**CAS 2011/A/2495 FINA v. César Augusto Cielo Filho & CBDA**
**CAS 2011/A/2496 FINA v. Nicholas Araujo Dias dos Santos & CBDA**
**CAS 2011/A/2497 FINA v. Henrique Ribeiro Marques Barbosa & CBDA**
**CAS 2011/A/2498 FINA v. Vinicius Rocha Barbosa Waked & CBDA**

# ARBITRAL AWARD

delivered by

## COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Alan Sullivan QC, barrister in Sydney, Australia

Arbitrators: Mr Olivier Carrard, attorney-at-law in Geneva, Switzerland

Mr Jeffrey G. Benz, attorney-at-law in Los Angeles, USA

in the arbitrations between

**1. FEDERATION INTERNATIONALE DE NATATION (FINA),** Lausanne, Switzerland
Represented by Me Jean-Pierre Morand, attorney-at-law in Lausanne, Switzerland and Me Ross Wenzel, attorney-at-law in Lausanne, Switzerland

- Appellant-

**and**

**CESAR AUGUSTO CIELO FILHO,** Brazil
Represented by Mr Howard Jacobs, attorney-at-law in Los Angeles, USA

-First Respondent-

and

**CONFEDERAÇÃO BRASILEIRA DE DESPORTOS AQUÁTICOS (CBDA),** Rio de Janeiro, Brazil
Represented by Mr Marcelo Franklin, attorney-at-law in Rio de Janeiro, Brazil

- Second Respondent-

**2. FEDERATION INTERNATIONALE DE NATATION (FINA),** Lausanne, Switzerland
Represented by Me Jean-Pierre Morand, attorney-at-law in Lausanne, Switzerland and Me Ross Wenzel, attorney-at-law in Lausanne, Switzerland

- Appellant-

**and**

**NICHOLAS ARAUJO DIAS DOS SANTOS,** Brazil
Represented by Mr Howard Jacobs, attorney-at-law in Los Angeles, USA

-First Respondent-

and

**CONFEDERAÇÃO BRASILEIRA DE DESPORTOS AQUÁTICOS (CBDA),** Rio de Janeiro, Brazil
Represented by Mr Marcelo Franklin, attorney-at-law in Rio de Janeiro, Brazil

- Second Respondent-

**3. FEDERATION INTERNATIONALE DE NATATION (FINA),** Lausanne, Switzerland
Represented by Me Jean-Pierre Morand, attorney-at-law in Lausanne, Switzerland and Me Ross Wenzel, attorney-at-law in Lausanne, Switzerland

- Appellant-

**and**

**HENRIQUE RIBEIRO MARQUES BARBOSA,** Brazil
Represented by Mr Howard Jacobs, attorney-at-law in Los Angeles, USA

-First Respondent-

and

**CONFEDERAÇÃO BRASILEIRA DE DESPORTOS AQUÁTICOS (CBDA),** Rio de Janeiro, Brazil
Represented by Mr Marcelo Franklin, attorney-at-law in Rio de Janeiro, Brazil

- Second Respondent-

**4. FEDERATION INTERNATIONALE DE NATATION (FINA),** Lausanne, Switzerland
Represented by Me Jean-Pierre Morand, attorney-at-law in Lausanne, Switzerland and Me Ross Wenzel, attorney-at-law in Lausanne, Switzerland

- Appellant-

**and**

**VINICIUS ROCHA BARBOSA WAKED,** Brazil
Represented by Mr Howard Jacobs, attorney-at-law in Los Angeles, USA

-First Respondent-

and
**CONFEDERAÇÃO BRASILEIRA DE DESPORTOS AQUÁTICOS (CBDA),** Rio de Janeiro, Brazil
Represented by Mr Marcelo Franklin, attorney-at-law in Rio de Janeiro, Brazil

- Second Respondent-

## A. Factual Background

### 1. The Parties

1.1 The Fédération Internationale de Natation ("FINA" or "the Appellant") is the International Federation governing disciplines relating to swimming and is the Appellant in these Appeals.

1.2 César Augusto Cielo Filho ("Mr Cielo") is a Brazilian swimmer and is one of the Respondents to Appeal CAS 2011/A/2495 FINA v. César Augusto Cielo Filho & CBDA.

1.3 Nicholas Araújo Dias dos Santos ("Mr dos Santos") is also a Brazilian swimmer and is one of the two Respondents to Appeal CAS 2011/A/2496 FINA v. Nicholas Araujo Dias dos Santos & CBDA.

1.4 Henrique Ribeiro Marques Barbosa ("Mr Barbosa") is another Brazilian swimmer and one of the two Respondents to Appeal CAS 2011/A/2497 FINA v. Henrique Ribeiro Marques Barbosa & CBDA.

1.5 Vinicius Rocha Barbosa Waked ("Mr Waked") is also a Brazilian swimmer and is one of the two Respondents to Appeal CAS 2011/A/2498 FINA v. Vinicius Rocha Barbosa Waked & CBDA.

1.6 The Confederação Brasileria de Desportos Aquáticos ("CBDA") is the Brazilian National Federation in respect of swimming, is a member of FINA and is also a Respondent to each of the four abovementioned Appeals.

1.7 In this Award, where appropriate, Mr Cielo, Mr dos Santos, Mr Barbosa and Mr Waked are referred to collectively as "the Athletes".

1.8 Although there are four separate appeals to determine it is convenient to provide one set of reasoning in respect of all of them due to the commonality of issues and to the fact that the Athletes have each filed a consolidated answer.

## 2. The Background Facts

2.1 In May 2011 the Athletes competed at a Brazilian national level swimming event known as *Maria Lenk* ("the Event") and were the subject of in competition doping control tests.

2.2 Urine samples were provided by each of the Athletes. The samples were split into an A sample and a B sample for each Athlete. Each Athlete's A sample was found to contain *Furosemide* which is a diuretic and which is a Prohibited Substance under Class *S5 Diuretics and other Masking Agents* on the *2011 WADA Prohibited List*. Importantly, *Furosemide* is also designated as a *Specified Substance* for the purposes of the *World Anti-Doping Code* ("the WADC") and for the FINA Doping Control Rules ("the FINA Rules – in this Award, individual rules of the FINA Rules are prefaced by the phrase "Rule DC") which, as they must be (because FINA is a signatory to the WADC), are relevantly identical to the equivalent provisions of the WADC (see Article 23.2.2 of the WADC).

2.3 As required by the FINA Rules, a hearing was held in respect of the positive result by each of the Athletes on 1 July 2011 by the CBDA Doping Panel ("the CBDA hearing"). At the CBDA hearing each Athlete expressly confirmed that he accepted the result of the A Sample analysis and that he waived the B Sample analysis.

2.4 Accordingly, in effect, each Athlete admitted he committed an anti-doping rule violation ("ADRV") within the meaning of Rule DC2.1.2 (which is identical to Article 2.1.2 of the WADC – unless otherwise indicated in this Award, the FINA Rules have identical counterparts with identical numbering in the WADC).

2.5 Thus, each of the Athletes became subject to the sanction regime contained in Rules DC9 and DC10.

2.6 At the conclusion of the CBDA hearing, the CBDA Doping Panel decided in respect of each of the Athletes, other than Mr Waked, that:-

(a) pursuant to Rule DC9 the Athlete's results at the Event were disqualified;
(b) the question of the appropriate sanction had to be determined in accordance with Rule DC10.4;
(c) there was *No Fault or Negligence* on the part of the Athlete and that, therefore, the appropriate sanction was one of a warning.

2.7 The situation was a little different in respect of Mr Waked as he had a previous ADRV in 2010. In his case, the CBDA Doping Panel made the same findings as set out in [2.6](a) – (c) above but, in addition and because of the previous ADRV, it had to consider the multiple violation provision contained in Rule DC10.7.

2.8 In Mr Waked's case, the CBDA Doping Panel concluded that because there was *no fault or negligence* on his part, the sanction of the warning would not be taken into account for the purposes of Rule DC10.7 by reason of the operation of Rule DC10.5.1. Thus, no *Period of Ineligibility* was imposed upon him.

2.9 As will become apparent later in this Award, this Panel considers, with great respect and deference to the CBDA Doping Panel, that its reasoning in respect of the imposition of sanctions against each of the Athletes was internally inconsistent and in error. That is because if it was concluded, as the CBDA Doping Panel did, that there was *No Fault or Negligence* on the part of any of the Athletes then:-

(a) no sanction, not even a warning, should have been imposed because of the operation of DC10.5.1;

(b) not all the results obtained by the Athletes at the Event should have been disqualified. Rather only those results of the particular competition at that Event in respect of which the positive sample was obtained should have been disqualified (see Rule DC9 and Rule DC10.1.1).

2.10 However, the appeal to this Panel involves a hearing *de novo* with this Panel having full power to review the facts and the law (see R.57 of the Code of Sports-related Arbitration ("the CAS Rules") and, for example, *CAS 2010/A/2216 Ryan Napoleon v. FINA* at [4.3]). Consequently, this Panel may conclude that the result arrived at by the CBDA Panel was correct or partly correct even if its reasoning was faulty. Furthermore, this Panel must consider the Appeals on the evidence before it which is not necessarily the same as that which was before the CBDA Doping Panel.

2.11 It is to that evidence that the Panel now turns and in respect of which it sets out its findings of fact relevant to these Appeals.

3. **Findings of Fact on these Appeals**

3.1 Although we are considering four individual Appeals, overwhelmingly the material facts in respect of each appeal are common to each other appeal. As noted later in this Award, all of the parties agreed that the Appeals be heard concurrently and in parallel with evidence in one to be evidence in each of the other Appeals. In those circumstances, it is convenient to deal with the findings of fact in each Appeal on a collective basis.

3.2 All of the documentary evidence relied upon before the CBDA Panel was tendered and relied upon in these Appeals. Additionally, and importantly, this Panel had the benefit of oral evidence given to it in person by:

(a) each of the Athletes;
(b) the Athletes' doctor, Dr Magliocca.

3.3 The Panel has concluded that each of the witnesses called before it gave his evidence honestly and candidly and, except where expressly noted, accepts that evidence which, the Panel observes, is, in any event, largely corroborated by the documentary evidence before the Panel.

3.4 In those circumstances, the Panel makes the following findings of fact based on the evidence before it and the concessions made by FINA:-

(a) Dr Magliocca is an experienced medical practitioner specialising in sports medicine who has worked with Mr Cielo since 2008 and with each of the other Athletes since, at the latest, January 2011;

(b) sometime in 2009, after he had entered into a sponsorship relationship with its manufacturer, Mr Cielo began taking an energy drink called TNT and also, on occasions, drank coffee whilst competing at various swimming events. He did so in the knowledge that, and indeed because, each of those products contained caffeine. He consumed these products with his doctor's knowledge and in order to assist in overcoming tiredness or fatigue associated with either the fact of taking sleeping tablets to help him sleep during events extending over a period of days or the fact of having to compete in multiple races over a period of days during that particular swimming event;

(c) as stated, TNT and coffee contain caffeine as Mr Cielo and Dr Magliocca knew and understood. Caffeine is not a *Prohibited Substance* for the purposes of the FINA Rules

and Mr Cielo's undisputed estimate before this Panel was that about 90% of elite male freestyle sprinters take caffeine at some stage or other during swimming events;

(d) as a result of his consumption of TNT and coffee, Mr Cielo experienced some gastric problems and together with Dr Magliocca sought to find another source of caffeine which would provide its perceived benefits without the gastric side effects;

(e) Dr Magliocca read medical literature on the ingestion of caffeine and determined that the appropriate dosage of caffeine for Mr Cielo and other swimmers to take before a race was a minimum of 50 milligrams and a maximum of 100 milligrams. There was not available "over the counter" in Brazil any caffeine in tablet or capsule form in dosages of less than 250 milligrams and, even then, the tablets or capsules available did not contain pure caffeine but rather were mixed with other substances;

(f) Dr Magliocca, therefore, decided that the best course was for him to prescribe pure caffeine for Mr Cielo in the form of 50 milligrams capsules which could be taken one or two at a time (so as not to exceed Dr Magliocca's maximum dosage of 100 milligrams);

(g) both Mr Cielo and Dr Magliocca, and, for that matter, each of the other Athletes, were at all times conscious of the requirements of the WADC and the FINA Rules, the obligations of Athletes and of their medical advisers thereunder, and the risk of contamination of products such as caffeine capsules;

(h) Mr Cielo and Dr Magliocca, therefore, regarded it as important to ensure that the prescribed caffeine capsules were compounded or made up by a reputable, competent and reliable pharmacy which was aware of an elite swimmer's need to be supplied with caffeine in a pure form and of the need to avoid any risk of contamination of the capsules which were made up because of the fear of falling foul of the WADC or FINA Rules;

(i) Mr Cielo's father was a paediatrician who also happened to be the Health Secretary in Mr Cielo's home town of Santa Barbara (which has a population of about 200,000). This is a public office in Brazil. As Health Secretary, Mr Cielo's father was responsible for inspecting all the pharmacies in that town to ensure their compliance with various Brazilian health regulations;

(j) Mr Cielo's father recommended the Anna Terra Pharmacy to his son and Dr Magliocca as an appropriate pharmacy to make up the prescribed caffeine capsules. He assured them that the Anna Terra Pharmacy was the best he had seen in the whole time he had been Health Secretary in Santa Barbara. Additionally, Mr Cielo's family had had

medications made up at that pharmacy over many years without experiencing any problems;

(k) Dr Magliocca personally visited the pharmacy on a number of occasions and had conversations with the pharmacist to satisfy himself of its suitability. He was satisfied, as a result of those visits, of the pharmacy's suitability and thought that it was safer to use that pharmacy rather than one in Sao Paolo (where he and Mr Cielo were based) because he would not have the assurance of Mr Cielo's father in respect of any of the pharmacies in Sao Paolo;

(l) from January 2010, Mr Cielo began using the caffeine capsules prescribed by Dr Magliocca and made up at the Anna Terra Pharmacy at various major swimming meets around the world. It should be noted that Mr Cielo is a champion swimmer being the current world record holder in the Men's 50 Metre and 100 Metre Freestyle Events and the reigning Olympic champion in the Mens' 50 Metres Freestyle Event. As such, he is frequently drug tested and was so at the events we have mentioned where he was using the caffeine capsules. Mr Cielo gave evidence, which the Panel accepts, that he used the prescribed caffeine capsules during, at least, five swimming meets in 2010 and 2011 (other than the Event) without ever returning an adverse doping test result. At such events, and, indeed, at the Event in question Mr Cielo always declared his use of caffeine in his Doping Control Form;

(m) Mr dos Santos is a very close friend of Mr Cielo. In 2010, he visited Mr Cielo at the Auburn University, in Alabama, United States of America where Mr Cielo was then studying and swimming. Prior to 2010, Mr dos Santos had used energy drinks such as Red Bull as a source of caffeine but, in 2010, as a result of his visit to Auburn, he also began using the caffeine capsules prescribed for Mr Cielo by Dr Magliocca. He did with their knowledge and the Panel accepts his evidence that, in taking the pills, he always relied on Dr Magliocca. Mr dos Santos has been a member of the Brazilian Swimming Team since 2000 and competed at the Beijing Olympics. He has been drug tested on average about four or five times per year with no positive results until the result the subject of these Appeals. He, also, has been drug tested at swimming meets whilst using the prescription caffeine capsules without an adverse result being recorded;

(n) early in 2011, Mr Cielo decided to form a club of elite swimmers in Brazil known as Pro 16. His idea was to have elite Brazilian swimmers such as himself and the other athletes who usually trained or prepared overseas return to Brazil to train with the

confidence that they would have the same conditions and expertise available to them as they had in their overseas training centres or better;

(o) to this end, he persuaded his own personal coach, Mr Silva, who had been the head coach at another highly respected Brazilian swimming club for over thirty years and who had an extremely high reputation in Brazil, to agree to coach the Pro 16 Club and he also persuaded Dr Magliocca to become the doctor for the club (or at least its eight leading swimmers) on the strict condition that Dr Magliocca would attend all training sessions to advise the swimmers and to assist with their medical and nutritional needs and to provide counselling and information concerning doping;

(p) one of the first swimmers he invited to join the Pro 16 Club was Mr dos Santos and, at about the same time, he also invited each of Mr Barbosa and Mr Waked to join the Pro 16 Club. Each of the Athletes accepted that invitation and joined the Pro 16 Club in about January 2011;

(q) thereafter, each of the four Athletes began to use (or in the case of Mr Cielo and Mr dos Santos continued to use) the caffeine capsules prescribed by Dr Magliocca in the circumstances described below;

(r) the procedure in which the four Athletes engaged in respect of the subsequent taking of the prescribed caffeine capsules was that Mr Cielo would take the prescription written by Dr Magliocca for him to be made up at the Anna Terra Pharmacy when he visited his parents in Santa Barbara. Having obtained the bottle of caffeine capsules, he would then deliver that bottle of caffeine capsules to Dr Magliocca who retained it in his personal care and who would then dispense the caffeine capsules, as required, to Mr Cielo and the other Athletes at various swimming events when the swimmers requested them and Dr Magliocca thought it appropriate for the swimmer to use them;

(s) each of the Athletes gave evidence, corroborated by the evidence of Dr Magliocca, which the Panel accepts, that before using the caffeine capsules at any particular event he consulted with Dr Magliocca and acted on his advice. Each of the swimmers, corroborated by Dr Magliocca, gave evidence to the effect that Dr Magliocca informed the Athletes that the caffeine capsules were made according to prescription, were safe and were okay to use. It was particularly important in Mr Waked's case that he received such assurances because he had tested positive for a Prohibited Substance in 2010 and was very anxious to avoid inadvertently committing another ADRV. Mr Waked said he talked to Dr Magliocca before he started using the caffeine capsules and was assured that they were "really safe". Dr Magliocca gave evidence, which the Panel accepts, that

before taking the caffeine capsules the Athletes always asked the same questions namely "Is it safe?", "Can I take it?" or "Is it okay to take". When asked those questions, Dr Magliocca always assured the Athletes that the caffeine capsules were safe to take;

(t) notwithstanding that Dr Magliocca wrote the prescription in Mr Cielo's name, he had no difficulty in dispensing the caffeine products made up as a result of that prescription to the other Athletes. As stated, he gave evidence that he had read medical articles confirming the suitability and efficacy of caffeine and he gave it to the Athletes because during competition their sleep processes were sometimes disturbed and also in order to make their neurodynamic function work better;

(u) from time to time after first prescribing the caffeine capsules in January 2010, Dr Magliocca visited the Anna Terra Pharmacy in Santa Barbara when the pharmacy had acquired a new lot or consignment of caffeine to make up the caffeine capsules to be prescribed by him. On those occasions, the Panel accepts that Dr Magliocca was shown on a computer screen by the pharmacy a certificate showing that the caffeine to be used to make up the capsules was 100% pure (or so close thereto as makes no difference). One of the documentary exhibits before this Panel was a printed version of one of the certificates that Dr Magliocca said he saw in electronic form and that exhibit confirmed that the caffeine to be used was 100% pure (or virtually so – it certainly does not indicate any prohibited substance);

(v) Dr Magliocca was extremely conscious of the risk of contamination of supplements used by Athletes (he said it was "a world reality and a reality in Brazil") and extremely conscious of the need to determine that the products which he dispensed to the Athletes under his control were safe to take and free of risk both for personal health reasons and in respect of the doping requirements of the WADC / FINA Rules. He believed he had done everything possible to ensure that the prescribed caffeine capsules contained only pure caffeine and were not contaminated by other substances. In his view, the only other thing he could possibly have done to make sure that the caffeine pills to be used by the Athletes were completely pure was to have each bottle of pills, after they had been made up in accordance with his prescription, tested in an accredited laboratory;

(w) no problems were experienced by any of the Athletes in using the caffeine capsules up to the Event in May 2011. In that period, at least some of the Athletes were subject to doping control tests at various swim meets whilst using the prescribed caffeine capsules but did not return adverse results. Given their proximity as members of the same Pro 16

Club, the Panel infers that each of the Athletes knew that the others were using the prescribed caffeine tablets and had not returned any adverse doping result as a consequence;

(x) however, at the Maria Lenk Event in May 2011, each of the Athletes returned positive doping results;

(y) ultimately, it was determined that the cause of the adverse test results was the contamination of the caffeine capsules by Furosemide. This was established when an independent WADA – accredited laboratory, LABDOP of Rio de Janeiro, tested the remaining capsules in the bottle of capsules from which the caffeine capsules used by the Athletes at the Event were taken. The documentary evidence confirmed that independent testing. It appears this contamination occurred because, as admitted by Ms Ana Tereza Cósimo de Souza from the pharmacy in a declaration dated 27 June 2011 which was tendered as evidence by the Athletes in these appeals, on the same day that one bottle of the caffeine capsules was being made up at the Anna Terra Pharmacy, that pharmacy was also making up for other clients several prescriptions for the treatment of heart disease, an ingredient of which was Furosemide. It appears that, somehow or other, on that day the caffeine to be used in the caffeine capsules was inadvertently contaminated with the Furosemide which was being used in respect of the heart disease medication and which was made up at the pharmacy just before the caffeine capsules. Dr Magliocca gave further detailed evidence, which the Panel accepts, as to how the source of the contamination was found. He was not seriously challenged in respect of that evidence and, as we note below, FINA has, for the purposes of this Appeal, conceded that the Athletes have established how the *Specified Substance* entered their bodies for the purposes of Rule DC10.4. In those circumstances, at least for the purposes of these Appeals, it is common ground that the caffeine pills were contaminated in the manner summarised above and more fully described in Dr Magliocca's evidence;

(z) although it is not strictly relevant because FINA did not submit that the Athletes deliberately ingested the Specified Substance in order to mask the presence of other drugs, the doping results obtained in respect of the Athletes at the Event also showed that their urine concentrations were within the normal range and not diluted which meant that the *Furosemide* could not have been used as a masking agent.

3.5 There are other facts which the Panel may need to refer to when discussing the resolution of these Appeals, particularly in the case of Mr Waked, but what the Panel has recited above is the factual background which it considers most important for the disposition of each of the Appeals before it. The facts were not seriously disputed by FINA. However, the Panel has set out the facts at some length because of the difficult task with which it is confronted in considering the proper application of Rule DC10.4 and Rule DC10.5 and because of the importance of the facts in cases such as these.

## 4. **Proceedings before CAS**

4.1 These Appeals came before CAS on a very urgent basis, mainly due to the fact Mr Cielo had been selected to compete for Brazil in the World Swimming Championships in Shanghai, China at which the first swimming events began on Sunday, 24 July 2011. Two of the other Athletes were also selected to compete at the World Championships but became ineligible to do so following disqualification of their results at the Event. The CBDA decision was issued on 1 July 2011.

4.2 FINA filed four separate Statements of Appeal and Appeal Briefs (one in respect of each Athlete) on 8 July 2011. The Athletes and CBDA filed their Answers on or about 15 July 2011. This Panel was convened, as quickly as possible, to enable a hearing to take place in Shanghai and an Award to be delivered before 24 July 2011. FINA chose Mr Carrard to be one of the arbitrators whilst the Respondents chose Mr Benz. Mr Sullivan was appointed as the President of the Panel.

4.3 The hearing was conducted in Shanghai, with all parties, witnesses and legal representatives present in person, on Wednesday 20 July 2011.

4.4 At the commencement of the hearing, all parties agreed that the Appeals should be heard concurrently and in parallel, with evidence in one appeal to be evidence in each of the others, to the extent that it was relevant in such other Appeals. The hearing was conducted with a great degree of co-operation between the parties.

4.5 In the Panel's view, it is to the great credit of the parties, their legal representatives and the CAS Court Office in Lausanne that such an important and difficult appeal was able to be organised and determined in such a short space of time (particularly since the athletes

involved had no obligation to agree to expedite these proceedings but did so to get to a resolution with minimal impact on other athletes and on the FINA World Championships).

4.6 In addition to the parties and their legal representatives, with the express consent of FINA, certain representatives of the CBDA and/or the Brazilian Swimming Team were also present at the hearing.

4.7 At the conclusion of the hearing, the Panel indicated that it would communicate the operative part of its Award to the parties, prior to reasons, as soon as possible in accordance with R59 of the CAS Rules.

4.8 The operative part of the Award was communicated to the parties on Thursday 21 July 2011. The operative part of the Award in respect of each of the four Appeals is reproduced substantially at the end of this document under the heading "On These Grounds". This document constitutes the reasoned award of the Panel in respect of each of the four Appeals.

## B. Law

### 5. Jurisdiction

5.1 The jurisdiction of CAS is derived from Rule DC13.2.1 and is not disputed by the parties (see also R.47 of the CAS Rules).

5.2 As noted in [2.10] above, in these Appeals the Panel has full power to review the facts and the law and to hear the cases *de novo*. It has exercised that power in each of the Appeals.

5.3 Further, as stated, given the commonality of the factual and legal issues in each of the four Appeals, it was expressly agreed by all parties to each appeal that the four Appeals should be heard concurrently and in parallel with each other, with evidence in one appeal, to the extent relevant, to be evidence in each of the other Appeals.

5.4 Based on the foregoing, the Panel was satisfied that CAS had jurisdiction to hear these four Appeals and to hear them together.

5.5 The hearing was conducted on that basis.

## 6. Applicable Law

6.1 R.58 of the CAS Rules is headed "Law Applicable to the Merits" and relevantly provides:-

> *"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 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."*

6.2 The regulations applicable to the present Appeals are the FINA Rules as in force at May 2011 when the doping control tests were conducted. As the parties have not agreed on the application of any particular law, the rules and regulations of FINA shall apply primarily and Brazilian law shall apply complementarily. However, no party led any evidence of the content of relevant Brazilian law and the Panel was not asked to consider or apply any provision of Brazilian law.

Further, the Panel observes that the WADC and its derivatives such as the FINA Rules are to be interpreted as an independent and autonomous text and not by reference to the laws of any particular nation (see art. 24.3 of the WADC).

## 7. The Submissions

7.1 The Panel was greatly assisted by the submissions, oral and written, made on behalf of FINA, the Athletes and CBDA. The Panel has taken into account and considered all of those submissions but will only reproduce below those which it considers the most important for resolving these Appeals. If any particular submission is not set out or discussed below, it can be taken that the Panel has rejected that submission without feeling the need to give detailed reasons for its rejection.

The Appellant's Submissions

7.2 FINA, and its counsel, are to be commended for seeking to address only the real issues and in making appropriate concessions.

7.3 Importantly, FINA acknowledged that the preconditions specified by Rule DC10.4 had been established, namely:-

(a) that the Athletes had established how the *Specified Substance* entered their respective bodies (through the caffeine capsules inadvertently contaminated whilst being made up at the Anna Terra Pharmacy);

(b) that the Athletes had shown that the *Specified Substance* was not intended to enhance performance or to mask the use of a performance enhancing substance.

7.4 The Panel considers that these concessions were appropriately made. By making them, FINA accepted, as being common ground between all parties, that there was no intentional use of a *Prohibited or Specified Substance* and that the presence in the positive test results of the *Specified Substance* was the result of the inadvertent contamination of the caffeine pills at the Anna Terra Pharmacy.

7.5 Since such matters were common ground in these Appeals, this Panel cannot make findings to the contrary (especially in the absence of evidence to the contrary). Put simply, this Panel cannot make findings on issues of fact to the contrary of what all the parties to the Appeals have agreed to be the facts.

7.6 FINA's principal submissions were as follows:-

(a) contrary to the submissions of the Athletes, this was **not** a case of *no fault or no negligence* so as to bring into operation Rule DC10.5;

(b) however, each of the Appeals was an appropriate one for the application of Rule DC10.4;

(c) bearing in mind each of the Athlete's *degree of fault* and, in the case of Mr Waked, Mr Waked's previous ADRV, the appropriate sanctions were:-

(i) in the case of Messrs. Cielo, dos Santos and Barbosa, a *Period of Ineligibility* of three months; and

(ii) in Mr Waked's case, a *Period of Ineligibility* of one year.

The Respondents' Submissions

7.7 In essence, CBDA adopted the Athletes' submissions and sought to uphold the decisions of the CBDA Doping Panel.

7.8 The main submissions of the Respondents may be summarised as follows:

(a) caffeine, as prescribed in the present cases, was a **medication** not a **supplement**;

(b) therefore, DC10.5.1 came into play if the Panel accepted that the *Prohibited Substance* was ingested without any fault or negligence on the part of the Athletes. If that was accepted, the result was that no sanction could be imposed on any of the Athletes;

(c) if the caffeine, in the present circumstances, was a supplement, the Athletes acknowledged that a proper interpretation of Rule DC10.5.1, read in the light of the **comments** to that Rule (as it must be – see Rule DC17.2 / WADC Article 24.2), meant that the Athletes could not rely upon Rule DC10.5.1;

(d) if Rule 10.5.1 did not apply, so that the relevant provision was Rule DC 10.4 then, given the conceded satisfaction of the pre-conditions to the operation of that rule and in the light of the evidence which revealed no or minimal fault or negligence on the part of the Athletes, the appropriate sanction was one of a warning only (which is a sanction expressly available under Rule DC10.4);

(e) in the case of Mr Waked, given his previous ADRV, if the Panel held that Rule DC10.5.1 was inapplicable, nevertheless, despite the otherwise seeming mandates of Rule DC10.7, the **principle of proportionality** required a sanction of less than one year and, indeed, that a sanction of 3 – 4 months was appropriate for Mr Waked.

## 8. **Disposition**

8.1 All the parties and the Panel are bound by the FINA Rules as properly interpreted. The Panel is not at liberty to give a loose or sympathetic application to those Rules, as properly interpreted, merely because the Panel may think that, in a particular case, they produce an unduly harsh or unreasonable result. The FINA Rules and the WADC on which those Rules are modelled, are drafted in the way they are for very particular and important reasons, based

in the input of all the stakeholders in the Olympic movement and in other major sports. It is not the role of this Panel to seek to do justice as it perceives it by giving the Anti-Doping Rules an interpretation or application inconsistent with the language of those Rules, with the object and purpose of those Rules or with the body of CAS jurisprudence which has developed in respect of those Rules.

8.2 However, whilst CAS jurisprudence on the WADC, and its analogues such as the FINA Rules, is of extreme importance in respect of the interpretation of the WADC and related anti-doping regimes given the purpose of "enforcing anti-doping rules in a global and harmonised way" (see page 18 of the Preamble to the WADC), nevertheless the WADC and its analogues must be applied in the light of the facts of the specific case (hence the reference to "the unique facts of a particular case" in the comment to Rule DC10.5.1). Other CAS decisions based on fact-specific findings are of little relevance in deciding the present appeals unless the facts in such decisions are identical, or at least extremely similar, to the facts with which the present appeals are concerned.

8.3 Despite the helpful references by the parties to a number of previous cases (at least some of which were based on the significantly different provisions of the 2003 WADC) we do not consider any of the cases referred to us to be so close, in a factual sense, to the present one as to be of any significant relevance to our decision. Whilst we are informed by the views expressed in those cases by different Panels on legal issues, we do not consider that the particular outcomes in those cases are particularly useful in determining the outcome of these appeals in the light of the significantly different factual situations pertaining. Indeed, it is noteworthy that all parties to the present Appeals accepted, and presented their cases on the basis that, these Appeals presented unique or new issues as compared with previous cases.

8.4 The following central issues emerge from the submissions of the parties:-

(a) whether the prescribed caffeine capsules were a medication on the one hand or a supplement on the other for the purposes of the FINA Rules / WADC?

(b) if not, given that these Appeals are appropriately dealt with by application of Rule DC10.4, what is the appropriate sanction in each appeal having regard to the individual Athlete's degree of fault?

(c) in the case of Mr Waked, if his Appeal is to be determined by reference to Rule DC10.4, can a sanction be imposed outside the expressed range of a Period of Ineligibility of between one and four years apparently required by Rule DC10.7?

Medication or Supplement?

8.5 As the Panel has noted, it must take into account the comments to Rule DC10.5.1 in interpreting that Rule.

8.6 The relevant comments to the Rule are as follows:-

(a) it is only to have an impact in circumstances "that are truly exceptional and not in the vast majority of cases";

(b) a sanction **cannot be completely eliminated** in the circumstances where "a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest) (Article 2.1.1) and have been warned against the possibility of supplement contamination)".

8.7 It is apparent from these comments that the Panel cannot utilise, without significant unwarranted adjustment to the concept of "*No Fault or Negligence*" employed in this Rule, notions of what would be regarded as fault or negligence under either civil or common law.

8.8 It is very easy to imagine situations where a party would be held neither to be at fault nor negligent in circumstances of contamination or mislabelling of a supplement by third parties if civil law or common law principles were to be applied strictly. However, the comments to the Rule makes it clear that wherever there is such contamination or mislabelling of a supplement then a sanction of some sort must be applied and, it follows, that notwithstanding the definition of "*No Fault or Negligence*" in the FINA Rules / WADC, some fault or negligence has to be found to exist whenever an Athlete uses a contaminated or mislabelled supplement.

8.9 Further, the preamble to the WADC (see page 18) makes it clear that the WADC and its derivatives are not to be subject to or limited by the laws of any particular nation and the scheme of the WADC (and its derivatives), in the light of the difficulties of detecting and deterring doping in sport, is clearly to impose strict, if not absolute, liability once a *Prohibited*

*Substance* is detected subject to the rules of natural justice and the tempering effect of provisions such as Rule DC10.4.

8.10 Thus, if the caffeine as prescribed in the circumstances of these cases is a supplement rather than a medication, then notwithstanding that there may not, in an ordinary sense, be any fault or negligence on the part of the Athlete who takes that caffeine nevertheless the FINA Rules / WADC dictate a conclusion that the Athlete does not establish that he or she bears "*No Fault or Negligence*" for the purposes of Rule DC10.5.1.

8.11 Recognising these difficulties, Mr Jacobs and Mr Franklin, on behalf of the Respondents, urged on the Panel that the caffeine used in the circumstances being considered by these Appeals was a medication not a supplement so that the comments to Rule DC10.5.1 relating to supplements were irrelevant and so that resort could, in fact, be had to that Rule by the Athletes.

8.12 The Panel is of the view, strictly speaking, that it would have been necessary for the Respondents to file a cross-appeal to pursue such an argument since it would involve, if successful, the overturning of the CBDA's decision to impose a warning. Further, it is difficult to see, in any event, how the CBDA, at least, could appeal against the decision of one of its own constituent bodies. However, FINA did not object to the submissions being made on behalf of the Respondents on that basis and, in all the circumstances, the Panel is not disposed to reject or not consider the argument on that basis.

8.13 But the Panel rejects the submissions made on behalf of the Respondents on this issue anyway. Neither the FINA Rules nor the WADC defines, or distinguishes, what is a "medication" on the one hand and what is a "supplement" on the other. Apart from some very limited evidence from Dr Magliocca, there was no expert medical evidence before the Panel to assist in drawing such a distinction.

8.14 Dr Magliocca's view, unsupported by any reference to medical literature and not corroborated by any independent medical practitioner, was that prescribing caffeine in a pure form in the circumstances of the present Appeals was a medication.

8.15 The Panel is unable to accept this view. Caffeine is readily available, without medical intervention, in many forms such as in energy drinks and in coffee. The Panels knows of no situation in which caffeine is regularly or routinely prescribed by responsible medical

practitioners to treat a diagnosable medical condition nor has any evidence been given before the Panel of caffeine being used in such a way.

8.16 The "pure" caffeine in capsules with which these Appeals are concerned was apparently prescribed in order to avoid the adverse gastric side effects caused by ingestion of caffeine in other forms such as through energy drinks and coffee.

8.17 Without convincing medical evidence (which was not produced), the Panel is not prepared to accept that something can be a medication because it is prescribed in a pure form solely to overcome the adverse side effects of using it in a different form.

8.18 Moreover, the Panel does not think an ordinary person would regard caffeine as a medication. It is much more like a vitamin or nutritional supplement which is used to overcome fatigue or tiredness on a temporary basis. It is not a curative or healing substance as is the primary dictionary meaning of a "medication".

8.19 The Panel thus concludes that the caffeine used in the circumstances it is presently considering was a "supplement" as that term is used in the comment to Rule DC10.4 and that it is irrelevant, for so classifying it, that it was "prescribed" as opposed to being bought over the counter. The way the caffeine was acquired cannot change its fundamental character.

8.20 It follows, as properly conceded by Mr Jacobs and Mr Franklin on behalf of the Respondents if the Panel concluded that caffeine was a supplement, that Article 10.5.1 is not available to the Respondents and the Panel so finds.

Application of Rule DC10.4

8.21 Rule DC10.4 reads as follows:

"***DC 10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances***

*Where a Competitor or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Competitor's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in DC 10.2 shall be replaced with the following:*

*First violation: At a minimum, a reprimand and no period of Ineligibility from future Competitions, and at a maximum, two years' of Ineligibility.*

*To justify any elimination or reduction, the Competitor or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance. The Competitor's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.*"

8.22 As the Panel has observed previously, FINA accepted that Rule DC10.4 did apply to each of these Appeals and that its prerequisites had been satisfied. Rule DC10.4 expressly provides for a minimum sanction of a warning and a maximum sanction of a two year Period of Ineligibility with the Athlete's degree of fault to be the sole criterion for determining the appropriate sanction within that range.

8.23 In these circumstances, the only matters which the Panel needs to consider are the degree of fault of the individual athlete and the appropriate sanction for each individual athlete viewed in the light of that degree of fault.

8.24 In the particular circumstances of these Appeals, the Panel considers that the "fault" of the Athletes is at the very lowest end of the spectrum of fault contemplated by the FINA Rules / WADC.

8.25 The Panel's factual findings are set out in [3.4] above. In the light of those facts, it is very difficult to see what, if anything, else the Athletes (and their doctor) could have done reasonably or practically to avoid the positive test results.

8.26 Of course, the Athletes could have refrained from using caffeine at all but it can hardly be a "fault" (or at least a significant one) to use a substance which is not prohibited by the WADC or the FINA Rules and which is in widespread use amongst the Athletes' peers.

8.27 Perhaps the Athletes (or their doctor) could have conducted an audit or due diligence procedure on the pharmacy to satisfy themselves that the processes the pharmacy went through to make the capsules were sound and reliable. But even if that was the case, there is no evidence to suggest that such an investigation would have demonstrated a faulty or

unreliable manufacturing process. Indeed, what evidence there is suggests this was an excellent, well managed and highly regarded pharmacy.

8.28 Perhaps, the Athletes (and the doctor) could have investigated the possibility of importing pure caffeine capsules in the required dosages from reputable large multinational drug companies established outside Brazil. But there is no evidence before the Panel that such products were available from such sources and, even if there was, the Panel would not be prepared to accept, without evidence, that supply from such a source would necessarily be more reliable and safe than from a hand-picked pharmacy chosen by someone (Mr Cielo's father whose views were endorsed by Dr Magliocca on independent examination) with a public duty to assess the professional and ethical standards of such pharmacies.

8.29 Perhaps, the Athletes could have gone to the considerable trouble and expense of having each individual bottle of pills made up from Dr Magliocca's prescription independently analysed by an accredited laboratory. Undoubtedly, such a procedure would be both disproportionately expensive and time consuming. Notwithstanding the very high threshold of responsibility imposed on athletes by the WADC and its derivatives, the Panel does not think that it would be reasonable to attribute anything other than minimal fault to athletes for failing to embark upon such a disproportionately expensive and time consuming precaution.

8.30 No other steps were suggested by FINA as being available to the Athletes in order to have avoided the outcomes that are the subject of these Appeals.

8.31 The Panel is thus in somewhat of a dilemma. As explained, it cannot find that there was *No Fault or Negligence* as defined in the FINA Rules / WADC (and as explained or interpreted in the light of the comments to Rule DC10.5.1). On the other hand, looking at the matters objectively and with common sense, it cannot find anything but the slightest fault on the part of the Athletes in respect of the ingestion of the *Specified Substance*.

8.32 In these circumstances, in the Panel's view, the only appropriate sanction to impose on each of the Athletes, other than Mr Waked, for the ADRV's arising out of the Event is a **warning** and that is the sanction which the Panel imposes in respect of Mr Cielo, Mr dos Santos and Mr Barbosa.

Mr Waked's Special Position

8.33 Mr Waked committed an ADRV in February 2010 by inadvertently using a medicine which contained a stimulant. By his own admission, it was a mistake on his part but as he stated, and as the imposed sanction of two months ineligibility strongly suggests, this ADRV was a careless rather than an intention or reckless violation of the anti-doping regime and was a violation of a comparatively minor nature.

8.34 The conclusions of this Panel means that Mr Waked has been found to have committed another ADRV which is at the lowest end of the fault spectrum.

8.35 In those circumstances, if permitted to do so by the FINA Rules / WADC, this Panel would have been disposed to impose a comparatively lenient sanction on Mr Waked.

8.36 With characteristic fairness Mr Morand, on behalf of FINA, also submitted that, but for the structure and language of the FINA Rules / WADC, Mr Waked should be treated more leniently than by having imposed the minimum sanction for multiple offences apparently dictated by Rule DC10.7.

8.37 Further, there is much force in Mr Jacobs' submission that, bearing in mind the overriding principle of proportionality, Mr Waked should receive a sanction much less than the minimum one required by Rule DC10.7, namely ineligibility for a period of one year.

8.38 In support of his submission, Mr Jacobs referred us to a number of CAS cases on proportionality which suggest, according to him, that the Panel can impose a sanction outside the range otherwise mandated by the provisions of the FINA Rules / WADC.

8.39 The Panel has considered those cases. Unfortunately, however, those cases were ones decided under the 2003 WADC and its analogues. The Panel is presently dealing with the FINA Rules based on the 2009 WADC which changed radically the previous regime.

8.40 The 2009 WADC (and its derivatives such as the FINA Rules) made significant changes to Article 10 of the WADC and is derivatives such as Rule DC10. Those changes may be summarised as follows:-

(a) the 2009 WADC Code provides for an increase of sanctions in doping cases involving aggravating circumstances such as being part of a large doping scheme, the Athlete

having used multiple *Prohibited Substances* or a *Prohibited Substance* on multiple occasions;

(b) at the same time a greater flexibility has been introduced in relation to sanctions in general. Whilst the flexibility provides for enhanced sanctions, for example in cases involving aggravating circumstances, lessened sanctions are possible where the Athlete can establish that the substance involved was not intended to enhance performance;

(c) for the purpose of giving a discretion to impose those lessened sanctions, the definition of "*Specified Substances*" has been changed in the 2009 Code. The 2003 Code stated that "The Prohibited List may identify specified circumstances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents".

Where an Athlete could establish the use of such a *Specified Substance* was not intended to enhance performance, a doping violation could result in a reduced sanction (at a minimum a warning and reprimand and no period ineligibility and a maximum of one year ban).

The 2009 Code now provides that all *Prohibited Substances*, except substances in the classes of anabolic agents and hormones and those stimulants so identified on the *Prohibited List*, shall be "*Specified Substances*" for the purposes of sanctions.

This means that where an Athlete can establish how a *Specified Substance* entered his or her body or came into his or possession and that such *Specified Substance* was not intended to enhance sport performance, the sanction may be reduced to a reprimand and no period of ineligibility at a minimum and a two year ban at a maximum (where there are no prior ADRV's to consider);

(d) further, in the 2009 Code incentives to come forward have been strengthened. As compared with the 2003 Code, the 2009 Code provides for a greater suspension of any ineligibility period otherwise imposed than was the case with the 2003 Code.

8.41 It can be seen, therefore, that the clear intention of the 2009 WADC (and its analogues) was to provide for greater, or harsher, sanctions in what are viewed as aggravating circumstances (such as multiple offences) whilst providing for flexibility and the lessening of sanctions in

circumstances where, under the 2003 WADC, an Athlete, who was not a multiple offender, may have received what was considered to be an unduly harsh sanction.

8.42 The Panel cannot ignore the changes to the 2009 WADC or the evident purpose behind them. Those changes, and the purpose behind them, make the cases relied upon by Mr Waked (which were decided under the 2003 WADC or its derivatives) largely irrelevant to our determination of this issue.

8.43 Rather, the Panel's obligation is to determine Mr Waked's sanction in the light of the language of Rule DC10.7 in its present form.

8.44 Rule DC10.7 relevantly states:

> *"For a second anti-doping rule violation, the period of ineligibility* ***shall*** *be* ***within*** *the range set forth in the table below ..."* (emphasis added)

8.45 If one then goes to the table referred to in Rule DC10.7, the relevant range is 1 to 4 years.

8.46 There is thus a mandated **minimum** period of ineligibility of 1 year as a sanction for Mr Waked's latest ADRV.

8.47 Despite Mr Jacobs' submissions, the Panel does not believe it is entitled, by invocation of any principle of proportionality, to reduce Mr Waked's sanction to one below the minimum specified by this Rule. In this respect, the Panel respectfully and expressly adopts the reasoning of a differently comprised CAS Panel in CAS 2009/A/1870 *World Anti-Doping Agency v. Jessica Hardy & Another* at [138] where it was stated:-

> *"The Panel ... does not find that the requirements of the fundamental principles of proportionality ... allow (or even compel to) a deviation from the applicable anti-doping rule. In this respect, in fact, the following is to be underlined:*
>
> - *It is recognised that the measure of the sanctions contemplated by the WADC (and consequently of the FINA DC) is consistent with the principle of proportionality (compare Advisory Opinion of 21 April 2006, CAS 2005/C/976 and 986, FIFA and WADA at [139]);*
>
> ...
>
> - *This Panel agrees with the holding of another CAS Panel, where it is stressed that 'the WADC [and therefore the FINA DC] contains some degree of flexibility to enable the Panel to satisfy the general legal principle of proportionality. However, the scope of flexibility is clearly defined and*

> *deliberately limited so as to avoid situations where a wide range of factors and circumstances, including those completely at odds with the very purpose of a uniformly and consistently applied anti-doping framework are taken into account' (Award of 12 June 2006, CAS 2006/A/1025, Puerta v. ITF [11.7.8]).*"

It is to be noted that the *Hardy* case (and the cases to which it refers) were decided before the 2009 WADC (and the derivative FINA Rules) came into force. It is this Panel's view that the reasoning expressed by the Panel in *Hardy's* case applies with even greater force bearing in mind the changes effected by the 2009 WADC as summarised in [8.40] above.

The Panel therefore rejects the submission made on behalf of Mr Waked that, by reason of the principle of proportionality, it can and should impose a sanction of less than a period of one year's ineligibility.

8.48 Therefore, the Panel concludes that the minimum sanction it can impose on Mr Waked is a period of one year's ineligibility.

8.49 However, a question does arise as to the date from which Mr Waked's period of ineligibility should commence.

8.50 Mr Jacobs submitted that Mr Waked had promptly admitted the ADRV and that, therefore, his period of ineligibility should start from the date of his Sample collection namely 7 May 2011.

8.51 As stated in [2.4] above, by waiving the testing of his B Sample, Mr Waked did effectively admit his ADRV and, in these circumstances, the Panel considers he is entitled to the benefit of Rule DC10.9.2 which confers a discretion on the Panel to determine that the period of ineligibility may start as early as the date suggested by Mr Jacobs.

8.52 In all the circumstances of Mr Waked's case, the Panel considers it is appropriate to exercise its discretion in the manner suggested by Mr Jacobs. Therefore, Mr Waked's one year period of ineligibility will commence from 7 May 2011.

8.53 As stated, the Panel has sympathy for Mr Waked's position. The majority of the Panel considers that, but for the requirements of Rule DC10.7, an appropriate sanction for Mr Waked, considering the relatively minor nature of each of the two ADRVs, would be one much less than one year's ineligibility. However, for the reasons it has stated, the Panel must apply Rule DC10.7 in the circumstances and impose such a sanction.

Results obtained by Mr Waked since the Maria Lenk Event

8.54 Mr Jacobs submitted that certain results, medals, points and prizes obtained by Mr Waked since the Event should be retained by him. Unfortunately, the Panel is unable to accept that submission.

8.55 Subject to the mitigating provisions of Rule DC10.1.1, the provisions of Rule DC9 provide for the automatic disqualification of all results obtained at the Event including forfeiture of any medals, points and prizes.

The mitigating effect of Rule DC10.1.1 only applies where the Athlete establishes *No Fault or Negligence*. For the reasons we have given, Mr Waked has not established that matter in the present case. Accordingly, all of his results etc. obtained at the Maria Lenk Event in May 2011 must be disqualified.

8.56 So far as results which Mr Waked has obtained since the Maria Lenk Event in May 2011 it follows that, from our reasoning, those were obtained whilst he was, or should have been, serving a Period of Ineligibility. In the Panel's view, commonsense and the combined operation and effect of Rules DC10.8 – 10.10 means that any results obtained by Mr Waked since 7 May 2011 must also be disqualified.

## 9. Costs

9.1 The Panel is afforded a discretion in respect of legal fees and expenses of the parties incurred in Appeals of this nature by reason of Rule 65.3 of the CAS Rules.

9.2 In these Appeals, each of the parties has had a measure of success. Further, the Appeals raised important and somewhat unique questions. All parties conducted themselves in these Appeals impeccably. Further, FINA and CBDA are, the Panel infers, organisations of financial substance, perhaps more so than the Athletes.

9.3 In the circumstances, subject to Mr Waked's position, the Panel considers each party should pay his or its own costs and expenses of the Appeals.

9.4 Mr Waked's position is different. We have found that that the CBDA Doping Panel reached its conclusions on faulty reasoning. Had it not done so, Mr Waked would have had had

imposed on him a sanction of one year's ineligibility and FINA would have not found it necessary to appeal against that sanction.

9.5 In those circumstances, the Panel believes that CBDA should pay an amount of CHF2,500 towards FINA's legal and other costs incurred in connection with its appeal against Mr Waked.

## ON THESE GROUNDS

The Court of Arbitration for Sport rules that

**In CAS 2011/A/2495 FINA v. César Augusto Cielo Filho and CBDA**

1. The Appeal filed by the Federation Internationale de Natation ("FINA") on 8 July 2011 against Mr César Augusto Cielo Filho and the Confederação Brasileria de Desportos Aquaticos ("CBDA") concerning the decision taken by the President of the CBDA on 1 July 2011 is dismissed.

2. The Decision of the CBDA of 1 July 2011 is confirmed.

3. This Award is pronounced without costs, except for the Court Office fee of CHF1,000 paid by FINA which shall be retained by the CAS.

4. Each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.

5. All other claims are dismissed.

**In CAS 2011/A/2496 FINA v. Nicholas Araújo Dias dos Santos and CBDA**

1. The Appeal filed by the Federation Internationale de Natation ("FINA") on 8 July 2011 against Nicholas Araújo Dias dos Santos and the Confederação Brasileria de Desportos Aquaticos ("CBDA") concerning the decision taken by the President of the CBDA on 1 July 2011 is dismissed.

2. The Decision of the CBDA of 1 July 2011 is confirmed.

3. This Award is pronounced without costs, except for the Court Office fee of CHF1,000 paid by FINA which shall be retained by the CAS.

4. Each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.

5. All other claims are dismissed.

**In CAS 2011/A/2497 FINA v. Henrique Ribeiro Marques Barbosa and CBDA**

1. The Appeal filed by the Federation Internationale de Natation ("FINA") on 8 July 2011 against Mr Henrique Ribeiro Marques Barbosa and the Confederação Brasileria de Desportos Aquaticos ("CBDA") concerning the decision taken by the President of the CBDA on 1 July 2011 is dismissed.

2. The Decision of the CBDA of 1 July 2011 is confirmed.

3. This Award is pronounced without costs, except for the Court Office fee of CHF1,000 paid by FINA which shall be retained by the CAS.

4. Each party shall bear its own legal and other costs incurred in connection with these arbitration proceedings.

5. All other claims are dismissed.

**In CAS 2011/A/2498 FINA v. Vinicus Rocha Barbosa Waked and CBDA**

1. The Appeal filed by the Federation Internationale de Natation ("FINA") on 8 July 2011 against Mr Vinicus Rocha Barbosa Waked and the Confederação Brasileria de Desportos Aquaticos ("CBDA") concerning the decision taken by the President of the CBDA on 1 July 2011 is upheld.

2. The Decision of the CBDA of 1 July 2011 is set aside.

3. Mr Vinicus Rocha Barbosa Waked is suspended for a period of one year from 7 May 2011.

4. Mr Vinicus Rocha Barbosa Waked's results obtained at the Maria Lenk Swim Meet in Rio de Janeiro, Brazil in May 2011 are disqualified. The results, medals, points and prizes obtained by Mr Vinicus Rocha Barbosa Waked at the Maria Lenk Swim Meet in Rio de Janeiro, Brazil, in May 2011, are forfeited. The results, medals, points and prizes obtained by Mr Vinicus Rocha Barbosa Waked since the Maria Lenk Swim Meet in Rio de Janeiro, Brazil, in May 2011, are cancelled.

5. This Award is pronounced without costs, except for the Court Office fee of CHF1,000 paid by FINA which shall be retained by the CAS.

6. The CBDA shall pay an amount of CHF 2,500 towards FINA's legal and other costs incurred in connection with these arbitration proceedings.

7. All other claims are dismissed.

Operative part of the award issued on 21 July 2011
Lausanne, 29 July 2011

**THE COURT OF ARBITRATION FOR SPORT**

Alan **Sullivan QC**
President of the Panel

Olivier **Carrard**
Arbitrator

Jeffrey G. **Benz**
Arbitrator