Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2014/A/3561 IAAF v Real Federación Española de Atletismo & Ms Marta Domínguez Azpeleta

CAS 2014/A/3614 WADA v Ms Marta Domínguez Azpeleta & Real Federación Española de Atletismo

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President:	Mr. Conny **Jörneklint**, Chief Judge in Kalmar, Sweden
Arbitrators:	Mr. Romano **Subiotto QC**, Solicitor-Advocate in Brussels, Belgium, and London, United Kingdom
	Mr. Jacques **Radoux**, Attorney-at-law in Howald, Luxembourg
Ad hoc Clerk:	Mr. Vladimir **Novak**, Attorney-at-law in Brussels, Belgium

in the arbitration between

International Association of Athletics Federation, Monaco
Represented by Mr. Eugene Gulland, Attorney-at-law, Washington, USA and Ms. Emilie Jones, Solicitor, London, United Kingdom

-First Appellant-

World Anti-Doping Agency, Montreal, Quebec, Canada
Represented by Mr. Jean-Pierre Morand, Attorney-at-law, Lausanne, Switzerland; and Mr. Ross Wenzel, Solicitor, Lausanne, Switzerland

-Second Appellant-

and

Ms Marta Domínguez Azpeleta, Madrid, Spain,
Represented by Mr. José Rodríguez García, Attorney-at-law, Madrid, Spain

-First Respondent-

Real Federación Española de Atletismo, Madrid, Spain

-Second Respondent-

I. THE PARTIES

1. The International Association of Athletics Federations ("IAAF" or the "First Appellant"), is the international federation governing the sport of athletics worldwide, with a registered seat in Monaco.

2. The World Anti-Doping Agency ("WADA" or the "Second Appellant") is a Swiss private law foundation whose headquarters is in Montréal, Canada, but whose seat is in Lausanne, Switzerland. WADA was created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms.

3. Ms. Marta Domínguez Azpeleta (the "First Respondent" or the "Athlete") is a 38-year old former international-level athlete, specializing in middle distance events (from the 1,500 metre to 3,000 metre steeplechase). She competed internationally for over 20 years from 1991 until 2012, having won her first major competition in the 3,000 metre event at the 2002 European Indoor Championship in Vienna, Austria. Thereafter, she received medals in several international competitions and held several national records. She won the gold medal in the 3,000 metre steeplechase at the IAAF World Championship in Athletics in Berlin, Germany, in August 2009, and the silver medal in the 3,000 metre steeplechase at the European Championship in Barcelona, Spain, in July 2010. The Athlete competed in over 30 international competitions, including four Olympic Games and more than ten World Championships at junior and senior levels. Following the London 2012 Olympic Games, she announced her retirement from competitive athletics.

4. Real Federación Española de Atletismo ("RFEA" or the "Second Respondent"), is the national governing body for the sport of athletics in Spain, with a registered seat in Madrid, Spain. RFEA is the relevant member federation of the IAAF for the country of Spain.

5. The Appellants and the Respondents are each referred to individually as a "Party" and collectively as the "Parties".

II. FACTUAL BACKGROUND

A. Blood Doping And The Athlete Biological Passport (ABP)

6. Blood doping is strictly prohibited under the World Anti-Doping Code ("WADC") and is defined by WADA 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*".[1]

7. Three widely known substances or methods are used for blood doping, namely (i) administering recombinant human erythropoietin ("rEPO") (*e.g.* by injection or patch to trigger erythropoiesis, the stimulation of red blood cells); (ii) the use of synthetic oxygen carriers (*i.e.* infusing blood substitutes such as haemoglobin-based oxygen carrier or perfluorocarbons to increase haemoglobin ("HGB") concentration well above normal levels); and (iii) blood transfusions (*i.e.* infusing a matching donor's or an athlete's own (previously extracted) red blood cells to increase the HGB well above normal.[2] rEPO is a Prohibited Substance included in class "*S.2 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.

8. The ABP – developed and refined by WADA – consists of an electronic record that compiles and collates a specific athlete's test results and other data over time, unique to that particular athlete. The haematological module of the ABP records the values in an athlete's blood samples of haematological parameters known to be sensitive to changes in red blood cell production. The values, collected and recorded in a Web-based database management tool ADAMS, include HGB[3] and percentage of reticulocytes ("RET%"),[4] the statistical combination of which is used to calculate the "OFF-score",[5] a value sensitive to changes in erythropoiesis.[6]

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1 *See* WADA Questions & Answers on the Athlete Biological Passport.

2 *See* WADA Questions & Answers on Blood Doping.

3 "*Haemoglobin is a molecular carrier in red blood cells transporting oxygen from the lungs to body tissue, whose value "shows the athlete's capacity to produce red blood cells and thus his capacity concerning oxygen transfer. This value is – in the absence of specific pathological conductions – a very stable one and only subject to very minor changes.*" (*see* CAS 2010/A/2174 *Francesco de Bonis v. CONI & UCI*, para. 9.8).

4 RET% "*is a quantitative marker of recent red cell production of the bone marrow.*" (*see* Schumacher and d'Onofrio Article, p. 980).

5 The OFF-score is obtained by a formula that correlates HGB and RET% to measure their variation in the same or opposite direction.

6 The additional parameters (resulting from a full blood count) collected for the ABP profile include (i) haematocrit; (ii) red blood cell count; (iii) reticulocytes count; (iv) mean corpuscular volume; and (v) meancorpuscular haemoglobin concentration (*see* rule 2.1 of the WADA Athlete Biological Passport

9. For instance, when an athlete takes rEPO (artificially stimulating erythropoiesis), in the lead up to a competition, there is an increase in RET% (*i.e.* the percentage of immature red blood cells) and then rapid increase in the level of HGB. When the athlete suddenly stops taking the rEPO before the competition event (to avoid detection at an in-competition doping test), the stimulation of erythropoiesis will stop abruptly, leading to a significant and prolonged decrease of RET%, and in turn a high OFF-score.[7]

10. The marker values from the blood samples collected in the ABP programme are fed into a standardised Bayesian statistical model – the Adaptive Model. The Adaptive Model uses an algorithm that takes into account both (i) variability of such marker values within the population generally (*i.e.* blood values reported in a large population of non-doped athletes) and (ii) factors affecting the variability of an athlete's individual values, including gender, ethnic origin, age, altitude, type of sport, and instrument-related technology.[8] The selected markers are monitored over a period of time and a longitudinal profile is created that establishes an athlete's upper and lower limits within which the athlete's values are expected to fall, assuming normal physiological conditions (*i.e.* the athlete is healthy and has not been doping). The athlete becomes his/her own point of reference,[9] and each time a blood sample is recorded, the Adaptive Model calculates where the reported HGB and OFF-score values fall within the athlete's expected distribution.[10] Following a new test, a new range of expected results for the athlete is determined.[11]

11. The main goal of assessing the ABP data is to differentiate between normal and abnormal profiles and assess possible causes for abnormalities.[12] The assessment is performed by an automated software system that provides a probability for each ABP profile to be normal (*i.e.* a profile found in a healthy, undoped population of athletes). If the Adaptive Model determines that an athlete's values fall outside his or her expected individual range, the results are considered to be atypical and require further investigation and/or analysis. The "specificity" of the limits generated by the Adaptive

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Operating Guidelines & Compilation of Required Elements 2012). These additional variables may provide information as to the presence or absence of pathologies or analytical inaccuracies.

7 *See* Opinion of Prof. d'Onofrio in *CAS 2012/A/2773 IAAF v. SEGAS and Ms. Irini Kokkinariou*, para. 114.

8 *See* section titled "*What is athlete's haematological passport?*" in the summary of the ABP by Swiss Laboratory for Doping Analysis.

9 WADA Athlete Biological Passport Operating Guidelines & Compilation of Required Elements 2012, p. 26.

10 Today, only the HGB and OFF-score markers are used to establish an anti-doping rule violation. However, the other parameters mentioned in footnote 6 above are used as additional evidence to determine whether blood doping is likely to have occurred, to detect any altered quality of the blood sample and to identify any possible pathological condition (*see* section titled "*What is athlete's haematological passport?*" in the summary of the ABP by Swiss Laboratory for Doping Analysis).

11 *See* Schumacher and d'Onofrio Article, p. 980.

12 *See* Schumacher and d'Onofrio Article, p. 981.

Model (*i.e.* the software's ability to identify clean athletes) is 99%, in accordance with the WADA ABP Operating Guidelines (*i.e.* at most, only one in 100 athletes who are not doping and with normal physiological conditions would produce values outside the range by chance). The further the value lies outside the limits of the range predicted by the Adaptive Model, the less likely it is that the value reflects normal physiological conditions. Under the IAAF Anti-Doping Regulations,[13] an ABP profile is considered atypical if the athlete's HGB and/or OFF-score values are beyond the 99.9 percentile (*i.e.* there is less than one chance in 1,000 that the abnormal values and variations observed in an athlete's ABP profile could be explained by a normal physiological or pathological cause).

12. The IAAF implements the ABP through a 4-step procedure designed to safeguard an athlete's due process in establishing whether the doping regulations were violated: (1) assessment by the Adaptive Model to determine whether the athlete's blood profile is normal or abnormal; (2) if abnormal, analysis of the athlete's ABP together with other pertinent information (*e.g.* athlete's whereabouts and competition schedule) by three scientific experts on an anonymous basis; (3) the opportunity for the athlete to challenge the IAAF's expert panel's conclusions if the experts find strong indications of prohibited doping; and (4) a finding of a violation and the imposition of sanctions only if the experts conclude unanimously on the basis of the entire record (including the athlete's submissions) that there is an overwhelming likelihood that the athlete engaged in prohibited doping.

B. Review Of Ms. Domínguez Azpeleta's ABP By The Expert Panel

1. First period of sample collection

13. The IAAF added Ms. Domínguez Azpeleta to its Registered Testing Pool for inclusion in the ABP programme in 2009. In the period from August 5, 2009 to January 4, 2013, the IAAF collected from her 22 blood samples, though 2 samples were eventually disregarded.[14] Below is a summary of Ms. Domínguez Azpeleta's ABP, reflecting the first 13 Samples (excluding the two disregarded samples).

Table 1

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13 *See* Regulation 6.9.

14 The sample collected on August 9, 2009, showed an increase in MCV that indicated some cell swelling, that could have been caused by a sample storage in a warm condition for a longer period (29.5 hours) compared to the remaining samples stored at a room temperature. The Expert Panel (as defined in paragraph 15) determined that this sample be disregarded due to a length of its storage time prior to analysis. The sample collected on October 29, 2010 was excluded by the IAAF because Ms. Domínguez Azpeleta was in an early stage of pregnancy.

No.	Date of Sample	HGB (g/dL)	RET%	Off-score
1.	August 5, 2009	15.70	1.19	91.55
2.	August 13, 2009	14.40	0.42	105.10
3.	September 21, 2009	13.50	0.97	75.91
4.	October 29, 2009	12.80	1.24	61.19
5.	November 25, 2009	13.40	1.27	66.38
6.	December 21, 2009	13.60	0.66	87.26
7.	May 4, 2010	14.50	1.08	82.65
8.	May 31, 2010	14.10	1.15	76.66
9.	July 27, 2010	14.80	0.48	106.43
10.	January 30, 2012	13.00	0.92	72.45
11.	February 28, 2012	13.30	0.61	86.10
12.	April 11, 2012	14.10	0.97	81.90
13.	May 16, 2012	13.50	0.66	86.26

14. Each of the Samples was analysed by a WADA-accredited laboratory and logged in ADAMS using the Adaptive Model. Following the collection of the 15th sample (Sample number 13 in Table 1 above) on May 16, 2012, the Adaptive Model showed that the probability of Ms. Domínguez Azpeleta's blood profile sequence being abnormal was 100% for HGB and the OFF-score based on specificity of 99.9%.[15]

2. Initial review by the Expert Panel

15. Ms. Domínguez Azpeleta's ABP was submitted to a panel of experts for an initial review on an anonymous basis. The panel was comprised of three renowned experts in the field of clinical haematology (*i.e.* diagnosis of blood pathological conditions), laboratory medicine and haematology (*i.e.* assessment of quality control data, analytical

physiology: Professor Yorck Olaf Schumacher, Professor Giuseppe d'Onofrio, and Professor Michel Audran (the "Expert Panel").[16]

16. Following the initial review, each of the members of the Expert Panel produced an opinion ("First Expert Opinions"), concluding unanimously that, in the absence of a satisfactorily explanation by the Athlete, "*it is highly unlikely that the longitudinal profile is the result of a normal physiological or pathological condition and may be the result of the use of a Prohibited Substance or Prohibited Method.*"[17] The First Expert Opinions were based on the following reasoning:

- ***Professor d'Onofrio.*** Professor d'Onofrio explained that "[t]*he main abnormality in this profile is observed in the first six months. They reproduce a very likely sequence of ESA doping, which starts with high haemoglobin (157 g/l) and normal reticulocytes on 5-9-2009.*" Sample 2, obtained on August 13, 2009 (8 days following the collection of Sample 1 corresponds very clearly to the type of values that you would expect two weeks after an athlete has stopped administering EPO: "*this is the full OFF phase, in which haemoglobin remain*[s] *high but reticulocytes go down (0.42% in the profile) because of erythropoietic suppression*". Sample 3 collected on September 21, 2009, shows a further decrease in haemoglobin (135 g/l) and a recovery of reticulocytes (0.97%) which is "*likely expression of the return to normal red cell production, once the effects of the erythropoietic stimulation and subsequent suppression have cleared.*" Samples 5 and 6 (collected on November 25 and December 21 2009 respectively) show HGB values that appear normal for an adult female and are similar to HGB values detected in the last three samples of the first collection period. Professor d'Onofrio concluded that the athlete's ABP resembled a sequence "*expected in an athlete [who] manipulates his*[/her] *blood with ESA and stops the treatment before an important competition taking place in the middle of August.*" He noted, more specifically, that Sample 9 – collected the day before the first heats for the woman's 3,000 metre steeplechase at the 2010 European Championship in Barcelona – showed an abnormally high OFF-score, and indicated that some form of blood manipulation took place.

- ***Professor Audran.*** Professor Audran stated that "*Samples 1,* [...], [2] *show a decrease of HGB with a decrease of RET%, that isn't physiologic*[al]. *This is characteristic of cessation of the stimulation of erythropoiesis. The stimulation*

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16 The Expert Panel was provided, among others, with Ms. Domínguez Azpeleta's anonymous ABP file (identified by a code "W3A8"), a document summarizing the information contained in each of the laboratory documentation packages for Samples 1-13 (and for Samples collected on August 9, 2009 and October 29, 2010 which were eventually disregarded), the competition calendar of the athlete, anonymous whereabouts information and full documentation packages for Samples 1-11 (as the packages for Samples 12-13 were not available at that time).

17 *See* Professor Schumacher's First Expert Opinion, p. 1; Professor Audran's First Expert Opinion, p. 1; and Professor d'Onofrio's First Expert Opinion, p. 1.

is still evident in sample 1 where the RET% value is 1.9%. IRF [immature reticulocytes fraction] *even RDW* [red cell distribution width] *is high (1.1). The values of these three parameters decrease from sample 1 to sample* [2]". He noted that Sample 9 shows the second highest HGB value (14.8 g/dL) and the second lowest RET% value (0.48%), which confirms a "*slowdown of erythropoiesis*". The OFF-score of 106.43 in sample 9 is also abnormally high. He further explained that "*Sample* [10] *shows a low (119 g/l) and abnormal (specificity 99.9%) value of HGB, a high but normal, 1.36% RET% value and in consequence a low and abnormal (specificity 99.9%) OFF-score value. Only a blood loss or blood withdrawal could explain such parameters. As no blood loss is mentioned on the information, the blood withdrawal is more plausible hypothesis.*" Professor Audran concluded that there are "*clues of doping in two circumstances*": August 2009 and July 2010.

- ***Professor Schumacher.*** Professor Schumacher stated that "*the first abnormal feature concerns the sequence of blood samples taken in 2009 during summer. The first sample is beyond population limits for female athletes, which triggers further follow up. In these follow up tests, the athlete shows a continued decrease in* [RET%] *and* [HGB] *irrespective of whether* [the sample collected on August 9, 2009] *is included in the profile or not. Such pattern is typically observed after the use and discontinuation of an erythropoietic stimulant, where red cell mass is increased and erythropoiesis is suppressed. In sample 1, erythropoiesis is still active but becomes clearly down regulated in samples* [...] *and* [2]. *I therefore suspect that the athlete had withdrawn an erythropoietic stimulant only a few days before sample 1.*" Professor Schumacher further noted that the Athlete's blood profile showed higher concentrations of HGB in the samples collected during the spring/summer months (*i.e.* Samples 1, 2, 7, 8, 9, and 12) compared to those collected during the autumn/winter months (*i.e.* Samples 3, 4, 5, 6, 10, and 11). A normal blood profile would show opposite values as, usually, HGB levels are higher during the autumn/winter months because the body increases the plasma volume to regulate the body temperature. The higher concentration of HGB during the summer months "*can be caused by an artificial increase in red cell mass during spring/summer, which corresponds to the competitive season for most athletes*".

17. Accordingly, the Expert Panel unanimously found two suspected periods of blood doping: one around the time of the 2009 World Championship in Berlin and the other around the time of the 2010 European Championship in Barcelona.

3. Second period of sample collection

18. Following the First Expert Opinions, the IAAF collected seven additional samples (14 - 20) from Ms. Domínguez Azpeleta. The HGB, RET%, and OFF-score values are shown in Table 2 below.

Table 2

No.	Date of Sample	HGB (g/dL)	RET%	Off-score
14.	June 21, 2012	14.10	0.70	90.80
15	June 27, 2012	13.50	0.65	86.60
16	July 5, 2012	14.40	1.08	81.60
17	August 3, 2012	13.90	1.20	73.30
18	September 25, 2012	12.40	1.42	52.50
19	December 20, 2012	14.00	0.59	93.90
20.	January 4, 2013	12.50	0.69	75.16

4. Further review by the Expert Panel

19. Ms. Domínguez Azpeleta's anonymous ABP (consisting of 20 samples) was re-submitted to the Expert Panel for further review. Each member issued an additional opinion (the "Second Expert Opinions") unanimously confirming the conclusions of the First Expert Opinions. The following reasoning was added.

- ***Professor d'Onofrio***. The Samples collected from January to August 2012, did not show any suspect variations in HGB or RET% similar to the variations "*observed in 2009 and 2010*", but Sample 18 showed low values of HGB and increased RET% (*i.e.* 1.42%, the highest value in the Athlete's ABP). Professor d'Onofrio concluded that "*this picture is compatible with blood withdrawal possibly aimed to autologous blood transfusion.*"

- ***Professor Audran***. According to Professor Audran's opinion, "[i]*f the profiles are calculated from the values of 2012 only, the probabilities of abnormalities of the sequence are 87% for HGB and 96% for OFF score. When the expected athlete normal range is calculated with a specificity of 99.9%, all the values of different parameters are normal.*"

- ***Professor Schumacher***. According to Professor Schumacher, "*the suspicious points outlined in my initial expertise remain unaltered: 1. The abnormal pattern observed in Summer 2009 during and after the IAAF World championships (samples 1-*[3]*), where a clear OFF scenario is visible that levels off after the competition. 2. The abnormal distribution of samples with the highest haemoglobin and the lowest Reticulocytes (see samples 1 and* [9] *obtained during periods of competition (summer) and the winter values being*

much lower in Haemoglobin. Interestingly, this phenomenon is not visible anymore in 2012, suggesting a change of behaviour of the athlete."

C. Ms. Domínguez Azpeleta's Explanation Of Her Abnormal ABP Profile

20. On March 11, 2013, the IAAF informed RFEA of the atypical variations in Ms. Domínguez Azpeleta's longitudinal blood parameters and provided Ms. Domínguez Azpeleta the opportunity to explain the detected abnormalities in accordance with Regulation 6.13 of the IAAF Anti-Doping Regulations. On March 20, 2013, the President of the RFEA requested an extension until April 5, 2013. The IAAF agreed.

1. Initial Explanation

21. On April 5, 2013, the IAAF received Ms. Domínguez Azpeleta's explanation, consisting of (i) a summary of the relevant IAAF Blood Testing Regulations; (ii) alleged personal circumstances claimed to have impacted her profile; (iii) pre-analytical and analytical aspects claimed to have impacted her profile; (iv) an expert opinion prepared by Dr. Douwe de Boer; and (v) various certificates, medical reports and other documents (the "Initial Explanation").

22. The IAAF submitted the Initial Explanation to the Expert Panel. Each member of the Expert Panel produced a response (the "Expert Responses to Initial Explanation").

23. The IAAF also submitted the Initial Explanation to Dr. Neil Robinson, a leading expert in analytical methods relating to the ABP, at the WADA-accredited Swiss Laboratory for Doping Analyses in Lausanne, Switzerland. Dr. Robinson was requested to comment on the various issues and explanations raised by Ms. Domínguez Azpeleta in relation to the chain of custody, storage, and sample transportation. Dr. Robinson refuted Ms. Domínguez Azpeleta's assertions in his report dated April 30, 2013 (the "Report of Dr. Robinson").[18]

2. Supplementary Explanation

24. On May 8, 2013, the RFEA submitted additional information regarding Ms. Domínguez Azpeleta's medical conditions (the "Supplementary Explanation"). The IAAF made an exception and submitted this late filing to the Expert Panel. Each member provided additional comments (the "Expert Responses to Supplementary Explanation").

D. Review By The Expert Panel Of Ms. Domínguez Azpeleta's Explanations

25. In the Initial Explanation and Supplementary Explanation, Ms. Domínguez Azpeleta sought to explain the abnormal values by a combination of factors including her medical

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18 *See* Section V.D.4 below.

condition, allegedly flawed process in sample collection, alleged breach of the chain of custody, flawed analysis of the samples, and her use of hypoxic training methods.

26. The Expert Panel rejected these explanations and concluded that it was highly likely that Ms. Domínguez Azpeleta used a Prohibited Substance or a Prohibited Method. The reasoning is addressed at length in Section V.D.4. below.

E. RFEA Disciplinary Proceedings

27. By letter dated July 8, 2013, the IAAF informed the RFEA of Ms. Domínguez Azpeleta's anti-doping rule violation ("ADRV"), her immediate provisional suspension, a four-year sanction to be imposed due to aggravating circumstances, and her right to request a hearing in accordance with the IAAF Rule 38. On July 18, 2013, the RFEA informed the IAAF that Ms. Domínguez Azpeleta was duly informed of the IAAF charges.

28. Ms. Domínguez Azpeleta denied the ADRV, and petitioned the Spanish Committee on Sports Discipline (the "CEDD") for a decision on the venue for a hearing.

29. By letter to RFEA dated December 20, 2013, the IAAF requested that a hearing date be set no later than January 6, 2014, and reminded the RFEA that a first instance decision would be subject to an appeal to the Court of Arbitration for Sport in Lausanne, Switzerland (the "CAS"), in accordance with the IAAF Rule 42.

30. The hearing took place on February 26, 2014 before the RFEA Sports Disciplinary Committee in Madrid (the "RFEA Tribunal"). On March 19, 2014, the RFEA Tribunal issued a decision that acquitted Ms. Domínguez Azpeleta and lifted her suspension (the "RFEA Decision"). The reasoning was twofold:

- ***Medical evidence***. The RFEA Tribunal relied on expert reports produced by Dr. Cristobel Belda Iniesta, Professor José María Peña Sánchez, and Dr. Rosa Vidal, and concluded that (i) Ms. Domínguez Azpeleta's ABP did not give grounds for a finding she had administered EPO or any variants thereof, and her results were not necessarily abnormal; (ii) the IAAF experts did not take into account Ms. Domínguez Azpeleta's alleged subclinical hypothyroidism; (iii) required protocols were not fulfilled for samples taken; (iv) samples were not correctly analysed; (v) the ABP and OFF-score models are methodologically and conceptually flawed; and (vi) the IAAF experts' conclusions were contradictory, erroneous, and biased.

- ***Burden of proof***. Under Spanish law, penalties must be based on incriminating evidence, and the burden of proof lies with the accuser, *i.e.* the IAAF must prove Ms. Domínguez Azpeleta's ADRV beyond all reasonable doubt. The RFEA Decision concluded that evidence presented by Ms. Domínguez Azpeleta raised

sufficient doubts and the IAAF failed to observe her right to the presumption of innocence.

31. On March 25, 2014, the RFEA sent an English translation of the RFEA Decision to the IAAF.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

A. Opening Of The Appeal Case By The IAAF

32. Pursuant to Article R47 of the Code of Sports-related Arbitration (the "Code"), the First Appellant filed its statement of appeal on April 9, 2014 (the "First Appellant's Statement of Appeal") at the CAS, against the RFEA Decision. The First Appellant requested that the procedure be conducted in English.

33. By letter dated April 10, 2014, the CAS Court Office invited the First Appellant to submit a proof of payment of the CAS Court Office fee.

34. On April 10, 2014, the First Appellant sought an order from the President of the CAS Appeals Division (the "Division President") that the Respondents provide (i) an English translation of the expert reports of Dr. Cristobel Belda Iniesta and Professor José María Peña Sánchez (the "Belda-Peña Report"), and Dr. Rosa Vidal (the "Vidal Report"); and (ii) any and all documents (accompanied by an English translation) relating to Ms. Domínguez Azpeleta's diagnosis and treatment for subclinical hypothyroidism, referenced in the RFEA Decision.

35. By letter dated April 14, 2014, the CAS Court Office confirmed the payment of the CAS Court Office fee of CHF 1,000, and invited the Respondents to express, within three days, any objections against the First Appellant's selection of English as the language of the present Appeal proceedings and inform whether they agreed with the First Appellant's documents production request.

36. On April 25, 2014, the Division President rejected the First Appellant's request for documents production, and noted it would be for the Panel to invite the Parties to supplement their submissions.

37. On April 25, 2014, the First Respondent's counsel, Mr. José Rodríguez García, provided his contact details for further correspondence.

38. On May 7, 2014, the CAS Court Office informed the Parties of the First Respondent's letter dated May 7, 2014 (though received on May 6, 2014) in Spanish. The CAS Court Office noted that the Respondents failed to object to the selection of English as the language of the proceedings within the prescribed time limit, and thus all submissions and exhibits should be accompanied by an English translation.

B. Opening Of The Appeal Case By WADA

39. On May 23, 2014, the Second Appellant filed its statement of appeal against the RFEA Decision (the "Second Appellant's Statement of Appeal"). The Second Appellant made the following three procedural requests: (1) determination of the CAS jurisdiction by the panel on a preliminary basis; (2) in case of an objection to (1), extension of the Second Appellant's time limit to file an appeal brief of 30 days upon the receipt of the appeal brief filed by the First Appellant, if the two cases were consolidated; and (3) in case of objections to (1) and (2), extension of the time limit to file an appeal brief of 60 days.

40. The CAS Court Office invited the Respondents to address the Second Appellant's procedural requests within three days, and suspended the Second Appellant's time limit until further notice. The Parties were also invited to give notice within three days as to whether they agreed with the consolidation of the present procedure with the case CAS 2014/A/3561 *IAAF v Real Federación Española de Atletismo & Ms Marta Domínguez Azpeleta*. The CAS Court Office further noted that the Second Appellant chose to proceed in English, and invited the Respondents to express any objections within three days. Concerning all issues, it would ultimately be for the President of the CAS Appeals Arbitration Division, or his Deputy, to decide.

C. Formation Of The Panel and Petitions For Challenge

1. Formation of the Panel

41. On April 9 and May 23, 2014, the First and Second Appellants respectively appointed Mr. Romano Subiotto QC as an arbitrator. By letters dated April 14 and May 28, 2014, the CAS Court Office invited the Respondents to jointly nominate an arbitrator from the list of CAS arbitrators. If the two cases at hand were consolidated, the Respondents would be requested to nominate one arbitrator for the consolidated procedure.

42. On June 26, 2014, the CAS Court Office informed that the Respondents failed to nominate an arbitrator. Pursuant to Article R53 of the Code, the Division President nominated Mr. Jacques Radoux, Attorney-at-law in Howald, Luxembourg, as arbitrator *in lieu* of the Respondents. The First Respondent submitted that its interpretation of the CAS Court Office letter of May 28, 2014 was to nominate an arbitrator following the decision on consolidation, and thus requested that it be allowed to nominate an arbitrator by July 4, 2014. The Appellants agreed.

43. On July 4, 2014, the First Respondent submitted that the CAS arbitration does not satisfy the guarantees of Article 6 of the European Convention of Human Rights ("ECHR"). The First Respondent thus requested (i) that it be permitted to select an arbitrator outside the CAS Arbitrators list; (ii) the President of the Panel be selected by a mutual agreement between the First Appellant and the First Respondent without being bound by the CAS Arbitrators list, failure of which the right of selection be granted to

any Swiss court; (iii) a public hearing; and (iv) proceedings in both English and Spanish.

44. On July 11, 2014, the CAS Court Office stated that the First Respondent failed to nominate an arbitrator by July 4, 2014, and that as a result the Division President would nominate one *in lieu* of the Respondents. The First Respondent's requests of July 4, 2014, were rejected as inadmissible.

45. By letter dated July 14, 2014, the First Respondent requested that the CAS Court Office inform whether the Parties received its letter of July 4, 2014, and who rendered the CAS decision communicated in its letter of July 11, 2014. The CAS Court Office responded that the letter of July 4, 2014, was communicated to all the Parties, and the procedural decision of July 11, 2014, was rendered by the CAS Court Office's legal counsel in accordance with the Code (*i.e.* where such procedural decisions are not reserved for the Panel or the President of the CAS Appeals Division).

46. On August 14, 2014, the CAS Court Office informed the Parties that Prof. Dr. Ulrich Haas accepted his appointment as the President of the Panel.

47. On August 20, 2014, the First Respondent challenged the appointment of Prof. Dr. Ulrich Haas on various grounds, including his long-standing relationship with WADA since the 2004 Athens Olympic Games. On September 1, 2014, the CAS Court Office informed the Parties that Prof. Dr. Ulrich Haas decided to recuse himself from these proceedings. Consequently, the Division President appointed Mr. Conny Jörneklint, Chief Judge in Kalmar, Sweden, as the President in these proceedings.

48. On September 8, 2014, the First Respondent inquired about the organization that brought Mr. Conny Jörneklint to the attention of ICAS and who nominated him as an arbitrator. In response, Mr. Conny Jörneklint noted his role as an arbitrator on the former IAAF Arbitration Panel (1999 to 2001) and his nomination to the CAS arbitrators list following the IAAF Panel's abolition. By letter dated September 17, 2014, the First Respondent repeated its request of September 8, 2014. The CAS Court Office reiterated that Mr. Conny Jörneklint addressed the First Respondent's request in his letter of September 10, 2014, *i.e.* he became a CAS member in October 2002 following the abolition of the IAAF arbitration panel, which occurred shortly after the CAS jurisdiction was recognized by the IAAF.[19]

49. On September 25, 2014, the CAS Court Office informed the Parties that the Panel appointed to decide the present case was constituted as follows:

President: Mr. Conny Jörneklint, Chief Judge in Kalmar, Sweden

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19 At that time, ICAS proposed that the members of the former IAAF Arbitration Panel become CAS arbitrators.

Arbitrators: Mr. Romano Subiotto QC, Solicitor-Advocate in Brussels, Belgium, and London, United Kingdom

Mr. Jacques Radoux, Attorney-at-law in Howald, Luxembourg

2. Petitions for Challenge

50. On October 2 and 10, 2014, respectively, the First Respondent challenged Mr. Radoux, Mr. Subiotto, and Mr. Jörneklint. The arbitrators and Appellants submitted their comments.

51. On October 13, 2014, the CAS Court Office invited the First Respondent to inform whether she maintained her challenges. Given the First Respondent's silence, the matter was put before the ICAS Board in accordance with Article R34 of the Code.

52. The ICAS Board dismissed the petitions for challenge of Mr. Jörneklint, Mr. Radoux, and Mr. Subiotto, on January 28, 2015 (the "ICAS Decision"). The reasoning was detailed in the ICAS Decision. In brief:

Mr. Jörneklint

53. The First Respondent challenged Mr. Jörneklint on two grounds: (i) the First Appellant proposed him to the CAS Arbitrators list; and (ii) the Second Appellant nominated him twice, and he has served as arbitrator in previous cases involving the Appellants.

54. The ICAS noted that Mr. Jörneklint was nominated to CAS by ICAS itself. In any event, an international federation is only entitled to propose an apt personality to be admitted to the CAS list of arbitrators, the designation of which is at the ICAS' full and free discretion. The challenge on the second ground was manifestly late.

Mr. Radoux

55. Mr. Radoux was challenged based on his links with the Luxembourg Tennis Federation and Luxembourg Olympic Committee: Davis Cup player and a captain for the Davis Cup team of Luxembourg and a tennis coach for Special Olympics Luxembourg and *LETZServ*.

56. ICAS found that neither the Luxembourg Tennis Federation nor the Luxembourg Olympic Committee are parties to the present proceedings, and the First Respondent failed to assert any objective criteria that could give rise to legitimate doubts about Mr. Radoux' independence.

Mr. Subiotto QC

57. The First Respondent challenged Mr. Subiotto on five grounds: (i) Mr. Subiotto previously worked for the IOC, FIFA, or the ITF and the decision on jurisdiction *in*

casu could impact these entities; (ii) Mr. Subiotto has links with FIFA President Joseph S. Blatter, a member of WADA together with two ICAS members, Mr. Pound and Mr. Baumann; (iii) the Division President appointed Mr. Subiotto as President of the Panel on 24 occasions between 2012 and 2014; (iv) Mr. Subiotto sat as arbitrator on two cases concerning the ABP; and (v) Mr. Subiotto has an interest in establishing relationships with sports organizations as potential clients.

58. The ICAS rejected each of these grounds. First, neither FIFA nor the IOC are parties to the present proceedings and the First Respondent failed to assert any objective factors beyond mere speculative assumptions. Second, the alleged links between Mr. Subiotto and Mr. Blatter (*e.g.* representation of the International Sports Licensing in mid-90s) lack even the slightest degree of objective element or reason. Third, the multiple appointments of Mr. Subiotto only show that he had always carried out his appointments *lege artis*, in true independence and is in any event irrelevant given that the Division President or his Deputy is not a party to the present proceedings. Fourth, Mr. Subiotto's involvement in cases dealing with ABP in fact supports his legitimacy in the present case. Finally, the alleged interest in winning mandates from sports organizations is merely a speculative assumption devoid of any objective substance. Indeed, being a distinguished lawyer and arbitrator can by no means alone provide sufficient grounds to cast doubt on his independence.

D. Consolidated Proceedings

59. On June 2, 2014, the First Respondent submitted that the CAS does not provide appropriate guarantees as required by Article 6 of the ECHR. The First Respondent agreed that the jurisdiction be determined on a preliminary basis, and would address the request for consolidation following the CAS's answer on its request for revocation of the Division President's decision of May 30, 2014.

60. On June 3, 2014, the Division President decided that the Second Appellant's time limit for filing an appeal brief remained suspended pending the Parties' agreement or the Division President's decision on the various procedural requests contained in the Second Appellant's Statement of Appeal. Accordingly, the decision on the consolidation request was also pending. The CAS Court Office also noted that the Division President's decisions are not subject to revocation and it would be for the Panel to address such issues, once constituted.

61. By letter dated June 17, 2014, the CAS Court Office invited the Parties to express whether they agree to consolidate the procedure in case CAS 2014/A/3561 *IAAF v Real Federación Española de Atletismo & Ms Marta Domínguez Azpeleta* with case CAS 2014/A/3614 *WADA v Ms Marta Domínguez Azpeleta & Real Federación Española de Atletismo*, within 2 days of the receipt of the letter, upon failure of which it would be for the President of the CAS Appeals Arbitration Division, or his Deputy, to decide. The Respondents' time limit for filing an answer was suspended until further notice.

The First Appellant agreed with the consolidation. On June 24, 2014, the Division President decided (pursuant to Article R52 of the Code) to consolidate the two cases at issue.

62. By letter dated June 24, 2014, the First Appellant was invited to express, within 3 days, whether it agreed with the Second Appellant's request that the issue of CAS jurisdiction be decided on a preliminary basis, given accord of the First Respondent. The CAS Court Office advised the Parties that a decision on this matter would be made by the Division President. On July 4, 2014, the First Appellant requested the First Respondent to submit a brief statement explaining its grounds for the jurisdictional objection, to allow the First Appellant to determine whether to consent or oppose the determination of jurisdiction as a preliminary matter. On July 11, 2014, the CAS Court Office noted that the First Appellant's comments of July 4, 2014 were filed late.

63. On July 11, 2014, the CAS Court Office invited the Appellants to file their comments within 5 days on the First Respondent's request of July 4, 2014, for the hearing to be made public and conducted in both English and Spanish. The Appellants disagreed with proceedings being held in Spanish (arguing that the First Respondent may avail herself of an interpreter) and proposed that the request for a public hearing be determined by the Panel.

64. By letter dated July 24, 2014, the CAS Court Office noted that the Parties failed to agree on the selection of Spanish and thus English remained the only language of the present proceedings, and the issues of bifurcation, preliminary assessment of jurisdiction, and need for a (public) hearing would be decided by the Panel.

65. On January 28, 2015, the Panel decided not to bifurcate the present proceedings and would instead address jurisdiction and merits in one award.

66. On January 30, 2015, the Panel requested that the First Respondent produce the Belda-Peña Report and documents relating to her alleged condition of subclinical hypothyroidism, and that the Second Respondent submit the Vidal Report. Thereafter, the Appellants would be granted a set time limit to provide an English translation of these documents, following which the Parties could comment on it.

67. On February 4, 2015 – responding to the Panel's request to produce the Belda-Peña Report – the First Respondent reiterated that such production is prohibited by the Spanish Injunction.[20] The First Respondent also requested that the Second Appellant provide the ABP software.

68. On February 5, 2015, the Panel insisted that the Parties comply with its orders and urged the Respondents to produce documents requested on January 30, 2015. The Panel

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20 As defined in Section III.E. below.

further requested that the First Respondent specify the relevance of the production of the ABP software to the case at hand, in accordance with Article R44.3 of the Code.

69. On February 12, 2015, the Panel set a final deadline of February 16, 2015, for the Respondents to produce the documents requested in its letter of January 30, 2015.

70. On February 16, 2015, the First Respondent informed the Parties that its experts were updating the Belda-Peña Report and that it would submit it in due course. By letter dated February 18, 2015, the CAS Court Office informed the Parties that the Panel would not accept "updated versions" at that stage (allowing the First Respondent ample opportunity to submit additional arguments in her answer) and set a final deadline of February 19, 2015 for her to submit the version of the Belda-Peña Report as used in the RFEA proceedings.

71. On February 21, 2015, the First Respondent provided the Belda-Peña Report subject to a number of conditions, namely that: (i) the report be provided exclusively to the First Appellant; (ii) the report was provided against the will of the First Respondent and only by a command of the Panel, and thus could not be construed as the First Respondent's admission of the use of the report's data; and (iii) the First Respondent did not authorize the use of her haematological data pending the injunction of the Spanish courts. The CAS Court Office invited the First Respondent to submit argument(s) as to why the confidentiality of the present proceedings (as per Article R59 of the Code) were not sufficient to permit provision of the Belda-Peña Report to the Second Appellant and Second Respondent.

72. By letter dated February 27, 2015, the First Respondent submitted that it refused to provide the Belda-Peña Report to the Second Appellant and the Second Respondent, because it contained the haematological data of the First Respondent, the use of which was prohibited by the Spanish courts.

73. By separate letters dated March 16, 2015, the Appellants noted that the Second Respondent had failed to produce the Vidal Report. The First Appellant requested its immediate production or a declaration that the Respondents be precluded from relying on it. The Second Appellant requested an opportunity to respond to the Vidal Report prior to an oral hearing, should the Respondents rely on it.

74. On April 16, 2015, the Second Appellant filed its appeal brief (the "Second Appellant's Appeal Brief"), in accordance with Article R51 of the Code

75. By letter dated April 22, 2015, the CAS Court Office informed the Respondents that the Panel had requested the production of the Vidal Report within 5 days, upon failure of which the Respondents would be precluded from relying on it. On April 27, 2015, the Second Respondent submitted a Spanish version of the Vidal Report, and noted it was working on its translation. By letter dated April 28, 2015, the CAS Court Office

requested that the Appellants provide an English translation of the Vidal Report by May 11, 2015, following which the Parties could comment on it.

76. On April 30, 2015, the First Respondent requested that the Appellants provide the software used to calculate Ms Domínguez Azpeleta's haematological values, and an extension to submit its answer brief 20 days after receipt of the software.

77. On May 1, 2015, the Second Appellant requested that the Panel extend the deadline for the submission of the English translation of the Vidal Report until May 22, 2015 because the initial deadline of May 11, 2015 was not feasible and would put the Second Appellant under significant time pressure.

78. By letter dated May 5, 2015, the CAS Court Office reminded the First Respondent of its letter dated February 5, 2015 whereby the Panel requested that she specify the relevance of her request. The Panel deemed it insufficient for meeting the criterion of relevance as per Article R44.3 of the Code to merely call the programming and evaluation of the software into question without providing any slightest factual evidence or indication of the software's mal-programming or mal-calculation. Accordingly, unless the First Respondent were to refine its request accordingly prior to the expiry of her time limit to file the answer brief, the request would remain dismissed. In turn, unless the Panel were to subsequently order the production of the software, the First Respondent's request for extension were obsolete. The CAS Court Office also informed the Appellants that the Panel granted their request for extension to translate the Vidal Report until May 22, 2015.

79. By letter dated May 6, 2015, the First Respondent submitted that her accusation was based on individual thresholds calculated by the ABP software which were not open source and for which the exact code used to determine the limits and markers was not known to her. Hence, she was not able to verify the reliability of the calculations performed by the ABP software. Accordingly, the First Respondent requested the exact code to determine the limits and markers used by the ABP software.

80. By letter dated May 7, 2015, the Second Respondent informed the Parties of the decision of the High Court of Justice of Madrid dated May 5, 2015 declaring the RFEA Decision an administrative act under Spanish law.

81. On May 7, 2015, the Panel took due account of the First Respondent's clarification as regards the relevance of her request related to the ABP software. The Appellants were requested within 4 days to comment upon and provide the CAS Court Office with the following information: (i) the date of the software's introduction, (ii) a list of entities that had checked and certified the software, and (iii) a summary description of the methodology of said checks and certification, including how many times it has been checked and certified since its creation. The Panel would decide on the First Respondent's request for the Software's production thereafter.

82. On May 8, 2015, the Second Appellant requested an extension of the deadline to respond to the questions related to the ABP software until May 15, 2015 due to the unavailability of its main ABP expert, Dr. Sottas. The First Appellant agreed with this request. The Panel partially granted the request until May 14, 2015 and suspended Ms Domínguez Azpeleta's time limit to file her answer brief.

83. On May 13, 2015, the Second Appellant submitted a statement from Dr. Sottas related to the ABP software.

84. On May 19, 2015, the First Respondent noted that it was not in a position to analyse the ABF software, and requested a deadline to file an answer by June 1, 2015.

85. On May 21, 2015, the CAS Court Office noted that both Respondents received the appeal brief on April 21, 2015 and thus had until May 11, 2015 to file their answers. The Second Respondent failed to submit an answer within the prescribed time limit. On May 11, 2015, the First Respondent's time limit to file an answer was suspended pending the response of the Appellants' statements on the ABP software. On May 18, 2015, the suspension of the time limit was lifted with immediate effect, to thus to expire on May 18, 2015. Accordingly, the First Respondent's request for an extension dated May 19, 2015 was deemed not timely. The CAS Court Office therefore requested the First Respondent to provide comments on this issue no later than 10:00 am on May 26, 2015; the Appellants were also invited to express whether they agreed with the extension despite the First Respondent's late request.

86. On May 21, 2015, the First Appellant informed that its expert would not be able to provide comments on the Vidal Report by May 22, 2015 and thus requested a short extension of one working day until May 26, 2015. The request was granted by the Panel.

87. On May 22, 2015, the Second Appellant provided the English translation of the Vidal Report, and a report of Dr. Sottas dated May 19, 2015. On May 26, 2015, the First Appellant provided a response to the Vidal Report prepared by Prof. Schumacher. Subsequently, and with reference to its letter of April 28, 2015, the CAS Court Office invited the Respondents to file their replies, strictly limited to the Vidal, Sottas, and Schumacher reports by June 9, 2015.

88. On May 25, 2015, the First Respondent requested an extension of her time limit to file the answer until June 1, 2015, in order to adequately respond to the Second Appellant's submission titled "*Athlete's Passport Haematological Module Interpretation Technical Document*". Following the Appellants' consent, the Panel granted the extension.

89. On June 1, 2015, the First Respondent requested that it be permitted to submit the answer in Spanish that day and in English the following day, due translation issues. The Panel extended the deadline until June 2, 2015.

90. The First Respondent filed her answer to the First Appellant's Appeal Brief and Second Appellant's Appeal Brief on June 2, 2014 (the "Answer"), in accordance with Article R55 of the Code.[21]

91. By letter dated June 10, 2015, the CAS Court Office informed the First Respondent that it had not submitted comments to the Vidal Report by the prescribed time limit of June 9, 2015 and thus, unless consented by the other Parties or ordered by the Panel on the basis of exceptional circumstances, the First Respondent would not be allowed to supplement her submission in this regard.

92. On June 11, 2015, the First Appellant noted that it had not received the Answer, and requested a proof of a timely filing by the First Respondent. The First Appellant also reserved the right to supplement its submissions based on the content of the Answer and its exhibits. By letter dated June 12, 2015, the CAS Court Office confirmed a timely filing of the Answer and noted that the Panel would not allow additional submissions prior to the hearing but may allow post-hearing submissions if deemed necessary. In addition, the CAS Court Office reiterated that the Panel may decline to consider exhibits to the Answer that were not accompanied by an English translation. Finally, the Parties were invited to express within three days whether they agreed with the First Respondent's proposal that the hearing be made public.

93. By letter dated June 12, 2015, the CAS Court Office enclosed for the Parties' attention the exhibits to the Answer.

94. By letters dated June 15, 2015, the Appellants disagreed with the request for a public hearing, arguing insufficient time to establish the terms and conditions related to the hearing.

95. By letter dated June 18, 2015, the CAS Court Office circulated the Order of Procedure for the Parties' signature within four days.

96. On June 18, 2015, the Second Appellant noted the availability of its experts to the Panel and requested that the examination of the experts be done via "hot-tubbing".[22] On June 19, 2015, the First Respondent informed the Panel that its experts would only be available on June 25, 2015. In addition, the First Respondent submitted that Dr. Sottas works for WADA and thus could not be considered an "independent expert". The First Respondent also requested that its experts be heard last. Finally, the First Respondent disagreed with the proposal for a hot-tubbing discussion, contending that the experts'

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21 The Second Respondent did not file an answer.

22 Hot-tubbing enhances the Panel's findings on highly complex and scientific topics and the efficiency of the hearing. Hot-tubbing requires active participation of the Panel, to 'direct traffic' on the questioning of experts so that the process remains structured and orderly. Each counsel may put questions to the adversary's experts on the various topics involved.

comments would require simultaneous translation, because her experts would present their opinions in Spanish.

97. On June 22, 2015, the Second Appellant returned an executed Order of Procedure. The Second Appellant informed the CAS Court Office that it was not aware of the Second Respondent's jurisdictional objection and thus amended the executed Order of Procedure accordingly. One June 22, 2015, the First Appellant returned an executed Order of Procedure with certain qualifications. By letter dated June 22, 2015, the CAS Court office took due account of the Appellants' qualifications contained in their executed Orders of Procedure.

98. On June 22, 2015, the CAS Court Office informed the Parties that the Panel had decided to conduct the examination of their respective experts via hot-tubbing, pursuant to its discretionary powers (Articles R57 and R44.2 of the Code) and with due regard to the fact that the Parties were summoned to appear at the hearing two months ago and the First Respondent's experts were permitted to appear via video-link. A tentative Oral Hearing schedule was enclosed. The Parties were further advised that the Panel would address the First Respondent's remarks concerning the independence of Dr. Sottas at the Oral Hearing or in the award.[23] The Parties were also advised to arrange for the attendance of an independent non-interested interpreter if needed.

99. On June 25, 2015, the First Respondent signed the Order of Procedure subject to a reservation that the CAS had not complied with Article 6 ECHR.

E. Spanish Injunction

1. Summary of the proceedings and arguments

100. On September 16, 2013, Ms. Domínguez Azpeleta filed a complaint in the First Instance Court No. 7 of Palencia, Spain (*Juzgado de Primera Instancia No 7 de Palencia*) against the IAAF, and claimed that the testing and subsequent storage of her blood data infringed her rights to privacy and data protection, and that the IAAF should thus be ordered to erase the data. On June 18, 2014, Ms. Domínguez Azpeleta requested an interim measure to prevent the IAAF from using her blood data pending the resolution of the main proceedings. The request for interim measures was granted by the First Instance Court No. 7 of Palencia on August 28, 2014, and came into force on September 22, 2014 (the "Spanish Injunction"). By letter dated September 25, 2014, the First Respondent requested that the present proceedings be suspended until the

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[23] At the outset, the Panel emphasizes that the First Respondent did not provide any objective information or evidence that would put the independence of Dr. Sottas at doubt, beyond the mere fact he works for WADA. The Panel notes Dr. Sottas is a renowned expert and the principal author of the Adaptive Model who has appeared as an expert before the CAS in other doping cases. Hence, the Panel finds that the First Respondent did not provide sufficient information that would give rise to legitimate doubts about Dr. Sottas' independence.

legality of the use of First Respondent's blood data was determined by the Spanish courts.[24]

101. On September 25, 2014, the CAS Court Office acknowledged the receipt of the First Respondent's letter containing the Spanish Injunction, filed with a translation of the operative part only. The First Respondent was reminded that all submissions and correspondence in the present proceedings needed to be accompanied by a complete English translation, upon failure of which the Panel may decline to admit them.

102. On February 4, 2015 – responding to the Panel's request to produce the Belda-Peña Report – the First Respondent reiterated that such production is prohibited by the Spanish Injunction.

2. The analysis and findings of the Panel

103. The Panel recalls that "[a]*ccording to constant CAS jurisprudence, as an independent forum the Panel is not bound by the decisions of another jurisdictional body. With regard to its full power to review the facts and the law,* "[the] *Panel is not bound by decisions taken by any other jurisdictional body*". *Further, as regards specifically the admissibility of evidence, the Panel* "[is] *not bound by the rules of evidence and may inform* [itself] *in such a manner as the arbitrators think fit*".[25]

104. The Panel also recalls the CAS award in the *Caruso* case, which confirmed that the Panel "*is not bound by the orders of a Spanish judge* [...], *it is completely unclear what the consequences are of any – alleged – failure to comply with the judicial order*", [and] "[t]*he 'full power' granted the deciding Panel under the CAS Code precludes any notion that the Panel must abide by restrictions on evidence which may or may not have been adduced in previous proceedings before a national or international disciplinary tribunal.*"[26]

105. In its Order of December 22, 2009, in CAS cases 2007/A/1396 *WADA v. RFEC & Alejandro Valverde* and 2007/A/1402 *UCI v. RFEC & Alejandro Valverde*, the Panel took a similar position, stating that *"this Panel does not regard the Serrano-orders prohibitive for the production and use of the Operation Puerto documents in this arbitration".*[27] Finally, in case CAS 2009/A/1879, *Alejandro Valverde Belmonte v*

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24 The first instance ruling on interim measures was confirmed on appeal on February 13, 2015.

25 CAS 2009/A/1879 *Alejandro Valverde Belmonte v. Comitato Olimpico Nazionale Italiano*, paragraphs 123 – 124. *See also* CAS 2001/A/354, *Irish Hockey Association (IHA)/Lithuanian Hockey Foundation (LHF) and International Hockey Federation (LHF)*, and CAS 2001/A/355, *Lithuanian Hockey Federation (LHS)/International Hockey Federation (IHF)*, paragraph 6; and CAS 2002/A/399, *P./Federation Internationale de Natation (FINA)*, paragraph 13.

26 CAS *2008/A/1528 UCI v/ Giampaolo Caruso & Italian Cycling Federation CAS 2008/A/1546 CONI v/ Giampaolo Caruso & Italian Cycling Federation*, paragraph 9.3.

27 Paragraph 47.

Comitato Olimpico Nazionale Italiano, the Panel concluded that "*its discretionary power concerning the (non)-admissibility of evidence is not limited by the Order of Revocation or by the Decision regarding the Order of Revocation*".[28]

106. Accordingly, the Panel concludes that, notwithstanding the Spanish Injunction, it retains full discretion concerning the admissibility of any evidence.[29]

107. For completeness, the Panel makes the following observations. First, the Panel notes that Ms. Domínguez Azpeleta – a senior international athlete well aware of the applicable rules and regulations governing her sport – consented to the collection, storage, and use of her blood samples when executing the respective Doping Control Forms ("DCFs"). Second, the Panel does not rule on the applicability of the ECHR, which contains, *inter alia*, the right to protection of one's privacy.[30] However, even if the ECHR were to apply to the issue of admissibility in the present case, the Panel would not hesitate to conclude that the preservation of the Athlete's biological samples by the IAAF for the purposes of the ABP (*i.e.* a battle against doping in sport) is justified by the necessity of protecting health and morals, as set out in the Article 8(2) of the ECHR.[31]

108. Thus, the Panel finds that Ms. Domínguez Azpeleta's blood data are an element of proof admissible for the purposes of the present proceedings.

F. The Oral Hearing Dates

109. On January 28, 2015, the Parties were informed that the Panel had decided to hold a hearing in this case.

110. By letter dated March 19, 2015, the CAS Court Office invited the Parties to inform it whether they were available for a two-day hearing on June 10-11 or 24-25, 2015. By letter dated March 26, 2015, the First Respondent noted she needed to know the total number of experts/witnesses prior to the setting of a hearing date. Nonetheless, the First Respondent indicated June 24 and 25, 2015 as possible dates. The Appellants in

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28 Paragraph 125.

29 *See also* CAS letter dated February 5, 2015, informing the Parties of the Panel's finding that it "*is not bound by any alleged prohibition of use of Ms. Domínguez's blood data and dismisses Ms. Domínguez's request not to use such data in the present proceedings*".

30 As explained in the CAS Court Office letter dated February 5, 2015, the correspondence between the Parties in the present arbitral proceedings is confidential, pursuant to Article R59(6) of the Code. Moreover, to the extent the Parties were to disagree on the confidentiality of this Award (as per Article R59(6) of the Code), the CAS respects reasoned and justified requests for redaction of personal data when publishing awards.

31 *See also* CAS 2009/A/1879, *Alejandro Valverde Belmonte v Comitato Olimpico Nazionale Italiano*, paragraph 146.

principle confirmed their availability during the suggested dates. On April 22, 2015, the First Appellant unreservedly confirmed its availability on June 24-25, 2015.

111. By letter dated April 28, 2015, the CAS Court Office confirmed June 24-25, 2015 as the Oral Hearing dates and invited the Parties to submit a list of attendees. By letters dated June 1 and 2, 2015, the Appellants submitted their lists of attendees. Following a reminder from the CAS Court Office, the First Respondent submitted its own respective list on June 15, 2015.

G. The Oral Hearing And Post-Hearing Submissions

112. The Oral Hearing took place on June 24-25, 2015, at the CAS in Lausanne, Switzerland. The following people attended:[32]

Mr. Conny Jörneklint, President of the Panel;

Mr. Romano Subiotto, QC, Appellants-appointed arbitrator;

Mr. Jacques Radoux, Arbitrator appointed *in lieu* of the Respondents;

Mr. Vladimir Novak, *Ad-hoc* clerk;

Mr. Christopher Singer, Counsel to CAS;

Mr. Eugene Gulland, First Appellant's Counsel;

Mr. Habib Cissé, First Appellant's Counsel;

Ms. Emilie Jones, First Appellant's Counsel;

Mr. Colin Warriner, First Appellant's Counsel;

Mr. Jean-Pierre Morand, Second Appellant's Counsel;

Mr. Ross Wenzel, Second Appellant's Counsel;

Mr. José Rodríguez García, First Respondent's Counsel;

Mrs. Salomé Hangartner, First Respondent's Interpreter;

Mr. Olaf Yorck Schumacher, Expert Witness;

Mr. Pierre-Edouard Sottas; Expert Witness;

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32 The Second Respondent did not participate at the Oral Hearing.

Mr. François Pralong, Expert Witness;

Mr. Cristobel Belda Iniesta, Expert Witness (attended via video-link);

Mr. José María Peña Sánchez, Expert Witness (attended via video-link).

113. At the Oral Hearing, the Parties agreed to the following schedule of expert witness examination, in order to accommodate the Parties' experts' availability and thus allow for an effective examination by way of conferencing, *i.e.* 'hot-tubbing'. The Parties also agreed that the First Respondent's experts were entitled to a final statement on any topic should they wish so.

- Non-pathological factors and the alleged ADRV
  - Prof. Schumacher and Dr. Sottas (the Appellants)
  - Prof. Belda and Prof. Peña (the First Respondent)
- Pathological and physiological conditions and the alleged ADRV
  - Prof. Schumacher and Dr. Sottas (the Appellants)
  - Prof. Belda and Prof. Peña (the First Respondent)
- Subclinical hypothyroidism and the alleged ADRV
  - Prof. Pralong and Prof. Schumacher (the Appellants)
  - Prof. Belda and Prof. Peña (the First Respondent)

114. The arguments raised by the Parties during the Oral Hearing will, where relevant, be discussed in the corresponding sections on the merits below. At the end of the Oral Hearing, the parties were asked whether they had any objection to the way the hearing was conducted and whether their right to be heard had been respected. No objection was raised in this regard by any party, while Ms. Domínguez Azpeleta reiterated her request that the production of the data on which the ABP Model was based would be ordered and submitted that a public hearing would have been appreciated.

115. Following the Oral Hearing, the Panel agreed to accept post-hearing statements from each Party limited to the issue of the CAS's jurisdiction (the "Post-Hearing Briefs"), to be submitted by the First Respondent by July 1, 2015, and the Appellants within 5 working days from receipt thereafter.

116. On July 1, 2015, the First Respondent submitted her Post-Hearing Brief. The Appellants received it on July 5 and made their submissions on July 9 and 13, 2015 respectively.

117. On July 22, 2015, the First Respondent submitted, via e-mail, an answer to the Appellants' Post-Hearing Briefs. On July 22, 2015, the Second Appellant responded via e-mail that the First Respondent's answer contained new arguments which are in any event beside the point and beyond the scope of permitted rebuttal.[33]

118. On July 23, 2015, the CAS Court Office advised the Parties that all communications be sent by formal letter (*i.e.* not e-mail).

119. On July 27, 2015, the CAS Court Office provided the Parties with an audio recording of the Oral Hearing. The CAS Court Office further noted that the post-hearing submissions were concluded and the Parties were requested to refrain from any further submissions unless so ordered by the Panel.

H. The Request for Confidentiality of the Award

120. On 11 November 2015, Ms. Domínguez Azpeleta requested that the award should remain confidential, pursuant to Article R59 of the Code.

121. On the same date, the CAS Court Office notified Ms. Domínguez Azpeleta's request to the other parties which were requested to inform the CAS Court Office whether they would agree to such request.

122. On the same date, the IAAF informed the CAS Court Office that it does not agree to Ms. Domínguez Azpeleta's request and that the award should be made public.

123. On 12 November 2015, the CAS Court Office notified the IAAF's letter of 11 November 2015, noted that there was no agreement by all parties to keep the award confidential and that the award shall therefore be made public, pursuant to Article R59 of the Code, and advised that the parties may submit a motivated request for the redaction of sensible information in the public version of the award.

124. On 16 November 2015, Ms. Domínguez Azpeleta submitted that it is not mandatory that the award be published and requested that, should the award be published, any health data of her contained in the award shall remain confidential.

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[33] The Panel decided to reject these additional post-hearing submissions on the following grounds. First, the Panel notes the submissions were made via e-mail and not by formal letter. Second, the Panel wishes to emphasise that it neither requested nor authorized additional submissions following the Post-Hearing Briefs. The Panel allowed the Post-Hearing Briefs precisely to afford Ms. Domínguez Azpeleta and her counsel the opportunity to respond to the jurisdictional rebuttal – presented at the Oral Hearing – in writing. Further, it is noteworthy that the Appellants merely summarized arguments that were already presented during the Oral Hearing. In these circumstances, and taking into account the protracted nature of the present proceedings, the Panel did not see a legitimate reason to allow additional submissions concerning the jurisdictional issue.

125. On the same date, the CAS Court Office notified Ms. Domínguez Azpeleta's letter to the parties advising that it would be for the CAS Secretariat to finally decide how the award should be published and that the parties shall be informed of such decision prior to the publication of the award.

126. On the same date, WADA informed the CAS Court Office that it also objected to keeping the award confidential.

IV. THE PARTIES' REQUESTS FOR RELIEF

A. The IAAF's Request for Relief

127. In its appeal brief, the IAAF submitted the following request for relief:

In all the circumstances, the IAAF respectfully seeks the CAS Panel to rule as follows:

(i) CAS has jurisdiction to decide on the subject matter of this appeal.

(ii) The IAAF's appeal is admissible.

(iii) The decision of the RFEA Sports Disciplinary Committee (the RFEA Tribunal) dated 19 March 2014 be set aside.

(iv) The Athlete be found guilty of an anti-doping rule violation in accordance with IAAF Rule 32.2(b).

(v) A four-year Period of Ineligibility be imposed upon the Athlete for a first anti-doping rule violation where aggravating circumstances are present in accordance with IAAF Rules 40.2 and 40.6. The Period of Ineligibility should commence on the date of the hearing before CAS in accordance with Rule 40.10.

(vi) All competitive results obtained by the Athlete from the date that the first positive sample was collected, 5 August 2009, through to the commencement of her provisional suspension, 8 July 2013, shall be disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money, in accordance with IAAF Rule 40.8).

(vii) The IAAF be granted its costs in the appeal (including all CAS costs), such costs to be assessed.

B. WADA's Request for Relief

128. In its appeal brief, WADA submitted the following request for relief:

1. *The Appeal of WADA is admissible.*

2. *The decision rendered by the Committee on Sports Discipline of the RFEA in the matter of Ms Marta Dominguez Azpeleta dated 19 March 2014 is set aside.*

3. *Ms Marta Dominguez Azpeleta is found to have committed an anti-doping rule violation*

4. *Ms Marta Dominguez Azpeleta is sanctioned with a period of ineligibility of between two and four years in accordance with Rules 40.2 to 40. 6 of the IAAF ADR, such period of ineligibility to commence on the date on which the CAS award enters into force. Any period of ineligibility, whether imposed on, or voluntarily accepted by, Ms Marta Dominguez Azpeleta before the entry into force of such award, shall be credited against the total period of ineligibility to be served (Rule 40.10 of the IAAF ADR).*

5. *All competitive individual results obtained by Ms Marta Dominguez Azpeleta from the date of the commission of her anti-doping rule violation through the commencement of the applicable period of ineligibility shall be annulled, with all resulting consequences (Rule 40.8 of the IAAF ADR).*

6. *WADA is granted an award for costs.*

C. Ms Domínguez Azpeleta's Request for relief

129. In her answer, Ms Domínguez Azpeleta submitted the following primary request for relief:

"We request that the Court of Arbitration for Sport decline jurisdiction to hear the appeal by the IAAF and WADA against the decision of the Spanish Royal Athletics Federation on 19 March 2014."

Ms Domínguez Azpeleta alternatively requested:

"[...] the Panel confirm the decision of the Spanish Royal Athletics Federation of 19 March 2014, and to rule that WADA and IAAF should contribute to the expenses incurred by Ms Dominguez in her defence."

D. The RFEA's Request for Relief

130. As shown above, the RFEA did not filed any answer or otherwise submitted any request for relief.

V. JURISDICTION, APPLICABLE LAW AND ADMISSIBILITY

A. Jurisdiction

1. Jurisdictional objections

a. The Appellants' arguments

131. The First Appellant argued that the jurisdiction of CAS derives from IAAF Rule 42 and Article R47 of the Code. Pursuant to IAAF Rule 42.20, the CAS Panel is entitled to hear cases *de novo* on appeal and may substitute its own decision for the decision of the relevant tribunal of the IAAF Member, "*where it considers the decision of the relevant tribunal of the Member to be erroneous or procedurally unsound.*"

132. Further, IAAF Rule 42.1 states that "*unless specifically stated otherwise, all decisions made under these Anti-Doping Rules may be appealed in accordance with the provisions set out below.*" The IAAF Rule 42.2, concerning Appeals against decisions regarding anti-doping rule violations or consequences, contains a non-exhaustive list of decisions that may be appealed under the IAAF Rules, including a decision "*that no anti-doping rule violation was committed and any other decision regarding anti-doping rule violations or consequences that the IAAF considers to be erroneous or procedurally unsound*".

133. According to IAAF Rule 42.3, "*in cases involving International-Level Athletes or their Athlete Support Personnel, the first instance decision of the relevant body of the Member shall not be subject to further review or appeal at national level and shall be appealed only to CAS in accordance with the provisions set out below.*" The IAAF Rule 42.5 entitles IAAF to appeal in any case involving an International-Level Athlete.

134. The First Appellant submitted that it was not contested that Ms. Domínguez Azpeleta was affiliated to the RFEA, which had published the IAAF Rules in Spanish, that she was an International-Level athlete designated on the IAAF Registered Testing Pool and that the RFEA Decision was a first instance decision of a Member of the IAAF. It follows, in the First Appellant's view, that CAS has exclusive jurisdiction to decide on the present dispute in accordance with Article R47 of the Code and the IAAF Rules 42.3 and 42.5.

135. In addition, the First Appellant contended, when Ms. Domínguez Azpeleta signed, in first place, the IAAF DCFs") containing the wording, "*I accept the competence of the Court of Arbitration for Sport in Lausanne, Switzerland, to resolve definitively any such dispute, controversy or claim excluding all recourse to ordinary courts*" and, in second place, the International Doping Tests & Management's (the "IDTM") DCFs containing the wording "*I accept that all disputes howsoever arising from this doping control shall be resolved in accordance with the doping control rules of the organization authorising the test*" (where in each case the IAAF authorised the test), and in respect of the samples

collected on 21 June 2012 and 25 September 2009 the wording "*with any charges and/or other disputes resolved exclusively* [...] *where applicable by the Court of Arbitration of Sport in Lausanne, Switzerland*", she expressly accepted that CAS had exclusive jurisdiction to hear the present appeal. Furthermore, by virtue of competing in the London 2012 Olympic Games, Ms. Domínguez Azpeleta also accepted that CAS had jurisdiction in respect of cases arising from Sample 17, collected 3 August 2012, during those Olympic Games.

136. Finally, at the Oral Hearing, IAAF petitioned that Ms. Domínguez Azpeleta, in her function as the Vice-President of RFEA, could not have ignored the rules applicable to International-Level Athletes.

137. In its Post-Hearing submission, the First Appellant argued that the First Respondent raised no legally adequate objection to the CAS's jurisdiction. The argument, brought forward by the First Respondent, that she "*did not understand the waiver of fundamental rights contained in the doping control forms*" in which she explicitly accepted the IAAF Rules and CAS jurisdiction should be rejected on the principle, embodied in the IAAF Rule 32.2, that every athlete is personally responsible for being familiar with and abiding by the IAAF Rules and Regulations. Beyond that, the First Respondent's argument was neither credible nor supported by any evidence, as she was a leading international athlete of considerable experience – she had been competing in IAAF events for nearly 20 years before the events at issue. In addition, in the period 2009-2010, she served as a Vice-President of the RFEA, a body whose own rules – which are in the Spanish language – incorporate the IAAF Rules. Moreover, she is currently a member of the Spanish Senate. The assertion that Ms. Domínguez Azpeleta could neither know nor understand the consequences of accepting the IAAF Rules and CAS jurisdiction was therefore, in the First Appellant's view, unworthy of belief.

138. Regarding the First Respondent's submission that she was not able to understand the DCFs forms because she did not understand English or French, the First Appellant observed that on the form dated August 3, 2012, the First Respondent answered a question in English as follows: "*I don't want to answer question in Box 31.*" Nothing in the record suggested that Ms. Domínguez Azpeleta ever indicated during her 20 years of competition any inability to understand DCFs or the IAAF Rules.

139. The Second Appellant claimed that Ms. Domínguez Azpeleta is an international–level athlete affiliated to RFEA, which is a member of the IAAF. Pursuant to the anti-doping violation charge filed by the IAAF, Ms. Domínguez Azpeleta was heard, on the basis of IAAF Rule 38, by the RFEA Tribunal.

140. The Second Appellant maintained that, as the jurisdiction of the RFEA Tribunal derived from IAAF Rule 38, the IAAF Rules were applicable to this present procedure. Following the IAAF Rule 42.3, CAS is exclusively competent to hear an appeal against the decision given by the RFEA Tribunal in the present matter and pursuant to Rule

42.5 (f), WADA has a right to appeal to CAS in matters involving international-level athletes. At the Oral Hearing and in its Post-Hearing Brief, the Second Appellant submitted that the First Respondent's jurisdictional objections were meritless when considered within the proper context of Chapter 12 of the Swiss Private International Law Act (the "PILA").

141. The Second Appellant argued that the Swiss Federal Tribunal adopted a liberal approach to the validity of arbitration agreements in a sports context, in particular as regards the issue of consent.[34] The IAAF Rules contain a clear arbitration agreement in favour of the CAS and Ms. Domínguez Azpeleta had moreover explicitly agreed to the CAS jurisdiction when executing the IAAF's DCFs. Further, the Second Appellant contested Ms. Domínguez Azpeleta's reliance on the *Cañas*[35] award: the Swiss Federal Tribunal made clear, *obiter*, that it accepted the notion of "forced" consent in sports arbitrations, with a view of facilitating specialized and expeditious resolution of sports disputes, because there was a recourse to the Swiss Federal Tribunal.

142. The Second Appellant submitted that the issue of arbitrability is governed by the *lex arbitri, i.e.* Article 177 of PILA. Article 177(1) of PILA requires that the dispute involves a financial interest, a condition clearly met in the present case. The Second Appellant further argued that an exclusive jurisdiction of a state court conferred by a foreign law was potentially relevant if it would infringe public policy not to respect such a provision. However, to the best of the Second Appellant's knowledge, the Swiss Federal Tribunal had not denied the arbitrability of a dispute based on a substantive public policy. Moreover, the Second Appellant argued, it would be far-fetched to hold that public policy would be infringed if CAS were to determine the present dispute, in particular because Spain is a signatory of the UNESCO Convention Against Doping in Sport of October 19, 2005, and has thus committed to (i) respect the principles of the WADC; (ii) support the WADA in its mission to fight doping; and (iii) recognize sanctions at the international level.

143. The Second Appellant disagreed that the doping sanctions are criminal in nature, and instead referred to CAS Panels which held that "*disciplinary sanctions imposed by sports associations are subject to civil law and must be clearly distinguished from criminal penalties*".[36]

144. The Second Appellant further refuted the First Respondent's arguments based on an infringement of Article 6 of the ECHR and by way of an alleged abuse of a dominant position, submitting that the CAS is an independent and impartial body and the present proceedings were conducted in a fair manner.

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34 *See* Judgment of the Swiss Federal tribunal dated January 20, 2010, 4A_548/2009.

35 *See* Judgment of the Swiss Federal tribunal dated March 22, 2007, 4P_172/2006.

36 *See* CAS 2006/A/1102-1146.

145. Regarding *lis pendens*, the Second Appellant argued that no such stay occurred and in any event the proceedings Ms. Domínguez Azpeleta initiated in Spain did not involve the same subject matter of the same parties as the case at hand.

b. The First Respondent's arguments

146. The First Respondent contested that the CAS had jurisdiction to rule on the present case. First, given the case law of the European Court of Human Rights ("ECtHR"),[37] the CAS did not meet the requirements of Article 6 of the European Convention on Human Rights ("ECHR"). She maintained that arbitration:

- is mandatory because it is imposed by sports associations;
- sports associations have a predominant role in selecting the members of ICAS;
- the parties have to designate only arbitrators that were appointed by ICAS members;
- the chair of the Panel is designated by an ICAS member chosen by the sports associations;
- the arbitral award is reviewed by the CAS Secretary General;
- no state court will review the facts and the law applied by the arbitrators;
- the arbitration takes place in a language not spoken by Ms. Domínguez Azpeleta; and
- the hearing is not public.

147. Second, Ms. Domínguez Azpeleta argued the CAS was not competent to judge the present case. When Spanish sports federations perform public functions delegated by the National Sports Council, they are regarded as public authorities. The RFEA Tribunal performed such public functions when it delivered the RFEA Decision. This in turn led to the following five inferences:

- The RFEA Decision was a *jure imperii* act of the Spanish state; as a result of state immunity, the CAS did not have jurisdiction;
- Spanish public policy provided for exclusive and mandatory jurisdiction for the Spanish courts in respect of administrative acts by the RFEA. In turn, the parties could not validly consent to submit to CAS arbitration concerning administrative acts;

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37 Eur. Court H.R., judgment of 28 October 2010, *Soda c. République tchèque*, Req. 1643/06.

- The RFEA Decision belonged to the criminal sphere, deriving from the *ius puniendi* of the Spanish state, and thus could not be a subject of private arbitration;

- The RFEA Decision did not involve any economic interest.

148. Third, the First Respondent submitted the First Appellant was an undertaking for the purposes of application of European Union competition law (Articles 101 and 102 Treaty on the Functioning of the European Union ("TFEU"), that it held a dominant position as the sole entity organizing or authorizing international athletics competitions, and that, by obliging athletes performing their economic activity to sign an arbitration agreement in favor of the CAS, it abused this dominant position. An arbitration clause in favor of CAS would, in the First Respondents view, not be agreed to under normal circumstances, as the one-sided designation of the potential arbitrators is in favor of international sports associations — such as the IAAF, the national Olympic Committees and the International Olympic Committee, involved in disputes with athletes. These associations had a decisive influence on the selection of the persons acting as CAS arbitrators. The parties had to select an arbitrator amongst the list of CAS arbitrators compiled by ICAS. The provisions regulating the selection of ICAS members favored the sports associations as they held, with 12 members directly designated by them, the majority in ICAS. Furthermore, due to the fact that these 12 members nominate 8 other members of ICAS the independence of these 8 members was not preserved either.

149. According to the First Respondent, this disproportionate influence created the risk that the persons included on the CAS arbitrators list predominantly or even entirely favor the side of the sports associations over the athletes. This is also true concerning the arbitrators that are not proposed by the sporting association, as they are designated by ICAS members chosen by the sporting associations. A balanced influence of the parties on the composition of the CAS that would be needed to safeguard its independence was thus not provided.

150. Such a structural deficiency threatened the neutrality of the CAS and the fact that the persons included on the CAS list of arbitrators were not linked to the sports associations in any way constituted no valid remedy. Even when the personal integrity of the persons included on the CAS list was not affected, there was a potential risk that arbitrators share the worldview of the sports associations rather than the one of the athletes.

151. Even the ICAS statutes themselves did not assume the independence of the ICAS members, as they required that the last 4 ICAS members be independent from the "bodies" designating the other members of the ICAS.

152. Moreover, an imbalance in favor of the sports associations was also grounded in the fact that in the appeal procedure before CAS, the President of the panel was designated by the Division President, while the Division President was himself nominated by

ICAS, which was structurally dependent on the sports associations, through a simple majority decision. In this way, the sports associations could also exercise an indirect influence on the third member of the arbitral panel competent to deal with a specific dispute. As the trust of the parties in the independence and impartiality of an arbitral tribunal is eroded when there are reasons to fear that the judge facing them has been designated specifically in regard of the specific case at hand, it would be necessary to take measures to combat the sheer possibility and suspicion of a manipulation of the designation of the arbitrators.

153. The First Respondent argued that the sole reason why athletes accept to subject their disputes with sports associations to an arbitration tribunal, the composition of which is mainly determined by sports associations, was solely linked to the monopoly position of these sports associations. If the athletes could participate in World Championships or other international competitions whilst agreeing to the competence of a neutral arbitration tribunal, it could, following the First Respondent, be safely assumed that only an arbitration clause in favor of this tribunal would be agreed upon to the detriment of the CAS.

154. The departure from the arbitration agreements that would have been signed under normal conditions of competition strips the First Respondent from her fundamental right of constitutional rank to access a national court and a legally mandated judge.

155. As the arbitration agreement went beyond the intensity threshold required for the recognition of an abuse of dominant position, the arbitration agreement was contrary to the prohibition on abuse of dominant position and was, thus, null and void in light of EU competition law.

156. The First Respondent added that fundamental provisions of competition law are part of the *ordre public* exception,[38] to the recognition of arbitral awards within the meaning of Article 5, paragraph 2, 2 b), of the New York Convention.

157. Finally, the First Respondent argued that there is no valid consent of her part to the arbitration agreement relied upon by the Appellants. In order to be valid, such an agreement to arbitration requires the consent of all the parties involved and this consent should be hedged with a number of guarantees in order for it to be regarded, by the ECHR, as voluntary.

158. The mere existence of an arbitration clause did not entail that the consent to it was valid. In the case in hand, if there were an arbitration clause, it would be invalid as a result of flawed consent by Ms. Domínguez Azpeleta. Spanish courts held that there could be no valid consent if the consent was demanded as a prerequisite for exercising a profession if the clause was part of a pre-formulated standard document. Further, Swiss

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38 *See* judgments in case C-126/97, *Eco Swiss*, EU:C:1999:269, para. 39, and case C.8/08, *T-Mobile Netherlands BV a.o.*, EU:C:2009:110, para. 49.

academic literature highlighted that athletes' consent to arbitration clauses, or to other clauses restricting fundamental rights, was imposed coercively by the international sports associations and the consent could therefore not be deemed as given freely. Likewise, several Swiss courts, including the Swiss Federal Tribunal, ruled that the consent of the athletes to the arbitration clauses is not free because these clauses are non-negotiable as the sports associations and clubs belonging to them have a monopoly over the organization of the competitions.

159. Ms. Domínguez Azpeleta's submitted her consent to arbitration in this case is void because:

- she had no other option;
- there is no unequivocal and clear consent on her part to the arbitration agreement;
- the interference with rights and the consent were drawn up in English and French, languages not intelligible to Ms. Domínguez Azpeleta;
- based on ECHR case law, consent ought to be interpreted restrictively;
- Ms. Domínguez Azpeleta could not foresee the consequences of her supposed consent to arbitration, embedded in a regulation which might have provided for such measures but which was not even delivered to her, and such restrictions were not pointed out to her;
- the consent was not free as withholding it would have meant infringing a regulation or would have entailed an inability to practice her occupation;[39] and
- Ms. Domínguez Azpeleta's license does not provide for the possibility to apply the WADC and the IAAF regulations by reference nor does it provide a possibility to accept the arbitration clause.

160. In any event, Ms. Domínguez Azpeleta argued, the consent ought to be effective when the arbitration started. When the Appellants initiated the present arbitration, Ms. Domínguez Azpeleta had no license and was, therefore, not bound by the RFEA or IAAF regulations or any arbitration clause contained in those regulations.

161. In her Post-Hearing submission, the First Respondent made the following points:

- On November 20, 2011, WADA published a report on States that respect the WADC and Spain was included. This meant that Spanish laws and regulations – *i.e.* Article 27.1 and 27.2 of the Organic Law 7/2006 – were consistent with

39 ECtHR, *Suda v. Czech Republic*, judgment 28 October 2010, n° 1643/06.

the WADC. The First Respondent therefore maintained that WADA accepted that the Spanish sports federations exercise punitive functions in the fight against doping, delegated by the Spanish Higher Council for Sport.

- While UNESCO's Convention on anti-doping made it obligatory to respect the principle of the WADC, the code itself was not part of the Convention (Article 4). As Spain ratified this Convention it was only obliged to respect the principles of the code. WADA considered that Spain adhered to the principles of the WADC, allowing therefore the Spanish sports federations to exercise public functions when taking decisions regarding punitive decisions in the fight against doping. Thus, the decision that the RFEA Tribunal was competent to rule on the present proceedings by virtue of the provisions of Article 27.2 of the Organic Law 7/2006 was consistent with the WADC, the UNESCO convention on anti-doping and the Spanish judicial order.

- The DCFs signed by the First Respondent were not drawn up in Spanish and, as Ms. Domínguez Azpeleta did not understand English nor French, the waiver of her fundamental rights protected by Article 6 of the ECHR was not valid. She was not able to anticipate the consequences of the waiver of fundamental rights contained in the DCFs. Furthermore, Ms. Domínguez Azpeleta was not in a position to refuse to sign the DCFs due to the fact that to do so would have led to punitive action from the IAAF.

c. ***The analysis and findings of the Panel***

162. The Panel addresses below each and every jurisdictional objection raised by Ms. Domínguez Azpeleta, placed by the Panel in its appropriate context.

163. ***Lex arbitri***. Pursuant to Article 176 of PILA, Chapter 12 of PILA is applicable when the seat of the arbitration is in Switzerland and at least one of the Parties is non-resident in Switzerland. The Panel finds this to be the case in the present proceedings.

164. ***Formal validity of the arbitration agreement.*** Pursuant to Article 178(1) of PILA, an arbitration agreement is formally valid if it is in writing or in a form evidenced by text. The Panel finds the IAAF Rules comply.

165. ***Article 6 of ECHR***. The Panel recalls the ECtHR ruling that the right of access to the courts contained in Article 6 para. 1 of the ECHR is not "*absolute but may be subject to limitations*". These limitations are permitted by implication since the right of access "*by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals*". In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do

not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired and that a limitation would not be compatible with Article 6 para. 1 of the ECHR if it did not pursue a legitimate aim and if there was no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.[40]

166. The Panel further recalls that the ECtHR held that article 6 para. 1 did not preclude the setting up of arbitration tribunals in order to settle disputes and did not prevent a party to consent to arbitration if this consent was given freely, was licit and unequivocal.[41] The ECtHR therefore clearly distinguishes between forced arbitration, imposed by law, and freely consented arbitration foreseen for by agreement between parties. Only in the former case all guaranties of article 6 paragraph 1 have to be respected.[42]

167. In order to be able to decide whether all guarantees imposed by article 6 para. 1 of the ECHR have to be observed in the present case, the Panel has to examine if it is in presence of a freely consented arbitration.

168. The Panel notes that the present arbitration procedure cannot be considered as imposed by law.[43]

169. Second, contrary to the assertions of the First Respondent, the final finding of the ECtHR in its case *Suda v. Czech Republic*, cannot be transposed to the present dispute as the existing arbitration agreements cannot be considered as having been signed by third parties or not containing the unequivocal and explicit consent of Ms. Domínguez Azpeleta. Indeed, by signing – on multiple occasions – the DCFs, some of which explicitly conferred competence to the CAS for resolving definitively any dispute, controversy or claim arising thereof, the First Respondent gave her explicit consent to arbitration before the CAS.

170. Concerning the question whether this consent was unequivocal (valid), the Panel, first, does not follow the First Respondent's argument that she did not know or understand the consequences of her affiliation to the RFEA, her participation at international competitions, or signing the DCFs, because she did not understand English and French. As the First Appellant submitted during the Oral Hearing without having been contradicted on this point, the Spanish version of the rules to which athletes adhere to by getting affiliated to RFEA and participating at international level competitions was available to Ms. Domínguez Azpeleta and she adhered to these rules by getting her

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40 Eur. Court H.R., judgment 8 July 1986, *Lithgow a.o. vs. UK*, application n[os] 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81.

41 *R. c.. Suisse*, n° 10881/84, decision of the Commission of 4 March 1987 and decision *Transado – Transportes Fluviais do Sado, S.A. vs. Portugal* n° 35943/02, 16 December 2003.

42 Comm. EDH, 12 October1983, *Bramelid et Malmström vs. Suède*, n[os] 8588/79 et 8589/79, DR n° 29.

43 Comm. EDH, 12 October 1989, *Bramelid et Malmström v. Suède*, Req. 8588/79 et 8589/79.

affiliation and by entering the competitions. Second, Ms. Domínguez Azpeleta was a Vice-President of the RFEA during the years at stake in the present case and thus cannot credibly claim she did not understand the consequences of adhering to rules at issue or signing documents like the DCFs containing an arbitrational agreement conferring jurisdiction to the CAS. Third, by maintaining that the DCF number 17 was filled out by the inspector who translated the questions in the form to the Ms. Domínguez Azpeleta, she admitted to receive information contained on the DCF in Spanish. Thus, her argument that she did not understand the information contained on the DCF's because they were only in English and French is fallacious.

171. The Panel further considers that there was no constraint on the First Respondent's consent within the meaning of the jurisprudence brought forward by the First Respondent. The *Sigurjonsson vs. Iceland* case (11 January 2006), to which the First Respondent referred to in particular, concerned freedom of association protected by Article 11 of the ECHR. In that case the claimant was obliged by law to become member of a "certain association" in order to satisfy the license conditions and he was not free to join or form another association for that purpose. It was further provided by law that a failure to meet this condition could entail revocation of his taxi driver license and liability to pay a fine. By contrast, the Panel finds that these criteria are not fulfilled in the case at hand. In particular, athletes are not prevented to form, as did the professional tennis players in the 1970's, their own "association" to collectively defend their rights and to organize their own professional competitions. In addition, it clearly follows from DCF 17, that the simple fact of not accepting to fully fill out the DCF did not have any immediate adverse consequence on Ms. Domínguez Azpeleta's participation in the sporting event in question.

172. ***Compliance with competition rules.*** At the outset, The Panel notes that Ms. Domínguez Azpeleta did not submit an elaborated analysis of the First Appellant's conduct on competition law grounds. Instead, Ms. Domínguez Azpeleta merely asserted that the First Appellant has a dominant position that it allegedly abused by compelling her to observe the IAAF Rules and submit to the CAS's jurisdiction. However, finding the First Appellant liable for an abuse of a dominant position requires a complex legal and economic assessment. In brief, the European Commission adopts a 4-step methodology (developed in light of the European Court of Justice' (the "ECJ") case-law) when assessing the legality of rules adopted by sport organizations.[44]

- Is the sports association that adopted the rule to be considered an "undertaking" or an "association of undertakings"?

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44 Commission Staff Working Document The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport COM(2007) 391, section 3.4(b).

- Does the rule in question constitute an abuse of a dominant position under Article 102 TFEU?[45]
- Is trade between Member States affected?
- Is the rule objectively justified?

173. The Panel finds that Ms. Domínguez Azpeleta's claim fails already at the first hurdle of the 4-step methodology.

174. It is well-settled in EU jurisprudence that a sporting entity is an "undertaking" where it engages in an economic activity,[46] *i.e.* where it offers products, services, or commercial rights on a market which could be offered by a profit-making undertaking or which could potentially compete with profit-making undertakings.[47] The European Commission also notes that "*[A] sports association is an "association of undertakings" if its members carry out an economic activity.*"[48] The ECJ has confirmed in *MOTOE* that the analysis ought to be conducted for the specific activity at issue: "*the fact that, for the exercise of part of its activities, an entity is vested with public powers does not, in itself, prevent it from being classified as an undertaking for the purposes of Community competition law in respect of the remainder of its economic activities*".[49] Accordingly, the question of whether an entity acts as an undertaking within the meaning of EU competition law when it engages in an activity or adopts a specific rule is, and must remain, the primary issue when determining whether EU competition law is potentially applicable to that activity or rule.[50]

175. In turn, the Panel finds that the First Appellant (and sports federations more generally) do not engage in an economic activity, and thus do not constitute undertakings for the purposes of EU competition law, when determining a dispute resolution forum, with a view to facilitating the independent, impartial, specialized, and expeditious resolution

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45 Including an appropriate delineation of a product and geographic market.

46 Case T-313/02 *Meca-Medina*, EU:T:2004:282, para. 37 *et seq.*, Case C-36/74 *Walrave and Koch v. Association Union Cycliste Internationale*, EU:C:1974:140, para. 4; Case C-13/76 *Donà v. Mantero*, EU:C:1976:115, para. 12; Case C-415/93 *Union royale belge des sociétés de football association and Others Bosman*, EU:C:1995:463, para. 73; Joined Cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo*, C:2000:199, para. 41; and Case C-176/96 *Lehtonen and Castors Braine*, EU:C:2000:201, para. 32.

47 *See* Case C-49/07 *MOTOE*, EU:C:2008:142, para 25 *et. seq.*

48 Commission Staff Working Document The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport COM(2007) 391, section 3.4(b).

49 *See* Case C-49/07 *MOTOE*, EU:C:2008:142, para. 25 *et. seq.* *See also* Commission Staff Working Document The EU and Sport: Background and Context - Accompanying document to the White Paper on Sport COM(2007) 391, section 4.1.

50 *See* Subiotto, R. (2009) '*How Lack of Analytical Rigour Has Resulted in an Overbroad Application of EC Competition Law in the Sports Sector*', I.S.L.R, 2, 21-29, p. 28-29.

of sports disputes, especially in connection with the global fight against doping in sport.[51]

176. In any event, the Panel proceeds with a full analysis.

177. The First Respondent's allegations of abuse, could, on one hand, be understood as directly linked to the argument that the consent of the First Respondent to the arbitration agreement in favor of the CAS was not given freely and is thus flawed. It could, on the other hand, be understood as referring to the composition of the list of arbitrators of the CAS and the procedure applied by the CAS.

178. Concerning the former of these two aspects, the Panel already found that the First Respondent was not submitted to any constraint to sign the arbitration agreement. In addition, the fact that in most sporting disciplines the task of laying down the appropriate rules for the organization of and participation in sporting events is delegated, in principal, to one federation in each country has been recognized as a valid organization form by the ECJ and cannot, by itself, be considered as restriction to the athlete's freedom of choosing the rules under which it wishes to participate in a competition.

179. Moreover, the compatibility of rules with EU competition law cannot be assessed in the abstract. Instead, account must first of all be taken of the overall context in which the conduct of the undertaking was taken or produced its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate.[52]

180. The Panel considers that, as regards the overall context in which the consent to the arbitration agreement was given by the First Respondent, the general objective of the agreement was, as none of the parties disputes, to ensure that international-level athletes, of all countries, competing against each other at international events would be subject to the same anti-doping rules, the same procedural rules concerning disputes arising from the doping controls and that – in appeal – all disputes would be heard by one and the same arbitral body in order to safeguard equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport.

181. In addition, given that sanctions are necessary to ensure enforcement of the doping rules of the IAAF and other international sports associations, it is imperative that these sanctions be ultimately imposed by just one body to guarantee that all athletes, whatever their country of origin, are treated equally.

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51 The Panel notes that even though the administration of justice cannot be considered is being an economic activity, it does not preclude the dispute itself from having a financial interest – and thus be arbitrable – within the meaning of article 177 of PILA.

52 *See, e.g. Meca-Medina et Majcen v. Commission*, C-519/04 P, EU:C:2006:492, para. 42.

182. Giving these circumstances, the Panel considers that the prerequisite for international-level athletes to see their disputes arising from doping controls submitted to a single arbitration body like the CAS is inherent to the organization of international competitions in general and the application of anti-doping rules in particular: its very purpose is to ensure healthy rivalry and equal treatment between athletes from all countries.

183. Accordingly, the designation of the CAS as the dispute resolution forum for sport-related disputes is objectively justified in light of the need to ensure the independent, impartial, specialized, and expeditious resolution of sports disputes, especially in connection with the global fight against doping in sport.

184. Furthermore, in the light of this finding, the Panel considers that not only can the position of the RFEA and the IAAF as well as their rules relating to arbitration not be considered as having constituted a constraint to the First Respondent's consent to arbitration but they have to be considered as an incentive to give this consent as it was in the interest of Ms. Domínguez Azpeleta herself as an athlete competing against athletes from other countries.

185. The Panel further notes that the First Respondent did not raise any doubts in regards of the proportionality of the measure seeking to have all disputes concerning doping controls of international-level athletes submitted to an arbitration body and acknowledges that arbitration is the procedure that athletes would choose themselves.

186. Concerning the second of these aspects, first, the ECJ has held that EU competition rules are of such importance that if its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy (*ordre public*), it must also grant such an application where it is founded on failure to comply with a prohibition laid down in a European Union competition rule.[53]

187. Second, it has to be recalled that the CAS, like any other arbitration panel sitting in Switzerland, takes into account EU competition rules as they constitute foreign mandatory rules.[54]

188. Third, the Swiss Cartel law, as many other national competition laws around Europe, has been inspired by and modeled on EU competition law. Accordingly, the interests and values protected by such EU provisions are shared and supported by the Swiss legal system.[55] The Swiss Federal Tribunal also held that Swiss law ought to be interpreted

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53 *See, e.g.* Case C-126/97, *Eco Swiss*, EU:C:1999:269, para. 37.

54 *See* CAS 98/200, *AEK Athens and SK Slavia Prague v. UEFA*, 20 August 1999, para. 9 and 10.

55 CAS 98/200, *AEK Athens and SK Slavia Prague v. UEFA*, para. 11.

in conformity with EU law.[56] In addition, with the reform of April 1, 2004, the Swiss legislator adapted the national competition law to EU competition law.

189. Fourth, the Swiss legal system recognizes the *ordre public* principle with regards to the recognition and enforcement of arbitration awards,[57] and allows actions for annulment of an award on grounds of violation of the *ordre public*.[58]

190. Finally, the Swiss Federal Tribunal has, on numerous occasions, held that the CAS presents "*sufficient guarantees of independence and impartiality*". In addition, the Swiss Federal Tribunal has, in a judgment concerning an action for annulment based, *inter alia*, on a supposed lack of independency and impartiality of the CAS from international sports associations in general and the IOC in particular, stated that it considers the CAS as constituting a real arbitration tribunal and that it is sufficiently independent from sports associations, including, the IOC, that even in cases where these are parties to the dispute, its awards have to be considered as judgments having the same value as judgments from an ordinary state court.[59] Given that in the same judgment, the Swiss Federal Tribunal applied Article 190 para. 2 PILA, the Panel concludes that the Swiss Federal Tribunal does implicitly consider that neither the composition of the CAS nor the procedural rules followed by the CAS are the result of an abuse of a dominant position by the international sports associations.

191. In the light of the foregoing, the Panel considers that the arguments brought forward by the First Respondent with regards to the supposed abuse of a dominant position concerning the composition of the CAS and the arbitral procedure before the CAS lack any merit and have, thus, to be rejected.[60]

192. ***Valid consent***. The Panel further considers that the consent was licit. Indeed, contrary to the assertions of the First Respondent, sanctions for anti-doping rule infringements are disciplinary sanctions imposed by sports associations and are, as such, subject to civil law and must be clearly distinguished from criminal penalties.[61] This

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56 4C.316/2002, 25.3.2003.

57 Swiss Federal Tribunal 4A_612/2009, 10.2.2010.

58 Article 190 para. 2 (e) PILA). *See also* CAS 2005/A/983 & 984, paras. 24 to 32.

59 4A_612/2009, 10.2.2010.

60 *See also* Swiss Federal Tribunal ruling in *Pechstein*: "*Abgesehen davon, dass sich die Behauptungen der Beschwerdeführerin in tatsächlicher Hinsicht nicht auf die Sachverhaltsfeststellungen des angefochtenen Entscheids stützten lassen (vgl. Art. 105 Abs. 1 BGG), wären ihre allgemein gehaltenen Ausführungen nicht geeignet, berechtigte Zweifel an der Unabhängigkeit des TAS zu begründen. Die Rüge der fehlenden Unabhängigkeit des TAS wäre daher ohnehin unbegründet.*"

61 *See, e.g.* CAS 2006/A/1102-1146.

interpretation has been confirmed by the Swiss Federal Tribunal which held that criminal law principles are not applicable to disciplinary matters.[62]

193. Further, the Panel notes that the initial procedure for a suspected anti-doping rule violation against the First Respondent was launched on the basis of IAAF Rules 32.2 (b) and 38 and thus had no relation with Spanish administrative law.

194. In the light of these two findings, the Panel considers that the arguments brought forward by the First Respondent to establish that she could not lawfully consent to arbitration are without merit and have to be rejected. It follows from this conclusion that the arguments of the First Respondent relating to the RFEA Decision being a *jure imperii* act of the Spanish state and the Spanish public policy providing exclusive and mandatory jurisdiction for the Spanish courts in respect of administrative acts by the RFEA have to be likewise rejected.

195. In the Panel's opinion, it follows from all the foregoing considerations that the First Respondent has given its consent to arbitration and that this consent was given freely, licit and unequivocal.

196. As a result, and in compliance with the constant jurisprudence of the ECtHR, the Panel considers that, in the present case, the guaranties required by Article 6 para. 1 ECHR do not have to be fulfilled by the CAS,[63] consistent with the Swiss Federal Tribunal rulings in cases related to CAS arbitration.[64] Therefore, all arguments linked to this provision and raised in order to contest the jurisdiction of CAS are without merit and have to be rejected.

197. ***Compliance with Article 6 ECHR***. However, for the sake of completeness, the Panel adds that in any case, even assuming that the First Respondent's consent to the arbitration agreement was not given freely and that arbitration were to be considered as mandatory in the sense of the jurisprudence of the ECtHR (*quod non*), the arguments brought forward by the First Respondent contesting that the CAS meets the requirements of Article 6 para. 1 ECHR have to be rejected for the reasons that follow.

198. Concerning the scope of jurisdiction attributed to the CAS in a procedure like the present, the Panel notes that the CAS is entitled to hear cases *de novo* on appeal (Article R57 of the Code and IAAF Rule 42.20), meaning that it has full jurisdiction on all questions of fact and law relating to the dispute in question. The Panel considers that

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62 N., J., Y., W. v. FINA, 5P. 83/1999.

63 *See, e.g. Bramelid et Malmström c. Suède*, nos 8588/79 et 8589/79.

64 4A_612/2009, 10.2.2010.

the CAS can therefore be regarded as satisfying the "*full jurisdiction*" criteria of Article 6 para. 1.[65]

199. Thus, the argument of the First Respondent, that no state court has full jurisdiction to review the facts and the law applied by the CAS Panel falls short and has to be rejected if the independency and impartiality of the CAS is not successfully challenged.

200. With regard to these aspects, first, the Panel observes that the ECtHR held that there is a functional relation between independency and impartiality, the former being essentially intended to secure the latter.[66]

201. Second, the personal impartiality of the members of a panel must be presumed until there is proof to the contrary.[67] In the present case, the arguments put forward by the First Respondent are of a very general nature and have to be considered as mere assumptions. Indeed, the allegation that most members of ICAS are partial because they have been chosen by "sports organizations" and that the arbitrators on the list of the CAS are partial because they have been appointed by ICAS, cannot be considered as evidence capable of putting into doubt the impartiality of the CAS in general and the arbitrators of the present Panel in particular.

202. As for impartiality considered from an objective and organizational point of view,[68] none of the arguments raised by the First Respondent prompts the Panel to call the matter into question. In particular, the manner of appointment of the arbitrators on the list of the CAS provides no cause for treating those individuals as biased: although nominated by the ICAS, they do not act as representatives of the ICAS, or of any other entity, but in a personal capacity. Furthermore, the Panel finds that athletes do have an influence on the list of members of the ICAS as they can indirectly nominate a certain number of the members, that this influence is not manifestly disproportionate with regards to the overall number of cases dealt with by the CAS in relationship to the number of cases involving athletes and that the athletes have a large choice when it comes to designating an arbitrator, as they can choose from a list of over 300 personalities.

203. Third, the Panel recalls that "independence" within the meaning of the ECtHR jurisprudence relating to Article 6 paragraph 1 ECHR is twofold: independency of the arbitrators from the executive and independency of the arbitrators from the parties to the dispute.[69]

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65 *See Albert and Le Compte*, judgment of 10 February 1983, Series A no. 58, para. 29.

66 *See Bramelid, supra*, para. 33.

67 *See Le Compte, Van Leuven and De Meyere* judgments cited *supra*.

68 *See* ECtHR, *Piersack* judgment of 1 October 1982, Series A no. 53.

69 ECtHR, *Ringeisen*, judgment of 16 July 1971, para. 95, and *Bramelid* para. 36.

204. As the independence of the CAS arbitrators, in general or the present Panel in particular, from the ICAS and the "sports associations" was already addressed in the decision on the challenge of the panel rendered by the board of the ICAS on 28 January 2015, the Panel limits itself to a reference to the before said decision (para. 46) and to the jurisprudence of the Swiss Federal Tribunal, *inter alia*, cases 119 II 271 and 129 III 445.

205. Further, the Panel considers that the First Respondent's arguments that the arbitrators are not independent from the executive or the parties because the President of each CAS panel is designated by an ICAS member allegedly chosen by the "sports associations" or because the arbitration award is to be "reviewed" by the CAS Secretary General are meritless. Indeed, the first of these two arguments is purely speculative and lacks any sufficient ground in the present case. The second argument, which implicitly refers to article R59 of the Code, which states that the CAS Secretary General may make rectifications of pure form and may also draw the attention of the panel to fundamental issues of principle, does not raise any valid doubts as to the independency of the Panel – solely responsible for the final decision rendered in the award.[70]

206. In the light of these findings, the Panel considers that the fact that the Swiss Federal Tribunal does not have a full jurisdiction to review the facts and the law applied by the CAS does not constitute a violation of Article 6 para. 1 of the ECHR.

207. Concerning the last two arguments raised by the First Respondent to support its claim that the CAS does not meet the requirements of Article 6 para.1 ECHR, namely that the arbitration takes place in a language not spoken by Ms. Domínguez Azpeleta and that the hearing is not public, the Panel recalls, first, that according to Article R29 of the Code the parties may request that a language other than French or English be selected for the arbitration. Furthermore, the parties may be assisted, during the hearing, by an interpreter (Article R44.2 of the Code). Second, the hearing, although in principle not public, can, if the parties otherwise agree, be public. The Panel considers that the latter circumstance does not constitute a violation of Article 6 para. 1 of the ECHR as this provision allows, in its second sentence, restrictions with regards to the publicity of the hearing. Given the fact that disputes, like the one at stake, relating to doping controls very often give rise to numerous questions concerning, on the one hand, the private life of the parties involved and, on the other hand, sophisticated technical mechanisms and data especially developed in order to establish anti-doping rule offences, the Panel finds that publicity of the hearing would have prejudiced the interests of justice. The confidentiality of hearings is very common in private arbitration and no judicial precedent has to date stated that such confidentiality would violate Article 6 para.1 ECHR.

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70 *See* Swiss Federal Tribunal, 4A_612/2009, 10.2.2010, point 3.3.

208. ***Arbitrability***. The Panel recalls that the Swiss Federal Tribunal confirmed that the *lex arbitri*, and not *lex causae* or national laws, guides the issue of arbitrability.[71] Accordingly, Article 177 of PILA is determinative.

209. According to Article 177(1) of PILA, the dispute must involve a financial interest. The Panel disagrees with the First Respondent's position that the RFEA Decision does not involve an economic interest insofar as it represents an act in the exercise of public powers. To the contrary, the Panel finds the Appellants requested a disqualification of Ms. Domínguez Azpeleta's results and a forfeiture of her prize money, which undoubtedly pertains to Ms. Domínguez Azpeleta's economic interests.

210. Further, the Panel acknowledges the Swiss Federal Tribunal's finding that an exclusive state court jurisdiction conferred by domestic laws was relevant to the analysis if its non-observance would infringe public policy. The Panel notes that Spain signed the UNESCO Convention Against Doping in Sport (October 19, 2005), and thus committed to respect the WADC, support the WADA in its fight against doping, and recognize sports sanctions imposed at the international level. Against this background, the Panel is convinced that the acceptance of jurisdiction at hand does not breach public policy principals.

211. ***Lis pendens***. Pursuant to Article 186)1) bis of PILA, an arbitral tribunal "*shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court or another arbitral tribunal, unless there are serious reasons to stay the proceedings.*" As explained in great detail in Section III.E above, and concluded in CAS letter of February 5, 2015, in accordance with the principle of judicial non-interference in arbitral proceedings, the Panel is not bound by the rulings of the Spanish courts. Thus, Ms. Domínguez Azpeleta's *lis pendens* claim is likewise dismissed.

2. Jurisdictional basis

212. The IAAF Rule 42.1 states as follows:

> "*Unless specifically stated otherwise, all decisions made under these Anti-Doping Rules may be appealed in accordance with the provisions set out below. All such decisions shall remain in effect while under appeal unless the appellate body orders otherwise or unless otherwise determined in accordance with these Rules (see Rule 42.15). Before an appeal is commenced, any post-decision review provided in these Anti-Doping Rules must be exhausted (except where WADA has a right of appeal and no other party has appealed a final decision*

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71 *See* Judgment of the Swiss federal tribunal, 118 II 193: "*Arbitrability is governed by the lex arbitri, without regard to the possible stricter rules of the lex causae or of the national laws of the parties, which can have consequences for the recognition and enforcement of an award rendered in Switzerland, abroad.*"

under the applicable rules, in which case WADA may appeal such decision directly to CAS without having to exhaust any other remedies)."

213. The IAAF Rule 42.2 states as follows:

"*The following is a non-exhaustive list of decisions regarding Antidoping rule violations and Consequences that may be appealed under these Rules: a decision that an anti-doping rule violation was committed;* [...] *any other decision regarding anti-doping rule violations or Consequences that the IAAF considers to be erroneous or procedurally unsound.*"

214. The IAAF Rule 42.3 states as follows:

"*Appeals Involving International-Level Athletes: in cases involving International-Level Athletes or their Athlete Support Personnel, the first instance decision of the relevant body of the Member shall not be subject to further review or appeal at national level and shall be appealed only to CAS in accordance with the provisions set out below.*"

215. The IAAF Rule 42.5 states as follows:

"*Parties Entitled to Appeal: in any case involving an International- Level Athlete or his Athlete Support Personnel, the following parties shall have the right to appeal to CAS:* [...] *(c) the IAAF;* [...] *and (f) WADA.*"

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

217. Ms. Domínguez Azpeleta was an international-level athlete (designated to the IAAF Registered Testing Pool), the RFEA Decision is a first instance decision of a Member, subject to appeal to CAS, and the present appeals were filed by the IAAF and WADA. Accordingly, the Panel finds that CAS has jurisdiction in accordance with IAAF Rules 42.3 and 42.5.

B. Applicable Law

218. Article R58 of the Code provides as follows:

"*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is*

domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

219. The IAAF Rule 42.22 provides as follows:

> "*In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations*".

220. In addition, Ms. Domínguez Azpeleta signed the IAAF Doping Control Forms ("DCFs") which stated as follows:

> "*I accept that any dispute, controversy or claim howsoever arising from this doping control shall be resolved in accordance with IAAF Competition Rules*".[72]

221. Similarly, Ms. Domínguez Azpeleta signed the IDTM DCFs which stipulated as follows:

> "*I accept that all disputes howsoever arising from this doping control shall be resolved in accordance with the doping control rules of the organization authorizing the test* [i.e. IAAF]".[73]

222. Accordingly, the IAAF rules and regulations (including the Anti-Doping Regulations) form the applicable law to the merits of the present proceedings.

C. Admissibility

1. First Appellant's Statement of Appeal

223. Article R49 of the Code stipulates as follows:

> "*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.*"

224. The IAAF Rule 42.13 states as follows:

> "*Unless stated otherwise in these Rules (or the Doping Review Board determined otherwise in cases where the IAAF is the prospective appellant), the appellant shall have forty-five (45) days in which to file his statement of appeal with CAS starting from the date of communication of the written reasons of the*

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72 *See* Exhibit 58 to the First Appellant's Appeal Brief.

73 *See* Exhibit 59 to the First Appellant's Appeal Brief.

decision to be appealed (in English or French where the IAAF is the prospective appellant) or from the last day on which the decision could have been appealed to the national level appeal body in accordance with Rule 42.8(b)."

225. The First Appellant received an English translation of the RFEA Decision by e-mail on March 25, 2014. The First Appellant filed its Statement of Appeal on April 9, 2014, and thus timely (*i.e.* ahead of the May 9, 2014 deadline).

2. First Appellant's Appeal Brief

a. Rule

226. The IAAF Rule 42.13 states as follows:

"*Within fifteen (15) days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with the CAS*".

b. Summary of the proceedings and arguments

227. On April 10, 2014, the First Appellant requested that its time limit to file an appeal brief be stayed with immediate effect pending the outcome of its document request of April 9, 2014. On April 24, 2014, in the absence of a reply from the Respondents to the CAS Court Office letter of April 14, 2014, the CAS Court Office informed the Parties that the Division President would decide on the document requests and the time limit was accordingly suspended until further notice. On April 25, 2014, the CAS Court Office informed the Parties of the Division President rejected the First Appellant's request for extension and lifted the suspension with immediate effect (*i.e.* the deadline was suspended for one day).

228. On May 12, 2014, the First Appellant requested an extension of the time limit to file an appeal brief until June 13, 2014, due to limited availability of most of the anti-doping experts consulted by the IAAF during the following weeks. On May 13, 2014, the CAS Court Office invited the Respondents to express any objections by May 16, 2014, failure of which would be deemed as an accord.

229. By letter dated May 14, 2014, the First Respondent noted that its silence on the First Appellant's request of May 12, 2014 could not be deemed as the First Respondent's accord with such request. The CAS Court Office reiterated that the First Respondent did not object to the First Appellant's request dated May 12, 2014.

230. By letter dated May 27, 2014, the CAS Court Office confirmed that the Respondents failed to object to the First Appellant's request to extend its time limit to file an appeal brief until June 13, 2014, and thus the request was deemed agreed to by the Parties.

231. On May 28, 2014, the First Respondent inquired who had suspended the First Appellant's time limit for filing an appeal brief, and under what legal basis. The First

Respondent stressed that her silence could not be deemed as an accord and referred to her letter of May 14, 2014 in this regard. The First Respondent further argued that the time limit could only be extended if the initial time limit had not expired; however, the Division President had not in fact decided on the request for extension prior to the time limit's expiry on May 24, 2014, rendering the First Appellant's appeal withdrawn.

232. By letter dated May 30, 2014, the CAS Court Office stated that there was a clerical mistake in its letter of May 14, 2014, and consequently in its letter of May 27, 2014, confirming the time limit for filing the First Appellant's appeal brief. As the First Appellant requested the extension of the time limit prior to its expiry on May 12, 2014 and in view of the First Respondent's position that its silence could not be deemed an accord, the issue was submitted to the Division President.

233. By letter dated May 30, 2014, the First Appellant summarized the history of the proceedings related to its request for extension and reiterated that the request would not prejudice the Respondents, especially since the First Respondent was retired.

234. By two letters dated May 30, 2014, the First Respondent acknowledged that the time limit might have been extended by a decision of the Division President, but the CAS Court Office letter referring to such extension was dated May 27, 2014, and was thus issued two days after the expiry of the initial time limit. Accordingly, the First Respondent argued, the First Appellant's appeal should be deemed withdrawn.

235. By letter dated May 30, 2014, the CAS Court Office informed the Parties that the Division President had decided to retroactively (as the request was filed prior to the expiry of the time limit) extend the time limit until June 13, 2014. The First Respondent submitted that such a request may only be granted provided the initial time limit had not expired, meaning that the Division President's decision was contrary to Article R32 of the Code. The First Respondent requested that the decision be revoked.

236. On June 3, 2014, the CAS Court Office informed the Parties that the question of whether or not the First Appellant had received the First Respondent's letter of May 14, 2014, and the procedural remarks raised by the First Appellant in its letter of May 30, 2014 had no bearing on the Division President's letter, because the decision was already communicated to the CAS Court Office at the time the First Appellant's letter of May 30, 2014 was delivered to the CAS Court Office. The Parties were also informed that the decisions of Division President were not subject to revocation and any objections would be addressed by the Panel once constituted.

237. On June 13, 2014, the First Appellant filed its appeal brief together with its exhibits ("First Appellant's Appeal Brief").

c. ***The analysis and findings of the Panel***

238. Pursuant to Article R32 of the Code, the "[t]*he President of the relevant Division, may extend the time limits provided in these Procedural Rules* [...] *if the circumstances so warrant and provided that the initial time limit has not already expired.*"

239. ***Justifiable circumstances***. The Panel appreciates that the First Appellant's request was made due to the limited availability of most of the anti-doping experts consulted by it. The matter at hand is complex, and the experts' input is thus critical. Moreover, the extension would not prejudice the First Respondent because she was retired. Hence, the Panel finds that the request was justified.

240. ***Request prior to the time limit's expiry***. The Panel finds that the wording "*provided that the initial time limit has not already expired*" in the Article R32 of the Code refers to the date of the request and not the date of the decision rendered thereof. Indeed, a party may submit such a request even on the last day of the time limit – if the circumstances so warrant – and it cannot be expected that the CAS, or a Panel composed of three arbitrators, would render a decision immediately. In addition, it would be against fairness if the Code were to be interpreted in a manner whereby delays or the inactivity of the CAS (*quod non*) were to prejudice party's rights. The First Appellant's request for extension was submitted on May 12, 2015, and thus prior to the "*initial time limit*['s]" expiry.[74] In turn, the First Appellant's Appeal Brief was filed on June 13, 2014, and thus within the extended time limit.

3. Second Appellant's Statement of Appeal

241. The IAAF Rule 42.14 provides as follows:

> "*The filing deadline for an appeal to CAS filed by WADA shall be the later of (a) twenty-one (21) days after the last day on which any party entitled to appeal in the case could have appealed; or (b) twenty-one (21) days after WADA's receipt of the complete file relating to the decision.*"

242. The First Appellant's time limit to file an appeal expired on May 9, 2014. Thus, the Second Appellant's time limit expired on May 30, 2014. The Panel notes that the Second Appellant filed its Statement of Appeal on May 23, 2014, and thus timely.

4. Second Appellant's Appeal Brief

243. Article R51 of the Code provides as follows:

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[74] The First Appellant's time limit to file its Statement of Appeal expired on May 9, 2015, and thus, with the one day suspension granted by the CAS Court Office on April 24, 2014, the First Appellant's time limit to file its Appeal Brief would have expired on May 25, 2015.

> "*Within ten (10) days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the legal facts and legal arguments giving rise to the appeal*".

244. By letter dated May 28, 2014, the CAS Court Office suspended the Second Appellant's time limit to file an appeal pending an agreement between the Parties or, in the alternative, a decision by the Division President on the Second Appellant's procedural requests of May 23, 2014. By letter dated June 3, 2014, the CAS Court office informed the Parties that the time limit remained suspended.

245. On January 28, 2015, the CAS Court Office informed the Parties that the Panel rejected the Second Appellant's request to extend the time limit to file an appeal brief. Accordingly, the suspension of the time limit (pronounced on May 28, 2014) was lifted and resumed on the day of the receipt of the CAS Court Office's letter.

246. On January 29, 2015, the Second Appellant made a new and separate request for a 45 day extension of the time limit to file its appeal brief. According to the Second Appellant, due to the First Respondent's consent, it was reasonable to expect that its request for bifurcation of the proceedings would be granted and the Second Appellant would then only have to address the jurisdictional issue before any discussion on the merits. In addition, the Second Appellant needed to assess and respond in time to the Belda-Peña Report, the English translation of which was still pending.

247. On February 2, 2015, the Panel suspended the Second Appellant's time limit to file its appeal brief.

248. On February 3, 2015, the First Appellant consented to the Second Appellant's request for extension of the time limit to file its appeal brief. On February 4, 2015, the Panel partially granted the Second Appellant's request and extended the time limit by 35 days upon receipt from the (i) First Respondent of the Belda-Peña Report and documents relating to her alleged condition of subclinical hypothyroidism, and (ii) Second Respondent of the Vidal Report. The suspension of the Second Appellant's time limit was lifted (*i.e.* the time limit was suspended for two days).

249. On February 21, 2015, the First Respondent provided the Belda-Peña Report.

250. By letter dated March 12, 2015, the CAS Court Office informed the Parties that the Panel had decided that the 35-day time limit was triggered notwithstanding the failure of the Second Respondent to produce the Vidal Report. The Second Appellant's time limit thus started to run upon the receipt of the CAS Court Office letter.

251. The Second Respondent filed its Appeal Brief on April 16, 2015 and thus timely.

VI. MERITS

A. Structure Of The Merits Section Of This Award

252. The summary of the submissions in Section V refers to the substance of the allegations and arguments without listing them exhaustively. In its discussion of the case and its findings under Section V of this Award, the Panel nevertheless examined and took into account all of the allegations, arguments, and evidence submitted in writing and during the Oral Hearing, whether or not expressly referred to herein.

253. Given that the Division President decided to consolidate the two proceedings at issue, the Appellants in principle consented to each other's arguments, and in order to ensure a better reading of this Award, the Panel does not differentiate below between the Appellants but refers to them jointly. Moreover, the sections below start with Ms. Domínguez Azpeleta's explanations and arguments followed by the Appellants' submissions, in order to ensure a better logical flow. This in no way affects the Panel's rigorous analysis and the applicable burden and standard of proof.

B. The Panel's Scope Of Review

254. Pursuant to Article R57 of the Code "*the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.*" Therefore, the Panel is not bound by the conclusions of facts and law set forth in the RFEA Decision, but may proceed with a full review on this Appeal *de novo*.

C. Preliminary Observations Of The Panel On The Parties' Experts

255. At the outset, and given the complexity of issues at hand, the Panel wishes to make the following observations regarding the Parties' experts. Although these observations are by no means prejudicial to the Panel's rigorous analysis and findings on each of the key issues at hand, the Panel took them into account when determining the reliability and credibility of the expert testimonies.

- First, the First Respondent's experts' professional expertise (by their own explanations) – which the Panel has utmost respect of – essentially centres around methodology of clinical testing and oncology. Professor Belda[75] has published over 80 papers regarding biomarkers, and Professor Peña[76] over 100

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75 Professor Belda is a graduate of Medicine and Surgery, Doctor in medicine, Medical Oncologist, Head of the Thoracic Oncology and Neuro-Oncology at the Centro Integral Oncologico Clara Campal in Madrid. He is also a research fellow at the Instituto de Investigaciones Biomedicas Alberto Sols and Spanish National Research Council.

76 Professor Peña is a graduate in Computer Science, Doctor in Computer Science, Tenured Lecture at the Polytecnic University of Madrid, Assistant Director of the Supercomputing and Visualisation Centre of Madrid.

papers on data analysis. According to their statements at the Oral Hearing, none were published specifically in relation to doping. The Appellant's experts – Professor Schumacher,[77] Dr. Sottas,[78] and Dr. Pralong[79] – are renowned and leading experts (with numerous publications) specifically on the issues at hand. Their leading expertise and contributions thereof were also repeatedly recognized by the First Respondent's experts.

- Second, the First Respondent's experts admitted that they had, in certain key instances (*e.g.* use of hypoxic chambers, subclinical hypothyroidism), relied solely on the information provided by the First Respondent and had not verified it by other means. This will be addressed in more detail where relevant below.

D. The Anti-Doping Rule Violation

256. The IAAF Rule 32(2)(b) stipulates as follows:

> "*Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:*
>
> (b) *Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.*
>
> *(i) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his body. Accordingly, it is not necessary that intent, fault, negligence or*

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77 Dr. Yorck Olaf Schumacher completed his medical studies in Germany and South Africa. He obtained a specialization in Internal Medicine and Sports Medicine. In 2012, he joined Aspetar. He has been the team physician for the German Olympic Team since 2000 and attended many international sporting events in that function. His research interest ranges from Sports Science and Physiology to clinical Sports Medicine, his recent focus has been Sports Haematology and the adaptation of the haematological system of the athlete to different environments.

78 Dr. Sottas has a degree in biology and in physics and a PhD in life sciences from the Ecole Polytechnique de Lausanne. His expertise is in the evaluation of biomarkers of disease and of doping. He is the author of more than 50 peer-reviewed publications and book chapters in this field. He has been a WADA ABP Manager since 2010. He also provides consulting services to the pharmaceutical industry in the field s of biomarker evaluation, clinical trials designs and biomarker discovery for the early diagnosis of cancer. Prior to his WADA mandate, he was a head of research in the WADA-accredited laboratory at Lausanne (2004-2010) where his role included the evaluation of biomarker data obtained from clinical trials and the development of the ABP. He is the author of the Adaptive Model. He has also acted as an expert before the CAS in other doping cases.

79 Dr. Pralong is a full professor at the Faculty of Biology and Medicine at the Lausanne University, Chief of Service at the Service of Endocrinology, Diabetes and Metabolism at the Lausanne University Hospital, Vice Dean for Academic affairs, Faculty of Biology and Medicine, Lausanne University, and Associate Professor, Faculty of Medicine, University of Geneva. His research interest includes Physiology and pathophysiology of GI tract hormones, Development and physiology of hypothalamic GnRH neurons, and Central nervous system control of food intake. He has over 120 published manuscripts and book chapters.

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.

(ii) the success or failure of the Use or Attempted 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."

257. The IAAF Rule 33.3 provides as follows:

"*Methods of Establishing Facts and Presumptions.*

Facts related to anti-doping rule violations may be established by any reliable means, including but not limited to admissions, evidence of third Persons, witness statements, experts reports, documentary evidence, conclusions drawn from longitudinal profiling and other analytical information" (emphasis added by the Panel).

1. The burden and standard of proof

a. The First Respondent's arguments

258. The First Respondent referred to the RFEA Decision (based on Spanish law) that found the burden of proof lied with the accuser and "*any flaw in the outcome of the evidence, assessed freely by the penalizing body, should result in a declaration of not guilty*".[80] Accordingly, the Appellants ought to prove Ms. Domínguez Azpeleta's punishable conduct "*beyond all reasonable doubt*" and "*may not resort to the less stringent principles of the World Anti-Doping Code*".[81]

b. The Appellants' arguments

259. The Appellants' relied on the IAAF Rule 33.1 which stipulates as follows:

"*The standard of proof shall be whether the IAAF* [...] *has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt*".

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80 RFEA Decision, p. 7.

81 RFEA Decision, p. 8.

c. ***The analysis and findings of the Panel***

260. At the outset, as stated in Section IV.B *supra*, the IAAF rules, and *not* Spanish law, are applicable to the present proceedings.

261. ***Burden of proof.*** The Panel recalls that "*there is no 'factual presumption' that the blood screening tests produced correct result, because, according to the CAS case law, in anti-doping proceedings other than those deriving from positive testing, sports authorities do not have an easy task in discharging the burden of proving that an anti-doping rule violation has occurred, as no presumption applies. Accordingly, the federation bears the full burden to present reasonably reliable evidence to persuade the Panel, by the applicable standard of proof, that the athlete committed a doping offence in violation.*"[82] Hence, the Panel notes, the Appellants bear the burden of proof that Ms. Domínguez Azpeleta committed the ADRV at hand.

262. ***Standard of proof.*** The Panel recalls that the "comfortable satisfaction" test is well-known in CAS practice. The Panel further recalls that several CAS awards withstood the scrutiny of the Swiss Federal Tribunal, which stated that anti-doping proceedings are private law and not criminal matters and "*the duty of proof and assessment of evidence* [are] *problems which cannot be regulated, in private law cases, on the basis of concepts specific to criminal law.*"[83] Thus, the Panel does not agree with Ms. Domínguez Azpeleta's contentions that the standard of proof is "beyond all reasonable doubt" and that the Appellants may not resort to the less stringent principles of the World Anti-Doping Code. Accordingly, the Panel will apply the "comfortable satisfaction" standard as provided in the IAAF Rule 33.1,[84] and consistently applied in many cases concerning allegations of blood manipulation or other serious form of doping.[85]

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82 CAS 2009/A/1912 *P. v. International Skating Union (ISU) & CAS 2009/A/1913 Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU)*, award of 25 November 2009, para. 44 ff.

83 Swiss Federal Tribunal, 2nd Civil Division, Judgment of 31 March 1999, 5P.83/1999, c. 3.d. *See also* CAS 2009/A/1912 *P. v. International Skating Union (ISU) & CAS 2009/A/1913 Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU)*, award of 25 November 2009, para. 54.

84 *See also* Article 3.1 of the WADC.

85 *See also* CAS 2009/A/1912 *P. v. International Skating Union (ISU) & CAS 2009/A/1913 Deutsche Eisschnelllauf Gemeinschaft e.V. (DESG) v. International Skating Union (ISU)*, award of 25 November 2009, para. 56.

2. The ABP model

a. The First Respondent's arguments

263. ***Validity of the ABP and the OFF-score marker.*** The First Respondent submitted an extensive Belda-Peña Report titled "*Model for Haematological Markers in Athletes – Methodological Study, Application of the Model and Evaluation of Results*".

264. In short, the First Respondent's experts analysed the high scores on OFF-score on the basis of an article by *Gore et. al.*, 2003,[86] and concluded that the authors committed serious methodological errors (*e.g.* selection and results bias) as well as identifying significant shortcomings in the analysis methodology:[87]

> "*For example, the authors used a linear discriminant analysis to separate two groups that cannot be separated linearly. Moreover, they assumed that the variables were adjusted to a normal distribution when it has been demonstrated that the reticulocytes are not distributed in this manner. Finally, they verify their results for a group of federated athletes considered to be "clean" given that in a survey they declared they had not consumed any doping substances in the competitions in which they had participated in the last 12 months.*"

265. The First Respondent's experts found that "*these biases cast doubt on the validity of the study as a basis for sanctioning and, therefore, in the deduction of the components of this formula.*"[88] The experts also emphasised that "*the margins of error, in certain cases, are 600 times in excess of those the authors reported*".[89]

266. In addition, the First Respondent's experts argued that *Gore and collaborators* confused population measures with individual data, while "*a close reading of the publications that report the individual data of different individuals and compare the average obtained from the study population easily reveals the critical error of confusing the information that an average provides with the conclusions we could obtain from individual data*".[90]

267. In sum, the experts criticised the reliability of OFF-score markers, the application of which was wrong in its conception, which in turn leaded to systematically erroneous

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86 Gore C, Parisotto R, Ashenden M, Stray-Gundersen J, Sharpe K, Hopkins W, Emslie K, Howe C, Trout G, Kazlauskas R and Hahn A, "*Second-generation blood tests to detect erythropoietin abuse by athletes*", Haematologica 2003 ("Gore et al., 2003").

87 *See* the First Respondent's Expert Report, Summary, p. 3.

88 *See* the First Respondent's Expert Report, Summary, p. 3.

89 *See* the First Respondent's Expert Report, Summary, p. 3.

90 *See* the First Respondent's Expert Report, Summary, p. 4.

results. Since the OFF-score was an essential element of the ABP, the validity of the ABP as such was undermined.

268. ***Transparency and the ABP model.*** The First Respondent submitted that the data on which the ABP Model was based were not public, and thus athletes are not able to validate the reliability of the ABP methodology and software. Accordingly, the First Respondent requested that the Panel compel the Appellants to disclose the underlying data to a reputable third-party institution for validation purposes.

b. <u>The Appellants' arguments</u>

269. ***Validity of the ABP and the OFF-score marker.*** The Appellants relied on the expert opinion of Dr. Sottas, the principal developer of the ABP and the author of the Adaptive Model.

270. Dr. Sottas explained that the *Gore at al.*, 2003 article relied on by the First Respondent's experts described the application of the OFF-score marker in 2003, *i.e.* several years before the ABP was introduced. Hence, the article at issue addressed the application of the OFF-score marker in relation to a model with population-based limits. However, Dr. Sottas explained, the ABP is based on intra-individual, and *not* population-based limits.[91] The Adaptive Model was developed precisely to provide for a reliable basis for the evaluation of individual cases. Dr. Sottas also challenged the First Respondent's experts' premise that the OFF-score could not detect complex patterns of blood doping as it was based on a simple linear regression model. According to Dr. Sottas, this view

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91 *See* Statement by Dr. Sottas, dated March 30, 2015: "*The* [First Respondent's experts] *appear not to be aware that the OFF-score was initially not developed specifically for the Athlete Biological Passport, but as a marker of rEPO doping. This initial development was not intended to be applied in the context of longitudinal profiles. This is the reason why the Australian group, which performed the initial development of the OFF-score, referred to population-based limits and not intra-individual values, which is the case in the context of the ABP. Consequently, to discuss the validity of population-based limits in the context of the ABP is without any relevance for precisely the reason that the ABP is not based on the application of such limits. The* [First Respondent's experts] *only cite studies performed before 2003 that were not performed with reference to the ABP, and seem to be ignorant of all studies performed after 2003 which were performed in the context of the ABP development (3 studies by Sottas et al, 2 studies by Ashenden and Sharope at al, 3 studies by Morkerberg et al, 2 studies by Prommer at al, Voss et al 2008, Borno et al 2010, Pottgiesser at al 2011). These studies, which are the relevant ones in connection with the ABP not only show that the OFF-score is a valid biomarker for the ABP, they also show that a series of OFF-score values measured on the same individual are capable of: indicating the start of a rEPO treatment as well as the withdrawal of blood (leading to atypical low OFF-score); indicating the cessation of rEPO treatment as well as the transfusion/reinfusion of blood (leading to atypically high OFF-score). In that context, a low OFF-score measured out-of-competition, usually a few weeks or months before an important competition, followed by a high OFF-score measured at the time of the competition is a pattern that is characteristic of blood doping. This is the reason why the OPFF-score together with the Hemoglobin (Hgb) are the only primary biomarkers in the blood module of the ABP, meaning that it is mandatory for an anti-doping organization to proceed with the Result Management as soon an Atypical Passport Finding has been detected in Hgb and/or OFF-score.*"

ignored the fact that a longitudinal approach of the OFF-score was developed after 2003 with the possibility to detect both atypically low and atypically high OFF-score values.

271. Dr. Sottas concluded that "*the whole discussion with regard to the OFF-score by the* [First Respondent's Belda-Peña Report] *is quite simply beside the point because it is not addressing the OFF-score as used in the ABP*".[92]

272. In sum, the Appellants submitted that the First Respondent's Belda-Peña Report did not constitute a valid criticism of the ABP as established and applied, and did not call into question the reliability of the OFF-score marker, or the conclusion that the Ms Domínguez Azpeleta's values did exceed the relevant thresholds.

273. ***Transparency and the ABP model.*** Dr. Sottas explained that the Adaptive Model is publicly available and can be replicated by anyone. By contrast, the data used in the Adaptive Model belong to those that performed the clinical tests. Dr. Sottas submitted that the Adaptive Model was validated on numerous occasions, *e.g.* in 2009, the Adaptive Model was used by 70 users, out of which 20 to 30 groups used it for blood test purposes.

274. Dr. Sottas further explained that the ABP software[93] was developed between 2004 and 2007 at the Swiss Laboratory for Doping Analyses in Lausanne, to implement the Adaptive Model:

> "*It has been checked that the ABP Software produces results identical to the ones obtained in the published studies when applied to the corresponding data. The ABP module, in which the laboratories are reporting the biological results, was implemented in ADAMS in 2007. The ABP software has been checked by WADA to be compliant with the Technical Documents associated to WADA ABP Guidelines as well as compatible with the ABP module of ADAMS. In 2012, the application of the Adaptive Model was directly implemented in ADAMS in order to facilitate the exchange of information associated with the ABP. As a consequence, the ABP software is no longer used as a standalone. It remains available to [WADA] recognized anti-doping organizations.*"[94]

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92 *See* Statement by Dr. Sottas, dated March 30, 2015: "*In conclusion, the authors have failed to understand that it is not the model established on the basis of population-based limits proposed by Gore et al in 2003 that is used in the ABP but rather the Adaptive Model as developed in the years after 2—3. In particular, the validity of the OFF-score marker (not based on population-based limits) has been confirmed by several studies, which are posterior to the ones to which the authors discussed.*"

93 "*The ABP Software implements and applies the Adaptive Model. By analogy, an Excel spreadsheet may apply a formula and produce results based on data being inputted to that formula. The Adaptive Model is akin to the formula and the ABP Software is akin to Excel.*" (*see* Statement by Dr. Sottas, dated May 12, 2015.)

94 *See* Statement by Dr. Sottas, dated May 12, 2015.

c. ***The analysis and findings of the Panel***

275. ***Validity of the ABP and the OFF-score marker***. At the outset, the Panel recalls the CAS award in *Valjavec* which confirmed the validity and reliability of the ABP: "*WADA has approved the use of the ABP and this has been codified*".[95] In any event, the Panel rigorously reviewed all the experts' written and oral testimonies.

276. First, although the Panel acknowledges the comprehensiveness of the First Respondent's Belda-Peña Report (142 pages), the Panel notes that the First Respondent's criticism of the ABP's reliability was largely based on an irrelevant scientific study. Indeed, as confirmed by Dr. Sottas, the entire discussion concerning the OFF-score was "*beside the point*", as it did not address the OFF-score as applied in the ABP.

277. Second, the Panel is satisfied with the explanations provided by Dr. Sottas to the ABP's challenge in the Vidal Report.[96]

278. Finally, the Panel appreciates that numerous peer-reviewed applications have confirmed the ABP's reliability.[97]

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95 CAS 2010/A/2235 *UCI v Tadej Valjavec & Olympic Committee of Slovenia*, para. 81.

96 *See* Statement of Dr. Sottas dated May 19, 2015: First, the ABP is not descriptive as claimed in the report. The goal of the ABP is not to describe the physiology of an athlete through the collection of biological profiles, rather it is to draw conclusions from the collection of biological marker values indicative of doping. Hence, the ABP was developed following forensic, not medical, standards. In the ABP, the logic for the evaluation of the evidence is inferential and inductive, and not descriptive. Second, the OFF-score is not a "degree of deviation" as suggested, but a "stimulation indeX" because it represents the status of erythropoiesis after the cessation of rEPO doping or after the transfusion of blood. Third, contrary to what is claimed, the athletes do have access to their hematological profiles in ADAMS, which includes all OFF-score values. Fourth, only SYSMEX (as opposed to multiple analyzers) is used in the ABP. This choice was made in 2007 to avoid any inter-instrument bias, especially in the measurement of reticulocytes. Fifth, there are hundreds of studies done in sports hematology, that include the publication of normal values and/or normal variations of the biomarkers used in the hematological module of the ABP. Dr Sottas cited 12 studies that were performed on elite athletes with the ABP in mind. With one exception (where it was found *a posteriori* that some doped cyclists were included in the study without the investigator's knowledge), all studies confirmed the validity and relevance of the use of blood indices as biomarkers of doping in the ABP. Moreover, the athlete is used as his/her own reference with the derivation of individual limits, and not population ranges as suggested in the Vidal Report. All biomarkers used in the ABP are known to present large between-subject variations and therefore a longitudinal approach with the derivation of individual limits is done by the Adaptive Model, as opposed to general population clinical reference ranges as proposed in the Vidal Report, is a fundamental concept of the ABP. Finally,, the ABP is not just about sanctioning based on "algorithm", as a value deemed atypical triggers the evaluation of the athlete's passport by a panel composed of three experts in the field of sports physiology, blood doping and clinical hematology.

97 For completeness, the Panel recognizes that the IAAF Rule 33.3 was recently amended in order to explicitly acknowledge the reliability of the ABP as a mean of establishing an ADRV.

279. Therefore, following a consideration of the written and oral testimonies of the Parties' experts, the Panel is convinced that the ABP model is a reliable and valid mean of establishing an ADRV.

280. ***Transparency and the ABP model***. The Panel notes that the Adaptive Model was peer-reviewed and has been repeatedly validated. The Panel also notes that the Adaptive Model is essentially public and may thus be replicated if needed.

281. Importantly, given the relation between the Adaptive Model and the ABP Software (*i.e.* the former being akin to a formula and the latter being akin to a software implementation), the Panel deems it unnecessary to make the ABP Software available in order to assess the ABP model's reliability. In finding so, the Panel further recalls the ECJ ruling in the *Unitrading* case.[98] Indeed, as in *Unitrading*, Ms. Domínguez Azpeleta "*knew of the grounds on which the* [present] *decision is based,* [...] *was aware of all the documents and observations submitted to the* [CAS] *with a view to influence its decision and* [...] *was able to comment on them before* [the CAS]." Accordingly, "*in those circumstances,* [the analytical results] *provided by the* [ABP Software] *merely constitute evidence which* [the CAS], *also taking account of the arguments and evidence submitted* [...] *w*[as] *able to regard as adequate to establish the* [ADRV]." In turn, "[t]*he admissibility of such evidence, even if it is important or decisive for the*

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98 *See* Case C-437/13 *Unitrading Ltd v Staatssecretaris van Financiën*, ECLI:EU:C:2014:2318, paras. 20-25: "[h]*aving regard to the adversarial principle that forms part of the rights of the defence which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them. The fundamental right to an effective legal remedy would be infringed if a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views (judgment in ZZ, EU:C:2013:363, paragraphs 55 and 56 and the case-law cited). However, it does not appear that, in a case such as that at issue in the main proceedings, the principles referred to in paragraphs 20 and 21 of the present judgment have been infringed. It follows from the order for reference that Unitrading knew of the grounds on which the decision concerning it is based, that it was aware of all the documents and observations submitted to the court with a view to influence its decision and that it was able to comment on them before that court. In those circumstances, the results of the examinations provided by the American laboratory merely constitute evidence which both the customs authorities and the Netherlands courts, also taking account of the arguments and evidence submitted by Unitrading, were able to regard as adequate to establish the true origin of the goods.* [...] *The admissibility of such evidence, even if it is important or decisive for the outcome of the dispute concerned, cannot be called into question by the sole fact that that evidence cannot fully be verified by either the party concerned or the court hearing the matter, as appears to be the case of the results of the examinations by the American laboratory in the main proceedings. Although, in such a case, the party concerned cannot fully verify the accuracy of those results of the examinations, it is not, however, in a situation comparable to that at issue in the case which gave rise to the judgment in ZZ (EU:C:2013:363), where both the national authority concerned and the court hearing an action against the decision adopted by that authority refused, by application of the national legislation at issue in that case, to give precise and full disclosure to the person concerned of the grounds on which the decision concerning him was based.*"

outcome of the dispute concerned, cannot be called into question by the sole fact that th[e] [ABP Software] *cannot fully be verified by* [Ms. Domínguez Azpeleta]".[99]

282. In addition, the Panel appreciates that "*in case of discrepancy between the results found in the ABP Software and the results found with the methods described in th*[e] [Technical Document],[100] *the latter results should prevail.*"[101]

3. Atypical results detected in Ms. Domínguez Azpeleta's ABP

a. The First Respondent's arguments

283. The First Respondent's experts discussed the application of the Abnormal Blood Profile Score ("ABPS") to Ms. Domínguez Azpeleta's blood profile, and compared her values with the limits of 1.0 (doping), between 0.0 and 1.0 (suspicious) and below 0.0 (normal). The experts concluded that the ABPS values of Ms. Domínguez Azpeleta were not atypical.

b. The Appellants' arguments

284. The Appellants' expert, Dr. Sottas, pointed out that the First Respondent's experts' analysis and findings were flawed due to a fundamental mistake through their reference to thresholds that were valid for a modal population of Caucasian male athletes aged 20-40,[102] *i.e.* thresholds irrelevant in the case at hand.

285. In addition, Dr. Sottas submitted the following observations concerning the ABPS values obtained on the blood profile of Ms. Domínguez Azpeleta (in blue) and the limits obtained by the Adaptive Model (in red) as shown in Diagram 1 below for a specificity of 99%.[103]

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99 *See* Case C-437/13 *Unitrading Ltd v Staatssecretaris van Financiën*, ECLI:EU:C:2014:2318, paras. 20-25.

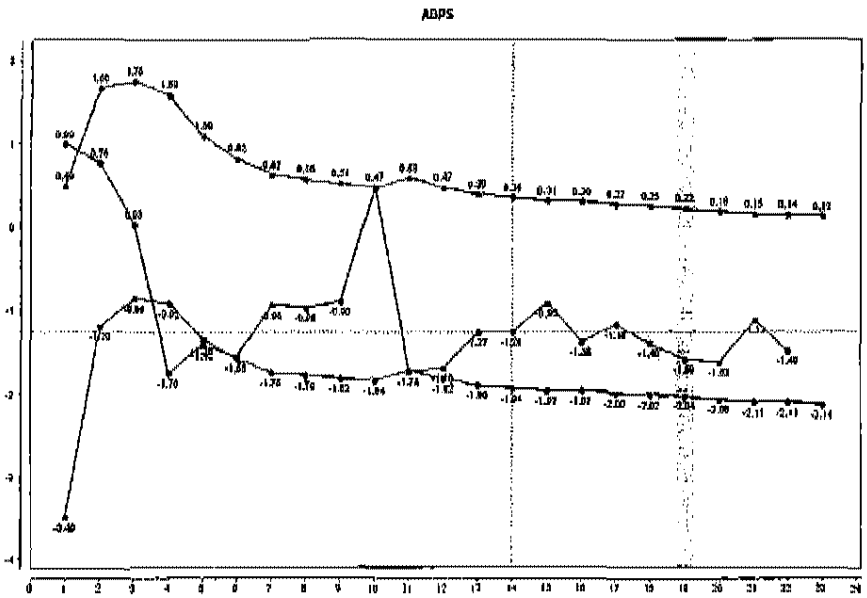
100 "*The Technical Document covers the interpretation of indirect markers of blood doping stored in an Athlete's Passport ("AP"). The hematological part of the AP contains: a longitudinal blood profile composed of the combined results of hematological parameters analyzed in a series of blood samples; information specific to the collection of the blood samples (see below); a collation of physiological characteristics pertinent for the evolution of doping (see below). The interpretation shall be based on laboratory measurements of samples obtained in conformity with the protocols specific to the AP.*" (*see* the Athlete's Passport Hematological module Interpretation Technical Document, p. 2.)

101 *See* the Athlete's Passport Hematological module Interpretation Technical Document, p. 2.

102 *See* Statement by Dr. Sottas, dated March 30, 2015.

103 *See* Statement by Dr. Sottas, dated March 30, 2015.

Diagram 1



- The upper population-based threshold of Female (and not male) Caucasian athletes is 0.49 (and not 1.0): this is the upper limit shown in red for the first test (*i.e.* before individualization of the profile).

- The individual-based thresholds, which are the last thresholds obtained in the sequence assuming a normal physiological condition of the athlete, are [-2.14 0.12]. Three values exceed this threshold: the two tests of August 5, 2009 and August 9, 2009[104] performed the week before the 2009 IAAF World Championships in Athletics and the test performed on July 27, 2010 before the 2010 European Athletics Championships. No atypical value is observed in the last 10 values (period 2012-2013), suggesting that the normal ABPS values for this athlete are around -1.0 and that any external factors that affected the profile (*e.g.* doping, transient medical conditions, exposure to high altitude, issues in sample collection or analysis) were in place before the competitions cited above.

- The limits of the Adaptive Model change drastically from one test to the next: this phenomenon only appears when external factors that vary over time (such as blood doping, transient medical condition) are at play.

286. Dr Sottas concluded that "[b]*eyond statistics,* [he has] *never observed in* [his] *career in the field of anti-doping, variations of more than two points in ABPS in any individual*

104 As explained in Section II.B.(1) above, the sample of August 9, 2009 was eventually excluded.

with a normally functioning erythropoiesis with samples collected following the technical documents specific to the ABP."[105]

c. ***The analysis and findings of the Panel***

287. At the outset, the Panel notes that the First Respondent's experts drew their conclusion on the basis of incorrect thresholds. The Panel recognizes that Diagram 1 shows that the upper population-based threshold of female (not male) Caucasian athletes is 0.49 (not 1.0).

288. The Panel is also persuaded by Dr. Sottas' observations on the ABPS values obtained on the blood profile of Ms. Domínguez Azpeleta. Suffice it to say that the "*sequence abnormality is higher than 99.999%, meaning that there is less than one chance in 100,000 (conservative estimate) to observe variations of this amplitude in a clean and healthy athlete without any external factor*" (emphasis added by the Panel).[106]

289. The Panel draws additional comfort from the unanimous conclusions of the Expert Panel,[107] made in the three First Expert Opinions and each of the three Second Expert Opinions (as described in more detail in Section II.B.2 and Section II.B.4 *supra*) finding atypical variations in Ms. Domínguez Azpeleta's longitudinal blood parameters, especially concerning Sample 2 of August 13, 2009, and Sample 9 of July 27, 2010. These are further reflected in Diagram 2 below.

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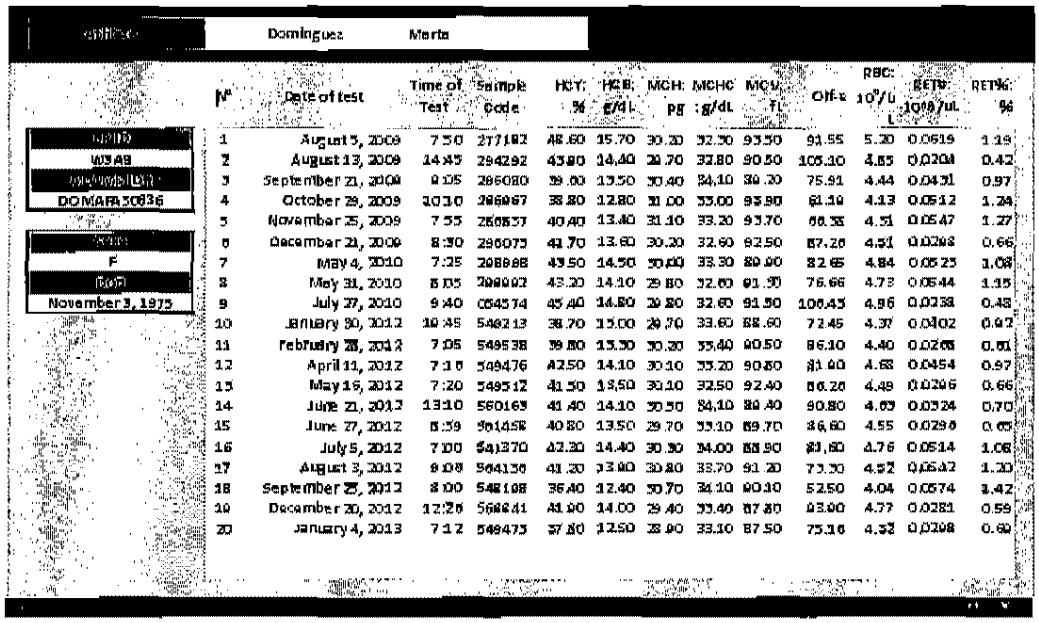
105 *See* Statement by Dr. Sottas, dated March 30, 2015.

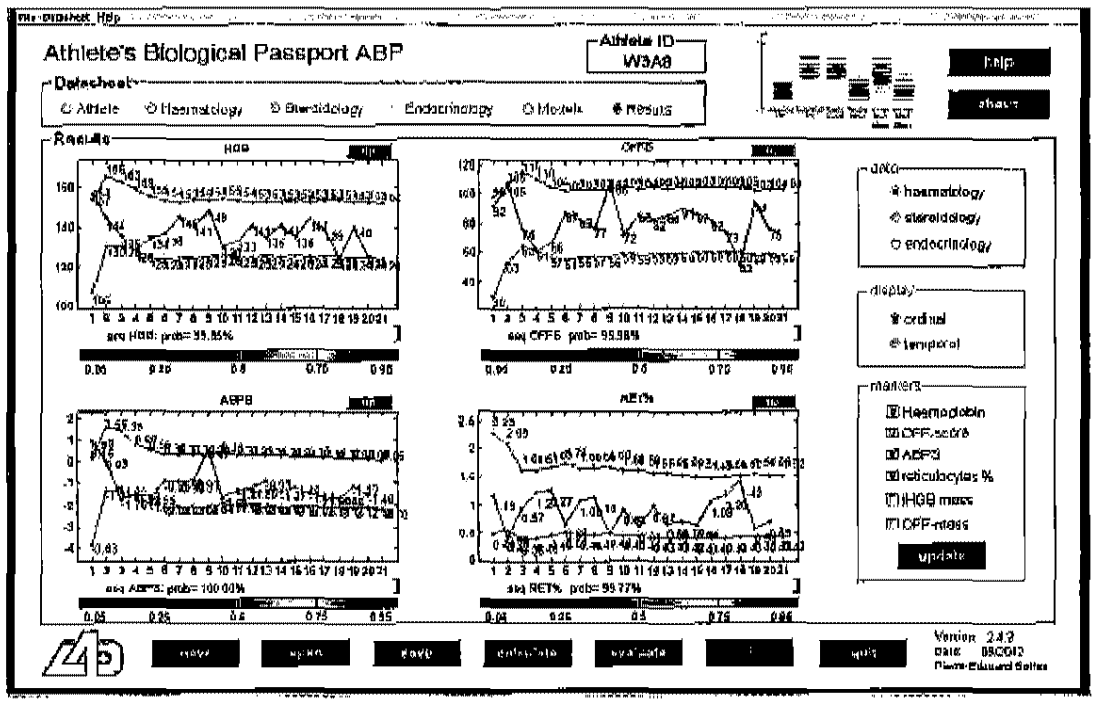
106 *See* Statement by Dr. Sottas, dated March 30, 2015.

107 The Expert Panel was comprised of three renowned experts in the field of clinical haematology (*i.e.* diagnosis of blood pathological conditions), laboratory medicine and haematology (*i.e.* assessment of quality control data, analytical and biological variability and instrument calibration), and sports medicine and exercise physiology: Professor Yorck Olaf Schumacher, Professor Giuseppe d'Onofrio, and Professor Michel Audran.

Diagram 2



	N°	Date of test	Time of Test	Sample Code	HCT: %	HGB: g/dL	MCH: pg	MCHC: g/dL	MCV: fL	Off-s	RBC: 10^6/µL	RETS: 10^9/µL	RET%: %
	1	August 5, 2009	7:50	277182	48.60	15.70	30.20	32.30	93.50	91.55	5.20	0.0619	1.19
	2	August 13, 2009	14:45	284292	43.90	14.40	28.70	32.80	90.50	105.10	4.85	0.0204	0.42
	3	September 21, 2009	9:05	286080	39.00	13.50	30.40	34.10	89.20	75.91	4.44	0.0431	0.97
	4	October 29, 2009	10:10	288967	38.80	12.80	31.00	33.00	93.90	61.19	4.13	0.0512	1.24
	5	November 25, 2009	7:55	290857	40.40	13.40	31.10	33.20	93.70	66.58	4.51	0.0547	1.27
	6	December 21, 2009	8:30	296075	41.70	13.60	30.20	32.60	92.50	87.26	4.61	0.0298	0.66
	7	May 4, 2010	7:25	298898	43.50	14.50	30.60	33.30	89.90	82.65	4.84	0.0525	1.08
	8	May 31, 2010	8:05	299902	43.20	14.10	29.80	32.60	91.30	76.66	4.73	0.0544	1.15
	9	July 27, 2010	9:40	054574	45.40	14.80	29.80	32.60	91.50	106.45	4.96	0.0238	0.48
	10	January 30, 2012	10:45	546213	38.70	13.00	29.70	33.60	88.60	72.45	4.37	0.0402	0.92
	11	February 28, 2012	7:05	548538	39.80	13.30	30.20	33.40	90.50	86.10	4.40	0.0265	0.61
	12	April 11, 2012	7:10	548476	42.50	14.10	30.10	33.20	90.80	81.60	4.68	0.0454	0.97
	13	May 16, 2012	7:20	548512	41.50	13.50	30.10	32.50	92.40	86.26	4.48	0.0296	0.66
	14	June 21, 2012	13:10	560169	41.40	14.10	30.50	34.10	89.40	90.80	4.69	0.0324	0.70
	15	June 27, 2012	8:39	561058	40.80	13.50	29.70	33.10	89.70	86.60	4.55	0.0296	0.65
	16	July 5, 2012	7:00	561370	42.20	14.40	30.30	34.00	88.90	83.60	4.76	0.0514	1.08
	17	August 3, 2012	9:08	564136	41.20	13.80	30.80	33.70	91.20	73.30	4.52	0.0542	1.20
	18	September 25, 2012	8:00	568108	36.40	12.40	30.70	34.10	90.10	52.50	4.04	0.0574	1.42
	19	December 20, 2012	12:26	568841	41.90	14.00	29.40	33.40	87.80	83.90	4.77	0.0281	0.59
	20	January 4, 2013	7:12	569473	37.80	12.50	28.90	33.10	87.50	75.16	4.32	0.0298	0.69



290. Accordingly, the Panel is comfortably satisfied that atypical results were detected in Ms. Domínguez Azpeleta's ABP profile. In turn, the Panel discusses below each of the explanations for detected abnormalities put forward by Ms. Domínguez Azpeleta.

4. Explanations of atypical results in Ms. Domínguez Azpeleta's ABP

291. Ms. Domínguez Azpeleta's explanations may be grouped into three categories: (i) physiological and pathological conditions; (ii) non-pathological factors; and (iii)

alleged flaws in the sample collection, storage, handling, and analysis. Each is considered in detail below.

Physiological and pathological conditions

a. Irregular menstrual cycles from October 2003 to August 2010

i. The First Respondent's arguments

292. According to Ms. Domínguez Azpeleta, she had an intrauterine device implanted from October 6, 2003 to August 11, 2010, for contraceptive purposes. During this time, she experienced irregular menstrual cycles (*i.e.* double cycles, normal cycles, and, on several occasions, missed cycles) and prolonged and/or excessive menstrual bleeding (*i.e.* hypermenorrhea, also known as menorrhagia). Following her pregnancy, a second intrauterine device was implanted on September 20, 2012. At the time of the second implantation, Ms. Domínguez Azpeleta had hypermenorrhea for 10 days. According to Dr. Douwe de Boer, Ms. Domínguez Azpeleta's expert, she continues to suffer from hypermenorrhea and polymenorrhea to date.[108]

293. Dr. Douwe de Boer submitted that the elevated OFF-score in relation to Sample 9 (collected on July 27, 2010) was due to the combination of a relatively high HGB value and a relatively low RET%. Dr. Douwe de Boer suggested that "*the cause may have been a physiological reaction to previous significant blood loss due to menstruation problems and/or decrease in concentration of haemoglobin due to a serious infection.*" The resulting HGB concentration would have forced an endogenous production of erythropoietin resulting in an increase of HGB, and after reaching an elevated level, it would lead to a decrease of RET production due to a negative feedback mechanism. Dr. Douwe de Boer submitted that such a reaction could only have been provoked by a significant blood loss, unless non-identified pathological incident such as a chronic infection was the co-trigger. Dr. Douwe de Boer admitted that the net effect of the claimed sequence of infections (pyelonephritis 110 days prior to the Sample 9 collection; and influenza infection 2 weeks prior to the Sample 9 collection) "*is speculative, but in combination with menstruation problems there are nonetheless some serious reasons to suspect a decrease in HGB concentration far prior to* [the Sample 9] *collection.*"[109]

294. Concerning Sample 18, Dr. Douwe de Boer noted that "*it cannot be excluded that the combination of the re-plantation of the device and/or blood loss due to irregular menstruation problems might have caused the decrease in OFF-score*",[110] as the

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108 *See* Expert Opinion of Dr. Douwe de Boer, dated April 6, 2013, p. 15.

109 *See* Expert Opinion of Dr. Douwe de Boer, dated April 6, 2013, p. 19.

110 *See* Expert Opinion of Dr. Douwe de Boer, dated April 6, 2013, p. 21.

pathological information provided to Dr. Douwe de Boer indicated significant blood loss in that period (*i.e.* Sample 18 was collected on September 25, 2012).

295. Hence, Dr. Douwe de Boer concluded, "*certain remarkable and/or other observations* [concerning Samples 9 and 18] *can* [...] *be explained by more than common blood loss due to menstruation problems and subsequent treatment in combination with or without infection*".[111]

296. In addition, in the Supplementary Explanation, Ms. Domínguez Azpeleta submitted a written note evidencing that she had "*menorrhagia and persistent alteration of the menstrual cycle*" on April 29, 2013.[112]

ii. The Appellants' arguments

297. The Appellants contested whether the alleged menstrual issues could explain the abnormalities in Ms. Domínguez Azpeleta's ABP.

298. First, although the Appellants acknowledged that prolonged and excessive bleeding can lead to persistently low HGB values, this was not an issue in the summer of 2009, one of the periods when Ms. Domínguez Azpeleta was suspected of blood doping activities. By contrast, her HGB levels during this period were higher than what would otherwise be expected.[113]

299. Second, an absence of menstrual bleeding would not cause an increase in HGB. Accordingly, the alleged missed cycles could not explain Ms. Domínguez Azpeleta's abnormal blood profile.[114]

300. Third, there is no scientific evidence supporting the conclusion that menstrual disturbances would cause the abnormal values in Ms. Domínguez Azpeleta's blood profile.[115]

301. Fourth, the First Respondent's argument that a heavy menstrual bleeding after implantation of the second intrauterine device (September 20, 2012) caused the abnormal HGB values in Sample 18 does not match the record: Ms. Domínguez Azpeleta already had a high RET% in the samples prior to Sample 18, and very similar

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111 *See* Expert Opinion of Dr. Douwe de Boer, dated April 6, 2013, p. 21.

112 *See* the First Respondent's Supplementary Explanation, p. 4 and 5.

113 *See* Expert Response of Prof. Schumacher to Initial Explanation 3.

114 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 3.

115 *See* Expert Response of Prof. Schumacher to Initial Explanation p. 3.

concentrations of HGB were observed in her Samples during periods with and without the intrauterine device.[116]

302. Fifth, Ms. Domínguez Azpeleta's claim of "*persistent alteration of menstrual cycle*" was made on April 29, 2013, and thus after the collection of her last sample (Sample 20) and almost a year after the first set of ABP samples were taken. The Appellants further pointed out that the First Respondent's report of April 29, 2013 was only produced after the Second Respondent was notified of the First Appellant's investigation (March 11, 2013).

303. Finally, the Expert Panel confirmed that the menstrual abnormalities could not explain the "*haematological picture described in the earlier of period of* [Ms. Domínguez Azpeleta's] *profile in 2009-2010*".[117]

iii. The analysis and findings of the Panel

304. At the outset, the Panel observes that Dr. de Boer's explanations and conclusions regarding the impact of alleged menstrual issues on the ABP at hand are often speculative in nature, using a wording such as "[it] *is speculative*", "*may have been*", or "*it cannot be excluded*".[118] This contrasts with the categorical positions adopted by the Appellants' experts.

305. The Panel acknowledges that prolonged and excessive bleeding can lead to persistently low HGB values. However, the Panel concurs with the Appellants that the HGB levels of Ms. Domínguez Azpeleta in the summer of 2009 – the first period of suspected blood doping activities – were higher than would be expected. The Panel is further convinced by Prof. Schumacher's testimony that missed menstrual cycles in this period would not have caused an increase in HGB.[119]

306. Moreover, as highlighted by Professor Audran,[120] Ms. Domínguez Azpeleta did not declare an important blood loss on the DCFs for Sample 18 and Sample 20. Hence, the allegations of a significant blood loss simply do not match the record. In any event, the Panel is persuaded by Prof. Schumacher's observations that the First Respondent's argumentation concerning Sample 18 – decreased OFF-score explained by menorrhagia following the re-implantation of the intrauterine device – does not fit Ms. Domínguez Azpeleta's ABP profile. More specifically, "*if the* [intrauterine device] *had indeed caused increased bleeding and an erythropoietic response in Sample 18, then the RET%*

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116 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 7.

117 *See* Second Expert Opinion of Professor d'Onofrio, p. 2.

118 *See* Expert Opinion of Dr. Douwe de Boer, dated April 6, 2013, p. 19 and 21.

119 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 3.

120 *See* Second Expert Opinion of Professor Audran.

response is not matching".[121] First, Ms. Domínguez Azpeleta already had a high RET% in preceding Sample 17, collected on August 3, 2012. Second, Ms. Domínguez Azpeleta's HGB concentration levels are similar during the period with the intrauterine device and the period without the device (2010 – 2013), as shown in Table 3 below.

Table 3

	With IUD (Hb/Ret%)	Without IUD (Hb/Ret%)
Sample 8	14.5/1.08	
Sample 9	14.1/1.15	
Sample 10	14.8/0.48	
Sample 12		13.0/0.92
Sample 13		13.3/0.61
Sample 14		14.1/0.97
Sample 15		13.5/0.66
Sample 16		14.1/0.7
Sample 17		13.5/0.65
Sample 18		14.4/0.1.08
Sample 19		13.9/1.20
Sample 20	12.4/1.42	
Sample 21	14.0/0.59	
Sample 22	12.5/0.69	
Mean	**13.71/0.90**	**13.72/0.84**

307. The Panel finds additional comfort in Prof. Schumacher's remark that with the inclusion of the 2009 values, the average HGB value "with device" would be higher, which would further weaken the First Respondent's argument that the abnormal menstrual bleedings and the associated blood loss (partly caused and amplified by the intrauterine device) were the reason behind Ms. Domínguez Azpeleta ABP's abnormal values.

308. Accordingly, the Panel is comfortably satisfied that the menstrual issues at hand do not explain the abnormal values detected in Ms. Domínguez Azpeleta's ABP.

b. Viral infections and other medical conditions

i. The First Respondent's arguments

309. Ms. Domínguez Azpeleta submitted she suffered from several viral infections during the periods of sample collection. In support of this claim, she produced several medical records showing the administration of various substances (*e.g.* antibiotics, paracetamol,

121 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 7.

blood pressure drugs, anti-anxiety drugs, anti-inflammatories, skin therapeutics, and an antipyretic and analgesic drug),[122] during the period from April 2010 to May 2012.[123]

310. Ms. Domínguez Azpeleta also submitted that she consumed *Isotetriroina* for skin problems (though she could not specify the exact period) and disclosed the consummation of psychoactive drugs as of January 2011. In addition, Ms. Domínguez Azpeleta submitted a medical file showing her admission to hospital with a diagnosis of *pyelonephritis* on April 7, 2010. Lastly, Ms. Domínguez Azpeleta submitted a hospital report dated April 25, 2013, evidencing she was diagnosed with *lymphocytic meningitis viral*.

311. Ms. Domínguez Azpeleta argued that these various substances could affect the analytical results.

ii. The Appellants' arguments

312. The Appellants flatly rejected the First Respondents arguments.

313. First, the Appellants submitted that there is no indication that the conditions treated with the drugs listed by Ms. Domínguez Azpeleta, or the drugs themselves, would alter the biological variables used in the ABP in a manner that would have caused the detected abnormalities.[124]

314. Second, Ms. Domínguez Azpeleta disclosed the use of antibiotics on the DCFs related to Sample 11 (February 28, 2012) and Sample 13 (May 16, 2012). However, her HGB values in these Samples were similar to HGB values observed in periods of 2012 when she did not declare the use of antibiotics on the DCFs (*i.e.* Sample 15 of June 27, 2012 and Sample 19 of December 20, 2012). Accordingly, the Appellants argued, the use of antibiotics would not vary her values to the extent claimed. In addition, the Appellants pointed out that antibiotics are not effective for viral infections and are thus rarely prescribed for that matter.[125]

315. Third, the Appellants argued, the drugs listed were taken from April 2010 onwards. There is no explanation for the abnormalities detected in 2009.

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122 *Isotetrinoina* (a skin therapeutic used during and undefined period); *Augmentin* (an antibiotic, April 2010), *Amoxicilin* (an antibiotic, July 2010 and May 2012); Paracetamol (an antipyretic and analgetic drug, July 2010); *Enalapril* (a blood pressure drug, from January 2010), *Sulpiride* (a psychoactive drug; from January 2011), *Alprazolam* (a drug against anxiety, form January 2011), *Cloxacillin* (an antibiotic, February 2011), *Ibuprofen* (an anti-inflammatory drug, May 2012).

123 *See* Initial Explanation, p. 37.

124 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 2.

125 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 2.

316. Fourth, the Appellants submitted that it was highly unlikely that *pyelonephritis* could have impacted Ms. Domínguez Azpeleta's blood profile as no samples were collected around the time she suffered from this disease.

317. Fifth, the Appellants submitted there is no correlation between the meningitis referenced in the hospital report dated April 25, 2013, and the haematological abnormalities in Ms. Domínguez Azpeleta's ABP present in 2009 and 2010.[126]

318. Finally, the Appellants relied on the conclusion of Prof. d'Onofrio that "[n]*one of the* [medications taken by Ms. Domínguez Azpeleta] *in 2011 and 2012 has been reported as a cause of abnormalities on the ABP blood parameters*",[127] rendering Ms. Domínguez Azpeleta's arguments relating to her other medical conditions irrelevant in the present case.

iii. The analysis and findings of the Panel

319. The Panel notes that Ms. Domínguez Azpeleta listed various drugs and medical conditions, and merely asserted that these could have impacted the analytical results. No further explanation was provided. By contrast, the Panel recognizes that the Appellants' experts categorically refuted the alleged correlation between the medical conditions and drugs at hand and Ms. Domínguez Azpeleta's abnormal blood profile.

320. The Panel agrees with the Appellants' remark that Ms. Domínguez Azpeleta's HGB values remained similar in periods when she disclosed the use of antibiotics on the DCFs, to periods when she did not, as shown in Table 4 below. Accordingly, the Panel fails to see the possible correlation between the use of antibiotics and the level of detected abnormalities at hand.

Table 4

	Sample	[illegible]
Antibiotics	Sample 11 (February 28, 2012)	13.30
	Sample 13 (May 16, 2012)	13.50
No Antibiotics	Sample 15 (June 27, 2012)	13.50
	Sample 19 (December 20, 2012)	14.00

321. Similarly, the First Respondent asserts that pyelonephritis could have impacted her blood profile, but the Panel finds it inconsistent with the record. In particular, while pyelonephritis was diagnosed on April 7, 2010, no samples were collected around that time: Sample 6 was collected on December 21, 2009, and Sample 7 on May 4, 2010.

126 *See* Expert Response of Prof. d'Onofrio to Initial Explanation, p. 6.

127 *See* Expert Response of Prof. d'Onofrio to Initial Explanation, p. 6.

322. The Panel is also convinced by Prof. d'Onofrio's categorical conclusion (compared with the First Respondent's assertions) that the meningitis and the other medical conditions claimed during the 2011-2012 period could not possibly correlate with the "*haematological abnormalities present in 2009 and 2010*" in Ms. Domínguez Azpeleta's blood profile.[128]

323. The Panel also draws additional comfort from the opinion of Prof. Schumacher that "*in the relevant scientific information and drug leaflets, there is no indication that the conditions treated with these drugs or the drugs themselves will alter any of the variables used in the ABP in a way that would cause alterations of the magnitude such as observed in the profile of* [Ms. Domínguez Azpeleta]",[129] and that "*it is highly unlikely that pathologies or the intake of the declared medication had any relevant impact on the blood variables measured in connection with the ABP*".[130]

324. Accordingly, the Panel is comfortably satisfied that the medical conditions and drugs listed by Ms. Domínguez Azpeleta did not explain the detected abnormalities at issue.

c. Fainting

i. The First Respondent's arguments

325. Ms. Domínguez Azpeleta submitted she fainted in connection with the collection of Sample 8 (May 31, 2010) and Sample 9 (July 27, 2010).[131] Accordingly, these samples should be disregarded.

ii. The Appellants' arguments

326. The Appellants pointed out that the First Respondent failed to provide any contemporaneous record of the alleged fainting. Moreover, Prof. Schumacher explained that the alleged fainting would nonetheless had no impact on the values of these samples.[132]

iii. The analysis and findings of the Panel

327. The Panel observes that the First Respondent's claim does not fit the contemporaneous record.

328. In any event, the Panel is persuaded by Prof. Schumacher's explanation that a fainting incident leading to a posture change (*i.e.* lying down) (which was not established in the

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128 *See* Expert Response of Prof. d'Onofrio to Initial Explanation, p. 6.

129 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 2.

130 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 3.

131 *See* Initial Explanation, p. 5.

132 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 3-4.

present case) could change the plasma volume in turn leading to an increased HGB, but the RET% would be intact as it is not a concentration-based measure.[133] Importantly, the Panel notes, it was the RET% which was abnormally low (*i.e.* 0.48) in the key Sample 9 at issue.

329. Accordingly, the Panel is convinced that the alleged fainting incident would not in any event affect the analysis of Sample 9.

d. Subclinical hypothyroidism

i. The First Respondent's arguments

330. Ms. Domínguez Azpeleta argued she was diagnosed with subclinical hypothyroidism in 2012, and was treated with L-thyroxin, a thyroid hormone used in the treatment of thyroid insufficiency.

331. According to the First Respondent's Belda-Peña Report, subclinical hypothyroidism is an asymptomatic disease which entails an activation of compensation mechanisms, and Ms. Domínguez Azpeleta could have suffered from it for years prior to its diagnosis. The First Respondent's experts' key points may be summarized as follows:

- There is a direct relationship between the physiology of thyroid hormones and erythropoiesis. Thyroid hormones play a biologically relevant part in erythropoiesis and may explain the haematological alterations found in pathological situations such as primary hypothyroidism and subclinical hypothyroidism. In any event, there are various compensatory mechanisms which are activated the moment there is a rise in thyroid-stimulating hormone ("TSH") produced by a lesser thyroid response for T4 (prohormone) secretion. These compensatory mechanisms function at different levels, preparing the organism for possible deficient erythropoiesis. In general, this compensation is sufficient to prevent most patients diagnosed with subclinical hypothyroidism from presenting anaemia although it is to be expected that the response to stress erythropoiesis will be abnormal. Although the compensatory mechanisms are effective, this abnormality will only be revealed by an abnormal variation in the numbers of immature erythroid forms, mainly those with transferring receptor expression, *i.e.* reticulocytes.

- Ms. Domínguez Azpeleta began treatment for subclinical hypothyroidism in January 2012 following which her reticulocytes ranges shifted towards the central levels of both the general and athlete population values. Hence, it is plausible that the treatment caused this movement. In turn, it is plausible that

133 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 4.

an absence of treatment was one of the combined causes behind the levels of reticulocytes throughout 2009 and 2010.

- Patients with clinical hypothyroidism have reduced erythropoiesis which, with adequate compensation, enables them to maintain normal levels in their direct haematological parameters. These compensatory mechanisms are capable of maintaining adequate erythropoietic balance as long as there is no increase in the demands of the subject. When this increase occurs, erythropoiesis becomes inefficient at compensating the losses produced by an excess of demand. In the annual itinerary of any top athlete, especially among medium distance runners, there is a highly intermittent pattern of demands associated with training and official competition so the requirements are sporadic and seasonal. Also, it must be remembered that subclinical hypothyroidism itself follows cyclical patterns of rises in TSH. Therefore, the combination of the intermittence of subclinical hypothyroidism itself with the intermittence and seasonal nature of the athlete's erythropoietic demands are biologically plausible causes of intermittent inefficient erythropoiesis, as can be observed in the data of Ms. Domínguez Azpeleta's ABP.

- In summary, what is observed in the ABP, analyzing it in its entirety and taking into account the periods of time between each sample, is that there is a disconnect between the haemoglobin variations and the reticulocyte response. Thus, the decrease in reticulocytes is associated with the decrease in haemoglobin. This decrease in haemoglobin is progressive for 3 months even though the reticulocyte levels continue to increase based on the test obtained in August 2009. This increase in reticulocyte production is not reflected in the haemoglobin levels up to 25 November 2009, which is when the increase in haemoglobin was detected for the first time. Therefore, the use of rEPO cannot explain the abnormalities evident in the analytical values of the biological passport of Ms. Marta Domínguez Azpeleta.

332. The First Respondent's experts concluded that it is not excluded that the ABP abnormalities could be explained by the untreated subclinical hypothyroidism.[134]

ii. <u>The Appellants' arguments</u>

333. At the outset, the Appellants stressed Ms. Domínguez Azpeleta failed to mention the alleged subclinical hypothyroidism during the initial evaluations by the IAAF expert panel. The Appellants further emphasised that Ms. Domínguez Azpeleta's argument is based solely on a short and undated medical report. The Appellants also noted that she

134 First Respondent's Expert Report, p. 60 – 72.

failed to declare this diagnosis and treatment on her DCFs in 2012 and 2013, notably on those from January 30 and February 28, 2012, shortly after her alleged diagnosis.

334. The Appellants further relied on the expert opinions of Prof. Schumacher and Prof. Pralong whose conclusions may be summarized as follows:

- The table of values provided by Prof. Schumacher did not show any difference indicative of a potential effect of the treatment allegedly applied from 2012 and which should have suppressed the supposed impact of subclinical hypothyroidism if any such impact had existed prior to the alleged treatment's application. Prof. Schumacher pointed out that the values remained consistent prior and following the period indicated as the one when the treatment started.

- The Belda-Peña Report's assertions concerning a potential impact of hypothyroidism relate to studies performed on rodents in which the thyroid function had been fully suppressed. This is materially different to a condition of subclinical hypothyroidism. Thus, the argument that subclinical hypothyroidism impacted the ABP variables at hand lacks basis and is purely speculative.

335. In addition, Prof. Pralong made the following additional remarks during the Oral Hearing:

- The diagnosis of subclinical hypothyroidism is made on biochemical and not clinical grounds.

- The diagnosis is typically made on the basis of T3 (thyroid hormone) and T4 (prohormone) measurements. The First Respondent's medical report thus represents an incomplete analysis, as it is not possible to make a diagnosis on the basis of an elevated TSH alone.

- It is not possible to second guess whether Ms. Domínguez Azpeleta suffered from hypothyroidism in 2009.

- The consensus is to start a hormone replacement therapy treatment if TSH is 10. It is evident that Ms. Domínguez Azpeleta (TSH 6) has at most a mild thyroid dysfunction, and thus does not require a treatment as much.

- The First Respondent's Belda-Peña Report is based on extreme conditions, *i.e.* a complete suppression of thyroid function, which cannot show possible effects of subclinical hypothyroidism on the ABP variables: thyroid hormones would be normal and so would be the effects.

- The higher the TSH is, the stronger is the stimulation of reticulocytes. However, the evidence at hand shows the opposite (*i.e.* the reticulocytes would rise and then go down, but this is not the case here).

- To his best knowledge, he is not aware that environmental effects would influence TSH, and although it cannot be excluded, it is apparent for other hormones, *e.g.* reproductive ones.

- Concerning a potential impact of hypothyroidism on ABP markers, studies have concluded that thyroid hormones remained stable during a period of three weeks of intense cycling.

- In any event, a mild case of hypothyroidism would have a non-measurable effect on the ABP markers.

iii. <u>The analysis and findings of the Panel</u>

336. At the outset, the Panel wishes to make the following preliminary remarks.

- First, Ms. Domínguez Azpeleta did not mention the subclinical hypothyroidism diagnosis and/or a treatment with Levothyroxine on any of the DCFs in 2012 following her alleged diagnosis on January 19 and February 14, 2012. This strikes the Panel even more when at the same time Ms. Domínguez Azpeleta listed other, arguably less severe, medications such as ibuprofen. Also, the Panel is particularly mindful that Ms. Domínguez Azpeleta was a senior high-profile athlete well aware of the importance of DCFs and any disclosures therein.

- Second, Ms. Domínguez Azpeleta likewise failed to mention this diagnosis during the initial evaluation by the Expert Panel. Again, this appears striking when at the same time she made an extensive submission (40 pages) challenging the Expert Panel's review on various grounds, including more minor ones.

- Third, Ms. Domínguez Azpeleta did not submit a comprehensive medical report substantiating the alleged diagnosis. As noted by Prof. Pralong, the report in question is clearly incomplete, as it is not possible to diagnose subclinical hypothyroidism on the basis of elevated TSH alone.

- Fourth, Ms. Domínguez Azpeleta did not submit any evidence that she suffered from subclinical hypothyroidism in 2009 and 2010, the period in question at hand.

- Fifth, Ms. Domínguez Azpeleta was not diagnosed with subclinical hypothyroidism during her pregnancy (2010/2011). While the Panel appreciates that a test for hypothyroidism is not a mandatory pregnancy one in Spain, Ms. Domínguez Azpeleta was a high-profile athlete under constant and

diligent medical care and considers it highly unlikely that Ms. Domínguez Azpeleta's TSH and thyroid hormone levels had not been controlled during her pregnancy.

- In sum, the Panel finds that Ms. Domínguez Azpeleta's assertions concerning subclinical hypothyroidism often contradict the record.

337. In any event, the Panel proceeded with a full analysis of Ms. Domínguez Azpeleta's claim below, given Prof. Pralong's statement that she could have suffered from a mild form of hypothyroidism.

338. The Panel is persuaded by Prof. Schumacher's testimony that Ms. Domínguez Azpeleta's values remained consistent prior and following the start of the treatment she indicated. Hence, the record showed no difference indicative of a potential effect of the treatment allegedly applied and which would be expected to suppress the supposed impact of hypothyroidism.

339. The Panel further notes that Ms. Domínguez Azpeleta's explanation was based on a study – a complete suppression of thyroid function in rodents – which cannot reasonably be replicated in her circumstances (*i.e.* Ms. Domínguez Azpeleta's thyroid hormone levels are considered rather normal). Accordingly, the Panel agrees with Prof. Pralong that the claimed impact of subclinical hypothyroidism on Ms. Domínguez Azpeleta's ABP variables is purely speculative.

340. In any event, the Panel is convinced by Prof. Pralong's conclusion that Ms. Domínguez Azpeleta has at most a mild thyroid dysfunction whose effect would be un-measurable.

341. Therefore, the Panel finds that subclinical hypothyroidism could not explain Ms. Domínguez Azpeleta's abnormal ABP profile.

Non-pathological factors

a. Extended travel

i. The First Respondent's arguments

342. Ms. Domínguez Azpeleta submitted that Sample 2 – which showed an abnormal OFF-score – was collected shortly after she arrived in Berlin to participate at the 2009 IAAF World Championships, following an 8-hour journey that included air travel from Madrid to Berlin.[135] According to Ms. Domínguez Azpeleta, Sample 2 should thus be excluded.

ii. The Appellants' arguments

135 *See* Initial Explanation, p. 5.

343. The Appellants relied on the opinion of Prof. Schumacher, who cited scientific evidence confirming that changes induced by air travel do not significantly alter the blood variables of the ABP.[136]

iii. The analysis and findings of the Panel

344. The Panel notes that Ms. Domínguez Azpeleta merely asserts that an extended travel may impact the analysis of Sample 2, but does not explain how. Moreover, the Panel observes the First Respondent's experts did not comment on this issue at the Oral Hearing. By contrast, the Panel is convinced by a scientific study presented by the Appellants that showed "*no indication that travel will affect haematological variables in way that might be mistaken for blood doping*".[137]

b. Use of hypoxic chambers

i. The First Respondent's arguments

345. Ms. Domínguez Azpeleta submitted that she bought a "hypobaric chamber" in 2003 and used it for training in certain periods throughout the year.[138] She further claimed a frequent use of "hypobaric facilities" in 2009.[139] Dr. de Boer submitted that "*it cannot be ruled out that for those parameters not affected by storage effects (for example concentration of haemoglobin), that these facilities might have been the cause of certain observations in th*[e] *period* [around Samples 1,4 and 5]".[140]

ii. The Appellants' arguments

346. The Appellants submitted that neither Ms. Domínguez Azpeleta nor Dr. de Boer explained which of the samples might have been affected by hypoxic exposure. The Appellants relied on Prof. Schumacher's opinion which can be summarized as follows:

- It is commonly accepted in scientific community that hypoxia will increase erythropoietin, which will in turn stimulate the bone marrow to produce more red cells and thus lead to increase in red cell mass leading to a higher score of HGB concentrations. The two key factors in determining an impact are the

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136 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 4: "*In the study, a group of highly trained endurance athletes was specifically examined to test the influence of air travel on the ABP variables before and after an 8-hour, inter-continental flight. The authors concluded that "*[…] [t]*he observed changes are in line with normal diurnal variations. There is no indication that travel will affect haematological variables in way that might be mistaken for blood doping".*" (*see* Schumacher YO, Klodt F, Nonis D, Pottgiesser T, Alsayrafi M, Bourdon PC, *et. al. The impact of long-haul air travel on variables of the athlete's biological passport.* Int. J. Lab. Hematol. 2012 Jul 16).

137 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 4.

138 Initial Explanation, p. 4.

139 *See* Expert Opinion of Dr. Douwe de Boer, dated April 6, 2013, p. 15.

140 *See* Expert Opinion of Dr. Douwe de Boer, dated April 6, 2013, p. 18.

relevant altitude and duration of exposure. Typically, significant and measurable increase in red cell mass can only be observed after approximately 300 hours of hypoxic exposure at altitudes above 2,000 metres.

- It can be safely assumed from current literature that the changes that can be expected immediately after appropriate altitude sojourns range around 0.16% for RET% and 0.6 g/dl for HGB. Following a return to sea level, HGB changes rapidly return to baseline, and RET% goes down within 1-2 weeks.

- Altitude is an unlikely explanation for Ms. Domínguez Azpeleta's 2009 values for the following reasons:

  - The magnitude of the changes observed is too large to be caused by hypoxia alone.

  - Ms. Domínguez Azpeleta participated at competitions leading up to the 2009 IAAF World Championship, which were based in cities with altitudes close to sea level (Madrid, Salamanca, Barcelona)[141] and she was also tested in Palencia (800 metres above sea level) and Santander (sea level). In 2010, Ms. Domínguez Azpeleta was tested in Berlin, again near sea level.

  - Even if Ms. Domínguez Azpeleta spent all her time in a hypoxic chamber outside the competition days, the duration would not be long enough to impact the HGB concentration during that time.

  - There is no scientific evidence that artificial hypoxic devices (*e.g.* a hypoxic tent) cause any measurable changes in the haematological variables used for the ABP.

347. In addition, Prof. Schumacher made the following additional remarks during the Oral Hearing:

- A study showed that hypoxic training does not impact the ABP results because any exposure is short. Responding to criticism by Prof. Belda that the study was a minor one, and not a clinical trial, and that there were other methodological flaws (*i.e.* a confusion between a mean and a value), Prof. Schumacher explained that, in any event, the relevant conclusion was that an intermittent exposure to hypoxic chambers has no impact on the ABP.

- There is a difference between a hypoxic tent and mask:

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141 The Panel notes, though, that Madrid, at 667 m.a.s.l., and Salamanca, at 802 m.a.s.l., cannot be considered close to sea level.

- Masks are commonly used for a few minutes and thus the simulation is much shorter.

- 8-9 hours per day in a hypoxic tent are required to simulate a natural altitude.

348. The Appellants further pointed out that the First Respondent's experts did not have any evidence or information on Ms. Domínguez Azpeleta's use of simulated altitude devices beyond her assertions. Also, the First Respondent's experts only stated that a hypoxic tent was used twice a day for 72 minutes (and incrementally increased) with an altitude between 3,000 and 6,000 metres, but otherwise did not know the exact dates of use.

iii. The analysis and findings of the Panel

349. The Panel emphasises that Ms. Domínguez Azpeleta attested on the DCFs dated August 13, 2009 (Sample 2) and July 27, 2010 (Sample 9) that she had not used hypoxic devices in the period of 2 weeks prior to the sample collection. The Panel again stresses that Ms. Domínguez Azpeleta was a senior high-profile athlete well aware of the importance of DCFs and disclosures therein. Moreover, the Panel notes that Ms. Domínguez Azpeleta's experts acknowledged at the Oral Hearing that they do not have any evidence of her use of such devices beyond what she told them. Further, Dr. de Boer – Ms. Domínguez Azpeleta's expert – also stated that "[Ms. Domínguez Azpeleta] *claimed to have used frequently certain hypobaric facilities* [in 2009]" (emphasised added by the Panel),[142] but no evidence was provided. Even if she were to use such devices, suffice it to say that neither Ms. Domínguez Azpeleta nor her experts were able to specify (and substantiate with evidence) the exact dates of such use, especially in circumstances when record (DCFs) shows no use at all.

350. Therefore, the Panel finds that the record does not allow for a clear conclusion that Ms. Domínguez Azpeleta used simulated altitude devices around the time Samples 2 and 9 were collected. In any event, the Panel proceeded with a full analysis of her claim below.

351. The Panel notes that Ms. Domínguez Azpeleta's experts only speculated that the claimed use of hypoxic devices affected her ABP results. By contrast, the Panel is convinced by Prof. Schumacher's explanation why such impact could not occur in the present circumstances:

- First, the Panel takes note that there is no scientific evidence showing measurable changes in the haematological variables used for the ABP by the use of artificial hypoxic devices such as a hypoxic tent.

142 *See* Expert Opinion of Dr. Douwe de Boer, dated April 6, 2013, p. 18.

- Second, the Panel is convinced by Prof. Schumacher's note that the magnitude of changes observed is simply too large to be caused by hypoxia alone.

- Third, the Panel is convinced by Prof. Schumacher's testimony that 72 minutes twice a day – intermittent altitude exposure – is not a good proxy for real altitude.

352. Accordingly, even if Ms. Domínguez Azpeleta had used altitude devices as claimed, the Panel finds that this could not explain her abnormal ABP profile.

c. ***Sample collection during daily activities***

i. The First Respondent's arguments

353. The First Respondent submitted that Sample 19, collected on December 20, 2012, should be excluded from her ABP as it was collected while she was "*developing her work duties*".[143] At the Oral Hearing, Prof. Belda argued – citing a study from 1991[144] – that daily routine work can cause considerable variations of up to 60% in the ABP profile. Prof. Belda also repeatedly argued that the studies cited by the Appellants' experts have a small sample size and are thus irrelevant.

ii. The Appellants' arguments

354. The Appellant submitted the expert opinion of Prof. Schumacher, concluding that "*normal daily activity* [...] *had no significant impact on the ABP variables*" and thus the First Respondent's argument "*can comfortably be dismissed*".[145]

355. At the Oral Hearing, the Appellants' experts added the following comments:

- Prof. Schumacher noted that the ABP is designed exactly to capture the athlete during his/her normal activities.

- Dr. Sottas further explained that variations of biomarkers were firstly developed at the end of 1990s, with main studies performed in connection with the 2000 Summer Olympics in Sydney. The ABP was then introduced in 2002 precisely to implement these variations. Dr. Sottas further pointed out that only 1 out of 10 studies showed high variations, though it was subsequently revealed that some doped cyclists were included in that study without the

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143 Initial Explanation, p. 5.

144 Deitrick, RW. (1991). Intravascular haemolysis in the recreational runner. British journal of sports medicine, 25(4), 183-187.

145 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 4, citing a study by Schumacher YO, Wenning M, Robinson N, Sottas P-E, Ruecker G, Pottgiesser T. *Diurnal and exercise-related variability of haemoglobin and reticulocytes in athletes*. Int. J. Sports Med. 2010 Apr. 31; (4): 225-30.

investigator's knowledge, so the outcome could not reflect a true variation.[146] Accordingly, in 2007, it was confirmed that variations are the same within and between groups of athletes, which ultimately enabled the development of the ABP. In conclusion, the variations are now universal.

- Prof. Schumacher concurred with Dr. Sottas and confirmed the number of variations is now universally recognized. He further stated that the ABP is designed to minimize the variations by, *e.g.* collecting the samples 2 hours after the sport activity, and in any event ensuring a 10-minute seating break prior to the sample collection.

- Prof. Schumacher contested Prof. Belda's statement that the sample size was small as the variations came from a study of 10,000 participants.

- Concerning the 1991 study cited by Prof. Belda, Prof. Schumacher noted that it was a small study on a concept that was subsequently abandoned.

iii. The analysis and findings of the Panel

356. At the outset, the Panel notes that the First Respondent's claims are largely based on a study made 24 years ago and which did not involve high level athletes. By contrast, the Panel is convinced by the submissions of Dr. Sottas and Prof. Schumacher that the number of variations are now universally recognized.

357. The Panel is further convinced by the remarks of Prof. Schumacher – supported by a scientific study – that the ABP is designed exactly to capture an athlete during his/her normal activities and consequently normal daily activity has no impact on the ABP variables. In any event, even if Ms. Domínguez Azpeleta were involved in heavy exercise, Prof. Schumacher rightly pointed out that the sample collection is commonly done 2 hours after the exercise and in any event following a 10-minute seating break.

358. In sum, the Panel is convinced that the collection of Sample 19 during normal daily activities could not impact the analysis and findings at issue.

Chain of Custody and Sample Analysis

359. ***Standard of proof.*** The IAAF Rule 33.3(b) provides as follows:

> "*Methods of Establishing Facts and Presumptions*
>
> [...]
>
> *The following rules of proof shall be applicable in doping cases:*

146 For the list of studies, *see also* Statement of Dr. Sottas dated May 19, 2015.

[…]

(b) Departures from any other International Standard or other antidoping rule or policy which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete or other Person establishes that a departure from another International Standard or other antidoping rule or policy has occurred which could reasonably have caused the Adverse Analytical Finding or other anti-doping rule violation, then the IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation."

360. The Panel also recalls the CAS jurisprudence: "[t]*herefore, the Panel deems a mere reference to a departure from the ISL insufficient, in the absence of a credible link of such departure to a resulting Adverse Analytical Finding. In other words, in order for an athlete to meet his/her burden and thus effectively shift the burden to an anti-doping organization, the athlete must establish, on the balance of probabilities, (i) that there is a specific (not hypothetical) departure from the ISL; and (ii) that such departure could have reasonably, and thus credibly, caused a misreading of the analysis. Further, the Panel remarks that such athlete's rebuttal functions only to shift the burden of proof to the anti-doping organization, which may then show, to the Panel's comfortable satisfaction, that the departure did not cause a misreading of the analysis.*"[147]

361. Accordingly, the Panel addresses below the alleged flaws in the sample procedures under a two-prong test. First, whether there was a departure from the IAAF Anti-Doping Regulations (or Blood Testing Protocol) and applicable International Standards. Second, whether any identified departure could reasonably have caused the ADRV.[148]

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147 CAS 2013/A/3112 *World Anti-Doping Agency v. Lada Chernova & Russian Anti-Doping Agency*, para. 85.

148 The Panel notes Ms. Domínguez Azpeleta argued at the Oral Hearing that the flaws in chain of custody and sample analysis caused variations in the ABP results. Accordingly, the Panel reviews below whether any alleged flaw (*quod non*) would reasonably have explained the abnormalities. *See also* CAS 2013/A/3112 *World Anti-Doping Agency v. Lada Chernova & Russian Anti-Doping Agency*, para. 86. For completeness, the Panel notes that the First Respondent also argued that a sample analysed on April 7, 2012 was analysed three months prior to sample 18 (collected on July 5, 2012) (*see* Initial Explanation, p. 12). However, the Panel recognizes that the reference to "07.04.2012" is merely a clerical error, when in reality it refers to 04.07.2012. In CAS 2009/A/1931 *Iourieva & Akhatova v. IBU*, the panel held that errors merely typographical in nature did not contribute to the overall reliability of the results. Similarly, the First Respondent argued that the Swiss Center of Quality Control's document is dated later than the analysis, and thus it is not possible to verify that the laboratory fulfilled the quality criteria on the day of the analysis. However, Dr. Robinson clarified that the date in question is that of the report, and not of the vial analyses, while adding that the data presented "*are excellent*" (*see* Report of Dr. Robinson, p. 9

a. <u>The athlete was not seated at least 10 minutes prior to sample collection</u>

i. <u>The First Respondent's arguments</u>

362. Ms Domínguez Azpeleta submitted that the Samples 1, 2, 3, 4, 5, 6, 7, 8, 9, 17, and 19 were collected without asking her to remain in a normal seated position with feet on the floor for at least 10 minutes prior to providing a sample. According to the First Respondent, this may have impacted the results and those samples should thus be excluded from her ABP.

ii. <u>The Appellants' arguments</u>

363. The Appellants' expert Dr. Neil Robinson pointed out that the DCFs in 2009 and 2010 did not include a question on whether the Athlete was seated for 10 minutes prior to the sample collection. However, Dr. Robinson explained, regardless of whether Ms. Domínguez Azpeleta was explicitly asked to seat for 10 minutes, one must assume she did as the collection process routinely includes approximately 10 minutes of waiting time, in particular during the identification of collection material, filling out the DCF, disinfection and phlebotomy. Dr. Robinson added that this is most likely the case in the circumstances at hand, because the blood was collected from Ms. Domínguez Azpeleta in a time well over 10 minutes following her arrival at the doping control station, as evidenced in the DCFs in question.[149]

364. In any event, the Appellants submitted that even if Ms. Domínguez Azpeleta were seated for less than 10 minutes, this could not reasonably have caused the ADRV. In support, the Appellants quoted the expert opinion of Prof. Schumacher that a posture-related plasma volume change, which affects the HGB concentration, would in any event had no impact on the RET%.[150] Accordingly, the abnormal reticulocytes pattern in 2009 remains unaffected by this criticism.[151]

iii. <u>The analysis and findings of the Panel</u>

365. ***Departure from applicable rules and standards?*** The IAAF Rule 4.57 stipulates as follows:

> *"The DCO/BCO shall ensure the Athlete is offered comfortable conditions for the Sample collection, including being in a relaxed position for at least 10 minutes prior to providing the Sample."*

- 12). Accordingly, the Panel rejects the First Respondent's arguments based on typographical errors and mischaracterization of the CSCQ reports' dates.

149 *See* Report of Dr. Robinson, p. 2-8.

150 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 3-4.

151 The First Appellant's Appeal Brief, para. 109.

366. Article 3.2.1 of the IAAF Blood Testing Protocol stipulates as follows:

> *"The following steps should be taken in preparing for the Sample Collection Session:* [...] *the Athlete should remain in a normal seated position with feet on the floor for a 'time-out' period of at least 10 minutes prior to providing a sample."*

367. The Panel notes that Ms. Domínguez Azpeleta did not submit that she was in fact not seated for 10 minutes prior to the sample collection, only that she was not asked to do so. In this regard, the Panel takes due account of Dr. Robinson's remark that she was in all likelihood complied with the requirement. Indeed, the Panel recognizes that the sample collection procedure commonly includes a rest period, and the DCFs show that the samples in question were collected in time over 10 minutes following Ms. Domínguez Azpeleta's arrival at the doping station.[152]

368. Moreover, the Panel recalls that the relevant burden is that of a "*balance of probabilities*". Thus, the Panel finds that, on the balance of probabilities, the First Respondent has failed to show a departure from applicable rules and standards.

369. ***Could a departure reasonably have caused the ADRV?*** The Panel recalls the explanations of Dr. Schumacher that only a posture change such as lying down could change the plasma volume which in turn can lead to an increased HGB. The First Respondent did not show that such a posture change in fact occurred that could have affected the plasma volume. In any event, the Panel is convinced that any possible change in the HGB would not impact the RET% which is not a concentration-based measure.[153]

370. Accordingly, the Panel is comfortably satisfied that, had the alleged departures from the applicable rules and standards occurred (*quod non*), this could not reasonably have caused the ADRV.

b. <u>Blood was not extracted from the athlete at the first attempt</u>

i. <u>The First Respondent's arguments</u>

371. Ms. Domínguez Azpeleta submitted that the Samples 18, 19, and 20 were taken following unsuccessful venepuncture attempts, which affected her values.[154]

ii. <u>The Appellants' arguments</u>

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152 See the DCFs related to Samples 1, 2, 3, 4, 5, 6, 7, 8, 9, 17, and 19.

153 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 4.

154 Initial Explanation, p. 5.

372. The Appellants noted that Ms. Domínguez Azpeleta did not submit any contemporaneous evidence concerning the alleged abortive attempts in collecting her blood.

373. Moreover, according to Prof. Schumacher, there is no indication that repetitive unsuccessful venepuncture attempts will alter the ABP variables. Prof. Schumacher further noted that a prolonged tourniquet application could marginally affect HGB levels if the tourniquet is kept tight for more than two minutes, which is significantly longer than the average time of less than 30 seconds during a routine laboratory blood collection procedure.[155]

374. In addition, Prof. Schumacher emphasised that the abnormal reticulocytes patterns would in any event remained unaffected by the First Respondent's criticism.[156]

iii. The analysis and findings of the Panel

375. ***Departure from applicable rules and standards?*** The Panel observes that the First Respondent's claim is not substantiated by contemporaneous records. Moreover, the Panel is persuaded by Prof. Schumacher's testimony that there is no indication that repetitive unsuccessful venepuncture attempts would alter the ABP variables. Further, although marginal impact on HGB levels may occur in circumstances where the tourniquet is kept tight for more than two minutes, the Panel observes that the First Respondent has not argued this to be the case and the standard practice is less than 30 seconds on average. Accordingly, on the balance of probabilities, the Panel concludes that there was no departure from applicable rules and standards.

376. ***Could a departure reasonably have caused the ADRV?*** In any event, the Panel is comfortably satisfied that the alleged abortive blood extraction attempts, and a marginal impact on HGB thereof (*quod non*), would in any event not explain the abnormalities in the reticulocytes patterns.

c. Samples were transported without having been sealed

i. The First Respondent's arguments

377. Ms. Domínguez Azpeleta submitted that Samples 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, and 14 were transported without being sealed.[157]

ii. The Appellants' arguments

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155 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 4.

156 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 4.

157 Initial Explanation, p. 5-14.

378. According to Dr. Robinson, the First Respondent's claim is a mischaracterisation of common practice which is not to seal bags, containers, and parcels used for shipment. In addition, Dr. Robinson pointed out that Ms. Domínguez Azpeleta's claim ignores the fact that all the specified samples except Sample 14 were delivered by the Doping Control Officer himself/herself.[158]

iii. The analysis and findings of the Panel

379. ***Departure from applicable rules and standards?*** Suffice it to say that the Panel is convinced by Dr. Robinson's explanation that common practice is not to seal bags, containers, and parcels used for the shipment, and all but one of the samples in question were in any event delivered by the DCOs. Accordingly, the Panel is satisfied that no departure from applicable rules and standards occurred in this case.

380. ***Could a departure reasonably have caused the ADRV?*** The Panel emphasises that there is no further elaboration in the First Respondent's written and oral submissions regarding the correlation of the alleged departure from transport/shipment rules and standards and the ADRV at hand.

d. Temperature reporting and control was inadequate

i. The First Respondent's arguments

381. Ms. Domínguez Azpeleta submitted that all samples except Samples 12 and 19 *"were transported to temperature set, while the norm demands* [them] *to be kept at a temperature between 2 and 12 degrees Celsius."*[159] Ms. Domínguez Azpeleta also submitted that samples were kept at over 12°C for too long and/or that the variation of temperature of the samples during transportation was unknown.[160] According to Ms. Domínguez Azpeleta, this affected the analysis of the samples.

ii. The Appellants' arguments

382. Prof. Schumacher explained that HGB concentration and RET% are stable at a room temperature for up to 72 hours, and even longer if kept between 4°C and 6°C.[161]

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158 *See* Report of Dr. Robinson, p. 2 and 4-10.

159 Initial Explanation, p. 5-11.

160 Initial Explanation, p. 5-14.

161 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 5, citing several studies: Robinson N, Mangin P, Saugy M. Time and temperature dependant changes in red blood cells analytes used for testing recombinant erythropoietin abuse in sports. Clin. Lab. 2004; 50(5-6); 317-23; Robinson N, Sottas PE, Pottgiesser T, Schumacher YO, Saugy M. Stability and robustness of blood variables in an antidoping context. Int. J. Lab. Hematol. 2011 Apr; 33(2):146-53; Ashenden M, Clarke A, Sharpe K, d'Onofrio G, Plowman J, Gore CJ.

383. Dr. Robinson noted that the samples were described as being brought cooled, transported in "refrigerated" conditions (*i.e.* between 2°C and 12°C) or at a room temperature. Moreover, in all instances when temperature was not recorded, there were no signs of deterioration, *i.e.* normal mean corpuscular volume ("MCV") and scatter grams, no flags.[162] Dr. Robinson further emphasised that even a slight increase in MCV could not alone invalidate a blood sample because MCV is not a variable utilized for ABP purposes, while HGB concentration and RET% are stable for a longer period.[163]

384. Accordingly, the Appellants maintained that no departure from the regulations and rules occurred, and in any event it would not have reasonably caused the ADRV.

iii. The analysis and findings of the Panel

385. ***Departure from applicable rules and standards?*** On the one hand, the Panel acknowledges that the samples often lack specific temperature records. However, the Panel recognizes that the samples were described to be brought under refrigerated, cool, or room temperature conditions, while the time between a sample collection and a sample analysis was in all 20 samples well below 72 hours.[164] Thus, as explained by Prof. Schumacher, the HGB concentration and RET% at hand remained stable.[165] In addition, the Panel notes the absence of any signs of deterioration. Thus, on the balance of probabilities, the Panel concludes that there was no departure from applicable rules and standards.

386. ***Could a departure reasonably have caused the ADRV?*** First, the Panel recognizes that MCV is not a blood variable used for the ABP, and thus, even if impacted (which was not established), it would in any event not have explained the detected abnormalities. Second, the Panel reiterates Prof. Schumacher's explanation that the HGB concentration and RET% – two primary ABP markers – are stable at room temperature for up to 72 hours, and even longer if kept between 4°C and 6°C. Accordingly, the First Respondent's objection would not reasonably have caused the ADRV at hand.

e. Errors in the calibration of the analysis machine exceeded allowed norms

i. The First Respondent's arguments

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162 *See* Report of Dr. Robinson p. 1 - 13.

163 *See* Report of Dr. Robinson, p. 13.

164 All samples were analyzed within 36 hours of the sample collection (and majority of samples within 12 hours). *See* Exhibit 27 to the First Respondent's Answer. *See* also Expert Response of Prof. Schumacher to Initial Explanation, p. 6.

165 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 5-6.

387. Ms. Domínguez Azpeleta argued that samples 1, 2, 3, 4, 5, 8, 9, 10, and 17 should be annulled because the quality control for a sample was more than 1.5% (HGB) or 15% (RET%) beyond the reference values provided by the manufacturer, and permitted by WADA.[166]

ii. The Appellants' arguments

388. Prof. Schumacher and Dr. Robinson both categorically submitted that the First Respondent simply misunderstood the WADA ABO Operating Guidelines and Compilation of Required Elements. More specifically, the "1.5%" and "15%" refer to the precision of the instrument: in repetitive measures of the same sample, the coefficient of variation must not be beyond those measures (*i.e.* 1.5% for HGB; 15% for RET%).[167] Hence, for each of the samples in question, the instrument was accurate and the measurements were found to be precise.[168] Prof. Schumacher concluded that the actual coefficients of variation ("CVs"), when calculated correctly, were well within tolerated limits.[169]

iii. The analysis and findings of the Panel

389. The explanations of Prof. Schumacher and Dr. Robinson have convinced the Panel that the First Respondent's objection reflected a clear misunderstanding of the applicable rules and standards. Accordingly, no departure from applicable rules and standards was identified.

f. Conclusion on Ms. Domínguez Azpeleta's explanations

390. The Panel concludes that none of Ms. Domínguez Azpeleta's explanations raised sufficient doubts for the Panel not to be comfortably satisfied by the explanations provided by the Appellants' experts.

E. Sanction

1. The First Respondent's arguments

391. The First Respondent maintained that no sanction should be imposed.

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166 Initial Explanation, p. 5-10, and 13.

167 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 5.

168 *See* Report of Dr. Robinson p. 2-5, 7-9, and 11.

169 *See* Expert Response of Prof. Schumacher to Initial Explanation, p. 5.

2. The Appellants arguments

392. The Appellants requested that a sanction of four years of ineligibility be imposed on Ms. Domínguez Azpeleta in accordance with the IAAF Rules 40.2 and 40.6, for the following reasons:

- The IAAF Rule 40.6 allows a sanction up to four years of ineligibility in light aggravating circumstances.
- The facts of Ms. Domínguez Azpeleta's case fall within two of the explicit examples of "aggravating circumstances" set out in the IAAF Rule 40.6:
  - Ms. Domínguez Azpeleta used Prohibited Substances and/or Prohibited Methods (*i.e.* blood doping) on multiple occasions; and
  - Ms. Domínguez Azpeleta's use of Prohibited Substances and/or Prohibited Methods was carefully planned as part of a doping plan or scheme.
- Ms. Domínguez Azpeleta failed to admit to her ADRV.
- Ms. Domínguez Azpeleta is a highly experienced (20+ years) and senior athlete and as such should serve as a role model for other athletes. She is also a member of the Spanish Senate and thus should be an upstanding member of her community and a role model for the general public.
- Imposition of an sanction under aggravated circumstances is consistent with sanctions applied in other ABP cases.

3. The analysis and findings of the Panel

a. Rules

393. The IAAF Rule 40.2 provides as follows:

> *"The period of Ineligibility imposed for a violation of Rules 32.2(a) (Presence of a Prohibited Substance or its Metabolites or Markers), 32.2(b) (Use or Attempted Use of a Prohibited Substances or Prohibited Method) or 32.2(f) (Possession of Prohibited Substances and Prohibited Methods), unless the conditions for eliminating or reducing the period of Ineligibility as provided in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided in Rule 40.6 are met, shall be as follows: First Violation: Two (2) years' Ineligibility."*

394. The IAAF Rule 40.6 provides as follows:

"Aggravating Circumstances which may Increase the Period of Ineligibility

If it is established in an individual case involving an anti-doping rule violation other than violations under Rule 32.2(g) (Trafficking or Attempted Trafficking) and Rule 32.2(h) (Administration or Attempted Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.

(a) Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the antidoping 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 performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or other 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 referred to above are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility.

(b) An Athlete or other Person can avoid the application of this Rule by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation (which means no later than the date of the deadline given to provide a written explanation in accordance with Rule 37.4(c) and, in all events, before the Athlete competes again)."

395. The IAAF Rule 40.8 provides as follows:

"Disqualification of Results in Competitions Subsequent to Sample Collection or Commission of an Anti-Doping Rule Violation

In addition to the automatic disqualification of the results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained from the date the positive Sample was collected (whether In-Competition or Out-of- Competition) or other anti-doping rule violation occurred through to the commencement of any Provisional Suspension or Ineligibility period shall be Disqualified with all of the resulting

Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money."

396. The IAAF Rule 40.10 provides as follows:

"*Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date the Ineligibility is accepted or otherwise imposed. Any period of* Provisional Suspension (whether imposed or voluntarily accepted) shall be *credited against the total period of Ineligibility to be served.*"

b. Analysis

397. At the outset, the Panel recalls CAS jurisprudence which supports the application of the IAAF Rule 40.6 in ABP cases.[170] In turn, the Panel will address below whether such application has merit in the case at hand.

i. Aggravating circumstances

398. ***The use of Prohibited Substance on multiple occasions.*** As described in great length in Section II and V.D. above, the Panel is comfortably satisfied that Ms. Domínguez Azpeleta used a Prohibited Substance or a Prohibited Method repeatedly in the period in question.[171] In particular, the Panel wishes to emphasise that Samples 2 (August 13, 2009) and 9 (July 27, 2010) – reflecting abnormal values – correlated with the timing of two major athletics events.[172]

399. ***Doping plan/scheme.*** In addition, the Panel notes that the Expert Panel found Ms. Domínguez Azpeleta's blood profile to show an engagement in blood doping, typically

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170 *See* CAS 2012/A/2773 *International Association of Athletics Federations (IAAF) v. Hellenic Amateur Athletic Association (SEGAS) and Irini Kokkinariou*, of November 30, 2012: "*IAAF Rule 40.6 does not contain any specific requirements on how aggravating circumstances are to be detected, and absent such requirements, it must be presumed that the IAAF's ABP program, a system of detection detailed in the IAAF Anti-Doping Regulations and IAAF Blood testing Protocol, can ground claims under IAAF Rule 40.6, in much the same way as it can ground claims under IAAF Rule 32.*" *See also* CAS 2013/A/3080 *Alemitu Bekele Degfa v. Turkish Athletics Federation and International Association of Athletics Federations*, of March 14, 2014: "*blood doping offences are by their nature repetitive and sophisticated. Aggravating features involve a doping plan or scheme and a repetitive and sophisticated use or possession of a Prohibited Substance or Method are likely to be regarded as aggravating circumstances which require a substantial increase over the standard sanction.*"

171 *See also* Professor Schumacher's First Expert Opinion; Professor Audran's First Expert Opinion; and Professor d'Onofrio's First Expert Opinion.

172 The Panel is also convinced by the conclusion of Professor d'Onofrio (in his First expert Opinion) that there is "*a high likelihood of treatment of erythropoiesis stimulating agents, possibly associated with other illicit methods of blood manipulation, starting from the first sample* (emphasis added by the Panel)".

ceased two weeks prior to a high-level competition.[173] Indeed, Samples 2 and 9 respectively corresponded to the IAAF World Championship in Berlin and the European Championship in Barcelona.[174] Accordingly, the Panel is comfortably satisfied that there is sufficient evidence showing that Ms. Domínguez Azpeleta planned her doping activities in order to improve her performance at high-level athletics events.

400. ***No admission.*** Suffice it to say that Ms. Domínguez Azpeleta did not admit the ADRV. Instead, she took every opportunity to challenge it, often with arguments that lacked support or even directly contradicted the factual record. Accordingly, the Panel finds that Ms. Domínguez Azpeleta cannot avail herself of the IAAF Rule 40.6(b).

401. ***Other relevant circumstances.*** In addition, the Panel notes that Ms. Domínguez Azpeleta was a high-profile athlete, with over 20 years of competing experience, and acted as a Vice-President of the RFEA. Accordingly, the Panel wishes to emphasise that Ms. Domínguez Azpeleta's positions obliged her to act with the utmost respect for rules and regulations and aspire to be a role model for other athletes.

ii. Period of ineligibility

402. In light of the foregoing, and recalling previous CAS jurisprudence,[175] the Panel finds it adequate to impose a sanction of three (3) years of ineligibility on Ms. Domínguez Azpeleta.

iii. Commencement of the period of ineligibility

403. Pursuant to the IAAF Rule 40.10, the Panel determines that the period of ineligibility should commence on June 24, 2015, the first day of the Oral Hearing. The period of provisional suspension imposed on Ms. Domínguez Azpeleta from July 8, 2013 through March 19, 2014, shall be credited against the 3-year period of ineligibility to be served.

iv. Ancillary orders

404. Pursuant to the IAAF Rule 40.8, the Panel concludes that all competitive results obtained by Ms. Domínguez Azpeleta from the date Sample 1 was collected (August 5, 2009) through to the commencement of her provisional suspension (July 8, 2013) shall

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173 *See* Professor d'Onofrio's First Expert Opinion.

174 For completeness, the Panel notes that it did *not* take into account Ms. Domínguez Azpeleta's ABP values from 2003-2007 period (submitted by the Appellants) even as a corroborating evidence, because she did not have an opportunity to address the values in the period prior to 2009 (which were not at issue in the present case).

175 *See, e.g.* CAS 2012/A/2773 *International Association of Athletics Federations (IAAF) v. Hellenic Amateur Athletic Association (SEGAS) and Irini Kokkinariou*, of November 30, 2012; CAS 2013/A/3080 *Alemitu Bekele Degfa v. Turkish Athletics Federation and International Association of Athletics Federations*, of March 14, 2014.

be disqualified, with all of the resulting consequences, including the forfeiture of any titles, awards, medals, points, prizes, and appearance money.

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VII. COSTS OF THE PROCEEDINGS BEFORE THE CAS

405. Article R64.4 of the Code provides as follows:

> "*At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties.*"

406. Article R64.5 of the Code provides as follows:

> "*In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.*"

407. On the one hand, the Panel takes due account that Ms. Domínguez Azpeleta is retired from competitive athletics. On the other hand, the Panel notes Ms. Domínguez Azpeleta's numerous, often clearly meritless, procedural objections which protracted the present proceedings. The Panel also notes that the RFEA failed to participate in the proceedings meaningfully.

408. Accordingly, in view of the outcome of the arbitration, the Panel holds that each Respondent shall bear one-half of the total costs of the arbitration, to be determined by the CAS Court Office. The Panel further decides that, taking into account the complexity and outcome of the proceedings and in particular the respective parties' respective procedural conduct, Ms. Domínguez Azpeleta and the RFEA shall each pay CHF 5,000 towards and in equal benefit to each Appellant's legal costs and expenses incurred in relation with the present proceedings.

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ON THESE GROUNDS

The Court of Arbitration for Sport decides that:

1. The CAS has jurisdiction to decide on the subject matter of this appeal.

2. The appeals filed by IAAF and WADA are admissible and partially upheld.

3. The decision of the RFEA Sports Disciplinary Committee of March 19, 2014 is set aside.

4. Ms. Domínguez Azpeleta is guilty of an anti-doping rule violation.

5. Ms. Domínguez Azpeleta is sanctioned with a three-year period of ineligibility starting on June 24, 2015. The period of provisional suspension imposed on Ms. Domínguez Azpeleta from July 8, 2013 through March 19, 2014, shall be credited against the 3-year period of ineligibility to be served.

6. All competitive results obtained by Ms. Domínguez Azpeleta from the date Sample 1 was collected (August 5, 2009) through to the commencement of her provisional suspension (July 8, 2013) shall be disqualified, with all of the resulting consequences, including the forfeiture of any titles, awards, medals, points, prizes, and appearance money.

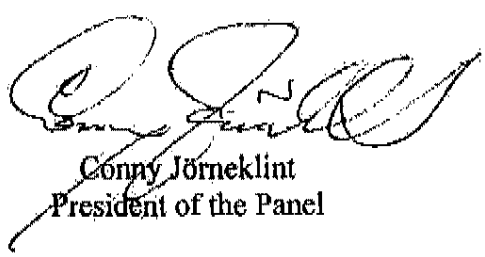
7. Each Ms. Domínguez Azpeleta and the RFEA shall bear one-half of the total costs of arbitration, as calculated by the CAS Court Office and communicated separately to the Parties.

8. Ms. Domínguez Azpeleta and the RFEA shall each pay CHF 5,000 (five thousand Swiss Francs) towards and in equal benefit to each the IAAF's and WADA's legal costs and expenses incurred in connection with the present proceedings.

9. All other or further claims are dismissed.

Done in Lausanne, Switzerland on November 19, 2015

THE COURT OF ARBITRATION FOR SPORT



Conny Jörneklint
President of the Panel