



**Arbitration CAS 2015/A/4009 International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF), Valeriy Borkin & Russian Anti-Doping Agency (RUSADA), award of 25 April 2016 (operative award of 24 March 2016)**

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Romano Subiotto QC (United Kingdom); Mr Mika Palmgren (Finland)

*Athletics (race walking)*

*Doping (Athlete's Biological Passport, ABP)*

*Athlete Biological Passport as evidence*

*Principle of lex mitior*

*Concept of fairness*

*Principle of proportionality*

1. An athlete who, based on his Athlete Biological Passport (ABP), is found guilty of an anti-doping rule violation and criticises the reliability of the ABP but does not challenge the respective decision accepts the conclusion that his ABP constituted sufficient evidence to ground the conclusion that he committed an anti-doping rule violation. Conversely, the criticism as to the reliability of the ABP can be understood as aiming to show that insufficient evidence has been submitted to prove that some of the samples included in the ABP of the athlete are abnormal, and therefore to allow the conclusion, from the athlete's perspective, that they should not be taken into account when determining whether the results achieved in the period surrounding those disputed samples have to be disqualified. In the same way, the athlete may invoke any alleged unreliability of the ABP method as a factor to be taken into account when assessing, in general terms, the "fairness" of the disqualification (or of the non-disqualification) of his results.
2. When applying the *lex mitior* principle in case of anti-doping rule violations, either the set of rules applicable at the time when the anti-doping rule violation was committed or otherwise the rules applicable at the time the decision is adopted are to be determined as the applicable set of rules most favourable to the accused, without picking individual provisions from each. The hearing body cannot undertake a rule-by-rule comparison of the two systems, picking the most favourable rule of each system.
3. The concept of "fairness" is a broad one, covering a number of elements that the deciding body can take into account in its decision not to disqualify some results. In the past CAS panels took into account a number of factors, such as the nature and severity of the infringement, the length of time between the anti-doping rule violation, the result to be disqualified and the disciplinary decision, the presence of negative tests between the anti-doping rule violation and the competition at which the result to be disqualified was achieved, and the effect of the infringement on the result at stake. It is

not a single element that is decisive alone: an overall evaluation of them is necessary.

4. The principle of proportionality implies that there must be a reasonable balance between the kind of misconduct and the sanction, and in particular that (i) the measure taken by the governing body can achieve the envisaged goal, (ii) the measure taken by the governing body is necessary to reach the envisaged goal, and (iii) the constraints on the affected person resulting from the measure are justified by the overall interest of achieving the envisaged goal. In other words, to be proportionate, a measure must not exceed what is reasonably required in the search for a legitimate objective.

## **I. BACKGROUND**

### **1.1 The Parties**

1. The International Association of Athletics Federations (“IAAF” or the “Appellant”) is the international federation for the sport of athletics. IAAF is an association under the laws of Monaco and has its headquarters in Monte Carlo, Monaco.
2. The All Russia Athletics Federation (“ARAF” or the “First Respondent”) is the national governing body for the sport of athletics in the Russian Federation and the Member Federation of IAAF for the Russian Federation.
3. Mr Valeriy Borkin (the “Athlete” or the “Second Respondent”) is an international-level athlete of Russian nationality specialising in the 20 kilometres race walk event, who has competed at an elite international level for a number of years with considerable success.
4. The Russian Anti-Doping Agency (“RUSADA” or the “Third Respondent”) is the national anti-doping agency established for the Russian Federation.
5. ARAF, the Athlete and RUSADA are hereinafter jointly referred to as the “Respondents”.

### **1.2 The Dispute between the Parties**

6. The object of the dispute between the parties is a portion of a decision issued by a disciplinary committee of RUSADA in an anti-doping case brought against the Athlete, based on the irregularities observed between February 2011 and August 2012 in the athlete’s biological passport (the “ABP”) concerning the Athlete. IAAF started the present arbitration claiming that the applicable anti-doping rules adopted by IAAF (the “IAAF ADR”) to implement the provisions of the World Anti-Doping Code (the “WADC”) had not been correctly applied on a specific point (disqualification of results).
7. The circumstances stated below summarize the main relevant facts concerning the dispute, as

submitted by the parties in their written pleadings or in the evidence offered during the course of the proceedings. Additional facts may be set out, where relevant, in connection with the following legal discussion.

8. A preliminary point of explanation is however necessary to clarify the factual background of the dispute. As mentioned, it follows the application of the ABP model to the Athlete, and some discussions took place in this arbitration about the ABP and its evidentiary value to establish an anti-doping rule violation, and more specifically the use of a prohibited substance or of a prohibited method. As submitted by IAAF, unlike direct detection methods, the ABP focuses on the effect of prohibited substances or methods on the body, rather than on their detection. For such purposes, the ABP was developed as an individual, electronic record for each athlete, in which the results of all doping tests over a period of time are collated. The ABP involves regular monitoring of biological markers on a longitudinal basis to facilitate the indirect detection of prohibited substances and methods. The list of relevant markers for a specific class of substance (*e.g.*, substances enhancing oxygen transfer such as recombinant EPO) are identified and monitored on a regular basis for a given athlete, in order to establish an effective longitudinal monitoring program. The collection and monitoring of values corresponding to these identified markers constitutes an individual longitudinal profile. Each collected sample is analysed following the appropriate analytical protocol and the biological results are incorporated into the Anti-Doping Administration and Management System (ADAMS), which is a web-based database management tool for data entry, storage, sharing, and reporting designed to assist stakeholders and the World Anti-Doping Agency (“WADA”) in their anti-doping operations. The statistical model developed for the ABP program is then applied to the results of analyses to determine an abnormal profile score. More specifically, once the new biological data are entered in ADAMS, a notification is sent to the Athlete Passport Management Unit, which updates the Athlete’s Passport and applies the ABP software, *i.e.* the Adaptive Model. The Adaptive Model is a mathematical model that was designed to identify unusual longitudinal results from athletes. The model calculates the probability of a longitudinal profile of marker values assuming that the athlete has a normal physiological condition. The Athlete Passport Management Unit proceeds with the mandatory steps outlined in the rules, which includes liaising with an expert panel established by the IAAF, if the athlete’s haemoglobin (HGB) and/or OFF-hr-Score (OFFS) values exceed the 99.9 percentile of the expected ranges returned by the Adaptive Model. The statistical result for the athlete does not in itself justify a conclusion that an anti-doping rule violation has occurred, but calls for an explanation by the athlete.
9. In 2009, IAAF started its ABP program. The Athlete was included by the IAAF in its ABP program and subjected to eleven in- and out-of-competition blood sample collections between August 2009 and August 2012. The analyses gave the following results<sup>1</sup>:

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<sup>1</sup> Such results are taken from the IAAF appeal brief in this arbitration, and are in themselves undisputed.

	COLLECTION DATE	RET [%]	HGB	OFF-SCORE
1	14.08.2009	0.14	16.0	137.60
2	15.08.2009	0.16	16.1	137.00
3	01.03.2011	0.48	14.9	107.40
4	15.04.2011	0.45	16.5	124.80
5	16.07.2011	0.33	13.2	97.50
6	27.08.2011	0.17	16.6	141.30
7	08.10.2011	2.09	15.6	69.30
8	17.01.2012	1.34	15.5	85.50
9	13.04.2012	0.68	14.5	95.50
10	11.05.2012	1.01	13.5	74.70
11	03.08.2012	0.45	13.0	89.80

10. The biomarker values from the samples collected from the Athlete were considered to be highly abnormal. As a consequence, the resulting Athlete's profile was sent to three independent experts, who unanimously concluded, in their initial review (the "Initial Review")<sup>2</sup>, that this profile was *"highly unlikely"* to be *"the result of a normal physiological or pathological condition, and may be the result of the use of a prohibited substance or prohibited method"*. In particular:

i. Professor Yorck Olaf Schumacher<sup>3</sup> in an opinion dated 26 June 2012 (following preceding opinions of 29 November 2011 and 17 December 2012) observed that:

*"In my initial review of this profile dated November 29th, 2011, I suggested to obtain additional samples from this male athlete, as virtually all previous tests were conducted during the competition period (=summer month). By these means, it was expected to further expose suspicious patterns in the profile.*

*Three more samples obtained during winter/spring (January-May) have now been obtained (samples 8-10). Another sample was added to the profile (sample 2). Note that the sample numbering is different now compared to my initial review due to the addition of new samples. I received the documentation packages of the new samples (8-10), anonymised whereabouts, competition information and the results of further (older) blood tests from the IAAF for evaluation.*

*Whereas the new sample 2 confirms the values of the first sample taken the day before, the results of the most recent samples (8-10) show lower Haemoglobin concentration and higher Reticulocytes than in most of the previous analyses. As these samples have been obtained far from important competitions (that take usually place in summer), the different aspect of these out of competition tests compared many of the other*

<sup>2</sup> It is to be noted that the experts only reviewed the first ten samples included in the ABP. Therefore, sample 11 was not considered in the Initial Review.

<sup>3</sup> Professor of internal medicine and sports medicine at the University of Freiburg, Germany.

*samples in the profile obtained in close timely vicinity to such competitions points towards a possible manipulation. In fact, in the specimens obtained before the IAAF world championships in 2009 and 2011, the highest OFF score of the profile was observed. This is confirmed by the data of the older blood tests of the IAAF testing program, where the athlete shows an OFF score of 143 prior to the Beijing Olympic Games. All these features point towards a supraphysiologically elevated red cell mass when the samples in question were obtained, thus at least in August 2008, 2009 and 2011.*

*I therefore conclude that absent a satisfactory explanation from the athlete, it is highly unlikely that the athlete's longitudinal profile is the result of a normal physiological or pathological condition or is caused by analytical alterations to the sample. It is, in contrast, highly likely that it is the result of the use of a prohibited substance or a prohibited method";*

- ii. Professor Giuseppe d'Onofrio<sup>4</sup> expressed on 24 November 2012 (after an opinion of 13 December 2011) the following:

*"The profile, composed of ten valid test performed between August 2009 and May 2012, is characterized by marked hemoglobin and OFF score variability, with the highest values obtained at the time of important competitions.*

*ABP quantitative results*

*The sequence of hemoglobin concentration, reticulocytes and OFF score is abnormal at 100%. The results repeatedly miss the Athlete's intraindividual limits, calculated by the software with 99.9% specificity, for all parameters. Thus, the probability of variation due to physiological conditions is almost nonexistent.*

*Hematological evaluation of the most abnormal results*

*Sample n. 1 and 2 (2009), and sample 6 (2011).*

*In these three samples hemoglobin is in the high range for a male; reticulocyte percentages, however, are very low (0.14, 0.16 and 0.17%), with extremely high OFF scores (137-141). The first two tests were conducted in close temporal proximity to the Berlin World Championship; test n. 6 was conducted the day before the Daegu World Championship.*

*Such a constellation is typical of the so-called OFF phase: when EPO or another ESA is stopped, hemoglobin remains high for up to three weeks, depending on the dosage, while reticulocytes are lowered because of high hemoglobin and inhibition of endogenous EPO production (Audran et al, 1999). The OFF phase picture is seen in blood-doped athletes at the time of important competitions, when ESAs have been suspended to reduce the risk of a positive finding in urine or blood direct tests.*

*There are no clinical conditions or hematological disorders in which hemoglobin is in the high range and reticulocytes are very low. Altitude stay or hypoxic training do not suppress reticulocyte count. On the other hand, the recent reinfusion of two or three bags of blood could have produced or reinforced a similar hematologic pattern.*

*Sample n. 5 (16-7-2011).*

*In three months hemoglobin has decreased down to 132 g/L. This is a 33 g/L reduction (-25%), which cannot be explained by physiological factors. It is superior to the critical difference for hemoglobin, which is 13% in the short period. In the absence of repeated blood donation or a pathological blood loss, such a*

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<sup>4</sup> Professor of clinical pathology and immunohematology at the Catholic University of the Sacred Heart in Rome, Italy.

*rapid decrease can indicate removal of at least two bags of blood about three weeks before (or just the day before), when reactive increase in reticulocytes is no longer visible (or, respectively, not yet occurred) (Morkeberg et al, 2009; Ashenden and Morkeberg, 2011). Whereabout information confirms that the athlete has not participated in any race for several weeks before and after this out of competition test.*

Sample no. 7.

*The increase in reticulocytes suggest that erythropoiesis was being artificially stimulated.*

*Ferritin*

*The ferritin level of 2275 mcg/L measured in the Athlete on 27-8-2011 is definitely abnormal by comparison to normal reference values.*

*The concentration of serum ferritin is an indicator of the quantity of iron stores. High levels indicate iron overload. Increased iron stores can damage many organs and increase the risk of infections. In the absence of a very unlikely advanced form of hemochromatosis, the value of ferritin of 2275 mcg/L reflects intravenous administration of high doses of an iron preparation. The use of parenteral iron in some groups of professional athletes is associated with ESA intake. Although it cannot be considered direct proof of former or actual doping, high ferritin due to iron supplementation in cyclists has been associated with the use of EPO or analogues (Zotter et al, 2004) and is an indirect clue which supports the suspect of a doping program based on ESA intake.*

*Evaluation of pre-analytical and analytical quality.*

*From a formal point of view, a certain number of inaccuracies are present in the available laboratory documentation, as indicated by the APMU. A scientific overview of the documentation, however, does exclude that analytical or pre-analytical issues might have influenced the results.*

*Conclusion*

*The present profile provides a reliable indication of illicit blood manipulation. In 2008 the athlete certainly adopted a consistent strategy of blood doping based on the use of erythropoietin, or similar drugs, to prepare the most important competition of the year. The stimulation was stopped a few weeks before the race, so that hemoglobin was in the high normal range and reticulocyte production was inhibited. The contemporary use of transfusion cannot be excluded. The coincidence of the most abnormal abnormalities, especially indicative of an OFF phase, with the most important competitions on subsequent years represent a definitive evidence of blood doping”;*

- iii. Professor Michel Audran<sup>5</sup> noted in the opinion of 15 June 2012 (following a preceding opinion of 2011) that:

*“Comments*

- *Samples 1 and 2 with high HGB values, low and abnormal (probability 99.9%) RET% values and high and abnormal OFF-score values (the sample 2 Off-score value is abnormal without sample 1) are characteristics of blood manipulations.*

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<sup>5</sup> Professor at the biophysical and bioanalysis laboratory of Faculty of Pharmacy, University of Montpellier I, France.

- *Same remark for:*
    - *sample 4, even if the values of the different parameters are in the athlete normal range.*
    - *sample 6 which the Off-score value is abnormal when the 2 first samples are removed from passport.*
  - *Non physiologic variation of HGB between samples 5 and 6: 34g/l in 6 weeks.*
  - *Sample 5 is abnormal: lowest and abnormal (probability 99.9%) HGB value (134 g/l) of the profile which goes with a low RET% value 0.33%. Such values can be found just after a blood withdrawal following a stimulation of erythropoiesis.*
  - *Abnormality of sample 7: high (through normal) HGB value 156 g/l with high and abnormal RET% value 2.09% (probability 99.9%) and in consequence a low and abnormal (probability 99.9%) OFF-score value, 69.*
  - *The same is true, to a less extend, for sample 8: HGB 155 g/l, RET% 1.34 (abnormal, probability 99.9%)”.*
11. On 19 September 2012, the IAAF forwarded the Initial Review to ARAF and, *inter alia*, in accordance with the IAAF ADR, requested that the Athlete be given an opportunity to explain his abnormal blood profile.
  12. On 15 October 2012, the Athlete, instead of providing the requested explanation, signed a voluntary Provisional Suspension Form.
  13. IAAF, then, in the subsequent period, sent several letters to ARAF reminding it that it had to review the case of a possible anti-doping rule violation by the Athlete. On 27 June 2014, finally, IAAF sent a notification to ARAF pointing out that, in violation of the applicable IAAF ADR, ARAF had not reviewed the case of the Athlete and informed it that, in the absence of such review by a set deadline, IAAF would take the case to the Court of Arbitration for Sport (the “CAS”) in accordance with the pertinent provisions of the IAAF ADR.
  14. On 8 August 2014, ARAF referred the matter to RUSADA, requesting it to review the case, conduct hearings with the Athlete’s participation and decide whether an anti-doping rule violation had been committed.
  15. Following ARAF’s referral, RUSADA submitted the ABP of the Athlete to three other independent experts, who provided the following opinions:
    - i. Professor Robin Parisotto<sup>6</sup> observed on 17 November 2014 the following:  
*“Overall there are six distinct features in this profile that require explanation and are outlined below.*  
*Observation 1*  
*The overall variability in Haemoglobin (Hb) measures is 27.7 % (130 – 166 g/L). Also the variability in Haematocrit (Hct) measures is 28.7% (39.4 to 50.7). It has been documented ... that variations in*

<sup>6</sup> Australian Institute of Sport, Canberra, Australia.

*Hb exceeding 15% between blood samples from elite endurance athletes would be indicative of blood manipulation. The large variability in Hb measurements particularly noting that the Hb values in PRE sample 1 (160), INC sample 2 (161) and PRE sample 10 (166) preceding the 2009 World Cup, and the 2011 World Cup respectively are higher than all other OOC values (except for sample 4) and requires explanation.*

#### *Observation 2*

*Samples 1, 2, 4 and 6 demonstrate higher Hb levels (160, 161, 165 and 166 respectively) than all other samples and are associated with extremely low reticulocyte levels of 0.14, 0.16, 0.45 and 0.17% respectively (significantly below the normal range lower limit of 0.5%) resulting in very high OFF-scores of 137.6, 137.0, 124.8 and 141.3 (significantly above the normal range high limit of 110.6). Specifically OFF- scores for samples 1, 2 and 6 breach the 1:10000 false positive rate (worst case scenario at sea level), breach the 1:1000 false positive rate (worst case at altitude) and sample 6 breaches the 1:10000 false positive rate (worst case at altitude).*

*In normal healthy individuals normal or increased Hb levels are associated with normal and/ or increased reticulocyte levels. There are few if any medical and/ or physiological phenomena (such as a medical blood transfusion) which are associated with such combinations of blood parameters resulting in such high OFF-scores. For instance, it is known that permanent high altitude dwellers with high Hb levels descending to sea level appear to have preferential destruction of reticulocytes, a term known as neocytolysis possibly resulting in high Hb and low reticulocyte levels .... However, as this athlete indicated there has only been exposure, to what could be best described as moderate altitude levels (up 2000m) during this time it is unlikely that such abnormally low reticulocyte levels in these two samples is a consequence of altitude exposure. It is intuitive that as Hb increases so should the reticulocytes indicating normal erythropoietic activity. The pattern of high Hb and markedly depressed reticulocytes observed in these two samples are typical of that seen post r-HuEPO administration ... and/ or post transfusion ....*

#### *Observation 3*

*The pattern observed over samples 4, 5 and 6 is quite alarming. Between samples 4 and 5 the Hb has decreased from 165 to 132, a decrease of 25.0% (Hct 50.2 to 42.9). Then some five weeks later the Hb has increased from 132 to 166, an increase of 25.8% (Hct 42.9 to 50.7) and correlates with the PRE World Cup of 2011. These are quite remarkable increases and decreases in Hb (and Hct) levels bearing in mind that it has been documented ... that variations in Hb exceeding 15% between blood samples from elite endurance athletes would be indicative of blood manipulation. In particular given that sample 5 is an OOC sample and sample 6 is a PRE sample (World Cup of 2011) the large disparity in Hb measures in these two samples requires explanation.*

#### *Observation 4*

*The reticulocyte value observed in sample 7 (2.09%) is quite a dramatic contrast to all other values. In the context of the profile where most other values are abnormally low (<0.5%) this requires an explanation.*

#### *Observation 5*

*The low Hb levels observed in PRE samples 10 and 11 (135 and 132 respectively) are again in contrast to all other PRE (or INC) samples. These disparities also require explanation.*



#### Observation 6

*A probable doping scenario is also reflected in the ABP files in which Hb, reticulocytes, OFF-scores and ABPS have resulted in probabilities of 100%.*

#### *Comment on reticulocyte analysis*

*It was noted that in samples 3 the duplicate retic analysis breached WADA Guidelines in that there was a greater than 15% difference between duplicate retic values. This however can easily be mitigated by accepting that the higher of the two values be regarded as the 'official' result for that sample. This also would be in favour of the athlete. Irrespective which value is considered however it does not change the opinion of the reviewer as both values are still abnormally low",*

and reached the following conclusion and recommendation:

*"The author believes that the overall variation in in extreme Hb measures of 130 and 166 (27.7% difference) and Hct measures of 39.4 and 50.7 (11.3 points difference) are beyond normal physiological limits. Coupled with higher Hb and Hct values in PRE samples than in most other OOC samples and the markedly depressed reticulocyte values in samples 1, 2, 4 and 6 in particular the findings are strongly suggestive of previous exogenous erythropoietic stimulation and/or blood transfusion. In addition the extremely low Hb values observed in Samples 5, 10 and 11 (132, 135 and 130) are physiologically and medically abnormal. As the athlete had not indicated on the Doping Control Form that there were no blood donations or traumatic blood loss this also needs explanation as this could indicate autobleed. ....*

*In the absence of any possible underlying medical conditions and/or other reasonable explanations the author of this report recommends that this case be considered for an Anti-Doping Rule Violation under the WADA code 2.2 – Use of a Prohibited Substance or a Prohibited Method";*

- ii. Dr Mario Zorzoli<sup>7</sup> indicated on 28 November 2014 that "the data of the athlete bear several abnormal features" for the following reasons:

#### "Abnormal HGB sequence

*The variability of the HGB sequence is beyond what it is physiologically normal. In fact, we observe higher values in the competition-related samples (C) compared to the out-of-competition samples (O) (Fig.1). The difference is also reflected by the different median values: 16.0 g/dL vs 14.7 g/dL respectively. This also goes against the principle of physiology, which indicates that in endurance disciplines it is known that during the competition period HGB values should be lower because of the increased plasma volume secondary to the augmented training and exercise workload. This is not the case for this athlete when we compare the values obtained at the time of the competitions to those collected out-of-competition. Additionally, some variations of values are also not natural: drop of 20%HGB from 16.5 to 13.2 g/dl between April 2011 and July 2012, or 20% increase of HGB from 13.2 to 16.6 g/dL in 6 weeks' time just prior to the 2011 World Championships! Interestingly, the highest values were measured in relation to competitions (samples 1, 2, 4 and 6).*

*Additionally, when we observe the evolution of the HGB, we see clearly two different periods (Fig. 2): samples 1-6, collected between 14.8.2009 and 27.8.2011 show a median value of HGB of 16.0 g/dL, while samples 7-11, collected between 8.10.2011 and 3.8.2012 have a median value of 14.5 g/dL.*

<sup>7</sup> Geneva, Switzerland. Dr Zorzoli is *inter alia* health manager at the International Cycling Union (UCI).

*Such non-physiological variations, and the time when they took place, are consistent with what we would expect to see in case of the use of blood doping (ESA and blood transfusion, with some sample collected at the time of withdrawal and other when blood was reinfused). ....*

#### Abnormal %RET and OFF sequence

*The abnormal behaviour of %RET is not physiological. Changes of HGB of the magnitude of those observed between sample 6 and 7 (increase of more than 1100%) in 6 weeks' time are extremely abnormal. By the way, such an increase cannot be the consequence of altitude, even if the athlete has mentioned of having stayed at altitude for less than 3 weeks at 1800m. The non-physiological change is corroborated by the different distribution of %RET depending on the period where samples are collected: samples collected at time of competitions (C) show low and stable results, with a mean value of 0.39%, while those collected out-of-competition (O) display a larger distribution of values (from 0.33% to 2.09%) with a mean value of 0.98% (Fig.3). Likewise, the mean value of samples 1-6 (period A) is completely different from the one of samples 7-11 (period B) (Fig.4). The explanation of such a different distribution of values is probably to be attributed to the use of prohibited substances out-of-competition (erythropoiesis stimulating agents – ESA) which is substantiated by the fact that OFF values are higher in the samples collected in relation to competitions (C) (Fig.5) when compared to those collected out-of-competition. The mean values are in fact very different, 117 vs 91. In this regard, it is worth mentioning the significance of an elevated OFF value, as in samples 1, 2 and 6, which is considered to be the consequence of a previous blood manipulation which increased the number of circulating red cells, and therefore HGB, either by ESA or by transfusions. To counteract this change in the body homeostasis, the organism reacts by shutting down its own production of red cells (negative feed-back) which is evidenced by the suppressed number of %RET. Consequently, such a combination of elevated HGB and suppressed %RET is not normally found in nature, and cannot be the consequence of a medical condition. ....*

*Finally, the difference among OFF values between the two different periods, A (samples 1-6) and B (samples 7-11) is also very striking. ....*

#### Sample 1, 6, and 7

*As described above, samples 1, and 7 are beyond the population and individual limits for this athlete for OFF and %RET (for 1 and 7), but in a different way. In fact, if sample 1 and 6 show the two highest OFF values (137.6 and 141.3), with the lowest %RET at 0.14 for sample 1, the behaviour is different for samples 7 and 10 which show the lowest OFF values with the highest %RET at 2.09% for sample 7. Additionally, samples 1 and 6 have been collected in relation to major competitions: the 2009 and 2011 World Championships.*

*Such a non-physiological change has already been commented, and is compatible with a doping scenario of the use of ESA and eventually transfusion (sample 6) during the out-of-competition period, in order to increase the number of circulating red cells at the time of the competition while decreasing the risks of being caught with the traditional anti-doping tests.*

#### Sample 5, 10 and 11

*Sample 5 shows the second lowest HGB (13.2 g/dL). This sample has been collected a few weeks prior to the 2011 World Championships. Such low HGB value is consistent, unless the athlete can show a medical reason to justify such a drop of HGB, with the withdrawal of blood to be reinfused prior to a competition (see above). By the way, at no time has the athlete mentioned blood losses or blood donation*

on the doping control forms. Additionally, also samples 10 and 11 are beyond the individual lower limit for HGB of this athlete.

#### Conclusions

*As mentioned above, the main elements of abnormalities of this profile are related to the extremely variable sequences of HGB, %RET and OFF, associated with several individual samples displaying values beyond the individual limits for this athlete.*

*In fact, high HGB, low %RET and high OFF were mainly found at the time of competitions (samples 1, 2 and 6) when compared to out-of-competition samples. This is compatible with what we would expect to observe when blood manipulation takes place at distance from competition, and is confirmed by the HGB evolution between samples 5 and 6 and by the high %RET measured on the out-of-competition sample collected on 8.10.2011 (sample 7).*

*It is therefore my opinion that the likelihood of these abnormalities being due to blood doping, such as the use of ESA and/or blood transfusion is very high. In contrast, the likelihood of such deviations being caused by a medical condition, altitude exposure or any other condition is low. As such, I therefore recommend requesting the athlete's explanations for his blood values.*

*I conclude that at this stage, considering the available information obtained within the passport data, and absent a satisfactory explanation from the athlete, that the athlete's profile correspond to what it would be expected to see when a prohibited substance or method was used";*

- iii. Professor Pavel Vorobiov<sup>8</sup> stated on 29 November 2014 the following (the "Vorobiov Opinion"):

#### *"Estimation of blood profile*

*The profile demonstrates the different fluctuations of ABP parameters in different samples.*

*The HGB demonstrates in samples 5, 10, 11 such values: 132, 135 and 130g/L, respectively. In the samples 1, 2, 3, 4, 5, 6 and 11 the levels of RET are 0,14%; 0,16%; 0,48%; 0,45%; 0,33%; 0,17% and 0,45% respectively, these values are below the normal range for males of 0,5-2,5% and this requires an explanation.*

*The OFF- score demonstrates in samples 1, 2, 4 and 6 high levels 137,5; 137,0; 124,8 and 141,3 respectively (reference range for males: 83±13,8 (range 55,4 –110, 6).*

*The attention is drawn to the fact that the high levels of the HGB in samples 1, 2, 4 and 6 (160, 161, 165 and 166 g/L, respectively) are associated with low reticulocyte levels 0,14%; 0,16%; 0,45% and 0,17% respectively, it is lower the normal range for RET of 0,5%. Simultaneously the OFF-score is very high (137,6; 137,0; 124,8 and 141,3) into the same samples (that is significantly higher the normal range for upper limit for male -110,6).*

*We could try to explain some of the changes by staying of the athlete at altitude. But normal that increase the level of HBG conjugates with normal or elevated levels of RET. Also it is know that permanent high altitude dwellers with high HBG levels descending to sea level appear to have preferential destruction of reticulocytes, resulting in we can watch high Hb and low reticulocyte levels. However, in this case the levels of the HBG, the RET and staying at altitude do not correlate with each other. The level of the RET at altitude and in case the athlete was not at altitude are the same low and it stay low with the HGB-*

*160 g/L and when the HGB is low (135g/L). Such discordant changes can indicate manipulation of blood and use ESA.*

*Pay your attention to the fact that samples 4, 5 and 6 were collected during 4 months. In period between sample 4 and 5 (in during 3 months) the level of HGB decreased from 165g/L to 132g/L. The level of RET did not increase (what is expected) but decreased. In a month after that the HGB lifted to 166g/L (25,8%) and the level of RET stayed low in sample 6. These changes in profile match with period of the preparation to the Word Cup 2011. Such dynamics of changes level of HBG and the absence of changes of RET indicate manipulation of blood (or use EPO).*

#### *Conclusion*

*The main abnormalities of the athlete's blood profile ... there are in all samples. These changes separately are in the normal range in some cases, but in the comparison they are not physiological.*

*In the absence of any possible underlying medical conditions and/or other reasonable explanations the author of this report believes that these changes of parameters of blood were caused blood manipulations and/or use EPO.*

*According to the WADA ABP Operating Guidelines, Version 4.0, considering the information within the RUSADA, it is high probability that the longitudinal profile is the result of the blood manipulations by the athlete”.*

16. On 12 December 2014, RUSADA informed the Athlete that, based on the further expert review, it was proceeding with a disciplinary case against him based on the atypical profile in his ABP, and gave the Athlete an opportunity to provide an explanation in that respect.
17. On 13 January 2015, the Athlete replied that, as he was unable to scientifically rebut the experts' conclusions, he admitted the charges brought against him and asked for the hearing to be conducted in his absence.
18. On 20 January 2015, the Disciplinary Anti-Doping Committee of RUSADA (the “Anti-Doping Committee”) held a hearing in the Athlete's absence. The IAAF was not a party to the RUSADA proceedings and was not asked to participate in the proceedings.
19. On 20 January 2015, the Anti-Doping Committee issued the decision No. 5/2015 (the “Decision”), which, in its unchallenged English translation, reads as follows:
  - “1) *The Athlete VALERIY BORKIN is found guilty of anti-doping rule violation (Art 32.2. (b) of the IAAF Anti-Doping Rules which were in force on the date of anti-doping rule violation):*
  - 2) *The Athlete VALERIY BORKIN is declared ineligible for a period of 8 (eight) years commencing from 15 October 2012 according to the Art 40.7 of the IAAF Anti-Doping Rules which were in force on the date of anti-doping rule violation.*
  - 3) *Pursuant to the Art 40.9 of the IAAF Anti-Doping Rules which are in force from 1 January 2015 and taking into account fairness and proportionality the competitive results of the Athlete VALERIY BORKIN are declared disqualified within the following periods:*
    - *14 July 2009 – 15 September 2009;*

- 16 June 2011 – 27 September 2011
- 11 April 2012 – 3 September 2012”.

20. In the Decision, the Anti-Doping Committee found that the anti-doping rule violation described in Article 32.2(b) of the applicable version of the IAAF ADR [*“Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method”*] had been committed, and sanctioned the Athlete with a period of ineligibility in the measure it found proper and proportionate for a second violation (since the Athlete had already received a first “reduced” sanction in 2005), starting from the date of the provisional suspension. With respect to the “selective” disqualification of results imposed in the Decision, the Anti-Doping Committee reasoned as follows:

- “45. Pursuant to Art. 40.8 IAAF Anti-Doping Rules which were in force in 2009-2012 (hereinafter referred as “Old IAAF ADR”), i.e. within the period when the IAAF was collecting the blood samples for ABP purposes, all competitive results of the Athlete from the date of anti-doping rule violation through the date of provisional suspension shall be disqualified.
46. In the meantime, on 1 January 2015 new IAAF Anti-Doping Rules entered in force (“New IAAF ADR”) where the results disqualification rules have been amended. In New IAAF ADR this provision contains additional clause which requires to disqualify all competitive results of the Athlete “unless fairness requires otherwise”.
47. The Commission notes that although the New IAAF ADR were not effective in 2009-2012, the Commission is entitled to apply it in the present matter on the basis of “lex mitior” which is foreseen by the Art 49 of the New IAAF ADR.
48. “Lex mitior” allows the hearing body to apply the rules which entered in force after an anti-doping rule violation had been committed provided that such rules establish more preferable position for a person which is subject to disciplinary proceedings. Thus, the Commission suggests that the New IAAF ADR contain more preferable position for a person under disciplinary proceedings allowing to disqualify competitive results unless fairness requires otherwise.
49. Then, the Commission shall set up an approach for disqualification of results with “fairness” principle. In this regard the Commission has to refer again to the CAS jurisprudence in similar cases in sports other than athletics which rules allowed heretofore to “selectively” disqualify competitive results of the athletes obtained after the date of anti-doping rule violation.
50. In CAS 2010/A/2235 [...] the CAS Panel ruled that the disqualification shall be applied only to those results which were likely to be affected by the anti-doping rule violation.
51. In furtherance of this approach the CAS Panel determined the samples which showed abnormal blood values and disqualified the results which had been obtained in the period between these 2 (two) samples plus 1 (one) month after the last “abnormal” sample.

52. *The Commission suggests that this rationale slightly amended keeping in mind peculiarities of this case may serve as a basis for disqualification of results in the present matter as well. The Commission has thoroughly examined the opinions of 6 IAAF and RUSADA experts and determined the samples with abnormal blood values. Given that anti-doping organization shall have the burden of proof when establishing an anti-doping rule violation and the standard of proof shall be greater than mere balance of probabilities but less than beyond reasonable doubt, the Commission decides to consider as “abnormal” the samples which contained abnormal values according to the opinions of not less than 5 experts.*
53. *Under such approach the Commission declares abnormal the samples #1 (14 August 2009), #2 (15 August 2009), #5 (16 July 2011), #6 (27 August 2011), #10 (11 May 2012), #11 (3 August 2012). Therefore, the Commission according to “fairness” principle shall obligatory disqualify the competitive results of the athlete within the period which commences 1 month prior to the date of abnormal sample and ends 1 month after the date of abnormal sample, and other results which may be affected by the anti-doping rule violation”.*
21. The Decision was notified to IAAF, with an English translation, on 9 February 2015.
- 2. THE ARBITRAL PROCEEDINGS**
- 2.1 The CAS Proceedings**
22. On 25 March 2015, IAAF filed a statement of appeal with the CAS, pursuant to Article R48 of the Code of Sports-related Arbitration (the “Code”), to challenge the Decision, naming ARAF and the Athlete as respondents.
23. The statement of appeal had attached 2 exhibits and contained the designation of Mr Romano Subiotto, QC as an arbitrator.
24. On 1 April 2015, the CAS Court Office forwarded to ARAF and the Athlete the Appellant’s statement of appeal. In the letter to the parties, the CAS Court Office noted that distinct appeals had been brought by IAAF to challenge decisions rendered by RUSADA in disciplinary proceedings regarding different athletes with regard to their atypical ABP profiles (the “Other Appeals”), which had been registered as follows:
- CAS 2015/A/4005, *International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation & Sergey Kirdyapkin*
  - CAS 2015/A/4006, *International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation & Yuliya Zaripova*
  - CAS 2015/A/4007, *International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation & Sergey Bakulin*
  - CAS 2015/A/4008, *International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation & Olga Kaniskina*

- CAS 2015/A/4010, *International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation & Vladimir Kanaikin*

and invited the parties to inform the CAS Court Office whether they agreed to submit the case regarding the Athlete to the same Panel to be appointed also for the Other Appeals.

25. On the same day, 1 April 2015, the CAS Court Office informed RUSADA that an appeal had been lodged against the Decision in the case concerning the Athlete and indicated that the appeal had not been directed at RUSADA. The CAS Court Office, at the same time, informed RUSADA that, if it intended to participate in the arbitration, it had to file with CAS an application to this effect.
26. On 10 April 2015, RUSADA confirmed, in a letter to the CAS Court Office, that it was ready *“to participate as a party in this case to defend its decision”*.
27. In a letter of 13 April 2015, the Second Respondent appointed Mr Mika Palmgren as an arbitrator and confirmed his agreement that the proceedings in this case and in the Other Appeals be referred to the same Panel.
28. On 15 April 2015, the First Respondent informed the CAS Court Office that it agreed to the participation of RUSADA in this arbitration and that the case of the Athlete be submitted to the same Panel appointed for the Other Appeals.
29. On 16 April 2015, the Second Respondent confirmed its agreement to the intervention of RUSADA.
30. On 17 April 2015, the Appellant indicated to the CAS Court Office that it had no objections to the intervention of RUSADA in this arbitration.
31. On 20 April 2015, as a result, the CAS Court Office advised the parties that RUSADA was considered as a party to the arbitration, and that the same Panel would be appointed to hear the case of the Athlete as well as the Other Appeals.
32. On 20 April 2015, the First Respondent agreed to the appointment as an arbitrator of Mr Palmgren.
33. On 27 April 2015, RUSADA also agreed to the appointment of Mr Palmgren.
34. On 4 May 2015, within an extended deadline, the Appellant submitted its appeal brief, in accordance with Article R51 of the Code, together with 26 exhibits, which included, *inter alia*, an additional expert opinion dated 18 March 2015 (the “Joint Expert Report”) jointly signed by Professor Schumacher, Professor d’Onofrio and Professor Audran, the authors of the Initial Review.
35. On 8 May 2015, the Appellant’s appeal brief was forwarded to the Respondents. Correspondence then followed with respect to the deadline for the submissions of the

Respondents' answers.

36. On 14 July 2015, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Mr Romano Subiotto, QC and Mr Mika Palmgren, arbitrators.
37. The Respondents, within extended deadlines, submitted their answers, in accordance with Article R55 of the Code, as follows:
  - i. on 11 July 2015, the First Respondent filed its answer, with no exhibits attached;
  - ii. on 24 July 2015, the Second Respondent filed his answer, together with 9 exhibits and a list of experts to be heard (Dr. Max Testa, Dr. Roberto Corsetti, Dr. Nicolas Faber, Dr. Bernard Vandengiste, Professor Pavel Vorobiov and Professor Sergey Rumyantsev);
  - iii. on 10 July 2015, the Third Respondent filed its answer, together with 6 exhibits.
38. In a letter of 11 September 2015, the Appellant, noting some submissions contained in the Second Respondent's answer, in which "*the athlete ... would appear to be arguing that the ABP concept is not sufficiently reliable or scientifically sound, thereby casting doubt as to whether the violation against the athlete should be upheld*", requested that the Athlete be required "*to clarify immediately*" some issues in that respect.
39. On 17 September 2015, the CAS Court Office advised the parties that the Panel, having considered the IAAF's request of 11 September 2015, had decided not to allow a second round of written submissions and to hold a hearing where the parties would have the opportunity to present their respective cases, as outlined in the written submissions.
40. On 22 September 2015, the Appellant insisted on its request that the Second Respondent be required to clarify his position on the issues mentioned in the letter of 11 September 2015.
41. In a letter of 25 September 2015, the parties were informed that the Panel had decided to hold a hearing in Lausanne, Switzerland, on 2 and 3 December 2015.
42. On 1 October 2015, the Appellant reiterated its requests of 11 and 25 September 2015.
43. On 8 October 2015, the CAS Court Office advised the parties that the Panel had decided to confirm its decision of 17 September 2015.
44. On 13 November 2015, the CAS Court Office transmitted to the parties a draft hearing schedule, indicating that the case of the Athlete would be discussed simultaneously with the discussion on the Other Appeals, with the sole exception of case CAS 2015/A/4006, that, as per a request of the athlete involved in that case, would be discussed separately.
45. Correspondence was then exchanged between the parties as to the organization and the schedule of the hearing.



46. On 24 November 2015, and for such purposes, a conference call was held with the participation of the President of the Panel and the parties' counsel. During this conversation, the parties agreed that the case CAS 2015/A/4006 would be heard on a different date, and therefore that on 2 and 3 December 2015 the case of the Athlete would be discussed together with the Other Appeals, with the exception of case CAS 2015/A/4006. In that respect, and as a result, the President of the Panel made it clear that, in order to safeguard the integrity of all proceedings, the award in the arbitration regarding the Athlete would be issued only after all Other Appeals (including CAS 2015/A/4006) were heard, even though it was clear that every case would be decided only on the basis of its specificities, and of the parties' respective pleadings and evidence. In the conference call, discussions also took place with respect to the Second Respondent's request that his experts, including those who had not provided an expert report, be heard last.
47. As a result, the Panel, in a letter dated 24 November 2015, advised the parties that *"experts and 'counter-experts' [would] be allowed to attend the hearing ... at the same time and to intervene under the control of the Panel"*, and set a deadline for the Second Respondent to file a list of issues, as detailed as possible, on which his expert(s) intended to express their opinion.
48. In a letter of 25 November 2015, the Second Respondent *"strongly"* protested against the procedural steps mentioned in the CAS letter of 24 November 2015, asking the Panel to reconsider them. In particular, the Second Respondent maintained: that it was not acceptable that a decision on his case be rendered only after hearing case CAS 2015/A/4006, since the cases should be decided *"totally separately"*; that the Athlete cannot be forced to reveal his defence strategy before the hearing, and therefore that no list of issues for the experts could be requested; and that the experts designated by the Second Respondent had to be heard after the experts called by the Appellant and that the Appellant's experts should not be allowed to attend the hearing before and after their testimony. In the alternative, the Athlete requested to be provided with copy of the other parties' submissions in case CAS 2015/A/4006.
49. On the same 25 November 2015, the CAS Court Office, writing on behalf of the Panel, advised the parties of the following:

*"As repeatedly mentioned during the conference call of yesterday, all cases will be decided by the Panel on the basis of their individual peculiarities and of the parties' submissions in their respect. No argument raised in one case will be used in another case, if not specifically raised also in such other case. Therefore, the request of communication to Dr Valloni of the submissions and documents filed by the other parties in case CAS 2015/A/4006 is denied.*

*The Panel's intention to issue the arbitral awards in all cases after all cases are heard does not contradict the foregoing and does not mean that the cases concerning the athletes represented by Dr Valloni will be decided after hearing the case of Ms Zaripova. The intention to issue all the arbitral awards at the same time concerns only their notification to the parties and is intended to protect the integrity of all proceedings.*

*The Panel does not treat the experts indicated by the parties as being part of the public. Therefore, the Panel has decided to allow their attendance at the hearing when another expert is heard, in order to answer the questions that the Panel or all parties may have by way of "experts' conferencing". This rule applies to all the experts:*

*therefore, the experts appointed by the athletes are invited to attend when the experts of the Appellant will be heard and will have the opportunity to intervene and contradict the statements of the Appellant's experts.*

*The Panel is fully determined to guarantee the athletes' right to be heard. Therefore, the Panel allows the athletes (and their counsel) to discuss with the experts they have appointed any issue relevant to their cases. In the list to be provided ... therefore, the athletes can indicate any issue they wish. At the same time, the Panel is striving to find a way to ensure that, on the basis of the list of issues that the athletes are invited to provide, it can benefit as much as possible from the presentations of the athlete's experts. In the same way, the Panel is aware of the Appellant's claim not to be taken by surprise. As a result, the athletes' request that the Panel reconsiders its decision is denied".*

50. In a letter of the same day, 25 November 2015, the First Respondent expressed its support to the Second Respondent's position.
51. On 27 November 2015, the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (the "Order of Procedure"), which was accepted and countersigned by the Appellant, ARAF and RUSADA. The Second Respondent declined to sign the Order of Procedure.
52. On 27 November 2015, the Appellant expressed its position and dissent with regard to the Second Respondent's letter of 25 November 2015.
53. In a letter of 27 November 2015, the Third Respondent informed the Panel that WADA had declared RUSADA "non-compliant" with the WADC and that it had to "immediately cease all anti-doping activities". Therefore, it requested the CAS to suspend the hearing scheduled "till clarification of RUSADA's status".
54. On 27 November 2015, the Second Respondent reiterated his rejection of the procedural measures, alleging that they "clearly favour the Appellant and undermine the Respondents' rights to a fair trial in an intolerable way". At the same time, the Second Respondent raised another issue "which heavily undermines [the] right [of the Athlete] to a fair trial" as follows:

*"As WADA suspended RUSADA ... with immediate effect, WADA seems to think that RUSADA is not entitled to attend the hearings of 2 and 3 December 2015 and is not entitled to act in the proceedings. This means that RUSADA cannot defend the decisions against which the Appellant appealed and that the proceedings are led with a Respondent 3 missing. This is unacceptable and this does also affect the position of the Respondents since RUSADA is not there to defend the decision taken. The proceedings at hand cannot be continued if [RUSADA] is not entitled to act and defend itself. Apart of that, the decision to suspend RUSADA is not final, hence another reason to suspend the proceedings up to the moment there is clarify about the position of RUSADA. Hence, we clearly support the position of RUSADA to wait until further clarification.*

*Furthermore, the decision of WADA to suspend RUSADA triggers an important issue about the jurisdiction of the CAS. Indeed, Respondents think that a suspension lift the arbitration clause as RUSADA is no longer considered by WADA as a party and does not have any rights in these proceedings. Therefore, WADA's decision affected the arbitration clause and Respondents do not accept CAS jurisdiction anymore and is not*

*accepting any change in the way the procedure is supposed to be run”.*

55. On 27 November 2015, the Panel denied the Athlete’s request to cancel the hearing scheduled for 2 and 3 December 2015, confirmed a deadline for the Second Respondent’s filing of a list of issues that would be discussed by his experts, and invited the other parties to comment on the remaining issues raised by the Athlete and by RUSADA in their letters of 27 November 2015.

56. On 30 November 2015, the CAS Court Office, writing on behalf of the Panel with respect to the recent correspondence and chiefly with regard to the invitation to the Athlete (and to all the athletes whose cases would be heard at the upcoming hearing) to provide a list of the issues, as detailed as possible, that would be discussed by his (their) experts, specified the following:

*“In order to avoid any misunderstanding, the Panel wishes to clarify the point, and provide some guidance with respect to the level of detail of such list. More specifically, the Panel confirms that it is inviting the athletes to provide only a description of the object of the experts’ declarations of the same kind and detail as that provided by the Appellant (see for instance §§ 40 and 41 of the appeal brief in CAS 2015/A/4005). At the same time, it is confirmed that the athletes can indicate any issue relevant to the case they wish”.*

57. On 30 November 2015, the Appellant forwarded a communication received from WADA confirming that “RUSADA’s non-compliant status does not prevent it from appearing as a respondent party to on-going CAS proceedings”.

58. On 1 December 2015, the Second Respondent, while again noting the “Panel’s denial to grant the right to a fair defence” and criticizing “the latest decisions of the Panel which clearly favour the Appellant”, listed the issues to be discussed with the experts as follows:

- “1) Accuracy of the Athlete Biological Passport and the method to detect doping
- 2) IAAF’s and WADA’s approach on doping cases
- 3) Examination of the samples in the cases at hand
- 4) Examination of the IAAF’s experts’ opinion in the cases at hand”.

59. On 1 December 2015, the Appellant reacted to the Second Respondent’s letter of even date objecting to the list of issues submitted by the Athlete and more specifically to the point concerning the “Accuracy of the Athlete Biological Passport and the method to detect doping”.

60. A hearing was held in Lausanne on 2 and 3 December 2015, as per the notice in the letter of 25 September 2015. The Panel was assisted by Mr Fabien Cagneux, Counsel to CAS. The following persons attended the hearing:

- i. for the Appellant: Mr Huw Roberts, Mr Nicolas Zbinden and Mr Ross Wenzel, counsel;
- ii. for ARAF: Mr Artem Patsev, counsel;

- iii. for the Athlete Mr Lucien W. Valloni and Ms Stéphanie Oneyser, counsel;
  - iv. for RUSADA Ms Anna Antseliovich, Head of the RUSADA Results Management Department.
61. At the hearing, after the opening statements of the parties, Professor Schumacher (via video connection), Professor d’Onofrio (physically present) and Professor Vorobiov (via phone connection), *i.e.* experts who had signed written opinions with respect to the Appellant’s case, were heard in direct, cross- and re-direct examination. The Second Respondent indicated that no additional expert mentioned in his answer would appear. The Panel therefore noted that the pre-hearing discussions concerning the Second Respondent’s request to be allowed to hear the deposition also of those experts he appointed (and chiefly of Professor Rumyantsev), who had not signed an expert opinion, had become moot.
62. The contents of the declarations of the experts can be summarised as follows<sup>9</sup>:
- i. Professor Schumacher confirmed the opinion expressed in the Initial Review, in the Joint Expert Report and in the Further Expert Report and explained that EPO increases an athlete’s maximal oxygen uptake (the “VO<sub>2max</sub>”) by 1% to 4% for a period of up to 4 weeks after the erythropoiesis stimulation, depending on the dosage of its administration, and confirmed that the use of micro-doses over a longer period can produce long-lasting effects. Professor Schumacher declared having appeared before CAS in all major ABP cases, and that he never assisted an athlete in CAS proceedings; however, he underlined that in several occasions, while reviewing ABP profiles, he had expressed an opinion favourable to the athlete;
  - ii. Professor d’Onofrio also confirmed the opinion expressed in the Initial Review and in the Joint Expert Report, and examined the values contained in the Athlete’s ABP (§ 9 above), underlining the abnormality of the low RET% count in some of the samples. Professor d’Onofrio also confirmed that he had expressed the opinion in 2010 that the panel in charge of the initial review should preferably be composed of 9 members, but that he now thinks that the decision to limit the panel to 3 experts was correct. In this case, the opinions of the experts were unanimous;
  - iii. Professor Vorobiov also examined the values contained in the Athlete’s ABP, confirming the position expressed in the Vorobiov Opinion, and declared that sufficient scientific documentation exists to validate the reliability of the ABP program, even though in his opinion some elements (such as altitude and hydration) should be better considered.
63. During the hearing, the parties specified their arguments in support of their respective petitions. In that context, *inter alia*:

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<sup>9</sup> This summary does not necessarily follow the order of presentation of the experts and intends only to give an indication of a few points touched at the hearing. The Panel, however, considered the entirety of the declarations rendered at the hearing.

- i. with respect to the issue of CAS jurisdiction:
  - a. the Second Respondent confirmed his objection, announced in the letter of 27 November 2015 (§ 54 above), as based ( $\alpha$ ) on the unclear position of RUSADA, following WADA's declaration that RUSADA had to suspend all anti-doping activities under the WADC, and ( $\beta$ ) on the suspension of ARAF by IAAF. In this connection, the Second Respondent underlined that he had only agreed to submit to CAS disputes with ARAF and RUSADA;
  - b. the Appellant indicated the basis for CAS jurisdiction and replied to the Athlete's objection (defined to be "*parasitic*", "*vexatious*", "*opportunistic*" and to amount to "*inappropriate procedural conduct*") by referring to the declaration of WADA, which had confirmed the possibility for RUSADA to participate in the arbitration;
  - c. the First Respondent declared that the suspension imposed by IAAF did not preclude its participation in the CAS proceedings and that it did not agree with the Athlete's objection;
  - d. the Third Respondent confirmed receipt of a communication on the part of WADA indicating that it could participate in the arbitration;
- ii. with regard to the merits of the appeal:
  - a. the Appellant underlined, in general terms, the effects of blood doping and the impact of EPO administration on sporting performances and on training as a result of the improvement it causes on the athlete's  $VO_{2max}$ . With specific reference to the Athlete, then, only continuous doping practices could explain the atypical profile of his ABP, and chiefly the fluctuations in the blood values it shows. At the same time, the Appellant submitted that the appeal is limited to the issue of the retroactive disqualification of results. The Second Respondent's announced challenge to the ABP as a method to detect doping practices was therefore irrelevant, noting that Professor Vorobiov also confirmed the ABP program's reliability. Finally, the Appellant contended that the application of the *lex mitior* principle does not allow "cherry-picking" and cannot result in the creation of non-existing rules. In that regard, reference was made to a judgment rendered on 18 July 2013 by the European Court of Human Rights (Grand Chamber) in the case of *Maktouf and Damjanovic v. Bosnia and Herzegovina*, and to a decision of the Swiss Federal Tribunal (ATF 119 IV 145) of 25 June 1993. However, the Appellant underlined that the ineligibility period imposed to the Athlete (eight years) is consistent with the provisions in force at the time the Decision was adopted. Therefore, it may be conceded that the rules in force at the time of the Decision, more favourable to the Athlete, could provide for a global legal framework to assess the consequences of the anti-doping rule violation committed by the Athlete, including the "fairness exception" to the ordinary disqualification of results thereby provided. In any case, in the Appellant's opinion, the Athlete cannot benefit from such "fairness exception", since he was involved in repeated, intentional and severe anti-doping rule violations;

- b. the First Respondent confirmed that the Decision correctly and fairly applied the relevant rules, including the *lex mitior* principle, and properly took into account the limited temporal effect of EPO administration. In any case, according to ARAF, the opinion of the IAAF experts evolved over the times, and IAAF failed to prove its contentions;
  - c. the Second Respondent described the IAAF's submissions to be "*fantasy talking*", since no prohibited substance had ever been detected in the samples provided by the Athlete. In any case, in the Second Respondent's opinion, the Appellant failed to rebut the criticism voiced in the scientific literature against the ABP program and its reliability, still disputed, as an indirect method of detection of an anti-doping rule violation. In addition, the analytical values of the Athlete could be influenced by other factors, such as a virus, or the altitude, which had not been taken into account: as a result, the ABP profile does not show with the required probability level that the Athlete had indulged in doping practices. Moreover, the "fairness exception" had to be applied, in light of its general nature, the necessity of its broad interpretation, and the *lex mitior* principle;
  - d. the Third Respondent emphasised that the "fairness exception" had been properly applied to the disqualification of results in this case.
64. At the conclusion of the hearing, after making closing submissions summarizing their respective cases, the Appellant, the First Respondent and the Third Respondent expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in the arbitration proceedings. The Second Respondent, through counsel, while expressly declaring that he no longer had any objection in respect of his right to be heard and to be treated equally in the arbitration proceedings, only made a reservation to confirm his objection to the CAS jurisdiction.
65. After the hearing, on the basis of the Panel's directions, the parties timely lodged with the CAS Court Office the quantification of their respective cost claims.

## 2.2 The Position of the Parties

66. The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered, for the purposes of the legal analysis which follows, all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

### *a. The Position of the Appellant*

67. The IAAF submitted the following prayers for relief in the merits:

*"(i) the IAAF's appeal is admissible;*

*(ii) the samples collected from Mr Borkin on 15 April (sample 4 in the profile) and on 8 October 2011*

*(sample 7 in the profile) are abnormal;*

- (iii) the decision of the RUSADA Commission not to disqualify Mr Borkin's results at the 2011 Rio Maior meeting on 9 April 2011 and at the 2012 Russian Winter Indoor meeting on 5 February 2012 be set aside; and*
- (iv) all competitive results obtained by Mr Borkin from the date of first commission of the anti-doping rule violation (14 August 2009) through to the commencement of his provisional suspension (15 October 2012) be disqualified, with all resulting consequences in accordance with IAAF Rule 40.9; or*
- (v) in the alternative, all competitive results obtained by Mr Borkin from the date of first commission of the anti-doping rule violation (14 August 2009) through to the last commission of the anti-doping rule violation (3 August 2012) be disqualified, with all resulting consequences in accordance with IAAF Rule 40.9; or*
- (vi) in the further alternative, all competitive results obtained by Mr Borkin that are likely to have been affected by anti-doping rule violations be disqualified (including the Rio Maior meeting on 9 April 2011), with all resulting consequences in accordance with IAAF Rule 40.9; and*
- (vii) the ARAF and Mr Borkin are ordered to pay the IAAF the costs that it has incurred in bringing this appeal".*

68. As already mentioned, IAAF challenges the Decision on only a single point. According to IAAF, in fact, the appeal is not about whether the Athlete has committed an anti-doping rule violation under the IAAF ADR, or about the appropriate period of ineligibility to be imposed on the Athlete for such anti-doping rule violation: *"the sole issue in this appeal concerns the further consequences of Mr Borkin's repeated blood doping in terms of the disqualification of his results in competitions in which he successfully participated during the relevant period 2009-2012 in which he doped"*. In that regard, IAAF notes that the Athlete's results at the 2009 World Championships, at the 2011 World Championships and at the 2012 Olympic Games were disqualified by the Anti-Doping Committee, but that the results obtained at the 2011 Rio Maior Meeting and at the 2012 Russian Winter Indoor Meeting were left untouched. In the Appellant's opinion, all results from 14 August 2009 onwards (the date on which the Athlete first committed an anti-doping rule violation) should be annulled, without exceptions, pursuant to Article 40.9 of the IAAF ADR.
69. IAAF considers that the "fairness exception" set forth in Article 40.9 of the IAAF ADR, as contained in Chapter 3 of the IAAF Competition Rules in their 2015 edition (the "2015 IAAF ADR"), should not be applied to the Athlete's case. In that regard, the Appellant challenges the Decision, which applied said "fairness exception" as more favourable to the Athlete (under the *lex mitior* doctrine) than the corresponding provision (Article 40.9) in Chapter 3 of 2009 edition the IAAF Competition Rules (the "2009 IAAF ADR")<sup>10</sup>, relevant under the *"tempus regit actum principle"*. IAAF in that regard submits that:

<sup>10</sup> It is in that respect to be underlined, as the parties acknowledged in their submissions, that the subsequent editions of the IAAF Competition Rules, of 2010-2011 and of 2012-2013, in force before the 2015 IAAF ADR became applicable, contained anti-doping rules identical to those set by the 2009 IAAF ADR. Therefore, for ease of

- i. as a matter of principle,
  - in its appeal brief, it accepted that “*the RUSADA Commission’s determination that ... the rule against which the issue of the disqualification of ... results is to be examined, is Rule 40.9 of the 2015 edition of the IAAF Rules*”;
  - at the hearing, then,
    - √ it contended that the application of the *lex mitior* principle does not allow “cherry-picking” and cannot result in the creation of non-existing rules: the “*lex mitior*” principle requires a comparison of different sets of rules, and the application in its entirety of the more favourable set to the accused, but cannot result in the artificial creation of an artificial system of rules composed of provisions belonging to different sets. In support of such contention the Appellant referred to a judgment rendered on 18 July 2013 by the European Court of Human Rights (Grand Chamber) in the case of *Maktouf and Damjanovic v. Bosnia and Herzegovina* and to a decision of the Swiss Federal Tribunal (ATF 119 IV 145) of 25 June 1993;
    - √ however, it underlined that the ineligibility period imposed to the Athlete (eight years) is consistent with the provisions in force at the time the Decision was adopted. Therefore, it may be conceded that the rules in force at the time of the Decision provide for a global legal framework to assess the consequences of the anti-doping rule violation committed by the Athlete, including the “fairness exception” to the ordinary disqualification of results thereby provided;
- ii. however, in the actual case, there are no grounds for the “fairness exception” to apply in the case of an athlete (like the Athlete) who engaged in intentional, serious and repeated acts of doping over a long period of time. In the Appellant’s opinion, the Athlete is not an innocent competitor, who inadvertently ingested a stimulant on a single occasion; this is the case of an athlete whose ABP records a total of eight instances of blood doping out of eleven samples collected from him in the period from August 2009 to August 2012 (the abnormal samples being at least 1, 2, 4, 5, 6, 7, 10 and 11), who engaged in intentional and carefully planned blood doping in connection with his preparation for major international competitions in at least 2009, 2011 and 2012, and deprived clean competitors of the opportunity to earn medals at such competitions. In support of this conclusion, the Appellant refers chiefly to the expert opinions in the Initial Review and in the Joint Expert Report, in which Professors Schumacher, d’Onofrio and Audran answered the questions asked by IAAF as follows:

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reference, any mention to the 2009 IAAF ADR shall be intended to cover also those editions which followed them, pre-dating the 2015 IAAF ADR.



1. ***Do you agree with the conclusions of the RUSADA Disciplinary Commission that samples 1, 2, 5, 6, 10 and 11 of the athlete's profile are abnormal as evidence of blood doping?***

*In our independently written initial reviews of the profile, dated June 2012 ..., in agreement with the more recent RUSADA expert reviews, we had unanimously identified samples 1, 2 and 6 as being the most abnormal tests of the profile. In addition, sample 5 was also explicitly mentioned as abnormal in two of our reports. The abnormality of sample 5 depends on the striking time proximity with two samples of much higher haemoglobin concentration, which points towards of a continued practice of blood manipulation from April to August 2011. We note that sample 10 and 11 were considered abnormal by all the RUSADA experts. These samples (especially sample 11) display as potentially suspicious feature low haemoglobin paired with low reticulocytes. Such pattern can be caused by dilution strategies to mask supraphysiological haemoglobin. We therefore agree with the conclusions of the RUSADA Disciplinary Commission that samples 1, 2, 5 and 6 are evidence of blood manipulation, samples 10 and 11 can be considered as suspicious.*

2. ***Are there samples in the athlete's profile that in your opinion are abnormal (or that form part of an abnormal sequence indicative of blood doping) in addition to those concluded by the RUSADA Commission? If so, which?***

*In our opinion samples 4 and 7 are also abnormal. In fact, in our initial reviews we had highlighted further abnormalities, which, in the context of the profile and the competition calendar of the athlete, displayed patterns suggestive of blood doping. In particular, an erythropoietic suppression picture - such as it is observed after the use and discontinuation of an erythropoietic stimulant - has been pointed out for sample 4 (see M. Audran initial review) prior to one major competition, similar (although less intense) to the ones seen in samples 1, 2 and 6. We underline that the absence of an explicit mention of a specific sample as abnormal at the time of the initial review does not mean that that sample is implicitly normal in the context of the passport.*

*Sample 7, on the other hand, shows markedly increased reticulocytes and was indicated explicitly as abnormal in two of our initial reviews (as well as by the RUSADA experts). The use of an erythropoietic stimulant (ESA) was likely when this sample was obtained (October 2011).*

3. ***In your opinion, is this the profile of an athlete who has been engaged in repeated blood doping in the period from August 2009 to August 2012?***

*The abuse of ESA, such as Erythropoietin by athletes typically consists of two phases: First, a stimulation phase, in which the substance is utilised and the bone marrow is stimulated to produce more red blood cells. During this phase, reticulocytes (young red blood cells) are elevated and haemoglobin concentration is usually still normal. Secondly, after a sufficient amount of additional red blood cells has been produced (haemoglobin has increased), the athlete typically stops the administration of the substance, which, due to the elevated red cell mass, leads to suppression of his red cell production, thus very low reticulocytes. This second phase is usually initiated closer to competition in order to avoid detection of the abused substance by conventional tests .... Autologous blood transfusion is also used to increase red cell mass ..., and it is often used in association with ESAs ....*

*In the present profile, the following phases can be identified:*

- *Suppression phases in sample 1 and 2 (August 2009), sample 4 (April 2011), sample 6 (August 2011)*
- *Stimulation phase in sample 7 (October 2011)*

*Given that the stimulation phases preceding the suppression usually occur several weeks before competition, these are often not caught on tests (see stimulation phases for samples 1+2, 4, 6). The athlete was most tested prior to major events, thus suppression phases are visible throughout his profile. Also, suppression phases last for about two weeks. Given the time lag between the different tests showing a suppression pattern (several months), this implies repetitive use of blood manipulation.*

*In summary and based on the available data, it can safely be stated that the athlete underwent at least four blood doping/ ESA cycles in the period from 2009 to 2012.*

**4. *Is the athlete's profile in Appendix 5 for the preceding period 17.05.07 – 14.08.08 indicative of blood doping? Is the athlete's profile for this period consistent with the profile you considered for the purposes of the ABP review process?***

*The data provided in Appendix 5 consist of 3 additional samples obtained during the years 2007 and 2008. All samples display high values of haemoglobin with heavily increased OFF scores, in line with what is described in the reply to the previous question. The level of the abnormalities increases from May 2007 to August 2008, when, on the eve of the Olympic Games, a striking haemoglobin concentration of 18.6g/ dL is recorded. All these samples have been obtained prior to major competitions. The pattern therefore repeats the manipulation scenario outlined above. This is fully consistent with the doping technique visible in the ABP profile of the athlete”;*

iii. in cases of serious, aggravated doping violations, IAAF has always sought to punish the athletes concerned to the maximum possible extent to reflect their serious offences, including the disqualification of results, and no “fairness exception” was applied. In the Appellant’s opinion, to do otherwise in the case of the Athlete would mean to act inconsistently and to send a dangerous message to the athletics community. In that respect, IAAF makes reference to the cases of:

- Kelli White, who in 2004 admitted to the repeated use of a number of performance enhancing substances and doping methods, and accepted a 2 year ineligibility sanction starting on 17 May 2004. In addition to her ineligibility, all of her competitive results from 15 December 2000 onwards were disqualified and she forfeited her World Championship titles in 2003;
- Marion Jones, who in 2007 admitted having regularly used steroids from September 2000 through to July 2001 (including at the 2000 Sydney Olympic Games), and accepted a 2 year sanction starting on 8 October 2007. In addition to her ineligibility, all of her competitive results from 1 September 2000 onwards were

disqualified and she forfeited all of her World Championship titles, as well as the 5 Olympic medals that she won at the 2000 Olympic Games;

- 7 Russian athletes, who in 2009 were found (through the use of DNA evidence) to have tampered with their out-of-competition urine samples by using substitute urines, and were each banned for a period of 2 years and 9 months starting from 3 September 2008. In addition, all of the athletes' competitive results were disqualified going back to April or May 2007, when the respective tampering of the samples had taken place;
- 37 athletes, who, since the IAAF's introduction of the ABP program in 2009, have been found guilty of blood doping. In addition to serving their respective periods of ineligibility, all 37 athletes have, without exception, had their results disqualified as from the date of their first violation;
- doping offenders in other sports, and namely of:
  - √ Jan Ullrich, who in 2010 was found guilty of a first anti-doping rule violation for the use of blood doping and other prohibited substances and was banned from the sport for a period of 2 years starting from 22 August 2011. As regards his career results, the Panel took the view that his involvement in Dr Fuentes' doping program in Spain had extended back as far as the spring of 2005 and it therefore disqualified all of his results from 1 May 2005 until the time of his retirement in 2007;
  - √ Lance Armstrong, who in August 2012 was banned for life from the sport of cycling for his involvement in the US Postal Service Team doping conspiracy and all of his career results from 1 August 1998 were disqualified without exception, including numerous Tour de France and other international titles;

iv. only in cases of "re-testing" (such as the case of Ms Kotova mentioned by RUSADA in its submissions: § 84 below) did IAAF deviate from this approach.

70. The IAAF's primary case, therefore, is that this Panel is not bound to apply the test adopted in the case CAS 2010/A/2235 of 21 April 2001, invoked in the Decision, namely, that it would be unfair to disqualify the Athlete's results not likely to have been affected by the anti-doping rule violation. In the Athlete's case, and as mentioned, there are no grounds for applying the "fairness exception" in Article 40.9 of the 2015 IAAF ADR. In the IAAF's opinion, the damage that the Athlete has caused to the sport of athletics should outweigh any possible consideration of fairness in his favour. Accordingly, the IAAF submits that all of the Athlete's results from 14 August 2009 should be disqualified.
71. In the alternative, the IAAF submits that, if the Panel were to find that the "fairness exception" in Article 40.9 of the 2015 IAAF ADR applies, the Panel should then nevertheless still disqualify

(as the CAS Panel did in the case CAS 2010/A/2235) all results obtained between the first and the last identified abnormal samples in his profile, plus a period of one month following the last abnormal sample. The IAAF contends that an athlete, who makes a conscious decision to manipulate his blood, believes that he has escaped detection through routine controls, and repeats the illegal act should not have any of the results he achieved between those two (or more) episodes of manipulation recognised. Applying such an approach in the Athlete's case, the Panel should take into account that there is a consensus of expert opinions that the first abnormal sample in the Athlete's profile is sample 1 from 14 August 2009 and the evidence of the IAAF experts is that the last abnormal sample in the profile should be considered to be sample 11, namely, the Athlete's sample at the 2012 Olympic Games on 3 August 2012. As a result, all of the Athlete's results between 14 August 2009 and 3 September 2012 should be disqualified.

72. Finally, if the Panel were to find that the correct test is to disqualify only those of the Athlete's results, which may have been affected by his respective violations, the IAAF submits that, in addition to the results disqualified by the Anti-Doping Committee, at a minimum the Athlete's result at the 2011 Rio Major Meeting should also be disqualified, because it is likely to have been affected by his blood doping.

***b. The Position of the Respondents***

*b.1 The Position of the First Respondent*

73. In its prayers for relief, ARAF requested the CAS to rule as follows:
- i. decision of the RUSADA Committee 5/2015 dated January, 20, 2015, is upheld;*
  - ii. in any event, the ARAF shall not bear any of the costs of this arbitration;*
  - iii. the Appellant (the IAAF) and/or Mr Valeriy Borkin shall be ordered to reimburse the ARAF for the legal and other costs incurred in connection with this arbitration, in an amount to be determined at the discretion of the CAS Panel".*
74. In other words, the First Respondent asks this Panel to dismiss the appeal brought by IAAF against the Decision, which ARAF finds to be *"grounded, well-founded and reasonable"*.
75. In support of such conclusion, ARAF submits the following:
- i. the Anti-Doping Committee took into account that:
    - the Athlete's first abnormal blood sample was collected on 14 August 2009,
    - the disqualification of competitive results means that an athlete is considered as never having participated in that competition,
    - the Athlete was provisionally suspended from 15 October 2012, and later declared ineligible for 8 years, so that the disqualification of all results from 14 August 2009 means that the Athlete would actually be suspended for 11 years and 2 months,

- when, according to the 2009 IAAF ADR, the maximum sanction was 4 years of ineligibility,
- the “fairness” principle recognized by Article 40.9 of the 2015 IAAF ADR had to be applied in the Athlete’s case;
- ii. all opinions expressed by the experts appointed by IAAF and RUSADA were carefully considered, and it was decided that a sample could be considered to be abnormal only when 5 of the 6 opinions described it as being abnormal, bearing in mind the seriousness of the allegations, the burden and standard of proof and the necessity to interpret in the Athlete’s favour all doubts or uncertainties;
  - iii. the Anti-Doping Committee, on such basis considered samples 1, 2, 5, 6, 10 and 11 to be abnormal;
  - iv. the CAS jurisprudence allows the “*selective disqualification*” of competitive results. In fact, in the case CAS 2010/A/2235, the CAS Panel disqualified only those results which had been likely affected by the anti-doping rule violation, and indicated that such a disqualification might extend no more than one month after the last abnormal sample. On this basis, the Anti-Doping Committee disqualified the Athlete’s competitive results achieved during the period commencing one month before and ending one month after the date of collection of each abnormal sample.
76. As a result, in the First Respondent’s opinion, the Decision was issued “*in strict compliance with the IAAF Anti-Doping Rules (ed. 2015), including ‘fairness’ principle, lex mitior principle, and was based on existing information, IAAF’s and RUSADA’s experts’ opinions, CAS jurisprudence*”.
- b.2 *The Position of the Second Respondent*
77. In his prayers for relief, the Athlete requested the CAS to:
- “1. To reject the Appellant’s appeal;
  2. To confirm RUSADA’s decision of 20 January 2015; or
  3. In the alternative to declare that the samples 4, 7 and 8 are not abnormal; and to declare that no other results of the Respondent 2 than the results during the periods 14 July 2009 – 15 September 2009, 16 June 2011 – 27 September 2011 and 11 April 2012 – 3 September 2012 shall be disqualified; or
  4. In the further alternative to declare that the Respondent 2’s results at the 2011 Rio Maior Meeting on 9 April 2011 and the 2012 Russian Winter Indoor Meeting on 5 February 2012 shall not be disqualified; and
  5. To order the Appellant to pay the costs that the Respondent 2 has incurred in this appeal procedure”.
78. Preliminarily, as contended in the course of the arbitration, the Second Respondent argues that the appeal should be dismissed because CAS lacks jurisdiction to hear it. This contention, raised in a letter of 27 November 2015 and confirmed at the hearing, results from WADA’s declaration that RUSADA had to suspend all anti-doping activities under the WADC and from IAAF’s

suspension of ARAF: *“this means that RUSADA [and ARAF] cannot defend the decision against which the Appellant appealed”*. In addition, according to the Second Respondent *“a suspension lift the arbitration clause as RUSADA is no longer considered by WADA as a party and does not have any rights in these proceedings. Therefore, WADA’s decision affected the arbitration clause and Respondents do not accept CAS jurisdiction anymore”*. In such connection, the Second Respondent underlined at the hearing that he had only agreed to submit to CAS disputes with ARAF and RUSADA: their absence from the proceedings affects his consent to arbitrate.

79. On the merits the Second Respondent argues that the Decision should be upheld, because:
  - i. it is not proven that the Athlete violated the anti-doping rules during the 2011 Rio Maior Meeting and the 2012 Russian Winter Indoor Meeting, and
  - ii. the principle of fairness has to be applied in this case, so that the Athlete’s results at the 2011 Rio Maior Meeting and the 2012 Russian Winter Indoor Meeting should not be disqualified.
80. With regard to the first point (*“No violation of the anti-doping rules with respect to the Rio Maior Meeting and the Russian Winter Meeting”*), the Second Respondent submits:
  - i. as to the burden and standard of proof, that IAAF must establish, to the *“comfortable satisfaction”* of the hearing body, that an anti-doping rule violation has occurred. In order to satisfy this burden at the required standard, *“good and clear evidence”* is to be provided. The Athlete in any case underlines that the *“comfortable satisfaction”* standard is harshly criticised, and that many authors seek the application of the stricter standard of *“beyond reasonable doubt”*;
  - ii. as to the evidence, that the ABP constitutes only an indirect method for the detection of anti-doping rule violations and that in many cases, including those mentioned by the Appellant, the anti-doping authority relied not only on the ABP evaluation, but also on other indirect and/or circumstantial evidence to conclude that an anti-doping rule violation had been committed. The Second Respondent considers that the possibility of basing a finding of an anti-doping rule violation only on the ABP is currently heavily criticized and serious doubts as to the reliability of the ABP when used alone have been raised. Relying on the ABP only would imply using an evidentiary standard so low as to be inconsistent with the right to a fair trial; in the scientific literature it is contested that this method is scientifically sound enough; the fact that only three experts review the ABP profile is also heavily criticized; the review process lacks transparency, since the content of expert reports is not accessible to non-specialists;
  - iii. that the probability for a sample to be qualified as abnormal has to amount to 99.9%: here, the probability of 99.9% regarding samples 4, 7 and 8 is clearly not met. The six experts tasked by IAAF and RUSADA to evaluate the Athlete’s ABP could not unanimously agree on what samples are abnormal: samples 1, 5 and 6 were considered to be abnormal by five experts, samples 2 and 7 by four experts, samples 4, 10 and 11 by three experts, samples 3 and 8 by two experts, and sample 9 by only one expert. As a result, samples 4, 7 and 8 are not conclusive, since the probability of 99.9% is not reached,

and do not allow the conclusion that the Athlete committed an anti-doping rule violation before, during or after the 2011 Rio Maior Meeting and the 2012 Russian Winter Indoor Meeting.

81. With regard to the second point (*'Fairness'*), the Second Respondent contends:

- i. in general terms, that the concept of fairness, "*nowhere defined*", is however "*broad*", as stated in case CAS 2013/A/3274. It is not an "*exception*", but a "*general principle*", which requires that all elements of a case be taken into account, even when not specifically mentioned. As a result, a measure can be considered to be unfair, from a substantive point of view, when it is disproportionate; in the same way, it would be unfair to disqualify results not affected by an anti-doping rule violation;
- ii. as to Article 40.9 of the 2015 IAAF ADR, that the fairness principle had to be introduced in this provision because, an athlete could otherwise be sanctioned automatically for one anti-doping rule violation in three ways: automatic disqualification from the competition in question, period of ineligibility and automatic retroactive disqualification of any results past the collection of the first positive sample. By adding the principle of fairness, an automatic retroactive disqualification can be avoided: it is only fair for everyone if an athlete is disqualified from the competition during which he was under the influence of a prohibited substance or method. However, it would be unfair to the athlete concerned that the automatic and retroactive disqualification apply in any circumstances. In addition, Article 40.1, second paragraph of the 2015 IAAF ADR also allows the results not to be disqualified under certain circumstances, in particular when the results were not influenced by the anti-doping rule violation. Furthermore, it might be unfair to base disqualifications on indirect methods/evidence such as the ABP only. In the case CAS 2010/A/2235, the CAS Panel explained well the problem of using the ABP as the only evidence for the use of prohibited methods or substances: "*Although the provisions as to disqualification are expressly made applicable to violations consisting of use of prohibited method, they are not easy to apply where the proof of such violation is to be found by reference to the ABP. The provisions are geared to the situation where the violation is an occurrence rather than a process, most obviously where the violation is the presence of a prohibited substance*". In summary, Article 40.9 of the 2015 IAAF ADR was modified precisely to mitigate this difficulty and take into account the principle of proportionality and to respect the athlete's personality. As a result, "*the principle of fairness shall not be considered as an exception but as a condition: if fairness does require otherwise, Rule 40.9 of the IAAF Anti-Doping Rules 2015 shall not apply*";
- iii. as to the burden of proof in this respect, that, contrary to the Appellant's position in its appeal brief, the Second Respondent does not bear the burden of proof under Article 40.9 of the 2015 IAAF ADR. Rather, the anti-doping organization that accuses the athlete of doping must prove to the comfortable satisfaction of the Panel that fairness "*does not require otherwise*", i.e. that all competitive results obtained by the athlete from the date of the anti-doping rule violation, through the commencement of the ineligibility period have to be disqualified;

iv. as to the application of the principle of fairness, that:

- the Decision is solely based on the ABP evidence, *i.e.* only on indirect evidence, not considered by all experts as a reliable mean to clearly establish an anti-doping violation. Moreover, the expert reports in which the ABP of the Athlete was analysed are not conclusive as to what specific sample is abnormal and as to whether the Athlete was under the influence of a doping method during the 2011 Rio Maior Meeting and the 2012 Russian Winter Indoor Meeting. The six experts do not all agree regarding what sample should be qualified as abnormal. It is unfair to punish the Second Respondent with an additional sanction if it is not proven that he was under the influence of a prohibited substance or prohibited method during the competition;
- it cannot be forgotten that the Second Respondent was never before found guilty of an anti-doping rule violation and thus that this case is the Second Respondent's first offence;
- the Appellant is "*trying to dramatize*" the case "*by falsely accusing*" the Athlete of prior violations from 2007 onwards. However, the Second Respondent never committed such violations and the Appellant cannot prove these violations (especially because the WADA Athlete Blood Profile Operating Guidelines came into force only on 1 December 2009, so that no anti-doping violation can be, even indirectly, proven prior to this date);
- the Second Respondent has already been punished with severe sanctions having an important impact on his life and career: to impose additional disqualifications is clearly disproportionate and thus unfair;
- the samples were collected between 2009 and 2012 and the competitions at stake took place in 2011 and 2012. Thus, the proceedings have been ongoing for more than six years. The Second Respondent is not responsible for this delay and it would be unfair to sanction him with additional disqualification so late.

### *b.3 The Position of the Third Respondent*

82. In its prayers for relief, the RUSADA requested that the CAS rule as follows:

- i. decision of the RUSADA Commission is upheld;*
- ii. alternatively if the CAS Panel decides that samples 4 and 7 are abnormal Mr Borkin's results on 15 April 2011 and on 8 October 2011 plus an additional period of one month are disqualified;*
- iii. if the decision of the RUSADA Commission is upheld, IAAF reimburses RUSADA all the costs;*
- iv. alternatively ARAF and Mr Valeriy Borkin shall bear all the costs".*

83. According to RUSADA, the disputed questions in this arbitration are:

- i. "who shall prove the principle of "fairness" (the athlete or the RUSADA commission on its own)", and*



ii. *“if there were exceptional circumstances that required application of “fairness” principle in this case”.*

84. Concerning the first point, RUSADA underlines that Article 40.9 of the 2015 IAAF ADR provides no indications as to who bears the burden of proving the applicability of the “fairness principle” in any given case. However, RUSADA refers to the correspondence sent by IAAF in another case (the case of Ms Kotova), in which IAAF would have agreed that the “fairness principle” can be applied at the discretion of the hearing body, without any burden for the athlete to invoke or prove it.
85. Concerning the second point, RUSADA emphasizes that:
  - i. *“taking into consideration that the Athlete was provisionally suspended from 15 October 2012 and later declared ineligible for eight years, disqualification of all results from 14 August 2009 [date of collection of the first abnormal blood sample] means that the Athlete would be actually suspended for eleven years and two months”, a period “significantly longer” than the maximum sanction contemplated for the Athlete under the 2009 IAAF ADR;*
  - ii. the selective disqualification of results decided by the Anti-Doping Committee is fair both for the Athlete and the clean athletes who competed against him, since the results that were achieved by unfair means have been disqualified, while those results that were not affected by the use of prohibited substances or methods have been left untouched;
  - iii. it is not possible to use the data of samples collected in 2007-2009 to claim that the Athlete engaged in a doping scheme over a long period, even before the first sample was entered into his ABP, since:
    - the data from samples collected before 1 December 2009 (when the ABP program became applicable) cannot be used to bring charges and cannot be taken into account due to their questionable scientific reliability, as they were analysed under other laboratory reporting requirements;
    - IAAF did not bring any charge against the Athlete based on those data, and waited for additional tests over several years without proceeding;
    - all the experts involved in the review of the Athlete’s blood values specified the samples and the periods affected by the use of prohibited substances or methods – which means that other samples and periods were within the physiological limits;
  - iv. the decision of the Anti-Doping Committee, not to consider samples 4 and 7 as abnormal, because only those samples so declared by at least five of the six experts involved were considered to be abnormal, was in line with the applicable standard of evidence imposed on the anti-doping organization to establish an anti-doping rule violation, and took into account the severity of the consequences that would have derived for the Athlete, including disqualification of results at major sporting events.

### 3. LEGAL ANALYSIS

#### 3.1 Jurisdiction

86. CAS has jurisdiction according to Article R47 of the Code, under which:

*“an appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement ...”.*

87. More specifically, the jurisdiction of CAS is based on Article 42 of the 2015 IAAF ADR, in force at the time the Decision was rendered and the appeal to CAS was filed, which reads, in the pertinent parts, as follows:

#### **Article 42 – “Appeals”**

##### *Decisions subject to Appeal*

1. *Unless specifically stated otherwise, all decisions made under these Anti-Doping Rules may be appealed in accordance with the provisions set out below. All such decisions shall remain in effect while under appeal unless the appellate body orders otherwise or unless otherwise determined in accordance with these Rules .... Before an appeal is commenced, any post-decision review provided in these Anti-Doping Rules must be exhausted ....*
  - (a) *Scope of Review Not Limited: the scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker.*
  - (b) *CAS Shall Not Defer To The Findings Being Appealed: in making its decision, CAS need not give deference to the discretion exercised by the body whose decision is being appealed. ....*

##### *Appeals from Decisions regarding Anti-Doping Rule Violations or Consequences*

2. *The following is a non-exhaustive list of decisions regarding anti-doping rule violations and Consequences that may be appealed under these Rules: ... a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation; ... a decision failing to impose Consequences for an anti-doping rule violation in accordance with these Rules; ....*

##### *Appeals arising from International Competitions or Involving International-Level Athletes*

3. *In cases arising from an International Competition or involving International-Level Athletes or their Athlete Support Personnel, the first instance decision of the relevant body of the Member shall not be*

*subject to further review at national level and shall be appealed exclusively to CAS in accordance with the provisions set out below.*

#### *Parties Entitled to Appeal*

5. *In any case arising out of an International Competition or involving an International-Level Athlete or his Athlete Support Personnel, the following parties shall have the right to appeal to CAS: ....*
  - (c) *the IAAF; ....*

#### *Time Limits for Filing Appeals to CAS*

15. *Unless stated otherwise in these Rules ..., the appellant shall have forty-five (45) days in which to file his statement of appeal with CAS, such period starting from the day after the date of receipt of the decision to be appealed (or where the IAAF is the prospective appellant, from the day after the date of receipt of both the decision to be appealed and the complete file relating to the decision, in English or French) .... Within fifteen days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within thirty days of receipt of the appeal brief, the respondent shall file his answer with CAS.*

#### *Respondents to the CAS Appeal*

18. *As a general rule, the respondent to a CAS appeal shall be the party which has taken the decision that is subject to appeal. Where the Member has delegated the conduct of a hearing under these Rules to another body, committee or tribunal ..., the respondent to the CAS appeal against such decision shall be the Member.*
19. *Where the IAAF is appellant before CAS, it shall be entitled to join as additional respondent(s) to the appeal such other parties as it deems to be appropriate, including the Athlete, Athlete Support Personnel or other Person or entity that may be affected by the decision.*

#### *The CAS Appeal*

22. *All appeals before CAS shall take the form of a re-hearing and the CAS Panel shall be able to substitute its decision for the decision of the relevant tribunal of the Member or the IAAF where it considers the decision of the relevant tribunal of the Member or the IAAF to be erroneous or procedurally unsound. The CAS Panel may in any case add to or increase the Consequences that were imposed in the contested decision.*
23. *In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence.*
24. *In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise.*

25. *The CAS Panel may in appropriate cases award a party its costs, or a contribution to its costs, incurred in the CAS appeal.*
  26. *The decision of CAS shall be final and binding on all parties, and on all Members, and no right of appeal will lie from the CAS decision. The CAS decision shall have immediate effect and all Members shall take all necessary action to ensure that it is effective”.*
- 
88. The First Respondent and the Third Respondent expressly accepted CAS jurisdiction, by signing the Order of Procedure. On the other hand, the Second Respondent, who had not raised any objection in this respect and had filed his submissions on the merits of the dispute, challenged CAS jurisdiction during the proceedings, when (i) RUSADA announced that it had been suspended by WADA and that it had to stay any anti-doping related activity, and (ii) IAAF suspended ARAF’s status of member federation. More specifically, the Second Respondent invoked the suspension of RUSADA and ARAF to deny CAS jurisdiction because (i) RUSADA and ARAF could not defend the Decision; and (ii) the Second Respondent only agreed to submit to CAS disputes with ARAF and RUSADA, meaning that their absence from the proceedings would affect his consent to arbitrate.
  89. IAAF defined such objection as “*parasitic*”, “*vexatious*”, “*opportunistic*”, corresponding to an “*inappropriate procedural conduct*”. In the Panel’s opinion, this objection is frivolous and must be rejected.
  90. First, the Second Respondent grounded his objection on the impossibility for RUSADA and ARAF to take part in the arbitration and defend the Decision. However, RUSADA and ARAF did take part in the arbitration in defence of the Decision: their position as parties was not under any point of view affected by WADA’s and IAAF’s suspension; no issue was raised as to their ongoing existence as legal entities, with full capacity to act in arbitration proceedings; WADA and IAAF confirmed they could appear as respondents; RUSADA and ARAF accepted CAS jurisdiction and did not raise the objection voiced by the Athlete.
  91. Second, the Second Respondent contended that he only agreed to submit to arbitration disputes with ARAF and RUSADA, meaning that their absence from the proceedings would affect his consent to arbitrate. However, as mentioned, RUSADA and ARAF participated in the arbitration without objecting to CAS jurisdiction. In any case, the Second Respondent’s contention does not correspond to the provisions in the IAAF ADR defining CAS jurisdiction over this arbitration. Under those rules, and specifically pursuant to Article 42.19 of the 2015 IAAF ADR, the Athlete agreed to arbitrate disputes with IAAF, and not with RUSADA and/or ARAF: ARAF was named as a respondent by IAAF in accordance with Article 42.18 of the 2015 IAAF ADR, and RUSADA is not a necessary party in such arbitration.
  92. As a result, the Second Respondent’s objection must be rejected because it is devoid of any merits.

### 3.2 Appeal Proceedings

93. As these proceedings involve an appeal against a decision rendered by RUSADA, brought on the basis of provisions contained in the statutes of an international federation, they are considered and treated as appeal arbitration proceedings in a disciplinary case heard by a national anti-doping organization, within the meaning and for purposes of the Code.

### 3.3 Admissibility

94. The statement of appeal was filed within the deadline set in Article 42.15 of the 2015 IAAF ADR, counted from the day of receipt by IAAF of the Decision. Accordingly, the appeal is admissible.

### 3.4 Scope of the Panel's Review

95. According to Article R57 of the Code,

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

96. Article 42.15 of the 2015 IAAF ADR confirms in that regard that:

*“All appeals before CAS shall take the form of a re-hearing and the CAS Panel shall be able to substitute its decision for the decision of the relevant tribunal of the Member or the IAAF where it considers the decision of the relevant tribunal of the Member or the IAAF to be erroneous or procedurally unsound. The CAS Panel may in any case add to or increase the Consequences that were imposed in the contested decision”.*

### 3.5 Applicable Law

97. The law applicable in the present arbitration is identified by the Panel in accordance with Article R58 of the Code.

98. Pursuant to Article R58 of the Code, the Panel is required to 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

99. Pursuant to Article 42.23 of the 2015 IAAF ADR (and to Article 42.22 of the 2009 IAAF ADR):

*“In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence”.*

100. In accordance, then, with Article 42.23 of the 2015 IAAF ADR (and to Article 42.22 of the 2009 IAAF ADR):

*“In all CAS appeals involving the IAAF, the governing law shall be Monegasque law”.*

101. As a result, pursuant to Article R58 of the Code, this Panel will apply primarily the IAAF rules and regulations, and subsidiarily Monegasque law.

102. The IAAF provisions set by the IAAF ADR which are relevant in this arbitration include the following:

- i. from the 2009 IAAF ADR:

**Article 40.9** – *“Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation”*

*“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”;*

- ii. from the 2015 IAAF ADR:

**Article 40.9** – *“Disqualification of Individual Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation”*

*“In addition to the automatic Disqualification of the Athlete’s individual results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained by the Athlete 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, unless fairness requires otherwise, 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”.*

### 3.6 The Dispute

103. The object of the dispute, as already underlined, is the portion of the Decision (point 3) which, *“pursuant to the Art. 40.9”* of the 2015 IAAF ADR *“and taking into account fairness and proportionality”*, disqualified the competitive results of the Athlete in three different periods (14 April 2009 – 15 September 2009, 16 June 2011 – 27 September 2011, and 11 April 2012 – 3 September 2012), corresponding to periods starting one month before and ending one month after the date of collection of those samples entered into the Athlete’s ABP that the Anti-Doping Committee conclusively found to be abnormal, *i.e.* samples 1 and 2 of 14 and 15 August 2009, samples 5 and 6 of 16 July 2011 and 27 August 2011, samples 10 and 11 of 11 May 2012 and 3 August

2012. IAAF challenges this “selective” disqualification of results, submitting, in its primary claim, that all results achieved by the Athlete from the date of his first abnormal sample (14 August 2009) to the date he accepted a provisional suspension (15 October 2012) must be disqualified, including those obtained in the 20Km walk competition on 5 April 2011 at the 2011 Rio Maior Meeting (where the Athlete ranked first) and on 5 February 2012 at the 2012 Russian Winter Indoor Meeting (where the Athlete won the 50Km race walk competition).

104. The other portions of the Decision, whereby the Athlete was found guilty of an anti-doping rule violation on the basis of the 2009 IAAF ADR (point 1) and was declared ineligible for a period of 8 years (point 2), remain unchallenged, and are therefore final.
105. As a result, the main issue that this Panel has to decide is whether the Decision was correct in disqualifying only some of the results achieved by the Athlete in the period following the date on which the anti-doping rule violation was found to have been committed and the beginning of the period of (provisional) suspension/ineligibility. In this connection, the parties brought some other incidental issues to the attention of the Panel during the course of the arbitration: *inter alia*, the identification of the rules which have to be applied, and, if relevant, the meaning and conditions of application of the “fairness exception” mentioned at Article 40.9 of the 2015 IAAF ADR.
106. In this context, the Second Respondent took issue with the use of the ABP as a method for identifying anti-doping rule violations. Contrary to the Appellant’s objections, the Panel considers that this issue is relevant even though this arbitration concerns only the disqualification of results and not the unchallenged and therefore final finding of an anti-doping rule violation, which was based on the abnormal profile shown by the Athlete’s ABP. Indeed, consistent with the Decision’s approach, which the Second Respondent defends and wishes to be confirmed, the criticism as to the reliability of the ABP can be understood as aiming to show that insufficient evidence has been submitted to prove that some of the samples included in the ABP of the Athlete are abnormal, and therefore to allow the conclusion, from the Athlete’s perspective, that they should not be taken into account when determining whether the results achieved in the period surrounding those disputed samples have to be disqualified. In the same way, the Second Respondent appears to invoke the alleged unreliability of the ABP method as a factor to be taken into account when assessing, in general terms, the “fairness” of the disqualification (or of the non-disqualification) of results. In such regard (but only within those limits), the Athlete’s submissions are admissible and relevant: on the other hand, they would not be (and indeed are not) admissible to the extent they were (or are) intended to dispute the foundation of those points of the Decision which are final. By not challenging (and indeed by defending) the Decision, the Athlete accepts the conclusion that his ABP gave sufficient evidence, at least with respect to some of the samples, to ground the conclusion that he committed an anti-doping rule violation.
107. At the same time, but conversely, the Panel notes that no other procedural issues remain to be addressed, except for confirming and explaining some directions issued in the course of the proceedings. The Second Respondent, who quite strongly criticized the Panel, for instance, with respect to the hearing of the expert witnesses, in the end waived his objections, recognizing (at

least in this regard) that his right to be heard and to be treated equally had been respected.

108. The Panel, therefore, can turn to the examination of the main issue that has to be decided: was the Decision correct in the portion in which it disqualified only some, and not all, of the results achieved by the Athlete after the date of commission of the anti-doping rule violation for which he was found guilty?
109. As said, in order to answer such question, the Panel was requested to identify, first, the rules which apply for a decision on the disqualification of the Athlete's results. The IAAF ADR have evolved over the years: at the time the anti-doping rule violation was committed (*i.e.*, in the period covered by the Athlete's ABP: July 2010 – October 2012), the 2009 IAAF ADR were in force<sup>11</sup>; when the Decision was adopted (on 20 January 2015), the 2015 IAAF ADR had become applicable.
110. Taking into account such evolution, and as already underlined, the Anti-Doping Committee decided to apply (i) the 2009 IAAF ADR, defined to be the "Old Rules", to the issue of liability (finding of an anti-doping rule violation) and to the determination of one of the consequences of the established liability (ineligibility period), and (ii) the 2015 IAAF ADR, defined to be the "New Rules", to another consequence of the same finding (disqualification of results). Such peculiar conclusion was reached by invoking the "*tempus regit actum*" principle to justify the application of the 2009 IAAF ADR, and the "*lex mitior*" principle to explain the application of the 2015 IAAF ADR. Article 40.9 of the latter, while providing for the disqualification of results (in the same way as Article 40.9 of the 2009 IAAF ADR), allows, unlike the former, the non-disqualification for reasons of "fairness". The most recent version of the IAAF ADR was thus considered to be more favourable to the Athlete, and was consequently applied as "*lex mitior*". The Anti-Doping Committee therefore found *ex officio* the existence of reasons of "fairness" to disqualify only some of the Athlete's results; with the consequence that the results achieved by the Athlete at the 2011 World Championships and at the 2012 Olympic Games were left untouched.
111. The Appellant disputes this approach. Even though it had accepted in its written submissions that the issue of the disqualification of the Athlete's results should be governed by the 2015 IAAF ADR, the Appellant took issue on this point, at the hearing, clarifying that precedents of the European Court of Human Rights and of the Swiss Federal Tribunal indicate that the "*lex mitior*" principle was improperly applied. The Appellant argued that the hearing body cannot undertake a rule-by-rule comparison of the two systems (the 2009 IAAF ADR and the 2015 IAAF ADR), picking the most favourable rule of each system, because it would thereby create a new *ad hoc* disciplinary regime composed of a miscellany of rules deriving from different systems. The Appellant added that the Anti-Doping Committee should have, and the CAS now must, apply whichever of the 2009 or the 2015 system is most favourable for the accused, without picking individual provisions from each. The Decision is wrong because it mixed provisions from both the 2009 and 2015 system. However, the Appellant concedes that the

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<sup>11</sup> See the preceding footnote 10: the reference to the 2009 IAAF ADR is intended to cover also those editions of the IAAF ADR which followed them and preceded the 2015 IAAF ADR.



measure of the ineligibility period applied by the Anti-Doping Committee, on the basis of the rules in force at the time the anti-doping rule violation (*i.e.*, the 2009 IAAF ADR), is consistent also with a global reference to the 2015 IAAF ADR for the definition of all consequences to be derived from the Athlete's anti-doping rule violation, including the disqualification of results. Therefore, the Appellant concedes that the "fairness exception" contained in the 2015 IAAF ADR, globally more favourable to the Athlete, could apply *in abstracto*, even if it should not in the specific circumstances.

112. The Respondents did not raise any objection to the admissibility of the Appellant's submission of this new line of reasoning, simply insisting that the "fairness exception" should apply also in the context of the 2009 IAAF ADR, because it is a general principle enshrined also in that edition of the IAAF ADR, and expressed in the WADC.
113. The Panel notes that it is undisputed that the 2009 IAAF ADR govern the issue of the commission by the Athlete of an anti-doping rule violation and were applied to the determination of the corresponding ineligibility period. This point was finally settled by the Decision, which was not challenged in this respect. It is therefore accepted that the 2009 IAAF ADR (and not the 2015 IAAF ADR) provide the overall legal framework to judge on the Athlete's anti-doping rule violation and its consequences.
114. On such basis, the application of the 2009 IAAF ADR would in principle also imply the applicability of Article 40.9 of the 2009 IAAF ADR, which does not provide for a "fairness exception". However, the question before the Panel is whether the "fairness exception" (within the meaning to be further specified) is also to be read into the 2009 IAAF ADR, as a general principle, or by reference to Article 40.9 of the 2015 IAAF ADR, pursuant to the "*lex mitior*" principle.
115. The Panel sees the force of the IAAF argument that specific rules cannot be picked from different systems. The *lex mitior* principle prevents the continued applicability of a disciplinary rule after it has been replaced by a more lenient one, and reflects, in favour of the accused, the evolution of a legislative policy, which translates into rules the opinion that the same infringement is less severe than it was previously perceived. However, this principle cannot be applied in a way that creates a law that never existed, composed of a mixture of old and new rules and upsetting the rationale of both systems.
116. At the same time, the Panel, even though it remains unpersuaded, cannot exclude as *prima facie* misplaced the Respondents' arguments regarding the possibility of applying a general principle of "fairness" in deciding whether some results are to be left untouched, even in the absence of an explicit rule to this effect in the 2009 IAAF ADR.
117. However, the Panel does not find it necessary to draw a conclusion on the issue of whether a "fairness exception" should be read as included in the 2009 IAAF ADR or has to be applied as a result of a reference to the 2015 IAAF ADR. Even assuming it does, the Panel would reach the same conclusion that it should not apply here, because the Panel cannot see any factors justifying a deviation from the rule of automatic disqualification set by Article 40.9 of the 2009

IAAF ADR and of the 2015 IAAF ADR.

118. In both versions, the finding of an anti-doping rule violation triggers the disqualification (i) of the results achieved in the competition which produced a positive sample, and (ii) of all other competitive results obtained in the period between (a) the date of the positive sample's collection, or of the other anti-doping rule violation, and (b) the date of commencement of the ineligibility (or provisional suspension). The version of Article 40.9 of the 2015 IAAF ADR makes clear that, while the disqualification of the results achieved at the competition which produced the positive sample is automatic and unavoidable, the disqualification of the competitive results obtained in the subsequent period applies "*unless fairness requires otherwise*", i.e. unless it is fair not to disqualify them. In other words, "fairness" should be found in order not to disqualify the results. It is therefore an exception to the general disqualification rule. In light of the provision's clear wording, the Panel therefore disagrees with the Respondents' submissions that "fairness" is a precondition to the disqualification of a result.
119. The findings (undisputed in this arbitration, and indeed never contested also before the Anti-Doping Committee) that the Second Respondent is responsible for an anti-doping rule violation (identified through the examination of his ABP) and that his anti-doping rule violation can be set (as mentioned in the Decision) at the date of the collection of sample 1 in his ABP (and therefore on 14 August 2009) thus mean that his competitive results obtained in the period between 14 August 2009 and 15 October 2010 (date on which he accepted the provisional suspension) must be disqualified, unless fairness requires otherwise.
120. The Panel finds that no reasons of fairness exist in this case that could justify mitigating the effects of Article 40.9 of the 2009 IAAF ADR. This conclusion applies irrespective of the discussion between the parties as to whether the anti-doping organization or the athlete bears the burden of proving whether it is fair to disqualify the results in question.
121. As a preliminary matter, the Panel notes that "fairness" is a broad concept (CAS 2013/A/3274, para. 85), covering a number of elements that the deciding body can take into account in its decision not to disqualify some results. The CAS precedents (in general terms, *inter alia*, CAS 2007/A/1283, para. 53; CAS 2013/A/3274, para. 85-88) took into account a number of factors, such as the nature and severity of the infringement (CAS 2010/A/2083, para. 81), the length of time between the anti-doping rule violation, the result to be disqualified and the disciplinary decision, the presence of negative tests between the anti-doping rule violation and the competition at which the result to be disqualified was achieved, and the effect of the infringement on the result at stake (CAS 2008/A/1744, para. 76; CAS 2007/A/1362 & 1393, para 7.22). The Panel underlines that no single element is decisive alone: an overall evaluation of them is necessary.
122. In that regard, and bearing in mind the submissions of the parties:
  - i. as to the characteristics of the anti-doping rule violation, the Panel notes that the Athlete engaged in continuous, intentional and severe violations of the anti-doping regulations. The point, indeed, is confirmed by the unchallenged findings in the Decision, which held

six of the eleven samples of the Athlete's ABP to be abnormal and set a long ineligibility period on the basis of aggravating circumstances. In the same vein, the Panel is comforted by the opinion of the IAAF experts filed in the course of this arbitration<sup>12</sup>, only marginally and "hypothetically" challenged by the Respondents' experts. As it has been underlined, the Athlete's ABP shows several abnormalities indicating that the Athlete was engaged in blood doping cycles at least in 2009, 2011 and 2012. More specifically, the Panel notes, on the basis of the expert reports reviewed, that samples 4 and 7 have to be considered as abnormal, in addition to those mentioned in the Decision. In particular, sample 4 (characterized by a high OFF score, caused by high HGB and low RET% values) shows an erythropoietic suppression phase, while sample 7 (marked by a low OFF score 2 caused by the high RET% count) indicates a stimulation phase<sup>13</sup>. In other words, the Athlete's case is not the "unfortunate" case of an athlete, who inadvertently ingested a contaminated product, or of an athlete whose degree of fault is light, or even of a cheater on a single occasion, but of an athlete, who put in place a careful scheme to avoid detection of the prohibited substances or methods he was using, but still gain the advantage of his unlawful practice<sup>14</sup>. At the same time, the gravity of the Athlete's anti-doping rule violation is accentuated by the fact that this is the second infringement for which the Athlete is found responsible;

- ii. as to the effects of the infringements on the results at stake, the Panel is convinced by the Appellant's submissions, based on the expert reports, that blood doping, in the way it was conducted by the Athlete, was intended to have, and actually had, long-lasting effects, as *inter alia* it improved the Athlete's capacity to train, for, otherwise, the Athlete's use of a prohibited method or of a prohibited substance chiefly in pre-competition periods would be substantially devoid of purpose. Therefore, the raising of doubts by the Respondents as to the abnormality of the analytical results of some of the samples in the Athlete's ABP does not mean that at the time those samples were collected the Athlete was not "benefiting" from the effects of blood doping evidenced by abnormal samples. It cannot therefore be maintained that some of the competitions in the period following (or comprised within) the various cycles of blood manipulation were not affected by the Athlete's doping practices;
- iii. as to the principle applied in the case CAS 2010/A/2235, the Panel remarks that the CAS Panel in that case, unlike the Anti-Doping Committee, disqualified all results in the period between the first and the last abnormal sample and considered, in applying the fairness

<sup>12</sup> The Panel remarks indeed the experience and expertise of the Appellants' experts, and, as the most important element, the weight of published literature which supported their opinions.

<sup>13</sup> The Panel in that regard understands, in fact, that (as explained by the experts heard at the hearing and underlined also in the case CAS 2010/A/2235, para 100) blood withdrawal produces lower than normal hemoglobin (HGB, measured by its weight in a given quantity of blood) and higher than normal percentage of reticulocytes in blood (RET%), since the bone marrow responds to blood loss by releasing a higher number of "young" blood cells. The reverse happens post EPO-stimulation, which produces an heritropoyetic suppression, *i.e.* an inhibition in the physiological process which produces red blood cells.

<sup>14</sup> Note that in CAS 2013/A/3274, to which the Second Respondent refers, a negative test and the light degree of fault were decisive elements for the Sole Arbitrator not to disqualify the results: para. 89 of the award of 31 January 2014.

exception, that it was unlikely that the results outside this period had been affected by the athlete's anti-doping violation. In the Athlete's case, the Panel considers that the Athlete's repeated violations of the anti-doping regulations over a long period of time make it impossible to exclude, in "fairness", some results, and chiefly the result obtained at the 2011 Rio Maior Meeting and at the 2012 Russian Winter Indoor Meeting, from disqualification;

- iv. as to the length of time between the anti-doping rule violation, the result to be disqualified and the starting date of the ineligibility period, the Panel underlines that such factor does not justify application of the "fairness exception". Indeed, the most recent "doping cycle" evidenced by the ABP took place in 2012, at the Olympic Games, only a few months before the day on which the Athlete's provisional suspension commenced;
- v. as to the absence of positive tests and the method applied to evaluate the samples provided by the Athlete to find an anti-doping rule violation, the Panel notes that the ABP profile has been validated in a long line of CAS cases (see *inter alia*: CAS 2010/A/2174; TAS 2010/A/2178; CAS 2010/A/2308 & 2335; CAS 2012/A/2773; as well as CAS 2010/A/2235) as a reliable means to detect blood doping, even in the absence of positive tests, through the identification of abnormal values calling for an explanation by the athlete in question. Even the Vorobiov Opinion, confirmed at the hearing by Professor Vorobiov himself, supports this conclusion. In addition, the Decision, unchallenged on this point, found the commission of repeated anti-doping rule violations based on the ABP evidence and the Athlete's failure to provide explanations regarding the abnormal values. In any case, the Panel is not persuaded by the literature invoked by the Second Respondent to cast doubts on the reliability of the ABP program. The Panel remarks that such literature dates back from some years ago and deals more with legal than scientific issues, and is therefore more than comfortably satisfied that the finding of an anti-doping rule violation based on the review of the Athlete's ABP does not constitute a ground not to disqualify (for reasons of "fairness") the results he obtained following his anti-doping rule violation;
- vi. as to the principle of proportionality, the Panel finds that, contrary to the Respondents' contention, it requires the retroactive disqualification of results, rather than the opposite. The principle of proportionality implies that there must be a reasonable balance between the kind of misconduct and the sanction, and in particular that (i) the measure taken by the governing body can achieve the envisaged goal, (ii) the measure taken by the governing body is necessary to reach the envisaged goal, and (iii) the constraints on the affected person resulting from the measure are justified by the overall interest of achieving the envisaged goal. In other words, to be proportionate, a measure must not exceed what is reasonably required in the search for a legitimate objective (CAS 2005/C/976 & 986, §§ 139-140, citing CAS precedents, legal doctrine and Swiss jurisprudence). In this respect, the Panel notes that:
  - the purpose of disqualification in the Athlete's case is *inter alia* to prevent him from gaining the advantage sought by his intentional, continued and severe doping violations over other competitors, who competed without doping;

- the measure of disqualification is certainly capable of achieving the envisaged goal, since it implies the cancellation of the results obtained;
- the measure of disqualification is necessary to reach the envisaged goal, because the Athlete, who cheated in the preparation of a given competition, would otherwise keep the benefits of the results achieved to the detriment of clean competitors, and
- the constraints on the Athlete are justified by the overall interest of achieving the envisaged goal.

123. In light of the foregoing and of an overall evaluation of all relevant elements, the Panel concludes that all competitive results obtained by the Athlete from the date of first commission of the anti-doping rule violation (14 August 2009) through to the commencement of his provisional suspension (15 October 2012) must be disqualified, with all resulting consequences in accordance with Article 40.9 of the 2009 IAAF Rules. No reasons of fairness can be found not to disqualify them.

### **3.7 Conclusion**

124. In light of the foregoing, the Panel unanimously holds that the appeal brought by IAAF is to be allowed and all competitive results obtained by the Athlete from 14 August 2009 to 15 October 2012 are disqualified, with all resulting consequences in accordance with Article 40.9 of the 2009 IAAF Rules. Point 3 of the Decision is modified accordingly.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed on 25 March 2015 by the International Association of Athletics Federations (IAAF) against the decision issued on 20 January 2015 by the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Agency is granted.
  2. Point 3 of the decision issued on 20 January 2015 by the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Agency is partially modified.
  3. All competitive results obtained by Mr Valeriy Borkin from 14 August 2009 to 15 October 2012 are disqualified, with all resulting consequences in accordance with Article 40.9 of the 2015 IAAF Rules.
- (...)
7. All other motions or prayers for relief are dismissed.