Arbitration CAS 2002/A/399 P. / Fédération Internationale de Natation (FINA), award of 31 January 2003

Panel: Dr. Martin Schimke (Germany), President; Prof. Richard H. McLaren (Canada); Dr. Denis Oswald (Switzerland)

Swimming
Doping (nandrolone)
Validity of the sampling procedure
Reliability of the analyses
Sanction

1. **The CAS has neither authority to apply or interpret the rules set by ISO (International Organisation for Standardisation), IEC (International Electrotechnical Commission) and ILAC (International Laboratory Accreditation Cooperation), or to force any laboratories to comply with those rules. The CAS is in no way a supervising authority for laboratories, being either IOC – ISO/IEC accredited or not. The CAS relies upon the accreditation process and is without authority to intervene and impose its views on the laboratory procedures to be applied by accredited labs. The absence of the "global uncertainty" in the A and B reports cannot, by any means, be considered as a gross violation of the ISO/IEC and ILAC guidelines, and therefore lead to arbitrary results and should consequently be corrected by the CAS Panel.**

2. **There is no provision which stipulates that a sampling agent is under no circumstances allowed to repeat a sample procedure and provides for that the possibilities to take another test is in any case exhausted after a first try. This does not mean that a sampling agent is more or less and always respectively allowed to make more than one urine collection. However, there is no provision which hampers him to do so when there are doubts about the regularity of the first test, especially when the athlete is casting doubts about that regularity.**

3. **Regarding the duration of the suspension, the CAS already had the opportunity to establish in previous awards that a four-year ban and even a life time ban were not disproportionate. Therefore, in a straightforward case of doping and when no circumstances tend to diminish the responsibility of the athlete, the policy set by FINA, IOC and other sporting federations in relation to doping is strict and consequently a four-year suspension and a six-month retroactive period involving cancellation of all result achieved shall be considered as proportionate.**

International Doping Tests and Management ("IDTM"), which conducts out-of-competition doping controls on behalf of FINA, granted Dr. R. ("SA") with a Collection Order enabling him to administer the collection of urine samples on behalf of the FINA from swimmers selected by the FINA Medical Committee in accordance with the FINA Doping Control Procedure.

The date for collection was : February – March 2002. The tests were to be *"Out-of-Competition"* and *"unannounced"* doping tests.

On February 23, 2002 Dr. R. arrived at the place of training of the swimmer P. (the Appellant) to carry out the sampling procedure.

When the Appellant was ready to provide the sample and selected the kit, she made the observation that the bottles and caps of the kit selected were marked "FIFA".

She asked whether it was a problem. According to Dr. R., he told her that if there were any problem, a new sample had to be provided. According to the Appellant, the SA told her that there would be no problem. The Appellant raised her objection on the sample collection form with the following remark: "The bottles have on top FIFA letters".

Dr. R came back on February 25, 2002 to perform another sampling procedure.

Once he got to the place of training of the Appellant, he explained to her that she had to provide another sample, as the kit he provided for the first sample was not the proper one. He destroyed the paperwork from the first test and gave the corresponding sample to the Appellant.

He gave no evidence of his ability to perform the sampling procedure.

The SA presented the Appellant with the sampling kits. She selected one and during its handling she locked the bottle by mistake.

She drew to the attention of Dr. R. that the bottles had no security rings.

Then, she took the second and only kit left and provided the urine sample.

The Doping Control Form was completed and signed by the Appellant, the trainer and the SA. Neither the Appellant nor her trainer made any formal reservation in regards to the security rings on the collection form.

Dr. R. kept the samples on his way back to his country. They were safely stored in cool conditions during the waiting time and then send by DHL on March 2, 2002.

The IOC accredited laboratory in charge of the analysis (IRNS Institut Armand Frappier, Québec) ("the Laboratory") received the samples on March 5, 2002.

Both samples were safely stored at the Laboratory.

On March 19, 2002 the A-sample analysis reported a positive test with a level of Norandrosterone of 7.3 ng/ml +/-0.3 (4.1%).

Consequently, on March 26, 2002, the FINA Executive decided to suspend the Appellant provisionally, starting on the same day, until a hearing before the FINA Doping Panel can be made following the test result of the B-sample.

The B-sample analysis was carried out on May 14, 2002 in the presence of the Appellant and her representative.

On April 16, 2002 the B-sample analysis reported a positive test with a level of Norandrosterone of 7.5 ng/ml +/-0.3 (3.6%).

On May 31, 2002, the FINA Doping Panel held a hearing in Lausanne that was attended by the Appellant, her lawyer and her trainer and a representative of the Respondent.

The Appellant was found by the FINA Doping Panel to have committed a doping offence under FINA rules DC 2.1(a) and DC 9.1.1. and was suspended for four years commencing on March 26, 2002. Furthermore the results achieved by the Appellant during the period from September 26, 2001 to March 26, 2002 were cancelled.

The decision was received by the Appellant on June 6, 2002.

A statement of appeal was filed before the CAS on July 8, 2002.

The hearing was held in Lausanne on December 12, 2002.

The following persons gave oral evidence :
- For the Appellant : Prof. Maurice Cox and Dr. Adriaan van der Veen.
- For the Respondent : Prof. Christine Ayotte and Dr. Martial Saugy.

The Appellant claims that the doping test upon which FINA's decision was based has no legal basis under FINA's own rules, as the Doping Officer was not authorised to perform a second sampling procedure.

It is submitted that FINA cannot meet its burden of proof in relation to the sampling procedure and how it was carried out.

It is further submitted that FINA cannot meet its burden of proof in relation to the Laboratory results taking into consideration the way in which the A and B-sample analysis was carried out and the duty to keep a proper chain of custody. This contention initially contained in the appeal brief was abandoned during the hearing and will therefore not be addressed by the Panel.

The Appellant considers that the Laboratory failed to make any reference to the measurement uncertainty in its reports which amounts to a violation of the FINA rules, Swiss law, as well as the requirements contained within the ISO/IEC guide 17025 and ILAC G8 and the principles "*Good Laboratory Practice*".

Furthermore she claims that the quantities of Nandrolone detected in her urine samples are too low to be considered as positive, as this substance can be produced naturally by athletes, particularly in response to stress and physical exertion.

Finally, the Appellant considers that the decision of the FINA fails to take into account her lack of intention to use doping.

For these reasons, the Appellant requests the Panel to dismiss any doping charges against her, or if a doping offence must be found, not to issue any suspension, or to issue a sanction that is proportionate to the offence committed.

The Respondent considers that the Doping Officer had the authority to perform a second sampling procedure and that this procedure was properly conducted.

As well, FINA considers that the chain of custody was properly maintained by the Laboratory and rejects the argument on the measurement uncertainty.

Concerning the sanction, the Respondent claims that its duration was consistent with the applicable rule.

For these reasons, FINA request the Panel to reject the appeal and confirm the sanction imposed by the FINA on the Appellant.

LAW

1. The competence of the CAS to act as an appeal body is based on art R47 of the Code, which provides that:

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

   and on article C 12.8.3 of FINA Constitution applicable at the time when the Appeal was filed which reads as follows:

"An appeal against a decision by the Bureau or the FINA Doping Panel shall be referred to the Court of Arbitration for Sports (CAS), Lausanne, Switzerland, within the same term as in C 12.8.2. The only appeal from a decision of the Doping Panel shall be to the CAS."

2. The Appellant's appeal is against the decision of the FINA Doping Panel. It is from the decision "*of a disciplinary tribunal or similar body of a federation*". Article C 12.8.3 provides for arbitration before the CAS and the Appellant has exhausted the legal remedies available prior the appeal to the CAS (There is none). The conditions set by R 47 of the Code and article C 12.8.3 are therefore met.

3. Moreover, the competence of the CAS is explicitly recognised by the parties in their briefs.

4. The appeal is admissible for the following reasons :

   a. The decision of the FINA Panel (of June 3, 2002) imposing a sanction on the Appellant was received on June 6, 2002.

   b. The Appellant's appeal was filed on July 8, 2002, namely on the first business day after the one-month time limit set by C 12.8.2 and C 12.8.3 of the FINA Constitution.

5. The art. R58 of the Code provides:

   "The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in absence of such a choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled."

6. Such provision was expressly mentioned in the Order of Procedure signed by both parties.

7. The *"applicable regulations"* in this case are the DC Rules (in the *"FINA Handbook"* for the period 2002-2005).

8. The parties have not expressly or by implication agreed a choice of law applicable to these proceedings before the CAS. Since the domicile of FINA is in Lausanne, Switzerland (Article C 2 of the FINA Rules) the Panel shall apply Swiss law.

9. Accordingly the Panel is going to apply those rules contained in Swiss law and in the FINA Rules. It stresses this because some of the authorities discussed in writing and orally before it related to the rules of other bodies such as ISO (the International Organisation for Standardisation), IEC (the International Electrotechnical Commission) and ILAC (the International Laboratory Accreditation Cooperation).

10. Those bodies form the specialised system for worldwide standardisation. Their purpose is the development of International Standards through technical committees established by the respective organisation to deal with particular fields of technical activity (see ISO/ISE 17025, page iv).

    According to the Preamble of Guidelines on Assessment and Reporting of Compliance with specification of ILAC-G8:1996 :

"These guidelines have been prepared to assist laboratories worldwide on the method for stating test results and assessment of compliance with specification for testing laboratories."

11. If those bodies have authorities towards the *"supplier"* or the *"client"* concerned by the *"particular fields of technical activity"* in which the ISO/IES or ILAC is active, they have no authority towards the parties involved in this proceeding, i.e. FINA and P.

12. Dicta in those cases have to be read in the context of the relevant regulatory structure, i.e. the accreditation of a *"supplier"* or the harmonisation of an *"International Standards"* and have, accordingly, no compulsive force upon the Panel.

13. The applicable procedure in this case is the appeal procedure provided for by art. R47 *et seq* of the Code. Pursuant to art. R57 of the Code

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

    Accordingly this Panel is not bound by the findings of or evidence adduced before any other court or body which has ruled on this case.

14. According to C 12.1 of the FINA Rules *"any member or individual member of a member may be sanctioned"*. Even though, technically, the Appellant is not a member or individual member of a member of FINA (Appellant is a member of her local swimming club and not of CRC, the FINA member), the fact that C 12.4 of the FINA Rules makes reference to a "competitor or a person" can only be interpreted to mean that (also) a swimmer can be sanctioned by FINA if they violate FINA Rules.

15. The question remains through which legal instrument the Appellant is bound by the FINA Rules. In particular the following questions arise:

    - Is there a chain of references to the FINA Rules in the by-laws (starting from the Appellant's swimming club over the by-laws of CRC to the FINA Statutes)?
    - Is there an agreement/licence/"swimming passport" through which the Appellant has accepted that she is subject to the FINA Rules?

16. Article DC 1.2 provides that the Rules and the Regulations of Member Federations shall indicate that the FINA Doping Control Rules shall be directly applicable to competitors. In the absence of counter evidence one can assume that the CRC-Rules comply with the requirements of article DC 1.2. In addition, the Appellant confirmed in a personal statement that she always felt subject to the FINA Rules. Therefore, the Panel has no doubt that the FINA Doping Control Rules can be deemed directly applicable to the Appellant.

17. FINA Doping Panel's competence to impose a sanction on a competitor derives from articles C 12.5 and C 21.5 of the FINA Constitution.

18. On June 3, 2002 the FINA Doping Panel found the Appellant to have committed a doping offence and therefore suspended her for four years commencing on March 26, 2002 and

cancelled all results achieved by the athlete during the period from September 26, 2001 to March 26, 2002.

19. Article DC 2.1.a) and DC 9.1.7 provide:

"Doping offences are:
a) the finding of a prohibited substance within a competitor's body tissue or fluids."

"The finding in a competitor's body tissue or fluids of a prohibited substance shall constitute an offence, regardless of whether the competitor can establish that he or she did not knowingly use the prohibited substance."

20. Under the FINA Doping Policy, an offence has therefore been committed when it has been established that a prohibited substance was present in the athlete's tissue or fluids. There is thus a legal presumption that the athlete is responsible for the mere presence of a prohibited substance. This is found to be the case in Baxter v/ IOC 2002/A/376 based upon the equivalent language in the Olympic Movement Anti-Doping Code.

21. The burden of proof of FINA is to establish to the comfortable satisfaction of the Panel that a prohibited substance has been properly identified in the athlete's urine. If FINA is successful in proving this element, there is a legal presumption that the athlete committed an offence, whatever the intention of the athlete to commit such offence. The extent to which the athlete has the opportunity to disprove their guilt under the FINA Doping Policy will be discussed later below.

22. The CAS believes that this legal presumption and the system of shifting the burden of proof is legally proper despite the fact that disciplinary sanctions in doping cases are similar to penalties in criminal proceedings where the prosecutor normally has the burden of proving not only the factual elements of an offence but also a degree of guilt on the part of the accused. On many occasions, the CAS had the opportunity to confirm this strict liability rule (F. v/ FINA 1996/156, p.42; C. v/ FINA 1995/141; G. v/ FEI 1992/63 confirmed by the Swiss Supreme Court ATF March 15, 1993 G. v/ FEI; FCLP v/ IWF 1999/A/252; A. v/ FINA 2001/A/317 p. 20 and the most recent decisions of the Swiss Supreme Court in this respect: judgement of December 04, 2000, 5P. 427/2000, R. v/ IOC, § 2.a. (not published); judgement of March 31, 1999, 5P. 83/1999, N. et al. v/ FINA in Digest of CAS Awards II, § 3d, p. 781).

23. In the case at hand, the first question to be answered is whether the FINA has met its burden of proof or, in other words, whether the condition provided for at art. DC 9.1.7 *"findings in a competitor's body tissue or fluids of a prohibited substance"* is fulfilled.

24. Articles DC 2.1 and DC 3.1 A provide:

"Doping offences are:
a) the finding of a prohibited substance (DC 3.1) within a competitor's body tissue or fluids;"

"Except as set forth in DC 3.5, the following classes of substances shall be prohibited in competition:
(…)

and the following classes of substances shall be prohibited at all times:
A. Anabolic agents
(…)"

25. Article DC 8.3.2 provides:

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

26. As such the findings of the IRNS (Institut Armand Frappier, Québec) ("the Laboratory") are sufficient to impose a sanction on the Appellant based on the above-mentioned rules:

- For the reasons set out in 9.1.3 above the FINA Doping Control Rules were applicable to the Appellant.
- According to article DC 8.3.2, the reports of the Laboratory, which is an IOC accredited laboratory, are presumed to be scientifically correct.
- According to articles DC 2.1 and DC 3.1 of the FINA Handbook and the Laboratory reports, the Appellant committed a doping offence.

27. FINA has thus met its burden to prove that in proper test proceedings a prohibited substance was found in the athlete's urine. Pursuant to article 9.1.7 of the FINA Handbook this constitutes an offence. The requirements for the legal presumption have been met.

28. As the Respondent has demonstrated that according to the results of an accredited laboratory a prohibited substance has been found in the athlete's fluids the burden of proof shifts to the Appellant to prove that either the sampling procedure was not correctly carried out, the Laboratory did not conduct a proper custodial procedure, the quantity of Nandrolone found in her urine was under the threshold or she had no intention to have committed a doping infraction.

29. The rebuttal of the presumption is provided for in the FINA material. Article DC 9.1.7 states:

"The right to a hearing related to an offence under DC 9.1 can involve only:

a) whether the correct body tissue or fluid has been analysed;
b) whether the body tissue or fluid has deteriorated or been contaminated;
c) whether the laboratory analysis was correctly conducted;
d) whether the minimum suspension for a first offence should be exceeded;
and
e) whether a minimum sanction can be lessened in accordance with DC 9.10."

30. No convincing argument has been adduced to establish that the laboratory analysis was not correctly conducted.

31. The first contention of the Appellant was about measurement uncertainty and how the Laboratory reported this uncertainty.

32. According to the expert witnesses for the Appellant in this matter, the Laboratory has issued incomplete test results which do not fulfilled the requirements set by the ISO/IEC and ILAC.

33. As already mentioned in part 8 (Applicable law) above, the Panel is of the opinion that those bodies have authorities towards the *"supplier"* or the *"client"* concerned by the *"particular fields of technical activity"* in which the ISO/IEC or ILAC is active.

34. Dicta in those cases have to be read in the context of the relevant regulatory structure, i.e. the accreditation of a *"supplier"* or the harmonisation of an *"International Standards"* and have, accordingly, no compulsive force upon the Panel.

35. The Panel has neither authority to apply or interpret the rules set by those bodies, or to force any laboratories to comply with those rules. The Panel is in no way a supervising authority for laboratories, being either IOC – ISO/IEC accredited or not. The Panel relies upon the accreditation process and is without authority to intervene and impose its views on the laboratory procedures to be applied by accredited labs.

36. In the case at hand, the only question to be answered is whether the laboratory analysis was properly conducted by the IRNS. If the Panel happens to rely on the rules set by the ISO/IEC and ILAC to answer this question, taking into consideration its position towards laboratories and towards those latter bodies, it shall only scrutinise those rules in a very cautious manner, as the Swiss Federal Court would do to apply the regulation enacted by local entities such as a Canton. Only a gross violation would lead to what shall be considered as arbitrary and consequently to a correction.

37. In relation to the measurement uncertainty argument, the Appellant relied on the testimony of two experts: Prof. Maurice Cox and Dr. Adrian van der Veen.

38. According to Prof. Cox, as the Laboratory is an ISO/IEC accredited laboratory, it should comply with the rules set by this body, in particular ISO/IEC 17025 clause 5.4.6.2 stating that:

    "(…)the form of reporting of the result does not give a wrong impression of the uncertainty (…)"

    As the uncertainty stated by the report of the Laboratory in the case at hand accounts only for repeatability effects and not for the systematic effects, the test results contained in the report are incomplete and therefore invalid.

39. According to Dr. van der Veen, the Laboratory has not established a credible and underpinned statement of measurement uncertainty.

    Dr. van der Veen relies on both ISO/IEC and ILAC regulations but as well on WADA draft document on Laboratory Accreditation Requirements and Operating Standards ("LAROS"), clause 5.4.4.3.2.2 stating that:

"The expression of uncertainty should use the expanded uncertainty using a coverage factor, k, to reflect a level of confidence of 99% (…)"

According to this expert, the Laboratory did not include in its report this *"expanded uncertainty"*, and as the reported values of 7.3 and 7.5 ng/ml were not significantly over the threshold of 5 ng/ml, the Laboratory misled its customer FINA.

40. The Respondent relied on the testimonies of Prof. Christine Ayotte, head of the IRNS Laboratory and Dr. Martial Saugy.

41. According to Prof. Ayotte, it has to be pointed out that the threshold of 5ng/ml for female is very cautious and well above the level of endogenous production of Nandrolone. This point was confirmed by Dr. van der Veen.

Despite this margin of tolerance, the IRNS Laboratory uses precise and reliable methods, calibration curve being one of them, to detect the level of Nandrolone. In the case at hand the standard deviation was considered to be of 0.3 ng/ml. (A sample report, page 50 and 51; B sample report, pages 97 and 98).

The conduct of the analysis by the IRNS is made according to the *"Analytical criteria for reporting low concentrations of anabolic steroids"* set by the IOC Medical Commission on August 7, 1998.

42. According to Prof. Ayotte even though the k=2 or k=3 factor would have to be considered, the results would still be above the 5ng/ml threshold.

43. Dr. Martial Saugy, head of the Laboratoire Suisse d'Analyse du Dopage, confirmed that the methods used by the IRNS were up to date methods and that this laboratory had to be considered as the most accomplished entity in the analysis of anabolic steroids.

44. The following undisputed facts need to be recalled:

- The IRNS Laboratory is an ISO/IEC accredited laboratory applying IOC requirements;
- As such, it has been considered by those bodies to fulfil the standards set by them;
- The reputation of the IRNS Laboratory has always been outstanding, this being confirmed by its peers;
- No proof was brought by the Appellant before the Panel that the IRNS Laboratory's ISO/IEC accreditation was in jeopardy;
- Neither the ISO/IEC and ILAC guidelines provide expressly for both measurement uncertainties (repeatability and global (k=3)), only the WADA draft document does so.

45. The Appellant relied on experts that consider that testing laboratories shall apply procedures for estimating uncertainty of measurement. This procedures, according to ISO/IEC and ILAC guidelines, shall include both repeatability standard deviation and global uncertainty measurement.

46. In the CAS-case H. v/FIM (2000/A/281) as in the case under consideration here there was a difference of opinion amongst the experts. In that case the appellant was of the opinion that a different calculation method with respect to the concentration needed to be applied and the specific gravity of the sample should be taken into account by the lab in the application of a correction factor.

    The panel in charge of that particular case finally held:

    "that the established IOC testing procedures need to be applied strictly and do not leave room for the transfer of certain methods from one testing procedure to another on a case by case basis. If there was a need for the application of a correction factor in ephedrine cases this decision had to be taken by the competent authorities of the IOC. It cannot be the task of the CAS to amend on a case by case basis the rules established by the International Olympic Committee and applied by the IOC accredited doping laboratories."

47. This being said, this Panel is of the following opinion:

    - Even though the A and B reports of the IRNS do not contain the global uncertainty measurement as recommended by WADA draft document (k=3), the Panel, taking into account the safeness of the methods used by the Laboratory, is of the opinion that "the results do not give the wrong impression of the uncertainty."
    - As such, the absence of the global uncertainty (k=3) in the A and B reports cannot, by any means, be considered as a gross violation of the ISO/IEC and ILAC guidelines, and therefore lead to arbitrary results and should consequently be corrected by the Panel.
    - If scientific amendments to the ISO/IEC guidelines seem to be necessary, it is the duty of the ISO/IEC to carry out the necessary implementations as was suggested in the Haga case. Significantly regarding the debated "confidence level" even Professor Dr. van der Veen made in his oral observation statements like:

      "One should address the competent bodies responsible for the accreditation procedure"

      or

      "one should recommend to the IOC Laboratories to introduce the said 99 % confidence level system".

48. Having said that, the Panel considers that the laboratory analysis were properly conducted by the IRNS, the presumption contained in article DC 8.3.2 is therefore not rebutted.

49. No convincing argument has been adduced to establish that the quantity of Nandrolone detected in the Appellant's urine is too low to be considered as positive.

50. The threshold of 5ng/ml is contained in the FINA Handbook, page 362:

    "Summary of urinary concentrations above which IOC accredited laboratories must report findings for specific substance (…)

    19-norandrosterone > 5 ng/ml in female (…)."

51. This threshold for reporting Nandrolone positives for female is scientifically backed by the majority of the medical opinions stated on this issue. (For example P. HEMMERSBACH ET AL.

(2000) reported endogenous production from 0.2 to a peak of 0.8 ng/ml (middle cycle – ovulation), pregnancy being excluded).

Stress and physical exertion has no impact on the quantity of the substance (Schmitt, N., et al. Nandrolone excretion is not increased by exhaustive exercise in a trained athlete, Med. Sci. Sports & Exerc., 34, 1436 (2002).

52. The Panel is convinced that the applicable threshold set by the IOC based on a recommendation of the directors of the various IOC accredited labs is valid. As the quantity of Nandrolone found in the Appellant's urine is above this threshold, her case has to be considered as positive.

53. No convincing argument has been adduced to establish that the sampling procedure was flawed.

54. The SA arrived on February 23, 2002 at the Appellant's place of training to carry out the sampling procedure. After having presented the necessary documentation started the usual collection process.

The kit used to collect the urine contained *"FIFA"* stamped bottles.

The SA came back on February 25, 2002 to perform another sampling procedure.

The SA presented the Appellant with the sampling kits. She selected one and during its handling she locked the bottle by mistake.

She draws the attention of the SA to the fact that the bottles had no security rings.

Then, she took the second and only kit remaining and provided the urine sample.

55. Article DC 1.4 of the FINA Handbook provides:

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

56. The question to be answered is whether

- the fact that the sampling process had to be carried out twice;
- the fact that the athlete locked by mistake one security kit leaving only one available kit;
- the fact that the bottle did not include any security rings;

should be considered as a departure casting genuine doubt on the reliability of the findings?

57. Concerning the fact that the sampling process had to be carried out twice, it must be noted that the SA was enabled to proceed to *out-of-competition unannounced tests* during a definite period of time: February to March 2002.

According to article DC 7.2 *"Unannounced doping control may be conducted at any time, including at the time or location of any competition in every Member country. Preferably it shall be carried out without any advance notice to the competitor or his Federation (…)"*

58. During the period set by IDTM on behalf of FINA, the SA had the opportunity to collect urine of the Appellant without any restriction. Such out-of–competition tests are precisely designed to be at random, depriving the athlete of the opportunity to foresee such tests.

In particular there is no provision which stipulates that a SA is under no circumstances allowed to repeat a sample procedure and provides for that the possibilities to take another test is in any case exhausted after a first try. This does not mean that a SA is more or less and always respectively allowed to make more than one urine collection. However, there is no provision which hampers him to do so when there are doubts about the regularity of the first test, especially when the athlete is casting doubts about that regularity.

The comparison brought forward by the Appellant to the German "Krabbe-Case" does not fit. The "Krabbe-Case" concerned in any case only one test and – as Appellant self-confirms – this test was carried out by an institution which had no authorisation at all (SAAF instead of DLV's Doping Commission). In the case at hand there is not doubt that FINA/FINA's SA was (basically) competent for the tests at issue.

Therefore, the fact that the sampling happened twice within a short period of time has no relevance on the validity of the results.

59. Concerning the fact that the Appellant could only choose the last sampling kit available, it must be pointed out that the first sampling kit was closed by mistake by the Appellant.

60. According to article DC 8.1.4 the competitor *"shall select from a number of such kits a urine control kit (…)"*. The SA agent had presented two kits. The conditions of article DC 8.1.4 were therefore met. If the Appellant misused one kit, it is not a reason to consider that only one kit was presented to her.

In addition, according to DC 8.2.1, rules applying to in competition procedures have to apply out of competition "as reasonably practicable". This justifies – according to the argumentation of the respondent – that SA may have fewer kits than would be the case as may be the case in competition.

61. Nonetheless, such departure, if it had to be considered as a departure, would not affect the validity of the results.

62. Concerning the fact that the bottle did not include any security rings, this matter is, according to the manufacturer, not relevant as the security rings are protecting the kits from accidental closure during its transportation. Moreover theses rings have no influence on the security of the kits, reason why they are optional.

For the rest, no formal reservations in regards to the security rings were made on the collection form (see 3.14). The athlete's failure to note irregularities in sample collection on the doping form can result in estoppel (see B. v/ FEI 2000/A/313).

63. The Panel is of the opinion that the reproaches addressed by the Appellant to the sampling procedure shall not be considered as departures casting genuine doubt on the reliability of the findings. Therefore they had no influence on their validity.

64. No convincing argument has been adduced to establish that the Appellant had no intention to commit a doping infraction.

65. Article DC 9.10 provides:

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

66. The Appellant in her statement simply denied having taken any substance during her whole career that could amount to doping. She did not give any explanations on how the substance got into her body.

67. According to article DC 9.10 she has the responsibility to assure that no prohibited substance shall enter her body. In the case at hand she was found with a prohibited substance in her urine. She shall be held fully responsible for those findings.

68. The offence is now established. The question, which remains to be answered, is whether the length of the suspension is correct.

69. According to article DC 9.1.1 of the FINA Handbook, for the first doping offence involving anabolic agents:

- *"a minimum of four years' suspension;*

plus

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

70. According to IRNS Laboratory results, the Appellant was tested positive with anabolic agents during an out-of-competition test. This was the first offence recorded for her. Therefore the four years suspension and the six months retroactive period appears to the Panel as justified.

71. Article DC 9.1.1 is drafted in a way, which does not allow the authority to take into consideration circumstances that would lead to a reduction of the sanction. However, the CAS, in many cases, took into consideration the reduction of a sanction (F. v/ FINA TAS 1996/56). The criteria for the application of such measure are laid in the case W. v/ FEI (1999/A/246). The main principle is the following:

"The Panel notes that it is a widely accepted general principle of sports law that the severity of a penalty must be in proportion with the seriousness of the infringements. The CAS has evidenced the existence and the importance of the principle of proportionality on several occasions."

72. The Panel considers, that the present case is a straightforward case of doping, that the policy set by FINA, IOC and other sporting federations in relation to doping is strict and that no circumstances are present in this case which would tend to diminish the responsibility of the athlete. Regarding the duration of the suspension, the CAS already had the opportunity to establish in previous awards that a four-year ban and even a life time ban were not disproportionate (see e.g. CAS 2000/A/274 S. v/FINA and CAS 2001/A/330 R. v/FISA). Therefore, both sanctions imposed on her shall be considered as proportionate and shall be confirmed.

The Court of Arbitration for Sport rules that:

1. The appeal filed by P. of 8 July 2002 is dismissed.

2. The decision of the FINA dated 3 June 2002 is confirmed.

3. (...)