



Arbitration CAS 2021/A/8012 Natalya Antyukh v. World Athletics (WA), award of 13 June 2022

Panel: Mr James Drake QC (United Kingdom), President; Mrs Judith Levine (Australia); Mr Lars Hilliger (Denmark)

Athletics (sprint & hurdles)

Doping (methasterone, boldenone, desoxymethyltestosterone, oxabolone, DHEA, 1-testosterone)

Discretion of a CAS panel to exclude evidence under Article R57 para. 3 of the CAS Code

Standard of proof

Methods of establishing facts

Assessment of circumstantial evidence

Lex mitior

Principle of fairness

1. In the appropriate circumstances, a CAS panel has the discretion to exclude evidence. It must be remembered, however, that such discretion should be exercised with restraint in order to preserve the *de novo* character of the CAS appeal proceedings and should be limited to those circumstances where the new material is adduced in an abusive way or with some measure of bad faith, for example, where the evidence is in hand at the first instance hearing but is withheld for strategic purposes and adduced for the first time on appeal.
2. The “comfortable satisfaction” standard is lower than the criminal standard of beyond reasonable doubt but higher than other civil standards such as the balance of probabilities. To reach this comfortable satisfaction, a CAS panel should have in mind the seriousness of allegation which is made. It follows that this standard of proof is a kind of sliding scale, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the panel would require to be “comfortably satisfied”. It should be borne in mind, however, that, contrary to what is often asserted, the standard itself does not change; it is the required cogency of the evidence that changes on the basis that the more serious the allegations (a) the less likely that the alleged fact or event has occurred and (b) the more serious the consequences. The standard of proof, however, remains to the comfortable satisfaction of the panel bearing in mind the seriousness of the allegations.
3. Rule 33.3 of the IAAF 2013 Anti-Doping Regulations provides that facts related to anti-doping rule violations may be established by any reliable means. This rule is not a requirement that the evidence adduced be ‘reliable evidence’ (whatever that might mean). Rather, it is a rule as to the method or manner or form in which the facts that are necessary to sustain an allegation of an anti-doping rule violation (ADRV) may be established. The rule provides (in a non-exhaustive list) a number of examples of means

of establishing facts which are characterised as ‘reliable’.

4. In case there is no direct evidence of use by an athlete, the CAS panel must assess all the circumstantial evidence separately and together and must have regard to what is sometimes called ‘the cumulative weight’ of the evidence. It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, establish guilt beyond reasonable doubt. In other words, there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.
5. The principle of *lex mitior* does not permit one to pick and choose between the most favourable individual provisions from different sets of rules; such would indeed offend against the principle of legality.
6. A rule is subject to a ‘general principle of fairness’ which provides a discretion on the part of a tribunal to modify the application of the rule where to apply it strictly would be unfair.

I. PARTIES

1. The Appellant, Ms Natalya Antyukh (“Ms Antyukh” or the “Athlete”), is a retired Russian athlete who competed in the 400-metre and 400-metre hurdle events at the international level. At the 2012 London Olympic Games, Ms Antyukh won a gold medal in the 400-metre hurdles and a silver medal in the 4x400-metre relay; and she won a bronze medal in the 400-metre hurdles in the 2011 World Championships in Daegu. She was born in 1981. She retired from professional sport and competition in February 2017.
2. The Respondent, World Athletics (“World Athletics” or the “Respondent”), is the international governing body for the sport of athletics, recognised as such by the International Olympic Committee. It has its seat and headquarters in Monaco. It is a signatory to the World Anti-Doping Code (“WADC”) issued by the World Anti-Doping Agency (“WADA”) and in compliance therewith has from time to time adopted its own anti-doping rules (“ADR”). It has also established (i) an ‘Athletics Integrity Unit’ (the “AIU”), the role of which is to protect the integrity of Athletics and which is charged with responsibility for the day-to-day administration of the ADR. (World Athletics was previously known as the ‘International Amateur Athletic Federation’ or ‘IAAF’. The IAAF changed its name to World Athletics in 2019).

II. FACTUAL BACKGROUND

3. Set out below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced in these proceedings. While the Panel has considered all the facts, allegations, arguments and evidence submitted by the Parties, reference is made in this Award only to the submissions and evidence considered necessary to explain the reasoning and decision.

A. The Russian Doping Scheme

4. This appeal takes place against the background of what has become known as the 'Russian doping scheme'.

5. In December 2014, a German television channel broadcast a documentary concerning the existence of sophisticated systemic doping practices in Russian athletics. Implicated in the documentary were (inter alios) Russian athletes and coaches, the All-Russia Athletics Federation, the governing body for athletics in Russia ("ARAF", now known as the Russian Athletics Federation or "RUSAF"), the IAAF, the Russian Anti-Doping Agency (RUSADA), and the WADA-accredited laboratory based in Moscow (the "Moscow Laboratory").

6. On 16 December 2014, following the broadcast of those allegations, WADA announced the appointment of an independent commission (the "Independent Commission") to investigate the allegations as a matter of urgency. The three members of the Independent Commission appointed by WADA were Mr Richard Pound QC, former President of WADA; Professor Richard McLaren, Professor of Law at Western University in Ontario, Canada ("Prof. McLaren"); and Mr Günter Younger, Head of the Cybercrime Department at Bavarian Landeskriminalamt in Munich, Germany.

7. On 9 November 2015, the Independent Commission submitted its report to WADA entitled "The Independent Commission Report #1 – Final Report". In the report, the Independent Commission (*inter alia*): (a) identified systemic failures within the IAAF and Russia that prevent or diminish the possibility of an effective anti-doping program, to the extent that neither ARAF, RUSADA, nor Russia can be considered to be acting in compliance with the WADC; and (b) confirmed the existence of widespread cheating through the use of doping substances and methods to ensure, or enhance the likelihood of, victory for athletes and teams. The Independent Commission also recommended, among other things, that RUSADA be declared non-compliant with the WADC and that the WADA accreditation of the Moscow Laboratory be revoked, both of which steps were implemented by WADA on 18 November 2015.

8. On 12 May 2016, the New York Times published a story called "*Russian Insider Says State-Run Doping Fueled Olympic Gold*". The so-called 'Russian insider' was Dr Grigory Rodchenkov ("Dr Rodchenkov"), at that time the director of the Moscow Laboratory.

9. On 19 May 2016, WADA announced the appointment of Prof. McLaren as an Independent Person (the "IP") to conduct an independent investigation into the matters reported on by the New York Times (and the allegations made by Dr Rodchenkov).

10. On 18 July 2016, Prof. McLaren issued his report (the “First McLaren Report”), in which he concluded that a systemic cover-up and manipulation of the doping control process existed in Russia.
11. On 9 December 2016, Prof. McLaren issued a second report (the “Second McLaren Report”), in which he identified a number of athletes who appeared to have been involved in or benefited from the systematic and centralised cover-up and manipulation of the doping control process. As explained by Prof. McLaren, the mandate of the IP did not involve any authority to bring Anti-Doping Rule Violation (“ADRV”) cases against individual athletes, but the IP did identify athletes who might have benefited from manipulations of the doping control process. Accordingly, the IP did not assess the sufficiency of the evidence to prove an ADRV by any individual athlete. Rather, for each individual Russian athlete, where relevant evidence had been uncovered in the investigation, the IP identified that evidence and provided it to WADA, in the expectation that it would then be forwarded to the appropriate international federation for their action.
12. Accompanying the Second McLaren Report was a cache of non-confidential documents examined by the IP during the investigation. This was called the ‘Evidence Disclosure Package’ or “EDP”. Included within the EDP were what have come to be known as the “Moscow Washout Schedules” (as to which see below).
13. Subsequent to the McLaren Reports:
 - On 2 December 2017, the IOC Disciplinary Commission issued a report (the “Schmid Report”) confirming the existence of “*systemic manipulation of the anti-doping rules and system in Russia*”.
 - On 5 December 2017, the IOC suspended the Russian Olympic Committee with immediate effect.
 - On 13 September 2018, the Russian Ministry of Sport “*fully accepted the decision of the IOC Executive Board of December 5, 2017 that was made based on the findings of the Schmid Report*”.

B. The Notice of Allegation

14. By letter dated 31 May 2019, the AIU, on behalf of World Athletics, issued a “Notice of Allegation” by which the AIU informed the Athlete that it had decided to assert that the Athlete had committed “*one or more*” ADRVs pursuant to Rule 32.2(b) of the 2012-2013 IAAF Competition Rules (the “2013 ADR”) in respect of use of a prohibited substance.
15. According to the AIU, the allegation was based on the McLaren Reports and, in particular, on the fact that “*four samples on the Moscow Washout Schedules are listed as belonging to you; they date from 30 June and 6, 14 and 25 July 2013 respectively (see, for example, EDP0034...)*” and that, as recorded in the schedules, those samples contained various prohibited substances:

methasterone, boldenone, desoxymethyltestosterone, oxabolone, dehydroepiandrosterone (or “DHEA”), and 1-testosterone.

16. The AIU went on to set out “*the primary evidence*” against the Athlete in respect of these ADRVs and asked the Athlete to provide an explanation. Amongst other things, the AIU set out what was said to be (a) a summary of the key aspects of the McLaren Reports and (b) a summary of the evidence of the Athlete’s ADRVs.
17. As to the former, the summary of the key aspects of the McLaren Reports, the AIU said this (note that “ADAMS” is a reference to the Anti-Doping Administration & Management System):

“4. The First McLaren Report found that “the Ministry of Sport directed, controlled and oversaw the manipulation of athletes’ analytical results or sample swapping, with the active participation and assistance of the FSB, CSP, and both the Moscow and Sochi laboratories”. The Second McLaren Report confirmed the key findings of the First McLaren Report.

5. In particular, the McLaren Reports uncovered and described three counter-detection methodologies known as (i) the Disappearing Positives Methodology (“DPM”), (ii) the Sample Swapping Methodology and (iii) Washout Testing, each of which is described in more detail below:

(i) Disappearing Positives Methodology

(a) Where the analysis of a sample revealed an Adverse Analytical Finding (“AAF”), the athlete would be identified, and the Russian Ministry of Sport would (through a Liaison Person) decide either to “SAVE” or to “QUARANTINE” the athlete in question.

(b) The AAF would typically be notified by email from the Moscow Laboratory to one of the liaison persons (e.g. Alexey Velikodniy), who would respond in order to advise whether athlete(s) should be “SAVED” or “QUARANTINED”.

(c) If the athlete was “SAVED”, the Moscow Laboratory would report the sample as negative in ADAMS and make the necessary manipulations in the Laboratory Information Management System (“LIMS”); conversely, if the athlete was “QUARANTINED”, the analytical bench work on the sample would continue and the AAF would be reported in the ordinary manner.

(d) During the 2013 World Universiade Games in Kazan, the DPM was also operated through an updating of a schedule (the “Universiade Schedule”). On a daily basis, the Moscow laboratory filled in the Universiade Schedule with any new positive found and forwarded the Universiade Schedule for the “SAVE” or “QUARANTINE” instruction to be entered directly on the Universiade Schedule. The process continued throughout the competition.

(ii) Sample Swapping Methodology

(a) The Sample Swapping Methodology involved the replacing of “dirty” urine with “clean” urine. This necessitated the removing and replacing of the cap on sealed B sample bottles through a technique developed and implemented by an FSB team known as the “magicians”.

(b) The Sample Swapping Methodology was trialed with respect to a limited number of athletes at the Universiade and at the IAAF World Championships in Moscow in 2013 (“Moscow World Championships”), rolled out in more systematic fashion at the 2014 Winter Olympic Games in Sochi and continued in operation subsequently with respect to samples stored in the WADA-accredited laboratory in Moscow.

(c) The Sample Swapping Methodology was facilitated by the establishment and maintenance of a “Clean Urine Bank” at the Moscow Laboratory; the Clean Urine Bank was comprised of unofficial urine samples provided by certain athletes that were analysed, stored and recorded in schedules in the Moscow laboratory (“Clean Urine Bank Schedules”).

(d) The so-called “magicians” would be called into the Moscow Laboratory on a monthly basis in order to remove the caps of the B samples that needed to be swapped.

(iii) Washout Testing

(a) The McLaren Reports (in particular, the Second McLaren Report) described a programme of “Washout Testing” prior to certain major events, including the 2012 London Olympic Games and the 2013 Moscow World Championships.

(b) The Washout Testing was deployed in 2012 in order to determine whether the athletes on a doping program were likely to test positive at the 2012 London Olympic Games.

(c) At that time, the relevant athletes were providing samples in official doping control Berek kits. Even when the samples screened positive, they were automatically (i.e. without the need for a specific SAVE order) reported as negative in ADAMS.

(d) The Moscow Laboratory developed schedules to keep track of those athletes who were subject to this Washout Testing, using official Berek Kits, in advance of the London Olympic Games (the “London Washout Schedules”).

(e) However, this combination of Washout Testing and automatic DPM, using official Berek kits, only worked where the sample remained under the control of the Moscow Laboratory and was ultimately destroyed. The Moscow Laboratory, however, realised that, as the Berek kits were numbered and could be audited, seized or tested, it would only be a matter of time before it was discovered that the contents of the samples would not match the entries into ADAMS/LIMS.

(f) Therefore, the Washout Testing programme evolved prior to the 2013 Moscow World Championships. It was decided that the Washout Testing would no longer be performed with official Berek kits, but non-official containers such as Coke or baby bottles.

(g) This “under the table” Washout Testing consisted of collecting samples in regular intervals and subsequently testing those samples for quantities of prohibited substances to determine the rate at which those quantities were declining so that there was certainty that the athlete would test “clean” in competition. If the washout testing determined that the athlete would not test “clean” at the competition, he or she was left at home.

(h) The Moscow Laboratory developed schedules to keep track of those athletes who were subject to this unofficial Washout Testing scheme and also included certain official samples provided by the athletes (the “Moscow Washout Schedules”). The Moscow Washout Schedules were updated regularly when new washout samples arrived in the Laboratory for testing”.

18. As to the summary of the evidence against the Athlete, the AIU said this in its letter of 31 May 2019:

“6. Within the context of the Second McLaren Report, the IP made publicly available on the IP Evidence Disclosure Package (“EDP”) website (<https://www.ip evidencedisclosurepackage.net/>), the evidence that he reviewed for the purposes of his Report.

7. All documents contained on the EDP website were anonymized, both for privacy reasons and also to protect the integrity of the ongoing investigations. However, the LAAF was provided with unredacted versions of the documents uploaded on the EDP website.

8. Upon review of the unredacted EDP documents, the principal evidence of your anti-doping rule violations is summarized below. We attach to this letter the relevant evidence ...

(i) Moscow Washout Testing

9. Four samples on the Moscow Washout Schedules are listed as belonging to you; they date from 30 June and 6, 14 and 25 July 2013 respectively (see, for example, EDP0034; Annex 1).

10. The following information is recorded on the Moscow Washout Schedules in respect of the 30 June 2013 sample:

- Methasterone (25000) 13*
- Boldenone (5 ng/ml) 14*
- Desoxymethyltestosterone (80 000) 15*
- Oxabolone 16*

11. The following information is recorded on the Moscow Washout Schedules in respect of the 6 July 2013 sample:

- “Too much of DHEA u 1-T”; 17*
- “the rest is not clearly visible”.*

12. The comment “prohormones overload” is also associated with this sample.

13. *The following information is recorded on the Moscow Washout Schedules in respect of the 14 July 2013 sample:*

- T/E 2.5 (probhormones)
- Desoxymethyltestosterone traces

14. *The following information is recorded on the Moscow Washout Schedules in respect of the 25 July 2013 sample:*

- T/E 0.6 clear”.

19. The AIU also notified the Athlete that the Respondent intended to seek an increased period of ineligibility up to a maximum of four years in accordance with Rule 40.6 of the 2013 ADR and that the Athlete’s results be disqualified from 30 June 2013, that date being the date of the first (positive) sample identified in the Moscow Washout Schedules.
20. The Athlete was given until 21 June 2019 to respond.

C. The Athlete’s Response to the Notification

21. On 19 June 2019, the Athlete responded to the AIU letter of 31 May 2019. The Athlete denied the allegation. The Russian version is not in the papers but it is accepted that the following English version is an accurate translation:

“Dear Sir/Madam,

I’m convinced that only on the basis of verifiable data is possible to blame an athlete for committing such a serious offence, which exposes an athlete in doping and destroys his entire career. It is obvious that the data in the table can be used as evidence only if this table contains information based on the original documents which certainly are: 1) analytical data from devices and 2) LIMS (Laboratory Information Management System) data on my samples.

I ask you to request the above mentioned documents which will provide the objective proof of my good behavior.

I’m convinced that the information in the table is entered arbitrarily on the basis of the data reported by Mr. Rodchenkov, whose impartiality raises serious doubts. The lack of quantitative analysis (which is not found in chemical research) in one of the indicators, replaced by “hard to see traces” also attracts attention.

I’m convinced that Mr. Rodchenkov lies and slanders in pursuit of his personal goals. I can state with full responsibility that I have never given unofficial samples and I have never been on any special privileged lists. I have always undergone the procedure of doping-control in accordance with WADA standards. I intend to fight for my honest name and to appeal to the independent anti-doping control body (AIU) to provide analytical data from the devices and LIMS data on my “unofficial samples” which will clarify everything and this data will be a reliable evidence that I’m an honest rival which I proved during all my sport career.

*Kind regards,
Antyukh Natalia”.*

III. THE FIRST INSTANCE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 17 July 2019, the AIU informed the Athlete that her explanation was rejected, that the AIU's allegations were maintained and that the matter would be referred to the Court of Arbitration for Sport ("CAS"). The AIU also called upon the Athlete to choose whether to proceed under Rule 38.19 of the IAAF Competition Rules 2016-2017 (the "2016 ADR") (i.e., sole instance before a three-member CAS panel) or Rule 38.3 (i.e., first instance procedure before a sole arbitrator with a right to appeal to CAS).
23. On 29 July 2019, the Athlete informed the AIU of her choice of the former. Accordingly, pursuant to Rule 38.19, the AIU sought WADA's consent to proceed in this way. On 4 December 2019, WADA declined to give its consent, wishing instead to maintain its right of appeal.
24. On 5 December 2019, the AIU informed the Athlete that, in the absence of consent on the part of WADA, the matter would be referred to CAS as a first instance procedure pursuant to or Rule 38.3 of the 2016 ADR.
25. In the event, World Athletics filed its Request for Arbitration pursuant to Article R47 of the Code of Sports-related Arbitration (the "CAS Code") against the Russian Athletics Federation and the Athlete.
26. The Hon. Franco Frattini was appointed as the Sole Arbitrator. A hearing was held on 18 September 2020 and an award rendered on 7 April 2021. The Sole Arbitrator made the following orders: (a) the request for arbitration by World Athletics against RUSAF and the Athlete was upheld; (b) the Athlete was found guilty of an ADRV under Rule 32(2)(b) of the 2013 ADR; (c) the Athlete was sanctioned with a period of ineligibility of four years from the date of the award; (d) the Athlete's competitive results dating from 30 June 2013 through to the commencement of the period of ineligibility were disqualified, with all resulting consequences including the forfeiture of titles, awards, medals, points, and prize and appearance money.
27. This award of the Sole Arbitrator shall be referred to herein as the "Appealed Award".

IV. THE PRESENT APPEAL BEFORE THE COURT OF ARBITRATION FOR SPORT

28. By a Statement of Appeal filed with the CAS on 21 May 2021 in accordance with Article R47 of the CAS Code, the Athlete instituted this appeal against the Appealed Award. In her Statement of Appeal, the Athlete nominated Mr Ken Lalo alternatively Ms Judith Levine as arbitrator.
29. The Athlete filed her Appeal Brief on 4 June 2021 in accordance with Article R51 of the CAS Code.
30. On 14 June 2021, World Athletics nominated Mr Jacques Radoux as arbitrator.

31. On 21 June 2021, the Athlete, by her counsel, expressed concern with the nomination of Mr Radoux by World Athletics, to which World Athletics responded on 24 June 2021. In any event, Mr Radoux declined the appointment and by email dated 7 July 2021 World Athletics nominated Mr Lars Hilliger as arbitrator.
32. On 11 July 2021, the Athlete requested that, in the interests of costs, the appeal be heard by a sole arbitrator. World Athletics did not agree to such a course. On 28 July 2021, the Deputy President of the CAS Appeals Arbitration Division decided to submit this reference to a panel composed of three arbitrators.
33. On 29 July 2021, World Athletics filed its Answer.
34. On 3 August 2021, the CAS Court Office asked the Parties to say whether or not they would prefer a hearing to be held in this matter. The Athlete did so prefer, while the Respondent left it to the discretion of the Panel.
35. On 13 September 2021, the CAS Court Office on behalf of the Deputy President of the CAS Appeals Arbitration Division, and pursuant to Article R54 of the CAS Code, informed the Parties that the Panel in this reference would be constituted by Ms Levine, Mr Hilliger and Mr James Drake QC (as president).
36. On 15 November 2021, the Parties signed and returned the Order of Procedure, issued by the CAS Court Office on behalf of the Panel, which noted, *inter alia*, that the Athlete relies on Article 42 of the the 2016 ADR as conferring jurisdiction on the CAS, that the jurisdiction of the CAS was not contested by World Athletics and was confirmed by the signature of the order.
37. A hearing took place on 16 November 2021. The hearing was conducted remotely via Webex. The following people took part in the hearing:
 - The Panel:
 - i. Ms Judith Levine
 - ii. Mr Lars Hilliger
 - iii. Mr James Drake Q.C. (President)
 - The Appellant:
 - i. Dr Daria Solenik, Counsel
 - ii. The Athlete
 - iii. Ms Tatiana Zarubina, Russian interpreter

- World Athletics:
 - i. Mr Ross Wenzel, Counsel
 - ii. Mr Nicolas Zbinden, Counsel
 - iii. Mr Aaron Walker, WADA
 - iv. Dr Julian Broséus, WADA
 - v. Dr Gregory Rodchenkov, former director of the Moscow Laboratory
 - vi. Ms Avni Patel, Counsel for Dr Rodchenkov
 - vii. Ms Tatiana Hay, Russian interpreter
- CAS Court Office:
 - i. Ms Andrea Sherpa Zimmerman, Counsel

38. At the conclusion of the hearing, the Parties confirmed that they had had a full and fair opportunity to present their respective cases, that their right to be heard had been fully respected, and that they had no objection to the manner in which the proceedings had been conducted.

V. THE PARTIES' EVIDENCE

39. The Athlete provided a witness statement and gave evidence at the hearing. The salient evidence from Ms Antyukh may be summarised as follows.

- The Athlete has never been involved in any doping program and has never provided 'unofficial' samples.
- Throughout her professional sports career, from 2000 to 2016, the Athlete has taken "numerous" doping control tests, which have been analysed by both Russian and foreign WADA accredited laboratories, and has never tested positive.
- The Athlete learned about the McLaren Reports when issued to the media. The allegations in the McLaren Reports "*cannot be considered credible*". She was not aware that her name appeared in the EDP documents until 31 May 2019 when she was contacted by the AIU. She learned of the documents that are now known as the Moscow Washout Schedules for the first time on this date.
- The Athlete did not provide urine samples on the dates set forth in the Moscow Washout Schedules – namely, 30 June 2013, 6 July 2013, 14 July 2013, and 25 July 2013 – and nor was she ever asked to do so.

- In 2013, the Athlete started the athletics competition season on 25 May 2013 in Manchester (UK) with the next race on 1 June in Eugene (US). She was then at a training camp in Podolsk (near Moscow) from 3 June until the beginning of the 2013 IAAF World Championships in Moscow, which took place from 10-18 August 2013. No out-of-competition samples were taken during this time. From 22-25 July 2013 she took part in the Russian Athletics Championships. It makes no sense therefore for her to have submitted an unofficial sample on 25 July 2013 since she was at the competition and could have been subject to official testing.
- The Athlete was officially tested out-of-competition on 30 July 2013, the result of which was negative (and a copy of which was attached to the Athlete's witness statement).
- The Athlete was surprised to see her name in the Moscow Washout Schedules. She thinks *"it is a mistake, or that it concerns someone else, whose so-called results were recorded under my name"*.
- The Athlete did not give any samples on the dates set forth in the Moscow Washout Schedules and cannot explain why her name or a name similar to her name appears in the schedules.
- The Athlete has never been to the Moscow Laboratory and had not, until these proceedings, ever met Dr Rodchenkov.
- Since it is unclear under what circumstances the samples were collected, who collected them, where they were collected, who performed the test, the Athlete assumes that the Moscow Washout Schedules are *"fabricated, probably to discredit the athletes mentioned in it on the eve of [the 2013 IAAF World Championships in Moscow] in order to allow the author of the document to settle some personal accounts"*.
- *"Even assuming that there existed some parallel testing system ... my name could appear in the lists simply because I was a member of the team. The result could be someone else's"*.
- The *"whole scandal"* has *"strong political backgrounds"*. *"I did not and do not take part in political quarrels. Sports should be beyond politics. It seems to me that I got involved in this case absolutely accidentally by some absurd coincidence"*.
- The Moscow Washout Schedules *"could be called a slander"*. The decision to charge the Athlete has caused her moral damage, *"damage to reputation and raised doubts about my honesty"*.
- During her oral testimony, the Athlete confirmed the above points, answered questions about her coach, Ms Korlukova, and teammate, Ms Galitskaia, repeated her denial that she took part in any meeting with Dr Rodchenkov at the Moscow Laboratory and stated she did not know Dr Irina Rodionova. The Athlete maintained

that she has never taken any prohibited substances. She said she never gave urine samples in unofficial containers like bags or soda bottles and explained her understanding of official tests (where officials are present) as distinct from unofficial tests (which she denied ever taking part in). When asked about it, the Athlete did not maintain her suggestion during the proceedings at first instance that her brother could have been the athlete named in the Moscow Washout Schedule and acknowledged that there was no other athlete with the same name as her competing in Russian athletics in 2013. The Athlete noted that she had lost her job and was currently unemployed.

40. The evidence adduced by World Athletics included the following:

- The McLaren Reports
- The Moscow Washout Schedules (with translation)
- Witness statement of Dr Rodchenkov dated 31 January 2020 (together with his oral evidence at the hearing)
- Expert report of Andrew Sheldon dated 31 October 2018
- Statement of Aaron Walker and Julian Broséus dated 27 July 2021 (together with accompanying documentary evidence and their oral evidence at the hearing).

A. The McLaren Reports

41. World Athletics adduced the McLaren Reports (dated 16 July 2016 and 9 December 2016) and relied upon:

- the “key findings” in the reports and the description in the reports of a number of counter-detection methodologies including in particular (i) the Disappearing Positives Methodology and (ii) Washout Testing; and
- the specific evidence in the McLaren reports relating to the Athlete herself.

42. The key findings as set out in the First McLaren Report are as follows:

“Key Findings

1. 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.

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

3. *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 FSB, CSP, and both Moscow and Sochi Laboratories*".

43. The key findings in the Second McLaren Report are in the following terms:

"1. An institutional conspiracy existed across summer and winter sports athletes who participated with Russian officials within the Ministry of Sport and its infrastructure, such as the RUSADA, CSP and the Moscow Laboratory, along with the FSB for the purposes of manipulating doping controls. The summer and winter sports athletes were not acting individually but within an organised infrastructure as reported on in the 1st Report.

2. This systematic and centralised cover up and manipulation of the doping control process evolved and was refined over the course of its use at London 2012 Summer Games, Universiade Games 2013, Moscow IAAF World Championships 2013, and the Winter Games in Sochi in 2014. The evolution of the infrastructure was also spawned in response to WADA regulatory changes and surprise interventions.

3. The swapping of Russian athletes' urine samples further confirmed in this 2nd Report as occurring at Sochi, did not stop at the close of the Winter Olympics. The sample swapping technique used at Sochi became a regular monthly practice of the Moscow Laboratory in dealing with elite summer and winter athletes. Further DNA and salt testing confirms the technique, while others relied on DPM.

4. The key findings of the 1st Report remain unchanged. The forensic testing, which is based on immutable facts, is conclusive. The evidence does not depend on verbal testimony to draw a conclusion. Rather, it tests the physical evidence and a conclusion is drawn from those results. The results of the forensic and laboratory analysis initiated by the IP establish that the conspiracy was perpetrated between 2011 and 2015".

44. The McLaren Reports also uncovered and described a number of counter-detection methodologies including (i) the Disappearing Positives Methodology and (ii) Washout Testing.

(i) *The Disappearing Positives Methodology*

45. As described by World Athletics:

"8. Where the initial screen of a sample revealed an Adverse Analytical Finding ("AAF"), the athlete would be identified and the Russian Ministry of Sport would (through a Liaison Person) decide either to "SAVE" or to "QUARANTINE" the athlete in question.

9. The AAF would typically be notified by email from the Moscow Laboratory to one of the liaison persons ... who would respond in order to advise whether athlete(s) should be "SAVED" or "QUARANTINED".

10. If the athlete was "SAVED", the Moscow Laboratory would report the sample as negative in ADAMS; conversely, if the athlete was to be "QUARANTINED", the analytical bench work would continue and the AAF would be reported in the ordinary manner.

11. *The DPM was used from late 2011 onwards*”.

(ii) Washout Testing

46. As described by World Athletics:

“12. *The McLaren Reports (in particular, the Second McLaren Report) described a programme of “Washout Testing” prior to certain major events, including the 2012 London Olympic Games and the Moscow World Championships.*

13. *The Washout Testing was deployed in 2012 in order to determine whether the athletes on a doping program were likely to test positive at the 2012 London Olympic Games.*

14. *At that time, the relevant athletes were providing samples in official doping control Berek kits. Even when the samples screened positive, they were automatically (i.e. without the need for a specific SAVE order) reported as negative in ADAMS.*

15. *Although the Washout Testing programme had started earlier, the Moscow Laboratory, through its Deputy Director Dr Timofei Sobolevsky, only developed schedules to keep track of those athletes who were subject to this Washout Testing in advance of the London Olympic Games (the “London Washout Schedules”) upon Dr. Rodchenkov's departure for the Games on 17 July 2012.*

16. *This combination of Washout Testing and DPM, using official Berek kits, only worked where the sample remained under the control of the Moscow Laboratory and was ultimately destroyed. However, in October 2012, a WADA team requested that the Moscow Laboratory send 67 samples collected before the London Olympic Games. Dr Rodchenkov explains that WADA informed the Moscow Laboratory that DHL would pick up the samples the following day and therefore the Moscow Laboratory had one night to conceal the “dirty” samples. Amongst the 67 samples, 10 were “dirty” according to Dr Rodchenkov, i.e. they had been misreported as negative into ADAMS.*

17. *Dr Rodchenkov explains that he swapped the urine in the relevant A bottles, using clean urine provided by the athletes; however, the B sample bottles were sealed and their content could not be swapped. Therefore, Dr. Rodchenkov made sure that the urine in both the A and B sample bottles looked similar, by diluting or mixing the urine with Nescafe instant coffee granules.*

18. *After this episode, the Moscow Laboratory realised that, as the Berek kits were numbered and could be audited, seized or tested, it would only be a matter of time before it was discovered that the contents of the samples would not match the entries in ADAMS; as a consequence, the swapping of the A sample bottle alone was not sufficient anymore.*

19. *Therefore, the Washout Testing programme evolved prior to the Moscow World Championships. It was decided that the Washout Testing would no longer be performed with official Berek kits, but rather with non-official containers such as soda or other plastic bottles.*

20. This “under the table” Washout Testing consisted of collecting samples in regular intervals and subsequently testing those samples for quantities of prohibited substances to monitor the rate at which those quantities were declining so that there was certainty that the athlete would test “clean” in competition.

21. The Moscow Laboratory developed schedules to keep track of those athletes who were subject to this unofficial Washout Testing scheme (the “Moscow Washout Schedules”). The Moscow Washout Schedules were updated regularly by Dr. Rodchenkov and were discussed during meetings with Deputy Minister Nagornykh”.

B. The Moscow Washout Schedules

47. World Athletics also relied upon what were called the “Moscow Washout Schedules” and, more particularly, the one sheet that bears the EDP reference EDP0034. It contains the following entries which are said by World Athletics to relate to the Athlete (translated into English):

Antukh 30/06		Methasterone (25000), boldenone (5ng/ml), desoxymethyltestosterone (80000), oxabolone
Antukh 06/07	prohormones overload	Too much of DHEA и 1-T, the rest is not clearly visible
Antukh 14/07		T/E 2.5 (prohormones), desoxymethyltestosterone traces
Antukh 25/07	parallel representation	T/E 0.6 clear

C. Witness statement of Dr Rodchenkov dated 31 January 2020

48. World Athletics adduced a witness statement of Dr Rodchenkov dated 31 January 2020 and called Dr Rodchenkov as a witness. Dr Rodchenkov is in a witness protection program in the United States of America, and testified from an unspecified location, behind a screen, in the presence of his lawyer and interpreter.

49. Dr Rodchenkov has a PhD in analytical chemistry. He was appointed as the director of the Moscow Laboratory in 2005 and resigned in November 2015. He has since been assisting WADA and Prof. McLaren in their investigations in relation to institutional doping in Russia. Dr Rodchenkov gave evidence as to, among other things, (a) the washout testing program and (b) his interactions with the Athlete.

50. As to the washout testing program generally, Dr Rodchenkov’s evidence may be summarised in the following way.

- Until the spring of 2012, the doping protocols of many Russian national team athletes were overseen by one Dr Sergei Portugalov. After a number of athletes reported positive doping results, the Russian Ministry of Sport lost confidence in Dr Portugalov.

- As a result, just prior to the 2012 London Olympic Games, the then Minister of Sport, Vitaly Mutko, charged Ms Irina Rodionova and Deputy Minister Nagornykh with the responsibility of overseeing athlete doping protocols.
- During preparation for the 2013 Moscow World Championships, a washout-testing program was conducted using unofficial samples. Deputy Minister Nagornykh and Ms Rodionova had discussed which athletes to include in the washout testing program. Spreadsheet documents were prepared containing details of athletes who were included in the washout testing program; these were known as the “Moscow Washout Schedules”. They were created by Dr Sobolevsky in the lead up to the Moscow World Championships.
- The Moscow Washout Schedules were updated to reflect the progress of the washout testing program. The Moscow Washout Schedules identified the names of the athletes involved.
- The athletes in the washout testing program were instructed to take a three steroid cocktail called the ‘Duchess Cocktail’ composed of trenbolone, methenolone and oxandrolone. However, many of the athletes used other doping protocols. Mr Alexey Kiushkin, Ms Rodionova’s assistant, who was in charge of preparing the Duchess Cocktail, was known to experiment with doping protocols and he provided prohormones containing methasterone to athletes. This was unsatisfactory because the washout of methasterone was slow and its long-term metabolite was detectable for a long period of time.
- The athletes delivered their unofficial urine samples to the Centre of Sports Preparation of National Teams of Russia (“CSP”) which, in turn, delivered them to the Moscow Laboratory. The samples to the laboratory were delivered outside normal working hours, generally on either Friday mornings or evenings. The sample bottles bore a note of the athlete’s name and collection date. The Moscow Laboratory conducted an initial analysis of the samples and the results were recorded in the Moscow Washout Schedules.
- The Moscow Washout Schedules were used to help organise pre-testing before the Moscow World Championships. When it was expected that an athlete would not test positive in view of the results of an unofficial sample, that sample was noted as a “parallel sample” in the Moscow Washout Schedule, which meant that the athlete was sent to RUSADA for an official out-of-competition sample.
- At least once per week, Dr Rodchenkov met with Ms Rodionova and Deputy Minister Nagornykh in his office at the Ministry of Sport to discuss the results of the washout testing program.

51. Dr Rodchenkov also gave evidence in relation to the Athlete in particular, which evidence may be summarised as follows.

- It is Dr Rodchenkov’s understanding that the Athlete benefitted from Russian state-sponsored doping program and that she “*engaged in doping over many years*”.
- In the early 2000s, the Athlete was coached by Ms Yekaterina Kulikova, a former world-class 400-metre runner. Ms Kulikova had a close relationship with Mr Evgeny Ter-Avanesov, the leading Russian coach in long and triple jump, known personally by Dr Rodchenkov.
- Ms Kulikova and Mr Ter-Avanesov trained several Russian athletes who had been found to have committed anti-doping rule violations.
- In 2010, Mr Ter-Avanesov asked Dr Rodchenkov to meet with Ms Kulikova to discuss the Athlete. Dr Rodchenkov met Ms Kulikova and Mr Ter-Avanesov in December 2010, and they discussed steroid use and steroid programs for the Athlete.
- Subsequently, Dr Rodchenkov met the Athlete with Ms Kulikova “*one or two times in the Moscow Laboratory to explain the use of oxandrolone and its detection windows*”. At the hearing, under questioning from the Panel, Dr Rodchenkov said that he had “*a clear recollection of the first meeting*” in December 2010. He said that he had been following the Athlete’s successes in advance of the meeting and was looking forward to meeting her. He recalled that present at the meeting were Ms Kulikova, the Athlete and himself; he met the Athlete and they shook hands; the meeting was in the cafeteria; it took place at “*possibly 6.00 or 7.00pm after everybody else had gone home*; it lasted for “*I would say 45 minutes*”; they discussed “*what steroids need to be used so that they were used safely*” and that throughout the meeting the Athlete sat there quietly while he had an “*intense*” conversation with Ms Kulikova. Dr Rodchenkov could not recall meeting the Athlete on other occasions, though he did say that he met subsequently with Ms Kulikova to discuss the Athlete.
- The Moscow Washout Schedules list four of Ms Antyukh’s samples. After the analysis of Ms Antyukh’s second sample, Dr Rodchenkov notified Ms Rodionova, who was in charge of Ms Antyukh’s doping program, to tell her that Ms Antyukh’s urine analysis suggested prohormones abuse and he asked Ms Rodionova to tell the Athlete to stop taking them.
- In answering questions, Dr Rodchenkov confirmed he did not personally collect or analyse unofficial samples from the Athlete or witness her providing the four samples listed in the Washout Schedules. He also noted the Athlete did not take the Duchess Cocktail itself, but rather she would have taken the substances listed in the Washout Schedules.

D. Expert report of Andrew Sheldon dated 31 October 2018

52. World Athletics adduced an expert report by Mr Andrew Sheldon dated 31 October 2018.

53. Mr Sheldon is a computer forensic consultant specialising in the detection of computer crime and fraud and abuse in computer systems. Mr Sheldon was asked (by WADA) for his expert view in relation to (*inter alia*) the Moscow Washout Schedules and, in particular, EDP0034. His report is dated 31 October 2018. In his expert opinion the Moscow Washout Schedules are authentic documents, created contemporaneously (i.e., in July 2013) by Dr Sobolevsky.
54. Mr Sheldon was not required for cross-examination and did not appear at the hearing.

E. Evidence of Aaron Walker and Julian Broséus

55. World Athletics also adduced a statement by Mr Walker and Dr Broséus dated 27 July 2021 and they were called to give evidence at the hearing.
56. Mr Walker and Dr Broséus are employed by WADA as, respectively, the Deputy Director and the Principal Data and Scientific Analyst of the WADA Intelligence and Investigations Department.
57. Mr Walker and Dr Broséus gave evidence that, in their view, the Athlete was a protected athlete, i.e., protected by the Russian state, and gave the following reasons for that conclusion.
- In the ordinary (and proper) course, samples provided to a laboratory for analysis are anonymous and the associated raw data and PDF files bear an anonymous sample code with no reference to the name or identity of the athlete.
 - Here, by contrast, for a number of the protected athletes, the Moscow Laboratory used the name of the athlete as part of the file name for associated PDF files. It follows that the athlete was not anonymous but was known to the Moscow Laboratory.
 - A number (eight) of PDF files were found bearing the name of the Athlete as part of the file name. Two of these PDF files were uploaded to LIMS within days of, respectively, the washout tests undertaken on 6 July 2013 and 14 July 2013.
 - The PDF files themselves are not available as they have been deleted, which, of itself, shows that the Athlete was protected.
 - On 23 July 2014, Mr Velikodny (acting as the liaison between the Moscow Laboratory and the Ministry of Sport) emailed five sample codes to Dr Sobolevsky and Dr Rodchenkov at the Moscow Laboratory. The subject line of the email was “*numbers from IIR*”, where IIR is a reference to Ms Irina Rodionova (the Deputy Director of the CSP). One of the sample codes related to the Athlete and this was said in the email: “*281877 from 22.07.2014 Antukh*”. The number 281877 corresponded to an entry for the Athlete in ADAMS for a test on 23 July 2014, a copy of which was also annexed to the report of Mr Walker and Dr Broséus.

- This is consistent with the evidence of Dr Rodchenkov that selected Russian athletes were subject to special treatment and their names communicated to the Moscow Laboratory in advance to ensure protection in the event that the athlete was tested.
- During their oral testimony, Mr Walker and Dr Broséus explained the scale and nature of their task and the time it had taken to request, retrieve and analyse the data. They further described the process of uploading the analyses of samples to the LIMS server. They answered questions about whether an athlete could have been protected even without being marked on a “save” list, and whether an athlete would have known if they were protected.

VI. THE PARTIES’ SUBMISSIONS

A. Application under Art. R57 of the CAS Code

58. At the outset of the hearing, as part of her opening submissions the Athlete made an application pursuant to Article R57 of the CAS Code. The Athlete applied to the Panel for an order that the witness statement of Mr Walker and Dr Broséus dated 27 July 2021 be excluded by the Panel. This witness statement was not before the Sole Arbitrator. It was submitted on behalf of the Athlete that this evidence was available to the Respondent or could have reasonably been discovered by the Respondent before the Sole Arbitrator rendered the Appealed Award.
59. The application was opposed on two main grounds. First, the material was not reasonably available to the Respondent before July 2021. Second, in any event, it was too late for the Athlete to make the application at the opening of the appeal hearing all the more-so where the Athlete had agreed a proposed hearing schedule – which the Parties had submitted to the Panel – that make express provision for the examination and cross-examination of Mr Walker and Dr Broséus. It was also submitted by the Respondent that the discretion of the Panel under Article R57 of the CAS Code should only be exercised where there has been some measure of abuse by the relevant party and that there was no suggestion of conduct of this sort here on the part of the Respondent.

B. The Applicable Rules

60. The Athlete submitted as follows in relation to the applicable rules in this matter.
- The Appealed Award was rendered pursuant to Rule 38.3 of the 2016 ADR on the basis that it provided for a first instance hearing before a sole arbitrator with a right of appeal to CAS.
 - Article R58 of the CAS Code provides that:

“Law Applicable to the merits

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”.

- The IAAF 2019 Anti-Doping Rules (the “2019 ADR”) provide:
 - i. by Rule 13.9.4, that *“In all CAS appeals involving the IAAF, the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Rules and Regulations)...”*; and
 - ii. by Rule 13.9.5, that *“In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the appeal shall be conducted in English, unless the parties agree otherwise”*; and
 - iii. by Rule 21.3, that all ADRVs committed before 3 April 2017 are subject (a) for substantive matters, to the rules in place at the time of the alleged ADRV; and (b) for procedural matters, to the 2016 ADR.
- The rules in place at the time of this alleged ADRV are the 2013 ADR.
- Accordingly, the 2013 ADR shall be applied to the substantive matters relating to the alleged ADRV while the 2016 ADR is to govern procedural matters.

61. For its part, the Respondent agreed that the 2013 ADR shall be applied to the substantive matters relating to the alleged ADRV while the 2016 ADR shall govern procedural matters.

C. The Athlete’s Submissions on Liability

62. The Athlete challenges the determination by the Sole Arbitrator that the Athlete was guilty of an ADRV under Rules 32.2(b) of the 2013 ADR – use of a prohibited substance, where use is defined as the *“utilisation, application, ingestion, injection or consumption by any means whatsoever”* of the prohibited substance. It is submitted by the Athlete that the evidence adduced by World Athletics is insufficient to establish the alleged ADRV.

63. The Athlete’s submissions may be summarised as follows under the following headings.

(i) The Burden and Standard of Proof

64. The 2013 ADR provide, by Rule 33.1, that:

- the prosecuting authority (here World Athletics) bears the burden of proving the ADRV; and

- by the same rule, the required standard of proof is whether the prosecuting authority has established the ADRV to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made.
65. There is well-established CAS jurisprudence to the effect that the comfortable satisfaction standard is lower than the criminal standard of beyond reasonable doubt but higher than the civil standard of on the balance of probabilities. It is nevertheless important for the Panel to take into account the seriousness of the allegation. It follows that the comfortable satisfaction standard is *“a kind of sliding scale based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be comfortably satisfied”*, per CAS 2014/A/3625, §132.
66. Accordingly, although the standard remains invariable, *“the more serious the charge, the more cogent the evidence must be in support”*, CAS 2014/A/3630, §152, and it is incumbent therefore on the prosecuting authority *“to adduce particularly cogent evidence” of an athlete’s personal involvement in the alleged wrongdoing*, CAS 2017/A/5422, §686.
67. In the particular context of this matter, it is not sufficient for World Athletics merely to establish the existence of an overarching Russian doping scheme to the comfortable satisfaction of the Panel. World Athletics must go further than that and establish that the Athlete *“knowingly-engaged in particular conduct that involved the commission of a specific and identifiable ADRV. In other words, the Panel must be comfortably satisfied that the Athlete personally committed a specific violation of a specific provision of the [applicable rules]”*, CAS 2017/A/5422, §686.
68. It follows therefore that when assessing the evidence the Panel must take into account the ‘utmost gravity’ of the charges brought against the Athlete and consider the required ingredients under each relevant provision in order to ascertain whether there has been a violation on the part of the Athlete.
69. The Sole Arbitrator failed to do this, instead he merely inferred the Athlete’s personal involvement in the Russian doping scheme from the fact that (so the Sole Arbitrator concluded) her name was mentioned in the Moscow Washout Schedules and from the witness evidence of Dr Rodchenkov.

(ii) The Evidence

70. It is a matter for World Athletics to adduce evidence that is sufficient to establish the facts required to sustain the allegation of an ADRV on the part of the Athlete. As set forth in Rule 33.3 of the 2013 ADR, these facts 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 and other analytical information”*.
71. In the context of this matter, the only strands of evidence are (a) the Moscow Washout Schedules; (b) Dr Rodchenkov’s statement; and (c) the McLaren Reports, and such strands of evidence will only *“comfortably satisfy”* the Panel if one strand sufficiently corroborates the other, which is not the case here.

(a) *The Moscow Washout Schedules*

72. It is accepted by the Athlete that the “*general reliability*” of the Moscow Washout Schedules has been established by previous CAS panels (CAS/O/5667; CAS2018/O/5668). However, even if reliable, the schedules must still establish use on the part of the Athlete of a prohibited substance.
73. In this respect, while it is accepted that the substances described in the Moscow Washout Schedules were prohibited substances according to the 2013 WADA Prohibited List in force at the relevant time, the Moscow Washout Schedules do not establish use of those prohibited substances by the Athlete because: (a) the Athlete is not personally identified in the schedules and (b) the schedules do not prove use by the Athlete of the substances set forth in the schedules. As to this:
- The schedules contain the last name (as translated) “Antukh” but do not provide a given name and do not identify the gender or the date of birth. There is therefore a risk that it is not the Athlete.
 - The various prohibited substances are recorded next to the name but it is only a bare assumption that these samples belonged to the Athlete and that the results are the results of samples provided by the Athlete. There is a risk of an error or a deliberately false record.
 - There is no corroborative evidence linking the samples to the Athlete; for example, unlike in other Russian doping cases there are here no ‘SAVE’ or ‘QUARANTINE’ emails relating to the Athlete.
 - The first column records a date, but it is impossible to identify whether that is the date of the sample or of the analysis (or something else).
 - The third column of the schedules merely lists the substances said to have been detected in the sample(s). This information does not “*validate a presumption*” that there has been any use on the part of the Athlete.
 - In relation to the so-called ‘unofficial samples’ in the third column, there is no evidence that these samples ever existed. If they did exist, there is no record of the circumstances in which the samples were collected, no explanation or evidence as to who collected them and as to how they were analysed and no evidence that the samples are attributable to the Athlete.
 - There is no evidence from any witness to the effect that the Athlete was seen using or attempting to use a prohibited substance and there is no evidence as to when the substances were administered to the Athlete or as to whether the Athlete was aware of the alleged doping or a knowing participant in the alleged doping scheme.

(b) *Dr Rodchenkov's Evidence*

74. The Athlete makes the following criticisms of the evidence of Dr Rodchenkov.

- Dr Rodchenkov's status as a protected witness does not dispense with the need on the part of the Panel to scrutinise his evidence carefully. Several other CAS panels have noted that Dr Rodchenkov is merely a fact witness and that they were unable to place much weight on his evidence.
- Nothing said by Dr Rodchenkov amounts to direct evidence of the alleged ADRVs. He did not ever see the Athlete use any prohibited substances.
- Dr Rodchenkov says that he met the Athlete but the Athlete denies that she ever met Dr Rodchenkov.
- Most of what is said as to the Athlete by Dr Rodchenkov is not contemporaneous to the events recorded in the Moscow Washout Schedules.
 - i. Dr Rodchenkov says that he had an initial meeting with the Athlete and her coach in December 2010 but the events reflected in the Moscow Washout Schedules took place in 2013.
 - ii. Dr Rodchenkov says that he had subsequent meetings in the Moscow Laboratory but he cannot date the meetings so that it cannot be inferred that they were in or about 2013.
- Dr Rodchenkov says that he explained the use of oxandrolone to the Athlete (and its detection windows) but this substance does not appear the substances recorded in the Moscow Washout Schedules against what is said to be the Athlete's name.
- Dr Rodchenkov says that he noticed that one of the Athlete's samples indicated prohormone abuse by the Athlete and that he told Mrs Rodionova, as the person in charge of the Athlete's doping program, to tell the Athlete to stop taking them. But there is nothing to corroborate that Dr Rodchenkov did so and, in any event, the Athlete has no relation with Mrs Rodionova and has never met her. Further, the entry on the schedule was not written by Dr Rodchenkov himself.
- In all, the evidence of Dr Rodchenkov should not be given much weight in this case.

(c) *The McLaren Reports*

75. The Athlete's submissions in relation to the McLaren Reports may be summarised in the following way.

- None of the findings in the McLaren reports “*personally targets*” the Athlete and “*nor do they support the alleged ADRV*”.
- Prof. McLaren’s mandate as the IP did not involve bringing ADRV cases against individual athletes.
- Even where Prof. McLaren did uncover certain evidence of an ADRV that would warrant further investigation he did not test the sufficiency of that evidence.

D. The Submissions of World Athletics on Liability

76. The submissions on the part of World Athletics may be summarised as follows (using the same headings as above).

(i) The Burden and Standard of Proof

77. World Athletics accepts that it bears the burden of proving the essential elements of the alleged violation of Rule 33.2(b) of the 2013 ADR.

78. It is also accepted by World Athletics that, pursuant to Rule 33.1 of the 2013 ADR, the standard of proof is “*to the comfortable satisfaction of [the Panel], bearing in mind the seriousness of the allegation which is made*”.

79. It is not, however, necessary for World Athletics to show the Athlete’s “*personal involvement*” in the Russian Doping Scheme in order to make out the requirements for a violation of Rule 32.2(b) of the 2013 ADR prohibiting use (or attempted use) of a prohibited substance. It is, therefore, simply not right to say, as the Athlete submitted, that World Athletics must establish that the Athlete “*knowingly-engaged in particular conduct that involved the commission of a specific and identifiable ADRV. In other words, the Panel must be comfortably satisfied that the Athlete personally committed a specific violation of a specific provision of the [applicable rules]*”, CAS 2017/A/5422, §686.

80. Indeed, Rule 32.2(b)(i) provides that “*it is not necessary that intent, fault, negligence or knowing use on the Athlete’s part be demonstrated*” in order to establish an ADRV in respect of use of a prohibited substance.

81. Rule 33 also provides, at (3) that “*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, experts reports, documentary evidence, conclusions drawn from longitudinal profiling and other analytical information*”.

82. It follows that it is sufficient if the Panel is comfortably satisfied that:

- the evidence adduced by World Athletics is “reliable” evidence; and
- the evidence establishes use of a prohibited substance, regardless of intent or fault on the Athlete’s part.

(ii) *The Evidence*

83. The evidence adduced by World Athletics is reliable evidence. The primary evidence relied upon is the Moscow Washout Schedules. Mr Sheldon, a forensic consultant, provided an expert report in which he confirmed that the Moscow Washout Schedules were authentic documents that were created contemporaneously. The Athlete does not challenge that expert view and has not asked to cross-examine Mr Sheldon in this appeal.

(a) *The Moscow Washout Schedules*

84. The Moscow Washout Schedules do identify the Athlete.

- It is clear from the evidence of Dr Rodchenkov that the Moscow Washout Schedules were maintained in order to monitor those athletes who were aiming to participate in the 2013 IAAF World Championships in Moscow. The Athlete was preparing for the 2013 IAAF World Championships in Moscow. There was no other athlete with that name who was preparing for that event. It follows that the reference to “Antyukh” in the schedules is a reference to the Athlete.
- The schedules record that the Athlete provided an unofficial sample on 25 July 2013 which is reported as showing “*T/E 0.6 clear*”. This unofficial sample is annotated as a “*parallel representation*”. This means that, in light of the negative result on 25 July 2013, the Athlete was then required to undergo an official out-of-competition test shortly thereafter, which she did on 30 July 2013, which also showed negative (the report of which was appended to the Athlete’s own witness statement). Accordingly, as explained by Dr Rodchenkov, the fact that the Athlete underwent an official doping control on 30 July 2013 corroborates rather than negates the contents of the Moscow Washout Schedules.
- The Athlete’s teammate and fellow hurdler Yekaterina Galitskaia and the Athlete shared the same coach, Ms Kulikova. Ms Galitskaia is also mentioned in Moscow Washout Schedules, with the same substances as are set out next to the Athlete’s name – namely, methasterone, boldenone, oxabolone, and testosterone – and the dates for the unofficial tests are the same for both athletes – 6 and 14 July 2013. This corroborates that the reference in the schedules to Antyukh is a reference to the Athlete and no-one else.

85. The Moscow Washout Schedules establish use on the part of the Athlete of the substances described in the schedules against her name.

- The Moscow Washout Schedules are a contemporaneous account of the washout testing program deployed by the Moscow Laboratory. As noted in CAS 2019/A/6161 at [189], these documents “*were created, edited and communicated contemporaneously by persons heavily implicated in the general doping scheme in Russia and by those responsible for overseeing athletes’ physical conditions*”.

- The Moscow Washout Schedules have been at the heart of a number of doping cases brought by World Athletics in recent years in all of which the athletes were found to have used prohibited substances; i.e., in all of these cases the Moscow Washout Schedules were considered “*apt*” to establish an ADRV (see, for example, CAS 2019/A/6167).
- The Moscow Washout Schedules demonstrate that, when towards the end of the washout period, an unofficial sample showed that it was expected that an athlete would no longer test positive for a prohibited substance, then the sample was marked “parallel representation” in the schedules and an official out-of-competition test was arranged with RUSADA. Eight out of the nine athletes whose unofficial sample taken on 25 or 26 July 2013 was marked in this way went on to undergo an official test with RUSADA between 29 and 31 July 2013. The only athlete who did not was Ms Galitskaia who did not compete at the 2013 IAAF World Championships in Moscow.
- Many of the other entries in the schedules have been corroborated. For example, one athlete provided an unofficial sample on 10 July 2013 which was reported to contain oxandrolone and testosterone. On the following day she provided an in-competition sample which showed the presence of the same prohibited substances.
- The contents of the schedules as they relate to the Athlete are also corroborated by the existence of contemporaneous PDF documents created shortly after the second and third of the Athlete’s unofficial samples which PDFs refer to the Athlete by name in their title. The fact that the PDF documents refer to the Athlete by name shows (a) that the Athlete was protected because samples are supposed to be supplied and analysed on an anonymous basis and (b) that the analytical PDFs relate to the unofficial samples provided by the Athlete because where PDFs relate to official samples there is no mention of the athlete concerned, merely the sample code. These PDFs therefore demonstrate that the Athlete did provide unofficial samples and that they were analysed – thereby showing that the Athlete was indeed providing unofficial urine samples exactly when the Moscow Washout Schedules say she was.
- In all, it is clear that the Moscow Washout Schedules “*are authentic and reliable documents and that their content is fully corroborated by many different contextual elements*”. The Moscow Washout Schedules “*clearly show the washout of a number of prohibited substances over the course of weeks in an effort to ensure that she would not test positive*” at the 2013 IAAF World Championships in Moscow.

(b) *Dr Rodchenkov’s Evidence*

86. World Athletics makes the following submissions in relation to the evidence of Dr Rodchenkov.
- Dr Rodchenkov’s evidence provides context for and corroboration of the contents of the Moscow Washout Schedules.

- It is not contended that Dr Rodchenkov’s testimony is “*sufficient evidence*” to show, of itself, that the Athlete used the prohibited substances as alleged. The primary evidence of this use is provided by the Moscow Washout Schedules.
- Nevertheless, Dr Rodchenkov’s evidence is credible and he is a credible witness. He has been found to be a truthful witness by a number of CAS panels and it is his evidence which gave rise to the McLaren Reports. He is the person who exposed and explained the Russian doping scheme and identified, in particular, the use of washout testing and the preparation and maintenance of the Moscow Washout Schedules. All of the “*revelations*” made by Dr Rodchenkov have proved to be correct.

(c) *The McLaren Reports*

87. As to the McLaren Reports, World Athletics submits as follows:

- It is accepted that McLaren Reports do not “*personally target*” the Athlete and that Prof. McLaren’s mandate as the IP did not involve bringing ADRV cases against individual athletes.
- The McLaren Reports constitute reliable evidence as to the Russian doping scheme generally.
- The McLaren Reports constitute reliable evidence as to the ‘counter-detection methodologies’ put in place by and or on behalf of the Russian state, including, importantly, the washout testing program.
- The McLaren Reports put the Moscow Washout Schedules and the evidence of Dr Rodchenkov in context.

E. The Athlete’s Submissions on Sanctions

88. The Athlete’s primary submission is that World Athletics has not discharged its burden on the evidence and that the alleged ADRV is unproved. In the event that the Panel decides otherwise, the Athlete makes a number of submissions in relation to the appropriate sanctions.

- The Athlete accepts that the ‘standard’ period of ineligibility for a first violation of Rule 32.2(b) of the 2013 ADR relating to use or attempted use of a prohibited substance is two years.
- The Athlete submits that there are no ‘aggravating circumstances’ here under Rule 40.6 of the 2013 ADR that would warrant conditions for increasing the standard sanction of a period of ineligibility of two years.
 - i. It has not been shown that there have been multiple violations.

- ii. It has not been shown that the Athlete used multiple prohibited substances. The Moscow Washout Schedules provide indications of test results on given dates but there is no evidence that traces the results to the samples or the samples to the Athlete.
 - iii. It has not been shown that the Athlete committed the ADRV as part of a ‘doping plan’ or ‘scheme’; in particular, there is nothing to show that the Athlete “personally and knowingly” participated in the Russian doping scheme.
89. In the alternative, if the Panel forms the view that there are aggravating circumstances pursuant to Rule 40.6 of the 2013 ADR then the circumstances do not warrant, an additional period of two years of ineligibility and a lesser period should be imposed.
90. The Athlete also submits that the period of ineligibility should be deemed to have started at an earlier date, invoking Rule 10.10.2 of the Respondent’s 2019 ADR, to be considered as *lex mitior*. This rule provides that “*where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the period of Ineligibility may be deemed to have started at an earlier date, commencing as early as the date the Anti-Doping Rule Violation last occurred (e.g., under Article 2.1, the date of Sample collection)*”.
91. According to the Athlete:
 - The period of time that elapsed between the publication of the Second McLaren Report on 9 December 2016 and the instigation of the present arbitral proceeding on 7 February 2020 “*appears significant*”.
 - There was a period of two and a half years between the Second McLaren Report and the AIU’s ‘Notice of Allegation’ letter of 31 May 2019.
 - These are substantial delays.
 - None of the delay is attributable to the Athlete.
92. The period of ineligibility should therefore start to run on an earlier date, but not later than the date on which the alleged violations have been brought to the Respondent’s attention, i.e. 9 December 2016.
93. Finally, the Athlete also appeals against the period of disqualification imposed by the Sole Arbitrator, namely “*seven years and nearly ten months of disqualification*” of competitive results from 30 June 2013 (the date of the first sample in the Moscow Washout Schedules) until 7 April 2021 (the date of the Appealed Award).
94. This period of time is disproportionate and unfair and out of kilter with sanctions imposed in similar cases, such as the period of disqualification imposed for Ms Galiskaia in CAS 2018/O/5712 of two years, five months and sixteen days.

F. World Athletics' Submissions on Sanctions

95. World Athletics' submissions in relation to sanctions may be summarised as follows.
96. The Sole Arbitrator imposed a four year period of ineligibility, on the bases that (i) the Athlete was engaged in the washout testing program which was part of a doping plan or scheme pursuant to Rule 40.6 of the 2013 ADR; and (ii) the Athlete used six different prohibited substances within a one-month period.
97. The Sole Arbitrator was right to do so in light of the aggravating circumstances.
- The Athlete did commit the ADRV as part of a doping plan or scheme. There is nothing in Rule 40.6 that requires a showing that the Athlete has "*personally and knowingly participated in the doping scheme*" as is argued for by the Athlete. On the contrary, the rule only requires that "*the Athlete ... committed the [ADRV] as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit [ADRVs]*".
 - The Athlete did use six prohibited substances within a one-month period.
98. The four year period was warranted in the circumstances. The Panel should not tinker with a "*well-reasoned sanction*", as this was. It cannot be said to be "*evidently and grossly disproportionate*".
99. As to the period of disqualification imposed by the Sole Arbitrator:
- Rule 40.8 disqualifies all results from the first evidence of doping, here 30 June 2013, until the start of the period of ineligibility. The Sole Arbitrator had a discretion to "*save results*" based on the "*fairness exception*" but chose not to do so.
 - The Sole Arbitrator was right not to do so.
100. As to the application of the Respondent's 2019 ADR, said to be applicable via *lex mitior*, World Athletics objects on three grounds:
- This argument was not made before the Sole Arbitrator.
 - The Athlete relies on the 2019 ADR based on *lex mitior* but this principle only allows a party to apply a whole set of rules of a certain year instead of the otherwise applicable one. The Athlete "*cannot pick and choose the best elements of both regime to create a new (more favourable) regime (see eg. CAS 2018/A/5977, para. 78)*". As a result, the applicable rule is Rule 40.10 of the 2013 ADR, which provides that the period of ineligibility shall run from the date of the award.
 - In any event, there were no delays (still less substantial) on the part of the Respondent. The matter is complex and required investigation. If there were any delays, the Athlete cannot say that any such delays were not attributable to her in that the evidence shows

that she was subject to underhand unofficial doping controls, which is the reason why lengthy investigations were required.

G. The Parties' Requests for Relief

101. The Athlete's prayers for relief are as follows.

I. The Appeal of Ms. Natalia Antyukh is admissible.

II. The Arbitral Award dated 7 April 2021 delivered by the Court of Arbitration for Sport in the matter CAS 2020/0/6759 World Athletics v. Russian Athletic Federation & Natalya Antyukh is set aside.

III. Ms. Natalia Antyukh is found not guilty of an anti-doping rule violation under Rule 32.2 of the IAAF Competition Rules 2012-2013.

IV. All individual results and titles earned by Ms. Natalia Antyukh from 30 June 2013 through 7 April 2021 are reinstated .

V. In the alternative to III and IV,

a. the period of ineligibility applied to Ms. Natalya Antyukh shall be two years or, alternatively, less than the maximal sanction of four years, starting in any case no later than on 9 December 2016.

b. the disqualification of Ms. Natalya Antyukh's competitive results is reduced to the period from 30 June 2013 to 31 December 2014.

VI. World Athletics shall be ordered to contribute to Ms. Natalya ANTYUKH's legal and other costs up to their amount".

102. For its part, the Respondent sought the following relief:

"... World Athletics respectfully requests that the CAS Panel issues an award holding that:

I. The Appeal filed by Ms. Natalya Antyukh is dismissed.

II. Ms. Natalya Antyukh is ordered to bear the costs of the proceedings.

III. World Athletics is granted an award for costs".

VII. JURISDICTION OF THE CAS

103. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration

agreement and if the Player has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned”.

104. The 2016 ADR, which the Parties agree are to apply to procedural matters, provide by Rule 38.3 that that the decision of the Sole Arbitrator at first instance shall be subject to appeal to CAS (see also Rule 42).
105. In addition, the jurisdiction of CAS was confirmed by the Parties’ signature of the Order of Procedure.
106. The Panel, therefore, confirms that CAS has jurisdiction to decide this appeal.

VIII. ADMISSIBILITY OF THE APPEAL

107. As to admissibility, it was common ground between the Parties that:
 - Rule 42.1 of the 2016 ADR provides that all decisions made under the rules may be appealed in accordance with the provisions of Rule 42 of the 2016 ADR.
 - The Appealed Award was rendered pursuant to Rule 38.3 of the 2016 ADR on the basis that it provided for a first instance hearing before a sole arbitrator with a right of appeal to CAS.
 - Rule 42 of the 2016 ADR provides that an athlete who is the subject of a decision being appealed has a right of appeal in any case involving an international level athlete. The Athlete is such an athlete and therefore has a right of appeal.
108. The Panel recalls that RUSAF was a named respondent in the proceedings at first instance but did not participate. The Athlete observed in her Appeal Brief that RUSAF may not be considered a mandatory respondent to the appeal, within the meaning of Rule 42.19 of the 2016 ADR and renounced from naming RUSAF as a second respondent. The Respondent did not dispute that approach in its Answer.
109. Article 42.14 of the 2016 ADR provides a 45 day deadline to file an appeal with CAS. The Appealed Award was notified to the Athlete on 7 April 2021. The Statement of Appeal was filed on 21 May 2021, i.e. in compliance with the prescribed deadline.
110. This appeal is therefore admissible, as is common ground between the Parties (as confirmed in the signed Order of Procedure).

IX. APPLICABLE LAW

111. Article R58 of the CAS 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”.

112. There was no issue between the Parties as to the applicable regulations. As was common ground:

- Article R58 of the CAS Code provides that:

“Law Applicable to the merits

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”.

- The Respondent’s 2019 ADR (with an effective date of 1 January 2019) provide:
 - i. by Rule 13.9.4, that *“In all CAS appeals involving the IAAF, the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Rules and Regulations)...”*; and
 - ii. by Rule 13.9.5, that *“In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the appeal shall be conducted in English, unless the parties agree otherwise”*; and
 - iii. by Rule 21.3, that all ADRVs committed before 3 April 2017 are subject (a) for substantive matters, to the rules in place at the time of the alleged ADRV; and (b) for procedural matters, to the 2016 ADR.
- The rules in place at the time of this alleged ADRV are the 2013 ADR.

113. Accordingly, the 2013 ADR are to be applied to the substantive matters, procedural matters governed are to be governed by the 2016 ADR, and to the extent that such rules do not deal with an issue then Monegasque law is to be applied subsidiarily.

X. THE ATHLETE’S APPLICATION PURSUANT TO ARTICLE R57 OF THE CAS CODE

114. As noted above, at the outset of the hearing the Athlete made an application pursuant to Article R57 of the CAS Code for an order excluding the witness statement of Mr Walker and Dr Broséus. At the hearing, the Panel allowed the material in *de bene esse* on the basis that the Panel would rule on the application in this Award. The witnesses were therefore called and gave evidence and were cross-examined on that basis.
115. Article R57 of the CAS Code provides as follows (in relevant part): “*The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered*”.
116. There is no doubt that, in the appropriate circumstances, a CAS panel has the discretion to exclude evidence. It must be remembered, however, that such discretion should be exercised with restraint in order to preserve the *de novo* character of the CAS appeal proceedings and should, in the Panel’s view, be limited to those circumstances where the new material is adduced in an abusive way or with some measure of bad faith (for example, where the evidence is in hand at the first instance hearing but is withheld for strategic purposes and adduced for the first time on appeal) (see generally MAVROMATI D., *The CAS Panel’s Right to Exclude Evidence Based on Article R57 Para. 3 CAS Code: A Limit to CAS’ Full Power of Review?* CAS Bulletin/ Bulletin TAS (2014)).
117. Bearing this well in mind, the Panel dismisses the application. First, there is no suggestion that there has been anything remotely abusive in the conduct of the Respondent in adducing this material. Indeed, the Respondent offered explanations as to the extent, nature, and timing of the forensic investigations underlying the witness statement. And second, it was far too late for the Athlete to make the application at the opening of the appeal hearing. When asked for the explanation of the delay, it was said that it was not open to the Athlete under the CAS Code to make further submissions once the Answer had been filed. But that is to confuse matters. If the Athlete considered that there were proper grounds for an application for this evidence to be excluded, the Athlete could and should have acted promptly in bringing such application. The Athlete did not do that but sat on her hands until opening submissions at the appeal hearing. This delay was compounded by the fact that, as noted by the Respondent, the Parties had agreed upon a proposed timetable which made specific allowance for these witnesses to give their evidence. That proposed timetable was agreed between the Parties and submitted to the Panel on that agreed basis. Having done so without any sort of reservation or marker, it was not open to the Athlete to apply to exclude the evidence.
118. The application is therefore denied. The Panel does not exercise its discretion to exclude the evidence; to the contrary it shall be admitted and be given such weight and consideration as the Panel thinks appropriate.

XI. THE MERITS

119. The Panel notes that while it has carefully considered the entirety of the submissions made and the evidence adduced by the Parties it only relies below on those matters which it deems necessary to decide the dispute. The merits of the appeal shall be considered in two sections: liability and sanctions.

A. Liability

(i) *The Nature of the Appeal*

120. This is an appeal against the first instance decision of the Sole Arbitrator. That being so, this is a re-hearing *de novo* and the Panel has the power to review the facts and the law anew: see Rule 42.22 of the 2016 ADR and Article R57 of the CAS Code.

(ii) *The Alleged ADVR*

121. World Athletics alleges that the Athlete has committed “*a violation*” (i.e., singular) of Rule 32.2(b) of the 2013 ADR. For the sake of good order, this rule provides 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:*

(b) 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 antidoping rule violation to be committed”.

122. It is apparent that this rule includes a number of defined terms. It is common ground that Ms Antyukh is an Athlete as defined, and that the substances that World Athletics alleged were used here were Prohibited Substances as defined. It is also not alleged that there has been any ‘Prohibitive Method’ or any ‘Attempted Use’ so that these terms can be ignored for present

purposes. As for the term ‘Use’, it is defined within the rules to mean: *“the utilisation, application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance”*.

123. It is also apparent that Rule 32.2(b)(i) expressly provides that it is not necessary for World Athletics to demonstrate intent, fault, negligence or knowing use on the Athlete’s part in order to establish an ADRV in respect of use of a prohibited substance. (That is not to say that these matters are irrelevant, only that they play no role in liability. These matters may well become relevant within the consideration of sanctions).
124. That then is what World Athletics has to establish: that there was utilisation, application, ingestion, injection or consumption by any means whatsoever of any prohibited substance by the Athlete -- and there is no requirement on World Athletics to establish intent, fault, negligence or knowing use on the Athlete’s part in order to establish an ADRV in respect of use of a prohibited substance.

(iii) *Burden and Standard of Proof for an ADRV*

125. The 2013 ADR go on to provide, by Rule 33, for the burden and standard of proof and for the methods by which the underlying facts for an ADRV are to be established. Rule 33.1 provides as follows:

“RULE 33

Proof of Doping

Burdens and Standards of Proof

1. The IAAF, the 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, the 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 in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. ...”

126. There is no uncertainty as to the import of this rule and the Panel respectfully adopts what was said by the Sole Arbitrator in this respect as an accurate account of the law:

“55. The CAS jurisprudence has clearly shaped the comfortable satisfaction standard as being lower than the criminal standard of beyond reasonable doubt but higher than other civil standards such as the balance of probabilities. Indeed, the “comfortable satisfaction” standard of proof has been developed by the CAS jurisprudence (i.e. CAS 2009/A/1920, CAS 2013/A/3258, CAS 2010/A/2267, CAS 2010/A/2172) which has defined it by comparison, declaring that it is greater than a mere balance of probability but less than proof beyond a reasonable doubt. In particular, the CAS jurisprudence has clearly established that to reach this comfortable satisfaction, the Panel should have in mind “the seriousness of allegation which is made” (i.e. CAS 2005/A/908, CAS 2009/A/1920). It follows from the above that this standard of proof is then a kind of sliding scale, based on the allegations at stake: the more serious the

allegation and its consequences, the higher certainty (level of proof) the Panel would require to be “comfortably satisfied” (CAS 2014/A/3625, para. 132).

56. Notwithstanding the foregoing, it shall be noted that this standard of proof “does not itself change depending on the seriousness of the (purely disciplinary) charges. Rather the more serious the charge, the more cogent the evidence must be in support” (CAS 2014/A/3630, para. 115)”.

127. It should be borne in mind, however, that, contrary to what is often asserted, the standard itself does not change; it is the required cogency of the evidence that changes on the basis that the more serious the allegations (a) the less likely that the alleged fact or event has occurred and (b) the more serious the consequences. The standard of proof, however, remains to the comfortable satisfaction of the Panel bearing in mind the seriousness of the allegations (see, e.g., CAS 2014/A/3630).

(iv) *Methods of Establishing Facts*

128. Rule 33 also makes provision for the methods by which facts (and presumptions) may be established in relation to the alleged ADRV. Rule 33.3 provides as follows:

“RULE 33

Proof of Doping

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, experts reports, documentary evidence, conclusions drawn from longitudinal profiling and other analytical information”.

129. It is important to understand what this rule means. It is not, as was submitted by the Parties, a requirement that the evidence adduced be ‘reliable evidence’ (whatever that might mean). Rather, it is a rule as to the method or manner or form in which the facts that are necessary to sustain an allegation of an ADRV may be established -- and the rule provides (in a non-exhaustive list) a number of examples of means of establishing facts which are characterised as ‘reliable’. In the great majority of cases the parties will deploy only reliable means in that, in the great majority of cases, the parties will seek to establish the facts by one or other of reliable means set forth in the rule itself and only by those means. In any event, that is certainly the position here as World Athletics has sought to establish the facts related to the alleged ADRV in this matter by (a) evidence of third persons, (b) witness statements, (c) expert reports, and (d) documentary evidence and, for her part, the Athlete has sought to establish facts by her own witness statement.
130. It follows that each of the means by which the Parties in this proceeding have sought to establish facts in relation to the alleged ADRV is a ‘reliable’ means for the purposes of the rule.

(v) ***Assessment of the Evidence***

131. That being so, it is a matter for the Panel to assess the evidence and form a view as to whether World Athletics has discharged its burden to the required standard, as discussed above. The issue therefore is whether, on the material before the Panel, the Panel is comfortably satisfied that the Athlete has used – i.e., utilised, applied, ingested, injected, or consumed by any means whatsoever – one or other of the substances set forth in the Moscow Washout Schedules (as set out above).
132. In this case there is no direct evidence of use by the Athlete – all the evidence is circumstantial. In this context, the Panel accepts the Respondent’s submission that the Panel must assess the evidence separately and together and must have regard to what is sometimes called ‘the cumulative weight’ of the evidence (as described by Lord Hoffmann in the Privy Council in AG for Jersey v Edmond-O’Brien [2006] UK PC 14 and as relied upon in CAS 2015/A/4059). In Edmond-O’Brien, Lord Hoffmann said this: *“It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, establish guilt beyond reasonable doubt”*. See also CAS 2018/O/5713 where there was reference to the following passage from Pollock CB in R v Exall (1866) 4 F&F 922, 929: *“One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of”*.
133. The evidence adduced by the Parties in relation to this alleged ADRV has been outlined above. It comprises:
- For the Athlete, the Athlete’s witness statement (with test result document attached) and oral evidence at the hearing.
 - For World Athletics: (a) the McLaren Reports, (b) the Moscow Washout Schedules, (c) the evidence of Dr Rodchenkov, (d) the expert report of Mr Sheldon, and (e) the evidence of Mr Walker and Dr Broséus (and the documentary evidence annexed to their statement, including an email and file names).
134. By way of preliminary matters:
- The Athlete offered what might be described as a ‘bare denial’ of the allegations without providing any contrary evidence as to the matters at issue. She was able to offer no explanation as to why her name appeared on the Moscow Washout Schedules and she denied, without more, that she had ever met Dr Rodchenkov in the Moscow Laboratory. The Panel read her statement and listened attentively to her oral evidence. On balance, where the Athlete’s evidence differed from the contemporaneous documents and/or the evidence of Dr Rodchenkov, the Panel preferred the latter. Dr Rodchenkov’s explanations were more plausible, and his recollections more detailed and cogent in the context of the documentary record. Although the Athlete had

identified some inconsistencies or queries about his evidence specific to her, he was able to provide the Panel with explanations for each of these.

- Before the Sole Arbitrator there appears to have been some criticism of Prof. McLaren and of the contents of the McLaren Reports. There was no such attack in the course of this appeal. Indeed, there appears to be no dispute on the part of the Athlete that there was a Russian doping scheme as described in some detail in the McLaren Reports. That being so, it suffices to say that the Panel accepts the McLaren Reports as a fair account of the Russian doping scheme and, in particular, accepts that the account of the washout testing program set forth in the McLaren Reports is an accurate and compelling account of what took place in this regard.
- What the Athlete does say in relation to the McLaren Reports is that, while the McLaren Reports provide ‘context’ to the alleged ADVR, they provide “*no additional strand of evidence in support of the same*”. The Panel does not accept this submission. True it is that the McLaren Reports do not expressly target the Athlete, but they do provide powerful contextual evidence to be weighed in the balance with all the other evidence – i.e., all the other strands of the cord.
- The Athlete levelled a number of criticisms at the evidence of Dr Rodchenkov. By way of example, it was said by the Athlete in her response to the AIU that there were “*serious doubts*” as to Dr Rodchenkov’s impartiality and that his evidence may be characterized as “*lies and slanders in pursuit of his personal goals*”. Such criticisms were not put to Dr Rodchenkov in cross-examination and nor were they repeated in submission on this appeal. In any event, as it was invited to do, the Panel scrutinised the evidence of Dr Rodchenkov with particular care and found Dr Rodchenkov to be an honest and credible witness such that, where his evidence was in conflict with that of the Athlete, the Panel preferred that of Dr Rodchenkov. In this respect, the Panel is aware that other CAS panels have formed their own views as to the evidence and credibility of Dr Rodchenkov. None of this matters at all for present purposes, where it is the task of this Panel to assess the evidence and the credibility of the witnesses as they appear in these proceedings and only in these proceedings.
- All that having been said, the Panel notes that extensive detail of, in particular, the washout testing program as set forth in the McLaren Reports is entirely corroborated by what was said by Dr Rodchenkov in this respect.
- The Respondent adduced an expert forensic report from Mr Sheldon in which he confirmed that the Moscow Washout Schedules were authentic documents that were created contemporaneously. The Athlete does not challenge that expert view and has not asked to cross-examine Mr Sheldon in this appeal. The Panel therefore proceeds on the basis that the Moscow Washout Schedules are authentic documents which were prepared contemporaneously and which record events as and when they happened.

- The Respondent adduced the evidence of Mr Walker and Dr Broséus. There was no substantive challenge to this evidence such that it remains effectively unchallenged. The Panel therefore accepts this evidence on that basis.

135. Bringing those matters into account, the Panel finds as a matter of fact that there was a washout testing program in place in advance of the 2013 IAAF World Championships in Moscow and that it was conducted in the following way.

- The historic position in Russia was that doping of athletes was undertaken on an *ad hoc*, decentralised basis where coaches and officials working with elite athletes “*in the field*” provided those athletes with an array of performance-enhancing drugs (or “PEDs”). The difficulty with this approach was that it could not keep abreast of the developments in doping control, including in particular the introduction of the Athlete Biological Passport (“ABP”) so that the athletes were at risk of being caught. In response, the Russian Ministry of Sport sought to ‘centralise’ the doping effort, and bring it under the control of the Moscow Laboratory. An essential part of this centralisation was the development by Dr Rodchenkov in or about 2012 of the so-called “Duchess Cocktail”, a cocktail of PEDs comprised of oxandrolone, methenolone and trenbolone, which cocktail had a very short detection period thereby reducing the risk of detection. The objective was to shift all of the athletes who were participating in the “*in the field*” programs onto this Duchess Cocktail and under the supervision of the Moscow Laboratory (and Dr Rodchenkov).
- Part and parcel of this new program was a program of ‘washout testing’ by the Moscow Laboratory. This was a means by which the Moscow Laboratory could discern whether, in advance of a particular competition, an athlete who was participating in the doping program could nevertheless compete at the event and, if tested, test clean, i.e., that the PEDs taken by the athlete had ‘washed out’ of the athlete’s system in time for the event.
- This washout testing started in 2012 in advance of the 2012 London Olympic Games but was also deployed for later competitions including in particular the 2013 IAAF World Championships in Moscow. According to the Second McLaren Report (speaking in relation to the 2012 London Olympic Games):

“Every country, through its Olympic Committee, wants to ensure that its Olympic athletes provide clean doping control samples at the Games. Therefore, testing before the competition is normal. In that testing, if an athlete tests positive it will result in discipline for an ADRV and non-attendance at the Olympics. The difference in the case of potential Russian Olympians was that the MoJS directed pre-competition testing not to catch doping athletes, but rather to ensure that they would be able to compete at the Games without being detected by doping control analysis. If they became clean, they went. This process of pre competition testing to monitor if a dirty athlete would test “clean” at an upcoming competition is known as washout testing”.

- The washout testing program consisted of collecting samples from athletes who were doping (whether in the field or under the supervision of the Moscow Laboratory and hence doping with the Duchess Cocktail) at regular intervals and testing those samples to determine the presence of the PEDs and the rate at which their concentrations were declining (or ‘washing out’) in order to determine whether the athlete would test “clean” in competition. If this washout testing determined that the athlete would not test “clean” at competition, then he or she was not sent. If the washout testing showed that the PEDs had washed out of the athlete’s system then he or she would be sent and would be able to compete with his or her doping going undetected. Dr Rodchenkov noted that not all athletes who took part in the washout testing program took the Duchess Cocktail itself, some other prohibited PEDs were taken, and Irina Rodionova came up with her own doping programs for some athletes.
 - In order to keep track of the athletes who were participating in this washout testing program, and the results of the testing, the Moscow Laboratory maintained ‘washout schedules’. These washout schedules were updated regularly by the Moscow Laboratory when new washout samples were sent by the athletes to the Moscow Laboratory for testing. In case of a positive initial test procedure showing the presence of prohibited substances, the Moscow Laboratory would record it on the Washout Schedules but would report the samples as negative in ADAMS. The schedules maintained by the Moscow Laboratory in respect of the 2013 IAAF World Championships in Moscow were known as the “Moscow Washout Schedules”.
 - The Moscow Washout Schedules were created by Dr Sobolevsky, the former Deputy Director of the Moscow Laboratory under Dr Rodchenkov.
 - The Moscow Washout Schedules showed the progress of the washout testing program for each of the athletes listed therein. That is to say that, as and when the analysis of a sample showed that the athlete would no longer test positive for a prohibited substance, then the sample was marked “parallel representation”, and the athlete was sent to RUSADA for an official out-of-competition test, thereby clearing the way for the athlete to compete.
 - Dr Rodchenkov discussed the washout testing program with the Russian Ministry of Sport, taking copies of the Moscow Washout Schedules with him to meetings with Deputy Minister Nagornyykh at which Dr Rodchenkov provided a status update.
136. Nevertheless, the Panel accepts the submission on the part of the Athlete that the mere existence of a washout testing program does not, without more, amount to satisfactory proof of the particular allegations made against the Athlete in these proceedings; i.e., that the Athlete used the prohibited substances that are listed in the schedules against her name. The evidence in relation to this matter is: (a) the Moscow Washout Schedules; (b) the evidence of Dr Rodchenkov, (c) the evidence of Mr Walker and Dr Broséus ; and (d) the Athlete’s evidence.

(a) *The Moscow Washout Schedules*

137. The EDP provided by Prof. McLaren included the Moscow Washout Schedules. These documents bore the EDP document references EDP0019 through to and including EDP0038 and EDP0757, EDP1168, EDP 1170 and EDP1173. The particular iteration of the schedules relied upon by World Athletics is EDP0034. As just noted, the Panel accepts that the Moscow Washout Schedules (EDP0034 included) are genuine documents.
138. Two questions arise: (a) do the Moscow Washout Schedules identify the Athlete; and (b) if so, do the Moscow Washout Schedules establish use on the part of the Athlete of the prohibited substances listed against her name?
139. On issue (a), the Panel accepts the submissions of the Respondent and agrees with the decision of the Sole Arbitrator. The Moscow Washout Schedules were prepared and maintained in the context of the 2013 Moscow World Championships in which event the Athlete participated. There was no other athlete bearing that name who did so, least of all the Athlete's brother as was once suggested by the Athlete (but not maintained in this appeal). The reference throughout the Moscow Washout Schedules to (in the English translation) "Antyukh" plainly refers to the Athlete and to no other athlete.
140. As to issue (b), do the Moscow Washout Schedules establish use on the part of the Athlete?, the Panel is of the clear view that they do. The Panel's reasons are as follows.
- The Moscow Washout Schedules are a contemporaneous account of the washout testing program deployed by the Moscow Laboratory. They are genuine documents. There is no serious contention on the part of the Athlete otherwise. True it is that they are not an 'official' document but that does nothing to depreciate their probative value.
 - It is safe, therefore, in the Panel's view to accept the contents of the Moscow Washout Schedules at face value as recording events that took place in the Moscow Laboratory at the time. At face value:
 - i. the schedules record the athletes who were participating in the washout testing program and kept a record of 'under the table' or 'unofficial' samples provided by the athletes for sampling by the Moscow Laboratory from time to time;
 - ii. the date given in the left-hand column schedule is the date on or about which the named athlete provided a sample to the Moscow Laboratory for washout testing;
 - iii. the information provided in column 2 is the Moscow Laboratory's analysis of the washout sample; and
 - iv. the entries in the schedules alongside the name "Antyukh" therefore show that, on or about the dates given in the schedule, the Athlete provided unofficial samples for testing by the Moscow Laboratory which samples, upon

analysis by the Moscow Laboratory, contained the substances set forth in column 2 of the schedules.

141. The Panel therefore finds, as a matter of fact, that the Moscow Washout Schedules show (in translation) that:

- on or about 30 June 2013, the Athlete used methasterone, boldenone, desoxymethyltestosterone, and oxabolone;
- on or about 6 July 2013, the Athlete used prohormones, DHEA (or dehydroepiandrosterone) and 1-testosterone; and
- on or about 14 July 2013, the Athlete used prohormones and desoxymethyltestosterone.

142. In the Panel's view, this conclusion is corroborated by the further evidence adduced by the Respondent.

(b) The Evidence of Mr Walker and Dr Broséus

143. As noted above, Mr Walker and Dr Broséus are, respectively, the Deputy Director and the Principal Data and Scientific Analyst of the WADA Intelligence and Investigations Department, and they oversee WADA's investigation into the LIMS data of the Moscow Laboratory (what WADA calls 'Operation LIMS'). As also noted above, there was no substantive challenge to the evidence of Mr Walker and Dr Broséus.

144. Mr Walker and Dr Broséus gave evidence that, in their view, the Athlete was a protected athlete. They relied on two principal matters to form that view.

145. The first matter relied upon by Mr Walker and Dr Broséus to support their 'assertion' (which is how it is put in the witness statement) that the Athlete was protected were the eight PDF files found bearing the name of the Athlete as part of the file name, two of which files were uploaded to LIMS within days of the washout tests undertaken on 6 July 2013 and 14 July 2013, respectively. The Panel agrees with Mr Walker and Dr Broséus that this provides corroborative evidence that the Athlete was a participant in the washout testing program and did, as a matter of fact, provide the unofficial samples on the dates set forth in the Moscow Washout Schedules. There is, in the Panel's view, no sensible innocent explanation, and certainly none offered by the Athlete, for the creation of the PDF files in this way at this time.

146. The second matter relied upon is an email dated 23 July 2014 from Mr Velikodny, a known liaison between the Ministry of Sport and the Moscow Laboratory, in which Mr Velikodny sent five sample codes to Dr Sobolevsky and Dr Rodchenkov at the Moscow Laboratory. The subject line of the email was "*numbers from IIR*", where IIR is a reference Ms Irina Rodionova (the Deputy Director of the CSP). One of the sample codes related to the Athlete and this was said in the email: "*281877 from 22.07.2014 Antukh*". The number 281877 corresponded to an entry for the Athlete in ADAMS for a test on 23 July 2014. As to this evidence, it is true that the email does not coincide with the time of the alleged ADRV and, of course, it is not

direct evidence of what took place in 2013. The email does, however, provide evidence that the Athlete was a protected athlete and, as such, does corroborate the evidence that she did, as a protected athlete, participate in the washout testing program in 2013.

(c) *The Evidence of Dr Rodchenkov*

147. In the Panel's view, this conclusion on the Moscow Washout Schedules is also corroborated by the evidence of Dr Rodchenkov, for the following reasons.
148. In the first place, the evidence of Dr Rodchenkov provides, as has been noted, corroboration of the existence of the washout testing program and of the creation, maintenance and purpose of the Moscow Washout Schedules.
149. Second, and more particularly, Dr Rodchenkov's evidence implicates the Athlete in the washout testing program. Dr Rodchenkov gave evidence as to his contact with the Athlete over the years. Some of this can be ignored as too general to be of any probative value (such as, for example, Dr Rodchenkov's statement that he understood that the Athlete benefited from the Russian doping scheme over many years). But Dr Rodchenkov did give evidence that he met with the Athlete and her coaches in 2010 and subsequently, at least one of which meeting took place in the Moscow Laboratory. Although the Athlete claims the meeting did not take place, the Panel accepts that, as a matter of fact, the Athlete and her coach did meet with Dr Rodchenkov in the Moscow Laboratory in late 2010 and discussed with him, in the Athlete's presence, the use of PEDs and their detection windows. The timing of the meeting did not, as the Athlete pointed out, coincide with the time of the alleged ADRV and, of course, it is not direct evidence of use in 2013 of the prohibited substances on the part of the Athlete. But it does, in the Panel's view, provide corroborative evidence that the Athlete did participate in the washout testing program.
150. Third, according to the evidence of Mr Walker and Dr Broséus, the contents of the schedules as they relate to the Athlete are corroborated by the existence of contemporaneous PDF documents generated by the Moscow Laboratory. These PDFs were created shortly after the second and third of the Athlete's unofficial samples and these PDFs refer to the Athlete by name in their title. The fact that the PDF documents refer to the Athlete by name shows (a) that the Athlete was protected because samples are supposed to be supplied and analysed on an anonymous basis and (b) that the analytical PDFs relate to the unofficial samples provided by the Athlete because where PDFs relate to official samples there is no mention of the athlete concerned, merely the sample code. These PDFs therefore demonstrate that the Athlete did provide unofficial samples and that they were analysed by the Moscow Laboratory – thereby showing that the Athlete was indeed providing unofficial urine samples when the Moscow Washout Schedules say she was.

(d) *The Athlete's Evidence*

151. The Panel weighs all of this against the evidence adduced by the Athlete. The only evidence from the Athlete is her witness statement (with one negative test result) and her oral evidence

at the hearing. As noted above, however, the Athlete’s evidence amounts to a ‘bare denial’ and provides little by way of corroborating or exculpatory evidence. There is no genuine challenge on the part of the Athlete to the existence of the Russian doping scheme generally or to the washout testing program in particular, and nor is there any contest as to the authenticity of the Moscow Washout Schedules, despite the Athlete’s statement in her witness statement that the schedules are “*fabricated, probably to discredit the athletes mentioned in it on the eve of the [2013 IAAF World Championships in Moscow]*”, of which fabrication there was no evidence at all.

152. Nor is there any credible explanation as to how it came to pass that her name appeared throughout the schedules or why it is that her name was listed against what appears on the fact of the schedules to be a record of submission of unofficial samples by her on or about the dates set forth. Nor is there any real contest that the analyses recorded in the schedules against her name are not contemporaneous analyses of her samples as performed by the Moscow Laboratory, whether part of the washout testing program or not. Moreover, it is accepted by the Athlete that the substances recorded against her name in the Moscow Washout Schedules are prohibited substances according to the 2013 WADA Prohibited List in force at the relevant time.

(e) *Conclusion on the Evidence*

153. In all, taking the evidence as a whole, the Panel is comfortably satisfied that, during the period on or about 30 June 2013 to and including on or about 25 July 2013, the Athlete used prohibited substances (namely, methasterone, boldenone, desoxymethyltestosterone, oxabolone, dehydroepiandrosterone (or DHEA), and 1-testosterone) in violation of Rule 32.2(b) of the 2013 ADR.

B. Sanctions

154. In light of the determination on liability, it is necessary to consider sanctions, in respect of the Parties’ respective submissions set out above.
155. It is common ground that this is the Athlete’s first violation.
156. The Athlete accepts that the “standard” period of ineligibility for a first violation of Rule 32.2(b) of the 2013 ADR relating to use or attempted use of a prohibited substance is two years, per Rule 40.2. The Athlete offers no “*exceptional circumstances*” that might be apt to eliminate or reduce that standard sanction pursuant to Rule 40.5 of the 2013 ADR so that the question that arises is whether there are any “*aggravating circumstances*” here that require that period to be increased pursuant to Rule 40.6 of the 2013 ADR.
157. Rule 40.6 of the 2013 ADR provides in relevant part as follows:

“Aggravating Circumstances which may Increase the Period of Ineligibility

6. 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 antidoping rule violation as 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 or used or possessed a Prohibited Substance or Prohibited Method 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 the 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. ...”.

158. The Sole Arbitrator took the view that there were aggravating circumstances here, namely that (i) the Athlete was engaged in the washout testing program which was part of a doping plan or scheme pursuant to Rule 40.6 of the 2013 ADR; and (ii) the Athlete used six different prohibited substances within a one-month period. In light of those aggravating circumstances, the Sole Arbitrator imposed the maximum period of ineligibility of four years.
159. The Panel agrees. By taking part in the washout testing program, the Athlete participated in a “*doping plan or scheme ... to commit anti-doping rule violations*” and used multiple (i.e., six) prohibited substances. The Panel would add, however, that, consistent with the Panel’s determination on liability, it is the Panel’s view that, by participating in the washout testing program, the Athlete also engaged in deceptive or obstructing conduct to avoid the detection of an anti-doping rule violation. In all of these circumstances, a period of ineligibility of four years is a proportionate sanction.
160. Accordingly, the Panel must consider (a) the date on which the period of ineligibility should commence and (b) the disqualification of the Athlete’s results in competition after the commission of the ADVR.
161. As to the former, the Athlete relies on Rule 10.10.2 of the Respondent’s 2019 ADR which is said to apply by dint of the principle of *lex mitior*. The Respondent, as noted above, objects to the application of this rule: (a) it is said that the reliance on the rule is new and was not an argument made before the Sole Arbitrator; and (b) it is then said that it is not open to the Athlete to pick and choose different rules from different years.
162. The Panel does not accept the former submission. In the Panel’s view, given that this is a rehearing *de novo*, the fact that the argument was not made at first instance is no obstacle at all.
163. The Panel does however agree with the latter submission. As noted above, the Athlete has relied upon Rule 21.3 of the 2019 ADR as the means by which the 2013 ADR are to be applied to the substance of the matter. It is open to the Panel under Rule 21.3 of the 2019 ADR to

“decide it appropriate to apply the principle of lex mitior in the circumstances of the case” and apply a different set of rules. But it is not open to the Panel, or the Athlete, to pick and choose rules from different iterations. In this regard, the Panel respectfully adopts the language of the panel in CAS 2018/A/5977 at [78]: *“The principle of lex mitior does not permit one to pick and choose between the most favourable individual provisions from different sets of rules; such would indeed offend against the principle of legality; the Club accordingly cannot blow hot and cold”*. Having relied upon the 2019 ADR to apply the 2013 ADR to the substantive matters, the Athlete is bound by those rules and cannot ‘cherry pick’ other provisions from other rules as and when she sees fit.

164. Accordingly, the applicable rule is Rule 40.10 of the 2013 ADR, which provides (in relevant part) as follows:

“Commencement of Period of Ineligibility

10. 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 to be served”.

165. In the result, the period of ineligibility shall run from 7 April 2021, the date of the Appealed Award.

166. As to disqualification, Rule 40.8 of the 2013 ADR is in the following terms:

“Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

8. In addition to the automatic disqualification of the results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained from the date the positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through to the commencement of any Provisional Suspension or Ineligibility period shall be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money”.

167. In this case there was no in-competition testing and so no automatic disqualification applies, and there was no provisional suspension. That being so, the rule provides that all competitive results achieved by the Athlete from the date that a positive sample was collected or other ADRV was committed through to the start of the period of ineligibility is to be disqualified with all of the resulting consequences as there set forth.

168. There is nothing on the face of the rule which provides a discretion on the part of a tribunal to modify the application of the rule where to apply it strictly would be unfair. Nonetheless, it is common ground that, according to established CAS jurisprudence, the rule is subject to a ‘general principle of fairness’ and that the Panel has a discretion to modify this period of time should fairness so dictate: see, e.g., CAS 2016/O/4881, CAS 2017/O/4980, CAS 2017/O/5039 and CAS 2017/A/5045.

169. In this case, the Sole Arbitrator disqualified all competitive results from the date of the first sample in the Moscow Washout Schedules (30 June 2013) through to the date of the Sole Arbitrator's award (7 April 2021), a period approaching eight years. The Sole Arbitrator took the view that, in light of the Athlete's conduct in this case, that period was both "*fair and necessary*".

170. As noted above:

- The Athlete submits that such a lengthy period is disproportionate and unfair and out of kilter with sanctions imposed in similar cases, such as the period of disqualification imposed in CAS 2018/O/5712 of two years, five months and sixteen days.
- For its part, the Respondent agreed with the decision of the Sole Arbitrator.

171. On this issue the Panel agrees with the Sole Arbitrator as to the applicable general principles. As noted by the Sole Arbitrator:

"89. Therefore, the general rule is that, in addition to the automatic disqualification of the results in the competition where the Adverse Analytical Finding has been produced, all the Athlete's competitive results obtained from the date of the commission of the ADRV through the start of any provisional suspension or ineligibility period shall be disqualified. In this regard, the Sole Arbitrator notes that the retroactive disqualification of the competitive results of an athlete that has committed an ADRV is fair and necessary to restore the integrity of all the sporting competitions in which he or she competed, rectifying the record books in the interest of sport. Deciding otherwise would be tantamount to reward the deceiver and would not be fair at all vis-à-vis the rest of the athletes that did not use Prohibited Substances.

90. Notwithstanding this, it is also important not to forget that the primary reason behind this measure (i.e. the disqualification of the sporting results of an athlete that cheated) is not to sanction him or her, but to ensure fair play and equal opportunities for all athletes, annulling those results achieved by those who acted or is reasonable to believe that have acted dishonestly vis-à-vis their competitors, being involved in any kind of ADRV, which is one of the most despicable breaches of the fundamental principles of sport. But, at the same time, it should be taken into account that, in certain exceptional circumstances, the strict application of the disqualification rule can produce an unjust result. In particular, this may be the case when the potential disqualification period covers a very long term, which is normally the case when the facts leading to the ADRV took place long before the adjudicating proceedings started which usually occurs when they are opened as a result of the re-testing of a sample or of the uncover of a sophisticated doping scheme. In addition, in this type of cases it may be difficult to prove that the athlete at stake used prohibited substances or methods during such a long period of time".

172. With respect, however, the Panel disagrees with the Sole Arbitrator as to the application of these general principles. The Panel takes the view that, in this case, there are exceptional circumstances which militate against a strict application of the rule: (a) the events in question took place in 2013, long before these arbitral proceedings, (b) the ADRV relates solely to those events, (c) there is no suggestion, let alone evidence, that there has been any use of prohibited substances on the part of the Athlete on any other later occasion; and (d) the Second McLaren Report (with EDP) was issued on 9 December 2016 and yet the Notice of

Allegation, which relied solely on the Second McLaren Report and the EDP, was not issued by the AIU until 31 May 2019.

173. These circumstances do, in the Panel's view, set this matter apart from the ordinary and require, in the interests of fairness, a reduction of the period of disqualification. In this regard, the Panel pays heed to other CAS matters of a similar nature such as CAS 2019/A/6161, CAS 2019/A/6165, CAS 2019/A/6166, CAS 2019/A/6167, CAS 2019/A/6168, and CAS 2019/O/6156 and takes the view that all competitive results from the date of the first sample in the Moscow Washout Schedules (30 June 2013) through to and including 31 December 2015 should be disqualified (with all attendant consequences).

XII. CONCLUSION

174. In view of all the above considerations, the Panel holds and determines that the appeal brought by the Athlete should be dismissed in part and allowed in part. In particular:
- The Panel is comfortably satisfied that the Athlete used prohibited substances in violation of Rule 32.2(b) of the 2013 ADR.
 - The Athlete is sanctioned with a period of ineligibility of four (4) years starting from the date of the Appealed Award, namely 7 April 2021.
 - All of the Athlete's competitive results from 30 June 2013 through to and including 31 December 2015 shall be disqualified, with all of the resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Natalia Antyukh on 21 May 2021 against the Award issued by the CAS Court Office on 7 April 2021 is partially upheld.
2. Ms Natalia Antyukh is found to have committed an anti-doping rule violation under Rule 32.2 of the IAAF Competition Rules 2012-2013.

3. Ms Natalia Antyukh is sanctioned with a period of ineligibility of four (4) years starting from (and including) 7 April 2021.
4. All competitive results achieved by Ms Natalya Antyukh from 30 June 2013 through to and including 31 December 2015 are disqualified with all of the resulting consequences, including the forfeiture of any titles, awards, medals, points and prize and appearance money.
5. (...).
6. (...).
7. All other or further requests for relief are hereby dismissed.