



Arbitration CAS 2014/A/3548 Indra Gunawan v. Fédération Internationale de Natation (FINA), award of 2 September 2014

Panel: Mr Romano Subiotto QC (United Kingdom), President; Mr Anangga Roosdiono (Indonesia); Mr Conny Jörneklint (Sweden)

Aquatics (swimming)

Doping (methylhexanamine)

Filing of the statement of appeal according to Article R48 CAS Code

Elimination or reduction of the sanction based on Article 10.4 WADC

Absence of intent to enhance sport performance as a condition for the application of Article 10.4 WADC

Fault as the decisive criterion to determine the period of ineligibility according to CAS case law

Description of the objective element of fault

Description of the subjective element of fault

1. In accordance with Article R48 of the Code, if necessary, ***“the CAS Court Office may grant a one-time-only short deadline to the Appellant to complete its statement of appeal, failing receipt of which within the deadline, the CAS Court Office shall not proceed”***. This procedure is respected if the Appellant submits the missing elements of the appeal on time but by email only and the formal requirements are completed within the deadline set by CAS.
2. To justify any elimination or reduction of the sanction based on Article 10.4 FINA DC (and of Article 10.4 WADC), 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.
3. In order to satisfy the second condition of Article 10.4 WADC, the athlete must establish the absence of an intent to enhance sport performance at the time of its ingestion. The starting point of the controversy surrounding the correct interpretation of the condition “absence of an intent to enhance sport performance” is the fact that in the second paragraph of Article 10.4 WADC (and of Article 10.4 FINA DC) there is no mention of the word “substance” (as there is in the first paragraph) in connection with the evidential burden to “produce corroborating evidence” that the athlete did not intend to enhance sport performance. Therefore, the key question is whether the intent to enhance sport performance relates to the use of the specified substance or to the product itself in which it was contained.
4. According to CAS case law and pursuant to Article 10.4.3 WADC, the decisive criterion

to determine the period of ineligibility is fault. One can distinguish between the following degrees of fault: (a) significant degree of or considerable fault; (b) normal degree of fault; and (c) light degree of fault. When applying these three categories to the possible sanction range of 0-24 months, CAS case law arrives at the following sanction ranges: Significant degree of considerable fault: 16-24 months, with a “standard” significant fault leading to a suspension of 20 months. Normal degree of fault: 8-16 months, with a “standard” normal degree of fault leading to a suspension of 12 months. Light degree of fault: 0-8 months, with a “standard” light degree of fault leading to a suspension of 4 months. In order to determine into which category of fault a particular case might fall, one must consider both the objective and the subjective level of fault.

5. The objective element of fault describes what standard of care could have been expected from a reasonable person in the athlete’s situation. The subjective element of fault describes what could have been expected from that particular athlete, in light of his personal capacities. The objective element is foremost in determining into which of the three relevant categories a particular case falls. The subjective element can then be used to move a particular athlete up or down within that category. The consistent approach of the CAS to date has been to qualify the athlete’s fault as objectively significant if the product in question is advertised, sold, or distributed as being performance enhancing.
6. Subjective factors of fault may include that: the athlete researched the product on the internet; consulted a team coach or doctor; confirmed the statements about the product made by the salesman with an independent source; consulted the WADA List of Prohibited Substances or his sporting federation; or relied on assurances or assistance from a trusted source, such as a family member or close confidant. While these factors are not determinative of the appropriate sanction, they are considerations that a CAS panel may take into account when assessing the athlete’s degree of fault.

I. THE PARTIES

1. The Appellant, Putera Guntur Pratama (“the Athlete”), is a member of the National Indonesian Swimming Team, specializing in the freestyle and the butterfly.
2. The Respondent, Fédération Internationale de Natation (“FINA”) is the International Federation governing the sports of swimming and diving. One of its responsibilities is the regulation of swimming, including, under the World Anti-Doping Code, the running and enforcing of an anti-doping program.

II. FACTUAL BACKGROUND

3. On July 2, 2013, the Athlete participated in the 4th Asian Indoor and Martial Arts Games in Incheon, Korea, where he competed in the men's 4x50 freestyle relay and won a silver medal.
4. During the competition, the Athlete took a supplement of Jack3d which he, according to his own allegation, obtained through the National Indonesian Swimming Team's coach, Mr. Albert Sutanto. The Athlete said that he was not aware that the supplement contained a banned substance.
5. The National Indonesian Swimming Team Coach explained during the investigation that since 2010 he encouraged all members of his swimming team to take Jack3d because the supplement contains nitrous oxide which helps to widen blood vessels. This would enable the heart to pump more blood, thereby strengthening the swimmers.
6. After the Athlete's competition he was selected for a doping control test. On July 5, 2013 the Olympic Council of Asia ("OCA") wrote to the Chef de Mission of the National Olympic Committee of Indonesia ("NOCI"), stating that the Athlete was found to have an "adverse analytical finding" in his urine sample.
7. The substance detected was methylhexaneamine, ("MHA"), a substance, which is prohibited in competition, listed on the World Anti-Doping Agency ("WADA") Prohibited List 2013. The Chef de Mission informed the Athlete that he had a right to a fair hearing by the OCA Disciplinary Commission, and that he had a right to request the analysis of the B sample at his cost.
8. Later on July 5, 2013, the Athlete attended a hearing accompanied by the Chef de Mission of NOCI, the team doctor, and legal support. At the hearing, the Athlete exercised his right to have his B sample tested.
9. On July 6, 2013, the Athlete's B sample was to be tested; however, the test was postponed. A deadline of July 11, 2013 was set to provide an explanation as to why the test was not conducted.
10. On July 11, 2013, the OCA Disciplinary Commission received correspondence from the NOCI indicating that the Athlete had waived his right to have the B sample tested.
11. On July 13, 2013 the OCA Disciplinary Commission decided that the laboratory findings from the A sample constituted a violation of OCA doping rules. They mandated that the Athlete be disqualified from the 4th Asian Indoor and Martial Arts Games, the results be nullified, and all medals and any other prizes or certificates awarded be withdrawn starting from the date when the athlete tested positive.

III. PROCEDURAL BACKGROUND

A. LADI PROCEEDINGS

12. On August 7, 2013, the Athlete was called to a hearing before the Indonesian Anti-Doping Agency (“LADI”). The disciplinary commission imposed a sanction of three months ineligibility on the Athlete to begin August 13, 2013.
13. On August 13, 2013, LADI determined that the prohibited substance found in the Athlete’s urine on July 1, 2013 constituted a violation of WADA’s ban of MHA, and therefore violated 2.1 of FINA’s Doping Control Rules (“FINA DC”).
14. LADI also applied FINA DC Article 10.4 concerning the “Elimination and Reduction of the Prohibition Period for Participation,” reasoning that because the Athlete did not know that Jack3d contained a banned substance, and because the Athlete did not use the drug during a race that a reduction in sanction was appropriate.
15. Although the standard sanction for a first-time doping offense is a two-year ban from the sport, LADI gave the Athlete a sentence reduced to three months to last from August 13, 2013 to November 12, 2013.
16. LADI also recommended that OCA annul the results of the Athlete’s race and that the Athlete return any medals awarded.

B. FINA PROCEEDINGS

17. On November 13, 2013, the FINA Executive Director asked the Chairman of the FINA Doping Panel to examine the Athlete’s Case.
18. On November 20, 2013, the Chairman of the FINA Doping Panel wrote a letter to the Athlete informing him of his right to a fair hearing as per FINA DC 8.1.
19. On November 21, 2013, the Athlete responded via email stating that he accepted the penalty imposed by LADI.
20. On November 28, 2013, the FINA Doping Panel Chairman informed the Athlete of his right to attend a hearing and to provide a defense to the allegations.
21. On December 16, 2013, the Indonesian Swimming Federation responded via letter stating that the Athlete neither wished to attend a hearing, nor to provide a defense.
22. On January 15, 2014, the FINA Doping Panel was formed pursuant to FINA Constitution Rule C 23.10.
23. By decision of March 1, 2014, FINA’s Doping Panel penalized the Athlete with a two year period of ineligibility commencing on July 1, 2013 and ending on June 30, 2015. All results obtained by the Athlete after July 1, 2013 were disqualified and any medals, points, or prizes

were forfeited (“the Decision”). Such decision was notified to the athlete through the Indonesian Swimming Federation on 10 March 2014.

24. FINA’s Doping Panel looked to sections 10.4 and 10.5 to potentially eliminate or reduce the Athlete’s sanction. To succeed under 10.5 with a “No Fault or Negligence” finding, FINA’s Doping Panel reasoned that the Athlete must show that he used “utmost caution” to keep himself clean of any prohibited substances. This means that the athlete should make “every conceivable effort to avoid taking a prohibited substance” and that the substance got into his system “despite all due care”. FINA’s Doping Panel did not find that the Athlete’s behavior had met this high bar.
25. FINA’s Doping Panel also reasoned that the mitigation under section 10.4 could not apply to the Athlete. He did not establish that performance-enhancement was not his endeavor, and he also knew that other athletes used the substance to strengthen themselves.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. On March 28, 2014, the Court of Arbitration for Sport (“CAS”) received an email from the Athlete declaring his intention to appeal FINA’s decision. The statement of appeal did not include (i) a copy of the decision appealed against, (ii) the nomination of the arbitrator chosen by the Athlete, (iii) copies of provisions of the statutes or regulations, (iv) a proof of payment of the Court Office fee, or (v) five additional copies of the statement to appeal by courier. All of these documents are required under Article R48 of the Code of Sports-related Arbitration (the “Code”).
27. On April 1, 2014, the Managing Counsel & Head of Arbitration from CAS responded to the Athlete extending the deadline three additional days. In the letter, CAS listed the information required to complete a proper statement of appeal in accordance with Article R48 of the Code.
28. On April 7, 2014, the Athlete emailed CAS a revised statement of appeal, although the statement was dated April 4, 2014.
29. On April 8, 2014, CAS responded to the Athlete, acknowledging receipt of the Statement of Appeal dated March 28 and completed April 7 against FINA. The correspondence also informed the Athlete that he had ten days to submit a brief stating the facts and legal arguments giving rise to the appeal. The letter mentioned that the brief should be filed by courier with at least six copies included.
30. On April 11, 2014, CAS acknowledged receipt of the Athlete’s appeal brief dated April 9, 2014.
31. On April 23, 2014, CAS emailed the Athlete informing him that he had 7 days to inform CAS whether he agreed with FINA’s arbitrator suggestion.
32. On May 1, 2014, CAS emailed the Athlete to inform him that the seven days to challenge FINA’s arbitrator request had expired and that the decision would remain with CAS. In a

separate email, CAS also informed the Athlete that his arbitration would be joined with that of Mr. Gunawan into the same arbitration panel.

33. On May 2, 2014, FINA submitted their Answer to CAS. On May 5, 2014, the answer was distributed to the Athlete.
34. On May 5, 2014, FINA expressed a preference for the appeals to be decided on the basis of the parties' written submissions.
35. On May 12, 2014, CAS received the Athlete's request to hold a hearing in writing before CAS. The request for a hearing was received by the deadline imposed by CAS. However, because a hearing in writing is not possible, CAS emailed the Athlete on May 13, 2014 inquiring as to whether he would like a hearing to be held or a second round of written submissions. The Athlete was given three days to respond. Because the Athlete did not respond within the given time period, CAS extended the deadline to May 22, 2014.
36. On May 22, 2014, the Athlete responded to CAS agreeing that the award should be rendered on the basis of the parties' written submissions. However, the Athlete did ask for the opportunity to provide a defense to FINA's answer. CAS confirmed receipt of the Athlete's request for a second round of submissions and gave FINA a deadline of May 27, 2014 to agree. On May 23, 2014, FINA agreed to the second round of written submissions and CAS gave the Athlete 20 days to file a reply.
37. On May 30, 2014, notice was given to the parties that the Panel to hear the appeal had been constituted as follows: President: Mr. Romano Subiotto QC, Solicitor-Advocate, Brussels, Belgium, and London, United Kingdom, Mr. Anangga Roosdiono, Attorney-at-law, Jakarta, Indonesia as Arbitrator appointed by the Appellant, and Mr. Conny Jörneklint, Chief Judge in Kalmar, Sweden, Arbitrator appointed by the Respondent. The parties did not raise any objection as to the constitution and composition of the Panel.
38. The Athlete never submitted another written submission.
39. In a letter of July 22, 2014, the Parties were invited to sign and return a copy of the Order if Procedure prepared for this case. While FINA returned its signed copy, the Athlete failed to do so. In a letter of August 18, 2014, the CAS Court Office informed the Parties that the Panel nevertheless would proceed with rendering its award in this case.

V. JURISDICTION, APPLICABLE LAW, AND ADMISSIBILITY

A. JURISDICTION

40. The jurisdiction of CAS is derived from FINA DC 13.2.1, which provides as follows:

In cases arising from participation in an International Competition or in cases involving International-Level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.

41. Article R47 of the Code provides as follows:

Article R47

An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned.

42. Neither of the Parties challenged the jurisdiction of CAS, and the Respondent signed the Order of Procedure, thereby recognizing that “[b]y signing the present order, the parties confirm that they agree that the CAS has jurisdiction to adjudicate the present case, including concerning its own jurisdiction”. The silence of the Athlete in this matter cannot be assessed as anything other than an acceptance of the jurisdiction of the CAS, since the Athlete brought the present appeal before CAS.
43. Accordingly, the jurisdiction of the CAS over this Appeal is both clear and undisputed.
44. Pursuant to Article R57 of the Code, the Panel has full power to review the facts and the law and to hear the case *de novo*, wherein at R57 it provides that:

Article R57

The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

B. APPLICABLE LAW

45. Article R58 of the Code, to which the parties submitted by agreeing to arbitrate in front of the CAS, provides as follows:

Article R58

This 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.

46. Pursuant to the above provision, the Panel must determine what regulations and law the parties chose to govern their dispute.
47. It seems to be common ground between the Athlete and FINA that the applicable regulations of this case are the FINA DC which applies to all members and participants in the activities of the FINA or of its member federations. Therefore, the FINA DC applies as to the merits.

Concerning procedural issues, the procedural rules of the CAS Code, supplemented by Swiss procedural law and principles are applicable as the CAS resides in Switzerland.

Applicable Rules of FINA DC

48. FINA's DC 2.1.1 states that it's each "Competitor's personal duty to ensure that no Prohibited Substance enters his or her body". Sufficient proof of doping is established upon a positive finding of a banned substance in both the A and B samples, or only the A sample if testing the B sample has been waived. DC 2.1.2.
49. When an athlete has been found guilty of using illegal substances, "[t]he period of ineligibility imposed for a violation" shall be two years of ineligibility, DC 10.2. The sanction can only be eliminated or reduced as provided in DC 10.4 and DC 10.5.
50. DC 10.4 and DC 10.5 provide ways in which an athlete's sanction can be reduced. The sections provide as follows:

DC 10.4¹

When 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 by the following:

First Violation: At 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.

DC 10.5.1 No Fault or Negligence

If a Competitor establishes in an individual Case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Sample in violation of DC 2.1 (Presence of Prohibited Substance), the Competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise

¹ To qualify for a 10.4 sanction mitigation, two factors must be established: (i) the athlete must establish how the Specified Substance entered his or her body or came into his or her Possession; and (ii) the athlete 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.

applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under DC 10.7.

DC 10.5.2 No Significant Fault or Negligence

If a Competitor or other Person establishes in an individual Case that he or she bears No Significant Fault or Negligence, then the otherwise applicable period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime, the reduced period under this Article may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in a Competitor's Sample in violation of DC 2.1, the competitor must also establish how the Prohibited Substance entered his or her system in order to have the period of ineligibility reduced”.

C. ADMISSIBILITY

51. Article R48 of the Code, to which the parties submitted by agreeing to arbitrate in front of the CAS, provides as follows:

Article R48

The Appellant shall submit to CAS a statement of appeal containing:

- *The name and full address of the Respondent(s);*
- *A copy of the decision appealed against;*
- *The Appellant's request for relief;*
- *The nomination of the arbitrator chosen by the Appellant from the CAS list, unless the Appellant requests the appointment of a sole arbitrator;*
- *If applicable, an application to stay the execution of the decision appealed against, together with reasons;*
- *A copy of the provisions of the statutes or regulations or the specific agreement providing for appeal to CAS*

Upon filing the statement, the Appellant shall pay the CAS Court Office fee provided for in Article R64.1 or Article R65.1

If the above-mentioned requirements are not fulfilled when the statement of appeal is filed, the CAS Court Office may grant a one-time-only short deadline to the Appellant to complete its statement of appeal, failing receipt of which within the deadline, the CAS Court Office shall not proceed.

52. Article R49 of the Code provides as follows:

Article R49

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 the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

53. The Decision is dated March 1, 2014 and it was sent to the Indonesian Swimming Federation on March 10, 2014.
54. The Athlete filed his Statement of Appeal via email on March 28, 2014. While the intent to appeal was filed within the deadline established under Article R49 of the Code, not all of the formal requirements for an appeal were followed.
55. The admissibility of the appeal will be considered below.

VI. THE SUBMISSIONS OF THE PARTIES

56. The summary below refers to the substance of the Parties' allegations and arguments without particularizing them exhaustively in detail. In its discussion of the case and its findings under Section VII of this Award the Panel has nevertheless examined and taken into account all of the Parties' allegations, arguments, and evidence on record, regardless of whether they are referred to expressly.

A. THE ATHLETE'S APPEAL

57. The Athlete maintains that he did not know that the substance he ingested contained any prohibited substances.
58. The Athlete has a minimum understanding of the banned substances list due to his rigorous daily training
59. The Athlete served the sanction handed out by LADI from August 13, 2013 to November 12, 2013. He was not expecting to receive a separate sanction from another sports authority, like FINA.
60. The Athlete challenges the overlapping sanctions from two sports authorities: LADI and FINA.
61. It is implied that the Athlete was not made aware that the FINA proceedings were separate proceedings, and as such the Athlete neglected to raise a defense at a FINA hearing.
62. The proceedings from both FINA and LADI have caused significant hardship for the Athlete, his family, and his teammates.
63. In view of the above, the Athlete filed the following requests for relief in his appeal brief:

1. *An annulment of FINA's decision;*
2. *A reinstatement of all results, medals, points, and prizes that the Athlete received as of July 2, 2013;*
3. *A mandate that FINA make public statements in order to repair the Athlete's reputation as an Indonesian Swimmer.*

B. FINA'S RESPONSE

64. FINA does not *per se* challenge CAS's authority to hear this appeal; however, it raises a significant objection to the appeal being carried out when the Athlete did not properly complete all of the formal requirements to make an appeal.
65. FINA specifically challenges the initial Statement of Appeal which was emailed on March 28, 2014 and did not include all of the formal elements of an appeal. They further challenge the Statement of Appeal on the grounds that the filed supplement failed to be submitted by the deadline as well as lacked the formal requirements.
66. FINA argues that R31 mandates that the Statement of Appeal be formally filed by courier or post in order to be valid. The fact that the Athlete submitted his Statement of Appeal via email should invalidate it.
67. FINA points out that the Athlete gave two very different stories to the OCA and LADI. Before OCA, the Athlete stated he obtained the Jack3d from his roommate, Mr. Gunawan, who had purchased the substance from Hungary. However, before LADI, the Athlete stated that he had purchased the Jack3d in a fitness center in West Jakarta after hearing that other Indonesian swimmers had been using it in accordance with the recommendation of their coach, Albert Sutanto.
68. To the Athlete's argument that he did not know Jack3d was a prohibited substance, FINA points to the substance's packaging and label which advertises its ability to grow muscles and provide ample energy, power and endurance.
69. The FINA's Doping Panel found that a reduction of the standard two-year sanction based on FINA DC 10.5.1 (No Fault or Negligence) or 10.5.2 (No Significant Fault or Negligence) was not warranted because the Athlete "fell well short of the duty of utmost caution".
70. The FINA's Doping Panel also concluded that the Athlete failed to provide any evidence for the purposes of FINA DC 10.4 to show that he had not wished to enhance his sport performance. Instead FINA reasoned that the evidence pointed in the other direction.
71. Ultimately, FINA's Doping Panel sanctioned the athlete for two years and it contended that LADI had no jurisdiction to hear the matter and render a decision.
72. In view of the above, FINA submitted the following requests for relief in his answer:

1. *A ruling that the appeal is inadmissible.*
2. *A ruling that the appeal is dismissed.*
3. *A ruling that the Athlete should bear the entirety of the arbitration costs for the appeal proceedings.*
4. *A ruling that the Athlete bear substantially all of the Respondent's legal fees and other costs in connection with these proceedings.*

VII. LEGAL ANALYSIS

73. The Panel will firstly examine the issues related to the timing of the request for appeal, and secondly analyze FINA's Doping Panel's decision to suspend the Athlete's from competition.

A. TIMING OF THE REQUEST FOR APPEAL

74. On March 28, 2014, the Athlete sent a Statement of Appeal by email and by courier to the CAS Court Office declaring his intention to appeal FINA's decision. The statement of appeal did not include (i) a copy of the decision appealed against, (ii) the nomination of the arbitrator chosen by the Athlete, (iii) copies of provisions of the statutes or regulations, (iv) a proof of payment of the Court Office fee, or (v) additional copies of the statement to appeal by courier. All of these documents are required under Article R48 of the Code.
75. Following a letter sent by the CAS Court Office on 1 April 2014, the Athlete completed his Statement of Appeal and sent it in 5 copies via courier on April 7, 2014, within the time limit fixed by the CAS Court Office.
76. The Panel refers to FINA DC 13.2.1 which allows for appeals to be handled exclusively by CAS "in accordance with the provisions applicable before such court". Because that court is CAS, the Panel sees no problem in applying only the CAS-mandated requirements.
77. In accordance with Article R48 of the Code, if necessary, "*the CAS Court Office may grant a one-time-only short deadline to the Appellant to complete its statement of appeal, failing receipt of which within the deadline, the CAS Court Office shall not proceed*". Such procedure was duly respected here and the Appellant did submit the missing elements of the appeal on time but by email only. Pursuant to Article R31 of the Code, "*the exhibits attached to any written submissions may be sent to the CAS Court Office by electronic mail, provided that they are listed and that each exhibit can be clearly identified*". In this case, the formal requirements were completed within the deadline set by CAS, which the Panel considers reasonable. Furthermore, the CAS Court Office's letter of April 8, 2014, notes the completion of all formal requirements and does not raise any doubt concerning the admissibility of the Athlete's appeal as a result of any failure to comply with any formal requirements. The Panel therefore finds the Appeal admissible.

B. SANCTION

78. Two issues must be evaluated when considering the Athlete's sanction. The first is determining which entity had the authority to sanction the Athlete. The second is whether, based on the facts, the sanction is appropriate.
79. It is undisputed that the Athlete's test results showed an adverse analytical finding of MHA, a banned Specified Substance, in his urine. While there may be some discrepancy in how the Athlete acquired the substance, it is undisputed that the Indonesian National Swimming Team's coach, Albert Sutanto, encouraged all members of the team to take Jack3d, the supplement which contained the banned substance.
80. Furthermore, it is uncontested that the Athlete did not know that the supplement contained a banned substance.
- a) *FINA's authority to sanction the athlete*
81. According to FINA DC 14.6 when a member federation receives an adverse analytical finding on one of its competitors, it must report that information to FINA "*within fourteen (14) days of the process described in FINA DC 7.1.2, 7.1.3, and 7.1.9*".
82. The processes described in FINA DC 7.1.2 (therapeutic exemptions and testing departures), FINA DC 7.1.3 (testing of the B sample), and FINA DC 7.1.9 (anti-doping violations that do not produce an adverse analytical finding) either lack relevance in this matter or were completed on July 13, 2013.
83. As mandated, OCA sent FINA an email with preliminary documents relating to the adverse analytical finding on July 8, 2013. However, OCA's decision regarding the adverse analytical finding was not provided to FINA until October 6, 2013, nearly four months later. Ten days after OCA informed FINA of the result FINA notified the Athlete that it would be handling his case.
84. Almost a month later, on November 11, 2013, nearly three months after LADI's decision and sanction had been handed down, the Indonesian Swimming Federation sent FINA an email stating that LADI had already sanctioned the Athlete. FINA replied on November 20, 2103 asserting that FINA had the authority to manage the Athlete's case, not LADI.
85. Though not detailed in either Party's brief, it appears that when FINA commenced action against the Athlete in October 2013, it had no knowledge that LADI had already held a hearing and sanctioned the Athlete. Based on the briefs submitted, it appears undeniable that both LADI and the Athlete believed that LADI was the sole entity with the authority to sanction the Athlete.
86. FINA's response points to OCA's Doping Rule 9.3 which states that "*[t]he management of anti-doping rule violations and the conduct of additional hearings as a consequence of hearings and decisions of the OCA, including with regard to the imposition of sanctions over and above those relating to the Asian Games,*

shall be managed by the relevant International Federations". The question then becomes which International Federation has that authority.

87. No definition of "International Federation" can be found within OCA's Doping Rules. But it follows from the Constitution of FINA that FINA is the International Federation governing the sports of swimming and diving. This means that FINA is the only governing body with power to impose sanctions regarding swimmers for doping offences committed in the Asian Games.

b) *Is FINA's sanction appropriate?*

88. Based on the written submissions and written evidence in the case the Panel can safely conclude that the Athlete violated an anti-doping rule. The issue that still needs to be decided is whether FINA's sanctioning of the Athlete is appropriate, that is if the standard two years' Ineligibility mandated by FINA DC 10.2 is appropriate in this case.

89. Both Parties agree that FINA DC 10.4 is applicable in the case at hand, because MHA is a Specified Substance within the meaning of the provision.

90. FINA DC 10.4 reads as follows:

Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specified Circumstances:

When 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 by the following:

First Violation: At 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.

91. Its origin can be traced to the World Anti-Doping Code 2009 ("WADC"), and it is a mandatory provision that must be adopted in the internal anti-doping rules of all international sports federations that are bound by the WADC.

92. Because the prohibited substance in question is a specified substance and can be traced back to the food supplement Jack3d that the Athlete took prior to the sample collection, the first condition of FINA DC 10.4 is satisfied.

93. In order to satisfy the second condition, the Athlete must establish that the Specified Substance was not intended to enhance the Athlete's sport performance. The breadth of the sanction is from 0 months to 2 years.
94. FINA Doping Panel found that the Athlete did not establish that the Specified Substance was not intended to enhance the Athlete's sport performance.
95. In order to satisfy the second condition, the Athlete must establish the absence of an intent to enhance sport performance at the time of its ingestion. This element of intent in Article 10.4 WADC (and in corresponding doping rules such as Article 10.4 FINA DC in the case at hand) has recently been the subject of controversial discussions by a variety of CAS and other national doping panels. The starting point of the controversy surrounding the correct interpretation of the condition "absence of an intent to enhance sport performance" is the fact that in the second paragraph of Article 10.4 WADC (and of Article 10.4 FINA DC) there is no mention of the word "substance" (as there is in the first paragraph) in connection with the evidential burden to "produce corroborating evidence" that the Athlete did not intend to enhance sport performance. Therefore, the key question is whether the intent to enhance sport performance relates to the use of the specified substance or to the product itself in which it was contained.
96. Case CAS 2013/A/3316 describes this case law thoroughly. In summary, it is correct to say that the Athlete must have an intent (direct intent, indirect intent or even a *dolus eventualis*) to ingest the prohibited substance. In this case it is common ground between the parties that the Athlete did not know that the supplement he took Jach3d did contain MHA. It is clear that he did not have a direct or indirect intent to ingest the prohibited substance. Even if one were to rely on the *dolus eventualis* it is not possible to say that the Athlete in this case would have taken the supplement if he had been aware of the risk that it contained a prohibited substance. As he relied on his coach it must be correct to say that he was not aware of such a risk.
97. With this background the Panel finds that the Athlete has established that the Specified Substance was not intended to enhance his sport performance.
98. The fact that the athlete had no intent within the meaning of Article 10.4 FINA DC does not, however, automatically lead to impunity. One still has to determine, in a second step, the extent to which the Appellant is eligible for a reduction of the standard period of ineligibility. The sanctions possible pursuant to Article 10.4 FINA DC range from a minimum sanction, consisting of a reprimand and no period of ineligibility, to a maximum sanction, consisting of a two-year period of ineligibility. According to Article 10.4 FINA DC, the degree of the athlete's fault (e.g. light or gross negligence) is the decisive criterion in assessing the appropriate period of ineligibility.
99. The Panel finds that cases CAS 2013/A/3327 and CAS 2013/A/3335 set forth in a helpful manner the approach taken consistently to determine the appropriate duration of the sanction for ingesting a Specified Substance with no intent to enhance the sports performance.

100. As Article 10.4.3 provides, the decisive criterion to determine the period of ineligibility is fault. One can, in line with the awards in the cases just mentioned, distinguish between the following degrees of fault: (a) significant degree of or considerable fault; (b) normal degree of fault; and (c) light degree of fault.
101. When applying these three categories to the possible sanction range of 0-24 months, the mentioned award arrives at the following sanction ranges:
 - a. Significant degree of considerable fault: 16-24 months, with a “standard” significant fault leading to a suspension of 20 months.
 - b. Normal degree of fault: 8-16 months, with a “standard” normal degree of fault leading to a suspension of 12 months.
 - c. Light degree of fault: 0-8 months, with a “standard” light degree of fault leading to a suspension of 4 months.
102. In order to determine into which category of fault a particular case might fall, one must consider both the objective and the subjective level of fault.
103. The objective element describes what standard of care could have been expected from a reasonable person in the Athlete’s situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities. The objective element is foremost in determining into which of the three relevant categories a particular case falls. The subjective element can then be used to move a particular athlete up or down within that category.
104. The substance at the heart of this case, MHA, is a specified stimulant banned in-competition only². For a substance prohibited in-competition only, the full standard of care will apply if the substance is ingested in competition.
105. In this case, the Athlete competed on July 2, 2013 in the 4x100m freestyle after which he was chosen for an in-competition doping test. Because his sample tested positive for MHA and because this substance has a short half-life, it is clear that the Athlete ingested the substance immediately before the competition and the doping test revealed that the prohibited substance was in his body while in competition. Furthermore, the Athlete confirms that he ingested Jack3d during the competition.
106. Furthermore, the consistent approach of the CAS to date has been to qualify the athlete’s fault as objectively significant if the product in question is advertised, sold, or distributed as being performance enhancing. In this case, a simple internet search that any reasonably athlete should be expected to carry out before ingesting a supplement would have alerted the Athlete that Jack3d contains a banned substance that has resulted in many doping violations and is banned in a number of countries.

² See WADA 2013 Prohibited List, International Standard. S6(b).

107. Subjective factors that may come into play concern for example, he (a) researched the (widely-known) product Jack3d on the internet (see CAS 2012/A/2804; CAS 2012/A/2747; CAS 2011/A/2677; CAS 2013/A/3075); (b) consulted a team coach or doctor (CAS 2011/A/2615 & 2618; CAS 2011/A/2518; CAS 2012/A/2701); (c) confirmed the statements about the product made by the salesman with an independent source (CAS 2013/A/3075; CAS 2012/A/2701); (d) consulted the WADA List of Prohibited Substances or his sporting federation (CAS 2012/A/2822); or (e) relied on assurances or assistance from a trusted source, such as a family member or close confidant (CAS 2013/A/3075; CAS 2012/A/2822; CAS 2012/A/2747).

108. The Athlete in this case has raised the lack of anti-doping education within the Indonesian swimming and that he relied on the advice of his team coach. It is also known that the Athlete has limited international experience

109. While these factors are not determinative of the appropriate sanction, they are considerations that this Panel takes into account when assessing the Athlete's degree of fault. However, since the Athlete did very little to assure himself that Jack3d was "safe" or did not contain the prohibited substance, the Panel finds that he has shown a significant degree of considerable fault. Consequently the Panel concludes that the Athlete is to be sanctioned with a period of ineligibility of 18 (eighteen) months.

c) Commencement of the ineligibility period

110. Article 10.9 of the FINA DC provides that the period of ineligibility - in principle - starts on the date of the "*hearing decision made providing for Ineligibility*".

111. According to the Decision the FINA Doping Panel decided that the period of ineligibility should start on July 2, 2013. As the LADI Decision decided that the three months period of ineligibility should last between August 13 and November 12, 2013 there is an overlap between the two sanctions which is not a disadvantage for the Athlete.

112. The Panel finds that it is appropriate to start the period of ineligibility on July 2, 2013 as the FINA Doping Panel decided.

d) Disqualification of the results

113. Art. 9 of FINA DC provides that "*An anti-doping rule violation in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes*". Art. 10.8 FINA DC states "*In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition), or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences including forfeiture of any medals, points and prizes*".

114. Based on Art 9 and 10.8 FINA DC the Panel hereby confirms the decision of FINA Doping Panel with respect to the disqualification of the results.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed on March 28, 2014 by Indra Gunawan against the decision handed down on March 1, 2014 by FINA is partially upheld.
 2. The decision of the FINA Doping Panel dated on March 1, 2014 is set aside and replaced by the following:
 3. Mr. Indra Gunawan is sanctioned with a period of ineligibility of eighteen (18) months, commencing on July 1, 2013.
 4. All sporting results obtained by Mr. Indra Gunawan from July 1, 2013, up to the expiry of the period of ineligibility shall be invalidated.
- (...)
7. All other motions or prayers for relief are dismissed.