



Arbitration CAS 2007/A/1395 World Anti-Doping Agency (WADA) v. National Shooting Association of Malaysia (NSAM) & Joseline Cheah Lee Yean & Bibiana Ng Pei Chin & Siti Nur Masitah Binti Mohd Badrin, award of 31 March 2008

Panel: Mrs Corinne Schmidhauser (Switzerland), President; Prof. Ulrich Haas (Germany); Mr Romano Subiotto (Belgium)

Shooting

Doping (propranolol)

Tacit arbitration agreement between the parties

Presumption of ingestion of the prohibited substance to enhance the performance

Reduction of the period of Ineligibility not justified

1. An agreement to arbitrate may be concluded explicitly or tacitly and may result from the content of the pleadings submitted by the parties. The submission by a party of numerous pieces of correspondence to the CAS which never raises or suggests any objection to the prospective jurisdiction of the CAS and contain arguments concerning the rights of the parties in a dispute may constitute responsive pleadings that do not object to the CAS's jurisdiction and therefore constitute an agreement to arbitrate before the CAS.
2. In case of a specified substance, the applicable two year period of ineligibility may be replaced by a lower period in the event the athletes can establish that the use of such a specified substance was not intended to enhance sport performance. The performance enhancing effects of propranolol which is a beta blocker in shooting cannot be ignored. Therefore, the burden is upon the athletes to show how this specified substance entered in their systems, and to demonstrate that this manner of ingestion was not intended to enhance their performance. Evidence that in the given circumstances an unintentional violation of the anti-doping rules by the shooters was more likely than the intentional misuse of the substance is required particularly in view of the sport enhancing effects of the substance.
3. Athletes have a duty to exercise "the greatest vigilance" or "utmost caution" with regard what they ingest. It is constant in CAS jurisprudence that athletes are responsible for making enquiries about food and medications they are given, regardless of the source. The athlete's willingness to ingest unwrapped chocolates without further enquiry is at least significantly negligent. The reduction or elimination of the period of ineligibility does not apply where the athletes do not rebut the presumption that they have ingested the prohibited substance to enhance their performance.

The World Anti-Doping Agency (“WADA” or the “Appellant”) is a Swiss private law foundation. Its registered office is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. It was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all of its forms.

The National Shooting Association of Malaysia (“NSAM”) is a member of the International Shooting Sport Federation (“ISSF”). It promotes the sport of shooting in Malaysia.

Ms Joseline Cheah Lee Yean (“Cheah”), Ms Bibiana Ng Pei Chin (“Ng”) and Ms Siti Nur Masitah Binti Mohd Badrin (“Masitah”) are international level shooters (“the Shooters”), members of the national team of the NSAM for between 7 and 10 years.

During a local shooting competition held in Malaysia from 8 to 11 March 2007, the Shooters Cheah, Ng and Masitah were tested positive for Propranolol and its metabolites. The “B” samples confirmed the “A” samples results of 23 April 2007.

On 18 April 2007, the NSAM suspended the Athletes on a provisional basis in accordance with Rule 5.8.4 of the ISSF.

On 10 and 17 June 2007, a doping enquiry panel examined the facts of the present case. The Panel was constituted from members of the NSAM, from the National Sports Council and the Medical Committee of the Olympic Committee of Malaysia. It came to the following conclusion:

“The Panel finds that the shooters did not intentionally take “Propranolol and its metabolites” to enhance their performance. As a matter of fact, the Panel finds that the shooters were innocent victims as they merely consumed the chocolates as any reasonable person would when chocolates are offered. Therefore, it is the recommendation of the Panel, that the period of ineligibility for the 3 shooters be eliminated or alternatively to reduce the ineligibility period to 6 months”.

The doping enquiry panel issued a written report on its findings, which the NSAM forwarded to the ISSF on 20 July 2007.

On 3 August 2007, the ISSF informed the NSAM that it did not agree with the reduction of the period of ineligibility to 6 months as recommended by the doping enquiry panel. According to the ISSF, such a suspension would not be in compliance with the World Anti-doping Code (“WADC”).

By letter of 19 August 2007, the NSAM appealed before WADA in order to reduce the period of ineligibility to 6 months starting from the day of the sample identification until 21 September 2007.

On 29 August 2007, WADA replied to the NSAM’s letter of 19 August 2007, whereby it informed the NSAM that it is not an appeal body and that it is therefore not competent to deal with the NSAM’s appeal. Furthermore, it advised the NSAM to refer to article 5.14 of the ISSF Anti-doping Rules (“ISSF ADR”), which provides that any appeal concerning international athletes shall be lodged

before the Court of Arbitration for Sport (“CAS”). However, in the event that the athletes are of national level, the decision shall be appealed before the national-level reviewing body.

By letter of 14 September 2007, the NSAM requested WADA’s advice in relation to the appropriate sanction to be imposed on the three Shooters, since the ISSF disagreed with the sanction decided by the NSAM.

On 20 September 2007, WADA replied to the NSAM that it is difficult for WADA to give any advice, since it never received the decisions concerning the Shooters. However, WADA informed the NSAM that *“Propranolol, as it is the case with all beta-blockers, is a specified substance. This means that the sanction ranges from a warning to a 1-year ban. However, to benefit from these milder sanctions, the athlete has to establish that he/she did not take the substance to improve his/her performance. In case the athlete is unable to establish this, the standard 2-year ban shall be imposed for a first violation”*.

The next day, the NSAM sent to WADA a copy of the decisions taken in relation to the Shooters.

By letter of 27 September 2007, the ISSF acknowledged receipt of the NSAM’s letter to WADA of 14 September 2007 which confirms the 6-month ban imposed on the Shooters. Within its letter the ISSF reminded the NSAM of the content of the ISSF’s letter of 3 August 2007, where it mentioned that the sanction imposed by the NSAM has to be reconsidered, since it was not in compliance with the WADA Code. Furthermore, it cited article 5.15.6 of the ISSF ADR which authorizes the ISSF Executive Committee to impose a sanction if a Member Federation of the ISSF has failed to impose a sanction in compliance with the ISSF ADR. Finally, it informed the NSAM that the ISSF Executive Committee would take over the case and advised that any written submissions from the Shooters would have to be received on or before 8 October 2007.

On 4 October 2007, the ISSF acknowledged receipt of a letter sent by the NSAM on 28 September 2007 and reminded the NSAM that the sanction it imposed on the Shooters was not in compliance with the WADAC. It asked the NSAM again to reconsider its sanction.

On 5 October 2007, WADA sent a letter to the NSAM, whereby it noted that there was a lack of appropriate action against the coach on behalf of the NSAM, since he was deemed to have clearly been involved in this doping matter.

“Actions should be taken on behalf of you federation to ensure that this individual’s coaching privileges are affected on a global level. The coach in question should be subject to a minimum four year period of ineligibility pursuant to Article 10.4.2 of the code.

Sneaking a substance into a person’s body is a potentially dangerous violation that athletes should be protected from. A sanction with more global implications will ensure that this coach cannot infuse other unsuspecting athletes with banned substances.

Please let us know if our understanding of your actions against the coach is inaccurate. If we are correct in our understanding of your federation’s sanctions against the coach, then please make the appropriate adjustments to

ensure that your actions in this case cease to divert from the standards of the World Anti-Doping Code. Please send us as soon as possible a copy of the decision that you will take”.

By letter of 6 October 2007, the NSAM informed the ISSF, with copy to WADA, that it had decided to revise the 6-month sanction imposed on the three shooters to a 1-year ban.

On 25 October 2007, the ISSF acknowledged receipt of the above-mentioned letter and informed the NSAM that its new decision was acceptable for the ISSF and conformed to the WADA Code.

On the same day, the ISSF informed WADA that the ISSF Medical Committee agreed with the NSAM's decision to reduce the mandatory sanction of 2 years to 1 year taking into account the special circumstances of the cases and the fact that it was grounded on the principle of no-significant fault. Furthermore, the ISSF confirmed that *“there is as such no procedure relating to the Malaysian shooting cases pending before the ISSF”*.

On 5 October 2007, WADA filed a statement of appeal before the CAS against the NSAM's decision communicated to WADA on 21 September 2007 in relation to a 6-month suspension imposed on the Malaysian shooters Cheah, Ng and Masitah.

On 11 October 2007, WADA filed an additional statement of appeal before CAS against the NSAM's decision communicated to WADA by letter of 6 October 2007. In its statement of appeal WADA requested inter alia to *“join this appeal with the appeal procedure CAS 2007/A/1395 against the same Respondents; to authorize WADA to file one Appeal Brief for both procedures; extent the time-limit fixed to file an Appeal Brief in the procedure CAS 2007/A/1395 until the expiry of the time-limit to file an Appeal Brief in the procedure concerning the decision rendered on October 6, 2007 (31 days from receipt of the decision ... until November 6, 2007)”*.

By letter of 12 October 2007, the CAS Court Office acknowledged receipt of the additional submission filed by the Counsel for Appellant and informed the parties that the additional submission will be treated by the CAS as a complement to the statement of appeal filed by WADA on 5 October 2007. In addition the Respondents were invited to declare on or before 17 October 2007 whether they agreed with WADA's request for an extension of the time limit to file its appeal brief until 6 November 2007. In the event that the Respondents do not agree the parties were advised by the CAS Court office that the President of the Appeals Arbitration Division will decide upon this issue.

On 22 October 2007, the NSAM replied that it was surprised to know that WADA filed an appeal with CAS since such action is premature, as the matter is currently dealt with by the ISSF and NSAM is awaiting the final decision of the ISSF Executive Committee. It follows that the decision process was not final. Finally, the NSAM concluded that it hoped to find an amicable way to resolve this matter without going to arbitration.

In light of the content of the aforementioned letter of NSAM, the CAS Court office invited the Appellant by letter of 23 October 2007 to declare whether it wished to suspend the present procedure or not.

On 24 October 2007, the Appellant informed the CAS Court office that it had requested the ISSF *“to provide us with further information about the procedure which NSAM indicated to be pending before ISSF in the matter of the shooters Cheah, Ng and Masitah”*. WADA will inform the CAS Court Office upon receipt of ISSF’s answer.

By letter of 25 October 2007, the CAS Court office informed the parties that the Deputy President of the Appeals Arbitration Division had granted the Appellant’s request for an extension of the time limit to file its appeal brief until 6 November 2007.

On 25 October 2007, the NSAM informed the CAS Court office about the ISSF’s letter of the same day, whereby ISSF stated that it *“will not interfere”* with NSAM’s decision to impose a 1-year suspension upon the Shooters.

By letter of 26 October 2007, WADA informed the CAS Court office about the ISSF’s letter that in view of the revised decision by the NSAM *“there is as such no procedure relating to the Malaysian shooting cases pending before the ISSF”*. WADA concluded from this letter that there was no reason to stay the present procedure, and that it will, therefore, file its appeal brief within the deadline of 6 November 2007.

On 26 October 2007 the CAS Court office informed the parties that the proceedings are not stayed.

On 6 November 2007 the Appellant lodged its appeal brief within the prescribed deadline.

By letter of 23 November 2007, the NSAM sent a reply to the CAS Court office which reads – inter alia – as follows:

“We note from your letter that WADA is proceeding with their appeal inspite of our earlier letters to CAS. As stated in our earlier letter, the International Shooting Sport Federation (ISSF) has concurred with our final decision which is the suspension of the athletes for the period of one (1) year. We take it that WADA is not in agreeable with the decision rendered by both the National-level body (NSAM) and the International Shooting Sport Federation (ISSF). As stated in our earlier letters, we do not have the financial means to proceed with the appeal, therefore, we shall leave the matter to your good office. ...”

None of the Shooters responded to the CAS.

By letter of 12 December 2007 the parties were informed that the time limit for the Shooters to file their answer with the CAS Court office had expired. Furthermore, the CAS Court office invited the parties to inform it whether their preference was for a hearing to be held in this matter.

On 4 February 2008, the Panel decided not to hold a hearing in the present procedure, in view of the circumstances of the case. The Panel will therefore render an award on the basis of the parties’ written submissions.

In its Appeal Brief dated 6 November 2007 the Appellant requests – inter alia – that:

- (1) “the decisions” of the NSAM dated 21 September 2007 and 6 October 2007 are set aside;
- (2) the Shooters be sanctioned with a period of ineligibility of two years starting on the date on which the CAS award enters into force. However any period of suspension imposed on the Shooters before the entry into force of the CAS award should be credited against the total period of suspension to be served; and that
- (3) the Shooters lose all competitive results obtained as of 8 March 2007 until the commencement of the period of ineligibility with all of the resulting consequences.

The NSAM did not submit a formal request.

No submissions and requests were received by the CAS Court Office from the Shooters.

LAW

Jurisdiction and Panel’s Scope of Review

1. In Appeal Arbitration Procedures an appeal may be filed against a decision of a federation with the CAS according to Article R47 of the Code insofar as the statutes or the regulations of the said body so provide or as the parties have concluded a specific arbitration agreement. Furthermore, Article R47 of the Code requires that the decision of the federation is final in the sense that there is no legal remedy available according to the statutes and regulation of the said sport-related body.

A. “Final decision”

2. In its letters of 23 November 2007 and 18 January 2008 the NSAM expressed the view that its decision dated 6 October did lead to the closure of the matter and, hence, no additional recourse was available according to its rules and regulations. This view is confirmed by ISSF’s letter to NSAM dated 25 October 2007, whereby it stated that it concurred with the last decision of the NSAM dated 6 October 2007. The same date a letter from the Executive Committee’s Secretary General Horst G. Schreiber to WADA confirmed the above mentioned decision and stated that *“our medical Committee proposed to accept this decision as it was reasoned on no-significant fault”*. The Panel is, therefore, of the view that the legal remedies in this matter according to Article R47 of the Code have been exhausted and that there is a “final decision”.

B. *Arbitration clause provided for in the statutes and regulations of the NSAM*

3. In order for the CAS to have jurisdiction the matter in dispute must be covered by an arbitration clause that binds the parties to the dispute. According to Article R47 of the Code the binding force of the arbitration clause may derive from the “*statutes and regulations of the said (sports-related) body*” or from a specific arbitration agreement concluded between the parties. Both alternatives, however, require that there is consent by the parties to submit to arbitration. In the first alternative the consent is expressed through membership in a sport-related body whose rules and regulations provide for arbitration. In the second alternative the consent is expressed by entering into a contract that contains an arbitration clause. In order to construe membership as a consent to submit to arbitration the relevant arbitration clause must be enclosed in the sports-related body’s own rules and regulations, since it is only to these rules and regulations that a person expresses acceptance through its membership (cf. RIGOZZI A., *L’arbitrage international en matière de sport*, 2006, marg. no. 792 et seq.).
4. According to the submissions made by WADA the NSAM has no anti-doping rules in its statutes or regulations. In particular there is no provision in the NSAM’s own rules and regulations providing for arbitration before the CAS in matters dealing with an appeal against decisions made by the NSAM. The mere fact that the NSAM applies rules of another sports-related body that contain an arbitration clause does not suffice in the view of the Panel to construe a consent of the Shooters to submit to arbitration. Accordingly, the jurisdiction of the CAS in this matter cannot be based upon the first alternative of Articles R47 of the Code.

C. *“Specific” Arbitration agreement*

5. If the statutes and regulations do not provide for arbitration with the CAS the latter is only competent to decide upon the Appellant’s request if there is a “specific” arbitration agreement concluded between the parties. Neither party has alleged that there is a specific agreement to arbitrate between them. Nevertheless, an agreement to arbitrate may be concluded explicitly or tacitly. There is CAS precedent for arbitral tribunals finding agreements to arbitrate, absent an express agreement, in particular from the content of the pleadings submitted by the parties.

“This reference to the CAS should be interpreted as an offer to conclude an arbitration agreement. Therefore, by sending a statement of appeal to the Court of Arbitration for Sport within the time-limit mentioned by FIFA, the party concerned implicitly takes up that offer and concludes the arbitration agreement entrusting the CAS with jurisdiction to hear the dispute in accordance with its Procedural Rules” (CAS 2002/O/422, Digest III 90, 95).

6. The CAS’s approach to its own jurisdiction in CAS 2002/O/422 is consistent with Art. 186(2) of the Swiss Federal Code on International Private Law (hereinafter referred to as “PIL”) and the modern approach to agreements to arbitrate in private international dispute resolution. For instance, arguably the most accepted of private international dispute resolution mechanisms, the United Nations’ 1985 Model Law on International Commercial Arbitration, as amended in

2006 (the “Model Law”), contains modern provisions for determining whether an arbitration agreement exists. Article 7(5) of the Model Law provides that an arbitration agreement will be held to exist if the parties exchange pleadings where “*an agreement is alleged by one party and not denied by the other*”.

7. As arbitration tribunals are willing to find that a party has agreed to jurisdiction based upon that party’s active participation in the arbitral proceedings, parties who object to a tribunal’s jurisdiction are careful to make their position very clear in order to avoid such a finding. It was for this reason, in CAS 2006/A/1190, that the Pakistan Cricket Board, in delivering its pleadings on jurisdiction, stated expressly that the pleadings were “*solely for the purpose of determining whether or not CAS have jurisdiction in this case*”, and for no other reason (CAS 2006/A/1190, at paragraph 6.4). Parties wishing to object to a tribunal’s jurisdiction are therefore advised to follow the example of the Pakistan Cricket Board and make their objections explicit.
8. In this case WADA has delivered pleadings alleging not that an arbitration agreement has been concluded, but that the CAS has jurisdiction by virtue of the NSAM’s application of the ISSF Rules. Despite WADA’s failure to plead specifically that an arbitration agreement exists, this Panel considers the delivery of pleadings, especially pleadings containing an allegation of this Panel’s jurisdiction on another basis, to constitute an offer to arbitrate (CAS 2006/A/1190, at paragraph 6.4). For the purposes of concluding an arbitration agreement, this Panel considers an offer to arbitrate within a pleading to be sufficiently similar in function to an allegation that an arbitration agreement exists as to dispense with the difference (CAS 2003/O/482, Digest III 106, 108 (a FIFA tribunal award that stated that it could be appealed to the CAS constituted an offer to conclude an arbitration agreement); CAS 2003/O/486, Digest III, 120, 121 (a FIFA tribunal award that stated that it could be appealed to the CAS constituted an offer to conclude an arbitration agreement)). Accordingly, this Panel finds that WADA’s pleadings constitute an offer to arbitrate.

D. Acceptance of the offer to arbitrate by the NSAM

9. The NSAM has not delivered pleadings in these proceedings. The reason the NSAM has not delivered pleadings ostensibly is related to the costs involved rather than any objection to the jurisdiction of the CAS. The NSAM has, however, submitted numerous pieces of correspondence to the CAS, some of which contain arguments that represent the NSAM’s position on issues of jurisdiction. By letter of 22 October 2007 the NSAM wrote to the CAS suggesting that WADA’s appeal to the CAS is pre-mature because the matter is not yet final. The letter continues: “*Therefore, we are of the view that there should not be any necessity to appeal to ICAS as NSAM has complied with the ISSF and WADA codes*”.
10. This letter contains the clear argument that WADA is not yet entitled to appeal to the CAS because (1) the initial award is not yet final, and (2) any appeal by WADA of an NSAM decision would be unmeritorious. Neither of these arguments raises or suggests any objection to the prospective jurisdiction of the CAS once an award is finally rendered by the NSAM. As this

correspondence contains arguments concerning the NSAM's rights in this dispute as it concerns this Panel's jurisdiction, and as the correspondence was addressed to the CAS, and as the correspondence does not expressly object to the CAS's eventual jurisdiction, this Panel considers such correspondence to be responsive pleadings that do not object to the CAS's jurisdiction, which constitutes an agreement to arbitrate before the CAS.

11. This conclusion about the NSAM's agreement to arbitrate is consistent with further correspondence received from the NSAM. On 23 November 2007 Dato' Sri J.J. Raj, Jr., Secretary General of the NSAM, wrote to the CAS. Mr. Sri explained that financial hardship will prevent the NSAM from taking part in these proceedings, and for that reason, *"we shall leave the matter to your good office"*. In light of the NSAM's willingness to engage with WADA through the CAS on the merits of the case without objecting to the CAS's jurisdiction, and considering the NSAM's letter of 23 November 2007 stating that *"we shall leave the matter to your good office"*¹, the Panel concludes that the NSAM has agreed to the jurisdiction of this Panel as the final arbitrator of this case².

E. Acceptance of the offer to arbitrate by the Shooters

12. Unlike the NSAM the three Shooters have never filed any letters or submissions with the CAS Court office. This "silence" of the Shooters has to be interpreted with caution. First of all there is no evidence that the Shooters are even aware of the fact that this procedure is pending before the CAS. All correspondence in relation to the Shooters has been forwarded by the CAS Court office to the address of the NSAM. No direct postal link has been established between the Shooters and the Panel, since their private coordinates were unknown to the CAS Court office. In fact in its letter of 18 January 2008 the NSAM advised the CAS Court office that it *"has been unable to contact them [the Shooters] ever since they have been suspended close a year ago. They [the Shooters] are not aware of the above cases"*. Furthermore, according to CAS jurisprudence the failure of a party to respond to an appeal filed by another party does not constitute a consent to arbitrate³. Since there is no evidence that the NSAM acted as the Shooters' agent in the present matter the Panel is of the view that it has no jurisdiction in relation to the Shooters. Hence, the appeal by the Appellant has to be dismissed insofar as it is directed against the Shooters.

¹ But see CAS 2000/A/262, Digest II 377, 385: *"The particularities of each case must be examined and a distinction must be made, if the parties involved are experienced in business or not. A global reference is not sufficient, when the party proposing an arbitration clause in this way knew or should have known by experience, that the other party did not want to agree to such a clause or if such a clause was unusual under given circumstances. A global reference on the other hand is valid and sufficient between two parties, who are experienced in the field or when an arbitration clause is customary in the particular sector of business, regardless of whether the other party has indeed read the document of reference and therefore knew, that it contained such a clause"*.

² This conclusion is also consistent with the approach in CAS 97/175, Digest II 158, 166: the athlete engaged the Panel through correspondence from his lawyer, but did not raise any objection to the Panel's jurisdiction. When the lawyer raised an objection to jurisdiction in later in correspondence, after the expiry period set by the Panel for an objection to jurisdiction, the Panel held that the athlete had already consented to jurisdiction.

³ Cf. CAS 2002/A/362, Digest III 265, 268 where the Panel was unwilling to accept jurisdiction based upon the athlete's failure to respond as to whether he accepted the CAS's jurisdiction, although it did ultimately assume jurisdiction on another basis (*"... Z. neither consented nor objected to jurisdiction. Silence cannot be deemed to be consent for purposes of the Transitional Provisions"*).

13. Pursuant to Article R57 of the Code, the Panel has the full power to review the facts and the law. In addition Article R57 of the Code provides that the Panel may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. This discretion of the Panel is not curtailed by the fact that the Shooters – unlike the NSAM - are not bound by a decision of the CAS. In view of the mandate of the Panel conferred upon it by the Code the Panel not only examined the formal aspects of the appealed decision but held a trial *de novo*, evaluating all facts, including the new facts, which were not mentioned before the doping enquiry panel of the NSAM.

Applicable Law

14. Article R58 of the Code provides the following:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

15. The “applicable regulations” according to Article R58 of the Code are the statutes and regulations of the sport-related body that issued the decision. According to the submissions of WADA and the NSAM the latter does not have any anti-doping rules of its own. Article R58 of the Code however not only makes reference to the “applicable provision” in order to determine the applicable law to the merits but also to the “rules ... chosen by the parties”. This choice of law is not limited to national legal provisions. This follows from the wording of Article R58 of the Code which refers to “rules of law” and not just law. Therefore, the parties may elect also sporting regulations as applicable law to the merits.
16. Furthermore, it is generally accepted that the parties may choose the applicable law either explicit or tacitly. The Panel notes that in prosecuting the Athletes, the NSAM has made consistent reference to the ISSF Rules, as if the NSAM applies the ISSF Rules by reference in lieu of maintaining its own set of rules. Furthermore, within the various correspondences sent by NSAM in relation to the appealed decision, the NSAM always refers to the ISSF Rules and to the WADC. This is confirmed by an email sent to WADA by the NSAM on 3 October 2007, whereby the latter stated that it had not adopted anti-doping regulations but expressed its intention to be in compliance with the ISSF Rules and the WADC. Accordingly, the Panel is of the view that the NSAM and WADA have chosen the ISSF Rules as well as the WADC as the applicable law to merits of the case.

Admissibility of the Appeal

17. The NSAM's decision did not specify a time limit for appeal. The ISSF Rules do not contain a specific provision concerning the time limit to file an appeal before CAS either.

18. Article R49 of the Code provides:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from receipt of the decision appealed against".

19. Both appeals were lodged within the 21-day deadline. It follows that they are admissible.

Merits

A. Establishment of the Violation of the Anti-doping Rules

20. By virtue of art. 5.3.1 of the ISSF Rules, the presence of a prohibited substance (according to the published list of WADA ("the Prohibited List")) or its metabolites or markers in a Shooter's bodily specimen constitutes an anti-doping rule violation.

21. The most recent list published by WADA includes Propranolol, a beta-blocker, but classifies it as a "specified substance". According to art. 5.5.2.1. of the ISSF Rules, beta-blockers are prohibited and no Therapeutic Use Exemption ("TUE") will be granted or accepted by the ISSF.

22. Furthermore, the Panel notes that the ISSF is also one of the International Sports Federations that prohibit beta-blockers out-of-competition (as well as the Archery Federation).

23. The analysis of the A samples taken from the athletes during a local competition held in Subang (Malaysia) in March 2007 were found to be positive for Propranolol and its metabolites.

24. In his written testimony, Dr Olivier Rabin, Science Director of WADA, stated that *"Propranolol is a prohibited substance described as a non cardio selective beta-blocker. Propranolol is used to manage hypertension, myocardial infraction, cardiac arrhythmias and prophylaxis of migraines. It can be used to alleviate anxiety disorders and tremors. (...) the use of Propranolol, for a Shooter would have a calming effect by significantly reducing the tremor of the hands, leading to significantly enhanced precision in the act of shooting".* He further mentioned that Propranolol is usually taken orally in the form of capsules or tablets. *"When taken orally, Propranolol is known to be a bitter substance. The bitterness is not overwhelming and is actually well tolerated with not much effect on the taste even when applied directly on the tongue".*

25. The panel of enquiry formed by the NSAM, which heard the Shooters and the coach on 10 and 17 June 2007, held that the prohibited substance was contained in the Ferrero Rocher

chocolates which were given to the Shooters by their coach, but that the Shooters were not aware of the presence of the prohibited substance in the chocolates.

26. Therefore, the Panel holds that the Shooters have committed a violation of the ISSF Anti-doping rules.

B. Period of Ineligibility

27. As far as the length of the period of ineligibility is concerned, the ISSF Rules, in accordance with the WADC, provide for a two-year suspension for a first violation of anti-doping rules, namely in the presence of a prohibited substance or its metabolites or markers in the bodily specimen of the athletes. The ISSF Rules in accordance with the WADC provide, however, for a reduction of the period of ineligibility under certain circumstances:

a) Reduction based on “specified substance”

28. Propranolol is identified by the Prohibited List as a specified substance. According to articles 5.11.3 of the ISSF Rules, art. 10.3 of the WADC, the applicable period of ineligibility may be replaced by a lower period in the event the athletes can establish that the use of such a specified substance was not intended to enhance sport performance.
29. Within its appeal brief, WADA alleged that the NSAM did not bring sufficient evidence to establish that the Shooters did not ingest Propranolol for performance enhancing purposes for three separate reasons:
 1. Propranolol enhances performance in shooting and *“the nature of the substance may play a role in establishing the intention of the athlete to enhance his/her sport performance. An athlete is obviously more likely to intend to enhance his/her sport performance by taking a substance capable of doing so than one not capable of doing so...”*.
 2. The Athletes could not in good faith have not suspected that they were ingesting a prohibited substance.
 3. The Athletes ingestion of unwrapped chocolates is so negligent as to constitute an assumption of the risk of ingesting a substance, thereby making the ingestion of Propranolol intended rather than unintended.
30. The Panel notes from the proceedings before the doping panel of enquiry that the Athletes’ position is that they did not purposefully ingest the Propranolol and as such did not ingest the Propranolol with the intention to enhance their sporting performance.
31. Considering the above, the Panel concludes that the performance enhancing effects of Propranolol in shooting cannot be ignored. Therefore, the burden is upon the Athletes to show how this specified substance entered in their systems, and to demonstrate that this manner of

ingestion was not intended to enhance their performance. The Panel notes that, during the proceedings before the doping enquiry panel, the Athletes have alleged that this substance has occurred in their systems by ingesting the chocolates given by their coach, who expressly intended to enhance their performance. However, the Panel finds that the NSAM did not present sufficient evidence to apply a reduction of the period of ineligibility in accordance with art. 5.11.3 of the ISSF Rules.

32. When interpreting art. 5.11.3 of the ISSF Rules, art. 10.3 WADC, one must look at the wording and particularly the context of the provision. Webster's Unabridged Dictionary describes the term "to establish" by, inter alia, the words "to prove or "to demonstrate". This implies that a "shooter" must do more than merely "bring forward" or "contend". Rather the shooter must convince the sanctioning authority – to a certain degree – of the presence of the inner fact, namely that he did not intend to enhance his performance. While inner facts are not events which can be perceived externally and cannot, therefore, be proven directly various legal systems consider inner facts to be legally significant in many areas. Such facts can, in state proceedings, be proven by establishing circumstances which according to the experience allow one to conclude the presence of the facts to be established. In the present case there is no circumstantial evidence – other than the mere allegation of the Shooters – that they did not intend to enhance their performance. The Shooters did not provide to the doping enquiry panel a piece of the contaminated chocolate. Nor did the coach admit before the doping enquiry panel to have manipulated the chocolate. Furthermore, there is no evidence that in the given circumstances an unintentional violation of the anti-doping rules by the Shooters was more likely than the intentional misuse of the substance. This is in particular true in view of the sport enhancing effects of the substance. Taking all the above into account the Panel is of the view that the Shooters and the NSAM did not discharge their burden of proof that the anti-doping rule violation was committed by the Shooters without their intent to enhance their performance.
- b) Reduction based on no fault or negligence
33. ISSF Rule 5.11.5.1 provides for the elimination of an athlete's period of ineligibility if the athlete is found to bear no fault or negligence for the violation and if the athlete can establish how the prohibited substance entered his system.
34. In general, the elimination of the period of suspension is only possible in the case where the athlete can establish that he/she was unaware, that he/she did not doubt or could not have reasonably known or presumed, even with the greatest vigilance or utmost caution, that he/she was given a prohibited substance or prohibited method. The burden is therefore shifted to the athlete to establish that he/she has done all that is possible to avoid a positive testing result (see CAS 2006/A/1133).
35. ISSF Rules 5.3.1.1, art. 2.1.1 of the WADC, provide that each athlete has the duty to ensure that no prohibited substance enters his/her body. This means that the athletes are responsible for what they ingest and for the conduct of those persons whom they entrust the access to their

food and drinks. This is confirmed by the CAS constant jurisprudence (see e.g. CAS 2006/A/1133; TAS 2006/A/1038; CAS 2005/A/969; CAS 2005/A/921; CAS 2005/A/847).

36. According to ISSF Rule 5.3.1.1 it is each shooter's personal duty to ensure that no prohibited substance enters his/her body. Shooters are to be responsible for their own bodies, and the presence of a prohibited substance constitutes a failure in the Athletes' part to fulfil this duty. The ISSF Rules provide the following definition of each athlete's personal duty:

"No Fault or Negligence

The Athlete's/Shooter's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of the utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method".

37. In the present matter, the Shooters alleged before the doping enquiry panel that they ate unwrapped chocolates given to them by their coach during the shooting competition held in Malaysia in March 2007. They have also mentioned the bitterness left on their tongue after the ingestion of those chocolates.
38. Therefore, in view of the above, the Panel is of the opinion that the Shooters did not exercise "the greatest vigilance" or "utmost caution", which is expected of athletes ingesting unwrapped chocolates. The Panel also notes that the NSAM alleged during the enquiry proceedings that the coach had contaminated the chocolates which would lead the athletes to be mere victims. However, the report does not advise as to how the coach is alleged to have distinguished the prohibited substance in the chocolates, or under what form the coach is alleged to have administered the Propranolol (pill, powder, liquid or other format). Furthermore, it appears that the NSAM did not intend any disciplinary procedure against the coach. The latter resigned his contract with the NSAM before the NSAM took the decision to terminate his agreement.
39. The Panel notes that the brand of chocolates known as Ferrero Rocher, as commonly sold, contain a whole hazelnut surrounded by a hazelnut cream encased in a hard milk chocolate shell and wrapped in a metallised paper wrapping. Inserting a pill into such a confectionary would pierce the outer shell and cause the chocolate to become difficult to eat and less appetizing. If the prohibited substance were administered in powder form, it would probably alter the outer shell of the confectionary. Injecting the chocolate with Propranolol in liquid would cause trauma similar to that caused by inserting a pill. In all instances, it would have been apparent to any reasonably cautious adult that the chocolate had been subject to some unusual trauma or alteration and have been rejected.
40. But even assuming the chocolates containing the Propranolol did not exhibit any obvious signs of tampering or modification, consuming unwrapped confectionaries is at least negligent to a degree for international level athletes. It is highly unusual to offer chocolates such as Ferrero Rocher out of their wrappers.

41. The Panel observes in conclusion that the Athletes cannot excuse their violation on account of the fact that their coach is alleged to have administered the prohibited substance. It is not generally open to athletes to excuse their negligence on account of the fact that a trusted advisor – a coach, relative or physician – administered the prohibited substance. It is constant in CAS jurisprudence that athletes are responsible for making enquiries about food and medications they are given, regardless of the source. The more unusual or novel the food or drug administered, the greater the duty of the athlete to make appropriately prudent enquiries. Athletes are also responsible for choosing carefully the individuals they entrust if they intend to delegate their duty to such individuals. It has been severally confirmed by CAS Panels that *“it would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/herself did not know of that substance”* (see also CAS OG 04/003; CAS 2002/A/432; CAS 2002/A/385).
 42. Accordingly, the Panel concludes that ISSF Rule 5.11.5.1 does not apply to eliminate the period of ineligibility since the Athletes did not rebut the presumption that they have ingested the prohibited substance to enhance their performance.
- c) Reduction based on no significant fault or negligence
43. According to articles 5.11.5.2 of the ISSF, art. 10.2 of the WADC, the period of ineligibility may be reduced (to one half at the maximum) in the event the athlete can demonstrate that, considering all of the circumstances and taking into account of the criteria inherent in the absence of fault or negligence, that his/her fault or negligence is not significant with respect to the violation of the anti-doping rules.
 44. Considering all the circumstances of the case, the fact that as international level athletes, the Shooters must know that they could be subject to doping control at any time, that the Shooters are responsible for their bodies, the Panel is of the opinion that the Shooters’ willingness to ingest unwrapped chocolates without further enquiry is at least significantly negligent.
 45. Accordingly, the Panel concludes that the Shooters did not establish any exceptional circumstances whereby the suspension period may have been reduced or eliminated. There is no information in the file to suggest that the Athletes have committed any prior doping infractions. Therefore, the ordinary two-year ban for a first anti-doping rule violation provided for in articles 5.11.2 of the ISSF Rules is applicable.
- d) Starting point of the sanction
46. ISSF Rule 5.11.8 provides that the Shooters’ period of ineligibility will run from the date of the arbitral decision, with credit being given for any period of provisional suspension.

47. ISSF Rule 5.8.4 authorizes a provisional suspension of the athlete between the date of a positive test and the date of the hearing. In the present case, the NSAM provisionally suspended the Athletes since 18 April 2007. The Panel does not have any information indicating prior provisional suspension or voluntary inactivity of the Shooters. So the two-year period of ineligibility shall begin on this date.
48. Finally, any and all results obtained by the Shooters from 8 March 2007 until 18 April 2007 are disqualified in accordance with ISSF Rule 5.11.7.

The Court of Arbitration for Sport rules:

1. The Appeals filed by WADA on 5 October 2007 and 11 October 2007 are upheld insofar as they are directed against the NSAM. In relation to Ms Joseline Cheah Lee Yean, Ms Bibiana Ng Pei Chin and Ms Siti Nur Masitah Binti Mohd Badrin the appeal by WADA is dismissed.
2. The decision issued on 21 September 2007 by the National Shooting Association of Malaysia is set aside.
3. The decision issued on 6 October 2007 by the National Shooting Association of Malaysia is amended as follows: The Shooters Joseline Cheah Lee Yean, Bibiana Ng Pei Chin and Siti Nur Masitah Binti Mohd Badrin are sanctioned with a two-year suspension. The period of ineligibility shall be calculated from 18 April 2007. Any results in a competition obtained by the Shooters from 8 March 2007 until 18 April 2007 are disqualified.
4. (...).
5. (...).
6. All other prayers for relief are dismissed.