



**Arbitration CAS 2016/A/4839 Anna Chicherova v. International Olympic Committee (IOC), award of 6 October 2017**

Panel: Judge Mark Williams SC (Australia), President; Mr Dominik Kocholl (Austria); Mr Mark Hovell (United Kingdom)

*Athletics (high jump)*

*Doping (turinabol)*

*Applicable editions of the International Standard for Laboratories and International Standard for Testing*

*Contractual relationship between the athlete and the IOC*

*Waiting time before splitting and re-analysis of samples*

*Independence of witnesses*

*Right to be heard*

*Right to initiate disciplinary proceedings regarding positive re-testing following initial negative results*

*Retrospective automatic disqualification*

1. It is important that the technical experts be able to make timely changes to International Standards without requiring any amendment to the World Anti-Doping Code (WADC) or any individual stakeholder rules and regulations. Whilst athletes need to know clearly which rules may be applied to them, those persons carrying out the analysis should be able to benefit from any advancement in techniques in order to enable the World Anti-Doping Agency (WADA) and all other anti-doping bodies to best achieve their objectives (in the (athletes') interest of fair competition).
2. Under Swiss law, contracts do not have to be in writing. Therefore, even if an athlete did not sign the Entry Form of the Olympic Games (as it might be someone at the National Olympic Committee who signed on his/her behalf), the athlete's conduct (i.e. participating in Beijing 2008 and submitting him/herself to Doping Control) can amount to an acceptance to be bound by the rules and regulations of the sporting competition, in particular its Anti-Doping Regulations (ADR). Therefore, there is an implied contractual relationship between the athlete and the IOC, as the IOC is known to be the last authority of last resort on any question concerning the Olympic Games.
3. Analysis is not without costs. Clearly it is in the IOC's best interests to wait as long as possible before re-analysing, in order to see if the new testing methods enable it to uncover positives that would have previously been undetectable. Additionally, the amount of urine in the sample is limited and therefore the number of re-analyses to be carried out restricted. One caveat to that is where samples could be affected by time (so substances are naturally broken down or are created over time).
4. Absent any evidence, there is no reason to conclude that any purported lack of true independence of the witnesses used by the IOC in the opening and splitting of an

athlete's samples could reasonably have caused an adverse analytical finding.

5. Pursuant to the the International Standard for Laboratories 2015/16, the presence of the athlete or his/her representative is not a pre-requisite for the IOC to conduct the B-Sample opening and splitting procedure. If the IOC made reasonable attempts to accommodate the athlete, but was unsuccessful, it is within its rights to appoint an independent witness and proceed with the procedure. In any case, if, to the extent that the athlete did have a right to attend, s/he exercised this right by sending someone (irrespective of whether that person was designated as an official representative or not), there is no violation of the athlete's right to be heard, even if the athlete was not present him/herself at the opening and splitting of the B-Sample.
6. The negative outcome of an athlete's sample analysis (i. e. test) in a specific edition of the Olympic Games is not a 'decision' which needs to be appealed in order for the IOC to reserve their right to re-test the athlete's sample 8 years later. The outcome of the test is a report of the analysis/testing process and its result for that sample. If later "re-tests" return a positive result, a disciplinary procedure can be initiated, ultimately leading to a decision, the appeal of which can be the basis of CAS proceedings.
7. Automatic disqualification after 8 years is not excessively binding pursuant to Article 27 of the Swiss Civil Code. Whilst it can be considered to be harsh, it represents a consensus which has been incorporated into the WADC. Its scope is predominately to look at a single event. If an athlete has competed in that event with the benefit of a prohibited substance, then the regulations are in place to effectively remove that athlete's performance, to ensure a level playing field for the remaining athletes. The records need to show which one of those competing without the benefit of a prohibited substance came first and the rewards (medals, prize money, pins, the accolade, etc.) need to go the unassisted winner. It is not a matter of the athlete's intent, fault or negligence. It may be that when that is examined elsewhere a perfectly plausibly explanation is advanced that results in the athlete receiving no ban at all and his/her reputation remains intact. When that matter is heard, s/he is able to defend him/herself. Therefore, his/her right to defend him/herself against further sanctions is not affected.

## I. PARTIES

1. Ms Anna Chicherova (the "Athlete" or the "Appellant") is a Russian citizen and professional high jumper, born in Yerevan, Russia on 22 July 1982.
2. The International Olympic Committee (the "IOC" or the "Respondent"), is the world governing body of Olympic Sports, with its registered office in Lausanne, Switzerland. The IOC is incorporated as an association with respect to articles 60 *et. sq.* of the Swiss Civil Code ("SCC").

## II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in this Award only to the submissions and evidence it considers necessary to explain its reasoning.

### A. Background Facts

#### *i. The Athlete's participation in the Beijing 2008 Summer Olympics*

4. The Athlete participated in the Beijing 2008 Summer Olympics ("Beijing 2008"). As a condition of her participation, the Athlete was required to sign an 'Eligibility Conditions Form' ("the Beijing Entry Form") according to which she would – like the other participants – have specifically agreed to comply with the provisions of the World Anti-Doping Code (the "WADC") in force at the time of the Olympic Games as well as the IOC Anti-Doping Rules applicable to the Beijing 2008 Summer Olympics (the "Beijing ADR").
5. However, at the hearing for this matter, the Athlete testified that she did not sign the Beijing Entry Form, and the signature on the signed Beijing Entry Form submitted by the IOC was not hers. Moreover, she stated that nobody drew her attention to the regulations contained in the Beijing Entry Form. Accordingly, she submitted that she was not bound by any applicable regulations, including *inter alia*, the Beijing ADR. The consequences of this will be dealt with in the merits section of this award.
6. From 21 to 23 August 2008, the Athlete competed in the Women's high jump event (qualification and final), in which she finished third and was awarded a bronze medal.
7. On 24 August 2008, during the night after the final of her event, the Athlete was requested to provide a urine sample for a doping control. This sample was identified with the number 1846073.
8. The A-Sample 1846073 was analysed during Beijing 2008 by the World Anti-Doping Agency ("WADA") accredited laboratory in Beijing. This analysis did not result in an adverse analytical finding ("AAF") at that time.

#### *ii. The Athlete's participation in the London 2012 Summer Olympics*

9. The Athlete participated in the London 2012 Summer Olympics ("London 2012"). The Athlete competed in the Women's high jump event (qualification and final), in which she finished first and was awarded a gold medal.
10. On 11 August 2012, after the competition, the Athlete was requested to provide a urine sample for a doping control. This sample was identified with the number 2717361.

11. The A-Sample 2717361 was analysed during London 2012 by the WADA accredited laboratory in London. This analysis did not result in an AAF either.

*iii. Collection and Storage of samples during Beijing 2008 and London 2012*

12. Since the 2004 Athens Summer Olympics, the IOC had decided to collect samples and store them long term so they could be subject to a delayed analysis. Even if a sample had initially tested negative, the sample could still be re-tested in the future. Part of the rationale for this was to save samples so that they could be re-analysed a long time after the initial analysis by more technologically advanced analytical methods.
13. The possibility of this re-testing was provided for in the respective IOC Anti-Doping Rules applicable during each Olympic Games since 2004. The possibility to collect samples during Beijing 2008 and the London 2012 for long term storage was provided for in Article 6.5 of the Beijing ADR and Article 5.1 of the IOC Anti-Doping Rules 2012 respectively. These provisions clarified that re-analysis could be performed for up to 8 years after collection, i.e. the applicable statute of limitation specified under Article 17 of the WADC applicable to anti-doping proceedings.
14. Article 6.5 of the Beijing ADR stated as follows:

***“Storage of Samples and delayed analysis***

*Samples shall be stored in a secure manner at the laboratory or as otherwise directed by the IOC and may be further analysed. Consistent with Article 17 of the Code the ownership of the samples is vested in the IOC for the eight years. During this period, the IOC shall have the right to re-analyse samples (taken during the Period of the Olympic Games). Any anti-doping rule violation discovered as a result thereof shall be dealt with in accordance with these Rules. After this period, the ownership of the samples shall be transferred to the laboratory storing such samples, provided that all means of identification of the Athletes will be destroyed and that proof of this destruction shall be provided to the IOC”.*

15. After the conclusion of Beijing 2008 and London 2012, all the samples collected during the Olympic Games (including the Athlete’s samples 1846073 and 2717361) were transferred to the WADA accredited laboratory in Lausanne, Switzerland (the “LAD”) for long term storage.
16. The IOC sought to ensure that athletes who were likely to participate in future Olympic Games had not committed anti-doping violations in past editions of the Games. Accordingly, the global re-analysis programs implemented were generally performed towards the end of the 8 year statute of limitation period and/or shortly before an upcoming Olympic Games, thereby allowing testing laboratories to apply the most technologically advanced analytical methods available at that time.
17. The first global re-testing program was conducted on samples collected during the 2004 Athens Summer Olympics in Spring 2012, i.e. close to the 8 year statute of limitation period and before London 2012. This re-testing program resulted in the establishment of 5 anti-doping rule violations (“ADRVs”).

18. The second global re-testing program was conducted on samples collected during the 2006 Torino Winter Olympics in autumn 2013, i.e. close to the 8 year statute of limitation period and before the 2014 Sochi Winter Olympics. It is unclear how many ADRVs were established as a result of this second re-testing program, but the IOC submitted that it was less than 5.
19. A further global re-testing program was scheduled to be completed prior to the Rio 2016 Summer Olympics (“Rio 2016”), and the results were expected by the IOC to be in line with those of previous re-testing programs.

*iv. The WADA Independent Commission Report and the McLaren Report in 2015/2016*

20. On 9 November 2015, prior to the global re-testing program scheduled for 2016, The Final Report No 1 of a WADA Independent Commission, chaired by Mr Richard Pound QC and including members Professor Richard McLaren and Mr Günter Younger, were released. The Independent Commission had been established to report on allegations made on German television in December 2014 of widespread doping among Russian athletes.
21. On 14 January 2016, Part 2 of the results of the Independent Commission investigation were released. Collectively, these two reports will be referred to as the “WADA Independent Commission Reports”.
22. In May 2016, Professor McLaren was appointed by WADA as an Independent Person to investigate allegations made in US media reports as to allegations of widespread doping during the Sochi Winter Olympic Games.
23. On 16 July 2016, Part 1 of the report was released by Professor McLaren.
24. On 9 December 2016, Part 2 of the report was released by Professor McLaren. Collectively, these two reports will be referred to as the “McLaren Report”.

*v. Re-testing of samples collected in Beijing 2008 and London 2012*

25. The results of the WADA Independent Commission Reports and the McLaren Report resulted in the IOC changing the planning of the re-testing program for 2016. The number of samples it re-tested were significantly increased and it decided to re-test samples collected from both Beijing 2008 and London 2012.
26. As the overwhelming majority of the samples collected from Beijing 2008 and London 2012 were stored at the LAD (with the exception of a few samples stored in Cologne), the LAD was instructed to perform most of the re-analysis.
27. On 24 March 2016, formal instructions were sent by the IOC to the LAD to re-analyse over 400 samples collected at Beijing 2008.
28. On 30 March 2016, formal instructions were sent by the IOC to the LAD to re-analyse over 250 samples collected at London 2012.

29. However, there were an unexpectedly large number of AAFs as a result of this re-testing, so further tests were conducted for samples stored from both London 2012 and Beijing 2008, eventually leading to the re-testing of just under 1,000 samples from Beijing 2008 and over 400 samples from London 2012, all before Rio 2016. In all, more than 100 samples were found to contain a Prohibited Substance.
30. The presence of *Dehydrochloromethyltestosterone*, otherwise known as ‘DHCMT’ or ‘(oral) turinabol’ was detected in over three-quarters of the findings of Prohibited Substance(s) made in the course of the re-testing process.
31. WADA had specifically recommended a re-testing of the Athlete’s samples as her name had been mentioned in media reports in connection with allegations of urine substitution. Accordingly, especially as the Athlete won medals in both Beijing 2008 and London 2012, both of the Athlete’s samples (i.e. from Beijing 2008 and London 2012) were re-tested.
32. The re-testing of the Athlete’s London 2012 sample (number 2717361) reported as negative. However, the re-testing of the Athlete’s Beijing 2008 sample (number 1846073) returned a positive result for DHCMT (oral turinabol). This positive result from the re-testing of the Athlete’s Beijing 2008 sample forms the basis of this case.

*vi. Re-testing procedure and the follow up proceedings*

33. In the re-testing of the Beijing 2008 samples, the IOC decided to implement the analysis of split B-Samples. The reason for this was that the A-Samples were not re-sealed, nor were they transported in sealed boxes during their transfer from the respective Olympic laboratories to the LAD. The requirement to re-seal the samples individually or to place them in sealed boxes during their transfer to the laboratory was not specifically provided for in the relevant International Standard for Laboratories (“ISL”) applicable at the time of transfer – i.e. ISL 2008. The A-samples would still be tested, but no reliance would be made on any findings.
34. Provisions providing for the possibility to use a split B-Sample in re-testing had been first introduced in ISL 2008 and was maintained in the subsequent versions of the ISL, notably ISL 2012, which was applicable at the time of the previous re-testing programs (Athens 2004 samples and Torino 2006 samples).
35. However, ISL 2015 (and ISL 2016<sup>1</sup>) had specified the requirement to re-seal samples or to place them in sealed boxes during their transfer<sup>2</sup>. Accordingly, the IOC felt that the application of the split B-Samples procedure for the Beijing samples would provide additional safety and confidence in the results and better guarantees for the athletes involved.

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<sup>1</sup> On 2 June 2016, the ISL 2015 was superseded by the ISL 2016, which the IOC argued became applicable in respect of all processes performed from that date. The Athlete argued that ISL 2008 were the applicable regulations throughout the entire procedure. The Panel’s decision on which version of the ISL was applicable is set out in the merits section of this award.

<sup>2</sup> Article 5.2.2.12.4 of ISL 2015.

36. ISL 2015 and ISL 2016 also provided for another important change, which was allowing for the B-Sample opening and splitting without the requirement that the Athlete would be notified or present, but with the presence of an Independent Witness<sup>3</sup>. Further, the IOC made a policy decision that it would, in principle, not use that possibility unless in situations in which the athlete concerned could not be found or would not participate in the process in good faith.

37. In an IOC internal memo dated 9 March 2016, it stated:

*“As this decision was made to reinforce the warranties by the process to the concerned athletes, it was also decided that the possibility to proceed with the first phase of the Sample analysis without informing the concerned athletes and without giving them the possibility to attend it, would not be used, unless the athletes could not be found and/or would refuse to participate in good faith to the process.*

...

7. *The principles applicable to regular B-sample analysis will be observed mutatis mutandis. The Athlete shall be allowed to be accompanied or to be represented at this occasion. Reasonable requests to accommodate the schedule of the process will be considered to the extent possible”.*

38. The IOC stated that the procedure followed in case of positive results included the following steps:

- As a first step, the result of the re-analysis of the A-Sample is communicated as well as the decision to conduct a full analysis process on the split B-Sample. The analytical result obtained from the A-Sample is described as a Presumptive Adverse Analytical Finding (“PAAF”). The communication form sent to the relevant athlete specified that the attendance by the athlete was not required by the ISL but that the IOC nevertheless offered such a possibility. A form was attached to each letter in which the athlete had to tick a box informing the IOC whether (1) they would attend the opening, splitting of the B-Sample, sealing of the B2-Sample and the analysis of the B1-Sample; or (2) they would not attend but send a representative; or (3) they would not attend and not send a representative.
- Provided the analysis of the B1-Sample confirmed the presence of a Prohibited Substance, the next step was issuing of a formal AAF notification letter. The athlete was then informed of his/her right to request the opening and analysis of the B2-Sample and to obtain Laboratory Document Packages (“LDPs”). This letter also referred to the opening of disciplinary proceedings and indications in that respect.
- The third formal step was the communication of the results of the B2-Sample analysis and the invitation to confirm whether the athlete would file written submissions and/or attend a hearing of the IOC Disciplinary Commission. Normally, an indication of the potential dates of the hearing were given at this stage.

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<sup>3</sup> Article 5.2.12.10 of ISL 2015.

- The LDPs were then provided to the IOC when received from the laboratory. This was usually done within 10 working days from the date the IOC requested it<sup>4</sup>. The IOC stated that since the A-Sample analysis results were not used to support an AAF, there would accordingly be no specific LDP issued specifically for the A-Sample<sup>5</sup>. However, the IOC nevertheless sought to include an analysis of the A-Sample in the LDPs. These LDPs were hence referred to as ‘A/B1 Doc packs’. However, the first ‘A/B1 Doc packs’ which were issued in June 2016 contained only a copy of the A-Sample analysis report (and not a detailed LDP). Given the heavy workload of the LAD at the time, the IOC thus decided that no A-Sample LDPs would be provided going forward. Once the matter was heard by the IOC Disciplinary Commission, if an athlete requested an A-Sample LDP, this was duly issued<sup>6</sup>.
- At the end of the process, if a hearing was required, one was held by the IOC Disciplinary Commission, either in the physical presence of the athlete and/or through video conference.
- A decision was then issued by the IOC Disciplinary Commission.

## **B. The re-testing of the Athlete’s B-Sample**

39. On 4 May 2016, the results of the Athlete’s A-Sample re-analysis were reported by the LAD. It indicated a PAAF, and the presumptive presence of turinabol (metabolites).
40. On 18 May 2016, a letter formally informing the Athlete of the existence of the A-Sample re-analysis results and of the planned conduct of the B-Sample analysis was issued. The letter stated that the IOC had decided to offer the Athlete the opportunity to attend the opening and splitting of the B-Sample despite the fact that this was not formally required. The dates indicated were 31 May and 1 June 2016.
41. On 24 May 2016, the Athlete wrote to the IOC, *inter alia*, requesting a full LDP of her A-Sample, all the documents relating to the chain of custody from the time she gave her sample in Beijing 2008 to that date and also stated that irrespective of the result of the analysis, she was willing to cooperate with the IOC.
42. On 25 May 2016, Dr. Thilo Pachmann wrote to the IOC stating that he had been instructed by the Athlete. Dr. Pachmann, *inter alia*, requested the IOC to reschedule the opening and splitting of the B-Sample and asked for a copy of the LDP for the A-Sample. Dr. Pachmann also stated that the proposed dates of 31 May and 1 June 2016 were inappropriate due to his

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<sup>4</sup> Pursuant to Article 5.2.6.13 of the ISL 2016.

<sup>5</sup> This was in line with the definition of the LDP in ISL 2016.

<sup>6</sup> In the present case, the Athlete ultimately did not appear at her hearing at the IOC Disciplinary Commission, so no A-Sample LDP was issued at the time. However, a copy of the Athlete’s A-Sample LDP was ultimately included in the IOC’s Answer before the CAS.

own personal schedule and the Athlete's training and competition schedule. He requested dates at the end of June or beginning of July 2016.

43. On 27 May 2016, the IOC wrote to Dr. Pachmann stating, *inter alia*, that while the IOC were willing to accommodate a reasonable request from the Athlete, there was no obligation for the Athlete to be present to conduct the first phase of the B-Sample analysis and the 1 month delay suggested was not appropriate given that the matter had to be resolved within a timely manner, prior to Rio 2016. The IOC proposed alternative dates of 6 or 7 June 2016.
44. On 30 May 2016, Dr. Pachmann wrote to the IOC rejecting the proposed new dates indicating that it would not be appropriate for the Athlete (who could not interrupt her training and competition schedule so shortly before Rio 2016), for him (as he had a teaching engagement in South Korea) or for the scientist contacted by the Athlete, Dr. Douwe De Boer (although he could make 8 June 2016). Dr. Pachmann indicated that the only available dates for the 3 of them would be 27, 28 or 29 June 2016.
45. On 31 May 2016, the IOC wrote to Dr. Pachmann and stated that since the Athlete's chosen scientist was available on 8 June 2016, the re-testing process was rescheduled for 8 June 2016.
46. On 2 June 2016, Dr. Pachmann wrote to the IOC protesting, stating, *inter alia*, that even though Dr. De Boer would try to attend the re-testing process on 8 June 2016 that would still not cure the numerous subsequent violations of the Athlete's rights. Dr. Pachmann claimed that performing the splitting and testing of the B1-Sample without the Athlete being present would amount to a violation of her right to be heard, her constitutional and human rights (Article 29(2) Swiss Constitution and Article 6 European Human Rights Convention ("EHRC")), and her procedural rights.
47. On 2 June 2016, the IOC wrote to Dr. Pachmann requesting him to confirm whether Dr. De Boer would be attending the re-testing process. The IOC also stated that the Athlete should consider adapting her training schedule to attend, if she so wished.
48. On 6 June 2016, Dr. Pachmann wrote to the IOC stating that the Athlete needed to go to the hospital "*due to her intense training before the Olympic Games in Rio de Janeiro*" and would "*under no circumstances be able to make it to Lausanne for the sample re-testing and splitting*". No further details were provided about the Athlete's hospitalisation, however Dr. Pachmann reiterated that performing the re-testing in the absence of the Athlete was a severe violation of her procedural rights.
49. On 7 June 2016, the IOC wrote to Dr. Pachmann, *inter alia*, reminding him that, under the ISL, the presence of the Athlete during the re-testing process was not required. The IOC nevertheless offered to postpone the re-testing process to 9 or 10 June 2016. Dr. Pachmann did not respond to this correspondence.
50. On the morning of 8 June 2016, the Athlete's B-Sample was scheduled to be split and re-tested at the LAD in Switzerland. Dr. De Boer arrived unannounced at the LAD and stated that he was acting as a scientific observer and not as a representative (legal or scientific) for

the Athlete, and accordingly, he did not have any authorisation to sign any of the LAD forms on behalf of the Athlete. Due to this confusion, the opening process was rescheduled to 4pm that afternoon.

51. At 4pm on 8 June 2016, the LAD received confirmation and instructions from the IOC to proceed with opening the sample 1846073. The sample was opened and split. The list of attendees during this procedure was as follows:
- Dr. Tiia Kuuranne – Director of the LAD
  - Dr. Norbert Baume – Deputy Director of the LAD, Certifying Scientist
  - Mr Sylvain Giraud – Certifying Scientist and Quality Manager
  - Mr Nicolas Jan - Certifying Scientist
  - Mr Nicolas Francois – IOC Representative
  - Mr Viktor Berezov – Russian National Olympic Committee (“NOC”) representative
  - Dr. Douwe De Boer – Athlete’s scientific observer
  - Ms Andrea Zimmermann – Independent witness
52. At that time, it was too late to consider progressing to B1-Sample preparation and analysis, so the process was postponed until the next morning.
53. On the evening of 8 June 2016, the IOC sent an email to Dr. Pachmann which, *inter alia*, stated that Dr. De Boer had until 8am on the following morning in which to inform the LAD whether he would be ‘observing’ the analysis process.
54. In the morning of 9 June 2016, Dr. De Boer sent an email to the LAD Director (Dr. Kuuranne) in which he indicated that he had not received any further instructions from the Athlete or her counsel, so he would not be present during the analysis.
55. Later that same day, Dr. Pachmann sent a fax to the IOC in which he, *inter alia*, stated that the IOC knew all along that Dr. De Boer would only be available on 8 June 2016. Accordingly, Dr. Pachmann argued that the LAD’s inability to complete the analysis on that day was purposely done to prevent the Athlete from not only being able to witness the sample splitting herself but also to prevent Dr. De Boer from witnessing the re-testing of the B1-Sample. Dr. Pachmann also alleged that the IOC had a “*secret agenda*” and that such “*justice behind closed doors must be forbidden*”.
56. Later that same day, the IOC sent an email to Dr. Pachmann stating:
- “Please note that the IOC does not agree with the content of your fax that you sent to [us] earlier today”.*

57. On 15 June 2016, the AAF notification letter reporting the analytical results of the B1-Sample analysis (which tested positive for turinabol<sup>7</sup>) was sent to Dr. Pachmann. Further, the opening of the B2-Sample was scheduled to occur on 29 June 2016 (a date which the Athlete, Dr. Pachmann and Dr. De Boer had previously stated they were all available for) at the LAD, with analysis being performed over the days following. This letter also indicated that the matter would be heard by an IOC Disciplinary Commission, and stated that the hearing would likely be scheduled between 11 and 15 July 2016.
58. On 21 June 2016, the IOC received the Athlete's completed AAF Notification Appendix in which the Athlete indicated that she did not accept the AAF and requested an opening and analysis of the B2-Sample. Dr. Pachmann also wrote to the IOC stating, *inter alia*, that there was no reason for the Athlete to witness the opening of the B2-Sample since the integrity of the sample "*had been violated behind closed doors*". Nevertheless, Dr. De Boer would still attend the procedure in Lausanne as a 'scientific reviewer'. In this letter, Dr. Pachmann also raised an objection in regard to the jurisdiction of the IOC Disciplinary Commission, arguing that the negative results of the initial analysis conducted at the time of Beijing 2008 would constitute a negative decision, which should have been appealed by the IOC at that time.
59. On 22 June 2016, the IOC wrote to Dr. Pachmann stating that according to "the ISL" (it did not clarify which version), the Athlete can choose either to attend in person or through a representative and that the Athlete was free to choose how she exercised that right. Further, it stated:
- "There is no specific qualification attached to the Athlete's representative, and your attempts to allege that Dr. Douwe De Boer is anything other than an athlete's representative is artificial. Dr. Douwe De Boer will be allowed to attend the sample based upon the above".*
60. On 29 June 2016, the opening and analysis of the B2-Sample was conducted. The attendees at this procedure were as follows:
- Dr. Tiia Kuuranne – Director of the LAD
  - Dr. Norbert Baume – Deputy Director of the LAD, Certifying Scientist
  - Mr Nicolas Jan - Certifying Scientist
  - Mr Nicolas Francois – IOC Representative
  - Dr. Douwe De Boer – Athlete's scientific observer
  - Ms Elizabeth Fulton – Independent witness
61. During the procedure, Dr. De Boer stated that he was not there as a witness and would not verify anything. He was simply there as an observer. He did not answer any questions in relation to the sample or sign any paperwork. Further, Dr. De Boer stated that Dr. Pachmann

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<sup>7</sup> For the avoidance of doubt, any references to the Athlete's sample testing positive for (oral) turinabol throughout this award refer to turinabol (Dehydrochloromethyltestosterone) and/or its metabolites and/or its markers.

had asked for the B1-Sample LDP, to which Ms Kuuranne responded by saying that everything would be processed as soon as possible. The B1-Sample LDP was ultimately ready on that day (i.e. 29 June 2016), and as such, a copy was provided to Dr. De Boer. Later that day, an electronic copy was also sent to Dr. Pachmann via a secure mechanism.

62. On 29 June 2016, Dr. Pachmann wrote to the IOC stating, *inter alia*, that despite repeated requests, he had not received the LDPs for the A-Sample or the B1-Sample (until that day) and that merely providing a copy of the B1-Sample LDP to Dr. De Boer on that day was “*not acceptable*”. Dr. Pachmann stated that the Athlete should have “*received the documentation package well ahead of the testing of the B2 Sample to properly review all documentation packages with the competent persons*”. He also stated that “*... you know very well that Dr. Douwe De Boer is not representing my client in this matter. Dr. Douwe De Boer is scientifically reviewing the testing procedure only*”. Dr. Pachmann went on to say:

*“This is even more important as my client has realized in the meantime that the Sample of the Beijing Olympic Games has – contrary to all other tests – not been entered into the ADAMS system. This is extremely suspicious. However, this might be the explanation, why the IOC is carrying out its justice behind closed doors and without granting my client her legal right to be heard”.*

63. On 30 June 2016, the results of the B2-Sample analysis were reported to the IOC. The results confirmed the B1-Sample analysis results and the presence of the metabolites (substances produced by a biotransformation process within the body) of a Prohibited Substance, i.e. turinabol.
64. On 1 July 2016, the results of the B2-Sample analysis confirming the presence of turinabol were communicated to the Athlete. In this same letter, the Athlete was invited to state whether she would be attending the IOC Disciplinary Commission hearing and/or file a written defence. The letter indicated that the hearing would be scheduled in the third week of July (i.e. 18-22) 2016.
65. Also on 1 July 2016, the International Association of Athletics Federations (the “IAAF”) wrote to the Athlete notifying her that as a consequence of the AAF, she was “*provisionally suspended from all competitions in athletics pending final resolution of [her] case*” with immediate effect.
66. On 6 July 2016, Dr. Pachmann wrote to the IOC stating as follows:

*“On behalf of my client I herewith object against the Adverse Analytical Finding of the B2-Sample, and insist on a Hearing in front of the IOC Disciplinary Chamber.*

*Given the fact that the IOC purposely decided not to give my client the possibility to attend the Sample splitting, and to scientifically review the re-testing of the sample we decided not outline in detail our agendas to allow the IOC on more time to make use of my personal and my client’s absences to continue justice behind closed doors. However, I already protest on behalf of my client should I and/ or my client not be able to attend the Hearing.*

*Furthermore, we object once again for still not having received all the documents which my client has already requested in her email dated 24 May 2016, and in my letter dated 25 May 2016. Given the justice behind*

*closed doors applied through the IOC and the inconsistencies already mentioned in my letter dated 29 June 2016 in the ADAMS System the full disclosure is of utmost importance. Furthermore, I kindly request you to provide us in particular with all the temperatures measured during the taking and the storage of the sample during the last eight years”.*

67. On 7 July 2016, the B2-Sample LDP was provided to the Athlete.
68. On 13 July 2016, the documentation relating to the handling of the sample in Beijing 2008 and its transfer to the LAD was provided to the Athlete.

### **C. Proceedings before the IOC Disciplinary Commission**

69. On 11 July 2016, the IOC informed Dr. Pachmann that the hearing of the IOC Disciplinary Commission was scheduled to take place on 21 July 2016, at 15:30 at the IOC headquarters in Lausanne, Switzerland. The correspondence stated that this schedule had been set further to direct contact between Dr. Pachmann and the IOC’s counsel, Mr Jean-Pierre Morand. It was understood by the IOC’s counsel that Dr. Pachmann could attend the hearing as scheduled.
70. On 12 July 2016, Dr. Pachmann wrote to the IOC stating that he would not be available on 21 July 2016. He also reiterated various requests regarding documentation.
71. On 13 July 2016, the Chairman of the IOC Disciplinary Commission, Mr Denis Oswald, advised Dr. Pachmann that the hearing had been fixed in the later part of the afternoon on 21 July 2016 based on the understanding between him and the IOC’s counsel. Nevertheless, additional dates were suggested to Dr. Pachmann – 18, 19, 20 and (once again) 21 July 2016. It was also indicated that a hearing could be held via videoconference. Dr. Pachmann was invited to indicate which date he chose for the hearing. Dr. Pachmann ultimately rejected all of these proposed dates.
72. On 14 and 15 July 2016, after further correspondence between Mr Oswald and Dr. Pachmann, Mr Oswald confirmed that a hearing would take place on 21 July 2016.
73. On 19 July 2016, Dr. Pachmann wrote to Mr Oswald and stated, *inter alia*, that the Athlete upheld her objection against holding a hearing on 21 July 2016 for a variety of reasons, including having insufficient time to collect adequate evidence supporting her case and the absence of English copies of some of the documents the Athlete had requested the IOC to provide. Dr. Pachmann also stated that the Athlete would not be able to travel to Lausanne on such short notice and that he may also not be able to attend the hearing due to another hearing he had to attend that morning, in Zurich.
74. Pursuant to Article 7.2.4 of the Beijing ADR, the IOC Disciplinary Commission was constituted as follows:
  - Mr Denis Oswald (Chairman, Switzerland), a member of the IOC Juridical Commission;

- Mrs Gunilla Lindberg (Sweden); and
- Mr Ugur Erdener (Turkey).

75. On 21 July 2016, the IOC Disciplinary Commission conducted a hearing. Neither the Athlete nor Dr. Pachmann were in attendance.

76. On 4 October 2016, the IOC Disciplinary Commission issued a decision as follows (the “Appealed Decision”):

*“CONSIDERING the above, pursuant to the Olympic Charter and, in particular, Rule 59.2.1 thereof, and pursuant to the IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad in Beijing in 2008 and, in particular, Articles 2, 5.1, 7.3.3, 8, 9 and 16 thereof.*

*THE DISCIPLINARY COMMISSION OF THE  
INTERNATIONAL OLYMPIC COMMITTEE  
DECIDES*

*I. The Athlete, Anna CHICHEROVA:*

- (i) is found to have committed an anti-doping rule violation pursuant to the IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad in Beijing in 2008.*
- (ii) is disqualified from the Women’s high jump event in which she placed 3rd upon the occasion of the Olympic Games Beijing 2008.*
- (iii) has the bronze medal, the diploma, and the medallist pin obtained in the Women’s high jump event withdrawn and is ordered to return same.*

*II. The LAAF is requested to modify the results of the above-mentioned event accordingly and to consider any further action within its own competence.*

*III. The Russian Olympic Committee shall ensure full implementation of this decision.*

*IV. The Russian Olympic Committee shall notably secure the return to the IOC, as soon as possible, of the medal, the medallist pin and the diploma awarded in connection with the Women’s high jump event to the Athlete.*

*V. This decision enters into force immediately”.*

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

77. On 25 October 2016, in accordance with Article R47 of the Code of Sports-related Arbitration (the “CAS Code”), the Athlete filed a Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) challenging the Appealed Decision and requesting the following prayers for relief:

- “1. *The decision of the Respondent dated 4 October 2016 in the matter BRT III – 007 shall be annulled.*
2. *The CAS shall hold that the Respondent does not have any competence to initiate and/or conduct any disciplinary proceedings against the Appellant. In the alternative the CAS shall hold that the Respondent does not have any right to change the results of the Appellant at the 2008 Olympic Games.*
3. *The Respondent shall be ordered to pay an adequate sum as damages and an adequate compensation for the reputational harm done for missing the Rio Olympic Games.*
4. *The Respondent shall be ordered to pay all costs and fees relating to the preparation and conduct of this arbitration, including, but not limited to, those of Appellant’s attorneys, experts and advisors, which the Appellant reserves the right to produce in due course”.*

78. In her Statement of Appeal, the Athlete submitted the following procedural requests:

- “A. *The Panel shall not be composed of any arbitrators that are on the official list of the Court of Arbitration for Sport.*
- B. *The President of the Panel shall be determined by the two arbitrators, and should the two arbitrators appointed by the parties not agree, by the President of the Cantonal Court of the Canton of Vaud.*
- C. *The deadline to file the appeal brief shall be extended for 10 days, i.e. until 14 November 2016”.*

79. In her Statement of Appeal, the Athlete submitted the following disclosure requests:

- “A. *Any documentation on any testing performed by the Beijing laboratory on any of the Beijing samples (complete raw data / results of the entire analysis (LC, GC traces of the sample as well as MS/MS fragmentation maps from all analysed peaks) and the detailed methodological description for the (re-)analysis on all the Appellant’s urine samples.);*
- B. *Full disclosure of the Standard Operating Procedures of the tests carried out on the Appellant’s urine samples at the Beijing and the Lausanne laboratories;*
- C. *Confirmation that there are no additional documents regarding the chain of custody of any of Beijing samples apart from the documents received until today;*
- D. *Detailed documentation on the storage conditions at the Lausanne laboratory as well as the Beijing laboratory for the Appellant’s sample (including in particular the automatic temperature recordings at the Lausanne laboratory as well as the video recordings);*
- E. *Full disclosure of the communication between the Respondent and the Lausanne laboratory regarding the re-analysis program of the Beijing Olympic Games;*
- F. *Full disclosure from the Respondent of any food and drinks (including samples) which the Appellant was provided by the Beijing Olympic Games Organizing Committee at the 2008 Olympic Games.*

- G. *The Respondent shall be ordered to hand out the full information on the validation of the testing procedure as well as all other tests carried out on the Appellant's urine sample (validation package including proof of suitability of the method which includes in particular full transparency on about the specificity and the sensitivity of the applied tests (i.e. all the detailed numbers on how large was testing population, how many positive controls were included, how many negative controls were included in the test population to obtain test measurements for specificity and sensitivity))*".
80. In her Statement of Appeal, the Athlete nominated Dr. Dominik Kocholl, Attorney-at-Law, Innsbruck, Austria, as an arbitrator, however she also stated the following:
- “17 *According to R48 CAS Code Appellant herewith nominates Mr. Dominik Kocholl, Austria, as its Arbitrator. This nomination is, however only been made in order to comply with the appeal requirements, and can under no circumstances be construed as acceptance of the closed list of arbitrators which are exclusively allowed to arbitrate on CAS Panels. For this reason and pursuant to her procedural request Appellant herewith nominates Dr. Lucien Valloni, Switzerland, as arbitrator for Appellant's side*”.
81. Further, in relation to the composition of the Panel for this case, the Athlete stated the following in her Statement of Appeal:
- “Composition and Functioning of the Arbitral Tribunal**
- 13 *Appellant is well aware that all the arbitrators of the arbitrator list have been appointed by the ICAS which maintains a very close connection to Respondent, which is the International Olympic Committee. In fact, the president of the Respondent has been until recently a very influential member of ICAS.*
- 14 *For this reason the Appellant asks ICAS to take all the necessary steps to ensure the independence of the Panel of Respondent. It has to be ensured that the Respondent has absolutely no and not even indirect influence on the composition of the Panel and the taking of its decisions. For this reason the Appellant requests that the Panel will be only composed of arbitrators that are not members of the CAS list of arbitrators. Furthermore, the President of the Panel shall be determined by the two arbitrators appointed by the parties, and – if these two arbitrators do not agree on a president – by the President of the Cantonal Court of the Canton of Vaud or by another arbitration institute.*
- 15 *The present appeal, and in particular the necessary choice of an arbitrator of the CAS list of arbitrators, can under no circumstances be interpreted as agreement on the way the panel is composed and the way the decisions are taken according to the rules of the CAS Code. Thus, Appellant reserves the right to appeal against the composition of the Panel and to bring the case to an independent tribunal if the composition of the panel and the way of the decision making should not be performed in a manner which is satisfactory for Appellant”.*
82. On 2 November 2016, in accordance with Article R53 of the CAS Code the IOC nominated Mr Mark A. Hovell, Solicitor, Manchester, England, as an arbitrator.
83. On the same day, the CAS Court Office wrote to the parties confirming that the Athlete's deadline to submit her Appeal Brief was extended by 10 days.

84. On 9 November 2016, the Athlete wrote to the CAS Court Office, *inter alia*, requesting certain further information regarding Mr Hovell. Further, the Athlete requested a further extension of 10 days to submit her Appeal Brief.
85. On 10 November 2016, Mr Hovell wrote to the CAS Court Office providing the information which was requested by the Athlete.
86. On the same day, the IOC wrote to the CAS Court Office stating that counsel for the parties had been in contact and agreed that the Appeal Brief would be lodged by 8 December 2016 and the IOC's Answer would be lodged by 31 January 2017. Both deadlines were not going to be extended any further.
87. On 17 November 2016, the Athlete wrote to the CAS Court Office challenging Mr Hovell's appointment as an arbitrator in this case.
88. On 30 November 2016, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to this case was constituted as follows:
- President: Judge Mark L. Williams SC, Judge, Sydney, Australia
- Arbitrators: Dr. Dominik Kocholl, Attorney-at-Law, Innsbruck, Austria  
Mr Mark A. Hovell, Solicitor, Manchester, England
89. On 7 December 2016, Mr Hovell submitted a further letter to the CAS Court Office addressing the points raised by the Athlete in her letter dated 17 November 2016.
90. On 7 December 2016, the Athlete wrote to the CAS Court Office stating as follows:
- “As already mentioned in the Appeal Statement, the Appellant herewith fully upholds her requests regarding the composition of the Panel and herewith challenges the choice of arbitrators from the closed list of arbitrators as well as the appointment of the Panel's President. In particular, the Appellant is worried by the Panel's President's appointment through the Australian Olympic Committee as chairman for the appeal tribunals for various national federations prior to 2012 Olympic Games. Furthermore, the Appellant reserves her right to challenge any of the arbitrators should additional information become available”.*
91. On 8 December 2016, the CAS Court Office wrote to the parties acknowledging receipt of the Athlete's letter dated 7 December 2016, and stated that since the letter did not constitute a formal challenge in accordance with Article R34 of the CAS Code, it was not going to be dealt with further.
92. On 8 December 2016, in accordance with Article R51 of the CAS Code, the Athlete filed her Appeal Brief with the CAS, reiterating the same four prayers for relief stated in her Statement of Appeal dated 25 October 2016, except for request 2 and 3 which had been altered as follows:

“2. *The CAS shall hold that the Respondent does not have any competence to initiate and/or conduct any disciplinary proceedings against the Appellant.*

*Subsidiary, the CAS shall hold that (i) the Respondent does not have any right to state that the Appellant has committed an anti-doping rule violation pursuant to the IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad in Beijing in 2008, (ii) to disqualify the Appellant from the Women’s high jump event in which she placed 3<sup>rd</sup> upon the occasion of the Olympic Games Beijing 2008, and (iii) to withdraw the bronze medal, the diploma, and the medallist pin obtained in the Women’s high jump event of the 2008 Beijing Olympic Games.*

3. *The Respondent shall be ordered to pay an adequate sum as damages and an adequate compensation for the reputational harm done for initiating the disciplinary proceedings against the Appellant and for missing the Rio de Janeiro Olympic Games”.*

93. In her Appeal Brief, the Athlete reiterated procedural requests A and B stated in her Statement of Appeal dated 25 October 2016, along with the following amendments and additions:

“C. *The Panel shall order an independent scientific expert to review the scientific validity, sensitivity and general reliability of the analysis applied to establish the presence of Turinabol in the Appellant’s alleged Beijing sample. Such expert shall in particular give a statement on the probability of false positive findings.*

D. *The Panel shall order an independent expertise whether the athletes participating in the Beijing Olympic Games were aware of a possible re-analysis program of the Respondent and the consequences this would have had for the athletes to keep proof for the future.*

E. *The Panel shall order the Respondent to provide readable and translated copies of the Documentation of the Chain of Custody of the alleged Beijing [sic] of the Appellant and give the Appellant the possibility to comment on them.*

F. *The Panel shall order a detailed analysis of the bottles and caps covering the alleged Appellant’s urine samples by an independent professional investigator in order to review whether they have been tampered with and whether there has been a similar practice applied on the alleged Appellant’s urine samples as in the Sochi laboratory (possible replacement of the Appellant’s urine by a third party and/or adding of a prohibited substance into the Appellant’s urine samples).*

G. *The Appellant shall be given the opportunity to present further evidence regarding the possibility of the replacement of the Appellant’s urine by a third party and/or adding of a prohibited substance into the Appellant’s urine samples should additional evidence come up”.*

94. In her Appeal Brief, the Athlete submitted the following disclosure requests:

“A. *Any documentation on any testing performed by the Beijing laboratory on any of the Beijing A sample (complete raw data / results of the entire analysis (LC, GC traces of the sample as well as MS/MS fragmentation maps from all analysed peaks) and the detailed methodological description for the (re-) analysis on all the Appellant’s urine samples).*

- B. *Any documentation on any testing performed by the Lausanne laboratory on the alleged Beijing A Sample of the Appellant (complete raw data / results of the entire analysis (LC, GC traces of the sample as well as MS/MS fragmentation maps from all analyzed peaks) and the detailed methodological description for the (re-)analysis on all the Appellant's urine samples).*
- C. *Any documentation on any testing performed by the London laboratory and the Lausanne laboratory on the London Sample(s) of the Appellant (complete raw data / results of the entire analysis (LC, GC traces of the sample as well as MS/MS fragmentation maps from all analyzed peaks) and the detailed methodological description for the (re-)analysis on all the Appellant's urine samples).*
- D. *Any documentation on any testing performed by the Daegu laboratory and the Lausanne laboratory on the Daegu Sample(s) of the Appellant (complete raw data / results of the entire analysis (LC, GC traces of the sample as well as MS/MS fragmentation maps from all analyzed peaks) and the detailed methodological description for the (re-)analysis on all the Appellant's urine samples).*
- E. *Any documentation on any testing performed by the Lausanne laboratory on the different urine samples which were tested in the same sequence on 8/9 and 29/30 June 2016 as the Appellant's alleged Beijing Sample (complete raw data / results of the entire analysis (LC, GC traces of the sample as well as MS/MS fragmentation maps from all analyzed peaks) and the detailed methodological description for the (re-)analysis on all the Appellant's urine samples).*
- E. *Full disclosure of the Standard Operating Procedures of the tests carried out on the Appellant's urine samples at the Beijing and the Lausanne laboratories.*
- F. *Confirmation that there are no additional documents regarding the chain of custody of any of Beijing samples apart from the documents received until today.*
- G. *Detailed documentation on the security mechanisms applied as well as the storage conditions at the Lausanne laboratory as well as the Beijing laboratory for the Appellant's alleged Beijing samples (including in particular the automatic temperature recordings in the storage box right after the sample is taken, the automatic temperature recordings during the time in the Beijing laboratory, the automatic temperature recordings during the transport from the Beijing to the Lausanne laboratory, and the automatic temperature recordings at the Lausanne laboratory as well as the video recordings).*
- H. *Full disclosure of the communication between the Respondent and the Lausanne laboratory regarding the re-analysis program of the Beijing Olympic Games.*
- I. *Full disclosure from the Respondent of any food and drinks (including samples) which the Appellant was provided by the Beijing Olympic Games Organizing Committee at the 2008 Olympic Games.*
- J. *Full disclosure from the Russian Olympic Committee and the Russian Athletics Federation of any food and drinks (including samples) which the Appellant was provided during the months before the 2008 Olympic Games.*
- K. *The Respondent shall be ordered to hand out the full information on the validation of the testing procedure as well as all other tests carried out on the Appellant's urine sample (validation package including proof of suitability of the method which includes in particular full transparency on about the*

*specificity and the sensitivity of the applied tests (i.e. all the detailed numbers on how large was testing population, how many positive controls were included, how many negative controls were included in the test population to obtain test measurements for specificity and sensitivity)).*

- L. *Disclosure of the alleged decision of the IOC and the reasons thereof not to enter the testing at the Beijing Olympics into the ADAMS System.*
- M. *Disclosure of all the connections of the “independent witness” “A. Zimmermann” to the Respondent, the WADA, the IAAF, the ICAS, and the Lausanne laboratory (meaning full disclosure of all her professional relationships with these organizations today and in the last seven years).*
- N. *Disclosure of the BOCOG and/or the Respondent’s decision to choose the Lausanne laboratory for the re-analysis of the Appellant’s urine samples”.*
95. On 13 December 2016, the IOC wrote to the CAS Court Office stating its position regarding the Athlete’s challenge of its appointment of Mr Hovell as an arbitrator. In summary, the IOC rejected the Athlete’s challenge.
96. On 14 December 2016, Dr. Kocholl replied to the CAS Court Office regarding that challenge stating *inter alia* that it was his understanding that “*it should be and was solely the decision of ICAS..., which 12 arbitrators were selected for the CAS Ad hoc Division during the Rio de Janeiro Olympic Games 2016*”.
97. On 15 December 2016, the CAS Court Office wrote to the parties and provided the Athlete with a deadline of 20 December 2016 in which to confirm whether she wished to maintain her challenge of Mr Hovell’s appointment.
98. On 19 December 2016, the IOC wrote to the CAS Court Office requesting that the deadline for submitting its response to the Athlete’s disclosure requests be extended to the time of filing the IOC’s Answer, for the purposes of procedural efficiency and on the basis that the IOC’s counsel was going to be on leave over the Christmas period.
99. On 19 December 2016, the CAS Court Office wrote to the parties informing them that the President of the Panel had decided to grant the IOC’s request to address the Athlete’s disclosure requests in its Answer.
100. On 20 December 2016, the Athlete wrote to the CAS Court Office, *inter alia*, maintaining her challenge of Mr Hovell’s appointment as an arbitrator and requested that the ICAS render a decision in that regard. Moreover, the Athlete requested information regarding the persons at ICAS who would be rendering such a decision and stated that “*such formal decision of the ICAS is even more important as the Appeal Division’s President did not step down from her position given the first appointment of Prof. Matthew Mitten who was through his nationality directly involved in the matter*”. The Athlete also stated that she upheld her challenges “*against the other members of the Panel as well, and she expects an additional decision of the ICAS pursuant to her challenge filed on 7 December 2016*”. In particular, the Athlete expressed concerns regarding the appointment of Judge Williams SC as

President of the Panel, and requested Judge Williams SC to provide further information regarding his background.

101. On 21 December 2016, the CAS Court Office wrote to the parties acknowledging receipt of the Athlete's letter dated 20 December 2016 and confirmed that the ICAS Board would render a decision regarding Mr Hovell's appointment in due course pursuant to Article R34 of the CAS Code. Further, the CAS Court Office stated the following:

*“Concerning the Appellant's concerns with respect to her letter of 7 December 2016, I kindly inform the Appellant as follows:*

- *Her objection to the choice of arbitrators from the closed list of arbitrators as well as the appointment of the President of the Panel has been expressly dealt with in my letter of 1 November 2016 pursuant to which “The Appellant is advised that since she has decided to refer the matter to CAS arbitration, the procedural rules of the Code will apply strictly. The Appellant is furthermore advised that each arbitrator nominated in the present matter will have to sign a statement of independence and will have to disclose any information which could affect her/his independence or impartiality”. This is the reason why I have stated in my letter of 8 December 2016 that her reservations about the composition of the Panel were noted.*
- *The above is also relevant with respect to the Appellant's request that the President of the CAS Appeals Arbitration Division steps down from her role for the appointment of the President of the Panel. In this respect, the Appellant is advised that the President of the CAS Appeals Arbitration was not made aware of any possible conflict of interest of Mr Matthew Mitten in the present matter, since the latter spontaneously resigned from his function, and that such circumstance cannot constitute a ground for challenge.*
- *The Appellant's general reservation of her right to challenge any of the arbitrators in abstracto cannot constitute a formal challenge of Messrs Mark Williams SC or Dominik Kocholl as per the provisions of Article R34 of the Code. Only challenges against arbitrators as per the Code shall be dealt with”.*

102. On 21 December 2016, Judge Williams SC wrote to the CAS Court Office providing information on his background, as requested by the Athlete. This was duly forwarded to the parties by the CAS Court Office.

103. On 6 January 2017, the ICAS Board rendered its decision regarding the appointment of Mr Hovell, which concluded as follows:

*“The Board of the International Council of Arbitration for Sport hereby rules:*

1. *The petition for challenge the nomination of Mr Mark Andrew Hovell filed on 17 November 2016 by Ms Anna Chicherova is dismissed.*
2. *The costs of the present order shall be determined in the final award or in any other final disposition of this arbitration”.*

104. On 9 January 2017, the Athlete wrote to the CAS Court Office stating the following (emphasis added by the Athlete):

*“The Appellant refers to the decision of the ICAS Board dated 6 January 2017 which was signed by Michael B. Lenard.*

*Unfortunately, it seems as if the decision was not taken without the involvement of people being extremely close to the Respondent. Michael B. Lenard is a former Vice-President of the United States Olympic Committee, a former member of its Executive Committee and Board of Directors, and a former member of the Board of Directors of the Organizing Committee for the 1996 Olympic Games. In such position he is clearly connected to the Respondent. Moreover, Michael B. Lenard was the President of several CAS Ad-hoc Divisions at the Olympic Games. Due to such position it is clear that he should not have decided on this question which would have put in question his own credibility. For all these reasons it is crystal clear that Michael B. Lenard could not have been included in the decision making progress on the Appellant’s challenge. Let alone all the questions which would need to be asked on the way Michael B. Lenard was appointed as ICAS member.*

*The Appellant herewith formally protests against such decision and request detailed information on the way such decision was taken. In particular, the Appellant requests clarification on the ICAS members involved in the decision.*

*The Appellant reserves all her legal rights due to such violation of her procedural rights”.*

105. On 9 January 2017, the CAS Court Office wrote to the parties acknowledging receipt of the Athlete’s letter dated 9 January 2017, and informed the Athlete that *“as indicated on the Order on Challenge, the decision was taken by the ICAS Board but that Mr John Coates, as Vice-President of the IOC, had decided to recuse himself in the context of the present matter. Furthermore, the Appellant is advised that the CAS is not the appropriate forum if she wishes to challenge the Order rendered”.*
106. On 9 January 2017, the Athlete wrote a further letter to the CAS Court Office, stating that new evidence had come to light recently, in the form of a scientific article regarding the application of the applied turinabol test. The Athlete also stated the following (emphasis added by the Athlete):

*“The renown [sic] scientist Arthur T. Kopylov has analysed the applied Turinabol test in more detail and has come to the conclusion that the results are not reliable and require a careful revision by the scientific community. Until today there are no control samples, post administration assays [sic], there is a lack of real standards as well as contradictions to previous and current research and many other questionable aspects.*

*For this reason the Appellant herewith files Arthur T. Kopylov’s paper on the “Critical Assessment of the Current WADA Approach for the Detection of 4-Chlorodehydromethyltestosteron” which was published in the Journal of Analytical Sciences, Methods and Instrumentation, in December 2016, p 65-82.*

*Furthermore, the Appellant herewith calls Arthur T. Kopylov as a witness and requests the Panel to invite Arthur T. Kopylov as a witness in this case. Should Arthur T. Kopylov not follow the Panel’s invitation the Appellant requests that Arthur T. Kopylov is interrogated by state courts”.*

107. On 31 January 2017, in accordance with Article R55 of the CAS Code, the IOC filed its Answer to the Athlete's Appeal. In its Answer, the IOC made the following requests for relief:

*"In light of the above, the IOC respectfully requests that the CAS Panel issues an award holding that:*

I. *The Appeal filed by Mrs Anna Chicherova is dismissed.*

II. *The IOC is granted an award for costs.*

III. *Any and all prayers for relief shall*<sup>8</sup>.

108. In its Answer, the IOC submitted the following responses to the Athlete's procedural requests:

**"a. Panel composition**

365. *This request is moot.*

**b. President designation**

366. *This request is moot.*

**c. Designation of independent scientific expert**

366. *This request is to be rejected.*

367. *This request is not substantiated.*

368. *The method in question is a well established and proven one.*

370. *The WADA report and the Statement of Prof Ayotte show the arguments of Dr. Kopylov to be meritless.*

371. *The Panel will be able issue an informed decision on the basis of these elements.*

**d. Expertise on awareness of re-analysis**

372. *This request is to be rejected.*

373. *This request is not serious and does not deserve discussion.*

**e. Readable Beijing Documents**

374. *The Respondent has provided the best copies it could.*

375. *The Respondent refers to the description provided in the brief.*

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<sup>8</sup> The Panel notes that this request for relief appeared to be incomplete, but has quoted the request verbatim.

376. *In the Respondent's opinion, the documentation as provided allows to cover all the elements relevant to this case (i.e. elements in connection with the Samples N° 1846073).*

**f. Analysis of the bottles**

377. *This request is to be rejected.*

378. *The occurrences in Sochi [sic] are of an extraordinary nature and cannot be per se a reason to conduct additional investigations in the absence of any substance in the allegation of urine substitution.*

379. *It can be noted that in Sochi, the samples were "cleaned" not spiked with a doping substance.*

380. *The prohibited Substance found is a long term metabolite, i.e. not a substance, which could be used for spiking. These metabolites were not even reported in 2008.*

381. *There is not the slightest plausibility in a tampering scenario and the gratuitous insinuations of the Appellant shall be not be given weight.*

**g. Further evidence**

372. *This is not a request".*

109. In its Answer, the IOC submitted the following responses to the Athlete's disclosure requests:

**"a. Documentation on analysis of the A-Sample 1846073 in Beijing**

383. *This request is to be rejected.*

384. *The requested documentation does not exist and is without any relevance for the outcome of this matter. The only relevant analysis are the ones performed in Lausanne.*

385. *Since the analysis was negative, no analytical documentation has been issued. The Doping Control Report (negative) and the Distribution for screening analysis Form relative to this Sample are included in the Beijing documentation are the only documents available existing to date.*

386. *The Respondent notes that the inclusion of the data concerning other samples will only serve a strategy of flooding the case with irrelevant elements.*

**b. Documentation on analysis of the A-Sample 1846073 in Lausanne**

387. *The A-Sample Documentation is provided with this brief.*

388. *This corresponds to what is to be provided in accordance with the ISL and the applicable TD2009LDOC.*

389. *Further requests shall be rejected and reference is made in this respect to the position of the Laboratory, which is in control of the data ...*

**c. Documentation on analysis of the A-Sample 1846073 in London and Lausanne**

390. *This request is to be rejected.*
391. *The negative results are a fact.*
392. *There is no relevance in connection with only relevant analysis, which are the ones performed in Lausanne on a sample collected in 2008.*
393. *Since the analysis was negative, no analytical documentation has been issued.*
394. *The Respondent notes that the inclusion of the data concerning other samples will only serve a strategy of flooding the case with irrelevant elements.*

**d. Documentation on analysis of the Daegu Sample**

395. *This request is to be rejected.*
396. *The IOC has no authority over this sample.*
397. *In any event, the analytical data regarding this sample is without relevance in relation with this matter.*

**e. Documentation on other samples tested in the same sequence**

398. *The request is to be rejected.*
399. *All the analytical data, which has to be provided is included in the Laboratory Document Packages.*
400. *The IOC is not in control of further data.*
401. *These samples are in any event third party samples and data cannot be communicated. Reference is made to the position of the Laboratory Director...*
402. *Batch procedures are standard laboratory has procedures in place to avoid/control any risk of cross-contamination. In this case such is excluded.*

**f. Provision of SOPs**

403. *The request is to be rejected.*
404. *The IOC is not in possession of SOPs.*
405. *The request has been forwarded to the Laboratory. Reference is made to the position of the Laboratory Director.*

**g. Additional documents Beijing**

406. *What could be obtained has been provided.*

***h. Security Mechanism of LAD***

407. *The request is to be rejected.*

408. *The request has been forwarded to the Laboratory. Reference is made to the position of the Laboratory Director.*

***i. Communication in regard of the re-analysis program Beijing***

409. *The Respondent has provided with this brief the mission order and the list (edited) as well as a statement (with exhibits) mentioning elements specific to the Appellant.*

410. *The request is to be denied for the rest as the Appellant is not entitled to have access to elements, which do not concern her own situation.*

***j. Disclosure by ROC and ARAF of food and drinks***

411. *These requests are to be rejected.*

412. *These requests are addressed to entities, which are not parties.*

413. *In any event, their sole purpose is to create confusion.*

414. *Turinabol is not an ingredient in regular food and drinks.*

***k. Validation data***

415. *The request is to be rejected.*

416. *The request has been forwarded to the Laboratory. Reference is made to the position of the Laboratory Director.*

***l. Implementation of Adams***

417. *This request is without purpose.*

418. *In 2008, the Respondent had not implemented Adams yet.*

419. *There is nothing else to report, explain or disclose in this respect.*

***m. Questions regarding Ms Andrea Zimmermann***

420. *This request is to be rejected.*

421. *The Respondent has no link with Mrs Zimmermann.*

422. *Questions to witnesses are to be asked in due time.*

***n. Choice of LAD to re-analyse the Appellant's samples***

423. *The mission order confirms the decision to entrust the LAD with the re-analyse i.a. the Appellant.*
424. *There is nothing else to be disclosed*".
110. On 1 February 2017, the CAS Court Office wrote to the parties and, *inter alia*, invited the parties to inform the CAS Court Office by 8 February 2017 whether they wished for the Panel to hold a hearing or whether they wished for the Panel to render an award solely on the written submissions.
111. On 6 February 2017, the CAS Court Office wrote to the parties informing them, *inter alia*, the any of the Athlete's remaining procedural requests would be dealt with at the hearing, if any, and in the final award.
112. On 7 February 2017, the CAS Court Office wrote to the parties granting the Athlete 7 days in which to state which disclosure requests she maintained and the reasons therefor.
113. On 8 February 2017, the Athlete wrote to the CAS Court Office insisting that a hearing be held in this matter, and noted that the IOC's exhibit 13 was not submitted with the Answer. On the same day, the CAS Court Office wrote to the IOC requesting it to submit a copy of exhibit 13 at its earliest convenience.
114. On 8 February 2017, the IOC wrote to the CAS Court Office stating its preference for a hearing to be held but noted that as a matter of principle, it was "*opposed to any procedural requests outside the customary ones*". The IOC also submitted a copy of exhibit 13 and stated that it was a merely a result of human error rather than a deliberate withholding of the exhibit.
115. On 10 February 2017, the CAS Court Office wrote to the parties informing them that the Panel had determined to hold a hearing in this matter, and that they would be available for a hearing on 30 and 31 May 2017. The parties were invited to submit their availability on those dates by 17 February 2017.
116. On 14 February 2017, the Athlete wrote to the CAS Court Office stating, *inter alia*, the following:
- The Athlete stated that the LAD responded to some of the disclosure requests on behalf of the IOC, which raised doubts about its independence and protested that the IOC was allowed to disguise the LAD's statements as its own.
  - The Athlete stated that the CAS Court Office appeared to have decided on the admittance of the LAD's letter dated 27 January 2017 instead of the Panel. The Athlete protested against this decision and reminded the CAS Court Office to "*strictly refrain from attempting to somehow influence the Panel in the future*".

- The Athlete maintained all of the disclosure requests contained in her Appeal Brief dated 8 December 2016 and addressed each one<sup>9</sup>. The Athlete requested the Panel to grant her the necessary information and documents.
  - The Athlete requested the Panel to inquire as to the current status of a research project which Dr. Kopylov was undertaking and to consult such a project.
  - The Athlete requested the Panel to declare exhibit 13 of the IOC's Answer as inadmissible due to its late submission.
117. On 16 February 2017, the IOC wrote to the CAS Court Office stating that it would be available for a hearing on 30 and 31 May 2017.
118. On 17 February 2017, the Athlete wrote to the CAS Court Office stating that she would be available for a hearing on the proposed dates. On the same day, the CAS Court Office wrote to the parties confirming that a hearing would be held on 30 and 31 May 2017.
119. On 20 February 2017, the CAS Court Office wrote to the parties on behalf of the Panel, informing them, as follows, of the Panel's decision regarding the Appellant's various disclosure requests:

*"The Appellant's disclosure requests"*

*The Panel has discussed at length the various disclosure requests made by the Appellant and has considered the Respondent's Answer together with the letter from the Appellant dated 14 February 2017.*

*The Panel notes it has the ability, pursuant to Article R44.3 of the CAS Code, to order the "other party" (i.e. the Respondent) to produce documents in its possession or under its control, should the Panel determine that these are likely to exist and to be relevant.*

*The Panel notes that a number of the disclosure requests relate to documents that are, or may be, in the possession of third parties. The most prominent third party is the Lausanne Laboratory. The Panel notes that the Respondent has contacted the Director of the Laboratory, who has provided some evidence and statements, and the Panel understands that the Director will be available for examination at the hearing. The Panel is not able to make any direct disclosure orders against the Laboratory or other third parties, as such, the Appellant will have to deal with those third parties at the hearing.*

*Specifically, the Panel has considered each request and makes the following determinations or requests (using the lettering applied by the Appellant - which contains two (E)s):*

- (A) *The Panel would like the Respondent to expand on its response within **14 days** from the receipt of the present letter. It seems a test was taken on the A Sample in Beijing. What documentation (or "raw data") would normally be produced for such a test, where the outcome was negative? Has that*

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<sup>9</sup> For the sake of brevity, the Panel has not quoted or summarised all of the submissions by the Athlete in her letter in this award, but notes that it took all of the submissions into consideration when making its decisions.

*documentation been destroyed, lost, misplaced, etc? The Panel would like to know why it “does not exist”.*

- (B) *This request has been satisfied.*
- (C) *The Panel allows this request and orders the Respondent to provide the Appellant with the required documentation within **14 days** from the date of this letter.*
- (D) *The Panel notes that the Respondent has no authority over this documentation and denies this request.*
- (E) *The Panel denies this request. It is not appropriate for other athletes’ test data to be passed to the Appellant. The Panel understands that Dr. Kuuranne will be available for examination at the hearing.*
- (E) *The Respondent is ordered to enquire from the Laboratory how many and which of the SOPs were directly relevant to the re-testing of the Appellant’s samples and to provide any answer to the Appellant and the Panel within **14 days** of this letter. Thereafter, the Appellant will have **14 days** to address in more detail the relevance of these to its submissions in the present case.*
- (F) *The Respondent is ordered to explain within **14 days** of this letter exactly what documentation would normally be available to check the chain of custody of any sample and then to state if they have all been provided or whether any are missing, as opposed to stating “what could be obtained has been provided”.*
- (G) *This request is denied. The Appellant will have the opportunity of examining Dr. Kuuranne at the hearing, as it appears that he will be called to give evidence.*
- (H) *The Respondent is ordered to confirm within **14 days** of this letter whether there are any communications between itself and the Laboratory relating to the Appellant’s retesting and to provide any copies. Otherwise, this request is denied. The Appellant will have the opportunity of examining Dr. Kuuranne and Dr. Budgett at the hearing, as the Respondent has indicated that they will be called at the hearing.*
- (I) *This request is denied. The Panel is not persuaded that such documentation would exist. Further, unless the Appellant is alleging contamination or sabotage, the Panel fails to see the relevance of the request.*
- (J) *This request is denied, for the reasons set out in (I) above. Further, the request relates to the ROC and the IRAF, and the Panel has no power to order production from those bodies.*
- (K) *The Respondent is ordered to request from the Laboratory details of its method validation data and to provide any answer to the Appellant and the Panel within **14 days** of this letter, notwithstanding the reference to 5.4.4.2.3 of the ISL in the letter from Dr. Kuuranne of 27 January (Exhibit R-42).*
- (L) *The Respondent is ordered to inform the Panel and the Appellant within **14 days** from the date of this letter, whether it was its practice to put into ADAMS details of tests taken from 2007 (or*

*another time before ADAMS was implemented) and, if so, from when, and if the Appellant's initial negative results were within that period, why her results were not included.*

(M) *This request is denied. The Appellant will have the opportunity of examining Mrs Zimmermann at the hearing if the Respondent calls her to give evidence, as indicated.*

(N) *This request is denied. The Appellant will have the opportunity of examining Dr. Kuuranne and Dr. Budgett at the hearing, assuming the Respondent calls them to give evidence as indicated in the Answer”.*

120. In the same letter as above, the CAS Court Office informed the parties that the late filing of the IOC's exhibit 13 was admissible, as the Panel was satisfied that *“it was simply a clerical error that resulted in the late filing. It was clearly referred to in the Answer and is not considered a supplemental exhibit”*.

121. In the same letter as above, the CAS Court Office informed the parties of the Panel's decision regarding Dr. Kopylov, which was as follows:

*“The Panel notes that pursuant to Article R51 of the CAS Code, it is for the Appellant to present her own evidence, witnesses and experts. Article R44.3 of the CAS Code is for situations where the Panel determines to appoint its own expert. The Panel has determined to accept the late filing of the paper written by Dr. Kopylov by the Appellant, as it is satisfied that this was submitted once the Appellant was aware of the same and well before the filing of the Answer, in accordance with Article R56 of the CAS Code. However, the Panel declines the invitation to call Dr. Kopylov itself.*

*Further, the Appellant has not requested that it be now able to call Dr. Kopylov as a witness. The Panel anticipates that she may look to do so now and invites the Appellant to confirm this within 7 days from the date of this letter, further granting the Respondent 7 days thereafter to respond to such request, should it be made”.*

122. On 27 February 2017, the IOC wrote to the CAS Court Office requesting guidance from the Panel regarding the scope of the Athlete's disclosure request C.

123. On 27 February 2017, the CAS Court Office wrote to the parties informing them that Mr Tiran Gunawardena, Solicitor, Sydney, Australia had been appointed as an *ad hoc* clerk in this matter.

124. On 27 February 2017, the Athlete wrote to the CAS Court Office confirming that she wished to call Dr. Kopylov as a witness, but as she could not contact him, requested the Panel to invite him to attend the hearing and should he not follow the Panel's invitation, that he should be interrogated by state courts.

125. On 28 February 2017, the IOC wrote to the CAS Court Office requesting an extension for providing its answers to the remaining disclosure requests. On the same day, the CAS Court Office wrote to the parties inviting the Athlete to state her position on the extension request by 3 March 2017.

126. On 3 March 2017, the Athlete wrote to the CAS Court Office stating, *inter alia*, the following:
- The Athlete stated that the Panel’s denial of some of her disclosure requests amounted to a violation of her right to be heard and the right to a fair trial pursuant to Article 29 of the Swiss Constitution and Article 6 of the EHRC.
  - The Athlete reiterated her request for the Panel to grant the full disclosure request C stated in her Appeal Brief and stated that a refusal to do so would amount to a violation of her right to be heard and the right to defend herself.
  - The Athlete refused to consent to the extension request of the IOC.
127. On 6 March 2017, the IOC wrote to the CAS Court Office stating, *inter alia*, the following:
- Dr. Kopylov would be a scientific expert, not a witness of fact.
  - Pursuant to Articles R57 and R44.2 of the CAS Code, it is the responsibility of the parties to bring their own witnesses and experts.
  - The IOC noted that the Athlete had already appointed an expert, Dr. De Boer, who was in a position to evaluate the merits (or lack thereof) of Dr. Kopylov’s publication.
  - The IOC noted that Dr. De Boer had cooperated with Dr. Kopylov on a previous case cited by the Athlete herself (*CAS 2016/A/4632*<sup>10</sup>), which implied that the Athlete “*should probably be in a position to find and contact Dr. Kopylov and to have him as expert, should Dr. Kopylov agree to do so*”.
128. On 7 March 2017, the IOC submitted its answers to the remaining disclosure requests of the Athlete<sup>11</sup>.
129. On 8 March 2017, the Athlete wrote to the CAS Court Office stating, *inter alia*, the following:
- The Athlete reiterated that she did not consent to the extension of time.
  - Pursuant to Article 164 of the Swiss Civil Procedure Code (“CPC”), the fact that the IOC unjustifiably denied to satisfy the disclosure requests ordered by the Panel should be interpreted to the disadvantage of the IOC.
  - The IOC’s actions amounted to a clear violation of the Athlete’s right to be heard and right to a fair trial.

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<sup>10</sup> *CAS 2016/A/4632*.

<sup>11</sup> For the sake of brevity, the Panel has not set out all the points made by the IOC in this letter. To the extent that the points made are essential to explain the reasoning of the Panel in its decision, they have been referred to in the merits section of this award.

- The Athlete reiterated her protest at the actions of the CAS Court Office, requested that the extension of the deadline not be granted and requested the Panel to take into account the IOC's unjustified refusal to cooperate, when appraising the evidence.
130. On 16 March 2017, the Athlete wrote to the CAS Court Office and, *inter alia*, reiterated her request for the Panel to invite Dr. Kopylov as a witness and that Dr. Kopylov be interrogated by state courts should he not accept the Panel's invitation.
131. On 27 March 2017, the CAS Court Office wrote to the parties on behalf of the Panel and stated the following:

*"1) The Appellant's repeated requests for the Panel to call Dr. Kopylov as a witness or expert*

*The Panel notes that the Appellant has now requested the Panel to call Dr. Kopylov as a witness/expert and that he be interrogated by state courts should he not accept the Panel's invitation, on four separate occasions.*

*On 20 February 2017, the Panel already declined the invitation to call Dr. Kopylov either as a witness or an expert pursuant to Article 44.3 and Article R57 of the CAS Code. Having considered all the submissions of both parties since then, the Panel reiterates its conclusion that **it will not** call Dr. Kopylov as an expert or witness pursuant to Article 44.3 and Article R57 of the CAS Code. Further, **it will not** request state courts to compel Dr. Kopylov to testify as a witness or expert.*

*This decision by the Panel is final and accordingly, the Panel kindly invites the Appellant to refrain from requesting the Panel to call Dr. Kopylov as an expert or witness any further.*

*2) The late inclusion of Dr. Kopylov as a witness/expert of the Appellant*

*However, the above does not preclude Dr. Kopylov from attending the hearing altogether, as the Appellant may call him as one of her witnesses/experts.*

*That said, the Panel notes that the Appellant failed to include Dr. Kopylov as a witness in her Appeal Brief and did not submit a witness statement or brief summary of expected testimony for him as was required under Article R51 of the CAS Code. Accordingly, if the Appellant wishes to now belatedly call Dr. Kopylov as a witness, she must do so pursuant to Article R56 of the CAS Code, i.e. there must be exceptional circumstances for doing so.*

*Despite repeatedly requesting that the Panel invite Dr. Kopylov as a witness/expert, the Panel notes that the Appellant has, to date, not identified any exceptional circumstances for why Dr. Kopylov should be belatedly allowed as a witness/expert for the Appellant.*

*Therefore, the Panel now provides a final opportunity for the Appellant to clarify, **within 7 (seven) days**, what exceptional circumstances there are for her late submission of Dr. Kopylov as a witness/expert for the Appellant under Article R56 of the CAS Code. In this regard, the Panel draws a distinction between the late admission of Dr. Kopylov's report (which has already been admitted to the file) and the late inclusion of Dr. Kopylov as a witness/expert – which the Appellant is now invited to provide justification for.*

***Further, the Appellant is requested to clarify (with reasons) whether Dr. Kopylov is being called as a party appointed expert or a witness of fact. Based on the submissions to date, the Panel is of the opinion that he is a scientific expert, and not a witness of fact.***

*Once the Appellant has submitted her comments on the above, the Respondent will get an equivalent deadline to submit its response. In the event that the parties are in disagreement, the Panel will render a final decision in respect of the issue.*

3) *The responsibility to bring Dr. Kopylov to the hearing*

*To clarify matters for both parties, in the event that the Panel allows the late inclusion of Dr. Kopylov as an expert or (if convincingly established) also a witness of fact for the Appellant (which will be decided as outlined above), pursuant to Articles R44.2 and R57 of the CAS Code, ***it will be the sole responsibility of the Appellant*** to make Dr. Kopylov available at the hearing.*

*For the abundance of clarity, if Dr. Kopylov refuses the Appellant's request to attend the hearing, and the Appellant wishes to file a request with state courts to compel his attendance, then that is the sole responsibility of the Appellant.*

*If the Panel decides to accept Dr. Kopylov as an expert or (if convincingly established) also a witness of fact, and Dr. Kopylov ultimately attends the hearing, then the Panel would be happy to hear his testimony. However, with the exception of assistance with visa requirements (if necessary), the Panel is not able to assist the Appellant in procuring Dr. Kopylov's attendance.*

4) *The Respondent's submission of 7 March 2017*

*The Panel has decided that the Respondent's letter of 7 March 2017 is admissible and is therefore admitted to the file.*

5) *English translations for Exhibits R-44b and R-44c*

*Further to the above, the Panel requests the Respondent to provide certified English translations of Exhibits R-44b and R-44c ***within 7 (seven) days***”.*

132. On 27 March 2017, the Athlete wrote to the CAS Court Office, *inter alia*, reiterating her disclosure requests B and E regarding all the Standard Operating Procedures of the tests carried out on the Athlete's urine samples at the Beijing laboratory and the LAD.
133. On 28 March 2017, the IOC wrote to the CAS Court Office stating, *inter alia*, the following:

- The Athlete's requests to obtain data on negative analysis was not supported by any rational explanation. The allegations of "mix ups" were unsubstantiated and even if it were justified, the correct request would be for a DNA analysis.
  - The Athlete's request in this regard corresponded to a "fishing exercise" which was in complete contradiction with the provisions and rules of the WADC and makes a mockery of the presumptions set forth in the applicable regulations.
  - The IOC stated that the Athlete was "pursuing a strategy of deliberate harassment and procedural flooding. The IOC may be in a position to sustain such strategy. However, if procedural requests are not kept to what is relevant and required for a good reason by the applicable rules, this kind of strategy will render anti-doping impossible to sustain by anti-doping organisations, which do not have the same financial strength. Further, laboratories must be protected from senseless requests, which result in complete waste of working resources".
134. On 31 March 2017, the Athlete submitted a list of attendees for the hearing.
135. On 3 April 2017, the IOC wrote to the CAS Court Office submitting a list of attendees for the hearing. In the event that Dr. Kopylov was to attend the hearing, the IOC reserved the right to call Professor Mario Thevis as a supplementary expert. On the same day, the IOC also submitted English translations of the exhibits requested by the Panel and reiterated its request that the Athlete be made to pay the associated costs.
136. On the same day, the CAS Court Office wrote to the parties stating that the issue of costs related to the translations would be dealt with in due course and that a final decision on the disclosure requests would be reserved until the end of the hearing. Until then, the Panel was not in a position to grant any further disclosures requested.
137. On the same day, the Athlete wrote to the CAS Court Office stating, *inter alia*, that there were exceptional circumstances for allowing Dr. Kopylov as a witness, mainly being that his findings only surfaced after the submission of the Appeal Brief. The Athlete also stated that Dr. Kopylov should be deemed an expert witness, however also as a "sachverständiger Zeuge" (witness with background as an expert).
138. On 4 April 2017, the Athlete wrote to the CAS Court Office stating that the IOC only provided the names of attendees at the hearing after the deadline of 31 March 2017, so she therefore requested the Panel to not admit any of the IOC's witnesses to the hearing.
139. Also on 4 April 2017, the IOC wrote to the CAS Court Office stating, *inter alia*, that it would not oppose the appearance of Dr. Kopylov at the hearing as "expert-witness", so long as the IOC was allowed to then call Prof. Thevis or Dr. Geier.
140. On 20 April 2017, the CAS Court Office wrote to the parties on behalf of the Panel, stating that the list of attendees for the hearing was for organisational purposes only, and therefore the Athlete's request for the Panel to not admit any of the IOC's witnesses was rejected.

141. On 4 May 2017, the CAS Court Office wrote to the parties providing them with a draft hearing schedule outlining how much time was to be allocated to each witness. The CAS Office requested the parties to mutually agree the schedule, as far as possible, and provided the parties with a deadline of 11 May 2017 in order to provide this. The parties agreed on a schedule which assisted in the efficient conduct of the hearing.
142. On 24 May 2017, the CAS Court Office wrote to the parties providing them with the finalised hearing schedule.

#### IV. THE HEARING

143. A hearing was held on 30 and 31 May 2017 at the CAS premises in Lausanne, Switzerland. The parties did not raise any further objection as to the composition of the Panel. The Panel were all present and was assisted by Mr William Sternheimer, Deputy Secretary General at the CAS and Mr Gunawardena as *ad hoc* clerk. The following persons attended the hearing, as counsel:
- i. The Athlete: Dr. Thilo Pachmann and Mr Oliver Schreier;
  - ii. IOC: Mr Jean-Pierre Morand and Mr Nicolas Français.
144. In addition to the Athlete, Mr Howard Stupp and Ms Tamara Soupiron, who were there as IOC representatives, the following witnesses gave evidence before the Panel across the two days of the hearing. All the witnesses were physically present. Each of the witnesses who had submitted a written statement confirmed its content. The witnesses provided their oral testimony in English, Russian or German. Where testimony was provided in Russian, translations in English were provided by the translator provided by the Athlete at the hearing (Ms Elena Ocheva). Where testimony was provided in German, translations in English were provided by the counsel for the Athlete (Mr Schreier) with counsel for the IOC (Mr Morand) and Dr. Kocholl reviewing and verifying the accuracy of the translations.
145. Testimony was provided by:

**For the Athlete:**

	<b><u>Witness / Expert</u></b>	<b><u>Role / Position</u></b>
i.	The Athlete	Appellant
ii.	Prof. Hans-Michael Riemer:	Legal expert
iii.	Dr. Douwe De Boer:	Witness / Scientific expert
iv.	Mr Indrek Tustit:	Witness

**For the IOC:**

	<b><u>Witness / Expert</u></b>	<b><u>Role / Position</u></b>
v.	Dr. Richard Budgett:	IOC Medical and Scientific Director
vi.	Dr. Tiia Kuuranne:	LAD Director / Witness / Scientific expert
vii.	Ms Andrea Zimmermann:	Witness
viii.	Mrs Elizabeth Fulton:	Witness
ix.	Dr. Norbert Baume:	LAD Deputy Director / Witness
x.	Prof. Christiane Ayotte:	Scientific Expert

146. The contents of the respective statements, depositions and evidence have been summarised below<sup>12</sup>.

**For the Athlete:**

- i. **The Athlete** testified that she had never knowingly taken any prohibited substance and that she had never asked anyone to give her such a substance. She never took the risk of using steroids because she was always competing. She knew that she could be tested at any time. She had been tested on many occasions between 2003 and 2015 and never tested positive. Before and after Beijing 2008, she competed in 18 events, was subject to drug tests on many occasions and never tested positive. Before her suspension in July 2016, she thought that she was in a good position to win the gold medal in Rio 2016, as she jumped the same height to win the Russian National Championship as was later necessary to win the gold medal in Rio 2016. Her partner, Andrey Silnov, won the gold-medal in Beijing in the men's high jump – they had the same coach and training regime, and he did not test positive.

The entry form for London 2012, bore her signature. However, the Athlete testified that the entry form for Beijing 2008 did not bear her signature, and she did not recognise the writing. She said that no one from the Russian Olympic Committee (“ROC”) ever showed her the entry form and that no one ever showed her the Beijing ADR.

She was admitted to hospital on 6 June 2016 for 2 days, and would have attempted to travel to Lausanne for the testing and analysis if she had not been in hospital, as she regarded it as very important to witness the process for herself. There were problems with getting away from the training camp in late May, as she needed to organise a visa and also to organise nursing care for her daughter. However, she was planning to be in Lausanne but for her stay in hospital.

In cross examination, she said that she knew that the Olympic Games were bound by rules, as she had previously competed in the Athens 2004. She knew that part of those

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<sup>12</sup> The summary which follows intends to give an indication of a few material points touched on at the hearing. The Panel, in fact, considered the entirety of the declarations rendered at the hearing and/or contained in the relevant witness statements.

rules were the anti-doping rules (WADC). She knew that the Russian athletics team had been suspended from international competition in May 2016, and that there were lengthy debates involving the IAAF and she hoped that despite the suspension of the Russian athletics team she would be able to compete in Rio 2016. She knew, as her sample from the Daegu World Championships in 2011 had been reanalysed by IAAF, that the procedure adopted was to split her B-Sample into B1 and B2 samples. She conceded that she was aware in 2008 that her samples may be retested at any time, up to the limitation period of eight years.

- ii. **Prof. Dr. Hans-Michael Riemer** is a professor of law and the former judge of the Swiss Federal Tribunal (“SFT”). He was retained by counsel for the Athlete to answer four questions.

Firstly, is the ISL 2016 the applicable basis for the re-analysis? His answer started from the premise that according to Appendix 1 of the Beijing ADR, ‘doping control’ is defined as the whole process from urine collection until the disciplinary proceeding. Although the WADC provides that ISL revisions shall become effective immediately, the ADR should be interpreted *in dubio contra stipulatorem*, and thus in the absence of explicit regulation, the applicable codes are the WADC 2003, the ISL 2008 and the IST 2003.

Secondly, is the automatic disqualification after eight years excessively binding pursuant to Article 27 of the SCC? He said that, similar to the decision of 27 March 2012, as the automatic disqualification effectively results in the worldwide stigmatisation of the Athlete (who is viewed as a fraud without the possibility to defend herself), this is a far reaching occupational ban for the Athlete which is excessively binding.

Thirdly, is the automatic disqualification of results without necessity to prove fault after almost 8 years legally admissible? He said that although Swiss law permits associations to issue fines, an athlete has an interest in restoring their reputation by demonstrating innocence, but that such a possibility after eight years is not readily available. Thus a contractual stipulation to the contrary also violates Article 27 of the SCC (personality rights do not allow excessive binding) and the right to a fair trial.

Fourthly, if only the first five athletes in Beijing 2008 gave a urine sample, and the consequence ultimately is that the bronze medal was awarded to the sixth place athlete, is this a violation of the mandatory provision of equal treatment of all athletes? His answer was that it obviously violates the principle of equal treatment which exists in Swiss association law, as explained in his writing in the Berner Commentary. He said that all possible candidates should be tested. When asked whether it was reasonable to test the first five athletes in the hope that only a maximum of two may have committed a doping offence, he said that it was not.

In cross examination he was taken to the headings “*Doping Control*” in Article 5 and “*The analysis of samples*” in Article 6 of the Beijing ADR, and said that they cannot be looked at separately. He asserted that it would be difficult for an athlete to understand which provisions apply. He understood that the provision for automatic disqualification meant that the athlete has no available defence of innocence, but questioned whether it was legally sound. He adhered to the proposition that automatic disqualification was

unacceptable and that was important to be able to defend oneself. He said that the rules of an association must comply with the higher principles of Swiss law. He referred to many instances in which the SFT had not allowed rules of an association to stand if they did not comply with those higher levels of Swiss law. In short, the rules of an association cannot displace state law. He did not accept the proposition that in a sporting contest governed by a contractual arrangement between an athlete and an association, such arrangement was permissible despite state law.

When pressed with the proposition that the WADC and associated rules had been applied by sporting bodies for some 15 years without successful challenge, he asserted that he did not know of any decision which accepted the legality of such a regime. He was challenged as to the notion of a presumption in civil law and the consequences if one could not rebut a relevant presumption.

Prof Reimer said that a period of eight years, or two Olympic cycles, was excessive to allow re-testing. Ultimately he asserted that a four year period would be satisfactory, but conceded that this was both a legal and a political opinion.

In re-examination, he said that if an association wished to apply the future rules, it would have to be stated succinctly and clearly in the relevant document. In this case, under Swiss law the Beijing ADR prevailed over a more general code such as the WADC 2003. He said that it was highly unusual to allow in a contractual setting, the right of one party to change the rules for a future testing procedure.

In conclusion, Prof. Reimer made a statement to the Panel in which he acknowledged that the use of prohibited drugs was dangerous, and must be controlled; however it was fundamental that the laws of the State should not be ignored.

- iii. **Dr. Douwe De Boer** has qualifications in biochemistry and experience in doping control and testing. He is a former director of the WADA accredited laboratory in Portugal. He has considerable experience in reporting on and giving evidence in cases of alleged doping. His experience over some 30 years has involved him witnessing in excess of 300 B-Sample procedures.

On 1 June 2016, he was requested by Dr. Pachmann to assist as a scientific observer in a case of an PAAF relating to the Athlete. His first report, contained observations during his involvement on that day. He arrived at the LAD at about 8:15 AM on 8 June 2016. After a discussion with the laboratory director, Dr. Kuuranne, it was clear that she had not been told that the procedure was to take place on that day. Shortly afterwards, Mr Berezov, a representative of the ROC also arrived. Dr. De Boer concluded that the IOC had scheduled the procedure for the re-testing of the Athlete's sample but apparently did not inform the LAD. After some delay, the procedure of opening, splitting and re-sealing the B-Sample commenced at 4 PM, as had been described in the minutes prepared by Ms Zimmermann. He said that no microscope was used to review whether or not the bottle containing the sample showed marks and scratches which could indicate tampering. He acknowledged that use of a microscope was not part of the testing and he stated that he had never seen a microscope used in a B-Sample opening, but later in evidence said that perhaps one needed a microscope in this case. Dr. De Boer was unable to be present on the following day when the re-testing was to continue,

as he had booked a flight. He said that he would tell the LAD director before 8 AM on 9 June 2016 whether he would be able to change his schedule. Before 8 AM on the following morning, he told the LAD director that he would not be present. The conclusions set out in his first report did not contain any criticism of the splitting and retesting procedure.

He prepared a further report in relation to his observations at the LAD on 29 June 2016 for the handling of the B2-Sample. He said that the process commenced at about 8:30 AM on that day in his presence as a scientific observer. The analysis of the sample started at about 4:35 PM. He returned on 30 June 2016 and the results of the analysis were available during that morning. The only criticism of the procedure contained in his report was that without adjusting adequately the background in one of the positive urine samples, a bias in the identification procedure of the compound of interest may create a controversy in respect to the confirmation method.

In evidence he said that 8 June 2016 was an exceptional day, according to him, because the LAD did not know that he was coming. He was surprised when the independent witness told him that he may have to testify in front of the CAS. In cross examination he said that he had only acted as a scientific observer on two or three other occasions, and agreed that there is no reference to the role of scientific observer in any rules. He said that he did not look specifically at the bottle, but that he just observed the process from a distance. He spoke to Dr. Pachmann on the morning of 8 June 2016, when Dr. Pachmann was in Korea. It was put to him that Dr. Pachmann did not ask him to try to postpone or delay the procedure which was going to occur on 8 June 2016, and he did not dispute that proposition.

In cross examination, it was suggested that he had seen nothing to raise the possibility that the result of the re-analysis was wrong. He said that there were a few matters which might have biased the result, and he expanded upon those when he returned to give evidence on the second day of the hearing. He said that he had checked or verified the integrity of the chain of custody documents, and in his view, the chain of custody was incomplete. He said that the information supplied was far from complete. The chain of custody documents were submitted as evidence. He pointed, for example, to the entry on page 7 of the sample receiving form, and noted that simply because the sample was received did not establish its integrity, and also noted some indecipherable Chinese handwritten notations beside the entry 1846073.

He confirmed that he was present simply as an observer and that he had not been given authority by the client to verify the integrity of the seal on the sample.

- iv. **Mr Indrek Tustit** is a friend of the Athlete. He had sent an email dated 6 June 2016 to Dr. Pachmann advising that the Athlete had been admitted to hospital that day with stomach pains. He said in evidence that he had no reason to doubt that her illness was genuine, and he was not cross examined.

**For the IOC:**

- v. **Dr. Richard Budgett** is the Medical and Scientific Director of the IOC. He submitted a written statement. He was in charge of planning and implementing the re-analysis of stored samples. In response to feedback from WADA, the WADA Independent Commission Reports and the McLaren Report, a large number of samples were targeted for re-analysis from Beijing 2008 and London 2012. There were an unexpectedly large number of AAFs from the initial batch of about 400 samples, and ultimately about 1,000 samples from Beijing and 400 samples from London were re-analysed. The name of the Athlete was mentioned in the list of Russian athletes in respect of which WADA had specifically recommended a re-analysis of samples. There were 62 AAFs from samples collected in Beijing, 18 of which were from Russian athletes, and all 18, including that of the Athlete, contained turinabol.

He said that the IOC relied upon the split B-Sample procedure so as to give more protection to the Athlete. The present case involving the Athlete was the only one in which the splitting and re-analysis occurred without the presence of an athlete's representative.

He was cross examined as to the correspondence immediately before the events of 8 June 2016. He did not accept that the IOC imposed an unreasonable deadline on the Appellant or her representatives.

- vi. **Dr. Tiia Kuuranne** has been the director of the LAD since 1 June 2016. She provided an affidavit and a further report, both dated 27 January 2017 (both submitted as evidence). She explained the situation in relation to the B-Sample split scheduled for the morning of 8 June 2016, noting that her instructions included a comment to hold the 8:30 AM slot pending a response from the Athlete's lawyer on Monday. When Dr. De Boer arrived on the morning of 8 June 2016, he did not have any document linking his presence to any sample code or a document attesting to his authorisation to act on behalf of any person.

She confirmed that the procedures carried out on 8 June and 29 June were as summarised in the statements of Ms Zimmermann and Ms Fulton. She stated that the use of a microscope to review bottle caps for scratches and marks is neither mandatory nor a routine method of inspecting the sample container. She noted that Dr. De Boer was present when the B2-Sample was returned to the freezer room which has a temperature reader clearly visible outside the storage room, and further that no questions were raised by him about the prevailing temperature conditions. She said that throughout the re-testing process the LAD and the IOC were in frequent contact regarding the planning of the processes which would meet the needs of the athletes and their representatives and the requirements of the analytical processes without sacrificing the reporting timelines.

As to the possible bias suggested by Dr. De Boer, she said that when using reference collection samples the initial concentration may be inappropriately high to be comparable with the sample and therefore require adjustment. However in the case of the B2-Sample the comparison is made to the other positive sample and not to ES636.

Consequently, there was no bias in the identification procedure or any controversy regarding the confirmation procedure.

Dr. Kuuranne said that there were no strict guidelines for the appointment of an independent witness, and that there may be occasions where an independent witness would be engaged in five or six separate sample procedures.

- vii. **Ms Andrea Zimmermann** was the independent witness at the opening of the B1-Sample at the LAD on 8 June 2016. The report of that process was submitted as evidence at the CAS, as was a statement from her. There was no challenge to the chronology of the process set out in her report. The process commenced at about 11am in the presence of representatives of the LAD, the IOC, the ROC, as well as Dr. De Boer (described as a scientist observer and not legal representative for the Athlete). After Dr. De Boer called the Athlete's lawyer and confirmed that he had no authorisation to sign any document during the opening process, the session was postponed until further instructions were received from the IOC. The session resumed at about 4pm and the opening process was documented and confirmed by Ms Zimmermann.

Ms Zimmermann was cross examined to suggest that she was not a truly “independent” witness. She confirmed that she had worked at the CAS from 2003 until 2013, and then had been involved with operating a travel company. After 2013, she had two or three assignments from the CAS, and after 14 June 2016 she was working for CAS as counsel for about 60 % of her time. At the time of her acting as the independent witness on 8 June 2016, she did not know that she was going to be offered a position with the CAS starting on 14 June 2016. She had previously worked with counsel for the IOC, Mr Morand, about 14 years ago. The only time that she acted as an independent witness was on 8 June 2016.

It was not suggested to her that she did, or recorded, anything which was contrary to the recognised obligations of an independent witness.

- viii. **Ms Elizabeth Fulton** was the independent witness to the B2-Sample splitting on 29 June 2016. Her minutes of the procedure were provided as evidence in the IOC's written submissions. Dr. De Boer was present as the representative of the Athlete. There was no cross examination as to the procedure set out in her minutes. Ms Fulton stated that she acted as an independent witness in approximately 70-80 instances for the IOC, and was paid CHF 100 an hour for her services.
- ix. **Dr. Norbert Baume** is the deputy director of the LAD. In his affidavit, he described the documents which evidence the chain of custody, including the delivery of the samples from Beijing to the LAD which were received by him personally on 20 October 2008. Subsequently, on 24 March 2016 the LAD was asked by the IOC to re-analyse 433 samples.

The initial testing procedure (“ITP”) described in the LDP was initiated on 6 April 2016 for a batch containing the sample 1846073, and this sample was found to be suspect on 19 April 2016. The high number of samples that were declared suspect after the ITP, as well as the strategy agreed between the IOC and LAD, to perform a second testing

before reporting the A-Samples, lead to a more specific procedure to validate the ITP results. The analytical report on sample 1846073 was issued on 4 May 2016 and indicated the result as a PAAF.

Dr. Baume said in evidence that the LAD followed the ISL and did not address the IST. He was cross examined as to security, and said that three people had had key access to the freezer room during the period of approximately 8 years in which the samples were stored. In March 2017, the LAD had upgraded to the highest level of security involving a camera and a code. He agreed that, as set out in his email of 7 June 2016, it is occasionally difficult to find an independent witness on short notice. He further agreed that as the LAD is not aware of the name of the athlete involved, he was unable to check the independence of the witness chosen to be present at a relevant sample procedure. He agreed that there were no written criteria to enable the evaluation of potential independent witnesses in June 2016.

- x. **Prof. Christiane Ayotte** is the director of the WADA laboratory in Montréal. After filing the Appeal Brief, the Athlete became aware of a paper prepared by Dr. Arthur T Kopylov, containing criticisms of the testing procedure for Turinabol. There was a significant amount of correspondence between the parties and the Panel in relation to the question of whether Dr. Kopylov would attend the hearing. Ultimately, as he stated in a short email in May 2017, Dr. Kopylov was unable to attend. The IOC filed evidence in response to the proposed evidence of Dr. Kopylov.

Although the views of Dr. Kopylov were not subject to testing in evidence, the Athlete's closing submissions maintained that he should be heard. In deference to the argument, the Panel notes the following conclusions of Prof. Ayotte.

Prior to 2012, testing for turinabol or its metabolites was only effective in a window of detection of a few days. A study by Timofei Sobolevsky and Dr. Grigory Rodchenkov in 2012, reported in a peer reviewed article, noted that testing for metabolites which can be detected for much longer in the body after the ingestion of the parent compound than the metabolites which had been targeted in the past, extended the window of detection from a few days to 50 days or more. The views of Dr. Kopylov were the subject of examination and adverse comment by the IOC Disciplinary Commission in two decisions in September 2016 (both were submitted in evidence).

A report by WADA (also submitted in evidence) was based on a report by Prof. Ayotte. Prof. Ayotte was retained by the IOC to provide an opinion as to the paper by Dr. Kopylov. Her findings formed the basis of the WADA report of 25 January 2017. She said that the detection and identification of long term metabolites by WADA accredited laboratories was scientifically valid, and that, in short, the views expressed by Dr. Kopylov, were invalid. Her evidence before the Panel was very clear and persuasive. She asserted that it was impossible to have a false-positive in such testing. Her laboratory had been engaged in approximately 28,000 testing procedures per annum. Prof. Ayotte gave convincing evidence as to the validity of the new testing regime searching for long-term metabolites of turinabol.

- 147. The party representatives and all the witnesses/experts were invited by the President of the Panel to tell the truth subject to the sanctions of perjury. The parties and the Panel had the

opportunity to examine and cross-examine the witnesses/experts. The parties then were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. The Athlete herself was also then allowed to submit her final closing remarks in full length. The hearing was then closed and the Panel reserved its detailed decision to this written Award.

148. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings, other than those previously advanced by the Athlete. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

## V. THE PARTIES' SUBMISSIONS

149. The following summary of the parties' positions is illustrative only and does not necessarily comprise each and every contention put forward by the parties. The Panel, however, has carefully considered all the submissions made by the parties, even if no explicit reference is made in what immediately follows.

### A. The Athlete's Submissions

In summary, the Athlete submitted the following in support of her Appeal.

150. The Appealed Decision should be annulled for the following reasons:
- The Athlete never signed the Beijing Entry Form, so she was not bound by the Beijing ADR, and the IOC Disciplinary Commission therefore did not have the jurisdiction to render the Appealed Decision.
  - In the alternative, the IOC "*severely and systematically violated the agreement with the Appellant and almost all the procedural rules contained therein*". In particular, the IOC applied a re-testing method which was never agreed between the two parties and the IOC was not entitled to apply rules retrospectively in that way.
  - The most important violation of the Athlete's procedural rights was the violation of her right to be heard when the B sample was opened and split. Even if the ISL 2015 was applied, such a rule would violate the basic procedural rights of the Athlete and could not be applied.
  - Finally, the entire re-testing program – "*which stigmatizes the Appellant as [a] fraudster after more than eight years without any possibility to show her innocence or at least no fault*" – is highly questionable as it took away the Athlete's mandatory human rights. This, and the rules applied in rendering the Appealed Decision must be considered as excessively binding in the sense of Article 27(2) of the SCC.

- The IOC, “*as a monopoly organisation*”, implemented extremely unfair rules which would be illegal under Article 6 of the Swiss Federal Act on Cartels and other Restraints of Competition (“Cartel Act”).

*i. The Athlete’s claim that she did not sign the Beijing Entry Form and was therefore not bound by the Beijing ADR*

151. At the hearing, the Athlete testified that she did not sign the Beijing Entry Form. Whilst she did not make any mention of this in her written submissions, the Athlete submitted that she only became aware of this once the IOC submitted a copy of the Beijing Entry Form with its Answer and saw that it contained a signature which was not hers. The Athlete did not hypothesize as to who may have signed the document, but she simply reiterated that it was not signed by her. As she did not sign the Beijing Entry Form, the Athlete argued that she was therefore not bound by the Beijing ADR, even though she did participate in Beijing 2008.
152. The Athlete submitted that entry into an Olympic Games is a contractual relationship, and because no contract had been entered into between the Athlete and the IOC, she was not bound by any terms of the proposed contract (i.e. the Beijing Entry Form). In any event, the Athlete noted, the Beijing Entry Form would only have created a contractual relationship between the Athlete and the Beijing Organising Committee (“BOCOG”), and not the IOC. Consequently, as the BOCOG was a Chinese legal entity, the Panel would need to look at Chinese law in order to determine which regulations would be applicable - if any.

*ii. There was no legal basis for the IOC to apply a “sample splitting” procedure on the Athlete’s samples according to the ISL 2016*

153. The Athlete argued that the IOC contradicted itself regarding the question of the applicable version of the ISL. The IOC stated in its letter dated 18 May 2016 that the re-testing process would take place pursuant to ISL 2015. However, in the Appealed Decision, the IOC held that ISL 2016 was applicable, not ISL 2015. The IOC stated that this was a result of the application of the Rules in combination with the WADC 2003, to which the Rules refer. The Athlete stated that since the participation in the Olympic Games is a single event only, the Athlete never agreed to a future set of rules which the IOC was not even aware of at the time.
154. Whilst the Beijing ADR provided for a re-testing of the Athlete’s sample within 8 years, the rules did not specify the exact process and framework applicable in such a re-analysis. It also did not refer to any other legal document and the WADC applicable at that time (i.e. WADC 2003) and as a result did not provide for any such re-analysis. Moreover, the wording contained in the WADC 2003 was not sufficient to apply any future ISLs based on a new WADC.
155. As the Athlete’s doping control sample was taken on 24 August 2008, pursuant to Articles 5.3 and 6.4 of the Beijing ADR, the applicable ISL was ISL 2008. Article 5.2.2.12 of ISL 2008 referred to the possibility of “*re-sealing samples for future re-testing*”, however that Article “*did not*

contain any provisions addressing the issue of applicability of section 5.2.2.12 in time”. Further, the Athlete stated that:

*“...it was not until 2015 that provisions addressing the issue of applicability of the ISL section relevant here in time have been included in the ISL. Section 5.2.2.12.9 of the ISL 2015 contains an explicit provision according to which further analysis of doping samples shall be performed under the ISL and Technical Documents in effect at the time the further analysis is performed. More particularly, the athlete may not be held to have consented to the doping samples of 2008 being further analyzed under the ISL and Technical Documents in effect at the time the further analysis is performed, as provided for by section 5.2.2.12.9 of the ISL 2015. Yet, such consent is indispensable for any action performed on the basis of the said provision to be considered lawful”.*

156. The application of present rules on ongoing proceedings is firmly established in Swiss law. According to Article 404 of the CPC, the procedural rules apply which are in force at the time when the proceedings are commenced. The Athlete argued that the ‘doping control’ encompasses the entire process (including control, analysis, re-analysis and proceedings) which makes it clear that the rules applicable in 2008 when the same was taken are applicable.
157. The Athlete submitted an expert legal opinion from Prof. Dr. Hans Michael Riemer, an expert on Swiss Association law. The Athlete asked Prof. Riemer the following question: *“Are the ISL 2016 on which the IOC bases its re-analysis applicable on the case at hand?”*
158. Prof. Riemer’s written response was as follows:

*“The urine collection took place in 2008 (under the Beijing ADR), while the IOC applies the new WADA-CODE 2015 and the ISL 2016 to the current procedure. Art 5.3 para. 1 Beijing ADR stipulates that: “Doping control conducted by the IOC, BOCOG and any other Anti-Doping Organization under Article 5.2.3 shall be in conformity with the International Standard for Testing in force at the time of Doping Control”. According to Appendix 1 Beijing ADR, Doping Control is defined as the whole process from urine collection till the disciplinary proceeding. The urine collection in 2008 represents therefore the beginning of the Doping Control, so the Standards which were introduced or modified later, don’t apply. Art 5.3 para. 1 Beijing ADR must at least be interpreted in dubio contra stipulatorem in such a way and in favour of Mrs. Chicherova. The general reference in the introduction of the WADA Code 2003 that the ISL revisions shall immediately become effective changes nothing in this respect. It would have been necessary to explicitly regulate, that the new provisions also apply to Doping Controls, which have already begun. Consequently, the IOC should have had applied the Beijing ADR, the WADA Code 2003, the ISL 2008 and the IST 2003 to the re-analysis”.*

159. Accordingly, the only regulations applicable to the Beijing samples were the Beijing ADR, the WADC 2003, ISL 2008 and IST 2003. All those regulations only foresaw the application of a sample splitting procedure as an exception in case there was not sufficient urine left in the A-Sample. In the case at hand, it was undisputed that there was sufficient urine remaining in the A-Sample for re-testing. Further, the Athlete stated that:

*“It was due to the Respondent’s fault only that such sufficient amount of urine was not properly re-sealed, and hence, completely useless. For this reason there was, hence, no reason whatsoever to apply the provision where no urine remains of the A Sample for possible re-testing remains. The Respondent would have had to apply*

*art. 5.2.2.12.1.1 as sufficient urine remained. The Respondent is not allowed to cover its lack of due process regarding the re-sealing of the A Sample by applying subsidiary rules that were meant for other cases only”.*

160. The IOC did not follow its own rules and applied a completely different re-testing procedure. The IOC applied a sample splitting procedure without granting the Athlete the rights foreseen in ISL 2008. The Athlete argued that such behaviour should not be accepted.

***iii. The IOC violated not only the ISL 2008 but also ISL 2016 by not having an independent witness reviewing the sample opening and splitting procedure***

161. The Athlete noted that an “A. Zimmermann” was chosen to be an independent witness at the opening of her B-Sample on 8 June 2016. The Athlete noted that this was Ms Andrea Zimmermann, who was a CAS counsel before and after the opening. Accordingly, given the links between the IOC and the ICAS (and therefore the CAS), Ms Zimmermann could not have been an “independent” witness and appointing her as such meant that *“the International Standards of any version would have been heavily violated”*.

***iv. Given the latest WADA reports, the identity of the Athlete’s alleged Beijing samples is questionable and not proven by the IOC***

162. The Appellant notes that the WADA Independent Commission Reports referred to the *“highly questionable behaviour of the Lausanne laboratory in the past. Obviously, the Lausanne laboratory destroyed certain urine samples of Russian athletes without the agreement of the WADA”*. The Athlete claimed that the fact the 67 samples provided by Russian athletes were destroyed *“prevented any re-analysis of the samples following the raising of suspicions that some positive samples had been illegally swapped for clean ones”*.

163. The Athlete claimed that it was thus possible that sample swapping was also practiced in Beijing, during the bulk transport of the samples or at the LAD. Replacing positive samples with negative samples requires clean urine with a similar composition of the athlete concerned. *“This might well be the reason why the Appellant’s A Sample from the Beijing Olympic Games were “unsealed” when the samples were re-analysed”*. The Athlete claims that this could have been a result of someone checking to see whether the urine was suitable for exchange.

164. The Athlete stated that the McLaren Report did not clarify the allegations regarding the general problems with the current and past doping control system. The Athlete therefore reserved the right to present additional information in that regard should new information surface. Against this background however, the Athlete stated that it was *“very questionable”* and unacceptable that the LAD was chosen for the re-testing.

165. According to Article 6.1 of the Beijing ADR, the choice of the WADA-accredited laboratory used for the analysis was determined by the BOCOG, which was the Beijing laboratory. Accordingly, the IOC’s choice of using the LAD was illegal.

166. The Athlete claims that she would have never consented to her samples being tested at the LAD, given the public criticisms and its lack of independence from the IOC. Moreover, there

is no provision whatsoever in the IOC's rules and regulations, particularly the Beijing ADR, that allows it to choose a different laboratory for the re-analysis. Article 6.5 of the Beijing ADR states only that the IOC is entitled to choose another place for a secure storage. The choice of another laboratory was not foreseen.

167. The Athlete claimed that given the possibility of the loss of samples by the LAD and the practice of sample swapping, the chain of custody was not secure. Further, it was not possible to review whether the samples tested by the IOC in 2016 were the same samples as those tested in Beijing 2008, and it was not even possible to review whether the A and B sample belonged to the same athlete. Moreover, to the knowledge of Dr. De Boer, the independent witness, Ms Zimmermann, did not review the samples with a microscope to check whether there were any traces of tampering with the urine bottles.
168. The Athlete stated that the IOC has failed to discharge its burden of proof in relation to the chain of custody and the IOC's prayers for relief could be dismissed directly.

**v. *The IOC violated numerous applicable International Standards***

169. The Athlete noted that the IOC admitted that *"the A-samples were not individually resealed nor transported in sealed containers"*. This meant that the Athlete's alleged samples were completely unprotected for at least six days during their transport from Beijing to Lausanne, i.e. between 14 October 2016 and 20 October 2016. Moreover, it was unclear on which date the urine samples left the Beijing laboratory, so it was even possible that the samples were not even stored in the Beijing laboratory. The Athlete noted that no readable or fully translated copies of documentation had been provided to her.
170. The Athlete also stated that the confirmation letter written by Mr Roland Daettler from the transporting company was dated a year after the end of the transport. The Athlete therefore requested the opportunity to cross-examine all the persons involved in the handling of her urine samples.
171. The Athlete alleged that her samples were not individually registered when they arrived at the LAD in 2008, which clearly indicated that the Beijing samples were never sent to the LAD for the purpose of re-analysis.
172. The Athlete rejected the IOC's attempt to justify its omission in sealing the samples and only transporting sealed samples by stating that *"resealing of A-Samples (or transport in sealed containers) was not a requirement pursuant to the then applicable ISL (2008)"*. The Athlete submitted that the transport of the samples is regulated by the International Standard for Testing ("IST") and not by the relevant ISL. Accordingly, ISL 2008 is irrelevant in this regard.
173. Whilst the IOC did not address this issue in the Appealed Decision, the Athlete submitted that *"almost all of the provisions for the Requirements for transport of Samples and documentation according to art. 8, art 9.2 and art. 9.3 were violated"* as follows:

- In violation of Article 8.3 of IST 2003, after the administration of the tests, the Athlete's samples were not stored in a manner that protected their integrity, identity and security.
  - In violation of Article 9.3.1 of IST 2003, the transport system of the samples, i.e. a bulk process of unsealed samples without any registration of samples, did not protect the integrity, identity and security of the samples.
  - The IOC did not develop a system for recording the chain of custody of the samples and sample collection documentation and given the fact that many samples had gone missing, there was also no confirmation that the samples had really arrived at their intended destination (which was a violation of Article 9.3.2 of IST 2003).
  - The entire sample collection session documentation was to be sent as soon as practicable after the completion of the sample collection session to the Athlete. As readable copies were not provided until July 2016, the Athlete argued that it was not sent to her on time, in violation of Article 9.3.5 of IST 2003.
  - In violation of Article 9.3.6 of IST 2003, the IOC failed to check the chain of custody at the arrival of the bulk process of unsealed samples at the LAD, as the integrity of the samples might have been compromised.
174. The Athlete submitted that the abovementioned violations were also violations of the IST 2009, IST 2012 and IST 2015. As the requirements and structure of Article 8 and Article 9 of IST 2009, IST 2012 and IST 2015 were quite similar, the question of which IST shall be applied was irrelevant.
175. The Athlete also submitted that *“several other severe and continuous violations of the International Standards and the [IOC’s] rules and regulations have occurred”*:
- Until the time of the filing of the Appeal Brief, in violation of Article 7.2.5 of the Beijing ADR, the IOC failed to provide any information on the A-Sample laboratory packages of the Beijing laboratory and the LAD.
  - The LDP of the B1 and B2-Samples were not provided within the period required under the applicable ISL 2008 (10 days pursuant to Article 5.2.6.13). The B1 sample LDP was provided only after 20 days and after the B2-Sample analysis had already begun (i.e. on 29 June 2016). The documents relating to the chain of custody which should have been provided within the same period were only provided on 13 July 2016, i.e. 34 days after the B1-Sample re-analysis on 9 June 2016.
  - *“According to art. 5.2.4.3.2.6 of ISL 2008, the Athlete and/or her legal representative would have been authorized to attend the B confirmation”*.

- According to Article 5.2.4.3.2.6 of ISL 2008, the independent witness should have reviewed in detail whether there were any signs of tampering with the alleged B-Sample of the Athlete. However, to the knowledge of Dr. De Boer, no one reviewed the alleged B-Sample of the Athlete with a microscope which should have been necessary given “*today’s sample swapping techniques*”.
- “*Most importantly, the entire structure foreseen in the Beijing ADR for the proceedings were overturned by the [IOC]. The proceedings carried out do not have anything to do [with] what should have happened. This is not acceptable at all*”.

176. The Athlete submitted that:

*“All these violations of the Beijing ADR and the International Standards of Laboratory confirm that the principle of strict liability must not be applied in the present case as all these findings could have easily influenced the testing results. It is not comprehensible at all how the Respondent can even dare to proudly state that “no departures of the International Standards Laboratory” exists. This is ridiculous given all the violations of the International Standards of Laboratory and Testing, let alone all the violations of the prevailing ADR. The assumption according to art. 3.2.1 Beijing ADR on which the [IOC] relies on to justify its testing is, hence, not applicable at all”.*

177. The Athlete submitted that the IOC bore the burden of proof in respect of the validity of the AAF and it had not lived up to this burden.

**vi. *The IOC violated the Athlete’s right to be heard during the re-testing of her Beijing sample***

178. The Athlete submitted that the procedure of splitting and re-testing her sample without her being present constituted a grave infraction of her right to defend herself. The Athlete quoted Article 6(3) of the EHRC and argued that it “*specifically guarantees the universal right to defend oneself, if charged with a criminal offence, and it is well established in Swiss law that these principle also applies to disciplinary proceedings of associations*”. Further, she argued that in Switzerland, the right to defend oneself was unequivocally established in Article 29(2) of the Swiss Constitution and represented a part of the general principle of the right to a fair trial (Article 29(1)). She submitted that this right comprised the right to express oneself to the matter at hand, to be involved with the taking of evidence and to be involved in the procedure and the right of inspection of records. Further, a part of the right to be heard is the right to a person facing allegations to contribute to and participate in the procedure of taking essential evidence which can influence the decision in the case.

179. The Athlete submitted that this same right was also provided for in Article 7.2.5 of the Beijing ADR, which stated:

*“The IOC President [...] shall, in confidence, promptly notify the Athlete of:*

*a) [...]*

*c) the right of the Athlete and/or the Athlete's representative to attend the B sample opening and analysis if such analysis is requested;*

*d) the Athlete's right to request copies of the A and B sample laboratory package which includes information as required by the International Standard for Laboratories; ...”.*

180. The Athlete further argued that ISL 2008 provided her the right to participate in the opening and re-testing of her sample as Article 5.2.2.12.1.2 stated (emphasis added by the Athlete):

*“The opportunity shall be offered **to the Athlete**, or to the representative of the Athlete **to be present at the opening of the sealed “B” bottle** [...]*

*When opening the “B” Sample, the Laboratory will divide the Sample into two bottles **and the Athlete or the Athlete's representative will be invited to seal one of the bottles** using a tamper proof evident method if the analysis of the first bottle reveals an Adverse Analytical Finding, a confirmation shall be undertaken, if requested by the Athlete or his/her representative, using the second bottle”.*

181. The Athlete submitted that the IOC therefore “*incorrectly assumed*” that there was no entitlement for her to participate in the opening and splitting of the B-Sample, sealing of the B2-Sample and analysis of the B1-Sample. Further, the IOC was “*surely not “offering” the Athlete the opportunity to attend the first phase of this procedure, but was pretending to comply with the specific rules agreed between the parties*”. The Athlete also argued that the IOC's actions were in violation of Article 7.2 of the WADC 2003, which provided for similar rights to an athlete.

182. The Athlete went on to argue (emphasis added by the Athlete):

*“A dynamic referral of art. 6.4 Beijing ADR would lead to a limitless application of the newest version of the International Standard of Laboratories, which in turn would lead to the athletes being stripped of **rights that were once granted to them, which were agreed upon and on which the athletes rely upon** when participating in the Olympic Games. A further consequence is, there is always a lower technical standard which applies at the time of collection of the samples and a disproportionately high technical standard – in testing, **not in procedural rights** – at the time of re-testing. The re-analysis is however based on inaccurate or outdated technical standards for the collection and preservation of samples. This inexorably leads to a constellation in which the athletes right to defend themselves is severely undermined. The referral in art. 6.4 Beijing ADR is **static**. If the [IOC] does not agree with that statement, it is to be assumed, that the rules are unclear in this respect. Such rules therefore need to be interpreted **in dubio contra stipulatorem**, that is, against the person who established them. It is not possible to hold something against the athlete if no provision was implemented in the contractual set-up which specifically provides for the application of the latest version of the International Standard for Laboratories”.*

183. The Athlete submitted that she had specifically communicated to the IOC repeatedly that she wanted to attend the opening and splitting of the B-Sample, sealing of the B2-Sample and the analysis of the B1-Sample and wanted to be accompanied by scientists and her legal representative<sup>13</sup>. However, the IOC did not allow her to do this as they scheduled the entire

<sup>13</sup> The Athlete once again referred to this being part of her human rights, granted by Article 6 EHRC and Article 29(2) of the Swiss Constitution, and that this was explicitly provided for by Article 5.2.2.12.1.2 of ISL 2008.

re-testing process just 8 days after the Athlete was first informed that a PAAF was found, despite the fact that the IOC took more than 2 weeks to inform the Athlete of the PAAF. Moreover, the IOC waited 8 years to re-test her sample.

184. The Athlete argued that the IOC's sole objective was a swift procedure, at the expense of allowing the Athlete to sufficiently defend herself. Further:

*"The reason for this behaviour is that the [IOC] wished to demonstrate to the world that even only the slightest indication of a possible anti-doping violation will be severely punished. How else can the [IOC's] continuous public announcements on its own website regarding the number of athletes which were sanctioned be explained?"*

185. The Athlete submitted that *"the cost of this expedited "justice" is that the legal rights conferred to a person facing serious and career-annihilating allegations are being bulldozered [sic] away by the [IOC]"*.

186. The Athlete submitted that her counsel, Dr. Pachmann, was the only person who was authorised to act as her representative but he was unable to attend the re-testing procedure *"due to a tightly packed schedule and insufficient notice-time"*. Despite this, Dr. Pachmann attempted to propose suitable dates in June and July 2016, as the presence of the Athlete's counsel and external scientific expert were essential to enable her to properly defend herself against the IOC's allegations.

187. However, the IOC responded to him by stating that there was no entitlement for the Athlete, her counsel or experts to be present and also only offered 2 dates which were only 5 days after the originally proposed dates. The Athlete stated that as she was training in Russia for the upcoming Rio 2016 Olympics, and given that the PAAF was only established almost 8 years after her sample was collected, this was *"everything but reasonable"*. The Athlete submitted that not only did the IOC's behaviour *"seriously undermine the right to be heard of the [Athlete], but also demonstrates the arbitrariness of the [IOC], in direct contravention of art. 9 Swiss Constitution. It was therefore clear, that the [IOC] had absolutely no intention of coordinating with the [Athlete]"*.

188. The Athlete stated that the IOC's attempts to accommodate her were *"inadequate"* as the dates offered were on such short notice that it would have known that she was unable to travel at that time. Further, the IOC was aware that her counsel, Dr. Pachmann, was in South Korea on teaching arrangements during the offered dates. To make matters worse, it was *"incomprehensible"* that the IOC questioned whether the Athlete was actually forced to go to the hospital. The Athlete noted that sudden *"acute and persistent stomach pains"* are *"hardly ever preannounced"* and *"contrary to the preposterous claims"* of the IOC, the Athlete *"did not have any chance whatsoever to attend the B Sample opening and splitting"*.

189. The Athlete rejected the IOC's claims that she had not made a reasonable proposal of alternative dates. The Athlete also rejected the IOC's claim that the process had to run its course in a timely manner before Rio 2016. The Athlete submitted that even if the re-testing had been conducted on 27 June 2016, there would have been enough time for the process to run its course and accordingly, the wish of the Athlete to conduct the initial proceedings on 27, 28 and 29 June 2016 should have been respected.

190. The opening and splitting of the Athlete's B-Sample and sealing of the B2-Sample ultimately took place on 8 June 2016, while she was still in hospital, and this represented a crucial and non-repeatable step in the current process. The IOC clearly violated Article 5.2.2.12.1.2 of ISL 2008, Article 6.4 of the Beijing ADR, Articles 29 and 32 of the Swiss Constitution and Article 6 EHRC. These violations cannot be cured retrospectively.
191. The Athlete submitted that Dr. De Boer was not a representative of the Athlete, and argued that this was confirmed by the way the LDPs for the B1- and B2-Samples were completed. The Athlete noted that Dr. De Boer was not even mentioned in the B1-Sample LDP. Therefore, it was *"contradictory to retrospectively consider Dr. Douwe De Boer as "the representative" of the Appellant ..., just to attempt to somehow heal the blatant violation of the Appellant's right to be heard"*.
192. The Athlete submitted that even though Dr. De Boer attended the procedure, this did not make him her representative, as he was solely acting as 'an observer'. *"It is on the other hand, contradictory and abusive to appoint an independent witness pursuant to art. 5.2.2.12.10 [ISL 2016], if the [IOC] truly believed, that Dr. Douwe De Boer was the representative of the [Athlete]"*.
193. The Athlete submitted that manner in which the opening, re-sealing and re-testing of the Athlete's sample was conducted raised serious doubts as to the integrity of the her sample and the compliance with the relevant ISL. *"It was clear that the process conducted on 8 and 9 June 2016 was unprepared, unprofessional and shrouded in a cloud of confusion"*. As a consequence of this confusion and miscommunication, the process was – perhaps deliberately – postponed and Dr. De Boer was unable to witness the re-testing of the Athlete's B1-Sample. This further demonstrated that the IOC was *"systematically hindering"* the Athlete's right to defend herself. When confronted with these allegations, the Athlete claimed that the IOC simply stated that it did not agree with the Athlete's position, without offering any explanations.
194. The Athlete rejected the IOC's claim that Dr. De Boer voluntarily decided not to attend the B1-Sample splitting, and the IOC's claim that attendance by Dr. Pachmann and Dr. De Boer were not an obligation, but merely an opportunity. The IOC clearly violated Article 5.2.4.3.2.6 ISL 2008, which stated that *"the Athlete and/or his/her representative [...] shall be authorized to attend the "B" confirmation"*.
195. The Athlete also submitted that it was unjustifiable that the IOC, despite having the samples for almost 8 years, would wait until 2 months before Rio 2016 to notify the Athlete of the PAAF. Worse still, the IOC conducted their scientific procedure and re-testing little over a week after the notification.
196. The Athlete quoted the panel in *CAS 2010/A/2161*<sup>14</sup>, which stated that:
- "It is now established CAS jurisprudence that the athlete's right to attend the opening and analysis of her B sample is fundamental and, if not respected, the B sample result must be disregarded. This is so even if denial of that right is unlikely to affect the result of a B sample analysis"*.

<sup>14</sup> *CAS 2010/A/2161 (at 9.8)*.

197. The Athlete concluded that:

*“... the right of the [Athlete] to be heard, guaranteed by art. 29 para. 2 and art. 32 Swiss Constitution and art. 6 EHRC have been violated, by not allowing the Appellant to witness the opening and splitting of the B-Sample, the re-sealing of the B2-Sample and the re-analysis of the B1-Sample. This violation cannot be healed retroactively, as the Appellant’s sample has already been opened and tested and there is none left, to conduct the procedure again. The severity of the violation consequently leads to the test, which was conducted by the [IOC] on 8 and 9 June 2016 and 29 June 2016 being null and void”.*

*vii. The IOC violated the Athlete’s right to be heard by not providing her with the requested documentation regarding her A and B samples*

198. The Athlete submitted that her right to be heard comprised of the right to access all the files of the procedure. In Switzerland, this right is established in Article 29(2) of the Swiss Constitution. This right serves to guarantee that the party concerned knows the basics on which the tribunal rests its decision on. The Athlete argued that the right to access the documentation of the case is also condition *sine qua non* for the effective participation in the process and the general right to be heard. This right also includes the right to have files which are wrong or incomplete, be corrected. The right to access the files is also a precondition for the right to a fair trial, pursuant to Article 6 of the EHRC.

199. The Athlete argued that Article 32(2) of the Swiss Constitution firmly established the right to be notified as quickly and comprehensively as possible of the charge brought against an individual. The Athlete submitted that this was the reason the IOC included Article 7.2.8 into the Beijing ADR, according to which:

*“[...] It shall allow the Athlete or other Person concerned an opportunity to adduce any relevant evidence, which does not require the use of disproportionate means (as decided by the Disciplinary Commission), which the Athlete or other Person deems helpful to the defence of his case in relation to the result of the test, or other anti-doping rule violation, either orally before the Commission, or in writing, as the Athlete or other Person concerned so wishes”.*

200. Specifically, Article 7.2.5 of the Beijing ADR stated the following (emphasis added by the Athlete):

*“The IOC President or a person designated by him shall, in confidence, **promptly notify the Athlete or other Person concerned**, the Athlete’s or other Person’s chef de mission, the International Federation concerned and a representative of the Independent Observer program of:*

*a) the adverse analytical finding;*

*b) the Athlete’s right to request the analysis of the B sample or, failing such request, that the B sample analysis may be deemed waived;*

*c) the right of the Athlete and/or the Athlete’s representative to attend the B sample opening and analysis if such analysis is requested;*

***d) the Athlete's right to request copies of the A and B sample laboratory package, which includes information as required by the International Standard for Laboratories;***

*e) the anti-doping rule violation or of the additional investigation that will be conducted as to whether there is an anti-doping rule violation;*

*f) the composition of the Disciplinary Commission”.*

201. The Athlete submitted that after being informed of the PAAF on 23 May 2016, she requested the IOC to provide her with the relevant documentation no fewer than 11 times. She argued that this proved beyond reasonable doubt that the IOC had no intention to provide her with the resources to effectively defend herself against the allegations. The Athlete noted that she was not even in possession of the B1-Sample documentation by the time the IOC started the B2-Sample analysis, all *“while constantly keeping up the pressure by issuing ludicrously short deadlines which were sometimes even unilaterally cut short by the [IOC] itself”*. Accordingly, there can be no question that the IOC infringed upon her right to have access to the files of the IOC.
202. The Athlete rejected the IOC's position that the provision of documentation was not a pre-requirement to conduct a sample analysis or its claim that there was no need to provide any documentation which was unrelated to the sample being analysed. The Athlete maintained that she had the right to access any and all the information that may have been necessary in the procedure. The Athlete also argued that, pursuant to Article 82 of the Swiss Code of Obligations (“CO”), the IOC was *“mandatorily prevented”* from continuing any re-testing until she had provided her with the necessary documentation. Further, contrary to the IOC's claim, there was nothing in Article 7.2.5 of the Beijing ADR *“precluding or limiting the granting of access to the necessary documentation pertaining to the case”*. Accordingly, *“it was simply the will of the [IOC] to deny the [Athlete] her right to defend herself, which led to a clear violation of the right to access of documents pursuant to art. 6 EHRC and art. 29 para. 2 Swiss Constitution”*.
203. The Athlete noted that when she requested the IOC to provide documentation regarding the sample temperature, this was once again denied and the IOC stated, *inter alia*, it would be expected of a WADA-accredited laboratory to avoid any mistakes during parallel analysis and that this request was justifiably rejected. The Athlete argued that this was also a violation of her right to be heard and her right to defend herself.
204. The Athlete noted that on 12 July 2016, she once again requested the IOC to provide the necessary documentation. While some documents were provided, it was still largely incomplete and was even partially in Mandarin and therefore incomprehensible for the Athlete or her counsel, and therefore needed to be translated. On 13 July 2016, the IOC refused to provide the Athlete with the LDP related to her A-Sample as they claimed it was neither relevant nor required.
205. The Athlete concluded that the IOC systematically hindered her from actively defending her legal rights by refusing to provide her with the necessary documentation and referred to the IOC's actions as a *“trickle-down right to access of files”*.

**viii. *The IOC unjustifiably acted in an extreme hurry, violating the Athlete's right to be heard due to its own fault***

206. The Athlete rejected the IOC's claims that she had 'obstructed' the re-testing of her samples and claimed that it was the IOC Disciplinary Commission who rendered the Appealed Decision valued their right to go on two weeks' vacation before Rio 2016 over her right to defend herself and/or be heard in a case where her entire sporting career was at stake. Moreover, the Athlete argued that this was all the more striking given that the IOC could have re-tested her sample at any time up to 4 years prior, as a turinabol test was available even before London 2012.
207. Given the huge amount of re-testing that needed to be done, it was clear from the beginning that the IOC would need to act in an extreme hurry. The Athlete argued that this situation was solely the fault of the IOC and raised the principle of *nemo auditor suam proprium turpitudinem alle-allegans*, meaning that no one shall be heard, who invokes his own guilt.
208. The Athlete argued that the IOC's behaviour was contradictory as on one hand, it did not stick to the 24 hour deadline foreseen in Article 7.2.13 of the Beijing ADR, but on the other hand, the IOC did not give her the necessary time to review the sample opening and splitting in person. The IOC simply did what it felt like to support its claims, and that was not acceptable.

**ix. *The IOC is barred from initiating a disciplinary procedure as it failed to appeal the negative decisions taken when analysing the Athlete's Beijing samples***

209. The Athlete submitted that the IOC was barred from acting against her by virtue of violating the rule contained in Article 12.5 of the Beijing ADR, which states:
- "The time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party".*
210. The Athlete noted that the abovementioned Article set a strict time limit to all challenges made in respect of decisions regarding ADRVs – including decisions that no ADRV was committed. Moreover, it was undisputed that the Athlete's urine sample was first tested on 24 August 2008 (during Beijing 2008), and resulted in a negative finding.
211. If the above test resulted in an AAF, disciplinary proceedings would have commenced immediately<sup>15</sup>. However, if no AAF was found, no further action is taken and it results in a decision of non-commission of an ADRV, which remains in force unless appealed. *"Moreover, since the decision on the non-commission of an anti-doping violation serves as basis for awarding medals and honours to the athlete, the decision serves to grant the athlete concerned with a legitimate expectation that the matter is resolved with binding legal effect (res judicata) and may not be set aside or reversed by the Respondent at their discretion, without first being subject to judicial review by the competent arbitral tribunal".*

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<sup>15</sup> Pursuant to Articles 7.2.1, 7.2.2, 7.2.3, 7.2.4, 7.2.5 etc. of the Beijing ADR.

212. While Article 6.5 of the Beijing ADR provided for the storage and delayed testing of samples for various reasons, most predominantly for scientific purposes, it did not allow for arbitrary review of the IOC's prior decision without due process. If during the re-testing certain samples resulted in an ADRV, the IOC could not simply issue a new decision on the existence of this ADRV as this would leave two conflict decisions in relation to the same subject matter. *"Since both decisions have equal legal force, the only way in which the earlier – ostensibly wrong – decision may be set aside is by way of appeal pursuant to article 12.2 of the Beijing ADR"*. In order to pursue that right, the IOC would have had to appeal the first decision within 21 days (as provided in Article 12.5 of the Beijing ADR), which it failed to do.

**x. *The IOC only had the right to analyse the Athlete's samples during Beijing 2008***

213. The Athlete submitted that according to Article 5.1 of the Beijing ADR, the Athlete agreed to allow the IOC to carry out *"Doping Control during the Period of the Olympic Games. This means clearly that the entire process, including analysis needs to be carried out during the Olympic Games. Would the [IOC] wanted to carry out Doping control after the Period of the Olympic Games, the [IOC] would have had to make this clear"*. The Athlete argues that the IOC is basing its entire re-testing program on Article 6.5 of the Beijing ADR, which is in clear contradiction to what was stated in Article 5.1 of the Beijing ADR.

214. The Athlete submitted that it was quite clear that the IOC has changed Article 6.5 of the Beijing ADR without informing athletes of the consequences the new provision may have. The Athlete noted that Article 6.5 of the relevant anti-doping rules for Athens 2004 stated as follows:

***"6.5 Storage of Samples and delayed analysis***

*Samples shall be stored in a secure manner at the laboratory and may be further analysed"*.

Whereas the same provision was amended in the Beijing ADR to state as follows:

***"6.5 Storage of Samples and delayed analysis***

*Samples shall be stored in a secure manner at the laboratory or as otherwise directed by the IOC and may be further analysed. Consistent with Article 17 of the Code the ownership of the samples is vested in the IOC for the eight years. During this period, the IOC shall have the right to re-analyse samples (taken during the Period of the Olympic Games). Any anti-doping rule violation discovered as a result thereof shall be dealt with in accordance with these Rules. After this period, the ownership of the samples shall be transferred to the laboratory storing such IOC Anti-Doping Rules – 07.05.2008(F) Page 10 samples, provided that all means of identification of the Athletes will be destroyed and that proof of this destruction shall be provided to the IOC"*.

215. The Athlete submitted that an athlete reading the Beijing ADR could easily have skipped this amendment as it was *"completely unusual"*. Under Swiss law, such unusual provisions are illegal unless it was duly brought to the attention of the athletes concerned. The Athlete submitted that the athletes participating in Beijing 2008 were not aware of the newly introduced provisions which allowed the IOC to perform re-testing for several years. The athletes needed

to be informed about these changes as they would have had to take additional precautions to defend themselves for several years, including keeping records of all food and drink taken during that time.

216. The Beijing ADR indicated that doping control was only possible during the period of Beijing 2008 and the re-testing of samples was limited to the choice of the BOCOG only – the IOC had no right to choose another laboratory for re-testing.

217. The Athlete argued that if new obligations of athletes were to be introduced, or if waivers of their rights were to be established, a clear basis in the relevant sports organisation’s regulations were required. The athletes needed to be made aware of such far reaching new provisions and it was not admissible to change the content of paragraphs with unclear meanings as the rules and regulations of private associations could be revised and amended quite easily.

218. The Athlete also argued that it was imperative to take into account CAS jurisprudence regarding the *contra proferentem* principle. The CAS has repeatedly confirmed that this principle was a general principle of Swiss law and that it was also applicable to matters related to the regulatory framework of sports organisations<sup>16</sup>. When applied to the regulatory framework of sports organisations, the *contra proferentem* principle entails that any ambiguous, or otherwise unclear, statutory regulation must be interpreted against the sports organisation that drafted it<sup>17</sup>. In other words, shortcomings in a regulatory framework cannot result in disadvantages to the athletes concerned.

219. As an example, the CAS has held:

*“Since FIFA had several chances to [...] codify the regulations on the club’s obligation to release their players to the Olympic Games, it must bear the legal disadvantageous consequence in not doing so”<sup>18</sup>.*

*“[...] inconsistencies in the rules of a federation will be construed against the federation [...]”<sup>19</sup>.*

220. The Athlete submitted that both the IOC and WADA have failed, for a considerable period of time (i.e. approximately 10 years), to formulate their rules and regulations in a coherent and consistent manner with regard to the issues presently relevant. In light of the CAS jurisprudence on the *contra proferentem* principle cited above, the IOC and WADA need to bear the “*legal disadvantageous consequences*” of their actions. These consequences were, in effect, that they could not perform a re-test with a B-Sample splitting on the Athlete’s samples.

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<sup>16</sup> The Athlete cited, amongst others, the following CAS cases as evidence: *CAS 2007/A/1396 & 1402*, *CAS 2008/A/1622*, *1623 & 1624*, *CAS 2008/A/1502*, *CAS 2011/A/2670*, *CAS 2013/A/3274*, *CAS 2007/A/1936*.

<sup>17</sup> The Athlete cited, amongst others, the following CAS cases as evidence: *CAS 2008/A/1622*, *1623 & 1624*, and *CAS 2013/A/3274*.

<sup>18</sup> *CAS 2008/A/1622*, *1623 & 1624*.

<sup>19</sup> *CAS 2011/A/2670*.

*xi. The IOC's re-testing program violates Swiss law*

221. The Athlete argued that this was a unique situation in which the IOC wanted an 'automatic correction of results', and in the IOC's disciplinary proceedings there were no proceedings foreseen which would give the Athlete the possibility to defend herself legally and prove that this was a case of no fault and/or no negligence.

222. The Athlete cited Rule 39(4) of Chapter 3 of the IAAF Competition Rules 2008, which stated:

***"Disqualification of Results***

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

223. The Athlete submitted that the above provision meant that all of an athlete's results obtained between 2008 and today could be taken away and such an automatic forfeiture of medals would constitute a double punishment.

224. The Athlete submitted that it is the opinion of the former judge of the SFT, Prof. Riemer, that such a system violates Article 27 of the Swiss CO. His opinion was supported by the jurisprudence of the SFT in the *Matuzalem* case and *A.\_\_\_\_\_ v. The Football Federation of Ukraine*<sup>20</sup>.

225. The Athlete also submitted that the automatic correction of results is *"very similar to a lifelong ban with all the personal and economic consequences attached thereto, albeit without the same kind of legal recourse or opportunity to defend herself. If an athlete is disqualified from an event through no fault of their own, they are still able to rehabilitate themselves in the future. An old athlete who is about to retire will always be tarnished and without an opportunity to clear their good name"*.

226. Accordingly, the Athlete submitted that this case *"comes extremely close to such an excessive contractual curtailment of economic freedom"*<sup>21</sup> for the following reasons:

*"- The system is clearly arbitrary in two respects: a) there are certainly false positives as in any technical test (the likelihood of which we do not even know) and b) there were no clear predetermined conditions for retroactive testing when she entered into the games;*

*- The "automatic correction of results" jeopardizes the [Athlete's] personal and economic existence;*

<sup>20</sup> *A.\_\_\_\_\_ v. The Football Federation of Ukraine, 4A\_448/2013.*

<sup>21</sup> Pursuant to Article 27(2) of the Swiss CO.

- *The “automatic correction of results” is not simply ensuring the correct course of the Olympic Games but gravely violates the [Athlete’s] privacy and economic pursuits;*
- *There is no way to defend herself legally and/ or factually (violation of art. 6 EHRC) which makes the entire system even more arbitrary and against any legal principle of the Western world;*
- *The “automatic correction of all results” at the end of a career equals an occupational ban against the Appellant not just in sports but even in many other areas which makes this case even more severe than the worldwide ban in the Matuzalem case;*
- *The federations’ interests in fighting doping could have been pursued before the London Olympic Games”.*

227. Moreover, the Athlete argued that the IOC’s re-testing program in the present case must be considered illegal under the Cartel Act, which prohibits the IOC (a monopoly organisation) from imposing unfair provisions. *“Stigmatizing an athlete as [a] fraudster without giving the athlete a real chance to show his or her innocence after eight years is certainly an unfair provision and must not be applied”.*

228. Finally, the lack of any real legal and factual possibility to defend oneself was a violation of Article 6(1) of the EHRC.

***xii. The IOC’s re-testing program violates its obligation to treat all athletes equally***

229. The Athlete noted that it appears that her bronze medal from Beijing 2008 was to be given to the sixth placed athlete. However, that athlete was not subject to any doping control measures. *“This shows exemplarily how nonsensical the entire re-analysis program of the Respondent is. In order to show the world (and in particular its sponsors) its endeavours in its fight against doping the Olympic results have now become completely random. The medals are simply give to the first athlete who was not subject to Doping Control”.*

230. The Athlete posed the following question to Prof. Riemer:

*“According to art. 5.6.1.2.1 Beijing ADR only the five best athletes had to give a urine sample. Giving the Beijing bronze medal to the sixth placed athlete means that an athlete whose urine samples were never subject to any analysis would receive an Olympic medal. Do you consider this as a violation of the mandatory provision of the equal treatment of all athletes through the IOC?”*

231. Prof. Dr. Riemer’s response was as follows:

*“Indeed it does obviously violate the principle of equal treatment of members, which exists in association law [...], when Athletes, who never have been tested, receive an Olympic medal instead of Athletes who were analysed. Had the doping controls been thoroughly conducted during the Olympic Games, then these other Athletes could have been tested as well. Today, this is not possible any more, which demonstrates that the whole system of re-analysis of selective available old doping samples in the current procedure – if not all the Athletes were tested and are tested again – violates the principle of equal treatment”.*

232. The Athlete argued that if the IOC wanted to establish a new ranking for the event after 8 years, it would be acting arbitrarily and would not be treating all athletes equally. According to Article 6 of the Cartel Act, monopolies must treat all contracting parties in an equal manner and as the IOC did not carry out doping tests on all the potential medal winners, the IOC had not satisfied its obligations to treat all participants equally. The IOC is therefore prohibited from correcting its results in general.

**B. The IOC's Submissions**

In summary, the IOC rejected all the arguments submitted by the Athlete and submitted the following:

233. The Appealed Decision should stand because:

- The IOC Disciplinary Commission correctly applied the applicable rules. Pursuant to Article 6.5 of the Beijing ADR, the IOC had the right to order the re-testing of the Athlete's sample (No. 1846073) and the re-testing procedure was correctly conducted in accordance with the applicable provisions of ISL 2015/2016.
- In application of Article 5.2.2.12.10 ISL 2015, the IOC conducted a full analysis of the split B-Sample and there was no requirement of notification to, nor attendance by, the Athlete of the B-Sample split, the re-sealing of the B2-Sample and the B1-analysis under the aforementioned Article.
- Even if there was a requirement for her to attend, the Athlete could not claim her rights were violated as the IOC *"made more than reasonable efforts to offer convenient alternatives and proposed 7 different dates"*. Conversely, the Athlete failed to submit alternative reasonable dates and the explanations provided for not being available on the IOC's proposed dates (i.e. training, unavailability of Dr. Pachmann etc.) were not valid. Further, the opening and splitting of the B-Sample was effectively attended by a person present on her behalf (i.e. Dr. De Boer), *"who was for all purposes her representative. The same person did not attend the B-1 Sample not because he could not have but because he was instructed not to"*. Moreover, Dr. De Boer attended the opening and analysis of the B2-Sample, so the Athlete's representative thus attended the equivalent of what could be attended in a regular process.
- Sample number 1846073 was *"unequivocally the Sample of the [Athlete] collected from her on August 24, 2008"*. The chain of custody allowed for the tracing of the Athlete's samples from collection, arrival in the Beijing laboratory and then transfer to the LAD. In any event, the sealed B-Sample ensured the integrity of the sample.
- The presence of a Prohibited Substance was detected in the Athlete's sample. This substance was a metabolite of turinabol, which is an exogenous anabolic steroid. As such, the objective finding is sufficient to establish an ADRV (presence and/or use)

pursuant to the Beijing ADR and to disqualify the results obtained by the Athlete in Beijing 2008.

- Finally, given the substance at stake and the strong converging contextual evidence existing in this respect, the IOC Disciplinary Commission correctly observed that the ADRV was consistent with intentional use of a Prohibited Substance. Thus, the Appealed Decision referred to both Articles 8.1 of the Beijing ADR (automatic disqualification) and 9.1 (disqualification as sanction).

234. As a direct reply to the arguments made by the Athlete, the IOC submitted the following:

*i. The Athlete’s claim that she did not sign the Beijing Entry Form and was therefore not bound by the Beijing ADR*

235. The IOC rejected the Athlete’s claim (made at the hearing) that she did not sign the Beijing Entry Form and was therefore not subject to the Beijing ADR. The IOC noted that the Athlete did not raise this argument at any time prior to the hearing at the CAS. In any event, the IOC submitted that irrespective of whether the signature was the Athlete’s or not (and the Panel notes that the IOC did not specifically challenge the Athlete’s allegations in this regard), the fact of the matter was that she had participated in Beijing 2008 and further, she had even won a medal. Moreover, she signed the Doping Control Form (“DCF”) which was provided to her at Beijing 2008.

236. The IOC submitted that the Athlete could not have it both ways; if she wanted to argue that she did not sign the Beijing Entry Form and was not bound by the Beijing ADR, then following that line of reasoning, it meant that she was not entitled to participate in Beijing 2008 at all (as she had no contractual basis for doing so) and was therefore not eligible to claim her bronze medal. Alternatively, if the Athlete argued that she was eligible to participate or has participated in Beijing 2008, then she had implicitly agreed to the conditions of entry into the tournament (i.e. the Beijing Entry Form), and therefore agreed to be bound by the Beijing ADR.

*ii. The absence of legal basis to perform the “sample splitting” procedure on the Athlete’s samples*

237. The IOC submitted that the applicable ISL was ISL 2015 and 2016. They provided a basis for the procedure which was followed. Regarding the basis for re-testing the Athlete’s samples, this was provided for by Article 6.5 of the Beijing ADR. The Athlete’s argument in reference to Article 404 of the CPC was completely meritless.

238. The re-testing was a specific process in which the laboratory was asked to re-test specifically chosen samples and this re-testing was conducted under the applicable ISL at the time, i.e. at the time of re-testing. There was no link or continuity between the successive processes. The re-testing was “a completely new process, which may or may not develop into disciplinary proceedings”. If disciplinary proceedings were initiated, then a decision was issued that was subject to an

appeal. The re-testing was not an ‘appeal’ against the former analytical process. The IOC rejected the expert opinion provided by Prof. Riemer as not relevant.

239. The arguments based on the application of ISL 2008 had no merit in principle as the applicable ISL 2015 & 2016 did not provide for discretion of the testing authority in the use of the A-Sample. Despite this, the IOC submitted that it effectively and practically provided the Athlete with the same opportunity as she would have had been entitled to if she had been exercising her attendance rights in regard of the B-Sample split under ISL 2008. In particular, the Athlete was given an adequate opportunity to attend and she *“effectively exercised it through a representative designated by her, who attended the opening and the split of the B-Sample”*.

**iii. *The lack of an independent witness reviewing the sample opening and splitting procedure***

240. The IOC noted that the Athlete questioned the independence of Ms Zimmermann, who is presently a CAS counsel. However, Ms Zimmermann confirmed in a witness statement that she was not employed by the CAS at the relevant time.

**iv. *The allegations regarding the identity of the Athlete’s samples***

241. The IOC rejected the Athlete’s allegations regarding the identity of her samples. The IOC argued that the WADA-accredited LAD was *“under no investigations for any impropriety”*. Further, *“the matter of the sample disposal (55 sample[s] and not 67) has been cleared with WADA. It was not linked to any violation nor failure in compliance on the side of the LAD”*.
242. The IOC submitted that in December 2015, a report was issued by the internal audit services of the Lausanne University Hospital (“CHUV”)<sup>22</sup>, which confirmed that the LAD observed the applicable rules in the conduct of its mission in anti-doping and that this had also, and in particular, been the case in relation with the re-testing of the samples coming from the laboratory in Moscow. The IOC also noted that the Athlete failed to submit any concrete evidence to support her allegations that any of the *“extraordinary occurrences of tampering in the laboratory in Sochi could have occurred in Beijing, in Lausanne or in any other laboratory”*.
243. The IOC also added that *“tampering is logically not applied to render samples positive”*. Further, the IOC submitted that *“the alleged tampering would have been a particularly improbable one: the metabolite found is a Long Term metabolite, not found outside the body and which forms the end of the process. It would be rather not the most obvious way of tampering samples. In 2008 and in Beijing, this would have even been unthinkable as the metabolite was not even reported yet”*.
244. In any event, *“the insinuations of tampering are, in this case, completely gratuitous”*. The Athlete’s B-Sample was inspected upon opening and the bottle and seal was found intact. Even if no inspection by microscope was performed (which was, and is, not part of the routine

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<sup>22</sup> In French, the ‘*Centre hospitalier universitaire vaudois*’, which is one of the five university hospitals in Switzerland.

inspection), there was no basis to assume that it was tampered with or that the identity of the sample was in doubt.

**v. *The alleged violations of numerous applicable International Standards***

245. The IOC acknowledged that the A-Samples were not re-sealed but noted that this was the reason for the choice to rely on the split B-Samples to conduct the re-analysis. At the same time, the IOC always underlined that the individual re-sealing of samples for transport between laboratories was not a requirement under – the then applicable – ISL 2008. The requirement to re-seal the samples or use sealed boxes was only introduced in ISL 2015 (under Article 5.2.2.12.4).
246. The IOC submitted that the Athlete’s samples may be properly traced back from its collection in Beijing, to its transfer to the LAD based on the relevant documentation (which was submitted as evidence). The DCF dated 24 August 2008 unequivocally linked the Athlete’s urine with the sample number 1846073 and the chain of custody documents evidenced the valid transfer to the LAD.
247. In response to the Athlete’s allegations regarding the temperature at which the samples were stored, the IOC referred to the documentation submitted as evidence which the IOC claimed stated, *inter alia*, that the samples were transported and stored in a freezer.
248. Further, the IOC noted that when the B-Sample was opened, the independent witness (Ms Zimmermann) notably checked whether the bottle was properly closed and sealed and also whether it was intact. Moreover, Dr. De Boer was present as a representative of the Athlete (irrespective of what the Athlete claimed his role was) and “*could have inspected the bottle as closely as he would have wished*”.
249. The IOC rejected the Athlete’s references to various provisions of the IST as being without relevance. The IOC submitted that the ISTs covered testing and this included the transport of the samples from collection to the (first) laboratory (in Beijing) and not the actions of the laboratory thereafter. Once the samples arrived at the laboratory, their handling fell under the ISL provisions, which governed the processes by the laboratories. At that time, the relevant ISL did not include detailed provisions on the handling of long term storage samples. This is now covered by Article 5.2.2.12 in ISL 2015/2016.
250. The IOC noted that one of the points clarified by ISL 2015/16 was that samples received for long term storage were not subject to individual inspection until they were selected for analysis. The IOC argued that since it is now specified, that removes any doubt as to the proper interpretation of the rules when there was no specific rule about the issue.
251. The IOC submitted that the documentation it submitted as evidence was sufficient to demonstrate both the proper chain of custody and that no violations of ISL 2015 & 2016 occurred. Further, the B-Sample, which was intact, confirmed both the integrity and the identity of the sample. The consistency with the A-Sample results comfort that finding.

252. The IOC submitted that the exact same chain of custody was already verified by the CAS in *CAS 2009/A/2018*<sup>23</sup>, which dealt with one of the cases subject to the specific limited re-testing conducted in 2009. In that case, the A/B-Sample procedure was applied for the re-testing. The IOC submitted that the re-testing of the split B-Sample in the present case, in comparison, gave additional security to the sample.
- vi. The alleged violations of the Athlete's right to be heard during the re-testing of her Beijing sample*
253. The IOC submitted that since this is not a criminal matter, the Athlete's references to the Swiss Constitution and to paragraph 6(3) of the EHCR was irrelevant.
254. In relation to the Athlete's arguments regarding her right to attend the opening and splitting of the B-Sample, the IOC submitted that ISL 2015/16 were clear in that the provisions provided that neither the notification, nor the attendance, was a requirement. The IOC's position was that the process at stake was a procedural one and did not modify the fundamental obligations of the athletes (i.e. to not commit ADRVs) which remained unchanged. Moreover, the ability to amend an ISL was provided for. In any event, the IOC also noted that the splitting of the B-Sample was already provided for in ISL 2008.
255. The IOC submitted that ISL 2015/16 brought into line the re-testing procedure for what it represented, i.e. a process in which the A-Sample is replaced by the B1-Sample and the B-Sample is replaced by the B2-Sample. Logically in that context, the exercise of rights exercised normally in connection with the B-Sample were exercised at the B2-Sample level.
256. The verification of integrity at the first level of the B1-Sample analysis (corresponding to the A-Sample analysis, which is always conducted without the Athlete) becomes entrusted to an independent witness. The IOC argued that this was an appropriate measure, given that if an A-Sample was not available or insufficient, it avoided the necessity to call an athlete in situations in which the likelihood of a positive outcome could be minimal.
257. The IOC submitted that the issues which arose in connection with the attendance (or lack thereof) of the opening and splitting of the B-Sample should be considered in light of the above. *"The decision is then easily made: since there is no right in principle, such right cannot a fortiori be violated in a situation, in which the other party has made every effort to be forthcoming. In addition, Dr. De Boer was present and he did attend"*.
258. Even if the Panel were to conclude that the Athlete had a right to attend, the IOC submitted that it did enough to accommodate such a right, which in addition, she exercised through a representative.
259. In relation to the right of the Athlete to attend, the IOC argued that as a matter of principle, the right to attend the process should not be turned into a right to dictate it. It was not up to the Athlete to set the date. She could have asked for alternative dates, if the originally proposed

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<sup>23</sup> *CAS 2009/A/2018*, award of 30 July 2010.

dates were truly unsuitable. This meant that *“the attendance shall not be the last of the priorities of the Athlete. In particular, training, which a daily activity for a competitor cannot, per se, be a justification to obtain a delay”*.

260. The IOC also stated that whilst the Athlete had a right to send a representative to the procedure, *“not to accept a date in view of his or her vacation is not a legitimate ground”*. Moreover, the Athlete had the responsibility to make sure that her representatives were reasonably available.

261. Regarding how long a process could be delayed, the IOC stated the following (emphasis added by the IOC):

*“... whilst there may not exist an absolute answer in specific circumstances, the following elements are to be considered: first, the ISL sets effectively a dead-line, which is quite clear and strictly worded: i.e. maximum 7 working days (5.2.4.3.2), i.e. approx. 9 to 10 days. This dead-line applies in the case of a regular B-Sample analysis and not a B1-Sample. However, if to be applied in this context, there is a second reason for which, the application should be even stricter. Indeed in this case, the B1-Analysis (equivalent to A-Sample) may lead to provisional suspension. An Athlete may have a good (bad) reason to delay the process at any price. It further means that not only the interests of the athlete concerned are at stake but of his competitors. In any event, it is plain and clear that a postponement by one month is completely beyond any reasonable claim an athlete could make”*.

262. The Athlete’s proposal to delay the process by a month was in absolute terms not acceptable. This was even more so given that the Athlete was subject to a potential automatic provisional suspension. In such a context, any justification for being unable to attend linked to training and competition was irrelevant.

263. The IOC stated that the other reasons given relating to the unavailability of the Athlete’s counsel were also unacceptable. *“In particular a legal counsel cannot ask for his vacations or academical career to be taken into consideration. He has to get organised personally or through somebody else to support his or her client, when needed. As regards, Dr. De Boer, his personal presence might have been more relevant, given his expertise. However and again that would not be a justification for an exaggerated postponement”*.

264. Based on the above, the IOC submitted that the Athlete did not propose any reasonable alternative date while the IOC so (i.e. 6, 7 or 8 June 2016). Moreover, even after the Athlete stated that she needed to go to the hospital, the IOC proposed 2 further dates, but never heard a response.

265. The IOC also stated that the Athlete failed to provide any specific details regarding the Athlete’s alleged hospitalisation. The IOC argued that the Athlete could have even attempted to use a deliberate appointment as a justification for her absence. Had the Athlete duly explained her medical condition, the IOC claimed it would have *“certainly considered a further postponement”* to accommodate her. However, *“instead of managing the situation in good faith, it is however all too clear that the [Athlete’s] counsel jumped to the occasion to be in a position to claim that the rights of her poor client lying in the hospital, would have been mercilessly trampled”*.

266. The IOC submitted that *“what happened with in connection with Dr. De Boer was a pitiful comedy”* as Dr. De Boer first arrived unannounced leading to confusion, followed by Dr. Pachmann attempting to claim that Dr. De Boer was somehow not a representative of the Athlete, but was still nevertheless attending on behalf of the Athlete. This led to delays in the procedure. Dr. De Boer nevertheless attended the B-Sample opening and splitting, despite again claiming that he was not acting as the Athlete’s representative. However, Dr. De Boer did not attend the B1-Sample testing as on the morning of 9 June 2016, he stated that he had not received instructions to attend.

267. The IOC argued that it had been forthcoming in attempting to find a solution, while the Athlete was not. She either rejected or did not answer the IOC’s proposals. In addition, a representative attended the B1-Sample opening and splitting and the B2-Sample testing. Dr. De Boer could have attended the B1-Sample testing, but did not as he did not receive appropriate instructions from Dr. Pachmann. The IOC submitted that the Athlete *“behaved abusively in claiming that her representative was not representing her”*. The IOC concluded that the re-testing procedure was properly conducted. To the extent that the Athlete had a right to attend, this was respected as much as could be reasonably expected.

**vii. *The alleged violations of the Athlete’s right to be heard by not providing her with the requested documentation regarding her A and B samples***

268. The IOC submitted that the Athlete was provided with her B1-Sample analytical results on 15 June 2016. The B1-Sample LDP was issued by the laboratory on 29 June 2016 and provided to the Athlete on the same day. The B2-Sample analytical results were notified to the Athlete on 1 July 2016 and the corresponding LDP on 7 July 2016. The IOC noted that there was no specific dead-line applicable to the provision of the LDPs to the Athlete.

269. Article 5.2.6.13 ISL 2016 provided that the LDP *“should”* be provided within a deadline of 10 working days from a corresponding request of the Result Management Authority. The IOC submitted that given the difficult conditions under which the LAD was then working, the provision of the abovementioned LDPs were completed in an effective manner.

270. The delivery of the B1-Sample LDP occurred within 10 working days from the notification of the results to the Athlete while the B2-Sample LDP was provided within 4 working days. Obtaining documentation from the Beijing laboratory took some time, but was nonetheless provided on 13 July 2016.

271. Regarding the provision of the LDP relating to the A-Sample, the IOC stated that the obligation to provide it was debatable. It nevertheless provided a copy of this in its Answer. Thus, the IOC claimed that all the relevant LDPs had been provided to the Athlete.

**viii. *The alleged undue imposition of urgency***

272. The IOC acknowledged the challenges posed by the scale of the re-testing process and stated that the magnitude of the positive results were indeed unexpected and created a certain time

and work pressure. However, despite this, the procedures were still conducted in an appropriate manner.

273. The IOC claimed that the re-testing process was conducted within specified deadlines and the disciplinary process that followed was conducted within a few months, which was not out of the ordinary. Further, the IOC dismissed the Athlete's discussions and suggestions as to how the re-testing should have been organised as "*simply pointless*".
274. The IOC also rejected the Athlete's arguments regarding the possibility of applying the re-testing method back in 2011. The global re-testing of Olympic samples was a vast logistical exercise mobilising huge resources. It could not be implemented each time a particular new testing method was installed as re-testing cannot, by definition and with the limited amount of urine available be repeated many times. That was the rationale behind re-testing the samples as close to the expiration of the 8 year statute of limitations as possible. That also had the effect of maximising the gap between the initial test and the re-testing.
275. In the case of the Athlete, the IOC argued that no strikingly short deadlines were imposed in any event as it was normal to apply deadlines in days in the analytical process. Assuming that the Athlete had true intentions of attending the process with a scientific expert and a lawyer (which the IOC claimed was not usual), the burden was on the Athlete and the concerned representatives to ensure they made themselves available. It was unacceptable for the Athlete and/or her counsel and/or her scientific expert (or a combination of the 3) to delay the proceedings by over a month due to their own unavailability due to vacations or other professional/academic commitments.
276. Regarding the disciplinary proceedings, the IOC submitted that the deadlines, even if short, were manageable. Moreover, the Athlete had the opportunity to postpone these proceedings, but chose to drop her initial request. On 20 July 2016, the Chairman of the IOC Disciplinary Commission made it clear that the hearing was held "*based on the understanding that the request for postponement had not been maintained*". Dr. Pachmann failed to react, and so the Athlete's claim that the proceedings were conducted in undue haste was abusive.

***ix. The alleged negative 'decision' not appealed***

277. The IOC noted that an analytical report reporting negative analytical results was not a negative decision but a factual statement issued by the LAD and expressing the objective fact that a given sample analysed through the methods applied by the laboratory did not produce positive results. The moment a negative analytical result is issued, that report is normally correct. There is no reason to challenge it, nor 'appeal' it.
278. The IOC submitted that the proposition that the IOC or any anti-doping organisation should appeal any negative report or being precluded from ordering later re-testing of the samples as expressly provided by the rules was "*simply ludicrous*".

**x. *The allegation that the IOC had no right to analyse the Athlete's samples outside Beijing 2008***

279. The IOC referred to the wording of Article 6.5 of the Beijing ADR which clearly provided a basis for re-testing of the samples collected during Beijing 2008 over the following 8 years. The IOC submitted that there was no contradiction between Article 6.5 and Articles 5.1 and 5.2 of the Beijing ADR, which dealt with testing.
280. The IOC stated that it *"failed to follow"* the Athlete's arguments and complaints regarding the amendments of the respective ADR applicable in each Olympic Games and noted that ADR are issued during each edition of the Olympic Games and *"it is only fortunate that improvements are made each time"*. Irrespective of this, the IOC noted that Article 6.5 of the Beijing ADR was clear in its meaning that the IOC had the right to re-test samples for 8 years.

**xi. *The alleged violations of Swiss law***

281. The IOC submitted that what the Athlete was challenging here was not the re-testing but rather the principle of automatic disqualification, which is provided for in Article 8 of the Beijing ADR, corresponding to Article 9 of the WADC.
282. The IOC submitted that automatic disqualification means that an objective ADRV automatically leads to a disqualification of the results affected by the violation, and it is not technically a sanction, but rather an eligibility rule which applies retroactively. Whilst it might be harsh in certain cases, the IOC noted that it represented a consensus incorporated in the WADC.
283. The IOC also noted that an athlete found with oral-turinabol in her body might in any event not be the ideal case to seek a precedent in respect of the validity of the principle of automatic disqualification. In her particular case, the Appealed Decision was based on both Articles 8.1 and 9.1 of the Beijing ADR. So the IOC argued that the Athlete first needed to overcome the hurdle of establishing that she bore no fault or negligence. The IOC questioned the Athlete's ability to do this (irrespective of how much time has elapsed since the sample was taken) as *"turinabol does not come in coffee, nor in legitimate supplements"*.
284. Finally, the IOC argued that the drawing of a comparison between the disqualification of a single result in the past, and a precedent in which the possibility to exercise an activity and earn a living was at stake, was not convincing.

**xii. *The alleged violation of the IOC's obligation to treat all athletes equally***

285. The IOC rejected the Athlete's claims and stated that she was not the bearer of interests of the athletes' community and moreover, the last people entitled to discuss issues linked with the reallocation of medals were clearly the athletes losing them. The IOC stated that what happens with Olympic medals which are withdrawn as a result of ADRVs and how they are reallocated is an issue which strictly does not concern the Athlete, who has no standing nor legitimacy to make any submissions in this respect.

**xiii. *The Prohibited Substance found in the Athlete’s sample and comments on Dr. Kopylov’s expert opinion***

286. The IOC submitted that aside from the various alleged procedural issues raised by the Athlete, *“this matter is in substance a very straightforward and simple one”*. A Prohibited Substance, turinabol, was found present in the Athlete’s sample and this was confirmed by an analysis of the Athlete’s B1-Sample and B2-Sample. The *“fully consistent and effectively complete results obtained in the A-Sample analysis comfort the validity of the finding”*.
287. The IOC stated that the substance found present in the Athlete *“is a classical doping substance. It is not one which accidentally contaminates food or supplements (meaning here “legitimate” supplements not supplements, which are deliberately “powered”)*”. Further, *“exceptionally strong and converging contextual evidence shows that turinabol was a doping substance in high and active use in Russia”*.
288. The IOC submitted that new long-term metabolites of turinabol could be identified for the first time in a peer-reviewed publication by Timofei Sobolevsky & Dr. Grigory Rodchenkov in 2012 and the search for these metabolites was progressively implemented by the WADA-accredited laboratories from 2012/13, and it was now part of the routine analytical testing. The Athlete’s positive result was one of over 80 positive cases.
289. The IOC noted that in 4 separate cases, athletes – with the support of their appointed expert Dr. Kopylov – attempted to question the validity of the re-testing method. The IOC rejected Dr. Kopylov’s publication submitted by the Athlete in this case and noted that Dr. Kopylov had previously testified in front of the CAS<sup>24</sup> as an independent witness and did not impress the CAS panel with his testimony. Dr. Kopylov eventually turned the expert report he submitted in that case into a publication, which is the one submitted by the Athlete in the present case.
290. In the meantime, the WADA had also published a report<sup>25</sup> addressing the validity of the method and the arguments raised by Dr. Kopylov and concluded that *“Dr. Kopylov’s comments and criticisms are not supported by facts or objective scientific reasoning and interpretation of data”*.

**VI. JURISDICTION OF THE CAS**

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

*“An appeal against a 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 Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the Statutes or regulations of that body”*.

<sup>24</sup> In CAS 2016/A/4632, at 58 and 59.

<sup>25</sup> WADA, *“WADA Report on Oral Turinabol Analysis in Anti-Doping Laboratories”*, 25 January 2017. A copy of this report was submitted in evidence.

292. In her written submissions, the Athlete relied on Article 12.2 of the Beijing ADR, which stated as follows:

***“12.2 Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, and Provisional Suspensions***

*A decision that an anti-doping rule violation was committed, a decision imposing Consequences of an anti-doping rule violation, a decision that no anti-doping rule violation was committed, a decision that the IOC lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences, and a decision to impose a Provisional Suspension may be appealed exclusively as provided in this Article 12.2. Notwithstanding any other provision herein, the only Person that may appeal from a Provisional Suspension is the Athlete or other Person upon whom the Provisional Suspension is imposed.*

***12.2.1*** *In all cases arising from the Olympic Games, the decision may be appealed exclusively to the Court of Arbitration for Sport (“CAS”) in accordance with the provisions applicable before such court.*

***12.2.2*** *In cases under Article 12.2.1, only the following parties shall have the right to appeal to CAS: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the relevant International Federation and any other Anti-Doping Organisation under whose rules a sanction could have been imposed; and (c) WADA”.*

293. The Athlete also relied on Article 59 of the Olympic Charter in force at the time of Beijing 2008, which stated as follows:

*“Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration”.*

294. However, the Panel notes that at the hearing, the Athlete submitted that she did not sign the Beijing Entry Form, and as a result, she was not subject to the Beijing ADR 2008. As a consequence, the CAS would therefore not have jurisdiction to hear this appeal pursuant to Article 12.2 of the Beijing ADR.

295. Despite this, the Athlete explicitly stated that she agreed and accepted that CAS had jurisdiction to hear this dispute. To do so the Athlete could also rely on the Olympic Charter.

296. Accordingly, the jurisdiction of CAS was not disputed by either of the parties. It follows that the CAS has jurisdiction to hear this dispute.

## **VII. ADMISSIBILITY**

297. The Statement of Appeal, which was filed on 25 October 2016, complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

298. It follows that the Appeal is admissible.

### VIII. APPLICABLE LAW

299. Article R28 of the CAS Code provides that the seat of the CAS and of each Arbitration Panel is in Lausanne, Switzerland. Swiss procedural law therefore applies to this arbitration. Regarding the law applicable to the merits, Article R58 of the CAS Code provides the following:

*“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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

300. In relation to the applicable law, the Athlete stated the following (emphasis added by the Athlete):

*“As the federation’s rules are based on Swiss law in the present case, the choice of the federation’s rules includes naturally the regular order in which Swiss law is applied on the federations’ rules. This means that **mandatory Swiss law always prevails before the federations’ rules**. Furthermore, substantial deviations from the dispositive Swiss law are only possible in the statutes of the federation not in any rules and regulations of lower level”.*

301. The IOC submitted that the applicable CAS Code was the version in force from 1 January 2016, as those were the rules in force when the Athlete filed her Statement of Appeal.

302. Further, in relation to the applicable law relating to the merits, the IOC submitted that aside from the Olympic Charter, the Beijing ADR was applicable as well as the WADC which serves as a reference for its interpretation (pursuant to Article 16.5 of the Beijing ADR). Moreover, the IOC stated that Swiss law was applicable pursuant to Article 16.1 of the Beijing ADR.

303. In relation to the relevant rules applicable to this dispute, the IOC submitted that the ISTs are *“are clearly and without doubt not applicable, both in its subjective and objective scope, to the conduct of the analytical process by the laboratory”*. Moreover, Article 6.4 of the Beijing ADR provides that the re-testing is governed by the ISL. However, it does not specify which ISL is applicable in case of re-testing under Article 6.5, which could occur (as it did here) years after the sample was taken.

304. The IOC submitted that this issue was answered by the WADC 2003, which is both directly applicable and referred to in Articles 16.1 and 16.5 of the Beijing ADR. The applicable version of the WADC is the 2003 edition, which was the edition in force at the time of Beijing 2008. The introduction of the WADC 2003 stated:

*“International Standards and all revisions shall become effective on the date specified in the International Standard or revision”.*

305. Accordingly, the relevant ISL is the one which was in force when the re-testing process was conducted. When the process began in March 2016, the ISL in force was the ISL 2015. A further version came into effect as of 2 June 2016, i.e. ISL 2016. ISL 2016 was therefore applicable to processes conducted after 2 June 2016, which includes the analysis of the B1-Sample (which occurred on 8-9 June 2016) and of the B2-Sample (on 29 June 2016). In relation to the issues in question in the present case, the IOC submitted that the two versions (i.e. ISL 2015 and ISL 2016) were identical so the change has no practical consequence. The IOC also submitted that Article 5.2.2.12.9 of ISL 2015 and ISL 2016 expressly confirmed that *“further analysis of Samples shall be performed under the ISL and TD in effect at the time the Further Analysis is performed”*. Finally, the IOC argued that it was simply logical that the LAD would apply the set of rules applicable at the time they acted.
306. Having considered the submissions of both parties, the Panel concludes that the primary anti-doping rules applicable to the matter at hand are the Beijing ADR. These were based upon the WADC 2003 which shall form the basis of interpretation (cf. Article 16.5 of the Beijing ADR and Article 24.3 WADC 2003 and WADC 2015 which calls for interpretation as an independent and autonomous text) and may give context to the matter at hand, but any further gaps or lacunas in the Beijing ADR shall be filled using Swiss law (cf. Article 16.1 of the Beijing ADR), also as the law of the country of the IOC, the institution that issued the Appealed Decision. The Panel considers that each version of the WADC is non self-executing and not directly applicable, but is of great importance.
307. The Panel notes that the Beijing ADR deviate slightly from the WADC 2003. Whereas Article 6.4 is only a little different, Article 6.5 exists in the Beijing ADR only and establishes the ability to re-analyse within 8 years. As such it transmits Article 17 of the WADC 2003 which cannot be found in the Beijing ADR. Article 6.5 of the Beijing ADR is quite similar to Article 6.5 of the WADC 2009 which came into force on 1 January 2009. More importantly, Article 3.2.1 of the Beijing ADR compares to Article 3.2.1 of the WADC 2009 (and deviates from the WADC 2003 in force during Beijing 2008 and the specific reference made to this provision in the ISL 2008). As a signatory of each version of the WADC, the IOC is bound by Art 20.1.1 quite strictly and therefore *“has to adopt and implement policies and rules which conform with the Code”*.
308. The more contentious issue concerns which editions of the ISL and IST are applicable at the case in hand. The Panel notes that the Beijing ADR provides the rules and regulations that are aimed at the athletes. The Panel notes the Athlete’s submission that athletes only accept those (anti-doping) rules that are in force when they compete, and that those rules should remain applicable even if the athlete’s Sample is tested some years later – there should not be any *“dynamic referral”* allowed. However, the ISL are clearly aimed at those carrying out the analysis i.e. the laboratories. Whilst the Beijing ADR does not offer much assistance to the Panel, the WADC 2003 does help somewhat (although it is not directly applicable). As the IOC has submitted, it is WADA’s intention that the ISL will be revised from time to time and any revisions will become effective and shall be implemented from the date specified in each such revision. The footnotes to the WADC 2003 stated that *“it is important that the technical experts be able to make timely changes to International Standards without requiring any amendment to the Code or any individual stakeholder rules and regulations”*. The Panel notes the common sense in such a system. Whilst athletes need to know clearly which rules may be applied to them, those

persons carrying out the analysis should be able to benefit from any advancement in techniques in order to enable WADA and all other anti-doping bodies to best achieve their objectives (in the (athletes’) interest of fair competition).

309. The Panel notes when both the ISL 2015 and 2016 came into effect and agrees with the IOC that these are applicable to the LAD when splitting and analysing the B1 and B2-Samples respectively. As there is no difference between the two ISLs for the purposes of the matter at hand, the reference herein shall be to the ISL 2015/16. ISL 2008 was applicable for the analysis by the Beijing laboratory.
310. The same is true for the IST. These apply to the collection, storage and transportation of Samples and are aimed at ensuring the identity and integrity of Samples. Again, these are not aimed at the athletes. They are also intended to change over time. In the case at hand, the Athlete’s Samples took quite a journey over an 8 year period, so the IST applicable will be that on any date when the Panel are required to consider an event (such as the move from Beijing to the LAD) on such journey. The collection of the Athlete’s sample was at Beijing 2008, so the IST 2003 would apply. The next edition was effective from 1 January 2009, being the IST 2009. They were replaced on 1 January 2012, by the IST 2012. On 1 January 2015, the IST 2015 came into force.
311. The transnational scope of global anti-doping rules implementing the WADC and the role of Swiss and international ordre public and Swiss mandatory law will be dealt with in the merits section of this award.

## **IX. MERITS OF THE APPEAL**

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

312. The role of this Panel is to consider the Athlete’s appeal against the Appealed Decision. In a nutshell, that decision was that, as a result of the AAF involving the presence of turinabol (a metabolite of turinabol) in a sample taken from the Athlete during Beijing 2008, her results from that event (the women’s high jump) needed to be disqualified and the medal, diploma and the like she achieved following on from those results should be cancelled. Pursuant to Articles 8.1 and 9.1 of the Beijing ADR, any such disqualification is “automatic” for the high jump event and may be made for any other events that might have been affected by that AAF during the window of Beijing 2008. As the high jump was her only event at Beijing 2008, the Panel is not empowered and does not have jurisdiction to deal with her intent, fault, negligence or the like and is not involved in “*the further management of the consequences of the ADR*”. These may be issues for another tribunal, on another day. If an athlete’s performance in an event has been tainted by an AAF, then she or he must be disqualified from the record of that event.
313. The Panel must be sure that the Athlete’s various rights have been respected during this appeal process before the CAS and that the IOC stays within the boundaries of (its) various regulations and the applicable law.

314. The Panel observes that the parties have made a great number of submissions and arguments in the matter at hand, however the main issues to be resolved are:
- a) Was there a contractual relationship between the Athlete and the IOC?
  - b) What is the applicable standard of proof and who bears the burden in this case?
  - c) Were there departures from the ISL 2015/16 and/or the IST that could reasonably have caused the ADRV/AAF?
  - d) Was the Athlete's right to be heard violated?
  - e) Was the IOC barred from initiating a disciplinary procedure against the Athlete according to Article 12.5 of the Beijing ADR?
  - f) Did the IOC have the right to analyse the Athlete's samples outside of Beijing 2008?
  - g) Does the IOC's re-testing program and/or do the applicable regulations violate Swiss law or the EHRC?
  - h) Is the re-testing process reliable, in the light of Dr. Kopylov's written position?
  - i) Is the IOC's re-allocation of medals a violation of the Athlete's right to be treated equally?
  - j) If so, is the Athlete entitled to financial compensation?

The Panel will consider each of these in turn:

**a) *Was there a contractual relationship between the Athlete and the IOC?***

315. A threshold issue in this dispute, which was only raised at the hearing by the Athlete (in response to the copy of the Beijing Entry Form which the IOC filed with its Answer), is whether the Athlete was contractually bound by the Beijing Entry Form, and therefore the Beijing ADR, because she did not sign the document. The Panel inspected the signatures in the documents presented at the hearing and acknowledges that the signature on the Beijing Entry Form appeared to be inconsistent with the Athlete's signatures on other documents. The Athlete could not expand on who signed it. No forensic tests were carried out. The IOC suggested that someone at the ROC may have signed the form on her behalf. Ultimately, this can remain a mystery, as the Panel rejects the Athlete's arguments in this regard.
316. In summary, the Panel came to the conclusion that there was an implied contractual acceptance of the rules and regulations including the Beijing ADR through participation and accreditation at Beijing 2008. The Panel also agrees with the IOC's argument that the Athlete cannot 'have it both ways'. If the Athlete argues that she was not bound by the Beijing Entry Form and the Beijing ADR, the logical conclusion to this line of reasoning is that she was also not allowed to participate in Beijing 2008 or to have finished in third place in the women's high jump event and to have obtained a bronze medal. The fact of the matter is she did participate in Beijing 2008 and she did win a medal. It does not stand to reason that the Athlete could on one hand participate in a sporting competition (an Olympic Games no less) and win a medal, but on the other hand not be bound by any of its rules or regulations.
317. Under Swiss law (namely Article 11 of the CO), contracts do not have to be in writing. The Panel notes that the Athlete participated in Athens four years earlier and did sign her entry

form and subjected herself to the ADR for that competition. The Panel agrees with the Athlete that the Athens form does not apply to Beijing 2008, but it, along with the one she signed for London 2012 (albeit 4 years later), shows that she was fully aware of the entry conditions for the Olympic Games. For completeness, the Panel notes that the IOC did not submit evidence that the Athlete signed an entry form for Athens 2004, however notes that the Athlete did not claim that she didn't sign such a form.

318. In any event, under cross examination, the Athlete admitted that she knew about the WADC and that the Olympic Games were regulated by rules, including anti-doping rules, as she had previously participated in Athens 2004 and she had been a professional athlete from a young age. She also acknowledged signing the DCF at Beijing 2008 and conceded that she was aware in 2008 that her samples could be re-tested at any time in the following eight years. Accordingly, the Panel is satisfied that the Athlete's conduct (i.e. participating in Beijing 2008 and submitting herself to Doping Control) amounted to an acceptance of the terms of the Beijing Entry Form.
319. Therefore, there was an implied contractual relationship between the Athlete and the IOC (and not just the BOCOG, as the IOC is known to be the last authority of last resort on any question concerning the Olympic Games). As a result, the Athlete was, and is, bound by the Beijing ADR and contrary to the Athlete's position Chinese Law is not applicable.

**b) What is the applicable standard of proof and who bears the burden in this case?**

320. The applicable burden of proof is set out in Article 3.1 of the Beijing ADR, as follows:

**“3.1 Burdens and Standards of Proof**

*The IOC shall have the burden of establishing that an anti-doping violation has occurred. The standard of proof shall be whether the IOC has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability”.*

321. Moreover, Article 3.2 of the Beijing ADR sets out the methods of establishing facts and presumptions, as follows:

**“3.2 Methods of Establishing Facts and Presumptions**

*Facts related to anti-doping rule violations may be established by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:*

- 3.2.1 *WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The*

*Athlete may rebut this presumption by establishing that a departure from the International Standard, occurred, which could reasonably have caused the Adverse Analytical Finding.*

*If the Athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding, then the IOC shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.*

3.2.2 *Departures from the International Standard for Testing which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete establishes that departures from the International Standard occurred during Testing then the IOC shall have the burden to establish that such departures did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation”.*

322. In summary, the IOC needs to prove to the ‘comfortable satisfaction’ of the Panel that an ADRV has occurred<sup>26</sup>. The Athlete is not to have a Prohibited Substance in her bodily specimen (Article 2.1 of the Beijing ADR as well as WADC) and if she does, then an ADRV has been committed (the so called principle of “strict liability”). This is discovered by an accredited laboratory (in the case of the re-testing, the LAD) analysing the Athlete’s urine sample and discovering an AAF while applying the applicable ISL. Further, there is a presumption that the LAD conducted the re-analysis of the Athlete’s B-Samples in accordance with ISL 2015/16. The Athlete then has the ability to rebut this presumption by establishing that, on a balance of probability, a departure from ISL 2015/16 occurred which “*could reasonably have caused*” the AAF. Additionally, the Athlete can seek to demonstrate that there were departures from the IST. If successful in relation to the ISL and/or IST, the burden then shifts to the IOC to establish why such a departure did not cause the AAF. The Panel notes the difference between Articles 3.2.1 and 3.2.2 in that only in Article 3.2.1 (relating to the ISL) does the Athlete need to prove that departures ‘could reasonably’ have caused the AAF.
323. The Panel notes that the Athlete’s A-Sample, when re-analysed in 2016, resulted in a PAAF showing the presumptive presence of a metabolite of oral turinabol. As this A-Sample was not re-sealed after the initial 2008 analysis, the Athlete’s B-Sample was then split and the B1 and B2-Samples were analysed and these two samples showed the presence of turinabol. Therefore, in total three separate analyses of the Athlete’s Sample tested positive for turinabol. However the Panel bears in mind that only two of them were conducted using a sealed sample. Turinabol is an exogenous anabolic steroid and a Prohibited Substance. Accordingly, the Panel is comfortably satisfied that an ADRV had occurred pursuant to Article 2.1 of the Beijing ADR. The question then turns to whether the Athlete could establish whether departures to the ISL occurred “*which could reasonably have caused*” the AAF in her Sample, which resulted in this ADRV.

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<sup>26</sup> The Panel notes the standard of proof of ‘comfortable satisfaction’ being greater than a mere balance of probability but less than proof beyond reasonable doubt is consistent with CAS jurisprudence. For example, see *CAS 2015/A/4059*, at 104.

**c) *Were there departures from the ISL 2015/2016 and/or the IST that could reasonably have caused the AAF?***

324. The Panel considers this to be the most critical issue in this dispute. In summary, the Athlete claimed that the following potential departures from ISL 2015/16 could reasonably have caused the AAF:

- i. The choice of the LAD;
- ii. Allegations regarding the samples' identity;
- iii. Waiting nearly 8 years before the splitting and re-analysis;
- iv. Other samples being analysed at same time;
- v. Not being ready/state of confusion; and
- vi. Role of the independent witnesses.

She also claimed that the following potential departures from IST could have caused the AAF:

- vii. Chain of custody issues.

The Panel will consider these in turn.

*i. The choice of the LAD*

325. The Athlete questioned the IOC's choice of the LAD as the laboratory to store her Sample and to carry out the retesting. It had allegedly lost a large number of samples. Further the IOC only had the right to store the samples of athletes from Beijing 2008 somewhere else, but all testing should have been carried out at the Beijing laboratory in accordance with the Beijing ADR.

326. The IOC submitted that the LAD had been cleared of any blame for the lost samples by WADA and that it could re-test the samples from Beijing 2008 where it chose.

327. The Panel was satisfied that the Sample of the Athlete was not lost, so failed to see the relevance of other samples that may have been lost. Ultimately the Beijing ADR is clear, the ownership of all samples taken at Beijing 2008 vests in the IOC. It is for the IOC to determine where it wants to store these and which laboratory it chooses to use for any re-testing. Finally, the Panel saw no evidence to suggest that there were any links (other than a geographical one) between the LAD and the IOC. In any event, the choice of one laboratory per se as opposed to another would not cause the AAF.

*ii. Allegations regarding the samples' identity*

328. The Athlete stated that given the findings of the McLaren Report and the WADA Independent Commission Reports, notably the swapping of samples and the allegations that

the LAD destroyed samples of Russian athletes without WADA's consent, there were legitimate doubts regarding the identity of the samples tested. The IOC rejected this argument and stated that the Athlete failed to submit any concrete evidence to support her allegations that any of the "*extraordinary occurrences of tampering in the laboratory in Sochi could have occurred in Beijing, in Lausanne or in any other laboratory*".

329. The Panel notes that while questions were raised by the Athlete regarding the identity of the samples, they were largely based on broader circumstantial evidence of – as the IOC put it "*extraordinary occurrences*" - of sample swapping in Sochi. Despite questioning some of the past actions of the LAD, the Athlete did not submit any evidence indicating that the LAD was guilty of sample swapping or tampering. In the Panel's opinion, the occurrence of sample swapping in a laboratory in Sochi does not reasonably indicate that the same practice could, or did, occur at the LAD. The Panel further notes, and concurs with, the position of the IOC that the practice of sample swapping was to clean samples that would have tested positive, not to contaminate clean samples to achieve a positive test result.
330. Moreover, the Panel notes that the Athlete bore the burden of proof in establishing her claim that the samples tested were not those of the Athlete and the Panel believes the Athlete could have done more to meet this burden. Both parties acknowledged in pre-hearing correspondence that a DNA test on the samples would be the most appropriate solution to verifying the identity of the samples. However, although the idea was raised, the Athlete never requested one to be conducted. Had a DNA test been completed, it would have established the identity of the sample beyond any reasonable doubt. However, the Athlete chose not to request the DNA test. Accordingly, in summary, the Panel finds that the Athlete failed to meet her burden of proof and based on the evidence presented, her allegations regarding the identity of the samples are insufficient to convince the Panel that it could "*reasonably have caused*" the AAF.
- iii. Waiting nearly 8 years before the splitting and re-analysis*
331. The Athlete noted that the turinabol testing advancements had been made some time ago, around 2012 and onwards. There was no need for the IOC to wait until 2016 to carry out the re-analysis.
332. The IOC explained that its policy was to wait until towards the end of the 8 year window available to it to carry out re-analysing. This allowed for the maximum time for technical advancements to be made.
333. The Panel notes the IOC's policy and further notes that analysis is not without costs. Clearly it is in the IOC's best interests to wait as long as possible before re-analysing, in order to see if the new testing methods enable it to uncover positives that would have previously been undetectable. Additionally, the amount of urine in the sample is limited and therefore the number of re-analyses to be carried out restricted.
334. One caveat to that is where samples could be affected by time (so substances are naturally broken down or are created over time). However, the evidence of Prof. Ayotte was that

turinabol is an exogenous anabolic steroid that would not be created naturally in the sample of an athlete. The Panel is satisfied that any delay in re-analysis or potential changes regarding the samples' temperatures during that timeframe did not result in the AAF.

*iv. Other samples being analysed at same time*

335. The Athlete provided the Panel with the observations of Dr. De Boer who was present at the analysis of the B-Sample, as her "external expert observer". He noted that the Athlete's B2-Sample was analysed at the same time as a sample of another athlete. The implication is that these samples may have somehow been mixed up ("*possible unintended sample substitutions*" as Dr. De Boer called it) and this could be responsible for the AAF.

336. The Panel note that Dr. De Boer did not actually report that he witnessed any mix up, just the possibility that it could happen. The IOC called Dr. Kuuranne, who was also present at the analysis of the B2-Sample to testify at the hearing. She explained that it is not uncommon to test more than one sample at the same time. However, each sample is resealed and put back into storage before the next one comes out and is opened. Further, her technicians are experienced and follow the set procedures, which include the use of negative controls, which ensures no cross contamination. All of this is evident from the LDPs for the tests of all samples.

337. The Panel notes that the Athlete was eventually provided with all LDPs (including for the re-analysis of the A-Sample which showed the PAAF) and had raised no further argument regarding cross contamination. There was only a possibility raised by Dr. De Boer, which the Panel are satisfied was not a reality in the case at hand and there is no evidence of any cross contamination causing the AAF.

*v. Not being ready/ state of confusion*

338. It is undisputed that on 8 June 2016, when the B-Sample of the Athlete was eventually split, there was some initial confusion at the LAD. It seems to the Panel that the LAD were on standby for the splitting and re-analysis, but it never received final confirmation that this would occur. Somewhere, between all the parties/stakeholders, there was a breakdown in communication. Dr. De Boer clearly understood that the splitting and re-analysis was to take place that day, as he turned up promptly in the morning. However, the LAD were not informed that everything was finally going ahead, so were not ready. It also appears that Dr. De Boer was able to refer to the Sample by the Athlete's name, but not by its sample number, whereas the LAD worked the other way around. Finally, the stance taken by Dr. De Boer, to act as an external expert, as opposed to an observer appeared to throw the LAD personnel somewhat.

339. The Panel sees no need to apportion any blame in this case. Both sides could have communicated better with each other and the LAD. Ultimately the splitting was achieved on that day in the presence of an independent witness and Dr. De Boer, both of whom produced written reports of those events which the Panel was able to consider.

340. Unfortunately the delay did mean that Dr. De Boer was unable to observe the analysis of the B1-Sample. However, he did witness the B-Sample being split into the B1 and B2-Samples and these being re-sealed and stored. He later witnessed the analysis of the B2-Sample (which is supposed to be identical to the B1-Sample) and had full access to the LDPs for both tests. After this he gave no evidence or supported any submissions that the confused process somehow resulted in the AAF.

*vi. Role of the independent witnesses*

341. The Athlete submitted that the two independent witnesses used by the IOC in the opening and splitting of the Athlete's samples, Ms Zimmermann and Ms Fulton, were not truly independent.

342. The Panel notes that Ms Zimmermann worked at the CAS as a legal counsel from 2003 until 2013, worked in her own business for 3 years, and then returned to the CAS as a part-time legal counsel from 14 June 2016. However, in her oral testimony she confirmed that on the date she acted as an independent witness, 8 June 2016, she was not employed (again) by the CAS and did not know or anticipate that she would be employed by the CAS in the future. The Panel notes that Ms Zimmermann was cross examined in depth regarding her history with the CAS (and that the Athlete advanced her opinion that the CAS was indirectly linked to the IOC), and the fact that she had worked for the counsel of the IOC in this dispute (Mr Morand) over 14 years ago.

343. Undoubtedly, in hindsight, a different independent witness would have been preferable. However, despite questioning her independence at length, the Athlete did not argue - or indeed submit any evidence suggesting - that while she was acting as an independent witness she did, or recorded, anything which was contrary to the recognised obligations of an independent witness. The Athlete submitted that Ms Zimmermann should have inspected the bottle containing her B-Sample under a microscope to check the integrity of the seal, given the findings of the McLaren Report regarding the tampering of samples in Russia. However, the IOC pointed out that the McLaren Report was only published in July 2016, i.e. weeks after Ms Zimmermann acted as an independent witness, so she could not reasonably have been expected to inspect the sample under a microscope. Further the other witnesses from the LAD confirmed that, at that stage, no one inspected the seals of the bottles with a microscope.

344. The Athlete also challenged Ms Fulton's independence on the basis that she had acted as an independent witness for the IOC on 70-80 instances and given how much she would have been remunerated for her services (at CHF 100 an hour), she was akin to an employee of the LAD. Once again, despite questioning her independence, the Athlete did not argue - or indeed submit any evidence suggesting - that while Ms Fulton was acting as an independent witness she did, or recorded, anything which was contrary to the recognised obligations of an independent witness. No questions were raised regarding the procedure set out in her minutes/report.

345. The Panel notes that while questions could be asked about the LAD's selection process for independent witnesses, there was absolutely no evidence submitted in this case to suggest that

any such witness had ‘tampered’ with the samples or doctored the minutes/reports. For example, if Dr. De Boer reported anything to indicate that there was a mistake in the sample opening/re-sealing procedure but the witness failed to record it in their minutes/report, then the Panel may have been more convinced by the Athlete’s arguments regarding the witnesses’ lack of independence contributing to the Athlete’s AAF. However, no such claims were made and no evidence was submitted to cast doubt on the actions of the two witnesses. Further, the Panel notes that tampering with sample bottles was a practice to clean dirty samples, not to contaminate clean ones. Accordingly, in summary, the Athlete failed to submit any evidence to convince the Panel that the actions (or indeed any purported lack of true independence) of Ms Zimmermann or Ms Fulton “*could reasonably have caused*” the Athlete’s AAF.

*vii. Chain of custody issues*

346. Dr. Baume stated that when all the samples were received from the Beijing laboratory, they arrived in a number of boxes and one box was open. The samples in that box were moved to a standard LAD box, but no further investigation was undertaken regarding the open box. The IOC stated that all the A-samples were not individually re-sealed or transported in sealed containers and they were not individually registered when they arrived at the LAD. Accordingly, the Athlete argued that the integrity, identity and security of all the samples were violated. The Athlete also noted that the report on the transportation was not made contemporaneously, but rather a year after the samples were moved to the LAD. Further, that the storage of the samples was unaccounted for during a number of days in October 2008 so the Athlete could not be certain at what temperature her Samples were kept at. The transport from the Beijing laboratory to the LAD was organised by the IOC.
347. However, the IOC submitted that the integrity in the sample does not arise from the box, but rather the sealed sample itself. When the relevant mission order was received to test the Athlete’s samples, the Athlete’s B-Sample was opened, split and then analysed in front of independent witnesses. In any event, the IOC submitted that a positive oral turinabol result could not occur as a result of a sample not being properly frozen (although it denied that the sample had not been kept frozen as required) as it is not a positive result that could be caused by temperature. Finally, whilst the report on the transportation may have been made after the event, there were no inaccuracies in it and temperature would have no effect on the Sample and certainly not to have resulted in the AAF.
348. The Panel also notes that Dr. Kuuranne testified that Dr. De Boer was present when the B2-Sample was returned from the freezer room and the temperature of the sample was clearly visible. Dr. De Boer did not ask any questions about the prevailing temperature conditions and the Panel notes that he also did not raise any concerns about this issue in his written reports or during his oral testimony. Further, the IOC’s use of a split B-Sample – which was sealed at all times until opened in front of independent witnesses - added further comfort to the integrity of the Athlete’s samples as both the B1 and B2-Samples provided the same outcome as the re-tested A-Sample.
349. Dr. De Boer also testified that in his view, the chain of custody documentation was incomplete. He pointed to the relevant chain of custody documents and argued that just

because the forms stated that the samples were received did not mean that its integrity was intact. Further, he noted that there were some indecipherable Mandarin handwritten notes beside the entry 1846073 and that despite the open box no investigation took place at all.

350. However, the Panel, on examining the Mandarin writing notes that it was only a couple of characters, which the Athlete could have arranged to be translated to see if it was of any significance. There was no evidence to show that the Athlete's sample was in the open box nor that the sealed B-Sample had been compromised in any way. The notes regarding the transportation were produced at a later stage, but there was nothing to establish this was a departure from the IST. Finally, the Panel is satisfied that any changes in the storage temperature were not proven, but equally would not have affected the Athlete's Samples. Proper chain of custody controls shall always be enforced during all testing and specimen handling. Only authorized persons shall handle specimen. The Panel did note more of the Athlete's concerns, however, based on the evidence submitted to it, was not convinced that there had been any departures from the IST.

*Summary*

351. In summary, the Panel notes that while potential departures from ISL 2015/16 and ISL 2008 and/or the IST were raised and explored, there simply was not enough evidence submitted to verify that any of them either in isolation, or in combination, could have reasonably caused the AAF.

**d) Was the Athlete's right to be heard violated?**

352. The Athlete argued that her right to be heard was violated by (1) the IOC not permitting her, or her representatives, to attend the opening, splitting and re-testing of her samples; (2) the IOC's failure to provide her with the requested LDPs in time; and (3) its own extreme hurry (i.e. its own fault). The Panel will deal with these in turn.
353. Firstly, in relation to the Athlete's 'right' to attend her B-Sample opening and splitting, the relevant provisions in ISL 2015/16 state as follows (emphasis added by the Panel):

*"5.2.2.12.10 Further Analysis on long-term stored Samples shall proceed as follows:*

- *At the discretion of the Testing Authority, the "A" Sample may not be used or it may be used for initial testing (as described in Article 5.2.4.2) only, or for both initial testing and confirmation (as described in Article 5.2.4.3.1). Where confirmation is not completed in the A Sample the Laboratory, at the direction of the Testing Authority shall appoint an independent witness to verify the opening and splitting of the sealed "B" Sample (**which shall occur without requirement that the Athlete be notified or present**) and then proceed to analysis based on the "B" Sample which has been split into 2 bottles.*
- *At the opening of the "B" Sample, the Laboratory shall ensure that the Sample is adequately homogenized (e.g. invert bottle several times) before splitting the "B" Sample. The Laboratory shall*

*divide the volume of the “B” Sample into two bottles (using Sample collection equipment compliant to ISTI provision 6.3.4) in the presence of the independent witness. The splitting of the “B” Sample shall be documented in the chain of custody. The independent witness will be invited to seal one of the bottles using a tamper evident method. If the analysis of the first bottle reveals an Adverse Analytical Finding, the Testing Authority shall use reasonable efforts to notify the Athlete as provided in Article 7.3 of the Code. A confirmation shall be undertaken, using the second sealed bottle, if requested by the Athlete or his/her representative, or if the Testing Authority’s reasonable efforts to notify the Athlete have not been successful or at the Testing Authority’s election. **If the Athlete or his/her representative is not present for the confirmation, then the Laboratory shall appoint an independent witness to observe the opening of the second sealed bottle.***

...

*5.2.4.3.2.6 **The Athlete and/or his/her representative**, a representative of the entity responsible for Sample collection or results management, a representative of the National Olympic Committee, National Sport Federation, International Federation, and a translator **shall be authorized to attend the “B” confirmation**. If the Athlete declines to be present or the Athlete’s representative does not respond to the invitation or if the Athlete or the Athlete’s representative continuously claims not to be available on the date of the opening, **despite reasonable attempts by the Laboratory to accommodate their dates, the Testing Authority or the Laboratory shall proceed regardless and appoint an independent witness** to verify that the “B” Sample container shows no signs of Tampering and that the identifying numbers match that on the collection documentation...”*

354. The Panel notes that a significant amount of time was spent by both parties explaining the events leading up to the Athlete’s sample opening, splitting and re-testing. The IOC submitted that it made every effort to accommodate the Athlete and her representatives, while the Athlete submitted that the proposed dates were all unsuitable for a variety of reasons. The Athlete claimed she had a right to attend, whereas the IOC claimed that there was no such requirement. The Panel considered all the correspondence submitted as evidence as well as the oral testimony of the relevant parties (including the expert testimony regarding Swiss law) and ultimately concludes that pursuant to the abovementioned Articles of ISL 2015/16, the sample opening and splitting being conducted without the Athlete’s presence did not violate her right to heard. Moreover, even if the Athlete did have a ‘right’ to attend, despite her claims to the contrary, she did exercise that right by sending Dr. De Boer as her representative.
355. The Panel notes that the Athlete repeatedly stressed that Dr. De Boer was not her representative, and was merely sent as an independent scientific observer. The Panel struggles to see the logic behind this argument. If he was not going to act in the Athlete’s interest, why send him at all? In the Panel’s opinion, when the IOC informed her about the sample splitting procedure on 18 May 2016, the Athlete was faced with one of two reasonable options. She could have either (a) attended the procedure herself or sent a representative; or (b) chosen not to send a representative. If she chose the former option, she *should* have requested her representative to closely inspect the procedure to ensure that it complied with any applicable regulations and that her rights were protected. Alternatively, she could have chosen the latter option and argued that her right to be heard was violated. Instead, she decided to “hedge her

- bets” and chose a hybrid third option and sent Dr. De Boer (but not as a representative), asked him to inspect the procedure (but only from a distance), and instructed him not to sign any documents on her behalf to ensure the documents stated that she was not represented.
356. The Panel suspects this was a strategic decision by the Athlete (or her counsel) to preserve any arguments regarding her right to be heard, whilst simultaneously ensuring that a representative was present in the event any defects in the procedure could be identified. Indeed, Dr. De Boer wrote 2 reports and in his oral testimony, Dr. De Boer testified regarding what he believed to be bias in the testing procedure and defects in the chain of custody. Based on the oral testimony of the witnesses, the Panel is satisfied that Dr. De Boer could have inspected the samples and procedure as closely as he wished, but he chose (or more accurately was instructed) not to and elected instead to observe from a distance. In doing so, the Panel feels that perhaps the Athlete missed an opportunity to validate, or alleviate, any concerns she had with the procedure.
357. The Panel heard from the Athlete herself, stating that she would have attended, but for her illness. The Panel accepted both the fact that she was ill and that she would have otherwise attended. Finally, the Panel notes that her counsel (Dr. Pachmann) was overseas with work when the B-Sample was split, so was unable to attend himself. However, the Panel also notes that the Athlete provided the counsel with a power of attorney dated 24 May 2016 to represent her in the matter at hand. This named six attorneys, one of which was Dr. Pachmann. There were five other attorneys. The Panel never heard why one of these could not attend on her behalf. Ultimately, the Panel were left with the impression that the Athlete’s representatives took the approach to try to delay and/or frustrate the splitting and re-testing process.
358. In any event, the ISL 2015/16 has some logic to it. Athletes, when providing samples are able to split their own sample into an A and B bottle and seal them both. A normal testing procedure is the anti-doping body will test the A-sample on its own and if a prohibited substance is detected, then the athlete gets to witness the B-sample being unsealed before his or her eyes and then tested. Here, we were dealing with a splitting and testing of the B-sample. The B1-sample is the equivalent of the A-sample; the B2-sample, the equivalent of the B-sample. So the athlete’s right to witness his or her sample testing is at the B2-sample stage. The Panel does note all arguments advanced regarding Swiss law and the right to be heard and therefore acknowledges the position of the IOC to regardless attempt to get the athlete to be present at the splitting and B1-sample testing, if not in person, then represented and to also provide an independent witness.
359. In summary, the Panel concludes that pursuant to ISL 2015/16, the presence of the Athlete or her representative was not a pre-requisite for the IOC to conduct the B-Sample opening and splitting procedure. In any event, the Panel is satisfied that the IOC made reasonable attempts to accommodate the Athlete, but when unsuccessful, it was within its rights to appoint an independent witness and proceed with the procedure. The Panel is comforted by the fact that to the extent that the Athlete did have a right to attend, she exercised this right by sending Dr. De Boer (irrespective of whether he was designated as an official representative or not). Accordingly, there was no violation of the Athlete’s right to be heard. *CAS*

2010/A/2161 quoted by the Athlete (cf. 196) therefore was adhered to, even if she was not present herself at the opening and splitting of the B-Sample.

360. Secondly, in relation to the IOC's purported failure to provide the Athlete with the requested LDPs within the required timeframe, the Panel notes that Article 5.2.6.13 ISL 2016 states that LDPs "should" be provided within 10 working days, and the B1 and B2-Sample LDPs were provided within this timeframe. Whilst the Athlete's A-Sample LDP was only provided at the CAS, the Panel concurs with the IOC's argument that it was not directly relevant to the Athlete's split B-Sample results. Ultimately, the Athlete was provided with the LDPs she requested, even if regrettably it took multiple requests before it occurred. She was able to fully address the Panel on any issues arising from the LDPs. To the extent that there were any alleged violations of the Athlete's right to be heard in the IOC Disciplinary Commission proceedings, the Panel notes that it is well established<sup>27</sup> that the CAS appellate procedure provides for a *de novo* review of a case, which cures any possible procedural violations in the first instance decision.

361. Thirdly, the Panel can see some merit in the Athlete's argument that the IOC acted hastily (for example the date for the IOC Disciplinary Commission hearing was set for the afternoon on a day when Dr. Pachmann was already committed to a hearing in Zurich that morning). However, the Panel does not believe this amounted to a violation of the Athlete's right to be heard or her procedural rights. The Panel understands and accepts the rationale behind the IOC re-testing samples as closely as possible to the 8 year statute of limitation period, as this maximises the chances of detecting previously undetectable substances. Accordingly, as detailed above, it rejects the Athlete's claims that the re-testing could, and should, have been done as early as 2011. In relation to the procedure itself, the Panel accepts that deadlines in the analytical process are short, but as noted above, the non-attendance of the Athlete during the sample splitting procedure did not prohibit the IOC from proceeding. The IOC were clearly concerned that it had no power to provisionally suspend the Athlete, so its processes needed to be followed so the IAAF could follow its processes and potentially ensure the Athlete did not compete at Rio 2016. That noted, the process regarding the AAF itself still ran through to an IOC Disciplinary Commission hearing. The process may have been swift, but any procedural issues were cured at the CAS level. The Athlete was provided every opportunity to be heard during the present CAS proceedings.

362. In summary, the Panel concludes that there have been no violations of the Athlete's right to be heard.

**e) Was the IOC barred from initiating a disciplinary procedure against the Athlete according to Article 12.5 of the Beijing ADR?**

363. The Athlete claimed that the IOC was barred from acting against her as it did not appeal the negative result of her sample test from Beijing 2008. The Athlete claimed that pursuant to

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<sup>27</sup> These *de novo* powers are pursuant to Article R57 of the CAS Code. See ATF 124 II 132 of 20 March 1998, A., 138. See ATF 118 Ib 111, p. 120 and ATF 116 Ia 94 of 30 May 1990.

Article 12.5 of the Beijing ADR, the IOC had 21 days to appeal that decision, which it failed to do. The Panel rejects this argument.

364. The Panel determines that the negative outcome of the Athlete's sample analysis (i. e. test) in Beijing 2008 was not a 'decision' which needed to be appealed in order for the IOC to reserve their right to re-test her sample 8 years later. The outcome of the test in 2008 was negative, and it was a report of the analysis/testing process and its result for that sample. The Athlete's samples, which were retained pursuant to Article 6.5 of the Beijing ADR, were re-tested in 2016. Those "re-tests" returned a positive result which initiated a disciplinary procedure ultimately leading to the Appealed Decision, the appeal of which is the basis of these CAS proceedings.

**f) *Did the IOC have the right to analyse the Athlete's samples outside of Beijing 2008?***

365. The Panel notes that Article 6.5 of the Beijing ADR stated as follows:

*"Samples shall be stored in a secure manner at the laboratory or as otherwise directed by the IOC and may be further analysed. Consistent with Article 17 of the Code the ownership of the samples is vested in the IOC for the eight years. During this period, the IOC shall have the right to re-analyse samples (taken during the Period of the Olympic Games). Any anti-doping rule violation discovered as a result thereof shall be dealt with in accordance with these Rules. After this period, the ownership of the samples shall be transferred to the laboratory storing such IOC Anti-Doping Rules – 07.05.2008(F) Page 10 samples, provided that all means of identification of the Athletes will be destroyed and that proof of this destruction shall be provided to the IOC".*

366. The Athlete pointed to the wording of Article 5.1 of the Beijing ADR, which stated that all testing needed to be delegated to the BOCOG, who would carry out any testing relating to samples given at Beijing 2008.

367. The Panel concludes that the wording of Article 6.5 of the Beijing ADR is clear and unequivocal in stating that the IOC had the authority to retain ownership of the Athlete's Beijing samples for a period of 8 years. In her written submissions, the Athlete argued that this provision was "completely unusual" and illegal under Swiss law as it was not brought to the attention of the athletes at Beijing 2008. However, at the hearing, the Athlete testified that she was indeed aware that the IOC could retain her samples for a period of 8 years and re-test/re-analyse them.

368. There would be no sense in returning re-testing (re-analysing) to the BOCOG (which no longer existed). It was charged with testing during the currency of Beijing 2008, thereafter, the IOC took possession of all samples and assumed the responsibility for re-analysing. These two provisions are not in conflict as they are applicable during different times.

369. Accordingly, the Panel concludes that the IOC was authorised to re-analyse (re-test) the Athlete's samples in 2016.

***g) Does the IOC's re-testing program and/or do the applicable regulations violate Swiss law?***

370. The Athlete submitted that the re-testing program and subsequent automatic disqualification after 8 years was a violation of numerous provisions of Swiss law. The Panel is satisfied that while 8 years is a long period of limitation, it is not excessive in the context of anti-doping (WADC 2015 even increased this period to 10 years). Moreover, the Athlete admitted that she was aware of the 8 year period of limitation when providing her samples in Beijing 2008. Whilst Prof. Riemer testified that two Olympic cycles was too long and one would have been acceptable, the Panel notes that he conceded that was a political opinion as much as a legal one.
371. The Athlete also stated that the automatic disqualification after 8 years is excessively binding pursuant to Article 27 of the SCC. Moreover, Prof. Riemer testified that automatic disqualification was unacceptable as it was important to be able to defend oneself. However, the Panel notes that the principle of automatic disqualification has been applied by sporting bodies around the world for over 15 years without successful challenge. Whilst Prof. Riemer argued that he did not know of any decision which accepted the legality of such a regime, that does not render it illegal. Whilst automatic disqualification applied retrospectively can be harsh, as the IOC noted it did represent a consensus which has been incorporated into the WADC. In summary, the Panel rejects this argument as it repeats that its scope is predominately to look at a single event. Has an athlete competed in that event with the benefit of a prohibited substance? Yes or no? If yes, then the regulations are in place to effectively remove that athlete's performance, to ensure a level playing field for the remaining athletes. Which one of those competing without the benefit of a prohibited substance came first? The records need to show that and the rewards (medals, prize money, pins, the accolade, etc.) need to go to the unassisted winner. The Panel is not concerned with the Athlete's intent, fault or negligence. It may be that when that is examined elsewhere a perfectly plausible explanation is advanced that results in the Athlete receiving no ban at all and her reputation remains intact. When that matter is heard, she is able to defend herself. However, even if that happens, so far as the event in question is concerned, the record will only show which unassisted athlete jumped the highest. The Panel has concluded that there was an AAF in her Samples, but this does not prevent her from defending herself against any sanctions she may personally face at some later stage. Having concluded that her right to defend herself against further sanctions is not affected by these proceedings, the Panel sees no merit in the Athlete's parallel arguments regarding her Human Rights or the provisions of Article 29(2) of the Swiss Constitution being breached.
372. The Panel also noted that the Athlete referred to IAAF Rule 39.4 and its potential consequences, however, this is outside of the scope of this Panel. Any argument regarding this rule can be advanced by the Athlete before the IAAF in the future.
373. The Panel notes that pursuant to Article R58 of the CAS Code, Swiss law is applicable to the merits only subsidiarily in relation to the regulations i.e. the Beijing ADR etc. Where the anti-doping rules and regulations contain a ruling, they prevail over Swiss law, even if the otherwise

applicable provision of Swiss law were mandatory<sup>28</sup>. However negative (transnational) ordre public applies.

374. Anti-doping rules based on the WADC (set up by WADA as an hybrid organisation with national governments as stakeholders) and implemented by International Federations or the IOC etc. are transnational sports rules or regulations the Panel (as well as the IOC when rendering the Appealed Decision) has to apply. According to Article 187 of the Swiss Federal Act on Private International Law (“PILA”) they are deemed to be “*règles de droit*” and such choice of law (of non-state normative sets of rules) is subject to a great amount of party autonomy. Global harmonization of the anti-doping system is to be achieved. Based upon Article 187 PILA the indirect choice of law via Article R58 of the CAS Code only foresees the subsidiary application of state law. Such freedom is necessary for such transnational sports rules envisaged by the UNESCO-Convention etc.
375. This freedom of contract and party autonomy is only limited by public policy considerations (ordre public) according to Article 190 paragraph 2 (e) PILA. As the issues and facts of the Matuzalem (*SFT 4A\_588/2011*) case are not in any way comparable with the issue to be decided here (the Athlete’s result in Beijing 2008), that case is to be distinguished. The Panel considers its decision to be in line with the findings of the SFT in *4A\_448/2013*.
376. WADC is non self-executing and not directly applicable. Its independent and autonomous provisions have to be transposed i.e. implemented. As the IOC’s scope of such WADC-implementation is limited (Art 20.1.1 “*has to adopt and implement policies and rules which conform with the Code*”), the *contra proferentem* principle the Athlete has addressed is nothing she can rely on in this context.
377. CAS tribunals have consistently upheld the disciplinary nature of anti-doping regimes (and sanctions undertaken) which were, and are, enforceable as private law and not criminal law (with its special safeguards). The SFT has also decided regularly that pro anti-doping regimes comply with fundamental principles of human rights and public policy under Swiss law.
378. Dynamic referrals are to be allowed – especially in the anti-doping context. The Athlete is not a member of the IOC. The IOC is the event organiser and the authority of Olympic Games and as such only in a contractual relationship with the Athlete/athletes. As a consequence, association law is simply not applicable.
379. Random sampling in the context of doping controls is to be considered as in line with Swiss and international ordre public. In the international context of Article 187 PILA together with R58 of the CAS Code the party autonomy (choice of law) is wider than according to Swiss (mandatory) law in a national context before state courts.

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<sup>28</sup> See *TAS 2005/A/983* & *984*; *CAS 2008/A/1558* & *1578*.

***h) Is the re-testing process reliable, in the light of Dr. Kopylov's written position?***

380. The Athlete attempted to secure the attendance of Dr. Kopylov at the hearing, however he neither appeared at the hearing nor provided a written witness statement. Despite being filed after the Appeal Brief the Panel did allow his article<sup>29</sup> which cast some doubt on the oral turinabol testing/analysis methodology onto the CAS file.
381. The IOC presented evidence from Prof. Ayotte in response to this article and she was cross-examined by the Athlete during the hearing. The Panel found her evidence balanced and compelling.
382. The Panel clearly recognises the difficulty the Athlete faced by not being able to rely upon Dr. Kopylov in person to attempt to prove the testing process was flawed, however, she has the burden of proof and has failed to meet it. The Panel were satisfied from what it heard from Prof. Ayotte, that this new testing/analysis procedure, made *inter alia* possible as a result of the advancement in technology in spectrometers, had enabled long term metabolites of turinabol to remain detectable in samples given for much longer (several weeks compared to a few days) than previous testing could detect. The Panel came to the conclusion that the process is reliable.

***i) Is the IOC's re-allocation of medals a violation of the Athlete's right to be treated equally?***

383. The Athlete argued re-allocating her bronze medal to an athlete who did not complete a doping test was a violation of Article 6 of the Cartel Act, as monopolies had to treat contracting parties in an equal manner. Whilst the Panel concurs that the IOC needs to treat contracting parties in an equal manner, an element of reasonableness should be applied. The Athlete argued that the IOC should have carried out doping tests on "*all potential medal winners*". How many would that entail? The Panel notes that in this particular event, the top 5 competitors were tested. Unfortunately, the fourth and fifth placed participants have also since been disqualified for doping offences. The next best placed athlete (6<sup>th</sup>), who would be next in line to be awarded the bronze medal, was not subject to doping control. However, how many tests are the IOC reasonably expected to conduct? When questioned at the hearing, Prof. Riemer stated that testing only the first five athletes in the hope that only a maximum of two would have committed a doping offence was insufficient. Does every competitor in a final, even the last placed one (or even a competitor who does not finish the event due to injury etc.) have to be subject to doping control on the off chance that every athlete that finished ahead of him/her might subsequently be disqualified for a doping offence at some point in the next 8 years? That could lead to a significant, and expensive, administrative burden on the IOC. Random sampling is common practice in anti-doping work. It follows then that

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<sup>29</sup> KOPYLOV A.T., (2016) Critical Assessment of the Current WADA Approach for the Detection of 4-Chlorodehydromethyltestosterone, *Journal of Analytical Sciences, Methods and Instrumentation*, 6, 65-82, <http://dx.doi.org/10.4236/jasmi.2016.64008>.

any re-testing-program does not need to take into account and provide for all contingencies or eventualities.

384. Ultimately however, the Panel does not believe it has the authority to answer those questions as it would be acting outside its scope and, as neither party has asked for it, in violation of the principle of *ultra petita* if it were to render a decision regarding how the IOC had to re-allocate the bronze medal to other participants. The IOC has not confirmed who the medal will be awarded to, if anyone, and the potential recipients of the medal are not a party to this dispute (the Athlete did not include them as a respondent). The Panel has not heard any submissions from those potential recipients of the medal. Rendering a decision that would impact them, before a decision had even been made to allocate them a medal, without first providing them an opportunity to be heard would in itself be a violation of their right to be heard and due process.
385. Finally, the decision the Panel needs to make is solely whether the Appealed Decision should be upheld or overturned. How the bronze medal would be allocated if the appeal was rejected or how random sampling should be designed is not within the scope of review for this Panel. Accordingly, the Panel rejects this argument.

*j) Is the Athlete entitled to financial compensation?*

386. For completeness, the Panel notes that during closing submissions at the hearing, the Athlete requested financial damages of CHF 110,000 in addition to costs, stating that this amounted to the damage suffered by the Athlete as a result of the Appealed Decision. However, when questioned as to what authority the Panel has to award such damages, counsel for the Athlete conceded that the Panel would not have the authority to award damages. Accordingly, as the Panel dealing with an Appeal Arbitration Procedure would be acting in violation of its jurisdiction and its competence in this case if it were to award damages, this request for relief is rejected without further consideration.

**B. Conclusion**

387. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel rejects the Appeal by the Athlete in its entirety and upholds the Appealed Decision.
388. Any further claims or requests for relief are dismissed.

## ON THESE GROUNDS

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

1. The appeal filed on 25 October 2016 by Anna Chicherova against the decision rendered by the International Olympic Committee Disciplinary Commission on 4 October 2016 is dismissed.
2. The decision rendered by the International Olympic Committee Disciplinary Commission on 4 October 2016 is upheld.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.