



**Arbitration CAS 2016/O/4469 International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Tatyana Chernova, award of 29 November 2016**

Panel: Prof. Michael Geistlinger (Austria), Sole Arbitrator

*Athletics (middle distance)*

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

*CAS Jurisdiction according to Article 38.3 IAAF Competition Rules*

*Version of the regulations applicable*

*ABP finding as single anti-doping rule violation*

*Prerequisites to disregard sample from ABP profile*

*Prerequisites to add samples to ABP profile*

*Establishment of an anti-doping rule violation by means of an ABP*

*Disqualification of results in case of a violation found by reference to the ABP*

*Application of the principle of proportionality with regard to disqualification of results*

*Purpose of disqualification of results*

- 1. In circumstances where an IAAF member federation is prevented from convening and completing a hearing within the deadline set by Rule 38.3 of the IAAF Competition Rules (the "IAAF Rules"), e.g. because it is suspended from IAAF activities, the IAAF is permitted to refer the matter directly to a sole arbitrator appointed by CAS, subject to an appeal to CAS in accordance with Rule 42 of the IAAF Rules. In case of such referral it is Rule 38.3 of the IAAF Rules that establishes the jurisdiction of CAS.**
- 2. Pursuant to the legal principle of *tempus regit actum*, procedural matters of a case are governed by the regulations in force at the time of the procedural act in question. Conversely the substantive aspects of an alleged anti-doping rule violation shall be governed by the version of the applicable rules that have been in force at the time of the alleged violation unless the rules applicable at that time contain a *lex mitior* rule and the application of this leads to the applicability of another version of the respective rules in the specific case.**
- 3. An ABP finding of an anti-doping rule violation is not to be considered as a multiple violation under Rule 40.8(e) of the 2016-2017 IAAF Rules but rather as a single anti-doping rule violation, established on the basis of a set of different samples collected at different times, places and occasions. This follows clearly from the concept and the wording of the WADA ABP Operating Guidelines, which provide at the end of Article 5 of Annex E that in case of confirmation of an Adverse Passport Finding by unanimous decision of the Expert Panel an Anti-Doping Organisation (ADO) has the obligation to advise the athlete and WADA that it is considering the assertion of "an anti-doping rule violation (ADRV)" against the athlete. *I.e.* the wording speaks of an ADRV established by the ABP as a whole and embraces a multitude of anti-doping rule violations**

documented by the ABP.

4. In order to successfully argue that a sample which has been taken on the day prior to another sample for which the athlete has been charged with and sanctioned for an anti-doping rule violation, is to be excluded from his ABP because it has been caused by the same source as the sample that lead to the sanction for the positive anti-doping finding, the athlete has to adduce evidence supporting the allegation of the same source. Only if the athlete succeeds to establish the above can it be concluded that there is only one anti-doping rule violation with the consequence that the sample in question has to be excluded from the athlete's ABP.
5. Samples voluntarily provided by an athlete can only be added to his ABP if the athlete proves under which circumstances the samples were taken from him and that such processes complied with the applicable standards.
6. Abnormal values in the ABP of an athlete for which he cannot provide a credible explanation do not on their own allow the conclusion that an anti-doping rule violation has been committed. Rather, the deviations in the ABP are to be interpreted by experts, called to examine various hypothesis that could explain the abnormality in the profile values; *i.e.* a distinction is made between a "quantitative" and a "qualitative" assessment of the evidence. Specifically, the inference to be drawn from abnormal blood values is enhanced where the ascertainment of such values occurs at a time when the athlete in question could benefit from blood manipulation, *i.e.* if the levels coincidence with the athlete's racing schedule. In conclusion, to find that an athlete has committed an anti-doping rule violation the panel needs to be convinced that the abnormal values are caused by a "doping scenario", which does not necessarily derive from the quantitative information provided by the ABP, but rather from a qualitative interpretation of the experts and possible further evidence.
7. Although the provisions of the IAAF Rules regarding disqualification of results are expressly made applicable to violations consisting of use of a 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. However, even if the violation is found by reference to the ABP, the respective case falls under Rule 40 of the IAAF Rules and, as a consequence, the athlete's competitive results are nevertheless subject to disqualification.
8. The 2016-2017 IAAF Rules regarding disqualification of results (Rule 40.9) differ from the 2012-2013 IAAF Rules (Rule 40.8) as the former regulations include a fairness exception ("unless fairness requires otherwise"), whereas the latter – read literally – do not. Considering however that Article 10.8 of the WADA Code 2009 included the fairness exception, that this provision was part of the obligatory commitment of the IAAF as signatory to the WADA Code according to Article 23.2.2 WADA Code and that the IAAF was not allowed to include any substantial change to this provision, the fairness

exception has to be read into Rule 40.8 2012-2013 IAAF Rules, read together with Articles 10.8 and 23.2.2 WADA Code.

9. Taking into account that the sanction of disqualification of results embraces the forfeiture of any titles, awards, medals, points and prize and appearance money, it is to be held equal to a retroactive imposition of a period of ineligibility and, thus, is a severe measure. The athlete loses all income from sport and, even more, has to return income achieved. However, not to disqualify results that have been achieved by using a prohibited substance or prohibited method cannot be considered as fair with regard to other athletes that competed against the athlete during this period. The main purpose of disqualification of results is not to punish the transgressor, but rather to correct any unfair advantage and remove any tainted performances from the record.

## I. PARTIES

1. The International Association of Athletics Federations (the “Claimant” or the “IAAF”) is the world governing body for the sport of Athletics, established for an indefinite period with legal status as an association under the laws of Monaco. The IAAF has its registered seat in Monaco.
2. The All Russia Athletics Federations (the “First Respondent” or the “ARAF”) is the national governing body for the sport of Athletics in the Russian Federation, with its registered seat in Moscow, Russian Federation. The ARAF is a member federation of the IAAF, currently suspended from membership.
3. Ms Tatyana Chernova (the “Second Respondent” or the “Athlete”) is a Russian athlete specialising in heptathlon, in which discipline she won bronze medals at the 2008 Olympic Games in Beijing and the 2012 Olympic Games in London and a gold medal at the 2011 IAAF World Championships in Daegu. The Athlete is an International-Level Athlete for the purposes of the IAAF Competition Rules (the “IAAF Rules”).

## II. FACTUAL BACKGROUND

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

5. The Athlete has been charged with violating Rule 32.2(b) of the IAAF Rules: *“Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method”*.
6. The evidence of the Athlete’s alleged anti-doping rule violation in the matter at hand is based on a longitudinal analysis of her Athlete Biological Passport (the “ABP”) and allegedly involves prohibited blood doping during the period between August 2009 and November 2014.
7. From 14 August 2009 to 13 November 2014, the IAAF collected 19 ABP blood samples from the Athlete. Each of the samples was analysed by a laboratory accredited by the World Anti-Doping Agency (“WADA”) and logged in the Anti-Doping Administration & Management System (“ADAMS”) using the Adaptive Model, a statistical model that calculates whether the reported HGB (haemoglobin concentration), RET% (percentage of immature red blood cells – reticulocytes) and OFF-score (a combination of HGB and RET%) values fall within an athlete’s expected distribution.
8. The registered values for HGB, RET% and OFF-score in the Athlete’s respective samples are as follows:

No.	Date of Sample	HGB (g/dL)	RET%	OFF-score
1.	14 August 2009	15.80	0.27	126.80
2.	10 March 2010	16.30	0.84	108.00
3.	27 July 2010	13.90	0.63	91.38
4.	26 February 2011	13.10	0.84	76.00
5.	25 May 2011	14.30	0.88	86.70
6.	18 July 2011	14.80	0.91	90.80
7.	28 August 2011	15.40	0.61	107.10
8.	28 December 2011	15.20	0.54	107.90
9.	24 February 2012	14.10	0.62	93.80
10.	8 March 2012	14.50	1.33	75.80
11.	15 May 2012	14.50	0.64	97.00
12.	24 May 2012	13.50	0.80	81.30
13.	2 August 2012	15.10	0.72	100.10
14.	12 December 2012	13.50	0.88	78.70
15.	23 January 2013	14.40	0.70	93.80
16.	18 March 2013	13.80	0.80	84.30
17.	16 May 2013	14.40	0.45	103.80
18.	8 July 2013	15.90	0.93	101.10
19.	13 November 2014	13.70	0.98	77.60

**A. Proceedings in respect of the Athlete’s positive test for oral turinabol**

9. Further to a retesting in 2013, the urine sample provided by the Athlete on 15 August 2009 on the occasion of the 2009 IAAF World Championships in Berlin tested positive for the anabolic steroid known as dehydrochloromethyltestosterone (“oral turinabol”).

10. On 20 January 2015, the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Authority (“RUSADA Disciplinary Committee”) found the Athlete to be guilty of an anti-doping rule violation and imposed an ineligibility period of 2 years on the athlete from 22 July 2013 to 21 July 2015 and disqualification of her results from 15 August 2009 until 14 August 2011.
11. On 24 April 2015, the IAAF filed an appeal against the decision of the RUSADA Disciplinary Committee with the Court of Arbitration for Sport (the “CAS”), seeking an increased sanction and the disqualification of further results. This matter is currently still pending before CAS with the reference number CAS 2015/A/4050. Such proceedings are however suspended upon the request of the IAAF, as the outcome would apparently potentially be affected by the relief sought in the present case.

**B. Proceedings in respect of a longitudinal analysis of the Athlete’s ABP**

12. On 7, 9 and 17 April 2015, three experts with knowledge in the field of clinical haematology (diagnosis of blood pathological conditions), laboratory medicine and haematology (assessment of quality control data, analytical and biological variability and instrument calibration), sports medicine and exercise physiology: Prof. Giuseppe d’Onofrio, Prof. Michel Audran and Dr. Yorck Olaf Schumacher (the “Expert Panel”) analysed the Athlete’s ABP profile on an anonymous basis and concluded independent from each other that *“it is highly unlikely that the longitudinal profile is the result of a normal physiological or pathological condition and may be the result of the use of a prohibited substance or prohibited method”*.
13. On 24 April 2015, the IAAF Anti-Doping Administrator informed the ARAF that the IAAF was considering bringing charges against the Athlete on the basis of her ABP but that such charges would not be brought until she had been given the opportunity to provide an explanation for the alleged abnormalities, which the Athlete however failed to do.
14. On 17 August 2015, notwithstanding the lack of any haematological explanation from the Athlete to explain her alleged atypical profile within the deadline granted and upon the request of the IAAF, the Expert Panel issued a joint expert opinion (the “Joint Expert Opinion”), concluding that *“it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause”*.
15. On 24 September 2015, the IAAF received a document from the Athlete’s former representative, which sought to challenge the integrity and reliability of certain samples forming part of the Athlete’s ABP (*i.e.* Samples no. 1, 2 and 7).
16. On 21 October 2015, the IAAF provided RUSADA with a response to the Athlete’s letter authored by Dr. Neil Robinson of the WADA-accredited Swiss Laboratory for Doping Analyses (the “Neil Robinson Response”). The Neil Robinson Response dismissed each of the alleged issues raised in the Athlete’s letter dated 24 September 2015.
17. On 5 February 2016, the IAAF notified ARAF of an alleged anti-doping rule violation of the Athlete on the basis of the ABP profile, her immediate provisional suspension and her right to

request a hearing. The IAAF informed the Athlete that ARAF's membership had been suspended, that it took over the responsibility for coordinating the disciplinary proceedings and that her case would be referred to CAS. The Athlete was offered to choose between the following two procedures:

*“Before a Sole Arbitrator of the CAS sitting as a first instance hearing panel pursuant to IAAF Rule 38.3. The case will be prosecuted by the IAAF and the decision will be subject to an appeal to CAS in accordance with IAAF Rule 42; or*

*Before a CAS Panel as a single hearing, with the agreement of WADA and any other anti-doping organisations with a right of appeal, in accordance with IAAF Rule 38.19. The decision rendered will not be subject to an appeal (save to the Swiss Federal Tribunal)”.*

18. Furthermore, the Athlete was informed by the IAAF that (i) if she chose to proceed under Rule 38.3 of the IAAF Rules, the IAAF would seek the suspension of the proceedings in CAS 2015/A/4050 until the final resolution of the present proceedings and (ii) if she chose to proceed under Rule 38.19 of the IAAF Rules, the IAAF would seek to either consolidate the two cases or at least refer them to the same panel for adjudication.
19. On 19 February 2016, the Athlete's former representative informed the IAAF that *“the Athlete requests a hearing, as per IAAF Rule 38.2, according to the requirements of the Code of Sports-related Arbitration (CAS) because the Athlete denies the accusation presented in terms of the [ABP]”.*

### III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 23 February 2016, the IAAF lodged a Request for Arbitration with CAS in accordance with Article R38 of the CAS Code of Sports-related Arbitration (2016 edition) (the “CAS Code”). The IAAF informed CAS that its Request for Arbitration was to be considered as its Statement of Appeal and Appeal Brief and requested the matter to be submitted to a sole arbitrator. This document contained a statement of the facts and legal arguments and included the following requests for relief:

- (i) *“CAS has jurisdiction to decide on the subject matter of this dispute.*
- (ii) *The Request for Arbitration of the IAAF is admissible.*
- (iii) *The Athlete be found guilty of an anti-doping rule violation in accordance with Rule 32.2(b) of the IAAF Rules.*
- (iv) *A period of ineligibility of between two and four years be imposed upon the Athlete, commencing on the date of the (final) CAS Award.*
- (v) *The two year period of ineligibility served by the Athlete pursuant to the decision of the RUSADA Committee dated 20 January 2015 be credited against the period of ineligibility imposed pursuant to request (iv) above.*

- (vi) *Any period of provisional suspension effectively served by the Athlete before the entry into force of the CAS award shall be credited against the total period of ineligibility imposed pursuant to request (iv) above.*
  - (vii) *All competitive results obtained by the Athlete from 14 August 2009 through to the commencement of her provisional suspension on until 5 February 2016, shall be disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money).*
  - (viii) *Any arbitration costs be borne entirely by the Respondents.*
  - (ix) *The IAAF is awarded a significant contribution to its legal costs”.*
21. On 25 February 2016, the CAS Court Office initiated the present arbitration and specified that, as requested by the Claimant, it had been assigned to the CAS Ordinary Arbitration Division but would be dealt with according to the Appeals Arbitration Division rules. The Respondents were further invited to submit their Answer within 30 days
22. On 24 March 2016, upon the request of the Athlete, the CAS Court Office provided the parties with the CAS Award in CAS 2013/A/3080, not then available on the CAS website. The CAS Court Office also informed the parties that the other CAS Award requested (CAS 2014/A/3561 & 3614) could not be forwarded as the parties had not yet lifted its confidentiality.
23. On 31 March 2016, the ARAF requested the IAAF, via the CAS Court Office, to clarify why the ARAF was involved in this case as a respondent, not as a witness, and what types of relief are sought by the IAAF against the ARAF.
24. On 1 April 2016, the Athlete filed her Answer in accordance with Article R55 of the CAS Code. The Athlete submitted the following requests for relief:
- I. *“Dismiss the requests for relief of IAAF:*
    - I.I. *This arbitration process in CAS does not fulfil the requirements of fair trial. The arbitration is not impartial and does not fulfil the requirements of equality of arms.*
    - I.II. *The Appeal of IAAF shall be rejected as inadmissible because of lack of jurisdiction.*
    - I.III. *The Appeal of IAAF shall be rejected as inadmissible because no anti-doping violation has occurred during 2011 – 2015.*
  - II. *If, against the Respondent’s view, the Appeal of IAAF is admissible, it shall be confirmed that the sanction of ineligibility period has already been served entirely by Ms. Chernova and there are no grounds for disqualification of further results and other merits.*
  - III. *Arbitration costs be borne entirely on the Appellant. In any case Ms. Chernova should be relieved for paying any legal costs.*
  - IV. *IAAF must be obligated to compensate Tatyana Chernova legal costs for the full amount. CAS shall be informed of the amount in due time”.*
25. On 11 April 2016, the IAAF informed the CAS Court Office that CAS is effectively acting as a substitute for the ARAF because of the ARAF’s inability to conduct disciplinary proceedings in

Russia in due time and that the IAAF Rules clearly contemplate that, in these circumstances, the costs of those proceedings will be borne by the ARAF. The IAAF therefore maintained its requests for relief against the ARAF.

26. On 19 April 2016, the IAAF filed a Submission on Jurisdiction in accordance with Article R55, para. 5 of the CAS Code, requesting the Athlete's objection to the jurisdiction of CAS and the admissibility of the claim to be dismissed.
27. On 20 April 2016, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Ordinary Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted by:
  - Prof. Dr. Michael Geistlinger, Professor in Salzburg, Austria, as Sole Arbitrator.
28. Also on 20 April 2016, the CAS Court Office informed the parties that Mr Dennis Koolaard would act as *ad hoc* clerk and that if a hearing would be held, such hearing would address the objections of inadmissibility/lack of jurisdiction together with the merits of the case, but that this was without any prejudice on the Sole Arbitrator's decision on the above-mentioned objections.
29. On 25 April 2016, the Athlete informed the CAS Court Office that a hearing should be arranged and the IAAF informed the CAS Court Office to prefer a hearing to be held. In the same letter, the IAAF informed the CAS Court Office that the Athlete raised a new defence to explain the blood values in the first ABP sample collected on 14 August 2009 and requested a deadline of 14 days to produce further evidence in this respect. The IAAF also requested that the Athlete be ordered to "*provide information as to her use of oral turinabol before 14 August 2009. This information should include the dosage, regularity, date of commencement, date of cessation etc*".
30. On 29 April 2016, the Athlete objected to the IAAF's request to be allowed to produce further expert evidence and asked the IAAF's request that she be ordered to provide information about any use of oral turinabol be declined.
31. Also on 29 April 2016, the CAS Court Office informed the parties that "[t]he Sole Arbitrator considers that the fact that the Athlete relies on the use of oral turinabol to explain her blood value in sample 1 of the ABP for the first time in her Answer is an exceptional circumstance justifying that the [IAAF] be allowed to provide observations and new evidence strictly relating to this explanation. In order to respect the equality of the parties, the Respondents will then be granted the right to submit an answer strictly limited to the observations/evidence that will be filed by the [IAAF] on this issue". In addition, the parties were informed that the Sole Arbitrator "*considers that Article R44.3 of the CAS Code cannot be used to oblige the Athlete to provide information (and not a specific document) that the Athlete appears to consider as potentially detrimental to her. The Sole Arbitrator, on the other hand, wishes to underline that the Athlete would however not be allowed to provide the information requested by the [IAAF] for the first time in her second written submission, if any. In view of the above, the Sole Arbitrator deems it appropriate to grant the Athlete a last opportunity to submit information relating to her use of oral turinabol by fax/e-mail on or before 3 May 2016 at noon. Upon receipt of such information, or after the expiry of the above-mentioned time limit: - the [IAAF] will be granted the opportunity to submit, within 10 days, by fax/e-mail to the CAS Court Office and directly*

*to the Respondents its observations and evidence strictly relating to the use of oral turinabol; - the Respondents will, thereafter, be granted the opportunity to submit, within 10 days, by fax/email to the CAS Court Office and directly to the other parties their answer strictly limited to the [IAAF's] brief on the use of oral turinabol".*

32. Also on 29 April 2016, the IAAF provided certain comments in respect of the scope of the Athlete's argumentation and of the participation of Prof. Audran and Dr. Robinson during the hearing.
33. On 3 May 2016, the Athlete confirmed that *"this case is no more about [the Athlete's former representative's] submission on 27<sup>th</sup> September 2015 nor Dr. Robinson's answer to that submission. Therefore the signatory sees no point in hearing Dr. Robinson [...]"*. Furthermore, the Athlete stated that *"the testimony of prof. Audran is unlikely to give any new or additional information to this case as it is very likely that his testimony will be more or less the same as prof. D'Onofrio's and Schumacher's. [...] Therefore again signatory sees no point in hearing prof. Audran. [...]"*. As to the use of oral turinabol, the Athlete submitted that it is clear from Dr. de Boer's expert statement that the ABP finding of 14 August 2009 was the result of oral turinabol and that the IAAF had access to her doping test details of 15 August 2009. The Athlete maintains that from these details IAAF experts must be able to say what, if any, effect the use of oral turinabol had on the ABP sample taken just a day before.
34. Also on 3 May 2016, the CAS Court Office informed the parties that Prof. Audran's statement would not be excluded from the file in case of non-appearance.
35. On 13 May 2016, the IAAF filed its comments regarding the Athlete's arguments in respect of the oral turinabol. The IAAF submitted an expert report of Dr. Hans Geyer and an additional joint expert report of Prof. d'Onofrio and Dr. Schumacher. The IAAF concluded that the abnormal blood values in her sample of 14 August 2009 (Sample 1) are not caused by her use of oral turinabol.
36. On 20 May 2016, the Athlete provided the CAS Court Office with two articles referred to by Dr. de Boer in his expert opinion.
37. On 23 and 24 May 2016 respectively, the Athlete and the IAAF returned duly signed copies of the Order of Procedure to the CAS Court Office. ARAF failed to do so.
38. On 30 May 2016, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, all parties confirmed that they had no objection to the constitution and composition of the arbitral tribunal.
39. In addition to the Sole Arbitrator, Ms Pauline Pellaux, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

For the IAAF:

- Mr Ross Wenzel, Counsel
- Mr Nicolas Zbinden, Counsel

For the Athlete:

- Mr Hannu Kalkas, Counsel
- Ms Annina Valkama, Counsel

40. The Sole Arbitrator heard evidence of the following persons in alphabetical order:
  - Dr. Douwe de Boer, Expert on ABP and anti-doping issues, in person;
  - Dr. Hans Geyer, Deputy Head of the Institute of Biochemistry of the German Sport University Cologne, by video-conference;
  - Prof. Giuseppe d'Onofrio, Expert haematologist, in person;
  - Dr. York Olaf Schumacher, Expert in sports medicine, by video-conference.
41. All experts were invited by the Sole Arbitrator to tell the truth subject to the sanctions of perjury. All parties and the Sole Arbitrator had the opportunity to examine and cross-examine the experts in person.
42. During the hearing, Dr. de Boer, Dr. Geyer, Prof. d'Onofrio and Dr. Schumacher were all invited to explain their point of view and to enter into a debate with each other on the issues where their opinions diverged, *i.e.* an expert conference was held. Dr. Geyer left the expert conference early as his expert opinion only concerned the assessment of how long, before Sample 1 was taken, the Athlete must have ceased administering oral turinabol, whereas the other experts also addressed the consequences of the alleged administration of oral turinabol on the different parameters of the Athlete's ABP.
43. The parties were afforded ample opportunity to present their case, submit their arguments and answer the questions posed by the Sole Arbitrator.
44. Before the hearing was concluded, all parties expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.
45. During the hearing, the Athlete provided the Sole Arbitrator with an overview of the fees, costs and expenses incurred in relation to the present proceedings.
46. On 2 June 2016, the IAAF provided the CAS Court Office with an overview of the fees, costs and expenses incurred in relation to the present proceedings.
47. On 5 October 2016, the Sole Arbitrator offered the parties the opportunity to submit observations in writing strictly limited to the issue of proportionality related to a strict application of Rule 40.8 of the 2012-2013 IAAF Rules, should the Sole Arbitrator find that (i) the Athlete committed an anti-doping rule violation and (ii) this version of the IAAF Rules is applicable to the merits of the case.

48. On 13 October 2016, the Claimant and the Athlete submitted their observations. The Claimant argued in the strongest possible terms that the principle of proportionality should not be revived and applied in this case and that, if the Sole Arbitrator were to consider the fairness exception as a result of the general principle of fairness, it should not be applied on the facts of the case. The Athlete pointed at Article 10.8 World Anti-Doping Code 2009 which continued the fairness exception on the WADA level through to 1 January 2015, when the 2015 version entered into force. The 2012-2013 IAAF Rules should be understood as having not been in conflict with the World Anti-Doping Code, but that the fairness exception for some reason was just not mentioned by the 2012-2013 IAAF Rules. Equal treatment of athletes, thus, requires a fairness exception also under the 2012-2013 IAAF Rules. In the opinion of the Athlete, RUSADA's decision, which took into account the fairness exception in determining the period of disqualification of competition results, therefore, was just and should be upheld as to the determination of such period.
49. The Sole Arbitrator confirms that he carefully took into account in his decision all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

#### IV. SUBMISSIONS OF THE PARTIES

50. The IAAF's submissions, in essence, may be summarised as follows:
- The IAAF's case is that the Athlete's ABP profile constitutes clear evidence that the Athlete has committed an anti-doping rule violation in breach of Rule 32.2(b) of the IAAF Rules as follows:
    - The ABP sequence is abnormal for HGB and OFF-score with a probability in excess of 99.9%.
    - The Athlete's ABP profile contains individual "outliers" for all three blood markers. An outlier on the upper or lower limit is abnormal with a probability of 99.9% (*i.e.* 1 in 1,000<sup>1</sup>) and an outlier over or under the limit is abnormal with an even higher degree of certainty.
    - The Athlete's ABP profile reveals a supraphysiological increase in red blood cell mass in and around competition periods. HGB levels are markedly higher during the summer months (competition period), contrary to what one would expect physiologically.
    - The overall variation in HGB of *circa* 25% from 13.1 g/dL to 16.3 g/dL is further evidence of blood manipulation.

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<sup>1</sup> The Sole Arbitrator noted that the IAAF submitted that this chance was 1 in 10,000, but considers this to be an obvious clerical mistake.

- The Athlete's ABP profile contains various indications of OFF-phases, *i.e.* high HGB, low RET% and high OFF-score, which are indicative of a recent cessation of erythropoietic stimulation. These OFF-phases (*e.g.* samples No. 1, 2 and 7) occur always in proximity to an important competition.
- In view of the foregoing and, in particular, on the basis of the expert opinions and the Joint Expert Opinion, the IAAF submits that the ABP profile of the Athlete constitutes reliable evidence of blood doping in the period from 2009 to 2014.
- As to the period of ineligibility, the IAAF maintains that Rule 40.6 of the 2012-2013 IAAF Rules may be applied in order to increase the period of ineligibility up to a maximum of a four-year period of ineligibility due to aggravating circumstances, as the evidence indicates that the Athlete (i) used a prohibited substance or a prohibited method on multiple occasions and (ii) engaged in a doping plan or scheme.
- The IAAF also submits that the Sole Arbitrator is entitled, when determining the length of the ineligibility period, to take into account the Athlete's anti-doping rule violation from the 2009 IAAF World Championships (which is the subject of the proceedings in CAS 2015/A/4050). Whereas the IAAF is seeking an increased period of ineligibility and further disqualification in such case, the fact of that violation is not in dispute between the parties.
- The IAAF maintains that Rule 40.7(d)(ii) of the 2012-2013 IAAF Rules concerning a situation where facts are discovered of a second anti-doping rule violation after the resolution of the first anti-doping rule violation but which occurred before the notification of the first violation is applicable and that an additional sanction can therefore be imposed. The IAAF however accepts that this is not a situation of multiple violations in the context of Rule 40.7 of the 2012-2013 IAAF Rules.
- The IAAF submits that a period of ineligibility at the very top end of the 2-4 year spectrum should be imposed. Indeed, the IAAF considers that a sanction of four years would be the only appropriate sanction.
- The IAAF further maintains that the Athlete should receive credit for the period of ineligibility she served in respect of the violation at stake in CAS 2015/A/4050, *i.e.* two years from the date of her provisional suspension (22 July 2013) to 21 July 2015. The additional period of ineligibility should however commence on the date of the (final) CAS award, as provided for by Rule 40.10 2012-2013 IAAF Rules.
- Finally, the IAAF submits that since the IAAF Rules provide for the automatic disqualification of all results from the date of the anti-doping rule violation through the commencement of any period of provisional suspension and because the evidence indicates that the Athlete was using prohibited substances in 2009, the IAAF seeks the disqualification of all the results of the Athlete for all competitions in which she took part from 14 August 2009 until her provisional suspension on 5 February 2016, together with the forfeiture of any prizes, medals, prize money and appearance money etc.

51. Although duly invited, the ARAF did not submit any position on the merits of the present proceedings.
52. The Athlete's submissions as to the merits, in essence, may be summarised as follows:
- The Athlete submits that the IAAF made reference to a recent CAS Award and that she requested CAS to be provided with such award, which was denied. The Athlete maintains that this leads to the fact that she is the only party in this arbitration who does not have full access to the material that the case is decided upon and that this arbitration does therefore not fulfil the requirements of equality of arms and a fair trial.
  - Samples 1, 2 and 3, which have been taken between August 2009 and July 2010 cannot show use of doping in the year 2011 and afterwards. There are no samples taken in 2015 and as such there can be no anti-doping rule violation in 2015. Only sample 19 is taken in 2014. However, according to the experts, it shows no irregularities and as such there can be no anti-doping rule violation in 2014.
  - Sample 1 was taken on 14 August 2009. On 15 August 2009, the Athlete tested positive for oral turinabol. The irregularities detected in Sample 1 are directly related and a direct consequence of the use of oral turinabol. As such, there is only one anti-doping rule violation.
  - Based on an expert report of Dr. de Boer, the Athlete maintains that Samples 11 and 18 are invalid due to storage problems, Sample 1 is caused by oral turinabol and the reason for the relatively high concentration of haemoglobin in Sample 2 is possible dehydration.
  - With reference to Rule 40.8(d)(ii) of the 2012-2013 IAAF Rules, the Athlete maintains that the preconditions of a second violation are not met and that the 2009 violation cannot be viewed as a second violation. The Athlete submits that the IAAF's request to impose a 4 year period of ineligibility on the Athlete is to be dismissed as there was only one anti-doping rule violation in 2009, for which a period of ineligibility was already imposed on the Athlete.
  - The Athlete maintains that since there is only one anti-doping rule violation in 2009, the IAAF's request to disqualify all the Athlete's results since 14 August 2009 is unreasonable and against the "fairness principle" of Rule 40.9 of the 2016-2017 IAAF Rules, which shall be applied.

## V. JURISDICTION AND ADMISSIBILITY

53. The IAAF maintains that the jurisdiction of CAS derives from Rule 38.3 of the IAAF Rules 2016-2017 edition. As a consequence of its suspension, the ARAF was not in a position to conduct the hearing process in the Athlete's case by way of delegated authority from the IAAF pursuant to Rule 38 of the IAAF Rules. The IAAF argues that, in these circumstances, it is

plainly not necessary for it to impose any deadline on the ARAF for that purpose. The Athlete also expressly consented to the application of Rule 38.3 of the IAAF Rules.

54. The Athlete argues that there is no decision of a federation, association or any other sports-related body that can be appealed in this case. The Athlete also maintains that she has not entered into a specific arbitration agreement with the IAAF pursuant to which the IAAF can take the matter to CAS. Furthermore, the Athlete submits that the IAAF has not exhausted the legal remedies available to it prior to the appeal since it should first have itself arranged for a hearing. Even if Article R27 of the CAS Code would be applied, there is no arbitration agreement and therefore no jurisdiction.
55. As to the wording of Rule 38.3 of the IAAF Rules, the Athlete maintains that ARAF has not neglected its responsibilities concerning a hearing or rendering a decision and that the IAAF therefore does not have the right to refer the case to CAS.
56. The Athlete also maintains that she did not request for a hearing in accordance with Rule 38.3 of the IAAF Rules, but rather invoked Rule 38.2 of the IAAF Rules. As such, she did not request for a hearing before CAS. The alternatives presented to the Athlete by the IAAF are not in accordance with the IAAF Rules. Furthermore, the Athlete argues that Rule 38.3 of the IAAF Rules is a standard rule and that if standard rules are unclear they must be interpreted against the drafting party.
57. Finally, the Athlete submits that human rights are applicable in this procedure, including the right of access to justice (equality of arms), the right to be heard in one's own language and without costs, which in this case are disregarded.
58. The IAAF replied in this respect that it filed a Request for Arbitration precisely on the basis that it is bringing this case to CAS in the first instance on the basis of Rule 38.3 of the IAAF Rules. The claim, once filed, shall be subject to the procedural rules set out at Article R47 of the CAS Code. The IAAF maintains that, self-evidently, this does not mean that the threshold criteria of Article R47 of the CAS Code need to be satisfied as this would render the relevant part of Rule 38.3 of the IAAF Rules completely meaningless. This provision is aimed precisely at allowing the IAAF to proceed before CAS at first instance where no decision has been made and without exhausting any further channels within the Member's disciplinary system.
59. Furthermore, the IAAF submits that the language referred to by the Athlete – neglecting responsibilities, fulfilling responsibilities etc. – does not feature in Rule 38.3 of the IAAF Rules, which actually states that the IAAF may proceed before CAS in the first instance where *“the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter”*. The IAAF also adds that, in accordance with Rule 38.5 of the 2016-2017 IAAF Rules, a first instance hearing may take place before the relevant tribunal of the Member or before a tribunal *“otherwise authorised”* and that ARAF has accepted that, in view of its suspension, doping cases may be brought before CAS in the first instance.
60. The Sole Arbitrator observes that Article R47 of the CAS Code determines as follows:

*“An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Claimant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body”.*

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

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

62. The Sole Arbitrator finds that Article R47 of the CAS Code allows for two options to submit a case to the jurisdiction of the CAS, either by application of a statutory rule providing for jurisdiction of CAS, or by an arbitration agreement. In the case at stake, CAS has jurisdiction based on the statutory rule of Rule 38.3 IAAF Rules.
63. At the hearing and in her submissions in writing, the Athlete did not put in doubt that ARAF was properly suspended, as confirmed by the IAAF’s Council meeting in Monaco on 26 November 2015. In its letter of notification of the Athlete’s ABP anti-doping rule violation dated 5 February 2016, the IAAF informed ARAF that as a consequence of such suspension, *“the IAAF has taken over responsibility for coordinating the disciplinary proceedings in inter alia the case of the Athlete (who is an International Level Athlete for the purposes of the IAAF Rules)”.*
64. This letter dated 5 February 2016 was confirmed by the then representative of the Second Respondent as having been duly received by the Athlete on 9 February 2016. The Athlete, thus, knew that the IAAF had withdrawn its delegation of part of the procedure in case of anti-doping rule violations to the ARAF. The Athlete, therefore, when having her then representative sent the letter of 19 February 2016, knew that the IAAF would refer the matter to CAS. The IAAF made the role of CAS explicit in its letter dated 5 February 2016, when writing as follows:

*“If the Athlete requests a hearing within the timeframe set out at paragraph 10 above, her case will be referred to the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland) for a hearing to be conducted, at her election, in accordance with one of the following two procedures.*

- 13.1 *Before a Sole Arbitrator of the CAS sitting as a first instance hearing panel pursuant to IAAF Rule 38.3. The case will be prosecuted by the IAAF and the decision will be subject to an appeal to CAS in accordance with IAAF Rule 42; or*
- 13.2 *Before a CAS Panel as a single hearing, with the agreement of WADA and any other anti-doping organisations with a right of appeal, in accordance with IAAF Rule 38.19. The decision rendered will not be subject to an appeal (save to the Swiss Federal Tribunal)”.*

65. The Sole Arbitrator finds that the statement made by the then representative of the Athlete in her answer to the IAAF’s letter of 5 February 2016 on 19 February 2016 can only be understood as requesting for a hearing before CAS, and not as requesting for a hearing before the IAAF as alleged by the Athlete in the present procedure. The relevant part in the Athlete’s letter of 19 February 2016 reads as follows:

*“Regarding you[r] letter dated February 05, 2016 (received by Tatyana Chernova and her representative on February 09, 2016), which concerns Tatyana Chernova (the Athlete) violating anti-doping provisions, in particular, IAAF Rule 32.2 (b), and suspending the Athlete from all competition[s] until the court passes a final disposition under her case.*

*We hereby inform you that the Athlete requests a hearing, as per IAAF Rule 38.2, according to the requirements of the Code of Sports-Related Arbitration (CAS) because the Athlete denies the accusation presented in terms of the Athlete’s Biological Passport.*

*According to your letter dated 05.02.2016, Athlete’s case shall be transferred to the Court of Arbitration for Sport in Lausanne (Switzerland), should the Athlete request a hearing within the period specified in paragraph 10 of the letter. [...]”.*

66. Given this explicit wish of the Athlete to have a hearing being held before CAS, the Sole Arbitrator finds the argument of the Athlete in her written submissions and at the hearing that the wording of Rule 38.3, fifth sentence and following, of the IAAF Rules does not cover the case of a suspension of a Member by the IAAF not consistent and not convincing.
67. In the opinion of the Sole Arbitrator, the relevant part of Rule 38.3 of the IAAF Rules (see quotation above at para. 60) is clear in stating that, if the Member fails to complete a hearing, the IAAF may finally elect, if the Athlete is an International-Level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. In view of the exchange of letters between the IAAF and the Athlete dated 5 and 19 February 2016 respectively, the Sole Arbitrator finds that the IAAF’s intention to refer the matter to CAS has been understood and accepted by the Athlete. Neither was the letter issued by the IAAF misleading, nor the answer invalid because of false information provided by the IAAF. The language of the fifth sentence of Rule 38.3 of the IAAF Rules covers the understanding of the parties: A Member which is suspended also fails to complete a hearing, with the consequence that the IAAF may refer the matter directly to CAS.
68. The Sole Arbitrator, thus, finds that the CAS has jurisdiction based on Rule 38.3 of the IAAF Rules.

69. The Sole Arbitrator also holds that, since the Athlete in her letter of 19 February 2016 did not explicitly agree to the option offered by the IAAF under para. 13.2 of its letter dated 5 February 2016, the procedure to be followed shall be that of a sole arbitrator according to para. 13.1 of the IAAF's letter (see para. 63 above). This procedure does not require exhaustion of any available legal remedies before submitting the matter to CAS.
70. The rules in the CAS Code, allowing parties who feel not sufficiently firm in understanding the English language to use interpreters, are considered by the Sole Arbitrator as sufficient guarantees of the parties' right to be heard and were understood to be included when the former representative of the Athlete in her letter of 19 February 2016 accepted the procedure under the CAS Code.
71. As to the Athlete's argument to be heard without costs, the Sole Arbitrator notes that Rule 38.3 of the 2016-2017 IAAF Rules provides that the hearing shall be at the expense of the national federation and refers to section IX of the present award below.
72. Since there are no other concerns as to the admissibility of the present case, the Sole Arbitrator finds that the Request for Arbitration is admissible.

## VI. APPLICABLE LAW

73. The IAAF maintains that the procedural aspects of these proceedings shall be subject to the 2016-2017 edition of the IAAF Rules and that the substantive aspects of the asserted anti-doping rule violations shall be governed, subject to the possible application of the principle of *lex mitior*, by the pre-2015 editions of the IAAF Rules, such as the 2012-2013 edition of the IAAF Rules. To the extent that the IAAF Rules do not deal with a relevant issue, Monegasque law shall apply (on a subsidiary basis) to such issue.
74. The ARAF did not put forward any specific position in respect of the applicable law.
75. The Athlete requests that the 2016-2017 IAAF Rules are applied to the claimed sanctions.
76. Article R58 of the CAS Code provides as follows:

*“The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*
77. The Sole Arbitrator observes that it is not disputed and corresponds to Rule 42.23 and 42.24 of the 2016-2017 IAAF Rules, that the proceedings are primarily governed by the IAAF Rules and subsidiarily by the Monegasque Law. IAAF Rules 42.23 and 42.24 read as follows:

*“In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations. [...].*

*In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitration shall be conducted in English, unless the parties agree otherwise”.*

78. Pursuant to the legal principle of *tempus regit actum*, the Sole Arbitrator is satisfied that procedural matters are governed by the regulations in force at the time of the procedural act in question. As such, procedural matters are governed by the 2016-2017 version of the IAAF Rules.
79. However, whereas the IAAF argues that the 2012-2013 IAAF Rules shall be the applicable law in all material aspects, the Athlete asks for application of the 2016-2017 IAAF Rules to the claimed sanctions.
80. In the context of the sanction of disqualification, the Athlete bases this request on fairness. The request of the Athlete to apply the 2016-2017 IAAF Rules is, however, linked to a misunderstanding of a typing error committed by the IAAF that was later corrected. At the hearing, both parties agreed that the IAAF wanted to include also the 2009 Sample in the ABP findings, thus indicating a violation during 2009 – 2014 and not as wrongfully understood only during 2011 – 2014.
81. The Sole Arbitrator wishes to point at the transitional rule laid down by Rule 49.1 of the 2016-2017 IAAF Rules, which reads as follows:

*“Non-retroactive except for Rule 40.8(e) and Rule 47, or unless the principle of Lex Mitior applies:*

*The retrospective periods in which prior violations can be considered for the purposes of multiple violations under Rule 40.8(e) and the statute of limitations in Rule 47 are procedural rules and should be applied retroactively; provided however that Rule 47 shall only be applied retroactively if the statute of limitations period has not already expired by the Effective Date. Otherwise, with respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective Date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred unless the panel hearing the case determines the principle of lex mitior appropriately applies in the circumstances of the case”.*

82. The IAAF based its charge on 19 ABP blood samples collected from the Athlete in the period from 14 August 2009 to 13 November 2014, that means prior to 1 January 2015, the date when the 2015 version of Chapter 3 (Anti-Doping and Medical Rules) IAAF Rules entered into force, including a substantial increase of the regular sanction for an anti-doping rule violation from 2 years to 4 years based on the World Anti-Doping Code 2015. An ABP finding of an anti-doping rule violation is not to be considered as a multiple violation under Rule 40.8(e) of the 2016-2017 IAAF Rules but as a single anti-doping rule violation, established on the basis of a set of different samples collected at different times, places and occasions. The same goes for the 2012-2013 IAAF Rules, where Rule 40.7(e) had the same wording.
83. This follows clearly from the concept of the WADA ABP Operating Guidelines, which provide at the end of Article 5 of Annex E for the following obligation of an Anti-Doping Organisation in case of confirmation of an Adverse Passport Finding by unanimous decision of the Expert Panel:

“The ADO will then be responsible for:

- a. *Advising the Athlete and WADA that the ADO is considering the assertion of an anti-doping rule violation (ADRV) against the Athlete. [...]”.*

84. The wording speaks of “an anti-doping rule violation” established by the ABP as a whole and embraces a multitude of anti-doping rule violations documented by the ABP.

85. Rule 40.8(e) of the 2016-2017 IAAF Rules reads as follows:

*“Multiple Anti-Doping Rule Violations during Ten-Year Period: For the purposes of Rule 40.8, each anti-doping rule violation must take place within the same ten-year period in order to be considered multiple violations”.*

86. The present case, thus, falls under the prohibition of retroactive application of the 2016-2017 IAAF Rules, unless the Sole Arbitrator finds that they shall be applied based on the principle of *lex mitior*. The wording of the last sentence of Rule 49.1 of the 2016-2017 IAAF Rules does not allow for pick and choose, but refers to the “*substantive anti-doping rules*” as such. Thus, the Sole Arbitrator feels bound to consider the eventually applicable sanctions in their totality under the assumption the Sole Arbitrator will arrive at the conclusion that an anti-doping rule violation has been established.

87. For such case, the IAAF Rules covering the period 2009 – 2014 were all based on the 2009 World Anti-Doping Code and obviously, as to Rule 39 and the here relevant parts of Rule 40, have not been changed throughout this period. The 2012-2013 IAAF Rules, even if not yet in force in 2009 – 2011, with regard to Rule 39 and the relevant parts of Rule 40 correspond to the 2009 IAAF Rules word for word, which entered into force on 1 January 2009. The 2010-2011 IAAF Rules simply reproduced the 2009 IAAF Rules and even did not change the date of entry into force, as it is stated that these regulations also entered into force on 1 January 2009. The 2012-2013 IAAF Rules entered into force on 1 November 2011. Since the relevant provisions as laid down by the 2012-2013 IAAF Rules simply reproduce the provisions of the 2009 and 2010-2011 IAAF Rules and remained in force until 1 November 2013, when they were replaced by the 2014-2015 IAAF Rules, which, however, as to the provisions mentioned above remained identical, the 2012-2013 IAAF Rules can be taken as reflecting the IAAF anti-doping regulations under the World Anti-Doping Code 2009. On 1 January 2015, the IAAF implemented an amended Chapter 3 of the IAAF Rules (anti-doping and medical rules), reflecting the newly introduced World Anti-Doping Code 2015. The 2016-2017 IAAF Rules do not contain any material changes in comparison with these 2015 IAAF Rules.

88. As for the sanctions to be applied, the provisions on ineligibility under aggravating circumstances of the 2012-2013 IAAF Rules (Rules 40.2 and 40.6) are clearly the *lex mitior* in comparison to the 2016-2017 IAAF Rules (Rule 40.2). As will be analysed in more detail below, the 2012-2013 IAAF Rules allow the Sole Arbitrator to decide on a period of ineligibility within a margin of 2 to 4 years, whereas the 2016-2017 IAAF Rules set a standard sanction of 4 years. Since in case of an ABP anti-doping rule violation there can be hardly any circumstances under which an athlete is able to establish that the violation was committed unintentionally, no deviation from the 4 year period of ineligibility will in principle be possible. As to the

disqualification of results, the 2016-2017 IAAF Rules (Rule 40.9) differ from the 2012-2013 IAAF Rules (Rule 40.8) as the previous regulations included a fairness exception (“*unless fairness requires otherwise*”), whereas the latter – read literally – do not. Considering that Article 10.8 of the World Anti-Doping Code 2009 (“the WADC”), in force at the relevant time, included the fairness exception, that this provision was part of the obligatory commitment of the IAAF as signatory to the WADC according to Article 23.2.2 WADC and that the IAAF was not allowed to include any substantial change to this provision, the Sole Arbitrator sees an obligation to understand Rule 40.8 2012-2013 IAAF Rules harmoniously with Article 10.8 WADC. For whatever reason, the fairness exception was not mentioned explicitly in the 2012-2013 IAAF Rules, but had nevertheless to be applied based on IAAF’s commitment to Article 10.8 WADC. In a case where the WADC did not allow for any substantial deviation of the IAAF Rules from the WADC, the provision of Rule 47.5 2012-2013 IAAF Rules, otherwise providing that “*in case of conflict between these Anti-Doping Rules and the Code, these Anti-Doping Rules shall prevail*” is not applicable. The Sole Arbitrator, as to Article 10.8 WADC, sees no room for a possible conflict between the 2012-2013 IAAF Rules and the WADC. The most favourable version of the IAAF Rules for the Athlete, at least in the circumstances of the present case, is therefore clearly the 2012-2013 version.

89. The Sole Arbitrator, thus finds that the pre-2015 IAAF anti-doping regulations, as shown by the 2012-2013 IAAF Rules, shall be the applicable law as to the merits. Monegasque law is subsidiarily applicable.

## **VII. PRELIMINARY ISSUE**

90. The Sole Arbitrator observes that the Athlete initially argued in her written submissions that the IAAF’s claim was to be declared inadmissible due to lack of equality of arms, as the IAAF referred to an unpublished CAS award in its written submission while such CAS award was not available to the Athlete.
91. The Sole Arbitrator observes that the CAS Court Office explained to the Athlete on 24 March 2016 that such CAS award could not be provided to her as the parties involved had not yet lifted its confidentiality.
92. Since this circumstance had not changed until the hearing was held on 30 May 2016, the IAAF voluntarily withdrew its references to this particular CAS award, upon which the Athlete indicated that this question was no longer relevant.
93. Consequently, the Sole Arbitrator does not deem it necessary to rule on this issue and confirms to have no knowledge of the content of the relevant CAS award.

## **VIII. MERITS**

### **A. The Main Issues**

94. As a result of the above, the main issues to be resolved by the Sole Arbitrator are:

- i. Did the Athlete violate Rule 32.2(b) of the 2012-2013 IAAF Rules?
  - a) Are Sample 11 and 18 to be excluded from the Athlete's ABP due to storage problems?
  - b) Can the values of Sample 1 be explained by the use of oral turinabol by the Athlete?
  - c) Was the relatively high concentration of haemoglobin in Sample 2 caused by dehydration of the Athlete?
  - d) Can the pool of data be extended with samples voluntarily provided by the Athlete?
  - e) Which conclusion is to be drawn in the end?
- ii. If an anti-doping rule violation was committed, what sanction shall be imposed on the Athlete?

***i. Did the Athlete violate Rule 32.2(b) of the 2012-2013 IAAF Rules?***

95. The Sole Arbitrator observes that the following regulatory framework is relevant as to the merits of the case at hand.
96. The relevant parts of Rule 32 of the 2012-2013 IAAF Rules read as follows:

*“RULE 32 Anti-Doping Rule Violations*

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

[...]

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

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

97. Rule 33 (1), (2) and (3) of the 2012-2013 IAAF Rules read as follows:

*“RULE 33 Proof of Doping*

*Burdens and Standards of Proof*

1. *The IAAF, Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IAAF, Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*
2. *Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Rules 40.4 (Specified Substances) and 40.6 (aggravating circumstances) where the Athlete must satisfy a higher burden of proof.*

*Methods of Establishing Facts and Presumptions*

3. *Facts related to anti-doping rule violations may be established by any reliable means, including but not limited to admissions, evidence of third Persons, witness statements, expert reports, documentary evidence, conclusions drawn from longitudinal profiling such as the Athlete Biological Passport and other analytic information”.*
98. The Sole Arbitrator observes that in its attempt to establish an anti-doping rule violation of the Athlete under IAAF Rule 32.2(b), the IAAF relies on conclusions drawn from longitudinal profiling as shown by the Athlete’s ABP. The IAAF focusses on an abnormal sequence in the HGB and OFF-score values in the Athlete’s ABP with a probability in excess of 99,9%, individual “outliers” for all three blood markers in the Athlete’s ABP, individual analyses of the Athlete’s ABP by the three members of the Expert Panel, their Joint Expert Opinion, the expert report of Dr. Geyer and the additional joint expert report of Prof. d’Onofrio and Dr. Schumacher.
99. Although the Athlete initially argued that the IAAF only accused the Athlete of an anti-doping rule violation for the period 2011 to 2014, the Athlete voluntarily withdrew this argument at the occasion of the hearing as it was clear from the evidence submitted by the IAAF that the relevant period for the Athlete’s ABP was from 2009 to 2014, as Sample 1 (the first sample) was taken on 14 August 2009 and Sample 19 (the final sample) on 13 November 2014.
100. In the present case, the members of the Expert Panel concluded as follows:

Prof. d’Onofrio:

*“The probability of ABP sequence abnormality is higher than 99.9% for hemoglobin concentration (HGB) and the OFF score. HGB profile, in particular, shows a marked variability, from 13.1 to 16.3 d/dL. Some samples show a hematological picture in the normal range, with HGB and reticulocytes typical for adult women and female athletes: the majority of these samples have been collected one or more months far from important competitions and provide the likely basal picture for this Athlete (i.e. s. 4 in February*

2011, s. 14 in December 2012, s. 16 in March 2013, s. 19 in November 2014). Other samples show hematological abnormalities which are suspicious of blood manipulations. Sample 1 show very high HGB and low reticulocytes, with a high OFF score of 126.8 on the eve of the 2009 Beijing Olympic Games: such constellations usually reflects the erythropoietic suppression consequent to suspension of an erythropoiesis stimulating agent before a race. Sample 2 and 18, both collected in a period leading up to important races, are similar, although reticulocyte percentage is less depressed. In addition, increased HGB and OFF score are seen in correspondence with important competitions, such as in sample 7 (OFF score 107) and 13. Conditions of storage and transports, according to LDPs and instrument reports, were adequate for all samples of the profile; minor formal inaccuracies are present in some cases, but they never interfere with the results to the disadvantage of the Athlete”.

Prof. Audran:

*“The probabilities of abnormality of HGB and OFFS sequence are >99.9%.*

*OFFS value of sample 1, 126.8, is above the upper limit of the athlete expected range calculated with a specificity of 99.9%. This value is above the cut-off score for females worst case at sea level, 121.4, with a false-positive rate of 1 in 10 000.*

*This passport shows a quite large haemoglobin variation, from 135 g/l to 163/l (28 g/l), and haemoglobin values in period of competition (13 samples) are higher than in periods without competition (5 samples), respectively mean 148 g/l (135 – 163) and mean 141 g/l (135 – 152).*

*Sample 1 is really characteristic of blood manipulation. Its high OFFS value is mainly due to the low RET% value 0.28%. Such low value is the sign of a suppression of erythropoiesis due to a recent and non-physiologic increase of the red cell mass. Reticulocytes are sensitive to temperature but this sample has been transported in good conditions as laboratory mention “refrigerated” at arrival and MVC value 85.5 fL, confirms the validity of this sample.*

*If we remove this abnormal sample, HGB values of samples 2 and 17 are above the expected normal range (specificity 99.9%).*

*These 3 samples (1, 2, 17) have a lot of weight in the abnormalities of the HGB and OFFS sequences.*

*OFFS values of samples 6 and 7 are suspicious too, but the corresponding RET% values don’t allow to prove blood manipulation”.*

Dr. Schumacher:

*“From a formal point of view, in the information contained in the documentation packages or the certificates of analysis, there is no indication that analytical or pre-analytical issues might have influenced the results in a way that would render a sample abnormal or influence the results to the disadvantage of the athlete.*

*Regarding a quantitative evaluation, the athlete has values outside her individually calculated references ranges at 99% specificity for reticulocytes and OFF score (sample 1).*

*From a qualitative point of view, it is typical to find this kind of profile assuming blood manipulation. Suspicious constellations indicative of supraphysiologically increased red cell mass with increased*

*haemoglobin concentration, suppressed reticulocytes and therefore elevated OFF scores can be identified on at least three occasions, all matching major competitions (World Championships Berlin 2009 sample 1 (most obvious), Indoor World Championships Doha 2010 sample 2, World Championships Daegu 2011 sample 7). There are other samples, which, in the context of the profile, might also be interpreted as abnormal (samples 13, 17, 18), especially when considering the likely baseline of the athlete to range around a haemoglobin concentration of 13-14 g/dl and reticulocyte% of 0.8% (see samples taken far from competitions, for example 4, 14, 15, 19).*

*There is no other physiological scenario that presents with such a pattern as observed in the athlete other than blood manipulation and the fact that the athlete does not always display this constellation (see samples 4, 14, 15, 19) makes an individual feature or other natural causes improbable. Furthermore, it is very unlikely that any kind of disease or blood cell disorder might have caused the picture seen in this profile, as the red cell indices are within the normal range.*

*I therefore conclude that absent a satisfactory explanation from the athlete, it is very likely that the athlete's profile is the result of the use of a prohibited substance or a prohibited method".*

101. Since the Athlete failed to provide any explanations for the alleged abnormalities in her ABP within the deadline granted, the Expert Panel issued its Joint Expert Opinion without addressing any arguments of the Athlete. The Expert Panel concluded as follows:

*"In the automated analysis by the adaptive model, which determines whether fluctuations in the biomarkers of the Athlete Biological Passport are within the expected individual reference ranges for an athlete or not, the profile was flagged with abnormalities at 99.9% specificity twice for sample 1 (lower limit reticulocytes, upper limit OFF score). The sequences for haemoglobin concentration and OFF score are abnormal at >99.9%.*

*All samples were scrutinized for their analytical details outlined in the documentation packages and certificates of analysis. In the available documentation, there is no indication that any analytical or pre-analytical issues might have influenced the results in a way that would explain the abnormalities in the profile or influence the analytical result to the disadvantage of the athlete.*

*In our view, the data of the athlete bears the following abnormal features for which no explanation has been given:*

- 1. Sample 1 displays a high haemoglobin concentration paired with low reticulocytes resulting in a high OFF score (126.8) on the eve of the 2009 IAAF World Championships in Berlin: The pattern illustrates a supraphysiologically increased red cell mass (high haemoglobin) with downregulated erythropoiesis (low reticulocytes) in the lead up to a major competition. It is typically observed after the use and recent discontinuation of an erythropoietic stimulating substance to avoid detection in direct doping tests.*
- 2. The profile shows a distinct reference between samples taken in the lead up to major competitions and those taken outside the competition period. Whereas the samples taken close to major competitions show the highest haemoglobin levels of the profile (see for example samples 1, 2, 7, 13, 18), the tests conducted outside the competition season show lower haemoglobin (see for example samples 4, 9, 16, 19). This is a clearly unphysiological feature, as usually, the haemoglobin levels*

*are lower during summer (competition period) due to physiological plasma volume expansion (1, 2). The reticulocyte pattern is less pronounced.*

*Based on these facts and the information available to date, it is our unanimous opinion that in the absence of an appropriate physiological explanation, the likelihood of the abnormalities described above being due to blood manipulation, namely the artificial increase of red cell mass using for example erythropoiesis stimulating substances, is high. On the contrary, the likelihood of environmental factors or a medical condition causing the described pattern is low.*

*We therefore concluded that it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause”.*

102. The Sole Arbitrator observes that the Athlete, by means of a document submitted by the Athlete’s former representative, initially sought to invalidate Samples 1, 2 and 7. These allegations were subsequently rebutted by the Neil Robinson Response. In a letter to the CAS Court Office dated 3 May 2016, the Athlete however indicated that *“this case is no more about [the Athlete’s former representative’s] submission on 27<sup>th</sup> September 2015 nor Dr. Robinson’s answer to that submission”*.
  103. The Sole Arbitrator finds that the Athlete voluntarily decided not to dispute the integrity of Samples 1, 2 and 7 any longer and that this issue therefore does not need to be examined by the Sole Arbitrator.
  104. The Athlete in her Answer held against the opinions expressed by the members of the Expert Panel however arguments, which mainly rely on the expert opinion of Dr. de Boer. The expert report of Dr. de Boer contains the following conclusions:
    - “1. *The results of [Sample 11] and [Sample 18] clearly demonstrate storage problems and the result of the respective samples should not be taken into account for the ABP.*
    2. *The results of [Sample 1] indeed are typically observed after the use and recent discontinuation of an erythropoietic stimulating substance. The erythropoietic substance is the anabolic steroid dehydrochloromethyltestosterone (oral turinabol). Because the athlete was already sanctioned for the results of [Sample 1], the results of the respective sample should not be taken into account for the ABP.*
    3. *The results of [three samples added by the Athlete that were not originally part of the Athlete’s ABP] extend the pool of data and as such these data are of additional significance for the evaluation of the ABP.*
    4. *Assuming that certain results should not be taken into account and that other results can be taken into account additionally, the overall results should be evaluated in a different context. By doing that the “cleaned and updated” ABP does not show so-called irregularities, which justifies ABP violations”.*
- a) *Are Samples 11 and 18 to be excluded from the Athlete’s ABP due to storage problems?*
105. Dr. de Boer maintains in his expert report that the temperature at which a blood sample is being kept after a withdrawal of blood has an important effect on, for example, the MCV (mean corpuscular volume) and the haematocrit values. Because of a stable MCH (mean corpuscular

haemoglobin) value, the MCHC (mean corpuscular haemoglobin concentration) increases. During the expert conference at the hearing, Dr. de Boer upheld his opinion for Sample 18 arguing that due to a high MCV and due to high haematocrit values and a low MCHC storage could have been inadequate in respect to the temperature and that Sample 18 should not be taken into account for the ABP.

106. At the same occasion, Prof. d'Onofrio held against, that the variation in the blood values at this Sample are too small for allowing it to be explained by a storage at room temperature. In Prof. d'Onofrio's opinion, haemoglobin remains stable in room temperatures up to 100 hours, a period which could not be reached in the case at hand. He, thus, insisted that Samples 11 and 18 are perfectly valid. Dr. de Boer agreed that an increased temperature is, indeed, irrelevant for the haemoglobin value.
107. The Sole Arbitrator, thus, finds that at a balance of probability, the Athlete could not rebut the establishment of the expert opinion as to Samples 11 and 18. Consequently, the Sole Arbitrator holds that Samples 11 and 18 shall not be excluded from the Athlete's ABP.

b) *Can the values of Sample 1 be explained by the use of oral turinabol by the Athlete?*

108. Dr. de Boer argues that he "agrees completely" with the Joint Expert Opinion in respect of Sample 1 that "it is typically observed after the use and recent discontinuation of an erythropoietic stimulating substance to avoid detection in direct doping tests". However, traces of the anabolic steroid oral turinabol were found on 15 August 2009, while Sample 1 was collected on 14 August 2009. According to Dr. de Boer, anabolic steroids are classical examples of erythropoietic stimulating substances and that, because of that, those steroids are also examples of "blood doping". Dr. de Boer concludes as follows in his expert report:

*"Assuming that the [IAAF] was aware of the Adverse Analytical Finding (AAF) and because the athlete was already sanctioned for that AAF, it is not logically to take that sample into account for the ABP and to be part of the ABF, especially if an ABF is being evaluated for a new anti-doping disciplinary process. Therefore, it can be concluded, because the athlete was already sanctioned for the results of [Sample 1], that the respective sample should not be taken into account for the ABP. [...]"*

109. The IAAF maintains that the Athlete's urine sample of 15 August 2009 indeed tested positive for metabolites of oral turinabol. However, the IAAF submits that the facts surrounding the Athlete's alleged ABP violation must be distinguished from the Athlete's steroid use in 2009. The Athlete's ABP profile suggests that she manipulated her blood values throughout the relevant period (2009 to 2013) and actually predates the steroid violation. However, in determining the length of the suspension for the Athlete's alleged ABP violation, the IAAF maintains that the Sole Arbitrator is entitled to take into account the Athlete's steroid violation. Pursuant to Rule 40.7(d)(ii) of the IAAF Rules, the Sole Arbitrator may impose an additional sanction that could have been imposed if the two violations would have been adjudicated at the same time.

110. In response to the Athlete's argument that the high HGB values in Sample 1 were caused by the use of oral turinabol, the IAAF invited Dr. Geyer to estimate how long in advance of the positive urine sample the Athlete ceased using oral turinabol. Dr. Geyer concluded as follows:

*"Based on these results and provided that the athlete has administered therapeutic doses (about 5-10 mg/day) of [oral turinabol] for several days or a single supra-therapeutic dose of 15 mg and more I exclude that the athlete ceased the administration of [oral turinabol] less than two weeks before the doping control on the 15<sup>th</sup> August 2009" and that "[...] I estimate that the administration of [oral turinabol] has been ceased at least 3 weeks before the doping control on 15<sup>th</sup> August 2009".*

111. The IAAF then invited Prof. d'Onofrio and Dr. Schumacher for their opinion, taking into account the conclusion in Dr. Geyer's report, as to whether *"the abnormal blood values in Sample 1 of the ABP could have been caused by the Athlete's use of oral turinabol"*. Prof. d'Onofrio and Dr. Schumacher concluded as follows:

*"There is ample evidence that anabolic steroids impact the red blood cell system. In fact, one of the main side effects of anabolic steroids is an increase in red cell mass. However, compared to human erythropoietin, the physiological regulator of red cell mass, the effect of anabolic steroids on the red cell system is relatively slow. Whereas the use and discontinuation of erythropoietin (EPO) and related substances causes relatively rapid changes in red blood cell markers, the action of anabolic steroids is delayed".*

With reference to the results of two diagrams with results of trials, Prof. d'Onofrio and Dr. Schumacher submit that, *"[i]n the testosterone trial, an increase of ~2g/dl was not achieved, even using relatively high doses of testosterone [...]. In the EPO trial however, an increase of 2g/dl was achieved after 30 days of administration of a normal EPO treatment regime. This difference in magnitude and adaptive speed illustrates that the constellation visible in sample 1 of the profile is likely not caused by anabolic steroids but highly likely by the use and discontinuation of an erythropoietic stimulant such as EPO ..."*.

*Relating these facts to the information provided by Dr. Geyer in his expertise, the issue becomes even more clear: Dr Geyer concludes that "... the administration of [oral turinabol] has been ceased at least 3 weeks before the doping control on 15<sup>th</sup> August 2009". This is due to the extremely low concentration of the long term metabolite discovered in the urine. Linking these facts to figures 1 and 2 and the related metabolic processes explained above, it is evident that anabolic steroid abuse alone cannot cause such an abrupt suppression/ OFF pattern as observed in sample 1 of the profile. In contrast, it is typical to observe such a picture after the use and recent discontinuation of an erythropoietic stimulant.*

*Summarising these explanations to answer your question, we therefore conclude that it is highly unlikely that the abnormal blood values in Sample 1 [...] are caused by the Athlete's use of oral turinabol".*

112. The Sole Arbitrator observed that all experts called by the parties reiterated their expert reports during the hearing. The Sole Arbitrator will only address the arguments advanced between the experts in respect of issues that were not set out in their expert reports.

113. Prof. Geyer explained that the Athlete's urine sample of 15 August 2009 was initially not considered an adverse analytical finding as no long-term metabolites could be discovered at the time, but only short and mid-term metabolites. Since the Athlete's urine sample did not contain

mid-term metabolites, which can be detected for approximately 14 to 21 days after finishing the administration of oral turinabol, Prof. Geyer concluded that the Athlete must have stopped the application 14 to 21 days before the doping control. Only when the urine sample was retested about 4 years later, long-term metabolites could be detected and an anti-doping rule violation could be established. Prof. Geyer estimated that the application of oral turinabol stopped about 30 days or more before the doping control, maybe even 50 days before.

114. Dr. de Boer criticised the conclusions of Prof. Geyer on the basis that the experiments referred to by him were based on oral administration of tablets or pills, whereas it is reported in the media that in the Russian doping programme steroids are dissolved in liquids containing alcohol, which is subsequently ingested by athletes by keeping the liquid in their mouth for a certain period. This method of ingestion is apparently more efficient than ordinary oral administration and the kinetics of such method of ingestion may well be different and could entail a lower detection window.
115. Prof. Geyer admitted that the kinetics of such method of ingestion may be different and that metabolites may be detected earlier, however the amounts detected will be the same. Long-term metabolites may not be discovered after a period of 30 to 40 days.
116. The Sole Arbitrator, after having examined the expert reports in detail and after taking into account the discussion that took place during the hearing, finds that Prof. Geyer's conclusion at a balance of probability could not be rebutted by the arguments advanced by Dr. de Boer. First of all, the argument that the Athlete ingested the oral turinabol in the way described above is mere speculation. Second, although apparently no specific research has been done in this respect, the Sole Arbitrator is not convinced by the arguments of Dr. de Boer that the kinetics of such method of ingestion will be very different from the kinetics in case of "ordinary" oral administration. They might well be different, but the results as pointed at by Prof. Geyer are the same. Consequently, the Sole Arbitrator has no reason to doubt about the conclusion of Prof. Geyer and considers it established that the Athlete ceased the use of oral turinabol at least 3 weeks before the doping control of 15 August 2009.
117. Further to this discussion and based on the conclusions reached by Prof. Geyer, Dr. de Boer submitted that steroids (such as oral turinabol) substantially increase the level of HGB, whereas Prof. d'Onofrio submitted that this only has a limited effect. Dr. de Boer criticised the conclusion of Prof. d'Onofrio because the research relied upon by him was conducted on young men. Young men have higher testosterone levels than female or old men and research shows that the effects of steroids on HGB levels of old men with low testosterone levels is almost double in comparison to young men with high testosterone levels. In addition, Dr. de Boer submitted that levels of reticulocytes have a much higher biological variation than HGB levels.
118. Prof. d'Onofrio submitted that Dr. de Boer's conclusions were flawed. The RET% in Sample 1 is very low. Steroids may cause an increase of HGB, but it is denied that it has an effect on RET%.
119. Dr. de Boer then argued that if HGB levels are influenced because of steroids, but not the RET%, the OFF-score is nevertheless influenced.

120. Prof. d’Onofrio did not deny this conclusion as such, but argued that such deviation would not be of such a magnitude that it would alter the conclusions reached. The biological variation for haemoglobin is 2,7 %, for reticulocytes about 11%, whereas the variation in the present case is more than 300%.
121. Dr. Schumacher added that if steroids would have caused an OFF-score this would have been visible at least 14 days earlier, as the Athlete ceased using steroids at least 3 weeks before sample collection.
122. At the end of the discussion, Prof. d’Onofrio concluded that in his opinion it was almost certain, or at least highly likely, that oral turinabol did not cause the abnormal values in Sample 1.
123. The Sole Arbitrator observes that not all opinions of the experts are corroborated by scientific research. However, the Sole Arbitrator considers the opinions expressed by the experts called by the IAAF very convincing. The doubts expressed by Dr. de Boer based on the alleged method of ingestion of steroids were not corroborated by any evidence, but amounted to mere speculation.
124. The Sole Arbitrator observes that Dr. de Boer did not contest that steroids have no significant effect on the level of reticulocytes (RET%), but rather argued that the high HGB levels caused the high OFF-score. The Sole Arbitrator however observes that the RET% of Sample 1 is very low while this can apparently not be explained by the use of oral turinabol.
125. The Sole Arbitrator further considered Dr. Schumacher’s argument convincing that a possible OFF-score caused by the use of steroids would have been present at least 14 days earlier, as the Athlete ceased the administration of oral turinabol at least three weeks before 15 August 2009. This explanation is indeed consistent with the conclusion reached in the joint expert report of Prof. d’Onofrio and Dr. Schumacher that *“it is evident that anabolic steroid abuse alone cannot cause such an abrupt suppression/ OFF pattern as observed in sample 1 of the profile. In contrast, it is typical to observe such a picture after the use and recent discontinuation of an erythropoietic stimulant”*. The Sole Arbitrator has no reason to doubt the credibility of this conclusion.
126. Consequently, the Sole Arbitrator finds that the abnormal blood values of Sample 1 cannot be explained by the use of oral turinabol by the Athlete and that Sample 1, thus, is not to be excluded from the Athlete’s ABP.
127. Based on the submissions of the IAAF and the IAAF Rules, the Sole Arbitrator is satisfied to accept that the Athlete’s prior steroid violation is relevant for determining a sanction in the present proceedings, if any. The exact consequences of the Athlete’s prior violation for the present proceedings will be examined below.
128. In any event, the Sole Arbitrator considers the explanation of Prof. Audran in his expert opinion that *“if we remove this abnormal sample [referring to Sample 1], HGB values of samples 2 and 17 are above the expected normal range (specificity 99.9%)”* convincing, which argument was reiterated by Prof. d’Onofrio during the hearing. The Sole Arbitrator deems this important because if Sample 1 would be excluded, *quod non*, Sample 2 would have been flagged as an individual outlier as the

reference range of the Athlete's ABP would have been different due to exclusion of Sample 1. Excluding Sample 1 would therefore not lead to the consequence that no abnormal values would have been flagged in the Athlete's ABP.

129. Consequently, the Sole Arbitrator finds that Sample 1 is not to be excluded from the Athlete's ABP, however, the prior steroidal violation of the Athlete will be taken into account in determining a sanction for the ABP violation, if any.

c) *Was the relatively high concentration of haemoglobin in Sample 2 caused by dehydration of the Athlete?*

130. Dr. de Boer agrees in his expert report with the opinion of the IAAF that the concentration of haemoglobin (HGB) in Sample 2 is relatively high. However, Dr. de Boer submits that the concentration is "not abnormally high, if the dehydration status is such that the athlete was relatively dehydrated. Besides all kinds of physiological effects, the hydration status is correlated with hemorheology" and concludes that "a possible explanation for the results of [Sample 2] is dehydration, which cannot be excluded. Obviously, other explanations also exist, which are not in favour of the athlete, but as long as dehydration cannot be excluded, those explanations are speculative".

131. Dr. Schumacher contested this argument by stating that the body stores fluid in several places in the body. In case of dehydration, a person does not lose the same amount of fluid from every single compartment. Dr. Schumacher pointed at the fact that, if Dr. de Boer's assumption were correct, the Athlete would have lost an incredibly high amount of weight. Dr. Schumacher, thus, concluded that the dehydration theory is not credible.

132. The Sole Arbitrator finds that he does not have to conclude whether dehydration may cause higher levels of haemoglobin, because the Athlete in any event failed to establish that she suffered from dehydration at the time.

d) *Can the pool of data be extended with samples voluntarily provided by the Athlete?*

133. Dr. de Boer finally submits that three samples should be added to the Athlete's ABP (two samples that were allegedly taken before Sample 1 and one sample that was taken after Sample 19). Dr. de Boer argues that by adding these samples to the Athlete's ABP the pool of data is extended and the usefulness of the pool increases. No indications exist that these data are not reliable. Dr. de Boer concludes that "[a]ssuming that certain results can be taken into account additionally and other results should not be taken into account [i.e. Sample 1, 11 and 18], the overall results should be evaluated in a different context and by doing that these samples do not show so-called irregularities, which justifies ABF violations".

134. Prof. d'Onofrio stated that the first two added samples were taken in competition, but that it is not known under which circumstances they were obtained. Prof. d'Onofrio argued that adding samples is not legitimate as they were taken outside the scope of the applicable ABP operating guidelines. There is no documentation package of these samples, nothing is known as to the apparatus and storage used. Such samples are irrelevant from an haematological point of view.

135. The Sole Arbitrator finds that the Athlete failed to prove under which circumstances the samples were taken from the Athlete and that such process complied with the applicable standards. Consequently, the Sole Arbitrator finds that the three samples voluntarily provided by the Athlete cannot be added to her ABP.

e) *Conclusion*

136. In view of the above conclusions, the Athlete's ABP remains as it is; no samples are excluded and no samples are added. Sample 1 was therefore validly flagged as "abnormal" both for HGB as well for OFF-score.

137. The Sole Arbitrator is satisfied to accept that the ABP is a reliable and accepted means of evidence to assist in establishing anti-doping rule violations and feels comforted in this conclusion by CAS jurisprudence and legal literature (see CAS 2010/A/2174, para. 9.8; VIRET M., *Evidence in Anti-Doping at the Intersection of Science and Law*, 2016, p. 735; LEWIS/TAYLOR (Eds.), *Sport: Law and Practice*, 2014, para. C.126).

138. The Sole Arbitrator is however mindful of the warnings expressed in legal literature that a pitfall to be avoided is the fallacy that if the probability of observing values that assume a normal or pathological condition is low, then the probability of doping is automatically high (VIRET M., *Evidence in Anti-Doping at the Intersection of Science and Law*, 2016, p. 763, with further references to Dr. Schumacher and Prof. d'Onofrio 2012, p. 981; Sottas 2010, p. 121) and that it has been submitted in this context that "*if the ADO is not able to produce a "doping scenario" with a minimum degree of credibility ("density"), the abnormality is simply unexplained, the burden of proof enters into play and the ADO's case must be dismissed since there is no evidence pleading in favour of the hypothesis of "doping" any more than for another cause*" (VIRET M., *Evidence in Anti-Doping at the Intersection of Science and Law*, 2016, p. 774).

139. This view has indeed also been adopted in CAS jurisprudence and the Sole Arbitrator finds that another CAS panel summarised it nicely by stating that "*abnormal values are (for the purposes of the ABP) a necessary but not a sufficient proof of a doping violation*" (CAS 2010/A/2235, para. 86). Although such panel continued by emphasising that it is not necessary to establish a reason for blood manipulation, the panel noted the coincidence of the levels with the athlete's racing schedule and stated the following:

*"As Dr Sottas convincingly explained, in the same way as the weight of DNA evidence said to inculpate a criminal is enhanced if the person whose sample is matched was in the vicinity of the crime, so the inference to be drawn from abnormal blood values is enhanced where the ascertainment of such values occurs at a time when the Athlete in question could benefit from blood manipulation"* (CAS 2010/A/2235, para. 102).

140. The Sole Arbitrator agrees with these considerations and, as such, concludes that from the mere fact that an athlete cannot provide a credible explanation for the deviations in his or her ABP it cannot automatically be deduced that an anti-doping rule violation has been committed. Rather, the deviations in the ABP are to be interpreted by experts called to put into the balance various hypothesis that could explain the abnormality in the profile values, *i.e.* a distinction is made between a "quantitative" and a "qualitative" assessment of the evidence.

141. Applying the above to the matter at hand, the Sole Arbitrator finds that although the Athlete was not able to provide a credible non-doping related explanation for the abnormal values in her ABP, this does not automatically mean that the abnormal values are necessarily to be explained by doping. Rather, the Sole Arbitrator needs to be convinced that the abnormal values are caused by a “doping scenario”, which does not necessarily derive from the quantitative information provided by the ABP, but rather from a qualitative interpretation of the experts and possible further evidence.
142. The Sole Arbitrator notes that, besides the abnormal values of Sample 1, Sample 2, 7, 13 and 18 show relatively elevated levels of haemoglobin (HGB), whereas Sample 4, 14, 15, 16, 17 and 19 show relatively low levels of haemoglobin (HGB), although all within the “normality” threshold of the ABP.
143. As documented by the below list, the particularity with the samples included is that Sample 1, 2, 7, 13 and 18 were all taken closely before or during an important competition, whereas Sample 4, 14, 15 and 16 were taken in the off-season:

No.	Date of Sample	Most recent competition before Sample	Most recent competition after Sample
1	14 August 2009	21 June 2009 – Ratingen	15 August 2009 – Berlin
2	10 March 2010	27 February 2010 – Moscow	13 March 2010 – Doha
4	26 February 2011	29 January 2011 – Krasnodar	28 May 2011 – Gotzis
7	28 August 2011	6 August 2011 – Moscow	29 August 2011 – Daegu
13	2 August 2012	5 July 2012 – Cheboksary	3 August 2012 – London
14	12 December 2012	19 September 2012 – Talence	8 May 2013 – Adler
15	23 January 2013	19 September 2012 – Talence	8 May 2013 – Adler
16	18 March 2013	19 September 2012 – Talence	8 May 2013 – Adler
18	8 July 2013	26 May 2013 – Gotzis	10 July 2013 – Kazan

144. According to the IAAF, also Sample 19 was taken in the off-season, but no competition data was submitted in respect of the Athlete’s 2014 season, so this cannot be verified by the Sole Arbitrator. However, since generally no athletics competitions are held in November, the Sole Arbitrator accepts that also this sample was taken in the off-season.
145. The experts called by the IAAF conclude the following in their Joint Expert Opinion: *“This is a clearly unphysiological feature, as usually, the haemoglobin levels are lower during summer (competition period) due to physiological plasma volume expansion (1, 2)”*.
146. After having conducted a qualitative analysis of the ABP, the three members of the Expert Panel concluded that the abnormal results are highly likely caused by doping:

*“Based on these facts and the information available to date, it is our unanimous opinion that in the absence of an appropriate physiological explanation, the likelihood of the abnormalities described above being due to blood manipulation, namely the artificial increase of red cell mass using for example erythropoiesis stimulating substances, is high”*.

147. In this respect, the Athlete only argued that due to the fact that certain samples had to be disregarded and certain other samples had to be added to the Athlete's ABP, the ABP should have been evaluated in a different context.
148. The Sole Arbitrator considers this combination of circumstances convincing evidence that the Athlete engaged in blood doping practices throughout the period between August 2009 to at least July 2013.
149. The Sole Arbitrator finds it to be convincingly established by the IAAF that the Athlete generally had abnormally high levels of HGB on the eve of competitions, whereas her base levels of HGB appear to be much lower, as shown by the off-season samples.
150. The Sole Arbitrator finds that the IAAF succeeded to establish a "doping scenario" and is satisfied, indeed to his comfortable satisfaction, that the values in the Athlete's ABP are caused by the use of a prohibited substance or a prohibited method by the Athlete.
151. Consequently, the Sole Arbitrator finds that the Athlete violated Rule 32.2(b) of the 2012-2013 IAAF Rules.
- ii. *If an anti-doping rule violation has been committed, what sanction shall be imposed on the Athlete?***
152. The Sole Arbitrator observes that Rule 40.7(d), heading (i) and (ii) of the 2012-2013 IAAF Rules determines as follows:

*"Additional Rules for Certain Potential Multiple Violations*

- (i) *For the purposes of imposing sanctions under Rule 40.7, an anti-doping rule violation will only be considered a second violation if it can be established that the Athlete or other Person committed the second anti-doping rule violation after the Athlete or other Person received notice pursuant to Rule 37 (Results Management) or after reasonable efforts were made to give notice of the first anti-doping rule violation; if this cannot be established, the violations shall be considered together as one single first violation and the sanction imposed shall be based on the violation that carries the more severe sanction; however, the occurrence of multiple violations may be considered as a factor in determining aggravating circumstances (Rule 40.6).*
- (ii) *If, after the resolution of a first anti-doping rule violation, facts are discovered involving an anti-doping rule violation by the Athlete or other Person which occurred prior to notification of the first violation, then an additional sanction shall be imposed based on the sanction that could have been imposed if the two violations would have been adjudicated at the same time. Results in all Competitions dating back to the earlier anti-doping rule violation will be Disqualified as provided in Rule 40.8. To avoid the possibility of a finding of aggravated circumstances (Rule 40.6) on account of the earlier-in-time but later-discovered violation, the Athlete or other Person must voluntarily admit the earlier anti-doping rule violation for which he is first charged (which means no later than the deadline to provide a written explanation in accordance with Rule 37.4(c) and, in all*

*events, before the Athlete competes again). The same rule shall also apply when facts are discovered involving another prior violation after the resolution of a second anti-doping rule violation”.*

153. The Sole Arbitrator considers the above rule applicable to the matter at hand, as the undisputed ABP violation by the Athlete in the present proceedings occurred before the Athlete was notified of the steroid charge.
154. Since the Athlete did not appeal the judgment by which she was suspended for the steroid violation, it is established that a steroid violation was committed. However, different from what is assumed in Rule 40.7 (d) (ii) of the IAAF Rules, the period of ineligibility deriving from such previous violation is not yet definite in the case at hand and depends on the outcome of the pending CAS proceedings that are suspended until a final decision has been reached in the matter at hand.
155. The relevant question to be answered for the Sole Arbitrator is therefore not whether an additional period of ineligibility shall be imposed on the Athlete (as the word “additional” implies that such sanction is already known), but rather what period of ineligibility shall be imposed on the Athlete, taking into account that another anti-doping rule violation was committed in the same period without being able to take into account the specific circumstances and severity of the steroid violation, as this would have to be decided by the CAS panel adjudicating such case.
156. Be this as it may and proceeding with the determination of the period of ineligibility to be imposed on the Athlete, the Sole Arbitrator observes that Rule 40.2 of the 2012-2013 IAAF Rules determines the following:

*“The period of Ineligibility imposed for a violation of Rules 32.2(a) (Presence of a Prohibited Substance or its Metabolites or Markers), 32.2(b) (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or 32.2(f) (Possession of Prohibited Substances and Prohibited Methods), unless the conditions for eliminating or reducing the period of Ineligibility as provided in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided in Rule 40.6 are met, shall be as follows: First Violation: Two (2) years’ Ineligibility”.*

157. Rule 40.6 of the 2012-2013 IAAF Rules determines as follows:

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

- (a) *Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed*

*multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or other Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation. For the avoidance of doubt, the examples of aggravating circumstances referred to above are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility.*

(b) *An Athlete or other Person can avoid the application of this Rule by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation (which means no later than the date of the deadline given to provide a written explanation in accordance with Rule 37.4(c) and, in all events, before the Athlete competes again”.*

158. The Sole Arbitrator finds that Rule 40.4 of the IAAF Rules dealing with Specified Substances is clearly not applicable in the case at hand and that no circumstances could be demonstrated by the Athlete as to the application of Rule 40.5 of the IAAF Rules (Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances). The Athlete in fact disputed to have committed an anti-doping rule violation, but did not put forward any arguments that could lead to the reduction of the otherwise applicable standard sanction of a two year period of ineligibility in case an anti-doping rule violation would be established.
159. The remaining question to be examined by the Sole Arbitrator is therefore whether there are aggravating circumstances that should lead to an increase of the standard sanction, up to a maximum of a four year period of ineligibility.
160. The Sole Arbitrator considers it highly important in this respect that it has been established that the Athlete is found guilty of using steroids as well as for the present ABP charge and that both violations were committed during more or less the same period. The Sole Arbitrator also finds that the IAAF succeeded in convincingly establishing by means of expert evidence that both offences have been committed independent from each other and that the Athlete's use of oral turinabol could not cause the abnormal blood values in the Athlete's ABP Sample 1. As such, the Athlete used multiple prohibited substances or prohibited methods, *i.e.* oral turinabol and blood doping, at the same time.
161. The Athlete did not admit any of these two violations. This is relevant since Rule 40.7(d)(ii) of the IAAF Rules determines that in order to avoid a finding of aggravating circumstances an athlete must voluntarily admit the earlier anti-doping rule violation for which he is first charged. *A contrario*, since the Athlete did not admit the oral turinabol violation, the second anti-doping rule violation should necessarily be considered as an aggravating circumstance, triggering the application of an extended period of ineligibility.
162. Besides this, the Sole Arbitrator holds that the IAAF was able to convince him to his comfortable satisfaction that the Athlete was subjected to a sophisticated doping scheme, which on its own is given as example for aggravating circumstances by the IAAF Rules and recognised by CAS jurisprudence. This scheme prolonged over a period of at least four years. Thus, the Athlete used a prohibited substance and in parallel followed an extended doping scheme.

163. The Sole Arbitrator takes into account the CAS jurisprudence referred to by the IAAF (CAS 2012/A/2773 and CAS 2013/A/3080), where a four year and a two year and nine months period of ineligibility, respectively, were imposed on athletes for ABP violations. The Sole Arbitrator is aware of the IAAF's pleadings for four years and of the stayed CAS proceedings in the case CAS 2015/A/4050.
164. The Sole Arbitrator reads the case CAS 2013/A/3080, at paras. 82 – 84, as demonstrating that not any ABP violation automatically leads to the increase of the period of ineligibility to the maximum of four years in the view of CAS. In that case, the Panel imposed a sanction of two years and nine months ineligibility considering that the established culpability of the athlete related to only one year and to the targeting of two competitions. In the case CAS 2012/A/2773, on the other hand, a period of four years ineligibility was imposed, because obviously the whole career of the respective athlete was built on doping.
165. Considering that the Athlete in the case at hand committed two separate anti-doping rule violations, the use of turinabol and an ABP violation, and considering that the established ABP violation of the Athlete lasted considerably longer than in the case CAS 2013/A/3080, but on the other hand, that the IAAF did not maintain that the whole career of the Athlete was built on doping, the Sole Arbitrator finds that a period of ineligibility of three years and eight months is appropriate to the severity of the Athlete's misbehaviour.
166. Since the Athlete already served a period of ineligibility of two years between 22 July 2013 until 21 July 2015 in respect of her steroid violation, the Sole Arbitrator finds that this period shall be credited. For practical reasons and in order to avoid any eventual misunderstandings, the Sole Arbitrator holds that the remaining period of ineligibility (*i.e.* one year and eight months) shall commence not at the date of this award, but at the date of commencement of the provisional suspension, which was 5 February 2016.
167. Finally, turning his attention to the disqualification of the Athlete's results, the Sole Arbitrator observes that Rule 40.8 of the 2012-2013 IAAF Rules, determines as follows:
- "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 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".*
168. The Sole Arbitrator observes that this is not a case of a specific "positive sample", it is however a case that falls under Rule 40 of the IAAF Rules as a consequence of which the Athlete's competitive results are nevertheless subject to disqualification. A complicating factor in this respect is that an anti-doping rule violation established on the basis of an ABP does not determine when the violation of Rule 32.2(b) of the IAAF Rules was committed exactly, but rather that based on all the evidence available it must be concluded that a violation was committed during a certain period. This difficulty has already been identified in CAS jurisprudence (CAS 2010/A/2235, para. 116).

169. In the present case, the Sole Arbitrator observes that a re-test, which was performed in 2013, of a Sample taken on 15 August 2009 and which showed the presence of a prohibited substance led to the imposition of a two year period of ineligibility by RUSADA only on 20 January 2015, which means nearly two years later. The review of the Athlete's ABP for the period 14 August 2009 – 8 July 2013 (being the last sample indicative of blood doping) by the Independent Experts took place only on 7 – 9 April 2015, which is also nearly two years later. The current proceedings started on 24 April 2015. The delay of one year and nine months from July 2013 – April 2015 was certainly not caused by the Athlete. On the other hand, the IAAF is asking for disqualification of the Athlete's results for the period 14 August 2009 until the commencement of the provisional suspension, which was 5 February 2016. This is a period of six and a half years and is considerably longer than the maximum period of ineligibility of 4 years that can be imposed according the 2012-2013 IAAF Rules. In the opinion of the Sole Arbitrator, this fact causes an issue of proportionality and fairness of the sanction.
170. As explained above, the Sole Arbitrator finds that a fairness exception must be read into Rule 40.8 2012-2013 IAAF Rules, read together with Articles 40.8 and 23.2.2 WADC. Only when reading in this manner and applying them fairly to the Athlete concerned, both provisions can be understood as complying with the proportionality requirement under general principles of law applicable in Switzerland and Monaco, being the seats of WADA and the IAAF respectively. This award is subject to review by the Swiss Federal Tribunal. The Sole Arbitrator, thus, is bound to observe the Swiss public policy, which – as far as emanating from the European Convention on Human Rights (the "ECHR") – is also binding for the IAAF under the law of Monaco, which is the subsidiary law applicable on the present case. Monaco has ratified the ECHR on 30 November 2005.
171. The European Court of Human Rights (the "EHRC") stated in the *Lithgow and others v. The United Kingdom* case (8 July 1986, application nrs. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81) at para. 194 that the following requirements need to be met in case of even obligatory arbitration:
- (a) The right of access to the courts secured by Article 6 para. 1 (art. 6-1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals".*
  - (b) In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.*
  - (c) Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved".*
172. Established CAS jurisprudence is aware of this obligation and holds that the principle of proportionality requires to assess whether a sanction is appropriate to the violation committed

in the case at stake. Excessive sanctions are prohibited (see *e.g.* CAS 2005/A/830, at paras. 10.21 – 10.31; 2005/C/976 & 986, at paras. 139, 140, 143, 145 – 158; 2006/A/1025, at paras 75 – 103; TAS 2007/A/1252, at paras. 33 – 40, CAS 2010/A/2268 at paras. 141 f, all of them referring to and analysing previous awards and doctrine). The Sole Arbitrator does not see that any more recent arbitral award referred to by the IAAF in its observations has deviated from this requirement. These more recent awards simply come to the conclusion that there was no issue with regard to proportionality in the facts of these cases. One arbitral award discussed only fairness.

173. The Sole Arbitrator considers as essential and continuously applicable also under the WADC and the 2015 WADC, which, by the way, *e.g.* in Article 10.10 explicitly refers to the principle of proportionality, what the Panel had stated in CAS 2005/C/976 & 986, at para. 143:

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

174. In the present case, the Sole Arbitrator is satisfied to accept that Sample 1 is evidence of doping. The Sole Arbitrator is also willing to accept that the Athlete systematically used doping at least over the course of the following three years and eleven months, since a clear pattern could be established. Had such establishment occurred in 2013, when the adverse result of the re-test became known, and the review of the ABP had taken place immediately thereafter, this would have led to the imposition of a provisional suspension in 2013, or at the latest at the beginning of 2014. Thus, even without a fairness exception, the period of disqualification of results would have ended at that moment of time.
175. It must be noted that the results of the Athlete from 15 August 2009 until 14 August 2011 have already been disqualified following the decision of the RUSADA Disciplinary Committee dated 20 January 2015. Further to that, the Athlete could not achieve any competition results anymore in the period she was subject to ineligibility (22 July 2013 – 21 July 2015). The question for the Sole Arbitrator, thus, is, whether considering the overall effect of the sanction on the Athlete, the results in the period in between (15 August 2011 – 22 July 2013) shall be disqualified.
176. Taking into regard that the sanction of disqualification of results embraces the forfeiture of any titles, awards, medals, points and prize and appearance money, the sanction of disqualification is to be held equal to a retroactive imposition of a period of ineligibility and, thus, is a severe measure. The Athlete loses all income from sport and, even more, has to return income achieved. Considering, however, that the ABP has established continued doping of the Athlete for the whole period until 8 July 2013, considering that this comes roughly equal to the overall length of ineligibility period imposed by this award, and considering that the effects of doping at the beginning of July 2013 might well have continued until 22 July 2013, the Sole Arbitrator considers it justified, to disqualify all the Athlete’s results from 15 August 2011 until 22 July 2013, bearing in mind that the results of the Athlete from 15 August 2009 until 14 August 2011 have already been disqualified by the RUSADA Disciplinary Committee. Such disqualification of results covers the whole period during which the Athlete is found to have used doping, as established on the basis of her ABP. The Sole Arbitrator is aware of the fact that such period of disqualification, seen only from the perspective of the sanction of disqualification of the

results, must be deemed excessive in terms of proportionality. However, not to disqualify results that have been achieved by using a prohibited substance or prohibited method cannot be considered as fair with regard to other athletes that competed against the Athlete during this period. The main purpose of disqualification of results is not to punish the transgressor, but rather to correct any unfair advantage and remove any tainted performances from the record (LEWIS/TAYLOR (Eds.), Sport: Law and Practice, 2014, para. C.162, with further references).

177. The Sole Arbitrator feels comforted in this conclusion by the fact that previous CAS panels have also disqualified results going back to the first sample that was collected in the context of an ABP (CAS 2012/A/2773, para. 132).
178. As a consequence, the Sole Arbitrator finds that a period of ineligibility of three years and eight months is to be imposed on the Athlete and that all results of the Athlete since 15 August 2011 through to the commencement of her first period of ineligibility on 22 July 2013 are to be disqualified, including the forfeiture of any titles, awards, medals, points and prize and appearance money, in addition to the results already disqualified by decision of the RUSADA Disciplinary Committee dated 20 January 2015.

(...).

185. The present award may be appealed to CAS pursuant to Rule 42 of the IAAF Rules.

## ON THESE GROUNDS

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

1. The claim filed on 23 February 2016 by the International Association of Athletics Federations against the All Russia Athletics Federation and Ms Tatyana Chernova is partially upheld.
2. A period of ineligibility of three years and eight months is imposed on Ms Tatyana Chernova starting from 5 February 2016.
3. The period of ineligibility served by Ms Tatyana Chernova between 22 July 2013 and 21 July 2015 shall be credited against the period of ineligibility imposed.
4. All results of Ms Tatyana Chernova since 15 August 2011 are disqualified through to 22 July 2013, including forfeiture of any titles, awards, medals, points and prize and appearance money obtained during this period.

(...)

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