

**Advisory opinion CAS 2000/C/267 Australian Olympic Committee (AOC), 1 May 2000**

Sole Arbitrator: Prof. Richard H. McLaren (Canada)

Compliance of full body swimsuits with FINA rules

Authority and ability of FINA to grant approvals for the use of full body swimsuits

Introduction

1. Controversy has surfaced in regard to swimmers wearing swimming costumes in the form of full body swimsuits. Such bodysuits are made by at least two manufacturers, Speedo and Adidas. Various claims are made in respect of these bodysuits including claims that the suits increase a swimmer's speed and endurance, and reduce drag. It may also be the case that they have an effect on the buoyancy of the swimmer. In an effort to settle these controversies, the Australian Olympic Committee (AOC) has requested this Advisory Opinion.

The Background to the Request for an Advisory Opinion

2. In order to qualify for participation in the Olympic Games, swimmers must swim qualification times determined by Fédération Internationale de Natation Amateur (FINA) and approved by the International Olympic Committee (IOC). For Australia, Australia Swimming Inc. will nominate to the AOC, swimmers for selection to participate in the 2000 Olympic Games as part of the Australian representative team. The AOC will make its selection of swimmers to the team dependent upon placings achieved at the 2000 Telstra Australian Open Championships to be held between 13-20 May of this year.
3. Accordingly, the AOC is vitally interested in determining whether the bodysuits comply with FINA rules because the determination will impact on its swimmers' rights to participate in the Olympic Games. Swim suits could be "specialized" clothing worn during actual competition in accordance with clause 8.3 of By-Laws to rules 31 and 32 of the Olympic Charter. As such they would be outside the authority of a National Olympic Committee (NOC) such as the AOC. However, in accordance with clause 8.3, the decision to acknowledge a piece of equipment as "specialized" within the meaning of the clause lies mainly with the concerned NOC being in charge of the decision to acknowledge it as such or not to do so. Additionally, results which are achieved by swimmers as members of the 2000 Olympic team may be subject to challenge by virtue of them wearing a bodysuit.
4. In view of these controversies and the pending Summer Olympic Games in Sydney, Australia, the Australian Olympic Committee requested from the Court of Arbitration for Sport (CAS) an Advisory Opinion pursuant to Rule 60 of the Code of Sports-Related Arbitration (the

“Code”). The President of the AOC requested through the President of FINA that it join the AOC in a request for an Advisory Opinion. FINA declined to join in seeking this Opinion. At the request of CAS it provided a submission received on 25 April 2000.

5. The questions asked by the AOC as the requesting party of the Opinion were:
 1. whether the bodysuits contravene FINA’s Rule SW 10.7 in that they may aid a swimmer’s speed, buoyancy or endurance during competition;
 2. whether FINA has the authority and ability to grant “approvals” for any device that may contravene Rule SW 10.7;
 3. if yes to the preceding question, what is the effect of any such “approval”;
 4. if no to question 2, what is the effect on performances by the athletes achieved while wearing the bodysuits; and
 5. has FINA given any valid “approval” to the bodysuits in question?

Procedure

6. The AOC’s request for an Advisory Opinion was submitted to CAS on 21 March 2000. I was advised that the President of CAS had selected me as the sole arbitrator on 28 March 2000. On 29 March, counsel for the AOC was advised that in accordance with R61 of the Code the CAS President had formulated the questions to be submitted to me as follows:
 1. Can the bodysuits in question be considered as a “device” according to FINA’s Rule SW 10.7?
 2. Has FINA given an “approval” allowing the use of the bodysuits in question?
 3. Has FINA the authority and ability to grant “approvals” for the use of such bodysuits that may contravene Rule SW 10.7?
 4. If yes to the preceding question, what is the effect of such an “approval”?
 5. If no to question 3, what is the effect on performances by athletes achieved while wearing the bodysuits in question?
7. On 30 March 2000 the AOC requested a modification to Question No. 1 formulated by the CAS President by adding question 1A: *“If yes to question 1, do the bodysuits aid a swimmer’s speed, buoyancy or endurance during a competition?”* The CAS President decided not to change the questions he formulated. He considered that the question 1A is already covered by his formulation of Question No. 1.

Jurisdiction of AOC to Request Opinion of CAS

8. FINA asserts that the requested opinion is a disguised appeal against a decision that the AOC would otherwise not be able to make. Therefore, it is an improper use of the Advisory

jurisdiction of CAS. It is also submitted that the Advisory Opinion is not meant to decide an existing dispute, which is what lies behind this particular request. It is further submitted that, given the nature of the request, the documentation is not supposed to be a legal brief and include adversarial arguments.

9. The AOC has an interest in the proper interpretation of the rules applicable to swimming because of its responsibility to select Australian swimmers to participate in the Olympic Summer Games. Some Australian swimmers who compete using the full bodysuit have asserted that the suits are specialized equipment, thus being outside the purview of the AOC as not being clothing or a uniform to be worn. Specialized equipment is regulated by FINA, the international sports federation in this matter. The AOC asserts that CAS has jurisdiction because the AOC could possibly be affected by the application and interpretation of FINA swimming Rule SW 10.7. While that is a possible basis for the jurisdiction of CAS to render this opinion it is unnecessary to go further than R60 of the Code, which forms a complete basis for the AOC request for this Advisory Opinion. It is then within the exclusive discretion of the CAS President by Code R61 to determine whether the request “*may be the subject of an opinion*”. The President made such a determination in this case.

Description of the “Long John” Swimsuits

10. There are currently two competing choices for the “Long John” swimsuit. One is manufactured by Adidas and is known as “full bodysuit”; the other of which is manufactured by Speedo, whose suit is called “Fastskin”TM. There are a number of different silhouettes of the suit from a full body to a hydra silhouette and a trunk. The silhouettes are different for males and females.
11. The material presented by each manufacturer at the FINA Bureau meeting in Kuwait on 8 October 1999, was requested by the AOC. None of it was provided to the AOC and has not been reviewed by me. The final position of Adidas on the request of the AOC concerning its products was that it would not provide any information with the apparent rationale that the questions to be answered in this Advisory Opinion did not extend to all swimwear. Speedo was asked by the AOC to provide the same information. It provided information which I have reviewed and is the basis of the description set out herein. None of this information is of a confidential nature. It has all been derived from the material in the AOC submission which is largely based upon material made available publicly by Speedo at the launch of its products on 16 March, 2000.
12. The promotional literature and CD-ROM disc which has been provided to me make the following statements in relation to the Speedo Fastskin. The claimed effect of the new bodysuit is that it could improve swim times by up to three percent over previous suit designs. There are a number of tests which Speedo has had conducted which support the assertion that the full bodysuit represents a three percent improvement in swimming efficiency over previous suit designs. It is suggested that it is the successor to the Speedo Aquablade worn by many of the medal winners at the Centennial Summer Olympic Games held in Atlanta in

1996. It is stated that the key to Fastskin is the way it mimics sharkskin. The suit concept is meant to provide for every conceivable benefit for the swimmer.

13. The Fastskin was developed by focusing on biomimetics, which is the extraction of good design from nature. A shark is extremely fast in water and has highly-developed skin to minimize drag and maximize swimming efficiency. The bodysuit mimics the dermal denticles of a shark's skin. According to the literature provided, as an object moves through water it creates turbulence and therefore drag. Dermal denticles decrease drag and turbulence around the body as they direct water flow over the body and allow surrounding water to pass over a shark more effectively. The lycra fabric is knitted in such a fashion that it has ridges, whereby small vortices are formed. There is also a surface print effect that resembles the denticle shape. Large vortices are formed by the fabric print and they flow in the opposing direction to the small vortices formed in the fabric ridges. This ensures that the water is sucked closer to the body which reduces friction drag by allowing surrounding water to pass over more effectively. The Fastskin fabric lowers the drag resistance and, therefore, reduces the overall friction drag of the swimmer.
14. The Fastskin suit is said to have a super-stretch quality that provides greater stretch characteristics than traditional swimwear fabric. The fabric is said to have increased shape retention which improves fit and thereby minimizes drag. The fit is accomplished with the use of a scanner taking digital images of an athlete in different swimming positions to create a 3D-bodymap. This anatomic fit, achieved with bodymap scanning, contributes to the overall reduction of total drag. The dynamic cut, which can be made from the 3D-bodymap, also assists in the reduction of drag. Therefore, the combination of the maximum stretch fabric for movement without any excess fabric and contoured dynamic fit ensures that the Fastskin molds to the body like a second skin. With a proper fit, the swimmer can retain a better position in water which reduces form and friction drag. When that is combined with the fabric that reduces friction drag, the Fastskin contributes to the overall reduction of total drag.
15. Biomechanics, which is the study of the mechanical laws relating to the movement or structure of living organisms, has also been a contributor to the design of the Fastskin. The suit is alleged to connect the muscles which work as groups specific to swimming. It is alleged that, through the combination of panels and unique seaming, the anatomic swimsuit pattern reflects the muscular system and increases co-ordination of muscles to allow motion to occur more efficiently. The seams are said to act like tendons and provide tension in the suit, and panels act like muscles, stretching and returning to their original shape. It is asserted the Fastskin links both the propulsive pulling action and kick to the trunk muscles which are the core of the body. The increased elasticity from the seaming and paneling has been designed in such a way so as to facilitate the biomechanic functionality of the swimmer. Even the seams in the suit have been meticulously designed and constructed. There are 26 stitches per every 3cm of seaming and for each 1cm sewn, 52cm of thread are used.
16. The suit retains the feel of the water through the gripper fabric contained along the inner forearm area. This is high drag fabric placed on the inner forearm to increase the swimmer's "grip" or feel for the water through greater friction.

17. Far less information was available to me concerning the Adidas full bodysuit. I understand that the Adidas product launch is not taking place until mid-May and it has revealed less about its product as a consequence. In essence, the technology involved in that suit would appear to have similar effects to that of the Speedo full bodysuit. It is asserted by Adidas that its suit is better because it has been designed to compress the muscles of the swimmer. In so doing, it delays the onset of fatigue caused by lactic acid formation in the muscles. The compression will also decrease muscle vibration which helps to slow lactic acid formation. These same effects will be found with the Speedo suit but Adidas alleges that there are greater effects in these regards from its suit.
18. The difference in the level of information available emphasizes that the state of knowledge generally available about these products is increasing but is not fully known. The level of public information available as this opinion is written is clearly greater than it was even a few months ago. While the capabilities and what these suits can do is becoming increasingly apparent as time marches forward. It is unknown what the state of knowledge about the suits was at the time the FINA Bureau made its decision.

The Decision

19. The Fédération Internationale de Natation Amateur (FINA) Bureau at its meeting in Kuwait on 8 October 1999, made a decision to approve the bodysuits (which FINA described as “long john suits”). That approval was based upon the provision that it would be available to every competitor.
20. The Bureau minutes indicate that representatives of the sporting goods companies “Adidas” and “Speedo” presented reports on their research, design and other aspects of the “full body” swimsuits. The Bureau minutes then recorded the following decision:
(...) After a lengthy discussion, in which the whole Bureau took part, the FINA Bureau ruled the use of these swimsuits does not constitute a violation of the FINA Rules. The Bureau leaves the choice of swimsuits up to the swimmers (...).
21. The submission from FINA for this Advisory Opinion suggests that there is no specific rule regulating the bodysuit. It was submitted that the rule in connection with swimming suits is the same for all aspects of the sport and is GR 6. This rule does not provide minimum measurements leaving the swimming suit dimensions free from control under the relevant existing FINA rules. The result has been that women have regularly used one-piece suits sometimes with half-long legs and men have used suits with similar leggings. It is submitted that the decision on 8 October 1999, was a confirmation that the full bodysuits conform with the rules of FINA as they are obviously within the decency requirements of GR 6. It was further suggested that the technical swimming rules (referring to the SW) do not include any provision in connection with the swimming suit. It was submitted that the SW10.7 rule has never been interpreted as being applicable to swimming suits and certainly not to their dimensions and material. It has always been interpreted as concerning other elements

(“devices”) which are supplemental. Furthermore, it was submitted that what is meant by devices is illustrated by the bracketed examples. The dimensions or material used for the swimming suit do not correspond to any of the illustrated examples in the brackets.

22. The possible applicable FINA Rules

General Rules

GR 6 Costumes

GR 6.1 *The costumes of all competitors shall be in good moral taste and suitable for the individual sports discipline.*

GR 6.2 *All costumes shall be non-transparent.*

GR 6.3 *The referee of a competition has the authority to exclude any competitor whose costume does not comply with this Rule.*

GR 7 Advertising

GR 7.1 *Technical equipment worn when in the water: the competitor is not permitted to wear any visible form of advertising exceeding 16 square centimetres in area each.*

GR 7.2 *Pool deck equipment:*

Towels and bags may carry two advertisements. Track suits and Officials' uniforms may carry two advertisements on the top and two on the trousers or skirt. The logo of the manufacturer or sponsor may be repeated, but the same name may be used only once on each article or garment.

GR 7.3 *Body advertisement is not allowed in any way whatsoever.*

GR 7.4 *Advertising for tobacco or alcohol is not allowed.*

Swimming Rules

SW 10 The Race

SW 10.7 *No swimmer shall be permitted to use or wear any device that may aid his speed, buoyancy or endurance during a competition (such as webbed gloves, flippers, fins, etc.). Goggles may be worn.*

FINA Structure & Constitutional Organization

FINA is the world-wide Swimming Sports Organization. The relevant parts of its structure and constitutional organization are set out below:

C 3 **OBJECTIVES**

The objectives of FINA are:

- C 3.1* *to promote and encourage the development of Swimming in all possible manifestations throughout the world,*
- C 3.2* *to provide drug free sport,*
- C 3.3* *to promote and encourage the development of international relations,*
- C 3.4* *to adopt necessary uniform rules and regulations to hold competitions in Swimming, Open Water Swimming, Diving, Water Polo, Synchronized Swimming, and Masters,*
- C 3.5* *to organize world Championships and FINA events, and*
- C 3.6* *to increase the number of facilities for Swimming throughout the world.*

C 6 **RIGHTS AND DUTIES OF MEMBERS**

C 6.2 *All Members are obliged*

C 6.2.2 *to act in accordance with the decisions of the FINA Congress and the FINA Bureau,*

C 10.8 *Appeals*

C 10.8.1 *A member or individual sanctioned by the Executive may appeal to the Bureau.*

C 10.8.2 *An appeal shall be submitted to the Honorary Secretary of FINA not later than one month after the sanction has been received by the member or individual sanctioned.*

C 10.8.3 *(See answer to Question N°3)*

C 11 **THE ORGANIZATION OF FINA**

C 11.1 *The following entities are established to govern and administer FINA:*

the General Congress,
the Technical Congress,
the Bureau,
the Standing Committees,
the Ad Hoc Committees, and
the Arbitration Court.

C 12 **THE GENERAL CONGRESS**

C 12.1 *The General Congress is the highest authority to decide upon any matters arising in FINA, except those belonging to the authority of the Technical Congress. Decisions by the Technical Congress may, however, be overruled by the General Congress. The Bureau may decide to consider proposals relating to Technical Rules as well as other proposals.*

C 12.8 *At each regular General Congress the following items shall be included on the agenda:*

C 12.8.1 *declaration of a quorum,*

C 12.8.2 *report of the Bureau on its activities during the time since the previous Congress,*

- C 12.8.3 financial report of the Honorary Treasurer,*
- C 12.8.4 releasing the previous Bureau from responsibility,*
- C 12.8.5 proposals for changes and amendments of the FINA Constitution and General Rules,*
- C 12.8.6 election of Bureau members in accordance with C 14.4 and Officers, and*
- C12.8.7 other business for which notice has been given.*

C 13 TECHNICAL CONGRESS

- C 13.1 The Technical Congress is authorized to decide upon all technical matters concerning the competitive sport in Swimming, Open Water Swimming, Diving, Water Polo, Synchronized Swimming, and Masters and shall have the power to determine the Technical Rules of FINA.*

C 14 BUREAU

- C 14.2 The Bureau shall be elected by the General Congress. All the Bureau members, except the Honorary Secretary, and the Immediate Past Honorary Treasurer, shall be of different Countries or Sport Countries. Candidates for Bureau membership shall be proposed by the Member from which they come. Persons not actually in attendance may be elected if a written declaration of consent is presented.*

- C 14.11 Rights & Duties of the Bureau shall include the following:*

- C 14.11.2 to interpret and enforce the Rules of FINA, subject to confirmation at the next meeting of the Congress,*

- C 14.11.3 to decide and take action on any matter pertaining to the affairs of FINA, subject to confirmation at the next meeting of the Congress,*

- C 14.11.8 to make decisions in case of emergency, subject to ratification by the Congress at its next meeting.*

- C 14.12 The FINA Bureau is not authorized to make any changes in the Constitution, General Rules, or Technical Rules.*

C 21 ARBITRATION COURT (See answer to Question N°3)

QUESTION NO. 1

Can the bodysuits in question be considered as a “device” according to FINA’s Rule SW 10.7?

23. To answer this question would require that an interpretation of the rule be declared and enunciated by CAS to determine whether a swimming costume is a device. Then, the known facts concerning the bodysuits would have to be applied to the announced interpretation to give an analysis of whether the suit is within the scope of the rule. It is the role of the Bureau to provide such an interpretation and its application as set out in C 14.11.2 & C 14.11.3. The Bureau practice and precise interpretation of the rule in the past and in respect of the bodysuit decision is set out under the heading “The Decision” above.

24. This question is left unanswered for the reasons set out in Question No. 3.

QUESTION NO. 2

Has FINA given an “approval” allowing the use of the bodysuits in question?

25. The Bureau minutes do not indicate which rules were considered in its 8 October 1999, decision. It merely recorded that:
- “...the use of these swimsuits does not constitute a violation of the FINA rules...”*
26. The AOC sought advice from FINA as to the rules and processes implemented by FINA in evaluating technical equipment, and whether an approval was in fact given and the nature and effect of such an approval. No information was provided to the AOC by FINA. FINA in its submissions explained the process. See “The Decision” above.
27. The only information provided regarding the Bureau decision by the AOC is anecdotal and not in the form of evidence. The AOC submitted an article of 1 April 2000, from the Australian newspaper *Courier Mail* quoting Roger Smith, an Australian, who is a FINA Vice-President and Bureau member. The other information at hand is an article in the *Sydney Morning Herald* of Tuesday, 18 April 2000, quoting Mr. Gunnar Werner, the Honorary Secretary of FINA. Such information is not in the form of evidence such that I may take note of it or rely upon it.
28. The AOC submits that FINA cannot be the sole and final arbiter as to the proper interpretation of its rules.
29. Under the FINA constitution the Bureau has the right and duty to:
- “Interpret and enforce the Rules of FINA, subject to confirmation at the next meeting of the Congress”* (C 14.11.2);
- and to
- “decide and take action on any matter pertaining to the affairs of FINA, subject to confirmation at the next meeting of the Congress”* (C 14.11.3).
30. Based on the evidence upon which I can rely, the Bureau found compliance with all Rules. The FINA submission indicates the Bureau did so by characterizing the full bodysuit as a costume issue within GR 6; and not a swimming race issue within SW 10.7. On the basis of what I do know, I would have to conclude that the Bureau reviewed the matter of the full bodysuit and concluded that on the information it had, the swimsuits did *“not constitute a violation of the FINA Rules”*.

31. The Bureau directed its mind to the interpretation of the FINA Rules and applied them as is its role within the Constitution under C 14.11.2. It is the sole body under the Constitution having the right, duty, and therefore, authority, to make such a determination. Consequently, in finding no violation of the Rules, the Bureau has in effect granted its approval to the full bodysuit. In so doing they have not acted in contradiction of their own rules. They determined that swimsuits were not technical equipment and did not evaluate them as such. That is a characterisation of their rules in regard to swimsuits which they have apparently been applying for some time.
32. The Bureau is also the body under C 14.11.3 with the power to decide and take action on any matter pertaining to the affairs of FINA. The Bureau, therefore, had the authority to take action to review the bodysuits for compliance with the Rules provided it was not amending or failing to apply the Rules. Once again under rule C 14.11.3, the effect of reviewing the full bodysuits and determining them to be compliant with the Rules has caused FINA in effect to have granted its approval to the full bodysuit.
33. The Bureau had the authority to promulgate a rule in respect of bodysuits under its wide powers in C 14.11.3; or, if it were considered to be an emergency under C 14.11.8. It did not use these wide rule making powers. Had it done so then the rule would either have to be confirmed or ratified at the next Congress. The Bureau did not use its interim legislative powers in dealing with the bodysuit.
34. In summary, the General Congress and the Technical Congress have the power to issue rules. The Bureau interprets and applies them. In between congresses, the Bureau has further wide authority over all matters to be decided by FINA and, in particular, may issue decisions which will have authority in between congresses. Bureau decisions once made are effective until they are either confirmed or the Congress acts in a different fashion. The effect of the Bureau decision is binding and determinative of the issue until changed by the Congress.
35. To answer Question No. 2 FINA has applied the Rules and found no violation. In so doing, the decision has the effect of allowing the use of the bodysuits by swimmers. In this sense, the consequence of the decision is tantamount to what could be described as an “approval”. That “approval” is not in contravention of the FINA Rules and has been made with proper authority by the body charged with the responsibility and authority to make the decision. Therefore, the answer to Question 2 is **YES**.

QUESTION NO. 3

Has FINA the authority and ability to grant “approvals” for the use of such bodysuits that may contravene Rule SW 10.7?

36. The AOC submits that FINA has no power to conclusively:
 - (1) determine that the bodysuits do not contravene FINA’s Rules; or
 - (2) “approve” the bodysuits as not being in breach of FINA’s Rules.

37. It is submitted that FINA cannot be the sole and final arbiter as to the proper interpretation of its own Rules. It is suggested that it is the role of CAS, in providing this Advisory Opinion, to decide upon the proper interpretation of Rule SW 10.7 and its application to the bodysuits.
38. In support of its submission it was stated that there were ample precedents in the common law system allowing a court to interpret the rules of bodies controlling sport on a national or international basis. Among the cases cited were: *Reel v. Holder*, [1981] 1 W.L.R. 126 (Eng. C.A.); and *Williams v. Reason*, [1988] 1 W.L.R. 96 (Eng. C.A.). It was submitted that FINA's rules constituted a contract between FINA and its members which are subject to the control of the courts notwithstanding the sports body's powers to interpret those rules. Cases cited were: *AFL v. Carlton Football Club Limited*, [1998] 2 V.R. 546 (Victoria, Australia, C.A.) per Tadgell J.A. at 554; *Enderby Town Football Club v. Football Association Limited*, [1971] 1 C.H. 591 (Eng. Q.B.) per Lord Denning M.R. at 606; *Breen v. Amalgamated Engineering Union*, [1971] 2 Q.B. 175 (Eng. C.A.) per Lord Denning M.R. at 190.
39. As a further reason why CAS has the power to review FINA's decision the AOC submission made reference to cases that review inferior tribunals' decisions on the grounds that they are unreasonable. It was argued that while courts in the common law world have shown a traditional reluctance to interfere with the decision of domestic tribunals, including sporting bodies, those courts have however intervened to restrain the enforcement of a decision of a domestic tribunal that is unreasonable. See *Dickson v. Edwards* (1910), C.L.R. 243 at 245; *AFL v. Carlton Football Club Limited*, *supra* at 568-569. It was further submitted that courts would intervene in decisions for which there is no evidence; *Lee v. Showman's Guild of Great Britain*, [1952] 2 Q.B. 329 (Eng. C.A.) at 340; or, in decisions that are so unreasonable that no reasonable decision maker could have made them *Associated Provincial House Ltd. v. Wednesday Corporation*, [1948] 1 K.B. 223 (Eng. C.A.).
40. In answering Question No. 2, it was found that the Bureau could take action on any matter pertaining to the affairs of FINA. In so doing the Bureau also had the right and duty to interpret and enforce the Rules of FINA, and that it had done so in its decision of 8 October 1999, in respect of the full bodysuits. Question No. 3 asks if FINA has the authority and ability to grant "approvals" which might contravene Rule SW 10.7. This question presupposes an issue as to the scope of the review to be made by CAS as the quasi-judicial authority overseeing disputes.
41. The Constitution of FINA has two provisions with respect to the role of CAS. They may be found at Rule C 10.8.3 and C 21 as follows:
- C 10.8.3 *An appeal against a decision by the Bureau or the FINA Doping Panel shall be referred to the Court of Arbitration for Sports ("CAS"), Lausanne, Switzerland, within the same terms as in C 10.8.2. The only appeal from a decision of the Doping Panel shall be to the CAS. The CAS shall also have exclusive jurisdiction over interlocutory orders and no other court or tribunal shall have authority to issue interlocutory orders relating to matters before the CAS. Decisions by the CAS shall be final and binding, subject only to the provisions of the Swiss Private International Law Act, section 190.*

- C 21 *Disputes between FINA and any of its Members or individual members of its Members or between Members of FINA which are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the Court of Arbitration for Sports (CAS), Lausanne. Any decision made by the Arbitration Court shall be final and binding on the parties concerned.*
42. The scope of the jurisdiction extended by FINA to the CAS is set out in these constitutional provisions C 10.8.3 and C 21. Under the FINA Constitution at C 10.8.3, CAS has been extended a review role following the application of sanctions to a member who has exhausted its appeal under C 10.8.1 and C 10.8.2.
43. Under C 10.8.3, CAS may also hear an appeal against a decision by the Bureau or the FINA Doping Panel. CAS has the exclusive jurisdiction for an appeal from a decision of a Doping Panel as well as over interlocutory orders relating to matters before the CAS. Constitution provision C 21 then provides for referral to arbitration of disputes between FINA and any of its Members or individual members of Members, or between Members, which are not resolved by a FINA Bureau decision. For the purposes of this opinion it is presumed that the scope of the review discussed is in connection with a dispute arising under these two constitutional provisions, which dispute is before CAS for consideration.
44. FINA is the world-wide sports organization for swimming. CAS is the international adjudication body to whose jurisdiction FINA has attorned its disputes if they remain unresolved following exhaustion of FINA's procedures. The CAS conducts its appeals proceedings under the Code. Article R58 provides that:
"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".
45. The jurisprudence of CAS is informative. In CAS 96/157 *FIN v. FINA* it was concluded under a predecessor section of C 10.8.3 that the FINA Rules contained in the "FINA Handbook", which were then in force, were applicable in the same manner as Swiss Law because the seat of FINA is in Switzerland.
46. Question 3 raises the role of CAS in reviewing, by way of appeal, a decision of the Bureau. Such a hypothetical appeal would most likely occur by an individual member [a competitive swimmer] who is a member of a national body for swimming which is in turn a member of FINA making an allegation. Such a complaint would have to allege that the Bureau decision on the bodysuit had not been resolved or improperly resolved by a Bureau decision
47. As noted earlier, Question No. 3 presupposes and raises a broader issue concerning the scope of the review in which CAS ought to engage when exercising its jurisdiction to consider the validity, scope and effect of a decision by an international federation (IF). The choice for the CAS is essentially between three courses of action:
- (I) CAS will never review an IF decision;

- (II) CAS has full appellate jurisdiction over all IF decisions; or,
- (III) CAS has discrete and limited review of IF decision on certain specific grounds.

48. To answer question No. 3, the scope of the arbitral review by CAS must be determined as a threshold matter.

Threshold issue: the Role of CAS

49. The constitution of FINA is established by contract and FINA derives its powers by contract. FINA, as the world-wide body for swimming has promulgated rules and regulations for the sport. These rules and regulations also constitute a contract between the body and its members. CAS, as an international arbitration body ought to interpret these contracts according to the general principles used by international arbitration panels and as it is directed to do by Swiss law. The general principles of international contract law are too numerous and too complex to be summarized comprehensively for this opinion. For a general and authoritative presentation, see GOLDMAN, “La lex mercatoria dans les contrats et L’arbitrage international: réalité et perspectives”; 106 *Journal du droit International* 475, (1979).

50. FINA can interpret its constitution as can any international sports federation. The constitution, being the very essence and foundation of an IF, can have such interpretations reviewed by CAS. In this aspect the FINA Rules contained in the “FINA Handbook” which comprise the constating instrument are reviewable as to their proper interpretation by CAS. FINA can never be the final arbiter of its constating rules.

51. The AOC submission cited an example of the review of an IF’s constitution (the International Amateur Athletic Federation (IAAF) by a domestic English court in *Reel v. Holder, supra*). The basis for that review is the fact that the constitution is at the core of the contractual relationship. The constitution grants powers to an IF by contract; everything else in respect of the IF’s operation and existence stems from that contractual grant of powers. Therefore, an IF cannot be the final arbiter of its founding document under which all else is governed and developed.

1. *This is the first form of the discrete and limited review of an IF decision which CAS will always undertake.* The request for this opinion does not deal with the constitution of FINA. Therefore, there is no reason for a review of the decision of the Bureau by the CAS on the grounds that it would be interpreting the constating instrument, the constitution.

52. Athletes are individual members of a Member of an IF. They may come into conflict with their sporting body or their IF over matters which directly affect their self interest, whether that be in relation to doping, discipline or other alleged violations of the rules of the IF. The athlete in these instances is alleged to have breached rules promulgated or adopted by the IF to which the athlete has by contract agreed to abide. There has never been any doubt that such situations may be reviewed beyond the procedures of the IF. Indeed, the jurisprudence of CAS is replete with examples of such. See for example *FIN v. FINA, supra* or *TAS 99/A/223 K. v. ITF*. The judiciary throughout the world has always recognized jurisdiction

over these types of complainants and exercised a review of the powers used against the athlete. Any decision which injures the personality or property of the athlete may be reviewed [judgement of the Swiss Federal Tribunal, ATF 118 II 12/19]. See also generally the article BELOFF, “Pitch, Pool rink...court? Judicial review in the Sporting World” (1998) P.L. 95.

2. *This is the second form of discrete and limited review which CAS will always undertake.* The request for this opinion does not deal with the review of powers exercised over a particular individual pursuant to an IF's contractual arrangements which affect their personality or property. Therefore, there is no basis for CAS to review the bodysuit decision of the Bureau on this jurisprudential theory.
53. SW 10.7 is a rule found within Part III of the “Swimming Rules”. Part III has thirteen specific rules with multiple parts to each. These rules describe how competitions will be managed: the role of officials, seeding of heats, semi-finals and finals, and the starting process. There then follows, beginning at SW 5, specific rules related to different types of swimming strokes; after which the rules about the race commence at SW 10. Following that rule, rules on timing, world records, and the automatic officiating procedure can be found.
54. The rules contained in Part III provide how the swimming competition is to be run at a swimming meet. This is in contrast to the General Rules which are applicable to all types of swimming including swim racing, open water swimming, diving, water polo, synchronized swimming and masters events. It is there that the rule on costumes GR 6 is to be found. Rule SW 10.7 as with all of the SW rules in Part III of the FINA Rules contained in the “FINA Handbook” are properly characterized as rules to which the sport of swimming are subject. The General Rule GR 6 is of the same characterization.
55. The Bureau decision on the bodysuit is one relating to the sport and the rules to which the sport is subject being the basis of the competition. Therefore, this Advisory Opinion is in connection with the rules of the sport as it is to be played; or, the basis upon which the swimming competition is to be held. Such rules are established by contract. They do not have the effect of defining the constitution, or, being used to affect directly individual rights of personality or property. They are the rules of the game sometimes referred to as the “game rule”. There does not appear to be a consistent practice throughout the world in dealing with the review by judges of the “game rule”. See the discussion in *M. v. AIBA* [Digest of CAS Awards 1986-1998, Staempfli Editions SA, Berne 1998, p. 413], a decision of the ad hoc Division of CAS at the Atlanta Centennial Olympic Games.
56. In that case, “the game rule” was applied to a below-the-belt punch as adjudged by the referee in the boxing ring. CAS held that it was not a reviewable matter as it related to the application of a purely technical rule despite the fact that it might be the case under the laws of the United States or France that such a rule would not be shielded from the control of judges and would be reviewable on a limited basis. The ad hoc Panel held that:

“In casu, the referee’s decision, confirmed by the AIBA [as discussed in this opinion, the “TF”], is a purely technical one pertaining to the rules which are the responsibility of the federation concerned. It is not for the ad hoc Panel to review the application of these rules. This restraint is all the more necessary since, far from where

the action took place, the ad hoc Panel is less well-placed to decide than the referee in the ring or the ring judges”.

57. The Panel went on to add a caution to this shielding of “the game rule” from review in these terms:

“The above-mentioned restraint must be limited to technical decisions or standards. It does not apply when such decisions are taken in violation of the law, social rules or general principles of law (op. cit. [Margareta Baddeley, L’Association sportive face au droit] p. 378), which is not the case in this particular instance”.

58. The Appeal Division of CAS dealt with the issue subsequent to the ad hoc decision in *FIN v. FINA, supra*. In that case FINA, by one of its standing committees for water polo applied interim disciplinary guidelines to violence which arose following a match and ejected both competing teams from the particular competition. The standing committee determined that the Italian team was the instigator and used its discretionary power within the disciplinary guidelines to recommend the exclusion of the one team involved in the violence from the next FINA event that was to occur the following year. Both teams appealed the event exclusion to the Bureau, which appeal was rejected. The suspension of the Italian team from the next event was the subject of a hearing by the FINA Bureau which rejected the appeal. FIN then appealed to CAS against the decision of the FINA Bureau challenging the interpretation and application of the interim disciplinary guidelines and the discretionary decision connected to it.

59. In its decision the Panel noted *“that the decision challenged does not violate the procedural rules provided by the Interim Guidelines”*. It was further held:

“...that it can intervene in the sanction imposed only if the rules adopted by the FINA Bureau are contrary to the general principles of law, if their application is arbitrary, or if the sanction provided by the rules can be deemed excessive or unfair on their face”.

60. The Panel held that there could be a limited review of the Bureau decision. There could always be a review of the procedural process; although none was required in the particular case. There could also be a review of the decision of the Bureau if the rules being used were contrary to the general principles of law or natural justice. Another ground of review could be based upon the rules being applied in an arbitrary fashion. The decision itself could be reviewed if the sanctions of the rules could be deemed to be excessive or unfair on its face. This latter review is akin to the jurisdiction of CAS to review that which affects personality or property. It has already been stated that such a ground of review does not exist in respect of this Advisory Opinion.

61. Applying these principles in this opinion there could be a review of the Bureau decision if it was alleged that the decision was contrary to the general principles of law. There is no assertion that the rules SW10.7, GR 6, or any other of the FINA Handbook Rules are contrary to the general principles of law or natural justice. Therefore, there are no grounds to review the Bureau decision on the bodysuit on this basis. Furthermore, I have no evidence that the Rules are, or have been, applied in an arbitrary fashion in regard to the bodysuit decision. If that were the case then the decision could be the subject of review by the CAS. A

mere statement of a conclusion in the minutes of the Bureau is not a *prima facie* indication of an arbitrary decision.

62. General principles of international contract law require that a body such as the Bureau act in good faith. This is a universal principle according to which all persons are bound by a duty to act in a loyal, frank and open manner. See DASSER, *Internationale Schiedsgerichte und Lex Mercatoria*, Zurich 1989, pp. 108-109 and references; LALIVE, “Transnational (or Truly International) Public Policy”, in *Comparative Arbitration Practice and Public policy in Arbitration*, ICCA congress Series no. 3 December 1987, p. 308; MAYER, “Le principe de bonne foi devant les arbitres internationaux”, in *Etudes en l'honneur de Pierre Lalive*, Basel/Frankfurt-am-Main 1993, pp. 543-556 and extensive references therein.

3. *This is a third form of discrete and limited review which CAS may undertake.* While this would be a basis for a review by the CAS of the Bureau decision there is no indication that the Bureau acted without good faith in making its decision or otherwise acted contrary to general principles of contract law.

63. Another limited grounds of review by the CAS relates to lack of procedural fairness. Such a review would require an IF to follow its own procedures for making a decision such as the one involved in the bodysuit decision. This amounts to a review of the administrative process for consistency and correct procedural process. It would include the general principles of law as to procedural fairness. There is no suggestion that the Bureau has not followed its procedures for making the decision it did on 8 October 1999. Indeed the submission of the FINA suggests that the constant interpretation given to clause SW 10.7 has been that bodysuits, which in some form, have been used at least since the Atlanta Olympic Games do not include or represent a device.

4. *This is a fourth form of discrete and limited review which CAS may undertake.* There would be no basis for reviewing the Bureau decision on this ground.

64. There remains a final possible ground of review. If the IF decision is so unreasonable, that no reasonable decision-maker could have made it, the decision may be reviewed. Here again the CAS decision 96/157, *supra* is instructive of the principles of review. The Panel stated:

“To the extent the properly-constituted deciding body of the federation acts within the limits of the rules which have been validly laid down, it is the opinion of the Panel that the CAS cannot re-open an examination of the decision on the issue whether the measure of the sanctions imposed is fair and appropriate in light of the facts which the deciding body has established. It is the decision body of the federation which is in the best position to decide which rules and which sanctions are fair and appropriate in light of the facts constituting the violation”.

65. A similar analysis is provided in the case of *Associated Provincial Picture Houses v. Wednesbury Corp.*, *supra*. Lord Greene states at p. 229 the determinative test of whether a decision maker has acted unreasonably:

“A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider”.

66. He further states at p. 231:

“It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion cannot interfere”.

67. The Bureau in this matter is the appropriate body of the FINA who is in the best position to decide on the interpretation of the game rules and the application of them to the development of the bodysuit. In the Bureau’s decision there are no sanctions arising from the application of the rules. Applying the above principles, it can be said that the Bureau in making its decision on the bodysuit, acted within the limits (i.e. did not act unreasonably) of the rules which have been laid down by taking into consideration only those matters to which the rules applied. Consequently, CAS has no basis for a review of the FINA bureau decision on these grounds.

Summary of the Threshold Issue:

68. In this Advisory Opinion, the CAS had three choices as a basis for conducting a review of the Bureau decision. The propositions that it could either never, or, always conduct a full review of an IF decision were rejected. Instead the third option was chosen, that CAS has a discrete and limited review power of an IF decision on certain specific grounds. The grounds that could be identified in this case have been set out. The list of those grounds should not be considered as closed.

69. By the CAS selecting a limited standard of review, FINA, or any IF, is free to develop their own autonomy and form of self-government and take responsibility for their decisions. FINA in this instance will be required to take the responsibility for the decision of the Bureau on the bodysuit. This limited standard of review by the CAS will also restrict the appeals to CAS and focus them on procedural, good faith and natural justice issues. Beyond those areas of review the IF is the final arbiter of its decisions and of its rules in relation to the game rule.

70. To answer Question No. 3, FINA, through the Bureau, had the authority and ability to make the determination which it did in respect of the “game rule” and the bodysuit. There is no review by CAS of a game rule in these circumstances. Therefore, it is not for CAS in the circumstances of this Advisory Opinion to offer an opinion on whether the bodysuit may contravene Rule SW 10.7. The Bureau decision had the effect of approving the bodysuit since in its view the suit did not contravene any rule.

QUESTION NO. 4

If yes to the preceding question, what is the effect of such an “approval”?

71. Not applicable.

QUESTION NO. 5

If no to question 3, what is the effect on performances by athletes achieved while wearing the bodysuits in question?

72. Given the analysis of the controlling question No. 3 it is unnecessary to answer this alternative question.