Arbitration CAS anti-doping Division (OG PyeongChang) AD 18/003 World Curling Federation (WCF) v. Aleksandr Krushelnickii, award of 3 December 2018

Panel: The Hon. Judge Mark Williams SC (Australia), Sole Arbitrator

Curling
Doping (meldonium)
Burden and standard of proof
Admissibility of polygraph test results and expert opinion in relation to such results
Principles applicable to the source of the prohibited substance
Establishment of the source of the prohibited substance as proof of absence of intent
Sabotage

1. **According to Article 3.1 of the WCF Anti-Doping Rules (ADR), WCF shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether WCF has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. The standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these anti-doping rules place the burden of proof upon the athlete alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified acts or circumstances, the standard of proof shall be by a balance of probability.**

2. **Where there is no challenge to the conduct of a polygraph test or the expertise of the tester, the evidence should be admitted and taken into account knowing that it rises no higher than adding some force to the athlete's declaration of innocence but not supplanting the need to carefully consider all other evidence in the case in determining whether the burden of proof has been discharged.**

3. **It is for an athlete to establish the source of the prohibited substance, not for the anti-doping organization to prove an alternative source to that contended for by the athlete. An athlete has to do so on the balance of probabilities. Evidence establishing that a scenario is possible is not enough to establish the origin of the prohibited substance. An athlete must do so with evidence, not speculation. It is insufficient for an athlete to deny deliberate ingestion of a prohibited substance and, accordingly, to assert that there must be an innocent explanation for its presence in his system. If there are two competing explanations for the presence of the prohibited substance, the rejection of one does not oblige (though it may permit) the hearing body to opt for the other. The conclusion that the other is not proven is always available to the hearing body. In such a situation there are three choices, not just two, for the hearing body.**

4. **Establishment of the source of the prohibited substance in a sample is not mandated in order to prove an absence of intent. However, the likelihood of finding lack of intent in the absence of proof of source would be extremely rare, and if an athlete cannot prove source it leaves the narrowest of corridors through which the athlete must pass to discharge the burden which lies upon him.**

5. **The threshold for establishing sabotage as the reason for an ADRV is very high. Any proposed sabotage theory must be supported by reliable and credible evidence, not speculation or assertions of absence of motive. It is insufficient for an athlete to simply raise a hypothesis of sabotage without corroborating evidence and then to simply declare that sabotage is the only possible explanation.**

I. THE PARTIES

1. The World Curling Federation (the "Applicant" or "WCF") is the worldwide governing body for the sport of curling. It is an association constituted according to Article 60 Swiss Civil Code having its legal domicile in Switzerland.

2. Aleksandr Krushelnitckii (the "Athlete") is an Olympic Athlete from Russia. He competed in the mixed doubles curling competition during the Olympic Winter Games 2018 (the "Games") where he and his team were initially awarded the Bronze medal.

II. BACKGROUND FACTS

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced in this procedure. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in the Award only to the submissions and evidence he considers necessary to explain his reasoning as it relates to the Athlete's sanction.

4. On 12 February 2018, the Athlete underwent an in-competition doping control (the "First Doping Control") and provided urine sample number 6330170.

5. The analysis of the Athlete's A sample of the First Doping Control revealed the presence of Meldonium at an estimated concentration of 8069ng/mL.

6. On 13 February 2018, the Athlete underwent a second in-competition doping control (the "Second Doping Control") and provided urine sample number 6330166.

7. The analysis of the Athlete's A sample of the Second Doping Control revealed the presence of Meldonium at an estimated concentration of 5721 ng/mL.

8. Meldonium is a Hormone and Metabolic Modulator, prohibited under S4.5.5.3 of the WADA Prohibited List. It is a non-specified substance.

9. The Athlete was notified of the Adverse Analytical Findings by letter from the IOC of 18 February 2018.

10. On 18 February 2018, the Athlete informed the CAS ADD that he did not accept the Adverse Analytical Findings and requested that the B samples be opened in the presence of the Athlete and his representative.

11. The B samples were opened on 19 February 2018 at the Doping Control Centre, Seoul. The analysis of each sample confirmed the presence of Meldonium.

12. On 19 February 2018, the International Olympic Committee filed an application (the "Application") at the Anti-Doping Division of the Court of Arbitration for Sport (the "CAS ADD"). In the Application, the IOC sought the following requests for relief:

    1. The Application of the International Olympic Committee is admissible.

    2. The Athlete be found to have committed an anti-doping rule violation in accordance with Article 2.1 and/or 2.2 of the IOC Anti-Doping Rules.

    3. The results obtained by the Athlete in the Mixed Doubles Curling event at the Olympic Winter Games PyeongChang 2018 are disqualified with all resulting consequences including forfeiture of the medal, diploma, medallist pin, points and prizes.

    4. The results obtained by the team of the Olympic Athletes from Russia in the Mixed Doubles Curling event at the Olympic Winter Games PyeongChang 2018 are disqualified with all resulting consequences including forfeiture of the medal, diploma, medallist pin, points and prizes.

    5. The Chef de Mission of the Olympic Athletes from Russia delegation shall ensure full implementation of the award.

13. On 19 February 2018, the CAS ADD confirmed the appointment of His Honour Judge Mark Williams SC as Sole Arbitrator in this matter.

14. On 19 February 2018, the WCF requested that it be joined to the procedure as a co-Applicant. In that letter, WCF requested that the Sole Arbitrator provisionally suspend the Athlete beyond the period of the Games such that the Athlete would not be able to compete pending a final decision on any applicable sanction, if so determined.

15. On 22 February 2018, the Athlete confirmed that he accepted the Adverse Analytical Findings concerning both samples and reserved his right to seek elimination or reduction of the standard eligibility period based on the "No Fault or Negligence" principle during disciplinary proceedings within the World Curling Federation. Later that same day, under separate cover,

the Athlete accepted a provisional suspension beyond the period of the Games, and reserved all rights accordingly.

16. The CAS ADD delivered a Partial Award on 22 February containing the following order:

38. On the basis of the submissions of the parties as set forth above, the application of the IOC is granted and therefore:

- *a. The Athlete is found to have committed an anti-doping rule violation in accordance with Article 2.1 of the IOC ADR.*
- *b. The individual results obtained by the Athlete in the Mixed Doubles Curling event at the Olympic Winter Games PyeongChang 2018 are disqualified with all resulting consequences including forfeiture of the medal, diploma, medallist pin, points and prizes.*
- *c. The results obtained by the team of the Olympic Athletes from Russia in the Mixed Doubles Curling event at the Olympic Winter Games PyeongChang 2018 are disqualified with all resulting consequences including forfeiture of the medal, diploma, medallist pin, points and prizes.*
- *d. The Athlete is excluded from the Olympic Winter Games PyeongChang 2018.*
- *e. To the extent not yet done so, the Athlete shall leave the Village and return his accreditation (number 3043371-01) immediately.*

39. With the issuance of this Order, the IOC's participation in this proceeding is hereby terminated.

40. Furthermore, the application of the WCF is granted and therefore:

- *a. The Athlete is provisionally suspended from all Competition following the conclusion of the Olympic Winter Games PyeongChang 2018 pending a final decision on his violation.*

III. PROCEDURE BEFORE THE CAS ADD POST-GAMES

17. On 6 March 2018, upon consultation and agreement of the parties, the Sole Arbitrator set forth a procedural briefing schedule for the continuation of this procedure in accordance with Article 20 of the Arbitration Rules of the CAS ADD (the "CAS ADD Rules").

18. On 15 March 2018, the WCF filed its preliminary request for relief seeking the following:

- *The Athlete shall be declared ineligible from participating in any WCF- sanctioned event for a period of four years starting from 12 February 2018 for having committed an Anti-Doping Rule Violation (ADRV) contrary to Article 2.1 of the WCF Anti-Doping Rules.*
- *The Athlete shall contribute to the WCF's costs and expenses relating to these proceedings.*

19. On 11 May 2018, the Athlete filed his response to the WCF's preliminary request for relief. In his response, the Athlete requested the following:

67. For all the foregoing reasons, Mr Krushelnitckii respectfully requests that the Sole Arbitrator grants the following relief:

(a) *Dismiss the WCF's preliminary requests for relief and order that any applicable period of ineligibility shall be eliminated;*

(b) *In the alternative, reduce Mr Krushelnitckii's period of ineligibility at the Sole Arbitrator's discretion, but to significantly less than two years; and*

(c) *Order the WCF to pay Mr Krushelnitckii's costs and expenses in these proceedings.*

20. On 4 June 2018, the WCF filed its reply submission. In such submission, based on the Athlete's assertions as set forth in its response submission, the WCF modified its request for relief as follows:

(1) *The Athlete shall be declared ineligible from participating in any WCF-sanctioned event for a period of two years starting from 12 February 2018 for having committed an Anti-Doping Rule Violation (ADRV) contrary to Art. 2.1 of the WCF Anti-Doping Rules, subject to consent by WADA.*

(2) *The Athlete shall contribute to the WCF's costs and expenses related to these proceedings.*

21. On 29 August 2018, the Sole Arbitrator noted the amended request by the WCF in its reply submission proposing a two-year period of ineligibility as from 12 February 2018 and stated as follows:

Assuming the parties were not able to meet the consent requirements of Article 10.6.3 WCF ADR, as a preliminary issue, the Arbitrator seeks a brief and concise clarification from WCF as to whether it still seeks a reduced period of ineligibility of two years, rather than the presumptive four year sanction under Article 10.2.1 and, if so, the basis for such a request.

The WCF is invited to provide a response to this preliminary issue by 7 September 2018. The Sole Arbitrator will then invite the Athlete to respond, as necessary, at the hearing.

22. On 7 September 2018, the WCF informed the CAS ADD as follows:

The WADA does not agree to the application of WCF ADR 10.6.3 (prompt admission) in the above-mentioned case. The WCF therefore maintains its initial request for a period of ineligibility of four years.

23. On 19 September 2018, a hearing was held at the CAS Court Office in Lausanne, Switzerland. The Sole Arbitrator was assisted by Mr. Brent J. Nowicki, Managing Counsel to the CAS, and was joined by the following:

For the WCF:
Mr. Colin Grahamslaw, Secretary General of WCF
Mr. Stephen Netzle, Times Attorneys

For the Athlete:
Mr. Aleksander Krushelnitckii - Athlete
Mr. Philippe Baertsch – Schellenberg Wittmer
Mr. Christopher Boog – Schellenberg Wittmer
Dr. Anna Kozmenko – Schellenberg Wittmer
Mr. Bryan Fok – Schellenberg Wittmer

Mr. Dimitry Svishev – President, Russian Curling Federation
Ms. Olga Zharkova – General Secretary, Russian Curling Federation
Mr. Victor Bereznoy - translator

24. At the outset of the hearing, the parties confirmed that they had no objection to the Sole Arbitrator deciding this dispute and no objection to the procedure thus far. At the conclusion of the hearing, the parties confirmed that their right to be heard had been fully and fairly respected.

25. Three weeks after the hearing, the Athlete sought to introduce a video released by German broadcaster ARD on 7 October 2018 which referred to material provided anonymously and asserted *"grave security breaches"* regarding doping controls at the Games, such that the *"validity of test results might therefore be contestable"*. This new evidence asserted that there were breaches in regard to security of refrigerated samples and access to the doping control facility.

26. The CAS ADD provided the parties an opportunity to make submissions on whether the new material should be admitted, and if so, the effect of such material. In response, the Athlete asserted that the video showed that multiple unauthorised people had access to the samples in the testing laboratory. He cited established CAS jurisprudence as to the need for strict compliance with testing procedures. He further submitted that the sample results should be disregarded, or alternatively that the WCF must prove that the asserted breaches did not lead to an AAF. Moreover, he submitted that this provided additional support for his sabotage theory. He submitted that the case against him should be dismissed on the basis of this new evidence.

27. The WCF did not object to the admission of the new material. Instead, it submitted that the material neither contains any link to the Athlete nor asserts that the Athlete's samples were not handled in compliance with relevant standards. It submitted that the CAS jurisprudence establishes that the athlete must provide evidence which shows a specific departure from testing standards, rather than simply a hypothetical, speculative allegation. The Athlete had not produced any evidence as to how any alleged matters had led to the contamination of any of his samples.

28. On 26 October 2018, the Sole Arbitrator notified the parties that this new evidence would be admitted to the file, pursuant to Article 15(d) of the CAS ADD. However, on review, the Sole Arbitrator does not find that the evidence assists the Athlete's case on any basis. The allegations in the video are unconfirmed and unsupported by any evidence. There is no evidence that any of the Athlete's sample bottles were tampered with at any time during the testing and reporting process. The Athlete confirmed that the A and B samples for each test were in order and did not raise any point about tampering with any of the four sample bottles. A sabotage or tampering case would involve someone dealing with four separate samples so as to produce the resulting findings. It would imply that whoever allegedly tampered with the Athlete's samples knew the exact sample codes on each bottle and swapped them for other bottles on multiple occasions. This is extremely improbable and unsupported by any of the new evidence. Therefore, while such evidence is taken on file, the Sole Arbitrator therefore does not find

anything therein which supports the Athlete's case and gives such evidence little weight in his analysis.

IV. THE PARTIES' SUBMISSIONS

A. The Athlete's Written Submissions

29. The Athlete filed various documents, statements of evidence and submissions with his response of 11 May 2018, as summarized below.

a) The Athlete's statement dated 23 April 2018

30. The Athlete is a Russian citizen, born on 20 May 1992, who commenced curling at 15 years of age and became a professional athlete in 2011. He has an impressive record of international results in curling from 2012 to 2018, culminating in third place in the mixed doubles at the Games.

31. The profile for the athlete in ADAMS records negative tests over the period from 12 October 2015 to 22 January 2018. The entry for the partner/teammate of the athlete, Anastasia Bryzgalova, in ADAMS shows negative tests over the period from 23 July 2013 to 8 February 2018.

32. After being shocked by the news that his samples taken on 12 and 13 February tested positive for Meldonium, he accepted the adverse findings, returned his medal and left the Olympic Village.

33. He has never had a positive doping test result, with his most recent test before the Games being on 22 January 2018 in St Petersburg.

34. He has always exercised caution in monitoring what he ingests and has never personally purchased any medication. He has always received vitamin supplements and medications direct from the official team doctor. He was aware that prior to 2016 Meldonium was included in the prescription of products given to the team by the doctor as a prophylactic medication to prevent heart disease. He does not recall receiving any prescriptions containing Meldonium after it was included on the WADA prohibited list.

35. He closely monitors what he eats and drinks and does not eat or drink from open sources or leave food and drinks unattended. He always carries his own water bottle or bottled beverage.

36. He describes the stay in Sapporo from 23 January to 4 February 28 where he shared a hotel room with his sparring partner. He checked that any food and drink was properly sealed and inspected.

37. On 4 February 2018, he moved into the Olympic Village, sharing an apartment with his wife and curling partner Anastasia Bryzgalova, the coach, the team doctor and the foreign consultant. The apartment was serviced by four volunteers at a time, who had their own keys and entered the apartment at any time. He ate all his meals in the Olympic Village canteen buffet, except at McDonald's when he sometimes ordered coffee. His water bottle was in his possession at all times except for brief periods when he left it with the coach and the doctor during competition.

38. He says that he has never taken a prohibited substance and can only assume that someone added Meldonium to his food or drink in Korea during the room service in his absence when his clean water bottle could have been replaced or in McDonald's where he received a personalised coffee cup. The incident is currently being investigated by the General Prosecutor of Russia and investigations are continuing.

39. As a result of a doping scandal involving the famous Russian tennis player Maria Sharapova, and extensive media coverage of the incident in early 2016, he was aware that Meldonium was included in the WADA list of prohibited substances, that it had a lengthy wash out and was easily detected by modern laboratory analysis.

40. He had devoted his previous four years to preparing for the Games, sacrificing a lot and working hard, winning medals at almost every competition. Knowing that he and his teammate were medal candidates, he realised that each would undergo doping tests during the Games. Further, given the well-publicised issues regarding Russian athletes he expected to be subject to enhanced scrutiny and testing. In those circumstances, he describes the deliberate use of Meldonium as amounting to professional suicide and *"the murder of my most beloved wife"*, something that he would not contemplate. The fact that Meldonium does not enhance performance in curling makes it all the more absurd to him.

41. The Athlete and members of his group underwent polygraph tests. He has been subject to enormous social pressure in the media, being accused of actions that resulted in the Russian flag not being carried at the Closing Ceremony, and for betraying his country. He has lost the prize money and the financial support which he expected as a result of succeeding at the Games.

b) Vasilii Gudin

42. A witness statement was provided by Vasilii Gudin, 40 years of age, the head coach of the Russian national mixed doubles curling team. He is a qualified medical doctor in Russia having completed his studies and residency in 2002. After developing an interest in curling he became the coach of the Russian national team in 2007 and has been in that position since then. He first met the Athlete in 2012 and in 2015 became the head coach of the team including the Athlete and Ms. Bryzgalova.

43. He describes the Athlete as a very cautious and scrupulous person who is careful about what he ingests and never leaves drink bottles unattended. He has overheard the athlete warning Anastasia to be careful and reminding her to be cautious about her drinks and not leave them unattended. He says that the athlete was very cautious about his medications and supplements

and never takes medication without the team doctor's prescription. In 2016, the couple won the World Championship. The Athlete is described as the most eminent curler in the history of the Russian curling team so that it was obvious prior to the Games that they were aiming to win a medal.

44. He has carefully recalled all the events which happened in South Korea and he cannot explain how the substance Meldonium could possibly have entered the Athlete's body. He corroborates the version of the Athlete as to the care with which he approached eating and drinking in the Olympic Village.

45. As a sports doctor he knew that prior to 2016, Meldonium was widely used by Russian athletes as a prophylactic drug to prevent heart disease. His view is that Meldonium has no performance enhancing effects in curling which is a strategic and analytical sport not requiring intensive physical activity or putting excessive strain on the heart. He does not know of any medication capable of enhancing performance in curling.

46. Following the doping scandal after the Winter Olympic Games in Sochi in 2014, all Russian athletes realised that they would be under special WADA scrutiny in Korea, and thus the athletes, coaches and medical staff closely monitored the substances used by all athletes. He was convinced that the Athlete would never have taken Meldonium intentionally, given his view of the Athlete as a cautious and sensible person.

47. As to a sanction, if the Athlete were suspended for four years his career would be ruined as he would not be accepted into the national team.

c) Professor Ivars Kalvins

48. Professor Kalvins is the inventor of the cardio protective drug Meldonium, together with other drugs. He has authored more than 400 publications and holds 170 international patents. He is the chairman of the Scientific Board of the Latvian Institute of Organic Synthesis where he has worked since 1969. He teaches courses on drug development, medicinal chemistry and pharmacy at Riga Technical University. He was a finalist for the European Inventor Award 2015 in the category "Lifetime Achievement" and has received numerous national and international awards for his achievements in chemistry and pharmacology.

49. Professor Kalvins was instructed by the attorneys for the Athlete to opine on the use and pharmacological effects of Meldonium and the concentration levels of Meldonium detected in the Athlete's samples of 12 and 13 February 2018.

50. Professor Kalvins invented Meldonium as a cardio-vascular medicine in 1976. It was approved for medical use in 1984. His patents in relation to Meldonium expired in 2004 and he no longer receives any royalties or financial benefit from the sale or use of Meldonium. He designed Meldonium for the prevention of heart diseases, such as ischaemia, inclusive myocardium and brain infarcts. Meldonium reduces the accumulation of detrimental carnitine derivatives and improves the survival of cells and tissues under ischaemia.

51. Athletes may experience ischaemia if the demand of oxygen in muscles is higher than its supply which happens if an athlete is exposed to a very intense physical exercise. Thus it can help athletes to prevent heart disease. It does not make more energy available to heart and muscle cells, which means that it cannot enhance an athlete's performance.

52. Meldonium is mostly used in Eastern Europe and Russia where it is licensed and marketed as an over-the-counter medicine not requiring prescription.

53. It is necessary to take Meldonium for at least 4 to 6 weeks with a dosage of around 1000 mg per day in order to decrease carnitine levels in the muscles and achieve the pharmacological effect from the medicine, namely protection from ischaemia (oxygen deficit). Any short-term administration of Meldonium does not cause any effect as it has to be used during a period of 4 to 6 weeks two to three times annually. A single administration of Meldonium, even if taken in a very large dose, will not bring about any pharmacological effect.

54. Professor Kalvins designed Meldonium as a mirror of a native substance GBB (Gamma-butyrobetaine) which is present in the human body and is produced as response to stress. Even after a single dose, Meldonium is detectable in urine for at least two months. It has two phases of elimination from the human body. The first phase is faster and eliminates most of the Meldonium. On average half of the taken dose eliminates during the first 4 to 8 hours, but this can vary widely depending upon the individual circumstances. The second phase continues for many months after discontinuation of Meldonium intake. If an athlete takes Meldonium it will appear in urine as early as within 30 minutes of administration.

55. Professor Kalvins reviewed and analysed the levels of concentration of Meldonium found in the Athlete's samples. Based on the levels of 8069 ng/mL and 5721 ng/mL found in the respective samples, it is difficult to determine precisely when the substance was taken and whether the use was a single use or over a certain period of time. To provide a detailed answer would involve an examination of the Athlete in order to estimate his real Meldonium excretion capacity, and clearly this cannot be done.

56. Having said that, based on the relatively high levels found in the samples and the drop between the first and second test, it is likely that the athlete was going through the first elimination phase. If the Meldonium intake had been a regular therapeutic dosage, the intake would have likely taken place approximately two days before the test if a single dose had been taken, and about six days before the test if more than one dose had been taken.

57. If Meldonium entered the Athlete's body on the day of the first sample collection, namely 12 February, the level of 8069 indicates that a tiny drop of Meldonium was taken six hours prior to urine sample collection. Meldonium can be taken in liquid or powder form in a capsule and, if surreptitiously added to food or drink, would go unnoticed by the person taking such food or drink because it does not have a particular smell or taste.

58. In any event, an intake of Meldonium during a limited period of time or in a very small amount does not have any pharmacological or therapeutic effect and certainly no performance enhancing effect.

59. In short, Professor Kalvins concluded that it was likely that a very small amount of Meldonium entered the athlete's body on 12 February or a larger dose entered his body a few days earlier. Either way it would not have had any performance enhancing effects.

d) Dr Douwe de Boer

60. Dr de Boer is a biochemist who has been involved in sport drug testing since 1987 and has given expert evidence in a number of CAS hearings since 2000. He was asked by the attorneys for the Athlete to opine on the general use and effect of Meldonium, the level of concentration of the Meldonium detected, the time of possible Meldonium intake, and whether it was a single or multiple dosage intake.

61. He refers to studies by the Cologne WADA laboratory which indicate that urinary elimination of Meldonium includes an initial rapid excretion phase followed by a second longer elimination phase. He notes that no solid data supports the proposition that Meldonium use results in significant improvement of physical performance.

62. Dr de Boer notes a difference in social and scientific perception of Meldonium use between Eastern Europe on one hand and North America and Western Europe on the other hand. He concludes that there is no evidence based proof of positive or negative effects of Meldonium on physical exercise performance.

63. Turning to the specific facts of this case, Dr de Boer notes that the readings in the urine samples taken from the athlete on 12 and 13 February are relatively high and typical of the first elimination phase of Meldonium. They are typical of samples collected 2 to 6 days after intake. In light of the decrease in concentration between the two samples, he concluded that there was no additional intake of Meldonium after the first sample collection. He thus concluded that Meldonium was used only in a single or multiple therapeutic dosage two to six days before the first anti-doping control.

e) Oleg Sarovsky

64. Mr Sarovsky is described as a polygraph expert at the Centre for Forensic Expertise. He was instructed by the attorneys for the Athlete to conduct a polygraph examination on the Athlete, Ms. Bryzgalova and various members of the coaching, medical and support staff of the Russian national curling team. The purpose of his study was to identify whether there were psycho-physiological signs indicating that the examined individuals knew how Meldonium entered into the Athlete's body and knew the persons who administered Meldonium to the Athlete or otherwise caused Meldonium to enter his body. A number of documents are annexed to his report confirming his qualifications as a polygraph expert, and confirming that the laboratory and the equipment complies with certain standards.

65. The report contains the question and answers given by each examined individual during the course of the examination. The conclusion reached by Mr Sarovsky, based on the polygraph analysis, was that none of the examined individuals knew how the Meldonium entered into the Athlete's body or the person who administered Meldonium to the Athlete or otherwise caused Meldonium to enter his body.

f) Submissions in response by the Athlete dated 11 May 2018

66. A summary of the Athlete's position is that he accepted the Adverse Analytical Finding (AAF) and does not dispute the fact that Meldonium was detected in his body which constitutes an ADRV under the strict liability principle in Article 2.2 of the WCF ADR, but he bears "no fault or negligence" for the ADRV, on the basis that he had never deliberately or mistakenly taken Meldonium.

67. The Athlete argues that the only possible explanation for the presence of Meldonium in his urine samples is that the Meldonium was somehow added into his food or drink after he arrived in the Olympic Village, without his knowledge or involvement, so that he was likely the victim of sabotage and should not be suspended at all in accordance with Article 10.4 of the WCF ADR.

68. His alternative argument, if his primary argument does not succeed, is that the starting point for the period of ineligibility should be two years and not four years. Furthermore, considering his untarnished record, his good character and conduct, and his immediate admission of the AAF, any period of ineligibility should be significantly lower than two years.

69. The summary of the submission notes that it would have made no sense for the athlete to take Meldonium, given that he was a likely medal winner, that it would jeopardise his entire career as well as his teammate and wife's career, and that he knew that Meldonium was easily detectable in common doping sample testing.

70. The submission expands in some detail upon the above summary. In setting out the argument in detail below, a number of relevant provisions and cases cited by the Athlete will be considered.

71. Article 10.4 of the WCF ADR provides that *"if an athlete… establishes in an individual case that he … bears no fault or negligence, then the otherwise applicable period of ineligibility shall be eliminated"*.

72. The commentary to Article 10.4 of the WCF ADR states that this Article *"will only apply in exceptional circumstances, for example where an athlete could prove that, despite all due care, he … was sabotaged"*.

73. The Athlete relies on CAS 2009/A/1926 & 1930 in support of the assertion that Article 3.1 of WCF ADR does not require him to establish one single cause, but that it is sufficient to offer several alternative explanations and show which possibilities are more or less likely to have

occurred. The Panel in that case said *"for the panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The player thus only needs to show that one specific way of ingestion is marginally more likely than not to have occurred"*.

74. The Athlete asserts that Meldonium entered his body after he arrived in the Olympic Village, without his knowledge, and that this is shown by the high concentrations of Meldonium in each sample demonstrating, according to the report of Dr DeBoer, that the Meldonium entered his system two to six days before the first sample was collected. Further, the reduction of concentration between the first and second samples indicates that there was no additional intake after the first sample was collected. Further support for this proposition, according to the Athlete, was that the negative test sample on 22 January shows that the Meldonium was likely to have entered his system around 6 to 8 February.

75. The Athlete refers to the records showing that he was never prescribed Meldonium and that his usual medications and supplements do not contain the substance.

76. To support his argument that he would never intentionally use Meldonium, the Athlete refers to the extensive media coverage of the Maria Sharapova case; that he was aware as a neutral athlete from Russia with a high chance of winning a medal he would be subject to enhanced scrutiny; that he would have needed to take Meldonium for at least 4 to 6 weeks to have any pharmacological effect; and the fact that Meldonium has no performance enhancing effects in curling.

77. The Athlete further submits that his lack of intent is confirmed by the results of the polygraph examinations conducted on him and other members of the Russian curling team. He recognises that CAS panels have adopted different approaches to the admissibility and probative value of polygraph examinations. He submits that the pertinent decision for the present case is CAS 2011/A/2384 & 2386, as it considered Article 3.2 of the WADC, in identical terms to Article 3.2 of the WCF ADR. The decisions dealing with this issue will be considered below.

78. The Athlete submits that the only possible explanation for the presence of Meldonium is that it was added to his food or drink at some point without his knowledge after he arrived in the Olympic Village. Thus, a case of sabotage is established. He suspects that this most likely happened during room service in his absence when his clean bottles could have been replaced, or in the McDonald's restaurant in the Olympic Village where he would receive a personalised coffee cup. Because his wife did not drink coffee at McDonald's, he says that if Meldonium was added to his drink, then it would likely have been at McDonald's.

79. Further, it is argued that the unfortunate possibility that someone might have gone to the unthinkable lengths of committing a despicable act of sabotage in order to prevent a Russian athlete from winning a medal or to prevent the Russian team from being permitted to march under the Russian flag at the closing ceremony cannot be excluded. The evidence indicates that the incident of probable sabotage is currently being investigated by the General Prosecutor's office of Russia, and has been investigated by the Russian Curling Federation, so that further

evidence may be adduced in due course (although no further evidence was provided by the conclusion of the hearing).

80. A request was made by the Russian Curling Federation to the Director-General of the International Olympic Committee for production of video recordings taken at the Olympic village where the Athlete was staying during the Olympic Games. Requests were also made to the Hotel Sapporo and to the Hokkaido Bank Curling Stadium for video camera footage but none of these requests produced any material.

81. The Athlete argues that as he exercised utmost caution and took all possible measures to ensure no prohibited substance entered his body and has established on a balance of probabilities that it is more likely than not that Meldonium entered his body with no fault or negligence on his part, then the otherwise applicable period of ineligibility should be eliminated pursuant to Article 10.4 of the WCF ADR.

82. Turning to the alternative argument, in the event that the primary submission does not succeed, the Athlete asserts that the starting point of four years chosen by WCF is incorrect. The Athlete accepts that Meldonium is classified as a non-specified substance under the WADA Prohibited List. But he argues that if he succeeds in establishing that the ADRV was not intentional pursuant to Article 10.2.1.1, then pursuant to Article 10.2.2, the period of ineligibility shall be two years, not four years.

83. Article 10.2.3 expands upon the term "intentional" as being *"meant to identify those athletes who cheat. The term therefore requires that the athlete … engaged in conduct which he … knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk"*.

84. The Athlete submits that the ADRV was not intentional because he had no intention to take Meldonium, let alone to cheat, and he was unaware that there was a significant risk that he would have committed the ADRV. He relies upon the evidence already dealt with in support of this proposition.

85. In further opposition to the proposed four year starting point adopted by WCF, the Athlete refers to the introduction to the WADC at p. 17 which states that the rules *"are intended to be applied in a manner which respects the principles of proportionality and human rights"*. Further, the Advisory Opinion for FIFA and WADA states that the principle of proportionality requires that there must be a "reasonable balance" between the misconduct and the sanction.

86. The Athlete refers to a consistent line of CAS decisions which have departed from fixed sanctions on the grounds that such were disproportionate and not reflective of the extent of the athlete's fault, and submits that the principle of proportionality should be applied.

87. In the present case, it is submitted that a four-year period of ineligibility is disproportionate as he is an athlete with a clean doping record, and it would result in an excessively severe punishment with serious financial consequences and effectively terminate his sporting career.

88. Under Article 10.2 of the 2009 WADC, a standard two-year period of ineligibility for a first violation was recognised as proportionate and applied by CAS panels for many years. The 2015 amendment to Article 10.2 of the WADC reflects *"a strong consensus among stakeholders, and in particular, athletes, that intentional cheaters should be ineligible for a period of four years"*.

89. Article 10.6.3 provides that an athlete potentially subject to a four-year sanction under Article 10.2.1 may receive, by promptly admitting the asserted violation, a reduction in the period of ineligibility to a minimum of two years, depending upon the seriousness of the violation and the athlete's degree of fault.

90. The Athlete submits that the discretion should be exercised to further reduce the period of ineligibility below two years based on the proportionality principle and the circumstances of the case, including the fact that the athlete promptly admitted the ADRV.

B. The WCF's Written Submissions

91. WCF filed no witness statements but relied upon a number of documents and previous CAS decisions.

92. It argues that as the Athlete did not provide any evidence to support the sabotage case, a hearing should not be held and the arbitrator should decide the issue based exclusively on the party's written submissions.

93. WCF states that the only matter for the arbitrator to decide is the quantum of the sanction applying to the Athlete's ADRV, and that Article 10.6.4 describes the steps to be taken by the hearing panel to determine the sanction.

94. WCF submits that the Athlete's alternative explanations on how Meldonium entered his body are not convincing enough to conclude that he did not ingest the substance intentionally and thus the most probable explanation was the intentional administration of Meldonium. The sabotage argument is purely speculative and not supported by any evidence.

95. WCF submits that the Athlete has not established that there was no Fault and that the period of ineligibility should not be eliminated in Article 10.4.

96. Further, WCF submits that the period of ineligibility should not be reduced based on no significant fault or negligence under Article 10.5.2. Notwithstanding the prompt admission, WCF would support a reduction of ineligibility to two years.

97. WCF submits on the one hand that the Athlete cannot simply raise the hypothesis of sabotage without further evidence and then declare it *"the only possible explanation"*. Facts must be provided which make it likely that he was the victim of sabotage including, for example a credible indication of who might be the potential saboteur, what the motive for sabotage might have been, whether the concentration found was likely to be the result of a contaminated coffee and

the like. On the other hand, the most likely source of the finding of Meldonium is the ingestion of Mildronate capsules as recommended in the Patient Information leaflet.

98. The bar for accepting sabotage is very high, as demonstrated in CAS OG 16/025, where the athlete identified the person who had allegedly sabotaged him and led evidence that he had caught the suspect in a previous attempt to drug the athlete's food. However, the CAS Panel found that while the theory was possible, it was not probable and not grounded in any real evidence.

99. Although Meldonium has a very short first phase of elimination, there is a second elimination phase of several weeks which allows detection of Meldonium.

100. The WADA Prohibited List has included Meldonium since 1 January 2016 and, as the Athlete admits, he knew about the risks of taking Meldonium. It is irrelevant as to whether Meldonium is an effective drug or has performance increasing capacity. Although acknowledging that it is unusual to dope in curling, the WCF submits that it is not absurd, and the Mildronate instructions for use state that indications for its use include *"decreased working efficiency, intellectual and physical overstress (including in athletes)"*. It is submitted that the Athlete consumed Meldonium before and/or during the Olympic Games in order to reduce the stress and to strengthen his central nervous system which makes sense in a sport which requires high concentration.

101. The submission includes a photograph said to be of the McDonald's restaurant in the Olympic Village, and questions how, when and by whom Meldonium could have been added to a cup of coffee.

102. Further, it is submitted that there is no credible motive for sabotage, and there were several risks that any asserted attempted sabotage would fail, including the risk of detection while administering the substance, or the risk that the coffee was consumed by another person.

103. Relying upon CAS 2008/A/1515 and CAS 2014/A/3487, the WCF submits that the results of the polygraph tests should not be taken into account. Further, CAS 2011/A/2384 & 2386 went only so far as to show that the evidentiary value of a polygraph test is no greater than a personal statement by the athlete.

104. In response to the Athlete's argument as to proportionality, WCF submits that Article 10 of the WADC now provides for a distinct, specific and proportionate outcome in the determination of a sanction.

105. WCF accepts that the Athlete promptly admitted the ADRV upon notification and waived a hearing before the CAS ADD in PyeongChang. WCF accepts that this was without prejudice to his right to seek elimination or reduction of the sanction because of no fault or negligence or no significant fault or negligence.

106. WCF stated that it would be ready (subject to the consent of WADA and the Athlete pursuant to Article 10.6.3 of the WADC) to accept a reduction in the period of ineligibility to 2 years, based on the Athlete's prompt admission. But such consent was never given.

107. WCF argues that the Athlete fails in establishing "no-fault" (sabotage) or "no significant fault" or general considerations of proportionality and therefore that the presumptive four year sanction should apply.

C. The Athlete's Oral Evidence and Submissions at the Hearing

108. The opening oral submission for the Athlete adhered to the position that a four-year period of ineligibility should not apply, or alternatively that the period should be two years or substantially less, and noted that no reasons had been provided by WADA for failing to consent to the WCF provisional position that a two-year period of ineligibility would be appropriate.

109. The submission emphasised that the relevant burden of proof upon the Athlete is on the balance of probabilities, and not strict proof, so that it was only necessary to show that a case was more likely than not in order to enable the Athlete to succeed. Further, as Article 3.2 provides, proof upon the balance of probabilities may be established by any reliable means including, it was submitted, by circumstantial evidence.

110. It was submitted that the Athlete had demonstrated a number of possible saboteurs who had an interest in damaging the Athlete, and that sabotage was more likely than not to be the cause of the Meldonium in the samples. It was the only possible explanation as all other alternatives could not be established on the balance of probabilities.

111. The Athlete submitted that there was no support for the WCF position that if one fails to prove sabotage then one cannot rely upon the alternative argument of "no fault or negligence".

112. Finally, the Athlete relied upon the proportionality principle in support of an argument that any period of ineligibility should be reduced substantially below two years.

113. The Athlete gave evidence at the hearing and confirmed that the contents of his written statement were correct. He described his reaction to what he said was a devastating experience of being informed of the Meldonium finding. He confirmed the precautions that he had taken to ensure that no prohibited substances were ingested. He said that it was very hard for him to explain what happened as he had always been in favour of fair play and no doping in sport. He said that he definitely did not intend to cheat and that no one ever gave him prohibited substances.

114. He described his love for curling and the sense of tragedy, depression and fever which he has undergone since the Games. He has been banned from the possibility of pursuing his career and livelihood. He said that for the two years before the Games his team had been at the top of the world rankings and he reiterated that it would be tantamount to professional suicide for him to take Meldonium in those circumstances.

115. None of the witnesses called by the Athlete were cross-examined by counsel for WCF.

116. Dr de Boer gave evidence by Skype. He confirmed the contents of his written report and emphasised that there was no expert support for the proposition that Meldonium had any performance enhancing effect for athletes.

117. Professor Kalvins gave evidence by Skype. He confirmed the contents of his written report. He responded to the WCF submission concerning whether Meldonium could reduce stress by stating that he was not sure if this was the case, and certainly not in a single dose. He discussed the wash out period for Meldonium as expanded in his report. He said that there were no clinical studies as to the performance enhancing effect of Meldonium, notwithstanding the claim in the WADA Notice – Meldonium, relied upon by WCF.

118. Vasilii Gudin, the coach, gave evidence by Skype from Moscow. He also confirmed the contents of his statement. He said he had spent about 200 days per annum with the Athlete, that he was very diligent, cautious and attentive, and always carried his own water bottle with him. He said that, as his coach, he could never imagine that the Athlete would take any prohibited substance, as it would not make sense and could not have any performance enhancing effect. He confirmed that he is in contact with the Athlete and describes that he is very upset and is going through a lot of health problems likely to arise from the stress that he has had as a result of this episode.

119. Final submissions on behalf of the Athlete commenced by reference to the chronology of facts which demonstrated that the Meldonium could not have entered the athlete's body before he arrived in PyeongChang, and that it was ingested in either a single or multiple instances over a very short time period.

120. Submissions relied heavily upon CAS 2014/A/3475, a case in which a sabotage scenario was established on balance of probabilities after the Panel took into account facts including the existence of a complaint for harassment filed by the Athlete against a member of her entourage and, following the positive anti-doping test, of a criminal complaint against a person currently under investigation.

121. As to the McDonald's scenario, it was said to be very easy for the Athlete to turn his back on someone who may have been putting a tablet into his coffee, and that on balance, taken in conjunction with the possibility of tampering in the Olympic village, the Athlete had established either sabotage or, alternatively, no fault or negligence.

122. Turning to the alternative submissions on proportionality, the Athlete relied upon CAS 2005/A/830, as confirmed in CAS 2010/A/2268, and while acknowledging that proportionality is inherent in the WADC, claimed that the overarching principle of proportionality should be applied. It was said that the evidence filed in relation to the sabotage case, even if not sufficient to prove the principal case, could be taken into account in the general circumstances in considering proportionality. Those circumstances included the prompt admission by the Athlete.

123. A number of specific points were made in response to WCF's final oral submissions.

124. As to the "it makes no sense to take Meldonium" argument never succeeding, the Athlete pointed to CAS 2014/A/3475.

125. In further support of the validity of the polygraph test, the Athlete referred to CAS 2013/A/3170.

126. Although it is not necessary to establish source before proving absence of intention, the Athlete again referred to CAS 2014/A/3475 in support of the argument that he has discharged the burden on the balance of probabilities.

127. The Athlete referred to the expert evidence as to the lack of performance enhancing qualities of Meldonium, particularly when taken in short doses or for short periods.

128. In summary, the Athlete submitted that it was only necessary to find that it was more likely than not the case of sabotage was present, and that this was the just and right outcome in the present case given that the Athlete has suffered enough and already been punished very severely.

129. The hearing concluded with a final personal statement by the Athlete which was delivered in a very heartfelt and eloquent manner. He acknowledged that he had to rely on circumstantial evidence and that sabotage, by its nature, is aimed at defaming an individual and not leaving traces to be detected. He pointed out that he had been tested on a number of occasions before the Games as it was necessary to ensure that only clean athletes would represent Russia at the Games. He stressed that he had no motive to cheat, that it made no sense for him to take Meldonium, referred to his achievements, and said that he was fully aware that he was likely to be heavily scrutinised as a medal contender. In summary, he asked the Panel to consider his case with fairness, honesty, professionalism and sense of justice.

D. WCF's Oral Submissions at the Hearing

130. The opening statement for WCF asserted that the Athlete had not demonstrated how Meldonium entered his body and that this was either because he did not know the source or because he did not want to identify the source. In short, WCF submitted that there was no legal basis demonstrated for elimination or reduction of the four-year period of ineligibility.

131. In final submissions, counsel for WCF said that one often heard a defence in doping cases to the effect that *"I did not take it and it does not make sense"*, but that such an argument has never been successful.

132. The Athlete had invoked five possible grounds for relief as follows:

    (a) No Fault or Negligence leading to total elimination of the period of ineligibility under Article 10.4

(b) No intentional use and thus a two year period of ineligibility under Article 10.2.2

(c) No Significant Fault or Negligence and a reduction of 50% under Article 10.5.2

(d) Prompt admission under Article 10.6.3 and thus a period of ineligibility of two years

(e) Proportionality

133. As to the first ground under Article 10.4, WCF noted that the definition of No Fault or Negligence required that the Athlete establish how the Prohibited Substance entered his system in order to establish that he bears No Fault or Negligence, and that the Comment to Article 10.4 states that it will only apply in exceptional circumstances such as where an athlete could prove that, despite all due care, he was sabotaged by a competitor. Reliance was placed upon CAS 2017/A/5017, where the Panel confirmed that an athlete cannot successfully prove absence of intent simply by proffering a sabotage theory without any corroborating evidence: *"Without such evidence, when deconstructed, the Athlete's theory was nothing other than a more sophisticated way of saying 'I do not know how the prohibited substance into my system but I did not knowingly take it'. It is common ground that a statement of this kind does not suffice to disprove an assumed intentional anti-doping rule violation…"*.

134. The sabotage argument put by the Athlete was more an exclusion of any other explanation, which is not evidence of sabotage but mere speculation. WCF pointed to other possibilities including ingestion by the Athlete of medication provided by the team doctor as indicated in his statement.

135. As to the polygraph test, WCF submitted that it was not reliable evidence, but that even if it was it did not assist the sabotage case because the questions administered in the test were aimed at the exclusion of other sources. Further comments were made as to the reliability of the testing but, in the absence of any cross examination of the polygraph expert, it is unnecessary to make a finding on that particular aspect.

136. WCF also questioned how a sabotage theory could work when even on the evidence of the experts called by the Athlete, the concentration of Meldonium could have arisen from single or multiple applications. That is, if the Athlete's own experts allowed for the possibility of multiple ingestions there was no evidence of multiple sabotage actions.

137. In short, the submission was that the requirements of Article 10.4 had not been met and that a four-year period of ineligibility must apply.

138. As to the second ground, non-intentional use, it was noted that Article 10.2.3 does not explicitly require an athlete to prove the source of the substance. However, as shown in cases such as CAS 2016/A/4334, where an athlete cannot prove source it leaves only the narrowest of corridors through which athlete must pass to discharge the burden which lies upon him to prove absence of intent. Similarly, in CAS 2015/A/4919, following CAS 2016/A/4334, the Panel said that while an athlete does not necessarily have to establish source when attempting to prove on a balance of probability the absence of intent, in all but the rarest of cases the issue is academic.

139. A number of questions were raised as to how a saboteur could put Meldonium into the athlete's coffee at McDonald's, such as: how could the saboteur be sure that the Athlete would drink the cup; how could the saboteur be sure that the Athlete would be tested; how would the saboteur know whether the Meldonium reacted with the coffee?

140. It was submitted that the sabotage case collapsed like a house of cards in the absence of any real evidence of sabotage as required by the jurisprudence of CAS.

141. As to whether Meldonium was a performance enhancing drug, WCF noted that the athlete's team had been taking Meldonium prior to 2016, according to his written statement, and that there was some evidence that it had at least a protective effect.

142. As to the third ground, under Article 10.5.2, the same arguments were put as previously stated in relation to the first ground, so that in the absence of evidence of source, there is no legal basis for reduction of the period of ineligibility.

143. As to the fourth ground, there can be no reduction for prompt admission under Article 10.6.3 in the absence of consent of WADA. Further, there had not been a prompt admission of the ADRV, simply an acceptance of the laboratory test result. It was submitted that the purpose of the provision is to obviate the need for disciplinary procedures and save resources of anti-doping organisations. Reference was made to CAS 2017/A/5282, where the Panel noted that a simple acknowledgement of an adverse finding does not appear to be sufficient for an athlete to obtain any benefits thereunder because it concedes nothing that is not already vouched for by the adverse finding, whose accuracy is to be presumed unless rebutted.

144. As to the fifth ground, proportionality, WCF referred to CAS 2018/A/5546 & 5571 where the Panel noted that CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing the period of ineligibility provided for by WADC any further (and there is only one example of it being applied under the previous version of the WADC).

145. The WADC had repeatedly been found to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of the length of sanction. This was vouched for by an opinion of a previous President of the European Court of Human Rights. It noted that the WADC was designed not only to punish cheating, to protect athlete's health and, above all, to ensure fair competition in the level playing field, and has thus set up a detailed framework which balances the interest of those athletes who commit ADRVs with that of those who do not.

146. In short, the WCF submission was that if an athlete was able to claim sabotage and rely upon a polygraph test, a golden route would open for cheating in sport.

V. JURISDICTION OF THE CAS ADD

147. The jurisdiction of the CAS ADD for consideration of an ADRV committed during the Games arises from Article 7.1.2 and 10.2.2 of the IOC ADR, and includes the imposition of sanctions for such ADRV which exceeds the period of the Games.

148. Pursuant to Article 1 of the CAS ADD Rules, the CAS ADD *"shall be the first instance authority to conduct proceedings and to issue decisions when an alleged anti-doping rule violation has been asserted and referred to it under the IOC ADR, and for the imposition of any sanctions therefrom whether applied at the Games or thereafter. Accordingly, the CAS ADD has jurisdiction to rule as a first instance authority in place of the IOC and/or the International Federation concerned"*.

149. Article 15 (f) CAS ADD Rules provides that proceedings outside the period of the Games *"shall be conducted by the same Panel taking into account the existing time constraints and the right of the parties to be heard within a reasonable time"*.

150. Article 20 CAS ADD Rules provides that the Panel may make a partial award during the period of the Olympic Games and decide the remaining issues in a final award after the period of the Olympic Games. If the Panel does not issue a final award during the period of the OG the Panel formed during the OG remains assigned to the resolution of the dispute.

151. The WCF Anti-Doping Rules (Version 6.0, September 2016 Edition) (the "WCF ADR") are applied to determine the consequences of an ADRV committed at the Olympic Winter Games.

152. Both parties agree that the CAS has jurisdiction in these proceedings.

153. Jurisdiction is, therefore, vested with the CAS ADD over this matter.

VI. ADMISSIBILITY

154. The parties have filed documents within time periods agreed or specified by the Sole Arbitrator in accordance with the agreed procedural briefing schedule.

155. No objection has been taken to the admissibility of the proceedings, and it follows that the proceedings are admissible.

VII. APPLICABLE LAW

156. Article 17 CAS ADD Rules provides that *"The Panel shall rule on the dispute pursuant to the IOC ADR, the WADC, the rules of the IF concerned, the applicable regulations, Swiss law, and general principles of law"*.

157. The WCF ADR are applied to determine the consequences of an ADRV committed at the Games.

158. Thus, the IOC ADR, the WCF ADR, and the WADC are the applicable rules in this case.

VIII. DISCUSSION

A. BURDEN OF PROOF

159. At the outset, the Sole Arbitrator sets forth the burden of proof that must be applied throughout his analysis of the facts and circumstances presented by the parties.

160. Pursuant to Article 3.1 of the WCF ADR, the burden of proof is stated as follows:

"WCF shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether WCF has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. The standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these anti-doping rules place the burden of proof upon the athlete … alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified acts or circumstances, the standard of proof shall be by a balance of probability".

161. "No fault or negligence" is defined in appendix 1 to the WCF ADR as follows:

"the Athlete … establishing that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he… had used or been administered the prohibited substance or prohibited method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the prohibited substance entered his system".

162. "Fault" is defined as:

"any breach of duty or any lack of care appropriate to the particular situation. Factors to be taken into consideration in assessing an Athlete's … degree of fault include, for example, the Athlete's … experience, … the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's … degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's … departure from the expected standard of behaviour…".

163. The relevant standard of proof has been described in various ways, all to the same effect, in a number of previous decisions.

164. In CAS 2014/A/3820, the CAS Panel stated: *"In order to establish the origin of a Prohibited Substance by the required balance of probability, an athlete must provide actual evidence as opposed to mere speculation".*

165. In CAS 2010/A/2230, the Sole Arbitrator expressed the athlete's burden in the following terms:

"To permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body".

166. Evidence establishing that a scenario is possible is not enough to establish the origin of the prohibited substance. Indeed, the Panel in CAS OG 16/025 *"found the sabotage(s) theory possible, but not probable and certainly not grounded in real evidence"*. Ultimately, *"the nature and quality of the defensive evidence put forward by the athlete, in light of all the facts established, must be such that it leaves the tribunal actually satisfied (albeit not comfortably so) that the athlete's defence is more likely than not [to be] true"*.

167. As the Panel said in CAS 2008/A/1515,

"Once a violation of the anti-doping rules has been established, to benefit from the elimination or reduction of a period of suspension, the athlete must first establish how the prohibited substance entered his system. Secondly, it will only be possible to eliminate or reduce the period of suspension if the athlete satisfactorily establishes that he did not know or suspect and could not reasonably have known or suspected, even with the utmost of caution, that he had ingested a prohibited substance. A reduction in the duration of the suspension will not be possible unless he establishes that his fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for "No Fault or Negligence" was not significant in relation to the anti-doping rule violation. The balance of probability standard entails that the athlete has the burden of persuading the panel that the occurrence of the circumstances on which the athlete relies more probable than their non-occurrence or more probable than other possible explanations of the positive testing.

168. In CAS 2011/A/2384 & 2386 the Panel stated:

"The importance and difficulty of the struggle against doping in sport has brought about a qualification to these two normal indispensable precepts of justice. That qualification is that once a strict liability doping offence is established by demonstrating no more than the presence of a prohibited substance in an athlete's sample, the burden shifts onto the athlete to establish how the substance came into his body and that he bore no-fault or negligence for its presence. In essence, the athlete must prove his innocence. This significant incursion into the rights of the accused is however justified by the need to protect sport and the difficulty faced by the regulatory authority to actively prove the method of ingestion and the athlete's degree of fault".

169. Thus, the Sole Arbitrator determines that the he must find himself comfortably satisfied that the WCF established that the Athlete committed an ADRV bearing in mind the seriousness of the allegation which is made. In any situation where the applicable anti-doping rules place the burden of proof upon the athlete to rebut a presumption or establish specified acts or circumstances, the standard of proof shall be by a balance of probability.

B. POLYGRAPH TEST RESULTS

170. Consideration of the admissibility of results of a polygraph test, and expert opinion in relation to such results, appears to have first arisen in CAS jurisprudence in 1996, where a Panel did not

admit a polygraph test as legitimate evidence (*see* CAS 96/156) (The Athlete's submission in the present case refers to TAS 99/A/246 in 1999). In any event, the CAS Panel there noted that Swiss law was very much against the possible use of lie detector tests as evidence, and as a result the Panel did not deem admissible as evidence a deposition based on a lie detector test. The Panel took into consideration the assertions in the polygraph test as mere personal statements rendered by a party to the dispute or a witness, with no additional evidentiary value whatsoever given by the circumstance that they were rendered during a lie detector test.

171. The submission for the Athlete also refers to CAS 2012/A/2797 in 2012. However, as the Panel noted, the polygraph test results were irrelevant due to timing issues. Further, relying upon CAS 2008/A/1515, *"under Swiss law, a polygraph test is inadmissible as evidence per se but can be considered as a mere personal statement"*.

172. In CAS 2008/A/1515, the athlete was a professional sailor competing in the America's Cup in 2007. During an in-competition drug test metabolites of cocaine were found in a urine sample. A polygraph expert administered a so-called lie detector test to the athlete, who denied that he had ever used cocaine. On the basis of the polygraph examination, the expert asserted that it was his firm opinion that the athlete had been truthful in his answers. The athlete alleged that the only possible explanation for the ingestion of the drug was through a spiked drink on three different occasions when he was visiting public establishments. In support of his assertions he relied upon a number of statements as to his good character, evidence as to the strong hostility of fans of the opposing team, and the opinion of the polygraph expert. In response, the Panel stated:

"a polygraph test is inadmissible as per se evidence under Swiss law. Therefore, the CAS Panel may take into consideration the declarations of… (the athlete) in front of (the polygraph expert) as mere personal statements, with no additional evidentiary value whatsoever given by the circumstance that they were rendered during a lie detector test (TAS 99/A/246; CAS 96/156)".

173. More recently, in 2011 in CAS 2011/A/2384 & 2386, the athlete asserted that the presence of a prohibited substance in his test samples may have been due to the ingestion of contaminated meat, and in order to corroborate his assertion that he did not undergo a blood transfusion at a relevant time, he underwent a polygraph examination. The polygraph expert expressed the opinion that the athlete was telling the truth in the relevant answers. A further independent review by a polygraph credibility consultant came to the same conclusion. The appellants in that case, WADA and UCI, did not dispute the admissibility of the polygraph examination itself, but referred to CAS 2008/A/1515, citing the passage set out above. The athlete, in response, pointed to Article 23 UCI ADR and Article 3.2 of the WADC providing that: *"facts relating to anti-doping rule violations may be established by any reliable means, including admissions"*. The CAS Panel noted that although the results of the polygraph examination corroborate the athlete's own assertions, the credibility of those must nonetheless be verified in the light of all the other elements of proof adduced, so that the results of the polygraph add some force to the athlete's declaration of innocence but do not, by nature, trump other elements of evidence.

174. In CAS 2014/A/3487 in 2014, the athlete denied any intentional use of a prohibited substance and argued that the source of the substance found in her urine sample must be either sabotage

or contaminated food/drink. In support of that argument, the athlete relied upon evidence of a polygraph expert. The CAS Panel noted:

"… The utility and probative value of polygraph evidence is a matter of contention between the parties. Moreover, courts and tribunals in different jurisdictions have adopted significantly different approaches to the reliability of such evidence. Having regard to the contents of the expert reports …. and the other factors set out below, the Panel does not consider it necessary to consider the admissibility or reliability of the polygraph evidence. In these circumstances the Panel therefore concludes that it need place no weight on (the polygraph expert's) oral testimony or written report, and, while noting that the previous CAS cases have considered this issue (see, for example, [CAS 2011/A/2384 & 2386] and [CAS 2008/A/1515]) the Panel expresses no view as to the probative value of this testimony or the written report".

175. Even more recently, in 2016 in CAS 2016/A/4334 (which will be considered further below in relation to other issues), the panel considered the dispositive nature of such evidence. The Panel noted that even in the original home of the device, the US Supreme Court has held that the rejection of polygraph evidence was not unconstitutional, and noted that polygraph tests were notoriously passed by Lance Armstrong and Marion Jones, both of whom later admitted use of prohibited substances. The Panel expressed the view that polygraph evidence was of limited value and, moreover, the cost involved was disproportionate to any probative value of such test. It noted that if, in the future, it were not, as a matter of practice to be entertained by CAS panels, this would have the beneficial consequence that an athlete could not be criticised for failure to submit to such tests as a means of seeking to show lack of intent.

176. There being no challenge to the conduct of the polygraph test or the expertise of the tester, the Sole Arbitrator concludes that the evidence should be admitted and taken into account but that it rises no higher than the status accorded to such evidence by the Panel in CAS 2011/A/2384 & 2386, namely that it adds some force to the Athlete's declaration of innocence but does not supplant the need to carefully consider all other evidence in the case in determining whether the burden of proof has been discharged.

C. SABOTAGE CASES

177. As the Athlete's primary case asserted an alleged sabotage of his sample, the Sole Arbitrator deems it necessary to review the principal cases cited by the parties in his regard.

a) CAS OG 16/025

178. In CAS OG 16/025, the athlete argued that the adverse analytical finding for methandienone was a result of sabotage by a nominated person, Mr Jithesh. Evidence was given by witnesses who initially saw Mr Jithesh pour a powder into the curry which was ultimately consumed by the athlete. A wrestling partner of the athlete alleged that the curry had been contaminated so he threw it away but failed to mention this to the athlete. Shortly after this event, the athlete alleged that his energy drink was contaminated by the same Mr Jithesh, the day before an out of competition urine test was taken which ultimately revealed the presence of metabolites of a prohibited substance.

179. WADA argued against the sabotage theory. It was submitted that the athlete had not reported the earlier attempted sabotage of the curry, and then left his drink unattended at a critical time shortly before the sample was taken. WADA submitted that this case was different from previous cases CAS 2014/A/3475 and CAS 2009/A/1926 & 1930 as in those cases neither athlete had any reason to ingest cocaine and both had evidence that could be assessed by the panel – in the first case the bottle containing the substance was tested, and in the second case there was evidence that the athlete interacted with a cocaine user.

180. The athlete submitted that the panel could rely upon circumstantial evidence, citing CAS 2014/A/3475 in support of his position. He asserted that there was no need to cheat, as he had already qualified for the Olympic Games, he was on a weight reduction program and the prohibited substance would increase his weight so would not benefit him at all. The athlete submitted that his case was stronger than CAS 2014/A/3475 as here there was an identifiable culprit, who had access to the training facility, who was part of the entourage, and who had already attempted to spike the athlete's curry. It was also noted that police were apparently looking into his complaint against Mr Jithesh, but he had absconded.

181. The athlete did not dispute that he had committed an ADRV. The Panel, in considering the burden of proof, took into account circumstantial evidence as well as the expert evidence, noting that it is for the Panel to determine the weight to attach to all the evidence before it.

182. The Panel concluded that the sabotage theory was possible, but not probable and certainly not grounded in any real evidence. The Panel therefore determined that the athlete had failed to satisfy his burden of proof and the Panel was satisfied that the most likely explanation was that the athlete intentionally ingested the prohibited substance. The athlete was sanctioned with a four-year ineligibility period.

b) CAS 2008/A/1515

183. In CAS 2008/A/1515, the athlete argued that he had no idea how cocaine entered into his body. His only possible explanation was the ingestion of the drug through a spiked drink during one of three nights when he visited public establishments prior to competing in the America's Cup. As noted above, he relied upon the opinion of a polygraph expert following a polygraph test in support of his case. However, the Panel concluded that he had failed to establish that sabotage had occurred in any of the three asserted locations. The Panel said it:

"finds it difficult to acknowledge that (the athlete) offered persuasive evidence of how cocaine entered his body as the evidence is merely indirect and his version of the facts seems incompatible with (other evidence)".

184. Alternatively, even if the Panel accepted that the athlete had proved on the balance of probabilities that his drink was spiked on one particular day, the Panel was of the view that he had failed both the "no fault or negligence" test and the "no significant fault or negligence" test. The Panel concluded that the athlete had willingly put himself in an unsure situation for which he must take responsibility and that in the circumstances his fault or negligence had been significant.

c) CAS 2014/A/3487

185. In CAS 2014/A/3487 the Panel considered that there were at least four potential theoretical explanations for the presence of the prohibited substance in the athlete's urine sample – deliberate consumption of the substance; inadvertent consumption of the substance as a result of unintentional food or water contamination; deliberate spiking of the sample by a third party; or inadvertent environmental contamination of the sample as a result of the failure to comply with the mandatory partial testing procedure.

186. The first two possibilities would involve the commission of an anti-doping violation. As to the third, namely deliberate spiking, the Panel accepted the IAAF's argument and the expert evidence that deliberate spiking should be rejected as a possible cause of the adverse analytical finding. The evidence suggested that any attempt to spike the athlete's sample in the doping control room would have required exceptional skill, planning and opportunity, and would have been fraught with risk. There was no evidence before the Panel to suggest that any individual, either identified or unidentified, was behaving suspiciously in the doping control area. Nor is there any evidence to suggest that any individual may have had the skill, equipment, opportunity or indeed the motive to spike the athlete's sample during the short window of time between the collection of her first and second urine samples.

d) CAS 2012/A/2797

187. In CAS 2012/A/2797, an athlete attempted to establish no fault or negligence based on the fact that a named person, Mr Gergely Kalmar, had stated in a police investigation that he had put the prohibited substances in a food supplement drink of the athlete. At the hearing before the International Judo Federation, the alleged saboteur was represented, but not present and was not cross-examined. However, the Executive Committee of the IJF did not accept the athlete's submission. The Panel stated that the only way of finding whether a witness statement may be true or not is to hear the witness testifying under the obligation to say the truth. As Mr. Kalmar could not be heard or cross-examined, the Panel did not admit his evidence. The Panel considered the respective CAS jurisprudence in three similar cases , namely CAS 2008/A/1515, CAS 2007/A/1399 and CAS 2006/A/1067.

e) CAS 2006/A/1067

188. In CAS 2006/A/1067, a specified substance was detected in a rugby player's urine sample. The player asserted that the substance had entered his body without his knowledge through a spiked drink. He said that he had taken a client to a nightclub and accepted a few drinks from strangers sitting next to his table at the nightclub and that one of these strangers must have put cocaine into one of his drinks. He also produced a number of statements as to his good character in order to corroborate his allegations. A Disciplinary Panel found that, given his good character, he was given the benefit of any doubt and on the balance of probabilities conceded that the

prohibited substance entered body through a spiked drink. The decision of the Disciplinary Panel was upheld by a Review Panel, but that decision was appealed to CAS.

189. The *IRB* argued that the player had not established on the balance of probabilities how the prohibited substance entered his system, and in particular had submitted no medical evidence, witnesses, or other circumstantial or corroborative evidence to prove that his drink was spiked by third parties.

190. Citing the WADC comment, the CAS Panel noted that as to the standard of proof, it was necessary to establish the violation *"to the comfortable satisfaction of the hearing body"*. This standard of proof is greater than *"a mere balance of probability"* but less than *"proof beyond reasonable doubt"*. The Panel accepted the IRB argument that no evidence of the actual existence of the drink supposedly offered by strangers was submitted, there was no corroborating evidence that the athlete was even in the bar in question, but even if he was, the theory of cocaine contamination through a "spiked drink" is only a speculative guess or explanation uncorroborated in any manner. Additionally, and on point here, the Panel held that :

"One hypothetical source of a positive test does not prove to the level of satisfaction that a matter is factually or scientifically probable …. The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred. The Panel, therefore, finds that the Respondent's explanation was lacking in corroborative evidence and unsatisfactory, thereby failing the balance of probability test. In other terms, the Panel is not persuaded that the occurrence of the alleged ingestion of cocaine through a "spiked drink" is more probable than its non–occurrence. This failure to establish how the prohibited substance entered his bodily specimen means that exceptional circumstances have not been established and there can be no reduction in the sanction from the otherwise established two-year suspension. The Panel observes that the good character evidence submitted by the Respondent cannot overcome the strict liability principle or satisfy the burden of proof. Such evidence cannot help the Respondent in establishing any feature of the ingestion of the prohibited substance. Perhaps, the good character evidence might have helped the Respondent in reducing the sanction but only after having proven, first, how the prohibited substance came into his body and, second, the absence of any significant fault or negligence …. A CAS Panel cannot accept the submission that getting drunk, and possibly not realising and/or remembering what was going on, is an exceptional circumstance excusing an athlete from his fault or negligence. If it were to do so, this Panel would create a loophole enabling athletes who have been found guilty of a doping offence to get an unwarranted reduction of the sanction provided for by the applicable anti-doping regulations".

f) CAS 2007/A/1399

191. In CAS 2007/A/1399*,* a wrestler tested positive for a prohibited diuretic on the basis of a test which took place during the European Wrestling Championships. During investigations, including the administration of polygraph tests, a friend and former competitor of the athlete allegedly admitted to have poured the forbidden substance into a bottle of mineral water that the athlete drank from on the evening two days before the test. This was allegedly done because she was jealous and envious of the athlete. The athlete asserted that she was at all times very cautious about her food and beverages, and never consumed unknown new food or beverages without asking her coach, and always used beverages from closed bottles or well-known sources.

192. The CAS Panel found that a number of alleged facts were rather improbable namely:(a) that the alleged culprit, who was at a lower level and thus not in that sense a competitor of the athlete, would premeditate a plan to spike the athletes drink simply because of jealousy that had developed a few years earlier; (b) that at such a young age the alleged culprit would alone have sought a chemist shop to buy the prohibited substance; (c) that the alleged culprit had purchased the substance a considerable period beforehand without knowing when and how she might put the plan into execution; (d) that the alleged culprit had taken a long trip alone with the trainer to Moscow; (e) that she would be eating alone with the athlete on the eve of the competition, whereas they were not close friends and the athlete was staying in a different hotel; (f) that the athlete, being so obsessed about prudence with bottles and drinking precautions and remembering with such detail how the bottles were handled before, during and after the meal, while at the same time not recalling other contemporary facts such as what she had eaten; (g) that the alleged culprit had quickly taken a glass capsule out of her pocket and broken it open under the tablecloth and put it into a bottle in a hotel dining room at supper time while the athlete was fetching some fruit.

193. In light of the numerous unsatisfactory aspects of the evidence of the athlete and the alleged culprit the Panel found that it was improbable that the athlete's drinking water was spiked with the substance by the alleged culprit. In other words, the Panel found it more probable than not that the alleged culprit did not sabotage the athlete's drink. This finding was supported by expert evidence as to the unlikelihood of the quantity of diuretic found in the athlete's sample having been ingested two days earlier as alleged in the spiking theory. Thus the Panel considered that the athlete could not invoke the "no-fault or no significant fault" under the applicable regulations and the two-year suspension for a first offence was applied.

g) CAS 2014/A/3475

194. In CAS 2014/A/3475, the athlete's urine sample tested positive for cocaine after the World Judo Championships in 2013. The International Judo Federation Executive Committee imposed a two-year suspension under Article 10.2 as it then stood. On appeal to CAS, the athlete argued that the positive finding was due to an act of sabotage during a period of 30-45 minutes while the athlete was competing when a suitcase containing the athlete's Energy Boost drink powder was unattended and accessible to anyone with accreditation. The athlete had filed a criminal complaint against a named person. The athlete contended that she had never intentionally used cocaine. Further, a harassment complaint had been made by the athlete against a former coach, leading to the coach no longer being able to coach female athletes.

195. The Panel could not determine with certainly that an identifiable third party would be the perpetrator of sabotage. However, the Panel considered the scenario of sabotage by a malicious third party to be the most likely scenario. Given the very small amount of cocaine metabolites, the Panel believed that '*it may be somewhat more flexible in assessing the athlete's evidence of how the prohibited substance entered her body*'. The Panel concluded that the athlete had not committed any Fault or Negligence under Article 10.5.1, and cancelled the two year suspension.

D. CONSIDERATIONS OF INTENTION, SOURCE AND FAULT

196. Pursuant to Article 10.2.1.1 of the WCF ADR, the period of ineligibility shall be four years where the anti-doping rule violation does not involve a specified substance, unless the athlete can establish that the anti-doping rule violation was not intentional.

197. Pursuant to Article 10.2.2 of the WCF ADR, if Article 10.2.1 does not apply, the period of ineligibility shall be two years.

198. The following summarises the relevant principles as to proof of source as outlined in CAS 2018/A/5546 & 5571, to which the Sole Arbitrators adheres:

- It is for an athlete to establish the source of the prohibited substance, not for the anti-doping organization to prove an alternative source to that contended for by the athlete.
- An athlete has to do so on the balance of probabilities. Evidence establishing that a scenario is possible is not enough to establish the origin of the prohibited substance.
- An athlete must do so with evidence, not speculation.
- It is insufficient for an athlete to deny deliberate ingestion of a prohibited substance and, accordingly, to assert that there must be an innocent explanation for its presence in his system. As was said CAS 2010/A/2230 *"to permit an athlete to establish how a substance came to be present in his body by little more than a denial that he took it would undermine the objectives of the Code and Rules. Spiking and contamination – two prevalent explanations volunteered by athletes for such presence – do and can occur; but it is too easy to assert either; more must sensibly be required by way of proof, given the nature of the athlete's basic personal duty to ensure that no prohibited substances enter his body"*.
- If there are two competing explanations for the presence of the prohibited substance in an athlete's system, the rejection of one does not oblige (though it may permit) the hearing body to opt for the other. The conclusion that the other is not proven is always available to the hearing body. In such a situation there are three choices, not just two, for the hearing body.

199. Recent CAS jurisprudence has considered the issue of whether, in order to establish absence of intent for the purposes of provisions such as Article 10.2.1, it is necessary for an athlete to establish the source of the prohibited substance present in his sample. In other words, is establishment of the source of a prohibited substance in an athletes sample a *sine qua non* (necessary or indispensable condition) of proof of absence of intent?

200. In both CAS 2016/A/4334 and CAS 2016/A/4676, the panels concluded, in short, that establishment of the source of the prohibited substance in a sample is not mandated in order to prove an absence of intent. This conclusion was reached in each case after consideration of a number of factors supporting each side of the argument. However, in each case, the panels acknowledged that the likelihood of finding lack of intent in the absence of proof of source would be extremely rare, and that if an athlete cannot prove source it leaves the narrowest of corridors through which the athlete must pass to discharge the burden which lies upon him.

201. In CAS 2016/A/4334*,* the Panel considered Article 10.2 of the FINA Doping Control Rules (DC), which is identical to Article 10.2 WCF ADR. An ADRV was asserted against the athlete, and the principal issue considered was whether, in order to establish absence of intent, it was necessary for the athlete to establish the source of the prohibited substance present in his sample. The panel noted as follows*:*

"In particular, it is impressed by the fact that the FINA DC , based on WADC 2015, represents a new version of an anti-doping Code whose own language should be strictly construed without reference to case law which considered earlier versions whether versions are inconsistent. Furthermore, the Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history (it is recorded, if apocryphally, that the young George Washington admitted chopping down a cherry tree because he could not tell a lie. Mutatis mutandis the Panel could find the same fidelity to the truth in the case of an athlete denying a charge of cheating). That said, such a situation would inevitably be extremely rare. Even on the persuasive analysis of Rigozzi et al, proof of source would be an important, even critical first step in any exculpation of intent. Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him".

202. In short, the established CAS jurisprudence reviewed above demonstrates that the threshold for establishing sabotage as the reason for an ADRV is very high. The Sole Arbitrator subscribes to the premise that any proposed sabotage theory must be supported by reliable and credible evidence, not speculation or assertions of absence of motive. It is insufficient for an athlete to simply raise a hypothesis of sabotage without corroborating evidence and then to simply declare that sabotage is the only possible explanation.

E. ISSUES AND CONCLUSIONS

203. The Sole Arbitrator next considers the principal issues in this procedure as follows:

- As it has been established that an ADRV has occurred under Article 2.1 WCF ADR, has the Athlete established that the ADRV was not intentional under Article 10.2.1.1?
- Has the athlete established that he bears no fault or negligence under Article 10.4 WCF ADR?
- Has the Athlete established that he bears no significant fault or negligence under Article 10.5.1 WCF ADR?
- Has the athlete established that the mandatory period of ineligibility of four years should be reduced by reason of Prompt Admission under article 10.6.3, or by reason of the principle of proportionality?
- What is the quantum of any sanction that should be imposed?
- What is the commencement date of any period of ineligibility pursuant to Article 10.11 WCF ADR?

204. These issues will be addressed below.

205. As an initial matter, the Sole Arbitrator notes that the sole purpose of the circumstantial evidence and argument put forth by the Athlete is to question why a rational person would ingest Meldonium in his circumstances. However, despite such question raised, the Athlete failed to set forth any credible evidence whatsoever in support of the theory of sabotage at either of the locations suggested by the Athlete, namely McDonald's in the Olympic Village and the Athlete's accommodation at the Olympic Village.

206. The Sole Arbitrator instead favours the many doubts that arise and outweigh the Athlete's proposition as to how such sabotage could possibly have occurred. To name a few:

- There is no surveillance evidence of either location.
- There is no evidence as to how the asserted sabotage could have happened or been carried out.
- If such sabotage did in fact happen it would have had to have been a very well planned strategic operation targeting only the Athlete.
- There is no basis for concluding that any cleaners who entered the Athlete's room could know which bottle would be drunk by the athlete.
- Any attempt to sabotage the Athlete's drink in the McDonald's restaurant would involve the risk that such an attempt would fail, including the risk of being detected while administering the substance, or the risk that the coffee was consumed by another person (the Sole Arbitrator has not taken into account the contents of the WCF Reply Brief, or the supporting photograph, supposedly of the McDonald's restaurant at the Olympic Village, as there is no evidence to support the argument set out in that paragraph, and no submissions were put at the hearing in support of the argument).
- There is no relevant evidence of any motive to sabotage.
- If there were multiple ingestions of Meldonium, as postulated by the Athlete's experts, how was any sabotage operation carried out on multiple occasions?
- There are no witnesses to such sabotage or acts of suspicious activity in or around the Athlete's inner circle or personal property.

207. The Athlete has produced no evidence to support the sabotage theory, and the argument is based on pure speculation. As the Panel said in CAS 2017/A/5017, when finding that an athlete cannot successfully prove absence of intent simply by proffering a sabotage theory without any corroborating evidence: *"Without such evidence, when deconstructed, the Athlete's theory was nothing other than a more sophisticated way of saying 'I do not know how the prohibited substance into my system but I did not knowingly take it'. It is common ground that a statement of this kind does not suffice to disprove an assumed intentional anti-doping rule violation …"*.

208. The decision in CAS 2014/A/3475 does not assist the Athlete. In that case, as there was evidence in support of the sabotage theory, the decision is no more than a conclusion on the facts of that case in the light of established jurisprudence. Further, in CAS 2014/A/3475 there

was no direct consideration of the issue of whether the athlete had established the source, or established lack of intent under Article 10.2.1 as considered in recent cases such as CAS 2016/A/4334.

209. Further, in CAS 2014/A/3475 there was no direct consideration of the issue of whether the athlete had established the source, or established lack of intent under Article 10.2.1 as considered in recent cases such as CAS 2016/A/4334.

210. The Athlete has not proved the source of the Meldonium found in his samples. Proof of source is an important, if not critical, first step in any exculpation of intent. This is not one of the rare cases where the athlete who cannot prove source can pass through the narrowest of corridors left open to discharge the burden which lies upon him.

211. It is unnecessary to determine the date of the alleged ingestion, or whether Meldonium is a performance enhancing drug for curlers. The indication for the use of Mildronate is *"decreased working efficiency, intellectual and physical overstress (including in athletes)"*. The Athlete was aware of the risks of taking Meldonium, as confirmed in his statement and Response. Further evidence demonstrate that Meldonium was added to the Prohibited List because WADA concluded based on scientific studies, that Meldonium has a performance enhancing effect.

212. There being no evidence to support the sabotage theory, it is not necessary to determine, despite the WCF submission, that the Athlete ingested Meldonium voluntarily or negligently. It is sufficient to find that the Athlete has failed to establish that the ADRV was not intentional, as required by Article 10.2.1.1.

213. For the above reasons the Arbitrator finds that the Athlete has failed to discharge his burden of proving sabotage.

214. It is then necessary to consider the alternative arguments put by the Athlete.

215. First, as he has failed to establish source, or *"how the Prohibited Substance entered his system"* in terms of the definitions of "No Fault or Negligence" or "No Significant Fault or Negligence", he is not entitled to elimination or reduction of the period of ineligibility under Article 10.4 or Article 10.5.

216. Second, as to "prompt admission", one of the issues which arose in CAS 2016/A/4334 was the meaning of FINA DC 10.6.3, which was in identical terms to Article 10.6.3 WCF ADR. The Panel said:

"to trigger the possibility of a reduction from what would otherwise be a four year sanction, the Athlete must (i) admit the asserted ADRV; (ii) do so promptly after being confronted by FINA or a member Federation; and (iii) have the approval of both WADA and FINA. Even in such circumstances, (iv) the reduction is discretionary (see the word "may receive a reduction" in the context of the reference to the discretion of WADA and FINA, and depends upon the severity of the violation and the athlete's degree of fault).

The perceptible purpose of the provision is to avoid the time and cost involved in a contested dispute and its procedural consequences. … The Panel does not accept that such a provision, so construed, should be a spur to

an athlete, otherwise honest, to lie so as to gain the chance of a reduction to which he or she would not ordinarily be entitled with the consequence (as was argued) that such athlete might be better off than one who was genuinely ignorant of the source of the positive test and could not therefore properly make an admission. The latter athlete could, if so minded, make a false admission as easily as the former. In any event, in principle, a construction of a rule otherwise appropriate cannot be discarded on the basis that persons will not act in relation to it in good faith".

217. On the facts in CAS 2016/A/4334, the Panel noted that in contesting the sanction and raising the issue of lack of intent in two hearings, the athlete did not save cost and time in any significant way. Further in any event – and decisively – he had neither sought nor had the approval of WADA and sought the approval of FINA in so far as he raised the matter in the appeal to CAS. The panel was thus unable – and would not in any event be inclined in the circumstances of the proceedings – to reduce the sanction under DC 10.6.3.

218. The purpose of Article 10.6.3 is to obviate the need for disciplinary procedures and save resources of anti-doping organisations. The Sole Arbitrator accepts the WCF submission that a simple acknowledgement of an adverse finding does not appear to be sufficient for an athlete to obtain any benefits thereunder because it concedes nothing that is not already vouched for by the adverse finding, whose accuracy is to be presumed unless rebutted.

219. Article 10.6.3 does not provide for an automatic reduction of a period of ineligibility from four years to two years. As WCF submits, any reduction of sanction based on a prompt admission must be negotiated between the Athlete, WADA and WCF, and it is clear that WADA did not consent to any reduction. Although the Athlete raised a question at the hearing as to the basis of the WADA decision, there was no challenge to the statement by WCF that WADA were provided with a complete copy of the file in this matter at the time of seeking consent to a reduction, which was ultimately not forthcoming. In this case there was no Prompt Admission by the Athlete within the meaning of Article 10.6.3, and no approval by WADA. The Athlete therefore fails to establish an entitlement to a reduction in a period of ineligibility under Article 10.6.3.

220. Third, as to proportionality, the Arbitrator accepts the WCF submission that early CAS jurisprudence as to reduction of sanctions in exceptional circumstances must be qualified by the introduction of the WADC in 2003 and subsequent modifications.

221. As the Panel said in CAS 2016/A/4334

"The history of sanctions since the creation of WADA can be, if only broadly, summarised in three chapters. Under WADC 2003, the basic sanction for a first offence ADRV was two years. Under WADC 2009, it became two years, subject to increase to 4 years in circumstances of aggravation. Under WADC 2015, it became four years, subject to decrease in circumstances of mitigation. The sanctions screw was tightened in an effort to rid sport of the scourge of doping. Guarding against doping is so fundamental to the ability to hold fair sporting events and fund them that its presence jeopardises the existence of sports itself. The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim".

222. Further, as the Panel said in CAS 2018/A/5546 & 5571, the CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by WADC. This was also recently confirmed in a case relied upon by the Athlete, CAS 2017/A/5015, and in CAS 2016/A/4643. It is therefore unnecessary to consider the validity of the Athlete's submission that the evidence filed in relation to the sabotage case could be taken into account in the general circumstances in considering proportionality.

223. In consequence, the Athlete cannot benefit from any reduction of the mandatory four-year period of ineligibility.

224. In summary, the findings of the Sole Arbitrator on the issues raised in these proceedings are as follows:

- The Athlete has not established that the ADRV was not intentional under Article 10.2.1 WCF ADR.
- The Athlete has not established the source of the Prohibited Substance and is not entitled to elimination or reduction of the period of ineligibility under Article 10.4 or Article 10.5 WCF ADR.
- The Athlete has not established an entitlement to reduction of a period of ineligibility under Article 10.6.3 WCF ADR.
- The Athlete has not established that there should be any reduction in a period of ineligibility on the basis of the proportionality principle.

225. Consequently, pursuant to Article 10.2.1.1 of the WCF ADR, the Athlete is declared ineligible for a period of four years commencing on the date of his voluntary provisional suspension (i.e. 12 February 2018) for having committed an Anti-Doping Rule Violation contrary to Article 2.1 of the WCF Anti-Doping Rules.

IX. COSTS

(…)

X. RIGHT TO APPEAL

228. This award will be notified to the parties by email only. Pursuant to Article 21 of the CAS ADD Rules, this award may be appealed to the CAS Appeals Arbitration Division in Lausanne, Switzerland, pursuant to Article R47 et seq. of the Code of Sports-related Arbitration, no later than 21 days from the notification of the award.

XI. DECISION

The CAS Anti-doping Division hereby rules:

1. The application of the World Curling Federation is granted and therefore, Mr Aleksandr Krushelnickii is sanctioned with a period of ineligibility of four years commencing on the date of his voluntary provisional suspension (i.e. 12 February 2018).

2. The present award is rendered free of charge.

3. (…).

4. All other or further motions or prayers for relief are dismissed.