CAS 2008/A/1608 International Association of Athletics Federations v/ Athletic Federation of Slovenia & Ms Helena Javornik

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Luigi **Fumagalli**, Professor and Attorney-at-Law, Milan, Italy

Arbitrators: Mr Christoph **Vedder**, Professor, Munich, Germany
Mr Stephan **Netzle**, Attorney-at-Law, Zurich, Switzerland

in the arbitration between

International Association of Athletics Federations (IAAF)
represented by Mr Pierre Weiss, IAAF General Secretary, Montecarlo, Monaco and by Mr Habib Cissé, Attorney-at-law, Paris, France

- Appellant -

and

Athletic Federation of Slovenia (AFS)
represented by Mr Simon Gabrijelcic, Attorney-at-Law, Ljubljana, Slovenia

- First Respondent -

Ms Helena Javornik
represented by Ms Spelca Mežnar, Attorney-at-Law, Grosuplje, Slovenia

- Second Respondent -

1. BACKGROUND

1.1 The Parties

1. The International Association of Athletics Federations (hereinafter also referred to as the "IAAF") is the world governing body for the sport of athletics. It exercises regulatory, supervisory and disciplinary functions over associations, national federations, clubs, athletes, coaches and officials, worldwide. The IAAF is an association under the laws of Monaco and has its headquarters in Montecarlo, Monaco.

2. The Athletic Federation of Slovenia (Atletska Zveza Slovenije) (hereinafter also referred to also as "AFS" or the "First Respondent") has its headquarters in Ljubljana, Slovenia, and is the national body governing athletics in Slovenia. As such, AFS is affiliated to the IAAF.

3. Ms Helena Javornik (hereinafter also referred to as "Ms Javornik" or the "Second Respondent"; the First Respondent and the Second Respondent are hereinafter also jointly referred to as the " Respondents") is an international level athlete of Slovenian nationality competing in long distance run events. Ms Javornik is affiliated with the AFS, which was the competent National Federation to hear the athlete in accordance with Rule 38.5 of the IAAF Competition Rules.

1.2 The Facts and the Dispute between the Parties

4. On 9 March 2008 Ms Javornik underwent a doping control after competing in a half-marathon, in Vienna, Austria.

5. The A sample (code A346971) provided by Ms Javornik was analysed by the laboratory, accredited by the World Anti-Doping Agency (hereinafter also referred to as the "WADA"), located in Seibersdorf, Austria (hereinafter also referred to as the "Seibersdorf Laboratory"). The analysis' report issued by the Seibersdorf Laboratory indicated the presence of recombinant erythropoietin (hereinafter also referred to as "rEPO"), as also confirmed, in a double reading of the results of the analysis, by Dr. José A. Pascual of the WADA accredited laboratory of Barcelona, Spain (hereinafter also referred to as the "Barcelona Laboratory"). rEPO is a prohibited substance under the IAAF anti-doping rules.

6. On 18 April 2008 Ms Javornik requested the analysis of the B sample on the basis of Rule 37.4(e) of the IAAF Competition Rules 2008 (hereinafter also referred to as the "IAAF CR"). On 22 April 2008 Ms Javornik, then, sent a letter to IAAF, raising several objections with respect to the anti-doping testing procedure that far followed.

7. On 13 May 2008 the B sample (code B346971) was analysed at the Seibersdorf Laboratory. The counter-analysis' report issued indicated the presence of rEPO also in the B sample. The finding was confirmed, in a second opinion, by Dr.

Martial Saugy of the WADA accredited laboratory of Lausanne, Switzerland (hereinafter also referred to as the "Lausanne Laboratory"). The adverse analytical finding report was sent to the IAAF on 17 May 2008.

8. In a letter dated 11 June 2008, the IAAF Anti-Doping Administrator informed the AFS of the decision to provisionally suspend Ms Javornik, and of Ms Javornik's right to request a hearing before an AFS disciplinary body.

9. The hearing concerning Ms Javornik took place on 18 June 2008 before the Antidoping Commission of the AFS (hereinafter also referred to as the "AFS Commission").

10. On 19 June 2008, the AFS Commission issued a decision (hereinafter also referred to as the "Decision") in which it held the following:

"*1. Athlete Helena Javornik does not violate antidoping rules according to available and reviewed documentation*

2. Provisional suspension, passed by IAAF, is not valid

3. It is introduced to IAAF to dispose provisional suspension of the athlete and give right her to compete

4. In case of IAAF disagreement with resolution of AC AFS, IAAF will take all responsibility for further decisions and procedures".

11. The Decision indeed considered that "*there was not enough evidence to declare athlete Helena Javornik as positive to EPO*" for the following reasons:

"- *B test does not fulfil acceptance criteria-item 1 according to WADA TD2007EPO; there is evident smear on the lane, where athlete sample was analyzed (page 13, lab. documentation B sample analysis)*

- *assignation of bends at the gel requires a lot of imagination in case of naked eye observation or computer technology; it is not fulfilling of acceptance criteria (page 13, lab. documentation B sample analysis)*

- *identification and intensity of the bands at the gel are discussible; at least third item of identification criteria is not fulfilled. Densitometry values of the bands from basic area are not twice or more more intense than bands in endogenous area, what is visible from simple calculation (page 15, lab. documentation B sample analysis)*

- *the second opinion for sample results A is not clear, even more, the expert was confused what to comment and there is serious question what was the really base for final conclusion. The laboratory was changed the interpretation of the result, what is visible from documentation. Was it changed after receiving second opinion?*

- *antibodies to detect EPO are declared "for research only" and not as "for diagnostic use"*

- *at the hearing, Helena Javornik affirmed, that she never took any medicine consisting EPO for legal therapeutic use or for enhancement body capacity*

- *the laboratory must demonstrate its quality control criteria at lest with validation report for WADA prescribed EPO test, because there is too much doubts about validity of the test*".

12. The AFS Commission, finally, specified that, "*since two of the Antidoping Commission members are also highly trained laboratory experts in the field of Microbiology and Biochemistry and Immunology at the accredited laboratory*", its Decision was "*strongly supported by expert knowledge based on understanding of the methods in details*".

13. The Decision was received by the IAAF on 20 June 2008.

2. THE ARBITRAL PROCEEDINGS

2.1 The CAS Proceedings

14. On 21 July 2008, the IAAF filed a statement of appeal with the Court of Arbitration for Sport (hereinafter also referred to as the "CAS"), pursuant to the Code of Sports-related Arbitration (hereinafter also referred to as the "Code"), to challenge the Decision. The statement of appeal had attached 3 exhibits.

15. In the statement of appeal, the Appellant requested the CAS to decide:

"*(i) whether Ms Javornik committed an anti-doping rule violation, as defined in IAAF Rules; and*

(ii) whether, in proper compliance with IAAF Rules, Ms Javornik should be declared ineligible from competition for a minimum of two years from the date of the CAS Panel's decision, less any period of suspension already served by her".

16. On 11 August 2008, the Appellant filed its appeal brief, together with a bundle of 34 exhibits, requesting the CAS to rule as follows:

"*1. the IAAF appeal is admissible;*

2. Ms Javornik committed an anti-doping rule violation; and consequently

3. Ms Javornik should be declared ineligible for a minimum of two years from the date of the hearing, less any period of provisional suspension already served;

4. The IAAF be granted a contribution towards its costs".

17. By communication dated 15 September 2008, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Luigi Fumagalli, President of the Panel; Prof. Christoph Vedder, arbitrator appointed by the Appellant; Mr Stephan Netzle, arbitrator jointly appointed by the Respondents.

18. On 15 September 2008 Ms Javornik filed her answer, with 16 exhibits, disputing the requests submitted to the CAS by IAAF and seeking the following relief:

"- *Mrs Javornik respectfully requests the honourable tribunal to be fully acquitted of any doping accusations and*

- *To be granted a full reimbursement of her cost*".

19. The answer filed by Ms Javornik contained also the request for some evidentiary measures, and more specifically the collection of documentation concerning some EPO tests she had undergone in the past.

20. On 16 September 2008 AFS filed its answer to the appeal filed by the IAAF, requesting "*that CAS rule:*

1. The appeal filed by International Association of Athletics Federations on 18 August 2008 is dismissed.

2. The decision of the Anti-doping Commission of the Athletic Federation of Slovenia of 19 June 2008 is confirmed.

3. The Athletic Federation of Slovenia is granted contribution to its costs".

21. In a letter dated 6 November 2008, the IAAF requested the Panel that a further round of written submissions be allowed.

22. By communication dated 11 November 2008, the CAS Court Office informed the parties, on behalf of the Panel, that

i. letters had been sent to facilitate the collection by Ms Javornik of the information she was seeking with respect to the EPO tests she had undergone in the past;

ii. deadlines had been fixed for further rounds of submissions.

23. On 24 November 2008, the IAAF filed its "*Reply to the AFS and Ms Javornik answers*", with 12 exhibits; the Second Respondent filed a "*Respondent's Brief*" together with 3 exhibits.

24. On 28 November 2008 the CAS Court Office, on behalf of the President of the Panel, issued an order of procedure (hereinafter also referred to as the "Order of Procedure"), which was accepted by the parties. Such Order confirmed amongst other that CAS had jurisdiction to rule on this matter and that the applicable law would be determined in accordance with Article R58 of the Code.

25. On 4 December 2008 IAAF filed with CAS a "*Reply to Ms Javornik's brief of 24 November 2008*", with a document attached.

26. On 5 December 2008 the Second Respondent filed her "*Response to the IAAF Reply*". In such brief, Ms Javornik requested the Panel "*to declare IAAF Reply dated 24 November 2008 NOT permissible and to disrespect it for the purpose of this arbitration*", submitting that "*any other decision would jeopardize Mrs Javornik's right to a fair trial, which entails a right to prepare her defence in sufficient and adequate time*".

27. A hearing was held in Lausanne on 11 December 2008 on the basis of the notice given to the parties in the letter of the CAS Court Office dated 2 October 2008. The hearing was attended

i.	for the Appellant:	by Mr Habib Cissé, counsel, by Mr Thomas Capdevielle, IAAF Result Manager, and by Ms Francesca Rossi, IAAF Scientific Manager;
ii.	for the First Respondent:	by Simon Gabrijelcic, counsel;
iii.	for the Second Respondent:	by Ms Javornik personally and by Ms Spelca Mežnar, counsel.

28. At the hearing,

i. Ms Javornik made some declarations;

ii. declarations were also made by Dr. Karlheinz Demel, heard on the phone as witness indicated by the Appellant, as well as by Ms Susanne Pumper and by Mr Borut Podgornik, called as witnesses by the Second Respondent;

iii. the following experts were heard: Prof. Francesco Botré, Dr. Günter Gmeiner, Dr. Martial Saugy, Dr. José A. Pascual (on the phone) and Dr. Olivier Rabin (on the phone) (called by the Appellant), Dr. Rudolf Valenta and Dr. Vladka Čurin-Šerbec (called by the Second Respondent), and Prof Tadej Malovrh (called by the First and the Second Respondent).

29. At the conclusion of the hearing, the parties, after making cogent submissions in support of their respective cases, confirmed that they had no objections in respect of their right to be heard and to be treated equally in the arbitration proceedings. More specifically, the Second Respondent expressly withdrew the request submitted in her brief dated 5 December 2008 (§ 26 above). The Panel, in any case, decided to give the parties the opportunity to file, within a set deadline, written closing submissions in order to summarize their respective positions with regard to the scientific and legal issues presented in the briefs and at the hearing.

30. On 23 December 2008 the parties filed with the CAS their respective closing submissions.

2.2 The Position of the Parties

(a) The Position of the Appellant

31. IAAF considers the Decision to be "*erroneous and procedurally unsound*" and that "*there is clear evidence of the commission of an anti-doping rule violation by Ms Javornik*". The IAAF, in fact, indicates that the "*anti-doping rule violation under IAAF rules* [is] *constituted by the presence of the prohibited substance rEPO in her urine sample ... and disagrees with the decision of the AFS Commission to declare Ms Javornik not guilty of a doping offence on various grounds*". Indeed, the IAAF underlines that "*the presence of a prohibited substance in an athlete's urine sample constitutes a doping rule violation under IAAF Rules*", that "*rEPO is a prohibited substance both in-competition and out-of-competition*", that "*samples with code 346971 was provided by Ms Javornik*", and that "*the analysis of A and B 346971 revealed the presence of rEPO*".

32. Such analytical finding is not affected, in IAAF's opinion, by Ms Javornik's allegations concerning the collection, transportation and storage of the samples provided by her. IAAF, in fact, submits that "*the athlete either failed to identify a departure from a specific requirement imposed by the IAAF Procedural Guidelines for Doping Control, or failed to establish (prove) that a departure occurred. In any event, she failed to establish pursuant to IAAF Rule 33.4(b) that a departure occurred as such to undermine the validity of the finding in her sample*".

33. At the same time, the IAAF refutes the "*five reasons*" adduced by the AFS Commission in the Decision to support its conclusion that the analytical results produced by the Seibersdorf Laboratory had not established the presence of rEPO in Ms Javornik's samples, as follows:

    i. as to the allegation that "*the positivity criteria set out in WADA technical document TD2007EPO were not fulfilled in Ms Javornik's B sample*", IAAF explains the direct detection method used by WADA accredited laboratories to discover the presence of rEPO, as described in the WADA Technical Document TD2007EPO. In such respect, the Appellant

a. emphasizes that, according to such technical document, "*a smear can invalidate a lane only when it significantly interferes with the application of the identification criteria*", and that "*the mere presence of a smear does not automatically invalidate the results*", to conclude that "*although a smear exists on the athlete's sample's lane, it is visible on the bottom part of the lane and does not interfere with the identification criteria of rEPO on the upper part of the lane (basic area)*";

b. indicates that, contrary to the Decision's statement, in Ms Javornik's lane there are "*five identifiable and measurable bands, three in the basic area and two in the endogenous area*", allowing comparison with other reference samples; and

c. confirms that "*the two most intense bands in the athlete's lane ... are more intense (approximately twice or more) than the most intense band in the endogenous area, therefore fulfilling the third identification criteria in TD2007EPO*";

ii. as to the allegation that "*the second opinion given by Dr Pascual*" of the Barcelona Laboratory "*on the results of the A sample's analysis was confused and not clear*", the Appellant submits that "*Dr Pascual made a comprehensive review of the A analysis results submitted to him and produced a clear report*";

iii. as to the allegation that "*the antibodies used for the analysis were for research purposes only*", the Appellant emphasizes that "*it is clear from the WADA TD2007EPO that only one type of antibody ... is required to be used for urine EPO tests*" and that such type was used for testing Ms Javornik's urine sample;

iv. as to the allegation that "*the Seibersdorf laboratory should have given proof of its capability to perform EPO testing under WADA accreditation*", the Appellant confirms that the Seibersdorf Laboratory has been "*specifically accredited to conduct EPO analysis since 2003 (ISO 17025)*" and has a large experience in such tests;

v. as to the allegation that "*rEPO could not be found in Ms Javornik's sample as she denied taking EPO at the hearing*", the Appellant submits that "*this argument cannot seriously support*" the Decision.

34. In summary, in response to Ms Javornik's allegations, IAAF "*submits that*

1. the athlete does not demonstrate that the results produced by the Seibersdorf laboratory establishing the presence of recombinant EPO in her A and B samples are "false positive" results;

2. *the antibodies prescribed under the WADA Technical Document are suitable for the EPO analysis by IEF-double blotting;*

3. *the SDS-page is a reliable method which can be used as supporting evidence;*

4. *the results of the athlete's A and B sample analyses establish the presence of recombinant EPO in accordance with the positivity criteria set out in WADA Technical Document TD2007EPO;*

5. *the athlete failed to demonstrate that a departure from the WADA International Standard for Laboratories such as to undermine the reliability of the adverse analytical finding occurred*".

35. In light of the above, the IAAF recalls that the relevant IAAF rules provide for a fixed sanction regime. As a result, the Appellant submits that the Decision is to be set aside and that Ms Javornik, guilty of an anti-doping rule infringement (presence of a prohibited substance in her urine sample), has to be sanctioned with a two years' ineligibility pursuant to IAAF CR 40.1.

(b) The Position of the First Respondent

36. The First Respondent requests in this arbitration that the appeal be dismissed and the Decision be confirmed. In the AFS' opinion, in fact, the grounds on which the Decision is based are correct, because the analytical results of Ms Javornik's urine sample did not establish the presence of a prohibited substance, since they do "*not fulfil the criteria set out in the WADA Technical Document TD2007EPO*". More specifically:

i. with respect to the "*presence of a smear*", AFS confirms that "*every artefact in the gel can influence the movement of protein molecules through electric field and in this way interfere with application of the identification criteria. The impact of interference is not known, that is why the criterion requires clear line. The artefact may be protein aggregate and the antibodies may react unspecifically and react to such protein aggregate. This in turn undermines the result of urine sample analysis which can not be considered as credible proof of the presence of rEPO in the urine sample*";

ii. with respect to the "*assignation of bends*", AFS submits that "*the process of urine B sample analysis has been compromised because of presence of the smear and consequently the band assignment cannot be performed on such analytical result. Such result of analysis can not be taken as a valid result that can be subjected to application of criteria on rEPO presence*";

iii. with respect to the "*non-fulfilment of identification criteria*", AFS disputes that the ratio of 1.91, as measured by densitometry in Ms Javornik's B sample, between band 2 in the basic area and band α in the endogenous area satisfies the "*third identification criterion for rEPO in WADA*

TD2007EPO", according to which "*each of the two most intense bands in the basic area must be more intense (approximately twice or more) than any band in the endogenous area*". In AFS' opinion, the criterion must be strictly interpreted, as meaning that each of the two most intense bands in the basic area must be at least twice more intense than any band in the endogenous area: "*flexibility may lead to arbitrary decisions*", and chiefly so when "*all other criteria have not been clearly met*";

iv. with respect to the "*antibodies*", AFS notes that the Seibersdorf Laboratory used in the analysis of the B sample antibodies marked "*for research use only*", while antibodies validated for diagnostic use should have been used;

v. with respect to the "*Seibersdorf laboratory validation*", AFS submits that a "*laboratory validation report*" should have been submitted to confirm that the procedures followed at, and the reference values applied by, the Seibersdorf Laboratory are suitable to detect the presence of rEPO in an urine sample.

(c) The Position of the Second Respondent

37. Ms Javornik requests that the appeal filed by IAAF be dismissed and the Decision confirmed. She submits, in fact, that the evidence available shows that she has not committed any anti-doping rule violation. In her opinion, this conclusion is supported by two basic submissions:

i. the results of the A sample analysis are not valid because they failed to comply with WADA Technical Document TD2007EPO and WADA International Standard for Laboratories and are therefore negative;

ii. the result of the B sample analysis is clearly negative according to WADA Technical Document TD2007EPO.

38. Ms Javornik's position is based on several grounds, which all refer to the way in which the sample she provided was collected, stored and transported, and to the interpretation of the analyses performed by the Seibersdorf Laboratory. In Ms Javornik's opinion, "*it can be credibly and reliably considered that the profile in the athlete's sample has been caused by aggregated endogenous erythropoietin and not by administration of exogenous erythropoietin. More importantly, the Laboratory documentation of sample 34697B does certainly not allow drawing any definite conclusions that the sample contains recombinant erythropoietin*". The Second Respondent submits, in fact, that several factors, such as improper collection, storage and transportation conditions, have affected the analytical findings, that cannot be held to show a positive result.

39. According to Ms Javornik, in fact,

i. the urine sample was not collected, stored and transported in accordance with IAAF Procedural Guidelines and IAAF EPO Testing Protocol:

- the sample was collected in a place with a high temperature (30°C or more), and not adequate: a dog was strolling around and naked people were present;
- Ms Javornik was not given the opportunity to document the concerns she had about how the sample was collected;
- Ms Javornik was not informed by the Doping Control Officer (Mr Demel) that the sample collection was performed for an EPO test: she was not instructed to wash their hands before, and was not offered the use of sterile gloves while providing the sample;
- the sample was not stored in appropriate conditions to maintain its integrity, identity and security: it was not refrigerated immediately upon its collection; Mr Demel did not transport the sample in a cooling bag; and no evidence has been provided that the sample was properly stored before its analysis;

ii. the departures from IAAF Procedural Guidelines were of such a nature to undermine the validity of the analytical findings, having "*promoted and provoked*" the development of aggregation of endogenous erythropoietin or other proteins. According to Ms Javornik, there is clear evidence of the presence of such aggregates in the A and in the B sample analyses;

iii. the aggregation of endogenous erythropoietin has affected the migration behaviour of the protein: "*the aggregated endogenous erythropoietin in Mrs Javornik's sample migrated atypically and resulted in an uncharacteristic result*";

iv. neither the acceptance nor the identification criteria set by the WADA Technical Document TD2007EPO have been fulfilled:

- the presence of a smear affected the acceptance criteria; and
- "*the ratios 2/α below 2 have resulted in the non-fulfillment of the identification criteria*", whereas the criterion "*approximately twice or more*" in unclear and demands interpretation regarding ratios below 2; and an unclear criterion cannot be interpreted to detriment a party who has had no influence upon its making. In addition, "*approximately twice or more*" can only be understood to mean "*at least twice*", since, if ratios below 2 were included, the wording "*approximately twice*" would suffice;

v. in the laboratory documentation of the A sample analysis, there are at least eight "*typing errors*"; and one on them is the amendment of Ms Javornik's screening test results from negative to positive;

vi. the second opinions provided on the analytical findings cannot be accepted: the second opinion rendered by Dr. Pascual of the Barcelona Laboratory "*is not reliable*", while the second opinion of Dr. Saugy of the Lausanne Laboratory "*is too modest*":

- in Dr. Pascual's second opinion on the A sample analysis there are at least three "*typing errors*"; and Dr. Pascual made the same "*numerical error*", since, when he referred to Ms Javornik's lane, he missed it by three lanes;
- Dr. Saugy's second opinion on the B sample analysis contains only three sentences, two of which are repeating each other;

vii. the SDS page analysis is not an accredited method for finding rEPO and cannot be used to provide any kind of evidence in Ms Javornik's case;

viii. doubts can be expressed as to the reliability of the direct urinary EPO test, since "*renowned scientists … have … expressed concerns regarding the risks of false-positive results*";

ix. the final results may have been manipulated by the image processing software.

3. LEGAL ANALYSIS

3.1 Jurisdiction of the CAS

40. CAS has jurisdiction to decide the present dispute between the parties. The jurisdiction of CAS, not disputed by the Respondents, was based *in casu* by the Appellant on Article R47 of the Code and on IAAF CR 60. It is further confirmed by the Order of Procedure accepted by the Parties.

41. The jurisdiction of the CAS to act as an appeal body is provided by Article R47 of the Code as follows:

"*A party may appeal from the decision of a disciplinary tribunal of similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body*".

42. IAAF CR 60 ["*Disputes*"], to the extent it is relevant in these proceedings, then, so provides:

"*1. Unless otherwise stated in a specific Rule or Regulation (for example, in relation to disputes arising in the field of competition), all disputes arising under these Rules shall be resolved in accordance with the provisions set out below. [...]*

9. All decisions subject to appeal under these Rules, whether doping or non-doping related, may be appealed to CAS in accordance with the provisions set out below. All such decisions shall remain in effect while under appeal, unless determined otherwise (see Rules 60.23 and 60.24).

10. The following are examples of decisions that may be subject to appeal under these Rules: [...]

(c) Where a Member has taken a decision that an athlete, athlete support personnel or other person has not committed an Anti-Doping Rule violation. [...]

11. In cases involving International-Level athletes (or their athlete support personnel) …, the decision of the relevant body of the Member or the IAAF (as appropriate) may be appealed exclusively to CAS in accordance with the provisions set out in Rules 60.25 to 60.30. [...]

13. In any case involving International-Level athletes (or their athlete support personnel) the following parties shall have the right to appeal a decision to CAS:

(a) The athlete or other person who is the subject of the decision being appealed;
(b) The other party to the case in which the decision was rendered;
(c) The IAAF;
(d) The IOC (where the decision may have an effect on eligibility in relation to the Olympic Games); and
(e) WADA (in doping-related matters only). [...]

18. Unless otherwise stated below, as a general rule, the respondent to a CAS appeal under these Rules shall be the party which has taken the decision which is the subject of the appeal. [...]

21. In all references to CAS under Rule 60.10(c), the respondents shall be the relevant Member and the athlete. [...]

23. The decision by the IAAF as to whether a doping-related case should be appealed to CAS shall be taken by the Doping Review Board. The Doping Review Board shall, where applicable, determine at the same time whether the athlete concerned shall be re-suspended pending the CAS decision. [...]

25. Unless the Council determines otherwise, the appellant shall have 30 days from the date of communication of the written reasons of the decision to be appealed (in English or French where the IAAF is the prospective appellant) in which to file his statement of appeal with CAS. Within 15 days of the deadline for filing the statement of appeal, the appellant shall file his appeal brief with CAS and, within thirty days of receipt of the appeal brief, the respondent shall file his answer with CAS.

26. All appeals before CAS … shall take the form of a re-hearing de novo of the issues raised by the case and the CAS Panel shall be able to substitute its decision for the decision of the relevant tribunal of the Member or the IAAF

where it considers the decision of the relevant tribunal of the Member or the IAAF to be erroneous or procedurally unsound. [...]

28. In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Procedural Guidelines). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence.

29. In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise.

30. The CAS Panel may in appropriate cases award a party its costs, or a contribution to its costs, incurred in the CAS appeal.

31. The decision of CAS shall be final and binding on all parties, and on all Members, and no right of appeal will lie from the CAS decision. The CAS decision shall have immediate effect and all Members shall take all necessary action to ensure that it is effective. The fact of the referral to CAS and the CAS decision shall be set out in the next notice to be sent by the General Secretary to all Members".

3.2 Appeal Proceedings

43. As these proceedings involve an appeal against a disciplinary decision regarding an athlete brought by an international federation (IAAF), whose rules provide for an appeal to the CAS, they are considered and treated as appeal arbitration proceedings in a disciplinary case of international nature, in the meaning and for the purposes of the Code.

3.3 Admissibility

44. The Appellant's statement of appeal was filed within the deadline set down in IAAF CR 60.25. It complies with the requirements of Article R48 of the Code. Accordingly, the appeal is admissible.

3.4 Scope of Panel's Review

45. 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. [...]*".

46. In the same way, pursuant to IAAF CR 60.26,

"*All appeals before CAS ... shall take the form of a re-hearing de novo of the issues raised by the case and the CAS Panel shall be able to substitute its decision for the decision of the relevant tribunal of the Member or the IAAF where it considers the decision of the relevant tribunal of the Member or the IAAF to be erroneous or procedurally unsound*".

3.5 Applicable Law

47. Pursuant to Article R58 of the Code, the Panel is required to decide the dispute:

"*according to the applicable regulations and 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision*".

48. The "*applicable regulations*" in this case, and for the purposes of the present preliminary decision, are the IAAF rules.

49. In such respect IAAF CR 60, in fact, so provides:

"*28. In all cases involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including Procedural Guidelines). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence.*

29. In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties otherwise advise".

50. The IAAF rules relevant for the purposes of these proceedings are the following:

IAAF CR 32 ["*Anti-Doping Rule Violations*"]:

"*1. Doping is strictly forbidden under these Anti-Doping Rules.*

2. Doping is defined as the occurrence of one or more of the following anti-doping rule violations:

(a) the presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluid.

All references to a prohibited substance in these Anti-Doping Rules and the Procedural Guidelines shall include a reference, where applicable, to its, metabolites or markers.

(i) it is each athlete's personal duty to ensure that no prohibited substance enters his body tissues or fluids. Athletes are warned that they are responsible for any prohibited substance found to be present in their bodies. It is not necessary that intent, fault, negligence or knowing use on an athlete's part be demonstrated in order to establish an Anti-Doping Rule violation under Rule 32.2 (a).

(ii) except those prohibited substances for which a reporting threshold is specifically indentified in the Prohibited List, the detected presence of any quantity of a prohibited substance in an athlete's sample shall constitute an Anti-Doping Rule violation.

(iii) as an exception to the general application of Rule 32.2(a), the Prohibited List may establish specific criteria for the evaluation of prohibited substances that can also be produced endogenously".

IAAF CR 33 ["*Standards of Proof of Doping*"]:

"*1. The IAAF, the Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred under these Anti-Doping Rules.*

2. The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing body, bearing in mind the seriousness of the allegation which is made. This standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

3. Where these Anti-Doping Rules place the burden of proof on an athlete, athlete support personnel or other person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

4. Facts related to anti-doping rule violations may be established by any reliable means. The following standards of proof shall be applicable in doping cases:

(a) WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The athlete may rebut this presumption by establishing that a departure from the International Standard for Laboratories has occurred, in which case the IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not undermine the validity of the adverse analytical finding.

(b) A departure from the International Standard for Testing (or other applicable provision in the Procedural Guidelines) shall not invalidate a finding that a prohibited substance was present in a sample or that a prohibited method was used, or that any other Anti-Doping Rule violation under these Anti-Doping Rules was committed, unless the departure was such as to undermine the validity of the finding in question. If the athlete establishes that a departure from the International Standard for Testing (or other applicable provision in the Procedural Guidelines) has occurred, then the IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not undermine the validity of the finding that a prohibited substance was present in a sample, or that a prohibited method was used, or the factual basis for establishing any other anti-doping rule violation was committed under these Anti-Doping Rules".

IAAF CR 40 ["*Sanctions against Individuals*"]:

"*1. If any person commits an anti-doping rule violation under these Anti-Doping Rules, he shall be subject to the following sanctions:*

(a) For a violation under Rules 32.2(a), (b) or (f) (prohibited substances and prohibited methods), except where the prohibited substance is a specified substance in a case under Rule 40.5, or Rule 32.2(i) (competing whilst suspended or ineligible):

(i) first violation: for a minimum period of two years' ineligibility;

(ii) second violation: ineligibility for life.

9. In any case where a period of ineligibility is to be imposed under this Rule, 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. When an athlete has served a period of provisional suspension prior to being declared ineligible (whether imposed or voluntarily accepted), such a period shall be credited against the total period of ineligibility to be served".

51. Relevant for the purposes of these proceedings is also the Technical Document – TD2007EPO issued by WADA with respect to EPO tests conducted by the accredited laboratories, which reads as follows

"*WADA Technical Document – TD2007EPO*

Document Number	*TD2007EPO*	*Version Number:*	*2.0*
Written by:	*D. Catlin G. Nissen-Lie C. Howe J.A. Pascual F. Lasne M. Saugy*	*Approved by:*	*WADA Executive Committee*
Date:	*April 5th, 2007*	*Required for analyses performed after:*	*31 May, 2007*

HARMONIZATION OF THE METHOD FOR THE IDENTIFICATION OF EPOETIN ALFA AND BETA (rEPO) AND DARBEPOETIN ALFA (NESP) BY IEF-DOUBLE BLOTTING AND CHEMILUMINESCENT DETECTION.

The criteria presented herein have been established to ensure harmonization in the performance of the EPO urine test and the subsequent reporting of results across the Laboratories.

All the Laboratories are required to apply these criteria in the routine performance of the urine EPO test.

In this document, erythropoietin and its analogues are specified as follows:
rEPO: recombinant erythropoietin, also referred to as epoietin (i.e. epoietin alfa and beta).
uEPO: endogenous (secreted naturally by the athlete's own tissues) erythropoietin, found in the urine.
NESP: the erythropoietin analogue, darbepoietin alfa.

The original method was described by F. Lasne et al. in Analytical Biochemistry 311 (2002) 119–126.

Description of the method

The EPO urinary test must be performed according to the following method:

1) Sample preparation:
Sample preparation consists of a partially selective pre-concentration technique based on centrifugal ultrafiltration and buffer washing. Preventing degradation of the EPO during this concentration process is essential.
Additional purification step by immunoaffinity columns (IAC) is also an acceptable procedure as part of the sample preparation process.
Note: Although other more selective concentration techniques may potentially be used, any change to Sample preparation may affect the isoform distribution and consequently shall require an appropriate validation by the Laboratory.

2) Isoelectric Focusing (IEF):
Isoelectric focusing is performed in a pH range compatible with the isoelectric point (pI) of both the natural urinary EPO and its recombinant analogues (e.g. routinely in the pH range of 2 to 6). The pH gradient is constructed using carrier ampholytes and IEF is performed under denaturing conditions (approximately 7M

urea).

3) Double blotting:
After IEF separation, a double blotting procedure is followed. In the first blot, proteins in the gel are transferred to a first PVDF membrane. After that, a monoclonal antibody (mAb)(clone AE7A5, recommended supplier: R&D Systems of Minneapolis, USA) is applied to recognise EPO. In a second blot, the interaction between EPO and mAb is disrupted at an acidic pH and the mAb is transferred to a second PVDF membrane.
Note: The method relies on the particular specificity of the monoclonal antibody with which it was developed (clone AE7A5). This antibody is considered a critical reagent and shall not be changed. Because the method relies on an isoelectric focusing separation prior to the antibody based detection, the use of a unique primary antibody is deemed scientifically acceptable. Consequently, clauses 5.2.4.3 (2nd sentence) and 5.2.4.3.1.3 of the WADA International Standard for Laboratories (version 4.0) do not apply for this specific test.

4) Chemiluminescent detection:
The position of the mAb on the membrane is revealed by adding a sequence of reagents terminating in a peroxidase. This peroxidase generates light in the presence of the appropriate chemiluminescent substrate, allowing the generation of an image that maps the original position and quantity of EPO in the gel after IEF separation.
Typically, this sequence of reagents is made up of:
primary mouse anti-human EPO mAb – biotinylated anti-mouse secondary antibody – streptavidin- horseradish peroxidase complex – chemiluminescent substrate for horseradish peroxidase.

Testing
In compliance with the WADA International Standard for Laboratories (clause 5.2.4.3.1.1), a presumptive Adverse Analytical Finding in the Screening Procedure should be confirmed using a second aliquot taken from the original "A" Sample.

Evaluation and Interpretation of Results
Results need to fulfil the quality, identification and stability criteria described herein.
Figure 1 shows an example of a test result with the definition of basic, endogenous and acidic areas. Bands of the reference substances are identified by numbers and letters.

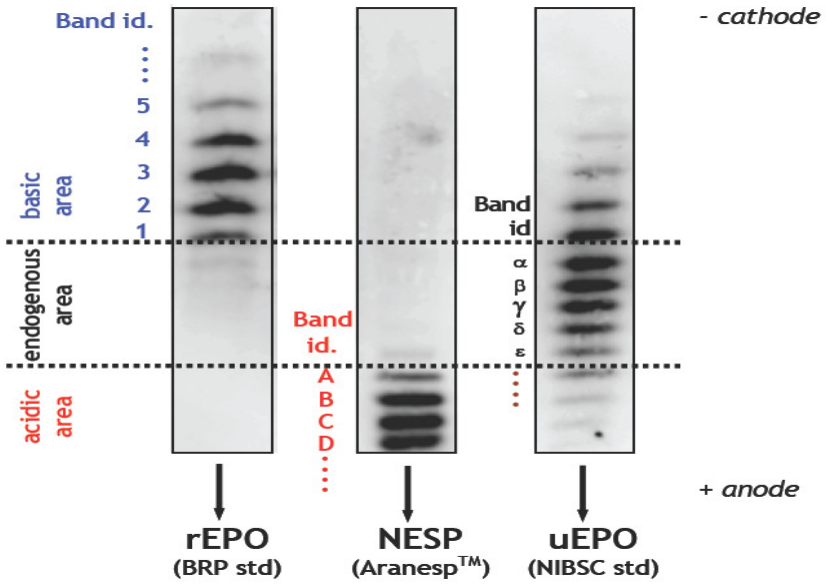


Figure 1. Image of three lanes obtained by the chemiluminescence acquisition system, and corresponding to the analysis of rEPO, NESP and uEPO.
Basic and acidic areas are defined, as described, by the position of the bands corresponding to rEPO (Biological Reference Preparation, BRP, of the European Pharmacopeia) NESP (aranesp™, Amgen) and by exclusion, the endogenous area is defined in between. In the figure it is exemplified by uEPO (International Reference Preparation, IRP, from the National Institute for Biological Standards and Control, NIBSC, of UK). The bands in the basic, endogenous and acidic areas are identified by numbers and letters as shown. Additional bands than those represented and numbered can occur in the different areas, as illustrated by the dots (….).

The evaluation of the image obtained is based on the consecutive application of:

- *acceptance criteria*
- *identification criteria*
- *stability criteria*

Acceptance criteria.
The acceptance criteria define the requisites that the image has to fulfil to allow the application of the identification criteria in order to ascertain the presence of rEPO or NESP.

1.- *Spots, smears, areas of excessive background or absent signal in a lane that significantly interferes with the application of the identification criteria shall invalidate the lane.*
2.- *Comparison to reference samples shall allow assignment of band numbers in the athlete's sample.*

Identification criteria.

When the EPO urinary method was initially developed, the proposed method of detection quantified the relative amount of basic band areas. Several CAS cases have referred to the "80% basic bands" rule in making decisions. Further research and experience has indicated that the identification criteria below are more discriminating than the "80% basic bands" rule and therefore the "80% basic bands" criterion should no longer be used.

The following identification criteria define the requisites that the image has to fulfil to consider that an adverse analytical finding corresponding to the presence of rEPO or NESP has occurred.

rEPO

1.- *in the basic area (as defined in Figure 1) there must be at least 3 acceptable, consecutive bands assigned as 1, 2, and 3 in the corresponding reference preparation.*
2.- *the 2 most intense bands measured by densitometry in the basic area must be consecutive and must be bands 1, 2 or 3.*
3.- *Each of the two most intense bands in the basic area must be more intense (approximately twice or more) than any band in the endogenous area, as measured by densitometry.*

NESP

1.- *in the acidic area (as defined in Figure 1) there must be at least 3 acceptable, consecutive bands assigned as B,C and D in the corresponding reference preparation.*
2.- *The most intense band measured by densitometry in the acidic area must be C or D.*
3.- *The most intense band (C or D) in the acidic area must be more intense (approximately twice or more)than any band in the endogenous area measured by densitometry.*

Methyl red may be used in the electropherogram to facilitate positioning and numbering of bands on the gel.

Stability Criteria

When, after applying the above identification criteria, a urine sample is suspected of an Adverse Analytical Finding for rEPO or NESP, the confirmation phase shall also establish the stability of the profile found. Since it cannot be discounted that some rare factors may interfere with the stability of a urine Sample and may affect the interpretation of an Adverse Analytical Finding for EPO, a stability test shall be performed before reporting an Adverse Analytical Finding for EPO in urine.
While it is recognized that other specific reagents may be developed and validated by the Laboratory, an acceptable procedure for the stability test is as follows:

Reagents:
Pepstatin A: 1mg/mL in methanol
CompleteTM (Roche): 1 tablet /2 mL of water
Microcon® YM-30 (Millipore), MWCO, 30,000 Da
50 mM sodium acetate buffer pH5

Tween-80
BRP and NESP
Method:
Centrifuge 0.6 mL of urine 10 min, 2700 RCF, 20°C and put 0.5 mL of supernatant in a test tube
Add 20 µL of Pepstatin A and 5 µL of CompleteTM
Concentrate to approximately 30 µL using the Microcon®
Add 200 µL of acetate buffer into the sample reservoir and mix by vortexing before the invert recovery spin
Adjust the volume of the recovered sample to 0.5 mL with acetate buffer
Add 20 µL of Pepstatin A and 5 µL of CompleteTM
Incubate 15± 2 min at room temperature
Add a mixture of BRP and NESP to a final concentration 1.5 x conc. used in references lanes of IEF
Incubate overnight at 37°C
Take 20 µL. Heat 80°C for 3 min
Add Tween-80
Apply to IEF gel

The stability criteria are:
1. The method described above does not result in a substantial shift in the position of the bands or in the appearance of new band(s) in the stability test lane compared to the reference standard lane(s).
2. The distribution of the most intense bands in the results of A screen, A confirmation (and B confirmation when available) is similar.

Documentation and Reporting
The following information is considered acceptable as "screening and confirmation test data" in compliance with the WADA International Standard for Laboratories-Technical Document TD2003LDOC, for this particular method:

Screening Assay Data:
- *Image acquired from the detection system, corresponding to the lanes representing:*
  - *Sample (screening aliquot)*
  - *Positive control sample or standard of the suspected or equivalent substance (i.e rEPO or NESP)*
  - *Negative control sample or standard of urinary EPO (uEPO).*
- *Processed images, such as densitometry profiles and/or contoured renditions of the signal density in the original image. These should show annotations demonstrating the application of the criteria to the isoform distribution of the Sample.*
- *Description of the result based upon application of all the criteria described in this Technical Document.*

Confirmation Assay Data:

- *Image acquired from the detection system, corresponding to the lanes representing:*
    - *Sample (confirmation aliquot)*
    - *stability test*
    - *Positive control sample*
    - *Standard of the suspected or equivalent substance (i.e rEPO or NESP)*
    - *Negative control sample and standard of urinary EPO (uEPO).*
- *Processed images, such as densitometry profiles and/or contoured renditions of the signal density in the original image. These should show annotations demonstrating the application of the criteria to the isoform distribution of the Sample.*
- *Description of the result based upon the application of the different criteria described in this Technical Document.*

Opinions:
Any comment(s) from the Laboratory deemed necessary in support of the analytical finding".

52. Finally, relevant in these proceedings are also the provisions set forth in the IAAF Procedural Guidelines for Doping Control, 2006 edition (hereinafter also referred to as the "Procedural Guidelines"), as well as the WADA International Standard for Laboratories (hereinafter also referred to as the "International Standard for Laboratories"). Reference was also made by the parties to the IAAF EPO Testing Protocol, dated March 2005, and the WADA TD2003LCOC on the Laboratory Internal Chain of Custody.

3.6 The Merits of the Dispute

3.6.1 Introductory remarks

53. The IAAF challenges, in this arbitration, the Decision and submits that Ms Javornik, contrary to the findings of the AFS Commission, committed an anti-doping rule violation under the IAAF CR, as established by the presence in the sample she provided of a prohibited substance (rEPO), for which she has to be sanctioned. The Respondents deny the anti-doping rule violation, since, in their opinion, the analytical results of both the A sample and the B sample provided by Ms Javornik do not establish the presence of a prohibited substance, but show findings that have to be considered negative or (at least) false positive.

54. The parties' submissions involve the examination by the Panel of two main questions, which, in their turn, have to be considered under several perspectives. One question is whether the analytical findings of the A sample and of the B sample show positive results; the other question is whether such results, if positive, are falsely so. The examination of the first issue mainly implies the evaluation of the analytical procedures and their outcome; the consideration of the second issue involves an evaluation of the procedures governing the collection, storage and transport of the sample, to verify whether a departure from the

applicable rules has caused the apparent (but actually nonexistent) adverse analytical finding.

55. In the examination of those issues, the Panel has to consider the rules on proof of doping, as set forth by IAAF CR 33.

56. In such respect, the Panel notes that the burden of proof is initially on the party asserting that an antidoping rule violation has occurred, i.e. IAAF (IAAF CR 33.1). However, IAAF CR 33.4 states that WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories: in other words, IAAF, in the establishment of an anti-doping rule violation, is not called to give evidence of the application of the relevant rules concerning the conduct of the analysis and the custodial procedures. The athlete, nevertheless, may rebut this presumption by establishing that a departure from the International Standard for Laboratories has occurred; in this case the IAAF has the burden of establishing that such departure did not undermine the validity of the adverse analytical finding.

57. As to the standard of proof, the IAAF has to establish that the violation has occurred "*to the comfortable satisfaction of the hearing body, bearing in mind the seriousness of the allegation which is made*" (IAAF CR 33.2). This standard of proof is greater than "*a mere balance of probability*" but less than "*proof beyond reasonable doubt*" IAAF CR 33.2). Once IAAF has discharged the above burdens, the presence in the athlete's body or bodily specimen of a prohibited substance is sufficient to establish an antidoping rule violation and thus the athlete's presumptive guilt.

58. On the other hand, when the burden of proof is upon the athlete to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a "*balance of probability*". The balance of probability standard – set forth also by IAAF CR 33.3 and by the CAS jurisprudence – means that the athlete alleged to have committed a doping violation bears the burden of persuading the judging body that the occurrence of a specified circumstance is more probable than its non-occurrence.

59. As a general rule, finally, IAAF CR 33.4 states that facts related to anti-doping rule violations may be established by any reliable means.

3.6.2 <u>The Doping Offence: The Presence of a Prohibited Substance</u>

60. The first question relates to the analyses of the A sample and of the B sample, which were found to be positive for the presence of a prohibited substance (rEPO).

61. EPO (erythropoietin) is indeed a hormone naturally produced by the human body, primarily by the kidney. In both its synthetic and natural forms, EPO stimulates the production of red blood corpuscles, thereby increasing oxygen transport and

aerobic power. Increased aerobic power leads to greater performance for endurance athletes. rEPO (recombinant EPO) is a synthetic version of the erythropoietin hormone. All synthetic forms of EPO are substances prohibited by IAAF (Procedural Guidelines, Schedule 1, S.2). Therefore, the confirmed presence, to the comfortable satisfaction of the Panel and on the basis of the analytical results, of rEPO in the urine of an athlete constitutes an anti-doping rule infringement under IAAF CR 32.2(a).

62. The presence of rEPO in the sample provided by Ms Javornik was established on the basis of the so-called "direct detection method", codified by the WADA Technical Document TD2007EPO and validated by CAS in several decision: CAS 2001/A/343, *UCI v/ H.*, award of 28 January 2002; CAS 2001/A/345, *M. v/ Swiss Cycling*, award of 28 January 2002; CAS 2002/A/370, *L. v/ IOC*, award of 29 November 2002; CAS 2002/A/374, *M. v/ IOC*, award of 24 January 2003; CAS 2001/A/452, *IAAF v/ B.*, award of 19 November 2003; CAS 2004/O/679, *USADA v/ B.*, award of 13 April 2005; CAS 2001/A/831, *IAAF v/ H.*, award of 5 May 2006. The Panel does not agree with the criticism to such method adduced by the Second Respondent. The scientific evidence submitted by IAAF, as well as the precedents in the CAS system, allow the Panel to confirm the reliability of the "direct detection method" to find the presence of rEPO in a urine sample.

63. Such method relies upon the fact that EPO and rEPO, because of their components, have different electrical charges. This means that EPO and rEPO respond differently when placed in an electric field: because rEPO has predominantly positive charges, it will move to the more basic area of a pH field, while endogenous EPO, having a majority of negative charges, will move predominantly to the acidic area of the pH field.

64. To test a urine sample for rEPO, a multi-staged laboratory process is conducted, in which the EPO hormones from the sample are preserved, concentrated and applied to a gel, which operates as an electric field once cathodes are attached. The resulting distribution of the EPO hormones through the electric field is specially photographed and developed as a computer image.

65. The possibility, then, to declare a sample positive is based on the evaluation of the image obtained, taking into account

    i. acceptance criteria, which define the requisites that the image has to fulfil to allow the application of the identification criteria;

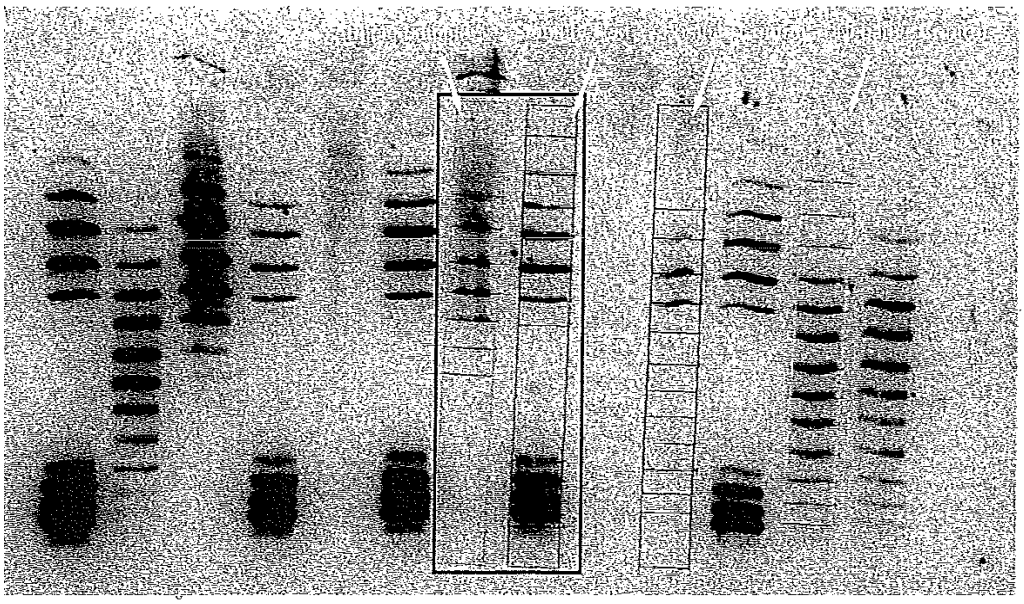
    ii. identification criteria, which define the requisites that the image has to fulfil to find the presence of rEPO;

    iii. stability criteria, which intend to confirm that no interference has affected the adverse analytical finding.

66. The images generated by the Seibersdorf Laboratory with respect to the A sample (first and second confirmation) of Ms Javornik are the following:

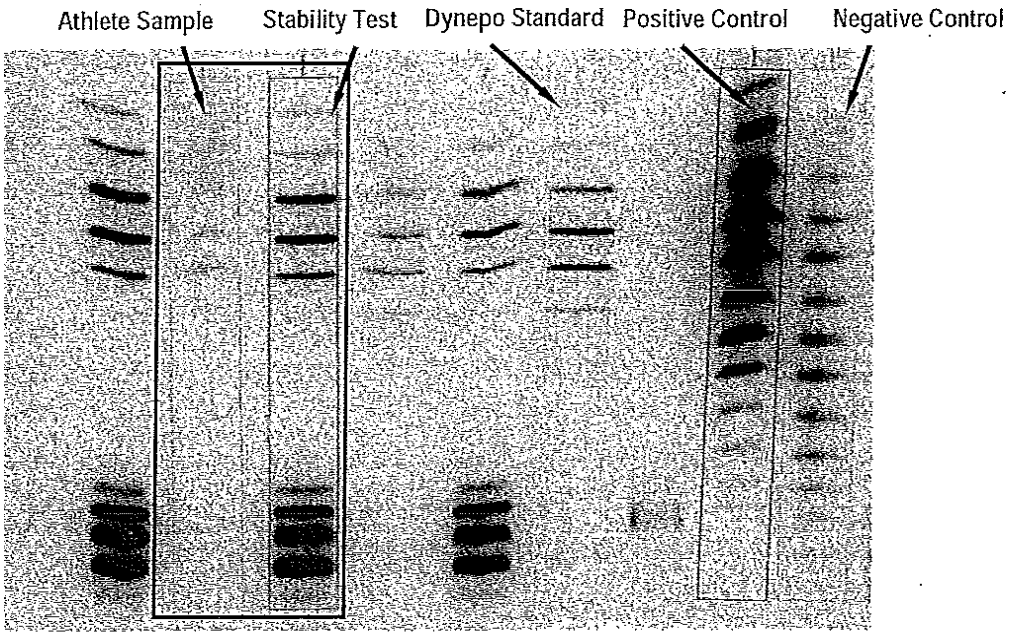
5.4. Test Results on negative, positive and athlete aliquot – 1st Confirmation

5.4.1. Gel Image – 1st Confirmation - Sample 346971 indicated in red



6.4. Test Results on negative, positive and athlete aliquot – 2nd Confirmation

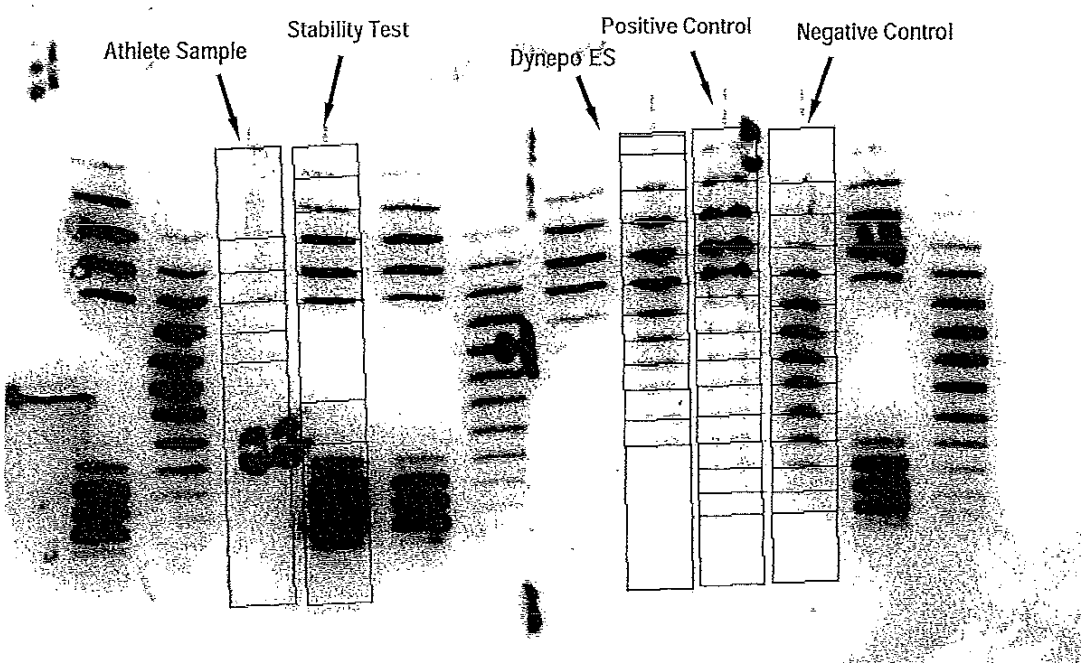
6.4.1. Gel Image – 2nd Confirmation (unprocessed) – Athletes samples marked in Red



67. The image generated by the Seibersdorf Laboratory with respect to the B sample of Ms Javornik is the following:

8.4. Test Results on negative, positive and athlete aliquot

8.4.1. Gel Image - Sample 346971B (Exposure Time: 15 min)



(images reprinted from the Laboratory Documentation Packages, A sample analysis, pp. 23 and 28, and B sample analysis, p.13).

68. Both with respect to the A sample and the B sample, the Seibersdorf Laboratory reported adverse analytical findings for the presence of rEPO. Such conclusions were confirmed by Dr. Pascual and Dr. Saugy, in their "second opinions" and when heard at the hearing, as well as by Prof. Botré at the hearing.

69. The above findings are disputed by the Respondents, under several points of view. Some of them relate to the A sample analysis, others concern the B sample analysis. Additional criticism applies to both the A sample and the B sample analyses. The Respondents' observations, then, regard all the criteria set by TD2007 EPO, which were not considered to be satisfied by the Decision.

70. Contrary to the Decision and the Respondents' position, the Panel is comfortably satisfied, taking into account the seriousness of the allegation, that the analytical results reported the Seibersdorf Laboratory show the presence of rEPO in the sample provided by Ms Javornik on the basis of the criteria established in TD2007EPO. The Panel in such respect agrees with the IAAF submissions.

71. In the Panel's opinion, in fact, in the images relating to the A sample (§ 66 above) and the B sample (§ 0 above) analyses, there are no spots, smears, areas of excessive background or absent signal in a lane that significantly interfere with the application of the identification criteria; comparison to reference samples allows assignment of band numbers in Ms Javornik's samples; in the basic area of

Ms Javornik's samples there are at least 3 acceptable, consecutive bands assigned as 1, 2, and 3 in the corresponding reference preparation; in Ms Javornik's samples the 2 most intense bands measured by densitometry in the basic area are consecutive and are bands 1, 2 or 3; each of the two most intense bands in the basic area are more intense (approximately twice or more) than any band in the endogenous area, as measured by densitometry; the application of the stability test to Ms Javornik's sample analyses did not result in a substantial shift in the position of the bands or in the appearance of new bands in the stability test lane compared to the reference standard lanes; the distribution of the most intense bands remained similar.

72. The Panel finds that the first acceptance criterion for the B sample is not affected by what the Decision and the Respondents described to be a "*smear*", i.e. some "*spots*" appearing in the mid-lower part of the athlete's lane.

73. The Panel, remarks that, according to TD2007EPO, a "*smear*" can invalidate a lane only when it significantly interferes with the application of the identification criteria, and holds that such "*smear*", present in the lower part of the lane, does not appear to interfere with the identification criteria of rEPO on the upper part (basic area) of the lane itself.

74. The Second Respondent, indeed, submits that such "*smear*" is a materialization of a "*protein aggregate*" (caused by improper collection, storage, and transportation of the sample), which has affected, in an uncharacteristic way, the migration of endogenous EPO in Ms Javornik's sample, therefore creating a "false positive" result.

75. The Panel is not persuaded by the submissions of Ms Javornik in such respect. Contrary to them, the Panel is comfortably satisfied by the IAAF's observations for the following reasons:

i. Prof. Valenta's opinion, on which the Second Respondent relies, offers only a "*possible explanation*", without proper scientific foundation, for the appearance and the effects of the "*smears*";

ii. there is no evidence that the collection, storage, and transportation of the sample has caused "*protein aggregates*" to appear in Ms Javornik's lane in the B sample: the Second Respondent only indicated the possibility, without proving, that the "*smear*" is constituted by "*protein aggregates*". Indeed:

- the Panel is comfortably satisfied, on the basis of the evidence offered by IAAF, that even assuming, without conceding (the point will be further considered at § 102 below), the existence of the improper conditions that according to the Respondents affected the collection, the storage, and the transportation of Ms Javornik's sample, their effect would have been the destruction of all proteins contained in the sample, and not the creation of "*protein aggregates*" and/or the unusual behaviour of endogenous EPO in the electric field;

- the stability tests performed on Ms Javornik's B sample confirmed that no external factor had contaminated the urine and affected the interpretation of the results.

iii. the "*spot*" appearing in the image concerning Ms Javornik's B sample is most likely not a "*protein aggregate*", but a "*matrix background*" (i.e., an artefact appearing in the background gel), since: it does not appear only on Ms Javornik's lane, but covers also part of the lane next to it; the image shows other "*smears*" randomly distributed across the entire gel; it appears only on the B sample analysis;

iv. the EPO bands in Ms Javornik's lane are not in the area of the "*smear*": this is placed in the lower part of the lane, where no bands relevant for the identification of the presence of rEPO are present.

76. In the same way, the Panel finds, contrary to the Respondents submissions, that also the second acceptance criterion ("*comparison to reference samples shall allow assignment of band numbers in the athlete's sample*") for the B sample is satisfied. In Ms Javornik's lane, in fact, there are five identifiable and measurable bands, three in the basic area (1, 2 and 3) and two (α and β) in the endogenous area, which allow comparison with other reference samples appearing in the image (see also § 78 below).

77. As to the identification criteria, discussion took place between the parties with respect to the satisfaction of the first (B sample analysis) and the third (A and B sample analyses) of them.

78. The Panel, having examined the Laboratory Documentation Package and the raw image of the B sample analysis, confirms that the first identification criterion ("*in the basic area there must be at least 3 acceptable, consecutive bands assigned as 1, 2, and 3 in the corresponding reference preparation*") is satisfied in the B sample analysis: the image shows, in fact, in Ms Javornik's lane, three identifiable and measurable bands in the basic area. The Panel is satisfied by IAAF's explanation that such bands, however clearly detectable, are less intense than other bands in the other control lanes due to the lower concentration of rEPO detected.

79. The Panel confirms that also the third identification criterion ("*each of the two most intense bands in the basic area must be more intense (approximately twice or more) than any band in the endogenous area, as measured by densitometry*") is satisfied in the A and B sample analyses.

80. The ratios, measured by densitometry, between the two most intense bands in the basic area (bands 1 and 2) and the most intense band (band α) in the endogenous area are the following:

Ratio	*A Sample Analysis 1. Confirmation*	*A Sample Analysis 2. Confirmation*	*B Sample Analysis*
1/α	3.09	2.32	2.78
2/α	2.63	1.54	1.91

81. The satisfaction of such criterion is disputed by the Respondents, which underline that the 2/α ratios in the second confirmation of the A sample analysis and in the B sample analysis are lower than 2, and therefore band 2 is not approximately twice or more more intense than band α.

82. The Panel does not agree with the Respondents submission that the third identification criterion has to be read as requesting that each of the two most intense bands in the basic area must be at least twice or more more intense than any band in the endogenous area. TD2007EPO clearly refers to an intensity of the two most intense bands in the basic area that must be "*approximately twice or more*" than the intensity of any band in the endogenous area. The use of the word "*approximately*" makes it clear that the lower level of the ratio must not be exactly "*twice*", but can be something "around" it, to be evaluated in the general context of the analytical findings in the samples.

83. In light of the above, the Panel holds that the 2/α ratio of 1.91 in the B sample analysis is to be considered "*approximately*" a ratio of 2, and therefore confirms the presence of rEPO. This conclusion is corroborated by the fact that the 2/α ratio calculated with reference to the first analysis of the A sample, when an identical aliquot (20 ml) of urine was used, was of 2.63.

84. Such conclusion is not contradicted by the 2/α ratio of 1.54 reported with respect to the second analysis of the A sample. The Panel comes to such conclusion because of two reasons: first, the Panel is satisfied by the IAAF's explanation that such result was caused because a much lower volume (7 ml) of urine was used, and lower volumes expose analytical results to larger variations; second, the Panel finds that the second analysis was not required by TD2007EPO and therefore that only the first analysis (showing a 2/α ratio of 2.63) has to be taken into account.

85. The Respondents challenge in this arbitration the antibodies used by the Seibersdorf Laboratory in the testing procedure. The Panel does not agree with such submissions and notes that the type of antibodies used for testing Ms Javornik's urine sample (the monoclonal antibodies AE7A5) corresponds to the type of antibodies required to be used by TD2007EPO.

86. The Second Respondent challenges, then, the Laboratory Documentation Package of the A sample analysis, indicating that there are at least eight "*typing errors*", and one of them (at page 16 of the Laboratory Documentation Package) is the amendment of Ms Javornik's screening test results (sample having the internal code of DU899/2008A, corresponding to code A346971) from negative (0) to positive (1).

87. The Panel has examined the Laboratory Documentation Package concerning Ms Javornik's A sample analysis and finds that the errors and corrections in their handwritten sections (including the correction at page 16) do not cast doubts as to the reliability of the adverse analytical findings, which are clear from the other portions of the same Laboratory Documentation Package to refer to sample having the internal code of DU899/2008A.

88. At the same time, the Respondents dispute under several perspectives the second opinions provided on the analytical findings by Dr. Pascual of the Barcelona Laboratory (as being "*not reliable*"), and by Dr. Saugy of the Lausanne Laboratory (as "*too modest*").

89. The Panel does not agree with such submissions, and finds that both opinions (notwithstanding the clerical mistakes in Dr. Pascual's opinion and the brevity of Dr. Saugy's statements) clearly confirm the adverse analytical findings. Such opinions, indeed, were confirmed by the same Dr. Pascual and Dr. Saugy at the hearing in their respective depositions.

90. The Panel does not agree also with the allegation that the Seibersdorf Laboratory should have given proof of its capability to perform EPO testing under WADA accreditation. The Panel is satisfied by the Appellant's indications that the Seibersdorf Laboratory has been specifically accredited to conduct EPO analysis since 2003 (ISO 17025) and is indicated in the Appendix to the IAAF EPO Testing Protocol as one of the "*WADA-accredited laboratories for IAAF rh-EPO testing*".

91. The Second Respondent, finally, challenges the adverse analytical findings under two other perspectives, submitting (i) that the final results may have been manipulated by the image processing software, and (ii) that the SDS-Page analysis is not an accredited method for finding rEPO and could not be used to provide any kind of evidence in Ms Javornik's case.

92. With respect to the first of these final allegations the Panel notes that the Second Respondent did not give any evidence of its statements, and remarks that the reliability of the software programs themselves is not disputed, and has been in any case confirmed in several peer-reviewed publications.

93. With respect to the second allegation, the Panel remarks that the SDS-Page analysis made by the Seidersdorf Laboratory on Ms Javornik's A sample was used only as supporting evidence (mainly to identify as Dynepo the kind of rEPO detected) to confirm the results obtained on the basis of the "direct detection method" codified by TD2007EPO. Indeed, even without the performance of the SDS-Page analysis, the analytical findings regarding Ms Javornik's A sample indicated the presence of rEPO, and therefore were to be reported as positive, in the same way as the Ms Javornik's B sample was declared positive without the SDS-Page analysis. This conclusion, therefore, makes it irrelevant for the Panel to verify whether the SDS-Page analysis is a reliable method for the detection and identification of rEPO and its forms. The Panel only notes that IAAF has

indicated peer-reviewed publications to confirm this conclusion.

94. On the other hand, the AFS Commission based its Decision that "*rEPO could not be found in Ms Javornik's sample*" also on the fact that Ms Javornik "*denied taking EPO*". In this respect, the Panel agrees with the Appellant's submission that "*this argument cannot seriously support*" the Decision, and with the statement contained in a CAS precedents that "*the currency of denial is devalued by the fact that it is the common coin of the guilty as well as of the innocent* (CAS 98/208, *Wang et al. v/ FINA*, award of 22 December 1998); and that "*oral testimony as to innocence, however impressively given, cannot trump scientific evidence as to guilt*" (TAS 99/A/234 & 235, *Meca-Medina & Majcen v/ FINA*, award of 29 February 2000).

95. The Panel, in light of the above, concludes that the IAAF has established, to the comfortable satisfaction of the Panel, that the anti-doping rule violation contemplated in IAAF CR32.2(a) has been committed. The analyses of the A sample and of the B sample of Ms Javornik's urine show positive results. Such results cannot be held to amount to falsely positive results. The Panel, as explained above (§ 75), found, in fact, that no interference of "protein aggregates" (which in the Second Respondent's opinion created a "false positive" result) occurred: the analyses indicated the presence of rEPO, which is a prohibited substance.

3.6.3 <u>The Alleged Departures from Sample Collection or Chain of Custody Procedures</u>

96. The above conclusion (§ 95), indeed, would make it irrelevant for the Panel to verify whether departures from the International Standard for Testing or the Procedural Guidelines occurred, which, in the Respondents' submissions, were the reasons for the creation of the mentioned "protein aggregates" and therefore the "false positive" result.

97. According to IAAF CR33.4(b), a departure from the International Standard for Testing (or other applicable provision in the Procedural Guidelines) does not invalidate a finding that a prohibited substance was present in a sample, unless the departure was such as to undermine the validity of the finding in question. Pursuant to the same rule, if the athlete establishes that a departure from the International Standard for Testing or the Procedural Guidelines has occurred, then the IAAF shall have the burden of establishing that such departure did not undermine the validity of the finding that a prohibited substance was present in a sample.

98. In light of such rule the Panel does not agree with IAAF that Ms Javornik had to establish (i) that a departure from the International Standard for Testing or the Procedural Guidelines occurred, and (ii) that such departure undermined the validity of the finding that a prohibited substance was present in her sample. Once the departure from the International Standard for Testing or the Procedural Guidelines is established by the athlete, it is for the IAAF to demonstrate that such departure did not undermine the validity of the analytical finding.

99. The Panel stresses the importance that procedural rules (as set by International Standard for Testing, by the Procedural Guidelines, or any other text) be followed in the collection, storage and transportation of urine samples. The Panel, in fact, remarks that the liability imposed on athletes (see § 57 above), as well as the ensuing shift in the burden of prove, once the presence of a prohibited substance in the sample is established, is justified only if the relevant anti-doping officer, organization or laboratory complies, to the maximum possible extent, with the procedural rules governing collection, storage, transportation and analysis of urine samples.

100. At the same time, however, the Panel remarks that the Procedural Guidelines, according to their very wording, "*are guidelines only. Whilst they are intended to be closely followed, practical conditions/issues may sometimes make this difficult and impossible to achieve and other solutions to the procedural problems of testing may have to be found*" (Preface, second last paragraph); and that they "*must be followed as far as is reasonably practicable*" (Article 1.4). At the same time, the Panel notes that "*In the event of any differences between these Procedural Guidelines and the WADA International Standards, the Procedural Guidelines shall prevail*" (Article 1.7).

101. In light of the above, the Panel finds that no departures took place (§ 102 below), and, in any case, that the validity of the analytical findings in Ms Javornik's sample was not undermined (§ 75 above and § 103 below).

102. With respect to the first point (existence of departures), the Panel notes the following:

    i. as to the identification of the doping control station, the relevant provision is contained in Article 3.2, first sentence of the Procedural Guidelines, under which "*The Doping Control Station should be clearly identified*". This provision, however, does not require specific methods for the identification of the doping control station and is meant to allow the athletes to timely reach the doping control station on the basis of the provided information. The doping control station, where Ms Javornik was tested, can therefore be deemed to have been sufficiently identified, since it is undisputed that Ms Javornik timely reached it. No departure from the applicable procedures, therefore, occurred;

    ii. as to the lack of privacy at the doping control station, Article 3.1 of the Procedural Guidelines requires that the doping control station "*ensures the athlete's privacy when providing a sample*", i.e. at the very moment the athlete is passing the urine. Since it is undisputed that privacy was ensured to Ms Javornik when she provided the sample, no departure from the applicable procedures can be identified;

iii. as to the heat in the doping control station, the Procedural Guidelines do not set any specific requirement. In addition, a temperature of 30°C (or more) does not seem to be extraordinary in the hot season (when most of the athletics events take place), without any dispute as to the possibility that samples can be collected in such conditions. No departure from the applicable procedures, therefore, can be identified;

iii. as to the hygienic environment in the doping control station, Article 3.2, final sentence of the Procedural Guidelines provides that "*the competition organizer and/or the DCO(s) should ensure that the facilities are clean and adequate*". The fact that "*a dog was strolling around*" (however a regrettable circumstance, which the doping control officer should have avoided in order to prevent any subsequent dispute from arising) does not imply *per se*, failing additional indications that the Second Respondent did not provide, that the doping control station was not "*clean and adequate*". No departure from the applicable procedures, therefore, can be identified;

iv. as to the notification period before the passing of the sample, Article 3.15 of the Procedural Guidelines prescribes that "*once the athlete has signed the notification form, he must report to the Doping Control Station as soon as possible but no later than the time stipulated on the form (being 60 minutes after the time of acknowledgment and acceptance of notification)*". As a result, the fact that Ms Javornik was not given 60 minutes from the notification to her reporting to the doping control station constitutes no departure from the applicable procedures, since Article 3.15 sets the maximum – and not the minimum – time allowed between notification and doping control;

v. as to the use of gloves by Ms Javornik when providing the sample, recommended by the IAAF in order to avoid manipulations by the athlete, no departure from the applicable procedures can be identified;

vi. as to the information about EPO analysis, no evidence has been adduced by Ms Javornik that she was not informed that the sample she was providing would be analysed for EPO: her statements are contradicted by the declarations of Dr. Demel. In addition, no specific rule, applicable to the collection of Ms Javornik's sample, subjects the possibility of EPO analysis to the fact that the athlete had received prior information of the performance of such analysis. Non rule, therefore, appears to have been violated;

vii. as to the making of comments on the doping control form, the Panel is satisfied that Ms Javornik, an experienced athlete, signed the form without inserting any remark and confirming "*the correct urine sampling appropriate to the current regulations*". Contradictory statements were rendered as to the fact whether Ms Javornik was prevented from inserting in the relevant box of the form remarks concerning the sampling procedure. Failing different indications, and taking into account that Ms Javornik signed the form, the Panel holds that Ms Javornik did not offer sufficient

evidence to establish that a departure from the applicable procedures took place;

viii. as to the storage and transportation of the samples, Article 3.72 of the Procedural Guidelines provides that "*the sealed samples should be stored in appropriate conditions in a manner that protects their integrity, identity and security prior to transportation from the Doping Control Station*"; Article 3.75 of the of the Procedural Guidelines provides that "*a transportation system shall be used that ensures that samples are transported to the laboratory in a manner that protects their integrity, identity and security*"; pursuant to the IAAF EPO Testing Protocol, then, "*Urine samples to be sent for rh-EPO analysis should be stored refrigerated in secure conditions prior to their transportation from the doping control station. … Samples shall be transported to the WADA-accredited laboratory by secure means. During transportation, the urine samples should be kept in refrigerated conditions (whenever possible, between 2 and 8 degrees Celsius)*". In such regard, the Panel notes that Ms Javornik has only raised doubts as to the proper storage of the samples by Dr. Demel. Contrary to such allegation, Dr. Demel indicated that the samples were refrigerated as soon as he arrived at home (some 90 minutes after the sample collection). Unchallenged indications were then given with respect to the proper storage of the samples at the offices of the Austrian Anti-Doping Agency. According to the depositions in this arbitration, then, the samples were kept refrigerated also when at the Seibersdorf Laboratory. In addition, the samples were transported to the Seibersdorf Laboratory "*as soon as practicable*". In the Panel's opinion, no departure from the applicable procedures, therefore, can be identified;

ix. as to the chain of custody reporting, Article 3.77 of the Procedural Guidelines provides that "*All information relating to the Chain of Custody of the samples collected should be recorded, including confirmation that the samples have arrived at their intended destination*". The WADA TD2003LCOC, then, describes the Laboratory Internal Chain of Custody. Contrary to the Second Respondent's submission, the Panel, finds that no departure from the applicable procedures can be identified. The IAAF has in fact provided evidence of the chain of custody: sample 346971 was provided by Ms Javornik on 9 March 2008 and was collected by Dr. Demel; Dr. Demel on 10 March 2008 delivered sample 346971 to the Austrian Anti-Doping Committee; the same sample was delivered on 14 March 2008 to the Seibersdorf Laboratory; sample 346971 was stored in the cold room at, and thereafter analysed by, the Seibersdorf Laboratory. The storage in the cold room at the Seibersdorf Laboratory was confirmed by Dr. Gmeiner, in accordance with TD2003LCOC, under which "*The chain of custody, along with relevant testimony from individuals documented on the chain of custody documents, should provide a complete record of the Sample or Aliquot location*" (emphasis added).

103. With respect to the second point (effect of departures), the Panel holds, in any case, that it has been demonstrated that the collection, storage and transport conditions of Ms Javornik's sample did not undermine the validity of the adverse analytical finding established by the Seibersdorf Laboratory, in addition to what already stated (§ 75 above), also for the following reasons:

    i. the presence of a dog and of naked people at the doping control station, as well as the fact that Ms Javornik was not offered the use of sterile gloves while providing the sample, clearly had no impact on the result of the analysis, showing the presence of rEPO in the sample provided by Ms Javornik;

    ii. the fact that the sample was collected in a place with a temperature of 30°C, or the fact (if conceded to have occurred) that the sample was not stored and transported in appropriate conditions to maintain its integrity, identity and security would not have led to a false positive result, but to a destruction of all proteins in the urine, including EPO. In other words, if those facts had occurred, their effect would have resulted in a negative analytical finding.

3.6.4 The Sanction

104. The conclusion that Ms Javornik is guilty of an anti-doping rule infringement pursuant to IAAF CR 32.2(a) (presence of a prohibited substance in her urine sample) implies that the Decision is to be set aside and that Ms Javornik has to be sanctioned with a two years' ineligibility pursuant to IAAF CR 40.1(a)(i).

105. In accordance with IAAF CR 40.9, the period of ineligibility starts on the date of the decision providing for ineligibility. However, when an athlete has served a period of provisional suspension prior to being declared ineligible, such a period shall be credited against the total period of ineligibility to be served. Ms Javornik was provisionally suspended on 11 June 2008, and she is still suspended. As a result, Ms Javornik is declared ineligible until 10 June 2010.

3.7 Conclusion

106. In light of the foregoing, the Panel upholds the appeal brought by IAAF. The Decision is set aside and Ms Javornik is declared ineligible for a period of two years expiring on 10 June 2010.

4. COSTS

107. Pursuant to Article R65.1 of the Code, disciplinary cases of an international nature shall be free of charge, except for the Court Office fee to be paid by the appellant and retained by the CAS.

108. Article R65.3 of the Code provides that the Panel shall decide which party shall bear the costs of the parties, witnesses, experts and interpreters, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.

109. As this is a disciplinary case of an international nature, which was brought to CAS by IAAF further to a decision issued by AFS with respect to an international level athlete, the proceedings will be free, except for the minimum Court Office fee, already paid by the Appellant, which is retained by the CAS.

110. With regard to the parties' costs, having taken into account the outcome of the arbitration, the conduct and the financial resources of the parties, the Panel finds it to be fair that each party bears the expenses it has incurred in connection with these arbitration proceedings.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the International Association of Athletics Federations against the decision issued on 19 June 2008 by the Antidoping Commission of the Athletic Federation of Slovenia is upheld.

2. The decision adopted on 19 June 2008 by the Antidoping Commission of the Athletic Federation of Slovenia is set aside.

3. Ms Helena Javornik is found guilty of an anti-doping rule violation under IAAF Competition Rule 32.2(a) and is declared ineligible for a period of 2 years commencing on 11 June 2008.

4. All other prayers for relief are dismissed.

5. This award is pronounced without costs, except for the court office fee of CHF 500 (five hundred Swiss Francs) paid by the International Association of Athletics Federations, which is retained by the CAS.

6. Each party shall bear its own costs.

Lausanne, 13 March 2009

THE COURT OF ARBITRATION FOR SPORT

Luigi **Fumagalli**
President of the Panel

Christoph **Vedder**
Arbitrator

Stephan **Netzle**
Arbitrator