Tribunal Arbitral du Sport



# Arbitration CAS 2006/A/1175 D. v/ International DanceSport Federation, award of 26 June 2007

Panel: Prof. Luigi Fumagalli (Italy), President; Mr David W. Rivkin (USA); Mr Goetz Eilers (Germany)

Dance Sport Doping Specified substance (Sibutramine) Power of an association to secure the observance of its rules by its associates Lack of intention of the athlete to enhance his/her sport performances Sanction

- 1. Swiss law allows an association to sanction the associates for their breach of the association rules, so as to secure the observance of those rules. Disciplinary commissions are actually intended to serve this purpose. In this framework, any reproach for the way specific disciplinary proceedings are organized should not be limited to an overall criticism about an alleged lack of independence or of a conflict of interest between the association and the associates, or the functional or organizational position of the disciplinary committee, but should concern identified violations of the internal rules of the association, or mandatory rules of the applicable law, governing the composition and the activity of the chamber in charge of hearing the given case.
- 2. As Sibutramine is mentioned by the IADC among the Specified Substances, no further evaluation is requested in order to establish whether Sibutramine is particularly susceptible to unintentional doping. Where sufficient elements have been adduced by the athlete, which are based on the characteristics of the sport concerned, as well as on scientific indications that have not been specifically contradicted, to confirm that Sibutramine could not enhance his/her sport performance, and therefore justify the conclusion of the lack of her intention to achieve that effect. Besides, the general purpose to achieve a "slimming" benefit, by use of a product not mentioning on the label the presence of a Specified Substance, cannot be equated to the specific intention to enhance the sport performance within the meaning of Article 5(V)(2) of the IADC.
- 3. The fact that a major sporting event is to take place within the period of ineligibility of an athlete found responsible of an anti-doping rule violation does not affect the measure of the sanction.

D. (the "Dancer" or the "Appellant") is a Lithuanian ballroom dancer, born in 1979.

The International DanceSport Federation (IDSF or the "Respondent") is the international federation, recognized by the International Olympic Committee, governing all aspects of DanceSport worldwide, either directly through its own organs, or through its national member bodies, or by administrative agreements with other persons and organisations. IDSF is a legal entity under Swiss law and has its headquarters in Lausanne, Switzerland.

The Dancer is registered with the Lithuanian Dance Sport Federation (LDSF), which in turn is a member of the IDSF. As a result, the Dancer is subject to and bound by the applicable rules and regulations of IDSF, including its anti-doping rules.

On 19 August 2006, the Dancer participated, with her dance partner, A., in an IDSF Grand Slam Standard competition in Stuttgart, Germany. On that occasion, the Dancer underwent a doping control according to the IDSF anti-doping rules.

In a letter of 14 September 2006, the Anti-Doping Director of the IDSF informed the Dancer of her positive test result. The WADA accredited German laboratory (the *'Institut für Dopinganalytik und Sportbiochemie Dresden'*) had in fact detected in the A-sample of urine provided by the Dancer the presence of Sibutramine, which is a prohibited substance of the category "S6: Stimulants" under the 2006 IDSF Anti-Doping Code (the "IADC").

In the same letter, the Anti-Doping Director of the IDSF informed the Dancer of her provisional suspension from any further competition as from 14 September 2006 according to Article 5(IV)(1) of the IADC.

On 14 September 2006 the Dancer requested the analysis of the B-sample of urine she had provided.

On 8 October 2006, the IDSF Disciplinary Council (the "DC") decided to temporarily lift the provisional suspension until the B-sample was analyzed. The adoption of this decision was communicated to the Dancer on the same day by phone and on 10 October 2006 by e-mail. The formal written decision, dated 16 October 2006, was received by the Dancer on 18 October 2006.

In a letter dated 10 October 2006 the Anti-Doping Director of the IDSF informed the Dancer that *"the analysis of the B-sample confirmed the analysis of the A-sample"*. The Dancer was therefore charged with a doping offence under Article 1(VII)(1) of the IADC.

By e-mail of 18 October 2006, the Dancer was informed that, as a consequence of the B-sample analysis, her provisional suspension from any further competition had re-entered into force with immediate effect until the case was decided by the DC. In the same e-mail, the Dancer was informed of the composition of the Chamber of the DC in charge of dealing with her case (the "Chamber").

On 26 October 2006, the Dancer submitted to the Chamber her statement of defence. In substance,

the Dancer indicated that the positive test was caused by her ingestion of a herbal slimming remedy, called "Meizitang", which she had bought for beauty purposes in a spa in Lithuania in August 2006 and began to ingest on a daily basis since this date until 19 August 2006. In this connection the Dancer emphasized that scientific examination, performed by the "Medicines Control Laboratory of the State Medicines Control Agency at the Ministry of Health of the Republic of Lithuania", had established that the tablets contained in the particular package of "Meizitang" contained Sibutramine, despite the fact that it was not mentioned on the ingredients list of the packet. As a result, the Dancer submitted, primarily, that she had to be held at "No Fault or Negligence" pursuant to Article 5(I)(1) of the IADC, and thus suffer no period of ineligibility, and, subsidiarily, that the sanction should be limited to a minimum level pursuant to Article 5(V)(2) of the IADC, Sibutramine being a "Specified Substance".

On 17 November 2006, the Chamber issued the following decision ("the Decision"):

- "1. Pursuant to article 1.VII.1 of the LADC, an anti-doping rule violation has been committed by the Athlete.
- 2. The athlete, D. is responsible for the commission of such anti-doping rule violation.
- 3. By virtue of art. 1.VII.1, and in accordance with art. 5.V.2 of the LADC, D. shall be declared ineligible for competition for 3 (three) months, starting from September 14<sup>th</sup>, date of the first provisional suspension.

For the calculation of the sanction, days where the suspension was temporarily lifted are not to be taken into account. Therefore, the Athlete will be allowed to compete again starting from December  $22^{nd}$  2006.

- 4. The athlete shall bear her own costs and expenses of the present procedure.
- 5. According to article 16 of the IDSF Disciplinary Code, the Athlete shall bear the minimum costs for any proceedings. Therefore, the Athlete shall pay the amount of CHF 100,00 (one hundred Swiss Francs).
- 6. The costs and expenses incurred with the IDSF Disciplinary Council shall be borne by the IDSF".

The Decision, in substance, confirmed that the presence of a prohibited substance in the urine samples provided by the Dancer constituted a doping offence pursuant to the IADC, and indicated that the "circumstance [inadvertent doping] that modifies responsibilities cannot be applied to this case ...: the Athlete cannot claim ignorance as after carrying out the relevant investigations we have noted that the information on the substance, effects of the substance, on the combination specifically with Meizitang are easily accessible to any person and of course much more accessible to an Athlete who should be informed about the drugs and other substances she takes".

At the same time, however, the Chamber acknowledged that Sibutramine was a "Specified Substance" with the ensuing applicability of Article 5(V)(2) of the IADC, "that enables ... replacing the sanction of two years of ineligibility by that set out in this regulation". Therefore, the Chamber considered that the sanction of 3 months of ineligibility was appropriate.

The Decision was notified to the Dancer on 18 November 2006.

On 21 November 2006, the Appellant filed an appeal with the Court of Arbitration for Sport (CAS), pursuant to the Code of Sports-related Arbitration (the "Code"), to challenge the Decision

On 16 March 2007, IDSF filed its answer to the appeal, with a counterclaim, requesting the CAS:

- to turn down the Appeal of D.;
  to set aside the Decision of the IDSF DC dated November 17<sup>th</sup>, 2006, and
- newly Decide this case, provisionally enforceable".

On 23 November 2006, IDSF submitted its answer to the Appellant's application for provisional measures, asking the CAS to dismiss it.

On the same date, the Deputy President of the CAS Appeals Arbitration Division issued a decision on the Appellant's application for provisional measures, as follows:

- "1. Admits the application for a stay filed by D.
- 2. States that the present order is rendered without costs".

A hearing was held in Lausanne on 25 April 2007.

# LAW

# Jurisdiction

- 1. CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of CAS, which is not disputed by either party, is based *in casu* on Article 6(VI) of the IADC, and Article 11 of the DC Code, which provide for an appeal to CAS against any decision made by the DC or one of its chambers.
- 2. In fact, pursuant Article 6(VI) ["Appeals"] of the IADC,
  - "1. Any decision made by the Disciplinary Council or one of its Chambers may be appealed to the Court of Arbitration for Sport ("CAS") in Lausanne; Switzerland, according to its rules and jurisdiction. This includes namely
    - decisions that an anti-doping rule violation was committed or not committed
    - a decision imposing CONSEQUENCES for an anti-doping rule violation
    - a decision that IDSF lacks jurisdiction to rule an alleged anti-doping rule violation or its CONSEQUENCES

- A decision revising the ANTI-DOPING REPRESENTATIVE's decision to impose a PROVISIONAL SUSPENSION.

Any such appeal must be made within twenty-one (21) days after the reception of such decision, according to the requirements of CAS.

- 2. Decisions appealed shall remain in effect while under appeal unless the appellate body orders otherwise.
- 3. The following parties shall have the right to appeal to CAS:
  - a) The ATHLETE or other PERSON who is the subject of the decision being appealed
  - b) IDSF
  - c) the International Olympic Committee or International Paralympic Committee, as applicable, where the decision may have effect in the relation to the Olympic Games or Paralympic Games, including decisions affecting eligibility for the Olympic Games or Paralympic Games
  - d) the International World Games Association (IWGA), where the decision may have effect in the relation to the World Games, including decisions affecting eligibility for the World Games
  - e) WADA.
- 4. The only person that may appeal from a suspension (Art. 6 II 1) is the ATHLETE or other PERSON upon whom the suspension is imposed".
- 3. Article 11 of the DC Code then provides, with respect to decisions made by the DC in its role as first instance adjudication body, such as those concerning violations of the IADC (Article 9 DC Code), that:

"Any decision made by the IDSF Disciplinary Council in its role as First Instance may be submitted exclusively by way of appeal to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, which will resolve the dispute definitively in accordance with the Code of Sports-related Arbitration. The period allotted for an appeal – if any – shall be two months after the receipt of the decision of the IDSF Disciplinary Council. However, filing an appeal for such a decision does not suspend or affect the IDSF Disciplinary Council's decision, which shall remain in full force until the Court of Arbitration has taken its respective decision".

- 4. In the same way, the Decision provided that:
  - "8.1 The formal decision of the IDSF Disciplinary Council may be appealed to the Court of Arbitration for Sport ("CAS") in Lausanne; Switzerland, according to its rules and jurisdiction;
  - 8.2. Any such appeal must be made within two months after the reception of this decision (according Art. 11 of the DC Code);
  - 8.3. Filing an appeal does not suspend or affect the IDSF Disciplinary Council's decision, which shall remain in full force until the CAS has taken its respective decision;
  - 8.4. According Art. 6 VI of the AD Code, and applicable to this case, the following persons shall have the right to appeal to CAS:
    - The athlete or other Person who is the subject of the decision being appealed;
    - The International DanceSport Federation (IDSF);
    - The World Anti-Doping Agency (WADA)".

## **Appellate Proceedings**

5. As these proceedings involve an appeal against a decision imposing a disciplinary sanction, issued by a federation (IDSF) whose statutes provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings, in a disciplinary case of international nature, in the meaning and for the purpose of the Code.

## Admissibility

- 6. The statement of appeal of the Dancer was filed on 21 November 2006, within the time limit set by the IADC, the DC Code and the Decision.
- 7. In its answer, however, the Respondent challenged the admissibility of Dancer's appeal. In the Respondent's opinion, in fact, the appeal brief was not filed within the time limit set by Article R51 of the Code: according to IDSF that time limit expired on 26 January 2007, while the appeal brief was filed on 29 January 2007, with the consequence that *"the appeal should be deemed to have been withdrawn"*.
- 8. Article R51 ["*Appeal Brief*"] of the Code so provides:

"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely, failing which the appeal shall be deemed withdrawn.

In his written submissions, the Appellant shall specify any witnesses and experts whom he intends to call and state any other evidentiary measure which he requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise".

- 9. The Panel does not agree with the Respondent's submissions. In this respect the Panel in fact notes:
  - i. that the appeal had to be filed *"within two months after the reception"* of the Decision, as directed by para. 8.2 of the same in accordance with Article 11 of the DC Code with an indication prevailing over the somehow contradictory provision contained in Article 6(VI)(1) of the IADC (indicating a deadline of twenty-one days);
  - ii. that it is a principle of Swiss law that *"where a time-limit is expressed in months or in years the* dies ad quem *shall be the day of the last month or of the last year whose date corresponds to that of the* dies a quo *or, when there is no corresponding date, the last day of the last month"* (Article 4 para. 2 of the European Convention on the Calculation of Time-Limits of 16 May 1972, in force for Switzerland since 28 April 1983: RS 0.221.122.3; Article 77 para. 1 No. 3 of the Swiss Code of Obligations); and
  - iii. that pursuant to Article R32 of the Code:*"the time limits fixed under the present Code shall begin from the day after that on which notification*

by the CAS is received. Official holidays and non-working days are included in the calculation of time limits. The time limits fixed under the present Code are respected if the communications by the parties are sent before midnight on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the country where the notification has been made, the time limit shall expire at the end of the first subsequent business day".

- 10. As a result, the Panel finds:
  - i. that the Decision was notified to the Dancer on 18 December 2006;
  - ii. that the time limit for the filing of the statement of appeal expired on 18 January 2007;
  - iii. that the appeal brief fell due on 28 January 2007, which was a Sunday, with the consequence that the time limit for its filing expired on the next day 29 January 2007.
- 11. Therefore, the appeal brief, submitted by the Appellant on 29 January 2007, was filed within the time limit set by Article R51 of the Code. The appeal cannot be deemed withdrawn.
- 12. Accordingly, the appeal is admissible.

## Applicable law

13. According to Article R58 of the Code, the Panel is required to decide the dispute

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

14. In this case, the parties have not agreed on the application of any particular law. Therefore, IDSF rules and regulations have to be applied primarily, with Swiss law applying subsidiarily.

## Scope of Panel's Review

15. Pursuant to Article R57 of the Code,

"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. [...]".

# The Evaluation of the Panel

16. The Appellant, in her first group of submissions, challenges the Decision, and requests that it be set aside, by invoking "procedural unfairness", "lack of independence", "real risk of a conflict of interest", errors in the reasoning, and the failure to consider the "proportionality".

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- 17. In other words, the Appellant, in support of her request, is adducing reasons broadly pertaining to the procedure before the Chamber (*errores in procedendo*), which she submits was affected by some defects (*"unfairness"*, *"lack of independence"*, *"risk of a conflict of interest"*, lack of motivation), as well as concerning the exercise of the power of evaluation vested in the Chamber (*errores in iudicando*), indicated as flawed by errors. According to the Appellant, such reasons justify the setting aside of the Decision, so that a *de novo* judgment can be rendered by this Panel.
- In this respect the Panel notes that, according to Article R57 of the Code, it has full power to 18. review the facts and the law. The Panel consequently hears the case de novo and is not limited to considerations of the submissions before the DC: the Panel can consider all new arguments produced before it. This implies that, even if a violation of the principle of due process (such as the alleged "unfairness", "lack of independence", "risk of a conflict of interest", or lack of motivation) occurred in prior proceedings, it may be cured by a full appeal to the CAS (CAS 94/129, USA Shooting & Q. v/ UIT, CAS Digest I, p. 187 at 203; CAS 98/211, B. v/ Fédération Internationale de Natation, CAS Digest II, p. 255 at 257; CAS 2000/A/274, S. v/ Fédération Internationale de Natation, CAS Digest II, p. 398 at 400; CAS 2000/A/281, H. v/ Fédération Internationale de Motocyclisme, CAS Digest II, p. 410 at 415; CAS 2000/A/317, A. v/ Fédération Internationale des Luttes Associés, CAS Digest III, p. 159 at 162; CAS 2002/A/378, S. v/ Union Cycliste Internationale & Federazione Ciclistica Italiana, CAS Digest III, p. 311 at 315). In fact, the virtue of an appeal system which allows for a full rehearing before an appellate body is that issues relating to the fairness of the hearing before the tribunal of first instance "fade to the periphery" (CAS 98/211, B. v/ Fédération Internationale de Natation, CAS Digest II, p. 255 at 264, citing Swiss doctrine and case law).
- 19. The Appellant has had and has used the opportunity to bring the case before the CAS, where all of the Appellant's fundamental rights have been duly respected. At the end of the hearing, the Appellant expressly confirmed that she had no objections in respect of her right to be heard and to be treated equally in the CAS arbitration proceedings. Accordingly, even if any of the Appellant's rights had been infringed upon by the DC, the *de novo* proceedings before the CAS would be deemed to have cured any such infringements.
- 20. In the same way, the CAS Panel, by using its full power to review the facts and the law, can consider all the elements of the dispute, and review the exercise of the power of evaluation vested in the Chamber, indicated as flawed by errors, so to determine whether an anti-doping rule violation has been committed by the Dancer and, in the event an infringement is found, whether the proper sanction has been applied.
- 21. In light of the foregoing, the Panel found it unnecessary to verify whether the Decision was affected by "procedural unfairness" on the part of the IDSF and the Chamber, whether the Chamber "lack[ed] ... independence", and whether a "risk of a conflict of interest", existed in order to be able to issue a de novo decision on the existence of an anti-doping rule infringement and its consequences. The Panel, in fact, has this power irrespective of the existence of the defects alleged by the Appellant.

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- 22. For the sake of clarity, however, the Panel underlines that it does not agree with the Appellant's submissions as to the alleged "*procedural unfairness*" on the part of the IDSF and the Chamber, the "*lack of independence*" of the Chamber, and the existence of a "*risk of a conflict of interest*".
- 23. More specifically, the Panel finds that no sufficient evidence has been brought by the Appellant with respect to the alleged lack of competence in the English language of the Chairman of the Chamber and chiefly as to how this assumed poor command of English affected the Decision: the Panel notes that the Dancer submitted her pleadings in English and that the Decision, written in English, deals with the points raised by the Dancer, thereby showing that the Chamber understood them.
- 24. In the same way, the Panel finds that the position of the members of the Chamber, including its Chairman, and their relations with IDSF, do not appear to amount to irregularities *per se* disqualifying the reasoning contained in the Decision.
- 25. The members of disciplinary commissions of any sports federation are in fact ordinarily appointed by other bodies of the same federation: disciplinary proceedings, however intended to take place by paying due respect to the right to be heard of the parties involved, lead to decisions which can be imputed to the same federation. In other words, the existence of a functional and organizational link between a disciplinary commission and the sport federation is the result of the very nature and purpose of disciplinary adjudication. As recently confirmed by the Swiss Federal Tribunal (decision 5 January 2007, Rayo Vallecano v/ FIFA, 4P.240/2006), Swiss law allows an association to sanction the associates for their breach of the association on rules, so as to secure the observance of those rules. Disciplinary commissions are actually intended to serve this purpose. In this framework, the Panel therefore finds that any reproach for the way specific disciplinary proceedings are organized should not be limited to an overall criticism about an alleged lack of independence or of a conflict of interest between the association and the associates, or the functional or organizational position of the disciplinary committee, but concern identified violations of the internal rules of the association, or mandatory rules of the applicable law, governing the composition and the activity of the chamber in charge of hearing the given case.
- 26. In this context, the Panel finds that no violation of specific rules of the DC Code or any other rule applicable within the IDSF, including mandatory rules of Swiss law has been committed: the position of the members of the Chamber and their relation with IDSF in the constitution of the Chamber its member associations do not lead to the setting aside of the Decision, failing a legal ground. In fact, it is not disputed that the components of the Chamber had the skills and qualities to meet the requirements of *"good standing and reputation"* set by Article 7 of the DC Code to act as adjudicators, and that the specific circumstances of ineligibility indicated in Article 18 para. 2 of the IDSF Statutes did not occur.
- 27. In the same way, the Panel finds that the alleged existence of an interest of the IDSF to disqualify the Dancer is not supported by any factual element.

- 28. The main question, therefore, to be dealt with in these arbitration proceedings concerns the commission by the Dancer of an anti-doping rule violation pursuant to the IADC and the determination, and if it is the case, of the proper sanction to be applied. The issues raised by the Appellant (with respect to the errors committed by the DC in rendering the Decision, including the alleged failure to apply the principle of proportionality, whatever their "cause") have to be considered in this framework.
- 29. In this respect, the Panel confirms that an antidoping rule violation has been committed by the Appellant. Indeed the Appellant herself now "admits the commission of a Doping Offence under Article 1 (VII) (1) of the LADC, insofar as a Prohibited Substance was present in her sample".
- 30. Pursuant to Article 1 ["Fundamental Principles and Interdictions"] of the IADC, in fact,
  - "VI. Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Art. 1 VII of this CODE.
  - VII. The following constitute anti-doping rule violations:
    - 1) The presence of a PROHIBITED SUBSTANCE or its METABOLITES or MARKERS in an ATHLETE'S bodily SPECIMEN. [...]".
- 31. Section 6 "*Stimulants*" of the List of Prohibited Substances and Methods attached to the IADC, then, mentions Sibutramine, which is therefore a Prohibited Substance for the purpose, and within the meaning, of Article 1(VII)(1) of the IADC. The presence of Sibutramine in the sample provided by the Dancer on 19 August 2006, as a result, constitutes an anti-doping rule infringement pursuant to the IADC.
- 32. In light of this (undisputed) finding, the question then becomes whether the Decision applied the proper sanction. In this respect the parties expressed opposite views:
  - i. The Appellant submits that the Chamber erred in the appreciation of the facts, to the extent it made reference to internet searches that the Dancer could not be expected to have conducted, and in the evaluation of the IADC rules concerning the sanctions to be applied, also taking into account some precedents invoked by the Appellant. More specifically, she invokes the fact that Sibutramine is classified by the List of Prohibited Substances and Methods attached to the IADC as a "Specified Substance", and submits that *"the circumstances of D. violation must warrant the lowest possible sanction"*.
  - ii. The Respondent contends, by way of counterclaim and contrary to the findings of the Decision, that the Dancer "should not benefit from the milder sanction defined Article 5 V 2" of the IADC: the sanction of ineligibility for two years provided by Article 5(V)(1) of the IADC should therefore apply.
- 33. Article 5(V) ["Sanctions"] of the IADC so provides:
  - "1. Except for the specified substances identified in Art. 5 V 2, the period of INELIGIBILITY imposed for a violation of Articles 1 VII 1 (presence of PROHIBITED SUBSTANCE or its METABOLITES or MARKERS), 1 VII 2 (USE or ATTEMPTED USE OF PROHIBITED SUBSTANCE or PROHIBITED METHOD) and 1 VII 6 (POSSESSION of PROHIBITED SUBSTANCES or means for

PROHIBITED METHODS) shall be:

- For a first violation: two (2) years' INELEGIBILTY
- For a second violation: lifetime INELIGIBILITY.

If an ATHLETE establishes in such a case that he or she bears NO SIGNIFICANT FAULT OR NEGLIGENCE, then the period of INELIGIBILITY may be reduced, but not to less than one year for first violations and eight years for second or subsequent violations. When a PROHIBITED SUBSTANCE or its MARKERS or METABOLITES is detected in an ATHLETE'S SPECIMEN in violation of Art. 1 VII 1 (presence of PROHIBITED SUBSTANCE), the ATHLETE must also establish how the PROHIBITED SUBSTANCE entered his or her system in order to have the period of INELIGIBILITY reduced.

- 2. The PROHIBITED LIST may identify specified substances which are particularly susceptible to unintentional doping because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. Where an ATHLETE can establish that the USE of such a specified substance was not intended to enhance sport performance, the period of INELIGIBILITY found in Art. 5 V 1 shall be replaced with the following:
  - For a first violation: at a minimum, a warning and a reprimand and no period of Ineligibility from future Events, and at a maximum one (1) year's Ineligibility.
  - For a second violation: two (2) years' Ineligibility.
  - For a third violation: lifetime Ineligibility".
- 34. Preliminarily, the Panel notes that the Appellant has accepted "that she cannot meet the extremely high threshold for No Fault or Negligence" and stated that she "does not wish the Panel to consider it any further".
- 35. At the same time the Panel remarks that the Appellant is not claiming that she bears "No *Significant Fault or Negligence*" within the meaning of the IADC and for the purposes of its Article 5(V). The Appellant's contentions focus only on the application of Article 5(V)(2) and the determination of the sanction applicable thereto.
- 36. As a result of the above, any and all considerations with respect to the degree of diligence required of the Dancer in the ingestion of a product (Meizitang), which does not mention in the label, but, which does contain, a prohibited substance, are not relevant for the determination of *"Fault or Negligence"* within the framework and for the purposes of the application of Article 5(V)(1) of the IADC, (the relevance of the degree of diligence required of the Dancer for the purposes of determining the sanction to be applied pursuant to Article 5(V)(2) of the IADC will be mentioned below, at § 49).
- 37. The first question to be examined, therefore, is whether Article 5(V)(2) of the IADC applies. Should the Panel deny this point, the general provision of Article 5(V)(1) would apply, as the Respondent submits.
- 38. The Panel agrees with the Appellant and the Decision that Article 5(V)(2) of the IADC applies.

- 39. The Panel remarks that Article 5(V)(2), in order to allow a replacement of the sanctions applicable pursuant to Article 5(V)(1) with those therein contained, requires the concurrent satisfaction of two conditions:
  - i. the anti-doping rule infringement should involve the use of a Prohibited Substance identified by the List of Prohibited Substances and Methods attached to the IADC as a *"Specified Substance"*; and
  - ii. the athlete can establish that the use of such a Specified Substance was not intended to enhance the performance of the sport.
- 40. The first condition is certainly met. The List of Prohibited Substances and Methods attached to the IADC, in fact, mentions Sibutramine among the Specified Substances for the purposes of Article 5(V)(2) of the IADC. As a result, no further evaluation is requested in order to establish whether Sibutramine is particularly susceptible to unintentional doping. The inclusion of Sibutramine in the list the Specified Substances is a conclusive element on the point.
- 41. The Panel is satisfied, in the same way as the Chamber was when it rendered the Decision, that the second condition is also met. More specifically, the Panel holds that the Dancer has adduced sufficient elements, which are based on the characteristics of DanceSport, as well as on scientific indications that have not been specifically contradicted, to confirm that Sibutramine could not enhance her sport performance, and therefore justify the conclusion of the lack of her intention to achieve that effect.
- 42. Such elements are not reversed by the contrary submissions of the Respondent, which claims now that the Dancer did intend to enhance her sport performance. According to IDSF, the Dancer, by taking Meizitang, i.e. the product that contained Sibutramine, in order to achieve "slimming" benefits, intended to increase her performance by influencing the aesthetic and artistic evaluation by the adjudicators. The Panel, in fact, taking into account the overall criteria according to which couples participating in IDSF events are judged, does not find that the "slimming" effects of Sibutramine amount to an improvement of the sport performance of a dancer. The general purpose to achieve a "slimming" benefit, by use of a product not mentioning on the label the presence of a Specified Substance, cannot be equated to the specific intention to enhance the sport performance within the meaning of Article 5(V)(2) of the IADC.
- 43. The findings of the Decision on this point are therefore confirmed.
- 44. The next question, then, is whether the sanction imposed by the Chamber in the Decision is appropriate. In this respect, the Panel notes that according to Article 5(V)(2) of the IADC, the Chamber had the discretion to set the sanction in a scale ranging from a warning and a reprimand and no period of ineligibility to one year's ineligibility. The Chamber used that discretion to impose a sanction of three months of ineligibility, by taking into account all the elements of the case it heard.

- 45. The parties dispute the measure of such sanction. According to the Appellant, the sanction imposed is excessive, as it disregards, without any motivation, the case-law adduced by the Dancer, does not respect the principle of proportionality, and does not take into account general mitigating factors, as well as the lack of a proper anti-doping environment within the IDSF. On the other side, the Respondent submits, by way of a subordinate counterclaim, for the event the Panel finds that Article 5(V)(2) of the IADC is applicable, that the sanction should be increased to at least eight months' ineligibility.
- 46. The Panel finds the measure of the sanction appropriate and does not require adjustments. This conclusion is justified by several elements.
- 47. In general terms, the Panel underlines that it is willing to enforce a strict approach in the definition of its power reviewing the exercise of the discretion enjoyed by the disciplinary body of an association to set a sanction. To the extent the exercise of such discretion does not run against the internal rules of the association, the mandatory provisions of the law applicable or even fundamental general principles of law, the Panel finds itself limited by the respect to be paid to the freedom of the association to set the way to secure observance by its associates of the association rules.
- 48. As a result this Panel adheres, in relation to proportionality, to CAS's jurisprudence, which makes it clear that the sanction imposed must not be evidently and grossly disproportionate to the offence (see CAS 2004/A/690, para. 86; CAS 2005/A/830, para. 10.26; CAS 2005/C/976 & 986, para. 143). To extent the sanction is not evidently and grossly disproportionate to the offence, therefore, it is appropriate to let the sanction remain as determined by the Chamber.
- 49. The Panel, in this respect, does not find the sanction imposed on the Dancer to be evidently and grossly disproportionate to the offence, taking into account all the elements of the case, and chiefly those indicated by the Appellant as general mitigating factors, including the duty of care which could be expected of a top-level athlete such as the Appellant. The fact that a major sporting event is to take place within the period of ineligibility of an athlete found responsible of an anti-doping rule violation does not affect the measure of the sanction. A different solution would create a high degree of uncertainty in the anti-doping system, particularly because it can be expected that doping practices are often undertaken in preparation for major events. The, unfortunate, fact that the ineligibility period imposed on the Dancer deprived her of the possibility to win (as she then did) the title of world champion does not render the sanction imposed evidently and grossly disproportionate to the offence. A different reasoning, taking into account the actual result achieved in the world championship, and therefore based on an ex post evaluation, is clearly not admissible.
- 50. The above conclusion is not refuted by the case law invoked by the Appellant, which refers to different cases heard various sports federations. Contrary to the Appellant's submission, in fact, those decisions imposed sanctions similar to or not conflicting with that imposed on the Dancer, thereby confirming that the latter is not evidently and grossly disproportionate to the offence.

- 51. In the same way, the Panel finds that any deficiency in the anti-doping environment and culture within the IDSF system, even if existing, does not excuse practices contrary to rules in force and specifically accepted. Well to the contrary, the lower the degree of observance of the rules, the stronger the need of enforcement of those rules. At the same time, however, the Panel wishes to encourage the IDSF to take further steps, in addition to the necessary repression of doping violations, to develop, directly or through its member associations, the awareness by all the athletes of anti-doping values, and to create a proper anti-doping environment preventing the commission of anti-doping rule violations.
- 52. The final point to be determined concerns the actual period covered by the ineligibility. On one hand, the Appellant requests that she be given credit for the ten-day period at the temporary lifting of the provisional suspension, and therefore that the period of ineligibility should start as from 14 September 2006, without interruption. On the other hand, the Respondent submits that the Decision followed the correct approach.
- 53. The Panel agrees with the Appellant's submissions and holds that the ineligibility covered the three months' period starting from 14 September 2006 and ending on 14 December 2006, without adding thereto the ten days, from 8 October 2006 to 18 October 2006, during which her provisional suspension was temporarily lifted. Indeed, the Panel remarks that the decision to lift the ineligibility, adopted on 8 October 2006, was only formally communicated to the Dancer on 18 October 2006, i.e. on the same date the ineligibility was reinstated. Failing a formal communication by the IDSF, the Dancer could not take advantage of the temporary lifting of her provisional suspension to participate in sporting events. The period covered by such lifting, therefore, does not have to be added to the three months' period of ineligibility starting from 14 September 2006. To the extent the Decision held otherwise, it has to be modified on the point.

## Conclusion

54. In light of the foregoing, the Panel holds that the appeal has to be only partially granted and that the Decision is to be modified only in the portion regarding the calculation of the period covered by the ineligibility, whose duration is confirmed. As a consequence, the interim measure adopted by the Deputy President of the CAS Arbitration Division in its decision delivered on 23 November 2006 is revoked. The counterclaim is dismissed.

## The Court of Arbitration for Sport rules:

1. The appeal filed by D. against the decision issued on 17 November 2006 by the Disciplinary Council of the International DanceSport Federation is partially upheld.

- 2. D. is declared ineligible for competition for 3 (three) months, from 14 September 2006 to 14 December 2006.
- 3. The counterclaim filed by the International DanceSport Federation is dismissed.

(...)