



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2002/A/360 Jovanovic v/USADA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

- President: Hon. Robert Ellicott QC, Barrister-at-Law, Sydney, Australia
- Arbitrators: Mr. Dirk-Reiner Martens , Attorney-at-law, München, Germany
- Mr Peter Leaver QC, Barrister-at-Law, London, England

between

PAVLE JOVANOVIC, Toms River, New Jersey, USA

represented by Mr. Howard Jacobs and Mr. Adam Driggs, Attorneys-at-law, Westlake Village, California, USA

and

UNITED STATES ANTI-DOPING AGENCY (USADA), Colorado Springs, Colorado, USA
represented by Mr. William Bock III, Attorney-at-law, Indianapolis, Indiana, USA

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THE PARTIES

1. The Appellant, Pavle Jovanovic is a bobsledder resident in the United States.
2. The Respondent is the United States Anti-Doping Agency ("USADA"). USADA is an independent legal entity is not subject to the control of the United States Olympic Committee ("USOC"). The USOC has contracted with USADA to conduct drug testing and results management for participants in the Olympic movement within the United States.
3. With the consent of the parties the hearing was attended by representatives of USOC and the World Anti Doping Agency ("WADA").

BACKGROUND FACTS

4. The USOC has authorized USADA to test any athlete named by the USOC or who is competing in a qualifying event to represent the USOC in international competition. This appeal is brought by the athlete from the decision of three arbitrators who were selected pursuant to the AAA procedure for arbitration initiated by USADA at the request of the Appellant ("the AAA Panel").
5. The Respondent provided a urine sample at the United States Olympic Bobsled Trials on 29 December 2001. The "A" and the "B" samples were poured into Berlinger bottles and delivered by USADA's Doping Control Officer, Irene J. Swinnea, to a commercial courier on 30 December 2001. They were, on that day, transported to the UCLA Olympic Analytical Laboratory in Los Angeles. There they were received, stored and labelled. The "A" sample was batch-screened and determined to contain nandrolone metabolites. As such, the "A" sample went through confirmation procedures. The A sample was determined to contain a concentration of the 19-norandrosterone greater than 2 ng/ml and 19-noretiocholanolone which are both nandrolone metabolites.

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6. USADA was notified of the laboratory's conclusions as to the "A" sample results on 16 January 2002. USADA notified the athlete on 17 January 2002 and gave him the option to have the "B" sample confirmation procedure performed at the UCLA laboratory which the Appellant elected to have done.
7. On 20 January 2002, the laboratory issued its report in which it concluded that the "B" sample contained 19-norandrosterone at a concentration greater than 2 ng/ml and 19-noretiocholanolone. In fact, the laboratory found that the concentration of 19-norandrosterone in the "B" sample was approximately 13.5 ng/ml.
8. In accordance with their Protocol for Olympic movement testing, USADA then referred the matter to its Anti-Doping Review Board and informed the Appellant accordingly.
9. Because of time constraints, it appears that the parties conferred and agreed that, rather than wait to first receive the recommendation of the Anti-Doping Review Board pursuant to the Protocol, the matter would be referred directly to a hearing before the AAA Panel pursuant to Clause 9.b.i & ii of the Protocol.
10. The matter was heard on 25 January 2002 and after a long hearing on that date, the Panel announced their decision disqualifying the Respondent. On 29 January 2002, the arbitrators delivered their reasons in which they found that the Appellant was guilty of a doping offence and was negligent in doing so. They concluded that he should be suspended from any competition for nine months from 26 January 2002. This means that the Appellant is not eligible to be chosen for the US. Bobsled Team at the XIX Olympic Winter Games in Salt Lake City.
11. The athlete immediately appealed the AAA Panel's decision to CAS pursuant to Rule 9.b.iii of the Protocol. That appeal is made pursuant to Art. R47 of the Code of Sports-related Arbitration ("the Code").

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12. We have been constituted pursuant to Rule 54 of the Code as the Panel to hear the appeal. Because of the pending Winter Olympics and his desire to be selected in the U.S. Bobsled team the Applicant requested that the appeal be heard and decision given before the Games commence. As a result, an expedited hearing was fixed for Wednesday, 6 February 2002.

RELEVANT PROVISIONS

13. Section 9.b.v. of the Protocol provides:

"In all hearings conducted pursuant to this procedure the applicable IF's categories of prohibited substances, definition of doping and sanctions shall be applied. In the event an IF's rules are silent on an issue, the rules set forth in the Olympic Movement Anti-Doping Code shall apply. Notwithstanding the foregoing; (a) the IOC Laboratories used by USADA shall be presumed to have conducted testing and custodial procedures in accordance to prevailing and acceptable standards of scientific practice. This presumption can be rebutted by evidence to the contrary, but the accredited laboratory shall have no onus in the first instance to show that it conducted the procedures other than in accordance with its standard practices conforming to any applicable IOC requirements; (b) minor irregularities in sample collection, sample testing, or other procedures set forth herein which cannot reasonably be considered to have effected the results of an otherwise valid test or collection shall have no effect on such results; and (c) if contested, USADA shall have the burden of establishing the integrity of the sample collection process, the chain of custody of the sample, and the accuracy of laboratory test results by clear and convincing evidence unless the rules of the applicable IF set a higher standard. "

14. The relevant doping regulations of the Fédération Internationale de Bobsleigh et de Tobogganing ("FIBT") provide:

"Section 1. DEFINITION OF DOPING.

Doping is the use by athletes of certain substances mentioned under item 3 of the F.I.B.T. Doping Control Regulations as banned substances as well as the application of forbidden practices. It is therefore forbidden to use, recommend, authorize or tolerate the use of all the substances or methods which appear in the IOC Medical Code.

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The use of medicaments and the application of doping practices to augment the athlete's performance which may result in an additional acute and chronic detriment to the athlete's health as well as endanger the bobsleigh driver when descending is rejected by the F.I.B.T. Medical Commission. Doping is for that reason forbidden.

3.1. Banned substances

The list drawn up by the I.O.C. and gradually updated is adopted. Beta-blockers must also be added to the banned substance contained in this list.

3.2. Forbidden doping practices

The list drawn up by the I.O.C. and gradually updated is adopted. "

15. The regulations go on to provide for a number of matters including the taking, analysis and evaluation of urine. Regulation 9 deals with penalties and it provides:

"PENALTIES

The F.I.B.T. Executive Committee shall impose the following penalties in case of a positive result according to items 1 and 3 of the F.I.B.T. Doping Control Regulations.

- 9.1. - *Two year period of ineligibility in the case of a first-time contravention of the rules*
- *lifelong ineligibility in the case of a repeated contravention of the rules.*

If the use of ephedrine and its derivatives has been proved, the athlete becomes ineligible

- *for three months in the case of a first-time contravention*
- *for two years in the case of a second contravention and*
- *lifelong after a further and imposed second punishment.*

9.2. ...

9.3. *If an athlete refuses to submit to a doping control, he and his crew members shall be disqualified from the sports event concerned.*

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The F.I.B.T. Executive Committee may impose additional disciplinary measures in accordance with article 1.14.3. of the F.I.B.T. Articles of Association.

9.4. Similarly, more serious penalties can be applied, to officials and third parties to which the I.O.C. Medical Code and the FIBT Rules apply, with the reservation that the penalty for a first contravention is only a minimum penalty and can be made more serious according to the circumstances and the degree of guilt of the individual. The penalties imposed on an individual in the context of a particular function will extend totally to all the other functions and all other sports and shall be respected by the authorities of the other sports for the entire duration of the sanction."

THE PARTIES' SUBMISSIONS

16. Although both parties provided the Panel with extensive written submissions in which a large number of topics were covered at the hearing only five issues were argued before us. Those issues were:

- a) Strict Liability : it was submitted on behalf of the Appellant that the definition in the FIBT Regulations required proof of intent to take a prohibited substance. The Respondent submitted that no proof of intent was required.
- b) Chain of Custody : it was submitted on behalf of the Appellant that the appeal must succeed because the Respondent could not establish a good chain of custody of the Appellant's specimen. The Respondent submitted that on the evidence a good chain of custody was clearly established.
- c) Testing : in opening, it was submitted by Mr. Jacobs on behalf of the Appellant that the ratio of norandrosterone to noretiocholanolone, namely, 25% of the latter to the former, did not disclose a sufficient relationship between the metabolites to establish definitively a doping offence. The allegations which appeared in the Appellant's written submissions of irregularities in the testing of the "B" sample were not advanced during the

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hearing. In his final submissions, Mr. Jacobs did not address us on the issue of the relationship between the metabolites, and it appeared to us, therefore, that this was no longer a submission advanced in support of the appeal. Nonetheless, for the sake of completeness, we deal briefly with this issue below.

- d) Supplement Contamination : it was submitted that the Appellant received mixed messages about the danger of supplement contamination from many bodies, including the IOC, the USOC, WADA, USADA and the FIBT, and that in the circumstances he could not be blamed for taking food supplements which, unknown to him, contained a prohibited substance. As will be clearly appreciated, this issue is essentially concerned with the question of intent, if intent is a necessary ingredient of the offence of doping under the FIBT Regulations. It is also relevant to the issue of sanction, if there is any scope under the FIBT Regulations to reduce the stated minimum period of suspension once a doping offence has been proved. The Respondent submitted that, as a matter of fact, no mixed message was given to the Appellant and that he was, at the very least, reckless in the taking of food supplements.
- e) Sanction : it was submitted on behalf of the Appellant that (i) there was scope under the FIBT Regulations to reduce the stated minimum period of suspension and (ii) it was important to establish a consistent sentencing policy across one sport, and that in the light of the decision of the CAS ad hoc Division in **Prusis** the Appellant should, if guilty, be given a reduced sentence. The Respondent submitted that the 2-year minimum sentence was mandatory, and that there was no provision for a reduction of the sentence in the FIBT Regulations. In the alternative, the Respondent submitted that, even if there were a provision for reduction, on the facts of the present case, no reduction was warranted.

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REASONS

We shall consider the issues in the order set forth above.

I. Strict Liability

17. The first question which the Panel has to decide is whether the FIBT Regulations identify the prohibited substances, define doping and provide for sanctions or are silent on these matters : see Clause 9.b.v of the Protocol.

That question can be shortly answered. Indeed, it was not suggested during the hearing that the FIBT Regulations were silent on any of those matters. The FIBT Doping Control Regulations provide a definition of doping (Regulation 1), identify banned substances (Regulation 3) and provide for sanctions (Regulation 9).

18. The strict liability issue raises a pure question of construction. That much was common ground between the parties during the hearing. As with most questions of construction, the answer is largely a matter of impression. In the present case, however, it is not necessary for the Panel to base its conclusion simply on impression. The definition is clear. It follows that the previous decisions of CAS, to which we were referred, in which the anti-doping regulations of other International Federations were considered, are in the Panel's view, of little assistance on the question of construction.
19. In our view, Regulation 1 makes it clear that the offence of doping is the simple "use" by athletes of a prohibited substance. In addition, it prohibits "the application of forbidden practices." As the second sentence of the first paragraph of the Regulations states "It is *therefore* forbidden to use, recommend, authorise or tolerate the use of all the substances or methods which appear in the IOC Medical Code." (emphasis added). In the Panel's view, the use of the word "therefore" makes it clear that, so far as the athlete is concerned, it is simple use which is forbidden.

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20. Thus, if an athlete ingests a food supplement, which contains within it a forbidden substance, he or she "uses" the substance as well as the other ingredients of the supplement. No question of intent or knowledge is involved. By way of analogy, if a person threatened on a dark night when he cannot see, grabs a golf club, not knowing what it is, to beat off an intruder, he nevertheless uses the golf club.
21. In the context of the first paragraph of Regulation 1, it is the Panel's view that "use" is satisfied if an athlete ingests a prohibited substance whether or not he or she knows that he or she is doing so. It makes no difference that, when ingested, it is taken unknowingly to him or her, because it is a component of a product differently named.
22. It was submitted on behalf of the Appellant that the second paragraph of the definition of doping lends support to a construction which would make "intent" a necessary element of the offence of doping. This, it is said, is because the words "use ... to augment the athlete's performance" import intent into the definition.

The Panel rejects that submission.
23. In our view the second paragraph is doing no more than explaining the reason why doping is forbidden, as the last sentence in the paragraph makes clear by the use of the phrase "for that reason". It does not extend the definition of doping as expounded in the first paragraph. It follows from this that, in our view, proof of the offence of doping under Regulation 1, does not require it to be proved that the athlete has taken the substance with the intention of augmenting his or her performance. Further support for this construction can be found in Rule 9.1 in which it is proof of simple "use" which attracts the penalty.

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24. We should add, that had we been of the opposite view we would have been satisfied, for reasons we will discuss when considering sanctions, that the Appellant did, in a relevant sense, "use" the prohibited substance when he ingested the supplement and did so for the purpose of augmenting his performance as an athlete and a bobsledder.

II Chain of Custody

25. It was submitted by the Appellant that the Respondent was unable to prove a proper chain of custody with regard to his urine samples. While the Appellant did not challenge the actual custody of the samples from the moment they were collected until completion of the laboratory tests, the Appellants argues that the airway bill shows the wrong address for the "Shipper" in that it lists the home address of Ms Irene J. Swennea, the Doping Control Officer for the test in question, and not the address of Ms Irene J. Swennea's hotel in Salt Lake City from which the samples were shipped. In the Appellant's submission, this error is fatal for the entire doping test.
26. The rules applicable to the question of the chain of custody in this case provide the following :

United States Anti-Doping Agency, Protocol for Olympic Movement Testing, Section 6:

"Sample Collection

Sample collection by USADA will substantially conform to the standards set forth by the IOC and the World Anti-Doping Agency."

United States Anti-Doping Agency, Protocol for Olympic Movement Testing, Section 9.b.v c):

".....c) if contested, USADA shall have the burden of establishing, the chain of custody of the sample,by clear and convincing evidence unless the rules of the applicable IF set a higher standard."

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27. Section 4.1 of Appendix C to the Olympic Movement Anti-doping Code (OMAC) provides as follows:

“The Doping Control Transport Form shall be completed and given together with the sealed transport containers to the Doping control Courier, hereafter referred to as the Courier, who is in charge of transportation of samples collected at each venue to the Doping Control Laboratory. The records on this form shall include the signature and accreditation number of the Courier, the seal numbers of the transport containers, the venue from which the transport containers have come and the departure time of the Courier.”

28. The Panel is satisfied that the Respondent has discharged the burden of proving a proper chain of custody. The Appellant’s only challenge to the chain of custody is an alleged inaccurate completion of the air waybill form. The Panel rejects this challenge for the following reasons :

- a. By Clause 9.b of the Protocol, the burden on the Appellant is to prove an intact chain of custody by clear and convincing evidence, not an intact documentation of the same. The Panel has no doubt that the Respondent was able to discharge that burden. In this context, the Panel agrees with the view expressed by the Panel in **Coan (TAS 98-188)**. The Appellant’s submission “confuses good chain of custody with chain of custody documentation”.
- b. The Appellant contends that the words “sample collection” in Section 6 of the Protocol include the transportation of the samples and that thus the documentation on the transport of the samples is to “substantially conform” with the OMAC. The Panel has doubts whether this is a correct interpretation of the Protocol, but even if it were, the documentation of the transport does indeed “substantially conform” to OMAC.

29. OMAC provides that the Doping Control Transport Form “shall include... the venue from which the transport containers have come”. The Appellant argues that the venue was Salt Lake City. The Panel rejects this argument. As can be seen from Section 1.1 of Appendix C to the OMAC (“The procedures which follow are those applicable to the Olympic Games”), this Appendix was drafted for use at the Olympic Games and it seems clear to the Panel that

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the reference to the "venue" is to the place where the particular sporting event takes place (i.e. in the present case, Park City) and not the host city of the Olympic Games (e.g. Salt Lake City for the 2002 Winter Games).

30. Ms Swinnea gave a detailed account of the sequence of events in connection with the transport of the samples and the completion of the form. The Panel accepts her evidence. Dr. Larry Bowers, Senior Managing Director of USADA, testified that the numbers stated on the "billing reference" in the air waybill form, i.e. "O10603" stand for the event (O), the year (1), the discipline, bobsleigh(06) and the venue (03, i.e. Park City). That evidence was not challenged. The Panel is, therefore, satisfied that the air waybill accurately identifies the venue, as required under OMAC. There is no requirement for the venue to be spelled out. It must merely be identifiable.
31. Even if "venue" were to be interpreted to mean the city from which the samples were shipped and the identification code were not sufficient, the listing of Ms Swinnea's home address in the air waybill would have to be viewed as a "minor irregularity" within the meaning of Article 5 of Chapter VI of the OMAC. Once again, the Panel interprets the sentence "(M)inor irregularities do not include the chain of custody" in Article 5 to refer to the chain of custody as such, not the documentation thereof, so that minor irregularities on the documentation do not invalidate the test.

III Testing

32. Mr. Jacobs submitted on behalf of the Appellant that evidence which Dr. Don Catlin, the Director of the UCLA Olympic Analytical Laboratory, gave in a case of **USA Triathlon v/Spencer Smith** TAS 99/A/241 was inconsistent with the evidence in this case and that, as a result, it should be found that no offence was committed.
33. The evidence in question, it was alleged, related to the relationship between 19-norandrosterone and 19-noretiocholanolone both of which were present in the Appellants urine sample. In **Spencer Smith**, the Panel (Paragraphs 68-70 of its reasons) said :

68. *The Appellant submits that, notwithstanding the laboratory error which, when corrected, resulted in a noretiocholanolone*

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concentration of three instead of eight, the Panel can still find that the metabolites of nandrolone exceeded the IOC's minimum threshold of 2 ng/ml., and such finding would still lead to the conclusion that a doping offense had been committed.

69. *The Panel finds that the new information concerning the concentration levels calls into question the reliability of the tests. It was Dr. Catlin's evidence that one would expect the noretiocholanolone concentration to be about 60% of what the norandrosterone concentration was. However, the Panel was also advised that in this instance, the revised calculations carried out by Dr. Catlin do not result in a change to the norandrosterone concentration which remained in excess of 11 ng/ml.*

70. *It is trite law to state that findings of doping infractions must be made or confirmed with the highest possible degree of certainty. Where doubt has been created with regard to the test procedure, such doubt must go to the benefit of the athlete. The Panel finds therefore, that a definitive case of doping has not been established against Spencer Smith.*

34. In the present case, Dr. Catlin testified that the concentration level of 19-Norandrosterone was approximately 13.5 ng/ml which, being above the threshold level of 2ng/ml clearly established the presence of a prohibited substance and a doping offence. He said that there was no possibility that a 13.5 ng/ml concentration could be endogenously produced.

35. Dr. Catlin also gave evidence to the effect that the relationship between 19-norandrosterone and 19-noretiocholanolone in an athlete's urine was irrelevant. It might be, say 5% or 95%, but it would make no difference in deciding whether the presence of 13.5 ng/ml of 19-norandrosterone would constitute an infraction of the doping regulations. He also testified that the Panel in the **Spencer Smith** case had misstated his evidence and that he did not give evidence that, in effect, meant that unless there was a noretiocholanolone concentration of about 60% of the norandrosterone concentration a finding of doping would be unreliable. His view is, as stated above, that the concentration ratio of the two is irrelevant.

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36. The Panel accepts the evidence of Dr Catlin on this matter. Indeed, there was no other relevant expert evidence before the Panel. The Panel is fully satisfied that there was found in the Appellant's "B" sample a concentration of 13.5 ng/ml of 19 norandrosterone (which is a prohibited substance) and that this established (the threshold level being 2ng/ml) that the Appellant had exogenously ingested the substance, had used it and had thereby committed a doping offence under Regulation 1 of the FIBT Doping Regulations. The Panel also accepts Dr Catlin's sworn evidence that the relation between 19-norandrosterone and 19-noretiocholanolone present in an athlete's urine is irrelevant. It does not propose to make any comment on the passages quoted from Spencer Smith's case. It has decided the Appellant's case on the basis of the evidence before it.

IV. The Effect of Contaminated Supplements

37. Dr. Catlin was unable to say from his examination of the Appellant's samples how or when the prohibited substance had been ingested by the Appellant. The possibility of injection was not ruled out.
38. The Appellant gave evidence that prior to the test on 29 December 2001 he had for some time been taking some 31 supplements which he named and lists in an Exhibit. He conceded that he had taken each of them in the time period of 12 months prior to the test. On the day of the test and prior to it, he agreed he had consumed 10 (and possibly 11) of these supplements. He told us that he took each of these substances in order to enhance his performance. Otherwise, there was no point in taking them.
39. The Appellant's coach, Mr. Stewart McMillan, gave evidence that he had assisted the Appellant to prepare the list of supplements which was in evidence, but that he (the coach) had not recommended the majority of them.

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40. As has been stated above, the Appellant gave evidence that he took the supplements to enhance his performance. He said that he was aware of the IOC Prohibited Substance List and had a copy of this list. He said that he was careful to avoid taking such substances and that, before he took a supplement, he looked at it to make sure what was in it and contacted the manufacturer to make sure that it contained no prohibited substances which could cause a positive drug test. The Appellant gave sworn evidence that he contacted the manufacturer of Nitrotech, one of the supplements he took. The gist of his evidence was that he spoke to somebody there who was knowledgeable on the matter as to whether it contained any prohibited substances and who said that it did not contain a prohibited substance. The Panel did not find his evidence on this matter convincing. It is not satisfied that the Appellant had any recollection of the detail of any such conversation. This view extends to his evidence generally about contacting manufacturers. He may have contacted them but the Panel is not satisfied that his discussions with them were as probing and detailed as he claimed.

41. The Appellant said that he knew he had to be careful of supplements and that they did not contain prohibited substances. He asserted, however, that until the drug test in question, he was unaware of the possibility of the contamination of supplements by manufacturers. After 17 January 2002 when he was informed of his positive test, he stopped taking supplements. In cross-examination, he agreed that some of the supplements he took were manufactured by a firm called "Bioform" on whose website his picture appears. He is compensated by Bioform not in cash but by being provided with supplements. He said that the supplement Nitrotech had made him ill and that he recently had it tested for any prohibited substances. It tested negative, but the test results were not produced.

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42. The thrust of the Appellant's case on this issue was, as stated earlier, that he had received mixed messages about the dangers of supplements from many bodies including the IOC, USOC, WADA, USADA, and the FIBT and that in the circumstances he could not be blamed for taking food supplements which, unknown to him, contained a prohibited substance.
43. The Panel cannot be satisfied on the evidence how the Appellant ingested the prohibited substance. There was no evidence that identified any of the supplements which he admitted taking as having contained it or as being likely to have contained it. It may have been contained in the supplements but, on the other hand, as Dr. Catlin testified, it may have been injected. It is not possible to come to a positive conclusion, nor is it necessary to do so.
44. The Appellant's case is that he certainly did not knowingly ingest it. It must have been contained in one or more of the supplements which he took not knowing it was in them.
45. Dr. David L. Black, Director of Laboratories at Aegis Sciences Corporation was called by the Appellant. He gave evidence as to contaminated supplements. He suggested that in relation to prohibited substances inadvertently taken in supplements, the threshold should be increased to 50 ng/ml because, on the basis of some limited research he had done, it was not until this level was reached, that an athlete's performance is likely to be enhanced.
46. The Appellant claimed that the USOC and USBSF had encouraged athletes to take supplements and that in a nandrolone case involving the ingestion of them, it should be necessary to prove that the positive result was not caused by contamination of an otherwise approved supplement. They could not have it both ways.

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47. The Panel agrees with the following observations of the Panel in *Aanes v. FILA* [CAS 2001/A/317 pp 22-23]

“As a general remark, the Panel observes that the sporting world has, for quite some time even before the 2000 Sydney Games, been well aware of the risks in connection with using so called nutritional supplements, i.e. the risk that they may be contaminated or, in fact, "spiked" with anabolic steroids without this being declared on the labels of the containers. There have been several cases of positive tests for nandrolone which have been attributed to nutritional supplements and which have been widely publicised in the sports press. This fact was the likely motive for the IOC press releases in October 1999 and February 2000 (II.2.2 above) which give an unequivocal warning about the use of imported and unlicensed nutritional supplements and their possible mislabelling.

Under these circumstances it is certainly not a valid excuse for an athlete to contend that he/she – personally – was not aware of these warnings. In fact, athletes are presumed to have knowledge of information which is in the public domain. In this context, the Panel notes that there is CAS case law to the effect that athletes are themselves solely (sic) responsible for, inter alia, the medication they take and that even a medical prescription from a doctor is no excuse for the athlete (CAS 92, 73, N. v/ FEI, CAS Digest, p. 153, 158). Furthermore an athlete cannot exculpate himself/herself by simply stating that the container of the particular product taken by him/her did not specify that it contained a prohibited substance. It is obvious that the sale of nutritional supplements, many of which are available over the internet and thus sold without an effective governmental control, would go down dramatically if they properly declared that they contain (or could contain) substances prohibited under the rules governing certain sports. Therefore, to allow athletes the excuse that a nutritional supplement was mislabelled would provide an additional incentive for the producers to continue that practice. In summary, therefore, it is no excuse for an athlete found with a prohibited substance in his/her body that he/she checked the label on the product he took and that the label did not specify that the product contained a prohibited substance.”

48. There was considerable evidence before the Panel of warnings being issued on this matter in the form of news release by the IOC, a statement made by WADA and warnings provided by USADA to athletes concerning the dangers of supplement use. These documents were issued over a period of approximately two years prior to the test on 29 December 2001. For

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instance, the IOC Athletes' Commission on 12 December 2000 issued a press release which contained the following :

“Regarding the increased use of nutritional supplements, we would like to caution the athletes of the world that recent findings show that such supplements may contain drugs that will cause the athletes to test positive for substances that are currently on the banned list. Moreover, we as a commission fully endorse that athletes must take complete responsibility for all drugs that are found in their bodies due to the use of nutritional supplements.”

49. In the relevant documentation it is emphasized that the use of dietary supplements is completely at the athlete's own risk (see too USADA's publication *“True Sport”* dated 1 October 2001).
50. The effect of the Appellant's evidence was that he knew that supplements might not indicate on their package that they in fact contained a prohibited substance but that what he did not know was that the prohibited substance, might be there because of contamination.
51. The Panel is satisfied, having regard to the fact that (a) the Appellant is being a top athlete, (b) his interest in supplements, and (c) his knowledge of prohibited substances, he must have become aware of warnings of the nature referred to earlier. It also is satisfied that those warning would have alerted him to the possibility of contamination and that the taking of supplements was entirely at his own risk. Indeed, as a potential Olympic athlete it would have been very negligent of him not to have known and understood these warnings. It is more likely, however, that he chose to ignore them. If by his evidence, he meant to deny that he has seen and read them, we do not accept it. If, he decided to be his own adviser on these matters it was foolish of him to do so.

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52. The high standing he has with the US Bobsleigh Federation does not assist in these proceedings because, albeit foolishly, he chose not to seek advice from it. The Federation's primary advice was not to take supplements. If it was thought by their athletes that they needed supplements they were advised they should take supplements recommended by the Federation. Mr. Roy, the Executive Director of the Federation gave evidence to this effect.
53. The issue as to contamination of supplements was presented by the Appellant in an attempt to support his case that he had not used a prohibited substance with intent to enhance his performance because he did not know he was using it. As the Panel has held, in dealing with the first issue, that intent is irrelevant in determining whether a doping offence has been committed under the FIBT Doping Regulations, the Appellant's evidence on this issue is likewise irrelevant.
54. However, it is potentially relevant to the issue of sanction with which the Panel will now deal and it has therefore expressed its views on the matter.

V Sanction

55. The relevant provisions of the FIBT Regulations have been set out above. It was submitted, on behalf of the Appellant that, notwithstanding the mandatory terms in which Regulation 9 is drafted ("*The F.I.B.T. Executive Committee shall impose the following penalties in case of a positive result according to items 1 and 3 of the F.I.B.T. Doping Control Regulations.*") there is a discretion to reduce the stated minimum period of suspension. It was accepted by Mr. Jacobs, on the Appellant's behalf, that if the Panel dismisses the appeal, it is open to it to increase the sentence imposed by the AAA Panel. The Respondent submitted that the sentence should be increased to the minimum period of two years. It will be understood that under art. R57 of the Code an appeal is a hearing di novo, and a CAS Panel therefore has power to vary a sentence in either direction.

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56. In **Prusis** the CAS ad hoc Division considered Regulation 9, and also considered in that case whether it was open to the FIBT to reduce the minimum period of suspension. In **Prusis**, the FIBT Executive Committee had relied upon the provisions of the OMAC as entitling it to reduce the period of suspension. The **Prusis** Panel explained that the Legal Consultant to the FIBT was unable to identify which provision of the FIBT Regulations entitled the FIBT to depart from the stated mandatory sanction : see Paragraph 31. It is implicit in the decision in **Prusis** that the **Prusis** Panel did not accept that OMAC was incorporated into the FIBT Regulations.

57. Mr. Jacobs submitted that Regulation 8.4 of the FIBT Regulations provided the necessary link between those regulations and OMAC. Regulation 8 is entitled "*Evaluation of urine analysis*" and Regulation 8.4 provides that "*The Medical Commission shall immediately evaluate the result of the second analysis and give appropriate recommendations to the F.I.B.T. Executive Committee*".

The Panel does not accept that Regulation 8.4 provides the necessary link between the FIBT Regulations and OMAC so that OMAC is thereby incorporated into the FIBT Regulations. The Panel takes the view that the provision in OMAC Chapter II, Article 3 b) III that : "*However, based on specific, exceptional circumstances to be evaluated in the first instance by the competent IF bodies, there may be a provision for a possible modification of the two-year sanction.*" is purely permissive and allows an International Federation, if it so wishes, to make a specific provision in its rules entitling it to reduce the mandatory period of suspension. That specific provision can be included in the rules in one of two ways : either by a specific rule or by incorporation of OMAC. Absent either a specific rule or incorporation, there is no justification for a reduction below the minimum period of suspension.

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58. In the Panel's view, there is no specific rule in the FIBT Regulations and no incorporation of OMAC, whether express or implied, which would entitle a tribunal to reduce the mandatory minimum period of suspension. Indeed, it is to be noted that Rule 9.4 of the FIBT Rules provides for a greater penalty depending upon "the circumstances and the degree of guilt of the individual".
59. However, in case we are wrong in our construction of the FIBT regulations, we think it right to consider what sentence we would impose if we had the power to reduce the period of suspension below the mandatory period of suspension in the present case. In the Panel's opinion, the AAA Panel was wrong to reduce the mandatory period of suspension and this Panel proposes to impose the minimum mandatory period of suspension of two years.
60. The Panel is firmly of the view that on the facts of the present case there are no "specific, exceptional circumstances" which would lead us to reduce the sentence. Our reasons have been set out above, but we summarize them briefly again.
61. We were unimpressed by, and do not accept, the Appellant's evidence as to the care he took about the taking of supplements. He did not approach the United States Bobsleigh Federation, or any other body, for guidance. He did not take medical advice. He relied only upon his own research, which, as we have found, was considerably less thorough than he would have had us believe. He ignored warnings about the dangers of contamination given by a number of bodies, including the IOC and USADA. Finally, he expressed no contrition, and accepted no blame, but sought to blame the IOC, WADA and USADA but not himself for the predicament in which he now finds himself.
62. For these reasons, even if we had had the discretion to reduce the mandatory minimum sentence of two-year suspension, we would not find "specific, exceptional circumstances" for doing so.

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63. For the sake of completeness, we should add that the fact that an athlete may miss the Olympic Games as a result of a suspension for a doping offence cannot, in our view, amount to "special, exceptional circumstances". If it did, no athlete could ever be suspended for the minimum two-year period in the two years before the next Olympic Games.

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DECISION

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr. Pavle Jovanovic on 28 January 2002 is dismissed .
2. The decision of the AAA Panel of 26 January 2002 is varied as follows:

The Appellant is ineligible for competition for a period of two years from 29 December 2001.

And the Panel so rules.

3. The award is pronounced without costs, except for the court office fee of CHF 500.-- (five hundred Swiss Francs) paid by the Appellant which is retained by the CAS.
4. Each party shall bear its own costs.

Salt Lake City, 7 February 2002

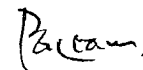
THE COURT OF ARBITRATION FOR SPORT



The Hon. Robert Ellicott QC
President of the Panel



Mr. Dirk-Reiner Martens
Arbitrator



Mr. Peter Leaver QC
Arbitrator