Arbitration CAS 2002/O/401 International Association of Athletics Federations (IAAF) / USA Track & Field (USATF), award of 10 January 2003

ARBITRAL AWARD

rendered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. L. Yves **Fortier**, C.C., Q.C., Barrister & Solicitor, Montreal, Canada

Arbitrators: The Hon. Robert J. **Ellicott**, Q.C., Judge & Barrister, Sydney, Australia

Mr. Jan **Paulsson**, Attorney-at-Law, Paris, France

(hereinafter, the "Panel")

Ad hoc Clerk: Mr. Stephen L. **Drymer**, Attorney-at-Law, Montreal, Canada

in the arbitration proceeding between:

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)

17 Rue Princesse Florestine, BP 359 – MC 9800, Monaco

Represented by Mr. Mark Gay, Ms. Karen Neale and Ms. Alexandra Scott-Bayfield of the law firm Denton Wilde Sapte, Five Chancery Lane, Clifford's Inn, London, United Kingdom, as Solicitors; and by The Hon. Michael J. Beloff, Q.C., Blackstone Chambers, Blackstone House, Temple, London, as Counsel

– and –

USA TRACK & FIELD (USATF)

One RCA Dome, Suite 140, Indianapolis, Indiana 46225, USA

Represented by Mr. Javier H. Rubinstein, Mr. Bradley J. Andreozzi and Mr. Allan H. Erbsen of the law firm Mayer Brown Rowe & Maw, 190 South La Salle Street, Chicago, Illinois, USA

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THE FACTS

A. The Parties

1. The International Association of Athletics Federations (“IAAF”), is the international federation governing the sport of athletics world-wide. IAAF has its seat in Monaco.

2. USA Track & Field (“USATF”) is the national federation governing the sport of athletics in the United States. It is recognised as a National Governing Body ("NGB") under US law and is a Member Federation ("Member") of IAAF. USATF has its seat in Indianapolis, United States.

B. The Arbitration Agreement

3. On 10 July 2002, the parties executed an Arbitration Agreement in which they described their dispute and established the terms by which it was to be submitted to arbitration (the "Arbitration Agreement"). Given the unique nature of the dispute and of the issues to be determined, it is useful to reproduce herein, in its entirety, the preamble to the Arbitration Agreement:

> WHEREAS:
>
> (A) The IAAF are in dispute with USATF over the obligation of USATF under IAAF Rules to disclose to the IAAF the results of "positive tests" conducted by or on behalf of USATF; to disclose the determinations of Hearing Panels convened by USATF in cases where athletes have been exonerated of a Doping Offence; and to disclose the material underlying such positive results and/or determinations of USATF Hearing Panels.
>
> (B) The IAAF contends that it requires such information in order to decide whether or not to exercise its power under IAAF Rule 21.3(ii) to refer such cases for review by its Arbitration Panel (or CAS), where the IAAF believes in the conduct or conclusions of such a hearing the relevant tribunal of the Member has misdirected itself or otherwise reached an erroneous conclusion.
>
> (C) USATF contends that disclosure of domestic doping control results is not required by IAAF Rules or any other legal constraints, and is neither required nor permitted by the US laws, rules, regulations and agreements to which USATF is subject. USATF also contends that in any event the information requested by the IAAF cannot be disclosed because it would violate the legal and personal rights

of the athlete. USATF further contends that the IAAF has no authority to review such domestic doping control cases.

(D) The dispute relates to a failure by USATF to disclose the information in (A) above during the period 1 October 1996 to a date to be determined by mutual agreement of the parties.[1]

(E) The facts will be set out in the Statements of Case to be filed by the parties to the dispute.

4. Among its various provisions, the Arbitration Agreement provides for the constitution of the Arbitration Panel (the "Panel") and addresses several procedural issues. For example:

- Clause 3.1 states that the arbitration will be held in Lausanne before the Ordinary Arbitration Division of the CAS.

- Clause 4.3 provides that the language of the arbitration is English.

- Clause 5.1 empowers the Panel to issue orders for the production of documents in the possession of either party where such documents are shown to be "clearly and directly relevant" to the resolution of the dispute.

- Clause 6.1 authorises interested athletes to join as parties to these proceedings, anonymously, subject to the execution by them of the Arbitration Agreement.[2]

- Clauses 7.1 to 7.3 provide that the Panel shall deliver its reasoned decision which "shall be final and binding on all parties," in English, by 30 November 2002, which decision "shall not be confidential."[3]

- Finally, Clause 8.1 states that the Arbitration Agreement shall be governed by and construed in accordance with Swiss Law; and clause 8.2 provides that, while the arbitration is "subject to the procedural law of the Swiss Courts," the Panel may, if it finds it necessary to do so, "select a substantive law governing the proceedings … "[4]

5. Significantly, the Arbitration Agreement also defines the specific issues to be determined by the Panel. It does so in the following terms:

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[1] The relevant period is 1 October 1996 to 31 December 2000. This is reflected, *inter alia*, in the IAAF's request (in its Statement, discussed below) that the Panel order USATF to disclose information concerning doping controls and related administrative procedures conducted by USATF during that period.

[2] In the event, no athlete joined the proceedings.

[3] Prior to the close of the hearing, on 2 November 2002, the parties agreed to allow the Tribunal until 20 December 2002 to render its Award. On 18 December 2002, this delay was further extended, with the consent of the parties, until 10 January 2003.

> **1. Agreement to Arbitrate**
>
> 1.1 The IAAF and USATF agree to submit to arbitration the following issues:
>
> (i) properly construed, at all material times did IAAF Rules provide that USATF was obliged:
>
> (a) to furnish the results of positive tests to the IAAF;
>
> (b) to provide the IAAF with copies of decisions of USATF Hearing Panels exonerating athletes of Doping Offences, and
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> (c) to provide the IAAF with the material it needs to decide whether or not to seek to have a Hearing Panel's decision reviewed by its own Arbitration Panel or CAS?
>
> (ii) if IAAF Rules did so provide, is there any valid reason why USATF should not be required to comply with these Rules?

6. As will be seen, the Panel will have reason to emphasise that the scope of its mandate is to answer these questions, and these questions alone.

C. Constitution of the Arbitral Panel

7. Clause 2.1 of the parties' Arbitration Agreement, entitled "Constitution of the Arbitration Panel" reads as follows:

> The Panel shall consist of three arbitrators. One shall be selected by the IAAF and one by USATF. The two appointed arbitrators shall then have 10 days in which to agree upon a Chairman of the Arbitration Panel. Failing such an agreement that Chairman of the Arbitration Panel shall be selected by the President of the Division within 7 days. The Chairman may not be a citizen of, resident, or domiciled in the United States of America.

8. In accordance with the Arbitration Agreement, the IAAF selected the Hon. Robert J. Ellicott, Q.C., to serve as its party-appointed arbitrator.[5] USATF nominated as its party-appointed arbitrator Jan Paulsson, Esq.[6] The two arbitrators subsequently selected L. Yves Fortier, C.C., Q.C. as President of the Panel.

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4 The matter of the applicable substantive law is addressed below.

5 See paragraph 1 of the IAAF's Request for Arbitration, dated 17 July 2002.

6 See paragraph 7.3 of USATF's Answer, dated 24 July 2002.

D. Events Giving Rise to the Arbitration

9. The Panel does not consider it either necessary or useful to describe at length the genesis of the dispute or to pronounce upon the parties' divergent interpretations of events proceeding the execution of the Arbitration Agreement. Where such events are relevant to the present Award, they are discussed below in the context of the Panel's analysis of the issues to be determined. Suffice it to say that this Award constitutes the culmination of a dispute which extends back to 1996 but which came to a head only much later, and which can be said to have crystallised fully on 19 July 2002, when the Arbitration Agreement was signed.

10. Two particular circumstances, however, merit comment. On 29 September 2000, further to allegations made during the 2000 Olympic Games in Sydney, Australia, that USATF "had concealed information about US athletes who may have tested positive for the use of performance enhancing drugs,"[7] USATF appointed an Independent Review Commission, chaired by Professor Richard McLaren (the "McLaren Commission"). The mandate of the McLaren Commission was as follows:

> As a result of these allegations, we [USATF] request that the Commission review, analyze and report on USA Track & Field's, rules, procedures and compliance with applicable anti-doping rules and procedures for the period beginning on January 1, 1999, and ending immediately preceding the Sydney Olympic Games … [8]

11. The McLaren Commission executed its mandate and, on 11 July 2001, issued its Report.[9] As with other facets of the factual background to the dispute, and given in particular that the McLaren Commission was an investigative rather than an adjudicative body, and that neither party in these proceedings suggests that its findings are in any way binding upon the Panel, we do not consider it necessary to summarise the McLaren Commission Report. Those aspects of the Report considered relevant are addressed, as appropriate, below.

12. The second circumstance to be noted concerns the transfer by USATF of all responsibility for doping control and related disciplinary proceedings to the independent United Sates Anti-Doping Agency ("USADA") in October 2000. Since that time, it is

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7 Exhibit 161: Report of the McLaren Commission, 11 July 2001, at l. (Unless otherwise stated, all references to exhibits in this Award are to the Joint Bundle of exhibits filed by the parties, at the request of the Panel, in advance of the hearing.)

8 Exhibit 137: fax from USATF to the McLaren Commission, dated 29 September 2000.

9 *Supra*, note 4.

USADA, not USATF, which tests athletes both in and out-of-competition, analyses the results, notifies athletes of positive tests and adjudicates such disputes as may arise; and unlike the USATF regulation previously in force, USADA's Protocol for Olympic Movement Testing provides for disclosure of domestic drug tests to the IAAF during the adjudicative process.

13. As explained more fully below, this arbitration, insofar as it concerns specific cases of doping control, concerns thirteen cases which predate USADA's activities, when US domestic doping control and adjudication were carried out by USATF.

PROCEEDINGS BEFORE THE CAS

E. Written Proceedings

14. Attached to the Arbitration Agreement, as Schedule I, is a Procedural Timetable agreed by the parties at the time, setting out the various procedural steps leading to the hearing and, thereafter, the decision to be rendered by the Panel. In the event, the Procedural Timetable was amended on several occasions, both with the consent of the parties and, where required, upon order of the Panel. Indeed, the Panel was seized of numerous applications and requests for rulings in respect of various procedural issues, ranging from the extension of certain deadlines, to the documents to be disclosed by each party to the other, to the nature and contents of the joint bundle of documents submitted by the parties.

15. At the end of the day, and in accordance with the Panel's directions, the following written submissions were filed concerning the substantive issues in dispute:

On 17 July 2002, the IAAF submitted its Request for Arbitration (the "Request");

On 24 July 2002, USATF filed its Answer to IAAF's Request (the "Answer");

On 19 August 2002, the IAAF served its Statement of Case ("Statement") and accompanying evidence, including written statements of its factual and expert witnesses;

USATF's Statement and accompanying evidence was filed on 19 September 2002;

On 7 October 2002, IAAF submitted a Reply to USATF's Statement;

On 21 October 2002, USATF filed its Answer to IAAF's Reply.

F. Order of Procedure

16. On 22 October 2002, the President of the Panel issued an Order of Procedure. In addition to reiterating certain of the information contained in the Arbitration Agreement, including the composition of the Panel and its mission, the seat and language of the arbitration and the law applicable to the merits, the Order of Procedure listed the written proceedings filed by the parties and set the date of the hearing for 1 and 2 November 2002, in Lausanne.

17. The Order of Procedure also noted that a daily schedule for the hearing remained "to be decided."

G. The Hearing

18. In accordance with the Order of Procedure dated 22 October 2002, the hearing took place in Lausanne on 1 and 2 November 2002.

19. Pursuant to the timetable agreed by the parties and approved by the Panel subsequent to the Order of Procedure, each party delivered opening and closing oral arguments (hard copy of which were subsequently provided to the Panel), conducted examinations-in-chief of its witnesses and cross-examinations of the witnesses called by the other party. In addition, both counsel and witnesses were questioned at length by the arbitrators, throughout the hearing, on evidentiary and legal matters of particular interests to the Panel.

20. In total, the Panel sat for approximately 19 hours over the course of the two days in question, during which it heard the parties' evidence and oral submissions.

H. The Parties' Submissions

21. A summary of the main elements of the parties' submissions concerning the issues to be resolved by the Panel is provided below.[10]

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[10] This summary addresses the principal points raised by the parties in respect to the legal questions at issue. It does not address in any detail the parties' extensive factual allegations or evidence concerning, for example, the origins of the dispute and the proceedings before the McLaren Commission.

This summary is drawn primarily from the extensive written submissions filed by the parties, setting out in detail their respective cases. These cases were further refined and focused in counsel's presentations during the hearing. As will be seen, the evidence presented and submissions made during the hearing which the Panel considers particularly relevant to its

22. It bears noting that, as the IAAF itself repeatedly emphasises, this arbitration "does not concern, and has never concerned, the merits of any individual case. (…) The issue at stake in these proceedings is, and always has been, that of the obligation of disclosure."[11] That said, there exist thirteen "outstanding cases", which the IAAF refers to as "a hardcore of cases which are, and continue to be, of interest, and concern, to it."[12] It is in respect of these cases – as mentioned above, cases which predate the current regime of USADA responsibility for domestic doping control and adjudication in the US, when such activities were carried out by USATF – that the issue arises as to the obligation of disclosure by USATF under IAAF Rules.

(i) The IAAF's Statement

23. The IAAF's position reposes largely on its submission to the effect that, in addition to the obligations explicitly set out in the IAAF Rules, its Members are also subject to what it refers to as an implicit (or implied) duty of disclosure arising under these Rules. The essential elements of its position are as follows.

USATF's Obligation to Disclose Positive Test Results

24. In support of its contentions regarding the duty to disclose, IAAF relies on three principal arguments: the "ordinary and natural meaning" of Rule 61.1; the "duty of supervision" with respect to enforcement of the IAAF Rules; and the proper "construction of IAAF Rule 59."

25. The IAAF submits that the ordinary and natural meaning of the words "positive result" as used in Rule 61.1 refers to the laboratory's initial determination that a prohibited substance has been found in an athlete's sample and not, as USATF contends, the final result of the disciplinary proceedings where a violation is found to have occurred.

26. The IAAF further contends that the obligation on Members to disclose positive test results is consistent with the IAAF's "duty to supervise enforcement" of its Rules, specifically its "task of ensuring that Members comply with their obligation to commence, prosecute and

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reasoning and conclusions are referred to in the following section of this Award, in the context of the Panel's analysis of the issues to be determined.

[11] IAAF Statement, *para.* 5.4.

[12] IAAF Statement, *para*. 5.2.

complete disciplinary proceedings against their athletes."[13] That task, it argues, would be "fatally undermined" in the absence of an obligation to "inform the IAAF of facts giving rise to the possible commencement of disciplinary proceedings … the IAAF would never know that athletes had failed domestic doping tests, and the whole world-wide struggle against doping could be lost in the first battle."[14] For this reason, it says, "what is required is the knowledge of the existence of a positive result at the outset of a case, not knowledge at some later stage when nothing can be done about it."[15]

27. The IAAF also refers to IAAF Rule 59, which, it says, provides (*inter alia*) that "athletes who are suspected of a doping offence, whether domestically or internationally, must be suspended pending the hearing" and illustrates the IAAF's power to intervene to enforce its Rules if, in its opinion, a Member is not doing so. The IAAF argues that the object and purpose of the Rule would be frustrated if a Member were under no obligation to report positive test results to the IAAF, further demonstrating that USATF's interpretation of Rule 61.1 is incorrect and would "[render] the IAAF-mandated standard world-wide disciplinary procedures in doping cases inoperable."[16]

USATF's (Implicit) Obligation to Disclose Decisions Which Exonerate Athletes

28. The IAAF reiterates that its duty to supervise the anti-doping activities of its Members, whether under its own Rules or the IOC Charter, are intended ultimately to ensure that Members cannot and do not "exonerate athletes on specious grounds."[17] A key element of this regulatory scheme is IAAF Rule 21.3(ii), which empowers the IAAF to refer a case to arbitration in the event that it considers that the relevant tribunal of a Member has "misdirected itself or otherwise reached an erroneous conclusion." Confidentiality agreements between a Member and an athlete have no authority under IAAF Rules, submits the IAAF, and would undermine their very purpose. Thus, it is the IAAF's "simple submission" in this regard that "it is implicit, in the overall supervisory regime put in place by IAAF Rules and the IOC

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[13] IAAF Statement, *para*. 4.16.

[14] IAAF Statement, *para*. 4.16.

[15] Ibid., *para*. 4.17.

[16] Ibid., *para*. 18

[17] IAAF Statement, *para*. 4.20.

Charter, and from the terms of IAAF Rule 21.32(ii), that the IAAF must have a right of access to the text of such decisions."[18]

USATF's (Implicit) Obligation to Provide the IAAF with the Material Required to Decide Whether to Have a Domestic Hearing Panel's Decision Reviewed

29. Finally, the IAAF submits that it is also implicit in the IAAF Rules that its Members are required to disclose all material that the IAAF reasonably considers is required in order to determine whether or not to refer to arbitration a matter arising from the decision of a tribunal of the Member. This, it says, follows from a Member's "general obligation of cooperation with the IAAF, implicit in IAAF Rules and stated explicitly in the Object of the IAAF at Rule 3.1."[19] The IAAF declares: "This should not be a matter of reliance on particular Rules or Procedural Guidelines, but a matter of general approach."[20]

30. It should be noted that the IAAF's position as regards this particular implicit obligation (for Members to disclose material deemed necessary by the IAAF to determine whether or not to refer a matter to arbitration), is that the obligation is not crucial to the regulatory regime. This is because a decision to refer a matter to arbitration can be, and often is, reached on the basis of the text of the decision alone, in the absence of other material. As such, the failure to provide additional factual information to the IAAF "is not fatal to the IAAF's supervisory regime, merely highly desirable."[21]

Relief Sought by the IAAF

31. In addition to its request that the Panel declare that the IAAF Rules provide that USATF was at all relevant times obliged to furnish the results of positive tests to the IAAF, to provide the IAAF with copies of USATF decisions exonerating athletes and to provide the IAAF with the material considered necessary to determine whether to refer such decisions to arbitration (and that there exists no valid reason why USATF should not comply with such Rules), the IAAF asks the Panel to order USATF:

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[18] Ibid., *para*. 4.22.

[19] Ibid., *para*. 4.25.

[20] Id.

[21] IAAF Statement, *para*. 4.29.

- To provide the information requested in respect of the thirteen "outstanding cases";

- To provide all positive results notified by IOC accredited laboratories to USATF in the period 1 October 1996 to 31 December 2000;

- To certify that no further notifications of positive results have been received from IOC accredited laboratories in the period 1 October 1996 to 31 December 2000, other than those already disclosed; and

- To provide details of all cases in the period 1 October 1996 to 31 December 2000 where it has been alleged to USATF, or otherwise come to its attention, that athletes have failed or refused to provide samples, together with all documents evidencing USATF's action in or resolution of such cases.

(ii) USATF's Statement

32. In USATF's submission, the IAAF fails to identify "any text in any rule that requires USATF to disclose any information about domestic exonerations."[22] USATF argues that this is because the IAAF Rules: make USATF responsible for domestic cases (Rule 58.2); allow USATF to adopt its own regulations for domestic cases (Rule 58.3); and compel disclosure only for recognition of final and binding findings (Rule 61). USATF further asserts that the CAS has repeatedly rejected claims by sports federations seeking to enforce "implicit" obligations, and it argues that, to the extent that the IAAF Rules are unclear, any ambiguity must be construed "against the IAAF and in favour of athletes, i.e., against disclosure and in favour of confidentiality."[23]

IAAF's Rules Do Require Disclosure of Domestic Exonerations

33. USATF's position rests on the following main pillars: the text of IAAF Rule 58; the correct interpretation of Rule 61; the lack of foundation for any so-called fact that "implicit" obligations have no foundation in the Rules.

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22 USATF Statement, *para*. 1.1.

23 Id.

a) IAAF Rule 58

34. USATF places much emphasis on IAAF Rule 58, which, it argues, "defines the relative roles of the IAAF and its Member NF's in doping cases."[24] It contends that a plain reading of the Rule, and in particular the word "responsible", establishes that, whereas the IAAF is responsible for international tests (Rule 58.1), USATF is fully entitled to adopt its own regulations for handling domestic doping cases (Rule 58.2). It contends that Rule 58.3 confirms this interpretation of "responsible" by exempting USATF from the IAAF's Procedural Guidelines in domestic doping cases, with the consequence that USATF acted within the scope of its discretion under Rule 58 when it adopted its confidentiality regulations. In this regard, USATF points out that all of the "outstanding cases" referenced in this arbitration involve domestic testing.[25]

35. USATF asserts that three amendments made to the IAAF's Rules and Procedural Guidelines in 2001 confirm the correctness of its interpretation of Rule 58, as follows:

- Amended Rule 12.4 states that athletes must "agree to be bound … [by] IAAF Rules, regulations and procedural guidelines … [in all cases where] the IAAF is responsible for doping control … [under] Rule 58.1."[26]

- Amended Rule 21.1 requires NFs to notify the IAAF in writing of all decisions by doping Hearing Panels, thus creating a "new" obligation that did not previously exist in the IAAF Rules.

- Amended IAAF Procedural Guideline 2.49 requires NFs to "inform the IAAF of the 'A' sample result and the name of the athlete promptly on receipt of the information from the laboratory," however, the Guidelines themselves are voluntary in "national" (i.e., domestic) cases, [by virtue of Guideline 1.1 and IAAF Rule 58.3.][27]

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[24] USATF Statement, *para*. 4.2.

[25] USATF Statement, *paras*. 4.3-4.6.

[26] USATF Statement, *para*. 4.10; USATF Exhibit 8.

[27] USATF Statement, *para*. 4.12.

b) IAAF Rule 61

36. USATF submits that, until the amendment of Rule 21.1, in 2001, "the only explicit Rule requiring NFs to report doping decisions to the IAAF was Rule 61.1 … [which] plainly applies only to convictions, not to exonerations."[28] In support of its assertion, USATF offers the following "five reasons":

- The second and third sentences of Rule 61.1 provide that the IAAF Council must "consider" and "recognize" "positive results" and that Members must treat these "findings" as "final and binding". However, only convictions, not laboratory results, are "final and binding." The IAAF Council simply does not "consider" or "recognize" laboratory reports regarding "A" sample results.[29]

- The IAAF's argument to the effect that its Rules could have specified, if that were the intent, that "positive result" means conviction, rather than positive laboratory test, cuts both ways: the IAAF could also have specified, had it wished, that the term means positive test result.[30]

- The purpose of Rule 61.1 could not be to "monitor" cases, as suggested by the IAAF: first, the Rule is entitled "recognition"; and second, "results" or "findings" are only recognized by IAAF Members at the end of cases, not the beginning.[31]

- The "title and location" of Rule 61 further support the proposition that it concerns convictions rather than laboratory tests. The seven doping provisions of the IAAF Rules (Rules 55-61) are titled, respectively: Doping; Ancillary Offences; Out-Of-Competition Testing; Responsibility for Doping Control; Disciplinary Procedures for Doping Control; Sanctions; and Recognition. In the view of USATF, this "progression of titles illustrates the logical sequence of the rules," which would be up-ended if the IAAF's interpretation of Rule 61 were correct, since "it would

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[28] USATF Statement, *para*. 4.14.

[29] USATF Statement, *paras*. 4.18-4.19.

[30] USATF Statement, *para*. 4.20.

[31] USATF Statement, *para*. 4.21.

place a disclosure requirement about the *beginning* of doping control (lab tests) at the *end* of the doping rules."[32]

- The meaning of the term "positive result." is anything but plain in this context, as illustrated by the Report of the McLaren Commission, which found that the term was "subject to varying interpretations" and urged the IAAF to "clarify" it.[33] In the submission of USATF, Rule 61.1 is "a comity provision that requires NFs to recognize the final and binding "positive result" of doping convictions. It is not a reporting requirement for laboratory results."[34] Such an interpretation, it contends, makes sense of the entire Rule.

c) "Implicit" Obligations Have no Place in IAAF Rules

37. USATF argues that the CAS has routinely rejected the "lack of transparency and predictability" associated with the concept of implicit duties or powers. It argues in favour of "precision and clarity", and rejects the IAAF's various efforts to "create an implicit obligation to disclose exonerations that [the IAAF] disclaimed explicitly when it limited Rule 61 to disclosure of convictions," or to "achieve its desired result by invoking general implied powers that contradict the limited scope of Rule 61," or to "invoke laudable motives as a substitute for legal justification."[35]

38. USATF goes on to critique the various sources of IAAF's so-called implicit power to compel disclosure of domestic exonerations. It submits that each of the particular Rules identified by the IAAF as the basis of this power deals with a specific aspect of the IAAF regulatory regime and has nothing to do with disclosure of domestic exonerations.[36]

39. For example, asserts USATF, Rule 21.3(ii) never mentioned disclosure until it was amended in 2001. In the submission of USATF: "The IAAF may regret this omission, but it is not CAS's job to rewrite the IAAF's rules or to invent 'implicit' requirements … "[37] Moreover, by virtue of Rule 58, which explicitly limits the IAAF's anti-doping "responsibility"

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32 USATF Statement, *para* 4.22.

33 USATF Statement, *para*. 4.23; McClaren Commission Report at 36, 101.

34 USATF Statement, *para*. 4.24.

35 See generally USATF Statement, *paras*. 4.40-4.51, including references to CAS decisions cited therein.

36 See generally USATF Statement, *paras*. 4.52-4.73.

to international cases, Rule 21.3(ii) does not apply to domestic cases. USATF submits that reading Rule 21.3(ii) to cover only international tests is sensible:

> NFs prosecute international doping cases as agents of the IAAF, *see* Rule 59.3, and thus Rule 21.3(ii) exists to allow the IAAF to review the conduct of its agents. In contrast, in NFs prosecuting domestic cases are not acting as IAAF agents because NFs alone have "responsibility" under 58.2.[38]

40. USATF also contends that it is "incongruous" for the IAAF to rely on Rule 21 as a source of "implicit" power, today, when it never invoked the explicit provisions of the Rule which would have allowed to refer to arbitration precisely the sort of interpretative dispute at issue in this arbitration.[39]

41. Insofar as IAAF Rule 59 is concerned, USATF asserts that the Rule actually shows the opposite of what the IAAF contends. It submits that:

> Until 1998, the IAAF had no power to suspend in domestic cases because of Rule 58.2, and thus it felt the need to amend Rule 59 to create such a power … [which] confirms that the IAAF lacks authority in domestic cases unless the rules granted such authority.[40]

42. USATF further argues that to the extent that there is any ambiguity in Rule 59, the rule of *contra proferentem* applies, given that the IAAF "drafted the Rule and failed to make it clear."[41]

The Legitimate Expectations and Rights of Athletes Militate Against Disclosure

43. USATF submits that even were the IAAF's construction of the Rules correct, the thirteen "outstanding cases" concern athletes who relied on USATF's promise of confidentiality, assumed that their cases were closed and moved on with their lives; their legitimate expectations in this regard would be frustrated if their cases were reopened. USATF therefore contends that the Panel should "limit the scope of any order accepting the IAAF's (incorrect) interpretation of its rules to prospective cases and should not apply the

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37 USATF Statement, *para*. 4.60.

38 USATF Statement, *para*. 4.61.

39 USATF Statement, *para.* 4.62.

40 USATF Statement, *para*. 4.69.

41 Id.

IAAF's interpretations retroactively to closed cases."[42] USATF also argues that the IAAF is estopped from challenging USATF's interpretation of Rule 61 and that, in any event, re-prosecution of any of the "outstanding cases" would be inherently unfair after so much time.

44. As regards the question of estoppel, USATF submits that the IAAF's "years of inaction in the face of what it now claims was a blatant violation of its rules, estops it from asking CAS to require disclosure of all case files."[43] Specifically, it alleges, the IAAF failed either to assert any claim of illegality in respect of USATF's conduct or to correct what it saw as a problem by clarifying its rules. USATF goes on to cite several authorities recognizing estoppel as a basic principle applicable in international sports law.

45. USATF submits that estoppel becomes "critically important" when, as here, substantial prejudice would be caused by the IAAF's reversal of its position, in view of the time elapsed, the fact that evidence may have been discarded, recollections may have faded, reputations would be at risk and the USATF would be exposed to legal action by the athletes whose cases are reopened.[44]

46. For these reasons, USATF asks the Panel to dismiss the IAAF's claims.

(iii) The IAAF's Reply to USATF's Statement

47. The IAAF's Reply to USATF's Statement constitutes what it calls "the major vehicle" by which it critically analyses USATF's position in respect of the questions posed in the Arbitration Agreement, focusing, in the words of the IAAF, on the "core issues" addressed by USATF.[45]

IAAF Rule 58

48. The IAAF submits that there are three problems with USATF's submission to the effect that Rule 58 gives it the right to rely on its own regulations in domestic doping cases, to the exclusion of IAAF Rules:

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42 USATF Statement, *para*. 5.1.

43 USATF Statement, *para*. 5.9.

44 USATF Statement, *paras*. 5.14-5.18.

45 IAAF Reply, *paras*. 1.1-1.2.

- USATF's submission lacks a factual basis, inasmuch as it assumes that a regulation was in place which would prohibit disclosure of material to the IAAF. In fact, USATF Regulation 10(G) is reasonably to be interpreted "not as restricting the disclosure of doping test information to IAAF or other entities participating in doping control, but rather as controlling the general publicizing of the information."[46]

- Rule 58 does not confer exclusive disciplinary jurisdiction on USATF, even where the source of testing is "domestic" rather than "international". The object of Rule 58 is not to "carve out an area of exclusive jurisdiction" but merely to "make Members take responsibility for doping control occurring within their territories." The Rule concerns "doping control," which, as Rule 58.3 makes clear, concerns matters that are dealt with in the IAAF Procedural Guidelines, namely, matters largely confined to "the process of the collection of the sample and its transmission to, and analysis at, the laboratory … not … the disciplinary procedures contained within IAAF Rules." If this were not the case, the "exclusivity" asserted by USATF would also be reflected in Rules 59, 60 and 21.3, which it is not.[47]

- IAAF Rules 58 and 61 deal with discrete subjects: Rule 58 is concerned with "the process of doping control"; Rule 61 is concerned with the "consequences" of doping control. In the IAAF's submission, "there is no inconsistency in a Member being in charge of domestic doping control, but being obliged to disclose positive results and recourse thereof to the IAAF."[48]

IAAF Rule 61

49. The IAAF contends that it is the first sentence of Rule 61 – "every Member shall inform the IAAF General Secretary of any positive result(s) obtained in the course of doping controls carried by that Member" – which materially binds USATF to disclose positive test

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[46] IAAF Reply, *para*. 3.2.

[47] IAAF Reply, *para*. 3.3. The IAAF goes on to contend that there is no "factual support" for the exclusivity claimed by USATF, noting that the assertion is nowhere made in the statements of USATF witnesses Robert Hersh and Craig Masback. (IAAF Reply, *para*. 3.4).

[48] IAAF Statement, *para*. 3.5.

results, a fact which USATF attempts to obscure by its analysis of the Rule.[49] The IAAF sets out to rebut USATF's position from three perspectives:

- From a factual perspective, it is clear that the first sentence of Rule 61.1 was "always intended to be the lynchpin of the IAAF's supervision of its Member's doping programmes. It was intended to mean just what it says."[50] The second two sentences of Rule 61.1, far from qualifying the first sentence, were intended merely to "give effect to the way cases in which (sic) were dealt within practice at the time. (…) Over time the wording of the last two sentences of Rule 61.1 had to yield to the importance of granting athletes a hearing before a final determination on ineligibility was reached."[51] According to the IAAF, the procedure laid out in those two sentences may have "fallen into disuse … due to the conflict of the Rule with IAAF Rule 59.3," however, this has no bearing on the proper interpretation of the obligation set out in the first sentence of Rule 61.1.[52]

- Regarding USATF's interpretation of Rule 61, the IAAF contends that it is impossible to see how the language of the first sentence can be "tortured" to support such an interpretation. The sentence does not mention convictions or results obtained at the end of the doping control process, but speaks of "any" positive results obtained "in the course of" (not at the end of) doping control; it concerns certain information obtained during doping control, not the consequences of doping control which are the subject of the second and third sentences of Rule 61.1. Reading the IAAF anti-doping provisions as "a coherent whole" also demonstrates the soundness of the IAAF's position, by revealing that both in the Procedural Guidelines (e.g. paras. 2.47 and 2.54) and in other IAAF Rules concerned with determination of a doping offence after a hearing (e.g. Rule 59.3 and 59.4),"positive results" refers to positive results of tests, not convictions.

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[49] IAAF Reply, *para*. 3.7.

[50] IAAF Reply, *para*. 3.9.

[51] IAAF Reply, *para*. 3.10.

[52] IAAF Reply, *para*. 3.11.

- Finally, the principle of *contra proferentem* has no application here: the first sentence of Rule 61.1 is unambiguous; and, in any event, this is not the case of "a regulator seeking to discipline an athlete for a doping offence," but of two parties "joined in a common enterprise" seeking to discern the intention of the framer of the Rule.[53]

(iv) USATF's Answer to the IAAF's Reply

50. In a nutshell, USATF describes the IAAF's position as: "the ends justifies the means;" "making up the rules as it goes along;" and "revisionist history." It points out that "no Rule required disclosure of domestic exonerations until *after* the 'outstanding cases' at issue," and it emphasizes that "USATF has *never* argued that its confidentiality regulation trumps IAAF rules. Our argument is that *there was no IAAF rule requiring disclosure*."

51. The essential elements of USATF's argument regarding the questions posed in the Arbitration Agreement are three:

- Sport federation rules must be interpreted according to their text;
- Ambiguous text is to be construed against the drafter; and
- Federations cannot compel Members to act unless the rules require such action.[54]

IAAF Rule 58

52. USATF contends that the IAAF has failed to rebut its (correct) interpretation of Rule 58, specifically, the division of anti-doping responsibility set out in that Rule. For USATF, Rule 58 is unambiguous in respect of this division. USATF therefore had "discretion to adopt its own rule for domestic cases, which is what it did when it enacted its confidentiality rule"[55].

53. According to USATF, the IAAF is correct to state that there is no "inconsistency" between granting Members responsibility for domestic testing under Rule 58.2 while requiring disclosure under Rule 61 – but it is correct for the wrong reasons:

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[53] IAAF Reply, *paras*. 3.14-3.19.

[54] USATF Answer, *para*. 2.1.

[55] USATF Answer, *para*. 3.1

> *If* Rule 61 required disclosure in domestic cases, *then* members would have a duty to disclose notwithstanding Rule 58. In effect, rule 61 would constitute an exception to Rule 58. The point is moot, however, because rule 61 does *not* require disclosing domestic cases.[56]

54. In sum, USATF submits that Rule 58 belies the IAAF's claim of implicit or implied powers, by granting Members "explicit" discretion to make their own rules for domestic cases: "Rule 58 expressly contemplates that IAAF-preferred procedures need not be followed in domestic cases"[57].

IAAF Rule 61

55. USATF accuses the IAAF of asserting that Rule 61.1 must be read "as a whole" but then interpreting the Rule so as to read its second and third sentences "out of existence."[58] In USATF submission, such an approach contradicts the text of Rule 61, CAS precedent and the IAAF's own extensive course of conduct. Rule 61.1 is clear and speaks for itself: if "positive result" means lab report, then the Rule makes no sense; however, if "positive result" means conviction, the Rule makes perfect sense.[59]

d) The Conduct of Other Federations Contradicts the IAAF's Interpretation

56. In the view of USATF, the documents that the IAAF was compelled to disclose in the arbitration, having relied on the theory that "other federations" share its interpretation of Rule 61.1, in fact show otherwise. USATF submits that the evidence demonstrates:

- Most federations do not dispute the IAAF's disclosure theory because "there is nothing for them to disclose: most federations do not conduct *any* domestic testing."[60]

- IAAF does not compel domestic testing, which undermines its claim that it has a right to supervise the few members who do conduct such tests and confirms

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[56] USATF Answer, *paras*. 3.3 to 3.12

[57] USATF Answer, *para*.3.13

[58] USATF Answer, *para*. 4.1.

[59] USATF answer, *para*. 4.2 to 4.3.

[60] USATF Answer, *para*. 4.6.

USATF's submission that "the IAAF oversight role is limited to its own tests under Rule 58.1."[61]

- Even those federations that do conduct domestic tests do not routinely disclose positive lab reports or other information about the progress of cases to the IAAF.

e) The IAAF's Interpretation of Rule 61.1 Makes No Sense

57. USATF contends that the IAAF's interpretation of Rule 61.1 "contradicts the text, contradicts Rule 59, and contradicts itself." According to USATF, the IAAF's position regarding the "intent " and "purpose" of the Rule "raises more questions than it answers." Moreover, "no CAS panel has allowed the testimony of an IAAF official about the intended meaning of a Rule to supersede the actual text of the Rule."[62] IAAF Rule 11 provides that only the IAAF Council can definitively interpret a Rule.

58. USATF goes on to attack what it calls the IAAF's "remaining arguments" for interpreting "positive results" as "'A' sample positives". It does so, *inter alia*, on the following grounds:

- The view that "positive result" must refer to a lab test because in the early 1990s athletes often pled guilty without challenging the "A" sample test result (with the consequence that the "result" being "recognized" as "final and binding" was the lab test), is illogical and untenable. For example, even in such circumstances it is not the lab result but the result of the disciplinary process – i.e., the decision of the disciplinary body accepting the athlete's plea – that is "recognized".[63]

- The IAAF claim to offer an interpretation that reads Rule 61 as a "coherent whole" does not hold water: its interpretation entails *ignoring* the second and third sentences of Rule 61.1.[64]

- The IAAF argues that Rule 61.1 is not ambiguous and so cannot be construed against it. Yet it goes on to offer extrinsic evidence of its intent as an aid to

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61 USATF Answer, *para*. 4.7.

62 USATF Answer, *para*. 4.15.

63 USATF Answer, para. 4.25.

64 USATF Answer, para. 4.26.

interpretation. The IAAF cannot have it both ways. Either the Rule is ambiguous and must be read against the IAAF, or the Rule is clear and the IAAF's exegesis is irrelevant.[65]

Rules 21.3 and 59 Do Not Entail "Implicit" Powers

59. As it argues in its Statement so USATF reiterates in its Answer that CAS precedent rejects the concept of implicit powers in the rules of sporting federations. Here, USATF states, "if Rule 61.1 – which the IAAF asserts is the "lynchpin" of its disclosure regime – does not require disclosure of domestic exonerations, then no 'implied' or 'implicit' obligation can fill that gap."[66]

60. USATF further alleges that "general principles of contract law", which recognise the existence of implied obligations in certain cases, do not support the IAAF's position. In this regard, it submits:[67]

- Contractual terms may be implied only insofar as they reflect the "presumed intention of the parties." Here, it is obvious that USATF had no intention to undertake an obligation of disclosure which would have flown in the face of its practice of confidentiality, which actually predates the IAAF's adoption, in 1990, of Rules 21, 59 and 61. Other Members, similarly, did not consider themselves bound by any such obligation.

- Implied terms must be consistent with the express wording of the contract. Here, Rule 61.1 expressly requires disclosure only of convictions.

- Terms are not to be implied unless it is "equitable and reasonable" to do so, which would not be the case where the result would be to require USATF to breach promises of confidentiality made to athletes.

- There is no lacuna in the IAAF Rules that requires a finding of any implied duty.

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65 USATF Answer, para. 4.27.

66 USATF Answer, para. 5.2.

67 USATF Answer, paras. 5.11-5.17

61. Finally, USATF submits that the texts of Rules 21.3 and 59 themselves contradict the IAAF's theory of implicit powers. As asserted by USATF, *inter alia*:[68]

- Until it was amended, in 2001 (after the "outstanding cases"), Rule 21.3 said *nothing* about disclosure. The IAAF itself concedes that the Rule was amended to require disclosure in domestic cases. The IAAF is effectively asking the Panel to apply an amendment to Rule 21.3 so as to imply (retroactively) the existence of a power during an earlier period.

- Similarly, until 1998, Rule 59 said nothing about IAAF power in domestic tests; and even today, the Rule says nothing about disclosure.

USATF Regulation 10(G)

62. USATF next revisits the terms of its Regulation 10(G), which, it argues, provides for complete confidentiality in the domestic doping control process and effectively prohibits disclosure to the IAAF. It impugns the IAAF's reliance on the phrase "available to the public", in the first sentence of the Regulation, to characterise the scope of the prohibition on disclosure set out in the Regulation, while ignoring, for example, the terms governing disclosure of "any other information" in the third sentence.

63. USATF's position is straightforward: by virtue of Regulation 10(G), it "may release information to the public after a conviction, and *cannot release any other information to anyone else without the athlete's consent*. This is what the regulation plainly says."[69]

Estoppel, Legitimate Expectations and Athletes' Rights

64. Finally, USATF submits that the IAAF has simply failed to rebut its defences based on the doctrines of estoppel and legitimate expectations. It reiterates *inter alia*:

> The IAAF knew of USATF's confidentiality regulation for many years.[70]

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[68] See USATF Answer, paras. 5.22-5.40.

[69] USATF Answer, para. 62. (Emphasis added)

[70] USATF Answer, paras. 7.3 – 7.10

- The IAAF never answered USATF's requests that it identify which specific Rule(s) required disclosure, preferring to blur the distinction between a preference and a duty to disclose.[71]

- Estoppel does not require a clear, positive representation; course of conduct and omission are sufficient to establish estoppel, and are, in this case, conclusive.[72]

- USATF relied, to its detriment, on the IAAF's conduct in respect of disclosure.[73]

I. Witnesses

65. The following witnesses provided witness statements on behalf of one party or the other, and were subsequently called to give evidence at the hearing:[74]

For the IAAF:

Professor Arne Ljungqvist, Senior Vice President of the IAAF;

Dr. Gabriel Dollé, an Anti-Doping Officer in the IAAF's Anti-Doping Office;

Mr. Eugene Gulland, a partner of the law firm Covington and Burling, presented by the IAAF as an expert on US law.

For USATF:

Mr. Craig Masback, Chief Executive Officer of USATF;

Mr. Robert Hersh, Member of the Board of Directors of USATF and of the IAAF Council;

Ms. Patricia Plumer, Member of the Board of Directors of USATF and Chair of USATF's Athlete Advisory Committee;

Professor Paul Haagen, Professor of Law and Co-Director of the Center for Sports Law & Policy at Duke University, presented by USATF as an expert on US law.

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[71] USATF Answer, paras. 7.19-7.26.

[72] USATF Answer, paras. 7.27-7.30.

[73] USATF Answer, paras. 7.31-7.43.

[74] As with the documentary evidence produced by the parties, those aspects of the evidence presented by the parties' witnesses (factual and expert) which the Panel considers most germane to its decision are addressed in the following section of this Award.

ANALYSIS

J. The Issues

66. The issues to be resolved by the Panel are simply stated in the Arbitration Agreement:

> 1.1 The IAAF and USATF agree to submit to arbitration the following issues:
>
> (i) properly construed, at all material times did IAAF Rules provide that USATF was obliged:
>
> (a) to furnish the results of positive tests to the IAAF;
>
> (b) to provide the IAAF with copies of decisions of USATF Hearing Panels exonerating athletes of Doping Offences, and
>
> (c) to provide the IAAF with the material it needs to decide whether or not to seek to have a Hearing Panel's decision reviewed by its own Arbitration Panel or CAS?
>
> (ii) if IAAF Rules did so provide, is there any valid reason why USATF should not be required to comply with these Rules?

K. The IAAF Rules

67. The IAAF Rules formally applicable to this arbitration are those contained in the IAAF Handbook ("IAAF Rules"), as supplemented by the IAAF Procedural Guidelines for Doping Control ("IAAF Procedural Guidelines").

68. The principal IAAF Rules at issue are reproduced below,[75] as is the USATF confidentiality regulation which, according to USATF, prohibited the disclosure sought by the IAAF. Other rules or guidelines, whether of the IAAF or other organisations, that are raised by the parties in support of their respective positions are reproduced, as required, in subsequent sections of this Award.

- IAAF Rule 21.3(ii) ("Disputes")

Doping Related Disputes

The following further matters may be submitted to the Arbitration Panel:

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[75] Unless otherwise stated, the following references to the IAAF Rules are to their 1998-1999 version, namely, the version in effect at the time of 8 out of the 13 "outstanding" cases.

(…)

(ii) Where a Member has held a hearing under Rule 59, and the IAAF believes that in the conduct or conclusion of such hearing the Member has misdirected itself, or otherwise reached an erroneous conclusion.

- IAAF Rule 58 ("Responsibility for Doping Control")

1. The IAAF will be responsible for doping control at:

(i) World Championships;

(ii) World Cups;

(iii) Golden League, Grand Prix, Grand Prix II Meeting;

(iv) IAAF Permit Meetings;

(v) On other occasions where random and/or designated testing is carried by the IAAF, for example Area Group Championships or Meetings. At these meetings an IAAF or Area representative shall be present.

2. In all other cases, except where doping control is carried out under the rules of another sporting body, the Member conducting the controls or in whose territory a meeting is held will be responsible for doping control.

3. Where testing is the responsibility of, or is carried out by, a Member, the Member should adhere, as far as is possible under the circumstances, to the recommended procedures contained in the "Procedural Guidelines for Doping Control".

- IAAF Rule 59 ("Disciplinary Procedures for Doping Offences")

1. Where a doping offence has taken place, disciplinary proceedings will take place in three stages:

(i) suspension;

(ii) hearing;

(iii) ineligibility.

2. The athlete shall be suspended from the time the IAAF, or, as appropriate, an Area or a Member, reports that there is evidence that a doping offence has taken place. Where doping control is the responsibility of the IAAF under IAAF Rule 58.1, the relevant suspension shall be imposed by the IAAF. Where doping control is the responsibility of an Area of a Member, the National Federation of the athlete shall impose the relevant suspension. If, in the opinion of the

IAAF, a National Federation has failed properly to impose a suspension, the IAAF may itself impose that suspension.

3. Every athlete shall have the right to a hearing before the relevant tribunal of his National Federation, before any decision on eligibility is reached. When the athlete is notified that it is believed that a doping offence has taken place, he shall also be served with a notice informing him of his right to a hearing, together with a notice of application. If an athlete does not return this notice of application within 28 days of receipt, he will be deemed to have waived his right to a hearing.

4. If an athlete is found to have committed a doping offence, and this is confirmed after a hearing, or the athlete waived his right to a hearing, he shall be declared ineligible. In addition, where testing was conducted in a competition, the athlete shall be disqualified from that competition and the result amended accordingly. His ineligibility shall begin from the date on which the sample was provided.

5. Where a hearing takes place, the IAAF or the member (as the case may be) shall have the burden of proving, beyond reasonable doubt, that a doping offence has been committed.

6. More detailed guidelines for the conduct of disciplinary procedures are to be found in the "Procedural Guidelines for Doping Control". See also Rules 21-23 and the IAAF "Guidelines for the Conduct of Arbitrations", for procedures to be followed when conducting hearings.

- IAAF Rule 61 ("Recognition")

1. Every Member shall inform the IAAF General Secretary of any positive result(s) contained in the course of doping controls carried out by that Member. These findings shall be considered at the next meeting of the IAAF Council which shall, on behalf of all Members of the IAAF, recognize any positive result(s) obtained. The positive results of doping control carried by that Member, will then be final and binding upon all Members, who shall take the necessary action to render such decision effective.

2. Where doping control has been carried out by the IAAF, every Member shall recognise the results of such doping control and shall take all the necessary action to render such decision effective.

The Council may, on behalf of all Members of the IAAF, recognise the results of doping control carried out by a sporting body other that (sic) the IAAF, or by a Member of the sporting body under Rules and Procedures different from those of the IAAF, if it is satisfied the testing was carried out and the rules of the body conducting these tests afford sufficient protection to athletes.

(…)

- USATF Regulation 10(G)

> **Confidentiality and publication of drug test results:** The names of athletes who have tested negative or who have provided valid excuses for failure to appear for testing shall be made available to the public. The names of athletes testing positive shall not be made publicly available until an athlete has been deemed ineligible by a BHB, or when the findings of the DHB has been reaffirmed by the DAB, when appropriate. Any other information will be made available only with prior consent of the athlete. (…)[76]

L. Interpretation of the IAAF Rules

i. Introduction

69. The crux of the parties' dispute as to the meaning and application of the IAAF Rules relates to Rule 61.1; and even more particularly, to the first sentence of that Rule, which reads: "Every Member shall inform the IAAF General Secretary of any positive result(s) obtained in the course of doping controls carried out by that Member."

70. The parties' differences as to the meaning of the words "*positive result(s) obtained in the course of doping controls*" lie at the heart of the issues to be determined by the Panel in respect of each of the three elements of the first question set out in the Arbitration Agreement. It is thus to the construction of these words that the Panel must turn.

71. Rule 61.1 does not, however, exist in a vacuum. It is but one provision (and its crucial first sentence is but one sentence) in a suite of rules which govern various aspects of the conduct of the IAAF and its Members. It is thus appropriate to examine Rule 61.1, as indeed any Rule, in the context in which it exists and operates.

72. The Panel notes that such an examination in no way signifies that the text of the Rule itself is so ambiguous or vague as to require an inquiry into context or background, or other areas extrinsic to the "four corners" of the Rule, in order to interpret its language. The Panel points to other Rules in this instance not as an aid to construction of terms which it considers unclear, but as a means of demonstrating he necessity of construing Rule 61.1 in accordance with its plain meaning.

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[76] USATF Regulation 10(G), as in force from December 1998 to December 1999. A review of the history of this provision is set out later in this Award.

73. As submitted by the IAAF, "[t]he starting point and the finishing point of construction is in the text."[77] Arguments from policy or purpose have their place in such an exercise to the extent that they enable one to consider "whether or not the construction that a literal interpretation favours is or is not compatible with the perceptible purpose of the Rule."[78]

74. As will be seen, the "construction that a literal interpretation [of Rule 61.1] favours" – and, it should be said, the construction that the IAAF favours – is compatible with and promotes the purpose, not only of the particular Rule in question, but of the IAAF Rules in their totality. The same cannot be said of the construction favoured by USATF.

ii. Fundamentals of the IAAF Rules

75. We begin by recalling certain key elements of the IAAF Rules, fundamental to their framework. These are:

- **Rule 2**, which reads in part:

  > The IAAF shall comprise duly elected national governing bodies for amateur athletics which agree to abide by the Rules and Regulations of the IAAF.
  >
  > The rules and regulations of an elected national governing body must be in conformity with and not wider than IAAF eligibility rules.

- **Rule 3**, which provides that "the objects of the Federation shall [include]":

  > (…)
  >
  > 4. To compile rules and regulations governing international competitions for men and women, of all ages in amateur athletics …
  >
  > 5. To ensure that all contests between Members, including Area and Group Championships or Games, shall be held under the laws and rules of the IAAF.

- **Rule 7.17**, which declares:

  > Only the Congress shall have the power to amend, add to, or alter any Rule.

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77 IAAF Oral Reply, p. 3, para. 16.

78 Id.

- **Rule 11**, which provides:

  The Council shall be the interpreter of the IAAF Rules.

76. From this it is apparent, and the Panel is of the opinion, that the IAAF Rules are not to be read as terms proffered by the IAAF to USATF (or to any other Member), but as resolutions adopted by and binding upon all Members, including USATF. There is thus no basis for their being read or construed *contra proferentem* one party or another in this arbitration.

77. Similarly, and in accordance with the idea that the Rules express the collective will of the entire IAAF Membership, it is both evident and entirely sensible that, where the rules and regulations of a Member do not conform with or are wider than those of the IAAF, it is the latter which prevail.

78. It is also clear that insofar as the promulgation, interpretation or amendment of the IAAF Rules are concerned, such powers are reserved exclusively to the appropriate organs of the IAAF.

iii. The Control of Drug Abuse

79. Rule 61.1 was introduced as one of a number of rule changes adopted in 1989 with the objective of establishing a comprehensive code, applicable to all Members, to deal with the scourge of doping in sport.

80. The comprehensive nature of this "code" is self-evident from Division III (Rules 55-61) of the Rules, entitled "Control of Drug Abuse", in respect of which the Panel considers several observations to be apposite:

(a) As mentioned, the title of Division III is “Control of Drug Abuse”. The expression “doping control”, which is also found in Division III, is but one factor in the control of drug abuse, albeit a vital factor.

(b) The process for the control of drug abuse established in the IAAF Rules applies at both domestic and international meets, as well as to all out-of-competition testing. This includes the offence of “doping” and the “ancillary offences” described in Rules 55 and 56, respectively.

(c) Rule 57.1 obliges an IAAF Member – "as a condition of membership of the IAAF" – to include in its constitution a provision for the conduct of out-of-competition doping control by the Member (Rule 57.1(i)), as well as provisions allowing the *IAAF* to conduct doping control both at certain domestic meets (Rule 57.1(ii)) and on the Member's athletes out-of-competition (Rule 57.1(iii)). This is an integral part of the system – what we have referred to as a "code" – effectively imposed by IAAF Members on themselves; and it reflects the surrender by them of otherwise unfettered jurisdiction over testing in their respective countries to their collective will expressed in the form of the IAAF Rules. The obligation to conduct out-of-competition testing thus derives, ultimately, not from their own rules but from the rules and regulations of the IAAF.

(d) Of course, in the event that the IAAF exercises its discretion under Rule 57.1(ii) to conduct doping control at domestic meets, it can carry into effect the suspension mandated by Rule 59.2, without more; the question of disclosure by a Member is moot. However, if USATF were correct in its construction of the disclosure requirement of the Rules, that would mean that where a Member conducts doping controls at domestic meets it can effectively withhold suspension and, by not disclosing the facts of the case to the IAAF, effectively foreclose any possibility for the IAAF to "itself impose that suspension." It would be odd if such divergent outcomes – dependant solely on whether testing on a given athlete at a given meet is carried out by the IAAF or the Member – were intended. (Rule 59 is addressed further, below.)

(e) Rule 57.2 provides that the procedural guidelines for out-of-competition testing, whether carried out by the member or the IAAF, are those set out in the *IAAF's* Procedural Guidelines for Doping Control, while Rule 57.3 provides that athletes may not compete at their national championships unless they first to subject themselves to out-of-competition testing by both the Member and the IAAF. These requirements are fully consistent with the idea of a "collective" programme, described above.

(f) It is a pivotal part of USATF's argument that the meaning of the words "doping control" (or "controls") in Rule 58 is such that Rule 58.2 gives it exclusive control

not only over drug testing as such but also over related matters such as the disclosure of positive tests carried out under its responsibility, the conduct of hearings, the disclosure of the results of hearings, suspensions – all of which are, of course, integral to the control of drug abuse. Because the words "doping controls" also appear in Rule 61.1, this issue is critical.

(g) Rule 59 provides for disciplinary procedures in three stages when a doping offence has taken place. "Suspension" is the first step in these proceedings, and Rule 59.2 (which was amended in 1997) provides that an athlete shall be suspended from the time the IAAF reports that there exists evidence of a doping offence. There are several aspects of this Rule which the Panel will highlight:

81. Other provisions of the IAAF Rules, beyond those contained within what we have referred to as the "code" governing the control of drug abuse, also offer important insight into the meaning and operation of Rule 61.1.

82. For example, and very significantly, Rule 21.3(ii) provides that the following matter may be submitted by the IAAF to its Arbitration Panel:

> Where a Member has held a hearing under Rule 59, and the IAAF believes that in the conduct or conclusions of such hearing the Member has misdirected itself, or otherwise reached an erroneous conclusion.

83. Finally, as regards Rule 21.3(ii) clearly, in order for this provision to operate – that is, in order for the IAAF to be in a position to form a belief regarding the "conduct or conclusions" of domestic hearings – that information must be communicated to the IAAF by the Member under whose auspices a hearing has taken place. No distinction is made in this provision between hearings resulting in convictions and those which exonerate athletes. Nor would such a distinction accord with the purpose of the Rule, which quite clearly is to ensure that the domestic hearing process – from its conduct to the conclusions which result – is subject to scrutiny by the IAAF and, if necessary, an IAAF Arbitration Panel.

84. Thus, Rule 21.4 declares that "the decision of the Arbitration Panel shall be final and binding on all parties, and on all Members of the IAAF… " in relation to the matters submitted to it.

85. On the basis of the foregoing, and having considered the evidence and submissions of the parties, the Panel distils the following principles.

86. In the Panel's view, neither Rule 58 nor any other provision of the IAAF Rules warrants the construction favoured by USATF with respect to the so-called exclusive division of responsibility, as between the IAAF and a Member, over all aspects not only of drug testing but of the consequences of such testing, including disciplinary proceedings. Obviously doping control must be carried out to control drug abuse. Rule 58 addresses the matter of who is responsible for it. It does so simply and clearly: Rule 58.2 provides that Members themselves are responsible for doping control at meets and on occasions not specified in Rule 58.1. "Doping control" clearly refers to the implementation of drug testing, whether by the IAAF or a Member. Issues such as suspension and hearings are dealt with in Rule 59, under the heading "Disciplinary Procedures for Doping Offences". ,[79]

87. Rule 59 mentioned, it deals with both the case where the IAAF is responsible for doping control and where the Member is so responsible. There could be little substance in an argument that Rule 59 as originally adopted only dealt with international doping and that, because of Rule 58.2, a Member was left to deal at its discretion with doping control and disciplinary procedures in relation to domestic meets. The proper conclusion is that Rule 59 was intended to be a comprehensive provision dealing with disciplinary procedures arising out of all meets and all testing, whether international or domestic.

88. Support for this conclusion can also be found in Rule 53.1(ii), governing eligibility for both international and domestic competition. It provides (*inter alia*) that an athlete is "ineligible to take part in competitions, whether held under IAAF Rules or the domestic Rules of the Member," if he or she has previously competed at a meet or in an event in which any of the other athletes were, to his knowledge, ineligible under IAAF Rules. This not only reinforces the intention not to treat doping control at international and domestic events as distinct regimes, but assumes that an athlete would know, or be able to learn, of the suspensions pending in respect of other athletes.

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[79] The Panel notes that Rule 58.3 provides that where testing is the responsibility of is carried out by a Member, the Member "should adhere, as far as is possible under the circumstances" to the "recommended procedures" contained in the IAAF's Procedural Guidelines. This clearly qualifies the binding effect of those Procedural Guidelines. However, Members are nonetheless obliged to implement the Guidelines in good faith, "as far as is possible", and Rule 58.3 is surely no warrant to

89. Rule 59.2 as first adopted did not provide for either the IAAF or the Member to impose the suspension. On its own, the first (and at the time, the only) sentence of the Rule operated of its own force to declare an athlete suspended from all competition. However, if the suspension were to be recognized and enforced, an additional Rule was required; IAAF argues that this was one of the reasons why Rule 61 was also adopted which may well have been the case.

90. It will be noted that suspension in the case of domestic doping control and disciplinary procedure occurred when a Member "reports" that there was evidence that a doping offence had taken place.

91. Yet, it was not to be left to implication that a Member would necessarily so report. Thus, once again, Rule 61 was called in aid, this time so ad to require the reporting of that evidence – specifically, the results of a positive "A" test (and perhaps a positive "B" test) – for a particular athlete, which are aptly described as "positive results" in Rule 61.1. The phrase "[where] a Member … reports that there is evidence that a doping offence has taken place" in Rule 59.2 is a clear reference to Members' duty to "inform" under Rule 61.1.

92. It is also significant that, when the IAAF Members, speaking through the medium of the Council, agreed to amend Rule 59.2, in 1997, they saw no need to alter in any way Rule 61.1. This could only be because they perceived no contradiction between Rules 59.2 and 61.1 – as indeed there is not. On the contrary, the two Rules are complementary: Rule 59.2, to be operative, requires the disclosure of relevant information, which is provided for in Rule 61.1. In a sense, the Council could be said to have "interpreted" Rule 61.1, in 1997, by choosing not to alter it.

iv. Rule 61.1

93. With the foregoing observations and comments in mind, it is evident to the Panel that the first sentence of Rule 61.1 – "every Member shall inform the IAAF General Secretary of any positive result(s) obtained in the course of doping controls carried out by that Member." –

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disregard either the Guidelines or any other aspect of IAAF rules and regulations where doing so would nullify the effect of provisions such as Rule 59.2 and Rule 61.1.

is in no way obscure. Nor, in any event, are the words "positive result(s)" ambiguous for lack of a stated definition. As submitted by counsel for the IAAF during his closing submissions:

> It is not defined because its meaning is obvious to anyone working in the field of doping control. A positive result is what the athlete fears, that the laboratory tests have shown the presence of a prohibited substance. "Doping control" is the subject of R.58, and the disciplinary process of R.59. The distinction so drawn is highly relevant to the construction of the phrase.[80]

94. The Panel agrees. In the opinion of the Panel, Rule 61.1 does not need to be strained in order to be interpreted as the IAAF submits. Its meaning is plain. The "positive result(s)" of which a Member is obliged to inform the IAAF are *laboratory results indicating the presence of a prohibited substance in an athlete's A and/or B sample, obtained in the course of drug testing carried out by that Member*.

95. USATF submits otherwise and, among its submissions in this arbitration, has offered an alternative interpretation of the crucial terms of Rule 61.1. However, in the opinion of the Panel, whether Rule 61.1 is read alone or within the context of the totality of the IAAF Rules, the only reasonable interpretation of its provisions – at once logical and practical – is that what is called for is disclosure to the IAAF of laboratory tests which show the presence of a prohibited substance in a sample provided by an athlete.

96. Indeed, the thread which weaves its way throughout the fabric of the IAAF Rules, and which arguably binds together into a single whole the obligations and powers vested in the IAAF and its individual Members, is the communication of information relevant for the performance of those obligations and the exercise of those powers. This includes, as described in the first question set out in the Arbitration Agreement: (a) the results of positive tests; (b) copies of decisions of USATF Hearing Panels exonerating athletes of Doping Offences; and (c) the material that the IAAF needs to decide whether or not to seek to have a Hearing Panel's decision reviewed by its own Arbitration Panel or CAS.

97. Any other conclusion would result in international athletics being played out on an uneven field, tilted this way or that according to the rules, whims and relative weight of various IAAF Members, to the detriment of sport and, perhaps more importantly, its athletes.

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[80] IAAF Oral Reply, pp. 1-2, para. 6.

98. For these reasons, the Panel answers the first question set out in the Arbitration Agreement (Clause 1.1(i) (a), (b), (c)) in the affirmative.

M. Estoppel, Legitimate Expectations and Athletes' Rights

(i) Introduction

99. Having determined that the IAAF Rules during the relevant period did require that USATF provide the IAAF with the results of positive tests and copies of decisions of domestic panels exonerating athletes of doping offences, as well as related material, the Arbitration Agreement mandates the Tribunal to address a further question: "Is there any valid reason why USATF should not be required to comply with these Rules?" Or, as the question was framed by USATF in its opening statement at the hearing:

> Should the IAAF now be estopped from claiming that USATF's confidentiality policy violated IAAF rules, and from seeking the disclosure of information concerning old domestic cases that were closed long ago, given the IAAF's failure to ever notify USATF that its policy violated any IAAF Rule, and because the IAAF affirmatively led USATF to believe that it indeed had the discretion to adopt that policy, thus leading USATF throughout this period to continue making its contractual promise of confidentiality to its athletes[?]

100. Had such a question been posed by USATF to one of its own witnesses, it would undoubtedly have prompted the IAAF to object on the basis that the question is leading in the extreme, in that it suggests, indeed spells out, the desired answer. However, the Panel is not constrained by the same prescriptions as the parties' advocates. In the context of the present decision, the question as put by USATF's counsel is pertinent precisely because it contains the germ of its answer. As explained below, the Panel finds that there are indeed valid reasons why the information which the IAAF seeks in relation to the thirteen athletes concerned in the "outstanding cases" at issue in this arbitration need not be disclosed to it by USATF.

101. The Panel's analysis regarding the proper construction of Rules 21(3)(1), 59 and 61.1 was, of course, primarily legal in nature, largely unaided by the evidence proffered by the parties' witnesses. The situation is somewhat different in respect of our analysis of the issues which arise in relation to the present question, concerning the existence of "any valid reason" why disclosure should not be ordered in this case. Although the meaning of the IAAF Rules

remains relevant, the Panel's answer to this particular question turns very much on the facts and circumstances of this most important, yet peculiar, case.

102. A significant circumstance is that, prior to adopting its confidentiality policy, USATF gave careful consideration to whether the adoption of that policy would contravene IAAF Rules and reached a firm view that it did not. This is the evidence of Mr Hersch and Ms Plumer. It is also a view from which USATF has never departed. It was based on a number of considerations including views that IAAF Rules 58 and 59 did not apply in relation to US domestic testing, that US law forbade the suspension of US athletes before a proper hearing and that US law contained a statutory guarantee of confidentiality. This last mentioned view was held until 1998 when it was abandoned.

103. We have no doubt that the view that its confidentiality policy did not breach IAAF Rules was strongly held by USATF from the time it was adopted in the late 1980s until the present time. It was a view which it put to the Maclaren Commission and this Panel in the strongest terms. However so to find is not the end of the matter. The question is whether IAAF led USATF to believe that it had discretion to adopt that policy and therefore continue to make contractual promises of confidentiality to those athletes it tested domestically. It is to this question we now turn.

104. In considering this question, one thing has become crystal clear to the Panel. It is that the conduct of the relevant actors during the period in question was not always as transparent or consistent as each party alleges it to have been (albeit for different reasons and to different ends). This conduct is significant, since it constitutes the backdrop against which the question is to be answered.

105. A very telling circumstance is the IAAF's persistent inability, or simple failure, or, indeed, refusal, throughout the relevant period to identify the particular IAAF Rules allegedly violated by USATF's confidentiality policy, to articulate clearly a position concerning the supposed illegitimacy of that confidentiality policy or to take some positive action against USATF to compel disclosure. It allowed the issue to drag on for years.

(ii) Which IAAF Rule(s) required the disclosure sought by the IAAF?

106. The question "*Which IAAF Rule(s) require(s) the disclosure sought by the IAAF?"* ought to have been answerable at the time the IAAF sought such disclosure; and when the question was actually put by USATF, it ought to have been answered by the IAAF directly. The evidence, however, reveals that at no time did the IAAF express a coherent position or state clearly and directly which of its Rules required USATF to conduct itself in the manner requested. When the question was put to the IAAF directly, it demurred.

107. There are many instances in which the IAAF *could* have articulated a straightforward position in this regard, in order to resolve any uncertainty regarding the rules. The most striking of these, in the opinion of the Panel, and more than sufficient to prove the point, is the exchange of correspondence between the parties during the period 1966-2000. This evidence was discussed at length during the hearing, both during cross-examination of the parties' witnesses and in colloquy between the witnesses or Counsel and the members of the Panel.

108. For example, on 22 May 1996, the General Secretary of the IAAF, Mr Istvan Gyulai wrote Mr Ollau Cassel, Executive Director of USATF, to request that the latter identify an athlete whose "A" sample had been the subject of a positive test but who had not been convicted.[81]

109. USATF's response was both quick in coming and straightforward. In a letter dated 31 May 1996 addressed to Mr Gyulai (and copied to Dr Dollé), Mr Cassell informed the General Secretary that, *inter alia*, the confidentiality provisions of USATF's rules prevented it from disclosing the information in question, and indeed prevented it even from "reporting a positive" to the IAAF, prior to "concluding the administrative hearing process" and determining that "a positive has been confirmed."[82] Among other telling aspects of this letter is the fact that USATF did not claim that its rules prevented it from disclosing such information only to the public; it specifically informed the IAAF that it could not disclose the information *to the IAAF*.

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[81] Joint Bundle, Exhibit 61.

[82] Joint Bundle, Exhibit 61, p.1.

110. The evidence is that the matter was referred to Dr Dollé to reply on behalf of the IAAF.[83] However, neither Dr Dollé nor anybody else at the IAAF saw fit to pronounce upon Mr Cassell's fairly adamant expression of USATF's views concerning its obligations toward the IAAF. The IAAF did not suggest that USATF had somehow misread its own rules. Still less did it state, let alone seek to demonstrate, that the USATF's protocol contravened IAAF Rules. Rather, the IAAF "asked for the information again, without claiming entitlement, without citing an IAAF Rule, and without disputing USATF's assertion that its own confidentiality regulation precluded disclosure."[84]

111. Interestingly, in his testimony before the Tribunal on 1 November 2002, Professor Ljungqvist stated that he did not recall seeing Mr Cassell's 31 May 1996 letter at the time, the inference being that neither the letter nor its contents were reported by Dr Dollé to Professor Ljungqvist. He further testified that it was the responsibility of the General Secretary to review Members' rules and, if necessary, to notify a Member of any concerns raised by its rules.

112. Dr Dollé himself testified, on the same day, that he did not consider it necessary to report Mr Cassell's 31 May 1996 letter to his superiors within the IAAF or to consult with them as to an appropriate response. Nor did he in fact respond to Mr Cassell's statements. Instead, he "ploughed doggedly on" (to use his Counsel's expression[85]), ignoring the issue specifically raised by Mr Cassell, and merely asked again for the information in a letter dated 18 June 1996.[86]

113. Dr Dollé declared before the Panel that he believed that the confidentiality rule cited by Mr Cassell was in violation of IAAF Rules, but the fact remains that he did not say so, or even suggest as much, in his response to Mr Cassell.

114. One month later, in response to a request from Dr Dollé for information concerning the identities of other American athletes who had tested positive during domestic doping control, the USATF again refused to identify the athletes in question.[87]

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[83] See IAAF Disclosure Exhibit 104: Letter from Dr Dollé to Mr Cassell, dated 18 June 1996. This evidence is discussed below.

[84] USATF Closing Argument, pp. 10-11.

[85] IAAF Oral Reply, para 33. P.7.

[86] IAAF Disclosure, Exhibit 104: letter from Dr Dollé to Mr Cassell dated 18 June 1996.

[87] Joint Bundle, Exhibit 65.

115. In 1997, the IAAF learned of the case of an American athlete whose positive test results had been reported to it neither by USATF nor the laboratory. The athlete's identity, originally unknown, was only subsequently disclosed by USATF further to a specific request from the IAAF and, as it turns out, only after the athlete had been convicted by a domestic tribunal. The case was discussed within the IAAF Doping Commission and is referred to in the Minutes of the Commission's 26-27 October 1997 meeting held in Monaco.[88] Those Minutes note that the case was considered "typical", in that it reflected USATF's practice of non-reporting and raised "the issue of confidentiality". Yet, as Professor Ljungqvist himself recognized during the hearing, nothing in the Minutes suggests that USATF had violated an IAAF Rule or that its conduct required either sanction or censure.

116. In 1998, the IAAF once more asked USATF to disclose the identities of athletes who had tested positive at the 1998 USA Outdoor national Championships but who had not been convicted. USATF's response was even more explicit than it had been earlier. In a letter dated 24 September 1998, the CEO of USATF, Mr Craig Masback, reiterated USATF's previous explanation that its confidentiality regulation precluded it from disclosing the requested information. He went on to note his own views regarding disclosure pursuant to IAAF Rule 61.1 and specifically asked the IAAF to identify "any IAAF protocol or agreement with USATF [which] entitles you to the requested information."[89]

117. Matters came to a head in August 2000, shortly prior to the Sydney Olympics. It seems that the IAAF was then claiming, albeit in less than limpid fashion, that USATF's failure to disclose information about a number of athletes constituted a breach of IAAF Rules. However it is pertinent to note that on 25 October 2000, after the Sydney Games, USATF's General Counsel, Ms Jill Pilgrim, wrote two letters to Dr Dollé, each in respect of an American athlete who had tested positive and about whom the IAAF had requested disclosure of the relevant files, including test results, hearing panel reports and disciplinary decisions.[90] In both letters, Ms Pilgrim states clearly USATF's view of the obligations imposed on it by IAAF Rule 61 and explicitly asks the IAAF to identify the Rule which allegedly requires Members to disclose the information sought by the IAAF. For example:

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88 Joint Bundle, Exhibit 83.

89 Joint Bundle, Exhibit 89.

90 Joint Bundle, Exhibits 140, 141.

- In a letter concerning an athlete whose case had yet to be heard by a domestic hearing panel, Ms Pilgrim writes:

> **Upon a determination that a "positive result" has been found with respect to the above-noted sample, USATF will report the fact to the IAAF, as required by IAAF Rule 61**. For your information the matter is currently in the hearing stage. (…)
>
> I require your assistance with one other matter indicated in your letter. I have not been able to locate an IAAF rule that requires Member Federations to send the IAAF the necessary files … to [your] Anti-Doping department (doping control form, hearing's panel report (sic), disciplinary decision, …) Perhaps I am not reading the IAAF rule book carefully enough. **I would appreciate your assistance in identifying the rule(s) in question**. (…)[91]

- Similarly, in a letter concerning an athlete who had been exonerated, Ms Pilgrim provides the following explanation for USATF's refusal to disclose the athlete's file:

> As regards your request for 'the full file … including the doping control form, the complete A & B analysis reports, the athlete explanation, the expert's opinion (if any), the hearing report with the panel members' opinions and the USATF argumented (sic) decision, **IAAF rule 61 only requires Member Federations to report 'any positive result(s) obtained in the course of doping controls.' You state accurately in your letter that this matter was resolved in favour of the athlete. Therefore, USA Track & Field has no positive finding to report …**
>
> Again I require your assistance in **identifying the IAAF rules that require the disclosure of the 'full file' where no doping violation has been found**.[92]

118. Notwithstanding the clarity of these requests they were met with deafening silence on the part of the IAAF. It neither disputed USATF's views as to the interpretation of, or interplay between, its confidentiality regulation and the IAAF Rules, particularly Rule 61, nor did it identify, as repeatedly requested by USATF, the IAAF Rule(s) supposedly violated by USATF's refusal to disclose information sought by the IAAF. It is clear to the Panel that the IAAF did not at any time respond directly to USATF's challenge.[93]

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91 Joint Bundle, Exhibit 141. (emphasis added).

92 Joint Bundle, Exhibit 141. (emphasis added).

93 Far from "identifying the rule(s)" requiring disclosure, as requested by USATF, in a letter addressed to Ms. Pilgrim dated 31 October 2000 Dr. Dollé wrote as follows: "With regard to our request for documented information on positive cases, I would assure you that it should not be interpreted as a matter of duty imposed by IAAF on USATF. (…)" (Joint Bundle Exhibit 142.)

119. Professor Ljungqvist himself acknowledged before the Panel that nothing in the record indicates that the IAAF ever attempted to identify the particular IAAF Rules allegedly contravened by USATF's confidentiality policy. And while the Panel accepts that, as both Professor Ljungqvist and Dr Dollé testified, they did not initially consider that USATF's confidentiality regulation prohibited anything other than disclosure to the *public* – as opposed to disclosure to the IAAF in the context of doping control – this fact does not explain the IAAF's continuing failure to respond directly to the question put directly to it by USATF to identify the rules.

120. In any event, the motivation of the IAAF's representatives is not at issue. The question with which we are concerned, here, is not what the IAAF or its representatives believed its Rules to require but, whether the IAAF caused USATF to continue with its confidentiality policy with the athletes, in the belief that to do so did not offend the IAAF rules.

121. Other examples exist which highlight the IAAF's attitude of ignoring USATF's reliance on its confidentiality regulation and of failing to identify clearly the requirements for disclosure under IAAF Rules. Why the IAAF acted as it did is of far less relevance than the fact and the consequences of its conduct, including its inaction. That inaction in the face of USATF's repeated attempts to have the IAAF spell out clearly the nature of the problem as it saw it and to substantiate its request for disclosure of information treated as confidential by USATF is ultimately fatal to the IAAF's position in respect of the second question posed in the Arbitration Agreement.

122. The evidence is that throughout the period 1996 to 2000 USATF continued to promise athletes confidentiality pending conviction, and it is not unreasonable to assume that, in the light of the terms of USATF's confidentiality policy, the athletes themselves expected that their identities would be protected from disclosure to anyone outside USATF unless and until they were convicted of a doping-related offence. That promise was reflected in USATF's confidentiality regulation, which was at all times known to the IAAF and which, as mentioned, was never challenged, or even queried, by the IAAF.

123. Between 1900 and 1998, USATF's Regulation 10(F) read as follows:

> **Confidentiality and publication of test results**: Negative "A" test results and excused failures to appear for testing shall be released as soon as possible when they have been received by the Executive Director.

> Positive "B" test results and unexcused failures to appear for testing shall be released by the Executive Director upon the athlete being deemed ineligible. (…)

124. The provision was amended in December 1998, and was re-numbered as Regulation 10(G), at which time it provided as follows:

> **Confidentiality and publication of test results**: The names of athletes who have tested negative or who have provided valid excuses for failure to appear for testing shall be made available to the public. The names of athletes testing positive shall not be made publicly available until an athlete has been deemed ineligible by a DHB, or when the funding of the DHB has been reaffirmed by the DAB, when appropriate. Any other information will be made available only with prior consent of the athlete. (…)

125. Regulation 10(G) was further modified as of December 1999 so as to read:

> **Confidentiality and publication of test results and doping offences**: The names of athletes who have tested negative or who have provided valid excuses for failure to appear for testing shall upon a final decision having been rendered, be published by USATF. The names of athletes determined to have committed a doping offence shall be published by USATF only after an athlete has exhausted all the domestic administrative proceedings available, including but not limited to a declaration of ineligibility by the AAA or when the findings of the AAA have been reaffirmed by the AAA Appeals Panel, if an appeal has been filed. Any other information will be made available only with prior consent of the athlete. (…)

126. Minds may differ as to whether these regulations protected athletes solely from unwarranted disclosure to the public at large or whether they prohibited disclosure to the IAAF as well. The Panel has before it the evidence the parties' respective experts (Mr. Gulland, for the IAAF; and Prof. Haagen, for USATF), both learned United States lawyers, whose views differed in this respect.

127. It suffices to note that the factual evidence – wholly uncontroverted – is that the USATF's representatives, such as Mr Cassell and Mr Masback, as well as its *athletes*, as the testimony of Ms Plumer illustrates, understood the object and effect of the regulation to be to prevent disclosure – to *anyone* – until the end of the domestic adjudication process. This seems to be what was intended when the regulation was originally conceived and adopted; and it is how USATF and its athletes believed it to operate.

128. Indeed, USATF repeatedly told the IAAF, in explicit terms, that the effect of its confidentiality rule was to preclude disclosure of positive test results to the IAAF until "a positive has been confirmed" by means of "the administrative hearing process", a position which prompted neither surprise nor rebuke from the IAAF. Indeed the IAAF never specifically sought to disabuse USATF of the notion that its confidentiality rule, as interpreted and applied by it, was valid.

(iii) Whether Disclosure is Required in the Circumstances

129. The matter to be decided is whether the facts as reviewed above constitute, as provided in the Arbitration Agreement, a "valid reason" why USATF should not be ordered to disclose the information requested by the IAAF, concerning the athletes at the centre of the thirteen so-called "outstanding cases". This is the remit of the Panel.

130. The IAAF has characterized the matter as involving "a naked question of law" to be resolved as between an International Federation and one of its Members. The metaphor may be apt, but only as far as it goes. Stripped of all vestiges of reasoning and rhetoric, and but for the heat and light of the hearing room, the bare truth is that, at its core, the case clearly concerns the lives, livelihoods and reputations of thirteen athletes who no doubt have every reason to wonder why questions which they thought were resolved should now be reopened. In the opinion of the Panel, they should not be.

131. Indeed, the cases in question are "outstanding" only within the context of the present dispute, as indeed is the entire subject of the arbitration, which, as both parties point out, will not affect future cases given recent amendments to the relevant rules. With the benefit of hindsight and of a determined effort by both parties to resolve the question once and for all, the Panel has been able to determine that the IAAF Rules during the relevant period in fact required the USATF to furnish all of the information requested by the IAAF and listed in the Arbitration Agreement. The naked question at issue as between the two parties to the present arbitration thus resolved, the Panel is unwilling to avail itself further of its hindsight to answer the second question which they have framed as the IAAF proposes.

132. USATF argues that the doctrine of estoppel "not only applies in these circumstances, it was *invented* for them."[94] It goes onto ask: "Is the IAAF's position equitable or fair? Should the IAAF be able to assert now that USATF is a wrongdoer when the IAAF never made any such assertion in the preceding decade?"[95] Such rhetoric strains, or at least exaggerates, the facts and law with which this arbitration is concerned; but it serves to make the point, which is that fairness lies very much at the heart of the concept of equitable estoppel. However, as explained below, the doctrine of estoppel is not the sole basis on which the matter at issue is to be decided.

133. Support for USATF's position can be found in various CAS decisions, including the *AEK Athens* case, in which the following basic proposition is enunciated: "[W]here the conduct of one party has led to legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party."[96] Indeed, the concept of legitimate expectations – more particularly, the concept of protecting *athletes*' legitimate expectations – has repeatedly been recognised by the CAS, for example, in the *USA Shooting*[97], *Watt*[98] and *Prusis*[99] decisions cited by USATF. In the case of *US Swimming* v. *FINA*,[100] the Panel resiled from penalizing unsuspecting athletes for the consequences of conduct beyond their control and for which they were blameless. Underlying all these decisions lies the notion of "fairness".

134. The IAAF submits that "the test is one of clear and unequivocal representation";[101] and that "USATF are not in a position to say – nor do they say – that they were positively informed by any representative of the IAAF … that Rule 61 did not compel disclosure."[102] However, the Panel is not persuaded that the "absolutist" approach advocated by the IAAF is necessarily correct, particularly in the circumstances of this case. Statements or actions may take a variety of forms and modes of expression, including *inaction* and *omission*. Moreover,

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94 USATF Closing Argument, para 35, p.10.

95 Ibid.

96 *AEK Athens and SK Slavia Prague* v. *Union of European Football Associations*, CAS 98/200, para. 60.

97 *USA Shooting & Q* v. *International Shooting Union*, CAS 94/129.

98 *Watt* v. *Australian Cycling Federation*, CAS 96/153.

99 *Prusis* v. *International Olympic Committee*, CAS 02/001.

100 CAS 96/001.

101 IAAF Oral Reply, para 29, p.6.

102 Id., at para 31, p.7.

silence or omission may be equivocal in the circumstances of one case while providing positive evidence in another.

135. The evidence before the Panel is not (as the IAAF's counsel suggested in his oral reply during the hearing) that the IAAF merely omitted to "identify that USATF was in breach of any IAAF Rule or take steps to penalise them for such breach." Rather, the IAAF was explicitly asked, on numerous occasions, to substantiate its requests for information by reference to the relevant IAAF Rule(s), and to reply to USATF's own clearly enunciated interpretation of the rules and regulations at issue. The evidence is that the IAAF refused to do so. Even when its attention was explicitly drawn to its Member's Regulations which, according to USATF, preclude disclosure of the information sought, the IAAF did nothing which would suggest that those Regulations violated IAAF Rules. In the opinion of the Panel, it did not so much acquiesce in a breach of IAAF Rules as fail even to attempt to substantiate the purported existence of any such breach.

136. The IAAF's conduct in this respect was such as to lead to the entirely reasonable conclusion that, perhaps contrary to what the IAAF might have believed to be the case prior to 1996, when Mr Cassell first advised that USATF's confidentiality regulation prevented it from reporting positive test results until "a positive has been confirmed" by means of "the administrative hearing process", and certainly contrary to what its representatives firmly believed *ought* to be the case, a close look at the Rules themselves revealed no explicit requirement for disclosure of the sort in question.

137. "The key fact," argues the IAAF, "surely is that Dr Dollé ploughed doggedly on." The Panel agrees, but to opposite effect. Refusing to respond to clearly articulated arguments against disclosure, turning a deaf ear to repeated requests that it substantiate its disclosure requests, failing ever to state in what manner a refusal to disclose grounded in domestic confidentiality regulations comprised a breach of IAAF Rules – in short, *ploughing doggedly on* – is no mere omission; and it is no defence. It is conduct which constitutes a statement and which speaks as loudly as any words. By that statement, the IAAF led USATF to understand, in effect: we would like you to disclose the information we request; we believe it to be desirable that you do so; but the Rules do not explicitly require such disclosure and we cannot

compel you to do as we ask;[103] and we are unaware of any violation of IAAF Rules reflected in your confidentiality regulation.

138. In any event, it bears reiterating that the question which the Panel must answer is not whether the IAAF is estopped from requesting disclosure, or, as USATF argues, whether the IAAF is able to assert, today, that USATF is a wrongdoer when it never made any such assertion in the part. The question which both parties agreed should be answered by the Panel is whether there is "any valid reason why USATF should not be required to comply" with IAAF Rules which required disclosure. The parties' arguments and the evidence cited by them in support of their claims must be viewed in the light of the precise terms of reference which they negotiated and agreed.

139. Expressed somewhat differently, what is at issue here is not estoppel with respect to the meaning of the IAAF Rules, but with respect to the ultimate and more limited second question framed by the Arbitration Agreement, namely, USATF's obligation to disclose under the circumstances (i.e. independently of the Panel's conclusion with respect to the intrinsic meaning of the IAAF Rules). We are not concerned whether the parties' conduct could result in creating a forced reading of the Rules, but with how the Rules are to be applied by the Panel today, in the light of all the circumstances. Those circumstances include, as mentioned, the dramatic and undoubtedly painful consequences for the athletes in question – no matter the eventual disposition of their cases – if disclosure were made obligatory so long after the events in issue, and so long after they were led to believe that their cases were closed.

140. For these reasons, our answer to the second question posed by the Arbitration Agreement – whether there exists any valid reason why USATF should not be required to disclose the information requested by the IAAF – is "yes".

N. Conclusion

141. In the opinion of the Panel, based on its appreciation of the evidence as a whole, the unique facts and circumstances of this case constitute a valid and compelling reason why USATF should not be required to disclose the information in question to the IAAF, notwithstanding the proper interpretation of the relevant IAAF Rules.

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[103] Dr. Dollé's 31 October letter to Ms Pilgrim, discussed above (see footnote 93), seems to state as much.

142. In the circumstances, and as requested by USATF,[104] the Panel explicitly refrains from applying the relevant IAAF Rules, as interpreted, to the thirteen cases at issue in these proceedings.

COSTS

143. The costs of the arbitration will be determined by the CAS Court Office in accordance with Articles R 64.4 and R. 64.5 of the CAS Code.

144. Having taken into account the outcome of the arbitration – in particular, the fact that neither party should be considered to have "prevailed" – as well as the conduct and financial resources of the parties, as required by article R 64.5 of the CAS Code, and in the light of all of the circumstances, the Panel is of the view that each party should bear all of its legal fees and other expenses incurred in connection with the arbitration, with the costs of the arbitration as calculated by the CAS Court Office to be shared equally between them.

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[104] USATF Statement, para 5.1.

AWARD

For all of the foregoing reasons, the Panel hereby decides and orders as follows, unanimously with respect to the first question and by majority with respect to the second question and the issue of costs:

1. QUESTION (i) set out in paragraph 1.1 of the Arbitration Agreement dated 10 July 2002 is answered in the affirmative;

2. QUESTION (ii) set out in paragraph 1.1 of the Arbitration Agreement dated 10 July 2002 is also answered in the affirmative;

3. The costs of the arbitration up to the date of the present award, which will be calculated later by the CAS Court Office, shall be shared equally by the parties.

4. Each party shall bear all of its own legal and other costs incurred in connection with this arbitration.

Lausanne, 10 January 2003

THE COURT OF ARBITRATION FOR SPORT

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L. Yves **Fortier**, C.C., Q.C.
President of the Panel