



**Arbitration CAS 2017/O/5330 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Alexander Pogorelov, award of 8 March 2018**

Panel: Mr Markus Manninen (Finland), Sole Arbitrator

*Athletics (decathlon)*

*Doping (dehydrochloromethyltestosterone metabolites)*

*Commencement of period of ineligibility in case of delays*

*Period of disqualification of results and fairness exception in retesting cases*

1. **Where there have been substantial delays in the hearing process or other aspects of doping control not attributable to the athlete, the IAAF Anti-Doping Rules allow a finding that the period of ineligibility shall start as early as the date the anti-doping rule violation occurred. However, if an athlete intentionally administers substances that render the analysis of the sample time-consuming, the delay is attributable to the athlete.**
2. **Pursuant to Rule 39.4 of the 2008 IAAF Rules, disqualification of results is the main rule and applying fairness would be an exception. The factors to be assessed in the fairness test include, but are not restricted to, the athlete's intent and degree of fault as well as the length of the disqualification period. In cases of a positive finding for a prohibited substance, where the nature of the prohibited substance is consistent with intentional use to deliberately improve performance, it is generally not appropriate to maintain, on the basis of fairness, all results between the anti-doping rule violation and the commencement of the provisional suspension. However, and on the other hand, in retesting cases it is the IAAF's policy to connect the disqualification period to the length of the period of ineligibility; any other shortened period of disqualification would also be arbitrary in cases of intentional use with the aim of enhancing performance.**

## **I. THE PARTIES**

1. The International Association of Athletics Federations (the "*Claimant*" or the "*IAAF*") is the international governing body for the sport of athletics recognised as such by the International Olympic Committee. It has its seat and headquarters in Monaco.
2. Russian Athletic Federation (the "*First Respondent*" or "*RUSAF*") is the national governing body for the sport of athletics in Russia. RUSAF has its registered seat in Moscow and is the relevant Member Federation, currently suspended from membership, of the IAAF for Russia.

3. Mr Alexander Pogorelov (the “*Athlete*” or the “*Second Respondent*”, together with the First Respondent, the “*Respondents*”), born in 1980, is a decathlete from Russia. The Athlete is an International-Level Athlete for the purposes of the IAAF Anti-Doping Rules.

## II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings, and evidence adduced. Additional facts and allegations found in the Parties’ written submissions, pleadings, and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.
5. On 22 August 2008, the Athlete was requested to provide a urine sample for a doping control at the Summer Olympic Games in Beijing, People’s Republic of China (the “*Games*”). He provided his urine sample on 23 August 2008 at 01:05 am. The sample was tested during the Games by a WADA-accredited laboratory in Beijing, but it did not result in an adverse analytical finding at the time. After the conclusion of the Games, all the samples collected in the Games were transferred to the WADA-accredited laboratory “Laboratoire Suisse d’Analyse du Dopage” in Lausanne, Switzerland (the “*Laboratory*”) for long-term storage.
6. Subsequently, the International Olympic Committee (the “*IOC*”) requested the Laboratory to perform further analyses on the Athlete’s sample. The analyses revealed the presence of dehydrochloromethyltestosterone (“*DHCMT*”) metabolites. The substance was found in the A-sample as well as the B1-sample. DHCMT is an Exogenous Anabolic Androgenic Steroid prohibited under S1.1.a. of the 2008 Prohibited List. The Athlete was informed by the IOC of his right to have the B2-sample analysed. The Athlete did not exercise his right.
7. On 3 June 2016, the IAAF received an Adverse Analytical Finding report forwarded by the IOC following the re-analysis of the Athlete’s sample collected on 23 August 2008 at the Games.
8. On 6 June 2016, the IAAF sent a letter to the Athlete and granted him an opportunity to provide an explanation for the Adverse Analytical Finding. The IAAF noted that should the explanation be inadequate, the Athlete would be provisionally suspended.
9. On 2 July 2016, the IAAF provisionally suspended the Athlete because he had not provided any explanation.
10. On 15 August 2016, the IOC Disciplinary Commission rendered a decision in which it found that the Athlete had committed an anti-doping rule violation and disqualified his results achieved during the Games (the “*IOC Decision*”). The case of the Athlete was then referred to the IAAF for the imposition of consequences over and above those related to the Games.
11. On 11 November 2016, the IAAF notified the Athlete that his case had been referred to it, that it recognised the IOC Decision in application of Rule 46 of the 2016-2017 IAAF Competition

Rules (the “2016-2017 IAAF Rules”), and that the Athlete was therefore deemed to have committed an anti-doping rule violation. The Athlete was informed that his case would be referred to the CAS and was granted a deadline until 20 November 2016 to choose whether to proceed under Rule 38.3 or 38.19 of the 2016-2017 IAAF Rules.

12. On 5 December 2016, the IAAF granted a final opportunity for the Athlete to choose between proceeding under Rule 38.3 and 38.19 of the 2016-2017 IAAF Rules, failing which the CAS hearing would be conducted under Rule 38.3 of the 2016-2017 IAAF Rules. The Athlete did not respond to the IAAF’s e-mail.
13. On 28 March 2017, the IAAF granted the Athlete one last opportunity to admit the anti-doping rule violation and receive a two-year ineligibility period and disqualification of results from 23 August 2008 until 22 August 2010. The Athlete never responded to the IAAF’s letter.

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

14. On 22 September 2017, the IAAF filed a Request for Arbitration with the CAS in accordance with Article R38 of the CAS Code of Sports-related Arbitration (2017 edition) (the “CAS Code”). The IAAF informed the CAS that its Request for Arbitration was to be regarded as the IAAF’s Statement of Appeal and Appeal Brief for the purposes of Articles R47 and R51 of the CAS Code, the procedure being governed by the CAS appeals arbitration rules, pursuant to Rule 38.3 of the 2016-2017 IAAF Rules. Furthermore, the IAAF requested the matter to be submitted to a sole arbitrator, acting as a first instance body. The Request for Arbitration contained a statement of facts and legal arguments and included requests for relief.
15. On 29 September 2017, the CAS Court Office initiated the present arbitration and specified that the case had been assigned to the CAS Ordinary Arbitration Division but it would be dealt with in accordance with the Appeals Arbitration Division rules. The Respondents were further invited to submit their Answers. Additionally, the First Respondent was invited to forward the letter and its exhibits to the Second Respondent. Finally, the Parties were invited to communicate the personal postal address of the Second Respondent at their earliest convenience. The cover letter accompanying the Request for Arbitration was also sent by e-mail to the e-mail address provided by the IAAF for the Second Respondent.
16. On 10 November 2017, the CAS Court Office advised the Parties that it had not received any Answer from the Respondents. Therefore, the CAS Court Office invited the First Respondent to inform the CAS Court Office by 16 November 2017 of the date on which the CAS letter of 29 September 2017 had been delivered to the Second Respondent and to produce any relating evidence of this date. Furthermore, the Claimant and the Respondents were again invited to communicate the personal postal address of the Second Respondent within the same time limit.
17. On 16 November 2017, the Claimant provided the CAS with the Second Respondent’s personal postal address. However, the Claimant noted that in its understanding, the Second Respondent has requested that the documents be notified to his work address.

18. By letter of 17 November 2017 delivered by e-mail and by DHL to the Second Respondent's personal and professional addresses, the CAS Court Office informed the Parties that unless an objection will be submitted by one of the Parties within three (3) days, it will be considered that the Parties agree that any future communications by the CAS Court Office to the Second Respondent will be sent by e-mail to the Second Respondent's e-mail address and/or his work address.
19. On 8 December 2017, in accordance with Article R54 of the CAS Code and on behalf of the President of the CAS Ordinary Arbitration Division, the CAS Court Office informed the Parties that Mr Markus Manninen had been appointed as the Sole Arbitrator. The Parties did not raise any objection as to the constitution and composition of the Panel.
20. On 12 December 2017, the CAS Court Office informed the Parties that the First Respondent had failed to indicate when it had provided the Second Respondent with the CAS Court Office letter of 29 September 2017 along with its enclosures. Therefore, the CAS Court Office re-sent, by e-mail and by DHL, a copy of the CAS Court Office letter dated 29 September 2017 and its enclosures to the Second Respondent and invited him to submit, within 30 days from receipt of the letter, an Answer containing a statement of defence, any defence of lack of jurisdiction, any exhibits, as well as the names of any witnesses and experts. Additionally, the CAS Court Office noted that unless the CAS would be informed otherwise by the Second Respondent within the 30-day time limit, it will be considered that he has chosen not to file any written submissions in this matter. Finally, the CAS Court Office invited the Parties to inform by 19 December 2017 whether they prefer a hearing to be held or for the Sole Arbitrator to issue an award based solely on the written submissions.
21. On 14 December 2017, the CAS Court Office re-sent the CAS letters of 12 December 2017 and 29 September 2017 as well as the IAAF's Request for Arbitration to the Second Respondent in hard-copy form because the previous shipment containing a CD-ROM had not reached him.
22. On 23 January 2018, the CAS Court Office informed the Parties that its letter dated 14 December 2017 had been delivered to the Second Respondent on 15 December 2017 and that the CAS Court Office had not received any Answer or communication from either of the Respondents. In addition, the CAS Court Office sent an Order of Procedure to the Parties. As noted in the Order of Procedure, pursuant to Article R57 of the CAS Code, the Sole Arbitrator considers himself sufficiently well informed to decide the matter without the need to hold a hearing. The Claimant's counsel signed and returned the Order of Procedure to the CAS Court Office on 23 January 2018. Both Respondents failed to return a duly signed copy of the Order of Procedure.

#### **IV. SUBMISSIONS OF THE PARTIES**

23. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Sole Arbitrator has thoroughly considered in its deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference

is made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

24. The IAAF submits, in essence, the following:

- In the IOC Decision, the IOC Disciplinary Commission determined that the Athlete had committed an anti-doping rule violation (Presence of a Prohibited Substance) under the IOC Anti-Doping Rules and the IAAF is bound by this decision as per Rule 46 of the 2016-2017 IAAF Rules.
- In any event, Rule 32.2(a) of the 2008 IAAF Competition Rules (the “2008 IAAF Rules”) also forbids the Presence of a Prohibited Substance or its Metabolites or Markers in an athlete’s sample.
- The presence of DHCMT has been found in the Athlete’s A- and B1-samples. DHCMT is prohibited in- and out-of-competition under Section S1.1.a. of the 2008 Prohibited List. DHCMT is a non-specified substance.
- The Athlete has waived his right to the analysis of the B2-sample, and the B2-sample was not analysed. Therefore, the fact of the anti-doping rule violation is unquestionable.
- According to Rule 40.1(a) of the 2008 IAAF Rules, the period of ineligibility shall be two years for a first violation under Rules 32.2(a), (b), or (f) (prohibited substance and prohibited methods), except where the prohibited substance is a specified substance in a case under Rule 40.5 or Rule 32.2(i) (competing whilst suspended or ineligible).
- As DHCMT is not a specified substance, the IAAF requests that the Athlete be sanctioned with a two-year ineligibility period.
- Pursuant to Rule 39.4 of the 2008 IAAF Rules, where an athlete has been declared ineligible under Rule 40, all competitive results obtained from the date when the positive sample was provided (whether in-competition or out-of-competition) 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, including the forfeiture of all titles, awards, medals, points and prize and appearance money.
- As the positive test was conducted on 22 August 2008 (sic), the principle is that all results obtained by the Athlete from 22 August 2008 (sic) until his provisional suspension on 2 July 2016 shall be disqualified. However, the IAAF is willing to accept, as a matter of fairness, that the period of disqualification be limited to two years from the sample collection, i.e. until 22 August 2010. The Athlete would have been declared ineligible for such period had the positive finding arisen at the Games.

25. In light of the above, the IAAF submits the following prayers for relief in the Request for Arbitration:

- “(i) CAS has jurisdiction to decide on the subject matter of this dispute;*
- (ii) The Request for Arbitration of the IAAF is admissible.*
- (iii) A period of ineligibility of two years is imposed upon the Athlete, commencing on the date of the CAS Award. Any period of provisional suspension imposed on, or voluntarily accepted, by the Athlete until the date of the CAS Award shall be credited against the total period of ineligibility to be served.*
- (iv) All competitive results obtained by the Athlete from 22 August 2008 until 21 August 2010 (to the extent not already disqualified by the IOC decision) are disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money).*
- (v) The arbitration costs are borne entirely by RUSAF or, in the alternative, jointly and severally by the Respondents.*
- (vi) The IAAF is awarded a contribution to its legal costs”.*

26. Although duly invited, neither of the Respondents filed an Answer to the IAAF’s Request for Arbitration, to be regarded as its combined Statement of Appeal and Appeal Brief, within the prescribed time limit or thereafter. Pursuant to Article R55 of the CAS Code, the Sole Arbitrator can proceed to make an award in relation to IAAF’s claims. Despite the lack of any formal Answer from the Respondents, the legal analysis below will take into account all available relevant information, and it is not restricted to the submissions of the IAAF.

## **V. JURISDICTION AND APPLICABILITY OF THE APPEAL ARBITRATION PROCEDURE**

27. The IAAF maintains that the jurisdiction of the CAS derives from Rule 38.3 of the 2016-2017 IAAF Rules, effective from 1 November 2015.

28. Rule 38.3 of the 2016-2017 IAAF Rules provides as follows:

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

29. The suspension of RUSAF's IAAF membership was confirmed on the occasion of the IAAF Council meeting in Monaco on 26 November 2015. On 17 June 2016, 1 December 2016 and, more recently, on 31 July 2017, the IAAF Council decided that RUSAF had not met the conditions for reinstatement to membership, and therefore RUSAF's suspension remains in place. As a consequence of its suspension, RUSAF was not in a position to conduct the hearing process of the Athlete's case by way of delegated authority from the IAAF pursuant to Rule 38 of the 2016-2017 IAAF Rules.
30. Consequently, RUSAF is not in a position to convene a hearing within the two-month time period set out in Rule 38.3 of the 2016-2017 IAAF Rules. In these circumstances, it is not necessary for the IAAF to impose any deadline on RUSAF for that purpose.
31. The Sole Arbitrator notes that the Athlete is an International-Level Athlete as defined in the IAAF Anti-Doping Rules and that RUSAF is indeed prevented from conducting a hearing in the Athlete's case within the deadline set by Rule 38.3 of the 2016-2017 IAAF Rules. The Sole Arbitrator confirms that the IAAF was therefore permitted to refer the matter directly to a sole arbitrator appointed by the CAS, subject to an appeal to CAS in accordance with Rule 42 of the 2016-2017 IAAF Rules.
32. It follows that the CAS has jurisdiction to adjudicate and decide the present matter and that the present case shall be dealt with in accordance with the Appeals Arbitration rules.

## **VI. ADMISSIBILITY**

33. The Claimant's Request for Arbitration to be regarded as its combined Statement of Appeal and Appeal Brief complies with all procedural and substantive requirements of the CAS Code. Neither Respondent disputes the admissibility of the IAAF's claims. Accordingly, the Sole Arbitrator deems the claims admissible.

## **VII. APPLICABLE LAW**

34. The IAAF submits that the IAAF rules and regulations are the applicable rules in this case. In the IAAF's view, the procedural aspects of these proceedings shall be subject to the 2016-2017 edition of the IAAF Rules. The IAAF further submits that for the substantive matters, the Athlete's anti-doping rule violation is subject to the rules in place at the time of the alleged anti-doping rule violation, i.e. the 2008 IAAF Rules. To the extent that the IAAF Rules do not deal with a relevant issue, Monegasque law shall be applied (on a subsidiary basis) to such issue.
35. RUSAF or the Athlete did not put forward any specific position in respect of the applicable law.
36. Article R58 of the CAS Code provides as follows:

*"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the*

*federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

37. This provision is in line with Article 187, paragraph 1 of the Swiss Private International Law Act (PILA), which in its English translation states as follows: *“The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected”.*

38. The relevant parts of Article 1.7 of the IAAF Anti-Doping Rules effective from 3 April 2017 (the “IAAF ADR”) read as follows:

*“These Anti-Doping Rules also apply to the following Athletes, Athlete Support Personnel and other Persons (...)*

*(b) all Athletes, Athlete Support Personnel and other Persons participating in such capacity in Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or affiliate organization of any National Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held (...).”*

39. Article 13.9.4 of the IAAF ADR states as follows:

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

40. Article 13.9.5 of the IAAF ADR further provides as follows:

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

41. The transitional provisions of Article 21.3 of the IAAF ADR read as follows:

*“Any case pending prior to the Effective Date, or brought after the Effective Date but based on an Anti-Doping Rule Violation that occurred before the Effective Date, shall be governed, with respect to substantive matters, by the predecessor version of the anti-doping rules in force at the time the Anti-Doping Rule Violation occurred and, with respect to procedural matters, by the version of the anti-doping rules in force immediately prior to the Effective Date save that (i) Article 10.7.5 of these Rules shall apply retroactively; (ii) Article 18 of these Rules shall also apply retroactively, unless the statute of limitations applicable under the predecessor version of the Rules has already expired by the Effective Date; and (iii) the relevant tribunal may decide it appropriate to apply the principle of *lex mitior* in the circumstances of the case”.*

42. Based on the above, and considering that the applicable law is not in dispute, the applicable laws in this arbitration are the IAAF rules and regulations and, subsidiarily, Monegasque law.

43. Pursuant to Article 21.3 of the IAAF ADR, the Sole Arbitrator is satisfied that procedural matters are governed by the version of the IAAF anti-doping rules in force immediately prior to the Effective Date (as defined in Article 1.13 of the IAAF ADR, i.e. 3 April 2017). Therefore, the 2016-2017 IAAF Rules in force as from 1 November 2015 are applicable to procedural matters.
44. With respect to the rules applicable to the substantive aspects of the case, the Sole Arbitrator notes that the Athlete's violation occurred in August 2008. Consequently, pursuant to Article 21.3 of the IAAF ADR, the 2008 IAAF Rules shall apply to the substantive matters of the case, subject to the possible application of the principle of *lex mitior*.
45. As for the sanctions to be applied, the provisions concerning ineligibility in the 2008 IAAF Rules are clearly *lex mitior* in comparison to the IAAF ADR. The 2008 IAAF Rules allow the Sole Arbitrator to order a period of ineligibility of two years for an intentional use of a banned substance, whereas the IAAF ADR set a standard sanction of four years for such violation.
46. With regard to the commencement of the ineligibility period, where there have been substantial delays in the hearing process or other aspects of doping control not attributable to the athlete, the IAAF ADR allow a disciplinary panel to deem that the period of ineligibility shall start as early as the date the anti-doping rule violation occurred. In contrast, the language of the 2008 IAAF Rules does not in itself enable such outcome. It follows that, in principle, the IAAF ADR lead to a more lenient outcome for the athlete in this respect. However, it has been accepted in CAS case law that if an athlete intentionally administers substances that make analysing the sample time-consuming, the delay is attributable to the athlete (CAS 2010/A/2041). Such a finding is also consistent with the comment concerning Article 10.11.1 of the World Anti-Doping Code 2015, which generally underlines that discovering and substantiating a doping offence may require a long time, in particular if the athlete endeavours to prevent the detection. In conclusion, the IAAF ADR are not *lex mitior* in comparison to the 2008 IAAF Rules in this respect either.
47. As to the disqualification of results, both the 2008 IAAF Rules (Rule 39.4) and the IAAF ADR (Article 10.8) require the annulment of all competitive results of the athlete obtained from the date the sample in question was collected through to the commencement of any provisional suspension or ineligibility period, unless fairness requires otherwise.
48. Based on the above considerations, the most favourable version of the IAAF rules for the Athlete is the 2008 IAAF Rules, which shall be applied in the substantive aspects of the matter at hand.

## VIII. MERITS

49. Considering all Parties' submissions, the main issues to be resolved by the Sole Arbitrator are the following:
  - A. Did the Athlete commit an anti-doping rule violation?

- B. In case the first question is answered in the affirmative, what is the appropriate sanction to be imposed on the Athlete?

**A. Did the Athlete commit an ADRV?**

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

51. The relevant parts of Rule 46.2 of the 2016-2017 IAAF Rules read as follows:

*“(...) In the case of an adjudication of the IOC arising from an anti-doping rule violation occurring at the Olympic Games, the IAAF and its Members shall recognise the finding of an anti-doping rule violation once it becomes final under applicable rules and shall thereafter submit the determination of the Athlete or other Person’s sanction beyond disqualification from the Olympic Games to the results management process provided in Rules 37 and 38”.*

52. Rule 32.2(a) of the 2008 IAAF Rules essentially reads as follows:

*“Doping is defined as the occurrence of one or more of the following Anti-Doping Rule violations:*

*(a) the presence of a prohibited substance or its metabolites or markers in an athlete’s body tissues or fluids.*

*All references to a prohibited substance in these Anti-Doping Rules and the Procedural Guidelines shall include a reference, where applicable, to its metabolites or markers.*

*(i) it is each athlete’s personal duty to ensure that no prohibited substance enters his body tissues or fluids. Athletes are warned that they are responsible for any prohibited substance found to be present in their bodies. It is not necessary that intent, fault, negligence or knowing use on an athlete’s part be demonstrated in order to establish an Anti-Doping Rule violation under Rule 32.2(a)”.*

53. Rules 33.1, 33.2, and 33.4 of the 2008 IAAF Rules, so far as material, stipulate the following:

*“1. The IAAF, the Member or other prosecuting authority shall have the burden of establishing that an Anti-Doping Rule violation has occurred under these Anti-Doping Rules.*

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

*(...).*

*4. Facts related to Anti-Doping Rule violations may be established by any reliable means. The following standards of proof shall be applicable in doping cases:*

*(a) 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 for Laboratories has occurred, in which case the IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not undermine the validity of the adverse analytical finding”.*

54. The Sole Arbitrator observes that, in its attempt to establish the Athlete’s ADRV, the IAAF primarily relies on the IOC Decision confirming an anti-doping rule violation by the Athlete.
55. The Sole Arbitrator notes that pursuant to Rule 46.2 of the 2016-2017 IAAF Rules, in the case of an adjudication of the IOC arising from an anti-doping rule violation occurring at the Olympic Games, the IAAF shall recognise the finding of an anti-doping rule violation once it becomes final under applicable rules. As shown by the IOC Decision, the IOC has adjudicated the Athlete’s anti-doping rule violation, which occurred at the Games. The Respondents have not even alleged that the IOC Decision was not final. Neither have the Respondents advanced any other reason why the IOC Disciplinary Commission’s finding on the Athlete’s anti-doping rule violation should not be recognised. Therefore, the Sole Arbitrator is comfortably satisfied that the Athlete has committed an anti-doping rule violation and that there are grounds to impose a sanction on him under Rule 46.2 of the 2016-2017 IAAF Rules.
56. Secondly and *ex abundanti cautela*, the IAAF relies on the Adverse Analytical Finding in the Athlete’s A- and B1-samples collected on 23 August 2008 as well as on the facts that the Athlete has waived his right to the analysis of the B2-sample and that the B2-sample was not analysed.
57. The Sole Arbitrator notes that Rule 32.2(a) of the 2008 IAAF Rules forbids the presence of a prohibited substance or its metabolites or markers in an athlete’s body tissues or fluids. The IAAF has presented two Doping Control Reports issued by the WADA-accredited Laboratory dated 4 May 2016 and 2 June 2016. According to said reports, the Laboratory detected the presence of DHCMT metabolites in the Athlete’s A- and B1-samples. Considering that the Athlete has not disputed the Laboratory’s finding, the Sole Arbitrator is comfortably satisfied that the Athlete has violated Rule 32.2(a) of the 2008 IAAF Rules and thus committed an anti-doping rule violation. This finding is consistent with the IOC Disciplinary Commission’s finding.

**B. If an ADRV has been committed, what is the sanction?**

**a. *The duration of the Ineligibility Period***

58. Rule 40.1 of the 2008 IAAF Rules reads, in the relevant parts, as follows:

*“If any person commits an Anti-Doping Rule violation under these Anti-Doping Rules, he shall be subject to the following sanctions:*

*(a) for a violation under Rules 32.2(a), (b) or (f) (prohibited substances and prohibited methods), except where the prohibited substance is a specified substance in a case under Rule 40.5, or Rule 32.2(i) (competing whilst suspended or ineligible):*

*(i) first violation: for a minimum period of two years’ ineligibility. (...).”*

59. As stipulated in Rule 40.1(a)(i) of the 2008 IAAF Rules, the basic duration of the ineligibility period for a violation under Rule 32.2(a) of the 2008 IAAF Rules is two years, except where the prohibited substance is a specified substance in a case under Rule 40.5.

60. DHCMT is not a specified substance. Furthermore, RUSAF or the Athlete have not filed any submissions with the CAS with regard to the length of the ban or any other consequence for the anti-doping rule violation governed by the 2008 IAAF Rules. In particular, the Athlete has not submitted to the CAS that the period of ineligibility should be mitigated for some reason. According to the IOC Decision, the Athlete has not provided any explanation for the presence of DHCMT in his sample in front of the IOC Disciplinary Commission either. Therefore, the Athlete shall be sanctioned with a two-year period of ineligibility under the 2008 IAAF Rules.

**b. Commencement of the Ineligibility Period and credit for Period of Ineligibility Served**

61. With respect to the sanction start date, the IAAF has requested that the ineligibility period commence on the date of the CAS award and that the period of provisional suspension imposed on the Athlete until the date of the CAS award be credited against the total period of ineligibility to be served. The IAAF has not elaborated the issue further. The Respondents have not addressed the matter during the CAS proceedings.

62. The Sole Arbitrator is guided by Rule 40.9 of the 2008 IAAF Rules, titled "*Commencement of ineligibility period*", which stipulates as follows:

*"In any case where a period of ineligibility is to be imposed under this Rule, the period of ineligibility shall start on the date of the hearing decision providing for ineligibility or, if the hearing is waived, on the date the ineligibility is accepted or otherwise imposed. When an athlete has served a period of provisional suspension prior to being declared ineligible (whether imposed or voluntarily accepted), such a period shall be credited against the total period of ineligibility to be served".*

63. The Sole Arbitrator finds that for practical reasons, and in order to avoid any eventual misunderstanding, the period of ineligibility shall start on 2 July 2016, the date of commencement of the provisional suspension, and not on the date of this Award.

**c. Disqualification of Results**

64. The IAAF has requested that all competitive results obtained by the Athlete from and including 22 August 2008 (*sic*) until 21 August 2010 be disqualified. The IAAF has noted that, in principle, all results obtained by the Athlete should be disqualified until his provisional suspension on 2 July 2016. However, as a matter of fairness, the IAAF has limited its request to two years from sample collection. The Respondents have not addressed the issue in the CAS proceedings.

65. Rule 39.4 of the 2008 IAAF Rules reads as follows:

*"(...) 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 (...), including the forfeiture of all titles, awards, medals, points and prize and appearance money”.*

66. Pursuant to Rule 39.4 of the 2008 IAAF Rules, the disqualification of results is the main rule and applying fairness would be an exception. Thus, in principle, all results of the Athlete from a period of almost eight years should be disqualified despite the fact that the IAAF has not provided any evidence of an anti-doping rule violation by the Athlete after the positive sample was collected from the Athlete in the Games. However, results may remain valid if fairness so requires in the circumstances of each case (e.g. TAS 2009/A/2014). The factors to be assessed in the fairness test include, but are not restricted to, the athlete’s intent and degree of fault as well as the length of the disqualification period.
67. The Sole Arbitrator observes that the IAAF is willing to accept, as a matter of fairness, that the period of disqualification be limited to two years (instead of eight) from sample collection. The IAAF has justified its request by noting that the Athlete would have been declared ineligible for a two-year period had the positive finding arisen at the Games.
68. The Sole Arbitrator agrees with the IAAF that the general principle of fairness must prevail. Thus, the following issue to be determined by the Sole Arbitrator is the length of the disqualification period.
69. The Sole Arbitrator has previously concluded that the Athlete committed an anti-doping rule violation by using an anabolic steroid that was not discoverable at the time the Athlete administered it. As noted by the IOC Disciplinary Commission, the nature of the substance which was found in the Athlete’s sample is consistent with intentional use of a prohibited substance specifically ingested to deliberately improve performance. In the circumstances of the case, it is not appropriate to maintain all results between the anti-doping rule violation and the commencement of the provisional suspension on the basis of fairness; the Athlete has endeavoured to enhance his sporting performance with a prohibited substance and thereby to gain unjustified advantage over his rivals.
70. The Sole Arbitrator notes that it is the IAAF’s policy in retesting cases to connect the disqualification period to the length of the ban (CAS 2016/O/4463 para. 138). Any other shortened period of disqualification would also be arbitrary in the circumstances of the case. The Sole Arbitrator observes that the Respondents have chosen not to submit any claims or arguments with respect to the disqualification of results.
71. Based on the above considerations, the Sole Arbitrator finds it justified to disqualify all of the Athlete’s results obtained within two years from the collection of the sample in question.
72. Finally, the Sole Arbitrator remarks that the positive sample in question was collected on 23 August 2008 at 01:05 am, not on 22 August 2008 as put forth by the IAAF in its Request for Arbitration (para. 41). Therefore, the Athlete’s results shall be disqualified starting from 23 August 2008, which is the date the positive sample was provided. In accordance with the IAAF’s request for relief and the principle of *ne ultra petita*, the disqualification period shall, however, only last until 21 August 2010.

## ON THESE GROUNDS

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

1. The Request for Arbitration filed by the International Association of Athletics Federations (IAAF) on 22 September 2017 is partially upheld.
2. A period of ineligibility of two (2) years is imposed on Mr Alexander Pogorelov, starting from 2 July 2016.
3. All competitive results of Mr Alexander Pogorelov from 23 August 2008 through to 21 August 2010 are disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes, and appearance money).

(...)

6. All other motions or prayers for relief are dismissed.