The Italian police reported having made the following findings:

a) In the possession of the Austrian cross-country skiing team:

- Jürgen Pinter: 4 used single-use syringes with traces of blood and 5 unopened boxes of single-use 20 ml and 10 ml syringes.
- Johannes Eder: a saline solution and intravenous infusion devices, including a tube and needle containing saline solution.
- Martin Tauber: a device for haemoglobin testing; 2 jars containing respectively 18 and 11 haemoglobin test strips; 14 medical devices including an open pack of needles with used single syringes with traces of blood; 10 closed boxes of single-use syringes; 2 unopened packs of needles for infusion or transfusion and 1 unopened infusion pack.

  It has been subsequently established that haemoglobin values were measured 59 times between 10 and 19 February 2006 with Mr Martin Tauber's biotest device.

- Roland Diethart: a saline solution contained in a 250 ml bottle fitted with an infusion cap; 4 jars with 50 devices for haemoglobin testing (Hemocue); 13 unopened packs of syringes; 5 unopened infusion device packs; 1 pack of epicranial needles; 1 sterile-packed microperfuser and 1 unopened single-use needle pack.

b) In Mr Emil Hoch's room, a travel bag containing: 3 containers for renal infusion devices; ampoules for infusions containing saline solution; needles and associated tubes and controller for intravenous drip device; a container marked Hemocure; an empty ampoule for infusions; 2 glass ampoules with liquid content marked Hatriumchlorid with cannulas and needles with blood; 2 corks for needles; 5 handkerchiefs with probable traces of blood and several glass containers.

c) A syringe needle was found in the trousers worn by the trainer Markus Kurschner.

d) In a waste bin at the entrance to Mr Hoch's residence: 3 containers for intravenous drip with liquid contents; 5 sterile needles; 7 silver-coloured packets labelled "Serafol ABO"; 10 sterile intravenous drip cannulas; 3 small corks with needle; 5 x 10 ml syringes without needles; a plastic syringe; a yellow bag with two blood-stained handkerchiefs; a needle cork and 2 plastic containers for syringe needles.

It was later determined that the seven packets labelled "Serafol ABO" constituted in fact a complete kit for testing blood.

e) In the possession of the members of the Austrian biathlon team, located in San Sicario:

- Mr Wolfgang Rottmann: a small case containing biotest equipment; 2 bottles with 500ml of liquid labelled in German; 2 bottles of 100 g partially full respectively labelled "Spirozink" and "Spirogrom"; a plastic bottle with undefined plastic material; a used bottle of 100 g labelled "Isozid h"; 3 sealed and unlabelled bottles with yellow liquid; various boxes of butterfly valves for intravenous infusion; 2 plastic bottles with probable saline solution; several unused needles for intravenous infusion and several phials.

  The Torino Prosecutor's Office noted that the "Biotest" equipment was in fact a haemoglobinmeter for measuring an athlete's haemoglobin values. It also determined that some of the bottles seized contained hCG and albumin.

- Mr Wolfgang Perner: 4 application sets; 2 butterfly valves for intravenous infusion; 7 injection needles; a used 24 ml syringe; 2 x 5ml syringes; 2 x 500ml bottles of saline solution; a 500ml bottle of saline solution; a blister pack of 6 pills labelled "Millgamma"; a blister pack with one pill labelled "Thiogamma"; a bottle labelled "neoton agflebo"; small amount of liquid probably "creatine"; 2 sealed and unlabelled bottles; a box of neoton containing an empty bottle of neoton creatine; a used application set; a bottle of "rhinomer"; a piece of toilet paper containing several used needles for syringes; a box containing 3 blister packs with a total of 60 capsules of "Thiogamma"; 2 bottles labelled "frisch & vit" probably containing used single-use syringes; an apple juice carton containing used syringes and phial; a bottle of "pyralvex."

  The Torino Prosecutor's Office analysed these materials and determined that within the bottles that were seized by the police, there were: (i) 2 infusers for

blood components with filter for microaggregates commonly used for transfusing whole blood or its components with a butterfly needle still connected; the infusers contained traces of blood; (ii) two small calibre needles with protective caps that could be used for taking blood sample; the calibre needles had been used or at least, had been removed from their packaging; (iii) one medium calibre needle with a protective cap that could be used for taking blood samples; the calibre needle had been used or at least, had been removed from its packaging; (iv) one bag for collecting whole blood for transfusion, used, with blood residues; (v) one transfusion bag, used and with residues of blood.

f) Other material was also found: plastic injection needles; a kit for determining blood grouping found in Pragelato; additional apparatus for transfusion including bags for collecting, storing and transfusing blood found in Pragelato; numerous infusion bottles containing very high concentration of human albumin and low doses of human chorionic gonadotropion (hCG) - a peptide hormone capable of inducing the secretion of testosterone in men.

14. Mr Emil Hoch testified before the FIS Doping Panel that he was instructed by his superiors to collect medical waste from the rooms and residence of the athletes on a daily basis and to dispose of it so that it would not be discovered (see page 12 par. 72 of the decision of the FIS Doping Panel in the matter of Mr Jürgen Pinter delivered on 22 November 2007).

15. Messrs Rottmann, Perner, Mayer, Hoch and Peter Baumgartl, the team doctor, hurried back to Austria the day following the police search.

II.3 THE "MELIOLI REPORT"

16. On 19 February and 7 March 2006, the Torino Prosecutor's Office appointed a team of experts to evaluate the nature of the material seized by the Italian police during its raid of 18 February 2006. A report (hereinafter referred to as the "Melioli Report") was issued and gives notably the following indications (as translated from Italian by the IOC):

- Regarding the blood bags found in San Sicario, the experts came to the following conclusions:

"Exhibits 63 seem to indicate the use of self-transfusion practices carried out using sub-professional methods in order to lower haemoglobin/haematocrit levels (a sample having been taken either before a blood test or immediately after a competition) or raise them (transfusing the product immediately before a competition). (...)

Exhibits 64 also indicate self-transfusion practices carried out with a view to altering haemoglobin/haematocrit levels as described for Exhibits 63. However, here the units were not assembled in an amateur fashion (the sampling tube was attached using appropriate equipment found in transfusion departments).

A study of Exhibit 64/4 in particular suggests a more complex and organized scenario in which blood self-transfusion procedures backed by the most up-to-date techniques are used for the storing of blood by freezing. (...).

This demonstrates the existence of an organization capable not only of collecting blood but also of freezing it in accordance with the most modern techniques available on the market, storing it in freezers at at least - 65°C (even for long periods) and thawing it to allow further storage in a blood storage refrigerator (or, more easily, in a refrigerator at 2-8°C) even for two weeks." (page 5 and 6)

- Regarding the material found in the accommodations of the Austrian cross-country skiers:

"*2.2 **Additional equipment for transfusion (1).** Kit for determining blood group*

(...)

2.2.5 Comments. The presence of this material suggests fairly complex scenarios. If only one athlete is using the self-transfusion technique a kit to check the blood group is not generally required. But if more than one athlete is self-transfusing, under the same logistical conditions, it can be necessary to check the group, especially if the bags are crudely identified and are all being stored together in a refrigerator or transported in a camper. The presence of a kit for checking a blood group therefore suggests the systematic use of the practice of self-transfusion by these athletes (...)

*2.3 **Additional apparatus for transfusion (2).** Bags for collecting, storing and transfusing blood (...)*

2.3.5 Comments. The availability of new bags is proof that the practice of self-transfusion was provided for in the context of the Austrian national ski team. It is inconceivable that this material would be intended for medical use (for example, to assist sick companions). These materials are not normally purchasable and their availability is therefore the result of an anomalous distribution chain, probably in parallel with the distribution chain of these materials by the healthcare structures authorized to perform transfusion medicine.

*2.4 **Instruments for checking haemoglobin** (...)*

2.4.5 Comments. Two ([1]) instruments for 'in the field' determination of haemoglobin were seized. It is important to note that the results are not named so it is not possible to ascribe the tests to any one athlete. This could only be done by means of on-going tests via legal medicine. Moreover, the extreme care with which the measurements were taken

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1 More exactly, only one instrument was seized in the chalet where the cross-country skiers were accommodated, the other having been found in San Sicario, with the Austrian biathlon team [Note of the Panel].

(measurements repeated within one or two minutes) and the ability to keep Hb levels just below 17 g%, are worth noting. This is probably achieved by the practice of self-transfusions and dilutions using the oral intake of fluids, infusions of physiological saline, possibly with albumin added which, acting as a plasma expander, retains water, preventing haemoglobin levels from returning to values above the 17 g% threshold.

2.5 Needles, infusions sets, syringes, etc (...)

2.5.5 Comments. Different types of needles (generally very fine, very mixed lengths) were found during the search. These needles, together with the large amount of blood products found, are one of the proofs of the infusion techniques systematically used by these athletes. Their thinness has the advantage of not leaving a mark on the skin, if used in relatively expert hands, although the time required for an i.v. injection is certainly very long. It is also possible that some, very long, needles could be used for the infusion of drugs into deep muscle (insulin?)." (pages 7 – 9)

- "*3. Conclusions*

3.1 The instruments found, the 'healthcare' materials identified, the sealed unlabelled bottles containing a peptide hormone, demonstrate that backing the athletes was a very sophisticated organization capable, among other things, of having:

3.1.1. a supply of blood products from transfusion centres.

3.1.2. all the equipment necessary for the collection and subsequent reinfusion of blood at its disposal and of using it.

3.1.3. laboratory methods to check the blood group and therefore the compatibility or identity of the donor.

3.1.4. laboratory methods for checking haemoglobin levels.

3.1.5. access to products intended exclusively for hospital use (bags for storing blood).

3.1.6. access to pharmaceutical products not provided for in the European pharmacopoeia.

3.1.7. a supply of doping substances in concentrations such as to make their identification in test urine quite difficult.

3.1.8. hidden all the material in non-transparent fruit juice bottles, proof of the fact that the organization was itself aware that prohibited practices were being performed.

3.1.9. access to an extremely sophisticated organization, since the availability of transfusion bags (one of which had been used) originating from the same supplier with different batch numbers, of bottles of physiological saline for intravenous infusion all from the same supplier, of all the material (infusion sets, needles, etc.) required for the intravenous

inoculation of any substance and of methods for the 'bedside' determination of haemoglobin levels, requires a degree of preparation which could not be put together in a few days." (page 11)

- Regarding Mr Jürgen Pinter's situation, the Melioli Report observes that "*Five syringes, four of them used, were found in his possession. They are therefore not obvious proofs of manipulation, even though the availability of syringes (some already used) suggests the casual use of this type of approach by this athlete too*" (page 13).
- "*On the basis of the above it can be said to have been demonstrated that blood doping practices and pharmacological doping were going on among the athletes during the Winter Olympics, simultaneously with strategies aimed at preventing such activities being spotted in routine tests.*" (page 14)

II.4 THE DECISIONS OF THE IOC EXECUTIVE BOARD

17. On 24 April 2007, the IOC Disciplinary Committee found that Mr Jürgen Pinter, Mr Johannes Eder, Mr Martin Tauber, Mr Roland Diethart, Mr Wolfgang Perner and Mr Wolfgang Rottmann had violated articles 2.6.1 and 2.8 of the IOC Anti-Doping Rules applicable to the Torino Olympic Games in that they possessed, used and aided/abetted other athletes to use or possess prohibited substances/methods.

18. On 25 April 2007 and having considered the recommendations of the IOC Disciplinary Committee, the IOC Executive Board decided the following:

> "*I. Mr Juergen PINTER, Austrian, Cross Country, Men's Team Sprint and Men's 4x10 km Relay:*
>
> *i. is disqualified from the Men's Team Sprint*
>
> *ii. is disqualified from the Men's 4x10 km Relay; and*
>
> *iii. is permanently ineligible for all future Olympic Games in any capacity.*
>
> *II. The Austrian Men's Team Sprint and Men's 4x10 km Relay teams are disqualified.*
>
> *III. The Fédération Internationale de Ski is requested to modify the results of the above-mentioned events accordingly.*
>
> *IV. The file is referred to the Fédération Internationale de Ski to consider any further action within its own competence."*

19. Similar decisions were delivered against Mr Johannes Eder, Mr Martin Tauber, Mr Roland Diethart, Mr Wolfgang Perner and Mr Wolfgang Rottmann.

20. On 23 May 2007, the National Olympic Committee of Austria was also sanctioned by the IOC Executive Board, which, among other measures, decided to "*suspend the National Olympic Committee of Austria from receiving or applying for any grants or subsidies, whether direct or indirect, from the IOC in the amount of one million United States Dollars (US$ 1,000,000.-)*".

21. Between 14 and 16 May 2007, Mr Jürgen Pinter, Mr Johannes Eder, Mr Martin Tauber and Mr Roland Diethart lodged an appeal before the CAS against the decisions delivered by the IOC Executive Board.

22. The appeals of Mr Jürgen Pinter, Mr Johannes Eder and Mr Martin Tauber were consolidated (as CAS 2007/A/1286, 1288, 1289) and dealt with by a CAS Panel chaired by Mr David Rivkin, Attorney-at-law, New-York, USA (hereinafter referred to as the "Rivkin Panel"). Mr Roland Diethart's case (CAS 2007/A/1290) was considered by a CAS Panel chaired by Mr Luc Argand, Attorney-at-law, Geneva, Switzerland (hereinafter referred to as the "Argand Panel").

23. On 4 January 2008, the Argand Panel issued an award (hereinafter referred to as the "Argand Award") partially upholding Mr Roland Diethart's appeal and deciding that the latter "*shall be ineligible to participate in any capacity in all Olympic Games up to and including the 2010 Olympic Games*".

24. On 4 January 2008, the Rivkin Panel issued an award (hereinafter referred to as the "Rivkin Award") dismissing the appeals of Mr Pinter, Mr Eder and Mr Tauber and upholding the respective decisions of the IOC Executive Board delivered on 25 April 2007.

II.5 THE REPORT OF THE AUSTRIAN SKI FEDERATION DISCIPLINARY BOARD

25. The Austrian Ski Federation Disciplinary Board investigated the incidents which took place during the Torino Olympic Games and, on 12 July 2007, issued a report, which gives notably the following indications:

- There is no question of the Austrian Ski Federation being involved with organised doping.

- "*Trainers and coaches were divided into specific groups. The group of Walter Mayer and Mag. Emil Hoch tolerated and actively supported doping in form of prohibited methods, namely administration of infusions to lower the haemoglobin level. Apart from this, Hoch was in the possession of a prohibited substance, namely plasma expander human albumin. There exists also indication that both Mayer and Hoch supported blood doping as well. As to Hoch, the most aggravating factor is that he was in the possession of medical equipment for blood-typing, of human albumin and of three unopened transfusion bags. DNA profiles found on pieces of evidence seized from Hoch, such as a used butterfly valve, could not be assigned to any Austrian athlete. Outside this group absolute secrecy was observed. The [Disciplinary Board] understands that Sports Director Markus Gandler as well as the trainers and coaches Walter Gapp, Alfred Eder, Walter Hörl, Heinz Mühlbacher, Andreas Eder, Gerhard Heigl, Stefan Rohrmoser, Richard Neuner and Gerhard Urain did not know about these practices.*" (page 2 par. 2)

- "*the DNA-profile found on the evidence seized from Hoch, such as a used butterfly valve, could not be assigned to an Austrian athlete or to the Lichtenstein athlete Hasler. The [Disciplinary Board], therefore, strongly suspects that Hoch*

supported athletes, possibly also athletes from other teams, in blood doping" (page 7 par. 1). However the Disciplinary Board did not have the opportunity to hear Mr Emil Hoch on that issue.

- The Disciplinary Board found Mr Wolfgang Perner and Mr Wolfgang Rottmann guilty of blood doping.

- *"In the case of the cross-country team the picture is more differentiated: Tauber and Diethart were in the possession of suspicious, mainly unopened medical equipment that is needed for infusions. (...). Other circumstantial evidence incriminating Tauber (possession of measuring instrument, conducting several measurements) is not sufficient to prove him guilty of the application of a prohibited method. Eder, who has a genetically high level of haemoglobin, administered a second infusion of sodium chloride solution additionally to the one already known. Jürgen Pinter did not possess infusion material and, therefore, the [Disciplinary Board] does not consider the possession of a prohibited method."* (page 3 par. 5)

- *"[Mr Hoch] stated he knew that the athletes Eder and Hasler applied infusions supposedly in agreement with Dr. Baumgartl and that he confiscated the items from the athletes for disposal. He admitted that the seized items were incriminating. (...) This statement of Mag. Hoch shows that he knew about the application of a prohibited method at least with respect to Eder as the infusion had not been administered, supervised and documented by a doctor after a respective diagnosis. It further proves that Hoch tolerated this procedure, even wanted it because of the expected high level of Johannes Eder. He supported the application by collecting the suspicious medical equipment after use for disposal. Furthermore, Hoch stated he collected an infusion device from Hasler, who administered an infusion under not yet known circumstances. According to Eder's supplementary statement from 15 June 2007 (see also point 5) he administered a second infusion prior to a FIS control a few days before the relay competition. This can definitely be qualified as application of a prohibited method as there was no clinical picture and no doctor had been consulted. This was only done to cover the high level from the FIS control. Hoch again collected the infusion device and therefore supported Eder in the application of a prohibited method. "* (page 5 par. 2)

- *"For lack of satisfactory evidence - and taking the evidence, seized from trainer Hoch into account - the [Disciplinary Board] is not in the position to state that Tauber, Diethart or Eder applied prohibited methods."* (page 12 par. 1)

- *"Disposable needles were found with Jürgen Pinter. The [Disciplinary Board], therefore, cannot identify any doping violation as to Pinter. Subcutaneous, intramuscular or intravenous administration of vitamins does not constitute a doping violation. The needles found with him were not suitable for infusions. Jürgen Pinter did in no way help his room mate Eder when administering an infusion."* (page 12 par. 2)

- *"The [Disciplinary Board] cannot ascertain an intentional collaboration between biathletes and cross-country athletes or among the cross-country athletes when applying prohibited methods. In this respect the [Disciplinary Board] conclusion varies from the disciplinary decision by the IOC."* (page 3 par. 5)

- *"The procedure of taking evidence has not produced any clues of collaboration of all biathletes and all cross-country skiers or biathletes and cross-country skiers and of their joint responsibility for the established doping violations of the athletes Perner, Rottmann and Eder as defined by point 2.8 of the WADA-Code. Biathletes and cross-country skiers lived nearly 40 km apart, which meant a 2-hour drive due to traffic. In the opinion of the [Disciplinary Board] it was absolutely impossible for the cross-country skiers to participate in a "conspiracy" due to the distance involved and the fact that, according to the results of the procedure of taking evidence, Perner and Rottmann watched carefully not to let their fellow-athletes and their trainer Alfred Eder know about their activities."* (page 13 par. 2)

II.6 THE DECISIONS RENDERED BY THE FIS DOPING PANEL

26. Based upon articles 7.2 and 8.1.2 of the FIS Anti-Doping Rules 2005/2006 (hereinafter referred to as the "FIS ADR"), Messrs Eder, Tauber, Diethart and Pinter's case had to be brought before the FIS Doping Panel, which had to adjudicate whether a violation of the applicable FIS ADR occurred.

a) Messrs Eder, Tauber, Diethart

27. On 22 November 2007, the FIS Doping Panel found Messrs Eder, Tauber, Diethart guilty of anti-doping violations and ruled that *"1. All competitive results achieved by the [athletes] in competition since February 18th, 2006 shall be disqualified and all Medals, Points and Prizes received in such competition shall be forfeited. 2. The period of ineligibility to be imposed upon the [athletes] shall be two (2) years commencing as of the date of this award."*

b) Mr Jürgen Pinter

28. A hearing was held in Zurich, Switzerland, on 17 September 2007. During the proceedings before the FIS Doping Panel and with regard to the facts, Mr Jürgen Pinter made the following submissions:

- He did not dispute that he was in possession of 4 used single-use syringes with traces of blood and 5 unopened boxes of single-use 20 ml and 10 ml syringes.
- Mr Jürgen Pinter claimed that he did not know about the presence of any alleged prohibited method in other rooms in the house in which he was accommodated or in the house of Mr Emil Hoch, who was his coach. However, he confirmed that he was present during Mr Eder's self-administrated infusion at the time of the search and seizure.
- He contended that the syringes were used to inject a non-prohibited substance, Thiogamma to alleviate muscle cramping in his legs and feet. He explained that

the product had to be injected intravenously as oral ingestion of the product would upset his stomach.

- He was of the opinion that it would have been impossible to perform or administer an alleged prohibited method with the material found in his possession. He explained that the syringe needles were used to scratch his fingertips to draw blood for the haemoglobin-testing device brought by Mr Martin Tauber.
- According to him, the presence of blood traces in the tubing used with the butterfly needle can be explained by the fact that blood must initially be withdrawn from the vein before injecting the Thiogamma.
- Unlike the statements made on his behalf by his lawyer before the IOC Disciplinary Committee where it was affirmed that Mr Jürgen Pinter occasionally checked his haemoglobin levels, the athlete told the FIS Doping Panel that he used Mr Martin Tauber's haemoglobin-testing device only once, out of curiosity.

29. On 22 November 2007, the FIS Doping Panel ruled that "*All allegations raised against the Athlete, Jürgen Pinter, in connection with the search and seizure conducted by the Italian police on February 18th, 2006 in Pragelato and San Sicaro are dismissed*".

30. In substance, the FIS Doping Panel found that despite the overall context, the evidence against Mr Jürgen Pinter did not meet the standard of proof required to sanction him. In particular, it observed that the objective elements of an anti-doping rule violation were not sufficiently proven, as it was notably not established that Mr Jürgen Pinter "*administered or attempted to administer a Prohibited Substance or Prohibited Method to any another athlete, or that he assisted, encouraged, aided, abetted, covered up or engaged in any other type of complicity involving an anti-doping rule violation or any attempted violation*" (see page 13 par. 82 of the decision). The FIS Doping Panel was of the opinion that the athlete had provided reasonable explanations regarding the syringes found in his possession and the purpose for which they were used. However, it reserved its right "*to re-consider this case in the event the continuing investigations regarding the blood residues found in the tubing used by the Athlete in the course of injecting Thiogamma confirm that the needles and tubing found in his possession were used for the purpose of withdrawing or injecting blood*""(see page 13 par. 84 of the decision).

31. On 22 November 2007, the Appellants were notified of the decision issued by the FIS Doping Panel.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

III.1 APPEAL OF THE IOC - APPEAL PROCEDURE CAS 2007/A/1434

32. On 11 December 2007, the IOC filed a statement of appeal before the CAS pursuant to article R47 of the Code of Sports-related Arbitration (hereinafter referred to as the "CAS Code"). It challenged the decision rendered on 22 November 2007 by the FIS Doping Panel with respect to Mr Pinter (hereinafter referred to as the "Appealed Decision"), submitting the following prayers for relief:

"The IOC respectfully seeks the following relief:

(a) The decision of the FIS Doping Panel regarding Mr Pinter be set aside and replaced with the following decision:

(i) All competitive results achieved by Mr Pinter in competition since 18 February 2006 shall be disqualified and all Medals, Points and Prizes received in such competition shall be forfeited.

(ii) The period of ineligibility to be imposed upon Mr Pinter shall be two (2) years commencing as of the date of this award.

(b) Mr Pinter be ordered to pay the IOC's costs and expenses arising out of this arbitration".

33. On 28 January 2008, the IOC filed its appeal brief, which contains a statement of the facts and legal arguments accompanied by supporting documents, and the following request for relief:

(a) The decision of the FIS DP regarding Mr Pinter be set aside and replaced with the decision recommended by WADA

(b) Mr Pinter be ordered to pay the IOC's costs and expenses arising out of this arbitration".

34. The IOC's submissions, in essence, may be summarized as follows:

- The IOC's appeal is admissible and was filed in a timely manner.
- Mr Jürgen Pinter engaged in some form of blood doping practices in order to increase his sporting performances.
- The fact that Mr Jürgen Pinter underwent numerous doping tests and that they all proved to be negative is irrelevant. As a matter of fact, there is presently no test that can detect whether an athlete has re-injected his own blood (autologous transfusion).
- In order to prevent wide-spread blood doping, the FIS started blood testing programs in order to monitor haemoglobin values. It lowered the threshold such that a male athlete would not be allowed to start any competition for five consecutive days if his haemoglobin values equalled or exceeded 17 g/dl. IOC suggests that professional cross-country skiers like Mr Jürgen Pinter are capable to manage how to reduce their haemoglobin values to the levels accepted by FIS.
- Because one cannot detect doping with autologous blood, "*the authorities have been left with merely the power to prevent athletes competing for "health" reasons if a blood test reveals high haemoglobin values. More permanent sanctions can be imposed, however, if blood doping can be established through other means, such as material found in the possession of athletes and/or their support staff*" (page 16 par. 55 of the appeal brief). Such is the case with Mr Jürgen Pinter, whose situation is very comparable as what happened with the members of the Austrian cross-country skiing team at the 2002 Salt Lake City Olympic Winter Games.
- Mr Jürgen Pinter explanations regarding the use of Thiogamma have been inconsistent:

- The use of Thiogamma by Mr Jürgen Pinter was not mentioned by his original lawyer during the proceedings before the IOC. At the hearing held by the Austrian Ski Federation Disciplinary Board on 10 March 2006, the athlete stated that he needed the disposable syringes to inject a preparation for the improved consumption of carbohydrates. However, he explained to the CAS Panel and to the FIS Disciplinary committee that his use of Thiogamma was to alleviate muscle cramping. Further on, he submitted a certificate of his doctor who confirmed the administration of Thiogamma to treat "unclear nerve pain" during the 2002/2003 World Cup Season.
- The traces of blood found in the syringe tubing are inconsistent with the administration of Thiogamma.
- Thiogamma is normally used in treatment of patients with diabetes and is administered intravenously only in extreme situations, incompatible with the practise of sport at a high level.
- It is undisputed that Mr Jürgen Pinter had never recorded his use of Thiogamma on any of his doping control forms, nor had he informed the team doctor of his use of the drug.
- There was no evidence that Mr Jürgen Pinter was actually in the possession of Thiogamma during the raid of the Italian police. "*There is no mention in the Italian Police report of any Thiogamma having been found in Mr Pinter's possession. In contrast, the presence of Thiogamma was recorded in the police report relating to Wolfgang Perner*" (page 22 par. 87 of the appeal brief). The IOC shares the opinion of the Rivkin Panel, according to which "*it [is] unusual that the Italian Police would not have recorded the Thiagamma in its report had such substance indeed been found*"(Rivkin Award, page 23 par. 9.28).

- Mr Jürgen Pinter's allegation according to which he used Mr Martin Tauber's haemoglobin test only once is in contradiction with the explanations given to the IOC Disciplinary Committee by his lawyer, who affirmed that he occasionally checked his haemoglobin levels.
- "*In the final analysis, Mr Pinter's explanations as to why he was caught with syringes with traces of blood cannot be accepted. In reality, as one CAS panel has already found, he had been using those syringes to effect small increases in his haemoglobin values. He then checked his haemoglobin values with Mr Tauber's haemoglobinmeter. In the event his values exceeded the FIS cut-off point, Mr Pinter had the syringes, and access to the saline found in the physical possession of both Mr Diethart and Mr Eder. As a result, the CAS panel were of the unanimous view that Mr Pinter violated Articles 2.6 and 2.8 of the IOC ADR. There is no reason for this Panel to reach a different view considering Articles 2.6 and 2.8 of the FIS ADR*" (page 24 par. 93 of the appeal brief).
- Mr Jürgen Pinter violated article 2.6.1 and 2.8 of the FIS ADR. As a result, the relief sought by WADA (see § 35-36 below) had to be granted.

III.2 APPEAL OF THE WADA - APPEAL PROCEDURE CAS 2007/A/1435

35. On 12 December 2007, the WADA filed a statement of appeal before the CAS pursuant to article R47 of the CAS Code. It also challenged the Appealed Decision and submitted the following prayers for relief:

> *"WADA hereby respectfully requests the CAS to rule:*
>
> *1. The Appeal of WADA is admissible.*
>
> *2. The decision of the FIS Doping Panel dated November 22, 2007 in the matter of Mr. Jürgen Pinter is set aside.*
>
> *3. Mr. Jürgen Pinter is sanctioned with a two-year period of ineligibility, starting on the date on which the CAS award enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr. Jürgen Pinter) before the entry into force of the CAS award shall be credited against the total period of suspension to be served.*
>
> *4. All competitive results obtained by Mr. Jürgen Pinter from February 18, 2006 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prices.*
>
> *5. WADA is granted an Award for costs."*

36. On 11 February 2008, the WADA filed its appeal brief, which contains a statement of the facts and legal arguments accompanied by supporting documents. It amended the third request for relief contained in its statement of appeal as follows:

> *"3. Mr. Jürgen Pinter is sanctioned pursuant to articles 10.2 and 10.4.2 of the FIS Anti-Doping Rules with a minimum period of ineligibility of four years, starting on the date on which the CAS award enters into force. Any period of ineligibility (whether imposed to or voluntarily accepted by Mr. Jürgen Pinter) before the entry into force of the CAS award shall be credited against the total period of suspension to be served."*

37. The WADA's submissions, in essence, may be summarized as follows:

- The appeal of the WADA is admissible and was filed in a timely manner.
- Mr Jürgen Pinter violated article 2.6.1 and 2.8 of the FIS ADR.
- The FIS Doping Panel erred when it held that the terms *"Constructive Possession"* mean *"control or dominion over an object without actual possession or custody of it"*.
- *"according to the FIS Anti-Doping Rules, an athlete shall be found in possession of a prohibited substance or method if he (i) has actual, physical possession of a prohibited substance or method or (ii) has constructive possession of a prohibited substance or method, which means either: (a) the athlete has exclusive control over the premises in which a prohibited substance or method exists or (b) the athlete knows about the presence of a prohibited substance or method and intends to*

exercise control over it (see CAS 2007/A/1286, 1288 & 1289 Pinter Tauber & Eder v/ the IOC (...) §9.37; CAS 2007/A/1290 Diethart v/ the IOC (...) § 63) (page 5 par. 24 of the appeal brief)

- In the view of the circumstances of the case and of the whole context of facts, Mr Jürgen Pinter was in physical or constructive possession of all the items found by the Italian police during its raid on 18 February 2006. The medical items found constitute the material required to perform "*intravenous infusions*", as prohibited under the WADA Code. According to the expert opinion of Professor Catlin filed by the IOC, the traces of blood on the syringes found in Mr Jürgen Pinter's possession indicate that blood has been either transfused or removed and are not compatible with the alleged injection of Thiogamma. Mr Jürgen Pinter has never applied for a Therapeutic Use Exemption authorising the use of the material found in his possession. According to article 2.6.1, the use of a prohibited method could be admissible if required by an emergency medical treatment, which was not established by Mr Jürgen Pinter.

III.3 THE ANSWER OF THE FIS

38. On 14 March 2008, the FIS submitted an answer to both appeals containing the following prayers for relief:

> "*[FIS] leaves it to the Panel to decide on the appeals of the [IOC] and [WADA]*
>
> *No award of costs shall be made to any party.*"

39. On the whole, the FIS mainly made considerations on the approach of Mr Jürgen Pinter's case by its Doping Panel.

III.4 THE ANSWER OF MR JÜRGEN PINTER

40. On 1 April 2008, Mr Jürgen Pinter submitted an answer to both appeals containing the following prayers for relief:

> "*Mr Pinter hereby request respectfully CAS to dismiss the Appeals of the Appellants and that Mr Pinter is granted an award for costs*".

41. Mr Jürgen Pinter's submissions, in essence, may be summarized as follows:

- Mr Jürgen Pinter has never been tested positive to any prohibited substance, which gives a strong indication of the fact that he has never violated the applicable FIS ADR.
- Mr Jürgen Pinter cannot be blamed for the misconduct of the members of the biathlon team, who were accommodated more than 40 km away from his place of residence.
- Given the definition of "*Possession*", only the material found in Mr Jürgen Pinter's actual possession can be taken into consideration to assess whether he breached the FIS ADR. Mr Jürgen Pinter had exclusive control over 4 used single-use syringes and 5 unopened single-use syringes and nothing else. The possession of those items

is not sufficient to support a finding of the use or performance of a prohibited method.

- Mr Jürgen Pinter had no control nor was he aware of the use of prohibited method or substance by the other members of the cross-country skiing team.
- Mr Jürgen Pinter "*clearly can not have violated the FIS anti-doping rules as he clearly did not possess all the means and materials necessary for the use of a prohibited method*" (page 6 par. 1 of the answer). The IOC, the WADA and the FIS bear the burden of proving that a doping offense has taken place under the FIS ADR, which they have not in the present case: a) None of the blood traces found were attributable to Mr Pinter; b) the syringes in his possession cannot be used either for a blood doping method nor for intravenous infusion "*as the quantities (10 ml /20 ml) would be too small to have an effect and it would take hours, due to the thinness of the needles, to have significant quantities of liquid infused*" (page 6 par. 3 of the answer); c) he was not in the possession of an infusion device or any substance or liquid to be infused, d) there is no indication that he was involved with the infusions administered by his team-mates; e) he used Mr Martin Tauber's haemoglobinmeter once and, by doing so, did not breach any FIS ADR; f) the report dated 12 July 2007 of the Austrian Ski Federation Disciplinary Board suspects that Mr Emil Hoch supported other athletes from other teams.
- "*The conclusions of WADA and the IOC with respect to the charge of complicity (2.8) are purely speculative. It is not established, not even as a mere balance of probability, in which manner the athlete should have assisted, encouraged, aided, abated or covered up any other athlete in committing an anti-doping rule violation*". The possibility of complicity between the members of the biathlon team and the cross-country skiing team is expressly rejected by the report dated 12 July 2007 of the Austrian Ski Federation Disciplinary Board.
- According to experts' opinions, injections must be distinguished from infusions, as injections are, *per se*, not prohibited under the WADA Code. Mr Jürgen Pinter only injected non-prohibited substance, Thiogamma, and has therefore not committed a doping violation. "*Even if an intravenous injection of an unprohibited substance would be found to constitute a doping violation, the Athlete would profit from the no fault no negligence clause according to article 10.5.1 of the FIS Anti-doping regulations as he could not have known about it.*" (page 14 of the answer).
- The Melioli Report is not reliable. The Appellants make no mention a) of the "Stefani/Verdiani reports" which confirm that the analyses made on the available blood traces were not attributable to Mr Jürgen Pinter nor b) of the "Vincenti/Medana report" which concludes "*with respect to the cross country team that "no medicines with potential doping effect other than proteins were found in the examined solutions"* (page 16 par. 5 of the answer).
- The CAS 2007/A/1289 has no binding effect and, moreover, was wrongly decided.

42. In addition, in his answer (par. 11.2 and 11.3) Mr Pinter requested the CAS to adopt evidentiary measures in order (a) to have members of the police team (which took part in the raid of 18 February 2006) testify on the question of the presence of Thiogamma in

his room, and b) to analyse the content of his syringes seized by the Italian police, in order to confirm the presence of Thiogamma in the remains that were in the tubes.

III.5 THE PROCEEDINGS BEFORE THE PANEL

43. In a letter dated 20 December 2007 the CAS Court Office informed the parties that the appeals filed by the IOC (CAS 2007/A/1434) and by WADA (CAS 2007/A/1435) had been consolidated.

44. On 15 February 2008, the CAS Court Office informed the parties that the Panel to hear the consolidated appeals had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Malcolm Holmes QC, arbitrator jointly designated by the Appellants; and Mr Martin Schimke, arbitrator jointly designated by the Respondents.

45. On 8 September 2008 the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure, which was accepted and countersigned by all parties. Such Order indicated the written submissions exchanged by the parties in the course of the proceedings, confirmed that CAS had jurisdiction to rule on this matter and that the applicable law would be determined in accordance with Art. R58 of the CAS Code.

46. A hearing was held on 30 September 2008 at the CAS premises in Lausanne. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel.

47. The following persons attended the hearing:

- For the IOC, its employee, Mr Christian Thill, assisted by the attorneys, Mr Mark Mangan and Mr Thomas Moxham.
- For the WADA, its medical director, Mr Alain Garnier, assisted by the attorneys, Mr François Kaiser and Mr Claude Ramoni.
- FIS was represented by its attorney, Mr Jean-Pierre Morand.
- Mr Jürgen Pinter was present and was accompanied by his attorney, Mr Günther Riess.

48. The Panel heard evidence from the following experts:

- Professor Don Catlin, medical expert, Los Angeles, USA;
- Doctor Hannes Lechner, general practitioner, Fieberbrunn, Austria;
- Professor Günther Gastl, from the clinical department for haematology and oncology of the Medical University of Innsbruck, Austria.

49. The experts were heard via teleconference, with the agreement of the Panel and pursuant to article R44.2 par. 4 of the CAS Code. They were examined and cross-examined by the parties, as well as questioned by the Panel.

50. With the consent of all the parties and of the Panel, Mr Jürgen Pinter filed the instruction leaflet for Thiogamma.

51. The parties had then ample opportunity to present their cases, submit their arguments and answer to the questions posed by the Panel. In this regard, Mr Pinter insisted for the granting of the evidentiary measures requested in his answer. At the conclusion of the hearing, the parties confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings. The Panel then closed the hearing and reserved its final award. The Panel heard carefully and took into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties even if they have not been summarized herein.

IV. DISCUSSION

IV.1 APPLICABLE LAW

52. Article R58 of the CAS Code provides the following:

> *"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-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

53. In the present matter, the parties have not agreed on the application of any particular law. In their respective submissions, the parties refer exclusively to the FIS regulations. As a result, subject to the primacy of the applicable FIS regulations, Swiss Law shall apply complementarily.

54. It is undisputed that the FIS ADR of 2005/2006 and the FIS Procedural Guidelines 2005/2006 to the FIS ADR are applicable.

55. As regards to *"Prohibited Substances and Prohibited Methods Identified on the Prohibited List"*, article 4.2 of the FIS ADR provides the following:

> *"Unless provided otherwise in the Prohibited List and/or a revision, the Prohibited List and revisions shall go into effect under these Anti-Doping Rules three months after publication of the Prohibited List by WADA without requiring any further action by FIS."*

56. The WADA 2006 Prohibited List (valid as from 1 January 2006) has been officially published in September 2005. Therefore, the *"Prohibited List"* as defined in the World Anti-Doping Code (hereinafter referred to as the "WADAC") (valid as from 1 January 2006) is applicable to the incidents at hand.

IV.2 ADMISSIBILITY

57. Based on articles 13, 13.1, 13.2.1 and 13.2.3 of the FIS ADR, the WADA and the IOC have standing to file an appeal with the CAS against the Appealed Decision. The standing of the Appellants is in any case not disputed.

58. The appeals were filed within the twenty-one day deadline provided by article 13.5 of the FIS ADR. The appeal complied with all of the other requirements of article R48 of the CAS Code, including the payment of the CAS Court office fee.

59. It follows that the appeals are admissible.

IV.3 CAS JURISDICTION

60. The jurisdiction of CAS, which is not disputed, derives from article 13 of the FIS ADR and article R47 of the CAS Code. It is further confirmed by the order of procedure duly signed by the parties.

61. As a result, CAS has jurisdiction to decide on the present dispute.

IV.4 JOINDER

62. As confirmed by the CAS Court Office on 20 December 2007, the two appeal procedures (CAS 2007/A/1434 and CAS 2007/A/1435) have been consolidated with the parties' unanimous consent. Therefore, the Panel shall render one common award.

IV.5 SCOPE OF REVIEW OF THE CAS PANEL

a) In General

63. The WADA submits that the scope of review of the Panel is limited as it should recognize and respect the decision of the IOC Executive Board based on the findings of the IOC Disciplinary Committee, as confirmed by the Rivkin Award. Its position is based on article 15 of the FIS ADR, which provides that "*Subject to the right to appeal provided in Article 13, the Testing, therapeutic use exemptions and hearing results or other final adjudications of any Signatory to the Code which are consistent with the Code and are within the Signatory's authority, shall be recognised and respected by FIS and its National Ski Associations. FIS and its National Ski Associations may recognize the same actions of other bodies which have not accepted the Code if the rules of those bodies are otherwise consistent with the Code*".

64. Furthermore, the WADA contends that the present dispute has already been dealt with by a CAS Panel, which issued a valid and final decision. It is of the opinion that Mr Jürgen Pinter is barred by *Res Judicata*.

65. According to article 7.1.3 of the International Olympic Committee Anti-Doping Rules applicable to the XX Olympic Winter Games in Turin, 2006 (hereinafter referred to as the "IOC ADR"), "*Any measure or sanction applying to any anti-doping rule violation arising upon the occasion of the Olympic Games will be pronounced in accordance with Rule 23 of the Olympic Charter and its Bye-law.*"

66. Article 23 of the applicable Olympic Charter states the following:

> *"23 Measures and Sanctions*
> *(...)*

2. In the context of the Olympic Games, in the case of any violation of the Olympic Charter, of the World Anti-Doping Code, or of any other decision or applicable regulation issued by the IOC or any IF or NOC, including but not limited to the IOC Code of Ethics, or of any applicable public law or regulation, or in case of any form of misbehaviour:

2.1 with regard to individual competitors and teams:
temporary or permanent ineligibility or exclusion from the Olympic Games, disqualification or withdrawal of accreditation; in the case of disqualification or exclusion, the medals and diplomas obtained in relation to the relevant infringement of the Olympic Charter shall be returned to the IOC. In addition, at the discretion of the IOC Executive Board, a competitor or a team may lose the benefit of any ranking obtained in relation to other events at the Olympic Games at which he or it was disqualified or excluded; in such case the medals and diplomas won by him or it shall be returned to the IOC (Executive Board);

(...)

4. All sanctions and measures are taken without prejudice to any other rights of the IOC and of any other body, including but not limited to NOCs and IFs."

67. Article 9 of the IOC ADR reads as follows:

"9.1 Disqualification of Olympic Games Results

An Anti-Doping Rule violation occurring during or in connection with the Olympic Games may lead to Disqualification of all of the Athlete's individual results obtained in the Olympic Games with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 9.1.1.

9.1.1 If the Athlete establishes that he or she bears No Fault or Negligence for the violation, the Athlete's individual results in the other Competition shall not be Disqualified unless the Athlete's results in Competitions other than the Competition in which the anti-doping rule violation occurred were likely to have been affected by the Athlete's anti-doping rule violation.

9.2 Status During Ineligibility

No Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in the Olympic Games.

9.3 Management of Anti-Doping Rule Violations beyond Disqualification:

The management of anti-doping rule violations and the conduct of additional hearings as a consequence of hearings and decisions of the IOC, including with regard to the imposition of sanctions over and above those relating to the Olympic Games, shall be managed by the relevant International Federations."

68. Pursuant to article 7.2 of the FIS ADR:

> *"**Results Management for Tests Initiated During Other International Events.** Results management and the conduct of hearings from a test by the International Olympic Committee, the International Paralympic Committee, or a Major Event Organization, shall be managed, as far as sanctions beyond Disqualification from the Event or the results of the Event, by FIS."*

69. Article 8.1.2 of the FIS ADR provides the following:

> *"When it appears, following the Results Management process described in Article 7, that these Anti-Doping Rules have been violated in connection with FIS Testing or Testing at an International Event then the case shall be assigned to the FIS Doping Panel for adjudication."*

b) In the case at hand

70. It results from the above quoted provisions that the management of anti-doping rule violations for the imposition of sanctions over and above those relating to the Olympic Games rests with the relevant international federation.

71. Article 23 of the Olympic Charter as well as article 9.3 of the IOC ADR are to be interpreted to mean that FIS is allowed to render its own independent decision on the particular case under review. In addition, the mechanism of recognition is not meant to give a decision, rendered under the jurisdiction of a sporting authority, effects in another system which it did not posses in the system of origin. The ineligibility to participate in the Olympic Games does not imply, *per se*, the suspension to compete in any and other competitions organized by the FIS or a national federation.

72. The above considerations are also consistent with the IOC Disciplinary Committee's own findings. In its decision dated 25 April 2007, the IOC Disciplinary Committee limited the scope of the sanctions to the Olympic Games ("*Mr Juergen PINTER, (...) i. is disqualified from the Men's Team Sprint; ii. is disqualified from the Men's 4xl0 km Relay; and iii is permanently ineligible for all future Olympic Games in any capacity.*) and referred the file to FIS "*to consider any further action within its own competence*". It necessarily implies that Mr Jürgen Pinter could well be sanctioned differently by FIS and thus, on appeal, by the CAS.

73. The Rivkin Panel only considered Mr Jürgen Pinter's case as decided by the IOC Disciplinary Committee, which is only empowered to impose a penalty with effects limited to the Olympic Games. Consequently, there has never been a final judgment in respect of sanctions outside the Olympic Games. Therefore, WADA's challenge for violation of the principle of *Res Judicata* must be disregarded without further consideration.

74. Article R57 of the CAS Code provides that "*the Panel shall have full power to review the facts and the law*". Under this provision, the Panel's scope of review is basically unrestricted. It has the full power to review the facts and the law and may even request *ex officio* the production of further evidence. In other words, the Panel not only has the power to establish whether the decision of a disciplinary body being challenged was lawful or not, but also to issue an independent decision based on the FIS Regulations

(CAS 2004/A/607 Galabin Boevski v/IWF; CAS 2004/A/633 IAAF v/ FFA & Mr Chouki; CAS 2005/A/1001 Fulham FC (1987) Limited v/ FIFA; CAS 2006/A/1153 WADA v/ Portuguese Football Federation & Nuno Assis Lopes de Almeida; CAS 2008/A/1515 WADA v/Swiss Olympic Association & Simon Daubney).

75. The CAS Panel holds that it has the full power to review the facts and the law of the case.

IV.6 PROCEDURAL MOTIONS

a) With respect to the amendment to the request for relief

76. In its statement of appeal, the WADA requested the CAS to rule that "*Mr. Jürgen Pinter is sanctioned with a two-year period of ineligibility*" whereas in its appeal brief, it requested a "*four-year period of ineligibility.*"

77. The WADA exposed that it had not been a party to any other judicial case initiated after the Italian police raid during the Torino Olympic Games. Until it was notified of the CAS awards rendered on 4 January 2008 (that is 23 days after the filing of the statement of appeal and 7 days before the appeal brief), the WADA was not aware of the fact that Mr Jürgen Pinter's conduct could form a constituent element of the offense as defined under article 2.8 FIS ADR and sanctioned with a minimum period of ineligibility of four years.

78. Mr Jürgen Pinter is of the opinion that the Appellant is not authorized to submit a new request for relief after the filing of the statement of appeal.

79. The Panel observes that the CAS Code does not prohibit the amendment in the appeal brief of the relief requested in the statement of appeal. Such a significant procedural limitation could be enforced only if it had been expressly foreseen by the CAS Code as it is the case, for instance, with regard to the submission of new arguments which are explicitly not allowed after the filing of the appeal brief and of the answer, except when agreed to by all parties (see article R56 of the CAS code). Amendments to original claims are very common in international arbitrations, as long as they are submitted within the time limit provided by the applicable regulations (see for instance articles 18 ff of the ICC Rules of Arbitration). Likewise, article R51 of the CAS Code allows the specification in the appeal brief of requests for evidentiary measures not contemplated in the statement of appeal.

80. In addition, the statement of appeal and the appeal brief are not to be considered as two separate and independent briefs. They must be considered together, as jointly containing the expression of the position of the appellant. They do not stand alone as one cannot be filed without the other: an appeal is deemed withdrawn, should the appellant fail to lodge an appeal brief (article R51 of the CAS Code).

81. Furthermore, the amendment in the appeal brief of the relief requested in the statement of appeal causes no adverse effect on Mr Jürgen Pinter's right to be heard. As a matter of fact, his answer was filed after the receipt by him of the appeal brief, therefore after the full and final specification of the relief requested by the WADA. Mr Jürgen Pinter

had the possibility to present factual and legal reasoning in connection with the new claim and to comment on the full submissions of the WADA, to discuss the evidence produced by the latter and to challenge it through its own evidence.

82. Finally, the Panel notes that a) the key elements of the dispute (the challenge to the Appealed Decision and the imposition of a sanction) had been identified by the IOC and the WADA since the statement of appeal, b) the violation of art. 2.8 FIS ADR had been discussed in all previous instances and c) Mr Jürgen Pinter took position on the claims concerning the breach of art. 2.8 FIS ADR.

83. For all the above reasons, the Panel is of the view that WADA's request for relief as amended in its appeal brief was filed in a timely manner and, thus, is admissible.

b) With respect to evidentiary measures

84. As mentioned above, Mr Pinter in his answer (par. 11.2 and 11.3) requested the CAS to adopt some evidentiary measures. Such measures were denied by the Panel by letters dated 22 May 2008 and 5 September 2008. The Panel, however, granted Mr Pinter the possibility to submit by himself the evidence sought. In addition and in order to assist Mr Pinter, the CAS Panel, on 26 May 2008, sent a letter, through the CAS Court Office, to the Italian authorities confirming that CAS proceedings were pending before the CAS and that it would welcome any assistance given by the Italian Public Prosecutor. The Panel confirms the decision to deny the measures requested: in fact, as it will be further explained (§ 117-118), even if the requested evidentiary measures had been granted, the conditions for the determination of the existence of an anti-doping rule violation would still be fulfilled on the basis of all the other considerations exposed here below.

V MERITS

85. At the hearing, the parties concentrated their submissions on two main issues namely whether there had been constructive possession of a Prohibited Method by Mr Jürgen Pinter (article 2.6 FIS ADR) and whether he had assisted, encouraged or had engaged in another form of complicity in an Anti-Doping Rule violation by another athlete or other athletes (Article 2.8 FIS ADR).

V.1 Constructive possession of a Prohibited Method

a) In general

86. According to the applicable WADA 2006 Prohibited List (valid 1 January 2006), the following are considered to be Prohibited Methods:

> "*M1. Enhancement of Oxygen Transfer*
>
> *The following are prohibited:*
>
> *a. Blood doping, including the use of autologous, homologous or heterologous blood or red blood cell products of any origin.*

b. Artificially enhancing the uptake, transport or delivery of oxygen, including but not limited to perfluorochemicals, efaproxiral (RSR13) and modified haemoglobin products (e.g. haemoglobin-based blood substitutes, microencapsulated haemoglobin products).

M2. Chemical and physical manipulation

a. Tampering or attempting to tamper, in order to alter the integrity and validity of Samples collected during Doping Controls is prohibited. These include but are not limited to catheterization, urine substitution and/or alteration.

b. Intravenous infusions are prohibited, except as a legitimate acute medical treatment."

87. According to article 2.6 FIS ADR the following constitutes an "*anti-doping rule violation*":

> *"2.6.1. Possession by an Athlete at any time or place of a substance that is prohibited in Out-of-Competition Testing or a Prohibited Method unless the Athlete establishes that the Possession is pursuant to a therapeutic use exemption granted in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification.*
>
> *2.6.2 Possession of Prohibited Substance that is prohibited in Out-of-Competition Testing or a Prohibited Method by Athlete Support Personnel in connection with an Athlete, Event or training, unless the Athlete Support Personnel establishes that the Possession is pursuant to a therapeutic use exemption granted to an Athlete in accordance with Article 4.4 (Therapeutic Use) or other acceptable justification."*

88. The concept of "possession" is defined in Appendix 1 (Definitions) of the FIS ADR as follows:

> *"Possession. The actual, physical possession, or the constructive possession (which shall be found only if the person has exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists); provided, however, that if the person does not have exclusive control over the Prohibited Substance/Method or the premises in which a Prohibited Substance/Method exists, constructive possession shall only be found if the person knew about the presence of the Prohibited Substance/Method and intended to exercise control over it. Provided, however, there shall be no anti-doping rule violation based solely on possession if, prior to receiving notification of any kind that the Person has committed an anti-doping rule violation, the Person has taken concrete action demonstrating that the Person no longer intends to have Possession and has renounced the Person's previous Possession."*

89. Under the FIS procedural guidelines to the FIS ADR (paragraph FIS.B.4), as a protective measure only, cross-country or Nordic combined skiers are not allowed to start in a FIS or international event if their haemoglobin (Hb) levels equals or exceeds

17 g/dl for men and 16 g/dl for ladies and they are prohibited from participating for five days commencing on the day the blood test took place. This protective sanction is sometimes referred to a "Start Prohibition".

90. There had been a concern in the sport that athletes were reducing or manipulating their haemoglobin levels before an event by blood management techniques including the administration of saline infusions. As noted above, this practice violates the general prohibition in the FIS ADR against infusions. It also exposes the athlete to a health risk since any form of infusion should be conducted only by trained and authorised medical personnel and only where it is as part of a legitimate acute medical treatment.

b) In Mr Jürgen Pinter's case

91. The Start Prohibition is very well known amongst those involved in the sport and athletes who are bound by the FIS ADR would be aware that intravenous infusions except as part of acute legitimate medical treatment are prohibited. Athletes cannot engage in such practices to manage or control their haemoglobin levels and cannot be in possession of the equipment to carry out such practices. Mr Jürgen Pinter said in his evidence that he had "*had six controls since [his] first race*" in Pragelato (page 135 of the transcript of the hearing held on 1 November 2007 before the Rivkin Panel) and there was discussion in his house about the protective sanctions.

92. Athletes bound by the FIS ADR would also be well aware that the prohibition is not only against actual physical possession but also extend to prohibit constructive possession as defined in Appendix 1 of the FIS ADR.

93. It was accepted in the present case that attention needed to be focussed on the definition of constructive possession. As relevantly stated in the definition, "*constructive possession shall only be found if*" (1) the athlete "*knew about the presence*" of the Prohibited Method, and (2) the athlete "*intended to exercise control over it*". Both of these two specific matters must be established to the comfortable satisfaction of the Panel before there can be a finding of constructive possession.

94. It is clear that the FIS Doping Panel erred when it said that constructive possession "*is control or dominion over an object without actual possession or custody of it*" (see page 9 par. 56 of the Appealed Decision). Also it should be noted that the definition of constructive possession does not require the athlete to intend to exercise "*exclusive control*" but merely that the athlete intends to exercise "*control*" over the Prohibited Method.

95. In essence, it was submitted in the present case that the evidence established that Mr Jürgen Pinter knew about the presence of the intravenous infusion equipment in the house and in the circumstances, that the Panel would be comfortably satisfied that he intended to exercise control over the prohibited method.

96. In order to evaluate the significance of the evidence which directly related to Mr Jürgen Pinter, it is necessary to consider it in the context of the environment and circumstances existing at the house at via del Plan No 5, Pragelato at the time of the police search in

the evening of 18 February 2006 and not in relation to events elsewhere such as at San Sicario or as may have occurred at the previous Olympics at Salt Lake City.

97. Mr Jürgen Pinter "*was the first Austrian cross-country skier*" to arrive at the house in Pragelato (page 106 of the transcript of the hearing held on 1 November 2007 before the Rivkin Panel) and he said that he arrived 10 days before his first event which was a relay race in which he competed with Mr Johannes Eder. This was the Men's Team Sprint held at Pragelato on Tuesday 14 February 2006. Mr Pinter and Mr Eder shared a room on the ground floor of the house next to the kitchen. The accommodation was cramped. Mr Johannes Eder has conceded before the Rivkin Panel that he had an infusion of saline solution in their room in Mr Pinter's presence at the time the police arrived at the house. Originally he said that there had been only the single infusion on the night of the search because he had diarrhoea (see Mr Johannes Eder's appeal brief filed before the CAS on 8 June 2007 – CAS 2007/A/1286, page 5, par. 15). It seems hardly credible that an athlete would travel from Austria to Italy with a blood infusion kit just in case he were to suffer diarrhoea in Pragelato.

98. Following the statement by Mr Emil Hoch that he had collected infusion bags found at his premises in Pragelato from Mr Johannes Eder and Mr Markus Hasler, and only at the hearing before the Rivkin Panel, Mr Eder accepted (or was reluctantly forced to admit) that there had been an earlier infusion. He said he was also concerned about high haemoglobin levels, yet in more than ten years of competition he had never been subject to a protective ban because of naturally occurring high levels or otherwise. He admitted that he had also administered another infusion of saline before the control blood test announced by FIS before the start of the Team Sprint. He then said that both these infusions were following an explicit order of his coach, Mr Hoch, because a protective ban was feared. Further, it was admitted that his coach, Mr Hoch, had collected the used infusion kit in order to dispose of it. There was no dispute that each of his actions constituted clear anti-doping violations under article 2 of the FIS ADR.

99. The floor plan and video footage of the house which had been rented by the Austrian cross-country skiers revealed that the room Mr Jürgen Pinter shared with Mr Johannes Eder on the ground floor was small, sparsely furnished with two small single beds, a single wardrobe and a chest of drawers. Two other cross-country skiers, Mr Martin Tauber and Mr Roland Diethart had rooms on the first floor of the house. At that time, Messrs Tauber, Pinter, Eder and Diethart comprised the four members of the Austrian team in the Men's 4x10km Relay which was to be raced at 10.00am on the following morning, Sunday, 19 February 2006. Mr Diethart occupied a separate room on the first floor but gained access through Mr Tauber's room.

100. When the Italian police conducted the search of the premises, they recorded that Mr Jürgen Pinter handed over a bag containing nine medical devices. These were four used single-use syringes with traces of blood and five unopened boxes of single-use 20 ml and 10 ml syringes which had been kept in the wardrobe.

101. Mr Jürgen Pinter has given conflicting reasons to explain the presence of this material:

- In a letter dated 19 March 2007 sent to the IOC Director of legal affairs, Mr Pinter,

through his lawyer, Dr Adolph Platzgummer, said "*the needles (...) had only been taken as a precaution, in case of an absolute emergency*" and as such an emergency had not occurred, they "*remained in their original packaging.*" For his defence before the IOC Disciplinary Committee, Mr Pinter made no references to his use of Thiogamma. On June 2007, in his appeal brief filed in the matter dealt by Rivkin Panel, Mr Pinter said that the syringes were used to inject Thiogamma and also to "*scratch the fingertip (...) to get a blood drop for the haemoglobin testing device*" which had been brought by Mr Martin Tauber (page 5 of the appeal brief). However, syringes are used to extract blood or infuse/inject substances into the blood stream and not to prick one's finger to get a blood drop. At the hearing before the Rivkin Panel, Mr Jürgen Pinter said that the four single-use syringes had been used by him to inject what he described as a "*homeopathic remedy*" on four occasions. He said that he used it three times before each race (page 107 of the transcript of the hearing held on 1 November 2007 before the Rivkin Panel). He had had one race on Tuesday 14 February 2007 and his second race was the Men's team relay at 10.00am on the following day, Sunday 19 February. He said that he had injected himself on the Friday night, that he was going to inject himself on the Saturday night but was unable to following the police search and that he would have injected himself on the morning of the race day.

- There was no evidence that Mr Jürgen Pinter was actually in the possession of Thiogamma during the raid of the Italian police. In his original defence before the Rivkin Panel, Mr Jürgen Pinter claimed that he handed over to the police a bag containing 4 used single-use syringes with traces of blood and 5 unopened boxes of single-use 20 ml and 10 ml syringes (see page 5 of his appeal brief in the matter CAS 2007/A/1286, 1288, 1289). It is only at a later stage of the proceedings that Mr Jürgen Pinter explained that he also handed over the Thiogamma to the Italian police with the used Thiogamma phials as well and they handed them back saying this is not important (page 111 of the transcript of the hearing held on 1 November 2007 before the Rivkin Panel). This assertion is doubtful. The police report which was in evidence did not record any such medication or phial (used or unused) being located during the search. Strangely, although Mr Pinter had purchased and used Thiogamma since about 2002/2003, not a single document or receipt has been produced to record a purchase or prescription of the substance. Nor had Mr Pinter ever recorded or advised the IOC, the WADA or any other agency or doping control about his use or injection of Thiogamma despite an alleged history of years of constant use. The point relating to the possession by Mr Pinter of Thiogamma will however be further considered below (§ 118).

- At the hearing held on 30 September 2008 before this Panel, Mr Jürgen Pinter's attention was drawn to the fact that the photograph of the used and unopened syringes obtained from him does not show used or unused butterfly needles. The police report does not make any reference to the presence of needles. For the first time since the police raid on 18 February 2006 and in contradiction with his answer lodged on 1 April 2008 (according to which the only material found in his possession was 4 used single-use syringes and 5 unopened single-use syringes), Mr Jürgen Pinter explained that the bag he handed over to the police also contained a butterfly needle. Allegedly, the police gave the needle back to the Mr Pinter, without reporting its existence. If Mr Pinter was going to inject Thiogamma,

presumably he would have obtained a needle from one of his teammates. Again, Mr Pinter produced no record of any purchase of the tubes and butterfly needles which he allegedly bought from chemists (page 116 of the transcript of the hearing held on 1 November 2007 before the Rivkin Panel) to inject the Thiogamma.

102. Mr Johannes Eder handed over an intravenous drip with a needle containing a small quantity of transparent liquid which was under the bed. Apparently, on being alerted by Mr Jürgen Pinter of the arrival of the search party, Mr Eder stopped his infusion and placed the equipment under the bed.

103. The Italian police then went upstairs and recorded that they found in Mr Martin Tauber's possession a "*biotest device for haemoglobin testing*" which was located on the bedside table, two jars (containing "*18 and 11 medical devices for haemoglobin testing*" which were found in Mr Tauber's travel bag), and fourteen medical devices (which included an "*opened pack with used single-use needles with traces of blood*", ten "*closed boxes of single-use needles*", two "*unopened packs of needles for infusions and transfusion*" and one "*infusion device in an unopened pack*"). In a letter dated 19 March 2007 sent to the IOC Director of legal affairs, Mr Tauber, through his representative, Dr Adolph Platzgummer said that the materials were used to test his haemoglobin levels and to ensure the most accurate results, "*the process was conducted several times a day*". Also he alleged that the device was used "*by other athletes*" and "*to help with the early diagnosis of overtraining, infections, etc*". Mr Jürgen Pinter alleged that he had only used this machine once and out of curiosity (see page 5 of his appeal brief in the matter CAS 2007/A/1286, 1288, 1289 and page 120 of the transcript of the hearing held on 1 November 2007 before the Rivkin Panel). Inconsistently Mr Pinter said (page 120 of the transcript) what other athletes had or didn't have, he wasn't aware of yet he then says "*I always saw people measuring haemoglobin level twice in a row with a maximum of two or three minutes in between*" and stated that Martin Tauber gave him a needle to measure his haemoglobin (page 121 of the transcript).

104. The Italian police then found in Mr Roland Diethart's possession four "*jars with 50 devices for haemoglobin testing*" which were found in a beauty case contained in his travel bag, one "*box labelled Anabol Loges, containing approximately 15 black pills*", one "*solution Kochsalz Braun 0.9% containing a transparent liquid with instructions*" which were found in a beauty case which was contained in Mr Diethart's travel bag. The police also recorded that they found in Mr Diethart's possession twenty-one "*medical devices including 13 unopened packs of syringes, 5 unopened packs of infusion devices, 1 pack of epicranial needles, 1 sterile packed microperfuser, and 1 unopened pack of single-use needles*" which were found in his beauty case in the travel bag. At the hearing before the Argand Panel Mr Diethart alleged that the police records were wrong. He said that his beauty case only contained lozenges (transcript of the hearing of 5 November 2007, page 126) and two butterfly needles and two infusion devices and not the twenty-one medical devices including 13 unopened packets of syringes as recorded.

105. The solution Kochsalz is a saline solution which is used in infusions to manipulate blood. Nevertheless, in a letter dated 19 March 2007 sent to the IOC Director of legal affairs, Mr Roland Diethart through his lawyer, Dr Adolph Platzgummer, said that it was urgently needed for washing his nose and nasal cavities, especially as he had an

infection (sinusitis) at the time. The syringes, infusion devices, butterfly needles (aka epicranial needles), microperfuser, and single-use needles were allegedly taken to the house by Mr Diethart as a precaution, in case of an absolute emergency and as an emergency had not occurred they were in their original packaging and intact. Inconsistently and before the Disciplinary Board of the Austrian Ski Federation, Mr Diethart said that "*it is correct that I had a box of cuvettes for controlling haemoglobin values. It was in my travelling bag. I check haemoglobin every day*" (page 6 of the transcript of the hearing held on 10 March 2006 before the Disciplinary Board of the Austrian Ski Federation). Mr Diethart, later at the hearing before the Argand Panel said that this was "a lie" and that he had only made this statement at the urging of the Austrian Ski Federation and Dr Platzgummer (transcript of the hearing of 5 November 2007, page 81, 97-100, 102-104). In addition, Mr Diethart, whose room was accessed via Mr Martin Tauber's and who arrived in the house, incredibly said that at the time he "*was unaware of the fact that Mr Tauber had*" the measuring device in the house (transcript of the hearing of 5 November 2007, page 80). Yet, Mr Tauber said that the "*machine was on my bedside table in my room and my room was never locked*" (page 172 of the transcript of the hearing held on 1 November 2007 before the Rivkin Panel). Mr Tauber said that "*all athletes living in our house who actually took their meals in the kitchen (...) were aware of the fact that I had a haemoglobinometer*" (page 182 of the transcript). Mr Tauber said he offered the machine to the other people in the house to use and that the rest of the equipment needed for it including the needle was in the little bag next to the machine (pages 183 and 184 of the transcript of the hearing held on 1 November 2007).

106. In the Melioli Report (pages 7 and 8), it is stated that the equipment found in the accommodations of the Austrian cross-country skiers constituted a "*complete kit for testing the ABO blood group. (...) The presence of this material suggests fairly complex scenarios. If only one athlete is using the self-transfusion technique a kit to check the blood group is not generally required. But if more than one athlete is self-transfusing, under the same logistical conditions, it can be necessary to check the group, especially if the bags are crudely identified and are all being stored together in a refrigerator or transported in a camper. The presence of a kit for checking a blood group therefore suggests the systematic use of the practice of self transfusion by these athletes.*"

107. Having conducted the search the Italian police left the premises at about 11.30pm and confiscated and removed one example of each device or material which had been found. These items were subsequently photographed and the photographs placed in evidence in these proceedings.

108. At about 11.50pm that same evening, members of the Italian police searched an apartment in Pragelato approximately 500 metres away at Pattamouche, Via Banchetta, No 1, in which one room on the ground floor was shared by Mr Emil Hoch, who was Mr Jürgen Pinter's and Mr Johannes Eder's coach, with a Mr Markus Gandler, who said that his duties included acting as "the manager" of the Austrian cross country ski team (pages 12 and 43 of the transcript of the hearing held on 2 May 2007 before the IOC Disciplinary Commission). The police recorded that a large amount of material was found inside a white plastic bag found in a travel bag in Mr Hoch and Mr Gandler's bedroom on the ground floor and was removed from the premises. The record of this

material was interpreted to and countersigned by Mr Hoch. Mr Hoch did not remain in Pragelato and fled to Austria the morning following the search. The amount of material was vast and even included a device for determining blood group.

109. The list of material inside the travel bag was described as:

a. three containers for renal infusion equipment;
b. one phial for infusions – brand name KOCHSALZ "BRAUN 0.9%;
c. needle with tubes and intravenous drip device;
d. one phial for infusions – brand name KOCHSALZ "BRAUN 0.9%;
e. one phial for infusions – brand name KOCHSALZ "BRAUN 0.9% containing liquid;
f. one plastic container with red top labelled "HEMOCURE";
g. one phial for infusions – brand name KOCHSALZ "BRAUN 0.9% apparently empty;
h. two glass phials containing liquid – brand name "Hatriumchlorod" 0.9% with cannulas and needles with blood;
l. one plastic container probably containing traces of blood;
m. two corks for needles with case and four empty cases and four needles with case;
n. one butterfly needle with probable traces of blood;
o. five handkerchiefs with probable traces of blood;
p. one plastic jacket with a white substance;
q. twelve pieces of plastic with a red substance and one plastic top;
r. one glass container;
s. one glass container with plastic top and metal bands;
t. one glass container with liquid.

110. The police also recorded finding materials in a rubbish bin outside the entrance to the apartment in Pragelato and adjacent to the bedroom occupied by Mr Emil Hoch and Mr Markus Gandler. Mr Hoch acknowledged that this was rubbish which he had collected from Austrian athletes for disposal. In this respect it confirms the evidence that the materials from first admitted infusion by Mr Johannes Eder had been collected by Mr Hoch, who had been put in charge of getting rid of the bloody material, the needles and everything else. In Mr Hoch's own testimony he said "*I gathered up the used vessels and needles as well as other rubbish at regular intervals in order to also dispose of those items*" (page 10 of the transcript of the hearing held on 18 April 2006 before the Austrian Ski Federation Disciplinary Board). Mr Pinter was trained by Mr Hoch and Mr Hoch also visited Mr Pinter's accommodation at Pragelato for meals and meetings (page 142 of the transcript of the hearing held on 1 November 2007 before the Rivkin Panel).

111. The list of the material inside the rubbish bin was;

a. three containers for intravenous drip containing liquid;
b. five sterile needles;
c. seven silver-coloured packets labelled "SERAFOL ABO";
d. ten sterile intravenous drip cannulas;
e. three small corks with needle;
f. five 10ml syringes with no needles;

g. one plastic syringe;
h. one yellow plastic bag containing two pieces of paper handkerchiefs, probably stained with blood, one needle cork and two plastic containers for syringe needles.

112. As described above, there was clearly ample evidence that blood infusion had taken place in the house at via del Plan No 5, Pragelato. There was a surprising amount of medical devices and equipment brought to the accommodation by the athletes and their coach. No medication such as Thiogamma was declared by any of the four athletes on any doping test form or protective test form.

113. There was evidence that Mr Martin Tauber's haemoglobin meter had taken 59 readings between 10 February 2006 and the search on 18 February 2006. Yet, there had only been three competitions before the police search. On 12 February 2006, Mr Tauber had competed in the Men's 30km Pursuit. On 14 February 2006, Mr Jürgen Pinter and Mr Johannes Eder had competed in the Men's Team Sprint. On 17 February 2006, Mr Tauber had competed in the Men's 15km Classical. The four athletes were due to compete as a team the next morning in the Men's 4x10km Relay. In the Melioli Report (page 9), it is noted that "*the extreme care with which the measurements were taken (measurements repeated within one or two minutes) and the ability to keep Hb levels just below 17 g% are worth noting. This is probably achieved by the practice of self-transfusions and dilutions using the oral intake of fluids, infusions of physiological saline, possibly with albumin added which, acting as a plasma expander, retains water, preventing haemoglobin levels from returning to values above the 17 g% threshold*".

114. This measuring device was freely available and was used by members of the same team living in close cramped quarters. However, with the exception of Mr Johannes Eder who now concedes two transfusions, each continues to assert that there was an innocent and independent explanation for their items of equipment. It was allegedly merely a matter of a combination of mere innocent coincidences. However, the haemoglobin meter was obviously there for one purpose and all the related equipment was clearly available for the same purpose that Mr Eder had sought to pursue namely the management or control of haemoglobin levels. All the equipment was freely available and the problems associated with these levels and of protective sanctions discussed in the house.

115. The unabashed and frank display of a prohibited infusion by Mr Johannes Eder in the presence of Mr Jürgen Pinter is consistent with a close and relatively intimate relationship between each of the four team members living in cramped quarters and sharing knowledge and resources. Mr Pinter may have injected himself with Thiogamma, but it is clear on the evidence that even for this practice he needed to obtain other injecting equipment such as unused butterfly needles from the other persons in the house if he intended to inject himself that night or in the next morning. The search records indicate that he had no supplies of unopened butterfly needles at the time of the search and that he would have had to use the equipment brought by the others even if he were only to inject Thiogamma. His evidence as to his single use of the haemoglobin meter is not credible, and it is most probable in the light of all the evidence that he also intended to use an infusion to control his haemoglobin levels by combining his equipment with that found in the possession of the others. On the evidence, the reasons each gave as an innocent explanation for the items seized from each of them are not

credible. The traces of blood in the syringes in Mr Pinter's possession are consistent with blood extraction as part of a blood infusion or manipulation. The most likely explanation for all the blood equipment is that each was aware of the problems of protective sanctions and what equipment the others had and where necessary, they would assist each other to ensure the levels were below 17 g/dl. Mr Pinter for example could access and use the saline solution found in the possession of both Mr Eder and Mr Diethart. The Panel is comfortably satisfied that Mr Pinter knew about the items seized from the others and intended to exercise control or use them to ensure that his haemoglobin level was just below and did not reach 17 g/dl.

116. Given

- the medical materials found in the physical possession of Mr Jürgen Pinter, within his accommodation and in the physical possession of the cross-country skiing team's support staff,
- the nature of the material found which suggests the systematic use of the practice of self-transfusion by the concerned athletes,
- the expert opinion of Professor Melioli, who concluded that, in the view of the circumstances, the Austrian cross-country and biathlon teams were supported by a sophisticated organisation,
- the active role of Mr Emil Hoch, who admitted that he was instructed to collect medical waste from the rooms and residence of the athletes on a daily basis and to dispose of it so that it would not be discovered,
- Mr Emil Hoch's testimony before the Austrian Ski Federation Disciplinary Board, where he confirmed that Mr Martin Tauber's haemoglobinmeter was at the disposal of the team,
- the athletes' close relationship and frequent contact with Mr Walter Mayer who was staying within walking distance of Mr Jürgen Pinter's accommodation in Pragelato,
- the nature of the living arrangements of the cross-country skiing team which made it impossible for Mr Jürgen Pinter to ignore the equipments that was in the physical possession of his team-mates,

the CAS Panel considers that each of the two ingredients necessary for constructive possession of a Prohibited Method has been established to the required standard of proof. The fact that syringes could also be possibly used by Mr Pinter for the injection of a non-prohibited substance, and the traces of blood found in the equipment physically found in the possession of Mr Pinter could show the presence of Thiogamma, do not change the conclusion: in any case, Mr Pinter was in possession (undisputedly of all necessary equipments) of a Prohibited Method.

117. In his answer of 1 April 2008 (par. 11.2 and 11.3), Mr Jürgen Pinter requested the CAS to take the necessary measures a) to have members of the police team (which took part in the raid of 18 February 2006) testify on the question of the presence of Thiogamma in his room and b) to analyse the content of his syringes seized by the Italian police, in order to confirm the presence of Thiogamma in the remains in the tubes. The CAS Panel

dismissed the request but granted Mr Pinter the possibility to submit the evidence by himself. In addition and in order to assist Mr Pinter, the CAS Panel sent a letter, through the CAS Court Office, to the Italian authorities confirming that CAS proceedings were pending before the CAS and that it would welcome any assistance given by the Italian Public Prosecutor. The latter rejected Mr Jürgen Pinter's requests for evidentiary measures.

118. The CAS Panel notes that even if the requested evidentiary measures would have been considered and would have resulted in the positive determination that Thiogamma was indeed in Mr Pinter's room and/or syringes, the conditions for the finding of the possession by Mr Pinter of a prohibited method would still be fulfilled on the basis of all the other considerations exposed here above. Even if the presence of Thiogamma were established, it would not exclude Mr Pinter's constructive possession of equipment that could be used for blood doping. Likewise, and as Mr Pinter is found guilty of constructive possession of a Prohibited Method, the fact that DNA-profile found on the evidence seized by the Italian Police could not be assigned to him, is irrelevant. If his blood would have been identified on the items seized, Mr Pinter would have been hit with the additional charge of "*Use or Attempted Use of a Prohibited Substance or a Prohibited Method*", as defined under article 2.2 of the FIS ADR.

V.2 Complicity

119. According to article 2.8 FIS ADR, "*Administration or Attempted administration of a Prohibited Substance or Prohibited Method to any Athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an antidoping rule violation or any Attempted violation.*

120. The Panel finds no reasons to depart from the position expressed in the Rivkin Award:

> *"9.56 In the context of the ADR, the first part of Article 2.8 may be fulfilled in the physical sense where, for example, an athlete physically assists a fellow athlete or support staff member by providing equipment to him or her that is necessary for the administration of that Prohibited Method. That physical assistance would also almost inevitably be a violation of the second part of Article 2.8.*
>
> *9.57 In the absence of proof of physical assistance, a violation of Article 2.8 can also be established by what might be termed "psychological assistance." Psychological assistance would be any assistance that was not physical assistance, such as, for example, any action that had the effect of encouraging the violation.*
>
> *9.58 This plain reading of the article is supported by Swiss Law (...).*
>
> *9.61 One athlete's own involvement in the practice or possession of items necessary for the practice of a Prohibited Method can have the effect of making other athletes more comfortable about their own use of a Prohibited Method. Under Swiss law, there are many cases that illustrate liability as an "accessory" for this type of psychological assistance. A good example is the case of Mailllard v Guye and Gutknecht [BGE 104 II*

184]. In that case, three children (A, B and C) had been engaged in a game of bows and arrows. During the game, A shot C in the eye. In assessing the civil liability of A and B, the Swiss Federal Tribunal found that both A and B had caused the injury to C because of their joint participation in the game. Although B did not shoot the arrow that actually hit C, he mentally supported and encouraged the dangerous game through his active participation in that game and therefore was found to be jointly and severally liable with A for the damage caused.

9.62 *The Panel must therefore consider whether or not each of the Appellants assisted, encouraged, aided, abetted or covered up the possession violations of his fellow Appellants in such a way as to contribute to causing his fellow Appellants' possession violations. The IOC has proven to the Panel's comfortable satisfaction that each Appellant met these standards. The facts outlined above demonstrate a broad pattern of cooperation and common activity, with the other athletes and with the coaches, in the possession of the Prohibited Method of blood doping.*

9.63 *Tauber's provision of the haemoglobinmeter was key in the administration of the Prohibited Method. Without that equipment, it is highly unlikely that the Appellants could have engaged in this activity. Tauber admits that he freely offered it to them for their use. Tauber also gave evidence that his fellow Appellants knew that he kept the haemoglobinmeter in his bedroom. Additionally, the Panel heard evidence about the cramped nature of the Appellants' accommodations and finds it highly unlikely that Tauber could have been unaware of the use of his haemoglobinmeter by his fellow Appellants or of the related equipment possessed by his fellow Appellants. For these reasons, the Panel finds that Tauber assisted his fellow Appellants in their own possession violations and has violated Article 2.8.*

9.64 *Both Eder and Pinter have violated Article 2.8 by engaging in the possession of a Prohibited Method and through this conduct encouraging and providing mental support to his fellow Appellants in their possession of a Prohibited Method. The possession by each athlete of various equipment necessary to engage in blood doping and the pattern of cooperation in, for example, using the haemoglobinmeter show that each athlete did not engage in this activity alone, but rather did so as part of a common scheme to engage in the Prohibited Method. Even if, as Eder suggested, the coach Hoch may have been the instigator of potential blood doping practices within the Austrian cross-country team at the Torino Olympic Games, the Panel believes that these practices would not have been possible had each Appellant himself not engaged in the Prohibited Method or at least possessed the items that enabled him to do so. This involvement had the effect of making routine the practice within the team, so that the Appellants were far more comfortable with, and less likely to reject, the practice. This effect is likely to be particularly compelling in a small, close-knit team such as that of the Austrian cross-country skiers.*

9.65 Moreover, the Appellants have denied any knowledge of the activities of their fellow Appellants or other athletes or of the items possessed by them (other than the haemoglobinmeter). The Panel does not consider these denials to be credible and rejects them. The evidence, particularly of the cramped nature of the accommodations and of the volume of materials found with Appellants and with Hoch, as well as the regular interaction with Hoch and other coaches, indicates to the Panel that the Appellants were aware of the items that all of them collectively possessed. Tauber and Pinter argue that none of the Appellants' DNA was found on the items possessed by Hoch and that those items therefore cannot be attributed to them. However, as described above in paragraph 9.25, blood residue remained in the syringe found in Pinter's possession. The Panel also notes that the report of Professors Stafano and Verdian concluded that their DNA analysis was largely inconclusive due to the lack of sizeable organic samples to test. On these bases, the Panel finds that all of the Appellants have violated Article 2.8 through their participation in these activities and the resulting encouragement of the possession violations of their fellow Appellants.

9.66 Tauber and Pinter submit that an athlete will only violate Article 2.8 if he or she is found to have assisted, encouraged, aided, abetted, covered up or engaged in "any other type of complicity" specifically in relation to the ADR violation(s) of another athlete. According to Tauber and Pinter, an athlete could only violate Article 2.8 if the athlete specifically conspired with other athletes engaged in an ADR violation. If only such "horizontal complicity" could violate Article 2.8, the mere participation of an athlete in, for example, a blood doping network would not represent a violation of Article 2.8 if that athlete was unaware that other athletes were also involved in the network. This interpretation would conflict with the plain reading of the ADR and the principle under Swiss law that assistance contributing to the violations of other athletes, even if negligently provided, will trigger joint liability. In any event, in this case, given the close proximity of the athletes living together and their common activities, the Panel is comfortably satisfied that the athletes knew what each other was doing.

9.67 Moreover, in light of the plain language of the second part of Article 2.8, which does not refer to athletes only, an athlete can violate Article 2.8 also through "vertical complicity," by which an athlete engages in an ADR violation that is facilitated by a coach or support staff, in circumstances where that coach or support staff also similarly facilitated the ADR violations of other athletes. In such a situation, an athlete may not positively know which other athletes are also engaging in ADR violations, but by his or her common utilisation of the coach or support staff for improper means, an athlete is complicit in the ADR violations of those other athletes and also of the coach or support staff. In this context, the Panel observes that although "complicity" is likely to involve some degree of knowledge on the part of the person alleged to be complicit, it is not necessary that that person knew all of the people involved or all of

the Prohibited Methods being used or possessed. The evidence of the regular participation of Hoch and other coaches in the athletes' activities would also show such vertical complicity."

121. The Panel fully accepts the reasoning made in the Rivkin Award, that in the absence of physical assistance or cover conduct such as concealment, complicity in a violation of the Anti-Doping Rules as required under Article 2.8 may be established by actions such as encouragement and exhortation. In the present circumstances each, whilst living in the same cramped accommodation, has used the same single haemoglobin measuring device on the premises. Each has most likely made available to the others items such as saline solution or butterfly needles to complete the equipment to carry out the blood control and manipulation. Each has most likely, and jointly, used Mr Hoch to dispose of the blood paraphernalia and blood refuse. In these circumstances there has clearly been sufficient collaboration to constitute complicity by Mr Jürgen Pinter within the meaning of Article 2.8 FIS ADR.

V.3 What is the sanction and how should it be calculated?

122. The sanction for a first violation of article 2.6 FIS ADR (Possession of Prohibited Substances and Methods) is a two-year suspension (article 10.2 FIS ADR). For violations of article 2.8 FIS ADR, the period of ineligibility imposed shall be a minimum of four years up to a lifetime ineligibility (article 10.4.2 FIS ADR).

123. Given the circumstances in which the FIS ADR violations occurred and in the view of Mr Jürgen Pinter's active participation in a collaborative blood doping network, the latter cannot qualify for a reduction in sanction as he cannot reasonably claim that he bears no significant fault or negligence or no fault or negligence (article 10.5 FIS ADR).

124. In the view of the above, a four-year period of ineligibility must be imposed upon Mr Jürgen Pinter.

125. Article 10.7 FIS ADR states that "*In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other doping violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes.*"

126. According to article 10.8 FIS ADR, "*The period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility to be served. Where required by fairness, such as delays in the hearing process or other aspects of Doping Control not attributable to the Athlete, FIS as the Anti-Doping Organization imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection.*"

127. At the hearing held on 30 September 2008, Mr Jürgen Pinter confirmed to the members of this Panel that he has never put on hold his career nor has he refrained from taking part in official competitions. Considering that none of Mr Jürgen Pinter's team-mates has been as severely sanctioned for similar or more serious deeds (if banned, they were sanctioned with a two-year period of suspension), the Panel is of the opinion that it would be unfair to sanction him with a period of ineligibility starting on 30 September 2008. As a matter of fact and based on article 10.7 FIS ADR, Mr Pinter would not only be suspended until September 2012 but all the results obtained since February 2006 would be forfeited, with the consequence that the sanction would actually be imposed over a six and a half year period. Finally, the CAS Panel takes into account the fact that the IOC and the FIS disciplinary proceedings were particularly lengthy. In particular the FIS did not complete the disciplinary process expeditiously, as the hearing before its investigation commission took place on 10 March 2006 and the Appealed Decision was rendered only on 22 November 2007.

128. Based on the foregoing, the CAS Panel deems it appropriate to declare that Mr Jürgen Pinter shall be sanctioned with a four years period of ineligibility starting on 1 March 2006, as this date coincide with the moment the latter could have been suspended after the Torino events.

VI. Costs

129. Articles R65.1 and R65.3 of the CAS Code provide that, subject to articles R65.2 and R65.4, the proceedings shall be free; that the costs of the parties, witnesses, experts and interpreters shall be advanced by the parties; and that, in the Award, the Panel shall decide which party shall bear them, or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

130. As a general rule the CAS grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. However, in the light of all of the circumstances and of the financial resources of the parties, the Panel concludes that it is reasonable for the parties to bear their own costs and other expenses incurred in connection with this arbitration.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeals of the IOC and of the WADA against the decision rendered on 22 November 2007 by the FIS Doping Panel are upheld.

2. The decision rendered on 22 November 2007 by the FIS Doping Panel is set aside.

3. Mr Jürgen Pinter is found guilty of anti-doping rule violations (article 2.6 and article 2.8 FIS ADR) and is declared ineligible for a period of four years running from 1 March 2006.

4. Mr Jürgen Pinter's results obtained during the above-mentioned period of ineligibility, his eventual medals, his points and prizes are forfeited.

5. This award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid and to be retained by the CAS.

6. Each party shall bear its own legal and other costs.

7. All other motions or prayers for relief are dismissed.

Lausanne, 20 November 2008

THE COURT OF ARBITRATION FOR SPORT

Luigi **Fumagalli**
President of the Panel