



**Arbitration CAS 2015/A/3977 World Anti-Doping Agency (WADA) v. Belarus Athletic Federation (BAF) & Vadim Devyatovskiy, award of 31 March 2016**

Panel: Judge James Reid QC (United Kingdom), President; Prof. Massimo Coccia (Italy); Mr Jeffrey Benz (USA)

*Athletics (hammer throw)*

*Doping (oxandrolone; methandienone)*

*Admissibility of the appeal*

*Right to attend and/or to be represented at the opening and analysis of the B sample*

*Absence of proof of a “use violation” rule*

1. There is no obligation foreseen in the applicable IAAF Rules for WADA to know or to make some inquiries about an appealed decision in order to preserve its own right to appeal. Furthermore, the fact that WADA might have discussed the athlete’s case before receiving the complete file does not initiate the 21-day time limit to file the appeal. According to the applicable regulations, this deadline starts running only after the reception of the complete file. Moreover, the fact that WADA received the complete file in a maximum of 13 days after it was aware of its existence cannot be regarded as incompatible with procedural fairness or in breach of any procedural rights of the athlete so as to require the abridgement of the appeal period provided by the rules. Finally, the fact that at some stage of the proceedings, WADA relied on a member of the IAAF to obtain evidence or information does not yet mean that it was acting as the agent of the international federation and does not prove that WADA was acting exclusively for the benefit of IAAF and hence committed somehow an abuse of process by filing its appeal within the regulatory deadline.
2. The generally recognised legal principle that a party may be present at the collection of evidence applies in the context of a confirmatory analysis and is respected only if the athlete is actually put in a position where he can effectively be present or represented by the person of his choosing at the B sample test. This right is fundamental and, if not respected, the B sample result must be disregarded. The fact that the athlete eventually agreed to be represented does not yet mean that he waived his right to be given a reasonable opportunity to be present or represented by the expert of his choosing at the B sample analysis. This very limited right arises from the obligation on the federation to observe the principles of a fair procedure and the right to be heard, as well as the right of proper defence. Given the seriousness of an allegation of doping, it is clear that strict requirements for proper respect of these procedural principles must be applied. This is so, even if denial of that right is unlikely to affect the result of a B sample analysis.

3. While there may well be cases where analytical evidence which does not meet the criteria to support a “presence violation” can be an important ingredient in establishing a “use violation” case, there must be additional supporting evidence rather than mere speculation. In this respect, speculation regarding a doping conspiracy organised at the national level by the federation and/or that the athlete took part in it, if accepted, would not be sufficient to establish to the comfortable satisfaction of the panel a “use violation” on the part of the athlete.

## I. THE PARTIES

1. The World Anti-Doping Agency (“WADA”) is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.
2. The Belarus Athletic Federation (hereinafter “BAF”, or together with Mr Vadim Devyatovskiy, “the Respondents”) is the national federation governing the sport of athletics in Belarus. It has its registered seat in Minsk, Belarus, and is affiliated with the International Association of Athletic Federations (“IAAF”).
3. Mr Vadim Devyatovskiy (hereinafter the “Athlete” or, together with the BAF “the Respondents”), born on 20 March 1977, is a former Belarusian Hammer Thrower, who retired from competitive sport in 2012. He currently is the President of the BAF and is a member of the Belarusian parliament.

## II. FACTUAL BACKGROUND

### II.1 Introduction

4. The appeal is filed against a decision dated 23 September 2014 of the BAF Disciplinary Commission, which cleared the Athlete of doping charges brought against him by the IAAF on grounds that he “*was not given opportunity to attend the opening and testing of his B sample [and] was not given opportunity to be represented [at] the opening and testing of his B sample by a representative of his choosing*”.
5. The case submitted to the BAF Disciplinary Commission was the result of the re-testing of a sample provided by the Athlete on 8 August 2005 during the IAAF World Championships in Helsinki, Finland. On that occasion, the Athlete’s urine samples were split into an A and a B sample, which carried the identification number 691793. Shortly after this sporting event, the Athlete’s A sample n°691793 was screened for prohibited substances but no adverse analytical finding was reported. In July 2012, the WADA-accredited laboratory for doping analyses, in Lausanne, Switzerland (the “Lausanne Laboratory”), was instructed to conduct new tests on the Athlete’s A sample n°691793, which the Laboratory reported as being found to contain

metabolites of oxandrolone and methandienone, two prohibited substances under the applicable WADA Prohibited List.

6. As will be discussed below in greater detail (see *infra* at sections II.6 and II.7), on 30 July 2012, at 22:00 (Minsk time), as he was at his Belarusian home, the Athlete was informed by phone of the results of the A-Sample no. 691793 retest and was requested to indicate in writing within the next two hours whether he and/or his representative intended to attend the splitting of the B sample n°691793 and analysis of B1 sample n°691793 (“First Bottle”), which were scheduled to take place the next morning at the Lausanne Laboratory. The Athlete’s attention was drawn to the fact that a failure *“to respond within the deadline indicated will be deemed to be a waiver of his right to the B sample analysis. In such event, he will be deemed to have accepted the adverse analytical finding in his A sample and will not be able to challenge these results at a later stage in the disciplinary procedure”*.
7. Eventually, according to WADA, the tests performed by the Lausanne Laboratory on the B1 and B2 samples n°691793 confirmed the adverse analytical finding.
8. The Parties agree that in this award the Panel of the Court of Arbitration for Sport (“CAS”) has to determine on a preliminary basis only whether the appeal is admissible and whether the Athlete’s rights relating to the opening and analysis of his B sample n°691793 were respected (hereinafter the “B Sample Issue”), as these issue might be dispositive of the whole case. The issues whether the results of the analyses carried out by the Lausanne Laboratory could establish an anti-doping rule violation (hereinafter the “Analytical Result Issue”), and whether the Athlete should be penalized are to be addressed in a further stage of this arbitration only if WADA were to prevail on the B Sample Issue.
9. Accordingly, on 6 July 2015 and with the consent of the Parties, the CAS decided that the *“proceedings shall be bifurcated so that the B sample issue be determined on a preliminary basis”*.
10. As a consequence of this determination, if the Panel makes a finding that that the Athlete’s rights were not respected and such a finding is fatal to the appeal, then the appeal must be dismissed at this stage. In this connection, the Panel must also consider whether the Appellant’s alternative case based (not on the presence of a prohibited substance in the Athlete’s samples) but on the Athlete’s *“use or attempted use of a prohibited substance or prohibited method”* – see *infra* at para. 113(c) – is supported by enough evidence to justify proceeding to the second stage of this arbitration to address WADA’s “non-analytical positive” allegation.

## II.2 Background facts

11. Below is a summary of the relevant facts and allegations based on the Parties’ written and oral submissions, pleadings, and evidence adduced. References to additional facts and allegations found in the Parties’ written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its award only to the submissions and evidence it deems necessary to explain its reasoning.

### II.3 The positive findings in the Summer Olympic Games in Sydney and Beijing

12. Shortly before the beginning of the 2000 Summer Olympic Games in Sydney, for which he qualified, the Athlete underwent an out-of-competition doping control. His samples revealed the presence of nandrolone, a prohibited exogenous anabolic steroid, and he was declared ineligible for a period of two years. To this day, the Athlete denies having knowingly or deliberately taken nandrolone or any other prohibited substance. He contends that the disciplinary proceeding initiated against him was vitiated by substantial procedural flaws and that the resulting decision could therefore be impugned. The Athlete claims that, because of his young age and inexperience, he did not realize that his right to be heard had been breached in several respects and he naively relied on the BAF's wrong assertion that he could not appeal his ban. However, the fact remains that the decision was never appealed and still stands.
13. On 17 August 2008, the Athlete and his Belarusian teammate, Mr Ivan Tsikhan, competed in the Men's Hammer Throw Final at the Summer Olympic Games in Beijing, China. They placed respectively 2<sup>nd</sup> and 3<sup>rd</sup>. Following a doping control performed immediately after the competition, the Beijing National Laboratory reported that the Athlete as well as Mr Ivan Tsikhan tested positive for exogenous testosterone. In two decisions dated 11 December 2009, the IOC Disciplinary Commission found both men guilty of an anti-doping rule violation and stripped them of their medals. The Athlete and Mr Ivan Tsikhan denied doping and appealed to CAS, which, in a consolidated award dated 10 June 2010, overturned the decisions of the IOC Disciplinary Commission. The CAS found that the Beijing National Laboratory did not respect the international laboratory standards as it had violated documentation and reporting requirements. The CAS held that these departures justified the annulment of the tests' results but stated that its decision "*should not be interpreted as an exoneration of the [Athlete and of Mr Tsikhan]. The Panel is not declaring that the [two men] did not, prior to the competition, administer exogenous testosterone. The Panel is merely concluding that the [IOC] has not been able to prove, to the comfortable satisfaction of the Panel, diligent adherence to the rules set out in the International Standard for Laboratories and the relevant Technical Documents*" (See CAS 2009/A/1752 & CAS 2009/A/1753 para. 6.12, page 75).

### II.4 The 2005 IAAF World Championships in Athletics held in Helsinki, Finland

14. The Athlete participated in the IAAF World Championships in Athletics, which took place in Helsinki, Finland, from 6 to 14 August 2005 (the "Helsinki Championships").
15. On 8 August 2005, the Athlete won the silver medal at the Hammer Throw event of the Helsinki Championships.
16. The same day, the Athlete was subject to an in-competition doping control. His A sample n°691793 was screened for prohibited substances but no adverse analytical finding was reported.
17. Upon the request of the IAAF, the Athlete's samples were sent for a long-term storage to the Lausanne Laboratory, which received them on 15 June 2006.

## II.5 The new test performed on the Athlete's A sample n°691793

18. On 17 July 2012, Mr Thomas Capdevielle, the Results Manager from the IAAF Medical and Anti-Doping Department, instructed the Lausanne Laboratory to perform new tests on the Athlete's A sample n°691793.
19. This request was made on the eve of the 2012 Summer Olympic Games, which took place in London from 27 July to 12 August 2012.
20. The Athlete alleges that, on 18 July 2012, he wrote to the BAF to give notice that, because of a back injury, he was withdrawing from the 2012 Summer Olympic Games. Whether or when this information was passed to the IAAF has not been established by the Parties to the present proceedings.
21. In its analytical report dated 26 July 2012, the Lausanne Laboratory reported that it detected in the Athlete's A sample n°691793 the "*Presence of Methandienone (Danabol) metabolite (18-nor-17b-hydroxymethyl, 17a-methyl-androst-1,4,13-trien-3-one)*" and the "*Presence of Oxandrolone metabolite (Oxandrolone long term metabolite)*". The Lausanne Laboratory informed that "*Methandienone and Oxandrolone belong to the exogenous Anabolic Androgenic Steroids (category S1.a of WADA prohibited list)*".
22. It is undisputed that IAAF received this report on 26 July 2012.
23. The Athlete's teammates, Mr Ivan Tsikhan, Mrs Nadzeya Ostapchuk (a Belarusian Shot-Put Athlete), Mr Andrei Mikhnevich (a Belarusian Shot-Put Athlete) and Mr Andrei Varantsou (a Belarusian Hammer Thrower) also competed at the Helsinki Championships and their samples were initially reported as negative. After being retested in 2012, their samples tested positive to prohibited substances. All these athletes have been sanctioned with various periods of ineligibility, running from a two-year to a life ban.

## II.6 The Athlete's notification of the results of the retest performed on his A sample n°691793

24. On 30 July 2012 at 20:00 London time (British Summer Time or "BST"), upon her arrival at the London Olympic site, the General Secretary of the BAF<sup>1</sup> (the "BAF General Secretary") received from Dr Gabriel Dollé, the IAAF Anti-Doping Administrator, a notice concerning the Athlete (the "IAAF Notification") informing of a) the retest of the Athlete's A sample n°691793, b) the conclusions contained in the analytical report of the Lausanne Laboratory, c) that, pursuant to the applicable IAAF regulations, the presence of a prohibited substance or its metabolites or markers in an athlete's sample as well as the use or attempted use of a prohibited substance or a prohibited method constitute an anti-doping rule violation, d) the fact that the adverse analytical finding was apparently not caused by some kind of departure from the IAAF Anti-Doping Regulations ("IAAF ADR") or from the WADA International Standard for

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<sup>1</sup> The person in question, who no longer holds any position within the BAF, requested to be referred to in the present award by her position and not by her name. This person's application was granted by the Panel with the agreement of the Parties.

Laboratories (“ISL”). The analytical report of the Lausanne Laboratory was attached to the IAAF Notification, which also contained the following instructions.

*“I would now ask you to notify [the Athlete] in writing as soon as possible:*

- (i) of the above adverse analytical finding;*
  - (ii) that this finding constitutes an anti-doping rule violation under IAAF Rule 32.2 (a) and Rule 32.2 (b);*
  - (iii) that he has the opportunity to provide an explanation for the adverse analytical finding;*
  - (iv) that he has the right to request promptly the analysis of his B sample (under the conditions set out below);*
  - (v) that he has the right to be provided, at his own cost, with the A sample laboratory documentation package.*
10. *Please inform [the Athlete] that he has until 22.00hrs (GMT) on **Tuesday 31 July 2012** to provide me with a written explanation for the finding in his sample. This explanation can be sent directly to me by confidential e-mail [...] or transmitted through your Federation. If no adequate explanation is received from [the Athlete] by the above deadline, he will be provisionally suspended in accordance with IAAF Rule 38.2 pending resolution of his case by your Federation.*
  11. *If [the Athlete] wishes to have his B sample analysed, the B sample will proceed by way of a split B sample procedure.*
  12. *[The Athlete] and/or his representative is entitled to attend the B sample procedure in its entirety, including the B sample splitting and analysis of the first bottle and the opening and analysis of the second bottle, if and when such take place. In the event that neither [the Athlete] nor a designated representative attends, such procedures will be conducted in the presence of an independent witness.*
  13. *The splitting of the B sample no. 691793 and analysis of the first bottle is scheduled to take place on **Tuesday 31 July 2012** at 10:30hrs at the Lausanne Laboratory (...).*
  14. *The opening and analysis of the second bottle is scheduled to take place at the same address and at the same time on **Thursday 2 August 2012**.*
  15. *[The Athlete] is required to indicate in writing by no later than **22.00hrs on Monday 30 July 2012** whether he and/or his representative intends to attend at the dates and times designated above (i) the B splitting procedure and analysis of the first bottle and (ii) the opening and analysis of the second bottle. A failure by [the Athlete] to respond within the deadline indicated will be deemed to be a waiver of his right to the B sample analysis. In such event, he will be deemed to have accepted the adverse analytical finding in his A sample and will not be able to challenge these results at a later stage in the disciplinary procedure”.*
25. Upon delivery of the IAAF Notification, the BAF General Secretary immediately signed an acknowledgement of receipt, confirming that the IAAF Notification had been handed over to her on 30 July 2012 at 20:00 BST.
  26. It is undisputed that at the same moment, the Athlete was in Minsk, Belarus, where it was 22:00, two hours ahead of London.

## II.7 The events between the IAAF Notification of 30 July 2012 handed to the BAF General Secretary and the splitting of the Athlete's B sample n°691793

27. Immediately after she was handed the IAAF Notification, the BAF General Secretary had several phone contacts with the Athlete, with Mrs Natalia Vadimovna Krek, the BAF's in-house lawyer, and with Mr Dmitri Vorobyov, the BAF's International Secretary.
28. On 30 July 2012, via an email sent at 22:10 BST, Mr Dmitri Vorobyov confirmed to Dr Gabriel Dollé "*that the representative of Ivan Tsikhan Mr. Sergei Beliaev will also be the representative of [the Athlete] at the B-sample analysis of his sample*". Dr Gabriel Dollé immediately forwarded this email to Mr Huw Roberts, IAAF's legal counsel, who, in turn, passed it on to Dr Martial Saugy, the Director of the Lausanne Laboratory, on 31 July 2012 at 9:41 BST (10.41 Swiss time or "CET").
29. It is the Athlete's case that he did not agree at any point to be represented by Mr Sergey Beliaev.
30. Hereafter, the Panel will assess the sequence of events from the perspective of the various actors involved, which sheds a valuable light on the exchange of mails which occurred during the short time frame (a little more than twelve hours) between the IAAF Notification and the splitting of the Athlete's B sample n°691793.

### a) *Statements made by the BAF General Secretary*

31. The BAF General Secretary, who no longer holds any position within the BAF, put forward several written statements during this arbitration.

### aa) *The BAF General Secretary's emails of March 2015*

32. By letters dated 16 October 2015 and 18 January 2016, admitted into evidence by the CAS Panel, WADA filed several emails sent by the BAF General Secretary to Mr Thomas Capdevielle of IAAF in March 2015. It is WADA's case that the BAF General Secretary's emails of March 2015 a) establish the fact that the Athlete accepted Mr Sergey Beliaev as his representative at the splitting of the B sample n°691793 and analysis of the First Bottle and b) conflict with her own witness statements filed later, on 14 August 2015, in support of the Athlete's answer.
33. On 2 March 2015, and in response to a list of questions from Mr Thomas Capdevielle, the BAF General Secretary sent an email to Mr Thomas Capdevielle, to which the following statement was attached:

*"Yes, I certainly remember the meeting with Dr. G. Dolle in London. That day I came to London. Our plane was detained. We came late and I immediately came to see Dr. G. Dolle.*

*After the meeting with Dr. G. Dolle I phoned [the Athlete] and explained everything to him. I told him that he or athlete's representative should be at the B sample analysis in Lausanne the next day.*

*After that I scanned the letter and sent it to Dmitry Vorobyov and [the Athlete] by e-mail. Mr. D. Vorobyov had to translate the letter and send the translated variant to me. Mr. D. Vorobyov was an International Secretary BAF. During the Olympic Games he was working in Minsk.*

*I and [the Athlete] phoned each other. He said that it was unreal to come to Lausanne on July, 31. So I proposed to [the Athlete] that Sergey Beliaev could represent him. Mr. Beliaev represented Ivan Tsikhan whose B-sample analysis had to be opened on the 31 of July in Lausanne.*

*[The Athlete] agreed to that.*

*Then Mr. Vorobyov sent the letter to you in which he wrote that Mr. Beliaev would be the representative of [the Athlete] at the B sample analysis on July, 31 in Lausanne.*

*But then [the Athlete] phoned me and told me that he didn't agree Mr. Beliaev to be his representative. [The Athlete] explained [to her] that he didn't know Mr. Beliaev at all and he couldn't trust him.*

*So because of this he decided to negotiate with IAAF Anti-Doping Administrator with the help of his lawyer Mr. M. Morgan. (...)"*

34. On 7 March 2015, Mr Thomas Capdevielle asked the BAF General Secretary to specify whether the Athlete agreed to be represented by Mr Sergey Beliaev on the phone or in writing and at what moment. The BAF General Secretary confirmed the following:

*"He did agree on the phone (...) That was 31 July morning or afternoon. Can more accurately tell you Mr. D. Vorobyov, because after consent [the Athlete] he sent a letter to the IAAF Anti-Doping Administrator and me".*

35. On 31 March 2015 and in response to further questions by Mr Thomas Capdevielle, the BAF General Secretary sent another email to which was attached the following statement:

*"(...) [The Athlete] was not to participate in the London Olympic Games and his arrival in London was not planned. (...)*

*On July 30, 2012, I was in contact with [the Athlete] quite a number of times, but it was already after 8 pm London time. He was really (sic) surprised and shocked with such a hurried WADA decision to open the sample 'B' and he had no time to make a right decision. I offered to [the Athlete] the candidacy of Sergey Belyaev to represent [his] interests in Lausanne while opening the sample "B".*

*[The Athlete] said - will think.*

*I asked Dmitry Vorobyev (who was in Minsk at that time) to contact [the Athlete] and inform WADA only in case he agrees that his representative at sample 'B' opening would be Mr Belyaev.*

*On July 31, 2012 after Dmitry Vorobyev sent a letter to WADA, [the Athlete] called and informed that Mr Belyaev does not search him and he would represent his own interests in negotiations with WADA. My reaction to [the Athlete's] statement was calm as there was nothing I could do to change the situation. Till today I was absolutely sure that [the Athlete's] sample 'B' was not open in Lausanne on July 31, 2012 as we received a note that opening a sample 'B' was postponed till August 28, 2012. When we returned after the London Olympic Games, the BAF executive committee banned [the Athlete] from participation in competitions".*



ab) *The BAF General Secretary's witness statement of 14 August 2015*

36. In a witness statement dated 14 August 2015, translated into English by the Athlete's representatives and filed in support of the Athlete's answer, the BAF General Secretary confirmed the following:

- She does not speak or read English. On the night of 30 July 2012, a member of the Belarus national team had to interpret what Dr Gabriel Dollé was explaining to her. From her witness statement, it appears that the BAF General Secretary fully understood a) the content of the IAAF Notification, b) what she was required to do, c) and the resulting consequences for the Athlete, should he fail to meet the deadlines set forth in the IAAF Notification.
- She was able to verify the content of the IAAF Notification only the following day, *i.e.* 31 July 2012, around noon, when she received a copy of this document translated into Russian. The Russian version of the IAAF Notification was then sent to the Athlete.
- The fact that the Athlete was given only two hours to indicate whether he and/or his representative intended to attend the B splitting procedure and analysis, failing which he would be deemed to have accepted the adverse analytical finding in his A sample came "*as a huge shock*" to her. She "*could not understand why there was such a rush to open the B sample, particularly as [the Athlete] was not even competing at this point*".
- After she signed the acknowledgement of receipt handed to her by Dr Gabriel Dollé (the content of which she could not understand), she immediately called the Athlete, who did not answer his phone. Consequently, she called Mrs Natalia Vadimovna Krek, the BAF's in-house lawyer, who was able to reach the Athlete.
- Eventually, the Athlete talked to the BAF General Secretary on two occasions: "*The first would have been very soon after [she] spoke to Dr Dollé at approximately 22:00 Belarus time, and then the second was approximately one hour after that*".
  - "*During the first telephone conversation, [she] told [the Athlete] about the letter and [her] conversation with Dr Dollé. He was very shocked and concerned. He told [her] that he could not accept the result of the A sample re-test, but that it would be impossible for him to get to Lausanne for the next morning and that there was not enough time for him to arrange for a representative of his choice to attend either*".

*[She] was aware that an individual named Mr Sergey Beliaev was going to be at the Lausanne Laboratory the following morning, to represent another Belarusian athlete. [She] did not know anything about Mr Beliaev and [she] had never met him, but - since [the Athlete's] options seemed rather limited - [she] suggested to [the latter] that he may wish to consider asking Mr Beliaev to be his representative. [The Athlete] had also never heard of Mr Beliaev and he made it clear to [her] that, after all the problems with his Beijing case, he did not trust anti-doping laboratories and, therefore, he did not want someone that he did not know representing him at the opening and analysis of his B sample. [She] repeated what Dr Dollé had told [her] and that he had no choice but to try to find someone to represent him if he did not want the A sample finding to become automatically binding. [The Athlete] became very agitated and ended the call to try to find a representative. [She] felt very sorry for [the Athlete] as [she] knew that this was an impossible task given the late hour and the extremely short notice*".

- During the second phone conversation, which took place at around 21:00 London time and 23:00 Belarus time, the Athlete told her that it would be impossible for any representative of his choice to get to Lausanne within the given deadline. The Athlete declared again that *“he did not agree to Mr Beliaev being his representative but that he did not accept the results of the analyses”*.
  - The Athlete then asked her what other options there were. She understood from Dr Gabriel Dollé’s explanations that there were no alternatives and she simply reminded him of the consequences for him, should he fail to confirm that he or a representative would attend the opening and analysis of the B sample by 22:00.  
*“[She] felt that it would be better for [the Athlete’s] situation to at least tell the IAAF by 22:00 that someone would attend the analysis rather than not naming anyone. [She] therefore told [the Athlete] that [the BAF] would ask Mr Beliaev to attend the analysis so that [they] were at least sure to have someone there to report back on the analysis. [The Athlete] was clearly not happy with the situation and ended the call”*.
  - She apparently asked Mrs Natalia Vadimovna Krek to call Mr Sergey Beliaev *“to ask him whether he could attend the analysis of [the Athlete’s] sample”*.
  - She instructed Mr Dmitri Vorobyov, the BAF’s International Secretary, *“to write to the IAAF to tell them that Mr Beliaev would attend the analysis”*.
  - *“[She] now understand that in that email Mr Vorobyov told the IAAF that Mr Beliaev would attend the analysis as [the Athlete’s] “representative”. [...] Mr Vorobyov must have been confused or, perhaps, he did not understand the significance of the term “representative” because:*
    - a. *[The Athlete] did not agree to be represented by Mr Beliaev and he made it clear to [her] that he was not happy to be denied the opportunity to have his own representative; and*
    - b. *precisely because of that, [she] did not tell Mr Vorobyov that Mr Beliaev would be acting as [the Athlete’s] representative.**Whilst [she] was copied in to Mr Vorobyov’s email to the IAAF, [she] did not understand the content or meaning of it at the time, as it was written in English”*.
  - She insisted on the fact that the presence of Mr Sergey Beliaev in Lausanne to attend the splitting of the B sample n°691793 was not the Athlete’s choice or decision. It was exclusively hers. As a matter of fact she *“just felt that it would be better to have someone at the Laboratory to report back what was happening than not have anyone there at all”*.
- ac) *The BAF General Secretary’s witness statement of 14 January 2016 (“the BAF General Secretary’s second statement”)*
37. In response to WADA’s evidence submitted on 16 October 2015 and related to the emails sent to Mr Thomas Capdevielle in March 2015, the Athlete’s representatives filed another witness statement from the BAF General Secretary, dated 14 January 2016. In this document, the BAF General Secretary explained the following:
- She does not speak or read English.

- When Mr Thomas Capdevielle first contacted her in February 2015, she suggested to the latter to correspond over email, so she could use Google Translate to help her communicate. She would systematically use that tool to make sense of Mr Thomas Capdevielle's messages and inquiries.
- During her first exchanges with Mr Thomas Capdevielle, she did not realize the weight, which would/could be given to her answers and was not aware that her statements would be used in legal proceedings.
- Under these circumstances, when she had to file her first lengthy answer to Mr Thomas Capdevielle, she considered it sufficient to get the help of a lady called "Yuliya", one of her goddaughter's friends, who had basic knowledge of English. The BAF General Secretary asked Yuliya to translate her handwritten notes from Russian into English on a Word format file, which she attached to her email of 2 March 2015 to Mr Thomas Capdevielle.
- When she was asked by Mr Thomas Capdevielle whether the Athlete agreed to her suggestion to be represented by Mr Sergey Beliaev at the opening and splitting of his B sample n°691793, her handwritten notes translated by Yuliya clearly indicated that the Athlete told her that he "would think". The fact that, in her mail of 2 March 2015 to Mr Thomas Capdevielle, it is indicated that the Athlete "agreed to that" is the result of a translation mistake made by Yuliya. "At no stage, did [the BAF General Secretary] ever indicate to the LAAF, or to anyone else, that [the Athlete] had agreed to be represented by Mr Beliaev because that is not what happened – on the contrary, [the Athlete] made it very clear that he did not agree to be represented by Mr Beliaev".
- She was unable to verify the accuracy of Yuliya's translation.
- When Mr Thomas Capdevielle contacted her again on 17 March 2015, it was to ask her to sign a draft witness statement for use in the present proceedings before the CAS. At that moment only, did she realise the importance of what was asked from her. She decided then to be assisted by a professional translator, who drafted the message sent to Mr Thomas Capdevielle on 31 March 2015. The content of this second letter corresponded to the real facts.

ad) *The BAF General Secretary's witness statement at the hearing held before the CAS on 20.01.2016*

38. At the hearing before the CAS, the BAF General Secretary confirmed that the content of her statements filed respectively on 14 August 2015 and 14 January 2016 was true. She particularly insisted on the fact that she did not speak English at all and systematically used Google Translate to communicate with Mr Thomas Capdevielle. The words "agree" and "consent" used in her email of 7 March 2015 are the results of a mistranslation attributable to Google Translate and of the fact that she somehow subconsciously wanted to protect herself from something she failed to explain clearly, in spite of WADA's insistence.

**b) Witness statement of Mrs Natalia Vadimovna Krek**

ba) Mrs Natalia Vadimovna Krek's witness statement of 14 August 2015

39. In a witness statement dated 14 August 2015 and filed in support of the Athlete's answer, Mrs Natalia Vadimovna Krek, the BAF's in-house lawyer, stated the following:

- On 30 July 2012, at around 22:00 Belarus time, she received a phone call from the BAF General Secretary, who asked her to call the Athlete and tell him to immediately contact the BAF's General Secretary. The BAF General Secretary explained to her that a prohibited substance had been detected in one of the Athlete's samples and that the Athlete was required to attend the analysis of the B sample the following morning in Switzerland.
- “[She] telephoned [the Athlete] immediately and relayed the details of the conversation that [she] had just had with [the BAF General Secretary]. [The Athlete] was clearly shocked. [She] told him that he should contact [the BAF General Secretary] urgently”.
- Thereafter, she had several phone conversations with the Athlete. “[Both the Athlete and she] were panicked by the situation because there was not enough time to arrange for [the Athlete] to attend himself, or for a representative of his choice to attend on his behalf”.
- “[The Athlete] told [her] that [Mrs Alexandra] had proposed sending Mr Sergey Beliaev, the new Director of the Anti-Doping Laboratory in Minsk, to the analysis. Mr Beliaev was due to be in Lausanne the following morning in order to witness the analysis of another athlete's sample. [She] knew of Mr Beliaev because [she] had assisted him with his travel arrangements for the trip. However, [the Athlete] made it clear to [her] that he was not happy to be represented by Mr Beliaev because he did not know anything about him and had never met him before. [The Athlete] told [her] that after what had happened to his urine sample at the Beijing Olympic Games in 2008, he could only trust a small number of people to witness the analysis. [The Athlete] was adamant that he was going to try to find a representative of his choice. In reality, [she] knew this was an impossible task because there was simply not enough time”.
- At around 23:00 Belarus time, the BAF General Secretary called her back to instruct her to call Mr Sergey Beliaev “to ask him whether he could attend the analysis of [the Athlete's] B sample”. In spite of numerous attempts, she could not get a hold of him.
- She gave Mr Sergey Beliaev's number to the Athlete, who tried to reach the latter throughout the night, without success.
- On 31 July 2012, at around 4:00 or 5:00 Belarus time, she managed to reach Mr Sergey Beliaev who was on his way to catch his flight. As he was in a hurry, the conversation was very short and she just had “enough time to ask Mr Beliaev whether he could attend the analysis of [the Athlete's] B sample that was due to take place in Lausanne later that morning. He confirmed that he would and he ended the call very shortly after that”.
- In the morning of 31 July 2012, she spoke with the Athlete “and told him that Mr Beliaev would be attending the analysis of his B sample” and that the latter could not be reached by phone throughout the day. “[The Athlete] let her know that he was very upset that he was unable

*to contact him and upset generally that he was not given an opportunity to send his own representative to the analysis”.*

- *“[The Athlete] called [her] several times throughout that day to try and find out if [she] had heard from Mr Beliaev. However, [she] had not. [They] both tried to contact Mr Beliaev throughout the day, but again it was impossible to get through”.*
- In the evening of 1 August 2012, she finally had a contact with Mr Sergey Beliaev, via “Skype Chat Message”. Mr Beliaev was reporting to her about the analysis of the sample of the other athlete, for whom he initially was requested to come to Lausanne.
- *“Curiously, Mr Beliaev made no reference to [the Athlete] or his sample until [she] raised it near the end of [their] discussion. [She] told Mr Beliaev that [the Athlete] desperately wanted to speak to him about what had happened at the Laboratory in relation to his B sample. Mr Beliaev told [her] that he could be contacted via Skype. Therefore, [she] arranged a Skype conversation between Mr Beliaev and [the Athlete] to take place that evening at 22:00 Belarus time”.*

*bb) Mrs Natalia Vadimovna Krek’s witness statement at the hearing held before the CAS on 20.01.2016*

40. At the hearing before the CAS, Mrs Natalia Vadimovna Krek confirmed that the content of her statement filed on 14 August 2015 was true. She also testified that when she reached Mr Sergey Beliaev for the first time and because the phone conversation was so short, she was not sure that the latter would actually attend the opening and splitting of the B sample n°691793. She also declared that the Athlete told her that he did not want Mr Sergey Beliaev to be his representative. She explained that she had several phone conversations with the Athlete after the IAAF Notification, during which the latter wanted to be updated on his situation and to voice his outrage over the whole situation.

**c) *Witness statement of Mr Dimitri Vorobyov***

41. At the time of the facts in issue, Mr Dimitri Vorobyov was the BAF’s International Secretary. He does not work for the BAF anymore.

*ca) Mr Dimitri Vorobyov’s witness statement of 17 August 2015*

42. In a witness statement dated 17 August 2015, and filed in support of the Athlete’s answer, Mr Dimitri Vorobyov confirmed the following:
- He sent the email to Dr Gabriel Dollé on 30 July 2012, at 23:12 Belarus Time confirming that *“Mr. Sergei Beliaev will also be the representative of [the Athlete] at the B-sample analysis of his sample”.*
  - *“[He] understand that [the BAF General Secretary] has confirmed that she instructed [him] to notify the IAAF that Mr Beliaev would attend the analysis of [the Athlete’s] sample but she asserts that she did not tell [him] to write that Mr Beliaev would be attending the analysis as [the Athlete’s] “representative”. It is entirely possible that [he] misunderstood her precise instructions as [he] did not*

*appreciate the significance of the term “representative”. Since [he] was told that Mr Beliaev was the “representative” of Mr Tsikhan, [he] simply repeated the same term with regards to [the Athlete]”.*

- On 30 July 2012, he did not have any contact with anyone else in relation to the Athlete’s case and his *“only other involvement in this matter was to translate an IAAF letter that [the BAF General Secretary] emailed to [him] late morning on 31 July 2012. [He] sent the translation to the Athlete and [the BAF General Secretary] at around lunchtime on 31 July 2012”.*

*cb) Mr Dimitri Vorobyov’s witness statement at the hearing held before the CAS on 20.01.2016*

43. At the hearing before the CAS, Mr Dimitri Vorobyov confirmed that the content of his statement filed on 17 August 2015 was true. However, he testified that the BAF General Secretary told him that Mr Sergey Beliaev would be representing the Athlete at the splitting of the B sample n°691793 and analysis of the First Bottle. He also confirmed that he did not send the translation of the IAAF Notice to the Athlete nor try to enter into contact with him.

**d) *Witness statement of Mr Sergey Beliaev***

44. At the time of the facts in issue, Mr Sergey Beliaev was the Director of the National Anti-Doping Laboratory of Belarus (hereinafter the “Belarus Laboratory”). He still holds this position.
45. In a witness statement dated 14 August 2015, and filed in support of the Athlete’s answer, Mr Sergey Beliaev testified the following:
  - In his capacity of director, he mainly manages his laboratory. He is not an analyst and is not involved in any aspect of the day-to-day analysis of samples.
  - He was required to travel to Lausanne in order to attend the opening and the analysis of the B sample provided during the 2004 Summer Olympic Games in Athens by two Belarusian athletes, Mr Ivan Tsikhan and Mrs Iryna Yatchenko. The confirmatory analysis procedure took place between 23 and 27 July 2012.
  - It was the first time that he was witnessing such a procedure. In view of his inexperience and because he *“would not know what [he] was supposed to be looking for”*, he asked to be accompanied by his colleague, Mrs Sviatlana Pradun, who is *“the Belarus Laboratory’s leading specialist in gas chromatography”*. The administrative work to obtain all the necessary documents and authorisation to attend the confirmatory analysis was quite tedious and so was the trip to Switzerland, which required taking a) a train from Minsk to Moscow, b) the next day, a plane to Geneva and c) a train to Lausanne. At the end of the confirmatory analysis, he left Lausanne on 27 July 2012 to finally arrive in Minsk the following day.
  - On 29 July 2012, he was asked to travel back to Lausanne to attend the opening of the B sample provided by Mr Ivan Tsikhan during the Helsinki Championships. The confirmatory analysis was scheduled to take place on 31 July 2010 at 9:00 Swiss time. Because of complications arising from the travelling arrangements and in order to book a cheaper flight from Minsk, the BAF asked the Lausanne Laboratory to delay the

opening of the sample, but this request was denied. For costs reasons, the BAF instructed Mr Sergey Beliaev to travel alone, without Mrs Sviatlana Pradun.

- On 30 July 2012, he sent an email to Dr Martial Saugy, the Director of the Lausanne Laboratory, to inform him that his plane would land in Geneva on 31 July 2012 at 8:45 Swiss time. He requested the opening of Mr Ivan Tsikhan's B sample to be postponed from 9:00 to 10:00–10:30 Swiss time. Dr Martial Saugy acceded to Mr Beliaev's demand.

- In 31 July 2012, he left his house for the airport between 2:00 and 2:30 Belarus time.

*"Between 4am and 5am on 31 July 2012, I received a panicked telephone call from someone at the BAF, possibly Natalia Krek, who is an in-house lawyer there. She told me that, whilst in Lausanne, I would also be required to witness the opening and analysis of the B sample of [the Athlete]. While I did not raise any objections, I was not prepared for this at all. I had never met or even spoken to [the Athlete], I did not know what his sample was supposed to be positive for, I had no analytical report to work from and I did not have any Power of Attorney or any other document confirming that I was permitted to attend the analysis of his sample. The only information that I had about his case was what I had been told during the course of a telephone conversation that lasted no more than a couple of minutes because I had to rush off the call to catch my flight".*

- During the night of 30-31 July 2012, he could not be reached as he had switched his phone off until his trip to the airport.

46. At the hearing before the CAS, Mr Sergey Beliaev confirmed that the content of his statements filed on 14 August 2015 was true.

**e) *Witness statement of Dr Martial Saugy***

47. In a witness statement dated 27 April 2015 filed by WADA in support of its appeal, Dr Martial Saugy confirmed that, in the morning of 31 July 2012, he received Mr Dmitri Vorobyov's email stating that the Athlete would be represented by Mr Sergey Beliaev at the splitting of the B sample n°691793 and analysis of the First Bottle, (also referred to as the "B1 sample"). Dr Martial Saugy or his team did not receive any communication or indication that Mr Sergey Beliaev was not authorized to represent the Athlete.

48. At the hearing before the CAS, Dr Martial Saugy confirmed that the content of his statements filed on 27 April 2015 was true.

**II.8 The splitting of the Athlete's B sample n°691793 and the analysis of the B1 Sample**

49. According to the IAAF Notification, the Athlete's B sample n°691793 was to be split in two and the analysis of the First Bottle, the B1 Sample, was scheduled to take place "*on **Tuesday 31 July 2012** at 10:30hrs at the Lausanne Laboratory*". The opening and analysis of the Second Bottle (hereinafter "B2 Sample n°691793") was to be carried out on 2 August 2012.

50. The opening of the B sample n°691793 took place on 31 July 2012 at 11:20 Swiss time in the premises of the Lausanne Laboratory, in the presence of Mrs Valérie Haas, a local notary. She

recorded every step of the procedure in a public deed, the content of which can be summarised as follows:

- The following persons attended the opening of the B sample n°691793: Martial Saugy, Carine Schweizer Grundisch, Annie Ferrari Gyger, Sergey Beliaev, Frank Sporkert and Valérie Haas.
- The purpose of the meeting was to open two Berlinger bottles, which carried the numbers B 691785, respectively B 691793.
- In the presence of the above-mentioned persons, Mrs Carine Schweizer Grundisch unlocked and entered into a cold room, where she picked up two Berlinger bottles from a white container. One of the Berlinger bottles carried the number B 691785 and the other the number B 691793.
- The above-mentioned persons then returned in a room designated as the “local immunologie”, where Mrs Carine Schweizer Grundisch recorded on an official form (entitled “B-Sample Opening Procedure”) every single step of the procedure (hereinafter the “Form”).
- At every stage of the procedure, Mrs Carine Schweizer Grundisch would fill in the Form with a description of the corresponding action. She would record the information only once she received the prior approval of Mr Sergey Beliaev, who would each time answer “yes” to each question put to him.
- Mr Frank Sporkert tried to open manually the two Berlinger bottles without success. The bottles were sealed and did not carry particular marks.
- Mrs Annie Ferrari Gyger placed the two Berlinger bottles in a receptacle filled with warm water.
- Meanwhile, the following persons signed the attendance form, it being stipulated that they each personally completed the section related to them:
  - Mr Frank Sporkert, in his capacity of “*forensic toxicologist*”
  - Mr Sergey Beliaev, in his capacity of “*Athlete representative*”
  - Mrs Valérie Haas, in her capacity of notary.
- The following persons signed a document entitled “*B-Sample Opening Procedure*”, which certified that a) both Berlinger bottles were correctly stored, b) they were intact, correctly closed and sealed, c) the number of the bottles corresponded to the number of the doping control form, d) after sampling the prescribed amount, the B sample was sealed again:
  - Dr Martial Saugy, in his capacity of representative of the Lausanne Laboratory
  - Mrs Carine Schweizer Grundisch, in her capacity of representative of the Lausanne Laboratory
  - Mr Sergey Beliaev, in his capacity of “*Athlete and/ or other representative*”
  - Mr Frank Sporkert, in his capacity of witness.
- At 11:31 and at 11:34 Swiss time, Mrs Annie Ferrari Gyger shook the bottles to check whether their content had been fully defrosted, which was not the case.



- At 11:42 Swiss time, Mrs Carine Schweizer Grundisch checked again whether the content of the bottles had been fully defrosted, which was the case.
  - Mrs Annie Ferrari Gyger broke the caps of the bottles. Then, she printed seven labels carrying the numbers “B2012-06534-1”, “B2012-06535-1”, “06535122 CBB”, “0653121 CFB”, “0653121 CBB”, “0653421 CFB” and “06534121 CBB” and handed a package containing nine tubes “Falcon” to Mr Sergey Beliaev, who was asked to pick two tubes randomly.
  - Mrs Annie Ferrari Gyger stuck the labels “B2012-06534-1” and “B2012-06535-1” on the respective tubes picked by Mr Sergey Beliaev. She poured 15 millilitres of the liquid contained in the Berlinger bottle N°691793 into the tube with the label “B2012-06535-1” and closed it with a blue lid. The Berlinger bottle N°691793 was closed with a green lid, selected by Mr Sergey Beliaev. The lid number was B 691793.
  - Mr Sergey Beliaev, Mr Frank Sporkert and Mrs Valérie Haas accompanied Mrs Carine Schweizer Grundisch to the cold room, where she put the Berlinger bottles in the container they were originally placed.
  - The opening procedure ended at 11:50 Swiss time.
51. On the attendance form, it was specified that Mr Sergey Beliaev was present at the opening as well as at the analysis of the B sample n°691793.
52. The doping control report issued by the Lausanne Laboratory on 31 July 2012 confirmed the presence of Methandienone metabolite and *“traces of Oxandrolone metabolite at the limit of identification”* in the Athlete’s B1 sample n°691793. According to the Lausanne Laboratory, Methandienone and Oxandrolone belonged to the exogenous Anabolic Androgenic Steroids (category S1.a of the WADA prohibited list).
53. It is undisputed that a) a GC-MS-MS confirmation procedure relating to Oxandrolone metabolite in respect of the B1 sample was conducted on 3 August 2012 and b) the Athlete and/or his representative received no notice of it either before or after 3 August 2012.
54. According to the conclusion contained in the documentation package of the B1 Sample dated 3 September 2012, *“Prohibited Substances Methandienone long-term metabolite (...) and oxandrolone long-term metabolite (...) were found in agreement with WADA Technical documents about identification criteria”*.
- a) *Witness statement of Mr Sergey Beliaev***
- aa) *Mr Sergey Beliaev’s witness statement of 14 August 2015*
55. In his witness statement dated 14 August 2015, and filed in support of the Athlete’s answer, Mr Sergey Beliaev confirmed the following:
- When he arrived to the Lausanne Laboratory on the 31 July 2012, he signed the attendance form in his capacity of *“Athlete representative”* as his *“role as regards Mr Tsikhan was clear”*.

- *“Conversely, it dawned on [him] at that moment that Ms Krek had not told [him] what [his] role was supposed to be as regards the analysis of [the Athlete’s] sample. She had simply asked [him] to attend the analysis but had not specified whether [he] would be attending as an independent observer or as a representative of the BAF or the athlete. [He] did not think it possible that [he] could act as [the Athlete’s] representative since [he] did not have any Power of Attorney authorising [him] to act on his behalf. (...) [He] specifically told Mr Saugy that [he] did not have any authorisation for [the Athlete]. [He does] not recall exactly what Mr Saugy said in response, but [he recalls] that he was not concerned”.*
- He does not remember much about the splitting of the B sample n°691793 and analysis of the B1 Sample as he had not slept in the previous 30 hours. *“[He] took comfort from the Lausanne Laboratory’s accreditations. Therefore, [he] felt [he] had no reason not to trust the work that they were doing. [He recalls] that [he] left the analytical process on several occasions throughout the day to use the restroom and to visit the Lausanne Laboratory’s impressive library, but [he is] unable to say now which parts of the analysis [he] missed”.*
- *“[He recalls] the laboratory discussed the process of Ivan Tsikhan’s sample analysis in some detail throughout the day (as it also took place that same day), but that they did not do the same in relation to [the Athlete’s] sample. [He does] not recall if [he] was told the result of the Athlete’s B-1 analysis that day”.*
- He left the Lausanne Laboratory at around 21:30 Swiss Time on 31 July 2012 and was not available by telephone during that day.
- On 1 August 2012, he called Mrs Natalia Vadimovna Krek to give her some information about Mr Ivan Tsikhan’s case. On that occasion, he was told that the Athlete wanted to talk to him, which he eventually did that day, via Skype at 21:00 Swiss time. It was his first contact with the Athlete.
- *“After having that conversation, [he] understood why [the Athlete] would be so concerned about the analytical process - especially in light of his experiences with the Beijing Anti-Doping Laboratory. [He recalls] that [the Athlete] was very surprised when [he] informed him that [he] had observed only elements of the analytical process. (...) [He believes] that if [he] had been able to speak to [the Athlete] before the opening and analysis had taken place, [he] would have been more attentive to the process carried out in the Lausanne Laboratory, starting with the inspection of his B sample bottle, through to the analysis of his sample. Moreover, [he] would have ensured that [he] remained with the vials of his sample throughout the analysis. (...) However, even if [he] had spoken with [the Athlete] before the analysis, [he maintains] that Ms Pradun or another analyst with her kind of experience would have been much better placed than [him] to witness the opening and analysis of the sample since this is not [his] field of expertise. Frankly, [he] would not have known whether the Lausanne Laboratory was doing what it was supposed to be doing since [he is] not familiar with the analytical process”.*

ab) *Mr Sergey Beliaev’s testimony at the hearing held before the CAS on 20.01.2016*

56. At the hearing before the CAS, Mr Sergey Beliaev confirmed the following:

- The content of his statements filed on 14 August 2015 was true.
- In Belarussia, it can take several days to obtain a valid and notarised power of attorney.

- He remembered having informed Dr Martial Saugy of the fact that he did not have a valid power of attorney for the Athlete. Nevertheless, he was not sure of Dr Martial Saugy's precise answer.
- In his witness statement of 14 August 2015, when he declared that "*Frankly, [he] would not have known whether the Lausanne Laboratory was doing what it was supposed to be doing*", he meant that he was not familiar with procedural aspects developed in other laboratories.
- When he first talked to the Athlete, he knew the results of the B1 Sample. He confirmed to the latter the presence of Methandienone metabolite but the Athlete kept asking him questions about Oxandrolone, which he was unable to answer.
- Upon his arrival at the Lausanne Laboratory, when he was presented with the attendance form, he did not know what he was exactly supposed to do with it, as there is no similar form in his laboratory. Under these circumstances, he mechanically signed this document in his capacity of "*Athlete representative*".
- The National Anti-Doping Laboratory of Belarus performs anti-doping analyses but has different forms and procedures from those of the Lausanne Laboratory.

**b) *Testimony of Dr Martial Saugy***

57. At the hearing before the CAS, Dr Martial Saugy made the following statements:

- He personally knows Mr Sergey Beliaev and has a lot of respect for him. The National Anti-Doping Laboratory of Belarus enjoys a good reputation of reliability.
- He does not remember that Mr Sergey Beliaev told him that he did not have the authorisation to represent the Athlete. If such were the case, he would have suggested to Mr Sergey Beliaev to leave a written comment in this regard.
- He remembers that Mr Sergey Beliaev was present at the crucial stages of the B sample n°691793 splitting and of the B1 Sample analysis. Mr Sergey Beliaev knew exactly what to look for.
- He has a precise recollection of the visit paid by Mr Sergey Beliaev to the library of the Lausanne Laboratory, as the latter wanted to read a very specific document, absolutely unintelligible for someone without a strong scientific background.
- As the director of a laboratory, Mr Sergey Beliaev could not seriously allege that "*Frankly, [he] would not have known whether the Lausanne Laboratory was doing what it was supposed to be doing*".
- Mr Sergey Beliaev stayed at the Lausanne Laboratory until 21:20 Swiss time. According to Dr Martial Saugy, when a witness stays that long at the laboratory, it is to obtain the results of the analysis conducted on the B sample.
- He does not remember having told to Mr Sergey Beliaev that further tests would be performed on the B1 Sample on 3 August 2012.

- The seal of the B sample n°691793 was broken in the presence of several witnesses and so was its splitting. The new B1 and B2 Samples were poured into Berlinger bottles and sealed with the same care as the A and B samples n°691793.
- He was not struck by the fact that Mr Sergey Beliaev only had a formal authorisation to represent Mr Ivan Tsikhan. Considering that Mr Huw Roberts, IAAF's legal counsel, forwarded him the mail of 30 July 2012 of Mr Dimitri Vorobyov, the BAF's International Secretary, he felt that he had no reason the doubt of Mr Sergey Beliaev's authorisation to represent the Athlete.

## II.9 The analysis of the Athlete's B2 sample n°691793

58. On 31 July 2012, the Athlete wrote the following email to Dr Gabriel Dollé:

*"(...) Since it had been seven years ago I was tested at World Championships in 2005 in Helsinki and this test was negative, I would like to ask you to give me one month to investigate the possibility of positive result of the same sample today and provide some explanations.*

*Also I would like to ask if you could provide me with documentation packages of A and B samples results".*

59. In an email sent on 1 August 2012 to the BAF General Secretary, Dr Gabriel Dollé acknowledged receipt of the Athlete's message and explained that the requested extension of the deadline could not be granted in light of the Athlete's participation to the Olympic Games in London during the next week. Dr Gabriel Dollé confirmed that, in the absence of an explanation for the adverse analytical finding provided within the time limit set in the IAAF Notification, the Athlete was to be provisionally suspended with immediate effect from all competitions in Athletics pending resolution of his case before the relevant hearing bodies.

60. The same day, Dr Dollé forwarded to the BAF General Secretary a copy of the doping control report issued on 31 July 2012 by the Lausanne Laboratory. He confirmed that a) he would send the requested "documentation packages of the A and B sample results (...) as soon as they are received from the Laboratory" and b) the analysis of the B2 samples n°691793 would take place on 2 August 2012, in the presence of the Athlete's representative, Mr Sergey Beliaev.

61. On 2 August 2012, the Athlete wrote the following email to Dr Gabriel Dollé:

*"I am writing to tell you that I would like to choose my representative for the second bottle of my B sample analysis. I want to indicate that during opening and splitting B691793 sample and analysis of the first bottle I did not have chosen representative. Because I had only two hours to make decision about my test, the only representative I was told that I could have was the one, which was the representative of another athlete, whose sample was tested the same date. But I don't know this man before and when I call him before the test on 31 October, he did not answer his phone. Finally I spoke to him for the first time tonight at 10 pm. I am not happy with this situation and I would like to ask you URGENTLY to stop the test of the second bottle until I can have my own representative to go to the test for me.*

*I ask you again to please send me documents packages of A and B sample analysis so I can understand this situation".*

62. On 2 August 2012, Dr Gabriel Dollé, presumably having realised that the Athlete was not due to compete at the Games confirmed to the Athlete that the analysis of the B2 sample n°691793 had been stopped and required him urgently to communicate the name of his representative for the second confirmatory procedure. Dr Gabriel Dollé also informed the Athlete that the A and B samples documentation package would be provided to him as soon as available.
63. In his witness statement dated 14 August 2015, Mr Sergey Beliaev confirmed that when he returned to the Lausanne Laboratory on 2 August 2012, he was told that the analysis of the B2 samples n°691793 had been postponed to a later date.
64. On 4 August 2012, the Athlete wrote the following email to Dr Gabriel Dollé:
- “Thank you for stopping testing of second B bottle. After problem with Beijing laboratory I sure testing laboratory don’t do correct things and this is my life!! I try to find my representative now to explain me everything. I will mail you urgently with information.*
- About first B bottle test, no one give me official result. I ask you please to send me official result of test urgently”.*
65. On 5 August 2012, Dr Gabriel Dollé forwarded to the Athlete the results of the B1 Sample.
66. On 14 August 2012, Mrs Susanna Verdesca, from the IAAF Medical and Anti-Doping Department, informed the Athlete that the analysis of the B2 sample n°691793 would take place at the Lausanne Laboratory on 28 August 2012. The Athlete was invited to confirm in writing by 24 August 2012 whether he would attend the analysis in person and/or whether he would be represented and, if yes, by whom.
67. On 23 August 2012, the Athlete’s legal representative wrote to Dr Gabriel Dollé to stress the following aspects:
- *“[The Athlete’s] B sample was already opened on 31 July 2012 in [his] absence or [in the absence of] any representative of his choosing. [This] violation of [the Athlete’s] essential right is not capable of being remedied and that the results of any B sample test now fall to be disregarded (see, for instance, paragraphs 9.8 and 9.9 of CAS 2010/A/2161 Wen Tong v. IJF). There is therefore no useful purpose in analysing the remainder of the B sample”.*
  - *“If it is the intention of the IAAF to nevertheless go ahead and test the remainder of the B sample, then [the Athlete] wishes to have a representative of his choosing attend the retest. The attendance of [the Athlete’s] representative at any retest is without prejudice to [the Athlete’s] submission that the violation of his right to witness the opening and analysis of the B sample has been irreversibly breached and that any of the B sample test results are now incapable of constituting evidence of an anti-doping rule violation”.*
  - The Athlete’s representative to attend the confirmatory analysis was going to be Mr Paul Scott, from the United States of America (USA), who was only available on 3, 4 or 6 September 2012.
  - In spite of the Athlete’s requests of 31 July, 2 and 4 August 2012, he still had not received a copy of the documentation packages in relation to the analysis of the A and B samples.

68. On 24 August 2012, Dr Gabriel Dollé acknowledged receipt of the letter of the Athlete's legal representative of 23 August 2012 and confirmed that the analysis of the B2 sample n°691793, initially scheduled on 28 August 2012, was cancelled.
69. Due to some miscommunication, the Athlete made arrangements for Mr Paul Scott to travel to Lausanne on 4 September 2015. However, the analysis of the B2 sample n°691793 scheduled for that day had been cancelled, IAAF not realizing that the Athlete's representative was on its way to attend the confirmatory analysis.
70. Eventually, the analysis of the B2 sample n°691793 took place on 4 October 2012 and the Athlete was represented by Mr Paul Scott, who travelled from the USA.
71. In his witness statement dated 27 April 2015, Dr Martial Saugy confirmed the following:  
“(…)  
11. *The B-2 Sample analysis took place on 4 October 2012. This time, [the Athlete] was represented by Mr. Paul Scott.*  
12. *According to our records, Mr. Paul Scott arrived at the laboratory at 9h10 and left at 16h50 (...).*  
13. *Mr. Scott had to leave the laboratory before the end of the B-2 analysis. I believe that he mentioned that he had to catch a plane back to the United States.*  
14. *The injections for the LC-MS-MS started at around 16h35. The results of the LC-MS-MS were produced at 17:04 (...).*  
15. *The first injection for the GC-MS-MS on 4 October 2012 occurred at 16h55 (...).*  
16. *After Mr. Scott had left the laboratory and during the GC-MS-MS analysis, technical difficulties were encountered relating to the sensitivity of the equipment. Whereas the GC-MS-MS signals showed the presence of the two metabolites, the sensitivity issues did not allow the identification criteria to be met.*  
17. *It was therefore decided to repeat the GC-MS-MS analysis after the issues relating to the sensitivity of the equipment had been resolved.*  
18. *The vials remained in the GC-MS-MS equipment until 16:30 on 5 October 2012. The vials were then placed in a fridge with a temperature of 4 degrees Celsius from 5 October until 8 October 2012 in order to prevent any possibility of degradation (...). The vials were also capped to prevent any possibility of contamination.*  
19. *The GC-MS-MS equipment is located in the EPCR-01-130 area. This area of the laboratory is restricted to authorized personnel and accredited persons only (...).*  
20. *The GC-MS-MS analysis was repeated on 8 October 2012. The results clearly identify the metabolites of oxandrolone and methandienone”.*
72. In a witness statement dated 15 August 2015, and filed in support of the Athlete's answer, Mr Paul Scott confirmed that “[during] the course of the day, [he] witnessed the preparation of [the Athlete's] B-2 sample aliquots for GC-MS-MS analysis. As it is over two and a half years since then, over which time [he has] witnessed other B sample analyses, [he does] not recall exactly when [he] left the Lausanne Laboratory. However, to the best of [his] recollection, [he] left the Lausanne Laboratory after the aliquots were placed onto

*the GC-MS-MS instrument, ready for injection. This would ordinarily have been the last time that the vials were handled by laboratory staff prior to the conclusion of that GC-MS-MS confirmation procedure”.*

73. The doping control report issued by the Lausanne Laboratory on 8 October 2012 confirmed the presence of Methandienone and of Oxandrolone metabolites in the Athlete’s B2 sample n°691793. This document was forwarded the next day by Dr Gabriel Dollé to the BAF General Secretary.
74. It is undisputed that the Athlete and/or his representative received no notice of the fact that the GC-MS-MS analysis would be repeated on 8 October 2012.

#### **II.10 The Disciplinary Proceedings before the BAF and the Athlete’s nomination as the BAF President**

75. The unfolding of the proceedings before the BAF Disciplinary Commission did not give rise to any particular comments or criticism on the part of the Parties. However the Athlete pointed out that, contrary to its usual practice, the IAAF did not provide the BAF Disciplinary Commission with its recommendation as to what sanction to impose on the Athlete, in spite of the fact that it had been formally invited to do so. According to the Athlete, this omission delayed significantly the proceedings before the first instance.
76. On 23 September 2014, the BAF Disciplinary Commission rendered the following one-page decision:

“(…)

*The Disciplinary Commission of the Belarus Athletics Federation has considered [the Athlete’s] case and makes the following decision:*

1. *[The Athlete] was not given opportunity to attend the opening and testing of his B sample on 31 July 2012 and he was not given opportunity to be represented the opening and testing of his B sample by a representative of his choosing.*
2. *The Disciplinary Commission notes that the Court of Arbitration for Sport when considered several cases, where the seal of a B sample was broken in the absence of an athlete or his representative, made decisions that the results of the B sample must be disregarded.*
3. *By the reason that without any B sample results, no anti-doping rule violation can be established, the Disciplinary Commission finds that no anti-doping rule violation in this case has been established. In view of this result, the Disciplinary Commission does not need to examine [the Athlete’s] other complaints.*
4. *The provisional suspension which was imposed on [the Athlete] by the IAAF on 15 August 2012 is therefore lifted immediately.*

*The Disciplinary commission notes that the Belarus Athletics Federation specifically sought the recommendation of the IAAF in relation to this case in August 2013, but the IAAF has not given its recommendation. The Disciplinary Commission does not wish to make any decision with which the IAAF disagrees and hopes that the IAAF will agree that no anti-doping rule violation can be established in this case”.*

77. On 23 September 2014, a copy of the decision issued by the BAF Disciplinary Commission (hereinafter the “Appealed Decision”) was emailed to Dr Gabriel Dollé. The latter apparently failed to acknowledge receipt of this document and/or to take the appropriate follow-up action.
78. On 25 September 2014, the Athlete was nominated President of the BAF.
79. On 28 January 2015, Mr Thomas Capdevielle wrote to the BAF stating that the IAAF was not aware of any decision in the case of the Athlete.
80. On 5 February 2015, the BAF responded to Mr Thomas Capdevielle by resending the email of 23 September 2014.
81. On 18 February 2015, WADA received the complete case file relating to the “Appealed Decision”.

### III. SUMMARY OF THE PROCEEDINGS BEFORE THE CAS

82. On 11 March 2015, WADA filed its statement of appeal with the CAS in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (hereinafter the “Code”).
83. On 13 March 2015, the CAS Court Office acknowledged receipt of WADA’s statement of appeal, of its payment of the CAS Court Office fee and took note of its nomination of Mr Massimo Coccia as arbitrator. It noted that the Appellant chose English as the language of the arbitration. In this respect, it informed the Respondents that unless they objected within three days, the procedure would be conducted in English. The CAS Court Office also invited the Respondents to jointly nominate an arbitrator from the list of CAS arbitrators within ten days, failing which the President of the CAS Appeals Arbitration Division, or her Deputy, would proceed with the appointment *in lieu* of the Respondents. Finally, the CAS Court Office noted that WADA applied for an extension of its deadline to file its appeal brief of 30 days and invited the Respondents to state by 18 March 2015 whether they agreed with WADA’s request, it being specified that their silence would be considered as an agreement.
84. On 18 March 2015, the Athlete informed the CAS Court Office that he did not object to WADA’s request for a 30-day extension of its deadline to file its appeal brief.
85. On 19 March 2015, given the Athlete’s letter of 18 March 2015 and the fact that the BAF remained silent, the CAS Court Office confirmed that WADA’s deadline to file its appeal brief was extended by 30 days.
86. On 27 March 2015, Morgan Sports Law LLP informed the CAS Court Office that the “Respondents nominate Jeffrey Benz (United States)” as arbitrator.
87. On 27 April 2015, WADA filed its appeal brief, in accordance with Article R51 of the Code, containing a statement of the facts and legal arguments accompanied by supporting documents.



88. On 28 April 2015, the CAS Court Office informed the Parties that the Panel to hear the case had been constituted as follows: His Honour James Robert Reid QC, President of the Panel, Prof Massimo Coccia and Mr Jeffrey G. Benz, arbitrators.
89. On 3 July 2015, the Respondents jointly requested a) this procedure to be bifurcated so that the B Sample Issue be determined on a preliminary basis, b) the right to file an initial answer limited to the B Sample Issue, c) the deadlines for filing briefs in relation to the remaining issues to be suspended pending a decision from the Panel on the B Sample Issue and d) an extension of 30 days to file their respective answers limited to the B Sample Issue.
90. On 6 July 2015 and in light of WADA's agreement, the CAS Court Office confirmed to the Respondents that all of their requests of 3 July 2015 were granted.
91. With WADA's agreement, the Respondents were eventually authorised to file their respective answers by 19 August 2015.
92. On 21 August 2015, the CAS Court Office acknowledged receipt of the Athlete's answer limited to the B Sample Issue, filed on 19 August 2015. It noted that the BAF did not file its answer within the prescribed time limit. In addition, the CAS Court Office invited WADA to file by 28 August 2015 its comments on a) the Athlete's objection to the admissibility of the appeal and b) his request for disclosure. Finally, the CAS Court Office invited the Parties whether their preference was for a hearing to be held on the B Sample Issue.
93. On 25 August 2015, WADA applied for an extension of the deadline to respond with respect to the issue of admissibility and the request for disclosure by 14 September 2015. In view of the Athlete's agreement, WADA's request was granted.
94. On 25, respectively on 28 August 2015, WADA and the Athlete confirmed to the CAS Court Office their preference for a hearing to be held on the B Sample Issue.
95. On 14 September 2015, WADA provided its comments with respect to the issue of admissibility and the request for disclosure raised by the Athlete in his answer.
96. On 7 October 2015 and on behalf of the Panel, the CAS Court Office informed the Parties of the following:

“(…)

  - *In accordance with its bifurcation decision (accepting the Respondent's request), the Panel shall decide only on the issue of the athlete's procedural rights with respect to the opening and analysis of his B sample. The Panel shall therefore exclude at this stage any discussion concerning the scientific aspects of the analyses and the stains of the Lausanne laboratory at the time, thus excluding any factual or expert evidence (or portion thereof) dealing with the latter issues.*
  - *The issue of the admissibility of the appeal shall be addressed at the hearing of 21 January 2015, together with the B-sample issues as explained above.*

- *The Second Respondent's request for disclosure is denied at this stage as far as the B-sample issue is concerned, without prejudice to the Second Respondent's right to renew it if necessary at a later stage in the proceedings.*
  - *The hearing of 21 January 2016 is confirmed. The Panel suggests that the hearing be extended to two days and that it also be held on 20 January 2016. (...)*
97. On 14 October 2015, both WADA and the Athlete provided the CAS Court Office with the name of the persons who would attend the hearing.
  98. On 16 October 2015, WADA sent to the CAS Court Office comments on the Athlete's allegations contained in his submission, according to which it sought to manipulate the BAF General Secretary or to persuade her *"to give evidence to the effect that [the Athlete] agreed to having Mr Beliaev as his representative"*. WADA supported its position with various exhibits.
  99. On 20 October 2015, the CAS Court Office informed the Parties that the Panel decided to admit WADA's letter of 16 October 2015 in the file *"as it only answers to the allegations of improper conduct vis-à-vis a witness that were put forward by the [Athlete]"*.
  100. On 21 October 2015, WADA signed and returned the Order of Procedure in this appeal.
  101. Between 21 October and 24 November 2015, the Parties and the CAS Panel dealt with several procedural issues, relating to the hearing.
  102. On 14 January 2016, the Athlete filed a second witness statement of the BAF General Secretary, which was eventually admitted in the file.
  103. On 18 January 2016, WADA commented on the Athlete's latest evidence and supported its position with a copy of an email exchange, which occurred in Spring 2015 between the BAF General Secretary and Mr Thomas Capdevielle. This submission was also admitted in the file.
  104. On 19 January 2016, the Athlete signed and returned the Order of Procedure in this appeal. On that occasion, he insisted on the fact that he objected to the admissibility of the appeal.
  105. The hearing was held on 20 and 21 January 2016 in Lausanne Switzerland. The Panel members were present and assisted, on the first day, by Mr Brent J. Nowicki, Counsel to the CAS, and, on the second day, by Mr William Sternheimer, Deputy Secretary General.
  106. The following persons attended the hearing:
    - WADA was represented by its legal counsel, Mr Ross Wenzel and Mr Nicolas Zbinden.
    - The BAF was not represented by anyone.
    - The Athlete was present and supported by his brother, Mr Oleg Devyatovskiy, and was represented by his legal counsel, Mr Howard L. Jacobs, Mr Mike Morgan, Mr Richard Martin and Mrs Donna Bartley. Mr Maxim Zhibankov, attended as interpreter.
  107. At the outset of the hearing, the Parties raised no objection as to the composition of the Panel.

108. The Panel heard oral evidence from the following persons:
- The Athlete;
  - the BAF General Secretary;
  - Mr Sergey Beliaev;
  - Dr Martial Saugy;
  - Mrs Natalia Vadimovna Krek;
  - Mr Dimitri Vorobyov.
109. The first 3 witnesses were present, whereas the others were heard via teleconference, with the agreement of the President of the Panel (see Articles R44.2 para. 4 and R57 para. 3 of the Code of Sports-related Arbitration - the “Code”).
110. Each witness was invited by the President of the Panel to tell the truth subject to the consequences provided by the law and was examined and cross-examined by the Parties as well as being questioned by the Panel.
111. After the Parties’ final arguments, the Panel closed the hearing, and announced that its award would be rendered in due course. At the conclusion of the hearing, the Parties confirmed that their right to be heard and to be treated equally in the present proceedings before the Panel had been fully respected.

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

##### **A. The Appeal**

112. WADA submitted the following requests for relief:

*“WADA hereby respectfully requests CAS to rule that:*

1. *The appeal of WADA is admissible.*
2. *The decision rendered by the Disciplinary Commission of the BAF on 23 September 2014 in the matter of [the Athlete] is set aside.*
3. *[The Athlete] is sanctioned with a period of ineligibility of no less than eight years starting on the date on which the CAS award enters into force. Any period of period (sic) of provisional suspension imposed on, or voluntarily accepted by [the Athlete] before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.*
4. *All competitive results obtained by [the Athlete] from and including 8 August 2005 are disqualified, with all resulting consequences (including forfeiture of any medals, points and prizes).*
5. *WADA is granted an award for costs”.*

113. WADA filed its appeal brief before the Panel decided to bifurcate the proceedings so that the B Sample Issue be determined on a preliminary basis. In summary, WADA's submissions relating to this issue were as follows:

- The appeal is admissible.
- The Panel has to determine a) whether there was a breach of the Athlete's right, b) if yes, whether the breach was fundamental and c) if yes, whether it disposes of WADA's entire appeal. WADA submitted that the CAS could only answer these questions in the negative.

**a) *The Athlete's rights were respected***

- The IAAF was notified of the Athlete's adverse analytical findings on 26 July 2012, during the 2012 Summer Olympic Games in London, which took place between 25 July and 12 August 2012. Whereas this is always a busy period for any International Federation, this was particularly the case for the Anti-Doping and Medical Department of the IAAF, which had to deal with a large number of adverse analytical findings, which had resulted from re-testing of samples from the Helsinki Championships and the 2004 Summer Olympic Games in Athens.
- The IAAF Notification was made not only in a context of urgency but also in accordance with the applicable regulations. As a matter of fact, the Athlete was notified of his right to request the B sample analysis, his right to attend and/or be represented at the same and all relevant details (date, time, place, *etc.*).
- The reasonableness of the deadline set in the IAAF Notification must be judged from the angle of the person who is making it: Dr Gabriel Dollé did not know that the Athlete was not going to compete in the London Olympic Games. It must be observed that the Athlete's A sample n°691793 was found to be positive on 26 July 2012; *i.e.* only a few days before the Olympic Hammer Throw event. Under these circumstances, it could not be envisaged that the Athlete would take part in an Olympic event, without first being cleared by the confirmatory analysis. Actually, the short time limit was in the Athlete's benefit as it gave him the opportunity to be heard and hence to avoid a suspension on the eve of his competition.
- The Athlete expressed his dissatisfaction with the developments of the situation but he agreed with the BAF General Secretary's proposal that he be represented by Mr Sergey Beliaev at the splitting of the B sample n°691793 and analysis of the B1 Sample.
- The deadlines set in the IAAF Notification were certainly short, but the Athlete managed to comply with them and never proposed alternative dates.
- The opening and the commencement of the analysis of the B2 Sample n°691793 took place on 4 October 2012, in the presence of the Athlete's representative, Mr Paul Scott, who decided to leave before the beginning of the GC-MS-MS confirmation procedure. Hence, the fact that this procedure did not occur in the presence of Mr Paul Scott cannot constitute a breach of the Athlete's right. There is no obligation in the rules to re-notify the Athlete of further tests, when his representative has freely decided to leave the confirmatory analysis. Had Mr Paul Scott stayed, he would have known that technical

difficulties arose during the GC-MS-MS analysis of the B2 Sample n°691793 and that the Lausanne Laboratory decided to repeat the GC-MS-MS analysis.

**b) *If there had been a breach of the Athlete's right, it was not fundamental***

- The Athlete's right were preserved by the fact that the splitting of the B-Sample n°691793 occurred not only in the presence of the Athlete's representative but also of two independent witnesses. *"The splitting of the B-Sample has been carefully documented by Ms. Valérie Haas and Mr. Beliaev agreed explicitly that each step of this process was conducted properly"*.
- The Athlete never raised any objections before the splitting of the B sample n°691793 and the analysis of the First Bottle. He agreed to be represented by Mr Sergey Beliaev and knew that the latter was going to attend on his behalf the splitting of the B sample n°691793 and analysis of the First Bottle. Under these circumstances and once the adverse analytical findings were confirmed, the Athlete could not come back and claim that he would have chosen another expert. He should have raised his objection *ab initio*.
- *"In short, the Athlete's B-Sample Procedural Argument is without merit. There is no departure from the 2012 IAAF Rules or the 2012 ISL, still less a departure which might reasonably have caused the anti-doping rule violation"*.
- The CAS case law on which the Athlete relies on is irrelevant.

**c) *If there had been a fundamental breach of the Athlete's right, the Athlete must still be sanctioned on the ground of a "Use violation" under the terms of Rule 31.2 (b) of the applicable IAAF ADR***

- In light of the evidence adduced by WADA, the Panel could be comfortably satisfied that the Athlete used prohibited substance and the hearing should therefore proceed to a second stage at which the Athlete could challenge that evidence and after which the Panel could determine whether it was comfortably satisfied that the Athlete had committed a "Use violation" and (if satisfied) sanction the latter accordingly.

**B. The Answers**

**a) *The BAF***

114. The BAF failed to submit an answer either within the given time limit or subsequent to the expiry of it. It also did not attend the hearing, although its President, being the other Respondent, was present in his personal capacity.

**b) *The Athlete***

115. The Athlete submitted the following requests for relief:

*"[The Athlete] respectfully requests the Panel to:*

(a) dismiss WADA's appeal.

(b) order WADA to

(i) reimburse [the Athlete's] legal costs;

(ii) bear the costs of the arbitration.

[The Athlete] respectfully requests the right to file separate costs submissions on completion of the appeal".

116. The Athlete's submissions, in essence, may be summarized as follows:

- The appeal of WADA was not filed in a timely manner and therefore CAS has no jurisdiction over the appeal and the appeal was not admissible.
- *"B samples are and always have been a critical element of the doping control process. (...) The requirement that the athlete retains absolute control of his sample until the A and B bottles are sealed by him is a fundamental procedural safeguard". "Those safeguards are automatically undone the moment the sample is unsealed in the absence of the athlete or his chosen representative. It is precisely for that reason that an athlete's A sample has no evidentiary value unless and until a valid B sample analysis confirms the results of the A sample".*
- *"The reason that the A sample does not carry the same significance as the B sample is because the A sample is always opened and analysed in the absence of the athlete. (...) If the A sample indicates the presence of a prohibited substance, the athlete has the right (which must be permitted to exercise) to attend the opening and analysis of the B sample. (...) Assuming the athlete exercises his right to attend the analysis of the B sample, he should, in theory, have a total control of his unsealed B sample from the time he passes the sample through to the completion of the sample analysis. (...) the validity of the B sample analysis depends on it".*
- A negative or invalid B sample invalidates the entire analysis. This is confirmed by every version of the WADA Code as well as by the applicable IAAF Anti-doping Rules (hereinafter IAAF ADR) since 2004; i.e. when the IAAF ADR incorporated WADA's International Standard for Laboratories (ISL).
- The importance of the B sample has been recognised by the world sports community as well as by the CAS.
- In view of the very short time frame between the IAAF Notification and the confirmatory analysis carried out on 31 July 2012, the Athlete was in fact denied any opportunity to exercise his right to attend or to be represented at the opening and splitting of his B sample n°691793 and analysis of his First Bottle.
- WADA cannot reasonably claim that the Athlete could have proposed alternative dates as a) a notification *"mandates a time and a place for the analysis"* and b) the Athlete received the IAAF Notification only after the splitting of the B sample n°691793 and analysis of the First Bottle had begun.
- The Athlete was not properly notified. According to the Applicable rules, the IAAF Notification should have been provided a) to the Athlete and b) in writing. The Athlete did not receive any written notification until the afternoon of 31 July 2012, by which time

the splitting of the B sample n°691793 and analysis of the First Bottle had already started. In the absence of a written notification, the Athlete was not in the position to make an informed decision. In particular, he did not know what prohibited substance had been detected in his A sample n°691793, which would have been a decisive information when choosing a representative. The IAAF Notification was defective as it gave no indication that the Athlete could reschedule the splitting of the B sample n°691793 and analysis of the First Bottle and that the Lausanne Laboratory “*was not properly accredited to conduct GC-MS-MS confirmation procedures*”.

- The Athlete did not agree at any point to be represented by Mr Sergey Beliaev:
- The B2 Sample n°691793 analysis cannot remedy the failure relating to the B1 Sample analysis.
- The analysis of the B2 Sample n°691793 conducted in the presence of Mr Paul Scott was negative. This analysis conducted on 4 October 2012 did not confirm the findings of the A Sample n°691793 retest or the analysis of the B1 Sample. As a matter of fact, the “*Lausanne Laboratory has based its results for the B-2 Sample on a re-analysis of the B-2 Sample that was conducted on 8 October, in the absence of [the Athlete] or any of his representatives. (...) Remarkably, the IAAF made no attempt at all to inform [the Athlete] that a re-analysis would be taking place and, therefore, [the Athlete] was not given any opportunity to attend such re-analysis. [The Athlete] did not know that a re-analysis had taken place until he received the Documentation Package for the B-2 Analysis many weeks later*”.
- There is no other circumstantial evidence that should lead the Panel to be comfortably satisfied that the Athlete had doped. In other words, WADA cannot resurrect its failure to establish the presence of a prohibited substance in the Athlete’s sample as a “Use case”, sanctioned under Rule 31.2 (b) of the applicable IAAF ADR.

## V. JURISDICTION

117. The jurisdiction of CAS derives from Rule 42.3 of the 2015 IAAF ADR and Article R47 of the Code.
118. It follows that the CAS has jurisdiction to decide on the present dispute.
119. Under Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law.

## VI. ADMISSIBILITY

120. The 2015 IAAF ADR provide so far as material as follows:

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

*The following is a non-exhaustive list of decisions regarding anti-doping rule violations and Consequences that may be appealed under these Rules: (...) a decision that no anti-doping rule violation was committed (...).*

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

*In cases arising from an International Competition or involving International-Level Athletes or their Athlete Support Personnel, the first instance decision of the relevant body of the Member shall not be subject to further review at national level and shall be appealed exclusively to CAS in accordance with the provisions set out below.*

### 42.5 Parties Entitled to Appeal

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

### 42.15 – 16 Time Limits for Filing Appeals to CAS

*15. Unless stated otherwise in these Rules (or the Doping Review Board determines otherwise in cases where the IAAF is the prospective appellant), the appellant shall have forty-five (45) days in which to file his statement of appeal with CAS, such period starting from the day after the date of receipt of the decision to be appealed (or where the IAAF is the prospective appellant, from the day after the date of receipt of both the decision to be appealed and the complete file relating to the decision, in English or French) or from the day after the last day on which the decision could have been appealed to the national level appeal body in accordance with Rule 42.8(b). Within fifteen days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within thirty days of receipt of the appeal brief, the respondent shall file his answer with CAS.*

*16. The filing deadline for an appeal to CAS filed by WADA shall be the later of (a) twenty-one days after the last day on which any other party entitled to appeal in the case could have appealed; or (b) twenty-one days after WADA's receipt of the complete file relating to the decision.*

121. The Athlete underwent an in-competition doping control on 8 August 2005, while competing at the 2005 IAAF World Championships in Athletics held in Helsinki, Finland. On 23 September 2014, the BAF Disciplinary Commission decided to acquit the Athlete. It appears that the requirements of Rules 42.2 and 42.3 of the 2015 IAAF ADR are met.
122. It is undisputed that WADA received the complete file on 18 February 2015 and lodged its statement of appeal with the CAS 21 days later, *i.e.* on 11 March 2015.
123. Notwithstanding the above, the Athlete submits that limb (b) of Rule 42.16 of the 2015 IAAF ADR could not be applied without due regard to procedural fairness. According to the Athlete, it was not reasonable to claim that WADA's deadline to lodge an appeal started running only once it had received the complete file, irrespective of how much time actually elapsed since the Appealed Decision was issued. The Athlete was of the view that after a certain time period, he should be entitled to believe that his case was closed and to move on with his life. This was particularly true in the present matter, where WADA filed its appeal almost 10 years after the relevant samples were collected, 3 years after the IAAF Notification took place, 6 months after the BAF issued the Appealed Decision and over a 100 days after IAAF's right to appeal had expired.
124. The Athlete contended that the principle of good faith could serve to bring forward the date on which the appeal should have been lodged. According to him and on the basis of this principle,



WADA had an obligation to inquire as to the existence or progress of the disciplinary proceedings against the Athlete and had the duty to lodge its appeal to CAS earlier than it did. In addition, the Athlete submitted that there was strong evidence that IAAF was acting through WADA to resurrect the appeal deadline, which it had failed to meet. In other words, the Athlete claimed that WADA was not acting independently but together with IAAF, if not upon the latter's instructions. According to the Athlete, this would constitute a clear case of abuse of right.

125. The Athlete asserted that WADA knew or should have known about the Appealed Decision before receiving the complete file (and should have inquired about it), because a) on 26 July 2012, it received a copy of the analytical results of the A-sample n°691793, b) between 8 March 2013 and 9 December 2014, IAAF made public announcements on the initiation of disciplinary procedures against the Athlete and five other persons, on the fact that the Athlete had become the 2005 IAAF Hammer Throw World Champion following Mr Ivan Tsikhan's disqualification and on the Athlete's appointment as the President of the BAF. In addition and according to the Athlete, WADA was obviously aware of the Athlete's pending case in view of its close working relationship with IAAF, which was established by several statements made by IAAF following the broadcast of a recent documentary on the German television as well as by the fact that IAAF had recurrent contacts with WADA's long standing external counsel.

126. The Panel observes that, on 23 September 2014, the BAF sent the Appealed Decision to Dr Gabriel Dollé as the sole recipient. This document was attached to an email, the exhaustive content of which is the following:

*"Dear Sir,*

*Please find attached a letter from Disciplinary Commission concerning the matter of [the Athlete]*

*Sincerely yours".*

127. By referring to the Appealed Decision as a "letter from Disciplinary Commission", the communication of the BAF certainly gave a misleading impression as to the importance of its attachment. This is all the more true as the attached Appealed Decision fit entirely on one page, which is unusually short for a decision related to a doping case and which was even more unlikely to draw the attention that it deserved.

128. Nevertheless, WADA has not tried to argue that Dr Gabriel Dollé did not receive this mail or that he had an acceptable excuse for ignoring its content. It is undisputed that IAAF was validly notified on 23 September 2014 of the Appealed Decision. However the Panel has no difficulty in accepting that, on 28 January 2015, Mr Thomas Capdevielle sent the following letter to the BAF in good faith and without any ulterior motive.

*"I write with respect to the doping case of [the Athlete], which, to date, according to our records, has not been concluded.*

*To our great surprise, we learnt in the meantime, that [the Athlete] had been elected President of the Belarus Athletic Federation.*

*We respectfully remind you that, according to our records, [the Athlete] was provisionally suspended on 1<sup>st</sup> August 2012 and that he shall remain suspended until resolution of his case by your Federation. As a result of his provisional suspension and pursuant to IAAF Rule 40.11 (a), [the Athlete] shall not be eligible to hold any position within BAF, let alone the Presidency.*

*The IAAF is not aware of any decision rendered by BAF in the meantime, resulting in a change of status of [the Athlete] under IAAF Anti-Doping Rules.*

*Thank you in advance for clarifying the matter and for sending me a copy of the full reasoned decision (in English) which may have been rendered by BAF in the meantime, which has not been brought to our attention”.*

129. On 5 February 2015, the BAF responded to Mr Thomas Capdevielle and forwarded him again the email dated 23 September 2014, which itself attached the Appealed Decision.
130. In light of the foregoing circumstances, the Panel finds credible that until 5 February 2015, IAAF did not appreciate the existence of the Appealed Decision, although it unquestionably should have done. It is clear that IAAF did not inform WADA of the Appealed Decision until after receipt of the email of 5 February 2015 and WADA did not receive the complete file until 18 February 2015.
131. It is obvious that IAAF did not deal with the situation as diligently as one could expect from an international federation of its importance. IAAF did not conduct itself in a fashion which is beyond reproach but its poor management of its internal communication cannot be laid at WADA's door. Likewise, as a national federation which represents the interests of all its members in general and of the Athlete in particular, the BAF should have dealt with this situation in a much more expeditious manner. Between the moment the Athlete's positive findings were known in July 2012 and the moment the BAF Disciplinary Commission issued its decision, more than 2 years elapsed. The BAF tries to put the blame of IAAF arguing that it had “specifically sought the recommendation of the IAAF in relation to this case in August 2013, but the IAAF has not given its recommendation” (see last para. of the Appealed Decision). However, the Panel is of the view that if IAAF's recommendation was decisive for the BAF Disciplinary Commission, the latter should have sent reminders instead of waiting during a year before issuing its decision. It appears clearly that the negligence committed by both the BAF and IAAF in the management of this case could have been easily avoided with a better communication between them.
132. As regards the contention that WADA should have known about the Appealed Decision or made some inquiries about it, nothing of this kind is foreseen in the applicable IAAF Rules. In addition, the Panel endorses the position articulated in a case precedent, according to which “[to impose a good faith obligation on WADA to enquire about a decision issued by a federation would] impose an unreasonable burden on WADA, which would have to constantly inform themselves about the current status of the pending proceedings to avoid the risk of losing its right to appeal decisions” (CAS 2007A/1284 & 1308, para. 93). This position was shared by another CAS Panel which added that “Placing an active duty on WADA – a non-party to the appealed decision – to unilaterally enquire about a decision to be issued by a federation in order to preserve its own right to appeal would place an undue burden upon the WADA and possibly hinder the fight against doping” (CAS 2009/A/1759 & 1778, para. 4.16).

133. The fact that, between 5 February and 18 February 2015 (*i.e.* the date when WADA received the complete file), WADA might have discussed the Athlete's case does not initiate the 21-day time limit for WADA to file its appeal. According to the applicable regulations, this deadline starts running only after it received the complete file. There is no evidence on record which could explain the reasons why WADA received the complete file 13 days after IAAF took cognisance of the fact that the Appealed Decision had actually been issued. It does not appear to the Panel that the period of 13 days for the request and delivery of the complete file is unreasonable.
134. The Panel finds that there are indications that WADA was aware of the existence of the Appealed Decision a few days before it received the complete file. In light of all the relevant circumstances of the case, the fact that WADA received the complete file in a maximum of 13 days after it was aware of its existence (period between 5 and 18 February 2015) cannot be regarded as incompatible with procedural fairness or in breach of any procedural rights of the Athlete so as to require the abridgement of the appeal period provided by the rules.
135. Finally, the Athlete claimed that WADA filed its appeal exclusively on behalf of IAAF. According to the Athlete, there was a clear abuse of right on the part of IAAF, which was trying to take advantage of WADA's right to appeal in order to resurrect its own deadline, which if failed to meet because of Dr Gabriel Dollé's omission correctly to process the email received from the BAF on 23 September 2014. For the Athlete, IAAF and WADA must be treated as the same party for the purpose of the time limit for appeal, which *in casu*, was missed.
136. Pursuant to Article 8 of the Swiss Civil Code, "*Unless the law provides otherwise, the burden of proving the existence of an alleged fact shall rest on the person who derives rights from that fact*". With regards to the burden of proof, it is the Athlete's duty to objectively demonstrate the existence of what he alleges (ATF 132 III 449 consid. 4; ATF 130 III 417 consid. 3.1). It is not sufficient for him to simply assert a state of fact for the Panel to accept it as true.
137. It can be observed that the Athlete has not produced a single piece of evidence to substantiate his allegation. In support of his position, the Athlete only puts forward the assertion that WADA and IAAF discussed his case repeatedly and that Mr Thomas Capdevielle approached three of his witnesses, being thus directly involved in the preparation of WADA's appeal.
138. For the reason set out above, the Panel held that, at the earliest, WADA found about the Appealed Decision on 5 February 2015, without however knowing the detail included in the complete case file. The fact that at some stage of the present proceedings, WADA relied on a member of the IAAF to obtain evidence or information does not yet mean that it was acting as the agent of the international federation. Because of his position, Mr Thomas Capdevielle has a privileged relationship with the representatives of the BAF (*i.e.* the witnesses) and it makes sense for WADA to make good use of it. As a result, the Panel finds that the Athlete failed to establish that WADA was acting exclusively for the benefit of IAAF and hence committed somehow an abuse of process by filing its appeal within the regulatory deadline. Indeed the Panel is of the view that WADA was properly pursuing its own goals and objectives in proceeding with the appeal.

139. Under these circumstances, the appeal of the WADA is admissible as it was submitted within the deadline provided by Rule 42.16 of the 2015 IAAF. It complies with all the other requirements set forth by Rules 42.2 and 42.3 of the 2015 IAAF ADR and by Article R48 of the Code.

## VII. APPLICABLE LAW

140. Article R58 of the Code provides the following:

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

141. The Athlete was subject to an in-competition doping control on 8 August 2005 and the adverse analytical finding was communicated to IAAF and BAF in July 2012.

142. Either in their written submissions or at the hearing before the CAS, the Parties agreed on the following:

- the IAAF ADR, in their 2005 version (“2005 IAAF ADR”), govern the substantive aspects of the appeal subject matter;
- the IAAF ADR, in their 2015 version (“2015 IAAF ADR”) govern the procedural elements of the present dispute, being understood that the CAS Code governs the procedural aspects not covered by this set of rules;
- the 2012 ISL and the 2012 IAAF ADR govern the results management and analytical procedures, as the retest occurred in 2012;
- Swiss law shall apply subsidiarily.

143. As a result and in light of the foregoing, subject to the primacy of the applicable IAAF ADR, Swiss Law shall apply complementarily.

## VIII. PROCEDURAL ISSUE – ADDITIONAL SUBMISSION

144. Article R56 para. 1 of the Code provides as follows:

*“Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer”.*

145. At the hearing, the Athlete filed the Russian version of the BAF General Secretary’s witness statement dated 14 January 2016 as well as a string of emails between the BAF General Secretary

and Mr Thomas Capdevielle. WADA agreed with these productions. Under these circumstances, the President of the Panel decided to allow these additional submissions.

## IX. MERITS

146. As stated in the IAAF Notification, the Athlete was charged with the following two anti-doping rule violations: the presence of a prohibited substance or its metabolites or markers in his sample and the use or attempted use of a prohibited substance or prohibited method (Rule 32.2 (a) and (b) of the 2005 IAAF ADR).
  147. Pursuant to Rule 33.1 of the 2012/2015 IAAF ADR, WADA bears the burden of establishing that an anti-doping rule violation has occurred.
  148. It is not disputed that WADA cannot establish a “presence” violation without a valid B sample (see para. 120 of its appeal brief and para. 11.4 of the Athlete’s answer). This is the direct consequence of Rule 32.2 (a) 2012/2015 IAAF ADR, which provides that “*sufficient proof (...) is established (...) where the Athlete’s B Sample is analysed and the analysis of the Athlete’s B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete’s A Sample*” (Rule 32.2(a)(ii)).
  149. The “use” violation however requires “only” that the deciding body is comfortably satisfied that the Athlete used or attempted to use a prohibited substance, bearing in mind the seriousness of the allegation which is made (Rule 33.1 of the 2012/2015 IAAF ADR).
  150. WADA claims that the presence of prohibited substances in the Athlete’s sample was established and confirmed by the analysis of by the B1 and B2 samples n°791693 whereas the Athlete contends that the B samples result must be disregarded as he was not offered the right to attend and/or to be represented by the person of his choosing for the opening and testing of his B sample n°791693, in violation of Rule 37.7 of the 2012 IAAF ADR and of Article 5.2.4.3.2.6 of the 2012 ISL.
  151. Based on the foregoing considerations, the main issues to be resolved by the Panel in deciding this dispute are the following:
    - Was the Athlete’s right to attend and/or to be represented at the opening and analysis of the B sample n°691793 respected?
    - If not, has WADA established to the Panel’s comfortable satisfaction that the Athlete has used or attempted to use a prohibited substance?
- A. Was the Athlete’s right to attend and/or to be represented at the opening and analysis of the B sample n°691793 respected?**
152. On the one hand, WADA claims that the IAAF Notification was made not only in a context of urgency but also in accordance with the applicable regulations. According to WADA, the Athlete certainly expressed his dissatisfaction with the developments of the situation but he

nevertheless agreed to be represented by Mr Sergey Beliaev at the splitting of the B sample n°691793 and analysis of the First Bottle. Under these circumstances, it is WADA's case that, no matter how short the deadlines set in the IAAF Notification were, the Athlete managed to comply with them and, under these circumstances, cannot claim that his rights were breached, once the adverse analytical findings were confirmed. On WADA's case the Athlete could not come back and claim that he would have chosen another expert; he should have raised his objection *ab initio* and/or asked for the postponement of the splitting and analysis of his B sample n°691793.

153. On the other hand, the Athlete contends that he did not agree at any point to be represented by Mr Sergey Beliaev and, in view of the very short time frame between the IAAF Notification and the confirmatory analysis carried out on 31 July 2012, he was denied any opportunity to exercise his right to attend or to be represented by the person of his choosing at the opening / splitting of his B sample n°691793 and analysis of his First Bottle.

**a) Introduction**

154. The 2012 (and 2015) IAAF ADR provide so far as material as follows:

Rule 37 – Results Management

1. *Upon receipt of an A Sample Adverse Analytical Finding or Atypical Finding or upon evidence of another anti-doping rule violation under these Anti-Doping Rules, the matter shall be subject to the results management process set out below. (...)*
4. *(...) the IAAF Anti-Doping Administrator shall promptly notify the Athlete of:*
  - (a) *the Adverse Analytical Finding;*
  - (b) *the Anti-Doping Rule that has been violated;*
  - (c) *the time limit within which the Athlete is to provide the IAAF, either directly or through his National Federation, with an explanation for the Adverse Analytical Finding;*
  - (d) *the Athlete's right to request promptly the analysis of the B Sample and, failing such request, that the B Sample shall be deemed to be waived. The Athlete shall be advised at the same time that, if the B Sample analysis is requested, all related laboratory costs shall be met by the Athlete, unless the B Sample fails to confirm the A, in which case the costs shall be met by the organisation responsible for initiating the test;*
  - (e) *the scheduled date, time and place for the B Sample analysis if requested by the IAAF or the Athlete which shall normally be no later than 7 days after the date of notification of the Adverse Analytical Finding to the Athlete. If the laboratory concerned cannot subsequently accommodate the B Sample analysis on the date fixed, the analysis shall take place at the earliest available date for the laboratory thereafter. No other reason shall be accepted for changing the date of the B Sample analysis;*
  - (f) *the opportunity for the Athlete and/or his representative to attend the B sample opening procedure and analysis at the scheduled date, time and place, if such analysis is requested; and*
  - (g) *the Athlete's right to request copies of the A and B Sample laboratory documentation package which includes the information required by the International Standard for Laboratories.*

*The IAAF Anti-Doping Administrator shall send the relevant Member and WADA a copy of the above notification to the Athlete. (...).*

*(...)*

6. *[7 for the 2012 IAAF ADR] The Athlete and/or his representative shall be allowed to be present at the B Sample analysis and to attend throughout the analysis being carried out. A representative of the Athlete's National Federation may also be present and attend throughout, as may a representative of the IAAF. An Athlete shall remain Provisionally Suspended despite the fact that he has requested analysis of the B Sample".*

155. According to the 2012 ISL, *"The Athlete and/or his/her representative, a representative of the entity responsible for Sample collection or results management, a representative of the National Olympic Committee, National Sport Federation, International Federation, and a translator shall be authorized to attend the "B" confirmation"* (5.2.4.3.2.6).

156. The leading CAS cases in the matter provide the following:

*CAS 2010/A/2161, award of 23 February 2011*

In this case, the athlete's A sample tested positive for a prohibited substance. She applied for her B sample to be tested but her national federation made her withdraw her request. Notwithstanding her withdrawal, the IJF tested the B sample but never told the athlete, who, therefore, never had the opportunity to be present during the testing. Because the B sample confirmed the presence of a prohibited substance, the IJF suspended the athlete two years for an anti-doping rule violation.

The CAS panel allowed the athlete's appeal because she *"was not given the opportunity to be present herself or by her representative for the opening and testing of her B sample in violation"* of the applicable regulations. It made the following findings:

*"15. The athlete thus has the right to be present for the opening and analysis of her B sample regardless of whether it is the athlete or the IJF who requests testing of the B sample. (...)*

*16. Moreover, it is now established CAS jurisprudence that the athlete's right to attend the opening and analysis of her B sample is fundamental and, if not respected, the B-sample results must be disregarded (see CAS 2002/A/385, paras. 22-34 – disregarding B-sample results where the neither the athlete nor her federation was given notice of the B-sample analysis). This is so even if denial of that right "is unlikely to affect the result of a B-sample analysis" (CAS 2002/A/385, para. 26). This is because 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 the Appellant committed an anti-doping rule violation" (CAS 2008/A/1607, para. 123 – disregarding B-sample results where the federation failed to make reasonable efforts to accommodate the athlete's request to have her B sample opened and analyzed in the presence of her representative; see also CAS 2002/A/385, para. 29 – explaining that to do otherwise would be to treat the athlete "as the object of the doping test procedure not its subject").*

*17. This right is "completely taken away from the athlete when the analysis of the B- sample is conducted without the athlete ... being given due notification of the relevant date and time" (CAS 2002/A/385,*

*para. 29). Moreover, it is not possible to remedy such a procedural error through the course of the arbitral process. In contrast to violations of the athlete's right to be heard, the "arbitration cannot substitute the presence (in its widest definition) of a representative of the athlete at the opening of the B- sample" (CAS 2002/A/385, para. 33). And where – as here – the rules establish a strict liability regime with respect to doping, "[i]t is of fundamental importance ... that the rules have been clearly followed" (CAS 2003/A/477, para. 29, citing CAS 94/129)".*

*CAS 2008/A/1607, award of 13 March 2009*

In this case, the athlete tested positive for the second time for a substance banned under IBU rules and was imposed a lifetime ban from competition. The athlete appealed, arguing that the test results should be discarded because the IBU did not reasonably attempt to accommodate her request to postpone the analysis of her B sample so she could have her nominated biochemical expert observe the proceedings. As a matter of fact, the day before the scheduled analysis, the athlete made an official request to postpone the date for at least one week because her designated expert was not yet available. The IBU turned down the request, although both its rules and the ISL required reasonable attempts to accommodate requests by an athlete when her representative was not available on the scheduled date. The IBU conducted the analysis on the following day and the B sample came back positive.

The CAS panel allowed the appeal. In its award, the CAS panel concluded 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 the Appellant committed an anti-doping rule violation"*.

*CAS 2002/A/385, award of 23 January 2003*

In this case, the athlete tested positive for a prohibited substance and requested the testing of her B sample. The date and time of the analysis of the B sample were not communicated to either the athlete or her national federation. The analysis of her B sample confirmed the adverse analytical finding and the athlete was sanctioned with a suspension for one year followed by one year's suspension with probation.

During the proceedings before the CAS, the Athlete did not contest the fact that her urine sample contained the forbidden substance but she contended that the FIG could not rely on the results of the analysis of her sample because neither she nor her federation were informed of the date and time when the analysis of the B sample was to be carried out.

The CAS panel agreed with the athlete and held that *"When looking at these rules it is obvious that the athlete's direct rights are essentially limited to two, i.e. the request for an analysis of the B-sample and the request to have this analysis carried out by another laboratory. (...) While in the Panel's view the Respondent's rules sufficiently (though not generously) respect the interests of the athlete, the limited rights with which the athlete is left must be followed with care so that for instance the federation attending the opening and analysis of the B-sample can satisfy itself on behalf of the athlete that the correct container with the number of the athlete's urine sample is being opened and that at the time of opening the seal was intact; in addition the representative may also*



*check the state of the urine sample at that time. In the event that at this stage variations or irregularities are apparent then these can be noted and can be used later to challenge the test results.*

*This right is completely taken away from the athlete when the analysis of the B-sample is conducted without the athlete or his/ her federation being given due notification of the relevant date and time. The athlete is then simply treated as the object of the doping test procedure not its subject.*

*It is not possible to remedy the procedural error described above in the course of the arbitral process. Contrary to a case where a federation fails to hear an athlete before imposing a sanction, the arbitration cannot substitute the presence (in its widest definition) of a representative of the athlete at the opening of the B-sample.*

*In conclusion, the Panel is inclined to view the procedural error committed in this case as compromising the limited rights of an athlete to such an extent that the results of the analysis of the B-sample and thus the entire urine test must be disregarded”.*

Eventually, the athlete’s appeal was dismissed, as there was other overwhelming evidence to establish that an anti-doping rule violation had occurred.

**b) In the present case**

157. The Parties argued at great length about whether the Athlete agreed or not to be represented by Mr Sergey Beliaev at the splitting of the B sample n°691793 and analysis of the First Bottle.
158. In order to establish that at he did not agree at any point to be represented by Mr Sergey Beliaev, the Athlete relied on the evidence provided by several witnesses, most of which the Panel found to be extremely unconvincing.
159. The Panel notes that, in every written statement, the witnesses carefully avoided to assimilate Mr Sergey Beliaev to the Athlete’s representative in spite of the fact that he attended the splitting of the B sample n°691793 and analysis of the First Bottle. The fact that all the witnesses apparently grasped the legal nuance between a representative and an attendee seemed remarkable.
160. More specifically, the Panel was not impressed by the unclear oral explanations given by the BAF General Secretary at the hearing in order to explain her change of attitude from the moment she was first approached by Mr Thomas Capdevielle in the beginning of March 2015 and at the end of the same month. Likewise, Mr Sergey Beliaev’s allegations that “*Frankly, [he] would not have known whether the Lausanne Laboratory was doing what it was supposed to be doing since [he is] not familiar with the analytical process*”, was simply not credible coming from the director of the Anti-Doping Laboratory in Minsk. The same can be said about his oral evidence that upon his arrival at the Lausanne Laboratory, he “*mechanically*” signed the attendance form in his capacity of “*Athlete representative*”.
161. Given the totality of the circumstances, the Panel is comfortably satisfied that, on the evening of 30 July 2012, the Athlete accepted to be represented by Mr. Sergey Beliaev at the splitting of the B sample n°691793 and analysis of the First Bottle:

- In his email sent to Dr Gabriel Dollé on 30 July 2012, Mr Dimitri Vorobyov unambiguously confirmed that *“Mr. Sergei Beliaev will also be the representative of [the Athlete] at the B-sample analysis of his sample”*. At the hearing before the CAS, Mr Dimitri Vorobyov confirmed that the words used in his email were consistent with the BAF General Secretary’s instructions.
  - It is undisputed that the Athlete was well-aware of the fact that Mr Sergey Beliaev would attend the splitting of the B sample n°691793 and analysis of the First Bottle on his behalf. The fact that he kept trying to contact Mr Sergey Beliaev before his flight to Geneva on 31 July 2012 in order to give him instructions is consistent with the fact that he had agreed to be represented by the latter. Likewise, the Athlete established contact with Mr Sergey Beliaev two days after the splitting of the B sample n°691793 and analysis of the First Bottle occurred.
  - Mr Sergey Beliaev signed the attendance form at the Lausanne Laboratory in the capacity of the Athlete’s representative and, as reported by a local notary, was asked to answer questions in the name of the Athlete, at least during the whole splitting procedure of the B sample n°691793.
  - In his emails sent to Dr Gabriel Dollé on 31 July, 2 August and 4 August 2012, the Athlete did not inform the latter of the fact that he did not agree to Mr Sergey Beliaev representing him. In his email sent on 2 August 2012 to Dr Gabriel Dollé, the Athlete requested the postponement of the B2 sample n°691793 and informed the latter of his wish to *“nominate a different representative for the B-2 Sample”*.
162. However, the fact that the Athlete eventually agreed to be represented by Mr Sergey Beliaev does not yet mean that he waived his right to be given a reasonable opportunity to be present or represented by the expert of his choosing at the B Sample analysis. This very limited right arises from the obligation on the IAAF to observe the principles of a fair procedure and the right to be heard, as well as the right of proper defence. Given the seriousness of an allegation of doping, it is clear that strict requirements for proper respect of these procedural principles must be applied. The generally recognised legal principle that a party may be present at the collection of evidence applies in the context of a confirmatory analysis and is respected only if the athlete is actually put in a position where he can effectively be present or represented by the person of his choosing at the B sample test. This was obviously not the case, here:
- The content of the IAAF Notification was communicated to the Athlete orally, at 22:00 Belarus time, while he was at home in Belarus.
  - According to the IAAF Notification the Athlete was given a mere two hours *“to indicate in writing (...) whether he and/or his representative intends to attend at the dates and times designated above (i) the B splitting procedure and analysis of the first bottle and (ii) the opening and analysis of the second bottle. A failure by [the Athlete] to respond within the deadline indicated will be deemed to be a waiver of his right to the B sample analysis. In such event, he will be deemed to have accepted the adverse analytical finding in his A sample and will not be able to challenge these results at a later stage in the disciplinary procedure”*.

- The opening and splitting of the B sample n°691793 and analysis of the First Bottle was scheduled to take place the next morning at 10:30 Swiss time, at the Lausanne Laboratory, in Switzerland.
  - The IAAF Notification does not indicate that the Athlete had the possibility of proposing an alternative date for the splitting of the B sample n°691793 and analysis of the First Bottle. On the contrary, the very straight forward text of the IAAF Notification strongly implies that it was a do-or-die case as a *“failure (...) to respond within the deadline indicated will be deemed to be a waiver of his right to the B sample analysis”*. It must be observed that such a waiver is not foreseen in the applicable IAAF ADR.
  - The Athlete only received the written notification in the afternoon of the following day, by which time the splitting of the B sample n°691793 and analysis of the First Bottle had already begun.
  - It is unquestionable that in two hours the Athlete did not have the reasonable time to review the applicable IAAF ADR to find out about the possibility of asking for a postponement while a) looking for a representative and/or b) making arrangements to book a flight for Switzerland. This is all the more true as it was 22:00 in Minsk.
  - The 2 hours deadline given to the Athlete is utterly unjustified, unfair and disproportionate considering that:
    - The Athlete’s samples had been collected 8 years earlier.
    - IAAF did not have to wait until 17 July 2012 to instruct the Lausanne Laboratory to perform new tests on the Athlete’s A sample n°691793.
    - The IAAF received the analytical report on the Athlete’s A sample retest on 26 July 2012. IAAF did not advance any reason why it waited until 30 July 2012, 22:00 Belarus time to notify the results to the Athlete.
163. In light of the above, the Athlete was required to make a decisive and possibly life-changing decision within two hours but without knowledge of all the facts, *e.g.* that he could reschedule the analysis of his B sample, the exact content of the IAAF Notification, what prohibited substance had been detected, *etc.*
164. In fact, the Athlete was left with no ability to choose whether he wanted to attend in person the confirmatory procedure as, at the time of notification, it was unreasonable to believe that he would be able to travel from Belarus to Lausanne in order to be present at the opening and splitting of the B sample n°691793. Likewise, with the limited time available, the Athlete was also not in a position to truly choose his own representative and had to rely on a person (*i.e.* Mr Sergey Beliaev), who he did not know and who just happened to go to the Lausanne Laboratory on behalf of another athlete. Effectively the Athlete was acting under duress.
165. The fact that, from IAAF’s perspective, IAAF was acting in good faith, under the pressure of the Olympic context and under the misconception that the Athlete was competing within days, cannot deprive the latter of his right to be given a reasonable opportunity to be present himself or to be represented by the person of his choosing at the splitting of his B sample and analysis of the First Bottle. The question is not whether IAAF was acting reasonably from its own

perspective, given the facts as it perceived them, but whether the Athlete was in practical terms given the opportunity to be present and/or represented by a person of his choosing. The fact that the Athlete eventually agreed to be represented by Mr Sergey Beliaev or that the opening and splitting of his B sample n° 691793 occurred in the presence of independent witnesses does not change the fact that the Athlete's right to personally attend the testing procedure was denied and so was his right to be represented by the person of his choosing.

166. The B sample bottle can only be opened once. In the present case, it was done in breach of the Athlete's fundamental right to be given a reasonable opportunity to attend personally or to appoint a proxy of his choosing. The procedural error cannot be remedied and it is irrelevant that the B sample n°691793 was split in two in the presence of independent witnesses and the B2 sample n°691793 was opened and analysed in the presence of the expert chosen by the Athlete. As another CAS panel stated in an oft-quoted award: *"The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves"* (CAS 94/129, para. 34).

167. In conclusion, the Panel finds that the Athlete was denied any reasonable opportunity to exercise his right to attend or to be represented at the opening and splitting of his B sample n°691793 and analysis of his First Bottle. Such a right is fundamental and, if not respected, the B sample result must be disregarded. This is so, even if denial of that right is unlikely to affect the result of a B sample analysis (CAS 2010/A/2161 para. 16; CAS 2008/A/1607, para. 32; CAS 2002/A/385, paras. 22-34). This conclusion makes it unnecessary for the Panel to address the issues raised by the Parties in relation with the B2 sample n°691793 and to address the "Analytical Result Issue" in a second stage of this arbitration (see para. 8 of this award).

168. In other words, WADA is unable to establish to the comfortable satisfaction of the Panel the presence of a prohibited substance or its metabolites or markers in the Athlete's samples n°691793 so as to found a finding of a "presence violation" under Rule 32.2(a) IAAF ADR.

**B. If the Athlete's right to attend and/or to be represented at the opening and analysis of the B sample n°691793 have not been respected, could WADA establish (assuming for these purposes the acceptance of evidence advanced by WADA) to the Panel's comfortable satisfaction that the Athlete has used or attempted to use a prohibited substance?**

169. Pursuant to Rule 33.1 of the 2012/2015 IAAF ADR, WADA has the burden *"of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether [WADA] has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt"*.

170. WADA claims that, in light of the evidence before it, the Panel should in any event be comfortably satisfied that the Athlete is guilty of a *"use or attempted use of a prohibited substance or prohibited method"* ("Use Violation") (Rule 32.2 (b) of the 2005 IAAF ADR).

171. In support of its case, WADA puts forward that a) the Athlete was found guilty of an anti-doping rule violation in 2000, b) several of his teammates, who participated in the Helsinki Championships, were sanctioned after it had been established that they tested positive to similar prohibited substances as the ones found in the A sample n°691793, c) Mr Ivan Tsikhan and the Athlete tested positive to similar prohibited substances during the 2008 Summer Olympic Games in Beijing but got away with it only because the Beijing National Laboratory did not respect the applicable ISL, d) the Athlete's sample n°691793 is alleged to have tested positive to Methandienone and Oxandrolone, which belonged to the exogenous anabolic androgenic steroids, e) the analysis carried out by the Lausanne Laboratory on the B1 and B2 samples n°691793 confirmed the results of the A sample n°691793 (albeit those tests were carried out in breach of the Athlete's rights) and f) these results were of particular significance as the Lausanne Laboratory was and is a WADA-accredited laboratory.
172. WADA submits that the Panel could be comfortably satisfied that the above facts establish large-scale and systematic doping among Belarussian athletes and, given the Athlete's past, the chances that the latter used or attempted to use a prohibited substance or prohibited method are *"greater than a mere balance of probability"*.
173. The Panel is ready to accept that the results of the B1 and B2 samples n°691793 could be taken into account for a Use Violation even though they have been obtained in an irregular manner. However, these results alone, obtained as they were in breach of the Athlete's rights, must be regarded with particular care and cannot themselves be sufficient to establish a Use Violation to the comfortable satisfaction of the Panel. Here, aside from the A and B samples n°691793 results, the evidence offered by WADA consists more of speculation than substantive proof. There is no evidence that there was a doping conspiracy organised at the national level by the BAF and/or that the Athlete took part in it. The Athlete had paid his debt as regards the anti-doping rule violation of 2000. The incidents which occurred during the 2008 Summer Olympic Games in Beijing are of no relevance as regards the tests carried out before or after these Olympic events and the fact that teammates were caught cheating during the same event and same sport does not establish the personal use or attempted use of prohibited substance or method by the Athlete.
174. In other words, the evidence adduced by WADA amounts to no more than an attempt by the back door to achieve the result it could not achieve by its failed Presence Violation case. While there may well be cases where analytical evidence which does not meet the criteria to support a Presence Violation case can be an important ingredient in establishing a Use Violation case, there must be additional supporting evidence rather than mere speculation. As was stated by another CAS panel, it *"would be a giant step backwards, which would eventually backfire and possibly deliver a fatal blow to any serious fight against doping and to the CAS's reputation if a CAS panel were to adjudicate cases relying on mere suspicions and insinuations"* (CAS 2009/A/1545, para. 24).
175. The Panel must conclude that in the present case the totality of the evidence on which WADA seeks to rely, if accepted, would not be sufficient to establish to the comfortable satisfaction of the Panel a Use Violation on the part of the Athlete.

### **C. Conclusion**

176. The Panel concludes that WADA is unable to establish to the Panel's comfortable satisfaction either a Presence Violation or (assuming for these purposes only that WADA's evidence is accepted) a Use Violation (Rule 32.2 (a) and (b) of the 2005 IAAF ADR).
177. It follows that the appeal must be dismissed and the Appealed Decision upheld.
178. This conclusion makes it unnecessary for the Panel to consider the other arguments and requests submitted by the Parties and to have a second stage in this arbitration. Accordingly, all other or different motions and prayers for reliefs are rejected.
179. As a general rule, the CAS grants the prevailing party a contribution toward its legal fees and other expenses incurred in connection with the proceedings. In the present matter, professional legal advisers assisted the Athlete, who also incurred costs to present evidence or counter-evidence. However, in this case not only was time spent on the Athlete's unsuccessful argument as to the admissibility of the appeal but a considerable part of the hearing was devoted to the examination and cross-examination of the Athlete's witnesses giving evidence most of which the Panel found to be unconvincing. In the light of all of the circumstances surrounding this case, the Panel finds reasonable to order WADA to contribute to the costs incurred by the Athlete in a reduced amount of CHF 6,000. Finally, the Panel decides that the BAF shall bear its own costs and legal expenses in relation to the present proceedings.

## **ON THESE GROUNDS**

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

1. The appeal filed on 11 March 2015 by WADA against the decision of the BAF Disciplinary Commission dated 23 September 2014 is dismissed.
2. The decision of the BAF Disciplinary Commission dated 23 September 2014 is confirmed.
- (...)
6. All other or further requests and prayers of relief are dismissed.