

CAS 2005/A/925 Laura Dutra de Abreu Mancini de Azevedo v/ FINA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Quentin **Byrne-Sutton**, Attorney-at-law in **Geneva**, Switzerland

Arbitrators: Ms Catherine Anne **Davani**, Judge, **Port Moresby**, Papua New Guinea
Mr Denis **Oswald**, Attorney-at-law in **Peseux**, Switzerland

between

Laura Dutra de Abreu Mancini de **Azevedo**, Rua Joaquim Sales 108 – Parque João Maria –
Campos dos Goitacazes (RJ) 28027-390, Brazil

As Appellant

and

Fédération Internationale de Natation (FINA), Avenue de l'Avant-Poste 4, CH-1005
Lausanne, Switzerland

Represented by Mr Jean-Pierre **Morand**, Attorney-at-Law in **Geneva**, Switzerland

As Respondent

I. THE PARTIES AND THE ORIGIN OF THE DISPUTE

A. The Parties

a) *The Appellant*

1. Ms Laura Dutra de Abreu Mancini de Azevedo (hereinafter referred to as “Ms Azevedo” or the “Appellant”) is a female elite swimmer affiliated to the *Confederacao Brasileira de Desportivos Aquaticos* (hereinafter the “CBDA”), itself a member federation of FINA.

b) *The Respondent*

2. The *Fédération Internationale de Natation* (FINA) is the international federation governing aquatic sports worldwide, recognized by the International Olympic Committee.

B. The Origin of the Dispute

3. On 1 May 2003, Ms Azevedo underwent a doping control conducted by CBDA at the Pan-American Games Swimming Trials held in Brazil.
4. The analysis of the samples A and B (hereinafter the “May 2003 samples A and B”) were carried out in the WADA accredited “*Laboratorio de Apoio Ao Desenvolvimento Tecnológico Instituto de Química - UFRJ*” (hereinafter “LADATEC”). The analysis disclosed the presence of three prohibited substances.
5. Based on this result, Ms Azevedo was suspended by CBDA for a two-year period commencing on 1 May 2003.
6. Ms Azevedo applied to a civil court in Rio de Janeiro (hereinafter the “Brazilian courts”) for relief against the suspension. She claimed that it was not her urine that had been analysed or that it had been altered before the analysis was carried out.
7. On 8 September 2003, the Brazilian courts ordered as a provisional measure that the suspension should be lifted (hereinafter the “Brazilian court order”), with the consequence that on 16 September 2003 CBDA lifted the suspension imposed on Ms Azevedo.
8. Ms Azevedo’s action before the Brazilian courts is still pending as an ordinary claim.
9. Ms Azevedo also appealed to CAS against the two-year suspension imposed by CBDA. The proceeding was registered as CAS 2003/A/510.

10. On 11 December 2003, in relation to the foregoing CAS proceeding, i.e. FINA, CBDA and Ms Azevedo, signed an agreement containing, among others, the following engagements: (§2) “*All parties, including FINA, agree to be bound by the award*” and (§3) “*The content of the award shall be: Either that a) Ms Azevedo will not be sanctioned and will be permitted to swim both nationally and internationally; Or, b) Ms Azevedo will be sanctioned and the suspension decided by the Arbitral Panel will be in effect both nationally and internationally*”.
11. On 15 January 2004, CAS rendered the following decision in the proceeding CAS 2003/A/510: “*The appeal by Ms Azevedo is dismissed, and it is ordered that the suspension imposed by CBDA should run for 2 years from 1st May 2003*”.
12. Consequently, on the basis of this CAS decision and the parties’ prior written agreement of 11 December 2003, Ms Azevedo was barred from participating in any official swimming competitions until May 2005 when her suspension period would end.
13. Despite the agreement and the CAS decision, Ms Azevedo did not withdraw her claim before the Brazilian courts and she continued to participate in swimming competitions in Brazil, which CBDA considered it could not prevent her from doing because of the Brazilian court order of 8 September 2003.
14. Between 4 and 6 June 2004, Ms Azevedo participated in the Winter State Swimming Championships, organized by the *Olaria Atlético Clube*, Brazil, during which she was selected for a doping-control test.
15. Ms Azevedo refused to submit to the doping-control test, stating that she would not refuse being tested, but objected to this particular test because the urine was going to be analysed by LADATEC, i.e. the same laboratory which conducted an earlier test, which she has challenged in the pending action before the Brazilian courts.
16. On 29 June 2004, CBDA informed FINA of Ms Azevedo’s refusal to undergo the doping control.
17. Thereafter, FINA requested CBDA to report upon the status of the proceedings before the Brazilian courts.
18. By letter dated 24 February 2005, CBDA advised FINA of the following:

“We would like to mention that for CBDA all the results obtained by the athlete in these competitions are just NOT VALID, since she is suspended for two years. Should we have considered them as VALID the athlete participation in the competition on the period of 04 - 06 June 2004, when she refused to take the doping test, we would have to recognize her situation as a legal one.”

This CBDA has opted for considering the participation of the athlete non official in this State Championships, and consequently also ignore her refusal of taking the doping examination."

19. In light of CBDA's position, FINA decided to bring the case before the FINA Doping Panel.
20. The FINA Doping Panel informed Ms Azevedo that the matter was set for hearing on 21 April 2005 in Lausanne, Switzerland, and invited her to attend.
21. On 26 March 2005, Ms Azevedo informed FINA that she could not attend the hearing because she did not have the financial capacity to do so and further that she also could not afford to have a lawyer represent her.
22. The hearing before the FINA Doping Panel proceeded on 21 April 2005 as scheduled.
23. On 21 April 2005, the FINA Doping Panel handed down its decision, which includes the following extract:

"[...]"

IV MOTIONS and CONTENTIONS

18. *Ms Azevedo has submitted her statements in writing: She confirms that she did take part in the Championships held on 4 - 6 June 2004 according to a judicial decision issued by the High Court. She continues that the process before the High Court had been necessary due to an inappropriate punishment applied to her by CBDA, when she was accused to have committed a doping-rule violation. According to the judgement made by the High Court the urine analysis executed by the LADATEC Laboratory was not reliable due to a following urine DNA test executed by the SONDA Laboratory, a blood DNA test also executed by the SONDA Laboratory and another blood DNA test executed by the NUDIM Laboratory were not reliable. When she was selected for a doping control on 6 June 2004 she heard that the urine analysis was to be done again by the LADATEC Laboratory. In her opinion she could not accept that, once that laboratory is mentioned in her judicious documentation process as responsible for the test not accepted by the Brazilian Court.*
19. *Ms Azevedo wants to make clear, that she did not refuse a doping control test in general, but that she refused to submit to doping control only as her urine was going to be analysed by LADATEC Laboratory.*

V IN LAW

20. *FINA anti-doping rules enforced from 11th September 2003 were to be applied. FINA Anti-doping-rules are directly applicable to the competitor Ms. Azevedo (FINA Rule DC 14.1).*

VI CONCLUSION

21. *Ms Azevedo has committed an anti-doping rule violation according to FINA Rules DC 2.3 and DC 5.1 Ms. Azevedo did not submit to a doping control test which was carried out in accordance with FINA Anti-Doping-rules which she was obliged to do (FINA Rule DC 5.1).*
22. *As all competitors, affiliated to FINA, Ms Azevedo was obliged to submit to doping control carried out in accordance with FINA Anti-Doping-Rules (FINA Rule DC 5.1).*
23. *Ms Azevedo had not the right to refuse the test as the collected urine was going to be analysed in the LADATEC Laboratory. This laboratory is accredited by WADA. It is presumed to conduct sample analyses and custodial procedures in accordance with the International Standard for laboratory analysis (FINA Rule DC 3.2.1). The competitor may rebut this presumption by establishing that a departure from the International Standard occurred (FINA Rule DC 3.2.1), but in this case Ms Azevedo did not so. She refers to the judgement made by the High Court. But the Court did not put in question the correctness of the analysis, carried out in the laboratory. It just came to the conclusion that there was doubt whether it was the urine of Ms Azevedo which was analysed.*
24. *Also Ms Azevedo neither in the proceeding before the High Court nor in the proceedings before CAS ever challenged the correctness of the analysis carried out by LADATEC Laboratory. She only argued that either it was not her urine which was analysed or that the urine collected from her must have been tampered or manipulated.*
25. *In addition it is to be considered that Ms Azevedo at the hearing before CAS had agreed to accept the judgement which CAS would come to. When CAS dismissed her appeal she was to accept the sanction of an ineligibility period of two (2) years to expire on 30th April 2005. This included the acceptance of the result of the analysis carried out by the LADATEC Laboratory. However, despite the agreement made, Ms Azevedo continued to take part in national swimming competitions.*

VII SANCTION

26. *In a case of refusing to submit to doping control the ineligibility period set forth in FINA Rule DC 10.2 shall apply (FINA Rule DC 10.4.1). According to FINA Rule DC 10.2 the sanction shall be an ineligibility period of two (2) years in the first case, and lifetime in the second case.*
27. *The refusal to submit to doping control on 6th June 2004 was the second anti-doping-rule violation committed by Ms Azevedo. The first anti doping rule violation was the positive testing on 1st May 2003, sanctioned by the Brazilian Swimming Confederation and confirmed by CAS*

28. *FINA Rule DC 10.5.2 is providing a possibility to reduce the sanction to be imposed for the failure to submit to Sample collection. If Ms Azevedo can establish that she bears no significant fault or negligence the ineligibility period may be reduced. However, Ms Azevedo did not establish such facts. In the contrary, she had agreed before at the CAS hearing to accept the sanction imposed on her by the Brazilian Swimming Confederation, according to which she was not permitted to take part in a swimming competition before 1st May 2005. And she refused to submit to doping control on purpose.*

29. *On these grounds:*

A lifetime ineligibility

beginning on the date of this judgement (21st April 2005) was to be imposed on the swimmer.

VIII THE COSTS

30. *All costs related to this case are to be paid by the Brazilian Swimming Confederation (FINA Rule DC 12.2)."*

24. On 21 April 2005, FINA informed Ms Azevedo of the above decision (hereinafter the "FINA Decision"). This is the decision that Ms Azevedo has lodged an appeal against.

II. SUMMARY OF THE ARBITRATION PROCEEDINGS

25. On 14 July 2005, Ms Azevedo filed a statement of appeal with CAS, requesting that the FINA decision be set aside. She also appointed Ms Catherine Anne Davani as arbitrator.

26. Attached with the appeal was a statement of 11 November 2003 by Dr. Enrique Medina Acosta (Head of the Investigative Unit, Molecular Identification and Diagnosis Unit, Centre for Biosciences and Biotechnology, State University of Fluminense). It is his opinion that the May 2003 samples A and B are incompatible with the genetic identity of Ms Azevedo as revealed by DNA tests.

27. On 26 July 2005, Ms Azevedo filed her appeal brief to which were attached three further statements. A statement, dated 5 June 2003, by Mr. James R. Shipe (Scientific Director Forensic Toxicology, University of Virginia Health Sciences Center), which is his opinion on the credibility of the results of the May 2003 B sample. A second statement, dated 26 July 2005, is signed by Ms Marília de Gonzaga Balbi Reis, the Director of the Swimming club for which Ms Azevedo competed in the June 2004

Winter State Swimming Championships. The statement explains the circumstances in which Ms Azevedo refused to undergo the doping-test control at this championship. The third statement, dated 22 September 2003, is another declaration by Dr. Enrique Medina Acosta where he explains why the May 2003 samples A and B are incompatible with the genetic identity of Ms Azevedo.

28. On 28 July 2005, FINA appointed Mr. Denis Oswald as arbitrator.
29. On 30 August 2005, FINA filed its answer, including the following prayers for relief:

“to reject the appeal and confirm the decision made by the FINA Doping Panel;

to reject any contrary or other claims of the Appellant.

NB: As to the admissibility of the appeal, the Respondent relies on the Panel’s decision.”
30. On 2 September 2005, CAS invited the parties to indicate whether they considered a hearing should be held or whether they would allow the Panel to issue an award on the basis of the written submissions.
31. On 5 September 2005, FINA informed CAS that it would accept the decision of the CAS without a hearing.
32. By letter of 14 September 2005, Ms. Azevedo informed CAS that:

“[...]

By responding your previous notices, in other opportunities, I proceeded according to my ethics and as a courtesy duty, but I did not mean to exempt my prerogatives as a Brazilian citizen, which are beyond my attribute of an athlete registered in a Federation and, as a consequence, subject to CBDA.

In this manner, I reaffirm that the civil suit being developed in the 26th Civil Court of the County of Rio de Janeiro shall be judged, once the evidences already filed and other evidences that the parties may exhibit are collated.

This is the reason why I do not intend to address and/or to participate in any hearing or procedural act”.
33. By letter of 16 September 2005, CAS informed Ms Azevedo that if she did not formally withdraw her appeal the proceedings before CAS would follow its course.
34. By letter of 22 September 2005 to CAS, Ms Azevedo advised, that:

“I reaffirm by precedent position, expressed in the mail I have sent you.

In fact, as the matter that confronts our interests is subject to Brazilian Judicial System, it is respective judgement that shall delimitate our conduct.

In a mean time, it is important to emphasize once again that conflicts with international nature must have their solution based on the application of related Conventions or in the consequences that are related to the nationality condition.

And in the present case, I reaffirm, there is no international Treaty or Convention compelling the solution to be taken by a Court that does not belong to Brazilian Judicial System.

My pronouncements to this CAS have always been a result of the consideration that your serious work and importance deserve, but not meaning, however, to exempt my prerogatives as a Brazilian citizen.”

35. On 26 September 2005, CAS confirmed the formation of the Panel comprised of Quentin Byrne-Sutton (President), Catherine Anne Davani and Denis Oswald.

36. By letter of 26 September 2005 to CAS, FINA advised among others, that:

“If the Appellant would withdraw her appeal, this will make the decision of the FINA Doping Panel final and binding and the Respondent would like to have this stated in the decision which the Panel will have to render to close these proceedings and which, to our understanding, will be a decision on the merits.

If on the contrary the Appellant does not withdraw her appeal but simply does not participate anymore in the proceedings, then a normal decision based on the elements before the Panel shall be made.”

37. By letter of 5 October 2005, CAS informed the Parties that “...upon duly considering the Parties' respective submissions and bearing in mind the Appellant's letter of 14 September 2005, whereby she declares "... I do not intend to address and/or participate in any hearing or procedural act", the Panel has decided to proceed to an award pursuant to art. R57 of the Code of Sports-related Arbitration, i.e. without holding a hearing. Consequently, CAS will be notifying the award to the Parties once it is rendered by the Panel”.

38. On 14 October 2005, the Panel requested FINA to produce copies of the currently applicable rules and any doping-control form signed by Ms Azevedo on 6 June 2004 when she failed to submit to the test. At the same time, FINA was requested to indicate whether it deemed the doping-control test of 6 June 2004 to have taken place in conformity with the International Standard for Testing.

39. By letter of 19 October 2005, Ms Azevedo submitted three new documents, stating that the documents “... per se explain the episode of the supposed refuse to submit myself to the anti-doping test in 2004”. One of the documents, a letter dated 15 June 2004 from Dr. Bruno Borges da Fonesca, Coordinator of the “Rio without Doping” project, to Mr. Marcos Firmino, President of the *Federacao Aquatica de Rio de Janeiro*, states that the doping-control test was organized under the auspices of that project and enclosed written declarations signed by Ms Azvedo and a witness on 6 June 2004. In those written declarations, Ms Azevedo states: “*I, Laura Dutra de Abreu Mancini de Azevedo, do not agree in submitting myself to the anti-doping test, due to*

the existence of a civil action being developed in Rio de Janeiro State of Court of Appeals, number 2003.001.103170-5, in which CDBA and Ledetec are defendants, and punished by FINA until May 5th, 2005, having obtained an anticipated court order that allows me to participate in competitions in Brazil”, whereas the witness, Marília de Gonzaga Balbi Reis, states: “The athlete does not refuse to submit to the anti-doping test, but to her urine sample being tested by Ladetec Laboratory. If the test takes places abroad, she agrees to submit”. The third document is a news item downloaded from the Internet by Ms Azevedo, which describes a case where a swimmer in Brazil refused to supply a sample for collection because she “... did not agree that her urine samples were collected in a domestic kit, made of plastic” and allegedly received advice from CBDA that she did not have to submit to the test.

40. On 10 November 2005, FINA produced a letter dated 31 October 2005 from CBDA to FINA stating, among others, that: *“Ms Azevedo did not sign any form on 6th June 2004. She refused to be tested during a competition held in Rio de Janeiro on that date. While refusing, she wrote down a letter, stating that she did not agree to be tested because her urine sample would be analysed by the LADATEC-LABDOP laboratory, in Rio de Janeiro (which is accredited by the World Antidoping Agency” and that “The test on 6th June was part of a Program called “Rio Sem Doping” (Rio without doping), which was organized by the Brazilian Olympic Committee and Rio de Janeiro’s Government”.*
41. The Panel will decide the case on the basis of the written submissions and documents filed by the Parties.

III. THE PARTIES’ CONTENTIONS

A. The Appellant’s Contentions

42. In substance, Ms Azevedo submits the following:
 - She did not commit the first doping offence for which she was sanctioned by a two-year suspension; her innocence notably being established by the DNA tests relating to the May 2003 A and B samples.
 - She did not refuse to submit to a doping-test control during the Winter State Swimming Championships on 6 June 2004, but merely demanded that the test involve a different laboratory than LADETEC, whose previous test results she is questioning as part of her action pending in the Brazilian courts. Consequently, she cannot be deemed to have committed a second offence

- The doping-test control on 6 June 2004 was not in conformity with applicable rules, notably because the doctor did not identify himself, because the standard official collection kit was not used and because she was never given a doping-test form.
- She was not accorded due process before the FINA Doping Panel, because she could not be present or represented at the hearing due to a lack of financial resources.
- A lifetime suspension is contrary to her individual and constitutional rights under Brazilian law.
- Because there are civil proceedings pending before the Brazilian courts, that the CAS cannot and should not decide the case on the merits.

B. The Respondent's Contentions

43. Concerning the admissibility of the appeal, FINA submits that it “... *relies on the Panel's decision*”.
44. With respect to the merits of its appeal, FINA submits the following:
- “*In the present case, the facts are not disputed.*”
 - “*A refusal to submit to sample collection is established and admitted.*”
 - “*The justification provided is without the slightest merits: an athlete has no right to choose the laboratory to which the samples are provided. LADETEC is a WADA accredited laboratory and it has the relevant competence and expertise to conduct doping control.*”
 - “*In any event the contentions of the Appellant are ludicrous: as pointed out by the FINA Doping Panel, the issues raised in the proceedings had no link with the competence of the laboratory.*”
 - “*These issues have been any way decided in a binding and final award of the CAS and any renewed discussion in this respect would be against the fundamental principle of res judicata which the Appellant completely ignores as she obviously and vainly attempts to restart a discussion which the CAS has definitively closed.*”
 - “*It must be underlined that the conduct of the Appellant is particularly abusive as she was participating to an event in plain contradiction with a final and binding decision of the CAS which she further expressly agreed to observe.*”

- “On top of that, the Appellant arrogantly pretends to have in fact the right to decide whether or not she can or cannot be tested and by whom, thus placing herself above the rules.”
- “Her established and deliberate refusal to submit to sample collection violates DC 2.4.”
- “It further constitutes a second violation, the first one being the one confirmed by the CAS on January 15, 2004 (for use of steroids).”
- “Given the above, the FINA Doping Panel has made a correct application of the rules and rendered the only adequate decision against the Appellant, i.e. lifetime ineligibility in application of DC 10.4 / 10.2.”

IV. DISCUSSION OF THE CLAIMS

A. Jurisdiction

a) *In general*

45. The jurisdiction of CAS derives from art. R47 of the Code of Sports-related Arbitration (the “Code”) and from article 13.2 of the FINA Anti-Doping Rules, which provides as follows:

DC 13.2.1 In cases arising from an Event in an International Competition or in cases involving International-Level Competitors, the decision may be appealed exclusively to the Court of Arbitration for Sport (“CAS”) in accordance with the provisions applicable before such court.

46. It is not disputed that Ms Azevedo is an elite swimmer affiliated to CBDA – member of FINA - and that in such capacity she appealed to CAS in the past (in the case *CAS 2003/A/510*) and in the present proceedings.
47. Therefore the Panel does have jurisdiction to decide on the dispute before it.

B. *Lis Pendens*

48. Although it is not clearly stated in Ms Azevedo submissions, it can be understood therefrom that she is requesting the Panel to suspend its ruling on the merits pending a decision by the Brazilian courts. This raises the question of *lis pendens*.
49. Under generally recognized principles of procedural law, *lis pendens* exists when proceedings are pending in another court between the same parties for the same object arising out of the same cause of action. For example and considering it will be determined hereunder that Swiss law applies, this is expressed in the following manner

under article 9 of the Swiss Private International Law Act (“PILact”): “*When an action having the same subject is already pending between the same parties in a foreign country, the Swiss courts shall stay the case if it is to be expected that the foreign court will, within a reasonable time, render a decision capable of being recognized in Switzerland*”.

50. Accordingly, two of the main cumulative conditions to admit the existence of *lis pendens* is that the pending dispute be between the same parties and relate to the same object.
51. Based on the documents on record, the Panel finds that neither of the two conditions have been met since the case pending in the Brazilian courts does not concern the same parties – FINA not being a party to the proceeding in Brazil – or the same object – since the dispute in the Brazilian courts relates to the validity of the results of the May 2003 A and B samples taken during the 1 May 2003 doping control conducted at the Pan-American Games Swimming Trials. In this case, the current appeal concerns the sanction imposed upon Ms Azevedo’s alleged refusal to submit to a second control involving a different competition on 6 June 2005.
52. Consequently, the conditions for staying these present proceeding have not been met.

C. Admissibility

53. Since FINA is not formally challenging the admissibility of the appeal on the basis of its allegedly belated filing, the Panel sees no reason not to consider it admissible.

D. Applicable Substantive Law

a) In General

54. Under art. R58 of the Code:

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

55. In view of art. R58 of the Code, the Panel considers that the FINA Anti-Doping Rules shall apply to this appeal. As indicated earlier, it is not contested that Ms Azevedo is an elite swimmer affiliated to CBDA – member of FINA - and it was in that capacity that she appealed to the CAS in proceedings CAS 2003/A/510 as well as in the present proceedings. Moreover, in relation to the case CAS 2003/A/510 she signed an

agreement on 11 December 2003 accepting that the FINA Anti-Doping Rules be applied in determining the outcome of her appeal. Consequently, Ms Azevedo had demonstrated through her behaviour that she accepts the application of the FINA Anti-Doping Rules.

56. In accordance with art. R58 of the Code and considering FINA is domiciled in Switzerland, the Panel considers Swiss law to be applicable to any questions not resolved by the FINA Anti-Doping Rules.
57. The question remains whether any rules of Brazilian law should be taken into account as rules of public policy. To date, the Swiss Supreme Court (“Tribunal fédéral Suisse”) has not decided on whether, in an international arbitration, an arbitral tribunal may rely on article 19 of the PILact, or on any other provision of the PILact, to take into consideration rules of public policy other than those of the normally applicable law.
58. Even if it could consider Brazilian law, the Panel is of the view that no evidence has been provided by Ms Azevedo to show that any Brazilian rules of public policy will prevent an athlete from submitting to other existing laws which provide for a lifetime ban as a sanction for doping violations. At the same time, the importance of anti-doping measures in sport is a matter of public policy in all nations, and the resulting widespread acceptance of strict sanctions, with the adoption of the World Anti-Doping Code (“WADC”) including lifetime ineligibility as a sanction, together demonstrates that regulations that provide for lifetime ineligibility as a possible sanction would most likely not be deemed contrary to public policy in Brazil.
59. Thus, in the absence of evidence to the contrary, that any particular rules of Brazilian public policy should be taken into consideration, the Panel shall apply FINA Anti-Doping Rules together with any relevant Swiss law.

b) *FINA Rules*

60. The main provisions of the FINA Anti-Doping Rules (“DC Rules”) which are relevant are the following:

DC 2 ANTI-DOPING RULE VIOLATIONS

The following constitute anti-doping rule violations:

DC 2.3 Refusing, or failing without compelling justification, to submit to *Sample* collection after notification as authorized in these Anti-Doping Rules or otherwise evading *Sample* collection.

DC 3.2.1 WADA -accredited laboratories are presumed to have conducted *Sample* analysis and custodial procedures in accordance with the *International Standard* for laboratory analysis. The *Competitor* may rebut this presumption by establishing that a departure from the *International Standard* occurred.

If the *Competitor* rebuts the preceding presumption by showing that a departure from the *International Standard* occurred, then FINA or its *Member Federation* shall have the burden to establish that such departure did not cause the *Adverse Analytical Finding*.

DC 5 TESTING

Testing by FINA and its *Member Federations* shall substantially comply with the *International Standard for Testing* (3) as more particularly provided below.

DC 5.1 Submission to *Doping Control*

All *Competitors* shall submit in accordance with these Anti-Doping Rules or other applicable regulations to *In- and Out-of-Competition Doping Controls* carried out in accordance with these Anti-Doping Rules or other applicable regulations.

DC 5.5.1.1 Each *Competitor* asked to provide a *Sample* shall also provide information on a form generated by FINA. The *Competitor's* name, country, code number and the event number will be entered into the form, as well as any medication taken by the *Competitor* which (a) is on the *Prohibited List* of substances and methods (DC 4.1), but which may be permitted under certain circumstances specified in the *Prohibited List*; or (b) has been approved for legitimate medical purposes pursuant to DC 4.4. The *Competitor* shall declare any medication and nutritional supplements that he/she has used in the preceding three (3) days. The form shall provide the names of the people present at the *Doping Control* station involved with the obtaining of the *Sample*, including the *Doping Control* Commission and the head of the station. Any irregularities must be registered on the form. The form shall include four copies for distribution as follows:

- a) a copy to be retained by the representative of FINA;
- b) a copy to be given to the *Competitor*;
- c) a special copy to be sent to the laboratory which is to conduct the analysis. The copy that is sent to the laboratory should not contain any information which could identify the *Competitor* who provided the *Sample*;
- d) an extra copy, for distribution as FINA deems appropriate.

DC 10.2 Except for the specified substances identified in DC 10.3, the period of *Ineligibility* imposed for a violation of DC 2.1 (presence of *Prohibited Substance* or its *Metabolites* or *Markers*), DC 2.2 (*Use or Attempted Use of Prohibited Substance or Prohibited Method*) and DC 2.6 (*Possession of Prohibited Substances and Methods*) shall be:

First violation : Two (2) years' *Ineligibility*.

Second violation : Lifetime *Ineligibility*.

However, the *Competitor* or other *Person* shall have the opportunity in each case, before a period of *Ineligibility* is imposed, to establish the basis for eliminating or reducing this sanction as provided in DC 10.5.

DC 10.4 The period of *Ineligibility* for other anti-doping rule violations shall be:

DC 10.4.1 For violations of DC 2.3 (refusing or failing to submit to *Sample* collection) or DC 2.5 (*Tampering with Doping Control*), the *Ineligibility* periods set forth in DC 10.2 shall apply.

DC 10.4.2 For violations of DC 2.7 (*Trafficking*) or DC 2.8 (administration of *Prohibited Substance* or *Prohibited Method*), the period of *Ineligibility* imposed shall be a minimum of four (4) years up to lifetime *Ineligibility*. An anti-doping rule violation involving a *Minor* shall be considered a particularly serious violation, and, if committed by *Competitor Support Personnel* for violations other than specified substances referenced in DC 10.3, shall result in lifetime *Ineligibility* for such *Competitor Support Personnel*. In addition, violations of such Rules, which also violate non-sporting laws and regulations, may be reported to the competent administrative, professional or judicial authorities.

DC 10.4.3 For violations of DC 2.4 (whereabouts violations or missed tests), the period of *Ineligibility* for the first violation shall be minimum three (3) months up to two (2) years. Subsequent violations shall result in a period of *Ineligibility* of at least 2 years.

DC 10.5.2 This DC 10.5.2 applies only to anti-doping rule violations involving DC 2.1 (presence of *Prohibited Substance* or its *Metabolites* or *Markers*), *Use of a Prohibited Substance* or *Prohibited Method* under DC 2.2, failing to submit to *Sample* collection under DC 2.3, or administration of a *Prohibited Substance* or *Prohibited Method* under DC 2.8. If a *Competitor* establishes in an individual case involving such violations that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the minimum period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this section may be no less than 8 years. [...]

DC 13.2 A decision that an anti-doping rule violation was committed, a decision imposing *Consequences* for an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that FINA lacks jurisdiction to rule on an alleged anti-doping rule violation or its *Consequences*, and a decision to impose a *Provisional Suspension* as a result of a *Provisional Hearing* or otherwise in violation of DC 7.1.2 may be appealed exclusively as provided in this DC 13.2.

DC 13.2.1 In cases arising from an *Event* in an *International Competition* or in cases involving *International-Level Competitors*, the decision may be appealed exclusively to the Court of Arbitration for Sport ("CAS") in accordance with the provisions applicable before such court.

DC 13.2.3 In cases under DC 13.2.1, the following parties shall have the right to appeal to CAS: (a) the *Competitor* or other *Person* who is the subject of the decision being appealed; [...]

DC 13.5 The deadline to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party and FINA. [...]

DC 14.1 All *Member Federations* shall comply with these Anti-Doping Rules. The regulations of *Member Federations* shall indicate that all FINA Rules including Anti-Doping Rules shall be deemed as incorporated into and shall be directly applicable to and shall be followed by *Competitors, Competitor Support Personnel*, coaches, physicians, team leaders, and club and Federation representatives under the jurisdiction of the respective *Member Federations*.

E. The Doping Offence

a) *The First Offence*

61. As indicated earlier in this award, on 1 May 2003 Ms Azevedo underwent a doping control conducted at the Pan-American Games Swimming Trials held in Brazil and, based on the test being positive, Ms Azevedo was suspended by CBDA for a two-year period commencing on 1 May 2003.
62. Ms Azevedo appealed to CAS against the two-year suspension and, on 15 January 2004, CAS rendered the following decision in proceedings CAS 2003/A/510: “*The appeal by Ms Azevedo is dismissed, and it is ordered that the suspension imposed by CBDA should run for 2 years from 1st May 2003*”.
63. Because CAS’s award of 15 January 2004 was properly heard on the merits and determined, this Panel cannot revisit the circumstances of the offence in question or the sanction imposed, because the principle of *res judicata* will apply.
64. On the other hand, if this Panel finds that Ms Azevedo has committed another doping offence under the DC Rules, under a different set of circumstances, that offence is deemed to be a fresh or second offence under the DC Rules.

b) *The Second Offence*

i. The Existence of the Offence

65. Article 2.3 of the DC Rules provides that, “*Refusing, or failing without compelling justification, to submit to Sample collection after notification ...*”, is a doping violation.
66. Ms Azvedo does not deny that on 6 June 2004 she failed to submit to the specific doping test that was required of her, since in her statement signed that day she declared: “*I, Laura Dutra de Abreu Mancini de Azevedo, do not agree in submitting myself to the anti-doping test, due to the existence of a civil action being developed in Rio de Janeiro State of Court of Appeals, number 2003.001.103170-5, in which CDBA and Ledetec are defendants, and punished by FINA until May 5th, 2005, having obtained an anticipated court order that allows me to participate in competitions in Brazil*”.

67. In a document filed by Ms Azvedo, Dr. Bruno Borges de Fonseca, Coordinator of the “Rio without Doping” project, states “... *that in the Winter State Championship the athlete Laura Dutra de Abreu Mancini de Azevedo has refused to submit to the doping control after the competition she won*”.
68. These admissions demonstrate prima facie a failure by Ms Azevedo to submit to a sample collection unless Ms Azvedo establishes a “*compelling justification*” for not undergoing the test.
69. In her submissions, Ms Azvedo attempts to show two grounds on which she believes that her actions for not submitting to the sample collection are justified.
70. Her first ground or justification is that the procedure and kit for the doping-control test on 6 June 2004 were not in conformity with international standards.
71. Ms Azevedo does not offer any evidence to support her allegations. The credibility of these allegations is reduced by the fact that neither her own signed declaration of 6 June 2004, i.e. made at the time of the facts, nor the statement of the person who witnessed her declaration that day, mention any problem with the procedure or the kit. Furthermore, statements of the organizers of the doping-control test support the reliability of the procedure. Dr. Bruno Borges de Fonseca, Coordinator of the “Rio without Doping” project, states that “*This doping control has been previously established by the “Rio without Doping” project, an association of COB, the City Hall of Rio de Janeiro and FARJ*”. The CBDA states “*The test on 6th June was part of a Program called “Rio Sem Doping” (Rio without doping), which was organized by the Brazilian Olympic Committee and Rio de Janeiro’s Government*”.
72. The evidence on record is contradictory as to whether Ms Azevedo received a doping-control form to complete. The Panel finds nevertheless that the existence of her signed declaration of 6 June 2004 and that of her witness demonstrate that Ms Azevedo chose not to fill in an official form because she was contesting the validity of the whole procedure. Her objections were recorded in the two declarations signed on 6 June 2004.
73. The second ground or justification submitted by Ms Azevedo is that her samples were to be tested by LADATEC, the body she took to court in Brazil over her claim that LADATEC produced erroneous results with regard to the May 2003 tests.
74. Having considered these grounds, the Panel finds that neither of these grounds satisfy the requirement that they are “*compelling justifications*”. We say this because her reasons did not prevent her from physically providing samples while simultaneously making her objections and reserving her rights.
75. No doubt, we are of the view that the logic of anti-doping tests and of the DC Rules demands and expects that, whenever physically, hygienically and morally possible, the sample be provided despite objections by the athlete. If that does not occur, athletes

would systematically refuse to provide samples for whatever reasons, leaving no opportunity for testing. In this respect, it is noteworthy that article 5.1.1.1 of the DC Rules provides, among others, that “... *any irregularities must be registered on the form*”.

76. In the present case, although Ms Azevedo was of the opinion that LADATEC was unqualified for the task and to have a conflict of interest because of the pending suit, there is no evidence of any circumstance that prevented her from providing the sample in addition to recording her objections in her written declaration of 6 June 2004. If she had done so, and irrespective of what would have been decided by them, she could have immediately taken up the matter with CDBA and FINA, to solicit that the sample be tested by a different laboratory.
77. We find that notwithstanding that she was contesting the conditions of the doping control, Ms Azevedo could and should have provided a sample.
78. Because Ms Azevedo did not provide a sample and having not proven “*compelling justification*”, the Panel finds that she has committed a doping violation under article 2.3 of the DC Rules, which is her second doping violation.
79. Having committed a second violation, the issue now before the panel is as to the most appropriate punishment or sanction under the DC Rules.
- ii. The Sanction
80. According to article 10.2 of the DC Rules, a second doping violation in principle entails a sanction of lifetime ineligibility.
81. However, article 10. 2 of the DC Rules reserves the possibility of eliminating or reducing the sanction in exceptional circumstances under the criteria laid down in article 10.5, i.e. if the athlete establishes that she/he bears “*no fault or negligence*” or “*no significant fault or negligence*”.
82. The question therefore arises whether there is evidence before the panel to show those exceptional circumstances, that she bears no fault or no significant negligence.
83. Ms Azevedo’s decision not to submit to the doping-control test on 6 June 2004 was a conscious decision, i.e. an intentional act, and the Panel has already found that the reasons she gave for not providing a sample, are not “*compelling reasons*”. This does not prevent the Panel from examining whether her conscious decision not to provide a sample was guided by considerations that make her fault less serious or absolve her of any fault.
84. On the evidence, the Panel finds that the circumstances under which Ms Azevedo refused to submit to the doping tests, do not allow a finding of no fault or no significant negligence.

85. However, the Panel considers that Ms Azevedo's refusal to take the test because she considered LADATEC to be incompetent and/or to have a conflict of interest, is a negligent action. As a high-level swimmer, she is required to adopt an overall responsible attitude, be properly informed of doping issues and more generally be knowledgeable of and abide by the rules governing her sporting activity. In this respect, article 21 of the World Anti-Doping Code provides, that athletes must "... *be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code*" and "... *be available for Sample collection*".
86. Ms Azevedo should have demonstrated responsible attitude and common sense to have then decided that the only means of properly dealing with her dilemma was to provide the sample, while making her objections in writing as she did. Put otherwise, when deciding not to provide the sample she should have realized she was breaching the rules and risking a sanction.
87. In a recent CAS award (CAS 2005/A/830) involving a sanction for the violation of FINA's DC Rules, the possible application of the doctrine of proportionality was examined as a principle which might, under certain conditions, enable a reduction of the period of ineligibility beyond the maximum reduction fixed and allowed by the DC Rules for a finding of no significant negligence.
88. In the present case the doctrine of proportionality will not be similarly considered because the Panel has found that the possible reductions of sanction provided in the DC Rules will not apply because of Ms Azevedo's negligence.
89. However, given the seriousness of a lifetime ban sanction, the question arises whether such sanction is deemed proportional to the violation even if the violation is found to be intentional and the sanction is therefore not subject to reduction under the relevant/appropriate DC Rules.
90. For several reasons, the Panel finds that, in this case, the sanction, despite its severity, is in keeping with the principle of proportionality.
91. First, "... *failure or refusal to submit to Sample collection after notification is prohibited in almost all existing anti-doping rules*" (see comment under article 2.3 of WADC) demonstrates that neither the WADC or the DC Rules show that failing to submit to a doping test is a less serious form of doping violation than the presence or use of a prohibited substance. This stands to reason because failing to submit to a doping control is one of the main ways to avoid being caught "red-handed", i.e. a possible means of cheating to avoid being caught cheating.
92. Second, a lifetime ban is now generally accepted as an adequate sanction for a second doping violation, given the importance of the worldwide anti-doping effort and the level of information available to athletes regarding anti-doping rules and principles. Thus, for example, the comment under article 10.2 of the World Anti-Doping Code ("WADC") states that: "*The consensus of the World Conference on Doping in Sport*

held in Lausanne in February 1999 supported a two year period of ineligibility for a first serious anti-doping rule violation followed with a lifetime ban for a second violation. This consensus was reflected in the OMADC”.

93. Third, while the principle of proportionality is already enshrined to a degree in the DC Rules themselves, under the exceptions which would then reduce the sanction in cases of no fault or no significant negligence, the Panel in this case found that Ms Azevedo did not meet these exceptions.
94. Finally, because Ms Azevedo refused to submit to the doping test control on 6 June 2004 in a situation where she was a competitor, disregarding her own written undertaking of 11 December 2003 to respect any period of ineligibility to which she might be sanctioned by CAS (see CAS 2003/A/510). This is an aggravating factor which re-emphasises the panels finding that a lifetime ban is not disproportionate.
95. Consequently, the Panel finds that it must confirm the validity of the lifetime ban imposed by FINA in its decision under appeal.

F. Due Process

96. The Panel considers that there is no evidence on record to show that Ms Azevedo was not afforded due process by FINA. Ms Azevedo was afforded the opportunity to attend a hearing in April 2005 but declined to do so or to be represented, whereas she had decided to be represented in the past in the same matter when entering the agreement of 11 December 2003.

V. COSTS

97. In accordance with art. R65.1 of the Code, this proceeding is free except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by the Appellant and to be retained by the CAS.
98. Because there was no hearing the parties' costs have not been substantial. Therefore, the Panel finds that each party shall bear its own legal costs.

ON THESE GROUNDS

The Court of Arbitration for Sport:

- 1) The appeal by Ms Azevedo is dismissed.
- 2) The award is pronounced without costs, except for the court-office fee of CHF 500 (five hundred Swiss Francs) already paid by the Appellant and to be retained by the CAS.
- 3) Each party shall bear its own costs.

Lausanne, 24 January 2006

THE COURT OF ARBITRATION FOR SPORT

Quentin Byrne-Sutton

President of the Panel

Catherine Anne Davani

Arbitrator

Denis Oswald

Arbitrator