



Arbitration CAS 2016/A/4615 Asli Çakir Alptekin v. World Anti-Doping Agency (WADA), award of 4 November 2016 (operative part of 5 July 2016)

Panel: Mrs Jennifer Kirby (United Kingdom), President; Mr Dirk-Reiner Martens (Germany), Mr Ken Lalo (Israel)

Athletics (middle distance)

Further suspension of period of ineligibility based on Substantial Assistance Agreement with WADA

Scope of CAS review of WADA refusal to further suspend the period of ineligibility of an athlete

Grounds for WADA denial of further suspension of period of ineligibility

1. If a Substantial Assistance Agreement concluded between an athlete and WADA foresees that WADA – having suspended part of the athlete’s period of ineligibility at an earlier point in time – has the power to suspend more of the athlete’s period of ineligibility *“if it considers, in its entire discretion”*, that the extent and/or quality of the Substantial Assistance provided by the athlete proves more valuable than currently anticipated and if according to the Substantial Assistance Agreement WADA is further obligated to *“act reasonably and in good faith”*, a CAS Panel requested to review WADA’s refusal to suspend further parts of the athlete’s period of ineligibility may only annul WADA’s decision if the athlete in question proves that WADA, in taking its decision, acted unreasonably or in bad faith.
2. The decision by WADA not to grant a further suspension of the period of ineligibility based on the consideration that the athlete had two prior anti-doping violations (both of which were serious (steroids and blood doping)) and that the granting of the further suspension requested would potentially enable the athlete to compete at the upcoming Olympic Games is not unreasonable or taken in bad faith.

1. THE PARTIES

- 1.1 Ms Asli Çakir Alptekin (the “Appellant” or the “Athlete”) is a middle distance runner, specializing in the 1’500m. She is also a *“whistle-blower”*.
- 1.2 The World Anti-Doping Agency (the “Respondent” or “WADA”) is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.

2. FACTUAL BACKGROUND

A. Background Facts

- 2.1 Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. 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 Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in these proceedings, it refers in its Award only to those it considers necessary to explain its reasoning.
- 2.2 The Athlete is currently subject to an eight-year ban that commenced on 10 January 2013 and is memorialized in a consent award dated 17 August 2015 (the "Consent Award").
- 2.3 On or about 13 November 2015, the parties entered into a Substantial Assistance Agreement. The 2015 World Anti-Doping Code (the "WADA Code") defines Substantial Assistance as follows:

Substantial Assistance: For purposes of Article 10.6.1, a Person providing Substantial Assistance must: (1) fully disclose in a signed written statement all information he or she possesses in relation to anti-doping rule violations, and (2) fully cooperate with the investigation and adjudication of any case related to that information, including, for example, presenting testimony at a hearing if requested to do so by an Anti-Doping Organization or hearing panel. Further, the information provided must be credible and must comprise an important part of any case which is initiated or, if no case is initiated, must have provided a sufficient basis on which a case could have been brought.

- 2.4 The parties entered into the Substantial Assistance Agreement further to Article 10.6.1.2 of the WADA Code and Rule 40.7(a)(ii) of the International Association of Athletics Federations ("IAAF") Anti-Doping and Medical Rules in force as from 1 January 2015 ("IAAF ADR"). Article 10.6.1.2 of the WADA Code, which is designed to encourage athletes to provide Substantial Assistance and is reflected in IAAF ADR Rule 40.7(a)(ii), provides in pertinent part as follows:

[A]t the request of the Athlete or other Person who has, or has been asserted to have, committed an anti-doping rule violation, WADA may agree at any stage of the results management process, including after a final appellate decision ..., to what it considers to be an appropriate suspension of the otherwise-applicable period of Ineligibility and other Consequences.

- 2.5 Pursuant to the Substantial Assistance Agreement, WADA suspended four years of the Athlete's period of ineligibility, such that she is now eligible to compete again from 10 January 2017.
- 2.6 Clause 5 of the Substantial Assistance Agreement – which lies at the heart of this appeal – contemplates that the Athlete may apply for a further suspension of her period of ineligibility,

where the extent or quality of her Substantial Assistance proves more valuable than anticipated. Specifically, Clause 5 provides as follows:

WADA may, of its own accord or upon application from the Athlete, suspend more of the Athlete's period of ineligibility if it considers, in its entire discretion, that the extent and/or quality of the Substantial Assistance provided by her proves more valuable than is currently anticipated. In exercising its discretion under this clause 5, WADA shall act reasonably and in good faith.

- 2.7 In November 2015, further to the Substantial Assistance Agreement, the Athlete revealed unprecedented levels of corruption within the IAAF, including attempts to subvert the anti-doping regime. Her Substantial Assistance included evidence of an alleged scheme by Papa Massata Diack (“PMD”) and Khalil Diack (“KD”) – both sons of former IAAF President Lamine Diack – and others to extort money from athletes charged with anti-doping violations. Her evidence was given to WADA and the IAAF Ethics Board, as well as to the French financial crimes prosecutor, which has launched a criminal investigation into the scheme.
- 2.8 In January 2016, the IAAF Ethics Board – chaired by Michael Beloff QC – found PMD guilty of breaches of the IAAF Ethics Code for extorting money from the Russian marathon runner Liliya Shobukhova and banned PMD for life from being involved in athletics. In its decision, the IAAF Ethics Board did not rely on any of the evidence the Athlete had provided.
- 2.9 In February 2016, PMD appealed the decision of the IAAF Ethics Board to the Court of Arbitration for Sport (“CAS”). The IAAF Ethics Board and the IAAF itself are respondents on that appeal.
- 2.10 Following PMD’s appeal, the IAAF Ethics Board and the French financial crimes prosecutor asked the Athlete to procure further evidence from additional witnesses to bolster the case against PMD. In response, in April 2016, the Athlete procured three witness statements from members of her entourage (her husband, a coach at her athletics club and the president of her athletics club) (the “Additional Witness Statements”) that provide direct evidence of PMD’s attempt to extort money from her after she was charged with the anti-doping violation that ultimately led to the Consent Award.
- 2.11 The Athlete contends that both the IAAF Ethics Board and France’s financial crimes prosecutor consider that this new evidence goes farther and is of better quality than the evidence the Athlete previously provided under the Substantial Assistance Agreement. This is because the evidence the Athlete provided against PMD was indirect evidence – as she never met with him herself – whereas the Additional Witness Statements provide direct evidence about the communications and meetings those additional witnesses had with PMD.

B. Decision Appealed

- 2.12 On Saturday, 23 April 2016, the Athlete filed an application with WADA for a further suspension of her period of ineligibility pursuant to Clause 5 of the Substantial Assistance Agreement (the “Application”). Specifically, the Athlete requested that her period of ineligibility

be suspended by a further six months and ten days such that she would be eligible to return to competition as of 1 July 2016 (rather than 10 January 2017). Such a further suspension would have potentially allowed her to compete to qualify for the Olympic Games in Rio (the “Olympics”).

- 2.13 In support of her Application, the Athlete noted that the obligations to provide information and cooperate under the terms of the Substantial Assistance Agreement apply to her alone. No one else is required to provide information or cooperate pursuant to that Agreement and the Athlete is not required to get anyone else to do so.
- 2.14 Further to her obligations, the Athlete had provided WADA, the IAAF Ethics Board and French prosecutors information she had regarding PMD and his brother KD. It was on the basis of this information that WADA agreed to suspend 50% of her eight-year ban under the terms of the Substantial Assistance Agreement.
- 2.15 The Athlete noted, however, that there was a risk that the information she had provided might be considered somewhat limited because she never met or communicated with PMD directly and only met with KD once. By contrast, her husband, a coach at her athletics club and the president of her athletics club had direct contact with PMD and KD on several occasions. The IAAF Ethics Board accordingly considered that the *“case against the Diacks could be significantly bolstered”* by evidence from these people and asked the Athlete to procure their evidence and cooperation.
- 2.16 In response, the Athlete procured the three Additional Witness Statements, which the Athlete understood the IAAF Ethics Board had already provided to WADA in draft. According to the Athlete, the value of the Additional Witness Statements *“greatly exceeds”* the additional suspension of *“just over 6%”* she was seeking and, *“in the case of Papa Massata Diack’s appeal ..., could prove the difference between winning and losing”* (bolding and underscoring original). The Athlete said that the IAAF Ethics Board shared her view in this regard.
- 2.17 The Athlete stated that, while the additional witnesses were keen to assist the IAAF Ethics Board by providing the Additional Witness Statements and their ongoing cooperation, they would only do so if WADA first agreed to (a) further suspend the Athlete’s period of ineligibility such that she would be eligible to return to competition as of 1 July 2016, and (b) publicly announce the further suspension once the additional witnesses provided their statements regarding PMD and KD.
- 2.18 Given the briefing schedule in the PMD appeal, the Athlete stated that she required a decision from WADA by 16H00 (GMT) on Monday, 25 April 2016, and if WADA agreed, she and the IAAF Ethics Board would require WADA to sign a tripartite Supplementary Substantial Assistance Agreement by 19H00 (GMT) that same day.
- 2.19 On Monday, 25 April 2016, WADA responded that it was not willing to agree to suspend a further portion of the Athlete’s ineligibility period (the “Decision”). As a preliminary matter, WADA noted that the deadline of Monday at 16H00 (GMT) equates to Monday at 11H00 in

Montreal, Canada where WADA has its headquarters, affording WADA only several working hours to respond to the Athlete's request. WADA noted that it had not been involved in the generation of the Additional Witness Statements and *"found out about these developments last week for the first time"*. In these circumstances, WADA stated that it was *"not in a position properly to assess the value of the third party statements (if any) to the fight against doping"* and was *"not willing (still less within the deadlines set out in your letter) to agree to suspend a further portion of Ms. Alptekin's ineligibility period"*.

- 2.20 In closing, WADA stated that it had *"made clear to the IAAF Ethics Board that it will urgently consider any proposal made by the IAAF to itself suspend a further portion of Ms. Alptekin's period of ineligibility in connection with"* the Additional Witness Statements to be provided to the IAAF in connection with the PMD appeal. WADA stated that *"[a]ny such proposal by the IAAF would of course require WADA approval"*.
- 2.21 Despite the Decision, the Athlete provided the Additional Witness Statements to the IAAF Ethics Board on 29 April 2016, and the IAAF Ethics Board submitted them with its response to the PMD appeal.
- 2.22 According to the Athlete, the additional value of the Additional Witness Statements she has provided justifies, at least, an additional seven-month suspension of her period of ineligibility, such that she would be entitled to return to competition on or before 10 June 2016 – an additional suspension that would amount to 7.3% of her total period of ineligibility. She has accordingly appealed the Decision.
- 2.23 After the Athlete filed her appeal, the CAS Panel sitting in the PMD appeal ruled the Additional Witness Statements inadmissible in those proceedings further to an objection by PMD.

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

- 3.1 On 17 May 2016, the Athlete filed a Statement of Appeal and Appeal Brief ("Appeal Brief") with the CAS against WADA with respect to the Decision. The Athlete requested that an expedited procedure be implemented.
- 3.2 On 24 May 2016, WADA objected to the Athlete's request for an expedited procedure.
- 3.3 On 27 May 2016, WADA objected to the admissibility of the appeal, indicating that it should have been filed by 16 May 2016, and requested that the deadline for its answer be suspended pending a decision in this respect.
- 3.4 On the same date, in accordance with Article R49 of the Code of Sports-related Arbitration in force as from 1 January 2016 ("CAS Code"), the CAS Court Office invited the Athlete to provide her position on the Respondent's objection to the admissibility of the appeal.
- 3.5 On 27 and 29 May 2016, the Athlete provided her comments on the admissibility of the appeal and objected to WADA's request that its deadline to file an answer be fixed after a decision on this preliminary issue.

- 3.6 On 30 May 2016, the President of the CAS Appeals Arbitration Division decided to refer to the Panel both the issue of the admissibility of the appeal and the issue of the Respondent's deadline to file its answer. WADA's deadline to file its answer was therefore suspended.
- 3.7 On 31 May 2016, WADA submitted further comments on the admissibility of the appeal.
- 3.8 On 2 June 2016, in view of the situation above, the Athlete filed an Urgent Request for Provisional Measures (the "Request") further to Article R37 of the CAS Code and asked the Panel to do the following:
- (a) *Suspend her period of ineligibility from **10 June 2016**, as requested in her "Requests for Relief" at Section 7 of her Statement of Appeal and Appeal Brief;*
 - (b) *Allow her to compete pending the determination of the Appeal.*
- 3.9 On 8 June 2016, WADA filed its Observations on Provisional Measures ("Observations") in opposition to the Athlete's Request and asked the Panel to issue a decision that:
- I. *The Appeal and the Application for provisional measures filed by Ms Asli Cakir Alptekin are dismissed inasmuch they are considered as admissible.*
 - II. *The World Anti-Doping Agency is granted an award for costs.*
- 3.10 On 10 June 2016, the CAS Court Office notified to the parties the operative part of the Panel's Order on Request for Provisional Measures, in which the Panel ruled as follows:
- 1. *The application for provisional measures filed by Ms Asli Cakir Alptekin on 2 June 2016 in the case CAS 2016/A/4615 Asli Cakir Alptekin v. WADA is partially granted as follows:*
Ms Asli Cakir Alptekin's period of ineligibility is provisionally suspended from 10 June 2016 until 5 July 2016 included.
 - 2. *The costs of the present order shall be determined in the final award or any other final disposition of this arbitration.*
- 3.11 In its covering letter, the Panel notified the parties that it could not decide at that stage that the appeal was not admissible and therefore decided to proceed with the matter. The Panel further informed the parties that it had decided that a final award should be rendered in this matter by 5 July 2016.
- 3.12 By letter dated 13 June 2016, WADA again asked the Panel to rule on admissibility as a preliminary issue.
- 3.13 By letter of the same date, the Panel confirmed that any further decision on the issue of admissibility would await the hearing.
- 3.14 By letter dated 16 June 2016, WADA again asked the Panel to rule on admissibility as a preliminary issue.

- 3.15 By letter dated 17 June 2016, the Panel called the parties for a hearing on 4 July 2016 at 9H30 in Lausanne, Switzerland. The Panel again confirmed that any further decision on the issue of admissibility would be taken after the hearing.
- 3.16 By letter of the same date, the Athlete asked the Panel to “*order WADA to respect this procedure, to direct all correspondence regarding the Substantial Assistance Agreement through the CAS until the conclusion of the procedure and to stop trying to intimidate Ms Alptekin*”. The Athlete also asked the Panel to “*take into account WADA’s conduct for the purposes of Article R64.5 of the CAS Code (Costs)*”. The Athlete’s requests were based on correspondence that had been exchanged between the parties by which WADA, further to the Substantial Assistance Agreement, had asked the Athlete to provide information about third-party anti-doping rule violations committed in connection with the Athlete’s own doping.
- 3.17 By letter dated 20 June 2016, WADA opposed the Athlete’s requests on the grounds that the information WADA was requesting was outside the scope of the present appeal, which concerns the Decision.
- 3.18 By letter dated 21 June 2016, the CAS Court Office notified the parties that the Panel had decided to reject the Athlete’s requests. The Panel rejected the Athlete’s requests because it understood that the information WADA was requesting was a matter between the parties further to Clause 2.1 of the Substantial Assistance Agreement and outside the scope of the present appeal.
- 3.19 On 30 June 2016, WADA filed its answer (the “Answer”).
- 3.20 On 4 July 2016, the Panel held a hearing with the parties at the CAS headquarters in Lausanne.
- 3.21 In addition to the Panel and Mr William Sternheimer, Deputy Secretary General of the CAS, the following people attended the hearing:
- Mr Mike Morgan, counsel for the Athlete
 - Mr Richard Martin, counsel for the Athlete
 - Mr Howard L. Jacobs, counsel for the Athlete
 - Mr Antonio Rigozzi, counsel for the Athlete
 - Mr Tom Mountford, legal secretary for the IAAF Ethics Board (by video)
 - Mr Jean-Yves Lourgouilloux, assistant prosecutor at the French office that handles financial prosecutions (by video)
 - Mr Gün Arun, translator
 - Mr Julien Sieveking, legal director for WADA
 - Mr Ross Wenzel, counsel for WADA

Mr Yvan Henzer, counsel for WADA

Dr Olaf Schumacher, sports medicine physician (by video).

- 3.22 At the close of the hearing, the parties confirmed that they had no objection to how the proceedings had been conducted. They also agreed that they had been treated equally and that their respective rights to be heard had been respected.
- 3.23 On 5 July 2016, the CAS Court Office notified to the parties the operative part of this Award.

4. SUBMISSIONS OF THE PARTIES

A. The Appellant's Submissions and Requests for Relief

- 4.1 The Athlete's submissions may be summarized as follows:
- 4.2 Under the terms of the Substantial Assistance Agreement, the Athlete had no obligation to procure evidence from other people, such as the Additional Witness Statements.
- 4.3 The Additional Witness Statements provide new, compelling, direct evidence of PMD's attempts to extort money from the Athlete – evidence the Athlete herself could not provide because she never met with PMD. There can be no doubt that the Additional Witness Statements go farther than anything that had been anticipated by the Substantial Assistance Agreement, as acknowledged by the IAAF Ethics Board and the French prosecutor's office.
- 4.4 The additional value of the Additional Witness Statements – above and beyond the evidence the Athlete provided further to the Substantial Assistance Agreement – entitles the Athlete to a further suspension of her ineligibility period under Clause 5 of the Substantial Assistance Agreement.
- 4.5 In a letter dated 20 April 2016 to the IAAF, WADA stated that the IAAF Ethics Board is better placed to assess the additional value of the Additional Witness Statements. Specifically, WADA stated the following:

WADA believes that the IAAF (including its Ethics Board) is in a better position to assess the specific value of the additional statements/information within the abovementioned contexts i.e. to what extent the chances of success in the CAS appeals will be increased and the likelihood and scope of future investigations by the IAAF Ethics Board. In particular, WADA is not a party to the CAS appeals. As a consequence, WADA does not feel comfortable assessing the precise value of the additional statements/information and quantifying the same in terms of a further suspension of sanction (if any).

- 4.6 On 22 April 2016, WADA wrote to the IAAF Ethics Board and made the following proposal:

WADA proposes that the IAAF (assisted by the Ethics Board if necessary) makes a specific and reasoned proposal to WADA for a further suspension of Ms. Alptekin's ineligibility period by the IAAF. As Ms.

Alptekin's sanction is final and binding, the IAAF proposal would require approval by WADA in accordance with Rule 40.7(a)(i) of the IAAF Rules. WADA commits to review any IAAF proposal on an urgent basis in view of the time constraints.

IAAF ADR Rule 40.7(a)(i) provides that, “[a]fter a final appellate decision under Rule 42” – such as the Consent Award here – “an Athlete or other Person’s period of Ineligibility may only be suspended by a Member” – in this case, the Turkish Athletics Federation (“TAF”) – “if the Doping Review Board so determines and WADA agrees”.

- 4.7 A further suspension pursuant to IAAF ADR Rule 40.7(a)(i) would thus require (1) the agreement of the TAF, which has never been involved in this matter, (2) the Agreement of the IAAF Doping Board, which has a direct conflict of interest, and (3) the agreement of WADA. In other words, a further suspension pursuant to IAAF ADR Rule 40.7(a)(i) was not an option for the Athlete and WADA knew it.
- 4.8 The IAAF Ethics Board agreed. The IAAF Ethics Board accordingly suggested that it make a reasoned submission to WADA to explain the value of the Additional Witness Statements and recommended that the Athlete make an application to WADA for a further suspension pursuant to Clause 5 of the Substantial Assistance Agreement. This is what the IAAF Ethics Board and the Athlete then did.
- 4.9 Specifically, on 23 April 2016, the IAAF Ethics Board made a Reasoned Submission to WADA that stated in pertinent part as follows:

3. *As Michael Beloff QC, Chairman of the EB [IAAF Ethics Board], wrote in his letter to Ross Wenzel of 20th April 2016, “if the draft statements are signed and admitted into evidence in the CAS appeal brought by ... [PMD], that ought to deal a fatal blow to Papa Massata Diack’s publicized denials of any involvement in any kind of attempted extortion from athletes. As of now the case against him rests on inference since it has never been the Board’s case that PMD made direct demands for money from Liliya Shobukhova, her husband or coach as the price of concealing her anti-doping violations. The statements are compelling in terms of detail as well as carefully distinguishing between matters of which the deponents do and those of which they do not have direct knowledge, which enhances their credibility. If PMD declines to give evidence before CAS (in the same way as he declined to give evidence before the Board) the statements will be not merely compelling but all but conclusive on the point”.*

[...]

8. *It is to be noted that neither in the Award nor in the IR [Ethics Board’s Investigator’s Report] nor in either of the WADA reports is there any evidence of PMD actually himself asking LS [Liliya Shobukhova] for money. The case against PMD rests (so far) exclusively on inference.*

[...]

24. *Against this background, the importance of the Turkish statements [Additional Witness Statements] was summarised in Michael Beloff's letter to Ross Wenzel on 20th April 2016. It is direct evidence and would be the **only** direct evidence of PMD's involvement in (in this instance attempted) extortion of money from athletes to conceal their doping violations. Although it does not deal with the extortion from LS, in common law parlance it would be 'similar fact evidence' admissible to support the finding of PMD's involvement in extortion from LS. Moreover in L'Equipe PMD said, referring to the WADA reports but in terms applicable to the EB award, "I saw no evidence of a system set up to extort money from (Russian) athletes" and referring to the allegation of attempted extortion from Ms Alptekin said, "I laughed when I heard this. I have never met this person". If, as anticipated, PMD does not give evidence, his lawyer will be in difficulty in seeking other than tangentially to undermine the Turkish statements which are conspicuously detailed and devoid of exaggeration. The text message exchanges referred to and **actually displayed in the Turkish statements** show that PMD wanted covert meetings with the Turks in Monaco; he would have to explain, given that the fact of the meetings or at any rate the making of arrangements for them appears incontrovertible why he wanted such meetings. Again he will have a choice; either to give evidence and expose himself to cross-examination generally, or to rely on his lawyers to try to pick holes in the Turkish statements but without any obvious means to do so.*
25. *It is the EB view that given (i) the vulnerabilities in the evidence apart from the Turkish statements and (ii) the cogency of the Turkish statements, their introduction would make the IAAF answer to PMD's appeal brief on merits that the EB considers to be compelling close to conclusive. To put it another way, it would be the strongest evidence upon which the IAAF could rely because it is direct evidence of PMD's involvement in extortion and not merely, as at present, evidence from which such involvement can be inferred. Hence it is of the utmost importance to the IAAF's ability to have upheld by CAS the substance of the EB's award. Mutatis mutandis the same applies to the possibility of further investigations by the EB including continuing investigations into HC [Habib Cissé] and LD [Lamine Diack], and contemplated investigatory proceedings against Khalil Diack's later discussions with the Alptekins (which will be the subject of separate statements).*
26. *We respectfully remind WADA that success by PMD in his appeal would inevitably have an adverse knock on effect on the perception of the strength of the WADA reports in so far as they deal with the same subject i.e. the "inappropriate conduct" of PMD and the extortion of LS, and would undermine the foundations of many of the recommendations set out at WADA 2 pp.34-37. The consequences of that happening are too obvious to spell out.*
27. *As the IAAF see it, adopting what Michael Beloff wrote in his letter to Ross Wenzel of 20th April 2016 with reference to Ms Alptekin, "It is of course a decision for WADA itself (and not for the IAAF Ethics Board) to evaluate all material circumstances including whether the downside of enabling her to compete at the Rio Olympics would be outweighed by the benefit of the evidence she (and her team) could provide in the context of the CAS appeals or (correlatively) whether the risk of losing the appeals because of an inability to use such evidence is outweighed by the benefit of maintaining her period of ineligibility*

so that she cannot compete at the Olympics even if otherwise satisfying the eligibility criteria”.

(Footnotes omitted; bolding original).

- 4.10 Despite this, WADA has refused to suspend any further portion of the Athlete’s period of ineligibility for no legitimate reason. Indeed, the Decision appears to be motivated by political and/or reputational concerns linked to the criticism WADA anticipates it might receive if it were to allow the Athlete the opportunity to compete in the Olympics.
- 4.11 In ascribing a numerical value to the additional value of the Additional Witness Statements, CAS should take into account the following and grant the Athlete a further suspension of her period of ineligibility of at least seven months:
- The Athlete’s original period of ineligibility was for eight years (96 months).
 - WADA granted the Athlete a four-year (48-month) suspension of her period of ineligibility for the evidence she provided further to the Substantial Assistance Agreement – i.e., 50% of the original term.
 - A further suspension of seven-months would be only a further 7.3% of the original term.
 - The additional value of the Additional Witness Statements vastly exceeds such a 7.3% figure. In fact, the Additional Witness Statements have a value several times greater than the Athlete’s own evidence that she provided further to the Substantial Assistance Agreement.
- 4.12 In denying the Athlete any additional suspension for the Additional Witness Statements, WADA did not act reasonably and in good faith as required under Clause 5 of the Substantial Assistance Agreement. This is evident in light of the following:
- WADA chose to defer to the IAAF Ethics Board and the IAAF to determine the additional value of the Additional Witness Statements, even though that evidence concerns the corrupt practices of IAAF personnel and the IAAF accordingly has a direct conflict of interest.
 - WADA effectively ignored the Reasoned Submission from the IAAF Ethics Board.
 - WADA suggested that any further suspension would have to be proposed by the IAAF and approved by WADA further to IAAF ADR Rule 40.7(a)(i) when it knew this would not be an option for her.
 - The Substantial Assistance Agreement makes no reference to IAAF ADR Rule 40.7(a)(i). WADA has the right under the WADA Code and the Substantial Assistance Agreement to determine the additional value of the Additional Witness Statements and further suspend the Athlete’s period of ineligibility. WADA’s claim that it was not in a position to do so is not credible.

4.13 The real reason WADA rejected the Athlete's Application was that WADA did not want to be responsible for allowing the Athlete the opportunity to compete in the Olympics. WADA does not state this openly for the following reasons:

- Such a statement would be contrary to Clause 5 of the Substantial Assistance Agreement, which contemplates that WADA may only take into account (i) the value of the Athlete's Substantial Assistance and (ii) the amount of any further suspension of her period of ineligibility. It does not permit WADA to take into account the timing of any particular competition.
- The WADA Code does not permit periods of ineligibility to be determined with regard to the timing of any particular competition. In assessing an athlete's degree of "Fault", the WADA Code states that the "*timing of the sporting calendar, would not be [a] relevant [factor] to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2*".
- If WADA were seen to be acting so unfairly, so unreasonably, and contrary to the WADA Code, its contractual commitments, its credibility, and that of the entire Substantial Assistance system would be undermined.

4.14 WADA knows that it should have granted the Athlete's Application from a legal and moral perspective, but instead let political considerations factor into its decision-making. The Athlete has done everything in her power to assist in the fight against doping and now has to appeal to CAS to get what WADA should have already given her. It is disappointing that WADA treats whistle-blowers this way.

4.15 The Athlete requests that the Panel grant the following relief:

- (a) *Ms Alptekin's period of ineligibility to be suspended by at least a further seven months;*
- (b) *Ms Alptekin to be declared eligible to compete as of 10 June 2016 or before;*
- (c) *WADA to be ordered to immediately notify the IAAF of the revised eligibility date, and the context in which it was revised; and*
- (d) *WADA to be ordered to:*
 - (i) *reimburse Ms Alptekin's legal costs;*
 - (ii) *bear the costs of the arbitration.*

B. The Respondent's Submissions and Requests for Relief

4.16 WADA's submissions may be summarized as follows:

4.17 The appeal is inadmissible. The CAS has "*no jurisdiction*" because the Athlete did not comply with the 21-day time limit provided for under Article R49 of the CAS Code for filing her appeal.

4.18 Neither (a) the seriousness of the anti-doping rule violation committed by the Athlete nor (b) the significance of the Substantial Assistance provided by the Athlete to the effort to eliminate

doping in sport weigh in favor of granting the Athlete any further suspension of her period of ineligibility.

- 4.19 After a prior doping violation involving steroids when she was a junior athlete, the Athlete engaged in an intentional, sophisticated doping scheme whereby she manipulated her blood values during a period of two years that ultimately culminated in her (ill-gotten) victory at the Olympic Games in London. The Athlete has never clearly admitted her wrongdoing. The Athlete's primary interest is not to aid in the fight against doping, but to engage in a calculated plea-bargaining exchange in an effort to participate in the Olympics. In this context, any further suspension of her period of ineligibility could only be obtained further to information or assistance that would genuinely and substantially advance the fight against doping going forward. The Athlete has not provided information and assistance that comes close to meeting this standard.
- 4.20 The IAAF Ethics Board banned PMD for life from involvement in athletics in light of his involvement in a scheme to extort money from Liliya Shobukhova. The IAAF Ethics Board's decision does not relate to the Athlete in any way. No information provided by the Athlete was used to support the IAAF Ethics Board's decision. On appeal, the scope of review of the CAS is limited to the findings of the IAAF Ethics Board – a fact that made WADA skeptical about the admissibility of the Additional Witness Statements when considering the Athlete's Application. And the CAS Panel sitting in the PMD appeal has now ruled the Additional Witness Statements – which concern the Athlete, not Liliya Shobukhova – inadmissible as additional evidence against PMD.
- 4.21 In light of the findings of the IAAF Ethics Board, it is difficult to see how PMD could ever play any role in sport again. The Additional Witness Statements at best only make a strong case stronger. And the extent of that strengthening WADA is not in a position to assess. In all events, however, the further strengthening of a strong case against a person who will never play any further role in sports governance cannot amount to Substantial Assistance.
- 4.22 The four-year suspension WADA has already granted the Athlete under the Substantial Assistance Agreement is substantial and generous and, perhaps, unprecedented. In providing the Additional Witness Statements, the Athlete simply complied with her duties under the Substantial Assistance Agreement and she cannot be rewarded twice for the same commitment. Indeed, the Athlete is seeking a second reduction by procuring statements and evidence from people – her husband, a coach at her athletics club, the president of her athletics club – who are part of her entourage and share her interests and whom she is able to control. This is contrary to the spirit of the Substantial Assistance Agreement.
- 4.23 Under Clause 5, WADA retains "*its entire discretion*" to suspend more of the Athlete's period of ineligibility. The CAS should accordingly give deference to WADA's opinion, as to do otherwise would render WADA's discretion meaningless. WADA's discretion has to be reasonably exercised and it was. The Athlete asked WADA to assess – within a very short time period – the value of the Additional Witness Statements within the context of appeal proceedings to which WADA was not a party. Taking into account the limited information it had, WADA

decided to exercise its discretion not to grant any further suspension. The Athlete's assistance has not proved more valuable than anticipated by WADA and WADA acted reasonably when taking its Decision.

4.24 WADA requests that the Panel issue a decision holding that:

- I. *The Appeal filed by Ms Asli Cakir Alptekin is inadmissible.*
- II. *The Appeal filed by Ms Asli Cakir Alptekin is dismissed inasmuch it is considered as admissible.*
- III. *The World Anti-Doping Agency is granted an award for costs.*

5. JURISDICTION OF THE CAS

5.1 In accordance with the Swiss Private International Law (Article 186), the CAS has the power to decide upon its own jurisdiction.

5.2 Article R47 of the CAS Code states that, "[a]n appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

5.3 In her Appeal Brief, the Athlete makes reference to Clause 12 of the Substantial Assistance Agreement, which provides as follows:

Any dispute arising from or related to the present Agreement will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved definitively in accordance with the Code of sports-related arbitration. The language of arbitration shall be English.

5.4 The Athlete also makes reference to Clause 9 of the Substantial Assistance Agreement, which provides that *"this Agreement is subject to the relevant provisions of the 2015 World Anti-Doping Code (including art. 10.6.1 thereof). Such provisions shall apply to this Agreement as if they were set out herein in full; they shall inform the interpretation of this Agreement and, in the event of a contradiction between the terms of this Agreement and the relevant provisions of the World Anti-Doping Code, the latter shall prevail"*.

5.5 Together, Articles 13.1 and 13.2 of the WADA Code provide that a decision made under the WADA Code, or rules adopted pursuant to the WADA Code, *"to suspend or not suspend, a period of Ineligibility"* may be appealed by the athlete to the CAS.

5.6 Based on the foregoing, the Panel considers that the CAS has jurisdiction to deal with the present matter. To the extent WADA speaks in its Observations and Answer in terms of the CAS having *"no jurisdiction"*, the Panel understands WADA to in fact be contesting the admissibility of the Athlete's appeal, an issue WADA initially raised in its letters dated 27 and 31 May 2016 and which the Panel addresses below.

6. ADMISSIBILITY

6.1 According to Article R49 of the CAS Code, “[i]n the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against”.

6.2 Article R32 of the CAS Code provides in pertinent part as follows:

The time limits fixed under this Code are respected if the communications by the parties are sent before midnight, time of the location where the notification has to be made, on the last day on which such time limits expire. If the last day of the time limit is an official holiday or a non-business day in the country where the notification is to be made, the time limit shall expire at the end of the first subsequent business day.

6.3 In her Appeal Brief, the Athlete states that, since neither the Substantial Assistance Agreement nor the WADA Code set a time limit for the appeal, the CAS Code default 21-day time limit in Article R49 of the CAS Code applies. As the Decision was notified to the Athlete on 25 April 2016, she contends that the 21-day time limit expired “on 17 May 2016 (since 16 May was a public holiday in Switzerland)”. She filed her appeal on 17 May 2016 and therefore contends it is timely.

6.4 As noted above (¶ 4.17), WADA objects to the admissibility of the appeal on the grounds that it should have been filed on 16 May 2016. Specifically, WADA contends that, under Article R32 of the CAS Code, the “country where the notification is to be made” for purposes of the appeal was not Switzerland but the United Kingdom because this is where the Athlete’s counsel is based. As 16 May 2016 was not a holiday in the United Kingdom, the Athlete should have filed her appeal on that day. As she did not file until the following day, the appeal is untimely and inadmissible.

6.5 The Athlete responds that WADA’s objection is based on a misreading of Article R32. According to the Athlete, the “country where the notification is to be made” for purposes of the Athlete’s appeal is Switzerland because notification was to be made to the CAS. As 16 May 2016 was a holiday there, the deadline for filing the appeal was the “first subsequent business day”, which was 17 May 2016. This is consistent with the typical practice in Switzerland for deadlines to be extended to the “first subsequent business day” following closure of the courts. Indeed, it was counsel for WADA who informed counsel for the Athlete that 16 May 2016 was a holiday in Switzerland in the context of discussing the filing of the Athlete’s appeal. To the extent there is any ambiguity in the language of Article R32 it should be resolved against WADA further to the principle of *contra proferentem*.

6.6 WADA replies that, while its counsel mentioned that 16 May 2016 was a public holiday in Switzerland, he in no way implied that the Athlete could therefore file her appeal on 17 May 2016. Rather, counsel for WADA simply stated that the documents – when filed on Monday – would not be forwarded until (at least) Tuesday. In addition, the principle of *contra proferentem* cannot help the Athlete, as WADA did not draft the CAS Code and the parties cannot agree to vary the time limit for appeal.

- 6.7 As noted above (¶ 3.6), on 30 May 2016, the President of the CAS Appeals Arbitration Division decided to refer to the Panel the issue of the admissibility of the appeal.
- 6.8 For the reasons explained below, the Panel has decided by majority that the appeal is admissible.
- 6.9 As a preliminary matter, the Panel notes that this is a case of first impression. No prior CAS Panel has determined which country's holidays are at issue when Article R32 of the CAS Code refers to official holidays "*in the country where the notification is to be made*".
- 6.10 The Panel also notes that both parties have argued that Article R32 of the CAS Code is clear and that each of their respective readings is the right one. This has been helpful to the extent that it has allowed the Panel to understand why each party reads Article R32 the way that it does. The majority notes, however, that to find the appeal admissible, the Panel does not need to find that the Athlete's reading of Article R32 of the CAS Code is *right*. It rather only needs to find that her reading is *colorable*. If it is, her right to appeal should not be cut off. Her appeal should rather be admitted and determined on the merits.
- 6.11 In referring to official holidays "*in the country where the notification is to be made*", neither Article R32 of the CAS Code nor any other provision of the CAS Code specifies which country is the country where the notification is to be made for purposes of filing an appeal with the CAS. In such a situation of legal uncertainty, the majority of the Panel considers that it cannot declare the appeal inadmissible, given the significant consequences for the Appellant, in the absence of a clear rule explaining what is "*the country where the notification is to be made*". The Appellant understood in good faith that the country where the notification is to be made for purposes of filing an appeal with the CAS is Switzerland because the CAS is located in Lausanne. The issue here is whether Article R32 of the CAS Code as written admits of the Athlete's reading. And in the majority's view, it does. Her appeal is accordingly admissible.
- 6.12 In closing, the Panel notes that the Athlete made an alternative argument for the admissibility of her appeal under IAAF ADR Rule 42.2. As the majority of the Panel has found the appeal admissible under Article R49 of the CAS Code, the Athlete's alternative argument is now moot.

7. APPLICABLE LAW

- 7.1 Further to Article R58 of the CAS Code, the "*Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate*".
- 7.2 As noted above (¶ 5.4), Clause 9 of the Substantial Assistance Agreement provides that that Agreement shall be subject to the relevant provisions of the WADA Code.
- 7.3 As WADA is domiciled in Switzerland, Swiss law applies subsidiarily.

- 7.4 The Athlete contends that, in addition, “*certain general principles of law which have become part of the so-called lex sportiva*” also apply and, if necessary, apply “*over and above the rules*” (underscoring original). These principles include the “*principles of legitimate expectation*” and the “*duty to act in good faith*”.
- 7.5 The Athlete has not, however, elaborated any specific arguments based expressly on these principles. Having said this, as the Panel understands that general principles of legitimate expectation and good faith form part of Swiss law, the Panel has taken these principles into consideration in making its Award, and has also taken into account all of the sports-law authorities cited by the parties.

8. LEGAL DISCUSSION

- 8.1 As noted above (¶¶ 2.12-2.18), in her Application, the Athlete sought a further suspension of her period of ineligibility under Clause 5 of the Substantial Assistance Agreement in light of her having procured the Additional Witness Statements. Further to Clause 5, WADA has the power to suspend more of the Athlete’s period of ineligibility “*if it considers, in its entire discretion, that the extent and/or quality of the Substantial Assistance provided by her proves more valuable than is currently anticipated*”. In exercising its discretion under Clause 5, WADA is obligated to “*act reasonably and in good faith*”.
- 8.2 In light of this language, the Panel considers that it should only uphold the Athlete’s appeal and annul the Decision if the Athlete proves that WADA acted unreasonably or in bad faith in denying her the further suspension she requested. This is a high bar and the Panel considers that the Athlete has failed to clear it.
- 8.3 As a preliminary matter, the Panel notes that, in the Application, the Athlete demanded that WADA respond to her in what amounted to only several working hours. While the Panel appreciates that WADA had learned of the Additional Witness Statements the week before, and that the Athlete’s time constraints were a function of the procedural calendar in the PMD appeal proceedings, the fact remains that WADA had precious little time to consider the Application, form a view and respond.
- 8.4 The Panel also notes that WADA did not consider itself well placed to assess the value of the Additional Witness Statements to the PMD appeal, as WADA was not a party to that appeal and had learned of the Additional Witness Statements only a few days before receiving the Application. Hence WADA’s suggestion that the IAAF (assisted by the IAAF Ethics Board, if necessary) assess the value of the Additional Witness Statements and propose a further suspension of the Athlete’s period of ineligibility, which WADA could then approve or not – a suggestion the Athlete considers a sign of WADA’s bad faith. While the suggestion may have proved unworkable, the Panel does not consider that it arose from bad faith, but rather from WADA’s discomfort in having to decide upon a further suspension on short notice and limited information.

- 8.5 Despite the time constraints and limited information, WADA did manage to consider the Application and decided that the value of the Additional Witness Statements did not justify granting the Athlete any further suspension of her period of ineligibility. In reaching this conclusion, WADA had the benefit of the Reasoned Submission from the IAAF Ethics Board on the value of the Additional Witness Statements to the PMD appeal, but considered that the Additional Witness Statements might well not even be admissible in those proceedings. WADA's concern in this regard was ultimately borne out when the CAS Panel in the PMD appeal subsequently refused to admit the Additional Witness Statements into evidence.
- 8.6 WADA also considered that, even if admissible, the Additional Witness Statements would only serve to make the already strong case against PMD even stronger – a marginal benefit that WADA considered of little value, particularly as it is nearly inconceivable that PMD will ever again have any role in sport even if he were somehow to succeed on his appeal.
- 8.7 WADA accordingly considered, "*in its entire discretion*", that the Additional Witness Statements did not render the Athlete's Substantial Assistance more valuable than anticipated. The Panel finds no basis to consider that WADA's decision in this regard was unreasonable or taken in bad faith.
- 8.8 The Athlete resists this conclusion on several grounds.
- 8.9 First, the Athlete contends that, as set out in its Reasoned Submission, the IAAF Ethics Board – which WADA acknowledges is better placed to judge the value of the Additional Witness Statements to the PMD appeal – considers that they go farther and are of greater value than the evidence the Athlete provided further to the Substantial Assistance Agreement. In taking its Decision, however, WADA effectively ignored the Reasoned Submission and denied the Athlete any further suspension for no legitimate reason.
- 8.10 There is no evidence, however, that WADA ignored the Reasoned Submission. On the contrary, it appears that WADA took it into account, but ultimately considered that the questionable admissibility of the Additional Witness Statements, and their marginal utility even if admitted, rendered them of little value. As the CAS Panel in the PMD appeal subsequently ruled the Additional Witness Statements inadmissible, WADA's views in this regard now seem prescient.
- 8.11 At the hearing, the Athlete attempted to overcome this turn of events by speculating that the Additional Witness Statements may be valuable to any investigation the IAAF Ethics Board may launch against PMD's brother, KD. The Additional Witness Statements do not concern KD, however; they only concern PMD. The Athlete similarly speculated that the Additional Witness Statements may be useful to the IAAF Ethics Board in the context of a new investigation against PMD should his appeal succeed. The Athlete, however, premised her Application on the value of the Additional Witness Statements to the defense of the PMD appeal. That is what WADA considered in making its Decision. Any alleged value the Additional Witness Statements may have against PMD post-appeal – a matter that WADA was not asked to consider – can accordingly provide no basis to find that WADA acted unreasonably or in bad faith in taking its Decision.

- 8.12 Second, the Athlete contends that the French prosecutors' office considers that the Additional Witness Statements go farther and are of better quality than the evidence the Athlete previously provided under the Substantial Assistance Agreement. The Athlete has, however, provided no evidence to support this contention. When he testified at the hearing, Mr Lourougouilloux spoke to the relative value of interviews the Athlete and her husband gave to the French authorities in March 2016, but he did not address at all what value (if any) the French prosecutor's office places on the Additional Witness Statements.
- 8.13 Third, the Athlete contends that, in denying her requested further suspension, WADA was motivated by political or reputational concerns linked to the criticism it might face if the Athlete were to compete in the Olympics. The Athlete contends that this was improper, as Clause 5 only permits WADA to take into account (1) the value of the Athlete's Substantial Assistance and (2) the amount of any further suspension of her period of ineligibility. In this regard, the Athlete relies on the definition of "Fault" in the WADA Code, which does not permit consideration of the timing of any particular competition when reducing a period of ineligibility under Articles 10.5.1 or 10.5.2 of the WADA Code.
- 8.14 WADA understood that the Athlete was seeking the further suspension with the aim of competing in the Olympics. And WADA acknowledges that it was disinclined to grant a further suspension that might work such a result in light of the Athlete's two prior doping violations, both of which were serious (steroids and blood doping), and neither of which she has fully acknowledged. The Panel does not consider it improper for WADA to have taken these matters into account in reaching its Decision. WADA was not determining a reduction of a period of ineligibility under Articles 10.5.1 or 10.5.2 of the WADA Code. It was rather deciding the Athlete's Application for a further suspension of her period of ineligibility pursuant to Clause 5 of the Substantial Assistance Agreement. And the Panel does not read Clause 5 to so narrowly circumscribe what WADA might take into consideration when exercising "*its entire discretion*" to grant or deny a further suspension. Indeed, the parties specifically negotiated over the issue of the Athlete's possible participation at the Olympics when negotiating the Substantial Assistance Agreement, and WADA expressly rejected this possibility.
- 8.15 Finally, the Athlete contends that, unless her appeal is upheld, WADA's failure to grant the Athlete the further suspension she requested will undermine the fight against doping because other athletes will be less likely to come forward and provide Substantial Assistance. The Panel considers this speculative, particularly as WADA's Decision was taken in the context of the particular facts and circumstances attending the Athlete's Application. Moreover, the Panel notes that the Substantial Assistance Agreement was entered into following the imposition of an eight-year period of ineligibility and that the discussions culminating in the Decision were in the context of negotiations regarding a further suspension of the period of ineligibility – i.e., this is not a case of an athlete stepping forward to reveal wrong-doing before any proceedings are initiated against her. In all events, however, the Panel does not consider that such policy considerations provide a basis to consider that WADA acted unreasonably or in bad faith under Clause 5 of the Substantial Assistance Agreement in denying the Athlete the further suspension she requested.

8.16 The Panel has accordingly decided to dismiss the appeal.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms Asli Çakir Alptekin on 17 May 2016 in the case CAS 2016/A/4615 Asli Çakir Alptekin v. WADA concerning the decision rendered by the World Anti-Doping Agency on 25 April 2016 is dismissed.

(...)

4. All further claims are dismissed.