Arbitration CAS 2008/A/1572, 1632 & 1659 Rebecca Gusmao v. Fédération Internationale de Natation (FINA), award of 13 November 2009

Panel: Prof. Christoph Vedder (Germany); Judge Carole Barbey (Switzerland); Prof. Denis Oswald (Switzerland)

Aquatics (swimming)
Doping (testosterone)
Bacterial degradation of the sample and method of detection
Tampering with any part of doping control and proof by any reliable means
Effect of the relocation of a laboratory on its accreditation
Production of new evidence
Notice of the first anti-doping rule violation
Lex mitior in disciplinary sanctions related to doping violations
Seriousness of the offence of tampering with a doping control

1. **Based on scientific evidence generally available and on established case law of CAS, IRMS analysis is the established and reliable method of distinguishing the exogenous origin of testosterone. IMRS allows the direct detection of the exogenous origin of testosterone and is not affected by dilution, bacterial degradation or a pathological state such as POS. In this respect, dilution and bacterial degradation do not exclude the application of the IRMS analysis.**

2. **Tampering with doping control can be proven by any reliable means; the term "any reliable means" includes any way to establish a proof as in any other area of law. In a situation where the analysis designed to detect prohibited substances which was conducted in a WADA accredited laboratory, based on the steroid profiles and other parameters, reveals that the samples collected from the same athlete on different occasions actually do not stem from the same person, anti-doping rules do not exclude that further investigations concerning the non-identity of the donors can be made by a non-WADA-accredited laboratory.**

3. **The relocation of an accredited laboratory to a new building does not affect the existing accreditation which refers to the whole of the analysis devices and methods rather than to the physical building. A new accreditation is necessary for temporary "satellite facilities" of laboratories established for the purpose of major events but not for the permanent relocation of a laboratory.**

4. **Under *"exceptional circumstances"* Article R56 of the CAS Code allows the president of the panel to authorize the parties *"to supplement their arguments … or to specify further evidence … after the submission of the grounds for the appeal and of the answer"*. The unambiguous wording of that clause, supported by its systematic position**

before Article R57 of the CAS Code which deals with the hearing, clarifies that Article R57 of the CAS Code does not cover the production of new evidence after the closure of the hearing.

5. **In the normal course of the handling of an alleged anti-doping rule violation, the notification in the results management process is a sufficient condition for a second violation. This is more than the knowledge of the mere laboratory report of an adverse analytical finding. The notification is issued only if the *initial review* conducted by the responsible anti-doping organization leads to the result that no therapeutic use exemption has been granted and no apparent procedural departure undermines the validity of the analytical finding. At that stage in the normal course of a doping case it is likely that an anti-doping rule violation was actually committed and, generally, the athlete is provisionally suspended. All further steps which are available to the athletes – request for the analysis of the B sample, request for a hearing, appeal of decisions etc. – are legal remedies which, as such, do not affect the validity of the suspension or other decisions. For the purpose of imposing sanctions for multiple violations, an anti-doping rule violation does not only exist when the last decision is taken which is final and binding. An interpretation to the contrary would open a period of time where, after the notification, an athlete could commit further doping offences without the risk of lifetime ineligibility for a second violation.**

6. **Even in cases where neither party makes submissions related to the *lex mitior* principle a CAS panel has to apply the applicable rules which include the transitory provisions. Therefore the panel has to consider whether the substantive rules of FINA's Doping Control Rules (2009) constitute a *lex mitior*. The rules governing the length of a doping sanction are substantive anti-doping rules. This determination has to be made under the circumstances of the particular case.**

7. **Tampering is a particularly serious offence because tampering reveals that the athlete knew about the presence of the prohibited substance which she tried to hide by the manipulation. It is not only the intake of the prohibited substance but also the additional effort to manipulate the doping control either individually or in collaboration with a doctor.**

Ms. Rebecca Braga Gusmao filed three appeals against decisions of the Doping Panel of the Fédération Internationale de Natation dated 12 May 2008, 17 July 2008, and 3 September 2008 respectively, which stated various anti-doping rule violations allegedly committed by her and, in the most recent of which, Ms. Gusmao was declared ineligible to compete for life. The appeals have been consolidated and are heard by this Panel.

The Appellant, Ms. Rebecca Braga Gusmao ("the Athlete"), was born in 1984 and is of Brazilian nationality. She is an international level athlete included in FINA's Testing Pool who competed in

national and international swimming competitions since 1998. She is affiliated to the Confederacao Brasiliera de Desportivos Aquaticos (CBDA).

The Respondent, the Fédération Internationale de Natation (FINA), is the International Federation governing the sport of swimming worldwide which comprises national federations as members, amongst them the CBDA. The FINA has its seat in Lausanne, Switzerland.

The Athlete appealed against three decisions of the FINA Doping Panel (DP), which each determined a single anti-doping rule violation. Two of them refer to the presence of a prohibited substance found in the samples collected from the Athlete in doping tests conducted on 25 and 26 May 2006 (*CAS/A/1632*) and on 13 July 2007 (*CAS/A/1572*), respectively. The third alleged anti-doping rule violation concerns tampering with the doping control conducted on 12 July 2007 and a control conducted on 18 July 2007 (*CAS/A/1659*). All three appeals, albeit consolidated, are independent in their substance and the anti-doping rule violations must be determined each for itself. They are, however, interrelated with regard to the possible sanction the Panel has to determine.

Doping Test Conducted on 25 and 26 May 2006 (CAS/A/1632 Gusmao v. FINA)

During the Brazilian Swimming Championships of 2006 the Athlete was submitted to an in-competition test on behalf of the CBDA on 25 May 2006. As the first sample provided by her (A 965054) was extremely diluted, a second one was collected (A 965047) which was also diluted. Therefore, a third sample (A 390650) was taken on the next day, 26 May 2006 which was sufficiently good for analysis.

The samples were sent to the WADA accredited laboratory in Montreal, Canada. The results of the A samples analyses were reported by the laboratory on 29 June 2006. Sample A 965047, due to its extreme dilution and a microbial degradation was not reported as an adverse analytical finding. However, it was mentioned that the T/E ratio was elevated (at 15). For sample A 965054 *"abnormal IMRS results"* were reported and an elevated T/E ratio was established (above 10). Sample A 390650, the one collected on 26 May 2006, showed *"abnormal IRMS results consistent with exogenous origin of testosterone"* and the T/E ratio was *"roughly estimated"* at 17. The results of the analyses conducted on the samples A 965054 and A 390650 were reported as adverse analytical findings. The laboratory was informed that the samples were from the same athlete, the identity of whom was not known.

FINA was informed of the results of the A samples analyses by the laboratory report at the end of June 2006 and kept the issue under observation. In the course of various communications between FINA and CBDA concerning the Athlete's case in late 2006 and until August 2007, CBDA, based on various reports of Dr. de Castro, Medical Director of CBDA, took the position that there was an insufficient basis to sanction the Athlete.

In November 2006 FINA brought the matter before its Doping Control Review Board (DCRB) which, on several occasions, expressed its view that the IRMS (Isotope Ratio Mass Spectrometry) analysis of the sample A 390650, which was collected on 26 May 2006, conclusively revealed the exogenous origin of testosterone and that the analysis of sample A 965054 confirmed that finding.

The DCRB further stated that bacterial degradation does not affect IRMS analysis and that the results cannot be caused by a Polycistic Ovary Syndrome (POS) as had been advocated by the Athlete. Based on this opinion, by letter of 23 November 2006 FINA recommended CBDA to proceed with the Athlete's case.

In a further exchange of letters CBDA insisted on its position until FINA, by letter of 10 May 2007 advised CBDA that the analysis results had to be considered as adverse analytical findings and requested that it proceed with the results management process and hold a hearing.

On 11 May 2007 a hearing before a "Provisional Panel for Doping Control" of CBDA under the presidency of Dr. de Castro was held *"to discuss the adverse analytical results in 965047, 390650 and 965054"*. The Athlete and her father, as her representative, attended. At the hearing the Athlete confirmed that all samples were correctly collected and did not make any objection about the procedure. According to the minutes the Athlete's right to be present or represented during the B sample analysis *"was reconfirmed"* and the Athlete appointed Dr. de Castro as her representative. Taking into account the disagreement between CBDA and FINA about the interpretation of the laboratory findings the panel decided not to temporarily suspend the Athlete.

In a letter of 16 May 2007 to FINA CBDA reiterated its position and informed FINA that the Athlete had requested the analysis of the B samples.

The results of the B samples analysis conducted by the WADA accredited laboratory in Montreal were reported on 15 August 2007 and forwarded to the CBDA by letter of 20 August 2007. The analysis of all three B samples showed *"IRMS results consistent with exogenous origin of testosterone"* and *"elevated T/E value"* which reached up to 28 in the B sample 965054.

Based on the results of the B samples analysis FINA informed CBDA by letter of 20 August 2007 that, if IRMS shows the exogenous origin of a substance, no further investigation is necessary. FINA requested CBDA *"to promptly organise a hearing to consider these adverse analytical findings and to issue a final decision as soon as possible"*.

Again, despite the results of the B samples analysis CBDA maintained the position that the results of the analysis could not be relied upon in order to sanction the Athlete. By letter of 21 August 2007 CBDA informed FINA that *"it is impossible to assure that a doping rule violation has really occurred and, thus, the Brazilian Swimming Confederation cannot punish the athlete*".

FINA considered this statement of CBDA as a decision of that federation and, on 10 September 2007, filed an appeal before CAS which led to the case *CAS/A/1373 FINA v. CBDA & Gusmao*. The CAS Panel which was established to hear that case dismissed FINA's appeal by an award pronounced on 9 May 2008. The Panel found the appeal inadmissible because of the lack of a decision which could have been appealed. The Panel stated further that the internal remedies available to FINA, according to its own rules, had not been exhausted.

Therefore, following that decision of CAS, FINA referred the case to its Doping Panel. According to Rule DC 8.2.2 of FINA's Doping Control Rules (DC) FINA can bring a case before its Doping Panel, if a hearing before a body of a national federation is delayed for more than three months.

The FINA Doping Panel held a hearing on 17 July 2008 at FINA's headquarters in Lausanne. The hearing was attended by the Athlete and her legal counsels. Dr de Castro was heard as an expert witness nominated by the Athlete.

In its decision of the same day the FINA Doping Panel found that the Athlete had committed an anti-doping rule violation in the form of the presence of a prohibited substance. According to this Panel the presence of exogenous testosterone was convincingly proven by the IRMS analysis. As the anti-doping rule violation was committed on 25 and 26 May 2006, prior to the other violations allegedly committed by the Athlete which also were pending before FINA's Doping Panel (see below paras. 27, 44), and, thus, in any event constitutes the first anti-doping rule violation in relation to the other violations allegedly committed by the Athlete, the Panel declared the Athlete ineligible to compete for two years commencing on 17 July 2008.

The decision was received by the Athlete on 23 July 2008. The Statement of Appeal on behalf of her was filed with CAS on 12 August 2008.

Doping Test Conducted on 13 July 2007 (CAS/A/1572 Gusmao v. FINA)

The Athlete participated in the swimming competitions of the Pan American Games (PAG) which were held in Rio de Janeiro from 13 to 29 July 2007. At the occasion of the PAG she was submitted to two doping tests on 12 and 18 July 2007 by the Pan American Sports Organization (PASO) which gave rise to the appeal by the Athlete in the case *CAS/A/1659 Gusmao v. FINA*. In addition to these doping controls, before the beginning of the swimming competitions the Athlete had to undergo an out of competition test on 13 July 2007 which was ordered by FINA on the suggestion of Dr. de Rose, President of the Medical Commission of PASO.

In the course of the doping control executed on 13 July 2007, given the extreme dilution of the samples, two separate samples were taken (976285 and 180319).

The samples were sent to the WADA accredited laboratory in Montreal, Canada for analysis. On 30 July 2007 the laboratory reported a T/E ratio above 4 (26,4 and 9,0 respectively) for the A samples 976285 and 180319 and *"IRMS results consistent with exogenous origin of testosterone"* for both samples.

It took some time for FINA to refer the case to its DCRB and to take further procedural steps. As late as on 31 October 2007 the DCRB confirmed the existence of an adverse analytical finding and recommended to proceed further. Based on the results of the A samples' analysis FINA notified the Athlete of her provisional suspension on 2 November 2007, pending a hearing before the FINA Doping Panel.

On the occasion of a hearing held before the Anti-Doping Commission of CBDA on 5 November 2007 the Athlete requested the analysis of the B samples.

Due to the relocation of the Montreal laboratory to a new building which took place at the end of November 2007, the analysis of the B samples was re-scheduled for 18 to 21 December 2007. The B samples' analysis was attended by Dr. José Herrera Blanco as the Athlete's representative. As the analysis took more time than originally scheduled Dr. Blanco returned to Brazil on 22 December before the final results were provided to him.

By its report of 12 January 2008 the Montreal laboratory confirmed the findings of the A samples. Elevated T/E ratios of 28,8 for B 976285 and 13,5 for B 180319 and *"IRMS results consistent with exogenous origin of testosterone"* for both B samples were reported.

By letter of 18 January 2008 the FINA Doping Panel informed the Athlete of the findings. Upon her request a hearing was held before the Doping Panel on 10 March 2008 at FINA's headquarters in Lausanne in a timely context with the hearing concerning the doping test conducted on 25 and 26 May 2006 (see above). The hearing was attended by the Athlete and her legal counsels. Dr de Castro, albeit nominated as witness, was not heard due to her involvement in the case.

In its decision of 12 May 2008 the Doping Panel of FINA found that the Athlete had committed an anti-doping rule violation in the form of the presence of a prohibited substance. According to the Panel the presence of testosterone was proven by the analysis which led to the finding of highly elevated T/E ratios and the proof of the exogenous origin of the testosterone by IRMS analysis.

The Doping Panel declared the Athlete ineligible to compete for two years commencing on 2 November 2007. However, the Doping Panel was aware of the fact that the anti-doping rule violation occurred on 13 July 2007 could constitute a second violation in relation to the anti-doping rule violation committed on 25 and 26 May 2007 which then would lead to a lifetime ineligibility. But, as far as *"there is no final judgement"* on the other case - in which the hearing before that Panel actually took place two months later on 17 July 2008 (see above) - the Doping Panel regarded the anti-doping rule violation committed on 13 July 2007 to be a first violation.

The decision of the FINA Doping Panel, dated 12 May 2008, was received by the Athlete on 14 May 2008 and appealed before the CAS by the Statement of Appeal of 3 June 2008.

Doping Tests Conducted on 12 and 18 July 2007 (CAS/A/1659 Gusmao v. FINA)

In the context of the XV Pan American Games (PAG) which were held in Rio de Janeiro, Brazil, from 13 to 29 July 2007 during which the Athlete competed in the events of 50 m freestyle, 100 m freestyle, 4 x 100 m freestyle relay, and 4 x 100 m individual medley relay, she was submitted to an out of competition test conducted by the Organizing Committee of the PAG on 12 July 2007.

In addition to that out of competition test the Athlete had to undergo an in competition test on 18 July 2007 which was also initiated by the Organizing Committee of the PAG. The PAG Organizing

Committee submitted the Athlete to further doping tests: an in-competition test on 22 July 2007 and an out-of-competition test on 29 July 2007. On 13 July 2007 the Athlete had to undergo the out-of-competition test ordered by FINA which lead to the appeal *CAS/A/1572*.

The samples collected on 12 and 18 July 2007 under the code numbers 1804068 and 1803229, respectively, were sent to the WADA accredited laboratory LADETEC in Rio de Janeiro on 18 July 2007 and tested on the following days. The tests on both samples were reported to be negative by the laboratory, on 28 July 2007 for the sample taken on 12 July 2007, and on 24 July for the sample taken on 18 July 2007. According to a report by the head of the LADETEC laboratory, Professor Radler de Neto, dated 31 October 2008, the sample A 1803229, which was collected on 18 July 2007, was diluted and, despite clear indications of an elevated T/E ratio, *"therefore we avoided giving an Adverse Analytical Finding, but suggested that a longitudinal evaluation should be performed …"*. The sample A 1804068, collected on 12 July 2007 was *"simply negative"*.

However, the PAG were attended by an Independent Observer Team of WADA ("WADA IO Team") which monitored all stages of the doping control. The WADA IO Team reported to FINA on 23 July 2007 that the circumstances of the doping control and the results of the tests gave rise to suspicions concerning the Athlete's samples. The Chairman of the WADA IO Team, Mr. Luis Horta, had visited the LADETEC laboratory on 20 July 2007 and requested the steroid profiles of the samples collected on 12 and 18 July 2007. According to the WADA IO Team the steroid profiles revealed that the samples stem from different persons.

Furthermore, the WADA IO Team noticed abnormalities in the conduct of the test executed on 12 July 2007. The sample was collected by Dr. de Castro who was the Chief Doping Manager of the PAG responsible for the overall doping control during the PAG and, in this capacity, not expected to collect samples personally as a Doping Control Officer. Furthermore, the test was conducted outside the time limits set by PASO at 22.45 h in the Athlete's room but not, as usual on the occasion of the PAG, in a specifically designated doping control station. As Dr. de Castro also was the Medical Director of CBDA and in this capacity related to the Athlete's team, the WADA IO Team noticed a conflict of interest. According to a press release of CBDA Dr. de Castro resigned from the position of the Medical Director on 7 November 2007 in the context of the public awareness related to the Athlete's alleged anti-doping rule violations.

The analysis made by the LADETEC laboratory revealed that the sample collected on 12 July 2007 had a normal concentration of 1.016 whereas the sample of 18 July 2007 with a concentration of 1.004 was diluted. All other samples collected from the Athlete on the occasion of the PAG by PASO and the samples which are the matter in dispute in *CAS/A/1572* and *CAS/A/1632* were highly diluted. A comparison of the samples collected on 18 July 2007 under regular and controlled conditions shows that the pattern of these samples - high dilution, steroid profile and other values - are consistent with the other samples taken from the Athlete at other occasions.

The steroid profiles and the other data obtained from the Athlete's samples of 12 and 18 July 2007, but not the results of the DNA analysis (see below para. 38), were communicated to the WADA accredited laboratory in Lausanne on 31 October 2007. On the same day Professor Saudan, Director of that laboratory, confirmed that, based on the steroid profiles, it is *"very improbable the samples are from*

the same donor". Furthermore he confirmed that the T/E ratio of the sample 1803229, which was collected on 18 July 2007, is above the threshold of 4.

Upon decision of the PASO Medical Commission to submit the samples to a DNA analysis for the confirmation of the fact that the samples stem from different donors, the samples collected on 12 and 18 July 2007 were sent to the SONDA laboratory in Rio de Janeiro on 25 July 2007 and on 29 August 2007 (the B sample of 18 July 2007). This laboratory is accredited by the Brazilian Justice and used for DNA analysis by the Federal Police of Brazil. For that purpose the samples were re-packaged in sealed containers and the laboratory codes of LADETEC were changed for the analysis in the SONDA laboratory. The transport of the samples was ensured by Professor Rumjanek of SONDA and Dr. Veloso from the PASO Medical Commission personally, and the chain of custody documented. The SONDA laboratory was specifically and exclusively requested to compare the DNA in the samples and to verify whether or not they belong to the same donor.

On 27 October 2007 the SONDA laboratory reported to the PASO Medical Commission and concluded that the samples of 12 and 18 July *"belong to different donors"*.

On 3 November 2007 CBDA notified the Athlete of a copy of a letter sent by Dr. de Rose, President of the Medical Committee of PASO, to the Brazilian Olympic Committee informing that the Athlete had committed an anti-doping rule violation.

On 7 November 2007 a meeting was held at the headquarters of the Brazilian Olympic Committee to consider the findings of the SONDA laboratory. The Athlete and her lawyers attended the meeting.

On 21 November 2007 the Brazilian Olympic Committee informed the Police Department of Rio de Janeiro which initiated an investigation for a false statement on the doping control form, which is a crime under Brazilian law. Dr de Castro, who was asked by the authorities to submit to a DNA analysis, relied on her constitutional right not to give testimony against herself and refused that request.

On 13 December 2007 FINA was informed of the findings of the SONDA laboratory by PASO with the view of disciplinary measures.

On 3 April 2008 the Executive Board of FINA referred the matter to the FINA Doping Panel. The Doping Panel informed the Athlete by letter of 24 May 2008 that she had committed an anti-doping rule violation according to FINA Rule DC 2.5 in the form of *"tampering, or attempting to tamper, with any part of doping control"*. A hearing was held on 27 July 2008 in the headquarters of FINA in Lausanne, Switzerland. The hearing was attended by the Athlete and her legal counsels.

By its decision of 3 September 2008 the Doping Panel found that the Athlete had committed an anti-doping rule violation according to DC 2.5, 10.2, 10.4.1, and 10.6.3 which was a second offence in relation to the one that had occurred on 25/26 May 2006, and declared her ineligible for life.

The decision of the FINA Doping Panel of 3 September 2008 was notified to the Athlete on 5 September 2008 and appealed to CAS on 22 September 2008 (*CAS/A/1659 Gusmao v. FINA*).

The parties have agreed to consolidate the three appeals filed on 3 June 2008, 12 August 2008, and 22 September 2008.

The hearing took place in front of the Panel on 17 March 2009 in the CAS premises in Lausanne, Switzerland.

The Athlete asks for relief that in all three appeals the decisions of FINA's Doping Panel be set aside. In the case *CAS/A/1572* the Athlete further pleads that, should the Panel not set aside the decision of the Doping Panel of FINA, that the date of the beginning of the period of ineligibility should be the date of the sample collection.

In the case *CAS/A/1632* FINA submits the following prayers for relief:

> *"Dismiss the appeal and confirm and amend the decision of the FINA Doping Panel as follows:*
>
> - *confirmation of a commission of a doping violation*
> - *confirmation of lifetime ineligibility from 17 July 2007 (subject to decisions in the other cases including the already consolidated case no 1572)*
> - *confirmation in any event of retroactive disqualification of all results with corresponding consequences regarding titles, medals, prizes and prize-money achieved from May 26, 2006.*
>
> *Order the Appellant to contribute to costs of the [Respondent] in application of the Code of sports related arbitration".*

In the case *CAS/A/1572* FINA submits the following prayers for relief:

> *"- dismiss the appeal*
> - *confirm the sanction of ineligibility for two years starting from November 2, 2007*
> - *alternatively to the preceding point, in the event the FINA Doping Panel issues a decision establishing the commission of a previous violation in the proceedings concerning samples collected in May 2006 before issuance of a decision in these proceedings, issue a sanction of lifetime ineligibility*
> - *in any event, confirm that all competitive results achieved by the Athlete from July 15 , 2007, shall be disqualified with all resulting consequences*
> - *order the Appellant to pay to the Respondent an appropriate contribution for the costs incurred by FINA".*

In the case *CAS/A/1659* FINA submits the following prayers for relief:

> *"Dismiss the appeal and confirm the decision of the FINA Doping Panel as follows:*
>
> - *confirmation of the commission of a doping violation within the meaning of art. DC 2.5 (tampering)*
> - *confirmation of sanction of lifetime ineligibility (sanction for second violation in relation to the violation(s) addressed in the proceedings no 1632)*

- *order the Appellant to contribute to costs of the [Respondent] in application of the Code of sports related arbitration".*

LAW

CAS Jurisdiction and admissibility

1. The Panel has the jurisdiction to hear the cases of the Athlete v. FINA according to R47 para. 1 of the Code of Sports-related Arbitration ("CAS Code"). The Athlete appealed three *"decisions of a federation"*, *i.e.* decisions of FINA's Doping Panel. According to DC 13.2.1 the said decisions which concern an international level athlete are exclusively appealable before the CAS. No other legal remedies are available under FINA's rules and regulations.

2. All three decisions were appealed in time. As DC 13.2 or other FINA rules do not provide for a specific time-limit and DC 13.2.1 refers to *"the provisions applicable before such court"* R49 of the CAS Code applies which requires that an appeal must be lodged within 21 days from the receipt of the decision appealed against.

3. The decision of FINA's Doping Panel in the case CAS/A/1632 was adopted on 17 July 2007, received by the Athlete on 23 July 2007 and timely appealed on 12 August 2007. In the case *CAS/A/1572* the decision of the Doping Panel was adopted on 12 May 2007, received by the Athlete on 14 May 2007 and timely appealed on 3 June 2007. In the case *CAS/A/1659* the Doping Panel decision was made on 3 September 2009, received by the Athlete on 5 September 2007 and timely appealed on 22 September 2007.

4. Furthermore, no objection was raised by the parties with regard to the jurisdiction of CAS, the composition of the Panel or other procedural issues.

Applicable Law

5. In accordance with Article R58 of the CAS Code, the parties agreed that the dispute shall be decided according to the *"applicable regulations"* of FINA, *i.e.* FINA's Doping Control Rules, in particular. The rules of FINA applicable in 2006 and 2007 are reproduced in the FINA Handbook 2005 - 2009. As FINA has its seat in Switzerland, according to Article R58 of the CAS Code, Swiss law applies, if needed.

The Merits of the Appeals

6. The Panel has first to determine whether or not the alleged anti-doping rule violations took place and, second, if needed, which sanction has to be imposed on the Athlete. The three alleged anti-doping rule violations are separate and independent in their merits and must be determined each for themselves. They are, however, interrelated with regard to a possible sanction the Panel has to adjudicate.

7. According to Article R57 of the CAS Code, the Panel has full power to review the facts and the law. The proceedings are *de novo*.

A. Anti-doping rule violations

(a) CAS/A/1632 Gusmao v. FINA

8. In the case *CAS/A/1632* the Athlete appeals a decision of FINA's Doping Panel which imposed a two year period of ineligibility for an anti-doping rule violation which allegedly occurred on 25 and 26 May 2006 when the Athlete was tested positive for testosterone.

9. According to DC 2.1 *"the presence of a prohibited substance or its metabolites or marker in a competitor's bodily specimen"* constitutes an anti-doping rule violation. Testosterone is a prohibited substance registered in the Prohibited List.

10. In the course of an in-competition test conducted on 25 and 26 May 2006, three samples were collected. Two of them, A 390650 and A 965045, revealed elevated T/E ratios of about 17 and above 15, respectively, and *"abnormal IRMS results consistent with exogenous origin of testosterone"* and, therefore, were reported as adverse analytical findings by the Montreal laboratory. The third sample, A 965047, was not reported positive due to its extreme dilution and bacterial degradation although it showed an elevated T/E ratio of 15. These findings were confirmed by the analysis of the B samples. All three B samples showed *"IRMS results consistent with exogenous origin of testosterone"* and elevated T7E ratios up to 28 in the sample B 965054.

11. The results of the analysis were not contested as such. However, the Athlete mainly submits that, first, due to the high degree of dilution and the bacterial degradation the samples should have been excluded from analysis, that, second, bacterial degradation affected both the T/E measurement and the IMRS analysis, that, third, the POS had caused an elevated T/E ratio and that, finally, the IMRS analysis should not have been conducted because CBDA did not request it and, thus, the confidentiality was breached.

12. Based on scientific evidence generally available, on established case law of CAS[1] and based, in particular, on the expert evidence provided by both Professor Ayotte in her written statement dated 19 September 2008 (exhib. R-31 to FINA's answer of 24 September 2008) and confirmed

[1] CAS 2000/A/274 par. 152 *et seq.*, par. 185; CAS 2005/A/908 par. 6.11; CAS 2007/A/1348.

at the hearing, and Professor Saudan in his oral testimony, the Panel concludes that the IRMS analysis is the established and reliable method of distinguishing the exogenous origin of testosterone. IMRS allows the direct detection of the exogenous origin of testosterone and is not affected by dilution, bacterial degradation or a pathological state such as POS. The Prohibited List expressly explains:

"In all cases and at any concentration, the athlete's Sample will be deemed to contain a Prohibited Substance and the laboratory will report an Adverse Analytical Finding, if based on any reliable analytical method (e.g. IMRS) the laboratory can show that the substance is of exogenous origin. In such cases, no further investigation is necessary".

13. Furthermore, the Montreal laboratory is specialized in IRMS analysis and has a high degree of expertise in that field.

14. The results of the IRMS analysis conducted on the samples 965054 and 390650 collected on 25 and 26 May 2007 respectively, prove the presence of exogenous testosterone to the comfortable satisfaction of the Panel. Samples A 390650, A 965054 and, decisively, samples B 390650, B 965054 show *"abnormal IRMS results consistent with exogenous origin of testosterone"*. The T/E ratios measured are of supporting evidence, corroborating the results of the IMRS analysis[2].

15. Due to the *Internal Standards*, as read in the right context, dilution and bacterial degradation do not exclude the application of the IRMS analysis. Furthermore, IRMS analysis does not need a special request of whomsoever. According to the the written statement of Professor Ayotte, dated 19 September 2008 (exhib. R-31 to FINA's answer of 24. September 2008) and confirmed in her oral testimony, it is common practice that laboratories are informed that various samples belong to the same donor. This statement explains how the Montreal laboratory was informed that the samples were of the same person but not of the identity of the donor.

16. FINA discharged its burden of proof according to DC 3.1 and DC 3.2. No procedural departures were to be found, and, even if the alleged departures should have happened, they were not of a kind to put the analysis results into question. The Panel finds that the Athlete, based on the samples collected on 25 and 26 May 2006, committed an anti-doping rule violation in the form of the presence of testosterone, according to DC 2.1.

(b) CAS/A/1572 Gusmao v. FINA

17. In the case *CAS/A/1752* the Athlete appeals a decision of FINA's Doping Panel which imposed a two year period of ineligibility for an anti-doping rule violation which allegedly occurred on 13 July 2007 when the Athlete was tested positive for testosterone in an out-of-competition test ordered by FINA.

[2] CAS 2000/A/274, par. 185 and 187 *et seq.*

18. According to DC 2.1 *"the presence of a prohibited substance or its metabolites or marker in a competitor's bodily specimen"* constitutes an anti-doping rule violation. Testosterone is a prohibited substance registered in the Prohibited List.

19. In the course of the doping control conducted on 13 July 2007, due to the high dilution of the urine, two samples were collected. The A samples were analysed by the Montreal laboratory which, on 30 July 2007, reported for the samples A 976285 and A 180319 elevated T/E ratios of 26,4 and 9,0, respectively, and *"IRMS results consistent with exogenous origin of testosterone"*. These findings were confirmed by the analysis of the B samples. The Montreal laboratory reported T/E ratios of 28,8 for sample B 976285 and of 13.5 for sample B 180319 and *"IRMS results consistent with exogenous origin of testosterone"* .

20. The results of the analysis are not contested by the Athlete.

21. Based on scientific evidence generally available, on established case law of CAS (see above para. 12) and based, in particular, on the expert evidence provided by Professors Ayotte and Saudan, the Panel concludes that IRMS is the established and reliable method to distinguish the exogenous origin of testosterone. The Montreal laboratory is specialized in IRMS analysis and has a high degree of expertise in that area.

22. In addition, the T/E ratios of up to 28,8 detected in the Athlete's B samples which are considerably above the threshold of 4, conclusively prove the presence of the prohibited substance of testosterone. No bacterial degradation or a pathological state such as POS were contended to have affected the analysis of the samples collected on 13 July 2007.

23. According to DC 3.2.1 WADA accredited laboratories *"are presumed to have conducted sample analysis and custodial* procedures *in accordance with the International Standard for laboratory analysis"*. However, this presumption can be rebutted if it is shown that a departure actually occurred. According to DC 3.1 departures must be proved by the Athlete by a balance of probability. The Athlete raised a number of procedural departures.

24. However, the Athlete made mere allegations instead of proving procedural departures, First, according to the *Internal Standards* the IRMS analysis does not need a special instruction by whomsoever and it is routinely performed by the Montreal laboratory. This is why FINA chose to send the samples collected on its behalf to the Montreal laboratory. No breach of confidentiality took place.

25. Second, as shown by Professor Ayotte's written statement of 17 March 2008 (exhib. R-9 to FINA's answer of 15 July 2008) to the FINA Doping Panel, as confirmed before the Panel and the laboratory`s documentation package, the Athlete's samples together with a series of other samples were transported in a sealed container under no. 39 to the new location on 27 November 2007 where they arrived under an intact seal. The good maintenance of the chain of custody has been confirmed by the report of the ISO inspection report in March 2008.

26. Third, the documentation packages relating to the Athlete's A and B samples and the written statement of Professor Ayotte dated 11 July 2008 (exhib. R-10 to FINA's answer of 15 July 2008) and her oral testimony before the Panel demonstrate that Ms. Fakirian analysed the B sample analysis whereas two other employees performed the A sample analysis.

27. Fourth, Dr. Blanco, the Athlete's representative, attended the opening of the B samples and observed the beginning of the analysis. According to Professor Ayotte's written statement dated 11 July 2008 (exhib. R-10 to FINA's answer of 15 July 2008) as confirmed orally before the Panel, Dr. Blanco decided not to stay and opted to wait for the results elsewhere. He did not complain of having been prevented from attending the analysis prior to the proceeding before FINA's Doping Panel or on any other occasion prior to the present CAS proceeding.

28. Fifth, the Montreal laboratory has maintained its ISO and, following that, its WADA accreditation without interruption. According to the relevant articles of the *Internal Standards* the suspension of an accreditation would have required a decision by WADA. The relocation to a new building does not affect the existing accreditation which refers to the whole of the analysis devices and methods rather than to the physical building. After the relocation the laboratory was audited in March 2008 and has maintained its accreditation. In her written statement dated 11 July 2008 (exhib. R-10 to FINA's answer of 15 July) as confirmed orally before the Panel the accreditation was continuously and still valid at the time the B sample analysis was conducted.

29. The Athlete erroneously relies on Article 4.3.1 of the *Internal Standards* of the version 4.0 in force until the end of December 2007 in order to claim that the relocation of the laboratory makes a new accreditation necessary. In the context of Article 4.3 as a whole which provides for requirements for major events, Article 4.3.1 refers to temporary "satellite facilities" of laboratories established for the purpose of major events but not to the permanent relocation of a laboratory.

30. Sixth, the press statements made by Dr. de Rose on 24 November 2007 and the following days, that he knew about the positive findings based on the Athlete's samples do not indicate that a breach of confidentiality occurred. The information that the Athlete was tested positive had already been made public by CBDA in a press release, dated 5 November 2007 (exhib. R-12 to FINA's answer dated 15 July 2008).

31. In this connection the Panel did not find any indication of a conspiracy orchestrated by Dr de Rose against the Athlete. The public statements of Dr. de Rose who was the President of the Medical Commission of PASO must be seen in the context of the other anti-doping rule violations allegedly committed by the Athlete. She had tested positive for testosterone on 25 and 26 May 2006 and the proceedings related thereto had lead to a dispute between FINA and CBDA. The alleged tampering with the doping control on 12 and 18 July 2007, during the PAG as well, due to a press release of CBDA of 8 November 2007 (exhib. R-3 to FINA's answer of 15 July 2008), was known to the public, too. As Dr. de Rose explained in his written witness statement, dated 9 July 2008 (exhib. R-11 to FINA's answer of 15 July 2008) and confirmed in his testimony before this Panel, he suggested that FINA proceed to the targeted test on 13 July

2007 because, based on the doping control in May 2006 and other indications, he was of the opinion that the Athlete was using testosterone.

32. Lastly, the Panel states that the fact that none of the four other samples collected from the Athlete during the PAG were reported positive by the LADATEC laboratory in Rio de Janeiro does not have any impact on the reliability of the findings of the Montreal laboratory. WADA accredited laboratories can be equipped differently and have different expertise. The Montreal laboratory is known for its special expertise in IRMS analysis.

33. According to the rules of proof set forth in DC 3.2 FINA has established the anti-doping rule violation in form of the presence of testosterone in the sense of DC 2.1.

(c) CAS/A/1659 Gusmao v. FINA

34. In the case CAS/A/1659 the Athlete appeals a decision of FINA's Doping Panel in which a lifetime period of ineligibility was imposed for an anti-doping rule violation in the form of tampering with a doping control which allegedly occurred on 12 July 2007 during an out-of-competition test, which constitutes a second violation in relation to the first anti-doping rule violation based on the samples collected on 25 and 26 May 2006.

B. Means of evidence

35. According to DC 2.5, *"tampering or attempting to tamper with any part of doping control"* constitutes an anti-doping rule violation. As a general rule, set out in DC 3.2, the facts related to an anti-doping rule violation *"may be established by any reliable means"*. Whereas subparagraphs 3.2.1 and 3.2.2 relate to anti-doping rule violations in the form of adverse analytical findings no rules can be found in FINA's Doping Control Rules which deal with non-analytical anti-doping rule violations more specifically. That means that, according to the general rule of DC 3.2, the tampering with doping control can be proven *"by any reliable means"*. According to DC 3.1 FINA has to prove that violation *"to the comfortable satisfaction"* of the Panel. *"This standard of proof … is greater than a mere balance of probabilities and less than a proof beyond a reasonable doubt"*.

36. The term *"any reliable means"* includes any way to establish a proof as in any other area of law. In a situation where the analysis designed to detect prohibited substances which was conducted in a WADA accredited laboratory, based on the steroid profiles and other parameters, reveals that the samples collected from the same athlete on different occasions actually do not stem from the same person, neither FINA's DC, nor the anti-doping rules in general as stipulated in the WADA Code exclude that further investigations concerning the non-identity of the donors can be made by a non-WADA-accredited laboratory such as SONDA.

37. DC 6.1 which is relied upon by the Athlete stipulates that

"FINA shall send Doping Control Samples for analysis only to WADA accredited laboratories …".

38. However, the context of this rule, in particular DC 6.2 and DC 6.3 demonstrate that DC 6.1 pertains to the analysis in order to detect prohibited substances, exclusively. DC 6.1 does not exclude that the samples collected in a doping test can be analysed by non-WADA accredited laboratories for DNA which has no bearing at all for the detection of prohibited substances. Additionally, the Panel takes note that, according to the oral testimonies of Professors Ayotte and Saudan, WADA accredited laboratories are not specifically equipped for DNA analysis. No doubts were raised that the SONDA laboratory which is accredited with Brazilian authorities and used for DNA analysis by the Brazilian governmental authorities is not reliable.

39. With regard to a DNA analysis, as part of the evidence of a non-analytical anti-doping rule violation, no B sample analysis is provided for. DC 7.1.3 which confirms the athletes' right to have their B samples analysed exclusively applies to the results management process following an adverse analytical finding

40. Contrary to the allegations submitted by the Athlete the chain of custody from the LADETEC laboratory to the SONDA laboratory is fully documented. Professor Rumjanek from SONDA and a representative of the Medical Commission of PASO secured the transportation of the samples. Therefore, no doubt exists that the SONDA laboratory analysed the samples collected from the Athlete on 12 and 18 July 2007.

C. Non-identity of the donors of the samples

41. The SONDA laboratory was requested to analyse the DNA of the samples, exclusively. For that purpose SONDA was equipped and experienced and regularly used by Brazilian authorities. Thus the findings of the SONDA laboratory constitute a reliable means to prove that the samples collected on 12 and 18 July 2007 do not belong to the same person.

42. Supporting evidence of the non-identity of the samples collected on 12 July 2007 and 18 July 2007 respectively, is provided by the fact the steroid profiles and other characteristics such as dilution differ from one to the other sample. This has been detected by the LADETEC laboratory and confirmed by the Lausanne laboratory, both WADA accredited laboratories.

D. Tampering of the doping control

43. A comparison of the samples collected on 12 and 18 July 2007 with other samples taken from the Athlete, in particular the ones collected the next morning on 13 July 2007, makes evident that the samples collected on 18 July 2007 which were collected under controlled circumstances in the doping control station are the ones from the Athlete. Characteristics like the steroid profiles and the extreme dilution are consistent with the samples provided by the Athlete on many other occasions. The sample collected on 12 July 2007, however showed a different steroid profile and a specific gravity indicating that the sample was not diluted. The Panel concludes therefore that the tampering occurred on 12 July 2007.

44. As evidenced by the report of the WADA Independent Observer Team the doping control conducted on 12 July 2007 took place under unusual conditions: at 11.45 pm in the Athlete's room instead of in the doping control station and was performed by Dr. de Castro who, in her capacity of the Chief Doping Manager of the PAG, was not in charge of collecting samples from athletes.

45. Furthermore, the Panel notes a clear conflict of interest. Dr. de Castro, until her resignation in November 2007, was the Medical Director of CBDA and, hence, of the Brazilian team which competed at the PAG. In the course of the proceedings relating to the anti-doping rule violation allegedly committed by the Athlete on 25 and 26 May 2006 Dr. de Castro acted as representative of the Athlete and she defended her by submitting reports which were designed to undermine the results of the analysis, in particular the IRMS analysis, in disregard of the established scientific and technical state of testosterone analysis.

46. The fact that the sample collected on 12 July 2007 does not stem from the Athlete leads the Panel to the conclusion that the Athlete committed an anti-doping rule violation in the form of tampering with the doping control. The substitution of the Athlete's sample by a sample from a different person or the direct provision of a sample from a different person could not have happened without the participation of the Athlete herself. By signing the Doping Control Form the Athlete confirmed *"that the sample collection was conducted in accordance with the relevant procedures for sample collection"*. That confirmation implies that the Athlete's urine was put into the bottles and sealed. As no departure in the chain of custody or other irregularities were contended the Athlete's samples should have arrived in the laboratory, which was not the case. The presence of urine which is foreign to that of the Athlete in the bottled and sealed samples cannot be explained in any way other than as with the collaboration of the Athlete.

47. The Panel weighed the facts described above and comes to the conclusion that FINA has established the tampering with a doping control committed by the Athlete on 12 July 2007 to the comfortable satisfaction of the Panel. This conclusion is supported by the fact that the samples collected from the Athlete the next morning on 13 July 2007 revealed the presence of testosterone in a T/E ratio up to 28.

E. Investigation of the Brazilian Police

48. The Athlete submitted that the investigation conducted by the Brazilian police did not evidence any involvement of the Athlete in providing a false statement which is a crime under Brazilian law. This information was not contested by the Respondent. However, before the closure of the hearing the Athlete did not produce any document to this effect. Therefore, the Panel cannot attach any evidential value to this information.

49. Furthermore, such a statement issued by the Brazilian police would have no binding or even prejudicial effect. According to Article R58 of the CAS Code the Panel has to apply the applicable rules of FINA. They include the rules on evidence and standards of proof which the

Panel applied in this award (see above para. 35). The standards of evidence sufficient to launch a criminal prosecution under Brazilian law may be different.

F. Decision of the Brazilian Judiciary

50. Under letter of 18 August 2009 the Athlete submitted a decision of the 27th Criminal Court of Rio de Janeiro, dated 10 August 2009 in a sworn English translation. The Brazilian judge had decided *"for not existing evidence enough for conviction"* not to proceed with prosecution against the Athlete. By letter of 21 August 2009 FINA opposed the admission of that decision to the proceedings before the Panel.

51. Under *"exceptional circumstances"* Article R56 of the CAS Code allows the President of the Panel to authorize the parties *"to supplement their arguments … or to specify further evidence … after the submission of the grounds for the appeal and of the answer*". The unambiguous wording of that clause, supported by its systematic position before Article R57 of the CAS Code which deals with the hearing, clarifies that Article R57 of the CAS Code does not cover the production of new evidence after the closure of the hearing. Therefore, the decision of the Brazilian court cannot be admitted.

52. However, the Panel wishes to state that the decision of the Brazilian Court, even if admitted, would have no bearing on the proceedings before it. As already stated, according to Article R58 of the CAS Code the Panel has to apply the applicable law which is the rules of FINA. They include the rules on evidence and on the standards of proof enshrined in DC 3. Based on the evidence before it, the Panel, by its comfortable satisfaction, had found that the Athlete tampered with the doping control on 12 July 2007 (see above para. 47). This conclusion would not be put into question by the said decision. The Brazilian court, under Brazilian criminal law, applied different rules of evidence and standards of proof on an unknown factual basis and comes to the conclusion that there was not enough evidence to continue criminal proceedings. Brazilian law is not applicable before this Panel (see above para. 5).

G. Multiple Anti-Doping Rule Violations

53. At this stage the Panel summarizes that the Athlete, on 25 and 26 May 2006, 13 July 2007, and 12 July 2007 committed three anti-doping rule violations each of which would have the consequence of a separate sanction.

H. Sanctions for the individual anti-doping rule violations

54. The anti-doping rule violation in the form of the presence of testosterone committed on 25 and 26 May 2006, according to DC 10.2 entails the imposition of a two year period of ineligibility. The anti-doping rule violation that occurred on 13 July 2007 in the form of the presence of testosterone as well, considered for itself, would lead to a two year sanction as well. According

to DC 10.4.1 in conjunction with DC 10.2, the same period of ineligibility would have to be imposed on the Athlete for the anti-doping rule violation committed in the form of tampering with a doping control on 12 July 2007, if taken for itself.

55. The standard sanctions of two years apply to each of these violations since exceptional circumstances neither have been contended nor established.

I. Second Anti-Doping Rule Violation

56. However, in the situation of three separate doping offences, the sanction to be imposed on the Athlete follows the rules on multiple anti-doping rule violations. For a second anti-doping rule violation DC 10.2 provides for a sanction of lifetime ineligibility. As a condition for the determination of a second violation under DC 10.2, according to DC 10.6.1, the second anti-doping rule violation must have been committed *"after the competitor … received notice … of the first anti-doping rule violation"*.

K. First anti-doping rule violation

57. According to the sequence in time of the doping controls the Athlete underwent, the anti-doping rule violation committed on 25 and 26 May 2006 must be considered the first violation in relation to the violations occurred on either 13 July 2007 or 12 July 2007. Since for the sanction for the tampering with a doping control DC 10.4.1 refers to DC 10.2 which *i.a.* provides for the sanction for the presence of a prohibited substance, the individual sanctions for all anti-doping rule violations committed by the Athlete - two for prohibited substances, one for tampering with a doping control - are governed by DC 10.2.

L. Notice of the first anti-doping rule violation

58. For the purpose of imposing sanctions under DC 10.2 for multiple violations DC 10.6.1 applies and makes a lifetime sanction conditional upon the receipt of notice of the first violation prior to the second one.

59. Due to the delay in processing by the CBDA of the anti-doping rule violation that occurred on 25 and 26 May 2006 the Athlete did not receive a formal notification as provided for in the course of the results management process according to DC 7.1.3. At least FINA is not in a position to establish proof to this effect.

60. Under these circumstances the Panel proceeds to evaluate the meaning of the term *"notice … of the first anti-doping rule violation"*. In doing so the Panel adheres to the established methods of legal interpretation: the wording of the terms in their context and in the light of the objective and purpose of the norm.

(a) Notice

61. The term *notice* is not restricted to a formal act of notification. Instead, *notice* includes the mere knowledge of a fact. In the case at stake the Athlete received notice when she obtained the knowledge of an anti-doping rule violation. Whether or not she was informed of an anti-doping rule violation prior to 12 or 13 July 2007 depends on what is to be understood by *anti-doping rule violation* in the sense of DC 10.6.1.

(b) Anti-doping rule violation

62. FINA proposes an interpretation which equates *anti-doping rule violation* with *adverse analytical finding* while the Athlete submits that the notification or knowledge of an adverse analytical finding does not meet the requirement for a second doping offence.

63. According to the definitions attached to the DC an *adverse analytical finding* is the *"report from a laboratory … that identifies in a specimen the presence of a prohibited substance"*. In the absence of an express definition of *anti-doping rule violation* in Appendix 1 to the DC the Panel refers to DC 2 which defines *anti-doping rule violation* as follows:

"The following constitute anti-doping rule violations: DC 2.1: The presence of a prohibited substance …".

64. This wording is not absolutely conclusive and gives room for interpretation.

65. Although the WADA Code does not apply directly but is to be implemented by the rules of the IFs it may be looked at for the purpose of interpreting the corresponding rules of the IFs. Article 10.6.1 of the WADA Code 2003, as in force at the time of the doping controls at stake to which DC 10.6.1 corresponds, reads as follows: *"received notice … of the first anti-doping rule violation"*. However, the Comment to 10.6.1 speaks of *"notice of the first positive test"*. This is, in the regular course, the notification of an adverse analytical finding based on the A sample in the course of the results management process according to DC 7.1.3 and Article 7.2 WADA Code 2003. This is why Article 10.7.4 WADA Code 2009 and DC 10.7.4 of FINA's DC 2009, which of course do not apply to the doping controls in 2006 and 2007, equate the *"notice of the first anti-doping rule violation"* with the *"notice pursuant to Article 7 [Results Management]"*.

66. Based on the foregoing the Panel concludes that, in the normal course of the handling of an alleged anti-doping rule violation, the notification in the results management process is a sufficient condition for a second violation. This is more than the knowledge of the mere laboratory report of an adverse analytical finding. The notification is issued only if the *initial review* conducted by the responsible anti-doping organization according to DC 7.1.2 leads to the result that no therapeutic use exemption has been granted and no apparent procedural departure undermines the validity of the analytical finding.

67. At that stage in the normal course of a doping case it is likely that an anti-doping rule violation was actually committed and, generally, the athlete is provisionally suspended. All further steps which are available to the athletes – request for the analysis of the B sample, request for a

hearing, appeal of decisions etc. – are legal remedies which, as such, do not affect the validity of the suspension or other decisions as DC 13.1 states for appealed decisions. An anti-doping rule violation in the sense of DC 10.6.2 does not only exist when the last decision is taken which is final and binding. An interpretation to the contrary would open a period of time where, after the notification, an athlete could commit further doping offences without the risk of lifetime ineligibility for a second violation.

68. This interpretation of the Panel does not contradict the conclusion reached by a CAS ad hoc panel at the Olympic Winter Games in Torino[3] which the Athlete makes reference to. In the case concerning the Brazilian bobsleigh rider *dos Santos* the ad hoc panel differentiated *adverse analytical finding* from *anti-doping rule violation* and came to the conclusion:

"Only after that process [results management, B sample analysis, hearing to contest the adverse analytical finding, added by this Panel] has been completed and the adverse analytical finding is confirmed is an anti-doping rule violation found".

69. According to the ad hoc panel an anti-doping rule violation is "found" if an appealable decision that an anti-doping rule violation was committed has been rendered by any authority. What actually happened in the case of *dos Santos* and was not considered sufficient by the ad hoc panel was that the Brazilian Olympic Committee, in disregard of the prohibition of any public disclosure, publicly announced the adverse analytical finding.

70. Furthermore, the ad hoc panel did not decide on a possible second anti-doping rule violation and, hence, its construction does not constitute precedence for the understanding of DC 10.6.2 or similar rules. Instead, the ad hoc panel had to decide whether or not *dos Santos* actually committed an anti-doping rule violation at a given date which would have justified his exclusion from the Winter Games. At the time the ad hoc panel had to decide only the positive laboratory report was provided and illegally published - roughly five weeks after the sample collection. The results management process did not even start or at least was not finished. No provisional suspension was imposed.

M. Notice of an anti-doping rule violation in the Athlete's case

71. In light of the above the Panel has to determine whether or not the Athlete *"received notice of the first anti-doping rule violation"* committed on 25 and 26 May 2007, prior to 12 or 13 July 2007.

72. The handling of the anti-doping rule violation allegedly committed by the Athlete in May 2006 by CBDA was unusual. CBDA was the responsible anti-doping authority for the tests conducted during the Brazilian Swimming Championships. According to the information available before that Panel no proper results management process took place after the Montreal laboratory reported the adverse analytical finding based on the A samples.

[3] CAS ad hoc Division OG 06/010, award of 20 February 2006.

73. After FINA was informed of the adverse analytical finding by the end of June 2006 FINA kept the case under observation. As CBDA adopted the position that the analysis results were not sufficient to establish an anti-doping rule violation and to suspend the Athlete, at various times later in 2006 and until early May 2007 FINA requested CBDA to proceed with the results management process and to hold a hearing. As late as on 11 March 2007 the hearing before the Provisional Panel for Doping Control of CBDA under the presidency of Dr. de Castro was held *"to discuss the adverse analytical finding"* with the Athlete attending. At that hearing the Athlete stated that she had no objections to the sample collection and the procedure. Her right to the B sample analysis was reconfirmed and she requested the B sample analysis. Despite the adverse analytical finding and FINA's opinion the Panel decided not to suspend the Athlete. After the analysis of the B samples which confirmed the exogenous origin of testosterone, by letter of 20 August 2007 FINA again requested CBDA to organize a hearing and to reach a final decision. However CBDA reiterated its position and, according to DC 8.2.2. FINA took over the matter and referred the case to its Doping Panel.

74. The Athlete was deeply involved in her case after the adverse analytical finding was reported on 29 June 2006. The various statements of Dr. de Castro in 2006 and early 2007 intended to undermine the analytical results and to explain the finding by a pathological state of the Athlete such as POS could not have been made without the Athlete being involved. At the hearing held on 11 May 2007, at the latest, the Athlete was in a position similar to that if she had received the notification in the results management process. She was informed about the adverse analytical finding, about her right to request the B sample analysis and to have a hearing. A hearing, albeit a *"provisional"* one, already took place on 11 May 2007.

75. In the case before it the Panel considers the state of information the Athlete received about her doping case at or before 11 May 2007 to be at least equivalent to the notification in the results management process according to DC 7.1.3. In the normal course of anti-doping proceedings the notification and suspension would have been made within the period of time much shorter than one year. The information the Athlete had received from CBDA, which was the competent anti-doping organization in her case at that stage, is to be credited to FINA because FINA called the Athlete's case in only after CBDA did not further proceed with the prosecution of the Athlete for longer than three months.

76. As the object and purpose of DC 10.6.1 is that an athlete, in order to be sanctioned for life for a second doping offence, must have been aware of a first violation and, hence been warned[4] that he or she has been "caught", the Panel is of the view that in the case of the Athlete the requirement of a *"notice of a first anti-doping rule violation"* is met because the Athlete was informed about the factual basis of the doping offence and that proceedings are initiated.

[4] CAS 2003/A/455, par. 32

N. The Sanction

(a) Lifetime ineligibility according to DC 2005

77. As the anti-doping rule violations committed by the Athlete on 12 July 2007 as well as on 13 July 2007 each constitute a second violation the Panel has to impose a lifetime ineligibility according to DC 10.2 in connection with DC 10.6.1.

78. According to DC 10.8 the period of ineligibility starts on the date of *"the hearing decision providing for ineligibility" i.e.* 13 November 2009. In the event of a lifetime ineligibility the period of provisional suspension the athlete served as of 2 November 2007 following the doping offence committed on 13 July 2007 cannot be credited against the total period of ineligibility, according to DC10.8 2nd sentence. The Panel notes that, in her case following the doping offence occurred on 25 and 26 May 2006, the Athlete was declared ineligible by the FINA Doping Panel as of the date of that decision, *i.e.*17 July 2008.

79. According to DC 9 an anti-doping rule violation based on an in-competition test *"automatically leads to the disqualification of the results obtained in that event with all resulting consequences, including forfeiture of any medals, points and prizes"*. As the test conducted on 25 and 26 May 2006 was an in-competition test the Panel states that the athlete is disqualified from the Brazilian Swimming Championship and has to return all medals, diploma, prize money etc.

80. According to DC 10.7:

"In addition to the automatic disqualification [according to DC 9] all other competitive results obtained from the date a positive sample was collected (whether in-competition or out-of-competition], or other doping rule violation occurred … shall, unless fairness requires otherwise, be disqualified with all the resulting consequences including forfeiture of any medals, points and prizes".

81. Therefore the Panel declares all results the Athlete obtained as of 12 July 2007 disqualified and orders the return of all medals, rewards and prize-money the Athlete received since that date.

(b) Application of the *lex mitior* principle according to DC 17.7 (2009)

82. DC 17.7 of FINA's Doping Control Rules 2009 - 2013 (hereinafter referred to as "DC (2009)") stipulates that with respect to anti-doping rule violations pending on 1st January 2009

"the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the panel hearing the case determines the principle of lex mitior appropriately applies under the circumstances of the case".

83. DC 10.7.1 (2009) foresees for a second anti-doping rule violation of the kind which is established in the Athlete's cases a sanction of ineligibility between 8 years and lifetime instead of lifetime ineligibility under the previous rules.

84. Although neither party made submissions related to the *lex mitior* principle the Panel, according to Article R58 of the CAS Code, has to apply the applicable rules which include the transitory provision of DC 17.7 (2009). Therefore the Panel has to consider whether the substantive rules of DC (2009) constitute a *lex mitior*. The rules governing the length of a doping sanction are substantive anti-doping rules. This determination has to be made under the circumstances of the particular case.

85. The transitory rule of DC 17.7 (2009) requires the Panel to examine whether it finds a lower sanction would apply to the Athlete under the new rules on sanctions

(c) Presence of a *lex mitior*

86. However, the Panel is doubtful whether or not the new rules actually constitute a *lex mitior*. DC 10.6 (2009) provides to take aggravating circumstances into consideration which justify the imposition of a period of ineligibility greater than the standard sanction. For a single anti-doping rule violation the sanction can be doubled from two years to four years *"unless the competitor … can prove to the comfortable satisfaction of the hearing panel that he or she did not knowingly commit the anti-doping rule violation"*. Furthermore, an athlete can avoid the application of the aggravating circumstances rule by a prompt admission. Neither of these two situations are applicable in the Athlete's cases.

87. As non-exhaustive instances of aggravating circumstances the Comment to DC 10.6 (2009) lists: commission of the doping offence *"as part of a doping plan or scheme either individually or involving a conspiracy or common enterprise", "use of prohibited substances at multiple occasions"* or *"the competitor engaged in deceptive or obstructing conduct to avoid the detection or adjudication"* of a doping offence. In addition to that, according to DC 10.7.4 (2009) the occurrence of multiple anti-doping rule violations which do not constitute a first and second violation in the sense of DC 10.7.4 (2009) or DC 10.6.1 (2005) *"may be considered as a factor in determining aggravating circumstances (DC 10.6)"*.

88. Should either the first (25 and 26 May 2006) or one of the second (12 or13 July 2007) anti-doping rule violations be considered committed under aggravating circumstances and therefore an aggravated sanction be imposed, DC 10.7.1 (2009) would provide for the second violation a sanction of lifetime ineligibility.

89. The consideration of aggravating circumstances has been newly introduced to the DC (2009) following the WADA Code 2009. The Panel tends to understand the new rules governing the imposition of sanctions such as DC 10.6 and 10.7.4 (2009) as a coherent set of rules which must be considered together in order to determine whether or not a *lex mitior* exists. The application of DC 10.6 and 10.7.4 (2009) on the Athlete's case may easily lead to the determination of aggravated circumstances in the commission of the anti-doping rule violations on 12 or 13 July 2007 with the consequence that, in the particular case, the new rules do not constitute a *lex mitior*. Nevertheless, the Panel leaves this issue undecided and proceeds to the determination of the specific sanction which would be imposed on the Athlete under DC 10.7.1 (2009).

(d) Sanction to be imposed under DC 10.7.1 (2009)

90. Should the Panel apply DC 10.7.1 (2009) separately as *lex mitior* the sanction would be in the span between 8 years and lifetime ineligibility. The length of the period of ineligibility would be determined according to the circumstances of the particular case. Having considered the table of sanctions provided in DC 10.7.1 (2009) and characterized the Athlete's anti-doping rule violations accordingly, the Panel finds that the Athlete committed three violations which each for themselves require, at the very least, the standard sanction.

91. Two of the anti-doping rule violations consist of the presence of the prohibited substance testosterone, while one doping offence is the tampering with the doping control. Tampering is a particularly serious offence because tampering reveals that the Athlete knew about the presence of testosterone which she tried to hide by the manipulation. It is not only the intake of testosterone but also the additional effort to manipulate the doping control either individually or, as it most likely happened on 12 July 2007, in collusion with Dr. de Castro. The analysis of the samples collected the next morning on 13 July 2007 in the targeted out-of-competition test ordered by FINA clearly showed the presence of testosterone.

92. Based on the evidence available the Panel can hardly avoid the impression that Dr. de Castro in her various functions and other representatives and bodies of CBDA attempted much effort to shelter the Athlete. The proceedings following the positive tests on 25 and 26 May 2006 were systematically delayed, if not obstructed by CBDA in disregard of the state of analytical technique and scientific evidence and in clear opposition to FINA's opinion. The Athlete at least was aware of this if not involved. The Athlete constantly blamed Dr. de Rose for a conspiracy against her while he was discharging his responsibilities as President of the Medical Commission of PASO.

93. On the other hand the Athlete did not attempt to elucidate her doping offences, to explain how the testosterone entered her body or to contribute to the fight against doping.

94. Having duly weighed all the circumstances of the three anti-doping rule violations committed by the Athlete the Panel is of the view that, in the event DC 10.7.1 (2009) should apply as *lex mitior*, it had no other option than to impose a lifetime ban.

95. Therefore, in the case before the Panel it can be left open whether or not DC 10.7.1 constitutes a *lex mitior* which appropriately should apply for the determination of the sanction. Under both the DC as in force at the material time and the DC (2009) a lifetime period of ineligibility has to be imposed on the Athlete.

Conclusions

96. Based on the foregoing considerations the Panel comes to the following conclusions.

97. Ms. Gusmao committed three anti-doping rule violations, two of them, committed on 25 and 26 May 2006 and on 13 July 2007, respectively, in the form of the presence of the prohibited substance testosterone, according to DC 2.1, and one, committed on 12 July 2007 in the form of tampering with a doping control, according to DC 2.5.

98. As Ms. Gusmao had received notice of the anti-doping rule violation based on the samples collected on 25 and 26 May 2006 on 11 May 2007, at the latest, the doping offences occurred on 12 July 2007 and 13 July 2007 both constitute a second anti-doping rule violation, according to DC 10.6.

99. Therefore, Ms. Gusmao is to be declared ineligible to compete for lifetime, according to DC 10.2 in conjunction with DC 10.4.1, as from the date of this award, *i.e.* 13 November 2009.

100. The results Ms. Gusmao obtained during the Brazilian Swimming Championship in May 2006 are automatically disqualified with all consequences. Ms. Gusmao has to return any medals, diploma, rewards and prize money, according to DC 9. All results Ms. Gusmao obtained as of 12 July 2007 are disqualified with all consequences, by this award. Ms. Gusmao has to return any medals, diploma, rewards, and prize money obtained since that date.

The Court of Arbitration for Sport rules:

1. The appeals filed by Ms. Gusmao on 12 May 2008, 17 July 2008 and 3 September 2008 are dismissed.

2. The decisions adopted by the Doping Panel of FINA dated 12 May 2008, 17 July 2003, and 3 September 2008 are upheld as far as they do not contradict this Award.

3. Ms. Gusmao is declared ineligible to compete for life as from 13 November 2009.

4. All results obtained by Ms. Gusmao during the Brazilian Swimming Championship in May 2006 and all results obtained as from 12 July 2007 are disqualified. Ms. Gusmao is ordered to return all medals, diploma, rewards and prize money, accordingly.

5. (…).

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