



Arbitration CAS 98/208 N., J., Y., W. / Fédération Internationale de Natation (FINA), award of 22 December 1998*

Panel: Mr. Michael Beloff QC (England), President; Mr. Mingzhong Su (China); Mr. Denis Oswald (Switzerland)

Swimming

Doping (Triamterene)

(Non-) discrimination

Burden of proof

Strict liability

1. **The burden of proof lay upon FINA to establish that an offence had been committed. This flows from the language of the doping control provisions as well as general principles of Swiss Law. The presumption of innocence operates in the athlete's favour until FINA discharged that burden. The standard of proof required of FINA is high: less than criminal standard, but more than the ordinary civil standard.**
2. **It is the presence of a prohibited substance in a competitor's bodily fluid which constitutes the offence under the FINA rules, irrespective of whether or not the competitor intended to ingest the prohibited substance.**
3. **If the presence of a prohibited substance is established to the high degree of satisfaction required by the seriousness of the allegation, then the burden of proof shifts to the competitor to show why the maximum sanction should not be imposed. It is only at the level of sanction, not of finding of innocence or guilt, that the concept of shifting burden becomes relevant at all. And it is only at this juncture that questions of intent become relevant.**

On 24 July 1998, the Appellants, N., J., Y., W., all members of the China Swim Team under 20 years of age, were suspended for two years ("the decision"), by the Doping Panel of the Respondent, the Fédération Internationale de Natation Amateur (FINA) the International Federation governing amateur swimming because they had tested positive for Triamterene in an unannounced doping control conducted on 8 January, 1998.

* NB: This award has been challenged before the Swiss Federal Tribunal; see judgment of 31 March 1999, N., J., Y., W. c. FINA, 5P.83/1999 (n.p. ATF).

The four Appellants had been tested several times as recently as November and December 1997 without positive results in domestic and international competitions: three as recently as 22 December and one as recently as 19 December 1997.

On 8 January 1998 the four appellants, chosen for unannounced testing pursuant to the FINA “Pre-World championships/out of competition Doping Control Programme”, were all duly tested.

On 9 January 1998 the “A” samples from the Appellants were received at the IOC accredited laboratory in Sydney (Australia) (“the Australian laboratory”). The covering letter from the Director on 15 January 1998 (“the covering letter”) stated “*A and B samples were received in sealed Versapak carry bags with seal numbers. ... There was no evidence of tampering. The B samples are stored, frozen and unopened.*” The Report in respect of each sample said “*the above sample was received in good order with the seal intact.*”

The “A” samples were analysed at the Australian laboratory. The covering letter informed FINA that in the “A” samples, of all four Appellants, identified the presence of Triamterene: “*The level of Triamterene was very low, estimated in the 5-10 ng/mil range.*” The Report specified:

“The presence of triameterene was confined in the sample by gas chromatography – mass spectrometry according to method NIOC/36”.

Triamterene is a diuretic and a substance banned under FINA Rules.

On 14 January 1998, the Honorary Secretary of FINA invited the Secretary General of the Swimming Association of the People's Republic of China (CSA) to inform the swimmers that FINA were ready to proceed with the analysis of the “B” samples.

On 14 January 1998, the Appellants (who denied doping) were banned by FINA from competing in the “World Championships” at Perth.

On 27 January 1998, the Appellants assented to the testing of the “B” samples. The Secretary General of the CSA asked for the test to be carried out in Barcelona.

On 23 January, FINA (correctly) informed the Secretary General of CSA that IOC rules required the testing of the “B” samples to take place in the same laboratory as that of the “A” samples.

On 30 January 1998, the Australian laboratory informed FINA that it planned to analyse the “B” samples “*using two analysts not involved in the “A” sample.*”

On 5 February 1998, the Appellant's “B” samples were accordingly tested in the Australian laboratory, the Panel will discuss later by whom the analysis was carried out.

The covering letter of 6 February 1998 after repeating the same description of the condition of the containers and samples as its predecessor states that the Appellants representatives “*all agreed that the seals were intact, the samples were correct and the procedures of FINA were observed*” and that “*the observed level of Triamterene and metabolites was very low in these samples.*”

The Report then stated that *“the presence of Triamterene was confirmed in the sample by gas chromatography – mass spectrometry”*.

On 14 February 1998, the Appellants were informed of the positive findings and of their right to a hearing before the FINA Doping Panel.

On 16 February 1998, the President of the Shanghai Swimming Association wrote to the President of FINA denying the doping charges, stating that the Appellants could not have used Triamterene for improper purposes, stressing their previous testing record and raising, for the first time, the possibility of Actovegin, a health food, as the source of a false Triamterene reading while stating that *“further analysis needs to be conducted to clarify the issue”*.

On 27 February 1998, the Appellants indicated an intention to exercise their right to a hearing before the FINA Doping Panel.

On 20 April 1998, the Shanghai Institute Drug Control produced a report of their own further analysis. It stated that Actovegin tablets used by the Appellants which showed *“a suspicious peak with the same retention time of Triamterene”* (para.1) and concluded *“Though the mass spectre of the samples and Triamterene are similar, we cannot conclude whether the suspicious peak is Triamterene or other compounds”* [para.3].

On 25 April 1998 a hearing (adjourned at the Appellants request from 14 March 1998, its scheduled date) was held before the FINA Doping Panel.

At the hearing, the Appellants denied they were guilty of doping offences;

- They stated that they had not taken Triamterene.
- They admitted to taking a (pursuant to their coaches plan) nutritional supplement Actovegin: a protein free calf-blood extract manufactured by Hafshand Ny Comed Pharma AG (“the manufacturer”).
- They asserted that Actovegin was potentially the source of what appeared to be positive Triamterene readings, but could have been another compound with the aid of charts from three Chinese laboratories and one German laboratory (which declined to be identified).
- They asserted, however, Actovegin is not stated to contain Triamterene (The manufacturer states that it does not contain Triamterene. The China Dope Testing Centre [10th December 1996] had cleared the produce for use, stating, *inter alia*, that it contained *“no substances ... that are listed in the IOC Banned Substances List, such as ... diuretics”*).

The Appellants asserted alternatively, if Actovegin does contain Triamterene, it is neither a masking agent, nor does it enhance performance and they had no intention to ingest it.

The Doping Panel originally decided to adjourn the hearing so that the Appellant's claims that the positive reading was the result of their ingestion of Actovegin could be verified by an independent laboratory.

The Doping Panel nonetheless sought (unsuccessfully) to persuade the Appellants to agree that a doping offence had been committed, originally on the basis that the provisional suspension to date was sufficient to cover the mistake that was made so that the swimmers could be back into competition immediately, but subsequently (after discussions with FINA) on the basis of a six month suspension. The Appellants through their Counsel declined the offer on the basis that they had committed no offence.

Thereafter the hearing before the FINA Doping Panel was adjourned for additional tests.

On 25 April 1998, the Appellant's suspensions were lifted pending further investigation.

On 25 April 1998, Data of the tests carried out on behalf of the Appellants and "Instructions for Testing Actovegin" were submitted on the Appellants on behalf of the Doping Panel. The Appellants wished the laboratory to test whether Actovegin had ability to present as Triamterene or not. FINA, however, asked the laboratory to test whether Actovegin contained Triamterene.

The Appellants also asked for the additional tests to be carried out in the Barcelona or the London laboratory.

On 7 May 1998, the Lausanne laboratory (selected in lieu by FINA) received three packages of Actovegin together with documents produced by the Shanghai Institute for Drug Control containing an analysis of the Actovegin tablets.

In early June 1998, the tests were carried out on the Actovegin tables at the Lausanne laboratory. The initial results confirmed the presence of an unidentified substance that appeared as Triamterene in approximately 1/3 of the samples tested.

The Lausanne laboratory then, at FINA's request prepared quantification estimates on the basis of the available material: no further tests were carried out.

On 9 June 1998, these results were returned in a laboratory report and sent to the Appellants. The Report stated, of three extracts which corresponded each to two tablets from each of the three packages:

- *"two were completely negative for Triamterene".*
- The third one *"showed a small signal at the Triamterene retention time".*
- When analysed in a scan mode in order to get a full main spectrum of the substance, the presence of Triamterene was not confirmed according to [...] usual analysis data. If, however, this peak would really be attributed to Triamterene, even without the appropriate analytical confirmation, its quantity can be evaluated at 2.5ng/tablets compared with the spiked Triamterene.

and under a rubric:

"COMMENT ON THE RESULTS",

The Report noted that by reference to the results obtained by the Australian laboratory *“Triamterene concentrations in the “B” sample urines can be evaluated at 5-10ng/ml. The occurrence of a metabolite in the urine samples indicates that the product has been ingested. To obtain that concentration in urine, the minimum amount of Triamterene should be ca 0.25mg.*

Considering the hypothesis that the peak seen in one of our tablets extract is indeed Triamterene and that this specific preparation was ingested by the athletes, 100,000 tablets (2.5ng Triamterene per tablet) would be necessary to swallow in order to get the observed concentration in the urine”.

On 24 July 1998, the hearing before the Doping Panel was resumed.

On 25 July 1998, the Doping Panel announced its decision was that the four Appellants had committed an offence under FINA Rule DC 9.2(b) and were each suspended for a period of two years (the period of temporary suspension from 14 January 1998 - 25 April 1998 being deducted from that two year period).

The written decision of the Doping Panel dated 30 July 1998 stated:

“The (Appellants) have not established why they should not be sanctioned and not to the full extent. The reported consumption of Actovegin by the swimmers, in average six tablets per day cannot (excluding) have ceased the findings of the IOC – accredited laboratory in Sydney.

There was a period of only 16 days for the consumption of Actovegin by the swimmers. Considering a consumption of six tablets per day by each of the swimmers and considering that only about thirty (30)% of the tablets were containing the substance not definitely identified any of the swimmers has consumed over a period of 16 days only about 30-35 tablets containing the substance. The consumption cannot have caused the finding of Triamterene with a level of 5-10ng/ml.

The Panel is much more convinced that the substance detected was taken to mask another compound which had been ingested by the swimmers, before ...”

On 18 August 1998, the Appellants filed their statement of appeal with the Court of Arbitration for Sport.

On 4 September 1998, the Appellants filed their appeal brief accompanied by 1 volume of exhibits and 1 volume entitled “Table of Authorities”.

On 5 October 1998, FINA filed its answer accompanied by 1 volume of exhibits.

On 20 November 1998, the hearing took place at the CAS headquarters in Lausanne in accordance with an order of procedure laid down by the President in a document dated 12 November 1998. The parties confirmed in writing their agreement with the said order of procedure.

LAW

1. On 18 August 1998, the Appellants submitted a timeous appeal to the Court of Arbitration for Sport (CAS).

CAS has jurisdiction in the appeal because of

- the art. C 10.8.3 of the FINA Constitution which provides, so far as material, *“An appeal against a decision by ... the FINA Doping Panel shall be referred to the Court of Arbitration for Sports (CAS) Lausanne, Switzerland, within the same term as in C.10.8.2”* (i.e. within one month of the decision appealed against);
- the FINA Doping Control (“DC Rules”) 8.9 which provides, *“Any person affected by a decision of the FINA Doping Panel may appeal from that decision to the Court of Arbitration for Sport (CAS), Lausanne in accordance with FINA Rule C.10.8.3”*;
- the statement of appeal dated 8 August 1998;
- the signature by the parties of the Order of Procedure dated 26 October 1998;
- R47 of the Code of Sports-related Arbitration (“the Code”) (as enforced on 22 November 1994) which provides: *“A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body”*.

Art. R58 of the Code provides, so far as material: *“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports body is domiciled”*. In the absence of a choice by the parties, the Panel accordingly had to decide the dispute pursuant to the applicable regulations, being the FINA Regulations, and to Swiss law.

2. Art. R57 of the Code provides:

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

Accordingly, the Panel was not limited to consideration of the evidence that was adduced before FINA either at first instance or at the appellate stage, but had to consider all evidence, oral documentary and real, produced before it: nor could it be restricted in such consideration by the arguments advanced below. This hearing was a rehearing.

Because of the need if possible to reach a verdict which would, if the appeal were upheld, enable the four Appellants to compete in the forthcoming Asian Games 1998, the hearing had to be conducted within strictly controlled time limits (agreed to by the parties). Both parties fully and usefully exploited the opportunity to make written submissions in advance and to

provide documentary evidence. Moreover, the Panel had been at pains to acquaint itself with that material prior to the hearing. Accordingly, it was not its view, at the end of the hearing, that such constraints in any way derogated from the fairness of the proceedings. It notes that fora as diverse as the Supreme Court of the United States of America and the European Court of Justice at Luxembourg impose limits on oral advocacy more stringent than those in play before it.

3. The FINA DC Rules, provided at the material time and provide, so far as material, as follows:

“DC 1 Doping is strictly forbidden as a violation of FINA Rules.

DC 1.2 The offence of doping occurs when

(a) a banned substance is found to be present within a competitor's body tissue or fluids.

DC 1.6 Any departure from the procedures set out in these Rules and the Guidelines shall not necessarily invalidate a finding that a banned substance was present in a sample, ... unless such departure was such as to cast genuine doubt on the reliability of such a finding.

DC 2 BANNED SUBSTANCES

DC 2.1 Banned substances include those listed in Appendix 1 to the Guidelines.

DC 2.2 It is a competitor's duty to ensure that no banned substance enters his body ... fluids. Competitors are responsible for any substance detected in samples given by them.

DC6 UNANNOUNCED TESTING

DC6.1 FINA or its Member federations may designate any Member, governmental agency or any other third party that is deemed suitable to collect samples in accordance with these Rules. Such designee shall be referred to in these Rules and the Guidelines as a Sampling Agent (“SA”).

DC 6.2 Procedural and administrative rules for the conduct of unannounced testing are as set forth in the Guidelines. It is understood that unannounced testing may occur at any time, including at the time or locale of any competition; it is also understood that it is preferred that unannounced testing be unannounced to the competitor or his or her federation.

DC 6.3 Unannounced testing may be conducted with respect to any banned substance or banned technique, focusing upon anabolic agents and other substances which will effect the detection of anabolic agents, and other substances which may be specifically so identified in the Guidelines.

DC7 RESPONSIBILITY FOR DOPING CONTROL

DC7.1 FINA shall be responsible for doping control at:

- (a) World Championships with the exception for Masters;*
- (b) World Cups;*
- (c) All other FINA Events.*

At these events a FINA representative or designee shall be present.

DC 7.2 In all other cases (except where doping control is carried out under the rules of another sporting body), the Member conducting the controls or in whose territory an event is held will be responsible for conducting doping control.

DC 7.3 Where the conduct of doping control is the responsibility of, or is carried out by, a Member federation, that Member shall adhere to procedures consistent with those set forth in the Guidelines.

DC 7.4 Where the conduct of doping control results in a positive test on a competitor who is not a member of the Member federation who conducted the doping control, the Member federation who conducted the doping control shall, as soon as possible, report the results of such test to the Member federation which normally exercises jurisdiction over such competitor, which will conduct the appropriate hearing procedures and impose the appropriate sanctions on the competitor. The Member federation who conducted the doping control shall send a copy of its report of the positive test to FINA.

DC8 DUE PROCESS

DC8.1 Analysis of all samples shall be done in laboratories accredited by the IOC. Such laboratories shall conclusively be deemed to have conducted tests and analyses of samples in accordance with the highest scientific standards and the results of such analyses shall conclusively be deemed to be scientifically correct. Such laboratories shall be presumed to have conducted custodial procedures in accordance with prevailing and acceptable standards of care; this presumption can be rebutted by evidence to the contrary, but there shall be no burden on the laboratory in the first instance to establish its procedures.

DC8.2 If there is an adverse report on a sample for a banned substance, FINA shall notify the competitor and the Member federation of the competitor, as well as the Secretary of the FINA Medical Committee. Arrangements for testing the B sample shall be made as soon as possible.

DC8.3 A competitor for whom there is adverse report on the A sample may be provisionally suspended by the FINA Executive without a hearing until a hearing before the FINA Doping Panel can be made following the test of the B sample.

DC8.4 It shall be presumed that every competitor will request that the B sample be tested to ascertain whether that sample discloses the presence of the same banned substance detected in the A sample, but a competitor may accept the results of the test on the A sample by so advising FINA within fourteen (14) days of receiving notification that the A sample discloses the presence of a banned substance. A competitor who has neither accepted the results of the test on the A sample nor made arrangements to have the B sample tested within twenty one (21) days of receiving notification that the A sample discloses the presence of a banned substance shall be deemed to accept the results of the test on the A sample. A competitor who has accepted the results of the test on the A sample is nevertheless entitled to a hearing in accordance with DC 8.6.

DC8.5 If the B sample proves negative, the entire test shall be considered negative and the competitor, his or her federation, and the Bureau shall be so informed.

DC8.6 If the B sample proves positive and a banned substance clearly identified, the findings shall be reported to the FINA Doping Panel for further considerations according to FINA Rule C 17.5. In case the doping control was conducted under the control of a FINA Member Federation, the findings shall be reported to an appropriate hearing panel controlled pursuant to the national law and rules of the Member Federation, to which the competitor belongs.

DC8.7 When a competitor is notified that there is suspicion or evidence that a doping offence has taken place, the competitor shall also be informed of his or her right to a hearing. If a competitor does not request a hearing within twenty-eight (28) days of being so informed, the competitor will be deemed to have waived the right to a hearing.

In the case of a doping offence as defined in DC 9.1. involving the banned substances referred to in DC 9.2. (A), the competitor shall be informed that the hearing can only involve:

(a) ...

(b) whether the body tissue or fluid has deteriorated or been contaminated;

(c) whether the laboratory analysis was correctly conducted;

(d) whether the minimum suspension for a first offence should be exceeded;

and

(e) ...

DC8.8 If a competitor or other person is found to have violated a doping rule as set forth in these DC Rules, ... the FINA Doping Panel ... that has heard the evidence shall impose sanctions in accordance with DC9.

DC8.9 Any person affected by a decision of the FINA Doping Panel may appeal from that decision to the Court of Arbitration for Sport (CAS), Lausanne, in accordance with FINA Rule C 10.8.3.

DC9 SANCTIONS

DC9.1 For the purpose of these Rules, the following shall be regarded as "doping offences"

(a) the finding in competitor's body ... fluids of a banned substance".

DC9.2 Sanctions shall include the following

(a) Anabolic androgenic steroids (...)

The finding in a competitors body ... fluids of a banned substance listed in this DC9.2(a) shall constitute an offence, and the competitor shall be sanctioned in accordance with DC9.2(a) regardless of whether the competitor can establish that he or she did not knowingly ingest a banned substance.

(b) (...) diuretics and related substances.

First offence:

up to (2) years suspension.

DC9.3 The finding in a competitors body ... fluids of any other banned substance (e.g. diuretics) ... shall shift to the competitor the burden of establishing why he or she should not be sanctioned in the full extent provided for under DC9.2(b)(c) ...

DC10 Competitors taking medications should declare such fact to the relevant authority."

4. FINA Guidelines for doping control provided at the material time and provide so far as material:

“PART 1: DOPING CONTROL

5.6 *B samples shall be analysed in the same laboratory with alternate personnel or performed in a second accredited laboratory. Only a commission member, or its designate, is authorised to break the seal of the B sample.*

6. Communication of Results

6.1 *The results from all analyses must be sent exclusively to FINA in encoded form. The report must be signed by the head of the laboratory designated to do the analyses. All communication must be arranged in such a way that the results of the analyses are confidential.*

6.2 *When FINA is advised by the laboratory of an adverse report on the a sample, FINA shall inform the competitor and the competitor's federation. Arrangements for testing the B sample should be made as soon as possible.*

6.3. *It shall be presumed that every competitor will request that the B sample be tested to ascertain whether that sample discloses the presence of the same banned substance detected in the a sample, but a competitor may accept the results of the test on the A sample by so advising FINA within 14 days of receiving notification of an adverse report on the A sample. a competitor who has neither accepted the results of the test on the A sample nor made arrangements to have the B sample tested within a month of receiving notification of an adverse report on the a sample shall be deemed to accept the results of the test on the A sample. Unless otherwise requested by FINA, a laboratory shall not be obliged to keep any B samples after all appeals have been heard and a final decision has been made.*

6.4. *Once a competitor has requested an analysis of the B sample, a date shall be arranged, convenient both for the competitor and for FINA, within 21 days of the request for the conduct of the analysis. The competitor's federation shall be informed of the date and time of the analysis. Should he wish to do so, the competitor and/or his representative may be present at the analysis, but the competitor may not delay the 21 days by insisting upon his own presence. a representative of the competitor's federation may also be present, as may a representative of FINA.*

6.5. *If the B sample proves negative, the entire test is considered negative. If the B sample is positive and the substance clearly identified, the Medical Commission, the FINA Executive, the competitor and his federation shall be informed without delay. In the case of a positive B sample in the Olympic Games, a member of the Medical Commission should attend the meeting of the IOC Medical Commission; a similar procedure applies in other events with regard to a representative of the appropriate Medical Commission.*

6.6. *Once testing on the B sample is complete, the laboratory report shall be sent to FINA along with a copy of all relevant laboratory data.*

7. UNANNOUNCED OUT OF COMPETITION DOPING CONTROL

7.9 *If an athlete is found to have a positive result, the sanctions will be applied by the FINA Doping Panel as if it were during competition.*

8. SANCTIONS

8.1 *If an athlete is found to have a positive result, the sanctions will be applied by the FINA Doping Panel in accordance with FINA Rules C.17.*

8.2 Before a final decision is made in any case of doping control, a faire hearing must be granted to the athlete (and possibly other persons concerned). See DC 8.7, 8.8 and 9.3.

8.3 Sanctions are set forth in DC 9 as follows:

DC 9.1 For the purpose of these Rules, the following shall be regarded as “doping offenses”:

- a) the finding in an athlete’s/competitor’s body tissue or fluids of a banned substance;
- b) the use or taking advantage of banned techniques;
- c) admitting having taken advantage of, or having used, a banned substance or a banned technique;
- d) the failure or refusal of the athlete/competitor to submit to doping control;
- e) assisting or encouraging others to use a banned substance or banned technique, or admitting having assisted or incited others;
- f) trading, trafficking, distributing or selling any banned substance.

DC 9.2 Rules regarding “sanctions” are set forth in DC 9 as follows:

- a) Anabolic androgenic steroids, growth hormones, and chemically or pharmacologically related compounds:
 - First offence: a minimum of four (4) years’ suspension, plus a retroactive sanction involving cancellation of all results achieved in competitions within a period of up to six (6) months before the offence shall be imposed.
 - Second offence: lifetime expulsion; plus a retroactive sanction involving cancellation of all results achieved in competition during the athlete’s/competitor’s career shall be imposed.

The finding in an athlete’s/competitor’s body tissue or fluids of a banned substance listed in this DC 9.2. (a) shall constitute an offence, and the athlete/competitor shall be sanctioned in accordance with DC 9.2. (a), regardless of whether the athlete/competitor can establish that he did not knowingly ingest the banned substance.
- b) Amphetamine-related and other stimulants, diuretics, beta-blockers, beta-2 agonists and related substances:
 - First offence: up to two (2) years’ suspension.
 - Second offence: a minimum of (2) years’ suspension up to a lifetime expulsion.
- c) Narcotic Analgesics:
 - First offence: up to two (2) years’ suspension
 - Second offence: up to lifetime expulsion.
- d) Ephedrine, phenylpropanolamine, caffeine (the level of caffeine must, however, be taken in consideration), cannabinoids (such as marijuana and hashish), and all other banned substances not otherwise set in DC 9.2. (a) through (c):
 - First offence: up to three (3) months’ suspension.
 - Second offence: three (3) months’ to two (2) years’ suspension.
 - Third offence: two (2) years’ suspension to lifetime expulsion.
- e) Refusal to submit do doping control when requested shall be regarded as an offence with anabolic androgenic steroids, and sanctioned in accordance with DC 9.2. (a).
- f) For all other violation of these Rules related to Coping Control, sanctions may be imposed at the discretion of the Doping Panel.

DC 9.3. The finding in an athlete's/competitor's body tissue or fluids of a banned substance, or any of its metabolites, shall shift to the athlete/competitor the burden of establishing why he should not be sanctioned to the full extent provided for under DC 9.2b-9.2f.

DC 9.4. As used in DC 9.2. and other DC Rules, "suspension" shall mean that the individual sanctioned shall not participate in any activities of FINA or any of its Member federations, in any discipline, in international competition, including acting as a competitor, delegate, coach, leader, physician or other representative of FINA or a Member federation. Unless otherwise determined by the appropriate body, a suspension shall take effect from the date that the athlete/competitor provides a sample. As used in DC 9.2., and other DC Rules "expulsion" shall mean suspension for life.

DC 9.5. Where any DC Rule has been violated by a member of relay team, a water polo team or a team in synchronized swimming, the competitor shall be sanctioned in accordance with DC 9.2., and the team shall be disqualified from the event.

DC 9.6. If any person, including a coach, trainer, or doctor is found to have helped or advised an athlete/competitor in violation of these Rules relating to Doping Control, or has knowledge of such violation without reporting it to FINA, such person shall be suspended up to life".

5. The Appellants case has been elaborated in writing on previous occasions, in the brief to the doping panel dated 24 April 1998, in their letter submitting further positions dated 13th May 1998, in their second brief to the doping panel dated 23 July 1998 and in the Statement of Appeal and Appeal brief to this Panel.
6. The Appellants main submissions were as follows:
 - As a matter of law intent of an individual to ingest the prohibited substance is required in order to penalise athletes for ingestion of diuretics or masking agents: such intent is lacking in the case of the athletes ("intent");
 - The burden of proof is clearly to identify the prohibited substance and exclude any possibilities that test results were caused by Actovegin even if Actovegin contains Triamterene lies upon FINA: the Respondents have failed to discharge such burden ("burden of proof on substance").
 - Only "B" sample results may be considered as evidence if test results differ between "A" and "B" samples. They did so here ("B" sample).
 - FINA rules require "B" samples to be tested by a different laboratory than that used to test "A" samples: or at least that alternative personnel be employed if the same laboratory is used. This was not done here and the results of the "B" samples cannot be used ("different laboratory").
 - Triamterene is only prohibited as a diuretic were it to be used for masking another substance, the burden of proof is on the Respondent to establish that such low levels can have the effect of a masking agent. They have failed to discharge such burden ("use of Triamterene").
 - In cases of minor or doubtful offences, only minor penalties are appropriate. The penalties here were too severe ("penalties").

- Failure to disclose Actovegin on Drug Testing Forms does not constitute a doping offence (“non-disclosure”).
 - The Appellants are entitled to full due process and Chinese may not be treated differently because of their race or political affiliations. In this case they were denied due process: and were treated differently (“discrimination”).
 - The FINA and their Doping Panel, as a monopoly amateur athletics association have trust and fiduciary duties to the Appellants to be fair, impartial and particularly concerned for Appellants' due process rights (“due process”).
7. The Panel will consider these submissions generally but notes, in order to dispose of the point, that while inadequate failure to disclosure medication contrary to DC.10.6 may not be a doping offence: [see CAS 95/142 in *Digest of CAS Awards 1986-1998*, Staempfli Editions, Berne 1998 (hereafter: “*Digest*”), p. 233, n. 22; CAS 96/149 in *Digest*, p. 256, n. 8] this, however, was not in any event the charge made against the Appellants.
 8. The Panel starts with a recognition of the seriousness of the matter from the Appellants' point of view. The fight against doping is no excuse for the conviction of innocent persons (see CAS 92/70 N. v. FEI). It starts too with a recognition that there exists a predisposition in some quarters to assume that Chinese swimmers are guilty of systematic drug taking. FINA's constitution states at C2 “*FINA shall not allow any discrimination against ... individuals ... on grounds of race ... or political affiliations*”. It may be unnecessary to say that, even without reference to that provision, the Panel would, as an international arbitral tribunal, not only be, but trust that it appears to be, free from any taint of such predisposition or discrimination. The Panel considers only the evidence before it: it pays no heed to media hyperbole.
 9. The law that the Panel have to apply is that of the doping control provisions of FINA in their present incarnation (and not the rules of any other sporting regulator), as well as principles of Swiss law which form the legal context in which they are to be interpreted. It stresses this because many of the authorities discussed in writing and orally before it related either to the rules of other bodies, differently drafted, or to the rules of FINA before they were repealed or amended. Dicta in those cases had necessarily to be read in the context of the relevant regulatory structure, and had, accordingly, no compulsive force upon the Panel.
 10. Moreover, given the freedom that the Panel enjoyed under R57 as to making findings of fact as well as to application of law, its main focus had to be on evidence before it. The treatment of that (or other evidence) before the FINA Doping Panel, although instructive was not ultimately relevant. The Panel was in no way constrained by the FINA Panel's approach. The virtue of an appeal system which allows for a full rehearing before an appellate body is that issues of the fairness or otherwise of the hearing before the tribunal of first instance fade to the periphery (Pierre Moor, *Droit administratif*, vol. II, Berne 1991, p. 190, citing Swiss Supreme Court Case i.e. ATF 114 Ia 307, 110 Ia 81) (see by analogy *Calvin v. Carr* 1980 AC 574 at pp. 592-593). The Appellant's entitlement was to a system which allowed any defects in the hearing before the doping panel to be cured by the hearing before CAS.

11. The Panel therefore finds it unnecessary to consider the charges made by the Appellants as to FINA's violation of due process. For the avoidance of doubt, however, it stresses that its silence should not be taken as endorsement of those charges: and that it sees no reason to doubt the good faith of the Doping Panel, who, whatever the unorthodoxy of its behaviour, sought to give the Appellants by adjournment and otherwise a full opportunity to make their case.
12. The Panel is in no doubt that the burden of proof lay upon FINA to establish that an offence had been committed. This flows from the language of the doping control provisions as well as general principles of Swiss civil code (Article 8). The presumption of innocence operates in the Appellants favour until FINA discharged that burden.
13. The Panel is equally in no doubt that the standard of proof required of FINA is high: less than criminal standard, but more than the ordinary civil standard. The Panel are content to adopt the test set out in K. and G. v. IOC (CAS OG 96/003-004) (“K.”): “*ingredients must be established to the comfortable satisfaction of the Court having in mind the seriousness of the allegation which is made*”. To adopt a criminal standard (at any rate where the disciplinary charge is not of one of a criminal offence) is to confuse the public law of the state with the private law of an association (tests drawn from the Swiss law of paternity are not apposite because the law is *sui generis*).
14. Resolution of the questions of burden and standard of proof however, does not *per se* answer the further question of what it is that has to be proved to this standard. The issues require to be disentangled.
15. In the Panel's view, it is the presence of a prohibited substance in a competitor's bodily fluid which constitutes the offence under FINA DC, irrespective of whether or not the competitor intended to ingest the prohibited substance (whether the FINA DC would be held compatible with general principles of law in so far as they purport to prevent a competitor from establishing his innocence by showing conclusively that the presence of a prohibited substance in his bodily fluid was the product of an ingestion which was neither intentional nor negligent, (e.g. where his drink is 'spiked' with a drug by a rival competitor) is not an issue which falls for decision in this case). This conclusion is reached on the basis of:
 - the language of the doping control provisions: especially DC2(a);
 - the contrast with the old repealed rules, which contained seeds of an ambiguity [see e.g. the reference to MED 4.1 “*Doping is strictly forbidden and can be defined as the use of any banned substance*”]. Use may imply intent, although significantly, the weight of authority contradicts such analysis [see CAS 95/150 V. v. FINA in *Digest*, p. 271, n. 13; CAS 96/149 A.C. v. FINA in *Digest*, p. 257, n. 14-15 (contrast the *Samantha Riley* case decided by the FINA executive on 20 February 1996, where a hard case made bad law)].
 - the perceived purpose of “strict liability”, which eliminates the need to investigate more difficult questions of motive, intent and the like (see e.g. CAS 95/141 C. v. FINA in *Digest*, p. 220, n. 13: “*Indeed, if for each case the sports federations had to prove the intentional*

nature of the act (i.e. to improve one's performance) in order to be able to give it the force of an offence, the fight against doping would become practically impossible”).

16. As to the Appellant's counter-arguments the Panel notes:
 - there is no requirement of Swiss law which would contradict or override clear words of the FINA doping control provisions, in particular since such provisions do not constitute part of the public criminal law;
 - those CAS cases which focus on lack of intent as a defence to a doping offence were concerned with differently drafted rules (e.g. CAS 91/56 S. v. FINA in *Digest*, p. 93; see also TAS 96/156 F. v. FINA, para.13.2-13.3 where it was contemplated that under the old FINA Rules, the Appellant could put forward a defence of inadvertent ingestion);
 - those CAS cases which endorsed a “strict liability” construction were based on analogous rules (see e.g. cases referred to in para.15 above and K.);
 - the reference to intent as a relevant factor in the doping control provisions (DC9) clearly refers, as its section title (“Sanctions”) shows, to the question of penalty, and not of liability.
17. If the presence of a prohibited substance is established to the high degree of satisfaction required by the seriousness of the allegation, then the burden shifts to the competitor to show why, in the case of a diuretic, the maximum sanction should not be imposed. The Panel repeats that under the new FINA rules it is only at the level of sanction, not of finding of innocence or guilt, that the concept of shifting burden becomes relevant at all. And it is only at this juncture too that questions of intent become relevant.
18. Whether the burden which lies upon the competitor can be discharged on the balance of probabilities or on the same standard of proof as lies upon the regulatory body initially (para.5.6 above) which does not fall for decision in this case, it is clear that the submission of the Appellants that, notwithstanding the shifting of the burden, the sporting regulator is still obliged to eliminate all other possibilities must be rejected. Such a submission is consistent neither with the concept of a shifting burden nor with language of the provisions nor required by Swiss law.
19. As to the facts, the Panel notes that the bulk of evidence was documentary or affidavit: this, of course, did not diminish its weight.
20. In the event that the only witnesses who were called before the Panel were expert witnesses, questions were raised about their independence, especially in the context of the Lausanne laboratory receipt of instructions given by FINA as to (i) what tests were to be carried out, and (ii) what matters should be commented on in the report. The Panel are in no doubt, whatsoever that the tests were carried out by the Lausanne laboratory in good faith, and that the results were properly recorded. It is, *inter alia*, self-evident, as Dr Saugy said, that any hint that a laboratory manipulated its results, would be fatal to its survival.

21. The Panel accepts moreover without reservation, that the evidence of Dr. Saugy to FINA and of Dr. Barwell for the Appellants was designed to assist the Panel as best each could; and that the views given were each's own. It is not what questions were asked by FINA of the Laboratory in Lausanne, but what answers were given which concerns the Panel. If the questions were not directed to the proper target, by the same token the answers might be inadequate. It is indeed to the adequacy of the evidence of the experts and the conclusions to be drawn from it that the Panel's attention must be directed, not as to whether either was an honest witness. Of that there is no doubt.
22. The Panel observes initially that although a negative "A" sample trumps a positive "A" sample with the result that the entire test shall be considered negative (DC8.5), *non sequitur* that a positive "B" sample dislodges a positive "A" sample from consideration. The FINA DC rules on their proper construction repudiate a conclusion so offensive to common sense (ditto FINA Guidelines 6.2-6.6). It is the "findings" (sc of both tests), which must be reported to the relevant FINA panel (DC8.6). In this instance it is useful to have regard to both samples, since the "A" sample analysis report includes a quantitative estimate which is not mentioned in the "B" sample analysis report. The present case thus provides not an example, of a negative "B" sample overriding a positive "A" sample, but one of a positive "B" sample confirming a positive "A" sample.
23. Both the analysis of "A" and "B" samples showed and confirmed the presence of a banned substance in each Appellants bodily fluids i.e. Triamterene listed as a diuretic (DC2.1) and Guidelines Appendix I (see above). The burden of proof which lays on FINA was therefore *prima facie* discharged.

24. DC 8.1 (quoted above) states:

"Analysis of all samples shall be done in laboratories accredited by the IOC. Such laboratories shall conclusively be deemed to have conducted tests and analyses of samples in accordance with the highest scientific standards and the results of such analyses shall conclusively be deemed to be scientifically correct. Such laboratories shall be presumed to have conducted custodial procedures in accordance with prevailing and acceptable standards of care; this presumption can be rebutted by evidence to the contrary, there shall be no burden on the laboratory in the first instance to establish its procedures."

The language of this rule which (if read in isolation) would appear to make the analysis of an accredited laboratory impregnable to challenge, must be read in the context of the appeal provisions at DC8.7 which clearly admit of the ability of a competitor to assert that the body fluid has been contaminated, or the laboratory analysis incorrectly conducted. The Panel accordingly next considers the two challenges which have been made to the accuracy of the "A" and "B" samples.

25. The first challenge (interestingly not advanced at all in the Appellants written submission to the Panel) was made on the basis that two of the Appellants asserted that the *"packaging (sic) of the containers to be used to carry the urine, was leaking air"*. The Panel naturally accepts that where there is a substantial risk of contamination of a sample, the results of that sample ought, save exceptionally, to be disregarded (see e.g. CAS 91/56 S. v. FINA in *Digest*, p. 93 ff.). However,

it cannot see why the fact that the packaging of containers (as distinct from the containers themselves) may be impaired could have the propensity to contaminate the sample (as distinct from leading to substitution).

26. Moreover, in this particular instance there was no difference in the results of the samples of those Appellants who asserted that there had been impairment of the packaging of their container and those who did not; a matter which, Dr Barwell agreed in evidence, tended to support the conclusion that there had been no contamination. As to substitution, no contention was (or, as the Panel sees, could have been) made on the Appellants behalf.
27. The Report from the laboratory Receipt Advice forms support the conclusion that the Australian laboratory noted in respect of both "A" and "B" samples that the seals were intact. More important in respect of the "B" sample, not only was there no assertion of contamination or other impropriety by those representing the Appellants at the test pursuant to FINA Guidelines 6.4, but they signed statements to the effect that the seals were intact, the samples correct, and FINA's procedures duly observed.
28. The second challenge was made on the basis that, contrary to the FINA guidelines para.5.6, which requires that alternative personnel be employed to test the "B" sample if the same laboratory is used as was used for the test on the "A" samples, the same person conducted the analysis of the "A" and "B" samples. There was no doubt that the Australian laboratory director was conscious of the obligations that different analysts should conduct (see his letter of 29th January 1998): and it would be surprising if he failed the test to ensure that the proper protocol was followed.
29. The only evidence before the Panel is that of the contemporary documentation. There is no doubt that J. Tjoa (JT) and G. Trout (GT) played a part both in relation to the 'B' test and to the 'A' test. In relation to the 'A' test Effi (sic) also played a part. The issue is as to what part each played: in particular as to whether either JT or GT were involved in analysis of the "A" samples themselves, as distinct from in other parts of the test.
30. As to this the Panel is unpersuaded, from its reading of the documentation that JT or GT were involved in anything other than tests of the controls. But critically it observes again that not only is there a presumption (even if rebuttable) of regulatory (DC 8.1), but the Panel repeats the Appellants representatives signed statement in relation to the 'B' test that FINA procedures were duly carried out. Since per Dr Barwell, the object of analysis by separate personnel is to avoid the perpetuation of error, the Appellants representatives imprimatur to the correctness of the procedures seems to scotch any subsequent criticism.
31. Therefore quite apart from the anti-technicality rule DC 1.6, in the Panel's view, there is no sufficient doubt cast upon the validity of the tests of the 'A' and 'B' samples. Indeed, the Appellants themselves relied upon the accuracy of the analysis of retention times in those tests to advance their own case as to the responsibility of an unidentified substance in Actovegin for such retention times.

32. The next issue is whether the Appellants nonetheless created a reasonable doubt that the retention times shown in the “A” and “B” samples, were of a substance other than Triamterene with the same retention time.
33. The Panel stresses that no-one who contended for the possibility of some other substance that Triamterene was able to state what it was. This is as true of the Shanghai and German laboratories as of Dr. Barwell; whose last affidavit conceded that it was “presently unidentified” (para. 7). When the Panel enquired of Dr. Barwell why on the basis that the substance was “indistinguishable from” Triamterene in its retention time, he was prepared to assert the possibility that it might be another substance, he said, fairly and candidly, that he could not identify any indicia of difference between Triamterene and such notional other substance, but merely postulated the possibility on the basis that, in the future, some test might be derived which would identify the substance as being different.
34. The Panel cannot ascribe to such possibility, based as it is on no verifiable evidence, the raising of a reasonable (as distinct from, at the highest a fanciful) doubt. It notes also that, as Dr. Saugy observed the fact that the “B” samples disclosed metabolites of Triamterene was cogent evidence in favour of the fact that it was indeed Triamterene which the samples contained.
35. It was alternatively contended on the Appellant's behalf that Actovegin might contain, if not a substance whose retention time was the same as that of Triamterene, then Triamterene itself.
36. In the context of the FINA Rules, this argument goes to penalty, not liability. It is, the Panel repeats, for the Appellants to satisfy it on the balance of probabilities that this was so – i.e. that it was more likely than not that it was the presence of Triamterene in Actovegin, in so far as established, which provided the explanation for its presence in the “A” and “B” samples. By that standard, they manifestly failed to provide such satisfaction. There was no test carried out on the Appellants behalf to explore this possibility on the remaining batch of the Actovegin tablets, i.e. those which had not already been either consumed or tested (Dr Barwell agreed that it would have been open to the Appellants to carry out such test). Indeed there were *no* tests carried out on *any* Actovegin tablets, which established that the amount of Triamterene found in the “A” sample was the product of its ingestion.
37. There were, moreover, facts which pointed to the opposite conclusion:
 - The Lausanne laboratory third extract which showed traces of Triamterene would, according to Dr. Saugy, be considered negative, in the context of a doping test;
 - The Chinese Association had itself tested Actovegin in 1996, and failed to detect traces of any diuretic, including Triamterene (see report of China Doping Control Centre dated 1st December 1996);
 - The manufacturers stated in written evidence adduced before the Panel (admittedly without exposing the basis for their conclusion) that the Actovegin contained no Triamterene or other diuretic;

- Most importantly, the Appellants who had been on their own evidence in affidavit taking Actovegin on a regular basis since November, had tested *entirely* negative on several occasions since then.
38. Finally, in spite of the admitted lack of precise accuracy of his quantification, Dr. Saugy was unequivocal in his view (despite a rigorous cross-examination) that the Australian laboratory quantification findings could not have been caused by Actovegin. In his view, the scale of discrepancy was such that fine tuning of the quantification would have been superfluous.
 39. There was in short no evidence before the Panel that ingestion of six tablets a day (paying all due regard to the contention that Actovegin tablets are not chemically formulated and can vary from tablet to tablet) since 22 December 1997 (the Appellants unchallenged evidence as to their own consumption) would produce the results shown in the “A” and “B” samples. The Appellants accordingly failed to discharge the burden that lies upon them.
 40. In reaching the conclusion that the offence was committed, and that the Appellants had not discharged the burden which lay upon them to mitigate the maximum sanction of two years, the Panel have borne in mind that all the swimmers have denied on affidavit that they took Triamterene. The Panel has treated that evidence as if it had been given on oath. However, it is regrettable that the currency of such denial is devalued by the fact that it is the common coin of the guilty as well as of the innocent.
 41. The Panel was vigorously pressed too with the argument that there was no evidence as to what purpose ingestion of Triamterene might serve for the swimmers at that particular time. The FINA DC Rules, however do not require investigation of purpose. The presence of a prohibited substance – including a diuretic – is sufficient (DC9.2). Given, however, the known propensity of diuretic to assist in flushing out what might be other prohibited substances, it is not impossible for the Panel to construct hypotheses as to why Triamterene might have been ingested. The Panel stresses that it does not rely upon such hypotheses, however, to sustain its conclusion – merely to test whether the clear and sufficient scientific evidence is somehow undermined. The FINA regulatory provisions require the Panel to consider what was in the competitor's fluids, and not why.
 42. Had the Panel identified Actovegin as the culprit for the result of “A” and “B” sample tests, then it would have given serious consideration as to whether or not the maximum sanction should have been applied and even (which we do not need to decide) whether such finding opened up the possibility that the Appellant could be completely exculpated. There is certainly no compelling evidence before it that Actovegin was taken in the knowledge that it contained Triamterene, or with the intent to gain such advantage by taking Triamterene as might exist. The Panel readily accepts the submission of the Appellants' that *prima facie*, (although always depending upon the particular circumstances of the case), lack of intent should be a powerful mitigating feature. Such is a consistent theme of all the CAS jurisprudence: CAS 95/141 C. v. FINA in *Digest*, p. 221-222, n. 21-24; CAS 96/149 A.C. v. FINA in *Digest*, p. 260-261, n. 29-30 a); CAS 95/150 V. v. FINA in *Digest*, p. 273, n. 20; TAS 96/156 F. v. FINA, para. 15.

43. In so saying, the Panel is not oblivious to the submission made on behalf of FINA that DC 2.2 states that *“it is a competitor's duty to ensure that no banned substance enters his body ... fluids. Competitors are responsible for any substance detected in samples given by them”*. Nonetheless if the persons responsible for team management have analysed a particular food product and cleared it of containing prohibited substances, it is not easy to see how much more could reasonably be required of competitors.
44. The Appeal must accordingly be dismissed for the foregoing reasons.

The Court of Arbitration for Sport hereby rules:

1. The appeal filed by N., J., Y., W. on 18 August 1998 is dismissed.
 2. The decision issued by the FINA Doping Panel on 24 July 1998 is confirmed.
- (...)