TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

CAS 2020/A/6842 Evgeny Ustyugov v. International Biathlon Union (IBU)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr André Brantjes, Attorney-at-Law in Amsterdam, The Netherlands
Arbitrators:	Mr Jordi López Batet, Attorney-at-Law in Barcelona, Spain
	The Hon. Michael J Beloff KC, Barrister in London, United Kingdom
Clerk:	Ms Stéphanie De Dycker, CAS Clerk, Lausanne, Switzerland

in the arbitration between

Mr Evgeny Ustyugov, Russian Federation

Represented by Mr Yvan Henzer, Attorney-at-Law, Libra Law SA, Lausanne, Switzerland and Herbert Smith Freehills CIS LLP, Moscow, Russian Federation

Appellant

and

International Biathlon Union (IBU), Salzburg, Austria

Represented by Dr Stephan Netzle and Dr Karsten Hofmann, Attorneys-at-Law, Times Attorneys AG, Zurich, Switzerland

Respondent

I. PARTIES

1. Mr Evgeny Ustyugov (the "Athlete" or "Appellant") is a former Russian biathlete and a team member of the National Olympic Committee of Russia who, most notably, won a Gold medal in the mass start 15km event and a Bronze medal in the 4 x 7.5km men's relay at the 2010 Vancouver Winter Olympics and a Gold medal in the 4 x 7.5km men's relay event at the 2014 Sochi Winter Olympics. The Athlete retired from competitive biathlon after the end of the 2013/2014 World Cup.

2. The International Biathlon Union (the "IBU" or "Respondent") is the world governing body of biathlon having its registered offices in Salzburg, Austria.

3. The Appellant and the Respondent are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

4. 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 the present proceedings, it refers in this award (the "Award") only to the submissions and evidence it considers necessary to explain its reasoning.

5. The present appeal was brought by the Athlete against the 13 February 2020 decision (the "Decision") of the IBU Anti-Doping Hearing Panel (the "IBU ADHP"), according to which he was found guilty of use of a prohibited substance or a prohibited method under Article 2.2 of the IBU Anti-Doping Rules (the "IBU ADR"), was found ineligible for a period of two years and got disqualified from all his competitive results as from that date of the sample collection, i.e. 27 August 2013, up to his retirement, including his results at the Sochi Winter Olympic Games. As will be explained below in more detail, in support of its case, the IBU relies mainly on the data retrieved from the World Anti-Doping Agency ("WADA") accredited laboratory in Moscow (the "Moscow Laboratory"), which the Athlete contests.

A. Background of the Dispute: The Russian Doping Scheme

6. On 16 December 2014, following the broadcast of a documentary alleging the existence of sophisticated systemic doping practices in Russian athletics, WADA announced the appointment of an independent commission (the "Independent Commission") to investigate the allegations as a matter of urgency. The three members of the Independent Commission appointed by WADA were Mr Richard Pound QC, former President of WADA; Professor Richard McLaren, Professor of Law at Western University in Ontario, Canada ("Prof. McLaren"); and Mr Günter Younger, Head of the Cybercrime Department at Bavarian Landeskriminalamt in Munich, Germany.

7. On 9 November 2015, the Independent Commission submitted its report to WADA entitled "The Independent Commission Report #1 – Final Report". In the report, the Independent Commission (inter alia): (a) identified systemic failures to the extent that neither RUSADA nor the Russian Federation can be considered to be acting in compliance with the WADA Code (the "WADC"); and (b) confirmed the existence of widespread cheating through the use of doping substances and methods to ensure, or enhance the likelihood of, victory for athletes and teams. The Independent Commission also recommended, among other things, that the Russian Anti-Doping Agency ("RUSADA") be declared non-compliant with the WADC and that the WADA accreditation of the Moscow Laboratory be revoked, both of which steps were implemented by WADA on 18 November 2015.

8. On 12 May 2016, the New York Times published an article called "*Russian Insider Says State-Run Doping Fueled Olympic Gold*". The so-called 'Russian insider' was Dr Grigory Rodchenkov ("Dr Rodchenkov"), at that time the director of the Moscow Laboratory.

9. On 19 May 2016, WADA announced the appointment of Prof. Richard McLaren as an Independent Person (the "IP") to investigate the allegations made by Dr Rodchenkov.

10. On 18 July 2016, Prof. McLaren issued his report (the "First McLaren Report"), in which he concluded that a systemic cover-up and manipulation of the doping control process existed in Russia.

11. On 9 December 2016, Prof. McLaren issued a second report (the "Second McLaren Report"), in which he identified a number of athletes who appeared to have been involved in or benefited from the systematic and centralised cover-up and manipulation of the doping control process.

12. Accompanying the Second McLaren Report was a cache of non-confidential documents examined by the IP during the investigation which was named as the "Evidence Disclosure Package" or "EDP".

B. The WADA LIMS and the Moscow LIMS

13. In October 2017, WADA received an extract of the Laboratory Information Management System ("LIMS") of the Moscow Laboratory (the database used by the Moscow Laboratory to store results of testing of samples) from a whistle-blower. That extract related to samples obtained in the period from January 2012 to August 2015 (the "WADA LIMS" or the "2015 LIMS"). The WADA LIMS copy was found to include presumptive adverse analytical findings made on the initial testing of samples which had not been reported in WADA Anti-Doping Administration & Management Systems (the "ADAMS") (a web-based database management system for use by WADA's stakeholders), nor followed up with confirmation testing.

14. In the context of the re-instatement procedure of RUSADA as compliant with the WADC, a WADA expert team was permitted to enter the Moscow Laboratory between 10 and 17 January 2019, and make copies of the Moscow Data. Over 23 terabytes of

data were obtained, including a copy of the LIMS database (the "Moscow LIMS" or "2019 LIMS"). In April 2019, Russian authorities sent to WADA a large number of samples that had been in storage in the Moscow Laboratory.

C. The Sample

15. The present appeal concerns urine doping control sample nr. 2808577 provided out-of-competition by the Athlete on 27 August 2013 in Tyumen, Russia for analysis by RUSADA.

16. The Moscow Laboratory did not report an Adverse Analytical Finding ("AAF") in ADAMS with respect to the Sample.

17. However, according to the IBU:

- The WADA LIMS indicates that both the Initial Testing Procedure (the "ITP") and the confirmation procedure (the "CP") performed on the Sample showed the presence of a long-term metabolite of the anabolic steroid oxandrolone and that the Sample should therefore have been reported as an AAF.

- In furtherance of what became known as the Russian doping scheme (as described above), the Moscow Laboratory, however, falsely recorded the analytical results of the Sample in ADAMS as negative so that the Athlete could avoid the consequences of an AAF.

18. On 27 August 2018, based on such information, the IBU notified the Athlete that an anti-doping rule violation ("ADRV") had occurred by way of his "use" of a prohibited substance or a prohibited method under Article 2.2 IBU ADR, and that "aggravating circumstances" existed pursuant to Article 10.6 IBU ADR, which justified the imposition of a period of ineligibility of four years (the "IBU Notice").

19. According to the IBU Notice, the ADRV resulted from the analysis of the WADA LIMS regarding the Sample, according to which:

- the Initial Testing Procedure resulted in:
  - the concentration of 0.6 ng/ml of the metabolite of oxandrolone "18-nor-17b-hydroxymethyl-17a-methyl-2-oxo-5a-androst-13-en-3-one", and
  - the concentration of 0.3 ng/ml of the metabolite of oxandrolone "18-nor-17a-hydroxymethyl-17b-methyl-2-oxo-5a-androst-13-en-3-one".
- the following Confirmation Procedure resulted in:
  - the concentration of 0.6 ng/ml of the metabolite of oxandrolone "18-nor-17b-hydroxymethyl-17a-methyl-2-oxo-5a-androst-13-en-3-one", but
  - in the concentration of 0.0 ng/ml of the metabolite of oxandrolone "18-nor-17a-hydroxymethyl-17b-methyl-2-oxo-5a-androst-13-en-3-one".

Thus, according to the IBU Notice, the analysis of the Athlete's A Sample revealed a Presumptive Adverse Analytical Finding ("PAAF") for oxandrolone (0.6 ng/ml of the metabolite of oxandrolone 18-nor-17b-hydroxymethyl-17a-methyl-2-oxo-5a-androst-13-en-3-one) in the Initial Testing Procedure, which was then fully confirmed in the Confirmation Procedure. The PAAF for oxandrolone (0.3 ng/ml of the metabolite of oxandrolone "18-nor-17a-hydroxymethyl-17b-methyl-2-oxo-5a-androst-13-en-3-one") was not confirmed in the Confirmation Procedure.

20. In the IBU Notice, the Athlete was invited to provide an explanation for the possible ADRV for his use of oxandrolone within 14 days of receipt, which he did, disputing having committed an ADRV.

D. Proceedings before the Anti-Doping Hearing Panel of the IBU

21. By letter of 24 October 2018, the IBU referred the matter to the IBU ADHP.

22. On 24 October 2018, the IBU submitted its application to the IBU ADHP.

23. On 19 December 2018, the Athlete filed his Answer.

24. By letter of 30 December 2018, the IBU and the Athlete were notified that pursuant to the IBU ADR, a panel had been established to hear the Athlete's case.

25. On 1 February 2019, the IBU filed its Response.

26. On 28 February 2019, the Athlete filed his Response.

27. On 24 April 2019, a first hearing was held in presence of both Parties and their representatives.

28. On 9 July 2019, the IBU ADHP issued a procedural order affording both Parties the opportunity to file and submit further evidence and submissions.

29. On 16 September 2019, the IBU filed its additional submissions.

30. On 22 November 2019, the Athlete filed his additional submissions.

31. On 10 December 2019, a second hearing was held.

32. On 13 February 2020, the IBU ADHP rendered the Decision, as follows:

"i. *Evgeny Ustyugov has committed an anti-doping rule violation for 'use' of a prohibited substance, in contravention to Article 2.2 IBU ADR.*

ii. *Evgeny Ustyugov is ineligible to compete in any sporting activity for a period of two years from the date of this decision.*

iii. *All competitive results obtained by Evgeny Ustyugov in the IBU competitions he participated in from 27 August 2013 through to his retirement at the end of the*

2013/14 World Cup season, including his results at the Sochi Winter Olympic Games are disqualified with all resulting consequences for medals, points and prizes.

iv. Each party bears its own costs of and incidental to this proceeding."

33. The reasoning to explain the Decision can be set out in material part as follows:

"[...]
Applicable Law
[...] The parties agree that the Athlete is bound by the IBU Anti-Doping Rules of the IBU Integrity Code effective in full force as of October 19, 2019 (the present IBU ADR), by virtue of his membership to RBU and IBU and pursuant to Article 1.2.1 of the present IBU ADR. [...]
Jurisdiction
[...] Regarding the procedural issues of the dispute, this matter was assigned to the ADHP in November 2018, under the IBU ADR in effect at that time. [...]
[...] However, the disciplinary procedures for this dispute were already well under way and a second hearing pending at the date the present IBU ADR became effective. The present IBU ADR are silent regarding the transfer of ongoing cases before the ADHP to the new IBU dispute resolution mechanism. Therefore, the ADHP continues to be the competent body to settle this dispute.
[...] As stated at par. 20 supra, neither party challenged this Panel's jurisdiction to adjudicate this dispute at any time, nor the appointment of any Panel member or its composition. [...]
Burden and Standard of proof
[...] [T]he standard of proof to establish that an ADRV has occurred, even in a 'use' case, remains that of a comfortable satisfaction, and not that of beyond a reasonable doubt.
[...] However, IBU's evidence supporting the charge of aggravating circumstances pursuant to Article 10.6 IBU ADR and which carries up to a four-year period of ineligibility, must be even more persuasive than the evidence supporting the charge of 'use' pursuant to Article 2.2 IBU ADR because based on the allegations at stake "the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be "comfortable satisfied". [...]
Reliable Means
The Panel must therefore determine if IBUs evidence and means of proving the ADRV for 'use' are reliable. Taking into consideration all the relevant circumstances of the case, the Panel must be persuaded that IBU's evidence is credible and sufficiently reliable to meet the Panel's comfortable satisfaction.

ISSUES FOR DETERMINATION [...]

1. Have any departures from International Standards occurred?

i. Has a departure to the ISTI occurred which could reasonably have caused the PAAF or IBU's factual basis for the ADRV charge, e.g. the data contained in the LIMS database?

The Panel's determination is that by way of his submissions, both written and oral, the Athlete has not brought forth sufficiently compelling arguments to support his allegation that a departure from the ISTI might have caused the PAAF for Oxandrolone. He, therefore, does not establish to the required standard that a departure from the ISTI could reasonably have caused the PAAF or IBU's factual basis for the ADRV charge, e.g. the data contained in the LIMS database.

ii. Has a departure to ISL occurred which could reasonably have caused the PAAF or IBU's factual basis for the ADRV charge, e.g. the data contained in the LIMS database?

[...]

The Panel accepts, as explained by IBU and confirmed by Dr Gmeiner at the hearing, that while, as per WADA assessments, there was room for improvement and updating of the Moscow Laboratory's SOPs, and GC/MS instruments, these concerns were not serious enough to result in the suspension of the Moscow Laboratory before the 2014 Olympic Winter Games. If some SOP's were lacking, the quality of their analysis and validity of their results did not appear to be.

[...]. Most significantly, Dr Gmeiner also explains that the canceled method of qualitative detection of anabolic steroids and other conjugated compounds in urine by the GC/MS/ MS relied upon by the Athlete is of no relevance to this case. That analysis related strictly the Athlete Passport Profiles under the TDEAAS, not the analysis of long-term Oxandrolone metabolites.

[...] Overall, the Panel finds that the shortcomings of the Moscow Laboratory's SOP or GC/MS -MS methods and instruments could not have reasonably caused the PAAF.

The chain of custody

[...] Therefore, even if the actual internal Chain of Custody Forms are missing, through no fault of IBU's, from the extensive WADA LIMS data and Moscow LIMS data, the associated Chain of Custody Form and spreadsheet entries, the Panel is satisfied that one can easily discern the movement of the Athlete's sample within the Laboratory throughout the various stages of analysis.

[...] The Panel finds that the missing internal Chain of Custody Form could not have reasonably caused or resulted in the Athlete's PAAF. If anything, as argued by IBU and established in its evidence, the Panel may infer that the fact that [...] no Chain of Custody Forms are available is likely to result from the many efforts undertaken to hide and manipulate data at the time.

***The absent Laboratory Documentation Packages (Doc Packs) and Quality Management Systems (QMS)** [...]*

More importantly, the non-availability of a Doc Pack is not in itself a cause to decide in favor of an athlete in a 'use' case. While in this case, the existence of a Doc Pack would likely be considered one of a number of reliable means of proof, neither its absence nor the Moscow Laboratory's lacking QMS render IBU's charge groundless or without merit so long as 'use' is established by any other reliable means and so long as this Panel is satisfied that sufficient safeguards have been observed.

The validation "or not" of the method

[...] Notably, even if WADA had commented that certain validation methods were not being properly conducted or corrected to its satisfaction, as Dr Gmeiner explains and the Panel accepts, this comment only related to GC/MS-MS validation methods for steroid profiles under the TDEAAS (as explained above), and not to the validation methods for the detection of long term Oxandrolone metabolites.

[...] Indeed, Dr Gmeiner explains, and the Panel accepts, that the detection of Oxandrolone NW metabolites does not require the same analysis as required under the TDEAAS. Therefore, the fact that SOP for the steroid profile analysis had been cancelled does not alter the validity of the Laboratory's developed validation method for the detection of long term Oxandrolone metabolites. Guided by Dr. Gmeiner's evidence, the Panel's interpretation of the ISL is that so long as the Laboratory had developed its own validation methods and followed its established operating procedures related to the same, it could effectively detect long term oxandrolone metabolites in compliance with the ISL.

[...] Based on the oral and written evidence submitted, the Panel accepts that the Moscow Laboratory was able to and did in fact conduct scientifically robust analysis for the detection of long-term Oxandrolone metabolites in 2013. They had the instruments to do so, the knowledge to do so, the research to do so, and had developed, validated and documented their methods to do so. They reported such findings and several Athletes were charged and sanctioned for ADRVs as a result. [...]

***The questionable positive control sample** [...]*

[W] hile it may be that Cologne was the only laboratory that was known to possess a standard control sample with Oxandrolone NW at the time, the Panel rejects the submission that the Control Sample was purchased on the black market, considering Oxandrolone was one of the ingredients of the Duchess Cocktail which was widely used and detected in various Russian samples at the same time. In any event, as this evidentiary element remains unverifiable, the Panel gives it no weight. [...]

Identification factors

[...] The Athlete claims that no long term Oxandrolone metabolites were detected in his sample and that Dr Gmeiner has confirmed the same.

[...] To the contrary, Dr Gmeiner's evidence refers to the Athlete's submission of 22 November 2019, in which the Athlete cites Dr. Gmeiner's WADA LIMS Review Data Report of 15 September 2019, and misquotes part of his conclusion, namely that in the confirmation procedure, the signals only indicate "a possible presence of the oxandrolone night watch".

[...]Dr Gmeiner specifies and the Panel agrees that the full sentence of his conclusion concerning the findings in the Confirmation Procedure is in fact as follows: "The signals at RT 12.32 indicate a possible presence of the Oxandrolone night watch metabolite 18-nor-17a-hydroxymethyl-17b-methyl-2-oxo-5a-androst-13-en-3-one", and that this sentence must be read in conjunction with Dr. Gmeiner's other two conclusions around the same sentence, which concern the confirmation of another metabolite[...].[...]

***Determination on the ISL** [...]*

[...] The various departures from the ISL raised by the Athlete are not mere technicalities. The Panel accepts that such departures could potentially undermine an

analytical process in certain circumstances. This is why they were flagged for corrective action by WADA.

However, again, pursuant to Article 3.2.2 IBU ADR, what the Panel must determine is whether such departures from the ISL could have reasonably caused the PAAF for Oxandrolone NW or IBU's factual basis for this bringing this case forward.

[...] Based on the evidence, the Panel is satisfied that the Moscow Laboratory was competent and had scientifically sound analysis, instruments, methods and analysis. It follows, therefore, that its analytical findings were reliable.

[...] Mr. Krotov and Dr Gmeiner both testified at the hearing on the issues of the presence, or not, of Oxandrolone in the Athlete's sample, the validation method applied to detect the same by the Moscow Laboratory, and the reliability of the manipulated LIMS data. The evidence shows that although the Moscow Laboratory appears, as highlighted by the Athlete, to have had shortcomings in some of its custodial procedures, these could not reasonably have caused the PAAF – as is required for the Athlete to succeed on this point. [...]

2. Does IBU establish that the Athlete committed an ADRV?

[...] Before attributing weight to the LIMS data in respect of the proof of the alleged ADRV for 'use', the Panel must be satisfied as to the reliability of the LIMS data evidence. First, the WADA LIMS, then if necessary, the Moscow LIMS.

i. Is the WADA LIMS reliable evidence?

[...] Having examined the WADA LIMS spreadsheets at length, this Panel understands from the hard data provided in the IBU Operation LIMS Investigation Report and other related evidence, that the information from the LIMS master data file referring to the Athlete's sample coded 280577 confirms, among others, that a presumptive AAF for the sample 280577 was reported and detected Oxandrolone and Oxandrolone metabolites. The WADA LIMS also provides evidence that a confirmation procedure confirmed the finding of Oxandrolone metabolites and that the sample was not only reported as negative in ADAMS but 'hidden'. The Athlete is clearly identified, as is the date of sample collection, the location of test, the PAAF, the estimated concentration etc. There is also a documented internal chain of custody for each step of the Moscow Laboratory's analytical and custodial process.

[...] Also, according to Mr. Walker and supported by way of his key reliability tenets, the theoretical possibility that the Moscow LIMS could be falsely constructed or is otherwise fake, in part or in total, cannot be absolutely excluded. That said, such a construction would have required monumental time, resources, access and coordination. However, for the reasons stated above, and summarized below, that possibility, is so improbable that it must be rejected. [...]

[...] The Panel does not accept the Athlete's assertion that the whistleblower is an unknown criminal. Although their identities were initially concealed and protected by the WADA whistleblower program, their identities have been revealed and they are in fact former employees of the Moscow Laboratory. Although the whistleblowers were not called as witnesses before the Panel, their absence does not diminish the evidentiary value of the WADA LIMS. [...]

[...] Reliance by the Panel on the analytical facts set forth in the WADA LIMS as accurate information is founded upon four key pillars outlined by Mr. Walker in the WADA I & I Report:

i. Firstly, the analytical data for AAFs legitimately reported in ADAMS (for Russian and non-Russian athletes) by the Moscow Laboratory between January 2012 and August 2015, matches the data contained in the WADA LIMS (Matching Using AAF Results).

ii. Secondly, 59 samples tested by the Moscow Laboratory as part of the 'external quality assurance scheme' were all correctly analyzed (EQAS Evidence).

iii. Thirdly, some of the samples which appear in the Moscow LIMS have been seized by WADA and subject to reanalysis (Sample Reanalysis), which validates the Moscow LIMS data.

iv. Fourthly, content of the McLaren Emails (e.g. Sample numbers, Presumptive AAFs) matches the associated data detailed within the (WADA) LIMS.

[...] These four pillars are quite compelling and of considerable weight. Mr. Walker and Dr. Broséus' testimony, which the Panel accepts, is to the same effect and leaves very little room for reasonable doubt.

[...] The Panel therefore accepts both the expert testimony IBU relies upon, as well as the explanations provided in the WADA LIMS flowcharts and Investigative Reports as to reliability of the WADA LIMS Data.

[...] The Panel also finds that the Excel spreadsheets distributed to IBU by WADA are indeed not 'a mere spreadsheet' as asserted by the Athlete. After studying them at length, the Panel, without reservation, accepts Mr. Walker's evidence and finds that they contain a "trove of information" that has been forensically authenticated and is reliable.

[...] For the above reasons, the Panel concludes that the information contained in the WADA LIMS is a 'reliable mean' within the meaning of Article 2.2 and 3.2 IBU ADR.

ii. Is the Moscow LIMS reliable evidence?

[...] The Panel accepts the forensic experts' analysis that reveals that data was deleted, altered and modified, and rejects the Athlete's argument that the fact that the Moscow LIMS data was manipulated renders the WADA LIMS data unreliable.

[...] From the evidence filed before the Panel and heard at the hearing, a manipulation of the Athlete's Moscow LIMS data clearly took place (as well as that of other athletes) and was only in the Athlete's favor to protect him. Dr Broséus' evidence is that the general protection scheme undertaken by the Moscow Laboratory especially in 2013 and 2014 was designed to conceal doping by Russian athletes and not to falsely implicate them. The Panel accepts this evidence.

[...] Mr. Walker further explains that investigations have established that the WADA Data is more reliable than the Moscow Data both generally and specifically with regards to the Athlete's samples. Again, the Panel accepts Mr. Walker's evidence.

[...] Professors Souvignet and Casey describe how their forensic examination indicates that some of the Athlete's specific records were deleted, altered or overwritten in the Moscow LIMS system. This confirms both their prior existence in the WADA LIMS and Moscow LIMS databases and the fact they were selectively manipulated. The Panel accepts their evidence.

[...] The Panel accepts Professors Casey and Souvignet's response to Mr. Nikitin's Witness Statement and report. The Moscow Laboratory processes and LIMS operation do not alter results of forensic examination of the Moscow LIMS data which, when considered in conjunction with the reliable WADA LIMS data, provides very strong evidence on the Athlete.
[...] The Moscow LIMS certainly appears to have been selectively manipulated, on suspicious dates, both for the benefit of the Athlete and to cast doubt on the reliability of the WADA LIMS data.
[...] It bears mention that based on the evidence heard with regards to the Athlete's samples, a finding that the Moscow LIMS was manipulated (as it clearly appears to have been) would not per se render it generally unreliable. This is particularly so if it can be established that the selective manipulation was solely for the benefit of protected athletes. However, this is beyond the scope of this decision.
[...] In any event, these points neither alter nor have any effect on the established reliability of the WADA LIMS for the purpose of meeting the requirements of IBU ADR Articles 2.2 and 3.2. [...]

iii. Did the Athlete 'use' Oxandrolone?

[...] The Panel has already decided that while the Athlete establishes that the Moscow Laboratory did not perform the entirety of its custodial procedures in accordance with the ISL, these departures from the ISL did not cause the PAAF for Oxandrolone or the factual basis for IBU's charge.
[...] The Panel also repeats that this is a 'use' case not a 'presence' case. Therefore, the ISL requirements and IBU ADR legal standards required to establish a 'presence' case do not apply strictly. Here, the Panel is to decide whether the ADRV for 'use' has been established by 'reliable means', not by way of a formal, typical and standardised AAF test report as in a 'presence' case, which would necessarily require that the Moscow Laboratory's custodial procedures, (B sample analysis, Doc Pack etc.) meet the ISL requirements without fail.
[...] The Athlete and his samples are clearly identified in the WADA LIMS data. The data shows that there was a confirmed PAAF for Oxandrolone. There is no ambiguity in this regard in the evidence before the Panel.
[...] Other than challenging the validity of the Laboratory's analysis and custodial procedures, the Athlete does not proffer any compelling explanation as to why the PAAF and confirmation procedures findings linked to his samples and identity were first recorded in the WADA LIMS then hidden and reported as negative in ADAMS, or why he has been expressly connected to a number of substances and identified by name in various instances in both LIMS databases.
[...] Finally, there has been no evidence submitted to the Panel in respect of the Athlete's sample which leads to a compelling inference of a false positive result for Oxandrolone NW. Indeed, the underlying facts arising from the WADA LIMS establish the opposite in stark candour – Oxandrolone NW was present in the Athlete's sample, thereby suggesting 'use' on the part of the Athlete, given that it cannot be endogenously produced.
[...] The Athlete's defence focuses on discrediting the Moscow Laboratory's custodial procedures, which the Panel rejects. [...]

[...] Although the Athlete has argued that 0.6 ng/ml does not meet the reporting threshold, Dr Gmeiner confirmed at both hearings that Oxandrolone was not a threshold substance. Therefore, no MRPL could be a cut-off point not to report a PAAF or to warrant omitting performing a confirmation procedure.
[...] The reliable WADA LIMS Data shows and establishes in detail that the Athlete's initial screening procedures showed that Oxandrolone was present in the Athlete's sample and reported a PAAF as a result. The reliable WADA LIMS data also shows that a confirmation procedure confirmed the presence of Oxandrolone NW in the Athlete's sample and that it was hidden thereafter and not reported in ADAMS. Irrespective of the estimated concentration detected, because there is no threshold limit for Oxandrolone, the Panel agrees that it should have been considered an AAF and reported as such in ADAMS.
[...] Because the AAF was never reported, the Panel also accepts IBU's approach in charging the Athlete with an ADRV for 'use', relying on all the reliable analytical and circumstantial evidence in the case file related to the WADA LIMS and all the compelling evidence that has since been brought forth regarding the Moscow LIMS data and its manipulation.
[...] Here, established facts made available by way of the WADA LIMS and reliable circumstantial evidence in support lead to a compelling inference that the Athlete used Oxandrolone. For the reasons above, upon careful deliberation of all the evidence before us, the Panel is comfortably satisfied that the Athlete 'used' Oxandrolone and therefore committed an ADRV within the meaning of Article 2.2 of the IBU ADR. [...]

3. Do aggravating circumstance exist?

[...][A]s a matter of fact, and law, the Panel finds there is insufficient reliable direct evidence before us linking the Athlete as a knowing, willing and active participant to any organised doping scheme. Consequently, we are not comfortably satisfied that there are aggravating circumstances in this case. Thus, Article 10.6 IBU ADR does not apply.

4. What are the appropriate consequences to impose, if any?

[...] Pursuant to Article 2.2 IBU ADR, the Athlete has committed an ADRV for the 'use' of Oxandrolone.
[...] Article 10.2 IBU ADR applies to ADRVs including Article 2.2 which is an ADRV for 'use or attempted use' of a prohibited substance. It provides for a mandatory sanction of a two-year period of ineligibility for a first ADRV for 'use' of a prohibited substance, unless the conditions for eliminating or reducing the period of ineligibility under Articles 10.4 or 10.5 IBU ADR are met. However, because the Athlete never raised the issue of sanction reduction, neither Article 10.4 nor Article 10.5 IBU ADR apply here.[...]
Therefore, all competitive results the Athlete may have obtained from 27 August 2013, through to his retirement in 2014, shall be disqualified with all resulting consequences including forfeiture of any medals, points and prizes.[...]"

34. On 14 February 2020, the Decision was received by the Athlete.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

35. On 5 March 2020, the Appellant filed his appeal against the Decision before the Court of Arbitration for Sport (the "CAS") and submitted his Statement of Appeal pursuant to Article R48 of the Code of Sports-related Arbitration (2019 edition) (the "CAS Code"). The Appellant nominated Mr Jordi Lopez Batet, attorney-at-law in Barcelona, Spain, as arbitrator.

36. On 13 March 2020, the Respondent requested that the present procedure be submitted to the same panel as the procedure *CAS 2020/A/6834 Svetlana Sleptsova v. International Biathlon Union*, and that the present proceedings be stayed until the CAS has rendered its final Award in the case *CAS 2020/O/6689 World Anti-Doping Agency (WADA) v. Russian Anti-Doping Federation.*

37. On 20 March 2020, the Appellant objected to the Respondent's requests (a) that the present procedure be submitted to the same Panel as the procedure *CAS 2020/A/6834 Svetlana Sleptsova v. International Biathlon Union (IBU)*; and (b) that the present proceedings be stayed until the CAS had rendered its final award in the case *CAS 2020/O/6689 World Anti-Doping Agency (WADA) v. Russian Anti-Doping Agency (RUSADA).*

38. On 23 March 2020, the Respondent commented on the Appellant's letter dated 20 March 2020.

39. On 26 March 2020, the CAS Court Office informed the Parties that the Deputy President of the CAS Appeals Arbitration Division had decided that the present procedure will not be consolidated nor submitted to the same Panel as the procedure *CAS/A/6834 Svetlana Sleptsova v. International Biathlon Union*, however reserving the possibility to appoint the same President in both cases.

40. On 30 March 2020, the Respondent nominated The Hon. Michael J Beloff QC (as he then was) Barrister in London, United Kingdom, as arbitrator.

41. On 14 April 2020, the Appellant filed his Appeal Brief with the CAS Court Office. In his Appeal Brief, the Appellant requested (i) the CAS Court Office to hold a public hearing in the present matter, (ii) the CAS panel to order the Respondent to disclose the WADA LIMS and the Moscow LIMS without any restriction, and (iii) to be able to file a rejoinder upon receipt of the Answer.

42. On 28 April 2020, the CAS Court Office informed the Parties that the Panel appointed to decide the present procedure was constituted as follows:

President: Mr Franco Frattini, Attorney-at-Law in Rome, Italy

Arbitrators: Mr Jordi López Batet, Attorney-at-Law in Barcelona, Spain
The Hon. Michael Beloff QC (as he then was), Barrister in London, United Kingdom

43. On 28 May 2020, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in the present matter and consulted the Parties as to possible hearing dates.

44. On 2 June 2020, the Respondent filed its Answer with the CAS Court Office. In its Answer, the Respondent took due note of the Appellant's request for a public hearing, and informed the CAS Court Office that it already submitted all data relating to the Athlete before the IBU ADHP so that the Appellant's request was moot.

45. On 6 July 2020, the Appellant requested the Panel to dismiss IBU's request to examine Mr Walker, Dr Broséus, Prof. Casey and Prof. Souvignet as witnesses in the present proceedings.

46. On 14 July 2020, the Respondent made its comments on the Appellant's said request of 6 July 2020.

47. On 16 July 2020, the CAS Court Office informed the Parties that the Panel had decided to dismiss the Appellant's request that Mr Walker, Dr Broséus, Prof. Casey and Prof. Souvignet be excluded as witnesses.

48. On 5 August 2020, the CAS Court Office issued an order of procedure, specifying that a hearing would be held in this matter on 20 October 2020.

49. On 10 September 2020, after having consulted the Parties, the Panel decided, due to the COVID-19 pandemic, to maintain the hearing scheduled for 20 October 2020 but to hold it in whole or in part by video-conference.

50. On 30 September 2020, the CAS Court Office informed the Parties that, due to the COVID-19 related travel and gathering restrictions, the Panel decided to maintain the hearing scheduled for 20 October 2020 but without video streaming for the public.

51. On 15-16 October 2020, the Appellant and the Respondent jointly requested a postponement of the hearing scheduled for 20 October 2020.

52. On 7 January 2021, both Parties informed the CAS Court Office that they still preferred the hearing in this matter to be held in person and that they would revert to the CAS Court Office with possible hearing dates and a proposed hearing schedule.

53. On 11 January 2021, the CAS Court Office informed the Parties that the present procedure was suspended pursuant to Article R32(3) of the CAS Code and invited the Parties to provide possible fresh hearing dates and a proposed hearing schedule.

54. On 27 May 2021, the CAS Court Office advised the Parties that Mr Franco Frattini had resigned from CAS.

55. On 31 May 2021, the CAS Court Office informed the Parties of the appointment of Mr André Brantjes, Attorney-at-Law in Amsterdam, as President of the Panel, and that the Panel to decide on the present appeal would be constituted as follows:

President: Mr André Brantjes, Attorney-at-Law in Amsterdam, the Netherlands

Arbitrators: Mr Jordi López Batet, Attorney-at-Law in Barcelona, Spain
The Hon. Michael Beloff QC (as he then was), Barrister in London, United Kingdom

56. On 12 July 2021, the Appellant informed the CAS Court Office of new possible hearing dates.

57. On 21 July 2021, the CAS Court Office informed the Parties that, in view of the Parties' availabilities, a hearing would take place in the present matter on 14 and 15 October 2021.

58. On 12 August 2021, the Appellant requested the CAS Panel to invite the Respondent to provide specific information relating to reanalysis of certain samples.

59. On 17 August 2021, the Panel invited the Respondent to answer the following questions raised by the Appellant:

"*1. Is it possible to conduct further testing on the sample 2808577?*
2. How many samples appearing as positive findings in the LIMS, but reported as negative in ADAMS, could have been reanalysed?
3. Out of these samples, how many were ultimately found to be negative further to the reanalysis procedure?"

60. On 24 August 2021, the Respondent provided his answer to the above questions.

61. On 7 September 2021, the Respondent informed the CAS Court Office that the Parties had agreed to proceed at the hearing scheduled on 14-15 October 2021 according to a jointly accepted hearing schedule and communicated its list of attendees. On the same day, the Appellant communicated his list of hearing attendees and reiterated his request for a public hearing.

62. On 7 September 2021, the Appellant requested that the Respondent be invited to file a request with the Investigation Committee of Russia (ICR) in order to obtain the Sample for retesting.

63. On 16 September 2021, the CAS Court Office advised the Parties that due to the limited space available and the COVID-related restrictions in place, it was not possible to hold a public hearing at the CAS Court Office, and invited the Parties to comment on the available alternatives, i.e. hold a public hearing elsewhere than at the CAS Court Office or as from March 2022 only at the new CAS premises. The CAS Court Office also informed the Parties that the Panel considered it necessary that the combined hearing in the present matter and in the matter *CAS 2020/A/6834 Svetlana Sleptsova v. International Biathlon Union* would require three full days rather than two as proposed by the Parties in their joint hearing schedule and therefore proposed to hold separate hearings. i.e. maintain the hearing in the present matter and postpone the hearing in the case *CAS 2020/A/6834 Svetlana Sleptsova v. International Biathlon Union.*

64. On 20 September 2021, the Respondent provided its comments as to the Appellant's request with respect to the reanalysis of the Sample. With respect to the hearing schedule, the Respondent agreed to maintain the hearing in the present matter but to postpone the hearing in the case *CAS 2020/A/6834 Svetlana Sleptsova v. International Biathlon Union*. Finally, the Respondent reserved its right to cross-examine the Appellant.

65. On 29 September 2021, the Appellant requested the CAS Panel to invite the Respondent to disclose additional information concerning the Sample. With respect to the hearing schedule, the Appellant objected to the proposal to hold two separate hearings in the present case and in the case *CAS 2020/A/6834 Svetlana Sleptsova v. International Biathlon Union*. Finally, the Appellant objected to his cross-examination by the Respondent but said that he would be available to answer the questions from the Panel.

66. On 1st October 2021, the CAS Court Office informed the Parties that the Panel had decided to postpone the hearing scheduled for 14-15 October 2021.

67. On 7 October 2021, the CAS Court Office consulted with the Parties in order to identify new possible hearing dates.

68. On 25 October 2021, the CAS Court Office informed the Parties that the hearing in this matter and in the case *CAS 2020/A/6834 Svetlana Sleptsova v. International Biathlon Union* would take place on 14-15-16 March 2022.

69. On 27 October 2021, the CAS Court Office invited the Respondent, on behalf of the Panel, to address the questions raised by the Appellant with respect to the Sample, and informed the Parties that the Panel had decided not to allow the Respondent to cross-examine the Appellant on the grounds that the Panel would not consider the Appellant's statement as evidence.

70. On 1st November 2021, the Respondent provided the additional information requested with respect to the Sample.

71. On 24 November 2021, the Appellant provided the CAS Court Office with an updated hearing schedule accepted by both Parties. The Appellant objected to the Respondent's proposal to have a PowerPoint presentation by one of the witnesses.

72. On 1st December 2021, the CAS Court Office informed the Parties that the Panel had decided to admit the PowerPoint presentation prepared by one of the witnesses provided that it did not contain any new information and requested a copy of such presentation.

73. On 18 February 2022, the CAS Court Office informed the Parties that due to a delay in the construction works at the headquarters of the CAS Court Office in Palais de Beaulieu it would not be possible to host a public hearing on the scheduled hearing date whether in person or through video streaming. The CAS Court Office therefore suggested either to maintain the hearing at the new headquarters but without public attendance by any means or to postpone the hearing until April 2022. Finally, the CAS Court Office invited

the Parties to inform the Panel about the status of the procedure *CAS 2020/ADD/6 International Biathlon Union v. Evgeny Ustyugov*.

74. On 18 February 2022, the Respondent informed the CAS Court Office that it preferred to hold the hearing as scheduled but without public attendance.

75. On 22 February 2022, the Appellant informed the CAS Court Office that he preferred to postpone the hearing to April 2022.

76. On 23 September 2022, the CAS Court Office advised the Parties on behalf of the Panel that the hearing was postponed and suggested new hearing dates.

77. On 28 February 2022, the Appellant and the Respondent separately informed the CAS Court Office about the status of the matter *CAS 2020/ADD/6 International Biathlon Union v. Evgeny Ustyugov*, the list of topics to be addressed by the experts and the format of examination of experts and witnesses as well as the hearing attendees.

78. On 1st March 2022, the CAS Court Office confirmed to the Parties that the hearing in the present matter would be held together with the matter *CAS 2020/A/6834 Svetlana Sleptsova v. International Biathlon Union* on 4-5-6 May 2022 at the headquarters of the CAS Court Office in Lausanne, and that such hearing would be held in public.

79. On 14 March 2022, the Respondent provided the CAS Court Office with the PowerPoint presentation of Dr Julian Broséus, to be presented at the hearing.

80. On 11 April 2022, the CAS Court Office issued an amended order of procedure (the "Order of Procedure") in the present proceedings, requested the Parties to return a signed copy of it, and invited the Parties to confirm their list of hearing participants.

81. On 21 April 2022, the Appellant requested the postponement of the hearing scheduled on 4 to 6 May 2022 as a result of the economic sanctions against the Russian Federation related to the conflict in Ukraine.

82. On 25 April 2022, the Respondent informed the CAS Court Office that it had agreed to postpone the hearing until the end of August 2022 to allow the Appellant to explore the possibilities for his attendance in person and that the Parties agreed that in case any participant would not be able to attend the newly scheduled hearing in person, such participant could participate to the hearing by videoconference. Finally, the Parties also jointly requested a procedural video conference with the President of the Panel.

83. On 26 April 2022, the CAS Court Office informed the Parties that, as a result of their agreement, the hearing scheduled for 4-5-6 May 2022 would be postponed and that a procedural video conference would be held on 5 May 2022.

84. On 5 May 2022, a procedural meeting was held by video conference. The President of the Panel, the CAS Clerk, the CAS Counsel and the Counsel for each of the Parties attended such meeting. After the meeting, the CAS Court Office invited the Parties to liaise and jointly provide a combined draft hearing schedule for the hearings in the present matter and also in the matter *CAS 2020/A/6834*.

85. On 17 May 2022, the Respondent submitted a hearing schedule accepted by both Parties as well as an alternative preferred by the Respondent.

86. On 19 May 2022, the CAS Court Office informed the Parties that the Panel would be available for a hearing in this matter on 1 September 2022, and invited the Parties to indicate whether they would be available.

87. On 24 and 27 May 2022, the Parties respectively confirmed their availability for a hearing to be held in the present matter at CAS headquarters in Lausanne.

88. On 30 May 2022, the CAS Court Office confirmed to the Parties that a hearing would take place in the present matter on 1 September 2022 at the CAS Court Office in Lausanne, Switzerland, and invited the Parties to provide their list of attendees.

89. On 7 June 2022, the Appellant informed the CAS Court Office that his list of attendees communicated on 14 January 2022 was unchanged.

90. On 9 June 2022, the Respondent provided its own list of attendees.

91. On 23 June 2022, the CAS Court Office, on behalf of the Panel, provided the Parties with the final hearing schedule to which the Parties had both agreed, requesting both Parties to prepare short closing statements instead of post-hearing briefs. The CAS Court Office also issued the updated Order of Procedure, which the Parties were requested to sign and return to the CAS Court Office. Finally, the CAS Court Office invited the Parties to communicate the names of any invited guests to the hearing.

92. On 22 August 2022, the Appellant returned a signed copy of the Order of Procedure to the CAS Court Office. On the same day, the Respondent requested the Panel some clarification as to the examination of the experts at the hearing.

93. On 29 August 2022, the Appellant made some comments regarding the Respondent's request for clarifications about the examination of the experts at the hearing.

94. On 30 August 2022, the CAS Court Office, on behalf of the President of the Panel, made clarification as to such examination of the experts.

95. On 1st September 2022, a hearing was held in the present matter at the headquarters of the CAS in *Palais de Beaulieu*, Lausanne, Switzerland. In addition to the members of the Panel, Ms Andrea Sherpa-Zimmermann, CAS Counsel, and Ms Stéphanie De Dycker, CAS Clerk, the following persons attended the hearing:

For the Appellant: Mr Evgeny Ustyugov, the Athlete [by video-conference]
Mr Yvan Henzer, counsel
Ms Tatiana Petropavlovskaya, counsel [by video-conference]
Mr Sergey Nikitin, expert [by video-conference]
Dr Douwe de Boer, expert
Mr Grigory Krotov, expert [by video-conference]
Mr Maxim Siderov, interpreter

For the Respondent: Mr Stephan Netzle, counsel
Mr Karsten Hofmann, counsel
Mr Greg McKenna, IBU representative
Mr Aaron Walker, expert
Dr Julian Broséus, expert
Prof. Eoghan Casey, expert [by video-conference]
Prof. Thomas Souvignet, expert
Dr Günter Gmeiner, expert
Prof. Christiane Ayotte, expert
Dr Olivier Rabin, witness [by video-conference]

96. At the outset of the hearing, the Parties declared that they had no objections as to the constitution of the Panel.

97. At the hearing, the Panel heard evidence from the following experts and witnesses: Dr Douwe De Boer, Mr Grigory Krotov and Mr Sergey Nikitin, all named by the Appellant, as well as Mr Aaron Walker, Dr Julian Broséus, Prof. Eoghan Casey, Prof. Thomas Souvignet, Dr Günter Gmeiner, Prof. Christiane Ayotte and Dr Olivier Rabin, all named by the Respondent. Before taking their evidence, the President of the Panel informed all of the experts and witnesses of their duty to tell the truth subject to sanctions of perjury under Swiss law. The Parties and the Panel had the opportunity to examine and cross-examine them. Each of them confirmed their written statement or expert opinion. Finally, the Athlete also made a statement.

98. The Parties were given full opportunity to present their case, submit their arguments and answer the questions from the Panel. At the end of the hearing, the Parties confirmed that they were satisfied with the procedure throughout the hearing, and that their right to be heard had been fully respected.

99. On 5 September 2022 pursuant to the Panel's request made during the hearing, the Respondent provided a compilation of case law relevant to the present matter.

100. On 6 September 2022, the Respondent returned a signed copy of the updated Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES AND REQUESTS FOR RELIEF

101. The aim of this section of the Award is to provide a summary of the Parties' main arguments rather than a comprehensive list thereof. However, the Panel confirms that in deciding upon the Parties' claims it has carefully considered all of the submissions made and evidence adduced by the Parties, even if not expressly mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant

102. In its Appeal Brief, the Appellant requested the following relief:

"[...] The appeal is upheld.
[...] The decision issued on 13 February 2020 by the IBU Anti-Doping Hearing Panel is annulled.
[...] The International Biathlon Union shall be ordered to bear all arbitration costs and to reimburse Mr Evgeny Ustyugov the minimum CAS Court Office fee of CHF 1,000.
[...] The International Biathlon Union shall be ordered to pay Mr Evgeny Ustyugov a contribution towards the legal and other costs incurred in the framework of these proceedings in an amount to be determined at a later stage or at the discretion of the Panel."

103. The Appellant's submissions, in essence, may be summarized as follows:

- The Decision was issued by a disciplinary body that was revoked by the IBU Statutes in force at the time of issuance. The Decision was therefore invalid.

- The IBU has the burden of proving to the comfortable satisfaction of the Panel that the Athlete committed an ADRV. In light of the utmost seriousness of the allegations made against the Athlete, the Panel must ensure that a commensurate standard of proof is applied. In addition, it is for the IBU to establish that the evidence provided – in particular the analyses of the Moscow laboratory and the documents emanating from such laboratory – is 'reliable'. It is only when this is established that the Athlete has the need to show that any departure from standards may have caused an AAF.

- Since, according to IBU, a long-term metabolite of oxandrolone was identified in the Sample, the alleged violation can only fall within the scope of application of Article 2.1 IBU ADR which specifies that "*the presence of a prohibited substance or its metabolites or markers in an athlete's sample*" constitutes an ADRV. A violation for "use" under Article 2.2 of the IBU ADR cannot be charged when a laboratory did not comply with the applicable standards for analysis or when there is no proof that the standards are met.

- The only evidence on file – the data from the WADA LIMS – allegedly supports the "presence" of a prohibited substance rather than its "use". *In casu* however, several flaws in the testing process prevent the Panel from finding that the Athlete committed an ADRV based on Article 2.1 IBU ADRV:

    - There is no laboratory documentation package, which therefore prevents the testing process from being verified.

    - The chain of custody, in particular the internal chain of custody, is not properly documented. As a result, it is impossible to establish that the results generated by the laboratory are unequivocally linked to the Athlete.

    - There is no B-sample analysis, which is a fundamental right of the Athlete.

- Alternatively, even if the Panel were to find that Article 2.2 of the IBU ADR is applicable – *quod non* –, the use of a prohibited substance lacks evidence. Indeed,

neither the copy of the WADA LIMS nor the Moscow LIMS are reliable pieces of evidence:

- The analyses are not documented so that there is no record that all mandatory safeguards as outlined in the International Standard for Laboratories (the "ISL") and the applicable technical documents issued by WADA have been complied with.

- The analyzes on the Sample required the use of a specific analytical method, that was not validated at the time of such analyses for the Moscow Laboratory.

- When the Sample was analyzed, there was no Standard Operating Procedure for the detection of anabolic steroids like oxandrolone, which constitutes another violation of the ISL.

- There was no valid positive control sample for the long-term metabolite of oxandrolone.

- As a result of the above-mentioned flaws and the departure from several other ISL standards, the Moscow Laboratory was not operating competently. It was for that reason that disciplinary proceedings were therefore initiated by WADA against the Moscow Laboratory.

- The concentration of the long-term metabolite of oxandrolone found in the Sample – i.e. 0,6 ng/ml – is extremely low and very significantly under the Minimum Required Performance Levels for exogenous anabolic androgenic steroids. The risk of a false positive is accordingly high, especially considering that the Moscow Laboratory would not conduct a confirmation procedure if the minimal concentration for oxandrolone was below 2ng/ml.

- The very low concentration of the Sample may also be the result of a possible contamination with another urine sample in the Moscow Laboratory.

B. The Respondent

104. In its Answer, the Respondent requested the following relief:

"(1) The Appeal shall be dismissed and the Decision of the Anti-Doping Hearing Panel of the International Biathlon Union dated 13 February 2020 shall be upheld in its entirety.
(2) The Appellant's procedural requests shall be dismissed.
(3) The costs of this appeal procedure, if any, shall be borne by the Appellant.
(4) The Appellant shall pay a fair contribution to the legal costs of the Respondent."

105. The Respondent's submissions, in essence, may be summarized as follows:

- According to the principle *perpetuatio fori*, a tribunal entrusted with a case retains jurisdiction unless it is expressly excluded. *In casu*, at the moment the IBU Statutes

were amended, the IBU ADHP was already validly entrusted with the present case. Since the IBU Statutes do not remove competence of the IBU ADHP to continue hearing procedures of pending cases, the ADHP validly adopted the Decision.

- The present case concerns a violation of Article 2.2 IBU ADR ('use of a prohibited substance') and not of Article 2.1 IBU ADR. The standard of proof is the "comfortable satisfaction" of the Panel, as described under Article 3.1 IBU ADR, and, in accordance with Article 3.2 IBU ADR, the allegation can be proven by any reliable means.

- According to the LIMS data, the ITP of the Sample resulted in the presence of a long-term metabolite of oxandrolone in a concentration of 0.6 ng/ml and the following CP resulted again in the same result. Oxandrolone being a prohibited substance at all times, any concentration of oxandrolone is considered an AAF. The result of such analysis should have been but was not reported in ADAMS as an AAF for a prohibited substance.

- The present case is a case about "use" of a prohibited substance as there was no *reported* AAF. The fact that the Moscow Laboratory failed to report an AAF in ADAMS does not exclude the prosecution of the alleged ADRV of the Athlete: the use of a prohibited substance should not go unpunished just because the Moscow Laboratory was successful for a considerable time in hiding athletes' AAFs. In such a situation Article 2.2 of the IBU ADR can be engaged. Since the present case is a case about "use" which can be demonstrated by any reliable evidence, the alleged lack of laboratory documentation package and of a B-sample analysis are both irrelevant. Although the *internal* chain of custody for the Sample is lacking, the Moscow LIMS still enables the tracing back of the steps taken by the laboratory and the persons entrusted with the handling of the Sample.

- The WADA LIMS data constitutes reliable evidence of the alleged ADRV:

    - The updated WADA statement of Mr Aaron Richard Walker and Dr Julian Broséus together with other earlier WADA reports confirm the reliability and authenticity of the data contained in the WADA LIMS.

    - The experts – i.e. Dr Günter Gmeiner, Dr Olivier Rabin and Prof. Christiane Ayotte – confirm that the analyses performed by the Moscow Laboratory are reliable:

        - The method for the detection of long-term metabolites of oxandrolone had been developed by the Laboratory in accordance with ISL requirements and therefore the fact that the formal validation of the method came later does not render the analyses unreliable.

        - The concerns with respect of the Laboratory's Standard Operating Procedure for the detection of steroids were not significant enough to invalidate the Laboratory's results.

- The absence of a valid positive control sample for oxandrolone is irrelevant since there is no doubt that the Moscow Laboratory positive control sample contained the long term oxandrolone metabolites.

- The Moscow Laboratory operated competently since it was ISO accredited between 2012 and 2014, i.e. at the very time when the Sample was analysed.

- The WADA scientific expert review of the Moscow Laboratory held in 2012-2013, unanimously concluded that the Moscow Laboratory was operating sufficiently well to allow it to continue its routine analytical activities despite the requirement for several corrective actions.

- The fact that the Sample showed a low concentration of oxandrolone cannot justify the not reporting the AAF in ADAMS since oxandrolone is a non-threshold substance.

- The analysis performed by the Moscow Laboratory as well as the WADA LIMS demonstrate the presence of a long-term metabolite of oxandrolone in the Sample as well as the fact that it was hidden thereafter and not reported in ADAMS.

V. THE HEARING

106. At the hearing, as described at paragraph 97 above, the Panel heard evidence from the witnesses and experts (i) on the issue of the reliability of the LIMS, including on its manipulation; (ii) on the capability of the Moscow Laboratory to detect oxandrolone, and finally (iii) on the assessment of the analytical results.

107. The evidence of the witnesses and experts can be summarized as follows:

➢ Dr Grigoriy Ivanovich Krotov:

Dr Krotov is biochemist and holds a PhD in biological sciences. From July 2008 to July 2016, he was head of the peptide doping department and blood analysis at the Moscow Laboratory. He explained that in 2009, Moscow Lab employees Oleg Stanislavovich Migachev ("Mr Migachev") and Timofey Gennadievich Sobolevsky ("Mr Sobolevsky") together developed the LIMS with a Russian language interface for keeping records of analysis carried out in the Moscow Lab.

With respect to the reliability of the LIMS, Dr Krotov confirmed that since this system was hand-made, it suffered regular failures and technical malfunctions. Therefore, Mr Migachev had been improving and updating LIMS for many years. Moreover, changes to the LIMS system were also necessary in order to take into account new WADA requirements. Dr Krotov was not aware of the existence of any technical documentation or user guidelines in respect of LIMS. Thus, no document has ever been presented to him for review which would describe LIMS and provide any information

on how to use the system. No education on how to work with LIMS was ever given to the employees of the Moscow Lab. It could accordingly be said that all employees, including him, mastered LIMS by trial and error. For instance, upon completion of the analysis of a sample, the employee recording the results in the system put a mark against the sample in the column labelled "completed" ("*завершено*"). In Dr Krotov's understanding, in addition to denoting that the analysis procedure in respect of the sample had been completed, this mark was necessary for the accounting department to issue invoices to customers. Nevertheless, after some further changes were made to the LIMS interface, Mr Sobolevsky wrote an angry letter to Dr Krotov saying that the column "completed" meant, in fact, "confirmed" ("*подтверждено*") and that it was necessary to put these marks only opposite the samples where the presence of a prohibited substance had been confirmed. Such situations occurred time and again, since the employees were not trained to work with LIMS and were not promptly informed about changes in the LIMS system. At the same time, LIMS had no tools to prevent mistakes resulting from employee error. Moreover, LIMS users had no means of correcting the mistakes. Only Mr Migachev and Mr Sobolevsky could make changes to LIMS. Dr Krotov also confirmed that he has no experience with other systems used by WADA-accredited laboratories.

With respect to the capability of the Moscow Laboratory to detect oxandrolone, Dr Krotov confirmed that, after one of WADA inspections to the Moscow Laboratory in 2013, he found out that the methods used for the qualitative detection of anabolic steroids were not validated by the staff of the department led by Mr Sobolevsky. Thus, since oxandrolone is an anabolic steroid, there were no validated methods in the Moscow Laboratory for the detection of the same substance in August 2013. In addition, with respect to long-term oxandrolone metabolites, there were definitely no validated methods of their detection at this period of time, which meant that the Moscow Laboratory could not identify such metabolites in compliance with the ISO 17025:2005 standard and the requirements of ISL as of January 2012. Dr Krotov nevertheless confirmed that WADA did not revoke the accreditation of the Moscow Laboratory (despite having the power to do so) since it considered that the Moscow Laboratory was at its best possible at that moment, which he accepted.

With respect to the urine control samples for long term oxandrolone metabolites, Dr Krotov stated that the situation in August 2013 was such that there were no standard samples with persistent metabolites of oxandrolone in existence worldwide except for in the Cologne laboratory. Ordinary urine of a volunteer after ingesting the drug – oxandrolone – was used as a positive control sample in the Moscow Lab. In that case the oxandrolone excretion studies were conducted on Mr Migachev. In the department of Mr Sobolevsky, the positive control samples of urine were obtained as a result of the "excretion study". Usually, the medicines used for studies which could not be bought within the territory of the Russian Federation (such as, for example, oxandrolone), were bought on the black market without any guarantees of the purchased substance's conformity to its apparent name. No documents relating to the research process were prepared and there was no control over, or documenting of, the actual ingestion of the drug, the time and date of the drug's intake, or the dosage of the drug. The positive control urine sample was obtained in respect of oxandrolone in the same way which, in

his opinion, did not comply with the standards of ISO 17025:2005 and the requirements of ISL as of January 2012.

- Mr Sergey Nikitin:

Mr Nikitin is deputy head of digital forensics laboratory at the Moscow office of Group-IB and is a GIEC Certified Forensic analyst as well as a BS ISO/IEC 27001:2013 Information security management systems Lead Auditor.

Mr Nikitin explained that the LIMS does not meet WADA ISL 2012 requirements nor the ISO 17025:2005 and the ISO 17025:2017 standards. He explained that the LIMS was designed, maintained and functioned in violation of the standards of the time for this kind of software and even more so in violation of the new modern standards; and that as a result it cannot constitute reliable source. In particular, Mr Nikitin observed that there is no proper audit trail in the LIMS. In his opinion, the findings of experts that the data were copied or changed only confirm his conclusions as in a system that meets the standards, mishandling of data is simply impossible. As such, a case like the present one would not have been possible had the ISO requirements been met by the Moscow Laboratory. Mr Nikitin confirmed that he has no experience with other WADA accredited laboratories. Mr Nikitin finally stated that had at the time applicable ISO requirements been complied with, mishandlings of the LIMS would have been impossible and the present case would therefore not have occurred.

- Dr Douwe de Boer:

Dr de Boer is a biochemist working with Drug Testing Consultancy and formerly scientific and technical Director of the doping department of an IOC and WADA accredited Sport Drug Testing laboratory in Portugal. Dr de Boer explained that the fact that the Moscow Laboratory did not lose its WADA accreditation, does not automatically imply that the quality of its analyses was sufficient, but could also indicate – in his personal opinion – the effect of immense political and logistic pressure just before the start of 2014 Winter Olympic Games in Sochi. ISO 17025 does not guarantee that every single analysis is adequate but rather that the complete process has been set up according to specific norms for their management system for quality, administrative and technical operations. The results of a few analyses of a fully accredited laboratory may have an insufficient quality and the accreditation quality mark guarantees only complete transparency.

In the case at hand, a contamination with another urine sample in the Moscow Laboratory cannot be excluded; in light of the absence of adequate quality management in the procedures of the laboratory, there was even a significant risk of contamination by oxandrolone and its metabolites. Dr de Boer agrees that a scenario of contamination – as it occurred in the WADA-accredited laboratory in Paris – is rare.

Moreover, there is no indication that the Moscow Laboratory did have a proper positive – and especially negative – quality control sample. In addition, the negative and positive control samples used by Dr Gmeiner were not from the same batch as the urine Sample

of Mr Ustyugov, the Appellant. As a result, there is no guarantee that the identification procedure was adequate. What is relevant is not whether or not the procedures were complied with, but rather the content of the raw data, which we are missing in the present case.

Moreover, there is no possibility to check that the analyses are compliant with the applicable standards because of the doubtful reliability of the LIMS data and the missing information on chain of custody and Laboratory Documentation Package. The chain of custody – if any – is insufficiently robust as even WADA confirmed that there was an absence of adequate quality management in the procedures of the Moscow laboratory and serious issues in the proper maintenance of the chain of custody. Since the respective concentrations were very low, and no adequate analytical validation and no adequate positive Quality Control samples were available, the Moscow Laboratory may have been reluctant to report an Adverse Analytical Finding in order to avoid the risk of a false positive result. There is no evidence that the method for the identification of the long-term metabolites of oxandrolone was validated nor that the Moscow laboratory was operating according to the Standard Operating Procedure for the methods of qualitative detection of anabolic steroids at the time the analysis on the Sample were made.

- Mr Aaron Richard Walker and Dr Julian Broséus:

Mr Walker is Deputy Director at the WADA Intelligence and Investigations Department ("WADA I&I") and Dr Broséus is Principal Data and Scientific Analyst at the WADA I&I.

The experts explained that the WADA LIMS, which was received by WADA on 30 October 2017 from a whistleblower, shows that the Sample underwent an ITP, which ended in a PAAF for two oxandrolone metabolites; the Sample then underwent a CP which was successful and reported an AAF for one of the two metabolites of oxandrolone. To the contrary, the Moscow LIMS, which was retrieved from the Moscow Laboratory in 2019 by WADA, shows that there was no PAAF for the same Sample. Mr Walker and Dr Broséus explained that after careful analysis, it is clear that the WADA LIMS constitutes reliable evidence and that the Moscow LIMS was manipulated as to its content before it was provided to WADA in 2019. The analysis of the LIMS enabled the experts to make the following three major discoveries: (i) the Moscow LIMS data analyzed enabled to retrieve a complete copy of the Confirmation Procedure datafile regarding the Sample as well as the fact that it had been deleted before release of the Moscow LIMS to WADA; (ii) the Moscow data enabled retrieval of a deleted version of the LIMS (the "Carved LIMS") which corresponds to the WADA LIMS; (iii) the logs of the LIMS could be retrieved, which provided evidence of each of the manipulations on the LIMS as well as their timing.

Dr Broséus first explained that the LIMS enables, through a chart of 8 tables, the tracking of what happened with a sample from its initial reception by the Moscow Laboratory up to the end of the procedure and the upload to ADAMS, each table containing all the raw data file and pdfs. The LIMS also contains information relating

to users' actions in the Moscow LIMS database, including what action, when and in what LIMS table it occurred, i.e. the logs, which not only constitute an internal chain of custody but also enable to authenticate the information contained in the LIMS. With respect to the case at hand, Dr Broséus explained that the manipulation in the Moscow Database was observed only with respect to the ITP and the CP as well as with respect to the logs. For the rest, all the data are identical.

A comparison of the "found" and "confirmation" tables of the WADA LIMS, the Moscow LIMS (2019) and the Carved LIMS as well as the "log_do" table in each version of the LIMS, shows that:

(i) a PAAF for two metabolites of oxandrolone was reported in the "found" table of the WADA LIMS;
(ii) the record of a PAAF for two metabolites of oxandrolone was deleted in the Moscow LIMS;
(iii) a successful CP for one of the two metabolites of oxandrolone was reported in the "confirmation" table of the WADA LIMS;
(iv) the record of a successful CP for one of the two metabolites of oxandrolone as well as the corresponding raw data were deleted in the Moscow LIMS.

The raw data regarding the Sample's successful Confirmation Procedure for one of the two metabolites of oxandrolone was recovered and was assessed by Dr Gmeiner as disclosing a reportable AAF. Finally, the Sample was searched several times in 2018 from within the Moscow Laboratory.

Dr Broséus explained that the analysis of the LIMS data showed that, when dealing with the Sample, the Moscow Laboratory analysed the positive control sample as well as the negative control sample; However, the corresponding folders were deleted and could not be recovered, which is why WADA provided a positive and negative control samples from another batch but analyzed on the same date.

➢ Professors Thomas Souvignet and Eoghan Casey:

Prof. Thomas Souvignet is Professor in Digital Forensic Science and Investigation and a researcher at the University of Lausanne, Switzerland. Prof. Eoghan Casey is Professor in the School of Criminal Sciences at the University of Lausanne, Switzerland, performing research, development and casework to advance digital forensic science and investigation.

They operated an in-depth forensic examination of the WADA LIMS database, the Moscow LIMS database and data in deleted state recovered from the LIMS system. Such in-depth forensic examination enabled them to identify evidence that specific records resulted in the presentation made by Dr Broséus: in the WADA LIMS database they found two records in the "found" table and two records in the "confirmation" table that reference sample 13739, i.e. the Sample. These records were not present in the Moscow LIMS database. Forensic examination found evidence that some of these specific records are in deleted state on the LIMS systems, which confirms their prior

existence in the Moscow LIMS database. Similarly, these experts were able to salvage a PDF file and a RAW data file in deleted state which were not found in the Moscow LIMS. Prof. Casey and Souvignet confirmed that the LIMS system is thorough and that the results are very strong and reliable. Moreover, they clarified that the manipulations of the Moscow LIMS were not accidental but intentional, and that, as a result, the requirements of ISO 17025 or any validation process could not prevent such type of intentional manipulations.

- Dr Olivier Rabin:

Dr Olivier Rabin is Senior Executive Director, Sciences and International Partnerships at WADA.

He explained that the reference to an estimated concentration of 0.6 ng/ml of the substance/metabolite is irrelevant since an anabolic steroid such as oxandrolone is a non-threshold substance and therefore the only relevant element is the proper identification of the exogenous anabolic steroid or its metabolite(s) based upon applicable identification criteria.

WADA visited several times the Moscow Laboratory in 2012-2013 before the Sochi Olympic Games. It appeared from these visits that the adherence to some of the rules in force, in particular the quality management processes, were not systematically applied by the Moscow Laboratory; however, the scientific expertise of the Moscow laboratory to analyze some classes of substances, and in particular the anabolic steroids, was never questioned by the WADA auditors. In Dr Rabin's view, the Moscow Laboratory was functioning more as a research laboratory than an anti-doping laboratory. For instance, the Standards of Procedure were outdated or missing but the laboratory was scientifically highly competent. It was clear to the WADA auditors at the time that the Moscow Laboratory scientists in charge of the Mass Spectrometry (MS) analytical section were very competent and developed a high degree of knowledge in the field of anabolic steroids and specifically on the long-term metabolites of anabolic steroids. When the Moscow Laboratory was under close monitoring by WADA in 2012-2013, if at any time the auditors would have considered that the Laboratory should have been suspended, such a procedure would have been initiated without hesitation. If such a procedure was not initiated, it is because it was the unanimous expert opinion of the auditors that, at the time, the Moscow Laboratory was operating sufficiently well to allow it to continue its routine analytical activities despite several corrective actions required. Later, when a disciplinary hearing of the Moscow Laboratory was conducted in November 2013, the conclusion by the Hearing Panel was that the laboratory would be suspended unless it could expeditiously address its quality management issues. If the Hearing Panel would have been convinced that the Moscow Laboratory was operating significantly outside of the rules, the Hearing Panel would have recommended a suspension of the laboratory immediately after the hearing procedure.

The Minimum Required Performance Level indicates the level of concentration a WADA laboratory must be capable to detect in 100% of the cases. A performant

laboratory may have the capacity to detect with sufficient certainty substances below that level as well.

- Prof. Christiane Ayotte:

Prof. Ayotte is the Director of the *Laboratoire de contrôle du dopage* at the *INRS Institut Armand-Frappier* in Québec, Canada, i.e. the only Canadian laboratory accredited by WADA; she has an extensive experience in anti-doping having been involved in various WADA committees.

Prof. Ayotte stated that even if the Moscow Laboratory had some issues with the quality management of its operations in 2013, the expertise of its scientists was recognised in the community, particularly with respect to long-term metabolites.

As to the internal chain of custody, she explained that the link between sample 2808577 and Mr Evgeny Ustyugov, the Appellant, is established from the Doping Control Form, an external document, and that the LIMS data then provide the date, time and identity of the laboratory staff involved for the sample reception and the correspondence with the laboratory code. The LIMS also contains the information on the initial and confirmation tests, including staff who performed each step. The entries in the LIMS are coherent, the substances found detailed with the full name and therefore, Prof. Ayotte does not see how these could be the result of a typographical error or a defective utilization of the LIMS.

The method for detection of long-term metabolites of oxandrolone employed by the Moscow laboratory was sound, similar to what was used in Montreal i.e. classic testing, in conformity with the scientific and technical requirements. It is untrue to claim that no one but the laboratory in Cologne could report AAFs for the long-term metabolites of oxandrolone in 2013: other laboratories had the method in place in already in 2012. It is also publicly known that the Moscow Laboratory did some research on oxandrolone urinary long-term metabolites which was presented at a workshop in Cologne in 2011.

There is no doubt based on scientific data, in particular the analysis done by Dr Gmeiner, that the Moscow Laboratory positive control sample contained the two long-term metabolites of oxandrolone. As a result, the argument that oxandrolone could not be purchased legally in Russia and that the positive control is invalid and could not be used to this end is unsustainable.

As to the Minimum Required Performance Level (the "MRPL") and the Limit of Detection (the "LOD"), Prof. Ayotte explained that the criteria for reporting an AAF for a non-threshold substance are not in any way related to its level of concentration – the identification criteria must be met and there is no uncertainty on this point, as Dr Gmeiner established. Moreover, MRPL is not a threshold or an LOD; adverse analytical findings may result from concentrations below the established MRPL values and below the LODs.

As to the risk of contamination in the absence of a B-sample analysis, Prof. Ayotte stated that such risk cannot invalidate or lead to dismissal of the results of the analysis made by the Moscow Laboratory in the present matter. With respect to the contamination episode that occurred in the WADA-accredited laboratory in Paris, which was provided by Dr de Boer, Prof. Ayotte explained that the laboratory in Paris admitted to having failed to separate heavily positive stanozolol samples and other routine samples on the automatic robot processing the samples, and utilized the same sequence for all the confirmations, therefore repeating the cross-contamination. To the contrary, in the Moscow Laboratory, screening and confirmation procedures were done on different aliquots. Moreover, a contamination would have required a concentration of 282 ng/ml which is very high and not at all typical at the end of excretion. Finally, since the long-term metabolite of oxandrolone was found in the initial procedure and in the confirmation procedure, it means that the A-Sample bottle itself (not only an aliquot) would have had to be contaminated.

- Dr Gunter Gmeiner:

Dr Gmeiner is chemist, head of the WADA-accredited laboratory in Seibersdorf, Austria. Dr Gmeiner analysed the data of the WADA LIMS and the Moscow LIMS, specifically with respect to the Sample.

The overall conclusion of Dr Gmeiner was that the signals at RT 12.54 show the presence of the metabolite 18-nor-17b-hydroxymethyl-17a-methyl-2-oxo-5a-androst-13-en-3-one; that the signals at RT 12.32 indicate a possible presence of the Oxandrolone night watch metabolite 18-nor-17a-hydroxymethyl-17b-methyl-2-oxo-5a-androst-13-en-3-one; finally, presuming that the positive control sample of the same sequence shows the same signals at a similar retention time and a similar ratio, the confirmation analysis of sample 13739 for Oxandrolone long term metabolites confirms the presence of at least one metabolite according to the WADA TD IDCR and indicates the presence of a second one.

As to the "low" concentration found in the Sample, Dr Gmeiner stated that this is not relevant; what is relevant only is that one metabolite of oxandrolone did pass the identification criteria.

As to the reliability of the positive control sample used for the purpose of the analysis on the Sample, Dr Gmeiner stated that he had no reason to doubt that the Moscow laboratory performed the analysis according to the rules, including the positive and negative quality control sample. However, since the positive and negative control sample from the same batch were not available, he was provided by WADA with a positive and negative control sample from another batch that was analyzed on the same date. Dr Gmeiner stated that the confirmation procedure results are strengthened by the fact that the identification criteria were met while using such other positive and negative control urine samples. Finally, Dr Gmeiner clarified that, had there been a contamination, the Moscow laboratory would have described the procedure as invalid; to the contrary, the Moscow laboratory indicated that the confirmation procedure was done correctly.

108. Finally, the statement of the Appellant can be summarized as follows:

Mr Ustyugov is a former professional biathlete of Russian nationality. He was born in Siberia within a family that was into professional sports and as such started skiing at an early age. Throughout his career, the Athlete won two silver medals (one in the individual race and the other one in the relay) at the World Cup in 2011, a silver medal at the 2011 European Championship in sprint and a silver medal at the 2011 European Championship in the individual race. In addition, he won the gold medal in mass start and the bronze medal in relay at the 2010 Olympic Winter Games in Vancouver. At the Olympic Games 2014 in Sochi, he won the gold medal in the relay. It is by hard work that he was able to reach such results. He was informed about the anti-doping rules as from 2005; he would always collaborate with RUSADA, for which body he shows appreciation. Throughout his career, he never tested positive, and he has never used prohibited substances. He retired in 2014 after the birth of his second child.

VI. JURISDICTION

109. Article R47 of the CAS Code provides as follows:

"An 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. [...]"

110. Article 13.2.1 of the IBU ADR provides as follows:

"In cases arising from competition in an international event or in cases involving international-level athletes, the decision may be appealed exclusively to the CAS in accordance with the provisions applicable before such court."

111. Article 13.2.3 let. a of the IBU ADR also states that "*in cases under Article 13.2.1, the following parties will have the right to appeal to CAS: (a) the athlete or other person who is the subject of the decision being appealed; [...]*"

112. There is no doubt and it is not disputed that the present case involves an international-level athlete. The Panel therefore finds that the Athlete has a right to appeal to CAS and that CAS has jurisdiction to decide on the appeal. Moreover, the Panel notes that Respondent does not contest the jurisdiction of CAS.

VII. ADMISSIBILITY

113. Article R49 of the CAS Code provides as follows:

"In 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. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties. [...]"

114. In the present matter, the Statement of Appeal was filed with the CAS Court Office on 5 March 2020, i.e. before the expiration of the time limit of 21 days as from receipt of the Decision on 14 February 2020. The appeal is therefore admissible. Moreover, it fulfils the requirements for a Statement of Appeal in Article R48 of the CAS Code.

VIII. APPLICABLE LAW

115. Article R58 of the CAS Code provides as follows:

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

116. Based on the above provision and on the time the relevant facts leading to this case occurred, the Panel finds that it should decide on the present dispute by reference to the IBU ADR as adopted in 2009 and amended in 2010 and 2012, being the applicable regulations in the sense of article R58 of the CAS Code. Austrian law, being the law of the country where the IBU is domiciled, should apply subsidiarily where necessary.

IX. MERITS

117. The Panel notes that, while it has carefully considered the entirety of the submissions made and the evidence adduced by the Parties, it sets out below only those matters which it deems necessary for it to decide the dispute. In this section of the Award, the Panel will accordingly examine the following issues:

- Was the IBU ADHP competent to issue the Decision?
- Did the Athlete violate Article 2.2 IBU ADR? In the affirmative,
- What are the consequences?

118. The Panel shall examine in the present section each of the above-mentioned questions in the indicated order.

A. Competence of the IBU ADHP

119. The Appellant submits that the Decision is invalid since, at the time it issued the Decision i.e. on 13 February 2020, the IBU ADHP was no longer competent under the IBU ADR. In accordance with article 30.2.1 of the new IBU Constitution which entered into force on 19 October 2019, anti-doping cases must be referred to the CAS Anti-Doping Division instead of the IBU ADHP. In addition, while article 37.1 of the new IBU Constitution expressly provides that the members of the Executive Board, Technical Committee and Athlete's Committee in office as of 19 October 2019 remain in office for the rest of their original terms, there is no equivalent provision for the members of the IBU ADHP.

120. The Respondent, in turn, contends that the IBU ADHP was competent to issue the Decision since it was competent according to Article 8 of the IBU ADR, i.e. the law in force at the time the proceedings were initiated; in addition, according to the principle *perpetuatio fori*, a tribunal entrusted with a case retains jurisdiction unless it is expressly excluded.

121. In resolving the question whether or not the IBU ADHP was competent to issue the Decision, the Panel notes initially that the Parties agree that when, on 24 October 2018, the IBU referred the present matter to the IBU ADHP for it to decide whether or not the Athlete had committed an ADRV, it did so in accordance with the law in force at the time of the initiation of such proceedings, namely Article 8 of the IBU ADR.

122. The Panel further notes that the IBU Constitution was amended in 2019 while the first instance proceedings in the present matter before the IBU ADHP were pending, and that article 30.2.1 of the new version of the IBU Constitution, which entered into force on 19 October 2019, provides that anti-doping cases will be referred to the CAS Anti-Doping Division.

123. CAS panels have already had the occasion to stress that inter-temporal issues are governed by the principle "*tempus regit actum*" which principle is referred to inter alia in CAS 2006/A/1008, para. 10, CAS 2018/A/5628, para. 70 and CAS 2018/O/5822, para. 64:

"In accordance with the CAS jurisprudence (CAS 2004/A/635), the Panel underscores that, as a general rule, transitional or inter-temporal issues are governed by the principle "tempus regit actum", holding that any deed should be regulated in accordance with the law in force at the time it occurred. As a consequence, procedural actions, such as the filing of an appeal, should be done in compliance with rules and time limits in force when they are performed, unless a transitory rule provide otherwise".

"According to the principle tempus regit actum, substantive aspects are governed by the regulations in force at the time of the relevant facts, while procedural matters are governed by the rules in force at the time when the procedural action occurs (CAS 2016/O/4683; CAS 2016/O/4883). Questions relating to jurisdiction are procedural issues as they pertain to the procedure rather than the nature of the obligations arising

from a legal relationship (CAS 2015/A/4059)." (see also CAS 2018/O/5822, para. 63 and cited references).

124. Applying those principle to the case at hand, the Panel notes that since the issue at stake in the present case is an issue of jurisdiction and thus a procedural matter, it shall be governed by the law applicable at the time the relevant procedural action was performed, i.e. the initiation of the disciplinary proceedings, unless a transitional provision would apply. The Panel however notes that there is no such provision applicable in the present matter: the IBU Constitution is silent regarding the specific issue of the transfer of ongoing cases before the IBU ADHP to the new IBU dispute resolution mechanism. The Panel finds therefore that the issue of whether or not the ADHP was competent to issue the Decision is governed by the regulations in force at the time of the initiation of such proceedings.

125. The Parties agreed that when disciplinary proceedings were commenced before the IBU ADHP, Article 8 of the IBU ADR in force at that time was correctly applied. Accordingly, the Panel finds that, based on the reasons set out above, the IBU ADHP was indeed competent to render the Decision.

B. The Alleged Violation of Article 2.2 of the IBU ADR

126. The IBU submits that the Athlete violated Article 2.2 of the IBU ADR, which provides as follows:

> *"2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.*
>
> *2.2.1 It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the athlete's part be demonstrated in order to establish an anti-doping rule violation for use of a prohibited substance or a prohibited method.*
>
> *2.2.2 The success or failure of the use of a prohibited substance or prohibited method is not material. It is sufficient that the prohibited substance or prohibited method was Used or attempted to be Used for an anti-doping rule violation to be committed."*

1. Applicable Burden, Standard and Means of Proof

127. In order to examine whether the Athlete committed an ADRV under the IBU ADR, the Panel shall first define the applicable burden and standard of proof as well as the applicable means of proof.

128. Article 3.1 of the IBU ADR provides as follows:

> *"The IBU and its member federations will have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof will be whether the IBU or*

its member federation have established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation that has been made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof will be by a balance of probability, except as provided in Articles 10.4 and 10.6, where the athlete must satisfy a higher burden of proof."

129. Accordingly, based on the above provision the burden of proving that the Appellant committed an ADRV rests on the IBU.

130. With respect to the applicable standard of proof of "comfortable satisfaction" envisaged in Article 3.1 of the IBU ADR, the Panel accepts and adheres to the overview of relevant case law made by the Sole Arbitrator in the case CAS 2018/O/5712:

"The Sole Arbitrator observes that CAS jurisprudence provides important guidance on the meaning of the application of "comfortable satisfaction" standard of proof. This standard of proof is well-known in CAS practice, as it has been the normal CAS standard in many anti-doping cases even prior to the WADA-code, cf. CAS 2009/A/1912, at para. 54.

The Sole Arbitrator aligns with the analysis of CAS jurisprudence by the Panel in CAS 2017/A/5379, at paras. 704-707:

- *The test of comfortable satisfaction "must take into account the circumstances of the case", cf. CAS 2013/A/3258, which include "[t]he paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport compared to national formal interrogation authorities", cf. CAS 2009/A/1920 and CAS 2013/A/3258.*

- *The gravity of the particular alleged wrongdoing is relevant to the application of the standard in any given case, cf. CAS 2014/A/3526 in which the Panel stated that the comfortable satisfaction standard is "a kind of sliding scale, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be "comfortable satisfied."*

- *However, the standard of proof is not a variable one. The standard remains constant, but inherent within that immutable standard is a requirement that the more serious the allegation, the more cogent the supporting evidence must be in order for the allegation to be found proven, cf. CAS 2014/A/3650 in which the Panel stated that, "the standard of proof does not itself change depending on the seriousness of (pure disciplinary) charges. Rather the more serious the charge, the more cogent the evidence must be in support"* (CAS 2018/O/5712, para. 130-131).

131. Accordingly, in the Panel's view, based on the consistent jurisprudence of CAS, the burden of proving, to the comfortable satisfaction of the Panel (taking into account the seriousness of the allegation) that the Athlete committed an ADRV, rests on the IBU.

132. With respect to the applicable means of proof, Article 2.2 of the IBU ADR provides that facts relating to ADRVs may be established by "*any reliable means*". Article 3.2 of the IBU ADR also provides that "*facts related to anti-doping rule violations may be established by any reliable means, including admissions*". The comment to Article 2.2 gives non-exhaustive examples of such "reliable means": admissions on the part of the athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information that does not otherwise satisfy all the requirements to establish "presence" of a prohibited substance.

133. In the context of the Articles cited in the foregoing paragraph, the Panel must first examine the argument made by the Appellant that since the IBU claims that a long-term metabolite of oxandrolone was identified in the Athlete's Sample, the case against the Athlete can only be a "presence" case under Article 2.1 of the IBU ADR and not a "use" case under Article 2.2 of the IBU ADR. In particular, the Appellant contends that violation for "use" under Article 2.2 of the IBU ADR cannot be applied to circumvent the safeguards that have been duly implemented in the WADC in order to protect the athletes against possible errors from laboratories.

134. From that premise, the Appellant further argues that since both there was no laboratory documentation package, as would be necessary to adequately verify the testing process and the chain-of-custody of the Sample, and the Athlete was deprived of his right to have the B-Sample analysed, the Athlete cannot be found guilty of the ADRV under Article 2.1 of the IBU ADR.

135. The IBU ADR,like the WADC and the respective ADRs of various anti-doping organisations, make a distinction between two forms of anti-doping rule violations: on the one hand, the "presence" of a prohibited substance in an athlete's sample (Article 2.1 IBU ADR), which must be established exclusively by laboratory analysis, and on the other hand, the "use" by an athlete of a prohibited substance (Article 2.2 IBU ADR), which may be established by "any reliable means" of evidence.

136. In accordance with the practice of previous CAS panels, the Panel shall start its examination of this issue by referring to the applicable rules.

137. The official comment under Article 2.2 of the IBU ADR regarding the methods by which a "use" violation may be proved, makes it clear that the "*reliable means*" include "*analytical information that does not otherwise satisfy all the requirements to establish "presence" of a prohibited substance under Article 2.1. For example, use may be established based upon reliable analytical data from the analysis of an A sample (without confirmation from an analysis of a B sample) or from the analysis of a B sample alone where the IBU provides a satisfactorily explanation for the lack of confirmation in the other sample.*"

138. The reference to "*the requirements to establish "presence" of a Prohibited Substance under Article 2.1*" is a reference to the requirements for "sufficient proof" under Article 2.1 IBU ADR, namely:

- that the analysis of the athlete's A sample shows the presence of a prohibited substance in the sample, and the athlete waives analysis of the B sample and the B sample is not analysed; or

- that the analysis of the B sample confirms the presence of a prohibited substance or its metabolite or markers found in the A sample where the athlete does not waive analysis of the B sample and the B sample is analysed.

139. It follows inexorably that a sample analysis that does not meet the requirements to establish "presence" of a prohibited substance, may nevertheless be relied upon as evidence of "use" under Article 2.2 of the IBU ADR.

140. In the Panel's view, this conclusion is corroborated by the IBU ADR provisions relating to results management. Article 7.1.7 of the IBU ADR indeed provides that "*If the B sample proves negative, the entire test will be considered negative and the athlete, his or her national federation, and the IBU will be so informed (unless the IBU takes the case forward as an anti-doping rule violation under Article 2.2) [...]*". Hence, analyses that are not available to be deployed in support of an Article 2.1 IBU ADR "presence" violation may still be relied upon by the IBU with respect to an alleged "use" violation under Article 2.2 of the IBU ADR.

141. The Panel would observe that it does not follow from the above that proving a "use" case is somehow easier than proving a "presence" case. In the Panel's view, these Articles simply provide different routes to the verification of the existence of different ADRVs, each of them with their own particularities. In a "presence" case, the anti-doping organisation relies exclusively on the scientific results of laboratory analysis and the strict laboratory procedures that are implemented to ensure their reliability. In contrast, in a "use" case, the anti-doping organisation is in general not able to rely on a classic sample analysis nor on procedural safeguards such as the opening of a B sample; rather, it is required to bring forward sufficiently reliable evidence of any kind to convince the Panel to the necessary standard of proof, that the athlete indeed used a prohibited substance. In either case it will be for the Panel to assess the evidence on record so as to determine the athlete's liability.

142. The Panel therefore dismisses the submission made by the Appellant that the present matter is a "presence" case that can exclusively be examined in light of Article 2.1 of the IBU ADR, and finds to the contrary that the IBU is free to place reliance on the sample analysis (and other reliable means of evidence) to support an allegation of "use" under Article 2.2 of the IBU ADR. The Panel shall examine such evidence on record in light of the applicable burden and standard of proof in order to decide whether or not the Athlete committed an ADRV.

143. Finally, in the light of the Panel's conclusion that Article 2.1 of the IBU ADR is not in issue in the present matter, the arguments made by the Appellant as to the absence of

any laboratory documentation package and thereby chain-of-custody as well as the absence of a B-Sample analysis, are not significant, still less decisive. Whereas such absence would result in an acquittal in a "presence" case, in a "use" case, it constitutes at most only a factor to be taken into account amongst many others. Since these arguments are reprised in the Appellant's plea to conclude that the IBU failed to establish that the Athlete committed an ADRV for the 'use' of a prohibited substance, the Panel shall revert to them in the next section.

2. The Liability

144. The Panel now turns to the analysis of the evidence on record to decide whether or not the Athlete committed an ADRV under Article 2.2 of the IBU ADR.

145. The IBU's charges rely on the analysis of the WADA LIMS and the Moscow LIMS as well as on the analysis by Dr Gmeiner, Prof. Ayotte and Dr Rabin of the LIMS data regarding the Sample. In order to assess the Athlete's liability under Article 2.2 of the IBU ADR in the present matter, the Panel will start its examination with the assessment of the WADA LIMS and the Moscow LIMS.

a. Reliability of the LIMS Data and Functioning of the Moscow Laboratory in general

146. The IBU submits that the WADA LIMS shows that the Athlete's Sample tested positive for a long-term metabolite of oxandrolone at the Initial Testing Procedure as well as at the Confirmation Procedure, and that the Moscow LIMS shows that the Moscow Laboratory staff fraudulently manipulated the LIMS data to conceal such positive results regarding the Athlete. In support of its submission, the IBU relies on the opinion from experts from WADA, Mr Walker and Dr Broséus, as well as those from the University of Lausanne, Professors Souvignet and Casey. The Athlete in turn submits that the WADA LIMS and the Moscow LIMS are not reliable pieces of evidence since they suffer from several flaws as detailed by the experts called by the Athlete, Dr Krotov and Dr Nikitin.

147. The Panel heard extensive evidence from all the above experts brought by the Parties on the issue of the reliability of the LIMS data and its alleged manipulation. In addition, both Parties adduced the same affidavit from Dr Rodchenkov, the former Director of the Moscow Laboratory (between 2005 and 2015) and an expert in anti-doping matters.

148. The Panel will start its analysis with some facts contained in the affidavit of Dr Rodchenkov, which was adduced by both Parties. The relevant part of his affidavit can be summarised as follows:

"When an Athlete's urine sample (Sample) was collected in Russia, the Sample and its associated collection records (External Collection Record) were delivered to the Moscow Laboratory.
[...] The External Collection Record ensured that the Sample and its test result could be unequivocally linked to the Athlete. Each Sample had a unique identifying number (Sample Code) that was reflected on the External Collection Record. [...] Upon receipt

of the Sample, a laboratory representative in the Moscow Laboratory would document the date and time that the Sample was received by the Moscow Laboratory. This information would be included as part of the Laboratory Internal Chain of Custody (Internal Chain-of-Custody Record). The Internal Chain-of-Custody Record documented the sequence of persons in custody of the Sample and all aliquots taken of the Sample for Analytical Testing. An Aliquot is a representative portion of the Sample used in the analytical process. [...] The Moscow Laboratory, like all WADA accredited laboratories, had a system to uniquely identify all Samples and link them with the respective External Collection Records and Internal Chain-of-Custody Records.

[...] As a WADA accredited laboratory, the Moscow Laboratory was capable of detecting Prohibited Substances or Metabolites of Prohibited Substances, Markers of the Use of a Prohibited Substance, and Prohibited Methods for relevant substances covered by the respective WADA Prohibited List (Prohibited List). WADA updates the Prohibited List annually.

[...] The Prohibited List is comprised of Threshold and Non-Threshold Substances. A Threshold Substance is an exogenous or endogenous Prohibited Substance, Metabolite, or Marker of a Prohibited Substance, which is analysed quantitatively and for which any analytical result that is in excess of a pre-determined decision limit (Decision Limit) constitutes an Adverse Analytical Finding (AAF). If analysis results in the finding of a Non-Threshold Substance, such result constitutes an AAF as soon as Identification Criteria are met. [...] The parameters of the detection level are determined by a 'Minimum Required Performance Level' (MRPL). The MRPL is a WADA approved Technical Document that reflects the concentration of substances on the Prohibited List that a WADA accredited laboratory is expected to reliably detect and confirm in the routine daily operation of the laboratory. [...]

First, the Sample is subject to an Initial Testing Procedure (Initial Testing). The purpose of an Initial Testing is to obtain information about the potential presence of substances from the Prohibited List. For threshold substances, Initial Testing includes appropriate controls near the applicable thresholds. For non-threshold substances, whenever such a substance is commercially available, Initial Testing includes appropriate controls at MRPL level for each available analyte.

[...] A Sample identified during Initial Testing as exhibiting the potential presence of Prohibited Substances, but for which a Confirmation Procedure (Confirmation Procedure) has not yet been done, is defined in the ISL as a Presumptive AAF. Generally, the ISL requires all Presumptive AAFs be subject to a Confirmation Procedure. The purpose of the Confirmation Procedure is to accumulate additional information to support a reported AAF. The Confirmation Procedure has an equal or greater selectivity than the Initial Testing. [...] Once Initial Testing was complete, the Instrument's software generates the Instrument's Electronic Data File (EDF). The Instrument's software processes analytical data from the EDF and generates a PDF Report. [...] Relevant data, such as the detected substance (metabolite) and concentration value, was electronically introduced into the Laboratory Information Management System (LIMS) in the form of a PDF Report. The evaluation would generally involve reviewing the chromatographic peak retention time, ion transitions, and its ratios. Each PDF Report is reviewed by two data readers.

[...] There were two scenarios for which the Disappearing Positive Methodology was utilized.

Scenario 1
[...] The first scenario occurred when Sample Codes of known protected athletes were sent to the Moscow Laboratory. When Sample Codes of protected Russian Athletes were communicated to the Moscow Laboratory in advance of urine analysis, the urine analysis were terminated after Initial Testing and the results were reported as negative in ADAMS. Protected athletes Sample Codes were communicated to the Moscow Laboratory via text message (SMS) from involved Russian officials or via messenger to the Moscow Laboratory as a document including a table of Athlete Sample Codes. If laboratory analysts found Presumptive AAFs, those findings were reported to the Deputy Minister for Sports, Yury Nagomykh (Deputy Minister Nagornykh).
Scenario 2
[...] The second scenario occurred when the Moscow Laboratory conducted urine analysis of a Sample Code without knowing whether it belonged to a protected Athlete. In this scenario, if laboratory analysts identified Presumptive AAFs in a urine Sample after Initial Testing, the Moscow Laboratory would send an email (or an SMS on rare occasions) to a member of Deputy Minister Nagornykh' s staff (Liaison) for a direction on how to treat the Athlete (i.e. protect or not protect). However, unlike the first scenario above, further analysis was not halted after Initial Testing. Instead, another aliquot was requested and the Confirmation Procedure was undertaken. The continuity of these processes was a necessary reality as any delay- either in aliquoting or the Confirmation Procedure- would be readily traceable in the Laboratory's records (e.g. Internal Chain-of-Custody forms, LIMS). This type of delay would appear as a red flag of suspicion to any discerning party. The question on how to treat the athlete was communicated to a Liaison, who then gave directions on whether to "protect" the athlete. Deputy Minister Nagomykh gave me the instructions to use his Liaison's to communicate the information. There were some instances when I communicated issues to Deputy Minister Nagomykh directly. [...] *After an email or SMS message was sent, the Liaison would contact the Russian Anti-Doping Agency (RUSADA) to request the Athlete identity associated with a Sample Code. [...] According to the Program's established procedure, Deputy Minister Nagornykh required that the Moscow Laboratory send him the aforementioned information allowing him to decide which Athletes to protect. If Deputy Minister Nagomykh decided that an Athlete was to be protected, the Liaison would communicate the code "SAVE" (generally via email) to the laboratory, often to me directly. If Deputy Minister Nagornykh decided an Athlete was not to be protected, the code "QUARANTINE" was communicated in the same manner.*
[...] If the Liaison communicated the "SAVE" directive, the Presumptive AAF or confirmed AAF would be falsely reported as negative throughout the open LIMS and ADAMS systems. I was often directly involved in this false reporting. I use the term "open LIMS" when describing the aforementioned because a hidden LIMS database (Hidden LIMS) was operated to manage and track the Program. [...] If a "SAVE" directive was received for an Athlete before the Confirmation Procedure was conducted, then an aliquot for a Confirmation Procedure was not requested and no further testing was done. [...] If a "QUARANTINE" directive was received then the AAF was accurately reported into ADAMS after the finding. [...] *It was imperative to the effectiveness of the Disappearing Positive Methodology that the correct values of the Presumptive AAF or AAF were included in the emails; after all, this was an important basis for*

the decision of whether to "SAVE" or "QUARANTINE" an Athlete.
[...] Investigator Walker asked me to identify which Initial Testing values would, based on my professional experience and expert opinion, most likely be confirmed following the Confirmation Procedure. In other words, the Presumptive AAF values that would most likely become a confirmed AAF to a Confirmation Procedure was conducted. Given the vast number of substances which appear on the Prohibited List, I have restricted my evidence to the following substances:

Drug	**Metabolite**	**Minimal concentration for confirmation ng/ml**	**Comments**
[...]			
OXANDROLONE	18-nor-17b-hydroxymethyl-17a-methyl-2- oxo-5a-androst-13-en-3-one	2	Long Term Metabolite No synthetic reference material available
OXANDROLONE	18-nor-17a-hydroxymethyi-I7b-methyl-2-oxo-5a-androst-13-en-3-one	2	Long Term Metabolite No synthetic reference material available

[...]"

149. The Panel accepts Dr Rodchenkov's statement as a coherent and credible account of how, in general terms, the LIMS was manipulated and, in particular, how the Disappearing Positive Methodology (the "DPM") worked in practice. Besides being revealed by the McLaren Reports, the existence and functioning of the DPM has been also confirmed by various CAS Panels (see for instance CAS 2021/A/7838; CAS 2021/A/7839; CAS 2021/A/7840). For the purposes of this Award, it is scenario 2 rather than scenario 1 as described by Dr Rodchenkov which is relevant. The Panel is comfortably satisfied that the DPM deployed by the Moscow Laboratory consisted in the Moscow Laboratory conducting an initial analytical screening of samples collected from Russian athletes; if that screening revealed a PAAF, a liaison person would obtain the identity of the athlete from RUSADA (by providing the bottle number of the sample); the athlete's identity would be provided to the Russian Deputy Minister for Sport, Mr Yuri Nagornykh, who would then issue an order that the sample be "saved" or "quarantined; Where a "save" order was given, the Moscow Laboratory would report the analysis of the sample as negative in ADAMS; Personnel of the Moscow Laboratory would then falsify the result in the LIMS, including the confirmation procedure result if any, to show a negative result. The Panel further notes that Dr Rodchenkov was the

director of the Moscow Laboratory at the time of the relevant facts and had in depth knowledge on how that Laboratory was covering up the positive samples.

150. The Panel further notes that several CAS panels have previously confirmed the large-scale manipulation of the LIMS data by the Russian authorities as part of the Russian institutionalised doping scheme. In particular, in CAS 2020/O/6689, the CAS panel confirmed the "*deliberate, sophisticated and brazen alterations, amendments and deletions [of the LIMS data, and that those manipulations] were intentionally carried out in order to remove or obfuscate evidence of improper activities carried out by the Moscow Laboratory as identified in the McLaren Reports [...]*".

151. In the Panel's view, it is especially interesting to note that an essential element of the DPM was that the samples collected were indeed accurately analysed and that the overall effectiveness of the DPM relied on the capacity of the Moscow Laboratory to correctly identify the results of the sample analysis and to forward the correct values of the PAAF or AAF to the Liaison so as to allow the Ministry of Sports to decide whether or not a specific athlete should be protected. This of itself shows clearly that the Moscow Laboratory performed sample analyses in a highly accurate manner and that, where applicable, such accurate results were thereafter manipulated in the LIMS in order to reflect the political decision to "protect" any such specific athlete.

b. Reliability of the LIMS Data and Functioning of the Moscow Laboratory with respect to the Appellant's Sample

152. The Panel then carefully reviewed the expert opinion and the oral statements from WADA representatives Mr Walker and Dr Broséus regarding the manipulation of the LIMS data with respect to the Athlete's Sample.

153. The Panel is convinced that the comparison between the records of the WADA LIMS and those of the Moscow LIMS regarding the Athlete's Sample analysis revealed discrepancies in the "found" table (containing the results of the ITP) and "confirmation" table (containing the results of the CP), as well as in the "log_do" table (containing the information as to a user's actions in the Moscow LIMS including what the action was and in what table it occurred).

154. Moreover, the Panel has no doubt concluding that the WADA LIMS is authentic evidence, whereas the Moscow LIMS is manipulated. Indeed, the Panel would rely on the fact that the Moscow LIMS contained a deleted version of the LIMS which could be recovered, i.e. the Carved LIMS.

155. In particular, the Panel accepts the evidence presented by Mr Walker and Dr Broséus, which is adequately summarised by the following tables:

Table 5 - Comparison of "Found" table[74]

LIMS[75]	Offset[76]	Record_state[77]	id[78]	code_int[79]	id_subs[80]	id_met[81]	scr_conc	DT_scr	scrin	id_user_scr	do
2015	0x00019e2a	Existing	2697	13739	62	60	0.3	2013-08-29 07:14:35	4	47	0
Carved	0x00019e2a	Deleted	0	0	62	60	0.3	2013-08-29 07:14:35	4	47	0
2015	0x00019e53	Existing	2698	13739	62	59	0.6	2013-08-29 07:14:51	4	47	0
Carved	0x00019e53	Deleted	0	0	62	59	0.6	2013-08-29 07:14:51	4	47	0

Table 6 - Comparison of "Confirmation" table[82]

LIMS version	Offset	Record_state	id	id_found	number_aliq	vol_aliq	proc	id_user_start	id_laborant
2015	0x0002d754	Existing	1782	2698	3	3	4	47	47
Carved	0x0002d754	Existing	1742	2708	3	3	4	47	47
2015	0x0002d7c0	Existing	1783	2697	3	3	4	47	47
Carved	0x0002d7c0	Deleted_Multiple	0[83]	0[84]	0[85]	3	4	47	47

DT_start	AB	if_found	conf_conc	ATF	SD	DT_end	comment	id_user_end	batch	do	ADAMS
2013-08-29 08:01:18	0	1	0.6	1	0	2013-08-29 17:01:48		1	1652	0	
2013-08-29 08:01:18	0	1	0.6	1	0	2013-08-29 17:01:48		1	1652	0	
2013-08-29 08:01:18	0	0	0	1	0	2013-08-29 17:01:26	IDCR failed[86]	1	1652	0	
2013-08-29 08:01:18	0	0	0	1	0	2013-08-29 17:01:26	IDCR failed	1	1652	0	

stor_out_DT	stor_out_uid	out_alik_DT	out_alik_uid	stor_in_DT	stor_in_uid
2013-08-29 12:35:00	46	2013-08-29 13:49:50	46	2013-08-29 13:49:54	46
2013-08-29 12:35:00	46	2013-08-29 13:49:50	46	2013-08-29 13:49:54	46
2013-08-29 12:35:00	46	2013-08-29 13:49:50	46	2013-08-29 13:49:54	46
2013-08-29 12:35:00	46	2013-08-29 13:49:50	46	2013-08-29 13:49:54	46

156. As convincingly explained by these experts, the "found" and "confirmation" tables in the Carved LIMS match the "found" and "confirmation" tables in the WADA LIMS including with respect to the Athlete's Sample.

157. In addition, the "log_do" table of the Carved LIMS match the "log_do" table of the WADA LIMS including with respect to the Sample:

Table 7 - Comparison of "log_do" table[86]

2015 DATABASE			CARVED LIMS		
Offset	Record_state	do	Offset	Record_state	do
0x03392f40	Existing	/2013/lab/scr_results.php a:6:{s:8:"code_int";s:5:"13739";s:5:"scrin";a:1:{i:1;s:1:"4";}s:3:"sub";a:1:{i:1;s:11:"oxandrolone";}s:8:"scr_conc";a:1:{i:1;s:3:"0.3";}s:6:"id_sub";a:1:{i:1;s:2:"62";}s:6:"id_met";a:1:{i:1;s:2:"60";}}[89]	0x03392f3f	Deleted-Multiple	/2013/lab/scr_results.php a:6:{s:8:"code_int";s:5:"13739";s:5:"scrin";a:1:{i:1;s:1:"4";}s:3:"sub";a:1:{i:1;s:11:"oxandrolone";}s:8:"scr_conc";a:1:{i:1;s:3:"0.3";}s:6:"id_sub";a:1:{i:1;s:2:"62";}s:6:"id_met";a:1:{i:1;s:2:"60";}}
0x03393194	Existing	/2013/lab/scr_results.php a:6:{s:8:"code_int";s:5:"13739";s:5:"scrin";a:1:{i:1;s:1:"4";}s:3:"sub";a:1:{i:1;s:11:"oxandrolone";}s:8:"scr_conc";a:1:{i:1;s:3:"0.6";}s:6:"id_sub";a:1:{i:1;s:2:"62";}s:6:"id_met";a:1:{i:1;s:2:"59";}}[90]	0x03393192	Deleted-Multiple	/2013/lab/scr_results.php a:6:{s:8:"code_int";s:5:"13739";s:5:"scrin";a:1:{i:1;s:1:"4";}s:3:"sub";a:1:{i:1;s:11:"oxandrolone";}s:8:"scr_conc";a:1:{i:1;s:3:"0.6";}s:6:"id_sub";a:1:{i:1;s:2:"62";}s:6:"id_met";a:1:{i:1;s:2:"59";}}
0x033b6408	Existing	UPDATE `2013`.`confirmation` SET `if_found` = '', `conf_conc` = '', `SD` = '', `DT_end` = NOW(), `comment` = 'IDCR failed', `id_user_end` = '1' WHERE `id` = '1783' a:5:{s:9:"conf_conc";s:0:"";s:2:"SD";s:0:"";s:7:"comment";s:11:"IDCR failed";s:8:"code_int";s:5:"13739";s:7:"id_conf";s:4:"1783";}[91]	0x033b6408	Deleted	UPDATE `2013`.`confirmation` SET `if_found` = '', `conf_conc` = '', `SD` = '', `DT_end` = NOW(), `comment` = 'IDCR failed', `id_user_end` = '1' WHERE `id` = '1783' a:5:{s:9:"conf_conc";s:0:"";s:2:"SD";s:0:"";s:7:"comment";s:11:"IDCR failed";s:8:"code_int";s:5:"13739";s:7:"id_conf";s:4:"1783";}
0x033b66d8	Existing	UPDATE `2013`.`confirmation` SET `if_found` = '1', `conf_conc` = '0.6', `SD` = '0', `DT_end` = NOW(), `comment` = '', `id_user_end` = '1' WHERE `id` = '1782' a:6:{s:8:"if_found";s:2:"on";s:9:"conf_conc";s:3:"0.6";s:2:"SD";s:1:"0";s:7:"comment";s:0:"";s:8:"code_int";s:5:"13739";s:7:"id_conf";s:4:"1782";}[92]	0x033b66d8	Deleted	UPDATE `2013`.`confirmation` SET `if_found` = '1', `conf_conc` = '0.6', `SD` = '0', `DT_end` = NOW(), `comment` = '', `id_user_end` = '1' WHERE `id` = '1782' a:6:{s:8:"if_found";s:2:"on";s:9:"conf_conc";s:3:"0.6";s:2:"SD";s:1:"0";s:7:"comment";s:0:"";s:8:"code_int";s:5:"13739";s:7:"id_conf";s:4:"1782";}

158. The Panel can verify that the matching logs also matched the content of the records as they appeared in the "found" and "confirmation" tables of the WADA LIMS and the Carved LIMS, and that the same "log_do" records are absent from Moscow LIMS.

159. Therefore, it appears clearly that the Moscow LIMS contains observable evidence that the ITP and CP records in the WADA LIMS once existed in the Moscow LIMS but were deleted after their creation and before release of the Moscow LIMS to WADA on 17 January 2019. Against the background of Dr Rodchenkov's witness statement and the findings above with respect to the reliability of the LIMS Data and the functioning

of the Moscow laboratory in general, the Panel finds that these data were deleted intentionally to cover up the Appellant's AAF.

160. Finally, Mr Walker and Dr Broséus convincingly showed that (i) the analytical evidence (i.e. raw data) concerning the CP for the Athlete's Sample, which confirmed that the latter was using oxandrolone, was destroyed from the Moscow LIMS and (ii) that evidence that the Sample (under Laboratory Code "13739") was 'negative' was artificially created. In addition, the experts likewise showed that the raw data file concerning the CP for the Athlete's Sample could be recovered from the Moscow LIMS and was assessed by Dr Gmeiner. Dr Gmeiner in turn confirmed that "*[p]resuming that the positive control sample of the same sequence shows the same signals at a similar retention time and a similar ratio, the confirmation analysis of the Athlete's Sample for Oxandrolone long term metabolites confirms the presence of at least one metabolite*". The Panel shall revert on the issue of the positive control sample in its analysis below.

161. The Panel can accept Dr Krotov's explanation that the LIMS suffered regular technical malfunctions; that no education on how to work with LIMS was ever given to the employees of the Moscow Laboratory; and that the LIMS had no tools to prevent mistakes resulting from employee error. Similarly, the Panel can accept the explanations put by Dr Nikitin that the LIMS was designed, maintained and functioned in violation of the contemporary standards of the time for this kind of software and even more so of the new modern standards and that it therefore failed to meet WADA ISL 2012 requirements, the ISO 17025:2005 and the ISO 17025:2017 standards. However, these explanations do not go to the heart of the present matter, because, as was explained by Mr Walker / Dr Broséus and Prof. Souvignet / Prof. Casey, the LIMS was manipulated intentionally rather than as a result of an employee mistake and neither the ISO requirements nor any validation process can prevent such type of intentional manipulations. Finally, the Panel notes that neither Dr Krotov nor Dr Nikitin have experience with systems used by other accredited laboratories.

162. The Panel further notes that Dr Krotov confirmed that the Moscow Laboratory was at the time of the relevant facts performing at its best, and for that same reason despite having the power to do so, WADA did not revoke the accreditation of the Moscow Laboratory. The Panel was further not convinced by Dr de Boer's suggestion that the Moscow Laboratory's accreditation was not removed only because of the immense political and logistic pressure ahead of the start of 2014 Winter Olympic Games in Sochi. As was confirmed by Dr de Boer himself, such suggestion was merely his personal opinion and one which does not rely on any evidence. Moreover, Dr Rabin explained that, at the time the Moscow Laboratory was under close monitoring by WADA in 2012-2013, it was the unanimous expert opinion of the auditors that the Moscow Laboratory was operating sufficiently well to allow it to continue its routine analytical activities despite several corrective actions required; and this is also why later, in November 2013, when a disciplinary hearing took place with respect to the Moscow Laboratory, the hearing panel did not decide to directly suspend the Moscow Laboratory but instead that it would be suspended unless it could expeditiously address its quality management issues.

c. The Alleged Violations of ISL Requirements

163. The Athlete contends that as a result of a series of violations of the fundamental ISL requirements, the Moscow Laboratory was not operating competently at the time of the Sample analysis and the evidence on record, in particular the LIMS data, is not reliable specifically: (i) the analyses are not properly documented as required under ISL; (ii) the method of detection of the long-term metabolites of oxandrolone applied by the Moscow Laboratory was not validated at the time of the Sample analysis; (iii) there was no Standard Operating Procedure for the detection of steroids; (iv) there was no valid positive/negative control sample for the Sample analysis; (v) the concentration found in the Sample according to the LIMS data was too low to constitute a robust result; and finally, (vi) the very low concentration of the Sample may be the result of a contamination with another urine sample. The Respondent in turn maintains that the evidence is robust and reliable, and that the Athlete's use of oxandrolone is sufficiently demonstrated.

i) Laboratory Documentation Package and Chain of Custody

164. The Athlete contends that the Sample analysis performed by the Moscow Laboratory is not documented as required by the ISL, in particular as to a documented chain of custody for the Sample and is therefore not reliable. The IBU submits in turn that there is sufficient authentic and valid evidence on record to confirm that the Athlete committed an ADRV.

165. As was explained above, the Panel has carefully examined the expert reports from Professors Souvignet and Casey and Mr Walker and Dr Broséus and is convinced that the WADA LIMS constitutes authentic evidence and that the Moscow LIMS was indeed manipulated in order to "protect" the Athlete from doping sanctions. In particular, with respect to the Sample, the experts were able to identify the following information based on the comparison of the "found", "confirmation" and "log_do" tables of the WADA LIMS, the Moscow LIMS and the Carved LIMS:

- a PAAF for two metabolites of oxandrolone was reported in the "found" table of WADA LIMS and the Carved LIMS;
- the deletion of a record of a PAAF for two metabolites of oxandrolone in the Moscow LIMS;
- a successful Confirmation Procedure for one of the two metabolites of oxandrolone was reported in the "confirmation" table of the WADA LIMS and the Carved LIMS;
- the record of a successful Confirmation Procedure for one of the two metabolites of oxandrolone as well as the corresponding raw data were deleted in the Moscow LIMS.

- The raw data regarding the Sample's successful Confirmation Procedure for one of the two metabolites of oxandrolone was recovered and was assessed by Dr Gmeiner as having a reportable AAF.

166. In the Panel's view, the above data from the LIMS constitute reliable evidence that the Appellant's Sample contained metabolites of oxandrolone. In particular, the Sample identification number as well as the data regarding the concentration and other analytical data with respect to the Sample analysis were either visible on the WADA LIMS and the Carved LIMS or could be recovered by the experts. As to the chain of custody in particular, the Panel is convinced by the explanation of Prof. Ayotte, who confirmed that the link between sample 2808577 and Mr Evgeny Ustyugov was initially established from the Doping Control Form, an external document, and that the WADA LIMS – as confirmed by the Carved LIMS – then provide the date, time and identity of the laboratory staff involved for the sample reception and the correspondence with the laboratory code. The LIMS also contains the information on the ITP and the CP, including staff who performed each step. As a result, the Panel finds that the data regarding the analysis of the Sample, including the external and internal chain of custody, is sufficiently documented to constitute reliable evidence in the present matter.

ii) Method of Detection applied by the Moscow Laboratory

167. The Athlete submitted that the Sample testing is not reliable since the method of detection applied by the Moscow Laboratory for the Sample analysis was not validated at the time of the Sample analysis, in violation of the ISL and ISO requirements. The IBU submits that although formally validated on 20 December 2013, the Moscow Laboratory's detection method was already robust at the time of the Sample analysis, relying in particular on the early scientific research.

168. The Panel first notes that, according to the ISL, standard methods are generally not available for doping control analysis and that, as a result, accredited laboratories should develop, validate and document methods for the detection of prohibited substances. Such Laboratory should demonstrate the ability to identify successfully 100% of the time the prohibited substance in a specific sample.

169. With respect to the Moscow Laboratory, the Panel notes on the one hand that after its site visit, WADA stated in its report of September 2013 that "*the [Moscow] Laboratory has not yet completed the method validation of the Steroid Profiling using the GC/MS/MS instruments*" and that "*a method validation study has not yet been conducted*". Moreover, in a letter dated 4 November 2019, WADA I&I confirmed that it "*does not possess documents which "duly" verify or validate the ability of the Moscow Laboratory to detect the long term oxandrolone metabolites*".

170. Similarly, Dr Krotov confirmed to the Panel that after one of WADA's inspections of the Moscow Laboratory in 2013, he found out that the methods used for the qualitative detection of anabolic steroids were not validated by the staff of the Moscow Laboratory department led by Mr Sobolevsky; and that as a result, there were no validated methods in the Moscow Laboratory for the detection of long term oxandrolone in August 2013

at the moment of the Sample analysis, in compliance with the ISO 17025:2005 standard and the requirements of ISL.

171. The Panel also notes on the other hand that, according to Mr Walker and Dr Broséus from WADA I&I as well as Professor Ayotte, the method of detection used by the Moscow Laboratory with respect to the Sample relied on a long term and thorough scientific research performed by Dr Sobolevsky from the Moscow Laboratory; after presentation to all WADA laboratories at a Workshop in Cologne in 2011 and peer-review, such method of detection was used in the Moscow Laboratory and others and was included in their routine testing procedures since 2011. Prof. Ayotte also explained that the method of detection used by the Moscow Laboratory was sound, similar to that which the WADA accredited laboratory used in Montreal being classic testing, in conformity with the scientific and technical requirements. Finally, Mr Walker and Dr Broséus also confirmed that the Moscow Laboratory reported AAFs for oxandrolone long term metabolites in ADAMS as early as 2011.

172. The Panel has carefully considered the above elements. The Panel first notes that the experts do not agree as to whether or not the method of detection for long-term oxandrolone metabolites were validated at the time of the Sample analysis. Indeed, whereas Dr Krotov confirmed that there was no such validated method of detection, Dr Gmeiner and Prof. Ayotte are of the view that WADA's comment according to which the Moscow Laboratory had not yet completed the method validation only concerned GC/MS/MS validation methods for steroid profiles, and not those for the detection of long term oxandrolone metabolites. In any case, the Panel does not need to resolve this specific issue for even if the method of detection used for the Sample analysis was not formally validated at the time it was performed, the Panel is of the view that the fact that it was not formally validated does not *per se* invalidate the analytical results.

173. Based on the written and oral statements of Prof. Ayotte and Mr Walker and Dr Broséus, the Panel accepts that the Moscow Laboratory was able to, and did in fact, conduct scientifically robust analysis for the detection of long term oxandrolone metabolites at the time of the Sample analysis. The Moscow Laboratory had the research, the capacity and the knowledge to do so, and was reporting results based on such method of detection as from 2011, with sanctions successfully imposed on athletes for ADRVs identified as a result of such reporting. Moreover, had WADA been of the opinion that the method of detection used by the Moscow Laboratory was suspect, it would have suspended the Laboratory's accreditation, as Dr Rabin confirmed. In the Panel's view, so long as the Moscow Laboratory maintained its WADA accreditation, the Laboratory's validation methods must be considered as valid. Moreover, Dr Rabin himself expressly confirmed that the experts' unanimous opinion after the site visit in 2013 was that the Moscow Laboratory was working sufficiently well to allow it to continue its routine analytical activities. Finally, the Panel recalls that, as it explained earlier (see above para. 151), the essential ingredient to the success of the Russian Doping Scheme was the ability of the Moscow Laboratory to detect correctly the presence of prohibited substances.

174. For those reasons the Panel therefore concludes that the lack of formal validation of the method of detection of long term oxandrolone metabolites did not affect the quality of the Sample analysis nor its reliability.

iii) Standard Operating Procedure for the detection of steroids

175. The Appellant observes that the Moscow Laboratory's standard operating procedure ("SOP") for the detection of steroids was cancelled nine days *before* the analysis of the Sample. In addition, the SOP showed that only four instruments were calibrated for detecting various types of prohibited substances, but not the specific instrument (i.e. "Homer") that was used for the detection of oxandrolone metabolites in the Sample. The IBU in turn maintains that although there was room for improvement, these concerns were not serious enough to suspend the work of the Moscow Laboratory.

176. The Parties agree that the Moscow Laboratory had no appropriate SOP for the detection of steroids at the time of the analysis of the Sample. WADA's site visit reports indeed stress that the Laboratory's SOP should be updated and completed. The Panel, however, is of the view that the fact that the Moscow Laboratory's SOPs were not updated does not *per se* invalidate the results of the Sample analysis. As was explained earlier (see above paras. 151), the essential ingredient to the success of the Russian Doping Scheme was the ability of the Moscow Laboratory to correctly detect the presence of prohibited substances; and, indeed, as was confirmed by Dr Rabin, the WADA experts' unanimous opinion was that despite several corrective actions required, the Moscow Laboratory was working sufficiently well to allow it to continue its routine analytical activities. This was also the opinion of the WADA Hearing Panel when, later, disciplinary proceedings were initiated to force the Moscow Laboratory to implement the corrective actions identified in the WADA site visit reports. As was confirmed by Dr Rabin, had the work of the Moscow Laboratory been considered to be unreliable, WADA would have suspended or removed its WADA-accreditation. The Panel finds no reason to conclude differently.

177. Furthermore, the mere fact that the "Homer" instrument detected the oxandrolone metabolite in principle shows that it was apparently adequately calibrated. The Panel can appreciate that an inadequately calibrated instrument may not detect that which it is supposed to detect. However, the Panel does not accept that it follows that an inadequately calibrated instrument may detect non-existent substances, and so generate. false positives. There is simply no evidence to support such a conclusion.

iv) Positive / Negative Control sample

178. The Athlete contends that the Sample analysis is not reliable since, at the time of the Sample analysis, there was no valid positive control sample ("PCS") available at the Moscow Laboratory to enable comparison with the results of the Sample analysis. The IBU contends to the contrary that there is evidence that a positive and negative control sample was used by the Moscow Laboratory in support of its Sample analysis and that the fact that it was not analysed in the same batch with the Sample, does not invalidate the results of the Sample analysis.

179. The Panel first notes that, according to the ISL, all batches undergoing an analysis should include appropriate negative and positive controls in addition to the sample being tested (see for instance, Article 5.2.4.2.3); the positive and negative control samples are thus analyzed in the same analytical run as the sample being tested. Moreover, as was confirmed by Prof. Ayotte, the ISL provides that, in the absence of the reference standard, a collection of urine samples that, based on scientific data, can be proven to contain the relevant metabolite is acceptable.

180. In the present matter, according to Dr Krotov, there were no standard samples with persistent metabolites of oxandrolone so that the positive control sample was created in the Moscow Laboratory based on a "excretion study" performed using oxandrolone bought on the black market, in violation of the ISL standards. In Dr de Boer's opinion, in the absence of adequate urine control samples, there is no guarantee that the identification procedure was adequate.

181. The Panel however notes that the fact that the Moscow Laboratory used a PCS that contained the two long-term metabolites of oxandrolone is scientifically established by Dr Gmeiner in his report and confirmed by Prof. Ayotte. Oxandrolone may have had to be bought from outside Russia on the black market, but the Panel finds that this does not per se make it unreliable. Again, to be of benefit for the Russian Doping Scheme as a whole, the Moscow Laboratory required reliable testing. Against this background, the Panel does not consider it to be feasible that the Moscow Laboratory would use oxandrolone of inferior or unknown quality or composition as a reference standard. In addition, Dr Broséus confirmed that the analysis of the LIMS data showed that, when dealing with the Sample, the Moscow Laboratory analyzed the positive control sample as well as the negative control sample.

182. The Panel further accepts that, although, as was confirmed by Dr Gmeiner, the CP was performed by him using the PCS from another batch (although analyzed on the same day), it appears nonetheless that the identification criteria were met despite the use of control urine samples from another rather than the same batch, which indisputably strengthened the analytical positive result. As a result, the Panel finds that the Sample testing was indeed reliable.

v) Low Concentration

183. The Athlete contends that the concentration found in the Sample according to the LIMS data is simply too low to constitute a robust result as it is below the LOD defined for oxandrolone in the Moscow Laboratory validation report of 20 December 2013 and the minimum concentration of 2 ng/ml that was reported by Dr Rodchenkov in his affidavit. In particular, relying on Dr de Boer's expertise, the Athlete contends that according to Dr Rodchenkov, the Moscow Laboratory would not conduct a CP if the minimal concentration for oxandrolone was below 2ng/mL in the initial testing values. In the Athlete's opinion, that low concentration was the reason why the AAF was not reported in ADAMS. The IBU disputes the Athlete's interpretation of the values included in Dr Rodchenkov's affidavit. The IBU further submits that nothing prevents a laboratory from validly detecting a non-threshold substance in a concentration below the LOD or the MRPL, and from validly reporting such positive result in ADAMS.

184. The Panel starts its examination of this issue by recalling that the MRPL indicates the level of concentration a WADA-accredited laboratory must be capable to detect in 100% of the cases; and that the LOD in turn refers to the minimum concentration of a specific substance that can be detected with reasonable certainty in urine at the ITP; the LOD is not higher than 50% of the MRPL.

185. The Panel agrees with Dr Rabin, Prof. Ayotte and Dr Gmeiner that the criteria for reporting an AAF for a non-threshold substance are not related to its level of concentration found in the sample but rather to whether the identification criteria are or are not met.

186. Furthermore, as was confirmed by Dr Rabin, the Panel accepts that performant laboratories may be able to validly detect non-threshold substances below the MRPL or the LOD. This is confirmed in a WADA document from 2019 which states "*since LOD values are estimations based on Analytical Method validation with a limited number of representative samples, a Laboratory may be able to effectively confirm the presence of a target Non-Threshold Substance (or its representative Metabolite or characteristic Marker) in a given Sample at levels below the validated LOD*". This is also not disputed by Dr de Boer.

187. The Panel then reviewed the affidavit of Dr Rodchenkov with reference to the specific issue of the minimum concentration values included therein. As was clarified by Mr Walker and Dr Broséus in their statement, these values were provided in answer to the question put to Dr Rodchenkov as to what concentration he would expect (indeed almost guarantee) would result in a successful CP – without any supporting analytical data. In reply to this question, in his affidavit, Dr Rodchenkov indicated that a concentration of oxandrolone long term metabolite of 2ng/ml "*would, based on my experience and expert opinion, most likely become a confirmed AAF to a Confirmation Procedure was conducted* [sic]".

188. In the Panel's view, it does not follow from Dr Rodchenkov's affidavit that the Moscow Laboratory would not conduct a CP if the minimal concentration for oxandrolone was below 2ng/ml in the initial testing values, or that the Moscow Laboratory was not able to detect oxandrolone with sufficient certainty if the concentration was below 2ng/ml at the ITP level. As was clarified by Mr Walker and Dr Broséus, Dr Rodchenkov's table means only that, based on his experience, the result would most likely be confirmed at the CP if the ITP provided a concentration above 2ng/ml. The Panel also recalls that this affidavit was rendered on 6 December 2017, i.e. at a time the WADA I&I had not recovered the Moscow LIMS yet, and was looking for ways to identify the most suspicious 'doping' cases within the WADA LIMS. Hence, by way of affidavit, Dr Rodchenkov was requested to identify very conservative concentrations of prohibited substances, which he believed would most likely result in a successful confirmation procedure. The situation is very different in the present matter since the IBU could retrieve and authenticate the analytical results of the Sample analysis, for the ITP and the CP, and assess them by independent expertise.

189. Furthermore, Dr de Boer states that the concentration below the laboratory's own LOD cannot be detected with reasonable certainty, especially when the chain-of-custody is

not flawless and the PCS and NCS were not analyzed in the same batch as the tested sample, and that such is the case in the present matter since, in addition to the other flaws, the confirmed result of 0,6 ng/ml is below the LOD for oxandrolone that, according to the Moscow Laboratory's own statement, was set to 1 ng/ml on 20 December 2013. The Panel disagrees with Dr de Boer's statement: the data contained in the WADA LIMS and recovered in the Carved LIMS convincingly show that the ITP result of 0,6 ng/ml was indeed confirmed at the level of the confirmation procedure for one of the oxandrolone metabolites. The raw data of the CP were moreover reviewed by Dr Gmeiner who confirmed that at least one metabolite of oxandrolone passed the identification criteria at the CP. Since the long-term oxandrolone metabolites are non-threshold substances, there is no uncertainty as to the fact that the Sample was positive for a long-term metabolite of oxandrolone "despite" its low concentration.

190. The Panel further notes that one of the oxandrolone metabolites, the concentration of which at the ITP was 0,3 ng/ml, was neither confirmed in the WADA LIMS nor included in the charges against the Athlete. In the Athlete's submission, this clearly shows that low concentrations (i.e. below the LOD/MRPL) may have triggered false positives, which undermines the reliability of the analytical results with respect to the oxandrolone metabolite for which the Athlete is charged. The Athlete further contended that the Moscow Laboratory may have had good reasons not report the AAF into ADAMS, in particular the low concentration found in the Sample.

191. Here again, the Panel must disagree with the Athlete: firstly, if the Moscow Laboratory had had good reasons not to report the AAF in ADAMS, in particular because of the low concentration found in the Sample, the question arises as to why it nevertheless found it necessary to delete the AAF from the LIMS data. It would indeed have been both much easier and more straightforward to disclose the risk of false positives. Secondly, it was sufficiently demonstrated by the IBU experts that the reason for which there was no charge of an ADRV with respect to the other oxandrolone metabolite, was not because its concentration was below the MRPL/LOD but rather because, as Dr Gmeiner showed, and the Panel accepts, the identification criteria for such other oxandrolone metabolite were simply not met at the level of the confirmation procedure. Hence, in the Panel's view, contrary to the Athletes contention, there was thus no such thing in the present matter as a clear risk of false positives.

192. The mere fact that the CP may only have met the identification criteria for one of the two oxandrolone metabolites identified in the ITP does not exclude the possibility that also the other oxandrolone metabolite was present in the sample and does not mean that such PAAF was a false positive. Moreover, the mere fact that the CP for the oxandrolone metabolite for which the Athlete is charged itself satisfied the identification criteria is a reassurance that the PAAF in the ITP was not a false positive.

vi) Contamination

193. The Athlete submits that in the absence of a B-Sample analysis, the low concentration found in the Sample could be due to contamination by other samples. The Athlete relies on the statement of Dr de Boer who referred in particular to a contamination episode

that occurred in the WADA-accredited laboratory in Paris. The IBU contends that the contamination scenario is not realistic and relies on the opinion of its experts.

194. The Panel carefully reviewed the Parties' arguments and the expert opinions on this issue.

195. Dr de Boer stated that a contamination with another urine sample in the Moscow Laboratory cannot be excluded; the risk is even significant in light of the absence of a B-Sample and the failure to analyze a PCS and NCS from the same batch. Dr de Boer however accepted that such contamination scenario is rare.

196. Prof. Ayotte stated that the contamination episode that occurred in the WADA-accredited laboratory in Paris was in a situation very different from that which existed at the Moscow Laboratory: the laboratory in Paris admitted its failure to separate heavily positive stanozolol samples and other routine samples on the automatic robot processing the samples, and utilized the same sequence for all the confirmations, therefore repeating the cross-contamination; to the contrary, at the Moscow Laboratory, screening and confirmation procedures were done on different aliquots. Prof. Ayotte further confirmed that a contamination would have required a concentration of 282 ng/ml in the other sample, which is a very high concentration and not at all typical. In addition, since the long-term metabolite of oxandrolone was found both in the initial procedure and in the confirmation procedure, Prof. Ayotte explained that a contamination scenario would mean that the A-Sample bottle itself rather than an aliquot would have had to be contaminated. Finally, Dr Gmeiner stated that had there been a contamination, the Moscow Laboratory would not have indicated that the confirmation procedure was done correctly in the LIMS data.

197. Having reviewed the above considerations, the Panel is comfortably satisfied that the AAF was not the result of a contamination. In the Panel's view, the contamination scenario alleged by the Appellant relies on a series of highly unlikely premises, in particular the fact that the contamination would have needed to affect the Sample A bottle in order for both the screening and the confirmation procedure (which were done on different aliquots) to be positive, and that the sample that contaminated the A Sample would have had to be at such high concentration that it would necessarily have been detected.

d. Conclusion

198. Based on the evidence examined above, the Panel is comfortably satisfied that:

- The ITP and CP records in the WADA LIMS regarding the Athlete's Sample are authentic: they once existed in the Moscow LIMS but were intentionally deleted before release of the Moscow LIMS to WADA. The Moscow LIMS, meanwhile, was manipulated in order to conceal the confirmed positive record for the Athlete's Sample in the WADA LIMS.

- The ITP and CP records in the WADA LIMS show that there was a confirmed PAAF for an oxandrolone long term metabolite with a concentration of 0,6ng/ml for the Athlete.

- The raw data regarding the confirmation procedure on the Athlete's Sample show that the Athlete tested positive for one long term metabolite of oxandrolone.

- The Moscow Laboratory provided state-of-the-art analysis on the Athlete's Sample. In particular, the Sample analysis data contained in the WADA LIMS and the Carved LIMS is sufficiently documented to constitute reliable evidence. In addition, the lack of formal validation of the method of detection of long term oxandrolone metabolites, or the fact that the Laboratory's SOPs were not up to date nor that the PCS/NCS analyzed for the purpose of the Sample testing stemmed from a different batch than the Sample, did not affect the quality of the Sample analysis nor its reliability.

- Since oxandrolone is a non-threshold substance under the WADC, the confirmed result in the WADA LIMS constitutes an AAF despite the low concentration observed in the Sample. Moreover, this AAF did not result from a contamination.

- The AAF should have been reported in ADAMS. Because the AAF was never reported in ADAMS, the IBU was entitled to charge the Athlete with an ADRV for "use" under Article 2.2 of the IBU ADR.

199. Based on the analysis of the WADA LIMS and the Moscow LIMS with respect to the Athlete's Sample as well as the specific investigations performed by the experts on such LIMS data, including the assessment of the analytical data that could be retrieved from the LIMS data, taken in the context of the established existence of an organized Russian Doping Scheme as was revealed by the McLaren Reports and the Reports of the Independent Committee of the IOC, the Panel is comfortably satisfied that the evidence on record sufficiently demonstrates that the Athlete used a prohibited substance, namely oxandrolone, in violation of Article 2.2 of the IBU ADR.

200. Intent of the Athlete to dope or knowledge that he was doping is not necessary to establish that an ADRV occurred under Article 2.2 of the IBU ADR since, as provided under Article 2.2.1 of the IBU ADR, the mere use of a prohibited substance, which in the present case has been proven by the evidence on file, is sufficient for that purpose.

3. Consequences

201. The Panel found that the Athlete committed an ADRV under Article 2.2 of the IBU ADR for the 'use' of a prohibited substance.

202. Article 10.2 of the IBU ADR provides as follows:

"The period of ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substances or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of

Prohibited Substances and Methods) will be as follows, unless the conditions for eliminating or reducing the period of ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met:
First violation: two (2) years' ineligibility."

203. The Panel notes that the Athlete did not raise the issue of sanction reduction or elimination provided for in Articles 10.4 and 10.5 of the IBU ADR and the Panel sees no reason to apply such a reduction or elimination, so the standard sanction of two years' ineligibility applies. Moreover, since the Decision appealed against by the Athlete ordered a two years' period of ineligibility and the IBU did not file an appeal, the Panel is barred from examining any allegation on aggravating circumstances which could have increased the period of ineligibility as provided under Article 10.6 of the IBU ADR.

204. According to Article 10.8 of the IBU ADR *"In addition to the automatic disqualification of the results in the competition that produced the positive sample under Article 9 (Automatic Disqualification of Individual Results), all other competitive results obtained from the date a positive sample was collected (whether in-competition or out-of-competition), or other anti-doping rule violation occurred, through the commencement of any provisional suspension or ineligibility period, will, unless fairness requires otherwise, be disqualified with all of the resulting consequences including forfeiture of any medals, points and prizes."*

205. As a result, noting particularly that the Athlete did not submit any arguments as to why fairness would require otherwise, the Panel finds that the Athlete's results obtained in competitions since the sample collection date of 27 August 2013 through his retirement at the end of the 2013/2014 World Cup season, including his results at the 2014 Sochi Winter Olympic Games are disqualified, with all of the resulting consequences, in particular, forfeiture of any medals, points and prizes.

X. COSTS

206. Article R65 of the CAS Code reads as follows:

"1. This Article R65 applies to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body. [...]
2. Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of CAS are borne by CAS.
Upon submission of the statement of appeal, the Appellant shall pay a non-refundable Court Office fee of Swiss francs 1,000. — without which CAS shall not proceed and the appeal shall be deemed withdrawn. [...]
3. Each party shall pay for the costs of its own witnesses, experts and interpreters. In the arbitral award and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of

witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings, as well as the conduct and financial resources of the parties. [...]"

207. The appeal filed by the Athlete is directed against a decision which is exclusively of a disciplinary nature rendered by an international sports body. Therefore, these proceedings are free, except for the CAS Court Office fee in the amount of CHF 1,000 (one thousand Swiss francs) paid by the Athlete, which are retained by the CAS.

208. In light of the complexity and outcome of the present proceedings as well as the conduct of the Parties, the Panel finds that the Athlete shall pay the amount of CHF 10,000 (ten thousand Swiss francs) to the IBU as a contribution towards the expenses incurred in connection with these arbitration proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Evgeny Ustyugov on 5 March 2020 against the Decision rendered by the Anti-Doping Hearing Panel of the International Biathlon Union on 13 February 2020 is dismissed.

2. The Decision rendered by the Anti-Doping Hearing Panel of the International Biathlon Union on 13 February 2020 in the matter *IBU v. Mr. Evgeny Ustyugov*, is confirmed.

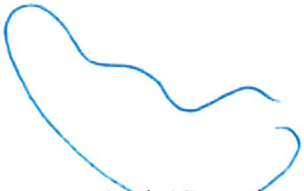
3. The Award is pronounced without costs, except for the Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by Mr Evgeny Ustyugov, which is retained by the CAS.

4. Mr Evgeny Ustyugov is ordered to pay the amount of CHF 10,000 (ten thousand Swiss francs) to the International Biathlon Union as a contribution towards the expenses incurred in connection with these arbitration proceedings.

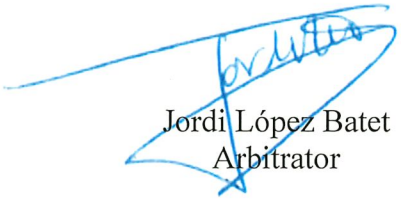
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 9 September 2024

THE COURT OF ARBITRATION FOR SPORT



André Brantjes
President of the Panel



Jordi López Batet
Arbitrator

The Hon. Michael J Beloff KC
Arbitrator

Stéphanie De Dycker
CAS Clerk