Arbitration CAS 2002/A/385 T. /International Gymnastics Federation (FIG), award of 23 January 2003

Panel**:** Mr. Dirk-Reiner Martens (Germany), President; Mr. Raj Parker (Great Britain); Mr. Denis Oswald (Switzerland)

Gymnastics
Doping (furosemide)
Nutritional supplement
Strict liability
Failure to invite the athlete for the B-test
Mitigating circumstances

1. **The failure to provide the athlete with an opportunity to be present or be represented at the opening and analysis of the B-sample constitutes a procedural error compromising the limited rights of an athlete to such an extent that the results of the analysis of the B-sample and thus the entire urine test should be disregarded.**

2. **It is not a positive urine test but the presence of a prohibited substance in an athlete's body which constitutes a doping offence. While the appellant in this case denies ever having taken Furosemide, the CAS Panel is of the view that there is overwhelming proof that she in fact did. The Appellant admitted having taken a version of "Hyper" (a nutritional supplement) which had not been previously tested and later turned out to contain a forbidden substance. The fact that the Appellant may not have been aware of the existence of Furosemide is of no relevance in respect of the objective elements of this case.**

3. **It has been a known and widely publicised fact for several years that food supplements can be – and sometimes intentionally are – contaminated with products which are prohibited in sports. An athlete who ignores this fact, does so at his/her own risk. It would be all too simple and would frustrate all the efforts being made in the fight against doping to allow athletes the defence that they took whatever the team doctor gave them, thus attempting to shift the responsibility to someone else. The athlete's negligence lies in the fact that he/she uses food supplements which include a generally known risk of contamination. The extent of the precaution taken to reduce the risk of contamination may have a bearing on the extent of the sanction.**

The Appellant T. is a rhythmic gymnast and member of the Rhythmic Gymnastics Federation of Russia. She participated in the 2001 Good Will Games in Brisbane, Australia. Chosen at random she underwent a doping control test on 30 August 2001.

Her urine sample was analysed by the IOC accredited Australian Sports Testing Laboratory (ASDTL), Pymble, Australia. According to the ASDTL report dated 18 September 2001, the A-sample (No. A214993) showed the presence of "Furosemide". By letter of 8 November 2001 the Appellant requested the testing of the B-sample.

The date and time of the analysis of the B-sample were not communicated to either the Appellant or to the Russian Federation.

The ASDTL analysed of the B-sample (No. B214993) on 14 November 2001. According to the ASDTL report of 15 November 2001, the gas chromatography-mass spectrometry confirmed the presence of "Furosemide" in the Appellant's urine sample.

The Appellant regularly used a product called "Hyper". This product was tested for doping substances by a Russian laboratory in Moscow. These tests did not reveal any forbidden substances and accordingly "Hyper" was approved by the Russian Federation as a nutritional supplement suitable to be taken by athletes.

In its letter of 5 November 2001, the Russian Federation stated that just before the Good Will Games in Brisbane the Appellant's trainer bought some new bottles of "Hyper" via the Internet for a price considerably below that charged by the Russian Olympic Committee pharmacy. According to the Russian Federation pills from these newly bought bottles were consumed by the Appellant just before the doping test was carried out. They differed in size and colour from the ones which had been previously tested by the Russian laboratory.

After the positive A-sample test the Russian Federation commissioned a test of the "Hyper" which had been bought via the Internet and which had been used by the Appellant which test was conducted by the same Russian laboratory which had previously tested the original pills. The test revealed the presence of about 19 mg of Furosemide per pill. Both parties agree that Furosemide is a prohibited substance under the Respondent's rules.

In addition, the Appellant tested positive for Furosemide a second time. On 19 October 2001, during the 2001 World Championships in Madrid another doping test was carried out. The samples were analysed by the IOC accredited laboratory in Madrid on 19 December 2001 and 7 February 2002. The results of both the analyses of the A-sample (No. A095898) and the B-sample (No. B095898) also revealed the presence of Furosemide in the Appellant’s body.

On 20 February 2002 the Special Commission of the Respondent's Executive Committee conducted a hearing regarding this matter in which the Appellant participated.

Further to the hearing, later the same day, the Commission decided that, taking into account the results of the urine analysis, a case of doping had occurred, and thus ordered the Appellant's suspension for one year followed by one year's suspension with probation. In addition, the Appellant's competitive results from the 2001 World Championships were also annulled.

By letter of 21 February 2002, the Appellant filed with the Respondent an appeal against the aforementioned decision. The Respondent's Executive Committee rejected this appeal by a decision of 9 May 2002. The Executive Committee did not take into account the second doping test carried out in Madrid. The Appellant did not participate in the appeal hearing even though she had an opportunity to do so.

The Appellant claims that her rights were infringed during the doping test procedure because the laboratory reports showed signs of irregularities and because she was not informed of the date and the time when the B-sample was to be opened and analysed by ASDTL. Furthermore, the Appellant denies that she ever admitted having taken a forbidden substance. In conclusion, the Appellant moves the Court of Arbitration for Sport (the "CAS"):

"*1. To reverse the decision made by the Special Commission of the FIG on 20. February 2002 in the part regarding* [T.];

2. To reverse the decision made by the Executive Body of the International Gymnastics Federation (FIG) on 8. May 2002 in the part regarding [T.]"

The Respondent requests the CAS to take the following decision:

"1. The appeal of [T.] is to be rejected;

2. The decision of the FIG dated 20 February 2002 and 8/9 May 2002 are to be upheld;

3. All costs and compensations are to be borne by [T.]"

In response to the Appellant's arguments, the Respondent concedes that the Appellant was not informed of the date and time of the B-sample test. The Respondent argues that this mistake only constitutes a minor procedural irregularity and must be disregarded in light of the other evidence before the Panel. Consequently, according to the Respondent, the failure to inform the Appellant of the B-sample test had no influence on the test result. Finally, the Respondent argues that the sanctions imposed on the athlete were appropriate taking into account all the relevant circumstances of the case and that, in fact, they were far below the maximum possible sanction.

On 29 May 2002 the Appellant filed a request for arbitration with the CAS with respect to both the decisions of the Special Commission and the Executive Committee of the Respondent. Together with that request, the Appellant also applied for a provisional stay of execution of the decisions to which the appeals relate.

By an order of 14 June 2002 the President of the CAS Appeals Arbitration Division, acting in accordance with Articles R48 para. 1, R52 of the Code of Sports-related Arbitration (hereinafter referred to as the "Code") granted a stay of execution in respect of the Respondent's decisions.

LAW

1. The jurisdiction of the CAS is based on 3.1 (D) of the Respondent's DCR of 8 July 1999.

   These rules provide that:
   "If the decision of the FIG Executive Committee is contested, it is possible – in the last instance – to appeal to the Court of Arbitration for Sport."

   In addition, both parties confirmed the jurisdiction of the CAS by signing the order of procedure of 17 July 2002 and also by not raising any question of jurisdiction at the hearing held in Lausanne on 13 November 2002.

2. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute according to the applicable regulations of the Respondent and under Swiss law as the Respondent has its seat in Switzerland and the parties did not choose an alternative governing law.

   As the doping control and the analysis of the samples took place before the meeting of the Respondent's Executive Committee of 30 November 2001, the Panel will apply the Respondent's DCR of 8 July 1999. In interpreting these rules the Panel will have special regard to Swiss law in accordance with Article R58 of the Code.

3. The Panel is satisfied that the Appellant committed a doping offence under the relevant rules of the Respondent, as interpreted pursuant to Swiss law.

4. Provisions on doping are found in the Respondent's DCR. They provide *inter alia*:

   "1. General Principles
   Doping is forbidden.
   (…)
   1.4 (…)
   Any competitor, who is found guilty of doping or who refuses to submit to the drug tests shall be excluded from the competition in question and be liable to sanctions.
   (…)

   2. List of Drug Substance Categories and Doping Methods
   These lists of drug substance categories officially written in the FIG rules are identical to those put forth by the IOC. The periodic updating automatically involves the same updating by the FIG. This concerns the list of banned substances and substances authorised under certain conditions in a precise context of use.
   2.1 Classification of Drug Substances:
   (…)
   D. Diuretics"

5. The Olympic Movement Anti-Doping Code's Appendix A states:

"I. Prohibited Classes of Substances
(…)
D. Diuretics
(…) furosemide
(…)

IV. List of Examples of Prohibited Substances
(…)
Diuretics (…) furosemide"

6. The Respondent contends that the doping regime put in place by the Respondent's rules is one of strict liability. According to the Respondent it is sufficient to prove that an athlete used a forbidden substance. The Respondent submits that there is no room for any consideration of "guilt". The Panel disagrees.

7. The Respondent's rules (Section 1.4 of the DCR) expressly provide that an athlete is "liable to sanctions" if he/she "is *found guilty* of doping" (emphasis added). In the Panel's view this is a clear indication that the Respondent's doping rules require an element of fault, i.e. intent or negligence, in order for the athlete to be sanctioned for doping.

8. In addition, the Panel wishes to point out that there is recent CAS case law according to which federation rules allowing for a suspension of an athlete for doping (as opposed to disqualification from a particular event) without fault on the part of the athlete would not sufficiently respect the athlete's right of personality ("Persönlichkeitsrecht") as established in Articles 20 and 27 *et seq.*of the Swiss Civil Code which CAS Panels are required to apply (Article 58 of the Code; see CAS 2001/A/317 A. v/ FILA, award of 9 July 2001, p. 16 *et seq.*). According to this view, it is necessary for the federations to put forward the objective elements of the doping offence. If the federations succeed in doing so the athlete is presumed to be guilty of a doping offence but he/she has the opportunity of rebutting this presumption by proving that he/she did not act with intent or negligence. The Swiss Federal Tribunal has repeatedly considered this system of reversal of the burden of proof to be compatible with public policy (see judgement of 4 December 2000, 5P.427/2000 R. v/ IOC, § 2 a), not published; judgement of 31 March 1999, 5P.83/1999 N. et al. v/ FINA, Digest of CAS Awards II, § 3 d), p. 781; judgement of 15 March 1993 G. v/ FEI, Digest of CAS Awards I, § 8 b), p. 575).

9. Having established the principle that the suspension of an athlete for a doping offence requires fault on his/her part, this does not, in the Panel's view, mean that it is for the relevant federation to provide full proof of every element of the offence, as is necessary in respect of a criminal act for which a presumption of innocence operates in favour of the accused. There is no doubt that the federation has to establish and – if contested – prove the objective elements of the offence, in particular, for example, that the sample was taken properly, that there was a complete chain of custody of the sample on its way to the laboratory and that the analysis of the sample was state-of-the-art. This follows from the accepted basic principle of Swiss Law that a person who alleges a fact bears the burden of proof (Article 8 Swiss Civil Code; see

also: CAS 98/208 N. & J. & Y. & W. v/ FINA, award of December 22, 1998, Digest of CAS Awards II, p. 234, 247; CAS 99/A/234 & CAS 99/A/235 M. & M. v/ FINA, award of February 29, 2000, p. 14; CAS 2001/A/317 A. v/ FILA, award of 9 July 2001, p. 19 *et seq.*).

10. As to the standard of proof, the Panel appreciates that because of the drastic consequences of a doping suspension on a professional athlete's exercise of his/her trade [Article 28 Swiss Civil Code (*ZGB)*] it is appropriate to apply a higher standard than that generally required in civil procedure, i.e. to convince the court on the balance of probabilities. Following established CAS case law, the disputed facts therefore have to be "established to the comfortable satisfaction of the court having in mind the seriousness of the allegation" (cf. CAS OG/96/003 & CAS OG/96/004 K. & G. v/ IOC, p. 20; CAS 98/208 N. & J. & Y. & W. v/ FINA, award of 22 December 1998, Digest of CAS Awards II, p. 234, 248; confirmed by the Swiss Federal Tribunal, judgment of 31 March 1999 [5P.83/1999], Digest of CAS Awards II, p.775 ff.).

11. However, it would put a definite end to any meaningful fight against doping if the individual federations were required to also *prove* the necessary subjective elements of the offence, i.e. intent or negligence on the part of the athlete (CAS 95/141 C. v/ FINA, Digest of CAS Awards I, p. 215, 220; CAS 98/214 B. v/ FIJ, award of 17 March 1999, Digest of CAS Awards II p. 291, 302; CAS 2001/A/317 A. v/ FILA, award of 9 July 2001, p. 19 *et seq.*). In fact, since unlike a public prosecutor in criminal proceedings neither the federations nor the CAS have the ability to conduct their own investigations or to compel witnesses to give evidence, it would be all too simple for an athlete to deny any intent or negligence and to simply state that he/she has no idea how the prohibited substance arrived in his/her body (see CAS 96/156 F. v/ FINA, award of 6 October 1997, p. 41 *et seq.*).

12. Therefore, once a federation is able to establish and – if contested – to prove the objective elements of a doping offence, there is a presumption of fault on the part of the athlete. The principle of presumed fault on the part of the athlete does not, however, leave him/her without protection because he/she has the right to rebut the presumption, i.e. to establish that the presence of the prohibited substance in his/her body was not due to any intent or negligence on his/her part (CAS 2001/A/317 A. v/ FILA, award of 9 July 2001, p. 20). The athlete may, for example, provide evidence that the presence of the forbidden substance is the result of an act of malicious intent by a third party (CAS 91/56 S. v/ FEI, Digest of CAS Awards I, p. 93, 97; CAS 92/63 G. v/ FEI, Digest of CAS Awards I, p. 115, 121; CAS 92/73 N. v/ FEI, Digest of CAS Awards I, p. 153, 157).

13. Bearing in mind these principles, the Respondent has to prove the objective elements of the offence, no more and no less. The Appellant in turn has to show that she acted neither intentionally nor negligently.

14. The Respondent provided laboratory reports according to which the Appellant's urine sample taken in Brisbane contained the forbidden substance Furosemide. The Appellant argues that the Respondent cannot rely on the results of the urine analysis because the testing procedure was flawed by material irregularities.

15. As a preliminary remark, the Panel wishes to clarify that there is consistent CAS case law which makes clear that deviations from the testing procedures prescribed by the relevant federation rules will only invalidate the results of an analysis where they are sufficiently material as to call into question the reliability of the test (CAS 98/188 C. v/ IPF, award of July 31, 1998, p. 9; CAS 98/184 C. v/ FEI, award of September 25, 1998, p. 11; CAS 98/223 ITF v/ K., award of August 31, 1999, Digest of CAS Awards II, p. 345, 353; CAS 2000/A/281 H. v/ FIM, Digest of CAS Awards II, p. 410, 419). In an *obiter dictum* in an early decision the CAS laid the ground for this policy which has since been consistently applied. The Panel observed:

„ ... it is the Panel's view that, as a general matter, if breaches of specific requirements laid down by a federation for the testing procedure are sufficiently material as to call into question the validity and correctness of the positive result, any athlete would be entitled to have that federation's decision overturned." (CAS 94/129 USA Shooting & Q. v/ UIT, Digest of CAS Awards I, p. 187, 200.)

16. This approach is also reflected in Chapter VI, Article 5 of the Olympic Movement Anti-Doping Code (hereinafter referred to as "OMAC") which states that "Minor irregularities which cannot reasonably be considered to have affected the results of otherwise valid tests, shall have no effect on such results." Furthermore, the new WADA Code (version 2.0) also contains the same basic principle in Article 1.3.2.2 (although not limited to "minor" irregularities). While neither set of regulations is applicable in the present case, both provide examples of a common understanding in the world of sport.

17. The Respondent is seeking to rely on the results of an analysis of the Appellant's urine sample taken during a doping test on 30 August 2001 which revealed the presence of Furosemide. According to the IOC's list of prohibited substances, which list forms part of the Respondent's DCR, Furosemide is a forbidden substance. The list does not stipulate any requisite threshold as to the concentration of this substance.

18. The Appellant does not contest the fact that her urine sample contained the forbidden substance Furosemide. However, she contends that the Respondent cannot rely on the results of the analysis of the urine samples which were collected on 30 August 2001.

19. Firstly, the Appellant claims that the testing procedure was not carried out according to standard laboratory practice by pointing out that the report of the B-sample was not signed by the analysts who conducted the test but by other persons "for" the analysts and further that the B-sample was opened on 14 November 2001 and yet the laboratory report is dated 15 November 2001.

20. The Panel is convinced that these errors are not sufficiently serious to call into question the results of the tests. Although the Panel would ordinarily recommend that the person who conducts the analysis and the person who supervises such analyst should both sign the results of the analysis, the Panel notes that it is not unusual for one person to sign for another if the latter is tied up with other business. The laboratory report clearly states that another person signed for Dr. Yap (B-sample). In addition, the Panel cannot see how the fact that the

laboratory report for the B-sample was signed one day after the analysis could affect the result of the analysis. The report states that the test was carried out on a specific day and that the results were put into a formal letter the day after this test. The Panel does not accept that these variations, whether considered individually or taken together, are likely to call into question the validity of the testing procedure as such.

21. Secondly, the Appellant argues that the procedure was materially flawed because neither she nor her federation were informed of the date and time when the analysis of the B-sample was to be carried out.

22. The Panel notes that according to the Respondent's own rules the Respondent is required to inform an athlete's federation of the date and time when the analysis of the B-sample is carried out:

"4.2.7 Sample analysis
(…)
The analysis of the B-sample shall be carried out at the time fixed by the FIG. The date and time will be communicated in a letter addressed to the Federation."

23. By not informing the Appellant's federation, the Respondent breached this provision.

24. The Respondent openly admits the breach but argues that this was merely a minor deviation from the procedure and therefore incapable of invalidating the results obtained by ASDTL. The Appellant argues that the Respondent's failure to communicate the relevant information to her federation violated one of the few rights an athlete has in the course of the doping test procedure. Thus, according to the Appellant the results of the analysis of both the A-sample and the B-sample should be disregarded by the Panel.

25. In order to assess the consequences of the Respondent's breach of its own rules, the Panel has to examine the importance of this provision. It must take into account the reasons for which an athlete should ordinarily be informed of the time and date of the opening of the B-sample.

26. As a matter of principle, the Panel is of the opinion that, even if a procedural error is unlikely to affect the result of a B-sample analysis, such error can be so serious as to lead to the invalidity of the entire testing procedure.

27. Under Section 4.2.7 of the Respondent's Doping Control Rules the athlete's rights in connection with the analysis of his/her sample are fairly limited:

- according to para 2 "the members of the Medical Commission of the FIG … can be admitted to the laboratory during the analysis";
- according to para 5 the athlete "can ask for a counter-analysis with the B-sample";
- according to para 6 "(T)he date and time [of the analysis] will be communicated … to the Federation";
- according to para 8 "upon the gymnast's request, the FIG Medical Commission can

entrust a different laboratory with the analysis of the B-sample";

- according to para 9 "(T)he federation in question shall be allowed to send a maximum of three representatives to the laboratory";
- according to para 11 the FIG decision shall be made "after having heard the gymnast and his chosen companion".

28. When looking at these rules it is obvious that the athlete's direct rights are essentially limited to two, i.e. the request for an analysis of the B-sample and the request to have this analysis carried out by another laboratory. As a consequence of the pyramid structure of sport it is not the athlete but his/her federation which has to be informed of date and time of the B-test and it is not the athlete but the federation which is allowed to send representatives to the testing of the B-sample. The federation thus assumes the role of the athlete's representative in the course of the proceedings. While in the Panel's view the Respondent's rules sufficiently (though not generously) respect the interests of the athlete , the limited rights with which the athlete is left must be followed with care so that for instance the federation attending the opening and analysis of the B-sample can satisfy itself on behalf of the athlete that the correct container with the number of the athlete's urine sample is being opened and that at the time of opening the seal was intact; in addition the representative may also check the state of the urine sample at that time. In the event that at this stage variations or irregularities are apparent then these can be noted and can be used later to challenge the test results.

29. This right is completely taken away from the athlete when the analysis of the B-sample is conducted without the athlete or his/her federation being given due notification of the relevant date and time. The athlete is then simply treated as the object of the doping test procedure not its subject.

30. The specific importance of the right to attend the opening of the B-sample is also set out in Chapter 7, Article 5 OMAC. This provision summarises the aforementioned arguments as follows:

"Minor irregularities, which cannot reasonably be considered to have affected the results of otherwise valid tests, shall have no effect on such results. Minor irregularities do not include … failure to provide the athlete with an opportunity to be present or be represented at the opening and analysis of the B-sample if analysis of the B-sample is requested."

31. Although the OMAC does not apply in the present case (the Respondent's Rules only refer to the OMAC's "List of forbidden substances"), it indicates a consensus in the world of sport regarding the proper enforcement of minimum requirements for doping tests. However, the Panel notes that the recent draft of Article 1.3.2.2 of the WADA Code (version 2.0) does not retain the specific exceptions to the term "minor irregularities" as set out in the OMAC.

32. In as far as the athletes' participation rights under the Respondent's rules are conferred upon the national federation these rights are exercised by such federation in the name of the athlete. A breach of the federations' right to attend is, in this case, a breach of the athlete's right to attend.

33. It is not possible to remedy the procedural error described above in the course of the arbitral process. Contrary to a case where a federation fails to hear an athlete before imposing a sanction, the arbitration cannot substitute the presence (in its widest definition) of a representative of the athlete at the opening of the B-sample.

34. In conclusion, the Panel is inclined to view the procedural error committed in this case as compromising the limited rights of an athlete to such an extent that the results of the analysis of the B-sample and thus the entire urine test must be disregarded.

35. However, the Panel can leave the question discussed above undecided because for the Panel's decision as to whether the Respondent established the objective elements of a doping offence, it is irrelevant whether the breach of the right to attend the opening of the B-sample weighs so heavily in this case that the entire doping test evidence cannot be used. Even if this was the case, the Panel is still convinced that the other evidence presented by the Respondent establishes the objective requirements of a case of doping.

36. It is worth noting at the outset that is not a positive urine test but the presence of a prohibited substance in an athlete's body which constitutes a doping offence. While positive A- and B-samples are the most obvious evidence of the presence of a prohibited substance in an athlete's body, there are other means of proving the objective elements of a doping offence, i.e. of proving that the athlete had a prohibited substance in his/her body. For example, an admission by an athlete that he has taken a prohibited substance is sufficient evidence for a doping offence (interestingly, the draft WADA Code, Version 2.0 provides in 8.2.2.1.3.2 "Methods of Establishing Facts and Presumptions**.** Facts related to anti-doping rule violations may be established by any reliable means, including admissions"). While the appellant in this case denies ever having taken Furosemide, the Panel is of the view that there is overwhelming proof that she in fact did.

37. The Appellant has declared that she took nutritional supplements immediately before the Good Will Games in Brisbane. The examination commissioned by the Russian Federation provided evidence that the forbidden substance Furosemide was present in the preparation taken by the Appellant, i.e. in a product called "Hyper".

38. This has been proven by a series of documents which have been furnished by the Respondent together with its Answer and of which excerpts are quoted below. The Appellant did not contest the validity of these documents.

39. In a letter to the Respondent of 5 November 2001, the Russian Federation states *inter alia*

"Nous … sommes arrivés à la conclusion *que cette situation est arrivée par la faute du médecin de l'équipe*, qui pendant une assez longue période administrait un supplément diététique spécial aux gymnastes. […] avant les Good Will Games le stock de ces suppléments étant épuisé, le docteur a emmené a Brisbane un nouveau lot de ce produit." (Emphasis added.)

The Russian Anti-Doping Center concluded its analysis on 8. November 2001:

"Le 5 novembre 2001 le Centre Antidoping a reçu pour test un supplément diététique "Hiper" (série N 03016) qui a fait l'objet du contrôle antidopage conformément au Règlement de la Commission Médicale du CIO, avec l'utilisation de la méthode de la chromato-mass-spectrométrie (HP 5972).

Les résultats de la recherché ont montré que l'échantillon soumis à l'analyse contenait Furosemide, substance de la classe des diurétiques, interdite dans le sport." (emphasis added.)

On 8 November 2001 the Russian Olympic Committee reported:

"(…)
4. L'échantillon en question a été montré aux représentants du fabricant. Ce dernier affirme que l'échantillon présenté est contrefait, l'emballage et le numéro de série n'étant pas conformes à la réglementation en vigueur.

Conclusions:
1. Le test positif au furosémide chez les gymnastes Kabeaeva et Tschaschina [sic] est la conséquence de l'utilisation du produit "Hiper" falsifié, acheté par le réseau de vente Internet. (…)"(emphasis added).

40. The transcript of the Respondent's Special Commission hearing of 20 February 2002 recorded the following statements:

"NV: Reconnaissez-vous ces deux flacons avec les vitamines?
T [Appellant]: Oui.
NV: Quand en as-tu pris la dernière fois ?
T: Avant les CM de Madrid.
NV: Et à Brisbane?
T: Oui, avant Brisbane."

41. The Appeal against the decision of the Special Commission which was filed by the Russian Federation but also signed by the Appellant personally contains the following statement:

"… la documentation recueillie atteste la présence d'un cas de force majeure. Ce cas de force majeure consiste dans *le fait de l'acquisition pour les gymnastes d'un produit falsifié*, dont le personnel de l'équipe nationale n'a pas eu la possibilité d'évaluer la qualité et l'authenticité" (Emphasis added).

42. If read together, all these statements provide conclusive evidence that the Appellant took a product which contained the forbidden substance "Furosemide". She admitted having taken a version of "Hyper" which had not been previously tested and later turned out to contain a forbidden substance. The fact that she may not have been aware of the existence of Furosemide is of no relevance in respect of the objective elements of this case.

43. The Panel would like to stress that it welcomes the efforts of the Russian Federation in the fight against doping. In particular, the value of its endeavours to clarify the circumstances and the important consequences of the outcome of its determinations must be underlined. By using such methods it is possible to identify the sources of non-intentional doping. The athletes can then be forewarned of such sources. Proceedings taken against persons who have

responsibility for training and for the health of the athletes but who breach their relevant duties of care must also be supported and encouraged. Otherwise the athlete may have to face the full consequences of actions for which others should also be held accountable.

44. As is set out above, the burden is on the Appellant to rebut the presumption of fault once the objective elements of a doping offence have been established. The Panel is of the opinion that the Appellant has not succeeded in proving that she was without fault.

45. The Appellant denies having knowingly taken Furosemide and claims that she did not know which products she was taking as it was always her doctor who gave her the vitamins without any explanation as to their ingredients.

46. The Appellant contends that she was not aware that the product she used contained a substance which was the source of her positive doping test.

47. In fact, the Panel accepts, in the Appellant's favour, that she did not intentionally take a prohibited substance, in other words, that she did not know that the batch of "Hyper", which she consumed immediately before and during the Good Will Games in Brisbane, contained Furosemide.

48. However, the Panel is of the opinion that the Appellant acted negligently when ingesting a food supplement which was contaminated.

49. As a defence the Appellant brings forward that she relied entirely on the team doctor when taking whatever medication or food supplements were given to her. No questions were asked by her. She further points out that the Russian Federation had tested the product "Hyper" and had found no prohibited substance. According to the Appellant her support personnel was not at fault when relying on the results of this test also with respect to the lot of "Hyper" which had been procured via the Internet.

The Panel disagrees.

50. It has been a known and widely publicised fact for several years that food supplements can be – and sometimes intentionally are – contaminated with products which are prohibited in sports. An athlete who ignores this fact, does so at his/her own risk. It would be all too simple and would frustrate all the efforts being made in the fight against doping to allow athletes the defence that they took whatever the team doctor gave them, thus attempting to shift the responsibility to someone else. The athlete's negligence lies in the fact that he/she uses food supplements which include a generally known risk of contamination. The extent of the precaution taken to reduce the risk of contamination may have a bearing on the extent of the sanction.

51. The Panel notes that the above analysis is perfectly in line with established CAS case law to the effect that athletes are themselves solely responsible for, *inter alia*, any medication and any nutritional supplements they take. Even medication taken on the basis of a doctor's

prescription has been held not to suffice as a valid excuse for an athlete (CAS 92/73 N. v/ FEI, Digest of CAS Awards I, p. 153, 158; CAS 2001/A/317 A. v/FILA, award of 9 July 2001, p. 23).

52. Further support for this principle can be found in the recommendations of the first International Athletes' Forum held in Lausanne on 19/20 October 2002, where the IOC Athletes' Commission concluded:

"The athletes should assume total responsibility for the intake of any substance, including food supplements, that may result in a positive doping sample."

53. With regard to sanctions the DCR provide:

"3. Sanctions

3.1. FIG Sanctions against the Athlete

A. Exclusion for a certain time period from all international competitions (Championships – Cups – Tournaments – Bilateral Competitions, etc.).
(…)
If the substance found is an: Anabolic Steroid, Diuretic, Narcotic Analgesics, Stimulant, or similar substance:

- 1st violation: maximum suspension of 2 years
- 2nd violation: possibility of complete exclusion.

B. Loss of all possible awards (medal, cup, etc) – withdrawal of classification, the competitor next in sequence taking the place forfeited.
(…)

C. The Imposition of Sanctions
(…)
They [the sanctions] are applicable and commence from the date of the drug test."

54. The Panel notes that the Respondent's rules in the event of a positive test result for Diuretics (Fusosemide is a Diuretic, see above) provide for a suspension of up to two years. Accordingly, the rules allow the Respondent to exercise discretion as regards the duration of any such suspension.

55. It is well established that a two-year suspension for a first time doping offence is legally acceptable. However, the Panel would like to point out that any sanction imposed must not be disproportionate and should always reflect the extent of the athlete's fault (CAS 95/141 C. v/ FINA, Digest of CAS Awards I, p 215, 222; CAS 92/73 N. v/ FEI, Digest of CAS Awards I, p. 153, 159; CAS 96/156 F. v/ FINA, award of 6 October 1997 p. 48). Therefore, this Panel in its capacity as an appeals body enjoys discretion in reviewing also the extent of the sanction.

56. When taking into consideration all the elements of this case, in particular the fact that the Appellant acted negligently but without intent and that she was only 19 years old at the time of the offence, the Panel is of the view that, based on the evidence produced, there are

mitigating circumstances which warrant a considerable reduction from the maximum penalty allowed under the rules and regulations of the Respondent. As a result, the Panel is of the opinion that the suspension for a 12 month period and a "probation" for an additional 12 month period, as imposed by the Respondent, is adequate and appropriate.

57. The Panel was not afforded the opportunity to form its own impression of the athlete. It is difficult for the Panel to identify further mitigating circumstances if an athlete decides not to appear before the Panel for the hearing of his/her case which may have a very substantial impact on his/her future professional career. The Panel encourages the athletes in their own interest to participate in the hearings before the CAS.

58. As regards the date upon which the suspension should be deemed to have commenced, the Panel takes note of the Respondent's regulations according to which the sanction imposed by the Respondent should start to run from the date when the test was first carried out (30 August 2001). Accordingly, the Appellant's suspension should have ended on 29 August 2002.

59. However, the Panel must take into account the fact that on 14 June 2002 the President of the CAS Appeals Arbitration Division provisionally stayed the execution of sanctions against the Appellant until the final decision of this Panel. The Panel therefore needs to disregard any period of time during which the Appellant was legally allowed to compete. Such period of time needs to be added to the above-mentioned period of suspension.

60. For the avoidance of doubt, the Panel wishes to clarify that all competitive results which have been attained by the Appellant between 14 June 2002 and the day upon which this award is served on the Parties may not be cancelled by the Respondent.

61. Accordingly, the Appellant is suspended from the effective date of this award, i.e. 23 January 2003 until 8 April 2003, this date included.

The Court of Arbitration for Sport rules:

1. The appeal filed by T. is rejected.

2. The decision of the FIG Executive Committee of 8/9 May 2002 is confirmed.

3. (...).