Arbitration CAS 2021/A/7840 World Anti-Doping Agency (WADA) v. International Canoe Federation (ICF) & Aleksandra Dupik, award of 9 June 2022

Panel: Mr James Drake QC (United Kingdom), President; Prof. Luigi Fumagalli (Italy); Mr Efraim Barak (Israel)

Canoeing
Doping (furosemide)
Use of a prohibited substance
Standard of proof
Methods of proof
Circumstantial evidence
Reduction of the period of disqualification in the interests of fairness

1. **It is made clear by Article 2.2.1 of the ICF 2009 Anti-Doping Regulations (ADR) that, because it is every athlete's duty to ensure that no prohibited substance enters his or her body, it is not necessary to show that any use on the part of an athlete was intentional or knowing, or that an athlete was at fault in some way or that he or she failed to take due care (i.e., was negligent).**

2. **The standard of proof of comfortable satisfaction is greater than a mere balance of probability, but less than proof beyond a reasonable doubt. The more serious the allegation, the more cogent the supporting evidence must be in order for the allegation to be found proven. However, contrary to what is often asserted, the standard itself does not change; it is the required cogency of the evidence that changes on the basis that the more serious the allegations (a) the less likely that the alleged fact or event has occurred and (b) the more serious the consequences. The standard of proof remains to the comfortable satisfaction of the Panel bearing in mind the seriousness of the allegations.**

3. **As a general rule, facts relating to anti-doping rule violations (ADRV) may (i.e., it is permissible) be established by *"any reliable means"*. This rule gives greater leeway to anti-doping organisations to prove violations, so long as they can comfortably satisfy a tribunal that the means of proof is reliable. As a result, it is not even necessary that a violation be proven by a scientific test itself. Instead, a violation may be proved through admissions, testimony of witnesses, or other documentation evidencing a violation. This rule is not a requirement that the *evidence* adduced be "reliable evidence". Rather, it is a rule as to the method or manner or form in which the facts that are necessary to sustain an allegation of an ADRV may be established, and the rule provides (in a non-exhaustive list) a number of examples of means of establishing facts which are characterised as "reliable".**

4. **In case there is no direct but only circumstantial evidence, the adjudicatory body must**

assess the evidence separately and together and must have regard to what is sometimes called "the cumulative weight" of the evidence. It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, establish guilt beyond reasonable doubt. There may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion, but the whole taken together, may create a strong conclusion of guilt.

5. Article 10.8 of the ICF 2009 ADR provides that all competitive results achieved by the athlete from the date that a positive sample was collected or other ADRV was committed through to the start of the period of ineligibility is to be disqualified with all of the resulting consequences as there set forth – unless fairness requires otherwise. Indeed in certain exceptional circumstances, the strict application of the disqualification rule can produce an unjust result. In particular, this may be the case when the potential disqualification period covers a very long term, which is normally the case when the facts leading to the ADRV took place long before the adjudicating proceedings started which usually occurs when they are opened as a result of the re-testing of a sample or of the uncover of a sophisticated doping scheme. In addition, in this type of cases it may be difficult to prove that the athlete at stake used prohibited substances or methods during such a long period of time.

I. PARTIES

1. The Appellant, the World Anti-Doping Agency ("WADA"), is a Swiss private law foundation with its registered seat in Lausanne, Switzerland and its headquarters in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms on the basis of the World Anti-Doping Code (the "WADC" or the "Code").

2. The First Respondent, the International Canoe Federation (the "ICF"), is the worldwide governing body for the sport of paddling (including canoe and kayak) recognised by the International Olympic Committee and the International Paralympic Committee. The ICF has its headquarters in Lausanne, Switzerland. It is a signatory to the WADC and in compliance therewith has from time to time adopted its own anti-doping rules, the relevant editions of which for the purposes of this appeal is the *'ICF Anti-Doping Rules (Based upon the 2009 revised WADA Code) (Coming into force on 1 January 2009)'* (the "ICF 2009 ADR") and the *'ICF Anti-Doping Rules (Based upon the 2021 World Anti-Doping Code) (Taking effect from 1 January 2021)'* (the "ICF 2021 ADR").

3. The Second Respondent, Ms Aleksandra Dupik, ("Ms Dupik" or the "Athlete"), is a Russian canoeist. She was born on 5 October 1986. Amongst other things, Ms Dupik won the bronze medal in the women's K1 (A) 200m final of the 2014 ICF Canoe Sprint World Championships in Moscow in August 2014.

II. OUTLINE OF THE APPEAL

4. As more fully described below, this is an appeal by WADA against the decision taken by the ICF not to bring forward an anti-doping rule violation against the Athlete in respect of a doping control sample provided by the Athlete in 2014. It is WADA's case that the evidence in relation to the sample *"clearly establishes that the Athlete committed an anti-doping rule violation"* and that *"the decision by the ICF not to move forward with this matter was manifestly wrong"*.

5. There was no pleaded challenge to the manner in which the ICF conducted itself in coming to its decision, only that its decision was wrong. The appeal was therefore conducted by the Parties as an inquiry into whether the evidence was sufficient to establish, to the applicable standard of proof, that the Athlete had committed an anti-doping rule violation and not as to whether the ICF had met its investigation obligations under its anti-doping rules and related international standards.

III. FACTUAL BACKGROUND

6. Set out below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced in these proceedings.

A. The Sample

7. This appeal concerns a doping control (urine) sample provided by the Athlete out-of-competition on 19 April 2014 (the "Sample"). The doping control was performed by the Russian Anti-Doping Agency ("RUSADA") and the doping control form is signed by the doping control officer and the Athlete. RUSADA sent the Sample to the WADA-accredited laboratory in Moscow (the "Moscow Laboratory") for analysis. The Moscow Laboratory duly analysed the Sample and recorded the result of the analysis in the Anti-Doping Administration & Management System ("ADAMS") as negative.

8. According to WADA:

   a. The analysis performed by the Moscow Laboratory in fact showed the (presumptive) presence of furosemide, a specified diuretic and prohibited at all times under S5 of the 2014 Prohibited List.

   b. In furtherance of what has become known as the Russian doping scheme (described below), the Moscow Laboratory falsely recorded the analytical results as negative in ADAMS so that the Athlete could avoid the consequences of positive test results.

B. The Russian Doping Scheme

9. In December 2014, a German television channel broadcast a documentary concerning the existence of sophisticated systemic doping practices in Russian athletics. Implicated in the documentary were (inter alios) Russian athletes and coaches, the All-Russia Athletics

Federation ("ARAF"), the International Amateur Athletic Federation (now known as 'World Athletics'), RUSADA, and the Moscow Laboratory.

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

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

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

13. On 19 May 2016, WADA announced the appointment of Prof. McLaren as an Independent Person (the "IP") to conduct an independent investigation into the matters reported on by the New York Times (and the allegations made by Dr Rodchenkov).

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

15. On 22 July 2016, WADA sent the following letter to the international sporting federations (including the ICF):

"As a follow up to the McLaren Report published on 18 July, I am pleased to advise that Prof. McLaren has provided WADA with the information from his report which relates specifically to your International Federation. Please find attached a copy of what has been provided to us.

The athletes listed in this document are the beneficiaries of what is referred to as the "Disappearing Positive Methodology" in use by the Moscow Laboratory in the McLaren Report. The listing indicates the decision by the Russian Ministry of Sport ("Save" or "Quarantine") in order to allow your Federation greater focus on the athletes who benefited from a "Save" decision and whose adverse analytical findings were not reported as a

consequence. An "N/A" indicates that the information is either not available or only partial information is available to the independent investigation team.

WADA would recommend that you identify and analyze any existing B-samples of the sample numbers listed in the attachment as well as any other available samples from the athletes concerned including, where relevant, by using available forensic techniques such as DNA analysis.

Please note that the information contained in the attached document is a result of the investigation to date. There may be further findings which become available during the course of Prof. McLaren's extended mandate. We reiterate the need for your Federation to review the information and take the necessary decisions based on your own rules and regulations. WADA remains available for any questions or guidance in this process. Thank you for your cooperation and commitment to clean sport".

16. On 24 July 2016, the IOC Executive Board issued a decision (the "IOC Decision") concerning the participation of Russian athletes in the Games of the XXXI Olympiad in Rio de Janeiro (the "Rio Olympic Games"). After referring to the First McLaren Report, the following was said:

"Under these exceptional circumstances, Russian athletes in any of the 28 Olympic summer sports have to assume the consequences of what amounts to a collective responsibility in order to protect the credibility of the Olympic competitions and the "presumption of innocence" cannot be applied to them. On the other hand, according to the rules of natural justice, individual justice, to which every human being is entitled, has to be applied. This means that each affected athlete must be given the opportunity to rebut the applicability of collective responsibility in his or her individual case.

> *1. The IOC will not accept entry of any Russian athlete in the Olympic Games Rio 2016 unless such athlete can meet the conditions set out below.*
>
> *2. Entry will be accepted by the IOC only if an athlete is able to provide evidence to the full satisfaction of his or her International Federation (IF) in relation to the following criteria:*
>
> > • *The IFs, when establishing their pool of eligible Russian Athletes, to apply the World AntiDoping Code and other principles agreed by the Olympic Summit (21 June 2016).*
> >
> > • *The absence of a positive national anti-doping test cannot be considered sufficient by the IFs.*
> >
> > • *The IFs should carry out an individual analysis of each athlete's anti-doping record, taking into account only reliable adequate international tests, and the specificities of the athlete's sport and its rules, in order to ensure a level playing field.*
> >
> > • *The IFs to examine the information contained in the [First McLaren Report], and for such purpose seek from WADA the names of athletes and National Federations (NF's) implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games.*

> • *The IFs will also have to apply their respective rules in relation to the sanctioning of entire NFs.*
>
> *3. The ROC is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping, even if he or she has served the sanction.*
>
> *4. The IOC will accept an entry by the ROC only if the athlete's IF is satisfied that the evidence provided meets conditions 2 and 3 above and if it is upheld by an expert from the CAS list of arbitrators appointed by an ICAS Member, independent from any sports organisation involved in the Olympic Games Rio 2016".*

17. On 2 August 2016, the IOC sent a communication to the international sports federations, including the ICF, in an effort to clarify what was meant by an athlete being *"implicated"* as set forth in the IOC Decision of 24 July 2016. In relevant part, the IOC said as follows:

> *"This is in follow-up to various requests received by the IOC.*
>
> *By decision dated 24 July 2016 (the "EB Decision"), the IOC Executive Board decided that "Entry will be accepted by the IOC only if an athlete is able to provide evidence to the full satisfaction of his or her International Federation (IF) in relation to the following criteria: […] The IFs to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games".*
>
> *Further to the EB Decision, the IOC understands that the International Federations were provided by WADA with lists of athletes prepared by Prof. McLaren (the "McLaren Lists"). These lists contained, as far as the IOC is aware, five columns ("indicated sample date", "sample no", "indication of steroid", "name of competitor" and "save/quarantine"). In view of recent appeals filed by Russian athletes with CAS, the IOC consider it necessary to clarify the meaning of the notion "implicated" in the EB Decision.*
>
> *In view of the recent appeals filed by Russian Athletes with CAS, the IOC considers it necessary to clarify the meaning of the notion "implicated" in the EB Decision* [i.e., the IOC Decision referred to in the previous paragraph]. *The IOC does not consider that each athlete referred to in the McLaren Lists shall be considered per se "implicated". It is for each International Federation to assess, on the basis of the information provided in the McLaren lists and the Independent Person Report, whether it is satisfied that the Athlete in question was implicated in the Russian State-controlled doping scheme. To assist the International Federations in assessing each individual case, the IOC wishes to provide some information. In the IOC's opinion, an athlete should not be considered as "implicated" where:*
>
> i. *The order was a "quarantine".*
>
> ii. *The McLaren List does not refer to a prohibited substance which would have given rise to an ant-doping rule violation or;*
>
> iii. *The McLaren List does not refer to any prohibited substance with respect to a given sample".*

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

19. Accompanying the Second McLaren Report was a cache of non-confidential documents examined by the IP during the investigation. This was called the 'Evidence Disclosure Package' or "EDP".

20. Subsequent to the McLaren Reports:

    a. On 2 December 2017, the IOC Disciplinary Commission issued a report (the "Schmid Report") confirming the existence of *"systemic manipulation of the anti-doping rules and system in Russia"*.

    b. On 5 December 2017, the IOC suspended the Russian Olympic Committee with immediate effect.

    c. On 13 September 2018, the Russian Ministry of Sport *"fully accepted the decision of the IOC Executive Board of December 5, 2017 that was made based on the findings of the Schmid Report"*.

IV. THE ICF DECISION

21. As noted above, WADA sent the letter of 22 July 2016 to the ICF. With the letter, WADA provided a list (prepared from information that Prof. McLaren had provided to WADA following delivery of his First Report) that identified positive tests of five Russian canoeists, including the Athlete (the "McLaren List"). The McLaren List showed that each of the named athletes was found to have had at least one positive sample screening test that had been "saved" rather than "quarantined", and thus unreported, by the Moscow Laboratory between November 2012 and June 2015.

22. In response to the letter, the ICF held a hearing (sometime in 2016) for several of the Russian canoe athletes, including in respect of this Athlete. It appears that, at that moment in time, the ICF formed the view that no further action should be taken against the Athlete. According to the (undated) formal decision subsequently issued by the ICF on 11 March 2021 (the "ICF Decision"), the ICF decided at that juncture (i.e., in 2016) to *"stop the procedure"*. The ICF said this:

> *"In 2016, following the McLaren report, the ICF held a hearing for several Russian Canoe Athletes for their individual cases, including this athlete.*
>
> *However, the legal advisors of ICF clearly stated that the lack of analytical evidence will lead to the dismissal of all cases of this hearing against these individual athletes, and that clear analytical evidence were require [sic] (such as a positive sample – analyzed by another laboratory than the Russian Lab) or the testimony of Mr. Roschenkov* [sic].

The ICF had no choice but to stop the procedure due to a lack of evidence".

23. It transpires that subsequent to the WADA letter of 22 July 2016 there was further correspondence between WADA and the ICF in relation to the matter, with further material provided by WADA in respect of the Athlete, namely: the Second McLaren Report with relevant extracts from the EDP; the Moscow Laboratory data base, the Moscow Laboratory's 'Laboratory Management Information System' ("LIMS"); a joint statement of Mr Aaron Walker and Dr Julian Broséus dated 2 March 2021; and the results of the investigation conducted by the WADA Intelligence and Investigations Department ("WADA I&I").

24. The ICF reviewed this further material but maintained its decision not to take any further action in respect of the Athlete. The ICF Decision is in the following terms:

Evaluation of the Evidence

The ICF, along with its legal advisors, and taking into consideration the first hearing in 2016 of the Russian athletes, considers that clear analytical evidences are required to move forward with the case, and to prove that the athlete intentionally violate the ICF Anti-Doping rules.

The ICF agrees that the evidence brought by the detailed investigation WADA I&I confirms that the Russian authorities have conducted an institutionalised doping scheme, and have manipulated the Moscow Laboratory data in an effort to cover up.

However, for individual cases such as this, the ICF Anti-Doping Rules considers only that the evidence must be directed against the athlete. In this case the evidence is not sufficient to be able to bring the case forward with the confidence of being able to sanction the athlete for an ADRV.

…

Conclusion

1/ The ICF, along with its legal advisors, consider that the case does not contains enough strong analytical evidence to be able to win it. ***Therefore the ICF does not bring forward this case.***

2/ Base [sic] *on all the information brought by WADA I&I, the ICF considers the athlete suspicious and will continue monitoring him. The ICF will test this athlete out-of-competition and/or in-competition. The athlete has been included in the ICF RTP since the first time suspicions where brought by the LIMS data, and is still currently in the RTP.*

3/ Besides the information provided by WADA I&I, the athlete whereabouts (available in ADAMS) or the training camp whereabouts, the ICF did not find any further information for this case".

25. In the result, the ICF determined not to bring the case forward. As noted above, the ICF Decision was issued on 11 March 2021.

V. THESE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

26. By a Statement of Appeal dated 31 March 2021 and filed with the Court of Arbitration for Sport (the "CAS") on 1 April 2021 in accordance with Article R47 of the Code of Sports-related Arbitration (the "CAS Code"), WADA instituted this appeal against the ICF Decision. In its Statement of Appeal, WADA nominated Professor Luigi Fumagalli as arbitrator.

27. On 7 April 2021 the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, made the following requests (inter alia): (a) requested the First Respondent to indicate whether it had notified the Uzbekistan NADO and, if applicable, RUSADA, of the ICF Decision; (b) requested the Respondents jointly to nominate an arbitrator; and (c) invited the Respondents to agree to submit this reference and the references in CAS 2021/A/7838 and CAS 2021/A/7839 to the same panel.

28. On 16 April 2021, the ICF informed the CAS Court Office that it did not object to the matter being referred to the same panel as that in place for 7838 and 7839, and nor did it object to different panels.

29. On 21 April 2021, the Deputy President of the Appeals Arbitration Division, acting pursuant to Article R50(2) 0f the CAS Code, decided to refer this reference to the same panel as that in place for CAS 2021/A/7838 and CAS 2021/A/7839.

30. On 29 April 2021, the First Respondent informed the CAS Court Office that the Respondents jointly nominated Mr Efraim Barak as arbitrator.

31. On 17 May 2021, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division, confirmed that the Panel in this matter was constituted by the appointment of Mr James Drake QC as the President of the Panel, together with Professor Luigi Fumagalli and Mr Efraim Barak.

32. On 9 June 2021, WADA filed its Appeal Brief on in accordance with Article R51 of the CAS Code.

33. On 26 July 2021, the Athlete filed her Answer.

34. On 27 July 2021, the ICF filed its Answer.

35. On 5 and 8 November 2021, respectively, the Parties signed and returned the Order of Procedure, issued by the CAS Court Office on behalf of the President of the Panel.

36. A hearing took place on 11 November 2021. By express consent of the Parties, the hearing was conducted on a hybrid basis in that some appeared in person while others participated remotely via Webex. In all, the following took part in the hearing:

    a. The Panel:

        i. Mr Efraim Barak

ii. Prof. Luigi Fumagalli

iii. Mr James Drake Q.C. (President)

b. WADA:

i. Mr Ross Wenzel, Counsel

ii. Mr Nicolas Zbinden, Counsel

c. ICF:

i. Mr Jorge Ibarrola, Counsel

ii. Mr Yvan Henzer, Counsel

iii. Mr Simon Toulson, Secretary General, ICF

iv. Mr Michel Alarcon, Anti-Doping Manager, ICF

d. The Athlete:

i. The Athlete

ii. Mr Emmanuel Kilchenmann, Counsel

iii. Maria Hertzschuch (interpreter)

e. Witnesses and Experts:

i. Professor Christiane Ayotte

ii. Mr Aaron Walker

iii. Dr Julian Broséus

f. CAS Court Office:

i. Ms Andrea Sherpa-Zimmermann, Counsel

37. At the conclusion of the hearing, the Parties confirmed that they had had a full and fair opportunity to present their respective cases, that their right to be heard had been fully respected, and that they had no objection to the manner in which the proceedings were conducted.

VI. THE PARTIES' SUBMISSIONS AND EVIDENCE

A. WADA's Submissions

38. WADA's submissions may be broken down into four parts: (a) the Russian doping scheme; (b) the evidence relating to the Sample; (c) the provisions of the ICF 2009 ADR and what must be established for an ADRV; and (d) sanctions.

a) The Russian Doping Scheme

39. WADA submits that the specific evidence relating to the Athlete must be understood and assessed in its context – and that the context is the Russian doping scheme. It is said that the Sample taken by RUSADA and analysed by the Moscow Laboratory was part and parcel of the Russian doping scheme and that the negative result recorded in ADAMS for the Athlete is but a singular instance of systemic cheating by and on behalf of the Russian State.

40. For the Russian doping scheme generally WADA adduced the McLaren Reports and relied upon the "key findings" therein and the description in the reports of the counter-detection methodologies known as (i) the "Disappearing Positives Methodology" and (ii) the "Sample Swapping Methodology".

41. The key findings relied upon by WADA as set out in the First McLaren Report are as follows:

> *"Key Findings*
>
> *1. The Moscow Laboratory operated, for the protection of doped Russian athletes, within a State-dictated failsafe system, described in the report as the Disappearing Positive Methodology.*
>
> *2. The Sochi Laboratory operated a unique sample swapping methodology to enable doped Russian athletes to compete at the Games.*
>
> *3. The Ministry of Sport directed, controlled and oversaw the manipulation of athlete's analytical results or sample swapping, with the active participation and assistance of the FSB, CSP, and both Moscow and Sochi Laboratories".*

42. The key findings relied upon in the Second McLaren Report are in the following terms:

> *"1. An institutional conspiracy existed across summer and winter sports athletes who participated with Russian officials within the Ministry of Sport and its infrastructure, such as the RUSADA, CSP and the Moscow Laboratory, along with the FSB for the purposes of manipulating doping controls. The summer and winter sports athletes were not acting individually but within an organised infrastructure as reported on in the 1st Report.*
>
> *2. This systematic and centralised cover up and manipulation of the doping control process evolved and was refined over the course of its use at London 2012 Summer Games, Universiade Games 2013, Moscow IAAF*

World Championships 2013, and the Winter Games in Sochi in 2014. The evolution of the infrastructure was also spawned in response to WADA regulatory changes and surprise interventions.

3. The swapping of Russian athletes' urine samples further confirmed in this 2nd Report as occurring at Sochi, did not stop at the close of the Winter Olympics. The sample swapping technique used at Sochi became a regular monthly practice of the Moscow Laboratory in dealing with elite summer and winter athletes. Further DNA and salt testing confirms the technique, while others relied on DPM.

4. The key findings of the 1st Report remain unchanged. The forensic testing, which is based on immutable facts, is conclusive. The evidence does not depend on verbal testimony to draw a conclusion. Rather, it tests the physical evidence and a conclusion is drawn from those results. The results of the forensic and laboratory analysis initiated by the IP establish that the conspiracy was perpetrated between 2011 and 2015".

43. The McLaren Reports also uncovered and described a number of counter-detection methodologies including the "Disappearing Positives Methodology" and the "Sample Swapping Methodology". As described by World Athletics:

1) Disappearing Positives Methodology

6. The DPM and Sample Swapping Methodology (which are relevant to the present matter) proceeded as follows

6.1. Where the initial screen of a sample revealed an Adverse Analytical Finding ("AAF"), the athlete would be identified and the Russian Ministry of Sport would (through a Liaison Person) decide either to "SAVE" or to "QUARANTINE" the athlete in question.

6.2. The AAF would typically be notified by email from the Moscow Laboratory to one of the liaison persons … who would respond in order to advise whether athlete(s) should be "SAVED" or "QUARANTINED".

6.3. If the athlete was "SAVED", the Moscow Laboratory would report the sample as negative in ADAMS; conversely, if the athlete was to be "QUARANTINED", the analytical bench work would continue and the AAF would be reported in the ordinary manner.

6.4. The DPM was used from late 2011 onwards.

2) Sample Swapping Methodology

6.5. The Sample Swapping Methodology involved the replacing of "dirty" urine with "clean" urine. This necessitated the removing and replacing of the cap on sealed B sample bottles through a technique developed by the FSB. The members of the FSB team in charge of the sample swapping were known as the "magicians",

6.6. The Sample Swapping Methodology was trialled with respect to a limited number of athletes at the 2013 University Games in Kazan and at the IAAF World Championships in Moscow in 2013, rolled out in more systematic fashion at the 2014 Winter Olympic Games in Sochi and continued in operation subsequently with respect to samples stored in the WADA-accredited laboratory in Moscow.

6.7. The Sample Swapping Methodology was facilitated by the establishment and maintenance of a "Clean Urine Bank" at the Moscow Laboratory; the Clean Urine Bank was comprised of unofficial urine samples provided by certain athletes that were analysed/ stored and recorded in schedules in the Moscow laboratory ("Clean Urine Bank Schedules").

6.8. The so-called "magicians" would be called into the Moscow Laboratory on a monthly basis in order to remove the caps of the B samples that needed to be swapped.

7. In the context of this investigation, Prof. McLaren's team retrieved from a whistleblower a significant number of emails exchanged between, and documents created by, the dramatis personae being, in particular, Dr. Rodchenkov (the then Director of the Moscow Laboratory), Dr. Sobolevsky (the then Deputy Director of the Moscow Laboratory) and Liaison Person Velikodniy (the "EDP Evidence").

b) The Evidence in Relation to the Sample

44. WADA relies on the RUSADA doping control form, according to which the Sample was collected out-of-competition from the Athlete on 19 April 2014 in Moscow (with sample code 291940). The Sample was then transferred to the Moscow Laboratory for analysis and, on arrival, was assigned the internal code 4733.

45. On 21 April 2014:

    a. The Moscow Laboratory conducted a number of ITPs including for diuretics. Following this analysis, a raw data file was created and an associated analytical PDF was imported to the 2015 LIMS. At that time, a presumptive adverse analytical finding ("AAF") for furosemide was entered into LIMS on 21 April 2014.

    b. Dr Sobolevsky sent an email to Mr Velikodniy (the liaison person identified by Prof. McLaren) and to Dr Rodchenkov by which Dr Sobolevsky reported *"one more result"*: *"2919440, F, canoe sprint (Persons with Physical Disabilities [PPD], training camp | 6168, RU Krasnodar, collection 2014-04-19, furosemide"*.

46. On 22 April 2014:

    a. The Moscow Laboratory conducted a confirmation procedure on the Sample which confirmed the presence of furosemide with an estimated concentration of 0.2 µg/mL. A raw data file was created and stored in a folder called *"04733 – Furosemide"*. The Moscow Laboratory also entered these results into LIMS 2015.

    b. Mr Velikodniy replied to Dr Sobolevsky as follows: *"Save 2919440 Dupik Aleksandr"*.

    c. Dr Sobolevsky recorded the Sample in ADAMS as negative as follows: *"No Prohibited Substance(s) or Prohibited Method(s), or their Metabolite(s) or Marker(s) on the test menu were detected"*.

47. WADA arranged for both the raw data and the analytical PDF to be reviewed by Prof. Ayotte, the director of the Institut National de la Recherche Scientifique (the National Institute for Scientific Research, or INRS), a WADA-accredited laboratory in Montreal. Prof. Ayotte set out her views in her report dated 8 June 2021:

    a. A presumptive AAF was recorded in LIMS for the presence of furosemide.

    b. The analytical PDF file (d_04733) confirmed the presence of furosemide.

    c. A confirmation procedure was successfully conducted, showing an amount of furosemide estimated at 0.2µg/mL.

    d. The raw files generated from the confirmation procedure support the presence of furosemide.

    e. *"In conclusion, the results entered in the Moscow LIMS version 2015 are supported by the results of the ITP and CP* [confirmation procedure] *of the corresponding pdf and raw files. Urine sample 2919440 contains furosemide, listed in section S5 of the 2014 prohibited list … and should have been reported as an adverse analytical finding (AAF)".*

c) ICF 2009 ADR and What Must be Established for an ADRV

48. The ADRV in issue in this appeal is the allegation by WADA that the Athlete has violated Article 2.2 of the ICF 2009 ADR which provides (inter alia) that an ADRV will be committed where there is use or attempted use by an athlete of a prohibited substance (WADA does not seek to show that there has been a violation of any other provision of Article 2.)

49. WADA submits that, under this rule, "use" of a prohibited substance may be established *"by any reliable means, including but not limited to admissions, evidence of third parties, witness statements, documentary evidence, conclusions drawn from longitudinal profiling … and other analytical information"* and that the rule expressly provides that it is not necessary that intent, fault, negligence or knowing use on the part of the athlete be demonstrated in order to establish an ADVR.

50. WADA's overarching submission is that the evidence *"clearly shows"* that the Athlete has used a prohibited substance and has, therefore, committed violations of Article 2.2 of the ICF 2009 ADR, and that the decision on the part of the ICF not to move forward with the matter was manifestly wrong.

d) Sanctions

51. In relation to sanctions, WADA submits that Article 10 of the ICF 2009 ADR provides that the period of ineligibility for an ADRV is two years unless the conditions set forth in Articles 10.4 and 10.5 for elimination or reduction or those set forth in Article 10.6 for aggravation are met.

52. It is submitted by WADA that the Athlete *"was part of the most sophisticated doping scheme in the history of sport"*. She was *"protected, in the sense that following a SAVE email, a clear positive was reported as negative in ADAMS"*. All this warrants, so it is submitted, an aggravated sanction under Article 10.9 of the ICF 2009 ADR of up to four years (commencing from the date of the award).

53. WADA also submits that, pursuant to Article 10.8 of the ICF 2009 ADR, the Athlete's results from the date of the first violation on 19 April 2014 through to the commencement of the period of ineligibility *"must be disqualified"*. WADA submits that established CAS jurisprudence is to the effect that it is not appropriate to maintain results on the basis of fairness *"where the doping is severe, repeated and sophisticated"* as it is in the matter at hand: CAS 2013/A/3274; CAS 2007/A/1362&1393; and CAS 2015/A/4005-4010.

e) Relief

54. By its appeal, WADA seeks the following relief:

> *"45. WADA respectfully requests the Panel to rule as follows:*
>
> *1. The appeal of WADA is admissible.*
>
> *2. The decision rendered by the ICF on 11 March 2021 in the matter of Aleksandra Dupik is set aside.*
>
> ***a) Principally***
>
> *3. Aleksandra Dupik is found to have committed an anti-doping rule violation pursuant to art. 2.2 ICF ADR.*
>
> *4. Aleksandra Dupik is sanctioned with a period of ineligibility from two to four years starting on the date on which the CAS award enters into force.*
>
> *5. All competitive results obtained by Aleksandra Dupik from and including 19 April 2014 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).*
>
> ***b) In the alternative***
>
> *6. The matter is sent back to the ICF.*
>
> *7. The ICF is ordered to notify Aleksandra Dupik of potential anti-doping rule violations under art. 2.2 of the ICF ADR pursuant to art. 5.3.2 of the International Standard for Results Management within 30 days of the date of the CAS award.*

c) In all the circumstances

8. The arbitration costs, if any, shall be borne by the ICF.

9. WADA is granted a significant contribution to its legal and other costs".

B. The ICF's Submissions

55. The ICF does not formally oppose the appeal brought by WADA. The ICF does, however, submit that it robustly reviewed the evidence provided by WADA in respect of the Athlete and formed the view, reasonable in all the circumstances, that there was insufficient evidence of an ADVR on the part of the Athlete so that it, the ICF, was not in a position to initiate disciplinary proceedings.

56. For the ICF, it is submitted that an ADRV must be established by *"a reliable means"* and that, here, the evidence that was available was not sufficiently reliable. The ICF submissions may be summarised in the following way.

a. The ICF acknowledges the Russian doping scheme *"and fully supports the sanctions against Russia".*

b. The ICF is *"committed to punish athletes when it can be established that anti-doping rules have been violated in an individual case".*

c. The strict anti-doping rules must be strictly followed so as ensure that athletes are not deprived of their rights and subjected to arbitrary decisions.

d. There is insufficient evidence to show that the analytical process conducted with respect to the Athlete in this case complied with the WADA International Standard for Laboratories 2012 (the "ISL") and WADA Technical Document TD2009LCOC.

e. The ISL sets out in some detail the mandatory requirements to be followed by a WADA-accredited laboratory in the conduct of its testing. The stated *"main purpose"* of the ISL is *"to ensure laboratory production of valid test results and evidentiary data and to achieve uniform and harmonized results and reporting from all* [WADA-accredited] *laboratories".* The ISL sets out *"the requirements for Laboratories that wish to demonstrate system, and are able to produce forensically valid results".* The ISL includes requirements in relation to the handling of samples, to the conduct of the initial testing procedures, to the conduct of the confirmation procedure for both Sample A and Sample B, and for the review and management of analytical results.

f. The WADA Technical Document TD2009LCOC is dated 1 January 2009 and is entitled "Laboratory Internal Chain of Custody". It provides for the maintenance of '*chain of custody'* documentation in relation to all laboratory samples and every aliquot prepared for an analytical testing procedure. For samples, the laboratory shall record

"all custody from receipt in the laboratory through storage and sampling to disposal". For aliquots, the laboratory *"shall record all custody from preparation through analysis"*

g. In the ICF's submission, *"When the only evidence of a possible ADRV is a sample analysis, it should in principle be demonstrated that the standards implemented in the ISL have been abided by"*.

h. The Athlete was not given the opportunity *"to enforce fundamental rights"* such as verifying the analysis (by, amongst other things, checking the laboratory documentation, part of a 'confirmation' procedure) and/or calling for the B sample analysis. The Athlete was not therefore able *"to double-check that the laboratory conducted analyses that were fully compliant with ISL"* consistent with ICF 2009 ADR (see, by way of example, Article 3.2.1).

i. In the ICF Decision, the ICF took the reasonable view that it was not appropriate to sanction an athlete based on analytical data showing the presence of a prohibited substance when it was not possible to check that the analysis undertaken complied with WADA standards including the ISL. *"The core issue in the present case is that the analysis conducted by the Moscow Laboratory cannot be verified because no proper documentation package was ever issued"*. In this respect, it is to be noted that "Laboratory Documentation Package" is a defined term in WADA terminology and refers to a package of specific documentation that is to be provided by a laboratory on request that supports the laboratory's analysis of a given sample (see, e.g., The WADA Technical Document – TD2021LDOC "Laboratory Documentation Package").

j. The safeguards in favour of athletes built into the ICF ADR must be fulfilled irrespective whether the alleged ADRV is pursuant to Article 2.1 (presence of a Prohibited Substance) or Article 2.2 (use of a Prohibited Substance) of the ICF 2009 ADR. This means that when the only evidence of an alleged ADRV is a sample analysis, it is necessary to show that the steps and standards set forth in the ISL have been met.

k. The ICF accepts that use or attempted use of a prohibited substance in violation of Article 2.2 may be established by *"any reliable means"*, which is in contrast with the requirements of Article 2.1.

l. However, where, as here, there is no full documentation package accompanying the (positive) analysis and no B sample then the analysis cannot be regarded as a reliable means of evidence of an ADRV. This is consistent with CAS jurisprudence to the effect that *"a defective laboratory analysis which is not deemed as sufficient evidence of a breach of Article 2.1 of the WADA Code cannot be 'requalified' as … valid evidence of 'use' within the meaning of Article 2.2 of the WADA Code"*. CAS panels have regularly ruled in favour of athletes in circumstances where there has been non-compliance with the ISL, even *"in cases where there was little doubt that athletes had used a prescribed substance"* (see e.g. CAS 2009/A/1752 and 1753 and TAS 2006/A/1119). The same is true where the right of an athlete with respect to the B sample has been breached (see CAS 2010/A/2161; 2008/A/1607). In these circumstances, it is not open to the anti-doping authority to

rely on the analytical results of the A sample to found a claim under Article 2.2 of use of a prohibited substance.

m. The LIMS data *"are not a fully reliable means"*. In addition to these matters of principle, the ICF also submits that the LIMS data available in this case are not *"fully reliable means"*. There is no laboratory documentation package in respect of the Samples and, without these documents, *"it is very complicated, if possible at all, to know how these samples were analysed"*. CAS case law makes it clear that *"when the testing process cannot be verified, the analytical data should not be used against an athlete"*, per CAS 2009/A/1752.

n. Without the laboratory documentation package, there is no "transparency" and it is not possible to verify the results. *"If an athlete is exonerated when it appears, after examination of the laboratory documentation package, that the laboratory did not comply with the ISL, it should be logical that an athlete should not be sanctioned when no documentation package even exists. When an analysis cannot be verified, how could it serve as proper evidence that an ADRV has been committed?"*

o. Accordingly:

i. As a matter of principle, it is not open to an anti-doping authority to circumvent the safeguards in the ICF ADR 2009 / WADA Code designed to protect athletes against possible errors in the laboratory by invoking Article 2.2.

ii. If the only evidence of use is the presence of a prohibited substance in a (blood or urine) sample, then the alleged violation should be determined according to the requirements of Article 2.1 and not under Article 2.2.

iii. Alternatively, Article 2.2 should not be applied in this case because the LIMS data *"are not totally reliable"*.

57. The ICF did not address sanctions.

58. As noted, the ICF does not (formally) oppose the appeal brought by WADA and seeks the following relief as set forth in its Answer:

"V. PRAYERS FOR RELIEF

The International Canoe Federation applies for the Court of Arbitration for Sport to rule as follows:

I. The International Canoe Federation defers to justice with regard to the appeal filed by the World Anti-Doping Agency.

II. No order on costs shall be imposed on the International Canoe Federation".

C. The Athlete's Submissions

59. The Athlete submits that the appeal should be dismissed and the ICF Decision should be confirmed.

a) General Submissions

60. The Athlete makes a number of overarching submissions which the Panel summarises in the following way.

a. The Athlete is an elite athlete, and as such has been received *"an appropriate"* education in antidoping matters and is *"perfectly aware"* of her responsibility to prevent any prohibited substance from entering her body.

b. She has been tested dozens of times throughout her career and has never returned a positive test. She has never been *"convicted"* of an ADRV.

c. WADA itself, in a communication issued on 25 February 2017 in concert with meetings held in Lausanne between WADA and various international federations (and others), understood that the objective and remit of Prof. McLaren was to investigate whether there was an institutionalised and systemic process in Russia to manipulate doping control and reporting. Prof. McLaren was not concerned to investigate individual violations.

d. In the same communication, WADA squarely accepted that, because of the nature of the evidence that was available and not available to Prof. McLaren, *"this means that there simply may not be sufficient evidence required to sanction, with potential ADRVs, some of the individual athletes identified in the Report. The anti-doping community must be clear on what it can and cannot achieve based on the evidence that Professor Richard McLaren was able to uncover"*.

e. It is vital, therefore, that each individual case be assessed thoroughly based on the evidence proffered in relation to the individual athlete.

f. An athlete's right to be heard is a fundamental right. That right includes the right to propose evidential measures and it, in turn, includes the right in this case to call for the cross-examination of Prof. McLaren and Dr Rodchenkov.

g. WADA bears the burden of proof pursuant to Article 3.1 of the ICF 2009 ADR.

h. Article 3.1 also provides that WADA must be able to show that there has been an antidoping violation *"to the comfortable satisfaction"* of the Panel. This standard is greater than the balance of probabilities but less than beyond reasonable doubt: CAS 2004/A/607, para 34.

i. However, given the seriousness of the allegations in this matter, the applicable *"must come very close to the proof beyond reasonable doubt"*.

j. WADA cannot satisfy the requirements of a violation of Article 2.1 of the ICF 2009 ADR. There is no A sample because the sample here is the *"pre-departure sample"* or, as described in the ISL, the *"screen testing"* or *"screening"*. There is no B sample and no waiver on the part of the Athlete as to that sample. Accordingly, *"there is therefore*

absolutely no scientific evidence that the three samples … contained any Prohibited Substance".

b) Submissions in relation to Article 2.2 of the ICF 2009 ADR

61. In relation to the allegation on the part of WADA that there has been a violation of Article 2.2 of the ICF 2009 ADR, WADA has *"failed to demonstrate that there is a* [sic] *reliable evidence demonstrating that* [the Athlete] *violated Article 2.2 ICF ADR".*

62. In this respect, the Athlete's submissions fall under the following headings:

    a. the contextual evidence; and

    b. the Disappearing Positives Methodology described by Prof. McLaren.

c) Contextual Evidence

63. The evidence adduced by WADA in respect of the Athlete is not direct but circumstantial evidence; for example, the McLaren Reports and the analysis of the LIMS data are not direct evidence of use by the Athlete of a prohibited substance but circumstantial evidence of the Athlete's conduct. As such, *"each and every piece of evidence provided by WADA must be scrutinized and assessed, in order to demonstrate whether it actually proves what it is supposed to"*. While such evidence is admissible, it is for the Panel to determine what weight such evidence should be accorded in the context of the case.

64. In this respect, the Athlete submits the decision in CAS 2017/A/5379 established *"very clear principles about the comfortable satisfaction that must be reached to have an ADRV"*, as set forth in the headnote of that award:

    "1. The comfortable satisfaction standard is well-known in CAS practice, as it has been the normal CAS standard in many anti-doping cases even prior to the World Anti-Doping Code (WADC). The test of comfortable satisfaction must take into account the circumstances of the case. Those circumstances include the paramount importance of fighting corruption of any kind in sport and also considering the nature and restricted powers of the investigation authorities of the governing bodies of sport as compared to national formal interrogation authorities. The gravity of the particular alleged wrongdoing is relevant to the application of the comfortable satisfaction standard in any given case. It is important to be clear, however, that the standard of proof itself is not a variable one. The standard remains constant, but inherent within that immutable standard is a requirement that the more serious the allegation, the more cogent the supporting evidence must be in order for the allegation to be found proven.

    2. A sports body is not a national or international law enforcement agency. Its investigatory powers are substantially more limited than the powers available to such bodies. Since the sports body cannot compel the provision of documents or testimony, it must place greater reliance on the consensual provision of information and evidence, and on evidence that is already in the public domain. The CAS panel's assessment of the evidence must respect those limitations. In particular, it must not be premised on unrealistic expectations concerning the evidence that the sports body is able to obtain from reluctant or evasive witnesses and other sources. In view of the nature of the alleged doping scheme and the sports body's limited investigatory powers, the sports body may properly invite the CAS panel to draw inferences from the established facts that seek to fill in gaps in the direct

evidence. The CAS panel may accede to that invitation where it considers that the established facts reasonably support the drawing of the inferences. So long as the CAS panel is comfortably satisfied about the underlying factual basis for an inference that an athlete has committed a particular anti-doping rule violation (ADRV), it may conclude that the sports body has established an ADRV notwithstanding that it is not possible to reach that conclusion by direct evidence alone. At the same time, however, if the allegations asserted against the athlete are of the utmost seriousness, i.e. knowingly participating in a corrupt conspiracy of unprecedented magnitude and sophistication, it is incumbent on the sports body to adduce particularly cogent evidence of the athlete's deliberate personal involvement in that wrongdoing. In particular, it is insufficient for the sports body merely to establish the existence of an overarching doping scheme to the comfortable satisfaction of the CAS panel. Instead, the sports body must go further and establish, in each individual case, that the individual athlete knowingly engaged in particular conduct that involved the commission of a specific and identifiable ADRV. In other words, the CAS panel must be comfortably satisfied that the athlete personally committed a specific violation of a specific provision of the WADC.

3. Article 3.2 WADC (in the present case the 2009 version) establishes that all ADRVs except those involving the actual presence of a prohibited substance can be proven by "any reliable means" including, but not limited to, witness testimony and documentary. In addition, an ADRV under Article 2.2 WADC in the form of use or attempted use of a prohibited substance or prohibited method, may be established by reference to "other analytical information which does not otherwise satisfy all the requirements to establish" an ADRV based on presence of a prohibited substance. This includes any admissions by the athlete, any "credible testimony" by third parties, and any "reliable" documentary evidence or scientific evidence.

4. Even admitting, arguendo, that a general doping and sample-swapping scheme existed, if the participation of an athlete in any of the various features of the scheme has not been proven, a CAS panel cannot be comfortably satisfied that an inference in favour of the athlete's use of a prohibited substance can be made.

5. The principle of strict liability does not apply in an identical fashion where an athlete is alleged to have committed an act or omission that contributed to the substitution of the athlete's urine by another person. Were it otherwise, then any athlete who provided a urine sample as part of normal doping control procedures would automatically commit an ADRV if a third party who is entirely unconnected with the athlete, and in respect of whom the athlete has no knowledge or control, later substitutes the content of the athlete's sample. Consequently, logic and fairness both dictate that an athlete can only be held liable under Article 2.2 WADC for the substitution of his/her urine by another person if (a) the athlete has committed some act or omission that facilitates that substitution; and (b) s/he has done so with actual or constructive knowledge of the likelihood of that substitution occurring.

6. In order for a CAS panel to be comfortably satisfied that an athlete has committed an ADRV of use of the prohibited method of urine substitution, it is insufficient merely to establish the existence of a general sample-swapping scheme; rather, the panel must be comfortably satisfied that the athlete was personally and knowingly implicated in particular acts that formed part of, and facilitated the commission of, the substitution of his urine within that scheme. The probative value of circumstantial evidence is insufficient to overcome the absence of direct evidence that the athlete committed an ADRV of use of a prohibited method.

7. Article 2.5 WADC provides that "tampering or attempted tampering with any part of doping control" constitutes an ADRV. The Comment to Article 2.5 WADC explains that this article prohibits conduct which subverts the Doping Control process but which would not otherwise be included in the definition of Prohibited Methods. As urine substitution is a prohibited method under Article 2.2 WADC in connection with M2.1 of the Prohibited List, Article 2.5 WADC covers types of tampering other than urine substitution

and of a few other methods defined under section M of the Prohibited List. In general terms, it is a misconception of the relationship between Article 2.2 WADC and Article 2.5 WADC to conclude that, if the requirements of Article 2.2 WADC are met, the requirements of Article 2.5 WADC automatically are met too. To the contrary, if the elements of Article 2.2 concerning a prohibited method are fulfilled, recourse to Article 2.5 WADC is excluded.

8. Article 2.8 WADC provides that the administration to any athlete of any prohibited method or prohibited substance shall constitute an ADRV. This therefore covers the administration of a prohibited method to an athlete by a third party (which can be another athlete). The administration of a prohibited method or substance by an athlete to himself constitutes a use of a prohibited method or substance, which would fall under Article 2.2 WADC, rather than under Article 2.8.

9. Mere participation of an athlete in a general doping and sample-swapping scheme in his/her own interest is not sufficient to constitute assistance and encouragement in an ADRV committed by other athletes, even through the involvement of coaches, team doctors, etc. If there is no sufficiently cogent and probative evidence to enable a CAS panel to comfortably conclude that the athlete assisted, encouraged, aided, abetted, covered up or was otherwise complicit in any ADRV under Article 2.2 to Article 2.7 WADC committed by other athletes, the athlete cannot have committed an ADRV under Article 2.8 of the WADC".

65. It is submitted by the Athlete that the Panel must bear this guidance well in mind when considering the circumstantial evidence surrounding the Athlete.

d) Disappearing Positives Methodology

66. In this case, WADA adduces evidence in relation to the Sample, as noted above, which is said to be an example of the Disappearing Positives Methodology described by Prof. McLaren. The Athlete makes, in essence, two submissions about this aspect of the case.

67. It is first said that there is no reliable scientific evidence before the Panel to show that the Sample was, as a matter of fact, positive. It is submitted that *"there is absolutely no scientific evidence demonstrating that the* [Samples] *were positive to any Prohibited Substance"* and that even if there were a *"scientifically based positive result of the screening analysis, quod non, this could not be used as a circumstantial evidence to demonstrate the Use of a Prohibited Substance of Article 2.2 ICF ADR".*

68. The Athlete's second submission on this aspect is that there are *"legitimate doubts"* about the emails relied upon by WADA in relation to the Sample.

    a. As to the email dated 21 April 2014 allegedly sent by the Moscow Laboratory to Mr Velikodniy, there are two problems: (a) it refers to screening analysis but attaches no scientific evidence such as documents from the Moscow Laboratory; and (b) the name of the sender is concealed in the document made available by Prof. McLaren in the EDP, such that the Athlete *"is therefore left without any possibility to provide counter-evidence regarding this email"* so that, in the end, the email the email *"cannot therefore be used against the Athlete".*

    b. As to the email dated 22 April 2014 allegedly sent by Mr Velikodniy in reply, *"there is no further evidence that* [Mr Velikodniy] *was actually the author of this email".*

c. It is *"extraordinary"* that Prof McLaren did not seek to interview those people *"allegedly involved"* in the DPM, which *"necessarily raises questions regarding the real identity of the persons who sent these emails, and possibility on the authenticity of these emails"*.

d. Even if the emails are found to be authentic, and were sent by the individuals concerned, all that the emails show is that these particular individuals attempted to conceal an alleged positive screening analysis of the Athlete's sample, but does not demonstrate a use of a prohibited substance by the Athlete in violation of Article 2.2 of the ICF 2009 ADR.

69. In sum therefore:

a. The emails do not prove that the screening analysis in respect of the Sample was positive.

b. Even if that were so, this cannot be used as circumstantial evidence that the Athlete committed a violation of Article 2.2.

c. Even if one accepts the authenticity of the emails, the most that they show is a systematic attempt to conceal what could potentially become positive test results.

d. The fact that Dr Rodchenkov is not available to be cross-examined and that Prof McLaren failed to interview the other individuals said to be involved *"seriously undermines the credibility, if not entirely discredit, the evidence provided by the WADA"*.

e. According to CAS 2017/A/5379, logic and fairness dictate that an athlete can only be held liable under Article 2.2 *"for the substitution of his/her urine by another person if (a) The athlete has committed some act or omission facilitates that substitution; and (b) s/he has done so with actual or constructive knowledge of the likelihood of the substitution occurring"*. In this case, neither (a) nor (b) has been met.

e) Sanctions

70. The Athlete did not make submissions on sanctions.

f) Relief

71. By her Answer, the Athlete seeks the following relief:

*"**VI. PRAYERS FOR RELIEF***

In view of all the above considerations, Ms Aleksandra Dupik respectfully asks the CAS to rule as follows:

I. The appeal of WADA is dismissed.

II. The decision rendered by the ICF on 11 March 2021 in the matter of Aleksandra Dupik is confirmed.

III. Ms Aleksandra Dupik has not committed any Anti-Doping Rule Violation.

IV. Considering the circumstances of the case, the WADA is condemned to pay an amount of CHF

10'000 to Ms Aleksandra Dupik, as a contribution for his expenses in relation to the present proceedings".

VII. JURISDICTION OF CAS

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

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Player has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

73. In these proceedings, as the alleged violations took place in 2014, the ICF 2009 ADR are applicable to the merits of the respective alleged violations while the ICF 2021 ADR applies to the procedural aspects of the case, including, in particular, the jurisdiction of CAS.

74. Article 13 of the ICF 2021 ADR provides in relevant part as follows:

a. Article 13.1 provides that decisions taken by the ICF may be appealed in accordance with Article 13.

b. Article 13.1.1 provides that the scope of the review on appeal is not limited but *"includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker. Any party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing so long as they arise from the same cause of action or same general facts or circumstances raised or addressed in the first instance hearing".*

c. Article 13.1.2 provides that, in making its decision, the CAS Panel *"shall not give deference to the discretion exercised by the body whose decision is being appealed".*

d. Article 13.1.1 provides that *"*[w]*here WADA has a right to appeal under Article 13 and no other party has appealed a final decision within the ICF's process, WADA may appeal such decision directly to CAS without having to exhaust other remedies in the ICF's process".*

e. Article of 13.2 provides, in terms, that a decision by the ICF not to bring forward an adverse analytical finding as an anti-doping rule violation, or a decision not to go forward with an anti-doping rule violation after an investigation in accordance with the International Standard for Results Management *"may be appealed exclusively as provided in this Article 13.2".*

f. Article 13.2.1 provides that, in cases involving international-level athletes, the decision may be appealed exclusively to CAS.

75. It is common ground that the Athlete is an international-level athlete for the purposes of this article and that it is open to WADA to bring this appeal (exclusively) to CAS and that CAS has jurisdiction to hear this appeal, as is confirmed by the Parties in the Order of Procedure.

76. The Panel, therefore, confirms that CAS has jurisdiction to decide this appeal.

VIII. ADMISSIBILITY

77. Article R49 of the CAS Code is headed "Time limit for Appeal" and provides as follows:

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

78. Article 13.6.1 of the 2021 ICF ADR sets out the time limits for the filing of appeals. It provides (in relevant part) that the deadline for WADA to appeal was *"Twenty-one (21) days after the last day on which any other party having a right to appeal could have appealed, or (b) Twenty-one (21) days after WADA's receipt of the complete file relating to the decision".*

79. The ICF Decision was rendered on 11 March 2021. WADA's Statement of Appeal was filed with CAS on 1 April 2021, within the provided 21-day period.

80. This appeal is therefore admissible, as is common ground between the Parties (as confirmed in the signed Order of Procedure).

IX. APPLICABLE LAW

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

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

82. It is common ground that: (a) the regulations applicable to the substantive issues in these proceedings are the ICF ADR that were in place at the time of the alleged ADRVs, namely the ICF 2009 ADR; (b) the regulations applicable to the procedural issues in these proceedings are the ICF 2021 ADR; and (c) the laws of Switzerland are to be applied subsidiarily, it being the country in which the ICF is domiciled.

83. The Panel shall therefore decide this dispute according to these regulations and, subsidiarily, according to the law of Switzerland.

X. THE MERITS

84. The Panel notes that while it has carefully considered the entirety of the submissions made and the evidence adduced by the Parties it only relies below on those matters which it deems necessary to decide the dispute. This section of the award is divided into (a) Liability and (b) Sanctions.

A. Liability

85. It is necessary at the outset to define an ADRV under Article 2.2 of ICF 2009 ADR and the requirements for the burden, standard and means of proof.

a) The Definition of an ADRV pursuant to ICF 2009 ADR Article 2.2

86. The allegation here is that there has been a violation of Article 2.2 of the ICF 2009 ADR, which article is in the following terms:

> "**ARTICLE 2 ANTI-DOPING RULE VIOLATIONS**
>
> *Athletes* and other *Persons* shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.
>
> The following constitute anti-doping rule violations:
>
> *[Comment to Article 2: The purpose of Article 2 is to specify the circumstances and conduct which constitute violations of anti-doping rules. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules has been violated.]*
>
> ***…***
>
> ***2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method***
>
> *[Comment to Article 2.2: As noted in Article 3 (Proof of Doping), it has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. Unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the ICF provides a satisfactory explanation for the lack of confirmation in the other Sample.]*
>
> ***2.2.1*** *It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be*

demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

2.2.2 *The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.*

[Comment to Article 2.2.2: Demonstrating the "Attempted Use" of a Prohibited Substance requires proof of intent on the Athlete's part. The fact that intent may be required to prove this particular anti-doping rule violation does not undermine the strict liability principle established for violations of Article 2.1 and violations of Article 2.2 in respect of Use of a Prohibited Substance or Prohibited Method. An Athlete's "Use" of a Prohibited Substance constitutes an anti-doping rule violation unless such substance is not prohibited Out-of-Competition and the Athlete's Use takes place Out-of-Competition. (However, the presence of a Prohibited Substance or its Metabolites or Markers in a Sample collected In-Competition will be a violation of Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers) regardless of when that substance might have been administered)].

87. Article 2.2 the ICF 2009 ADR thus provides that the *"Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method"* shall constitute an ADVR under Article 2. The capitalised terms are defined terms in the ICF 2009 ADR. For present purposes, both Attempted Use and Prohibited Method may be set to one aside as there is no allegation against the Athlete in either respect.

a. *"Use. The utilization, application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance … ".*

b. *"Athlete. Any Person who participates in sport at the international level (as defined by each International Federation) … ".*

c. *"Prohibited Substance. Any substance so described on the Prohibited List (which is further defined as "The List identifying the Prohibited Substances …")".*

88. It is made clear by Article 2.2.1 of the ICF 2009 ADR that, because it is every athlete's duty to ensure that no prohibited substance enters his or her body, it is not necessary to show that any use on the part of an athlete was intentional or knowing, or that an athlete was at fault in some way or that he or she failed to take due care (i.e., was negligent). It has been said that *"the rationale behind Article 2.2 is that prohibited substances and prohibited methods … are forbidden as such independent of intent, fault, or negligence"* (CAS 2017/A/5379 at [732]).

b) Burden, Standard and Means of Proof

89. The ICF 2009 ADR also make express provision in relation to the burden, standard and the methods of establishing the facts in respect of an alleged violation of Article 2.2.

Burden and Standard of Proof

"ARTICLE 3 PROOF OF DOPING

3.1 Burdens and Standards of Proof

The ICF and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the ICF or its National Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Articles 10.4 and 10.6, where the Athlete must satisfy a higher burden of proof.

[Comment to Article 3.1: This standard of proof required to be met by the ICF or its National Federation is comparable to the standard which is applied in most countries to cases involving professional misconduct. It has also been widely applied by courts and hearing panels in doping cases. See, for example, the CAS decision in N., J., Y., W. v. FINA, CAS 98/208, 22 December 1998]".

90. As is made clear therefore by Article 3 the ICF 2009 ADR, the burden is on (here) WADA and the standard of proof is whether WADA has established an anti-doping rule violation to the comfortable satisfaction of this Panel bearing in mind the seriousness of the allegations. As is noted, this standard of proof is greater than a mere balance of probability, but less than proof beyond a reasonable doubt. The Panel accepts the submission on the part of the Athlete that *"the more serious the allegation, the more cogent the supporting evidence must be in order for the allegation to be found proven"* per CAS 2017/A/5379. Having said that, it is important to bear in mind that, contrary to what is often asserted, the standard itself does not change; it is the required cogency of the evidence that changes on the basis that the more serious the allegations (a) the less likely that the alleged fact or event has occurred and (b) the more serious the consequences. The standard of proof, however, remains to the comfortable satisfaction of the Panel bearing in mind the seriousness of the allegations (see, e.g., CAS 2017/A/5422; CAS 2014/A/3630).

91. There is no uncertainty as to the import of this rule and the Panel respectfully adopts what was said by the Sole Arbitrator in CAS/2020/O/6759 this respect as an accurate account of the law:

55. The CAS jurisprudence has clearly shaped the comfortable satisfaction standard as being lower than the criminal standard of beyond reasonable doubt but higher than other civil standards such as the balance of probabilities. Indeed, "the "comfortable satisfaction" standard of proof has been developed by the CAS jurisprudence (i.e. CAS 2009/A/1920, CAS 2013/A/3258, CAS 2010/A/2267, CAS 2010/A/2172) which has defined it by comparison, declaring that it is greater than a mere balance of probability but less than proof beyond a reasonable doubt. In particular, the CAS jurisprudence has clearly established that to reach this comfortable satisfaction, the Panel should have in mind "the seriousness of allegation which is made" (i.e. CAS 2005/A/908, CAS 2009/1920). It follows from the above that this

standard of proof is then a kind of sliding scale, based on the allegations at stake: the more serious the allegation and its consequences, the higher certainty (level of proof) the Panel would require to be "comfortably satisfied" (CAS 2014/A/3625, para. 132).

56. Notwithstanding the foregoing, it shall be noted that this standard of proof "does not itself change depending on the seriousness of the (purely disciplinary) charges. Rather the more serious the charge, the more cogent the evidence must be in support" (CAS 2014/A/3630, para. 115).

92. It should be borne in mind, however, that the standard itself does not change; it is the required cogency of the evidence that changes on the basis that the more serious the allegations (a) the less likely that the alleged fact or event has occurred and (b) the more serious the consequences. The standard of proof, however, remains to the comfortable satisfaction of the Panel bearing in mind the seriousness of the allegations (see, e.g., CAS 2014/A/3630).

c) Methods of Proof

93. Both Article 2.2 (by its comment) and Article 3 the ICF 2009 ADR speak to the methods of proving facts. As a general rule, facts relating to ADRVs may (i.e., it is permissible) be established by *"any reliable means"*.

94. The comment to Article 2.2 the ICF 2009 ADR (see above) addresses in terms the permissible means by which a violation of Article 2.2 may be established. As is there said, it has always been the case that a violation of Article 2.2 may be established *"by any reliable means"*. The comment goes on to give examples of "reliable means": admissions on the part of the athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information. These are examples and are not to be taken as an exhaustive list. As to the last mentioned, it is made clear in the comment that use may be established based upon reliable analytical data from the analysis of an A sample (without confirmation from an analysis of a B sample) or from the analysis of a B sample alone where a satisfactory explanation is provided for the lack of confirmation in the other sample.

95. Article 3 the ICF 2009 ADR is in much the same terms. Article 3, set forth below, also provides that a violation may be established by *"any reliable means"* and likewise provides examples of what are to be regarded as "reliable means". Once again, these are but examples and are not to be taken as an exhaustive list.

"3.2 Methods of Establishing Facts and Presumptions

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

[Comment to Article 3.2: For example, the ICF or its National Federation may establish an anti-doping rule violation under Article 2.2 (Use of a Prohibited Substance or Prohibited Method) based on the Athlete's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Athlete's blood or urine Samples.]

3.2.1 WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding.

The ICF the Athlete or other Person rebuts the preceding presumption by showing that a departure from the International Standard occurred which could reasonably have caused the Adverse Analytical Finding, then the ICF or its National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

[Comment to Article 3.2.1: The burden is on the Athlete or other Person to establish, by a balance of probability, a departure from the International Standard that could reasonably have caused the Adverse Analytical Finding. If the Athlete or other Person does so, the burden shifts to the ICF or its National Federation to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical Finding.] …".

96. This language in relation to "reliable means" of proof was explained in the following way in CAS 2005/A/884:

"It is important to note that this rule gives greater leeway to USADA and other anti-doping agencies to prove violations, so long as they can comfortably satisfy a tribunal that the means of proof is reliable. As a result, it is not necessary that a violation be proven by a scientific test itself. Instead, as some cases have found, a violation may be proved through admissions, testimony of witnesses, or other documentation evidencing a violation.

As a result, it is not even necessary that a violation be proven by a scientific test itself. Instead, as some cases have found, a violation may be proved through admissions, testimony of witnesses, or other documentation evidencing a violation. For instance, in CAS 2004/O/645 and in CAS 2004/O/649, the CAS Panels held:

"The fact that the Panel does not consider it necessary in the circumstances to analyse and comment on the mass of other evidence against the Athlete, however, is not to be taken as an indication that it considers that such other evidence could not demonstrate that the Respondent is guilty of doping. Doping offences can be proved by a variety of means; and this is nowhere more true than in "non-analytical positive" cases such as the present".

97. It is important to understand what this rule means. It is not, as has often been said, a requirement that the *evidence* adduced be "reliable evidence" (whatever that might mean). Rather, it is a rule as to the method or manner or form in which the facts that are necessary to sustain an allegation of an ADRV may be established -- and the rule provides (in a non-exhaustive list) a number of examples of means of establishing facts which are characterised as "reliable". In the great majority of cases the parties will deploy only reliable means in that, in the great majority of cases, the parties will seek to establish the facts by one or other of reliable means set forth in the rule itself and only by those means. In any event, that is certainly the position here as each of the Parties has sought to establish the facts related to the alleged ADRV in this matter by (a) evidence of third persons, (b) witness statements, (c) experts reports, and (d) documentary evidence.

98. It follows that each of the means by which the Parties have sought to establish facts in relation to the alleged ADRV is a "reliable" means for the purposes of the rule.

99. In this respect it is necessary to address an argument put by the Respondents that, as a matter of principle, it is not open to an anti-doping authority to deploy Article 2.2 the ICF 2009 ADR as a means to circumvent the safeguards within the ICF 2009 ADR designed to protect athletes against possible errors in the laboratory. It is said that if the only evidence of use is the presence of a prohibited substance in a (blood or urine) sample, then the alleged violation must be determined according to Article 2.1 (presence) and not under Article 2.2 (use).

100. In the Panel's view, as deployed in these proceedings this argument is misconceived for the following reasons.

a. First, it is not the case here that the only evidence of violation is a sample analysis. As just discussed, it is open to WADA under Article 2.2 the ICF 2009 ADR to establish the facts related to the alleged ADRV by any reliable means and WADA has done just that.

b. Second, as the comments to Articles 2.2 and 3.2 the ICF 2009 ADR make clear (see above) in the explanation of the methods by which a "use" violation may be proved, such "reliable means" include *"analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the ICF provides a satisfactory explanation for the lack of confirmation in the other Sample".*

c. The reference to *"the requirements to establish "Presence" of a Prohibited Substance under Article 2.1".* is a reference to the requirements for "sufficient proof" under Article 2.1 the ICF 2009 ADR, namely:

   i. that the analysis of the athlete's A sample shows the presence of a prohibited substance (etc) in the sample and the athlete waives analysis of the B sample and the B sample is not analysed; or

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

d. It follows therefore that a sample analysis that does not meet these requirements may nevertheless be relied upon as evidence of "use" under Article 2.2 the ICF 2009 ADR.

e. This is corroborated by the provisions within the ICF 2009 ADR relating to results management. In particular, Article 7.1.7 provides as follows:

   "7.1.7 If the B Sample proves negative, then (unless the ICF takes the case forward as an anti-doping rule violation under Article 2.2) the entire test shall be considered negative and the Athlete, his National Federation, and the ICF shall be so informed".

f. This rule makes it plain that, where an athlete's B sample has been analysed and a negative result returned then the entire test shall be considered negative – subject to the exception where the ICF takes the case forward as a "use" ADVR under Article 2.2 the ICF 2009 ADR. This expressly envisages, therefore, that analyses that are not available to be deployed in support of an Article 2.1 the ICF 2009 ADR "presence" violation may still be relied upon by the ICF with respect to an alleged "use" violation under Article 2.2 the ICF 2009 ADR.

g. The authorities relied upon by the ICF to support this argument relate not to Article 2.2 but to Article 2.1 violations (see e.g. CAS 2009/A/1752). Properly understood, the admonitions in those cases for transparency in the sampling process relate to where (a) the alleged ADRV was presence and (b) the only evidence being proffered against the athlete was the sample analyses. None of these cases is authority for the proposition that where a sample does not meet the requirements of Article 2.1 the ICF 2009 ADR it cannot be relied upon for the purposes of Article 2.2 the ICF 2009 ADR.

101. All that being so, contrary to the ICF's submission, it is open to WADA to place reliance on the sample analyses in this case to support an allegation of "use" under Article 2.2 the ICF 2009 ADR despite the fact that the analyses cannot be said to satisfy the requirements of "sufficient proof" under Article 2.1 the ICF 2009 ADR.

B. Violation of ICF 2009 ADR Article 2.2 by the Athlete

102. The allegation here is that there has been a violation of Article 2.2 of the ICF 2009 ADR. In this reference, no issue has been taken as to whether Ms Dupik is an "Athlete" for the purposes of the ICF 2009 ADR. Nor has either Respondent sought to say that the substance alleged to have been detected in the Sample taken from the Athlete is anything other than a prohibited substance.

103. The overarching question for the Panel, therefore is, has (in this case) WADA established (the burden being on it) to the comfortable satisfaction of the Panel that a doping rule violation has occurred. The issue therefore is whether, on the evidential material adduced by WADA, the Panel is comfortably satisfied that Ms Dupik has used – i.e.., utilised, applied, ingested, injected, or consumed by any means whatsoever – the substance said to have been found in the Sample, namely furosemide.

104. In this case there is no direct evidence of use by the Athlete – all the evidence is circumstantial. In this context, the Panel accepts the submission that the Panel must assess the evidence separately and together and must have regard to what is sometimes called 'the cumulative weight' of the evidence (as described by Lord Hoffmann in the Privy Council in AG for Jersey v Edmond-O'Brien [2006] UK PC 14 and as relied upon in CAS 2015/A/4059). In Edmond-O'Brien, Lord Hoffmann said this: *"It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, establish guilt beyond reasonable doubt"*. See also CAS 2018/O/5713 where there was reference to the following passage from Pollock CB in R v Exall (1866) 4 F&F 922, 929: *"One strand of the cord might be insufficient to sustain*

the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of".

105. It is important to weigh all of the evidence adduced in order to decide whether or not there has been a violation of Article 2.2 the ICF 2009 ADR in respect of the Sample. In doing so, it will be, of course, necessary to consider the specific evidence proffered in relation to the alleged violation both – in context and in and of itself.

C. The Contextual Evidence

106. There appears to be no dispute on the part of the Respondents that there was a Russian doping scheme as described in the McLaren Reports and that it provides the context for the matters in issue in this appeal. Indeed, that was precisely how the Athlete put her case.

107. That being so, it suffices to say that the Panel accepts the McLaren Reports as a fair account of the Russian doping scheme and, in particular, accepts that the account of the Disappearing Positives Methodology set forth in the McLaren Reports is an accurate and compelling account of what took place in this regard. To be clear, on the basis of the McLaren Reports the Panel makes findings of fact as follows.

a. The historic position in Russia was that doping of athletes was undertaken on an *ad hoc*, decentralised basis where coaches and officials working with elite athletes *"in the field"* provided those athletes with an array of performance-enhancing drugs (or "PEDs"). The difficulty with this approach was that it could not keep abreast of the developments in doping control, including in particular the introduction of the Athlete Biological Passport ("ABP") so that the athletes were at risk of being caught.

b. In response, in or about 2012, the Russian Ministry of Sport sought to 'centralise' the doping effort and bring it under the control of the Moscow Laboratory. An essential part of this centralisation was the development by Dr Rodchenkov in or about 2012 of the so-called "Duchess Cocktail", a cocktail of PEDs comprised of oxandrolone, metenolone and trenbolone, which cocktail had a very short detection period thereby reducing the risk of detection. The objective was to shift all of the athletes who were participating in the *"in the field"* programs onto this Duchess Cocktail and under the supervision of the Moscow Laboratory (and Dr Rodchenkov).

c. Part and parcel of this new program was the Disappearing Positives Methodology deployed by the Moscow Laboratory. Samples were provided by the athletes and sent to the Moscow Laboratory for testing and analysis. The Moscow Laboratory conducted an ITP. Where the ITP revealed a potential AAF, the Moscow Laboratory would (through a liaison person) inform the Russian Ministry of Sport which would then decide either to "SAVE" or to "QUARANTINE" the athlete in question, and communicate that decision to the Moscow Laboratory. If the decision was made to "SAVE" the athlete, the Moscow Laboratory would report the sample as negative in

ADAMS and, conversely, if the athlete was to be "QUARANTINED", the analytical bench work would continue and the AAF would be reported in the ordinary manner.

D. The Evidence of Use by the Athlete

108. Nevertheless, the Panel accepts the submission on the part of the Athlete that these general matters do not, in and of themselves, amount to proof of the particular ADRV allegations made against the Athlete in these proceedings; i.e., that the Athlete used the particular prohibited substance on the date in question. It is necessary therefore to assess the evidence relating the Sample.

a) The RUSADA Doping Control Forms

109. The starting point is the RUSADA doping control form. It is common ground that this shows that the Sample was collected out-of-competition from the Athlete on 19 April 2014.

b) The 2015 LIMS

110. The 2015 LIMS was provided to WADA by an unnamed whistle-blower. WADA submitted, and the Panel accepts, that upon forensic examination, the 2015 LIMS is an accurate, authentic, and contemporaneous account of the original data and its contents can be relied upon as accurate and valid.

111. The 2015 LIMS contains the following information:

a. The Sample was received into the Moscow Laboratory on 19 April 2014 and assigned an internal code of 4733.

b. On 21 April 2014, the Moscow Laboratory performed a number of initial testing procedures on the Sample. The following information was entered into the LIMS:

   i. Internal code: 4733

   ii. External code: 2919440

   iii. Substance: furosemide

   iv. Concentration: 0.155

   v. User: Marina Dikunets

   vi. Do: 0

c. A confirmation procedure was conducted on 22 April 2014 and the following information was entered into the LIMS:

i. Internal code: 6799

ii. External code: 2919440

iii. Substance: furosemide

iv. Concentration: 0.2

v. User: Tim Sobolevsky/ Marina Dikunets

112. As noted above, the 2015 LIMS is an authentic, contemporaneous document which provides and authentic, contemporaneous account of the analysis of the Sample in this case. On the face of it, therefore, the 2015 LIMS provides evidence of use on the part of the Athlete of the prohibited substance furosemide as per the specific particulars set forth therein.

c) The Raw Data and the PDFs

113. WADA also adduced evidence in relation to the Moscow Laboratory's raw data and analytical PDFs in respect of the Sample. For the sake of good order, it is noted that the unchallenged evidence is that the Moscow Laboratory maintained raw data files in respect of each sample assessed by it and prepared analytical PDFs ('portable document format') for each sample which PDFs were stored on the Moscow Laboratory server and the name and location were recorded in LIMS.

114. WADA sent both the raw data and the analytical PDF document to Prof. Ayotte for her review. According to Prof. Ayotte, the following things are clear from the material reviewed by her:

a. The LIMS recorded the details in relation furosemide as set forth above.

b. The analysis was supported by the analytical PDF file (d_04733).

c. The Moscow Laboratory undertook a confirmation procedure on another aliquot, the result of which was the presence of an estimated at 0.2µg/mL. This was recorded in LIMS 2015.

d. The raw files underlying the confirmation procedure support the information that was entered in LIMS.

e. The results entered in the 2015 LIMS are *"supported"* by the results of the ITP and the confirmation procedure, namely that the Sample contained furosemide.

f. Furosemide is listed in section S5 of the 2014 prohibited list and should have been reported as an AAF.

115. There was no serious challenge to the expertise of Prof. Ayotte or to her expert evidence in relation to the material, and certainly no contrary expert view was put before the Panel. In the circumstances, the Panel readily accepts this evidence.

d) The Emails

116. WADA also relies on the emails of 21-22 April 2014 as further corroborative evidence of use by the Athlete. The emails are between Dr Sobolevsky, the then the Deputy Director of the Moscow Laboratory and Mr Velikodniy, the then liaison person at the CSP, liaising between the CSP and the Moscow Laboratory, and reporting to the CSP Deputy Director, Ms Irina Rodionova.

117. The Athlete calls the validity of these emails into question, arguing that it is not clear who sent the first email and that there is no evidence that Mr Velikodniy was, as a matter of fact, the author of the second email. But the Panel sees no reason at all not to accept these emails at face value and to take account of what is said in the emails and by whom.

118. In the Panel's view, these emails relate, on their face, to the Sample and they make plain the following things:

a. The Athlete provided an out-of-competition sample at Krasnodar on 19 April 2014 – as per the RUSADA doping control form.

b. The sample was analysed by the Moscow Laboratory and was positive for furosemide (as per the 2015 LIMS).

c. The Moscow Laboratory, by Dr Sobolevsky, informed Mr Velikodniy at the CSP of the results.

d. Mr Velikodniy, as the liaison person between the Moscow Laboratory and the CSP, duly replied, instructing the Moscow Laboratory to "Save" the Athlete, identified by Mr Velikodniy as Aleksandr Dupik.

e) The Athlete's Evidence

119. The Panel must weigh all of this against the evidence adduced by the Athlete. The difficulty for the Athlete in this case is that she did not provide a witness statement, did not give evidence before the Panel, and did not address the Panel in any way. There is, therefore, no counterweight evidence.

f) The ICF's Evidence

120. The ICF does not adduce any evidence in relation to the conduct of the Athlete. The ICF's evidence relates instead to its submission that the analyses here did not conform with the ISL and WADA's own Technical Document TD2009LCOC and are not available to be used in support of an alleged "use" violation. For the reasons expressed above, that argument is

misconceived but, in any event, there is no evidence from the ICF to be weighed against the evidence of use as described in some detail above.

g) Conclusion on the Evidence

121. In all, having carefully considered all of the evidence adduced by the Parties, the Panel concludes as follows:

a. There was a systemic cover-up and manipulation of the doping control process within Russia in the manner described by Prof. McLaren in the McLaren Reports, commonly referred to as the Russian doping scheme.

b. The Moscow Laboratory performed both initial testing procedures and confirmation procedures on the Sample, the results of which showed the presence of the diuretic, furosemide.

c. Furosemide is a prohibited substance.

d. In furtherance of the Russian doping scheme, and in order to protect the Athlete from the consequences of the positive test result, the Moscow Laboratory recorded the analytical results of the Sample in ADAMS as negative.

e. In relation therefore to the ADRV allegations in this matter, the Panel concludes that, upon taking the evidence as a whole and assessing its cumulative weight, the Panel is comfortably satisfied that, on or about 19 April 2014, the Athlete used a prohibited substance (namely, furosemide) in violation of Article 2.2(b) of the 2009 ICF ADR.

122. It follows therefore that the Panel takes the view that the decision taken by the ICF not to pursue the matter was wrong.

XI. SANCTIONS

123. In its prayer for relief, the "principal" relief sought by WADA were orders on the part of the Panel (a) finding the Athlete liable for the ADRV and (b) sanctioning the Athlete accordingly pursuant to the applicable provisions of the ICF 2009 ADR. In the alternative, WADA sought an order sending the matter back to the ICF for its further consideration. On balance, the Panel takes the view that, for the sake of expediency, the preferred course is for the Panel to go on to consider the question of sanctions.

124. The Panel has the benefit of submissions in this respect from WADA but neither the ICF nor the Athlete made submissions in relation to sanctions. The ICF does, however, say that it *"will obviously accept and enforce the CAS award, if the Panel is to reach another conclusion"* and, by its prayer for relief *"defers to justice with regard to the appeal filed by* [WADA]*"*.

125. Article 10 of the ICF 2009 ADR provides that the period of ineligibility for an ADRV is two years unless the conditions set forth in Articles 10.4 and 10.5 for elimination or reduction or those set forth in Article 10.6 for aggravation are met.

126. Nothing was said on behalf of the Athlete as to the conditions set forth in Articles 10.4 and 10.5 for elimination or reduction of the period of two years, so there is no question that the two-year period should be eliminated or reduced.

127. It was submitted by WADA that there are aggravating circumstances here such that the period of sanction should be increased from two years. It is said that the Athlete *"was part of the most sophisticated doping scheme in the history of sport"* and that she was *"strongly protected"*, as a consequence of which a number of positive results were never reported as such. All this warrants, so it is submitted, an aggravated sanction of up to four years (commencing from the date of the award).

128. The question that arises therefore is whether there are any *"aggravating circumstances"* that require that period to be increased pursuant to Article 10.6 of the ICF 2009 ADR.

129. Article 10.6 of the ICF 2009 ADR provides in relevant part as follows:

> *"10.6 Aggravating Circumstances Which May Increase the Period of Ineligibility*
>
> *If the ICF establishes in an individual case involving an anti-doping rule violation other than violations under Article 2.7 (Trafficking) and 2.8 (Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly violate the anti-doping rule.*
>
> *An Athlete or other Person can avoid the application of this Article by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation by the ICF.*
>
> *[Comment to Article 10.6: Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy the performance-enhancing effects of the anti-doping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation.*
>
> *For the avoidance of doubt, the examples of aggravating circumstances described in this Comment to Article 10.6 are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility. Violations under Article 2.7 (Trafficking or Attempted Trafficking) and 2.8 (Administration or Attempted Administration) are not included in the application of Article 10.6 because the sanctions for these violations (from four years to lifetime Ineligibility) already build in sufficient discretion to allow consideration of any aggravating circumstance]".*

130. In this matter, it is difficult to conclude that there are aggravating circumstances. On the one hand, it follows from the Panel's determination that the Athlete was a participant in a *"doping plan or scheme … to commit anti-doping rule violations"* but there is no allegation of multiple use and there is no allegation that the Athlete participated, for example, in the swapping out of clean for dirty urine as part of the Sample Swapping Methodology. On balance, the Panel declines to add to the period of two years, taking the view that a period of ineligibility of that length is a proportionate sanction in all the circumstances of this case.

131. The Panel must next consider (a) the date on which the period of ineligibility should commence and (b) the disqualification of the Athlete's results in competition after the commission of the ADVR.

132. The applicable rule for the former is Rule 10.9 of the ICF 2009 ADR, which provides (in relevant part) as follows:

"Commencement of Period of Ineligibility

10. Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date the Ineligibility is accepted or otherwise imposed.

10.9.1 Delays Not Attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the ICF or Anti-Doping Organization imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. …".

133. There is no suggestion on behalf of the Athlete that there has been a substantial delay in the hearing process so that Article 10.9.1 can be set to one side. In the result, the period of ineligibility shall run from the date of the present Award.

134. As to the period of disqualification, the salient terms of Article 10.8 of the ICF 2009 ADR are as follows:

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

8. In addition to the automatic Disqualification of the results in the Competition which produced the positive sample under Article 9 (Automatic Disqualification of Individual Results) all other competitive results obtained from the date the positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through to the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any medals, points and prizes. …".

135. In this case there was no in-competition testing and so no automatic disqualification under Article 9 of the ICF 2009 ADR applies, and there was no provisional suspension. That being so, the rule provides that all competitive results achieved by the Athlete from the date that a

positive sample was collected or other ADRV was committed through to the start of the period of ineligibility is to be disqualified with all of the resulting consequences as there set forth – unless fairness requires otherwise.

136. The article thus provides that the Panel is to take into account whether the strict application of the article is fair in all the circumstances. By doing so, the article gives expression to established CAS jurisprudence that it is subject to a principle of fairness and that the Panel has a discretion to modify this period of time should fairness so dictate: see, e.g., CAS 2016/O/4881, CAS/ 2017/O/4980, CAS 2017/O/5039 and CAS 2017/A/5045.

137. In this case, a strict application of the article would mean disqualification of the Athlete's results (etc) from 19 April 2014 (the date of the Sample) through to the date of this Award, a period approaching eight years.

138. A question arises as to whether such a lengthy period is disproportionate and unfair and out of kilter with sanctions imposed in similar cases. On this issue the Panel agrees with the approach taken in CAS 2020/O/6759 as to the applicable general principles (albeit there dealing with an implied fairness requirement). As noted there:

"89. Therefore, the general rule is that, in addition to the automatic disqualification of the results in the competition where the Adverse Analytical Finding has been produced, all the Athlete's competitive results obtained from the date of the commission of the ADRV through the start of any provisional suspension or ineligibility period shall be disqualified. In this regard, the Sole Arbitrator notes that the retroactive disqualification of the competitive results of an athlete that has committed an ADRV is fair and necessary to restore the integrity of all the sporting competitions in which he or she competed, rectifying the record books in the interest of sport. Deciding otherwise would be tantamount to reward the deceiver and would not be fair at all vis-à-vis the rest of the athletes that did not use Prohibited Substances.

90. Notwithstanding this, it is also important not to forget that the primary reason behind this measure (i.e. the disqualification of the sporting results of an athlete that cheated) is not to sanction him or her, but to ensure fair play and equal opportunities for all athletes, annulling those results achieved by those who acted or is reasonable to believe that have acted dishonestly vis-à-vis their competitors, being involved in any kind of ADRV, which is one of the most despicable breaches of the fundamental principles of sport. But, at the same time, it should be taken into account that, in certain exceptional circumstances, the strict application of the disqualification rule can produce an unjust result. In particular, this may be the case when the potential disqualification period covers a very long term, which is normally the case when the facts leading to the ADRV took place long before the adjudicating proceedings started which usually occurs when they are opened as a result of the re-testing of a sample or of the uncover of a sophisticated doping scheme. In addition, in this type of cases it may be difficult to prove that the athlete at stake used prohibited substances or methods during such a long period of time".

139. Bearing that approach in mind, the Panel takes the view that, in this case, there are exceptional circumstances which militate against a strict application of the rule: (a) the events in question took place in 2014, long before these arbitral proceedings, (b) the ADRV relates solely to those events, and (c) there is no suggestion, let alone evidence, that there has been any use of prohibited substances on the part of the Athlete on any other later occasion.

140. These circumstances do, in the Panel's view, set this matter apart from the ordinary and require, in the interests of fairness, a reduction of the period of disqualification. In this regard, the Panel pays heed to other CAS matters of a similar nature such as CAS 2019/A/6161, CAS 2019/A/6165, CAS 2019/A/6166, CAS 2019/A/6167, CAS 2019/A/6168, and CAS 2019/O/6156 and takes the view that, in line with the periods imposed in those cases, all competitive results from the date of the Sample (19 April 2014) through to and including 31 December 2016 should be disqualified (with all attendant consequences).

XII. CONCLUSION

141. In view of all the above considerations, the Panel holds and determines that the appeal brought by WADA should be allowed. In particular:

a. The Panel is comfortably satisfied that the Athlete used a prohibited substance in violation of Article 2.2(b) of the ICF 2009 ADR.

b. The Athlete is sanctioned with a period of ineligibility of two (2) years starting from the date of the present Award.

c. All of the Athlete's competitive results from 19 April 2014 through to and including 31 December 2016 shall be disqualified, with all of the resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the World Anti-Doping Agency on 1 April 2021 against the International Canoe Federation and Ms Aleksandra Dupik with respect to the decision rendered by the International Canoe Federation on 11 March 2021 is upheld.

2. The decision rendered on 11 March 2021 by the International Canoe Federation in the matter of Ms Aleksandra Dupik is set aside.

3. Ms Aleksandra Dupik is found to have committed an anti-doping rule violation under Article

2.2 of the International Canoe Federation's 2009 Anti-Doping Rules.

4. Ms Aleksandra Dupik is sanctioned with a period of ineligibility of two (2) years starting from the date of this Award.

5. All competitive results achieved by Ms Aleksandra Dupik from 19 April 2014 through to and including 31 December 2016 are disqualified with all of the resulting consequences, including the forfeiture of any titles, awards, medals, points and prize and appearance money.

6. (…).

7. (…).

8. All other or further requests for relief are hereby dismissed.