Arbitrations CAS 2008/A/1718-1724 International Association of Athletics Federation (IAAF) v. All Russia Athletics Federation (ARAF) & Olga Yegorova, Svetlana Cherkasova, Yuliya Fomenko, Gulfiya Khanafeyeva, Tatyana Tomashova, Yelena Soboleva & Darya Pishchalnikova, award of 18 November 2009

Panel: Mr David Williams QC (New Zealand), President; Prof. Ulrich Haas (Germany); Mr Massimo Coccia (Italy)

Athletics
Doping (manipulation of samples)
Applicable law
CAS power of review
Proof of tampering with the doping control process according to the applicable standard
Establishment of an unbroken chain of custody
Validity and reliability of the testing procedure conducted by a laboratory non-accredited by WADA
Athlete's right to be given a reasonable opportunity to observe the opening and testing of a B sample
Determination of the applicable sanction

1. **It follows from the clear wording of the World Anti-Doping Code (WADC) and from constant CAS jurisprudence that the WADC is not directly applicable to athletes. Furthermore, it follows that the associations have autonomy to regulate their athletes – subject to mandatory provisions of law – at their discretion. By issuing its anti-doping rules, the IAAF has exercised this discretion exhaustively and exclusively without any possibility that other regulations could apply unless there was a specific reference in the IAAF Rules.**

2. **Based on the clear wording of the IAAF Rules as well as on Art. R57 of the CAS Code, not only can a CAS panel review the facts and the law contained in the challenged decisions but it can as well replace those decisions if the panel finds that the facts were not correctly assessed or the law was not properly applied leading to an "erroneous" decision. The procedure before CAS is indeed a *de novo* appeal procedure, which means that if the appeal is admissible, the whole case is transferred to CAS for a complete rehearing with full devolution of power in favor of CAS. CAS is thus only limited by the requests of the parties (the so called *"petita"*).**

3. **Under IAAF Rules, the use or attempted use of a prohibited substance or prohibited method and tampering or attempting to tamper, with any part of the doping control process or its related procedures have to be established by the IAAF to the comfortable satisfaction of the panel, bearing in mind the seriousness of the allegation. In this respect, DNA analysis is a reliable evidentiary means. Circumstantial evidence of significant probative value can also support the inference of tampering which can be drawn from the DNA results. Motive is one of the items of circumstantial evidence**

which is often admitted to establish guilt. In this regard, the findings that several athletes had blood profiles indicative of the long term use of rh-EPO or other forms of blood doping does provide a motive for tampering with the out of competition samples, namely a need to disguise the use of prohibited substances. The lack of any remark by the DCOs clearly cannot be considered as proof that no tampering took place at the moment of the sample collection. In the context, the natural, if not irresistible inference, is that the athletes have somehow arranged to have the urine of third persons used in their out of competition testing.

4. **An unbroken chain of custody can be established to the comfortable satisfaction of the panel bearing in mind the seriousness of the allegation by the sampling and transportation evidence, namely the documentation provided by the IAAF, the evidence, both written and oral of the DCOs and the members of IDTM in charge of the transportation of the samples, as well as the evidence of the competent laboratories.**

5. **A WADA-accredited laboratory benefits from the presumption of compliance with applicable procedure. On the contrary a non WADA-accredited cannot benefit from the presumption of proper application of the custodial procedures. However, the fact that a laboratory in charge of DNA testing procedures acts in criminal cases for the Swiss Confederation, that it is ISO 7025 accredited, and that the officers within the said laboratory know very well the measures to be taken in order to avoid any DNA contamination eliminate any doubts about the reliability of DNA testing procedures.**

6. **The athlete's right to be given a reasonable opportunity to observe the opening and testing of a B sample is of sufficient importance that it needs to be enforced, even in situations where all of the other evidence available indicates that an athlete committed an anti-doping violation. However, a distinction must be made between the results management process applicable to the case of an anti-doping rule violation detected through an adverse analytical finding and one where there is no such finding. Where there is no adverse analytical finding the applicable results management process does not provide for the athlete's right to request the analysis of the B sample.**

7. **The length of the sanction depends on the particular facts of the case. Based on the structure of the IAAF rules as they stood at the relevant time and the CAS jurisprudence, the trend for a first offense with tampering seems to be a two years period of ineligibility. Depending on the attitude of the athlete and the nature and complexity of the scheme set in place, a tribunal obviously may increase the sanction. The circumstances that justify an increase must be serious. In addition, there is an upper limit for an increase of the sanction. Contrary to what the wording of the provision might suggest, the upper limit for the length of a sanction for a "standard infraction" must not exceed the lower limit of those anti-doping violations the IAAF rules consider to be particularly serious, ie 4 years of ineligibility. This follows from the overall context of the IAAF provisions on ineligibility.**

This appeal to the Court of Arbitration for Sport (CAS) is brought by the International Association of Athletics Federations ("the Appellant" or the IAAF), that is the world governing body for the sport of athletics, with corporate seat in the Principauté de Monaco. It seeks to increase the penalties imposed on seven female Russian track and field athletes by the All Russia Athletic Federation ("the 1st Respondent" or the ARAF) for anti-doping rule violations. As the national governing body for athletics in Russia, ARAF is a member of the IAAF, in accordance with Art. 4 of the IAAF Constitution. The athletes filed counterclaims with CAS challenging the ARAF decisions that they had committed anti-doping rule violations. The athletes concerned are as follows:

Olga Yegorova ("Ms Yegorova" and, together with the other athletes "the 2nd Respondents" or "the Athletes"), a Russian athlete of international level in the long distance (5000m) category.

Svetlana Cherkasova ("Ms Cherkasova" and, together with the other athletes "the 2nd Respondents" or "the Athletes"), a Russian athlete of international level in the middle distance (800m) category.

Yuliya Fomenko ("Ms Fomenko" and, together with the other athletes "the 2nd Respondents" or "the Athletes"), a Russian athlete of international level in the middle distance (1500m) category.

Gulfiya Khanafeyeva ("Ms Khanafeyeva" and, together with the other athletes "the 2nd Respondents" or "the Athletes"), a Russian athlete of international level in the hammer throw. She has been previously sanctioned on 12 September 2002 with a public warning and a disqualification from competition for having been tested positive to ephedrine.

Tatyana Tomashova ("Ms Tomashova" and, together with the other athletes "the 2nd Respondents" or "the Athletes"), a Russian athlete of international level in the middle distance (1500m) category.

Yelena Soboleva ("Ms Soboleva" and, together with the other athletes "the 2nd Respondents" or "the Athletes"), a Russian athlete of international level in the middle distance (1500m) category.

Darya Pishchalnikova ("Ms Pishchalnikova" and, together with the other athletes "the 2nd Respondents" or "the Athletes"), a Russian athlete of international level in discus throwing.

There was little or no dispute as to the general sequence of events in this case and the Tribunal finds the primary facts as follows (the question of the inferences to be drawn from the primary facts is dealt with later).

In March 2007, the IAAF commenced a vast investigation in Russia as it suspected that certain irregularities had arisen from its *"out of competition"* testing program conducted in that country.

The suspected irregularities that concerned the IAAF were two-fold. First, although the IAAF had found that some of the Russian athletes in its Registered Testing Pool had suspicious blood profiles, none of them had ever returned positive test results. Secondly, the number of missed tests, namely when an athlete is unable to be located for testing by a doping control officer at the whereabouts, arising from out of competition testing in Russia was significantly less than in other jurisdictions in which the IAAF conducted its out of competition program. Based on the foregoing, the IAAF was

concerned that its requirements for no notice out of competition testing were not being fully observed in Russia, thereby leaving the doping control process open to manipulation.

The IAAF thus started to investigate the possible manipulation of samples collected under its out of competition testing program in Russia. In particular, the IAAF decided to compare the DNA profiles of out of competition urine samples that had been collected from selected Russian athletes with the DNA profiles of *"in competition"* urine samples collected from the same athletes in conditions that could guarantee the origin of the samples.

Between March and August 2007, the IAAF proceeded to collect and centralise, in cooperation with the WADA-accredited Laboratory in Lausanne, the Laboratoire Suisse d'Analyse du Dopage (LAD), a number of in competition and out of competition samples provided by selected Russian athletes.

The 2nd Respondents provided out of competition samples between 7 April 2007 and 23 May 2007, namely:

- on 7 April 2007 Ms Yegorova;
- on 10 April 2007 Ms Pishchalnikova;
- on 26 April 2007 Ms Cherkasova and Ms Soboleva;
- on 27 April 2007 Ms Fomenko;
- on 9 May 2007 Ms Khanafeyeva;
- on 23 May 2007 Ms Tomashova.

The IAAF then arranged for pairs of samples attributed to the same athlete, being one out of competition sample and one in competition sample, to be transferred for DNA analysis. DNA analysis was carried out at the Laboratoire de Genetique Forensique (LGF) at the Institut Universaire de Medicine in Lausanne, Switzerland.

Initially, four pairs of samples were subjected to DNA analysis in August 2007. In mid-August, the IAAF was informed that, out of the four pairs of samples, the DNA profiles did not match in three of the cases.

As a result of the conclusions obtained from the first round of DNA analyses, the IAAF decided to continue its investigations and to select further Russian athletes for comparative DNA analysis. A second round of DNA analyses, including samples collected from the Athletes was therefore initiated from 25 October 2007, and a third round from 5 December 2007. In total, fifty-one samples from twenty-three Russian athletes were submitted to DNA analysis and compared between August and December 2007. The DNA analyses revealed that, for 7 female Athletes, the samples compared presented different genetic profiles, thereby excluding the possibility that the same person had provided both samples.

On 21 June 2008, Dr Gabriel Dollé, the IAAF's Anti-Doping Administrator, wrote to the President of the ARAF presenting the results of the DNA analyses and informing him that, in light of the IAAF's investigation, the Athletes would be charged with breaching IAAF Rules 32.2(b) and 32.2(e)

on account of a fraudulent manipulation of their urine samples. Dr Dollé advised the ARAF at the same time that the IAAF would collect a further sample from each of the Athletes for additional DNA analysis.

The Athletes denied the charges against them and refused to accept a voluntary provisional suspension from competition pending the outcome of their cases before the ARAF.

Six of the Athletes attended at the headquarters of the ARAF in Moscow on 22 July 2008 to provide the IAAF with a further sample for DNA analysis, in the form of a buccal swab. Ms Yegorova did not attend and did not take part in the anti-doping proceedings before the ARAF.

On 30 July 2008, Dr Dollé wrote to the ARAF President informing him of the results of the further DNA profile comparisons. Dr Dollé reported that, in all cases, (i) the DNA profiles of the samples collected from the Athletes in Moscow on 22 July 2008 were identical to the DNA profiles of samples previously collected from the same Athletes in competition; and (ii) the DNA profiles of the samples collected from the Athletes in Moscow on 22 July 2008 were different from the DNA profiles of samples that had been previously collected from the Athletes out of competition. Dr Dollé advised the ARAF that in his view these results confirmed the findings that the Athletes had committed anti-doping rule violations under IAAF Rules 32.2(b) and 32.2(e).

In the same letter, Dr Dollé further informed the ARAF President that the Athletes were provisionally suspended by the IAAF from all competitions pending resolution of their case. Dr. Dollé therefore asked the ARAF President to confirm to the Athletes their provisional suspension immediately.

On 31 July 2008, the ARAF President wrote to Dr Dollé to confirm that the Athletes had been informed of their provisional suspension as well as of their right to request a hearing within fourteen days, in accordance with IAAF Rules 38.6.

Following the provisional suspension of the Athletes, the ARAF established on 1 August 2008 a Special Commission in order to consider their disciplinary cases (the "ARAF Special Commission").

The ARAF Special Commission held hearings on 3 and 16 September 2008 to consider the facts and to make its recommendations to the ARAF Council.

On 20 October 2008, the IAAF received a letter from the ARAF General Secretary in which he informed the IAAF that the ARAF Council had decided to suspend the Athletes from competition for a period of 2 years from the date of the out of competition testing which provided the foundation for the IAAF investigation and to disqualify all their results from the same date.

The decisions of the ARAF Council in the Athletes' cases can be summarized in essence as follows:

> *"The ARAF Council ruled:*
>
> *On the basis of the Resolution of the ARAF Special Commission dated 17 October 2008 and in accordance with the Rule 40.1 of the IAAF Anti-Doping Rules (…) [the Athletes are] declared ineligible for participation in all international and national competitions for a period of 2 (two years) for violation of the Art.s 32.2(b) and 32.2(e) of the IAAF Anti-Doping Rules.*

Taking into account that after the moment of the anti-doping rule violation more than 16 (sixteen) months passed and the delays in the hearing process and other aspects of doping control not attributable to athlete in this case, in accordance with the Art. 10.8 of the World Anti-Doping Code the period of ineligibility shall start on the date of the sample collection [between 7 April 2007 and 23 May 2007 depending on each of the Athletes].

The ARAF General Secretary M. Butov shall immediately notify the IAAF about the decision rendered by the ARAF Council".

The ARAF Special Commission issued a Resolution, on which the ARAF Council relied in reaching its seven Decisions against the Athletes on 20 October 2008.

The IAAF submitted its Statements of Appeal to CAS on 26 November 2008. On 19 January 2009, further to extensions of time granted pursuant to Article R32 of the Code, the IAAF filed its appeal briefs.

ARAF filed its answers on 20 March 2009.

The Athletes, apart from Ms Yegorova, filed their Answers on 19 March 2009. The Answers stated, inter alia, that *"pursuant to Art. 55 of the CAS Code Answer of the Respondent may contain … counterclaims. Therefore this Answer will not touch the IAAF appeal and its grounds and will be totally devoted to challenging the ARAF decision of 20 October 2008".*

On 15 April 2009, the Appellant requested the authorization to file a reply brief. Its reasoning for the request was as follows:

"At the time of filing its seven Appeal Briefs, the IAAF made it clear that the appeals were solely concerned with the appropriate sanction to be imposed on the Second Respondents for the anti-doping rule violations that they had committed under IAAF Rules. The IAAF agreed with the First Respondent that the Second Respondents were guilty of anti-doping rule violations and noted that none of the Second Respondents had sought to appeal against the ARAF decisions to CAS (as they had been entitled to do under IAAF Rules). Accordingly, the IAAF limited the scope of its Appeal Briefs and supporting evidence to issues of sanction only.

In the Answers recently served by the Second Respondents, the athletes have now for the first time sought to challenge the decisions of the ARAF that they committed anti-doping rule violations under IAAF Rules by filing what they refer to as "counterclaim". The Second Respondents expressly state (at para 6 of their Answers) that "this Answer will not touch the IAAF appeal and its grounds and will be totally devoted to challenging the ARAF decision of 20 October 2008".

In their Answers, the Second Respondents have raised at least the following new issues in the case under specific hearings:

(i) the standard and burden of proof of the relevant anti-doping rule violation under IAAF Rules (and related issues):

(ii) the sample collection procedure (and related issues):

(iii) the DNA analysis made by the Genetic Forensic Laboratory (and related issues).

If the Answers of the Second Respondents are to be admitted in these appeals (together with any further evidence that they might file in the form of witness statements), the IAAF respectfully submits that both the First

Respondent and the IAAF must be given a full opportunity to respond to the new issues that have been raised. The IAAF considers for its part that, in addition to a Reply Brief, this will mean filing a number of additional witness statements and expert reports. It is accepted by the IAAF that the Second Respondents would have a right to respond to the Replies of the First Respondent and the IAAF in advance of the hearing".

Since CAS R55 allows a counterclaim the Panel considered that the Answers of the Second Respondents were admissible and that fairness required that the Appellant's request be granted. Accordingly the Appellant's request was granted.

By letter dated 12 May 2009, Ms Soboleva supplemented her answer.

On 14 May 2009, the Panel fixed a deadline for the Appellant of 1 June 2009 to file its reply brief and a deadline for the Respondents to file any response to the Appellant's reply brief until 10 June 2009.

In compliance with the assigned deadline, the IAAF filed a consolidated reply brief in order to address the numerous submissions of the ARAF and the Athletes as to the collection of the samples, the chain of custody of those samples and the execution of the DNA analysis at the LGF.

The ARAF claimed in letters dated 4 June and 12 June 2009 that the Appellant's reply brief was in breach of Art. R56 of the Code of Sports-related Arbitration (the "Code") since the parts of the Appellant's reply brief related to the starting date and the extent of the sanction and were in the ARAF's view to be considered as new submissions rather than a mere reply to the Athletes' submissions related notably to the chain of custody of the samples. For the same reason, the ARAF requested that the witness statements of Mr. Capdevielle and Ms. Radcliffe filed by the IAAF with its reply brief be disregarded.

On 22 June 2009, the Panel ruled, inter alia, that:

" *(…)*

(1) To the extent that the IAAF needs permission under Art. R56 of the Code (…) to raise these arguments [in the IAAF's reply brief], permission is granted by the President of the Panel. (…) and

(2) Both the ARAF and the IAAF may raise such arguments as they wish on all matters contained in the IAAF Consolidated [reply] Brief either in supplementary written submissions filed before the hearing or in oral argument at the hearing. (…).

B. (…)

(1) The witness statements of Mr Capdevielle and Ms Radcliffe are admitted. The question of the weight to be given to the statements is reserved for later consideration. The ARAF is granted leave to file reply briefs in answer to the statements no later than Friday 26 June 2009 if the ARAF so elects and/or to make oral submissions at the hearing as to the weight to be given to the statements. (…)

D. (…) all of the IAAF's witnesses are authorized to give evidence by telephone, pursuant to Art. R44.2 (…)".

Thereafter, all Parties except Ms Yegorova signed the Procedural Order, with the IAAF making a reservation to the effect that the applicable law should be the law of the Principauté de Monaco, where

the IAAF has its corporate seat. Paragraph 7 of the Procedural Order (law applicable to the merits) did not refer to Monegasque law.

The hearing was held on 3 July 2009.

At the commencement of the hearing each party made brief opening oral submissions based on their written briefs. Then nine witnesses whose witness statements had been lodged by the IAAF in support of its consolidated Reply were cross-examined, namely:

- Dr Vincent Castella
- Mr Evgeny Antilskiy
- Ms Elena Malevanaya
- Mr Andrei Leonenko
- Ms Katya Ilina
- Ms Paula Radcliffe
- Ms Tatyana Dymova
- Dr Giuseppe d'Onofrio
- Mr Thomas Capdevielle.

The parties' positions may be summarized as follows:

The IAAF grounded its appeal on IAAF Rules 32.2, 39.4, 40.1, 40.9 and 60.28 and observed that it raised two issues for determination:

The first was whether, having found the Athletes guilty of an anti-doping rule violation pursuant to IAAF Rules 32.2(b) and (e), the ARAF Council was correct in imposing the minimum period of ineligibility for such violation of 2 years. The IAAF submitted that, in light of the serious nature of the violation that was committed by the Athletes in this case, a 2-year sanction was not appropriate and the ARAF Council should have imposed a greater sanction on the Athletes of up to 4 years' ineligibility in accordance with IAAF Rule 40.1.

The second was whether the ARAF Council was correct in determining that the commencement date for the Athletes' 2-year period of ineligibility was the date of sample collection. The IAAF submitted that, in accordance with Rule 40.9, the commencement date should have been the date of the hearing less any period of provisional suspension previously served.

The position of ARAF may be summarized, in essence, as follows. First, the ARAF accepted CAS jurisdiction and the admissibility of the IAAF's Appeal.

As to the merits of the case, the ARAF claimed that a period of ineligibility of two years imposed on the Athletes was in line with the IAAF Rules and that it exercised its discretionary authority in a correct manner and did not misapply or abuse it. ARAF contends that the IAAF's submissions with

regard to the length of the period of ineligibility are unpersuasive. It stressed in particular that the concept of *"aggravating circumstances"* has been introduced in the WADC only in 2009 and is not applicable to the present case.

ARAF submitted that the lengthy process of the DNA analysis must not be disregarded when it comes to the determination of the commencement date of the ineligibility period. However, departing from its previous Decisions, which are the subject of the appeal, ARAF conceded that new information provided to it led it to conclude that the correct commencement date should be the 15 December 2007 and not the date of the sample collection.

The ARAF submitted to CAS the following requests for relief:

> *"The Appeal of the IAAF shall be dismissed, and the Decision[s] of the Council of the All Russian Athletics Federation dated 20 October 2008 shall be confirmed, with the following amendment:*
>
> *Point 2 of the Decision shall be amended as follows: "The period of ineligibility shall start on the 15 December 2007.*
>
> *All competitive results achieved by (…) [the Athletes] since [the date of the out of competition test] throughout the start of the period of ineligibility shall be annulled with all resulting consequences under IAAF Rule 39.*
>
> *The CAS shall order the IAAF to bear the costs of this arbitration;*
>
> *The CAS shall award to the Respondent a contribution towards its legal costs".*

At the hearing the ARAF confirmed that it did not question the chain of custody and the results of the DNA testing. It was however opposed to the IAAF's request for a longer period of ineligibility.

The Athletes' position (with the exception of Ms Yegorova who took no active part in the proceedings) can be summarized as follows.

From a procedural point of view, the Athletes stressed that under Art. R57 of the Code the Panel is required to hear the case de novo, considering new facts and new legal submissions and to issue a new decision with respect to the ARAF decision dated 20 October 2008. They also pointed out that in accordance with Art. R55 of the Code there was the possibility to file a counterclaim with their answers and by that challenge the ARAF Decision. This was what they had done.

As to the substance of the case, the Athletes claimed that the ARAF did not produce sufficient evidence of anti-doping rule violations. They blamed ARAF for having relied exclusively on the allegations of the IAAF without conducting its own investigation in order to determine what really had happened with the samples and to determine whether the athletes were guilty of an anti-doping rule violation. They argued that no evidence existed as to any tampering attempt from the Athletes. The IAAF allegations were founded only on the fact that different DNA profiles were found in the Athletes' samples, which, according to them did not by itself automatically constitute an anti-doping rule violation. Additional evidence which could prove the participation of the athlete in the process of sample manipulation was required and the ARAF should thus have joined the investigation of the DCOs. The procedures applied by the Genetic Forensic Laboratory of Lausanne, which was in charge of the DNA analysis, should also have been investigated in more detail.

The Athletes submitted to CAS the following requests for relief:

> *"1. the Decision of the ARAF Council dated 20 October 2008 shall be declared null and void.*
>
> *2. to order that the ARAF and the IAAF did not provide sufficient evidence to prove that (…) [the Athletes] had committed an anti-doping rule violation (Rule 32.2 (b) and 32.2 (e)).*
>
> *3. to order (…) [that the Athletes] did not commit an anti-doping rule violation.*
>
> *4. to order that (…) [the Athletes are] eligible for participation in all national and international athletics competition from the date of the CAS Award in this arbitration".*

By letter dated 12 May 2009, Ms Soboleva supplemented her answer by stating that she was not in a position to question scientifically the results of the DNA analysis and could thus only question them by stating that she never took doping substances and showing through media articles that DNA analysis errors can occur in the sphere of criminal matters. She then referred to various cases where DNA analysis errors were apparently made but stressed that she did not question the competences of the LGF and its employees.

In its further submissions dated 2 June 2009, the IAAF responded to the new issues raised by the ARAF and the Athletes in their counterclaims as to the collection of the samples, the chain of custody of those samples and the execution of the DNA analysis at the LGF. The reply brief of the IAAF may be summarized as follows:

The IAAF first noted that the counterclaims in this appeal represented the first time that the commission of anti-doping rule violations has been questioned by the Athletes. It acknowledged that there was no direct evidence of tampering contrary to IAAF Rule 32.2(e) or manipulation contrary to IAAF Rule 32.2(b) but contended that the indirect evidence, namely the analytical results, the chain of custody, the DCOs and laboratory evidence and the blood tests, sufficed.

In order to support its request for four years' suspension, the IAAF repeated that this was an exceptional case. Here there was widespread and systematic sophisticated cheating which represented, like the Balco case, a conspiracy on behalf of the Athletes to systematically cheat the system. What the IAAF calls *"the plot"* was not an amateurish attempt to defraud the system but was highly professional. Considering that the appeal before CAS involved a de novo hearing, the IAAF submitted that the Panel was fully entitled to take a more serious view of this case than the ARAF.

Claiming that the WADC embodies the current thinking in the field of anti-doping of the IOC, all major International Federations, National Olympic Committees and Associations, Athletes and Governments, the IAAF submitted that the 2009 WADC was of significance in evaluating the sanction that would be imposed in this case and that it should influence the Panel.

LAW

CAS Jurisdiction, admissibility and right to appeal

1. According to Art. R47 of the Code an appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body.

2. The IAAF Rule 60 provides that:

*"**Appeals***

9. All decisions subject to appeal under these Rules, whether doping or non-doping related, may be appealed to CAS in accordance with the provisions set out below. All such decisions shall remain in effect while under appeal, unless determined otherwise (see Rules 60.23-24 below).

10. The following are examples of decisions that may be subject to appeal under these Rules:

(a) Where a Member has taken a decision that an athlete, athlete support personnel or other person has committed an anti-doping rule violation…

(…)

11. In cases involving International-Level athletes (or their athlete support personnel), or involving the sanction of a Member by the Council for a breach of the Rules, whether doping or non-doping related, the decision of the relevant body of the Member or the IAAF (as appropriate) may be appealed exclusively to CAS in accordance with the provisions set out in Rules 60.25- 60.30 below.

(…)

Parties entitled to appeal decisions

13. In any case involving International-Level athletes (or their athlete support personnel), the following parties shall have the right to appeal a decision to CAS:

(…)

(c) The IAAF

(…)

The CAS Appeal

25. Unless the Council determines otherwise, the appellant shall have 30 days from the date of communication of the written reasons of the decision to be appealed (in English or French where the IAAF is the prospective appellant) in which to file his statement of appeal with CAS. Within 15 days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within thirty days of receipt of the appeal brief the respondent shall file his answer with CAS".

3. The jurisdiction of CAS was not disputed. All parties, except for Ms Yegorova, signed the order of procedure where a specific reference was made to the competence of CAS based on the IAAF Rule 60 paragraphs 9 and 25, from which CAS jurisdiction derives. As to Ms Yegorova who did not sign the order of procedure, the jurisdiction derives from the IAAF rules to which she has submitted as a member of the ARAF athletic team.

4. As to the time limit to lodge an appeal before CAS, the IAAF Rule 60 paragraph 25 provides that the statement of appeal must be lodged *"30 days from the date of communication of the written reasons of the decision to be appealed (in English or French where the IAAF is the prospective appellant) (…). Within 15 days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS".*

5. The seven statements of appeal were filed with CAS on 26 November 2008 and the seven appeal briefs were filed on 19 January 2009 against the decisions of the ARAF Council *("the Decisions")*, which are all dated 24 October 2008 and were all communicated in English to the IAAF the same day. The Decisions were completed by a translation in English of the seven resolutions of the ARAF Special Commission dated 17 October 2008 providing in writing the reasons for the Decisions and transmitted to the IAAF on 27 October 2008. It was not disputed that the statement of Appeal and the Appeal brief were thus lodged within the statutory time limit set forth by the IAAF Rules,

6. The IAAF filed its statements of appeal against Decisions issued in cases involving international-level athletes as provided under IAAF Rule 60 paragraph 11. It was not disputed that the IAAF thus had the right to appeal in the present cases.

7. The other requirements of Art. R47 of the Code, including that of exhaustion of internal remedies, have been satisfied. It follows that all appeals are admissible.

Applicable law

8. Art. R58 of the Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the Parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

9. As noted in paragraph 45, the parties agreed that the relevant IAAF Rules and Monegasque law applied. The only other question as to the applicable law which arose was whether the World Anti-Doping Code (WADC) was applicable.

10. The Panel notes that the Decisions were issued by the ARAF Council which is a jurisdictional body of the ARAF, a Russian sport federation with registered seat in Moscow, Russia. The Decisions relate to an anti-doping procedure against international-level athletes.

11. Art. 60, par. 28 and 29, of the IAAF Rules provides that:

"28. In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Procedural Guidelines). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence.

29. In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English unless the parties agree otherwise".

12. The ARAF is member of the IAAF and, as such, is bound by the IAAF Rules. The Athletes were participating in the IAAF's and ARAF's competitions and are thus subject to the IAAF Rules as defined under the IAAF Rules in the section Definitions, under IAAF Rule 1 par.1. and IAAF Rule 30 par. 1, The IAAF is the Appellant.

13. The Panel must therefore decide the present dispute according to the IAAF Constitution and its Rules and Regulations. Furthermore, as noted above it was agreed that Monegasque law was subsidiarily applicable.

14. The Parties submitted, each of them for different reasons, that the WADC should be applied by the Panel. The Panel refers first to the clear wording of the WADC 2003 and 2009, notably under the first paragraph of the Introduction chapter where it is mentioned that international federations are *"responsible for adopting, implement or enforcing anti-doping rules within their authority (…)"*. There are numerous CAS cases on the question of the direct applicability of the WADC: see for example CAS 2008/A/1627 nr 62, 81 and 82; CAS 2007/A/1445 nr 6.2). The Panel considers that it follows from this wording of the WADC that it does not claim to be directly applicable to athletes. Furthermore, it follows that the associations have autonomy to regulate their internal matters – subject to mandatory provisions of law – at their discretion. By issuing its anti-doping rules, the IAAF has exercised this discretion exhaustively and exclusively without any possibility that other regulations could apply unless there was a specific reference in the IAAF Rules.

15. Based on the foregoing, the Panel rejects all submissions of the Parties which suggested the application, either directly or by implication, of the WADC. It thus finds in particular that Art. 10.8, last sentence (of the 2003 WADC) related to the commencement of the period of ineligibility is not applicable to the present dispute.

Scope of Panel's Review – Burden of Proof – Standard of Proof

16. Art. R57 of the Code provides that:

"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. (…)"

17. Art. 60 par. 26 of the IAAF Rules provides that:

"26. All appeals before CAS (save as set out in Rule 60.27 below) shall take the form of a rehearing de novo of the issues raised by the case and the CAS Panel shall be able to substitute its decision for the decision of the relevant tribunal of the Member or the IAAF where it considers the decision of the relevant tribunal of the Member or the IAAF to be erroneous or procedurally unsound".

18. The ARAF claims that the Panel can only depart from the Decisions if it finds that the ARAF Council abused what the ARAF calls its *"discretionary power of decision"*. In other words, only *"abusive"* or *"arbitrary"* decisions could be annulled and replaced by CAS.

19. Based on the clear wording of Art. 60 para. 26 of the IAAF Rules as well as on Art. R57 of the Code, the Panel finds that nothing supports the ARAF's view on the scope of the Panel's review. Not only can the Panel review the facts and the law contained in the Decisions but it can as well replace those Decisions if the Panel finds that the facts were not correctly assessed or the law was not properly applied leading to an *"erroneous"* decision. The procedure before CAS is indeed a de novo appeal procedure, which means that if the appeal is admissible, the whole case is transferred to CAS for a complete rehearing with full devolution power in favor of CAS. CAS is thus only limited by the requests of the parties (the so called *"petita"*). The Panel takes comfort from the fact that its view on this issue is consistent with the opinion constantly maintained by CAS panels discussing their scope of review under the CAS Code (see e.g. CAS 2008/A/1515; CAS 2004/A/607; CAS 2004/A/633; CAS 2005/A/1001; CAS 2006/A/1153).

20. The Panel thus rejects the submission from ARAF concerning the Panel's scope of review. The Panel holds that it has no duty of deference towards the Decisions of the ARAF Council and that it has the full authority to review the facts and the law of the case and render an award fully superseding the Decisions.

21. With regard to proof, as mentioned by the IAAF, IAAF Rule 33 para. 4 provides that: *"Facts related to anti-doping rule violations may be established by any reliable means".*

22. As to the burden of proof to establish the facts related to anti-doping rule violations, IAAF Rule 33 para. 1 provides that *"The IAAF (…) shall have the burden of establishing that an anti-doping rule violation has occurred under these Anti-Doping Rules".* IAAF Rule 33(2) provides that *"the standard of proof shall be whether IAAF … has established an anti-doping rule violation to the comfortable satisfaction of the [Tribunal], bearing in mind the seriousness of the allegation .... The standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt".*

23. IAAF Rule 33 para. 4 lit (a) provides that:

"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 (…) shall have the burden of establishing that such departure did not undermine the validity of the adverse analytical finding".

24. IAAF Rule 33 para. 4 lit. (b) provides further that:

"A departure from the International Standard for Testing (or other applicable provision in the Procedural Guidelines) shall not invalidate a finding that a prohibited substance was present in a sample or that a prohibited method was used, or that any other anti-doping rule violation under these Anti-Doping Rules was committed, unless the departure was such as to undermine the validity of the finding in question. If the athlete establishes that a departure from the International Standard of Testing (or other applicable provision in the Procedural Guidelines) has occurred, then the IAAF (…) shall have the burden of establishing that such departure did not undermine the validity of the finding that a prohibited substance was present in a sample, or that a prohibited method was used, or the factual basis for establishing any other anti-doping rule violation was committed under these Anti-Doping Rules".

Analysis and findings of the panel as to alleged tampering

25. According to IAAF Rule 32 paras. 2 (b) and (e), *"the use or attempted use of a prohibited substance or prohibited method"* and *"tampering or attempting to tamper, with any part of the doping control process or its related procedures"* constitute anti-doping rule violations. It must be noted that the IAAF relied not only upon para. 2(e), related to *"tampering"*, but also upon para. 2(b) of IAAF Rule 32, related to the *"use of a prohibited method"*, because within the definition of prohibited methods the following can be read: *"M2. CHEMICAL AND PHYSICAL MANIPULATION. 1. Tampering, or attempting to tamper, in order to alter the integrity and validity of Samples collected during Doping Controls is prohibited. These include but are not limited to catheterisation, urine substitution and/or alteration"*. The Panel accepts that what allegedly occurred in this case may come within both para. 2(b) and para. 2(e) of IAAF Rule 32.

26. The first issue for determination is whether the facts said to establish the anti-doping violations have been established to the comfortable satisfaction of the Panel by *"reliable means"*.

27. As noted earlier, the case for the IAAF was that while there was no direct evidence of tampering with the out of competition doping control process contrary to IAAF Rule 32.2(b) or under Rule 32.2(e) in the sense that none of the Athletes were *"caught in the act"*, the cumulative effect of the indirect evidence of breaches was overwhelming. As noted earlier, the IAAF argued that that evidence consists of four parts:

(i) What the analytical results showed?

(ii) What the chain of custody evidence showed?

(iii) What the LGF Laboratory DNA evidence showed?

(iv) What the blood tests showed?

28. As to (iv), the IAAF submitted that there was evidence that the possible objective of some of these athletes in providing bogus urine samples out of competition was to disguise the use of recombinant erythropoietin ("rh-EPO"), a performance enhancing drug which is a prohibited substance under IAAF Rules. For athletes whose performance in their chosen event is unlikely to be assisted by rh-EPO, such as Ms Khanafeyeva (hammer throw) and Ms Pishchainikova (discus), IAAF suggested that the samples were manipulated to cover up the use of other substances, which would be performance enhancing in their events, such as anabolic agents.

29. Returning to the other three elements of the evidence, the first question is whether the analytical results showed that all of the athletes provided substituted urine samples, rather than their own, when tested out of competition in 2007. The IAAF submitted that when tested in competition (where manipulation and tampering is more difficult) and when subject to further DNA analysis by means of a swab, their true DNA profiles were revealed.

A. Analytical results

30. Individually, the analytical results relied upon by the IAAF were as follows:

Ms Soboleva

Ms Soboleva provided an out of competition sample on 26 April 2007 in Zhukovisky in Russia. She provided an in competition sample at the World Championships in Osaka on 2 September 2007. On 22 July 2008, she provided a buccal swab sample which was subject to DNA analysis. The results of DNA analysis on the three samples demonstrate that the DNA profile of the out of competition sample is different from that of the sample provided in competition in Osaka and from that provided by swab collection on 22 July 2008. The IAAF argued that the only inference that could be drawn was that the sample provided on 26 April 2007 was not that of the athlete. Therefore, the athlete had breached IAAF Rules 32.2(b) and 32.2(e).

Ms Fomenko

Ms Fomenko provided an out of competition sample on 27 April 2007 in St Petersburg in Russia. She provided an in competition sample at the Gaz de France Meeting in Paris, France on 6 July 2007. On 22 July 2008, she provided a buccal swab sample which was subject to DNA analysis. The results of DNA analysis on the three samples demonstrate that the DNA profile of the out of competition sample is different from that of the sample provided in competition in Paris and from that provided by swab collection on 22 July 2008.

Ms Yegorova

Ms Yegorova provided an out of competition sample on 7 April 2007 in Kislovosk in Russia. She provided in competition samples at events in Lausanne on 10 July 2007 and in Brussels on 14 September 2007. She was requested to, but did not provide a buccal swab sample. The results of DNA analysis on the three samples demonstrate that the DNA profile of the out of competition sample is different from that of the two samples provided in competition in Lausanne and Brussels.

Ms Khanafeyeva

Ms Khanafeyeva provided an out of competition sample on 9 May 2007 in Podolsk in Russia. She provided an in competition sample at the World Championships in Osaka on 26 August 2007. On 22 July 208, she provided a buccal swab sample which was subject to DNA analysis. The results of DNA analysis on the three samples demonstrate that the DNA profile of the out of competition sample is different from that of the sample provided in competition in Osaka and from that provided by swab collection on 22 July 2008.

Ms Pishchalnikova

Ms Pishchalnikova provided an out of competition sample on 10 April 2007 in Sochi in Russia. She provided an in competition sample at the World Championships in Osaka on 29 August 2007. On 22 July 2008, she provided a buccal swab sample which was subject to DNA analysis. The results of DNA analysis on the three samples demonstrate that the DNA profile of the out of competition sample is different from that of the sample provided in competition in Osaka and from that provided by swab collection on 22 July 2008.

Ms Tomashova

Ms Tomashova provided an out of competition sample on 23 May 2007 in Podolsk in Russia. She provided an in competition sample at the World Championships in Lausanne on 10 July 2007. On 22 July 2008, she provided a buccal swab sample which was subject to DNA analysis. The results of DNA analysis on the three samples demonstrate that the DNA profile of the out of competition sample is different from that of the sample provided in competition in Lausanne and from that provided by swab collection on 22 July 2008.

Ms Cherkasova

Ms Cherkasova provided an out of competition sample on 26 April 2007 in Zhukovisky in Russia. She provided an in competition sample at the Weltklasse Meeting on 7 September 2007 in Zurich. On 22 July 2008, she provided a buccal swab sample which was subject to DNA analysis. The results of DNA analysis on the three samples demonstrate that the DNA profit of the out of competition sample is different from that of the sample provided in competition in Zurich and from that provided by buccal swab collection on 22 July 2008. The IAAF argued that the only inference the IAAF can draw from this is that the sample provided on 26 April 2007 was not that of the athlete. Therefore, the athlete has breached IAAF Rules 32.2(b) and 32.2(e).

31. The IAAF contended that in each case the only inference that could be drawn was that the sample provided on 23 May 2007 was not that of the athlete. Therefore, the Athletes had breached IAAF Rules 32.2(b) and 32.2(e).

B. Reliability of the DNA Analysis

32. The Panel accepts the expert evidence of Dr Castella that the method of DNA analysis was a common and well established one, that the results were clear and reliable, that no DNA diversion could have taken place, and that since a genetic file belongs to only one person it cannot be falsified. The Panel is thus of the view that DNA analysis is a reliable evidentiary means to establish an anti-doping rule violation such as the use of a prohibited substance or method or the tampering or attempted tampering with doping controls. The Panel finds that the natural, if not irresistible inference, is that the Athletes have somehow arranged to have the urine of third persons used in their out of competition testing.

33. However, the Panel notes that, although many courts around the world routinely base criminal convictions on DNA evidence, some courts have warned in criminal cases that DNA evidence should not be relied upon as a complete substitute for proof beyond reasonable doubt. The court should consider the DNA evidence in combination with all the other evidence in the case: see e.g. *R v GK* (2001) 53 NSWLR 317, 323 per Mason P (New South Wales Court of Appeal, Australia).

34. The Panel observes that such comments have no application where, as here, the standard of proof is not that of beyond reasonable doubt. Nevertheless it is prudent, especially since the allegations are of a most serious kind, to consider first, any relevant circumstantial evidence to see whether, in combination with the DNA evidence, it supports the initial assessment that anti-doping violations occurred and, secondly, to consider the quality-control and chain of custody questions which might affect the probative value of the DNA results.

C. Supporting Circumstantial Evidence

35. As to circumstantial evidence, the Panel agrees with IAAF that there was circumstantial evidence of significant probative value which supports the inference of tampering which can be drawn from the DNA results.

36. First, the Panel finds the very fact that the seven Athletes came from a group of experienced highly ranked international level of athletes in one general discipline, track and field, from one country supports the view that a collaborative system of tampering was in effect.

37. Secondly, since motive is one of the items of circumstantial evidence which is often admitted to establish guilt, there is significant circumstantial evidence in the findings of Professor d'Onofrio that several of the Athletes, namely Cherkasova, Fomenko, Sobaleva, Tomashova and Yegorova had blood profiles indicative of the long term use of rh-EPO or other forms of blood doping. This evidence does provide a motive for tampering with the out of competition samples, namely a need to disguise the use of prohibited substances.

38. Against this background it is not necessary for the IAAF in proving an anti-doping violation to establish exactly how the tampering was carried out. When faced with the incontrovertible

evidence that the out of competition samples were not theirs and asked how the discrepancy could be explained and how the non-matching urine samples could have been substituted the Athletes responses ranged from *"I don't know"* to *"there must have been manipulation of the samples by others"*. They argued, in a nutshell, that the fact that the DCOs made no remark about irregularities on the official forms proved that the out of competition urine sample collected by the DCOs was indeed the Athletes' urine sample and inferred that at a later stage in the transportation process substitution of the non-matching urine samples must have occurred. The Panel rejects this submission. Following the Athletes' reasoning would mean that a tampering which remained unnoticed by the DCOs could never be sanctioned. It is clear that any DCO's remark on the form aims at either alarming the IAAF when DCOs detected an attempt to tamper the samples or to inform the IAAF of any other particularity noted by the DCOs during the sample collection. The lack of any remark by the DCOs clearly cannot be considered as proof that no tampering took place at the moment of the sample collection.

39. On this topic the Panel gives weight to the evidence from Mr Thomas Capdevielle, the experienced IAAF Results Manager as to how urine substitution can be effected. His evidence was that:

"In the case of female athletes, I understand that urine substitution is usually effected through the use of a catheter containing urine belonging to another individual. By the use of a catheter, the athlete is able to appear to pass urine naturally, when what they are actually producing is coming from the catheter rather than their own body. If an athlete uses a catheter, which is hidden within the athlete's own body, it is virtually impossible for a Doping Control Officer witnessing the passing of the urine to be able to tell that such a device is being used".

40. He also said that:

"… another possible explanation is the replacement of the urine collection vessel with another collection vessel containing "clean" urine from another individual. Unlike bottles, the plastic collection vessels are usually not coded and are freely available. As a result, the Doping Control Officer cannot verify that the urine collection vessel presented to him after the athlete has urinated is actually the same collection vessel that the athlete selected at the beginning of the sample to collection process. Such an exchange can easily be made in a momentary lack of attention from the Doping Control Officer. Such practice can only be carried out in circumstances where the athletes are warned in advance that they are going to have to produce a sample and also suggests organised and systematic tampering".

41. Dr Capdevielle also referred to IAAF concerns in relation to the out of competition testing of Russian athletes that the requirements of no advance notice of testing appeared to be disregarded in some cases. There was evidence from the DCOs in this case that supported the view that some of the Second Respondent Athletes may have had advance notice that the DCOs were coming to perform out of competition testing.

42. For all of the foregoing reasons the Panel finds that the out of competition samples provided by the Athletes were not those of the Athletes. Furthermore, the Panel finds that the out of competition samples were not substituted by third parties. The latter would, in principle, not have any motive to do so. If a person wanted to harm the Athletes that person would not have proceeded by replacing the urine of the Athlete with *"clean"* samples by other persons. As other CAS panels dealing with unsupported explanations provided by athletes accused of anti-doping

violations have repeatedly stated, mere speculation is not proof that a fact did actually occur (see e.g. CAS 2006/A/1067). The Panel therefore concludes that the only plausible course of events is that the Athletes or their agents or accomplices had provided the urine of other persons to the DCOs.

D. Was the Chain of Custody of any Sample broken or compromised at any Stage?

43. Before a dispositive finding of guilt can be made, it is necessary to examine the chain of custody evidence and the Athletes' assertions that there were defects and discrepancies in the handling and transportation of some of the samples.

44. The Panel notes that the Athletes did not contest the chain of custody of the samples taken in competition, nor did they contest the chain of the custody where the buccal swabs were taken. The sole challenge was to the chain of custody of the out of competition samples which the IAAF labelled as the bogus samples.

45. The primary thrust of the challenge by the Athletes to the chain of custody was with regard to the transportation of the samples from Russia to Lausanne. The Tribunal finds that there was an unbroken chain of custody of the out of competition samples from Russia to Lausanne. The Athletes drew attention to the admitted facts that the samples had been exported from Russia unlawfully and without proper authorization from the Authorities. The Tribunal found no connection between the apparent violation of Russian administrative or customs law and the sanctity of the samples. To the extent there was a departure from local administrative or customs procedures, it was not such as to in any way undermine the ultimate finding that tampering by the Athletes had occurred. Mr Leonenko, the courier, was a very experienced courier and one who certainly understood the importance of ensuring the samples were at all times in his proper custody. The Tribunal accepts his evidence as truthful and reliable.

46. As to the Athletes' argument that weight should be given to the fact that the DCOs made no remarks on the official forms that anything unusual occurred during the taking of the out of competition urine samples, the Panel did not find it persuasive. The DCOs testified that it was not possible to see the Athletes at all times and in some cases the Athletes had their backs turned to the DCOs. The Panel rejects the suggestion that unless some note of tampering was recorded by the DCOs, one must assume that no such tampering ever occurred either during the sampling or thereafter.

47. The Panel has carefully considered the submissions of the Athletes alleging inadequate proof of the chain of custody and suggestion that the chain has broken during the transportation of the samples from Russia to the LAD in Lausanne or from the moment the samples left the LAD to go to the LGF laboratory. Taking into account the sampling and transportation evidence presented to the Panel and summarised in Section VI above, namely the documentation provided to the Panel by the IAAF, the evidence, both written and oral of the DCOs and the members of IDTM in charge of the transportation of the samples, as well as the evidence of Dr Castella of the LGF laboratory and Dr Martial Saugy of the LAD, the Tribunal

finds to its comfortable satisfaction, bearing in mind the seriousness of the allegation, that the chain of custody was never interrupted or interfered with.

E. Validity and Reliability of the Testing Procedures

48. The LAD is a WADA-accredited laboratory and thus benefits from the presumption of compliance with applicable procedure. However, the LGF, where the DNA analysis was performed is not WADA-accredited and, thus, cannot benefit from the presumption of proper application of the custodial procedures. However, this does not of course render the analysis performed by the LGF unreliable. The Athletes themselves admitted that they had no doubts as to the professionalism of the LGF. To the extent that the Athletes claimed that they had never had access to the LGF documentation, it is to be recalled that the burden on the IAAF was to prove an intact chain of custody, not an intact chain of documentation: see CAS 2002/A/360 at paragraph 28. As to the complaint by the Athletes about the long duration of the LGF investigation, the Tribunal finds that the time taken was more than adequately explained in the evidence of Dr Castella summarized at paragraph 64 above and in the evidence of Mr Capdevielle summarized above. The fact that the LGF acts in criminal cases for the Swiss confederation, that it is ISO 7025 accredited, and that the officers within the LGF know very well the measures to be taken in order to avoid any DNA contamination eliminates any doubts about the reliability of DNA testing procedures.

F. Testing of B Sample

49. Finally, the Tribunal addresses the submission raised for the first time in the submissions of the Athletes at the hearing to the effect that *"an athlete's right to be given a reasonable opportunity to observe the opening and testing of a B sample is of sufficient importance that it needs to be enforced, even in situations where all of the other evidence available indicates that an athlete committed an anti-doping violation"*: CAS 2002/A/385; CAS 2008/A/1607. The IAAF justifiably complained about the introduction of this argument at the hearing without prior notice in breach of Art. R56 of the Code, which prohibits the supplementation of the appeal brief unless the President of the Panel allows it on the basis of exceptional circumstances. But in any event the Panel rejects this argument. A distinction must be made between the results management process applicable to the case of an anti-doping rule violation detected through an Adverse Analytical Finding and one where there is no such finding.

50. IAAF Rule 37, para 1 governs the results management processes *"following notification of an adverse analytical finding or other anti-doping rule violation"*. IAAF Rule 37 paras 3 to 10 delineates rules which are applicable *"on notification of an adverse analytical finding"* (IAAF Rule 37 para. 3), whereas IAAF Rule 37 para. 11 defines the results management process *"in the case of any anti-doping rule violation where there is no adverse analytical finding"*.

51. The athlete's right to request promptly for the B sample analysis is mentioned under IAAF Rule 37 para. 4 lit (d), which lists the information to be notified to an athlete by the IAAF Anti-

Doping Administration *"if the initial review under Rule 37.3 above does not reveal an applicable TUE or departure or departures from the International Standard for Testing (or other applicable provision in the Procedural Guidelines) or the International Standard for Laboratories such as to undermine the validity of the finding"*. IAAF Rule 37 paras. 4 lit (e) to (g), and 6 to 10 govern in details the procedure applicable to the B sample analysis.

52. As mentioned above IAAF Rule 37 para. 11 provides for a different results management process in case of an anti-doping rule violation where there is no adverse analytical finding. In this case, IAAF Rule 37 para. 11 provides that:

"In the case of any anti-doping rule violation where there is no adverse analytical finding, the IAAF Anti-Doping Administrator shall conduct any investigation based on the facts of the case that he deems to be necessary and, on completing such an investigation, shall promptly notify the athlete concerned whether it is asserted that an anti-doping rule violation has been committed. If this is the case, the athlete shall be afforded an opportunity, either directly or through his National Federation, within a time limit set by the IAAF Anti-Doping Administrator, to provide an explanation in response to the anti-doping rule violation asserted".

53. The clear wording of IAAF Rule 37 para. 11 thus shows that the results managements processes and notably the duties of the IAAF Anti-Doping Administrator related to them are different depending on the way the anti-doping rule violation is presented, i.e., whether it is by way of an adverse analytical finding or not. The B sample analysis is clearly not part of the results management process of IAAF Rule 37 para. 11.

54. In the present case, there is no Adverse Analytical Finding and therefore the results management process is the one of IAAF Rule 37 par. 11 and not of IAAF Rule 37 paras. 3 to 10. As IAAF Rule 37 para.11 does not provide for the athlete's right to request the analysis of the B sample, the Athletes' submissions with respect to the B sample management process necessarily fail.

G. Conclusion

55. For all of the foregoing reasons and taking into account all the evidence presented to the Panel and after carefully considering the competing submissions of the parties, the Tribunal finds that the anti-doping violations under IAAF Rule 32 paras. 2(b) and (e) alleged against each of the Athletes have been established to its comfortable satisfaction, bearing in mind the seriousness of the allegation.

Period of sanction

56. As noted earlier, the IAAF requests a period of sanction of four years to be imposed on the Athletes. The ARAF claims that a two years sanction is proportionate. Both parties referred to CAS jurisprudence on the matter.

57. The Panel first deals with the procedural submission made by the ARAF as to the alleged uncertainty of the IAAF's request when it asks that *"the ineligibility period in the Athletes' case be increased up to 4 years"*. The ARAF submitted that the IAAF had left it up to the Panel to decide on a period of sanction between two years and four years and therefore claimed that the request was not clear enough. The Panel does not agree and finds that the IAAF made clear in its request, which was confirmed at the hearing upon the ARAF's request, that the IAAF was requesting the Panel to impose a four years sanction, by increasing the sanction imposed by ARAF from two years up to four years.

58. The competing submissions of the parties have been summarized. It will be recalled that the IAAF advanced five grounds in support of its request for a four year sanction. For ease of understanding the five reasons are set out again:

(i) the nature of the violation committed by the Athletes;

(ii) that additional evidence in the form of some of the Athletes' blood profile data was indicative of the long term use of rh-EPO or other form of blood doping;

(iii) that a sanction of more than 2 years was consistent with the disposition of similar cases in the sport of Athletics in the past;

(iv) that this case was consistent the increased sanctions of up to 4 years on account of aggravated circumstances under the 2009 WADC; and

(v) that sanctions of more than 2 years were needed in order to succeed in the fight against doping in sport.

59. As to the second reason, it is to be observed that the IAAF does not complain that the blood profiles establish an anti-doping rule violation. Rather it contends that those blood profiles signify that the Athletes had something to hide and therefore a motive to tamper with the samples. The Panel is not persuaded that any significant weight should be given to this factor.

60. As to the fourth ground advanced by the IAAF, it will be recalled that the Panel has already rejected this submission. The Panel holds that since the 2009 WADC had not been adopted by the IAAF at the material times relevant to the present case, the new IAAF Anti-doping Rules as well as the 2009 WADC cannot be taken into consideration by the Panel.

61. Having rejected the second and fourth grounds advanced by the IAAF, the Panel finds that the only applicable rule is that contained in IAAF Rule 40(1)(b) which states the case of tampering should be sanctioned with *"a minimum period of 2 years ineligibility"*. Beyond that, it is obvious the question of the appropriate sanction is a matter for the overall discretion of the Panel taking into account all relevant circumstances. As a starting point, however, it has to be kept in mind that the IAAF Rules do not provide for differing sanctioning regimes for the use of a prohibited substance or for tampering. Both infractions are regarded as *"standard type"* violations and treated exactly the same according to the rules. Assistance for finding the appropriate sanction can of course be obtained from other comparable cases.

62. The precedents cited by the Appellant, however, are not particularly helpful. In the BALCO case cited by the IAAF, the North American Court of Arbitration for Sport sanctioned an athlete with a suspension of eight years, because she did not admit her guilt, did not agree to cooperate and covered up the facts. In addition, her doping took place over an extended period of time. Another athlete received a two year suspension because she had admitted the facts and cooperated. Most athletes were sanctioned with four years because *"the BALCO scheme was elaborately designed to hide the doping offenses of its athletes"* (AAA, United States Anti-Doping Agency v. Michelle Collins, 9 December 2004, nr 5.5). Whether or not this case has any relevance here is rather doubtful, since the case was judged at the time on a completely different legal basis than the one that is applicable here. While the applicable IAAF provisions applicable in this case correspond – substantially - to the 2003 WADC, the cases referring to the BALCO affair date back to a pre-WADC era. For the same reason not much guidance can be drawn from the cases of Montgomery and Gaines. Both athletes were sanctioned with the minimum period of ineligibility of two years at the time. The panel accepted the uncontradicted evidence of a credible witness who testified that they had both admitted to the witness their use of prohibited substances: (CAS 2004/O/645, nr 60).

63. The USADA's list of sanctions against athletes produced by the IAAF in its appeal brief revealed sanctions between two years and four years of ineligibility, with EPO cases leading to a four year period of ineligibility.

64. The IAAF also quoted two tampering cases. The first was CAS 2005/A/898 which related to the Greek athletics trainer C. He admitted the IAAF rules had been breached and under the settlement reached in that case he was sanctioned with a four years suspension for tampering with the doping control process by providing the authorities with deliberately misleading whereabouts information for his athletes. This reference, however, is not conclusive for the case at hand. The applicable IAAF rules at the time (which are basically the same as the ones applicable in the case at hand) expressly provided for a different sanctioning regime for athlete support personnel (such as trainer and coaches) and athletes. Anti-doping violations committed by athlete support personnel were considered (and still are considered) by the IAAF anti-doping provisions as particularly serious offenses requiring a minimum sanction of four years. It is, therefore, not surprising that the athletes, to whom a different legal regime applied, were only declared ineligible for two years.

65. The second tampering case quoted by the IAAF is comparable – at least at first sight to the present case – since, not only was the Bulgarian sprinter T. found guilty of tampering but it required a DNA analysis to prove the anti-doping violation. The athlete was sanctioned with two years as she had admitted her guilt and explained how the offence had taken place. However, the difference with the case at hand is that the decision relating to the Bulgarian athlete was never appealed before CAS. Whether or not the decision of the federation applying the IAAF rules would have stood up to CAS scrutiny and jurisprudence is unknown.

66. The ARAF gave two more examples of tampering cases, namely CAS 2004/A/714 and CAS 2004/A/718, where a two years period of ineligibility was pronounced against the athletes for a first violation.

67. Summing up, the only conclusion which can be drawn from the jurisprudence cited is that – unsurprisingly – the length of the sanction depends on the particular facts of the case. Based on the structure of the IAAF rules as they stood at the relevant time and these precedents, the Panel finds that the trend for a first offense with tampering seems to be a two years period of ineligibility. Depending on the attitude of the athlete and the nature and complexity of the scheme set in place, a tribunal obviously may increase the sanction. In the view of the Panel the circumstances that justify an increase must be serious. In addition, there is an upper limit for an increase of the sanction. Contrary to what the wording of the provision might suggest, the upper limit for the length of a sanction for a *"standard infraction"* must not exceed the lower limit of those anti-doping violations the IAAF rules consider to be particularly serious, ie 4 years of ineligibility. This follows from the overall context of the IAAF provisions on ineligibility.

68. Now that the extent of the discretionary powers have been determined, the Panel turns to the specific circumstances of the case to determine the precise length of the period of ineligibility. In doing so the Panel considers that the Athletes did set up a *"doping program"* which they hoped would result in negative testing. It involved the seven Athletes who belonged to the same team, namely the Russian International Athletics team. The Panel has no doubt that the Athletes participated together in this *"doping program"* which aimed at deceiving the anti-doping authorities on a large scale and not only on an individual basis. The Athletes adopted a coordinated approach when confronted with the out of competition and in competition tests. The collective attitude of all seven athletes constitutes an aggravating circumstance which should be taken into consideration.

69. On the other hand, the Panel finds that the circumstances of the case do not warrant to go to the upper limit of the range of the period of ineligibility, ie up to 4 years. The extent of the doping program of which the Athletes were undoubtedly part of has not been completely uncovered. It is hardly conceivable that the Athletes could have acted the way they did without the assistance of athlete support personnel or persons holding certain official functions within the federation. The Panel is of the view that the Appellant may not have used all efforts at its disposal to uncover the full extent of the *"doping program"*. It appears that the athletes were not offered the possibility of reducing their sanctions by providing substantial assistance in uncovering the *"doping program"*. This could have been an effective tool to uncover the true extent and the details of the *"doping program"*. In view of these persisting uncertainties the Panel does not find it just and equitable to go to the upper limit of discretion at its disposal concerning the length of the sanctions.

70. The ARAF submitted that the period of disqualification of the Athletes' results should be taken into consideration by the Panel when fixing the length of the period of ineligibility. The IAAF submitted, (see above) that those two sanctions are distinct from each other under the IAAF Rules. It argued that the jurisprudence on this matter did not support the ARAF's approach: see especially CAS 2004/O/645 where the athlete was sanctioned with a two years period of ineligibility commencing on 6 June 2005, whereas all awards of the athlete were cancelled retroactively from 31 March 2001 until 13 December 2005. The Panel takes a different view. It finds that CAS 2004/O/645 is not conclusive because the legal regime was completely different

at the time. The Panel considers that the relevant rules, properly construed, require that sanctions must be proportionate. Proportionality means, however, that even though disqualification and ineligibility are different in nature they both are sanctions and, thus, both have to be taken into account to come to a proportionate solution.

71. Taking into account the provisions of IAAF Rule 40(1)(b), the relevant precedents and the specific circumstances of this case, the Panel decides that the appropriate sanction for the Athletes is a period of ineligibility of two years and nine months.

72. The Panel records that it has not given weight to the evidence of Ms Radcliffe which supported the imposition of the heaviest possible sentence on the Athletes. The Panel means no disrespect to Ms Radcliffe but her evidence was very general in nature. She acknowledged that she did not really know the facts concerning the alleged misconduct by the Athletes. It appeared that she was simply expressing a view on the part of others that there should be strong penalties in all cases.

A. Ms Khanafeyeva

73. The Panel considered particularly the case of Ms Khanafeyeva, who had already committed a first doping offense. It decided to impose the same sanction on Ms Khanafeyeva as on the other Athletes for the following reasons:

74. First, in neither the IAAF and ARAF cases against Ms Khanafeyeva was the fact that Ms Khanafeyeva stood accused of a second anti-doping rule violation ever considered. The ARAF Decision against Ms Kanafeyeva did not sanction Ms Khanafeyeva differently from the other Athletes. In its appeal brief, the IAAF did not request the Panel to pronounce ineligibility for life against Ms Khanafeyeva, which is the sanction provided under IAAF Rule 40(1)(a) and (b), in cases of a second anti-doping rule violation.

75. While the IAAF mentioned in its submissions against Ms Khanafeyeva that it was a second anti-doping rule violation in her case, the content of the appeal brief was identical to that of the other Athletes.

76. The Panel therefore infers that the IAAF's request was that the Panel issues the same sanction against Ms Khanafeyeva as for the other Athletes.

77. The Panel does thus not find it appropriate to depart from the approach of the ARAF Committee, confirmed by the IAAF in its appeal brief. It therefore decides to impose the same sanction on Ms Khanafeyeva as applies to the other Athletes, namely a period of ineligibility of two years and nine months.

B. Commencement of the period

78. IAAF Rule 40 par. 9 provides that:

"The period of ineligibility shall start on the date of the hearing decision providing for the 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".

79. The ARAF Commission held an hearing on 3 September 2008 for all Athletes except for Ms Yegorova. She did not take part to the procedure before ARAF and her period of ineligibility commenced on 20 October 2008. All other Athletes were subjected to a provisional suspension commencing 31 July 2008.

80. Based on the foregoing and in application of IAAF Rule 40(9), the Panel decides that the period of ineligibility of two years and nine months shall start on 3 September 2008 for all Athletes but Ms Yegorova, who shall have the same period commence on 20 October 2008. However, credit is given to all Athletes for the period of ineligibility already served because of the provisional suspension dated 31 July 2008. The period of ineligibility of all Athletes will therefore expire on 30 April 2011.

81. For the avoidance of doubt, the Panel rejects the ARAF submissions based on the application of the last sentence of Art. 10.8 of the 2003 WADC. As already explained previously, the WADC is neither directly nor indirectly applicable to the present cases and the Panel cannot therefore apply a rule, namely the possibility to fix the start of the ineligibility period at an earlier date *"because of delays in the hearing process or other aspects of Doping Control not attributable to the Athlete"*, which was not incorporated in the IAAF Rules. There is no reason to follow the ARAF's thesis of a lacuna in the IAAF Rules. The IAAF Rules take over word for word the whole of Art. 10.8 of the 2003 WADC with the exception of the last sentence of this Art.. There is thus no doubt that the IAAF deliberately did not adopt the exact same wording of Art. 10.8 of the 2003 WADC in its Rules. The Panel is thus solely bound by the content of the IAAF Rules: see CAS 2005/A/831, nr 7.3.4 et seq.

C. Disqualification of Results

82. IAAF Rule 39 par. 4 provides that:

"Where an athlete has been declared ineligible under Rule 40 below, all competitive results obtained from the date (…) [an] anti-doping rule violation occurred through the commencement of the period of provisional suspension or ineligibility shall, unless fairness requires otherwise, be annulled, with all resulting consequences for the athlete".

83. The Athletes tampered the out of competition samples and thus the anti-doping rule violation occurred on the following dates:

(i) As to Ms Olga Yegorova on 7 April 2007

(ii) As to Ms Svetlana Cherkasova on 26 April 2007

(iii) As to Ms Yuliya Fomenko on 27 April 2007

(iv) As to Ms Gulfiya Khanafeyeva on 9 May 2007

(v) As to Ms Tatyana Tomashova on 23 May 2007

(vi) As to Ms Yelena Soboleva on 26 April 2007

(vii) As to Ms Darya Pishchalnikova on 10 April 2007

84. In accordance with IAAF Rule 39(4), all competitive results achieved by the Athletes since those respective dates are annulled.

85. All other prayers for relief are dismissed.

The Court of Arbitration for Sport rules:

1. The appeals filed by The International Association of Athletics Federation are partially upheld.

2. The Decisions of the ARAF Council dated 20 October 2008 regarding the Athletes Olga Yegorova, Svetlana Cherkasova, Yuliya Fomenko, Gulfiya Khanafeyeva, Tatyana Tomashova, Yelena Soboleva and Darya Pishchalnikova, are set aside.

3. The Athletes Olga Yegorova, Svetlana Cherkasova, Yuliya Fomenko, Gulfiya Khanafeyeva, Tatyana Tomashova, Yelena Soboleva and Darya Pishchalnikova are sanctioned with a suspension of two years and nine months.

   a. For Svetlana Cherkasova, Yuliya Fomenko, Gulfiya Khanafeyeva, Tatyana Tomashova, Yelena Soboleva and Darya Pishchalnikova the period of ineligibility shall start on 3 September 2008. However, credit is given for the period of ineligibility already served because of the provisional suspension dated 31 July 2008. The period of ineligibility, therefore, expires on 30 April 2011.

   b. For Olga Yegorova the period of ineligibility shall start on 20 October 2008. However, credit is given for the period of ineligibility already served because of the provisional suspension dated 31 July 2008. The period of ineligibility, therefore, expires on 30 April 2011.

4. All competitive results achieved by the Athletes since the out of competition testing are annulled, namely:

   a. All competitive results achieved by Olga Yegorova since 7 April 2007

   b. All competitive results achieved by Svetlana Cherkasova since 26 April 2007

   c. All competitive results achieved by Yuliya Fomenko since 27 April 2007

d. All competitive results achieved by Gulfiya Khanafeyeva since 9 May 2007

e. All competitive results achieved by Tatyana Tomashova since 23 May 2007

f. All competitive results achieved by Yelena Soboleva since 26 April 2007

g. All competitive results achieved by Darya Pishchalnikova since 10 April 2007

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

(…).