ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

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

Arbitrators: Dr Tricia **Kavanagh**, Sydney, Australia

Mr. Hernan Jorge **Ferrari**, Attorney-at-law, Buenos Aires, Argentina

between

International Association of Athletics Federations (IAAF)

Represented by Mr. Mark **Gay**, Attorney-at-law, London, England

and

1. Confederación Argentina de Atletismo

Represented by its President, Mr. Hugo Mario **La Nasa**, Entre Rios, Argentina

2. Ms Solange **Witteveen**

Represented by Mr. Thomaz **De Paiva**, Attorney-at-law, Belo Horizonte/Nova Lima, Brazil

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I. SUMMARY OF THE ARBITRAL PROCEEDINGS

1. On 1 October 2002, the Appellant filed a Statement of Appeal, in which the Appellant appointed Dr Tricia Kavanagh, Industrial Relations Commission of New South Wales (Sydney), as arbitrator.

2. On 7 October 2002, Respondent N° 2 (Ms Solange Witteveen) acknowledged receipt of the Statement of Appeal and appointed Mr. Hernan Jorge Ferrari, Attorney-at-law (Buenos Aires), as arbitrator.

3. On 10 October 2002, the Appellant filed its Appeal Brief, containing the following request for relief:

> "**32.** *The IAAF, therefore, submits that CADA misdirected itself or otherwise reached an erroneous conclusion in exonerating Ms Witteveen of a Doping Offence. In consequence, the IAAF submits that Ms Witteveen is guilty of a Doping Offence and should be declared ineligible from competition for 2 years pursuant to IAAF Rules 60.2(a)(i).*
>
> **33.** *In addition, the IAAF requests that CADA and/or Ms Witteveen reimburses to the IAAF the Court Office fee of 500 CHF and its costs, to be ascertained.*"

The Appeal Brief included an expert witness statement of 9 October 2002 by Professor Christiane Ayotte and ten exhibits.

4. On 11 October 2002, Respondent N° 1 (CADA) indicated that the appointment of Mr. Hernan Jorge Ferrari as arbitrator constituted a joint appointment by itself and Ms Solange Witteveen.

5. On 23 October 2002, the Secretary General of the Court of Arbitration for Sport ("CAS") informed the parties of the appointment of Mr. Quentin Byrne-Sutton, Attorney-at-law (Geneva), as President of the Panel and confirmed the constitution of the Panel.

6. On 4 November 2002, Respondent N° 2 filed its Answer, including a witness statement dated 3 November 2002 by Professor Jari N. Cardoso and four exhibits. In conclusion, Respondent N° 2 stated:

> "**54.** *Hence, one finds that the existence of extremely relevant issues as outlined herein leads to the conclusion that the decision reached by the Arbitration Tribunal of Athletics in Argentina was correct, considering the non-existence of a doping offence attributed to the Athlete and deciding not to suspend the Athlete. Consequently, the Appeal Brief presented by the IAAF, should be dismissed. In addition, any costs should be imposed to the Athlete.*"

7. On 5 November 2002, Respondent N° 1 filed its Answer, concluding that "*...the Argentinean Athletics Federation respectfully requests its exclusion of the present case, since it is our understanding that CADA is not part of this Arbitration.*" The Answer included two exhibits.

8. On 12 November 2002, the Appellant sought leave to serve a Reply.

9. On the same day, Respondents N° 1 and 2 indicated they had no objection to the Appellant being granted a period of time to file a Reply.

10. On 20 November 2002, the Secretary General of CAS informed the Appellant that it was being granted a deadline until 2 December 2002 to file a Reply.

11. On 2 December 2002, the Appellant filed its Reply, together with nine exhibits. In this Reply, the Appellant submitted "*...that CADA should not be excluded as a party. Instead, it should (to whatever extent it chooses) either involve itself in the dispute, by actively advising the athlete or it should leave it to the athlete herself to defend her position. In neither case does CADA cease to be a party to this dispute.*"

12. On 6 December 2002, the Secretary General of the CAS informed the parties that the Respondents were been given a deadline until 19 December 2002 to file a Rejoinder.

13. On 10 December 2002, the Secretary General of the CAS issued the Order of Procedure N° 1 on behalf of the Panel. Under § 9 of this Order of Procedure, the Parties were invited to declare by 19 December 2002 whether they requested a hearing in this matter. § 7 of the Order indicated that on the basis of R58 of the Procedural Rules of the Code of Sports-related Arbitration (the "Code"): '*The panel shall decide the dispute pursuant to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, pursuant to the law of Argentina.*"

14. On 11 December 2002, the Appellant objected to the content of § 7 of the Order of Procedure, stating that according to: "*...IAAF Rule 21.9, the CAS panel shall be bound by the IAAF Rules and regulations. IAAF Rules are clearly governed by Monegasque law and therefore Argentinean law is not applicable to the CAS proceedings.*" The Appellant also indicated that it required a hearing.

15. On 12 December 2002, the Secretary General of CAS informed the Respondents they should indicate by 19 December 2002 their position with regard to the applicable law.

16. On 19 December 2002, Respondent N° 1 filed its Rejoinder. In this submission, Respondent N° 1 concluded that "*...it will leave the athlete defend her own positions and will participate in this arbitration as a mere party and not interfering in any submission presented by the IAAF or the athlete herself.*"

17. On 19 December 2002, Respondent N° 2 filed its Rejoinder. In this submission, Respondent N° 2 confirmed the prayers contained in its submission of 4 November 2002. The Rejoinder included one exhibit.

18. In a separate letter the same day, Respondent N° 2 indicated that: "*Concerning to the IAAF's proposal about the applicable law, the Athlete does not agree with the IAAF position. However, in an alternative way, the Athlete suggests that the panel shall decide the dispute pursuant to either IAAF Rules, the IOC Regulations or, in absence of choice, pursuant to the Swiss law, in conformity with the Code of Sports-Related Arbitration – CAS.*" At the same time, Respondent N° 2 requested a hearing.

19. On 24 January 2003, the Secretary General of CAS sent the parties the Order of Procedure N° 2, issued on behalf of the Panel. Under § 2.4 of this Order, Respondent N° 1 was requested to indicate by 31 January 2003 whether it intended to participate in the hearing and, if so, whether it wished a representative to be heard. With regard to the applicable law, § 3 of the Order indicated that: "*The arbitral panel has taken note of the Parties' positions and will decide in its final award what national laws, if any, govern this case in addition to the applicable regulations. In order to leave the issue open, § 7 of the Order of Procedure dated 10 December 2002 is hereby replaced by R58 of the Code, which states the following: '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 which has issued the challenged decision is domiciled.'*"

20. On 29 January 2003, the Appellant accepted the members of the Panel "*...will decide what national law, if any, governs the dispute in their final award.*" At the same time, the Appellant submitted that R58 of the Code is inappropriate to apply when dealing with appeals by international federations against national federations and such rule should therefore not be applied. The Appellant concluded CAS should consider drafting new rules and, in this arbitration, the Panel should determine the applicable national law by deciding which national law has the closest and most real connection with the dispute. In consequence, the Appellant indicated it would not sign the Order of Procedure N° 2 and proposed it be amended to contain a section stating: "*The parties agree that the Panel shall decide the dispute in accordance with the IAAF Rules. If the Panel finds it necessary to select a substantive law, it should do so at the hearing.*"

21. On 5 February 2003, the Secretary General of CAS informed the parties "*...the Panel has taken note of the position expressed by IAAF in Mr. Mark Gay's fax of 29 January 2003 and will decide in its final award, if need be, whether art. R58 of the Code of Sports-related Arbitration is applicable or not in determining the national law which governs the dispute.*"

22. Between 13 February and 26 February 2003, an exchange of correspondence took place between the Parties and the Secretariat of the CAS, whereby the Parties agreed on the following organisational matters:

- The hearing would take place on 11 March 2003 at the premises of the CAS in Lausanne.

- ? Ms Solange Witteveen would take part in the hearing to make a declaration.
- ? The Appellant's expert witness, Professor Ayotte, would be examined via a telephone conference, by calling her in Montreal.
- ? Respondent N° 2's expert witness, Professor Cardoso, would be examined via a telephone conference, by calling him in Rio de Janeiro.
- ? The Parties would not be calling any witnesses as to the facts.

23. On 7 March 2003, counsel for the Appellant made certain proposals regarding the timetable of the hearing.

24. The hearing took place as planned on 11 March 2003. Respondent N° 1 chose not to appear.

25. The final timetable was fixed at the beginning of the hearing, by agreement between the Panel and the Parties' counsel.

26. During the hearing, Ms Solange Witteveen gave a detailed explanation regarding her position.

27. During the hearing, the examination of Professors Ayotte and Cardoso took place by telephone conferences as planned.

28. During the hearing, the Parties agreed on various additional documents being filed. Consequently, four new exhibits of the Appellant were admitted and seven new exhibits of Respondent N° 2. In addition, for ease of reference and with Respondent N° 2's agreement, the Appellant put a binder of already filed miscellaneous documents at the Panel and the Parties' disposal.

29. After the hearing was closed, the Panel deliberated and issued the holding of its award. The holding of the award was communicated to the counsel for Parties and to Ms Solange Witteveen, orally and in writting, immediately after the deliberation, i.e. on 11 March 2003. Simultaneously, the panel indicated that its award with the reasons would be following at a later stage.

II. THE PARTIES AND THE ORIGIN OF THE DISPUTE

A. The Parties

30. The Appellant, the *International Association of Athletics Federations* ("IAAF"), is an international association comprising national federations as members. It promotes and governs different aspects of track and field athletics, road running, race walking and cross-country running. IAAF has its seat in Monaco.

31. Respondent N° 1, the *Confederación Argentina de Atletismo* ("CADA"), is the national federation of athletics in Argentina and a member of the IAAF. As such, it regulates athletics in Argentina. CADA has its seat in Entre Rios.

32. Respondent N° 2, Ms Solange Witteveen, is a world class high jumper and member of CADA.

B. The Origin of the Dispute

33. On 19 May 2001, Ms Witteveen was subject to a doping control at the South-American Championships in Manaus, Brazil, after finishing first in the high jump with a height of 1m97, a new South-American record. Upon providing her sample, Ms Solange Witteveen filed the IAAF "Doping Control Form", in which, under the heading "Drugs declared to have been recently used", one finds the following indication: "*Amino acidos y antioxydantes*".

34. Her sample was dispatched to the IOC accredited laboratory in Montreal for an anti-doping analysis.

35. Due to delays during transport, the "A" sample analysis only began on 30 June 2001.

36. On 11 July 2001, the IAAF informed CADA that the test was positive due to having revealed the presence of a substance named **Pemoline**. The IAAF requested that the athlete provide an explanation and asked whether the athlete wanted the reserve "B" sample analysed.

37. On 15 July 2001, Ms Solange Witteveen provided her explanation in the form of a letter to the President of CADA, in which she stated the following (English translation received by IAAF):

> *"As I was notified of the presence of the substance pemoline in the sample you collected from me during the doping control procedure on May 19th this year in Manaus, Brazil, on the occasion of the South American Athletic Championship, I would like to express the following.*
>
> *I firmly declare that I did not and do not take, at least voluntarily, any substance banned by the International Amateur Athletic Federation (IAAF) Doping Control Rules.*
>
> *First of all, I would like to state clearly that all medication I took – on the day of the competition, the previous days and during the preparation period – has been provided to me by my personal physician, Dr. Walter Mira, who works at the Centro Nacional de Alto Rendimento Deportivo (CeNARD) (Sport High Performance National Centre) in Buenos Aires, Argentina.*
>
> *I have never taken any medicine without my physician's consent and approval, neither have I used any banned substance as I do not agree with getting any sport advantage through prohibited substances.*

I would also like to state clearly that I was always interested in being informed about everything concerning doping as it is a very important matter in sports. My interest and concern in that respect are well known and made the Secretary of Sports invite me as a panelist to a Doping Conference where I witnessed my categorical rejection on the use of banned substances in sports. On the other hand, during my nine years in the federative activity, I have gone through more than ten doping controls during competition and out of competition. I have even asked personally for some of them, even though they have not been programmed nor had I been random chosen. I attach, as an example, the doping control form corresponding to my previous South American record which I established in Italy.

I request that the reserve "B" sample be tested and, in case pemoline is identified, a report be attached detailing the substance and its metabolites concentrations.

Finally, I would like to inform you that I will attend the "B" counter analysis on a date to be agreed."

38. On 17 July 2001, the foregoing explanations of Ms Solange Witteveen, including her desire to have the "B" sample tested, were forwarded by CADA to the IAAF.

39. On 18 July 2001, the IAAF replied, among others, that: "*Unfortunately, the explanation provided by the athlete cannot be deemed as acceptable. Therefore, ... the test shall be regarded as positive and the athlete should be provisionally suspended at this time pending the resolution of the case.*"

40. Consequently, from 18 July 2001 onwards, Ms Solange Witteveen was subject to a provisional suspension.

41. On 4 August 2001, the "B" sample was opened and analysed at the Montreal laboratory, in the presence of Ms Solange Witteveen, her expert Professor Cardoso, and her lawyer, Mr. De Paiva. The "B" sample analysis confirmed the positive result of the "A" sample, i.e. the presence of Pemoline.

42. On 28 August 2001, the IAAF informed CADA that the analytical material relating to the "B" sample "*...confirms the adverse finding in the athlete's A sample.*"

43. On 19 December 2001, in accordance with the IAAF "*Procedural Guidelines for Doping Control*", Ms Solange Witteveen communicated to CADA, in the form of a written submission of 17 December 2001 by her lawyer, Mr. de Paiva, the reasons for which she considered she had not committed a doping offence. This submission included, as exhibits, written expert opinions by Professor Cardoso and Professor Otmaro E. Roses.

44. On 15 March 2002, the IAAF confirmed its position despite Ms Witteveen's foregoing written submission.

45. Thereafter, in accordance with the IAAF Rules and with the Statutes of CADA, Ms Solange Witteveen requested the right to be heard by the arbitral court established by CADA for such purposes.

46. On 3 May 2002, Ms Solange Witteveen, assisted by her lawyer Mr. de Paiva, was heard by the arbitral court set up in conformity with the CADA Statutes.

47. On 20 June 2002, the arbitral court in question decided that Ms Solange Witteveen was not guilty of a doping offence. One of the arbitrators, Dr. Juan Carlos Rivera, rendered a dessenting opinion.

48. On 21 August 2002, the decision of the arbitral court was sent to the IAAF by the President of CADA and received the same day by the IAAF.

49. The IAAF determined to appeal the finding of the arbitral court in question, and filed its Statement of Appeal with the CAS on 1 October 2002.

III. THE FACTS AND THE PARTIES' CONTENTIONS

A. Undisputed Facts

50. In the course of their examination by telephone conference during the 11 March 2003 hearing, the Parties' respective experts, Professors Ayotte and Cardoso, both stated in substance that:

- ? The testing of samples "A" and "B" by the laboratory in Montreal constituted reliable tests.
- ? The tests in question were not designed to determine the quantity of Pemoline in the samples but only its presence.
- ? The tests of samples "A" and "B" both revealed the presence of Pemoline.
- ? Pemoline is not endogenous in the human body.
- ? Pemoline is not used in food.
- ? Consequently, Pemoline could only be found in food through some form of contamination.
- ? Pemoline is only available on prescription.

51. During the hearing, the Appellant and Respondent N°2 agreed that, whether or not there had been a prior agreement on such point, a period of ineligibility of one year, seven months and twenty-four days should be deducted from Ms Solange Witteveen's sanction if the Appeal were to be upheld.

B. The Parties' Contentions

i. The Appellant

a) *Jurisdiction*

52. The Appellant considers Respondent N° 1 (CADA) must be deemed a party to these proceedings. The Appellant deems the CAS to have jurisdiction based on IAAF Rule 21.2, which provides that all appeals shall be referred to the CAS "*...within 60 days of the date of communication to the prospective Appellant of the decision that is to be referred.*"

b) *Applicable Law*

53. The Appellant considers the Panel must decide the dispute in accordance with IAAF Rules. The Appellant also considers that if the Panel finds it necessary to select a national law, it should do so by deciding which national law has the closest and most real connection with the dispute, because R58 of the Code is inappropriate when dealing with appeals by international federations against national federations.

c) *Doping Offence*

i. The Appellant

54. The IAAF considers the arbitral court set up by CADA misdirected itself when exonerating Ms Solange Witteveen of a doping offence on the basis that the concentration of Pemoline said to be present in the athlete's sample was neither performance enhancing nor damageable to Ms Solange Witteveen's health.

55. The IAAF submits it cannot be in dispute the samples analysed by the Montreal laboratory were those of Ms Solange Witteveen and that the results of the tests clearly demonstrated the presence of a prohibited substance, Pemoline. Consequently, the IAAF submits it has discharged the burden of proof it carries to show that Ms Solange Witteveen was guilty of a doping offence.

56. The IAAF submits that the legal test for determining if a doping offence has been committed is whether a prohibited substance is found in the athlete's body tissues or fluids and submits:

"*The relevant IAAF Rules dealing with doping are as follows:*

(i) IAAF Rule 55.1 states:

« Doping is strictly forbidden and is an offence under IAAF Rules. »

(ii) IAAF Rule 55.2 states :

« The offence of doping takes place with [sic] either :

(i) a prohibited substance is present within an athlete's body tissues or fluids ;... »

(iii) IAAF Rule 55.3 states :

« Prohibited substances include those listed in Schedule 1 to the « Procedural Guidelines for Doping Control »...

(iv) Schedule 1, Part I of the IAAF Procedural Guidelines for Doping Control states :

*« **(b) Amphetamines : e.g. ...pemoline** »*

(v) IAAF Rule 55.4 also include the important warning :

« It is an athlete's duty to ensure that no substance enters his body tissues or fluids which is prohibited under these Rules is present in his body tissues or fluids. Athletes are warned that they are responsible for all or any substance present in their body. »

(vi) IAAF Rule 60.1 states :

« For the purpose of these Rules, the following shall be regarded as « doping offences » (see also Rule 55.2) :-

(i) the presence in an athlete's body tissues or fluids of a prohibited substance... »

(vii) IAAF Rule 60.2 states :

« If an athlete commits a doping offence, he will be ineligible for the following periods :

(a) for an offence under Rule 60.1(i) or 60.1(iii) above involving the substances listed in Part I of Schedule 1 of the « Procedural Guidelines for Doping Control » or, for any other offences listed in Rule 60.1 :-

(i) first offence – for a minimum of two years from the date of the hearing at which it is decided that a Doping Offence has been committed. When an athlete has served a period of suspension prior to a declaration of ineligibility, such a period of suspension shall be deducted from the period of ineligibility imposed by the relevant Tribunal ;... »

57. In support of its foregoing position and interpretation of the IAAF Rules, the Appellant produced the copy of a witness statement dated 16 November 2002 by Professor Arne Ljungqvist, which was filed by the IAAF in a different arbitration (CAS 2002/A/399). In this statement, Professor Ljungqvist, who is Senior Vice President of the IAAF and Chairman of the IAAF's Medical Anti-Doping Commission, states, among others, that the IAAF anti-doping system is built around a strict-liability rule with fixed sanctions, in order to promote the uniformity of sanctions throughout track and field athletics. Professor Ljungqvist further indicates that since March 2001, the IAAF has decided to adopt a policy of not reinstating athletes having taken contaminated supplements, as the dangers of taking supplements are widely known. In this relation, Professor Ljungqvist indicates that "*...the IOC had been warning athletes since 1999 of the dangers of taking supplements.*" Professor Ljungqvist goes on to underline that although, in order to prevent the strict-liability rule from leading to

absurd results in certain cases, the IAAF Rules include a provision allowing for the reinstatement of an athlete by the IAAF's Council on the basis of exceptional circumstances, in 2002 the IAAF decided to modify § 4.1 of its *'Procedural Guidelines for Doping Control"* in order to expressly exclude the absorption of contaminated supplements as a possible basis for invoking exceptional circumstances.

58. The IAAF submits, in addition, that it has the practice of rigorously enforcing its Rules and sanctions, by referring to arbitration all cases where a national federation refuses to apply the strict-liability rule and fixed sanctions. The IAAF invoked several precedents in this respect.

59. Finally, the IAAF submits that the CAS precedents relied on by Respondent N° 2 concerning cases where the strict-liability rule and fixed sanction were not applied are irrelevant to the present case, because such precedents either involved applicable rules without fixed sanctions or related to international federations which did not rigorously enforce the principle of strict liability and fixed sanctions.

60. During its closing submission, the Appellant indicated it had decided not to seek any costs whatever the outcome of the appeal.

ii. Respondent N° 1

a) *Jurisdiction*

61. Respondent N° 1 indicated it accepted being a party to this arbitration while at the same time it would refrain from participating actively or making any submissions on the merits.

iii. Respondent N° 2

a) *Jurisdiction*

62. Respondent N° 2 has not challenged the jurisdiction of the CAS, but submits that "... *the decision reached by the "Arbitration Tribunal of Athletics" from Argentina cannot be reformed, since all matters of the case have been analysed to exhaustion, applying all pertinent legal bases of IAAF rules*".

b) *Applicable Law*

63. Respondent N° 2 contests the Appellant's argument that the applicable national law is Monegasque law. Respondent N° 2 submits as an alternative: "*...that the panel shall decide the dispute pursuant to either IAAF Rules, the IOC Regulations or, in absence of choice, pursuant to the Swiss law, in conformity with the Code of Sports-Related Arbitration – CAS.*"

c) *Doping Offence*

64. During her oral statement at the hearing on 11 March 2003, Ms Solange Witteveen notably declared the following:

? Under the supervision of Dr. Walter Mira, she had been using supplements for a number of months preceding the South-American Championships of May 2001.

? Such supplements contained six main categories of substances, none of which are prohibited by the IAAF.

? A local chemist in Argentina was producing her supplements, in the form of either pills or a powder solution, under the instructions of Dr. Walter Mira.

? Dr. Walter Mira never indicated the supplements could contain any prohibited substances, whether Pemoline or any other. It was Dr. Walter Mira who advised her what drugs to declare if she was required to complete a Doping Control Form. His advice is reflected in the Doping Control Form she completed on 19 May 2001.

? She has been active in her declarations against doping in sports, as proven by her participation in events against doping and her voluntary requests for doping controls. She never had any intention of taking Pemoline and was extremely surprised to discover she had tested positive.

? Her first thought was that she had been the victim of an act of sabotage. In that relation, she recalled having eaten a slice of cake with white icing, which gave her a stomach ache, prior to the May 2001 South-American Championships.

? She later dismissed the idea of sabotage and now believes it was most likely her supplements that were contaminated.

? She believes the chemist may have handled substances containing Pemoline and that a spatula or other instrument being used to fabricate her supplements may have been infected. Such she submits would explain the very low concentration of Pemoline found in her urine sample.

? After the positive test, Dr. Walter Mira confirmed during a discussion with her that no Pemoline was contained in any substance forming part of the supplements.

? Based on what she has learnt about Pemoline since the positive test, she believes it could not have enhanced her performance and, if any thing, would have unfavorably affected her co-ordination due to its described stimulating effect.

? During the period between when her sample was taken and when it was tested, she continued to take the supplements, believing they were fine.

? Because it took the IAAF 53 days to have the sample tested, the stock of supplements she was using before the South-American Championships was depleted

by the time she was informed of the results of the test. This prevented her from having the supplements analyzed after the positive test to verify whether they were contaminated.

? After receiving the results of the tests from the laboratory in Montreal, she voluntarily had other tests undertaken in Argentina and none of them revealed the presence of Pemoline.

? She does not contest that the samples tested by the Montreal laboratory were hers or claim that the tests undertaken were unreliable. However, she believes she is not to be held responsible for what must have been a contamination. She regrets that the IAAF's delay in testing her samples prevented her from analyzing the supplement.

65. In substance, Respondent N° 2 submits the referred decision should be confirmed. In the alternative, Respondent N° 2 submits Ms Solange Witteveen's suspension should be replaced by a warning.

66. Respondent N° 2 submits that the applicable IAAF Rules must be interpreted in light of:

? Precedents of the CAS which have tempered the application of strict-liability rules and fixed sanctions (notably CAS 95/141, CAS 96/156) and certain decisions to the same effect by national federations.

? The "*World Anti-Doping Code*" (version 3.0 of 20 February 2002) (the "WADC"), the Resolution adopted in that connection at the "*World Conference on Doping in Sport*" held in Denmark on 5 March 2003, as well as a summary legal opinion (dated 14 February 2003) by Professors Gabrielle Kaufmann-Kohler and Giorgio Malinverni and Mr. Antonio Rigozzi regarding the conformity of WADC with principles of international law and human rights.

? IOC rules, notably the lists of substances entitled IOC's '*Prohibited Substances and Prohibited Methods*" (the "IOC list"), constituting an appendix to the "*Olympic Movement Anti-Doping Code*".

67. With respect to the CAS precedents invoked and the newly adopted WADC, Respondent N° 2 submits that they are based on the overriding principle any sanction must reflect an athlete's degree of fault.

68. Respondent N° 2 submits that Solange Witteveen's innocence is supported by the fact the concentrations of Pemoline found in the samples were too low to be performance enhancing. She relies also on her prior exemplary behaviour. A fact for the Tribunal to consider must be that she continued jumping after reaching first place despite already holding the South-American record and the knowledge that setting a new record would entail a doping control test.

69. In addition, the Respondent N°2 submits that the IAAF Rules undermine the IAAF's contention they are based on fixed sanctions. An example relied upon is Rule 2.53 of the *Procedural Guidelines for Doping Control* (the "Procedural Guidelines") which provides the IAAF with some flexibility in determining whether a sanction should be applied and IAAF Rule 60.9 (combined with § 4 of the Procedural Guidelines) which gives the IAAF Council the authority to reinstate an athlete around exceptional circumstances.

70. As to the IOC list of banned substances, the Respondent N° 2 submits the IOC has merged amphetamines and stimulants into one broad category including substances such as caffeine. The IOC therefore tolerates a certain concentration of some substances in the body. Respondent N° 2 states that the IAAF adopted the foregoing IOC list at a Council meeting on 15 November 2002, during which, according to the Respondent N°2, the Council decided: "*... the prohibited substances list used by the IAAF should be updated so that it is exactly the same as the IOC-WADA list*". Based on the foregoing and the submission that Ms Solange Witteveen's samples contained a very low concentration of Pemoline which could not be performance enhancing, Respondent N° 2 contends that in the worst case IAAF Rule 60.2(b)(i) should apply, which provides for a public warning and a disqualification in case of a first offence.

71. Finally, Respondent N° 2 submits that if the CAS were not entitled to review fixed sanctions in order to account for the degree of fault and the need for proportionality, the CAS could not serve its purpose as the appellate body under the IAAF Rules.

IV. DISCUSSION OF THE CLAIMS

A. Jurisdiction

72. The Respondents do not dispute that the appeal was filed in a timely manner in application of IAAF Rule 21.2 (which is quoted supra, §52) and R49 of the Code.

73. Considering Respondent N° 1 has elected to formally remain a Party to these proceedings and the other Parties have not contested its right to do so, the Panel deems this arbitration to be a multiparty arbitration including Respondent N° 1.

74. The Panel considers that, contrary to Respondent N° 2's contention that the referred decision's analysis has left no room for review, it has full power to review the facts and the law *de novo* in application of R57 of the Code.

B. Applicable Law

75. Since chapter 12 of the Swiss Private International Law Act ("PILact") governs all international arbitrations with their seat in Switzerland and this arbitration constitutes an international arbitration with its seat in Switzerland as defined by article 176 of the PILact, article 187 PILact is the underlying conflict-of-law rule upon which to determine the applicable rules of law.

76. According to article 187 of the PILact (free translation): "*The Arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.*"

77. According to scholarly opinion[1], article 187 PILact gives the parties a large degree of freedom in selecting the applicable rules of law, notably the possibility of choosing conflict-of-law rules (to determine the governing substantive law), a national law or private regulations.

78. In addition, it is undisputed that the parties' choice of law can be made tacitly and result from their conduct once the arbitration is pending[2].

79. In the present case, R58 of the Code of Sports-related Arbitration, which can be deemed a form of conflict-of-law rule, could be considered the conflict-of-law rule chosen by the Parties, since the IAAF, CADA and Ms Solange Witteveen are all subject to the IAAF Rules, which, by reference, include the Code when a dispute is referred to arbitration.

80. R58 of the Code confirms the parties' freedom of choice, while underlining the primary application of the relevant sports regulations, since it 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.*" (Our emphasis)

81. Thus, both article 187 PILact and R58 of the Code allow the parties to chose the application of private regulations.

82. The Panel considers the Parties' declarations in their correspondence indicate a common acceptance the Panel adjudicate the dispute on the basis of the athletics' and anti-doping regulations it deems applicable.

83. Consequently, the Panel need not apply a national law and shall decide the dispute on the basis of the IAAF Rules and Procedural Guidelines, which constitute the regulations applicable to all the Parties as the IAAF Rules have been accepted by CADA as a member of the IAAF and by Ms Solange Witteveen as a member of CADA.

84. The Panel considers it unnecessary to determine whether there are any grounds[3] upon which to formally apply the IOC rules and/or the WADC alternatively invoked by Respondent

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[1] See e.g. A. Bucher/P.-Y. Tschanz, International Arbitration in Switzerland, Basle and Frankfurt on the Main, 1988, pp. 95-128; P. Lalive/J.-E. Poudret/C. Reymond, Le droit de l'arbitrage interne et international en Suisse, pp. 387-403.

[2] See e.g. A. Bucher/P.-Y. Tschanz, op.cit., p. 99, N° 200; P. Lalive/J.-E. Poudret/C. Reymond, op.cit, pp. 390, N°4.

N°2, since, as discussed below, the content of such rules would not modify the Panel's decision.

C. The Doping Offence

85. For reasons of clarity, the Panel deems it necessary to distinguish the issues surrounding the question of strict liability (i) from the issues relating to the sanction applied by the IAAF (ii).

i. Strict Liability

86. The Panel considers that the IAAF Rules encompass a rule of strict liability, i.e. the principle that a doping offence is constituted by the presence of a prohibited substance in the athlete's body irrespective of whether such presence is due to any fault (intention or negligence) of the athlete.

87. The foundation of this principle is stated in **IAAF Rule 55.2(i)**, whereby "*The offence of doping takes place when … a prohibited substance is present within the athlete's body tissues or fluids*", and in **IAAF Rule 60.1(i)**, which provides that "*For the purpose of these Rules, the following shall be regarded as "doping offences" (see also Rule 5.2): … the presence in an athlete's body tissues or fluids of a prohibited substance*". **IAAF Rule 55.4** further specifies, "*It is an athlete's duty to ensure that no substance enters his body tissues or fluids. Athletes are warned that they are responsible for all or any substance present in their body*". The Tribunal determines the foregoing rules emphasize the mere presence of a prohibited substance in the athlete's body constitutes a doping offence, thereby implicitly excluding the relevance of the athlete's fault in determining the existence of an offence[4].

88. Respondent N° 2 has not invoked any principle of international law or rule of national law which would make the application of the IAAF's foregoing rules on strict liability unacceptable in the present case. On the contrary, the legal opinion and the rules referred to by Respondent N°2 support the admissibility, under international law and in consideration of human rights standards, that international federations adopt rules of strict liability.

89. For example, the WADC invoked by Respondent N° 2 includes a rule of strict liability (see its article 2.1). In WADC version 3.0, invoked by Respondent N°2, there is a comment to Article 2.1 stating that: "… *the Code adopts the rule of strict liability which is found in the OMADC and the vast majority of existing anti-doping rules*". Moreover, in the legal opinion produced by Respondent N° 2 in connection with the WADC, it is stated that: "*On the basis of a through* (sic) *analysis of human rights and of the validity of possible restrictions, we come to the following conclusions with respect to the draft provisions of the Code: […] 1. The provisions of the Code about strict liability, pursuant to*

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[3] For example, as the expression of certain anti-doping principles forming part of a "*lex sportiva*".

[4] Regarding international federation rules which explicitly state that the athlete's fault does not come into consideration in establishing the doping offence, see e.g. the discussion by D. Oswald, Absolute and Strict Liability in the Fight Against Doping, in: CAS Seminar – 2001, Lausanne 2002, p. 75.

which the presence of a prohibited substance in an athlete's specimen constitutes an anti-doping rule violation without regard to fault or negligence, is in conformity with human rights standards"[5].

90. In order to establish the existence of a doping offence under a rule of strict liability the Appellant has the burden of proving that a prohibited substance was in Ms Solange Witteveen's urine sample and that the testing of the samples took place in correct conditions[6].

91. The Panel rejects Respondent N° 2's contention that an interpretation of the IAAF's list of prohibited substances, in light of the IOC list, leads to the conclusion that Pemoline must be treated in a similar fashion to Caffeine with the consequence that a certain tolerance must be admitted. Indeed, whether or not the content of the IOC list invoked by Respondent N°2 has been adopted by the IAAF, the Panel can find no indication in the IOC list that Pemoline constitutes one of the listed stimulants for which a tolerance is accepted. Certain substances such as Caffeine are explicitly singled out on the list as being authorized below a defined level of concentration. The fact that Pemoline and Caffeine are found within the same broad category of stimulants in the IOC list is irrelevant, we find, since a distinction is made within the category distinguishing substances for which a tolerance is allowed (indicated by means of an asterisk and a corresponding footnote) and the others.

92. We find Pemoline must be deemed a prohibited substance for which no tolerance is allowed, as defined and listed in Part I of Schedule 1 of the IAAF Procedural Guidelines.

93. With regard to the correct identity/handling of the samples and the reliability of the tests, the Panel considers the Appellant has met its burden of proof. Both expert witnesses indicated during their examination that they deemed the tests in question and the results (samples "A" and "B" revealing the presence of Pemoline) to be entirely reliable. Moreover, Professor Cardoso was present with Ms Solange Witteveen at the Montreal laboratory on 4 August 2001 when the sample "B" was opened. Respondent N° 2 has not contested the validity of the samples or the reliability of the tests. Ms Solange Witteveen criticized the delay in shipment of the samples to Montreal, but did not allege this affected the result of the tests insomuch as they revealed the presence of Pemoline.

94. For the above reasons, the Panel considers Ms Solange Witteveen to be guilty of a doping offence as defined by IAAF Rules 55.2(i) and 60.1(i)(a).

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[5] G. Kaufmann-Kohler, G. Malinverni, A. Rigozzi, Summary Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law, Geneva, 14 February 2003. See also, the case law quoted by D. Oswald, op.cit., p. 74.

[6] In this relation, IAAF Rule 21.9 provides that: "*In any doping cases before CAS, the IAAF shall have the burden of proving, beyond doubt, that a doping offence has been committed*". Regarding such burden of proof in general, see e.g. J.-P. Morand, Burden of Proof & Standard of Proof in Appeal Proceedings Before the CAS Panels, in: CAS Seminar – 2001, Lausanne 2002, p. 84; D. Oswald, op.cit., pp. 75-76.

ii. The Sanction

95. Ms Solange Witteveen's liability having been determined, the question remains whether the Panel is entitled to review the sanction applied by the IAAF and, if so, whether, in light of the nature of the doping offence and the circumstances in which it occurred, the Panel should reduce the sanction and, if so determined, then at what level.

96. A distinction needs to be drawn between the sporting sanction (a) and the disciplinary sanction (b).

a) *Sporting Sanction (disqualification)*

97. With regard to the sporting sanction for a doping offence, IAAF Rule 59.4 provides that "... *where testing was conducted in a competition, the athlete shall be disqualified from that competition and the result amended accordingly*".

98. Regarding this aspect of the sanction, it is not clear from Respondent N°2's submissions what its position is. Indeed, although Respondent N°2 does not explicitly refer to the disqualification, Respondent N°2 submits that the CAS has the powers to "*vary any kind of penalty*" and requests specifically that the referred decision, which concludes "... *that the performances achieved by the athlete during the South American Championships held in Manaos, are considered completely valid...*"[7], be confirmed by the Panel.

99. Respondent N°2 has not invoked any rules which would allow this Panel to cancel the disqualification of Ms Solange Witteveen.

100. Although the IAAF Rules are silent as to the outcome of a disqualification, the Panel considers that the possibility of canceling it, i.e. of re-qualifying Ms Solange Witteveen, is implicitly excluded by the IAAF Rules. The only procedure the IAAF Rules provide to modify a sanction concerns the right of an athlete to apply for re-instatement, on the basis of exceptional circumstances, during the period of ineligibility (IAAF Rule 60.9 and §4 of the IAAF Procedural Guidelines).

101. The Panel considers there is no applicable principle of international law or rule of national law which requires this Panel to disregard the IAAF's Rules' implicit exclusion of the possibility of re-qualifying an athlete. On the contrary, the Panel considers it may be a generally accepted principle among sports federations, their members and athletes that any rule of strict liability implies a fixed sanction of disqualification that cannot be modified[8]. Otherwise,

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[7] English translation (by CADA) of the last page of the decision rendered by the court of arbitration established by CADA.

[8] In this relation, it is interesting to refer to the following passage of an article by Richard H. McLaren: "*Disqualification and the loss of any benefits arising out of the event at which the athlete tested positive is a universal sanction which occurs once it has been established that an athlete has breached a particular sport's doping rules. Disqualification and its consequences occur whether or not the athlete intended to dope. There is a general consensus among arbitrators and athletes that the*

too much uncertainty and a risk of unequal/arbitrary treatment would arise for medal winners and record holders. Re-qualification would need to be based on an analysis of whether the use of the prohibited substance was performance enhancing for a given athlete on a given day[9].

b) *Disciplinary Sanction (suspension)*

102. With regard to the disciplinary sanction, the Panel considers that the IAAF Rules provide in part for a fixed sanction. Relevant in this relation is the wording of IAAF Rule 60.1(i)(a), since it stipulates that for a first offence ineligibility shall be for "... *a **minimum** of two years*..." (our emphasis).

103. That the IAAF intends its sanctions to be fixed as a matter of policy, in order to achieve a certain uniformity of sanctions, was convincingly submitted by the Appellant with reference to the IAAF's practices and to the statement of Professor Arne Ljungqvist.

104. That said, Professor Ljungqvist's statement as well as IAAF Rule 60.9 and §4 of the Procedural Guidelines make it clear that the IAAF's sanctions are not "set in stone", i.e. that a special procedure exists to review the sanction in case of "*exceptional circumstances*". Professor Ljunqvist indicates that this exception is based on the IAAF's realization that its strict-liability rule "... *could lead to absurd results*".

105. Professor Ljungqvist also declares that: " ... *to ensure that there was uniformity, it was decided that this power* [to review a sanction] *would be exercised solely by the IAAF Council*". This is confirmed by the wording of IAAF Rule 60.9 and §4 of the Procedural Guidelines.

106. Thus, the IAAF recognizes that despite not wanting flexible sanctions, it believes some form of "escape route" is necessary when applying fixed sanctions within a system of strict liability.

107. It is not altogether clear from the IAAF Rules how this special procedure in front of the IAAF Council ties in with the authority given to the CAS to adjudicate all appeals in doping-related disputes between the IAAF, its members and athletes (IAAF Rule 21.2)[10].

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event results of doped athletes will be invalidated. This is an illustration of a fixed sanction." (The Sanctions in Doping Cases, the International Federations & CAS Jurisprudence, in: CAS Seminar 2001, Lausanne 2002, p. 87.)

[9] In this relation, it is also difficult to imagine how in practice a CAS panel could have the expertise and be given the authority to determine whether such and such a substance or concentration of substance in an athlete's body affected her or his performance.

[10] For example, is a decision by the Council on re-instatement for exceptional circumstances subject to appeal, contrary to Professor Ljungqvist's statement that the Council has sole authority to decide on such circumstances? If so, does the athlete have to exhaust the special procedure in front of the Council before appealing to the CAS (R47 of the Code) and would the CAS be limited to applying the criteria for exceptional circumstances defined in §4 of the IAAF Procedural Guidelines? If not, is an athlete entitled

108. If the IAAF's Council is deemed the sole authority entitled to examine "*exceptional circumstances*" as defined by the IAAF Rules, the question arises whether the CAS is, in effect, left with any power to modify a sanction.

109. The Panel considers it need not resolve such question in the present case since, in any event, Ms Solange Witteveen has not managed to establish her absence of fault[11] with regard to the doping offence. Thus, the possibility of reducing the sanction does not come into our consideration on the basis of the IAAF rules. Moreover, since Ms Solange Witteveen is deemed at fault, it cannot be the Panel's role to determine whether, in itself, the minimum penalty of two years suspension provided by the IAAF Rules is adequate or not for the type of doping offence concerned. The identification of banned substances for an athlete and the degree to which they are performance enhancing, which may affect the categories of sanction that are fixed, are matters for the international federations to decide and re-evaluate on a regular basis in light of experience and the state of scientific knowledge[12] and in accordance with their particular agreements with relevant bodies, e.g. IOC, WADA.

110. The Panel considers for the following reasons that Ms Solange Witteveen has not established that her doping offense was unintentional:

- Pemoline is not found in any foodstuff and in principle can only be obtained on prescription.
- Consequently, Ms Solange Witteveen cannot have been contaminated through any food forming part of her ordinary diet.
- Ms Solange Witteveen herself ruled out the idea of an act of sabotage and has offered no evidence that an act of sabotage took place or might have been attempted.
- Ms Solange Witteveen has offered no evidence that her supplement was contaminated or that there was any risk that it be contaminated. For example, no evidence was offered that the chemist who prepared her supplement might have handled Pemoline and accidentally contaminated the supplement, whereas the testimony of both expert witnesses left the impression this was an unlikely occurrence in the circumstances.
- The only indication that Ms Solange Witteveen would not have resorted to taking

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to apply to the Council after the CAS has given a final award on the sanction?

[11] As a measure of the fashion is which fault is evaluated in anti-doping regulations, one can quote e.g. the following definition contained in Appendix 1 of the WADC, according to which proving no fault or negligence involves «*The Athlete's* (sic) *establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the prohibited substance or the prohibited method.* » Concerning more generally the concept of fixed sanctions being reviewed in light of an athlete's degree of fault, in order to ensure the proportionality of sanctions, see e.g. D. Oswald, op. cit., pp. 76-78 ; Richard H. McLaren, pp. 98-101.

[12] In this relation, see e.g. IAAF Rule 55.9-10.

Pemoline is constituted by her active participation in events against doping and her past choice of spontaneously subjecting herself to doping tests on certain occasions. However, the Panel considers such factors insufficient to prove her innocence given the lack of evidence of any form of contamination or act of sabotage and the unlikelihood of either having occurred.

- The fact that Ms Solange Witteveen could have stopped jumping after winning the event instead of continuing to jump to beat her own record with the certitude of being tested is not in itself a convincing argument, since experience teaches that when medals and/or new records are at stake athletes often underestimate or accept the risk of a test.

111. Consequently, the Panel considers that the Appellant's decision to apply the fixed sanction of IAAF Rule 60.1(i)(a) is well founded. The referred decision was in error due to the failure to correctly apply the relevant IAAF rules.

(...)

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ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the International Association of Athletics Federations (IAAF) on 1 October 2002 is upheld.

2. The decision issued by the Confederación Argentina de Atletismo (CADA) on 28 June 2002 is annulled.

3. The following sanction is imposed on Solange Witteveen:

   suspension of two years starting from 11 March 2003; after deduction of the served period of ineligibility of one year, seven months and twenty-four days, such suspension shall last until 17 July 2003, inclusive.

(...)

Lausanne, 12 May 2003

THE COURT OF ARBITRATION FOR SPORT