



2019/ADD/6 International Biathlon Union v. Evgeny Ustyugov

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Ms. Susan Ahern, Barrister in Dublin, Ireland

in the arbitration between

International Biathlon Union, Austria

Represented by Mr. Ross Wenzel, Attorney-at-Law with Kellerhals Carrard in Lausanne, Switzerland

Claimant

and

Evgeny Ustyugov, Russia

Represented by Mr. Yvan Henzer, Attorney-at-Law with Libra Law in Lausanne, Switzerland and Mr. Alexi Panich and Ms. Polina Podoplelova, Attorneys-at-Law with Herbert Smith Freehills in Moscow, Russia

Respondent

I. PARTIES

1. The International Biathlon Union (the “IBU” or “Claimant”) is the world governing body of biathlon having its registered offices in Salzburg, Austria.
2. Mr. Evgeny Ustyugov (the “Athlete” or “Respondent”) is a former Russian biathlete and a team member of the National Olympic Committee of Russia who, most notably, won Gold in the mass start 15km event and Bronze in the 4 x 7.5km men’s relay at the 2010 Vancouver Winter Olympics and Gold in the 4 x 7.5km men’s relay event at the 2014 Sochi Winter Olympics.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced in this procedure as they concern the merits of this case. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, she only refers to the submissions and evidence she considers necessary to explain her reasoning.

A. Blood Doping and the Athlete Biological Passport (ABP)

4. The World Anti-Doping Agency (“WADA”) defines blood doping as “*the misuse of certain techniques and/ or substances to increase one’s red blood cell mass, which allows the body to transport more oxygen to muscles and therefore increase stamina and performance.*”
5. Generally speaking, there are three substances/methods used for blood doping: (i) administration of recombinant human erythropoietin (“rEPO”) by injection to trigger erythropoiesis (the stimulation of red blood cells); or (ii) synthetic oxygen carriers through the infusion of blood substitutes such as haemoglobin-based oxygen carriers to increase haemoglobin above normal levels; and (iii) blood transfusions through the infusion of red blood cells previously extracted from the athlete/a donor into the athlete to increase haemoglobin above normal levels.
6. rEPO is a Prohibited Substance included in class “S2. Hormones and related substances” on the WADA Prohibited List. Synthetic oxygen carriers and blood transfusions are Prohibited Methods under class “M1. Enhancement of oxygen transfer” on the WADA Prohibited List.
7. To combat blood doping, WADA developed the Athlete Biological Passport (or “ABP”). The ABP is an electronic record that monitors selected variables (i.e. biomarkers) from an athlete over a period of time that indirectly reveal the effect of doping, as opposed to the traditional direct detection of doping by analytical doping controls. The biomarkers collected include haemoglobin concentration (“HGB”) and the percentage of immature red blood cells (i.e. reticulocytes) (“RET%”).
8. The ratio of HGB and RET% values is used to calculate a further composite value known as the “OFF-score”, which is sensitive to the production of red blood cells.

9. An electronic record of an athlete's biomarker variables is maintained on WADA's database known as the Anti-Doping Administration and Management System ("ADAMS").
10. The biomarker values set out in the ABP are entered into a statistical model known as the "Adaptive Model". The Adaptive Model uses an algorithm that considers both (i) the variability of such values within the (non-doped) general population; and (ii) factors affecting the variability of an athlete's individual values (i.e. gender, ethnic background, age, sport, etc.).
11. The selected biomarkers then create a longitudinal profile over a period of time that establishes an athlete's upper and lower limits, to a "specificity" of 99%, within which the athlete's values would be expected to fall (subject to explainable outliers), assuming normal physiological conditions. An athlete is his/her own point of reference every time a blood sample is recorded.
12. The Adaptive Model also calculates the probability of abnormality of the sequence of values in the ABP profile and each time a blood sample is recorded, the Adaptive Model calculates where the reported HGB, RET% and OFF-score values fall within the athlete's expected distribution. This in turn expands the range of expected results for that athlete.

B. The Athlete's Biological Passport

13. The Athlete, as an International-Level Athlete participating in IBU competitions throughout the period covered by the APB Blood Profile, was subject to the IBU ADR and results management of the IBU.
14. Between 24 January 2010 and 14 February 2014, the IBU collected nineteen (19) ABP blood samples from the Athlete. Seventeen (17) of these samples¹ were considered valid and used in the evaluation process of the Athlete's ABP. A summary of the Athlete ABP sample results (setting out the Athlete's HGB, RET% and OFF-score) is as follows:

No.	Date of Sample	HGB (g/dL)	RET%	OFF-score
1.	24 January 2010	15.4	1.71	75.54
2.	28 January 2010	17.6	1.53	101.80
3.	26 October 2010	17.0	2.81	69.40
4.	21 February 2012	17.7	1.05	115.52
5.	19 August 2012	17.1	1.47	98.30
6.	25 October 2012	16.3	1.77	83.20
7.	6 November 2012	17.5	2.16	86.80
8.	27 December 2012	16.8	2.08	81.00
9.	22 January 2013	17.8	2.00	93.15
10.	30 January 2013	18.5	1.72	106.31
11.	31 March 2013	17.2	1.83	90.80
12.	29 May 2013	16.8	1.94	84.40

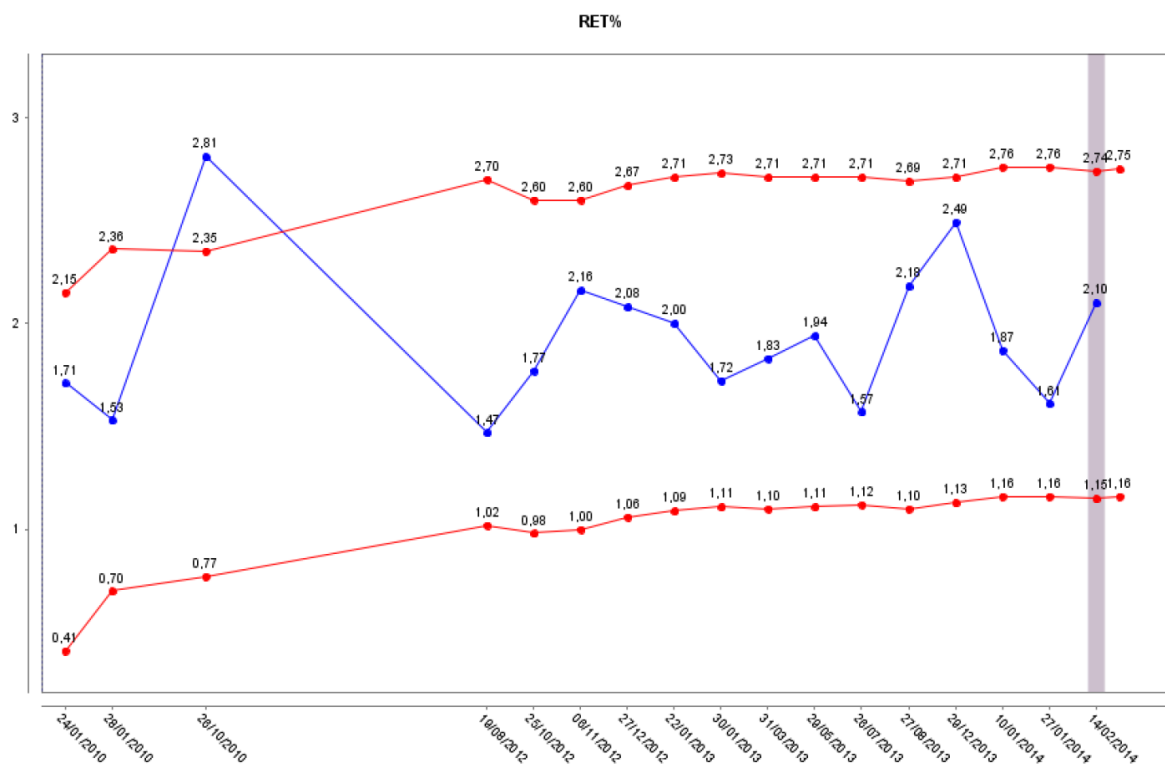
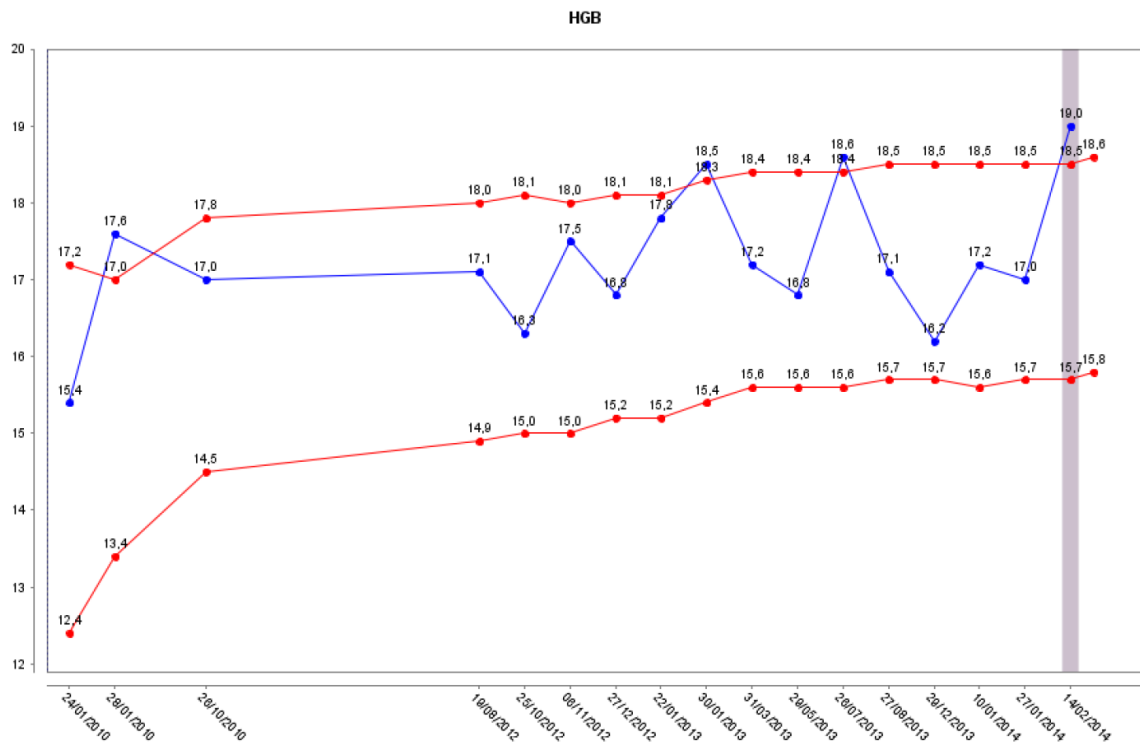
¹ Samples nos. 4 & 13 in the chart above were declared invalid.

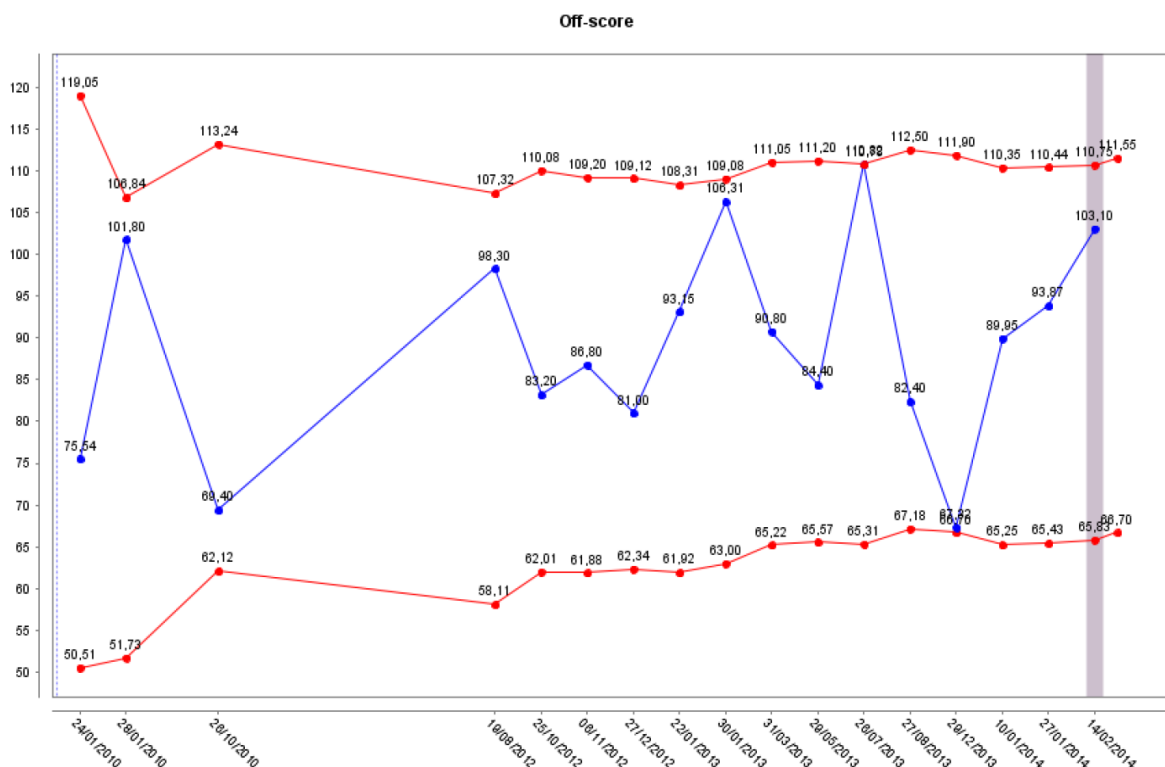
No.	Date of Sample	HGB (g/dL)	RET%	OFF-score
13.	17 July 2013	17.7	1.98	92.60
14.	26 July 2013	18.6	1.57	110.82
15.	27 August 2013	17.1	2.18	82.40
16.	29 December 2013	16.2	2.49	67.32
17.	10 January 2014	17.2	1.87	89.95
18.	27 January 2014	17.0	1.61	93.87
19.	14 February 2014	19.0	2.10	103.10

15. The ABP program for the IBU is managed by an external Athlete Passport Management Unit (“APMU”) known as the “Nordic APMU”.
16. On 27 September 2016, the Nordic APMU flagged the Athlete’s ABP for expert review based on suspicious samples and referred the matter to an expert panel, (a required resource under the ABP Operating Guidelines) to Dr. Paula Paixao, Prof. Giuseppe d’Onofrio, and Prof. Michael Audran (the “Expert Panel”). The members of the Expert Panel are experts in the fields of pharmacy, pharmacokinetics (study of the fate of pharmacological substances in the body), clinical haematology (diagnosis of blood pathological conditions), laboratory medicine and haematology (assessment of quality control data, analytical and biological variability and instrument calibration).
17. Each member of the Expert Panel independently and on an anonymous basis (using the code “BPX571J27”) reviewed the Athlete’s ABP and each concluded that the Athlete’s blood profile indicated “*likely doping*.”
18. On 20 March 2017, a report on the Athlete’s ABP Documentation Package was prepared by the Nordic APMU. This report included *inter alia* the Athlete’s competition/altitude training schedule, as well as a medical report previously filed by the Russian Biathlon Union on behalf of the Athlete, including a report from the Moscow Regional Scientific Research Clinical Institute dated 22 September 2012 which diagnosed “*hereditary hemochromatosis (H63D heterozygote)*” in the Athlete (Patient: “BPX571J27”).
19. On 21 March 2017, the Expert Panel issued a Joint Expert Opinion highlighting a number of abnormal haematological patterns in several ABP samples in particular:
 - (i) the sequence of samples 16 to 19;
 - (ii) the sequence of samples 1 and 2;
 - (iii) the levels of HGB to RET% in samples 3, 7, 9 and 10; and
 - (iv) the high values of hemoglobin in samples 10, 14, 19.
20. The Expert Panel noted that “in the automated analysis by the adaptive model, which determines whether fluctuations in the biomarkers of the Athlete Biological Passport are within the expected individual reference ranges for an athlete or not, the probability of abnormality in the Athlete’s ABP, according to ABP software at the 99% specificity level, was greater than 99.9% for haemoglobin (HGB), greater than 99% for the OFF-score, and greater than 99.5% for RET%. In particular, the software flagged abnormalities for HGB

in samples 2 (17.6g/dL), 10 (18.5g/dL), 14 (18.6g/dL) and 19 (19.0g/dL) and sample 3 (2.81%) for RET%.

21. The ABP graphs for the HGB, RET% and OFF-score are as follows:





22. The Expert Panel noted that the “*profile displays important variability, with difficult physiological explanations. In particular, the sequence between samples 16 and 19 is very suspicious: sample 19, collected in-competition, has an increase to the highest hemoglobin value (19g/dL) of the profile in less than 3 weeks (2g/dL), with a slight increase in ret%, suggesting that the body’s blood cell mass has been increased behind [sic] any physiological explanation.*” Sample no. 19 was collected in-competition on 14 February 2014, i.e. one week before the Athlete won a Gold medal at the Sochi Winter Olympics.
23. The Expert Panel highlighting that sample No. 16 showed the lowest HGB (16.2g/dL) and the highest RET% (2.49%) results of the prior three years; “*this sample was collected 1 week before a period of competitions, and hemoglobin increased thereafter to 17.2g/dL (sample 17) when the competition restarted, keeping this result (17g/dL) during his stay at the biathlon centrum (1700m), to peak on sample 19 (19g/dL).*”

The Expert Panel noted further: “*In addition, other haematological abnormalities are present in this passport, which are not compatible with normal physiology, altitude nor intense exercise, such as the very fast increase of HGB from sample 1 to sample 2 [i.e. from 15.4 to 17.6 between 24 and 28 January 2010, three weeks before he won gold at the Vancouver Olympics], the frequent combination of high HGB with high or very high reticulocytes (such as in samples 3, 7, 10), and the extremely high HGB value observed in samples 10, 14 and 19 [i.e. 18.5, 18.6, 19.0]. It has to be noted that these values are markedly above the upper limit of any published reference range for adult males [...].*”² Such abnormalities, in the absence of medical explanation for erythrocytosis with high reticulocytes, are suspicious for exogenous erythropoietic stimulation...

Based on these facts and the information available to date, it is our unanimous opinion that, in the absence of an appropriate explanation, the likelihood of the abnormalities being due to blood manipulation is high. On the contrary, the likelihood of environmental factors causing the described pattern is very low. We

² Kratz A, Ferraro M, Sluss PM, Lewandrowski KB. Case records of the Massachusetts General Hospital. Weekly clinicopathological exercises. Laboratory reference values. N Engl J Med. 2004 Oct 7;351(15):1548-63.

therefore conclude that it is highly likely that a prohibited substance or prohibited method has been used and that it is unlikely that the passport is the result of any other cause”.

C. Notice of Adverse Passport Finding

24. On 5 May 2017, the IBU sent the Athlete a notice of Adverse Passport Finding, which enclosed the ABP Documentation Package prepared by the Nordic APMU and the Expert Panel’s Joint Expert Opinion. The Athlete was therein invited to comment on his ABP Blood Profile.
25. In May 2017, the Athlete stated that elevated red blood cell count (generally corresponding to elevated HB in ABP) is a biological feature of his body and agreed to undergo in-depth clinical studies in a specialised centre relating to the existence of the mutations associated with erythrocytosis.
26. On 20 July 2017, the Athlete – on a voluntary basis - filed his initial response to the allegations against him, which included a letter of support from Dr. E.G. Okuneva. What followed was a series of exchanges between the Athlete and the Expert Panel/IBU concerning possible explanations for the alleged abnormal findings, including discussions with respect to the Athlete’s diagnosis of congenital erythrocytosis. Ultimately, the Athlete fully cooperated and voluntarily subjected himself to further unannounced testing.
27. On 2 October 2017, the IBU asked the Athlete to agree to the IBU conducting no-notice testing on him for an initial period of six months together with whereabouts information to facilitate the no-notice testing. The Athlete agreed.
28. On 25 October 2017, a blood sample was collected from the Athlete and sent to the Belfast Laboratory for genetic testing. In addition, an ABP sample was collected and sent to the Moscow laboratory for analysis.
29. On 6 December 2017, a urine and blood sample, was collected from the Athlete and sent to the Cologne Laboratory for testing. An ABP sample also collected was sent to the Moscow Laboratory for testing.
30. No prohibited substances or prohibited methods, or their metabolites or markers were detected in the 25 October and/or 6 December 2017 tests.
31. On 18 April 2018, the Belfast Laboratory reported that gene testing on the Athlete’s sample revealed a mutation of gene EGLN2, which was non-pathogenetic (i.e. not disease causing) and not associated with erythrocytosis. More specifically, the Belfast Laboratory stated as follows:

“You will note from the report that we described the variant detected as non-pathogenic in the gene EGLN2 (previously referred to a hypoxia inducible factor 2). This is thought not to be disease causing. The evidence to support this is twofold:

- (i) This variant has not been described in case of erythrocytosis.*
- (ii) This variant has been found in the normal population and is commonly referred to as SNP (single nucleotide polymorphism). SNPs are thought to be remnants of an evolutionary process that shaped human variation.*

Using this evidence and the information from the genetic databases, we believe that this variant is unlikely to be disease causing...”

32. Further ABP tests on the Athlete were conducted in October and December 2017 which the Expert Panel found *“confirmed the atypical presence of high HBs associated with increased reticulocytes, already pointed out in several of the Athlete’s ABP Passport.”*
33. On 25 April 2018, these complete results, along with the Athlete’s new ABP sample results (setting out the Athlete’s additional HGB, RET% and OFF-score – see table below) were forwarded to the Athlete, who was invited to provide any comments to the Expert Panel.

Date of Sample	HGB (g/dL)	RET%	OFF-score
25 October 2017	17.7	1.95	93.2
6 December 2017	18.5	1.61	108.9

34. On 15 May 2018, the Athlete responded, accompanied by a report from the ‘Institute of Hematology’³ to his new ABP values. Essentially, the Athlete asserted that a genetic feature in the form of an amino acid could be the cause of the idiopathic erythrocytosis:

“The athlete was found to have a genetic feature in the form of an amino acid substitution for the protein encoded by the EGLN2 gene, this is one of the key enzymes that affect the regulation of erythropoietin production...It cannot be ruled out that this amino acid substitution does not affect the activity of this enzyme and can be the cause of idiopathic erythrocytosis.”

35. The Athlete’s gene-testing results and subsequent comments were forwarded by the IBU to the Expert Panel for their further consideration.

36. On 16 June 2018, the Joint Expert Panel having considered the genetic findings together with the atypical hematological pattern in the Athlete’s ABP, issued a new Joint Expert Report concluding as follows:

“It is our opinion that, in consideration of these genetic findings, as well as of the atypical hematological pattern in the BPX571J27 ABP, which is not fully consistent with the most used and plausible blood doping schemes, the likelihood of ESA doping behavior in this case cannot be considered sufficient to prosecute the Athlete on the only basis of the indirect evidence ensuing from his hematological profile .

This opinion Is supported by the following elements.

1) EGLN2, although its variants have not been associated with pathology, is an important gene involved in the oxygen-sensing mechanism of the human body;

2) EGLN2 is included in the panel of genes for the genetic diagnosis of erythrocytosis because it is “potentially relevant” [1];

3) Experimental studies have shown that the inhibition of the EGLN-product PDHs is capable of inducing increased production of erythropoietin in laboratory animals [2]: although EGLN1 plays the dominant role, EGLN2 and 3 seem to have additive effects.

On the basis of the new findings and on the general characteristics of the blood profile, therefore, we are unable to conclude that it is highly unlikely that this profile is the result of a normal physiological or

³ FSBI NMRC for Hematology of the Russian Ministry of Healthcare

pathological condition; similarly, we are unable to conclude that it is highly likely that it was caused by the use of prohibited substances or prohibited methods." (emphasis added)

37. The Expert Panel recommended further tests and hematological ABP monitoring:
"...we recommend further tests for the Athlete, both in and out of competition, by searching all types of ESA in blood and urine and through further haematological ABP monitoring."

D. Further Examination of the Athlete's Samples

38. In December 2019, WADA presented the Athlete's anonymised ABP profile to a meeting of ABP experts, which include Prof. Giuseppe d'Onofrio from the Expert Panel and geneticist Prof. Thomas Werge.

39. On 9 January 2020, Prof. Werge, who was not a member of the Expert Panel, prepared a report based on his review of the Athlete's ABP blood profile to evaluate the functional effects of a genomic variant. He noted that the single-nucleotide variant ("SNV") in the gene EGLN2 had been reported in publicly available databases (and is referred to as rs774710749) and confirmed that *"the SNV has been observed in normal population"*. Moreover, he found:

"In conclusion, I find no evidence to support a claim that the observed SNV, rs774710749, has functional consequences in humans of pathological, clinical or biological importance" (the "Werge Report").

40. On 11 January 2020, the Expert Panel issued a Further Joint Opinion as follows:
"On the basis of the exclusion of any possible role of the gene mutation in erythropoiesis, it is our unanimous opinion that it is highly likely that the abnormalities observed in this passport and described by us in detail in our first Joint Expert Report were caused by the use of prohibited substances or prohibited methods, and that it is unlikely that they were the result of confounding factors." (emphasis added)

41. On 13 January 2020, the Athlete was invited to comment on the new Joint Opinion.
42. On 20 January 2020, the Athlete challenged the findings set out in the new Joint Opinion but did not provide a detailed response (save for noting his objection to the jurisdiction of the IBU's Integrity Unit ("BIU") and the CAS Anti-Doping Division ("ADD").

E. Notice of Charge

43. On 21 January 2020, the BIU issued a notice of charge on the Athlete. The charge was based on alleged abnormalities in the Athlete's ABP Blood Profile involving Use of a Prohibited Substance and/or a Prohibited Method during the period 2010-2014. Such alleged Use was in breach of Article 2.2 of the 2009 IBU Anti-Doping Rules.

"...you are hereby charged with commission of an anti-doping rule violation in the period January 2010 to February 2014 (inclusive), viz: Use of a Prohibited Substance (specifically, an erythropoiesis-stimulating agent, such as rEPO) and/or a Prohibited Method (specifically, the physical manipulation of blood, such as transfusion of blood or red blood cell products of any origin), in breach of Article 2.2 of the 2009 IBU ADR."

44. The notice of charge invited the Athlete to admit the charges against him or request a hearing.

45. On 7 February 2020, the Athlete formally denied the charges against him and *inter alia* requested the production of certain information with respect to the charges against him and the findings of the Expert Panel.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

46. On 25 February 2020, the Claimant filed a Request for Arbitration against the Athlete with the ADD in accordance with Article A13 of the Arbitration Rules of the ADD (the “ADD Rules”).
47. In its Request for Arbitration, and in accordance with Article A16 of the ADD Rules, the Claimant requested that this procedure be referred to a Sole Arbitrator appointed by the President of the ADD and waived its right to participate in the joint nomination of the Sole Arbitrator.
48. On 26 February 2020, the ADD opened this procedure and invited the Athlete to file an answer to the request for arbitration in accordance with Article A14 of the ADD Rules.
49. On 6 March 2020, the Athlete filed an objection to the jurisdiction of the ADD and sought the suspension of his deadline to file an answer until such time as a decision was rendered on his jurisdictional objection.
50. Also, on 6 March 2020, the ADD, on behalf of the President of the ADD, confirmed the appointment of Ms. Susan Ahern, Barrister in Dublin, Ireland, as Sole Arbitrator in accordance with Articles A16 and A17 of the ADD Rules.
51. On 11 March 2020, the Claimant filed its response to the Athlete’s objection to jurisdiction.
52. On 12 March 2020, the Athlete filed an unsolicited reply to the Claimant’s response on jurisdiction.
53. On 13 March 2020, the ADD reminded the Athlete that there was no right of reply envisaged in the ADD procedural rules without leave of the Sole Arbitrator. Nevertheless, the Athlete’s reply was accepted and the Claimant was invited to file a sur-reply on jurisdiction, as necessary.
54. Also, on 13 March 2020, the Claimant filed its sur-reply on the Athlete’s objection to jurisdiction.
55. On 16 March 2020, the ADD informed the Parties that the Sole Arbitrator considered that she had *prima facie* jurisdiction to proceed with the case, and that further consideration on the issue of jurisdiction would be given by the Sole Arbitrator with a final determination on jurisdiction to follow in the final award. The Athlete was then invited to file his Answer to the charges brought against him in accordance with Article A14 of the ADD Rules.
56. On 19 March 2020, the Athlete requested a one-month extension of time to file his Answer, as well as a request for various documents from the Claimant. In the absence of an objection by the IBU the extension was granted.

57. On 27 March 2020, the Claimant produced certain documents requested by the Athlete and noted its agreement to pursue any outstanding documents that were not currently in its possession (namely, the raw data from the genetic analysis and whether the Sanger sequencing was used).
58. On 30 March 2020, the Athlete objected to the Claimant's production and made a further request for additional documents.
59. On 2 April 2020, as a result of follow-up requests/reiterations for production of documents by the Athlete, the Claimant supplemented its production of documents. The Claimant objected to portions of the Athlete's requests on the basis that such requests did not comply with Article A19.4 of the ADD Rules.
60. On 6 April 2020, the Sole Arbitrator, taking note of the Athlete's outstanding requests and the Claimant's objections thereto, denied the Athlete's request for further production as too expansive and unparticularized.
61. On 7 April 2020, the Athlete renewed his request for the raw data from the analysis performed by the Belfast Laboratory with respect to the Athlete's 25 October 2017 and 6 December 2017 samples.
62. On 9 April 2020, the ADD took note of the Athlete's renewed request and invited the Claimant to keep the Athlete and Sole Arbitrator updated as to production of the requested raw data.
63. On 30 April 2020, the Athlete requested a further one-month extension of time to file his answer. In addition, and further to the Sole Arbitrator's preliminary decision on jurisdiction, the Athlete filed an expert report from Prof. Francois Bohnet in support of his objection to ADD jurisdiction and a further request for bifurcation of decisions on jurisdiction and merits.
64. On 4 May 2020, the Claimant objected to the Athlete's request for an extension of time to file his answer, as well as his request for bifurcation. Additionally, the Claimant objected to the filing of Prof. Bohnet's expert report.
65. On 8 May 2020, the ADD, on behalf of the Sole Arbitrator, denied the Athlete's renewed request for bifurcation and partially accepted the Athlete's request for additional time to file its Answer, thereby setting the deadline as 19 May 2020.
66. On 19 May 2020, the Athlete sought a further extension of time to file his Answer to 22 May 2020.
67. On 20 May 2020, the ADD, on agreement from the Claimant, confirmed the Athlete's request for a further extension to file his Answer.
68. On 22 May 2020, the Athlete filed his Answer, incorporating Prof. Bohnet's expert report and including a further objection to ADD jurisdiction.
69. On 1 July 2020, following an agreed-upon extension of time, the Claimant filed its response to the Athlete's further objection to ADD jurisdiction.

70. On 20 and 21 August 2020, the Athlete and Claimant signed and returned (subject to notations) the order of procedure.
71. On 26 August and 1 September 2020, a hearing was held. The first day of the hearing was limited to the Athlete's objection to jurisdiction. The second day focused on the merits of the charge against the Athlete.
72. During the two-day hearing, the Sole Arbitrator was assisted by Mr. Brent J. Nowicki, Managing Counsel, and joined by the following:

For the Claimant:

- Mr. Ross Wenzel, Counsel
- Mr. Anton Sotir, Counsel
- Prof. Antonio Rigozzi, Expert Witness
- Prof. Giuseppe d'Onofrio, Expert Witness
- Prof. Thomas Werge, Expert Witness
- Mr. Aaron Walker, Witness
- Mr. Reid Aiken, Witness
- Mr. Gregory Rodchenkov, Witness
- Ms. Avni Patel, Counsel to Mr. Rodchenkov
- Mr. Greg McKenna, BIU Observer
- Ms. Louise Reilly, BIU Observer
- Mr. Jonathan Taylor QC, BIU Observer

For the Athlete:

- Mr. Evgeny Ustyugov
 - Mr. Yvan Henzer, Counsel
 - Mr. Alexei Panich, Counsel
 - Ms. Polina Podoplelova, Counsel
 - Prof. Francois Bohnet, Expert Witness
 - Prof. Pascal Kintz, Expert Witness
 - Prof. Ekaterina Shubina, Expert Witness
 - Prof. M.A. Sokolova, Expert Witness
 - Mr. Maxim Sidorov, Interpreter
 - Ms. Oksana Sirotkina, Athlete Entourage
 - Ms. Tatiana Petropavlovskaya, Athlete Entourage
73. At the outset of the hearing, the Parties confirmed that they had no objection to the Sole Arbitrator. That said, the Athlete reiterated his objection to jurisdiction. No objections to the way in which the procedure was handled or organized were noted.
 74. The Sole Arbitrator also heard brief remarks from the Parties with respect to a new report ("Report on the Study of Polymorphisms Related to the Development of Inherited Erythrocytosis in Genes AIRE, EGLN2, HFE, PIEZO1 and STXBP2 in the Blood Sample of Evgeny Romanovich Ustyugov") filed by the Athlete on 28 August 2020. The IBU objected to the admission of the Report which they had not been made aware was being undertaken and which their experts would not have the opportunity to consider before the hearing. The Sole Arbitrator, upon hearing submissions from both Parties, rejected the

filing of this report on the grounds that there was no prior knowledge that such a study was being undertaken, it was submitted - without notice - one business day in advance of the hearing involving scientific experts and after the written submissions in the case were complete. Counsel for the Athlete submitted that the Report supported the findings of the Russian Joint Report of Whole-Exome Sequencing by FSAEI HE “Pirogov Russian National Research Medical University” of the Ministry of Healthcare of the Russian Federation (Center of high precision editing and genetic technologies for biomedicine) and the FSBI “National Medical Research Center for Obstetrics, Gynecology and Perinatology Named after Academician V.I. Kulakov” of the Ministry of Healthcare of the Russian Federation (Reproductive Genetics Institute)’ (“FSAEI HE & FSBI”).

75. Having considered the written and oral submissions of the Parties, the Sole Arbitrator determined that the threshold of demonstrated exceptional circumstances, as required pursuant to Article 19.2 of the ADD Rules, had not been met by the Respondent and therefore the application to introduce the new report was denied.
76. Separately, the Sole Arbitrator notes that while the Athlete requested a public hearing in Lausanne, various travel, health and quarantine restrictions in place due to Covid-19 made such request untenable, if not impossible. This said, the Sole Arbitrator highlights that each Party was joined with members of the public/observers and no objections were otherwise raised on the format of the hearing.

IV. SUBMISSIONS OF THE PARTIES

A. The Claimant

77. The Claimant’s submissions on the merits, in essence, may be summarised as follows:
78. In contravention of Article 2.2. of the 2009 IBU ADR (the relevant rules for substantive purposes) the Athlete committed an anti-doping rule violation (‘ADRV’) in that he Used or attempted to Use a prohibited substance or a prohibited method in the period 2010 to 2014. In this regard:
- (i) An Adverse Analytical Finding is not required in order to establish an ADRV;
 - (ii) It is each athlete’s personal duty to ensure that no prohibited substance or prohibited method is Used and they are strictly responsible for any prohibited substance or prohibited method Used without the necessity to demonstrate intent, fault, negligence or knowing Use on the athlete’s part.
 - (iii) The Claimant asserts that the Athlete has Used or attempted to Use either an erythropoiesis-stimulating agent or a method of physically manipulating his blood.
 - (iv) An ADRV may be established by any reliable means (Article 3.2 2009 IBU ADR) including based on reliable analytical data from conclusions drawn from the profile of a series of the Athlete’s blood or urine samples. The ABP model is a reliable means of establishing ADRVs.
79. The Athlete’s ABP Blood Profile constitutes clear evidence that he committed ADRVs in the period 2010 to 2014 as:

- (i) The probability of abnormality, according to the ABP software, was greater than 99.9% for haemoglobin (HGB), greater than 99% for the Off-score, and greater than 99.5% for reticulocyte percentage (RET%).
 - (ii) The software flagged multiple samples as outliers at 99%: Samples 2, 10, 14 and 19 for HGB (17.6, 18.5, 18.6, 19.0) and Sample 3 for RET% (2.81%).
 - (iii) Sample 19, collected in-competition (one week before the Athlete won gold at the Sochi Winter Olympics), shows an increase of 2 g/dL to the highest HGB value in the profile (19.0 g/dL) in less than 3 weeks, with a slight increase in RET%, indicating that the body's blood cell mass was artificially stimulated. The Expert Panel ruled out that this increase could be explained by the Athlete's one-month sojourn at an altitude of 1700m in advance of sample 19.
 - (iv) There is a "very fast increase" in the HGB value between samples 1 and 2, amounting to a spike of 2 g/dL in only four days. As with samples 16-19, this abnormal sequence occurred in the run-up to a major competition, viz. the Vancouver Olympic Games, at which the Athlete won Gold in the mass start event and Bronze in the relay.
 - (v) The Athlete's ABP Blood Profile includes other haematological abnormalities, which are not compatible with normal physiology, altitude, or intense exercise. In particular, there are frequent combinations of high HGB with high or very high RET% (such as in Samples 3, 7, 9, 10); and there are extremely high HGB values observed in Samples 10, 14 and 19. These values are markedly above the upper limit of any published reference range for adult males.
 - (vi) The Athlete's ABP Blood Profile is manifestly and massively abnormal from a quantitative perspective, in terms of the individual results and sequences across all three blood parameters. The main abnormalities, in particular the sharp and significant increases in the HGB%, coincide with major events e.g. the sequence and timing of samples 1 and 2 (1 week in advance of the Vancouver Olympic Games 2010) and the sequence of samples 16 to 19 (the 3 weeks leading up to the Sochi Olympic Games 2014).
 - (vii) The IBU relies upon the ABP Expert Panel Joint Opinion of 21 March 2017 and the Further Joint Opinion of 11 January 2020 issued following consideration of the Werge Report, which concluded that the genetic variation (EGLN2) did not account for the abnormalities in the Athlete's blood values.
80. In addition, the IBU submitted that the Athlete's doping in the period January 2010 to February 2014 is corroborated by other evidence:
- (i) The Athlete was a beneficiary of the Russian doping scheme documented in the reports of Prof. Richard McLaren of 18 July and 9 December 2016 – which involved *inter alia* the doping of athletes with the so-called 'Duchess cocktail' (alcohol mixed with three steroids: oxandrolone, methenolone and trenbolone), combined with a number of anti-detection mechanisms (washout testing, pre-departure testing, sample swapping, non-reporting of positive results, etc.) to undermine the anti-doping system in Russia.

- (ii) As attested to by Dr. Rodchenkov in his affidavit of 4 October 2017, biathlon was one of the sports heavily targeted by the Russian doping scheme to enhance their performance in the Sochi Olympic Games so Russia would win more medals.
 - (iii) The Athlete was found on 13 February 2020 by the IBU ADHP to have committed an ADRV for Use in 2013 of a prohibited steroid (i.e. oxandrolone) by the IBU ADHP (the “Oxandrolone Case”).⁴ Oxandrolone was a component in the ‘Duchess cocktail’ which was administered to athletes as part of the Russian doping scheme.
 - (iv) It is evident from the circumstances of the Oxandrolone Case that the Athlete was a protected athlete under the Russian doping Scheme. In particular he benefited from the ‘Disappearing Positives Methodology’ – whereby positive results from analysis of samples in the Moscow Laboratory were “saved” upon the instruction of Ministry of Sport liaison persons, with the consequence that the results of analysis of the samples were misreported as negative in ADAMS.
 - (v) The fact that the Athlete’s name was recorded next to specific samples in the 2015 LIMS, in what is supposed to be an anonymous database, demonstrating that he belonged to a group of specially protected athletes.
 - (vi) There is further specific evidence that anti-detection strategies were employed at the Sochi Olympic Games to cover-up the Athlete’s doping.
 - (vii) There is compelling evidence that the Athlete’s samples at the Sochi Winter Olympic Games were swapped.
 - (viii) The events and manipulations in the run-up to and during the Sochi Winter Olympic Games (e.g. the forced opening of sample bottles for swapping purposes, the contrived delay in analysis of the ABP sample so as to invalidate it) amount to clear attempts to avoid detection. These events coincide with the most abnormal sequence of values in the ABP Blood Profile, namely Samples 16 to 19.
81. The IBU argued that there are three categories of aggravating circumstances that apply, namely (i) the Use of Prohibited Substances or Prohibited Methods on multiple occasions between 2010 and 2014 (ii) the separate conviction (in 2020) for the Use of oxandrolone in 2013, and (iii) the fact that the violation was committed within the context of doping plan or scheme.
82. In its Request for Arbitration, the Claimant requested the following relief:
- The International Biathlon Union respectfully requests the Anti-Doping Division of the Court of Arbitration for Sport to rule as follows:*
- 1) *The Anti-Doping Division of the Court of Arbitration for Sport has jurisdiction to decide on the subject matter of this dispute.*

⁴ The Panel disqualified that Athletes competitive results from 27 August 2013 until the end of the 2013/14 season. This case is under appeal to CAS.

- 2) *Evgeny Ustyugov is found to have committed an anti-doping rule violation pursuant to Article 2.2 of the IBU ADR between 24 January 2010 and April 2014.*
- 3) *Evgeny Ustyugov is sanctioned with a four-year period of ineligibility starting on the date on which the award enters into force.*
- 4) *All competitive results obtained by Evgeny Ustyugov from 24 January 2010 to the end of the 2013/2014 season, including, without limitation, all results and medals won at the 2010 Olympic Games and the 2014 Olympic Games, are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).*
- 5) *Evgeny Ustyugov shall bear any costs, including special costs, of the proceedings.*
- 6) *The International Biathlon Union is granted a contribution to its legal and other costs.*

B. The Athlete

83. The Athlete's submissions, on the merits in essence, may be summarized as follows:
84. The IBU is acting in bad faith by bringing these proceedings before an incompetent body in breach of its own rules. The Athlete retired in 2014 and cannot be deemed to have accepted amendments to the IBU ADR Rules in 2019. The IBU was aware of the Athlete's retirement and published this fact on their own website. The CAS ADD does not have jurisdiction.
85. The CAS ADD as an institution lacks independence. The Athlete has not freely consented to the arbitration and is forced to have his case adjudicated by the CAS ADD being also deprived of the right to nominate an arbitrator.
86. The IBU:
 - (i) departed from its previous decision to terminate the case and to reopen proceedings in the absence of any new facts and scientific evidence. Therefore, the IBU is acting in bad faith by pursuing an alleged ADRV based on the Athlete's ABP which the ABP Expert Panel found on 16 June 2018 that they were "*unable to conclude that it is highly likely that [the blood profile] was caused by the use of prohibited substances or prohibited methods*". The IBU charges are solely based on an unsubstantiated one-page letter provided on 9 January 2020 by Prof. Werge which only confirms the Belfast Laboratory opinion of 18 April 2018.
 - (ii) is prohibited from acting against the Athlete in application of the principle of good faith – *venire contra proprium factum*.
 - (iii) is in breach of the data protection rules (WADA Standard and European Regulations) as it illegally processed sensitive personal information, i.e. genetic data, beyond the genetic analysis for which the Athlete gave his consent, by disclosing the identity of the Athlete to third parties, in particular to WADA where it was used at a meeting of ABP experts on the occasion of a conference organised by WADA in December 2019.

- (iv) acted unfairly and in violation of its own rules in claiming that all the Athlete's results should be annulled from 24 January 2010 when the applicable rules provide for an 8-year statute of limitations period.
87. The abnormalities in the Athlete's ABP Blood Profile are not caused by doping. His elevated red blood cell count (generally corresponding to elevated HB in ABP) is a biological feature of his body and is explained by his genetic condition. He relies upon:
- (i) The Belfast Laboratory report that the gene testing conducted on the 2017 blood samples revealed a mutation of the gene EGLN2. These findings also confirmed the opinion of the geneticist that the Athlete consulted, Dr. Okuneva E.G., whose July 2017 report stated that *"the patient's mother has had the similar results during tests"* (i.e. elevated hemoglobin).
 - (ii) Institute of Hematology reported that the SNV in his EGLN2 gene, a key enzyme that affects the regulation of erythropoietin production, could be the cause of idiopathic erythrocytosis.
 - (iii) That the Expert Panel were correct in their Joint Report of 16 June 2018.
 - (iv) Prof. Werge's opinion, upon which the Expert Panel subsequently relied (2020), is not substantiated by any medical publication or information on the influence of this mutation on the human state in publicly available databases, and he cannot rely on its absence from the ClinVar database, that just means this particular mutation has not been studied yet. Further, the opinion cannot have been made in full knowledge of the Athlete's history of consistently high levels of HGB and the fact his mother suffers from the same dysfunction.
 - (v) His genetic condition was further investigated by way of a conducted whole-genome sequencing of the blood samples of the Athlete as well as his parents: Olga Rudolfovna Ustyugova and Roman Alexandrovich Ustyugov and interpreted by specialists of the FSAEI HE & FSBI. The resulting Joint Report (dated 13 May 2020), of which Prof. Shubina was one of the authors, demonstrates that the Athlete in addition to EGLN2 presented with additional substitutions in 2 further gene mutations of significance (HFE and PIEZO1 in heterozygous state) which are responsible for his condition:
 - "1. A well-known pathogenic variant rs1799945 NM_001300749.2:c.187C>G(NP_001287678.1:p.His63Asp) was identified in the gene HFE... [Variant No.1]
 2. ...an extremely rare variant rs547409918 NM_001142864.3:c.5863C>T (NP_001136336.2:p.Arg1955Cys), not described in the database ClinVar, was identified in the gene PIEZO1...[Variant No.2]
 3. ...an extremely rare variant rs774710749 NM_053046.4:c.958G>A (NP_542770.2:p.Val320Ile), not described in the database ClinVar, was identified in the gene EGLN2... [Variant No.3]
 4. ...the variant rs121434254 NM_000383.4:c.769C>T (NP_000374.1:p.Arg257Ter) described in the ClinVar database as pathogenic one, was identified in the gene AIRE...

5. ... the variant rs61736587 NM_006949.4:c.1621G>A (NP_008880.2:p.Gly541Ser) described in the ClinVar database as pathogenic/probably pathogenic one, was identified in the gene STXBP2...”

In light of this additional values data, the view should now be taken that the Athlete has effectively symptoms of hemochromatosis, which explains his blood profile.

88. The Athlete further submitted that he:

- (i) did not use prohibited substances or methods and the alleged abnormalities in his blood profile are not caused by doping. The 2017 Samples show high HGB levels, which contradicts the scenario of doping as these were taken at a time when the Athlete had already been retired from competing for over 3 years and the values establish that he has a particular metabolism producing more HGB than the average population. This is supported by the additional six random blood tests post retirement which all show HGB levels superior to 16.5g/dL.
- (ii) is not a convicted doper as the decision issued by the IBU Anti-Doping Panel (“ADHP”) of March 2020 is challenged before the CAS and has not yet come to hearing.
- (iii) was not a protected athlete. Even the IBU ADHP (Oxandrolone Case) did not find that the Athlete was involved in a doping scheme.

89. In his Answer on the merits, the Athlete requested the following relief:

Mr. Evgeny Ustyugov applies for the Sole Arbitrator of the CAS ADD to rule as follows:

- I. *The Request for Arbitration filed by the IBU is declared inadmissible due to the lack of jurisdiction of the CAS ADD.*
- II. *The Request for Arbitration filed by the IBU is dismissed.*
- III. *Mr. Ustyugov is granted an award for costs.*

V. JURISDICTION

90. The jurisdiction of the ADD has been challenged by the Athlete. Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced in this procedure, and legal principles as they concern the jurisdiction of the ADD to decide this dispute.

91. Article A2 of the ADD Rules provides as follows:

“CAS ADD shall be the first-instance authority to conduct proceedings and issue decisions when an alleged anti-doping rule violation has been filed with it and for imposition of any sanctions resulting from a finding that an anti-doping rule violation has occurred. CAS ADD has jurisdiction to rule as a first-instance authority on behalf of any sports entity which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions.

These Rules apply whenever a case is filed with CAS ADD. Such filing may arise by reason of an arbitration clause in the Anti-Doping Rules of a sports entity, by contract or by specific agreement.

These Rules apply only to the resolution by first instance arbitration of alleged anti-doping rule violations filed with CAS ADD. They neither apply with respect to appeals against any other decision rendered by an entity referred to in this Article nor against any decision rendered by CAS ADD.

Decisions rendered by CAS ADD shall be applied and recognized in accordance with the WADC.

CAS ADD shall also have jurisdiction in case of alleged doping violations linked with any re-analysis of samples.”

A. The Athlete’s Objection to Jurisdiction

92. The Athlete objected to ADD jurisdiction as early as 20 January 2020 noting, in particular, that he retired from biathlon in 2014 when the ADD was not even in operation.

93. On 31 January 2020, the Athlete filed an *ex parte* request for super-provisional measures with the District Court of Lausanne seeking an interim injunction preventing the IBU from initiating proceedings before the ADD. The request for super-provisional measures was rejected on 31 January 2020.

94. On 4 February 2020, the IBU informed the Athlete that his case would be referred to “*a hearing Panel appointed by the Chair of the IBU Anti-Doping Hearing Panel*” (“ADHP”). Consequently, and in response, the Athlete wrote to the IBU on 7 February 2020, as follows:

“I note that the BIU [is not bringing] the dispute before the CAS Anti-doping division (CAS ADD), which is logical in the absence of any specific arbitration agreement. I also stress that the IBU ADHP does not exist anymore under the IBU Constitution.”

The Athlete then withdrew his application with the District Court in Lausanne on the understanding that the IBU agreed to not refer this procedure to the ADD.

95. The Athlete’s position is that the ADD does not have jurisdiction to deal with this matter on the basis that:

- (i) There is no agreement to arbitrate in writing, which is a requirement of Swiss law. The Athlete relies upon the expert opinion of Prof. Bohnet who explained that Swiss law governs the issue of jurisdiction since the ADD is based in Lausanne. Under Swiss law, an arbitration agreement must be made in writing in any means which is evidenced by text (art. 178 para 1 and 2 Private International Law Act (“PILA”). Here, the only applicable “agreement” would be the 2012 IBU ADR and the IBU Constitution of 2012 which were the last governing documents applicable (and agreed upon) by the Athlete prior to his retirement in 2014.
- (ii) The IBU ADHP is the competent authority, not the ADD. Article 7.7 of the 2012 IBU ADR provides that the competent authority during the Athlete’s activity remains competent after retirement. However, this provision does not provide that regulatory changes after his retirement would also apply to him. Such an interpretation is inconceivable as it would subject an athlete to a new set of rules to which he or she did not agree.

The Athlete, prior to his retirement, never consented to arbitration for the hearing and adjudication phase, rather, he only agreed to a review by an internal body within

the IBU (i.e. the ADHP). Therefore, since his retirement the Athlete is not bound by subsequent changes to the IBU regulations. Prof. Bohnet was of the view that:

“Since [retirement], the Athlete was not bound, according to the IBU regulations, by any subsequent amendment in the rules. The “forced” consent to amendments in the regulation is only admissible during the career, as a condition to participate in any competition. Thus, there is no basis to consider that Mr. Ustyugov has ever agreed to any arbitration for the hearing and adjudication phase. This phase was led, by the time the Athlete was still active, by the IBU ADHP, which isn’t an arbitration court. . . On the other hand, the CAS-ADD is a Court for arbitration. It is only since the 2019 modifications that the CAS-ADD has jurisdiction to rule the IBU’s hearing and adjudication phase. However, as the Athlete was no longer bound by the rules changes after 2014, and in particular those of 2019, he never consented to arbitration for the hearing and adjudication phase”. (emphasis is original)

96. In sum, the Athlete never agreed – implicitly or explicitly - to be adjudicated by an “*unknown third party*” such as the ADD and the 2012 IBU ADR cannot be amended in a way that allows the IBU to assign its disciplinary powers to the ADD in the absence of consent from the Athlete.

B. The IBU’s Response on Jurisdiction

97. The IBU asserts that the question of which tribunal has jurisdiction to decide a case is a procedural one governed by the rules in place when the charge is brought against an athlete. The most current version of the IBU Constitution came into effect on 19 October 2019. Article 30.2.1 of the IBU Constitution provides as follows:

“30.2 Alleged violations of the IBU Integrity Code will be prosecuted by the BIU before a Disciplinary Tribunal, as follows:

30.2.1 Where the alleged violation is of the anti-doping chapter of the IBU Integrity Code, the matter will be referred to the CAS Anti-Doping Division, which will appoint one or more CAS arbitrators to sit as the Disciplinary Tribunal that will hear and determine the case in accordance with the anti-doping chapter of the IBU Integrity Code, the CAS Code of Sports-related Arbitration, and the Arbitration Rules for the CAS Anti-Doping Division...”

98. Similarly, Article 8.1 the 2019 IBU ADR confirms that charges with respect to alleged anti-doping rule violations will be heard by a tribunal appointed by the ADD:

“8.1 When the BIU [Biathlon Integrity Unit] sends a notice to an Athlete or other Person asserting an anti-doping rule violation, and the Athlete or other Person does not waive a hearing in accordance with Article 7.11, the BIU will refer the case to the CAS Anti-Doping Division, which will appoint one or more CAS arbitrators to sit as the Disciplinary Tribunal that will hear and determine the case in accordance with these IBU Anti-Doping Rules, the CAS Code of Sports-related Arbitration, and the Arbitration Rules for the CAS Anti-Doping Division.”

99. Article A2 of the CAS ADD Rules, as set out above, provides that the ADD has jurisdiction to rule as a first-instance authority on behalf of any sports entity which has formally delegated its powers to the ADD to conduct anti-doping proceedings and impose applicable sanctions. In this respect, the agreement between the IBU and ADD provides that the IBU “*agrees to delegate its first-instance authority to adjudicate alleged anti-doping rule violations and any sanctions, if applicable, to the CAS ADD and in doing so, accepts the CAS ADD to apply to any doping-related procedure.*”

100. Separately, the IBU is entitled to prosecute athletes for anti-doping rule violations after they retire in accordance with Article 5.6.1 of the 2009 IBU ADR. In this respect, the IBU delegated this adjudicatory responsibility to the ADD, which effectively replaced the IBU ADHP and which is fully independent from the IBU.
101. Both now and when the Athlete last competed, the CAS Appeals Arbitration Division is/was the final appellate instance for anti-doping rule violations prosecuted by the IBU. Accordingly, both the Athlete and the IBU are entitled to appeal a decision rendered by the ADD before the CAS Appeals Arbitration Division (on a *de novo* basis) just as they previously could in relation to a decision rendered by the IBU ADHP.
102. In support of its argument, the IBU relies on the expert evidence of Prof. Antonio Rigozzi, in whose opinion, the Athlete's objection to ADD jurisdiction is flawed for three reasons:
- (i) The ADD, in acting as a first-instance tribunal on delegation from an international federation. It is meant to replace the former internal disciplinary tribunal. It is not an arbitral body and consequently an athlete's consent to arbitrate within the meaning of PILA is not required.
 - (ii) Even if the ADD were functioning as an arbitral body, the Athlete is bound by the procedural rules in force when he signed the IBU Declaration on 26 January 2006 (the "Declaration"). The Athlete never sent his Retirement Notification Form in writing to the IBU (despite the IBU sending the form to the Russian Biathlon Union ("RBU") for the Athlete's signature). Even then, notification of retirement would not retract the 2006 Declaration as there is a continuous applicability of all IBU regulations, including the IBU ADR, in accordance with Article 7.7 (and Article 7.13) of the 2009 IBU ADR.
 - (iii) Irrespective of whether or not the ADD is an arbitral body, and leaving aside the effect of the Declaration, the Athlete's agreement to be prosecuted after his retirement is itself an agreement to be subject to the procedural rules in place from time to time. In this respect, there is no detriment to the Athlete as the ADD provides greater guarantees of independence than previously provided by the IBU ADHP.
103. In consideration of the foregoing, the ADD is competent to decide this matter at first-instance.

C. Conclusion on Jurisdiction

104. It was undisputed between the Parties that (i) the ADRV is alleged to have occurred in the period between January 2010 and February 2014 and that the existence of an ADRV should be determined according to the rules in force at that time, namely the 2009 IBU ADR and (ii) that the IBU rules in force at the time of the alleged ADRV provided for the jurisdiction of the IBU ADHP to adjudicate anti-doping disputes at first instance.
105. Equally, it was accepted by the Athlete that he was bound by subsequent versions of the 2009 IBU ADR (as amended in 2010 and 2012) and "*subject to the authority of the IBU to bring action against him in relation to violations he committed before retirement*". At the time of his retirement (discussed below) in 2014, the applicable rules were the "2012 IBU ADR".
106. Article 8.1 of 2012 IBU ADR addressed the jurisdiction of the IBU ADHP as follows:

“8.1.1 The IBU Executive Board will appoint a standing panel consisting of a chairperson and at least four other experts with experience in anti-doping (“IBU Anti-Doping Hearing Panel (ADHP)”). The Chair will be a lawyer. Each panel member will be otherwise independent of IBU. Each panel member will serve a term of four years.

8.1.2 When it appears, following the results management process described in Article 7, that these Anti-Doping Rules have been violated in connection with IBU testing or testing at an international event, the case will be assigned to the IBU Anti-Doping Hearing Panel for adjudication. [...]

8.1.8 Decisions of the IBU Doping Hearing Panel may be appealed to the CAS.”

107. Since the Athlete’s purported retirement, the IBU has changed the procedure to be applied in cases of suspected doping. In 2019, after the alleged ADRV was committed and before the current proceedings were initiated, the IBU adopted the IBU Integrity Code, incorporating the 2019 IBU ADR at Chapter D (“2019 IBU ADR”). It provided for the establishment of the Biathlon Integrity Unit (“BIU”) and effectively replaced the IBU ADHP with the ADD. In its relevant part, Article 8 of the 2019 IBU ADR provides:

“8.1 When the BIU sends a notice to an Athlete or other Person asserting an antidoping rule violation, and the Athlete or other Person does not waive a hearing in accordance with Article 7.11, the BIU will refer the case to the CAS Anti-Doping Division, which will appoint one or more CAS arbitrators to sit as the Disciplinary Tribunal that will hear and determine the case in accordance with these IBU Anti-Doping Rules, the CAS Code of Sports-related Arbitration, and the Arbitration Rules for the CAS Anti-Doping Division. [...]

8.4 The decision may be appealed to the CAS as provided in Article 13. [...]”

a. What are the applicable rules?

108. The question of whether the 2012 IBU ADR or the 2019 IBU ADR applies to the Athlete is consequently of significance as the adjudication body has changed in the interim.
109. A central argument of the Athlete in support of the continuing application of the 2012 IBU ADRs to him, was that he retired in 2014 and the act of retirement was sufficient to trigger the withdrawal of his Declaration to submit to the rules of the IBU. Therefore, the applicable rules for procedural purposes were those in place at that time (in 2014) namely the 2012 IBU ADR and the jurisdiction of the ADD did not apply to him.
110. The IBU submitted that the Athlete was bound by the IBU rules on a continuous basis up to the current day. He had not formally retired by way of communication in writing, which was a mandatory rule, but limited to the anti-doping sphere only. In any event, the Athlete was bound by his Declaration which was never revoked before the 2019 IBU ADR came into effect, and which ‘retirement’ did not have the capacity to revoke. Therefore, he is bound by Article 8.1 of the 2019 IBU ADR which *“unequivocally provides for CAS ADD at first instance”*.

(i) Retirement of the Athlete

111. The provisions dealing with retirement are Article 5.5.2 and 5.6 of the 2012 IBU ADR and the IBU Retirement Notification Form” (which refers to Article 5.5.2 and 5.6 of the 2012 IBU ADR). These provisions read as follows:

“5.5.2 Athletes who have been identified by the IBU for inclusion in the IBU RTP will continue to be available for no advance notice out-of-competition testing, unless and until those athletes give written

notice to the IBU that they have retired or until they no longer satisfy the criteria for inclusion in the IBU RTP and have been so informed by the IBU. Athletes who have given notice of retirement to the IBU may not resume competing unless they notify the IBU at least 6 months before they expect to return to competition and are available for unannounced out-of-competition testing at any time during the period before actual return to competition. [...] (emphasis added).

5.6 Retirement and Return to Competition

5.6.1 *An athlete who has been identified by the IBU for inclusion in the IBU's Registered Testing Pool will continue to be subject to these Anti-Doping Rules, including the obligation to comply with the whereabouts requirements of the International Standard for Testing unless and until the athlete gives written notice to the IBU that he or she has retired or until he or she no longer satisfies the criteria for inclusion in the IBU's Registered Testing Pool and has been so informed by the IBU.*

5.6.2 *An athlete who has given notice of retirement to the IBU may not resume competing unless he or she notifies the IBU at least six months before he or she expects to return to competition and makes him/herself available for unannounced out-of-competition testing, including (if requested) complying with the whereabouts requirements of the International Standard for Testing, at any time during the period before actual return to competition."*

112. The Athlete sought to evidence his asserted retirement in 2014 through: (i) correspondence between the IBU Anti-Doping Department and the RBU of 12 & 26 January 2015 in which the RBU's Mr. Mnatsakanov confirmed the Athlete was retired and "said that the [sic] sent duly signed document about his retirement quite a long time ago...if it's lost somewhere, we will surely send the new one"; (ii) IBU communications to the Athlete on 12 & 13 March 2020 noting that the Athlete "retired from competition in April 2014" and "given that you [Athlete] retired from biathlon in 2014"; (iii) his IBU Data Centre status as "not active" with last recorded results being the 2013/2014 season; and (iv) the recognition of his retirement in an article on the IBU website on 23 April 2014: "Russia's 2010 Olympic Mass Start Gold medalist and 2014 Olympic Relay Gold medalist Evgeny Ustyugov surprised everyone including his teammates by announcing his retirement at the Moscow Race of Champions this April. Ustyugov at age 29 is one of the younger retirees of this season. He said in making his announcement that ongoing injuries were part of his decision to move on..."
113. Prof. Bohnet was clear that rule changes made after an athlete retires cannot be applied to them as in retiring the athlete had no further obligations to the IBU or to get any information on amendments to the IBU rules.
114. It was conceded by Prof. Rigozzi that notification of retirement in writing would satisfy Article 5.6.1 of the 2012 IBU ADR without the need to be in a particular form. The IBU retirement notification was for the purposes of anti-doping testing, related obligations including, *inter alia*, unannounced testing, inclusion in a registered testing pool and providing whereabouts information. No Retirement Notice Form or other written communication of the Athlete's retirement was received by the IBU.
115. The Athlete did not participate in any competition after 2014 and the last anti-doping test undertaken by the Athlete prior to this period was on 8 March 2014. He did not complete the formal requirements of 'retirement' by providing a written notice as required by Article 5.5.2 and 5.6 of the 2012 IBU ADR and the Sole Arbitrator does not accept that the RBU emails stating that the Athlete had sent a written notice meets the threshold of written notice of retirement.

116. However, no evidence was put before the Sole Arbitrator that the Athlete re-commenced competing, or that he was subjected to anti-doping tested again or asked to provide or did provide any whereabouts information post-2014 (save by agreement in 2017). On that basis it appears to the Sole Arbitrator, that the Athlete, while not complying strictly with the IBU ADR rules to notify the IBU of his retirement in writing, was *de facto* treated by the IBU as having been retired, both on a competitive basis and for anti-doping purposes. This was reinforced when in October 2017 the IBU sought the Athlete's consent to be tested. Therefore, the IBU in the view of the Sole Arbitrator, waived the requirement for written notice of retirement by the Athlete.
117. What effect does this retirement have on the issue of whether the retired Athlete remains otherwise bound by the IBU rules generally?

(ii) Athlete's 2006 Declaration

118. It was common ground that the retirement of an athlete from the sport does not alter the fact that the Athlete remains bound by the IBU regulations for the purposes of disciplinary proceedings related to offences committed before their retirement - in accordance with Article 7.7, 2009 IBU ADR⁵ (which is largely unchanged in Article 7.13, 2019 IBU ADR):
- "If an athlete or other person retires before any results management process has begun and the IBU would have had results management jurisdiction over the athlete or other person at the time the athlete or other person committed an anti-doping rule violation, the IBU has jurisdiction to conduct results management".*
119. The Declaration signed by the Athlete in 2006, provided that the Athlete was bound by the IBU's regulatory changes until he retracted them:
- "[The athlete/ team official] agrees, on the basis of §1.4.1 of the IBU Competition Rules to recognize and observe the Constitution of the IBU, all orders, rules and contracts of the IBU especially*
- 1. IBU Disciplinary Rules*
 - 2. IBU Event and Competition Rules*
 - 3. IBU Anti-Doping, Blood Test and Gender Verification Rules*
 - 4. IBU Regulations for Advertising and Sponsorships.*
- The undersigned declares to have received these IBU rules and directives from his/ her National Federation. It is his/ her own responsibility to get information on any amendments to these rules and directives... This declaration is valid as long as it is not retracted by the undersigned."*
120. The Athlete's legal expert, Prof. Bohnet, disputed the contention that the Declaration could cover regulatory changes post-retirement as being "completely inconceivable" as it would mean that an athlete could not retire to avoid a new set of rules with which they did not agree. He characterised the Declaration as an eligibility form to enable the Athlete to compete (on the basis the Athlete is not a member of the IBU), and it creates the legal nexus with the IBU the price for which is acceptance of the rules. However, upon retirement and consequent loss of eligibility to compete, it meant that the obligations would cease at that point in time, meaning the then applicable rules were the 2012 IBU ADR which provided for the IBU ADHP adjudicator structure not the ADD.
121. The IBU position was that notification of retirement would not retract the Declaration as retirement related specifically to anti-doping testing and did not have a wider application and there is a continuous applicability of all IBU regulations, including the IBU ADR until

⁵ Also identical in Article 7.7 2012 IBU ADR

such time as the Declaration is retracted, which was not done by the Athlete, as there was no specific communication by the Athlete expressing the intention to retract his Declaration.

122. Retirement has a particular meaning in anti-doping terms and is a mandatory provision of the WADA Code embedded in the IBU ADR rules (2012 and 2019). The Athlete was *de facto* retired from the sport in 2014, but that had no effect upon his status as an athlete contractually bound to the IBU via, *inter alia*, the Declaration. The Sole Arbitrator was presented with no evidence that the Athlete retracted or intended to withdraw his Declaration and therefore he is bound by the 2019 IBU ADR.
123. Even if the Sole Arbitrator is wrong in relation to the ongoing effect of the Declaration, a consideration of whether the change in the IBU adjudicator body from the ADHP to the ADD was a rule change of a procedural or substantive nature reveals that the ADD has jurisdiction.

(iii) Procedural or Substantive Rules

124. It was the position of Prof. Rigozzi that the body that adjudicates the dispute at first instance is procedural in nature and thus immediately applicable – relying upon CAS jurisprudence surrounding the fundamental sports law principle relating to “intertemporal issues” where there are changes to regulations:
- “...according to well-established CAS jurisprudence, intertemporal issues are governed by the general principle *tempus regit actum* or principle of nonretroactivity, which holds that (i) any determination of what constitutes a sanctionable rule violation and what sanctions can be imposed in consequence must be determined in accordance with the law in effect at the time of the allegedly sanctionable conduct, (ii) new rules and regulations do not apply retrospectively to facts [that] occurred before their entry into force, (iii) any procedural rule applies immediately upon its entry into force and governs any subsequent procedural act, even in proceeding related to facts [that] occurred beforehand, and (iv) any new substantive rule in force at the time of the proceedings does not apply to conduct occurring prior to the issuance of that rule unless the principle of *lex mitior* makes it necessary.”* (Emphasis original) (CAS 2017/A/5086).
125. Prof. Bohnet did acknowledge that the fact “*that procedural standards are generally immediately applicable to any new proceedings, even if based on facts prior to the change in procedural rules*” but did not accept that the adjudication aspect of the proceedings fell within the procedural ambit as *inter alia* they fell outside of the results management function. While he accepted that anti-doping ‘results management’ function is a procedural matter, it was in the context that the scope of the results management phase commenced with testing and concluded with the retirement from sport provisions (in Article 7 IBU ADR 2012). The adjudication and hearing phase fell outside of ‘results management’ and were substantive in nature (Article 8 IBU ADR 2012). Consequently, the rule changes in 2019 making the ADD the first instance body for IBU anti-doping cases were substantive in nature, not procedural and the Athlete did not consent to them. This meant that the body who originally had jurisdiction over a case remains the competent body for the future, even post-retirement.
126. If that is the case, it would mean that the IBU would have to maintain two different disciplinary structures for all changes made to their rules in order to prosecute athletes when the information become available subsequently, i.e. a pre-2019 ADHP regime as well as a post-2019 ADD regime. Prof. Bohnet’s view, confirmed at the hearing, was that in those circumstances, sports federations would have to maintain different disciplinary structures in parallel. The Sole Arbitrator does not accept this position.

127. Results management does not stop at the adjudication phase, rather it continues from first test through to the determination of the hearing process. This is the common understanding of anti-doping organisations with results management responsibility (e.g. IBU) and has been recently codified in the 2021 WADA Code and the International Standard for Results Management as acknowledged by Prof. Rigozzi. Results Management is defined as:
- “The process encompassing the timeframe between notification as per Article 5 of the International Standard for Results Management, or in certain cases (e.g., Atypical Finding, Athlete Biological Passport, whereabouts failure), such pre-notification steps expressly provided for in Article 5 of the International Standard for Results Management, through the charge until the final resolution of the matter, including the end of the hearing process at first instance or on appeal (if an appeal was lodged).”*
128. The rules governing the hearing and adjudication process are procedural in nature and procedural rules apply retrospectively. The legal experts could refer to no precedent under Swiss Law according to which an agreement to be prosecuted after retirement for an offence committed prior to retirement should be interpreted as an agreement to be prosecuted according to the procedural rules and under the disciplinary bodies that were in place at the time of the retirement.
129. The Athlete is bound by the jurisdiction of the CAS ADD as provided for by Article 8.1 of the 2019 IBU ADR as a consequence of his agreement to be prosecuted after he retired. Such agreement extends to the consent to be prosecuted according to the procedural rules in place from time to time. There is no detriment to the Athlete as the system is essentially the same with the ADD acting as the first instance anti-doping body for the IBU, but the ADD notably presents greater guarantees of independence than the ADHP did previously and moreover, the Athlete’s right to appeal therefrom is not impacted.
130. Therefore, the Sole Arbitrator finds that the alteration in the disciplinary body from IBU ADHP to the ADD in the 2019 IBU ADR being procedural, applied to the Athlete. Unlike in the *Ulrich* case (CAS 2010/A/2070), cited by the Athlete, the revised adjudication structure is a delegation of certain powers by the results management authority (IBU) to the ADD but does not displace the IBU’s results management authority as it did in that case. While it is a structural adjustment, it remains procedural in nature and the Athlete consented to be bound by the IBU rules, including the relevant adjudication body dealing with ADRVs. That given consent was unbroken from the signing of the 2006 Declaration.
131. The Sole Arbitrator, therefore, confirms the jurisdiction of the ADD to decide this matter. In consideration of the foregoing, the Sole Arbitrator does not consider that it is necessary to proceed to determine the status of the ADD as an arbitral tribunal or otherwise, noting that the Athlete in all circumstances retains the right of appeal to the CAS Appeals Arbitration Division from the outcome of the ADD.

VI. APPLICABLE LAW

132. Article A20 of the ADD Rules provides as follows:

The Panel shall decide the dispute in accordance with the WADC and with the applicable ADR or with the laws of a particular jurisdiction chosen by agreement of the parties or, in the absence of such a choice, according to Swiss law.

133. It is undisputed between the Parties that the alleged ADRV occurred between 2010 to 2014, and the potential existence of an ADRV shall be determined according to the rules in force at that time, namely the 2009 IBU ADR (as amended in 2012) and the 2012 IBU Constitution.
134. Separately, in considering issues of jurisdiction, the Athlete asserts that Swiss law shall apply since the ADD is located in Lausanne. The IBU does not, in principle, object in the application of Swiss law on the issue of jurisdiction and indeed its expert, Prof. Rigozzi, relies on various aspects of the Private International Law Act (18 December 1987) ("PILA").
135. The Sole Arbitrator, therefore, confirms that the 2009 IBU ADR applies to the determination of the merits of the asserted ADRV, while various aspects of the 2009 IBU ADR (as amended in 2012), the 2012 IBU Constitution, and Swiss Law are applicable to a determination on various procedural and preliminary determinations, including jurisdiction.

VII. MERITS

136. The submissions of the Parties were considered in their totality by the Sole Arbitrator. This Award, however, sets out only those matters which are necessary to the determination of whether or not an ADRV has been committed.

A. Lack of ADD Independence

137. The independence of the CAS as an institution is not disputed and is well settled by the Swiss Federal Tribunal (TF 4A_260/2017 consid. 3.2.1.).
138. The Athlete argued *inter alia* that there are substantial changes between the IBU ADHP and the ADD, and that the ADD is not independent of the CAS, both being divisions of the same organisation and thus, the Athlete is deprived of a proper independent second instance court. A further concern was the ADD recourse to a sole arbitrator in place of a three member panel thus depriving him of the right to nominate an arbitrator.
139. The Athlete did accept that the ADD is totally independent from the IBU. This is in contrast to the ADHP which, while independent in its function, formed part of the structural matrix of the IBU adjudication regime for anti-doping.
140. Regardless, the adjudication aspect of anti-doping results management process is procedural in nature and can be adjusted over time. The IBU has elected to enter into an agreement with CAS that the ADD would be its first-instance body under the IBU ADR Rules thereby accepting that a sole arbitrator will deal with cases at first instance. The right of appeal on a *de novo* basis to the CAS Appeals Arbitration Division before a three-person panel is retained. There is no cross-over between the CAS arbitrators on the ADD Panel and those on the Appeal Panel who are appointed by the President of the Ordinary Division or President of the Appeals Division respectively (and/or the parties as applicable). Moreover, the two Divisions are maintained by two different court offices, and are managed by different Division Presidents (and Deputy Division Presidents).
141. The role of the arbitrator is to be independent and act independently at every stage of the process regardless of whether she or he is appointed by a party or an institution such as the CAS. The appointment of an arbitrator by a party does not of itself give that party a greater

right or better access to justice than in circumstances where a sole arbitrator is appointed. The party nominated arbitrator carries out their function under that obligation of independence and impartiality and in that regard is no different to the sole arbitrator. (CAS/2010/A/2090). Accordingly, the Sole Arbitrator is not persuaded by the arguments of the Athlete in this regard and finds that the ADD does not lack independence.

B. Res judicata and venire contra factum proprium

142. The Athlete claimed that the IBU is not acting in good faith by closing a case and then re-opening it without new evidence and is contrary to Art. 2 and Art. 3 of the Swiss Civil Code which enshrines the principle of good faith: Art. 2 B provides:

“I Acting in good faith

- 1. Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.*
- 2. The manifest abuse of a right is not protected by law.”*

143. Consequently, the Athlete also invoked the principle *venire contra factum proprium*, namely that he had a legitimate expectation that he would not be pursued, that the case was closed and proceedings terminated and the IBU is, therefore, barred from exercising its disciplinary prerogatives on the Athlete because they acted in bad faith.
144. Further, the decision of the Expert Panel in 2018 had *res judicata* effect on the current proceedings as the “*IBU followed the joint opinion of the [APB] Panel and did not pursue the investigations against the Athlete. In fact, the disciplinary case initiated further to alleged abnormalities in the blood profile of the Athlete was terminated.*” And it was not acceptable to commence new proceedings on the basis of the Werge Report when the Athlete could not have been provided with all the relevant data and in any event it was in line with the Belfast opinion and, therefore, was not a new element.
145. The IBU submitted that these arguments bore no substance. It was entirely habitual that the Expert Panel could seek further testing, and in 2017-2018 the IBU was in the first stage of the results management phase, dealing with investigation of the Athlete’s APB and had not reached the tribunal phase. Therefore, there was no decision ever made or communicated to finally dispose of the matter. But even if there had been, the IBU asserted that the caselaw of the Swiss Federal Tribunal is clear that even an internal tribunal decision does not amount to *res judicata* as it is only the expression of the will of a tribunal, it is not a state court and therefore cannot be *res judicata* (ATF 119 II 271).
146. The plea of *res judicata* seeks to eliminate the possibility of a current dispute prejudicing rights already established by a judgment - “*The term res judicata refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties (the so-called “tripleidentity” criteria). Res judicata is said to have a positive and a negative effect. The positive effect of res judicata is the termination of a dispute in a final and binding manner between the parties. The negative effect prevents the re-litigation of the subject matter of the judgment or award, also referred to as ne bis in idem.*” (CAS 2015/A/3959 para 109).
147. While the Athlete’s ABP case was not very active in the period between the issuance of the Expert Panel Opinion in June 2018 and the receipt of the Werge Report in January 2020,

it is clear to the Sole Arbitrator that no evidence presented either constituted a ‘decision’ of the IBU to forego pursuit of the Athlete’s case or to ratify the findings of the ABP Panel. Neither could a *de facto* termination of the proceedings be implied.

148. These are not new proceedings but a continuation of the results management process that commenced in 2016 with the Athlete’s ABP review and which warranted the retention and use of the Athlete’s samples and data for that legitimate purpose. No IBU tribunal determination issued and even if a tribunal decision had been issued, it is clear that it would have emerged from “intra-association” proceedings and would not constitute an arbitral award or adjudication by a court where *res judicata* could be validly raised (see further: CAS 2003/O/460, para 5.3; CAS 2010/A/2091; CAS 2013/A/3380). The *res judicata* argument of the Athlete is not supported.
149. The principle of *venire contra factum proprium* is recognised by CAS precedents and Swiss law, whereby “*when the conduct of a party has led to raise legitimate expectations on the part of the second party, the first party is barred from changing its course of action to the detriment of the second party*” (CAS 2002/O/410; CAS 2011/A/2375; CAS 2015/A/3883).
150. For the Athlete’s estoppel argument to succeed, there must have been some reliance in good faith by the Athlete to his detriment (CAS 2011/A/2473). No example of reliance on a representation made by, or on behalf of, or under the auspices of the IBU was proffered by the Athlete much less a detrimental reliance which is a pre-requisite to the success of this argument. Neither has any prejudice to the Athlete been demonstrated.
151. This is an APB case where the unique genetics of the Athlete are proffered to explain his haematological abnormalities. Nothing prevents that explanation and the underlying evidence and relevant witness testimony being considered by the Sole Arbitrator in these proceedings giving the Athlete the full opportunity to defend himself (see CAS 2014/A/3639).

C. Illegal Evidence

152. The Athlete’s position is that the 2017 Samples were provided for the purposes of investigating his ABP. As such, their permitted use was concluded when the Expert Panel provided their Joint Opinion in June 2018. The Joint Opinion stated that the Expert Panel were “*unable to conclude that it is highly unlikely*” that the Athlete’s blood profile was the result of normal physiological or pathological conditions or that it was “*highly likely that it was caused by the use of prohibited substances or prohibited methods*”. The Athlete asserts that the subsequent forwarding of his medical data, to any third party, including WADA, required the consent of the Athlete, and such consent was never sought or granted. Prof. Werge’s opinion was, therefore, based upon illegally presented documentation, namely the Athlete’s ABP at a WADA conference (of ABP experts).
153. The IBU submitted that it is entirely normal to share anti-doping matters with WADA, as WADA host and have access to the ADAMS database with the ABP of the Athlete. In correspondence between the Parties, IBU clarified the following to the Athlete:

“With respect to the WADA meeting in Copenhagen in December 2019, your client’s ABP was discussed on an entirely anonymous basis. Furthermore, you will be aware that WADA has access to athletes’ ABP data through ADAMS and, more generally, has the right under the Code to see the evidence in connection with anti-doping rule violations throughout the results management process”.

154. IBU also emphasis that it is legitimate and necessary to share relevant documents with experts for the purposes of interpreting them and for future expert testimony in a tribunal setting. The IBU asserted that there was a valid request and agreement to collect samples for further genetic analysis and therefore no data breach. In any event, even if evidence is illegally obtained it can still be available for consideration as part of a balancing exercise (CAS 2011/A/2625).
155. Regarding the admissibility of illegally obtained evidence, the Panel in CAS 2016/A/4486 determined that the interest in the fight against doping can be greater than the individual's interest in not having an illicitly obtained evidence admitted and highlighted that:
- “...it has to be recalled that even illegally obtained evidence may be admissible if the interest to find the truth prevails (Art. 152, 168 Swiss Code of Civil Procedure; HAFTER, Commentary to the Swiss Code of Civil Procedure, 2nd ed., para. 8). According to the Swiss Federal Tribunal and the ECHR, the courts shall balance the interest in protecting the right that was infringed by obtaining the evidence against the interest in establishing the truth. If the latter outweighs the former, the courts may declare a piece of evidence admissible for assessment even though it was unlawfully acquired (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., p. 461) ...106. This balancing test set out by the Swiss Federal Tribunal, and applied by the CAS, is in line with the jurisprudence of the European Court of Human Rights (see i.e. K.S and M.S v. Germany, no. 33969/11, ECHR 2016-V, 6 October 2016, and case law cited).”*
156. The admittance of evidence is subject to procedural laws. In this respect, Article 3.2 of 2009 IBU ADR determines that anti-doping rule violations may be established by “*any reliable means*”. Considering the very large scope of means of admissible evidence provided by Article 3.2, the Sole Arbitrator considers that the Athlete's APB and expert witness opinions and statements should be considered as reliable means of evidence in the sense of the 2009 IBU ADR. Even illegally obtained evidence may be admissible if the interest in finding the truth is found to outweigh an athlete's rights as part of an overall balancing exercise.
157. WADA must be kept informed of investigations (Article 12 International Standard for Testing and Investigations), copied on charges (WADA Code Art. 7.10) and be notified of decision (WADA Code Art. 8.4). The Athlete was also aware that WADA was being kept apprised of the IBU's results management process as Dr Reid Aikin of WADA was *inter alia* copied on the IBU letter of investigation to the Athlete regarding his ABP Profile of 13 January 2020.
158. The Sole Arbitrator considers that the ABP of the Athlete was provided to Prof. Werge legally and on an anonymised basis by WADA, as the owner of ADAMS with the right to access the Athlete's ABP information. Prof. Werge's Report as provided to WADA & IBU was done by his own admission, “*on the interpretation of the genetic analyses performed by Dr Mark Catherwood and coworkers at the UK Reference Center Belfast City Hospital, Molecular Haematology Unit, as they were presented to me by Dr. Reid.*” The Belfast reports referred to “Patient Name: 337973”.

D. Has the Athlete committed an ADRV?

(i) The Legal Basis

159. The Athlete is charged with an ADRV based on Article 2 of the 2009 IBU ADR. Article 2.2. of 2009 IBU ADRV provides as follows:

[Doping is....]

(...)

“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.”

160. The IBU has the burden of establishing that the ADRV, in this case the Use or attempted Use of a prohibited substance or prohibited method, has occurred to the comfortable satisfaction of the Sole Arbitrator. Article 3.1 of the 2009 IBU ADR provides:

“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.” (emphasis added).

161. Consistent with the observations of the Panel in CAS 2017/A/5045, “*it clearly follows from the applicable provision that the applicable standard of proof is flexible.*” The threshold the IBU must meet is higher depending upon the seriousness of the allegation.

162. The test of comfortable satisfaction has been regularly applied by CAS (see CAS 2009/A/1912) and in CAS 2015/A/4059 WADA v Bellchambers et al. AFL & ASADA, the CAS Panel rejected the proposition that “*there is no material difference between proof beyond a reasonable doubt and proof of comfortable satisfaction.*” While more recently in IAAF v Cyrus Rutto – decision of the World Athletics Disciplinary Tribunal of 7 November 2019 - found that “*the IAAF need not eliminate all reasonable doubt in order to prevail. It is equally true, however, that a mere balance of probabilities is insufficient for the Tribunal to be comfortably satisfied of an anti-doping rule violation.*”

163. Therefore, when applied to this case it is not for the Athlete to prove that his analysis is the right or only conceivable one. Unless the IBU’s conclusions clearly outweigh those of the Athlete, the IBU’s burden will be unmet. The assessment of the admissibility of the evidence is as provided in 2009 IBU ADR at Article 3.2:

“Facts related to anti-doping rule violations may be established by any reliable means, including admissions. evidence of third Persons.

[Comment to Article 3.2: For example, the IBU or its member federation may establish an anti-doping rule violation under Article 2.2 (Use of a Prohibited Substance or Prohibited Method) based on the athlete’s admissions, the credible testimony of third persons, reliable documentary evidence, reliable analytical data

from either an A or B sample as provided in the comments to Article 2.2, or conclusions drawn from the profile of a series of the athlete's blood or urine samples]"

164. Blood doping and the nature and effect of an athlete's ABP have been considered in many previous CAS cases, including CAS 2017/O/5039, CAS 2018/O/5666, CAS 2018/O/5667, CAS 2018/O/5668, CAS 2018/O/5671, CAS 2018/O/5672, CAS 2018/O/5673, CAS 2018/O/5674, CAS 2018/O/5675, CAS 2018/O/5676, CAS 2018/O/5704, CAS 2018/O/5712 and CAS 2018/O/5713. It is well established under this jurisprudence that the ABP model is a "*reliable means*" of establishing ADRVs for example in CAS 2014/A/3614 & 3561 in which the Panel stated that it was "*convinced that the ABP Model is a reliable and a valid mean of establishing an ADRV... numerous peer-reviewed applications have confirmed the ABP's reliability...*".

(ii) Evidence before the Sole Arbitrator

a. ABP Blood Profile

165. The analysis of the ABP profile by the Expert Panel was *inter alia* that:
- (i) "*the probability of abnormality according to [the] ABP software at the 99% specificity level, is >99.9% for haemoglobin (HB), >99% for the Off-score, and >99.5% for reticulocyte percentage (RET%).*"
 - (ii) There were spikes in the Athlete's HGB levels which coincided with major sporting competitions e.g. 2g/dL spike in 4 days before the Vancouver Olympic Games (Samples 1 and 2), in 4 weeks during the World Cup (January 2013) and in a 3-week period leading up to the Sochi Olympic Games to reach a peak HGB of 19 g/dL (sequence of Samples 16 to 19).
 - (iii) There were also other haematological abnormalities, which are not compatible with normal physiology, altitude or intense exercise.
 - (iv) The HFE gene variant could not account for the profile abnormalities "*because a carrier usually does not express symptoms of hemochromatosis*" which is consistent with the Athlete's medical report showing "*normal serum iron, normal serum ferritin.*"
166. Prof. Giuseppe d'Onofrio in his evidence gave further context to the Athlete's ABP profile. He explained that in the ABP, HGB and RET% are chosen as the main markers as they are stable in healthy subjects. HGB in particular has very little biological variability within the individual, <2%. The profile of healthy athletes does not show excessive variation. High HGB with low RET% is an indicator of blood doping. He said that the Athlete's passport had "*serious, important atypical findings*". The HGB sequence is >99.9% likely not to be physiological even considering the possible (gene) variations. 18.5 g/dL or 19 g/dL are very abnormal levels of HGB and would worry a medical doctor, samples 10, 14 and 19 from the Athlete were at these levels. The proximity of Samples 2, 10 and 19 to Olympic Games and competition is notable. In his opinion, the high HGB samples could have been the result of micro-dosing complementing blood transfusions to keep RET% high.
167. The IBU focused also on the fact the Belfast experts determined the EGLN2 variation to be non-pathogenic and not associated with erythrocytosis. Rather, the variant is to be found in the normal population and as an SNV is thought to be a remnant of the evolutionary process that shaped human variation. The Belfast expert position is bolstered by the Werge Report which found that the variation had no "*functional consequences in humans of pathological, clinical or biological importance*".

168. The Athlete relied upon the following defences:

(i) Genetic Condition; (ii) The 2017 Samples; (iii) Private Samples and (iv) Altitude.

(i) Genetic Condition

169. The Athlete alleges that he is suffering from a haematological disease, namely erythrocytosis “...erythrocytosis is characterized by increased red cell mass and elevated haemoglobin concentration and haematocrit. Erythrocytosis is suspected when haemoglobin (HGB) is above 18.5 g/dl or the packed cell volume (PCV) is greater than 0.52 in a man... (Keohane et al, Br Med Jr, 2013)”.

170. The Athlete relied *inter alia* upon his unique genetic make-up as the basis for his abnormal APB initially relying upon the SNV in his EGLN2 gene, as the cause of his idiopathic erythrocytosis. Later reinforced by the results of the full genome sequencing conducted by FSAEI HE & FSBI who found that: “...the constantly increased hemoglobin level of Evgeny Romanovich Ustyugov is explained by his unique genetic characteristics.” In relation to gene HFE (variant No.1), the Athlete’s geneticists stressed that “a higher level of HGB is registered with the carriers” of such variant, while gene PIEZO1 (variant No.2) is known to cause “an increase in HGB”. Mutations in the gene EGLN2 (variant N°3) according to Camps *et al.*,⁶ are presumably associated with erythrocytosis.

171. The experts provided *inter alia* the following opinions:

Prof. Manana Sokolova (Professor, Haematologist, PhD in Medicine)

172. The existing hereditary genetic defect HFE (variant H63A), could be the cause of erythrocytosis, and this mutation could influence the blood values of the Athlete, notwithstanding he has no clinical symptoms of hemochromatosis. Because:

“As the sport of biathlon is associated with high-endurance exercise, where hepcidin synthesis can increase, and therefore reduce iron availability, it may be assumed that the carriers of mutations of hereditary HFE have a genetic advantage in sporting results with high oxygen demand and high muscle load...Therefore, it may be assumed that mutation in the gene HFE limits the hepcidin increase caused by physical activity, which results in an increase in iron availability and increased stimulation of erythropoiesis – this is what is necessary for high working capacity and endurance during athletic training. In addition, higher iron availability can help athletes to recover more effectively between competitions. Taking into account the considerations mentioned above, the conclusion can be drawn that mutation of HFE (H63A) with heterozygous genotype can possibly explain the increased level of hemoglobin, hematocrit and erythrocytosis”.

173. The EGLN2 gene mutations’ “...potential participation in HIF regulation and erythrocytosis development has not been fully studied yet. The fact that EGLN2 is not reflected in the ClinVar database simply means that the information on the influence of this gene on human health is absent as of today, as respective studies have not been conducted...In this regard, one cannot be sure that this mutation is non-pathogenic and has no influence on human medical parameters”.

174. In Prof. Sololova’s opinion the hereditary mutations revealed in the Athlete, including HFE (H63A), and EGLN2 (V320Ile), can result in abnormal values in the Athlete Biological Passport, such as an increased level of hemoglobin. She concluded that the mutations

⁶ (Haematologica, 2016, Vol.101(11), 1306-1318)

identified in the Athlete's genome sequencing "*confirms the relationship between the permanently high levels of hemoglobin and erythrocytosis, and the unique genetic characteristics of the Athlete*".

Prof. Pascal Kintz (Professor of Legal Medicine, Doctor of Toxicology)

175. Prof. Kintz, in considering whether the Athlete's ABP abnormalities could relate to his particular genetic profile, agreed with the Russian scientists' conclusions:

"In conclusion, several points have to be taken into consideration before the abnormalities observed in the athlete's biological passport of Evgeny Ustyugov can be attributed, with no doubt, to doping:

– 2 unannounced blood tests, performed late 2017 under control of the sport authorities, several years after retirement, have demonstrated an elevated HGB. In addition, 2 WADA controls (in Cologne), performed on blood and urine collected on the same dates, have indicated that the tests did not evidence a prohibited substance or a prohibited method

– 6 additional blood tests, performed from 2015 to 2020, after retirement of the athlete, have demonstrated high levels of HGB

– 3 gene mutations, in 2 different laboratories, have been found. The variant c.187C>G of the HFE gene has been considered in the join report of 13 May 2020 to correspond to a pathogenic variant. The two other variants (c.5863C>T from the PIEZO1 gene and c.958G>A from the EGLN2 gene) are of unclear clinical significance and deserve more investigation with respect to their possible pathogenic status. Given it has been verified that the athlete is presenting 3 mutations, one cannot consider that the ABP of Evgeny Ustyugov is presenting abnormalities, which can be listed as characteristic of doping practices."

Prof. Giuseppe d'Onofrio (Professor of Hematology, Oncology and Clinical Pathology)

176. The Expert Panel were aware of the first mutation (H63D - heterozygous) of the Athlete since the outset, with normal iron values. As haematologists they were familiar with this gene mutation from a clinical point of view and knew it is not associated with erythrocytosis, as supported by the literature. Therefore, they excluded that genetic anomaly from consideration in the first Expert Opinion (2017). In 2018 Opinion, the main element of doubt was the finding of a new gene (EGLN2) which was not known by the Expert Panel in terms of its clinical effect at that time. They were aware that EGLN1 can be associated with erythrocytosis and due to this doubt, they could not conclude "likely doping". However, in 2020 their knowledge of that gene was increased, including literature in this specific area and they could therefore say, having received Prof. Werge's Report, that this polymorphism was not the cause of the change. With the removal of the genetic related doubt, there was no basis for the Expert Panel not to revert to their original position.

Prof. Thomas Werge (Professor of Genetics)

177. Putting the genetic discussion in context, Prof. Werge noted that 10% of the 3 billion genome building blocks in humans vary between individuals (i.e. 320 million variants). There are two classes of variant (i) rare variants – which can be personal or familial or segregating e.g. Down Syndrome is a functional pathogenic variant and (ii) common variants (polymorphisms). Common variants, when considered individually have no relevant effect upon human traits.
178. To assess functionality of variants in the genomes, geneticists rely upon computer predictions, which are used to build hypothesis, but not infer causality. The known variants are listed in various genome databases e.g. ClinVar and are tabulated with their pathogenic effects. In relation to the Athlete's variants, he stated at the hearing that "*none of the implicated*

variants that I have been presented with are considered to be pathogenic in these settings and I don't see there is any evidence linking any of the implicated variants to any relevant pathology."

179. The starting point with any gene is non-significance and the scientists try to demonstrate "significance" and deduce causality. It, therefore, in Prof. Werge's opinion made no sense to argue as the Athlete's experts had done, that "non-significance" cannot be concluded. In the absence of evidence there is no significance. Rarity is not significant. Everyone is born with at least 30 mutations that their parents did not have and that are unique. Rarity is the rule not the exception and is not an argument for functionality.
180. Prof. Werge reviewed the Athlete's gene variants:
- (i) HFE – is a common variant and not a mutation. It has been related to hemochromatosis which may have an impact upon HGB. The observed variant in the Athlete (H63A) is not functional or pathogenic. There is a functional pathogenic variant in the HFE gene (C282Y) which is not carried by the Athlete. The notion that the two variants had similar effect is based on 20 year old literature and that hypothesis has been thoroughly dismissed. The H63A variant has a frequency of 10% in the general population and is, therefore, not extraordinary.
 - (ii) PIZOL1 – there is no connection between the variants in this gene in the literature and the one observed in the Athlete's variant. HGB levels were not statistically different in unaffected individuals. Clinically if one suffered from the disorder associated with this variant (dehydrated hereditary stomatocytosis) it would be inconsistent with high performance endurance sports.
 - (iii) EGLN2 – there has only been one single observation in the literature that there is an association between this gene and erythrocytosis (*Camps et al*), which is far from providing evidence of causality of pathogenicity in the Athlete's case. In his opinion, this variant is not predicted to be deleterious. The prediction run by Prof. Werge and separately by a colleague, did not replicate the prediction as described by the Athlete's experts. But in any event the prediction is not evidence.
181. Prof. Werge concluded that in his opinion, he saw no evidence that the individual variants mentioned (above and also AIRE and STXBP2) on their own, or collectively can cause or even contribute to the increased, much less fluctuating haemoglobin levels of the Athlete. If one put all the variants in the 400 genes discussed between the experts and combined the effect, you can explain only 6% of the variation of HGB in an individual. Any single variant, therefore, has no effect on HGB levels.
182. Having weighed up the evidence given by all the experts, the Sole Arbitrator is persuaded by the evidence of the IBU's experts and is not persuaded that the Athlete's genetic variations are the cause of his high HGB levels. The scientific evidence presented by the Athlete is based primarily upon inference and hypothesis. The absence of more up-to-date literature or a study to demonstrate that any of the identified variants in the Athlete's genes had a functional impact was unhelpful to his case. Equally unsatisfactory was the rationale provided for the strikingly fortuitous timing of spikes in the Athlete's HGB proximate to major championships.

(ii) The 2017 Samples

183. The Athlete submitted to further testing in 2017 which he claims was solely for the purposes of the analysis of a potential genetic variation compatible with erythrocytosis. The IBU in their letter of 2 October 2017 seeking the Athlete's consent, which he provided, do not limit their purpose to genetic testing but it also extended to "*any other analysis that may be relevant in connection with the investigation of the alleged congenital condition*".
184. It is not disputed that the HGB values in the Athlete's blood were 17.7g/dL and 18.5g/dL when samples were taken in October and December 2017 (the "2017 Samples"). The Parties were not, however, in agreement with regard to the interpretation of the 2017 Samples.
185. The Athlete has submitted that the high HGB levels could not be proscribed to doping, as he was retired and had been for three years when the 2017 Samples were taken. These too contained high HGB levels which he submitted were naturally occurring and hereditary. The Athlete disabused the proposition which he said the IBU were inferring, namely that he had engaged in blood doping all his life and into his retirement in 2014 until today, a position which was claimed "defies logic."
186. Prof. d'Onofrio when asked about the 2017 Samples opined that the high HGB levels (17.7 g/dL and 18.5 g/dL) could be attributed to the fact the Athlete knew he would be tested so they were not really unannounced tests and he could have been prepared in some way. He also noted that the high HGB levels do not correspond with the majority of the samples in the Athlete's ABP which fall between 16 g/dL and 17 g/dL.
187. The IBU was also supportive of the proposition that the Athlete could have artificially kept his HGB levels up in the knowledge that he would be tested out of competition in the three month window from October 2017 for which he provided his whereabouts information.
188. The Athlete indicated in his submissions that there were essentially two possible explanations, either that he produces naturally more HGB than the normal population or that he has continually taken prohibited substances since his retirement in 2014 to this day. On the basis that it has not been demonstrated that the Athlete's high HGB levels are naturally occurring as a result of a genetic condition, the only plausible explanation is that they are accounted for through the taking or Use of a prohibited substance or prohibited method. This is an ABP case, therefore only Use can be considered as an explanation and the Sole Arbitrator, on the basis of the expert evidence is comfortably satisfied that this is the case.

(iii) Private Samples

189. The Athlete had blood samples collected and tested privately, outside of the ABP passport and 2017 testing relied upon by the IBU. He has sought to rely upon the output of those blood samples and the opinion of his experts to demonstrate his "*permanently high levels of hemoglobin and erythrocytosis*". For example, Dr. Sokolova opined that the output from "*the analysis of the dynamic control of peripheral blood indices for 2015, 2016, 2017, 2018, 2019 and 2020, which made clear the maintenance of high values of the red blood indices with fluctuations within the following limits: hemoglobin 166-185gm/l, erythrocytes 5.18-5.54x10¹²/l, hematocrit 47.2-52%...even after the Athlete's career ended in April 2014, his level of hemoglobin still remains increased*". This was supported by Prof. Kintz also considered the values of the 2017 tests and the "*6 additional*

blood tests, performed from 2015 to 2020, after retirement of the athlete, have demonstrated high levels of HGB...” as being highly relevant and which should be taken into consideration before the abnormalities observed in the Athlete’s ABP “*can be attributed, with no doubt, to doping*”.

190. The position of the IBU is that private sample must be excluded from consideration as they are not taken in accordance with the same protocols or done in approved laboratories or subject to WADA quality assessment. Further, they raise issues about whether such additional private samples are in fact those of the Athlete and no evidence has been put before the Sole Arbitrator demonstrating the times and circumstances in which they were provided.
191. There is established CAS precedent in relation to the consideration by panels of the output from private sample testing. This is coherently stated by the Panel in CAS 2017/A/5045:
- “The Panel finds that only samples collected for anti-doping purposes from the Athlete and that comply with the respective protocols should be included in the ABP in order to ensure that the data is reliable and reflects the true profile of an athlete. Only standardized sample taking and quality control ensure fair and comparable testing results, needed to establish a level playing field and to ensure the equal treatment of all athletes.”*
192. The Sole Arbitrator is not prepared to accept the inclusion of private blood tests taken over a period of 5 years since the Athlete retired, taken in unknown circumstances and for unknown purposes. Only samples taken and managed in accordance with the appropriate supervision and in accordance with the IBU and the WADA International Standards for collection, storage and testing of samples is appropriate to maintain a level playing field.

(iv) Altitude

193. The Athlete’s experts were examined about the proximity of the spikes in the Athlete’s HGB levels above the ABP threshold levels in Samples 2, 10, 14 and 19. In particular regarding their proximity to significant competitions such as the Olympic Games in Vancouver and Sochi. The variations were explained by reference to influencing factors such as the altitude the Athlete was at, his training regime and time of day the samples were collected as relevant factors.
194. Prof. D’Onofrio agreed with Prof. Sokolov that altitude clearly has an effect on blood production. However, in the Athlete’s case the altitude effect was limited as based on his schedule, he was training at around 1500m which is not high enough to be associated with important changes in HGB levels. For there to be a real benefit the Athlete would need to be above 2000m and this was supported by the literature.
195. Reference was made to Australian research⁷ on the meta-analysis of changes on response to hypoxia related to altitude, which also found that there is a negative co-relation between altitude and persons with high base-line HGB levels. Prof. Shubina did not accept that position as the meta-analysis was done on a diverse selection of patients and it cannot be said that there are not individuals for whom altitude creates an effect outside of the normal analysis reach. Prof. d’Onofrio was of the opinion that altitude was not a relevant factor in the Athlete’s haemoglobin and notwithstanding the meta-analysis which indicates a trend

⁷ Lobigs LM, Sharpe K, Garvican-Lewis LA, et al. The athlete’s hematological response to hypoxia: A meta-analysis on the influence of altitude exposure on key biomarkers of erythropoiesis. Am J Hematol. 2018; 93:74–83.
<https://doi.org/10.1002/ajh.24941>

for which there can be outliers, it does not mean that all the abnormalities in the Athlete's ABP can be explained by altitude.

196. The Expert Panel in its March 2017 Joint Opinion took altitude into account in its analysis and considered that the haematological abnormalities present in the Athlete's ABP "*are not compatible with normal physiology, altitude nor intense exercise*" and raised a concern over the rapid increase in the Athlete's HGB between sample 16 and sample 17 which then persisted at a high level to reach a peak in sample 19. The 'altitude' factor was considered and dismissed by the Expert Panel as the Athlete was not at a high enough elevation to explain the impact, they were seeing in his blood profile:

"This sequence started with sample 16, which shows the lowest hemoglobin and the highest ret% results of the last three years; this sample was collected 1 week before a period of competitions, and hemoglobin increased thereafter to 17.2g/dL (sample 17) when the competition restarted, keeping this result (17g/dL) during his stay at the biathlon centrum (1700m), to peak on sample 19 (19g/dL). In the Doping control form of sample 19, the athlete declares that he stayed at altitude (1700m) for 1 month. It is well known that altitude can cause mild changes to the OFF score within a defined timeframe (1,2)⁸. Nevertheless, based on the many studies in which effects of altitude on the blood picture have been assessed, training at less than 2000m has very little hematological effect and cannot explain the hematological changes observed in this sample."

197. The Sole Arbitrator is not persuaded that in the Athlete's case altitude can account for the abnormalities in his ABP, in particular the high HGB levels and the even higher peaks which in some case increased by 2 g/dL within 4 days to reach 17.6 g/dL (between Sample 1 and 2) or over 3 weeks to reach 19 g/dL (between Sample 17 and 19).
198. The Sole Arbitrator, having considered all the evidence, determines that she is comfortably satisfied on the basis of the ABP profile of the Athlete that the Athlete committed an ADRV in that he Used a prohibited substance and/or a prohibited method in the period 2010-2014 in breach of Article 2.2 of the 2009 IBU ADR. Consequently, consideration of the other circumstantial evidence submitted by the IBU in terms of reaching the threshold test is not necessary as the burden of proof has been met by the IBU.
199. However, a consideration of the other circumstantial evidence submitted by the IBU and addressed by the Parties at the hearing is relevant to the issue of sanction in light of the submission by the IBU that the Sole Arbitrator consider the augmentation in the minimum mandatory sanction applicable for a breach of Article 2.2. based on aggravating circumstances. Therefore, the Sole Arbitrator has also considered the other circumstantial evidence in that light.

b. Other Circumstantial Evidence

200. The IBU submitted that the Athlete's doping in the period 2010-2014 in addition to the ABP was supported by other corroborating evidence.

⁸ 1) Bonne TC, Lundby C, Lundby AK, Sander M, Bejder J, Nordsborg NB. Altitude training causes haematological fluctuations with relevance for the Athlete Biological Passport. *Drug Test Anal.* 2015 Aug;7(8):655-62.

2) Garvican-Lewis LA, Sharpe K, Gore CJ. Time for a new metric for hypoxic dose? *J Appl Physiol* (1985). 2016 Jul 1;121(1):352-5.3)

(i) **McLaren Report**

201. In his reports dated 18 July and 9 December 2016, Professor McLaren confirmed the existence of a sophisticated and pervasive doping and protection scheme – involving *inter alia* RUSADA, the Moscow Laboratory, and individuals from the Ministry of Sport, the FSB (formerly the KGB), and the state agency known as the Centre for Sports Preparation (CSP) – which involved doping athletes with the ‘Duchess cocktail’ and also employed a suite of anti-detection methodologies (washout testing, pre-departure testing, sample swapping, non-reporting of positive results, etc.) to undermine the anti-doping system in Russia. The existence of the Russian doping scheme has been confirmed by various CAS Panels. See, for example, CAS OG 16/09, CAS OG 16/012, CAS 2017/O/5039, CAS OG 18/03, CAS 2018/O/5666, CAS 2018/O/5667 and CAS 2018/O/5713.
202. Dr. Rodchenkov, former director of the Moscow Laboratory, submitted three affidavits in this case variously dated in 2017. At the hearing and in his affidavit dated 4 October 2017 he verified that biathlon was one of the sports where doping was “*particularly widespread and all of the athletes were carefully protected*”. Biathlon was heavily targeted by the doping scheme in particular at the 2014 Olympic Games.
203. Dr. Rodchenkov confirmed that Mr. Stanislav Dmitriev, supplied EPO to the national biathlon team. Following a series of positive cases for EPO by three biathletes in 2009 the Moscow Laboratory noted that EPO caused abnormal blood parameters. Dr. Rodchenkov, was monitoring the Russian biathletes where he detected EPO abuse. The problems with low-quality EPO and its detection lead him to develop the Duchess Cocktail in 2011 which he said was used by “*the entire Russian National Biathlon Team...in the period before the Sochi Games*”. In April 2013 he ascertained that biathletes were injecting rEPO at the end of the season to enrich their blood, to have it withdraw and later available for transfusion for the Olympic season.
204. He further explains in his affidavit that clean urine was collected from biathletes (including the Athlete) in 2012; the details were recorded on a clean urine bank inventory by Ms. Irina Sukanova of the Moscow laboratory. Dr. Rodchenkov had particular knowledge (indicated by “++”) about the Athlete which he included in his affidavit as follows:

Ustyugov, Evgeniy	++	This athlete was treated by Mr Dmitriev. This athlete had the dirtiest ABP Profile in IBU. He was also a candidate for disqualification in 2009 by was protected by Mr Prokhorov. This athlete is now retired.
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205. After the ABP system was introduced following the Sochi Games, the RUSADA received ABPs for skiers and biathletes which were “terrible”. Dr Rodchenkov reviewed these passports (19 November 2014) with others including an APB specialist and they found the Athlete’s ABP profile to be “the worst”, he was not aware that the Athlete had retired at that juncture. Dr. Rodchenkov confirmed that it was established practice for an athlete that was facing disqualification, in order to do it quietly would just announce the end of his or her career.
206. The Sole Arbitrator found the evidence of Dr. Rodchenkov to be a credible witness who had direct knowledge of circumstances affecting and involving the Athlete and had particular knowledge relating to the Athlete himself.

(ii) Laboratory Information Management System (“LIMS”)

207. In September 2017, WADA received from a whistleblower a copy of the LIMS database of the Moscow Laboratory covering the results of analysis of samples in the period from 2012 to 2015 (the “2015 LIMS copy”). After validating its authenticity and reliability, WADA made the relevant parts of the 2015 LIMS copy available to the IBU, in November 2017. The 2015 LIMS copy confirmed the ‘Disappearing Positives Methodology’ in that it revealed hundreds of positive results that had been reported as negative in ADAMS.
208. The 2015 LIMS data shows that four of the Athlete’s samples had been reported negative in ADAMS and some had been hidden by the Moscow Laboratory including sample 2808577 which tested positive for oxandrolone. The Athlete was found guilty by the IBU ADHP for the Use (in August 2013) of a prohibited steroid that formed part of the Duchess cocktail, in what has been referred to as the “Oxandrolone Case”.
209. The Athlete is also identified by name in the 2015 LIMS database in the ‘general comments’ section, in respect of three of his Sochi samples, in what is supposed to be an anonymised database. This is considered by the WADA Intelligence and Investigations unit, in evidence given by Mr. Aaron Walker, to be an indication of special protection status. The core of the anti-doping sample collection process is based upon anonymity, no satisfactory rationale as to why that was not observed was provided.
210. The protected status of the Athlete was further exemplified by the IBU on the basis that a further cover up of the Athlete’s doping was executed when five of twenty samples collect at a training camp in Sochi on 14 February 2020 (by the IBU for its own analysis) were separately shipped to the Sochi laboratory, arriving later than the other 15 samples and without their doping control forms. The five samples included four collected from the Russian men’s biathlon relay team, including the Athlete. The samples were held (on the basis of the missing gender information) and not forwarded to the blood department of the laboratory until after the 36 hour period for sample collection to analysis had expired, thus resulting in ADAMS automatically recording the results as invalid. The samples were revalidated in 2016. Sample 19 was the Athletes sample taken on 14 February 2020, which had HGB reading of 19g/dL.
211. The IBU also presented evidence with regard to what was termed the Sochi Cover-Up and details of “sample swapping” (i.e. a technique to open the sealed sample bottles in order to replace the dirty urine with clean urine collected previously from the athletes prior to their analysis) as a replacement for the Disappearing Positives Methodology would not work due to the presence in the laboratory at the Sochi Olympics of international experts sent by the IOC. Comprehensive evidence was provided by Prof. Champod in relation to tampering of the sample bottles.

E. Period of Ineligibility

212. The IBU requests that the Sole Arbitrator imposes a four-year period of ineligibility on the Athlete in accordance with Articles 10.2 and 10.6 of the 2009 IBU ADR.
213. Article 10.2 of the 2009 IBU ADR provides the consequences to be imposed for anti-doping rule violations under Article 2.2 (Use) as follows:

“10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

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.”

214. Article 10.6 of the 2009 IBU ADR allows the Panel, where aggravating circumstances are present, to increase the period of ineligibility up to four years unless the athlete can prove to the comfortable satisfaction of the Panel that he or she did not knowingly commit the antidoping rule violation:

“10.6 Aggravating Circumstances Which May Increase the Period of Ineligibility

If the IBU establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 [Trafficking] and 2.8 [Administration] that aggravating circumstances are present that justify the imposition of a period of ineligibility greater than the standard sanction, then the period of ineligibility otherwise applicable will be increased up to a maximum of four years unless the athlete or other person can prove to the comfortable satisfaction of the hearing panel that he or she did not knowingly violate the anti-doping rule. An athlete or other person can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by the IBU.”

215. The comment to that Article states:

“Examples of aggravating circumstances that may justify the imposition of a period of ineligibility greater than the standard sanction are: the athlete or other person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the athlete or other person used or possessed multiple prohibited substances or prohibited methods or used or possessed a prohibited substance or prohibited method on multiple occasions; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of ineligibility; or the athlete or person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation. For the avoidance of doubt, the examples of aggravating circumstances described in this comment to Article 10.6 are not exclusive and other aggravating factors may also justify the imposition of a longer period of ineligibility...”

216. The Sole Arbitrator is comfortably satisfied the Athlete Used prohibited substances or prohibited methods on multiple occasions between 24 January 2010 and 14 February 2014. It is of note that blood doping using rEPO requires repeated administration (by injection) over a period of time and that blood doping by autologous blood transfusion requires both withdrawal and re-administration of the blood. The Expert Panel concluded that the Athlete’s ABP reflected an artificial increase in HGB levels immediately proximate to the Vancouver Olympic Games 2010 and the Sochi Olympic Games 2014. The intention to illegally improve performance in the most important international competitions “*can be considered particularly reprehensible because these events enjoy [the] ultimate respect*” and has been an aggravating factor in other CAS cases (2018/O/5667 and 5668).

217. The Athlete has been found to have committed another ADRV in the Oxandrolone case. The outcome of that case remains in place as at the date of this Award (but is under appeal to CAS). Notwithstanding same, Article 10.7.4 IBU ADR provides that were a separate violation cannot be treated under the multiple violations regime the second violation may nonetheless be treated as an aggravating circumstance;

“10.7.4.2 If, after the imposition of a sanction for a first anti-doping rule violation, the BIU discovers facts involving an anti-doping rule violation by the Athlete or other Person which occurred prior to notification regarding the first violation, then the BIU will impose an additional sanction based on the sanction that could have been imposed if the two violations had been adjudicated at the same time. Results in all Competitions dating back to the earlier anti-doping rule violation will be disqualified as provided in Article 10.8”

218. In light of the overwhelming circumstantial evidence provided to the Sole Arbitrator, it is difficult to conclude other than that the Athlete has had the benefit of protection and support to artificially augment his performance through doping and to avoid detection. Given the diversity of support, its elaborate nature and its extent, it could not have been achieved other than with a significant degree of orchestration or common enterprise to commit the instant anti-doping rule violation.
219. In light of these aggravating features, each individually deeply significant, the maximum period of ineligibility of four years is imposed.

F. Disqualification of Results

220. The Athlete contested that his results should be annulled from 24 January 2010 when the applicable rules provide for an 8-year statute of limitations period. However, consistent with Article 17 of the 2019 IBU ADR Rules, the relevant statute of limitations period is 10 years.
221. Consequently, pursuant to Article 10.8 of the 2009 IBU ADR, any competitive results obtained by the Athlete between the date of the ADRV and the date of his retirement from the sport in 2014 shall be disqualified, consistent with Article 9, with all resulting consequences, including forfeiture of any medals, points and prizes. This includes any results obtained as an individual and the results of any relay team of which the Athlete was a member. For the avoidance of doubt, this includes disqualification of the Athlete's results and forfeiture of the medals he won at the 2010 Olympic Games and the 2014 Olympic Games.

VIII. COSTS

222. Article A24 of the ADD Rules provides as follows:

“Subject to Article A23, the administrative costs of CAS ADD, the fees and costs of the arbitrators and ad hoc clerk (if any), and the expenses of CAS ADD (arbitration costs) associated with proceedings filed by the IOC, any Olympic IF, or the ITA (on behalf of an Olympic IF delegator) involving a Sole Arbitrator shall be covered by the budget assigned to the Olympic IFs by the IOC, for up to 4 procedures per annum filed by the same Claimant. Any costs associated with any proceedings filed thereafter (5 or more proceedings) shall be paid by the Claimant, as directed by CAS ADD.

...

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 and other costs incurred in connection with the proceedings. 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.”

223. The arbitration costs of this matter shall be determined and served upon the parties in accordance with Article A24 as set out above, if necessary.
224. As for the Parties’ legal and other costs, the Sole Arbitrator considers that the procedure was handled in a streamline fashion by the Parties and Counsel, with neither Party being required to unnecessarily waste financial resources. For this reason, the Parties shall bear their own legal and other costs.

IX. APPEAL

225. Article 8 of the 2019 IBU ADR provides:

“8.3 At the end of the hearing, or on a timely basis thereafter, the CAS panel will issue a written decision that includes the full reasons for the decision and for any period of Ineligibility imposed, including (if applicable) a justification for why the greatest potential Consequences were not imposed.

8.4 The decision may be appealed to the CAS as provided in Article 13. Copies of the decision will be provided to the Athlete or other Person and to other Anti-Doping Organisations with a right to appeal under Article 13.”

226. Pursuant to Article A21 of the ADD Rules, this award may be appealed to the CAS Appeals Arbitration Division within 21 days from receipt of the notification of the final award with reasons in accordance with Articles R47 *et seq.* of the Code of Sports-Related Arbitration, applicable to appeals procedures.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Anti-Doping Division of the Court of Arbitration for Sport has jurisdiction to decide on the subject matter of this dispute.
2. The request for arbitration filed by the International Biathlon Union is upheld.
3. Mr Evgeny Ustyugov is found guilty of an anti-doping rule violation in accordance with Article 2.2 of the 2009 IBU ADR Rules between 24 January 2010 and April 2014.
4. Mr Evgeny Ustyugov is sanctioned with a 4-year period of ineligibility starting from the date of the final CAS ADD Award.
5. All competitive results obtained by Evgeny Ustyugov from 24 January 2010 to the end of the 2013/2014 season, including, without limitation, all results and medals won at the 2010 Olympic Games and the 2014 Olympic Games, are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).
6. The award is pronounced without costs, except for the ADD Court Office fee of CHF 1,000 (one thousand Swiss Francs) paid by the International Biathlon Union, which is retained by the ADD.
7. Each party shall bear their own legal costs and other expenses incurred in connection with this arbitration.
8. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 27 October 2020

THE ANTI-DOPING DIVISION OF THE COURT OF ARBITRATION FOR SPORT



Susan Ahern
Sole Arbitrator