CAS 2017/O/5039 International Association of Athletics Federation (IAAF) v. Russian Athletic Federation (RUSAF) & Anna Pyatykh

ARBITRAL AWARD

rendered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

Panel: Prof. Jens **Evald**, Professor, Aarhus, Denmark, Sole Arbitrator

in the arbitration between:

INTERNATIONAL ASSOCIATIONS OF ATHLETICS FEDERATIONS (IAAF), Monaco

Represented by Mr Ross Wenzel and Nicolas Zbinden, Attorneys-at-Law, Kellerhals Carrard, Lausanne Switzerland

Claimant

v.

1/ THE RUSSIAN ATHLETICS FEDERATION (RUSAF), Moscow, Russian Federation

First Respondent

and

2/ Ms ANNA PYATYKH, Russian Federation

Second Respondent

I. PARTIES

1. The International Association of Athletics Federations (the "Claimant" or the "IAAF") is the world governing body for the sport of Athletics, established for an indefinite period with legal status as an association under the laws of Monaco. The IAAF has its registered seat in Monaco.

2. The Russian Athletic Federation (the "First Respondent" or the "RUSAF") is the national governing body for the sport of Athletics in the Russian Federation, with its registered seat in Moscow, Russian Federation. The RUSAF is a member federation of the IAAF for Russia, currently suspended from membership.

3. Ms Anna Pyatykh (the "Second Respondent" or the "Athlete") is a Russian athlete specializing in triple jump. She is an International-Level Athlete for the purposes of the IAAF Competition Rules (the "IAAF RULES").

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the parties' written and oral submissions and the evidence examined in the course of the present arbitration proceedings and during the hearing. This background is set out for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

5. This case concerns a claim by the IAAF against the Second Respondent for violating Rule 32.2 (a) of the 2007 IAAF Rules (*Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample*) and Rule 32.2 (b) of the 2013 IAAF Rules (*Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method*). The RUSAF has been included in the claim as the First Respondent, as the RUSAF has not been able to conduct the hearing process due to its suspension.

6. Two distinct sets of facts amount to separate anti-doping rule violations (the "ADRV"): (A) a retesting of a sample collected in 2007 (the "Retesting Allegation") and (B) the Moscow washout testing as described in the Richard H. McLaren, Independent Person reports of 16 July 2016 (the "First IP Report") and of 9 December 2016 (the "Second IP Report") and the underlying evidence (the "Washout Allegation"). Each set of facts will be described separately.

7. ***(A) the Retesting Allegation***:

8. The Athlete underwent doping test at the 11th IAAF World Championships in Osaka (Japan) on 31 August 2007. The sample was analyzed shortly after the doping control and did not reveal the presence of any prohibited substance.

9. At the request of the IAAF, the Athlete's sample was transferred for long-term storage to the WADA-accredited laboratory of Lausanne (Switzerland).

10. On 19 October 2016, the IAAF requested the Lausanne laboratory to carry out further analyses on the Athlete's sample. These analyses revealed the presence of Dehydrochlormethyltestosterone ("DHCMT") metabolites. DHCMT is an Exogenous Androgenic Anabolic Steroid, prohibited under section S1.1a of the World Anti-Doping Agency (the "WADA") Prohibited List.

11. On 5 December 2016, the IAAF notified the Athlete of the ADRV, informing her in particular of her right to provide explanations for the Adverse Analytical Finding (the "AAF") and to request the analysis of the B-sample and/or provision of the A sample Laboratory Documentation Package.

12. On 15 December 2016, having not received any reply from the Athlete, the IAAF provisionally suspended her and informed her of her right to request a hearing within 14 days, to be held before CAS in view of RUSAF's suspension. The Athlete was given the choice of having her case heard either by a Sole Arbitrator as a first instance panel pursuant to Rule 38.3 of the IAAF Rules or by a CAS Panel as a sole instance.

13. By email dated 16 December 2016, the Athlete provided her explanations for the AAF. According to her explanations, the positive result came from supplements that she had been taking. In her letter, she requested her case to be heard by a Sole Arbitrator as first instance and, *inter alia*, explained the following:

> *"One of them, with conceivably beneficial effect for training sessions, was Laxodrol, manufactured by Ergogen Labs. The product containing, with reference to the product description, exceptionally natural, plant steroid, called 5a-hydroxy Laxogenin. After a while, when I had run out of laxodrol, I regained the consumption of another 5a-hydroxy Laxogenin containing dietary supplement made by Xcel Sports nutrition, namely Natural Strength. Besides, as far as I recollect, I was consuming a large quantity of another products manufactured by Xcel Sports nutrition – Crackhead Xtreme, Pre-Workout and Ultimate BCAA.*
> *[…]*
> *In addition, as far as I strongly remember, I'd been consuming NANO VAPOR Pre-Workout and Nitro-Tech Performance dietary supplements, manufactured by Muscle Tech.*
> *At present moment, certainly, my assumptions are based on guesses about those sport nutritional products that had been designed to be merely dietary supplements, but apparently they hadn't since they gave rise to an adverse analytical finding."*

14. On 23 December 2016, the IAAF informed the Athlete that the explanation that she had provided was not adequate, that she therefore remained suspended and that her case would, as requested, be referred to CAS in accordance with Rule 38.3 of the IAAF Rules.

15. **(B) the Washout Allegations**:

16. On 16 July 2016, Prof. Richard H. McLaren (the "Independent Person" or "IP") issued the First IP Report on allegations of systematic doping in Russia.

17. The key findings of the First IP Report are the following:

- The Moscow Laboratory operated, for the protection of doped Russian athletes, within a State-dictated failsafe system, described in the report as the Disappearing Positive Methodology.

- The Sochi Laboratory operated a unique sample swapping methodology to enable doped Russian athletes to compete at the Games.

- The Ministry of Sport directed, controlled and oversaw the manipulation of athlete's analytical results or sample swapping, with the active participation and assistance of the Russian Federal Security Service (the "FSB"), the Center of Sports Preparation of National Teams of Russia (the "CSP") and both Moscow and Sochi Laboratories.

18. On 9 December 2016, the IP confirmed the key findings of the First IP Report (page 2 of the Second IP Report). In the Second IP Report, the IP described the so-called *"washout testing"* prior to certain major events, including the 2012 London Olympic Games and the 2013 IAAF World Championships in Moscow.

19. The washout testing started in 2012, when Dr. Rodchenkov developed a secret cocktail called the "Duchess" with a very short detection window (page 23 of the Second IP Report). In the Second IP Report is stated, that "*this process of pre competition testing to monitor if a dirty athlete would test "clean" at an upcoming competition is known as washout testing"* (see page 71 of the Second IP Report).

20. The washout testing was used to determine whether the athletes on a doping program were likely to test positive at the 2012 London Olympic Games (see pages 71-78). At that time the relevant athletes were providing samples in official doping control Bereg Kits. While the Laboratory's initial testing procedure ("ITP"), which show the presence of Prohibited Substances, were recorded on the washout list, the samples were automatically reported as negative in the Anti-Doping Administration and Management System ("ADAMS") (see page 72 of the Second IP Report).

21. As a result of this testing program, there were no positive Russian analytical results at the 2012 London Olympic Games, although 11 Russian athletes were retested positive at the time of the Second IP Report (see page 24 of the Second IP Report).

22. The covering up of falsified ADAMS information only worked if the sample stayed within the control of the Moscow Laboratory, and later destroyed. Given that Bereg kits are numbered and can be audited or also seized and tested the Moscow Laboratory realized that

it would be only a matter of time before it was uncovered that the content of samples bottle would not match the entry into ADAMS (see page 72 of the Second IP Report).

23. Therefore, the washout testing program evolved prior to the 2013 IAAF World Championships in Moscow. It was decided that the washout testing would no longer be performed with official Bereg kits, but from containers selected by athletes, such as Coke and baby bottles filled with their urine. The athlete's name would be written on the selected container to identify his or her sample (see page 85 of the Second IP Report).

24. This "under the table" system consisted of collecting samples in regular intervals and subsequently testing those samples for quantities of prohibited substance to determine the rate in which those quantities were declining so that there was certainty the athlete would test "clean" in competition. If the washout testing determined that the athlete would not test "clean" at competition, he or she was left at home (page 84 of the Second IP Report).

25. The Moscow Laboratory developed a schedule to keep track of those athletes who were subject to this unofficial washout testing program (the "Washout Schedule"). The Washout Schedule was updated regularly when new washout samples arrived in the Laboratory for testing.

26. The Washout Schedule was made public by the IP on its website (https://www.ipevidencedisclosurepackage.net/). All documents contained on the website were anonymized for privacy reasons. The IP informed the IAAF that the code number for the Athlete was A0701.

27. The documents on the IP's website in respect of the Athlete's code number include the Excel Washout Schedule, which was updated between 4 July 2013 and 21 August 2013. The latest and most updated version of the Washout Schedule, dated 21 August 2013 sets out the following information in relation to the code number A0701:

52	A0701 06/07	идет на тяжелой схеме!!!	T/E 10, онсандролон 3 млн., метенолон 7 млн., местеролон 600 000, оралтуринабол следы!!
53	A0701 17/07	идет на прогормонах	T/E 6, онсандролон (80 000), опальное плохо видно
54	A0701 25/07	параллельный зачет	T/E 0.5 вроде чисто..

In English:

52	A0701 06/07	goes on the heavy scheme !!!	T / E of 10, 3 million oxandrolone., Methenolone 7 million,

			Mesterolone 600,000, oral turinabol traces!!
53	A0701 17/07	goes on prohormones	T / E 6, oxandrolone (80 000), the rest is hard to see
54	A0701 25/07	parallel offset	T / E 0.5 like clean ..

28. The Athlete participated in the 2013 IAAF World Championships in Moscow at the Triple Jump event on 13 and 15 August 2013, where she finished 7th.

29. On 17 February 2017, the IAAF informed the Athlete that, following its letter dated 5 and 23 December 2016, it became aware of the evidence collected by the IP described above and it intended to bring a further ground of charge against the Athlete under Rule 32.2(b) of the IAAF Rules. The IAAF provided the relevant evidence to the Athlete and granted her an opportunity to provide her explanations in respect of this evidence by 3 March 2017 at the latest.

30. The IAAF specified that, upon expiry of this deadline, the case (including both the Retesting Allegations and Washout Allegations) would be referred to the CAS under Rule 38.3 of the IAAF Rules as per the Athlete's request.

31. In her letter to IAAF, dated 1 March 2017, the Athlete stated the following:

> *"I would like to thank you for handing over my case to a sole arbitrator of the CAS pursuant to IAAF Rule 38.3.*
> *As per information described in your letter, namely "IAAF 16-443/Anna Pyatykh/IP Report", dated 17/02/2017, I hereby declare I was always secured in the knowledge I had always been tested officially, strictly in accordance with WADA Code and IAAF Anti-Doping Regulations & Rules, and I was never exempt from official testing.*
> *With all due respect to professor Richard H. McLaren, never in all my life have I provided the unofficial urine samples."*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

32. On 22 March 2017, the IAAF lodged a Request for Arbitration with CAS in accordance with Article R38 of the CAS Code of Sports-related Arbitration (the "Code"). The IAAF requested that, pursuant to Rule 38.3 of the IAAF Rules, the procedure be governed by the CAS appeals arbitration rules, informed CAS that its Request for Arbitration was to be considered as its Statement of Appeal and Appeal Brief and requested the matter to be submitted to a sole arbitrator, acting as a first instance body.

33. On 24 March 2017, the CAS Court Office initiated the present arbitration and specified that, as requested by the Claimant, it had been assigned to the CAS Ordinary Arbitration Division but would be dealt with according to the CAS Appeals Arbitration Division rules, Articles R 47 *et seq.* of the Code. The Respondents were further invited to submit their Answer within 30 days.

34. On 21 April 2017, the Second Respondent filed her Answer in accordance with Article R55 of the Code.

35. The First Respondent did not file an Answer within the 30-day time limit.

36. On 2 May 2017, in accordance with Article R54 of the Code, and on behalf of the Secretary General of the CAS, the CAS Court Office informed the Parties that the Arbitral Panel appointed to decide the present matter was constituted by:

    - Prof. Jens **Evald**, Professor of Law in Aarhus, Denmark, as Sole Arbitrator.

37. Also on 2 May 2017, the Parties were invited to inform the CAS Court Office before 9 May 2017 whether they preferred a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

38. In her email of 8 May 2017, the Athlete informed, that she preferred for the Sole Arbitrator, provided he deemed himself sufficiently well informed, to issue an award based on the Parties' written submissions.

39. In its email dated 9 May 2017, the Claimant informed that it preferred a hearing to be held in this matter.

40. Although duly invited, the RUSAF did not submit any position on the proceedings before CAS.

41. On 16 May 2017, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing in this matter, which would be held in Lausanne and that a participation via Skype may be, upon request, in particular by the Second Respondent, allowed by the Sole Arbitrator. The Parties were further consulted on the date of the hearing.

42. On 19 May 2017, the CAS Court Office informed the Parties that a hearing would be held on Friday 16 June 2017 at 9.30am (CET) at the CAS Court Office in Lausanne, Switzerland and that the Second Respondent's request of 16 May 2017 to attend the hearing via Skype was granted.

43. On 6 June 2017, an Order of Procedure was issued. It was signed by the Claimant, on 8 June 2017, and by the Second Respondent on 7 June 2017.

44. On 16 June 2017, a hearing was held in Lausanne, Switzerland. In addition to the Sole Arbitrator and Ms Pauline Pellaux, Counsel to the CAS, the following persons attended the hearing:

For the IAAF:

- Mr Ross Wenzel, Counsel;
- Mr Nicolas Zbinden, Counsel;
- Mr Huw Roberts, Counsel;
- Ms Louise Reilly, Counsel;
- Ms Alexandra Volkova, Interpreter

For the Athlete:

- The Athlete, via Skype
- Mr Emil Mamedov, Interpreter, via Skype

45. Both interpreters were invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury under Swiss law.

46. The Parties were given ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.

47. At the hearing, the Claimant referred to two new exhibits regarding the Retesting Allegations in support of the assertion, that the product "Natural Strength" was not produced by the manufacturer Xcel Sports Nutrition prior to 2013.

48. Before the hearing was concluded, all Parties expressly stated that they had no objections to the overall conduction of the proceedings, in respect of the Parties right to be heard and to be treated equally in these arbitration proceedings.

49. After the hearing, the Claimant produced the two exhibits it had referred to and, by letter of 21 June 2017, the Sole Arbitrator invited the Respondents to submit their comments on such exhibits.

50. In her letter forwarded by email on 23 June 2017, the Second Respondent referred to Article R56 of the Code, submitted her comments and documents provided from the "Internet Archive Wayback Machine".

51. The First Respondent did not file any submissions on the exhibits.

52. By letter of 23 June 2017, the Second Respondent's communication of 23 June 2017 was duly notified and the Sole Arbitrator, for the sake of clarification, underlined that the documents submitted by both Parties were documents publically available on the web.

53. On 3 July 2017, the Claimant submitted observations on the Second Respondent's e-mail of 23 June 2017. On 4 July 2017, the Second Respondent objected to their admissibility and, on a subsidiary basis, submitted a response.

54. On 7 July 2017 and in application of Article R56 of the Code, the Sole Arbitrator excluded the Claimant's observations of 3 July 2017 and the Second Respondent's response of 4 July 2017 from the CAS file.

55. The Sole Arbitrator confirms that he carefully took into account in his decision all the submissions, evidence, and arguments presented by the Parties, even if they have not been specifically summarized or referred to in the present arbitral Award.

IV. SUBMISSIONS OF THE PARTIES

56. The IAAF's submissions, in essence, may be summarized as follows:

- The IAAF submits that the Athlete has committed two ADRV, one arising from the Retesting Allegations (Presence violation) and one from the Washout Allegations (Use violation).

- As to the Retesting Allegation, the presence of DHCMT has been found in the Athlete's A-sample and is uncontested by the Athlete. DHCMT is prohibited in- and out-of-competition under section S1.1.a of the 2007 Prohibited List. The violation of Rule 32.2(a) is therefore established.

- Pursuant to Rule 49 of the 2016-2017 IAAF Rules, the statute of limitation of Rule 47 of the 2016-2017 IAAF Rules applies retroactively to violations prior to the entry into force of the 2016-2017 IAAF Rules, *"provided however that Rule 47 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date."*

- The Effective Date according to Rule 48.5 of the 2016-2017 IAAF Rules was 1 January 2015, the statute of limitation had not expired by the Effective date and the present violation is subject to the statute of limitation of the 2016-2017 IAAF Rules.

- Given that the doping control took place on 31 August 2007 and that the IAAF notified the Athlete of the AAF on 5 December 2016, the statute of limitations of Rule 47 of the 2016-2017 IAAF Rule was complied with.

- As to the Washout Allegations Rule 32.2(b) of the 2013 IAAF Rules forbid the Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.

- Pursuant to Rule 33.3 of the 2013 IAAF Rules, facts related to ADRV may be established by any reliable means, including but not limited to admissions, evidence of third persons, witness statements, experts reports and documentary evidence.

- The IAAF submits that the Athlete committed a Use violation in 2013 on the basis of the reliable evidence collected by the IP:

    - The IP, a very reputable CAS arbitrator, has described in great detail the process of washout testing.

    - The Ministry of Sport had instructed the CSP to administer the "Duchess" cocktail, which contained oxandrolone, methenolone and trenbolone, to the Russian athletes prior to the 2013 IAAF World Championships.

    - To avoid detecting at the 2013 IAAF World Championships, the Moscow laboratory conducted *"under the table testing"* in unofficial containers.

    - All the results of the unofficial testing were reported on the Washout Schedule. The Washout Schedule indicated that the Athlete was tested three times before the 2013 IAAF World Championship, *viz*. the tests dated 6, 17 and 25 July 2013.

    - The initial test of 6 July showed the Athlete's T/E ratio was of 10, and the sample contained oxandrolone, methenolone, mesterolone and DHCMT.

    - It is striking that two of the three components of the "Duchess" cocktail were in the Athlete's sample, indicating that she was taking the cocktail.

    - The Athlete provided two further samples, dated 17 and 25 July 2017. The sample dated 17 July 2013 showed reduced T/E ratio of 6 compared to the ratio of 10 on 6 July 2013, as well as the presence of oxandrolone. The third and final sample, of 19 days after the first one, was normal, with a T/E ratio of 0,5. As the Washout Schedule indicates, the Athlete was *"like clean"*

    - As a result the Athlete was allowed to compete at the 2013 IAAF World Championship, as the Russian knew that she would not test positive.

    - All of the above clearly shows that the Athlete was using prohibited substances, *viz*. oxandrolone, methenolone, mesterolone as well as DHCMT, during the course of the summer 2013, to prepare for the 2013 IAAF World Championships in Moscow.

- As to the Period of Ineligibility, the IAAF considers that the two ADRV should not be considered as multiple violations, and that the sanction shall be based on the violation that carries the most severe sanction.

- The IAAF submits that the ADRV arising from the Washout Allegations carries the most severe sanction.

- Pursuant to Rule 40.6 (a) of the 2013 IAAF Rules the Ineligibility otherwise applicable shall be increased up to 4 years due to aggravating circumstances such as, i.e. the Athlete committed the ADRV as part of a doping plan or scheme, used multiple Prohibited Substances or used Prohibited Substances on multiple occasions.

- Almost all aggravating factors in Rule 40.6(a) of the 2013 IAAF Rules are relevant in the present case.

- In this case the Athlete has also been tested positive for DHCMT following the retesting of her sample collected at the 11th IAAF World Championships in Osaka (Japan) on 31 August 2007, which must be taken into account when assessing the Athlete's sanction.

- The IAAF submits that the only possible sanction for the Athlete is a four year ineligibility period.

- As to the Disqualification, the IAAF submits that the sample was collected on 31 August 2007 and therefore all the Athlete's results must be disqualified from this date through the commencement of her provisional suspension on 15 December 2016.

57. The Claimant makes the following requests for relief, asking the CAS:

"(i) CAS has jurisdiction to decide on the subject matter of this dispute:

(ii) The Request for Arbitration of the IAAF is admissible.

(iii) The Athlete is found guilty of one or more Anti-doping rule violations in accordance with Rule 32.2(a) and/or Rule 32.2(b) of the IAAF Rules.

(iv) A period of ineligibility of four years is imposed upon the Athlete, commencing on the date of the (final) CAS Award. Any period of provisional suspension imposed on, or voluntarily accepted, by the Athlete until the date of the (final) CAS Award shall be credited against the total period on ineligibility to be served.

(v) All competitive results obtained by the Athlete from 31 August 2007 through to the commencement of her provisional suspension on 15 December 2016 are

disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money).

(vi) The arbitration costs be borne entirely by the First Respondent pursuant to Rule 38.3 of the IAAF Competition Rules or, in the alternative, by the Respondents jointly and severally.

(vii) The IAAF is awarded a contribution to its legal costs."

58. The Athlete's submissions, in essence, may be summarized as follows:

- As to the Retesting Allegations, the Athlete submits that *"the presence of the Metabolites of the Prohibited Substance could apparently potentially be caused by the consumption of the contaminate product, viz. Natural Strength (manufactured by Xcel Sport Nutrition). The label of the dietary supplement in question, lists "5a-Hydroxy Laxogenin", and is not disclosing the fact that the product contains Prohibited Substances".*

- In accordance with the test results published by the United States Anti-Doping Agency (USADA), and made public on the USADA website, testing of a sample purchased in 2014 of this supplement revealed the presence of several anabolic agents, including, but not limited to methandienone, methasterone, methylclostebol, oxymesteron and turinabol.

- As to the Washout Allegations, the Athlete submits that she has always been tested officially, strictly in accordance with the WADA Code and the IAAF Rules and she has never provided the unofficial urine samples.

- As to the Second IP Report and the underlying evidence, the Athlete holds the following position:

    - For an AAF to be considered valid and exploitable in anti-doping proceedings, it must comply with the International Standard for Testing & Investigation (the "ISTI") and the International Standard for Laboratories (the "ISL").

    - The Claimant supports its allegations on *"a scraps of MS Excel document […] of a so-called "Washout Schedule" containing apart from alphanumeric code (in column A) chemical names of the Prohibited Substances, T/E ratios and the decimal numbers with undefined units of measure (in column C) [..]*.

    - Basing its hypothesis about the ADRV primarily on the scraps of MS Excel documents, the Claimant wrongfully concludes that the Athlete was part of a state dictated doping scheme.

- The scraps are of no pertinence to the ISL and may by no means substitute for the data specified in the Laboratory Internal Chain of Custody (TD2009LCOC) and the Laboratory Documentation Packages (TD2009LDOC documentation.

- The Claimant has not submitted Laboratory Internal Chain of Custody (TD2009LCOC) and Laboratory Documentation Packages (TD 2009LDOC) related documentation, that could adequately support the accusations of violations of Rule 32.2(b) of the IAAF 2012-2013.

- The Claimant failed to meet *onus pro tandi*, and thus the Washout Allegations must be dismissed.

- As to the Period of Ineligibility, the Athlete submits that whatever sanction would be imposed it ought to comply with the principle of proportionality, *"in the sense that there must be a reasonable balance between the kind of the misconduct and the sanction, hence sanction must not exceed that which is reasonable required in the search of the justifiable aim […]".*

- As to the Disqualification, the Athlete notes that the period would be more than nine years and 3 months. The Athlete considers the Claimant's request to be evidently and grossly disproportionate in comparison with the violation of Rule 32.2(a) of the 2006-2007 IAAF Rules and it is furthermore considered a violation of fundamental justice and fairness, and, thus, contrary to the mandatory 2007 IAAF Rules and WADC.

59. The Athlete makes the following request for relief, asking the CAS to rule as follows:

"(i) CAS has jurisdiction to decide on the subject matter of this dispute;

(ii) The Statement of Defence of the Second Respondent is admissible;

(iii) The anti-doping Rule 32.2(b) of the IAAF Rules violation charges, pertaining to the Wash Out Allegations, against the Second Respondent shall be entirely dismissed;

(iv) A period of ineligibility, the Second Respondent is imposed upon, provided that anti-doping Rule 32.2(a) of the IAAF Rules violation has occurred, in the circumstances of the present case, shall be decided based on fairness, as the Single Arbitrator deems it appropriate and just as well as adequate and proportionate.

(vi) The legal costs of the IAAF be borne entirely by the IAAF.

V. JURISDICTION, APPLICABILITY OF THE APPEAL ARBITRATION PROCEDURE AND ADMISSIBILITY

60. The IAAF maintains that the jurisdiction of CAS derives from Rule 38.3 of the 2016-2017 IAAF Rules. As a consequence of its suspension, the RUSAF was not in a position to conduct the hearing process in the Athlete's case by way of delegated authority from IAAF pursuant to Rule 38 of the IAAF Rules. In these circumstances, it is not necessary for the IAAF to impose any deadline on the RUSAF for that purpose. The Athlete also expressly consented to the application of Rule 38.3 of the IAAF Rules.

61. Rule 38.3 of the 2016-2017 IAAF Rules determines as follows:

> *"If a hearing is requested by an Athlete, it shall be convened without delay and the hearing completed within two months of the date of notification of the Athlete's request to the Member. Members shall keep the IAAF fully informed as to the status of all cases pending hearing and of all hearing dates as soon as they are fixed. The IAAF shall have the right to attend all hearings as an observer. However, the IAAF's attendance at a hearing, or any other involvement in a case, shall not affect its right to appeal the Member's decision to CAS pursuant to Rule 42. If the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the Member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rule 42. A failure of a Member to hold a hearing for an Athlete within two months under this Rule may further result in the imposition of a sanction under Rule 45."*

62. The Sole Arbitrator notes that the Athlete is an International-Level Athlete and that the RUSAF is indeed prevented from conducting a hearing in the Athlete's case within the deadline set out by Rule 38.3 of the IAAF Rules. The Sole Arbitrator confirms that the IAAF was therefore permitted to refer the matter directly to a sole arbitrator appointed by CAS, subject to an appeal to CAS in accordance with Rule 42 of the IAAF Rules. The jurisdiction of CAS is therefore based on Rule 38.3 of the IAAF Rules and the rules of the Appeal Arbitration Procedure shall apply.

63. Since the request for arbitration, to be considered as a combined statement of appeal and appeal brief, complies with the formal requirement set by the Code and since there are no objections as to admissibility of the present case, the Sole Arbitrator finds that the Request for Arbitration is admissible.

VI. APPLICABLE LAW

64. The IAAF maintains that the procedural aspects of this appeal, including the statute of limitations, shall be subject to the 2016-2017 IAAF Rules. The substantive aspects of the Retesting Allegations shall, subject to the possible application of *lex mitior*, be governed by the 2007 IAAF Rules and the substantive aspects of the Washout Allegations by the 2013 IAAF Rules. Monegasque law shall apply (on a subsidiary basis) to such issue.

65. The Athlete asserts that the proceedings are primarily governed by the IAAF Rules and pursuant to the legal principle *tempus regit actum*, the procedural matters are governed by the regulations in force at the time of the procedural act in question. As such, procedural matters should be governed by the 2016-2017 version of the IAAF Rules. The Athlete submits that the substantive aspects of the asserted anti-doping rule violations, shall be governed, subject to the possible application of the principle of *lex mitior*, by the pre-2015 editions of the IAAF Rules, such as the 2006-2007 and 2012-2013 editions of the IAAF Rules. Monegasque law shall apply subsidiarily.

66. Article R58 of the Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

67. The Sole Arbitrator observes that the Parties' assertions correspond to Rule 42.23 and 42.24 of the IAAF Rules 2016-2017, that the proceedings are primarily governed by the IAAF Rules and subsidiarily by Monegasque Law. IAAF Rules 42.23 and 42.24 read as follows:

> *"In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations. […]*
>
> *In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitration shall be conducted in English, unless the parties agree otherwise."*

68. Pursuant to the legal principle of *tempus regit actum*, the Sole Arbitrator is satisfied that procedural matters are governed by the regulations in force at the time of the procedural act in question. Consequently, whereas the substantive issues are governed by the pre-2015 edition of the IAAF Rules (more particularly the 2007 to the Retesting Allegation and 2013 editions to the Washout Allegations), procedural matters are governed by the 2016-2017 version of the IAAF Rules. As will be explained below (cf. § 13 ff), in spite of the introduction of the fairness exemption in the 2016-2017 IAAF Rules and of the automatic disqualification of results under the pre-2015 editions, the Athlete's case is in any event not

prejudiced by the application of the IAAF 2013 Rules instead of the 2016-2017 IAAF Rules, as the Sole Arbitrator deems that there is an overriding requirement of fairness in interpreting and assessing sanctions under the IAAF Rules.

VII. MERITS

69. The main issues to be resolved by the Sole Arbitrator are:

A. Did the Athlete violate Rule 32.2(a) of the 2007 IAAF Rules?

(1) The Occurrence of an ADRV

(2) The Statute of Limitations

B. Did the Athlete violate Rule 32.2(b) of the 2013 IAAF Rules?

(1) Regulatory Framework

(2) Analysis of the Second IP Report as basis for establishing an ADRV

(3) The findings of the Sole Arbitrator

In case of affirmative answer to questions A and/or B

C. Sanction

(1) Period of Ineligibility start and end date

(2) Disqualification

A. Did the Athlete Violate Rule 32.2(a) of the 2007 IAAF Rules?

1. The Occurrence of an ADRV

70. Pursuant to Rule 32.2(a) of the 2007 IAAF Rules, the *"[p]resence of a Prohibited Substance or its Metabolites or Markers in the Athlete's Sample"* is an ADRV.

71. The Sole Arbitrator notes, that DHCMT has been found in the Athlete's A-sample, that the Athlete did not request the analysis of the B-sample and that it is undisputed that the Athlete consumed DHCMT, a non-specified substance prohibited in- and out-of-competition, cf. WADA's 2007 Prohibited List under section S1.1.a, known to be sport performance enhancing. The Sole Arbitrator further notes that the Athlete does not contest the AAF.

72. Based on the above, the Sole Arbitrator finds that the Athlete violated Rule 32.2 (a) of the 2007 IAAF Rules.

2. The Statute of Limitations

73. The IAAF maintains that, pursuant to Rule 49 of the 2016-2017 IAAF Rules, the statute limitation period of Rule 47 of the 2016-2017 IAAF Rules applies retroactively to violations prior to the entry into force of such Rules, *"provided however that Rule 47 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date".*

74. Further, the IAAF asserts that as the violation occurred on 31 August 2007, under the version of the IAAF Rules applicable at the time, it would have become time-barred eight years later, i.e. on 31 August 2015. The Effective Date according to Rule 48.8 of the 2016-2017 IAAF Rules was 1 January 2015. Therefore, the statute of limitation had not expired by the Effective Date and the present violation is subject to the statute of limitation of the 2016-2017 IAAF Rules.

75. The Athlete has made no submissions in response to the IAAF's submissions on the statute of limitations.

76. The Sole Arbitrator observes that according to Rule 49.1 of the 2016-2017 IAAF Rules, the statute of limitations in Rule 47 is a procedural rule. Rule 49 explicitly regulates the intertemporal scope of application of the 10-year Limitation Period of the 2015 WADA Code. Accordingly, the 10-year limitation period may only be applied retroactively if the previously applicable statute of limitation has not already expired of 1 January 2015 ("Effective Date"), cf. CAS 2015/A/4304 at para 27(e). Since in the present case the limitation period according to the previous statute of limitation (laid down in the 2007 IAAF Rules) expired 31 August 2015 and the Effective Date being 1 January 2015, the new limitation period can be applied retroactively.

77. Further, the Sole Arbitrator observes that the doping control took place on 31 August 2007 and that the IAAF notified the Athlete of the AAF on 5 December 2016, therefore follows that the Athlete was notified of the ADRV within ten years from the date of which the ADRV occurred.

78. The Sole Arbitrator concludes that the IAAF was entitled to initiate proceedings against the Athlete.

B. Did the Athlete Violate Rule 32.2(b) of the 2013 IAAF Rules?

1. Regulatory Framework

79. The Sole Arbitrator observes that the following regulatory framework is relevant to the merits of the case at hand.

80. The relevant parts of Rule 32 of the 2013 IAAF Rules read as follows:

"RULE 32 Anti-Doping Rule Violations

1. Doping is defined as the occurrence of one or more of the anti-doping rule violations set out in Rule 32.2 of these Anti-Doping Rules.
2. Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:

[…]

(a) Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.

(i) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

(ii) *the success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used, or Attempted to be Used, for an anti-doping rule violation to be committed."*

81. Rule 33 (1), (2) and (3) of the 2013 IAAF Rules read as follows:

"RULE 33 Proof of Doping

Burdens and Standards of Proof

1. *The IAAF, Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IAAF, Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*

2. *Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Rules 40.4 (Specified Substances) and 40.6 (aggravating circumstances) where the Athlete must satisfy a higher burden of proof.*
Methods of Establishing Facts and Presumptions

3. Facts related to anti-doping rule violations may be established by any reliable means, including but not limited to admissions, evidence of third Persons, witness statements, expert reports, documentary evidence, conclusions drawn from longitudinal profiling such as the Athlete Biological Passport and other analytic information."

82. The Sole Arbitrator notes that in order to establish an ADRV in accordance with Rule 33.3 of the 2013 IAAF Rules, the IAAF has to establish an ADRV to the comfortable satisfaction of the Sole Arbitrator.

2. Analysis of the Second IP Report as a Basis for Establishing a Use ADRV

83. The Sole Arbitrator observes that in its attempt to establish an ADRV of the Athlete under the Rule 32.2(b) of the 2013 IAAF Rules, the IAAF relies on the conclusions drawn by Prof. Richard H. McLaren in the Second IP Report. The IAAF focusses on the so-called Washout Schedule indicating that the Athlete was unofficially tested three times before the 2013 IAAF World Championships, *viz.* the tests dated 6, 7 and 25 July 2013.

84. As a preliminary matter, the Sole Arbitrator will analyze the Second IP Report as basis for establishing a Use ADRV under Rule 32.2(b) of the 2007 IAAF Rules:

85. The Second IP Report confirms the findings of the First IP Report of 16 July 2016 and *"identifies, summer, winter and Paralympic athletes involved in the doping cover-up and manipulation"* (see page 4 of the Second IP Report);

86. Accompanying the Second IP Report is a release of the non-confidential evidence the IP has examined, named Evidence Disclosure Package ("EDP") (see pages 128-144, Appendix A of the Second IP Report);

87. The IP's investigative method is described in the Second IP Report (see pages 10-15). Among a number of things, the IP conducted cyber and forensic analysis of documentary evidence retried from hard drives and backups of Dr. Rodchenkov's laptop and access to emails. From the documentation retrieved on the hard drives, the IP created a working database. From the database, the following was done (see page 13 of the Second IP Report):

- *"Reviewed 4,237 Excel schedules, thousands of documents and emails;*
- *Cross-compared information available in the database against records in the Anti-Doping Administration and Management System ("ADAMS") to identify false entries;*
- *Used intelligence gathered by IP to identify witnesses to be interviewed and determine what they knew about the inquiry subject matter; and*
- *Used the intelligence to identify specific samples for laboratory and forensic analysis."*

88. As to the sufficiency of the evidence to prove an ADRV by any individual athlete, the Second IP Report (see pages 35/36 of the Second IP Report) states that the different types of evidence provided with respect to any individual athlete are "like strands in a cable". It would be up to each Results Management Authority to determine whether the provided strands of evidence, standing alone or together build a sufficiently strong cable to support an ADRV in an individual case;

89. According to the Second IP Report, a Use case against an athlete may be established by "any reliable means" pursuant to the WADA Code Article 3.2. As relevant to the IP's investigation, reliable means includes:

    i. Contextual evidence – which identifies how the athlete fits into the doping program which the IP investigation has established;

    ii. Initial Testing Procedure ("ITP") screen of the Moscow Laboratory indicating possible prohibited substances;

    iii. Forensic evidence related to sample tampering or substitution; and

    iv. Dr. Rodchenkov's evidence linking a particular athlete to doping.

90. As to the evidence provided by Dr Rodchenkov, the Sole Arbitrator is aware of the challenges using such evidence and has noted the following observations made by Mr Ramoni (cf. Claude Ramoni "The second McLaren Report – a basis for establishing anti-doping rule violations by Russian athletes?" World Sports Advocate, page 6):

    "The McLaren Report also mentions as evidence of the use of doping substances the information provided by Dr Rodchenkov. Using such evidence may be challenging for the hearing panel. First, samples analysed by laboratories shall be identified by their reference number only, and not by the athlete's name. In other words, one of the key aspects of sample analysis is that the laboratory does not know – and does not have the possibility of knowing – the identity of the person who provided the sample tested by the laboratory. Consequently, it is quite awkward for the director of a WADA-accredited laboratory to disclose the names of athletes who were using substances, but whose samples were reported as negative by the same laboratory director. To what extent would any witness statement by Dr Rodchenkov be held reliable evidence before the CAS, in view of all the circumstances in the case at hand?"

91. The Sole Arbitrator finds, however, that the combination and different types of facts provided by the Second IP Report with respect to any individual athlete are circumstantial evidence that can be used to establish an ADRV pursuant to Rule 33.3 of the 2013 IAAF Rules. This finding is supported by a number of CAS Awards, i.e. CAS (OG, Rio) AD 16/009 at para 7.12; CAS (OG, Rio) AD 16/021 at para 7.4; CAS (OG) AD 16/024, and CAS 2016/A/4745 at para. 40 *seq*. In CAS (OG, Rio) AD 16/009 at para. 7.11 the Panel noted that, *"the findings of the McLaren Report in relation to the "Disappearing Positive Methodology" meet – according to the report – a high*

threshold, because the standard of proof that was applied was "beyond reasonable doubt"". The Panel further noted (at para. 7.12):

"The Panel further notes that the findings of the McLaren Report were taken seriously by the IOC and lead to the IOC Executive Board's decision dated 24 July 216 that enacted eligibility criteria specifically for Russian athletes, which is unique in the history of the Olympic Games. Also the findings were endorsed by WADA, the supreme authority in the world of sport to lead and coordinate the fight against doping and by other international federations, such as the IAAF."

92. The Sole Arbitrator bears in mind that whether there is sufficient evidence to demonstrate an ADRV or not must be considered on a case-by-case basis.

93. The Sole Arbitrator will now consider whether there is sufficient evidence in the present case to conclude that the Athlete violated Rule 32.2(b) of the 2013 IAAF Rules.

3. The Findings of the Sole Arbitrator

94. The IAAF maintains, that the Athlete was unofficially tested and that the results were reported on the Washout Schedule, and the metadata of which were determined to have been made contemporaneously to the events, indicates that the Athlete was tested three times before the 2013 IAAF World Championships, *viz.* the test dates 6, 17 and 25 July 2013.

95. As to the reading of the Washout Schedule, the IAAF emphasizes that (i) the test of 6 July 2013 showed the Athlete's T/E ratio was of 10, and the sample contained oxandrolone, methenolone and DHCMT, (ii) two of the three components of the "Duchess" cocktail were in the Athlete's sample, (iii) the sample dated 17 July 2013 showed reduced T/E ratio of 6 compared to the ratio of 10 on 6 July 2013, as well as the presence of oxandrolone, (iv) the sample dated 25 July 2017 was normal, with a T/E ratio of 0.5, and (v) as a result, the Athlete was allow to compete at the 2013 IAAF World Championships in Moscow.

96. The IAAF maintains the all of the above clearly shows that the Athlete was using prohibited substances, *viz.* oxandrolone, methenolone, mesterolone as well as DHCMT, during the course of the summer 2013, to prepare for the 2013 IAAF World Championships in Moscow.

97. The Athlete maintains that for an AAF to be considered valid and exploitable in anti-doping proceedings, it must comply with the WADA International Standard for Testing & Investigation (the "ISTI") and the WADA International Standard for Testing (the "ISL").

98. As to the ADP (the "Washout Schedule"), the Athlete asserts that is has no pertinence to the case and "lacks adequate evidential basis" as it cannot substitute the data specified

in Laboratory Internal Chain of Custody (TD2009LCOC) and Laboratory Documentation Packages (TD2009LDOC).

99. As to the reading of the Washout Schedule, the Athlete holds the following position:

> *"[…] To support the its allegations Claimant submitted appurtenance – a scraps of MS Excel documents […] of a so-called "Washout Schedule" containing apart from alphanumeric code (in column A) chemical names of the prohibited Substances, T/E ratios and decimal numbers with undefined units of measure (in column C). What are those numbers and their units of measure is anybody's guess. Perhaps, the author of the scrap had meant these numbers as concentrations of EAAS, but then again, the units were not determined. Basing its hypothesis about the anti-doping violation primarily on aforementioned scraps of MS Excel document, the Claimant wrongfully concludes that the Athlete was part of a state dictated doping scheme, participated in unofficial testing on multiple occasions, used many EAAS that are in fact Prohibited Substances, etc. […]. Furthermore, the Claimant interpolates the unproven accusations against Athlete into the retesting pattern ordered by IOC [..]"*

100. As to the Athlete's assertion that the Second IP Report is of no pertinence and "lacks adequate evidential basis" as it does not comply with the ISTI, the ISL and other requirements for laboratories, the Sole Arbitrator reiterates that facts related to an ADRV may be established by any reliable means including but not limited to expert reports and documentary evidence pursuant to Rule 33.3 of the 2013 IAAF Rules. It follows that such facts need not to comply with the ISTI, the ISL or other laboratory requirements, cf. CAS 2007/A/1381, at paras 75 and 96 *et seq.*

101. The Sole Arbitrator notes that the Athlete has denied being part of the Washout Schedule as she had *"always been tested officially, strictly in accordance with WADA Code and IAAF Anti-Doping Regulations & Rules"* and that she had *"never in all my life have I provided the unofficial urine samples"*. The Sole Arbitrator observes that the Athlete offered no explanation neither in her written submissions nor at the hearing why her name ended up in the Washout Schedule nor did she challenge the credibility of the Second IP Report. It follows that, the Sole Arbitrator finds the Athlete's denial to be unsubstantiated and not credible. The Sole Arbitrator finds it to be convincingly established by the IAAF that it is in fact the Athlete's name in the Washout Schedule.

102. As to the Washout Schedule, the Sole Arbitrator finds that it cannot be read in isolation from the rest of the IP Report. Rather the Washout Schedule must be read in the context of the IP Report as a whole. Notwithstanding, the Sole Arbitrator holds that the Washout Schedule is a strong indication that the Athlete used the Prohibited Substances, *viz.* oxandrolone, metenolone and mesterolone. The Sole Arbitrator observes that "T/E ratio" is commonly used and referred to in WADA documents, i.e. WADA Technical Document TD 2004EAAS, for measuring the production and ratio of Testosterone to Epitestosterone (the T/E ratio). The Sole Arbitrator therefore agrees with the IAAF's reading that the declining T/E ratio level from 10 to 0.5 supports the assertion that the Athlete used the Prohibited Substances to prepare for the 2013 IAAF World

Championships in Moscow. The latter is furthermore supported by the proximity between the dates mentioned in the Washout Schedule and the Athlete's participation in the 2013 IAAF World Championships in Moscow.

103. Based on the above, the Sole Arbitrator finds that the Athlete violated Rule 32.2(b) of the 2013 IAAF Rules.

C. Sanction

104. The Sole Arbitrator observes that the IAAF does not consider that the two ADRV should be considered as multiple. The consequence is that the sanction imposed shall be on the violation that carries the most severe sanction. The IAAF submits that in this respect the ADRV arising from the Washout Allegation carries the more severe sanction.

105. The Sole Arbitrator finds that whether the standard sanction arising from both violations are equal, the ADRV arising from the Washout Allegation is the one that could carry the more severe sanction. Indeed, on the one hand, the IAAF does not allege any aggravating circumstances for the ADRV arising from the Retesting Allegation and alleges such circumstances for the ADRV arising from the Washout Allegation, while, on the other hand, the Athlete does not allege, on a subsidiary basis, the absence of (significant) fault or negligence for the ADRV that would arise from the Washout Allegation, while she does so for the ADRV arising from the Retesting Allegation.

106. In light of the above the Sole Arbitrator, who concluded that the Athlete violated Rule 32.2(a) of the 2007 IAAF Rules and Rule 32.2(b) of the 2013 IAAF Rules, finds that there is no need to examine whether the violation of Rule 32.2(a) of the 2007 IAAF Rules should lead, or not, to a sanction less than the standard 2 (two) years pursuant to Rule 40.1(a) of the 2007 IAAF Rules since the violation of Rule 32.2(b) of the 2013 IAAF Rules should lead to a sanction between 2 (two) and 4 (four) years.

107. For the sake of completeness, the Sole Arbitrator however notes that, in any event, the Athlete failed to meet her burden of proof in order to benefit from a reduced sanction. Indeed, she did not bring any concrete element supporting her allegation that her positive test would be due to the consumption of a dietary supplement, while, according to the CAS consistent case law (see, for instance, CAS 2014/A/3820, para. 80 or CAS 2016/A/4377, para. 52), an athlete must provide proper evidence, and not only allegations, in order to establish the origin of a prohibited substance.

108. Pursuant to Rule 40.2 of the 2013 IAAF Rules, the period of ineligibility for violation of Rule 32.2(b) shall be two years, unless the conditions for eliminating or reducing the period of ineligibility (Rules 40.4 and 40.5 of the 2013 IAAF Rules) or for increasing it (Rule 40.6 of the 2013 IAAF Rules) are met.

109. Rule 40.6 of the 2013 IAAF Rules reads as follows:

[…]

"Aggravating Circumstances which may Increase the Period of Ineligibility

[…] If it is established in an individual case involving an anti-doping rule violation other than violations under Rule 32.2(g) (Trafficking or Attempted Trafficking) and Rule 32.2(h) (Administration or Attempted Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.

(a) Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as a part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods on multiple occasions; a normal individual would be likely to enjoy performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or other Person engaged in deceptive or obstructing conduct to avoid detection or adjudication of an anti-doping rule violation. For the avoidance of doubt, the examples of aggravating circumstances referred to above are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility.

[…]"

110. The IAAF maintains that almost all of the aggravating factors are relevant in the present case: (i) the Athlete was part of a State-dictated doping scheme, (ii) the Athlete was part of the unofficial testing carried out prior to the 2013 IAAF World Championships in Moscow, (iii) two out of three prohibited substances contained in the "Duchess" cocktail were found in the Athlete's first sample, and (iv) the Athlete did not only use one prohibited substance, but four, *viz.* oxandrolone, methenolone, mesterolone and DHCMT (both in 2007 and 2013).

111. The IAAF submits that the Athlete's doping is extremely serious and deserves the most severe sanction of a four year ineligibility period, "*In fact, it is difficult to envisage how an athlete's conduct could be more severe than the Athlete's, who received a cocktail of multiple exogenous steroids, diluted in alcohol to limit the detection period of the same, who deliberately took part in private testing in order to ensure that she would be clean at the 2013 IAAF World Championships and, faced with the clear allegations, simply denied ever having been unofficially tested".*

112. Further, the IAAF submits that it must be taking into account when assessing the Athlete's sanction that the she also tested positive for DHCMT following a retesting of her sample collected at the 11th IAAF World Championships in Osaka (Japan) on 31 August 2007. The IAAF refers to Rule 40.7(d)(i) of the 2013 IAAF Rules that sets out

that *"the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (Rule 40.6)".*

113. The Athlete holds the position that there is no sufficient and reliable evidence *"pleading in favour of the hypothesis that the Athlete was indeed part of an organised and sophisticated State-dictated doping scheme, and was herself engaged in doping practices".*

114. The Sole Arbitrator is willing to accept that the Athlete took part of a State-dictated doping plan or scheme, stressing that (i) the Second IP Report concludes that an *"institutional conspiracy"* existed within Russia (see page 1 of the Second IP Report), (ii) the Second IP Report identifies the Athlete's name on the Washout Schedule, and (iii) the Athlete used a number of Prohibited Substances found in the "Duchess" cocktail.

115. The Sole Arbitrator is also willing to accept that the Athlete knowingly participated in a State-dictated doping plan based on the Second IP Report conclusion that all pre-competition samples in the Washout testing were collected only "under the table" in unofficial containers (see the Second IP Report page 84). Accordingly, the Sole Arbitrator finds that the Athlete's samples in the Washout Schedule, dated 6, 17 and 25 July 2017 must have been collected ("under the table") in unofficial containers and this could not have been done without the knowledge of the Athlete.

116. The Sole Arbitrator observes that the Athlete used four prohibited substances, *viz.* oxandrolone, methenolone, mesterolone (in 2013) and DHCMT (in 2007 and 2013), and he therefore concludes, that the Athlete used multiple Prohibited Substances.

117. The Sole Arbitrator observes that the Athlete was tested positive for DHCMT following a retesting of her sample collected at the 11th IAAF World Championships in Osaka (Japan) on 31 August 2007. As it has been established that the Athlete committed an ADRV in 2007 and was part of a State-dictated doping plan or scheme, the Sole Arbitrator concludes, that the Athlete used Prohibited Substances on more than one occasion.

118. On the basis of all the above, the Sole Arbitrator holds that IAAF was able to convince him to his comfortable satisfaction that the Athlete was part of a sophisticated doping scheme and that the Athlete used multiple Prohibited Substances on more than one occasion.

119. Considering the seriousness of the Athlete's ARDV and the fact that almost all of the aggravating factors in Rule 40.6(a) of the 2013 IAAF Rules are relevant in the present case, the Sole Arbitrator finds that a period of ineligibility of four (4) years is appropriate to the severity and the Athlete's misbehavior.

D. Period of Ineligibility start and end date

120. With respect to the sanction start date, the Sole Arbitrator is guided by Rule 40.10 of the 2013 IAAF Rules, which determines that:

"Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date the Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of Ineligibility served."

121. The Sole Arbitrator finds that for practical reasons and in order to avoid any eventual misunderstanding the period of ineligibility shall start on 15 December 2016, the date of commencement of the provisional suspension, and not on the date of the award.

E. Disqualification

122. The Sole Arbitrator observes that this is a case of a specific "positive sample" collected 31 August 2007 (the Retesting), that falls under Rule 39.4 of the 2007 IAAF Rules which determines as follows:

"In addition to the above, where an athlete has been declared ineligible under Rule 40 below, all competitive results obtained from the date the positive sample was provide (whether in-competition or out-of-competition) or other anti-doping rule violation occurred through to the commencement of the period of provisional suspension or ineligibility shall, unless fairness requires otherwise, be annulled, with all resulting consequences for the athlete (and, where applicable, any team in which the athlete has competed), including the forfeiture of all titles, awards, medals, points and prise and appearance money."

123. In the present case, the Sole Arbitrator observes that a re-test, which was performed in 2016, of a Sample taken 31 August 2007 and which showed the presence of a Prohibited Substance led to the provisional suspension by the IAAF only on 15 December 2016. The IAAF seeks disqualification of all the results of the Athlete for all the competitions in which she took part from 31 August 2007 until her provisional suspension on 15 December 2016, together with the forfeiture of any prizes, medals, prize money and appearance money. This is a period of nine years and three months and is considerably longer than the maximum period of ineligibility of 4 years that can be imposed according to the IAAF Rules.

124. The Sole Arbitrator notes that pursuant to the literal wording of Rule 40.8 of the IAAF Rules all the competitive results of the Athlete as from the moment of the positive sample was collected until her provisional suspension was pronounced would have to be disqualified.

125. Therefore, based on a literal reading of Rule 40.8 of the 2013 IAAF Rules, in principle all results of the Athlete as from 31 August 2007 until 15 December 2016 would have to be disqualified, despite the fact that the IAAF has not provided any evidence of doping use by the Athlete between 1 September 2007 and 5 July 2013 (the first date the Athlete's name appears on the Washout Schedule).

126. The Sole Arbitrator aligns with CAS 2016/0/4464 at para.182 and the observation made in this Award by the Sole Arbitrator, that "*the length of the period of ineligibility to be imposed must be defined considering the disqualification of the Athlete's results, which come equal to the effects of a retro-active suspension".*

127. The Sole Arbitrator agrees with the Athlete that the general principle of fairness must prevail in order to avoid disproportional sanctions. The Sole Arbitrator finds that the application of fairness is not only in accordance with the general principle of law, but also with the "fairness exception" mentioned in Rule 39.4 of the 2007 IAAF Rules.

128. According to established CAS jurisprudence, the principle of proportionality requires to assess whether a sanction is appropriate to the violation committed in the present case. Excessive sanctions are prohibited see *e.g.* CAS 2005/A830, at paras. 10.21-10.31; CAS 2005/C/976 & 986, at paras. 139, 140, 143, 145-158; CAS 2006/A/1025, at paras. 75-103; CAS 2010/A/2268 at paras. 141 *et seq.*; CAS 2016/0/4463, at para. 170 *et seq* 2016/0/4464, at para. 187 *et seq*, and CAS 2016/0/4469, at para. 182 *et seq*, all of them referring and analyzing previous awards, cases from the European Court of Human Rights and doctrine.

129. The Sole Arbitrator in the present case aligns with the Panel in CAS 2005/C/976 & 986 stating at para. 143:

> *"To find out, whether a sanction is excessive, a judge must review the type and scope of the proved rule-violation, the individual circumstances of the case, and the overall effect of the sanction on the offender."*

130. The Sole Arbitrator has previously concluded that the Athlete took part of a sophisticated doping plan or scheme and that she used multiple Prohibited Substances on more than one occasion and that the Athlete's doping therefore is severe, repeated and sophisticated. The Sole Arbitrator considers that it is not appropriate to maintain results on the basis of fairness where the doping is severe, repeated and sophisticated (cf. *e.g.* CAS 2013/A/3274 at paras. 84-89).

131. However, the Sole Arbitrator aligns with CAS 2016/A/4469 at para. 176, the need to *"Taking into regard that the sanction of disqualification of results embraces the forfeiture of any titles, awards, medals, points and prize and appearance money, the sanction of disqualification is to be held equal to a retroactive imposition of a period of ineligibility and, thus, is a severe sanction".* The Sole Arbitrator does not consider it fair to disqualify any results of the Athlete between 1 September 2007 and 5 July 2013

considering that there is no evidence that the Athlete used doping substances or methods during this period.

132. However, not to disqualify results that have been achieved by using a Prohibited Substance cannot be considered as fair with regard to other athletes that competed against the Athlete on 31 August 2007 (triple jump final, IAAF World Championships 2007) and between 6 July 2013 and 15 December 2016. The main purpose of disqualification of results is not to punish the transgressor, but rather to correct any unfair advantage and remove any tainted performances from the record (cf. CAS 2016/A/4464, at para. 194 and CAS 2016/0/4469, at para. 176 with further reference to doctrine).

133. As a consequence, the Sole Arbitrator finds that all competitive results obtained by the Athlete on 31 August 2007 and from 6 July 2013 through to the commencement of her provisional suspension on 15 December 2016 are to be disqualified, including the forfeiture of any titles, awards, medals, points and prize and appearance money.

VIII. COSTS

(…).

****

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The request for arbitration filed by the International Association of Athletics Federations (IAAF) on 22 March 2017 against the Russian Athletics Federation and Ms Anna Pyatykh is partially upheld.

2. Ms Anna Pyatykh has violated Rule 32.2(a) of the 2007 IAAF Rules and Rule 32.2(b) of the 2013 IAAF Rules.

3. A period of ineligibility of four (4) years is imposed on Ms Anna Pyatykh starting on 15 December 2016.

4. All results achieved by Ms Anna Pyatykh on 31 August 2007 and from 6 July 2013 to 15 December 2016 are disqualified, including forfeiture of any titles, awards, medals, points and prize and appearance money obtained during this period.

5. (…).

6. (…).

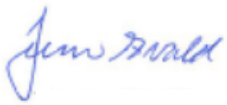
7. (…).

8. All other and further prayers or request for relief are dismissed.

Seat of arbitration: Lausanne

Date: 18 August 2017

THE COURT OF ARBITRATION FOR SPORT



Jens **Evald**
Sole Arbitrator