Arbitration CAS 2022/A/8653 Elena Danilova v. World Triathlon & World Anti-Doping Agency (WADA), award of 30 August 2023

Panel: Mr James Drake KC (United Kingdom), President; Prof. Christoph Müller (Switzerland); Prof. Luigi Fumagalli (Italy)

Triathlon
Doping (trimetazidine)
Method of appointment of the president of a panel at CAS
Comfortable satisfaction
Methods of establishing facts under the WTADR
Circumstantial evidence: assessment
Non-intentional use

1. **It is common for an appointing authority to appoint some or all of the members of the arbitral tribunal and common for arbitration agreements to so provide. There is nothing inherently objectionable in the process by which the president of a CAS appeals panel is appointed by the president of the relevant CAS division, and the fact that the president of a panel is chosen in this way does not depreciate or undermine the systemic impartiality and independence – and fairness – of the CAS panel. Additionally, Article R34 of the CAS Code provides for a mechanism to challenge arbitrators.**

2. **Comfortable satisfaction has been defined in recent case law as being lower than the criminal standard of beyond reasonable doubt but higher than other civil standards such as the balance of probabilities and less than proof beyond a reasonable doubt. To reach this comfortable satisfaction, the CAS panels should have in mind the seriousness of allegation which is made. Therefore, this standard of proof is 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) a CAS panel would require to be "comfortably satisfied". 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.**

3. **Article 3 of the 2015 World Triathlon Anti-Doping Rules (WTADR) makes provision for the methods by which facts (and presumptions) may be established in relation to the alleged anti-doping rule violation (ADRV): *"by any reliable means, including admissions"*. This rule does not relate to the reliability of the *evidence* adduced by the parties. It relates, instead, to the reliability of the *means* by which the evidence is adduced. The intention of the rule is to relax the formality by which evidence must be adduced in comparison to what is required for the proof of a violation for presence of a prohibited substance. It is not, as is often the case, to be confused with the weight that is to be accorded to any particular piece of evidence. As such, and whereas the *presence***

of a prohibited substance can and must be established exclusively by laboratory analysis, the *use* of a prohibited substance may be established by any reliable means, but not limited to witness evidence, documentary evidence and conclusions drawn from analytical information other than proving the actual presence of a prohibited substance.

4. **In cases where there is no direct evidence of use and all evidence are circumstantial, CAS panels must assess the evidence separately and together and have regard to the 'cumulative weight' of the evidence.**

5. **If an athlete is adjudged to have violated Article 2.2 of the 2015 WTADR by reason of the use of trimetazidine, a non-specified substance, the period of ineligibility is four years, unless the athlete can establish that the ADRV was not intentional. "Not intentional" requires a showing by the athlete (the burden being on him/her to the balance of probabilities per Article 3.1 of the 2015 WTADR) that he did not engage in conduct which s/he knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk. Even though the athlete is not bound to prove the source of the prohibited substance, s/he has to show, on the basis of the objective circumstances of the anti-doping rule violation and his/her behaviour, that specific circumstances exist disproving his/her intent to dope.**

I. INTRODUCTION

1. This is an appeal by Ms Elena Danilova (the "Appellant" or the "Athlete") to the Court of Arbitration for Sport (the "CAS") pursuant to the Code of Sports-related Arbitration (2021 edition) (the "CAS Code") against an award rendered on 17 January 2022 by the CAS Anti-Doping Division (the "CAS ADD") in CAS 2021/ADD/23 (the "Challenged Award"). The appeal concerns three samples collected from the Athlete in-competition in 2014 and 2015 (collectively, the "Samples").

II. THE PARTIES

2. The Athlete is a world class Russian triathlete, with a current World Triathlon ranking of 176. As at the date of this Award, she has participated in more than 125 triathlon competitions and has won 33 medals.

3. World Triathlon ("World Triathlon" or the "First Respondent") is the international federation for the sport of triathlon and its related multisport events. It has its seat in Lausanne, Switzerland. From time to time, World Triathlon published anti-doping rules (the "WTADR") including the World Triathlon Anti-Doping Rules 2015 (the "WTADR 2015") and the World Triathlon Anti-Doping Rules 2021 (the "WTADR 2021"). World Triathlon was formerly

known as the International Triathlon Union, or "ITU", and many of the historic references to the First Respondent in this Award will be to ITU.

4. The World Anti-Doping Agency ("WADA" or the "Second Respondent") 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. WADA publishes the World Anti-Doping Code ("WADC"), which provides the framework for anti-doping policies, rules, and regulations for sports organisations and related public bodies throughout the world, and on which the WTADR 2015 and WTADR 2021 are based.

5. The parties are collectively referred to herein as the "Parties". Unless necessary to distinguish between them, the First and the Second Respondent shall be referred to herein as the "Respondents".

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. While the Panel has considered all the material put before it, in this Award the Panel refers only to those matters considered necessary to explain the Panel's reasoning and decision.

A. The Russian Doping Scheme

7. The backdrop for this appeal is what has come to be known as the "Russian Doping Scheme". The Russian Doping Scheme has now been the subject of a considerable number of CAS awards but for present purposes the Panel refers to, and adopts, the account given in CAS 2020/O/6689 as well as the full and fair account given in the Challenged Award. What follows is a brief summary of the said scheme.

8. In December 2014, a German television channel broadcast a documentary concerning the existence of sophisticated systemic doping practices in Russian athletics. The documentary implicated (*inter alios*) Russian athletes and coaches, the All-Russia Athletics Federation, which is the governing body for athletics in Russia ("ARAF", now known as the Russian Athletics Federation or "RUSAF"), the International Amateur Athletics Association (the "IAAF", now World Athletics), the Russian Anti-Doping Agency ("RUSADA"), and the WADA-accredited laboratory in Moscow (the "Moscow Laboratory").

9. 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. The three members of the Independent Commission 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.

10. 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 the Russian Athletics Federation (previously named the All-Russia Athletic Federation or ARAF), RUSADA, nor Russia could 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.

11. On 18 November 2015, WADA declared RUSADA as non-compliant with the WADC and suspended the accreditation of the Moscow Laboratory.

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"), the former director of the Moscow Laboratory.

13. On 19 May 2016, WADA announced the appointment of Prof. McLaren 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 9 December 2016, Prof. McLaren issued a second report (the "Second McLaren Report", collectively the "McLaren Reports"). The Second McLaren Report confirmed what had been said in the First McLaren Report and stated as follows:

    "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 [the Centre of Sports Preparation of National Teams of Russia] and the Moscow Laboratory, along with the FSB [the Russian Federal Security Service]. The summer and winter sports athletes were not acting individually but within an organised infrastructure as reported on in the 1st Report".

16. In the Second McLaren Report, Prof. McLaren identified a number of athletes who, it was said, appeared to have been involved in or benefited from the systematic and centralised cover-up and manipulation of the doping control process. As explained by Prof. McLaren, his mandate did not provide him with any authority to bring anti-doping rule violation ("ADRV") cases against individual athletes, but he did identify athletes who might have benefited from manipulations of the doping control process. Accordingly, he did not assess the sufficiency of the evidence to prove an ADRV by any individual athlete. Rather, for each individual Russian athlete, where relevant evidence had been uncovered in the investigation, he identified that

evidence and provided it to WADA, in the expectation that it would then be forwarded to the appropriate international federation for action.

17. Accompanying the Second McLaren Report was a cache of non-confidential documents examined by Prof. McLaren during the investigation. This was called the *"Evidence Disclosure Package"* (or "EDP") and included various emails between the liaison person and the Moscow Laboratory in relation to a number of samples analysed by the Moscow Laboratory in the period between 2011 and 2015 (the "EDP Emails"). The EDP Emails included emails to and from the Moscow Laboratory relating to the Athlete's Samples.

B. WADA's Operation LIMS *et seq.*

18. In October 2017, a whistle-blower sent to WADA an extract of the Moscow Laboratory's laboratory information management system ("LIMS") relating to samples obtained in the period from January 2012 to August 2015 (the "2015 LIMS").

19. WADA, by its Intelligence and Investigations Department (WADA I&I), undertook a forensic investigation of the 2015 LIMS, codenamed "Operation LIMS". WADA concluded that the 2015 LIMS was *"reliable and valid"*. WADA found that the 2015 LIMS included a number of presumptive adverse analytical findings ("AAFs") upon the initial testing of a number of samples, which results were not reported in the anti-doping administration and management system maintained by WADA ("ADAMS") or followed up with confirmation testing.

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

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

22. 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"*. At the same time, as a condition of reinstatement, RUSADA and the Russian Ministry of Sport agreed to procure the authentic Moscow LIMS data for WADA.

23. In January 2019, in purported compliance with that agreement, WADA I&I recovered a significant amount of data from the Moscow Laboratory, including a copy of the LIMS (the "2019 LIMS") and raw data files and related PDF documents (the "Moscow Data").

24. In April 2019, the Russian authorities sent to WADA more than 2,000 samples that had been kept in storage in the Moscow Laboratory.

25. On 15 May 2019, WADA reported to the WADA Compliance Review Committee (the "WADA CRC") that there were a significant number of discrepancies between the 2015 LIMS and the 2019 LIMS.

26. On 26 June 2019, the WADA CRC instructed WADA to investigate these discrepancies with the help of independent experts. WADA engaged a team of independent experts from the University of Lausanne's Ecole des Sciences Criminelles (the "ESC") from the fields of digital forensic science, data analysis, laboratory analysis and anti-doping investigation to investigate the authenticity and reliability of the Moscow Data. The ESC produced a "Digital Forensic Examination Report" on 15 August 2019 (the "ESC Report").

27. On 6 September 2019, WADA and the ESC reported their findings to the WADA CRC.

28. On 17 November 2019, the WADA CRC concluded that the Moscow Data, including the 2019 LIMS, had been intentionally altered before being made available to WADA and on 21 November 2019 recommended that WADA send to RUSADA a formal notice of non-compliance with its post-reinstatement obligations.

29. On 9 December 2019, WADA declared RUSADA non-compliant with the WADC and the International Standard for Code Compliance by Signatories (the "ISCCS").

30. On 27 December 2019, RUSADA notified WADA that it disputed the notice of non-compliance and on 9 January 2020 WADA submitted the dispute to arbitration at the CAS, in proceedings CAS 2020/O/6689. Upon a hearing that took place in early November 2020, the CAS panel in that reference decided (*inter alia*) that the 2019 LIMS had been manipulated and that RUSADA had failed to comply with the WADC and the ISCCS:

> *"614. The Panel finds that, prior to the Moscow Data being retrieved by WADA in January 2019, and during its retrieval, it was subjected to deliberate, sophisticated and brazen alterations, amendments and deletions. Those alterations, amendments and deletions were intentionally carried out in order to remove or obfuscate evidence of improper activities carried out by the Moscow Laboratory as identified in the McLaren Reports or to interfere with WADA's analysis of the Moscow Data.*
>
> *[…]*
>
> *674. For the reasons given above, the Panel finds that RUSADA failed to procure an authentic copy of the Moscow Data and therefore failed to comply with the Post-Reinstatement Data Requirement. The steps taken to manipulate the Moscow Data and deceive WADA could hardly be more serious.*
>
> *675. Accordingly, the Panel finds that WADA has established that RUSADA is non-compliant with the 2018 WADC".*

C. The 2016-2017 Correspondence between World Triathlon and the Athlete

31. On 26 July 2016, following the First McLaren Report, World Triathlon wrote to the Athlete requesting an explanation as to the account given in the said report that trimetazidine ("TMZ") had been detected in her samples but not reported in ADAMS.

32. On 4 August 2016, the Athlete responded stating that she *"had never used performance enhancing drugs for increase of your sports results"* and asked that World Triathlon launch an independent investigation.

33. On 16 August 2016, World Triathlon decided to stay the proceedings against the Athlete pending publication of the Second McLaren Report.

34. As noted above, the Second McLaren Report contained evidence that the Athlete's Samples had benefited from a "save" order and not been reported as positive in ADAMS.

35. On 20 December 2016, World Triathlon wrote to the Athlete to inform her of the contents of the Second McLaren Report and to give her an opportunity to admit the ADRV.

36. On 29 December 2016, the Athlete responded to World Triathlon's letter stating that *"During my life I have never ever used any kinds of performance-enhancing drugs for increase my sport results! I don't want to be involved in any non-sporting processes. I don't want to be a victim"*.

37. On 24 May 2017, World Triathlon sent the Athlete a notification that it would not be proceeding with the charges against her and that it would be closing the file.

D. The ADRV Notice

38. On 7 May 2021, following Operation LIMS and the subsequent related events as described above, World Triathlon sent to the Athlete a *"Notice of a Possible Anti-Doping Rule Violation and Provisional Suspension"* (the "ADRV Notice"). World Triathlon thereby gave notice to the Athlete of a (singular) possible ADRV for use of a prohibited substance pursuant to Article 2.2 of the WTADR 2015 in connection with the detection of TMZ in the Athlete's collected urine samples on three occasions in 2014 and 2015.

39. The ADRV Notice provided the following particulars in relation to the Samples:

    a) Sample 1: Sample 2916387 collected in-competition on 28 June 2014 at the Youth European Championships in Penza, Russia, where the Athlete won the gold medal in the Under 23 women's triathlon ("Sample 1");

    b) Sample 2: Sample 2916525 (laboratory code 10247) collected in-competition on 7 August 2014 at the International Sports Games (Spartakiada) in Cheboksary, Russia, where the Athlete won a silver medal ("Sample 2"); and

    c) Sample 3: Sample 3880728 (laboratory code 06435) collected in-competition on 6 June 2015 at Russia's Championship in Sochi, Russia ("Sample 3").

40. The prohibited substance alleged to have been used by the Athlete was TMZ. TMZ was added to the WADA List of Prohibited Substances and Methods (the "Prohibited List") on 1 January 2014 as a specified stimulant under Section S.6b and was prohibited in-competition only. As

from 1 January 2015, TMZ was reclassified as a non-specified substance and a hormone and metabolic modulator under Section S.4 of the Prohibited List and was prohibited at all times.

41. The specific allegations made by World Triathlon in the ADRV Notice in relation to the Samples were as follows:

a) Sample 1: *"the evidence is that further to undergoing an Initial Testing Procedure which revealed a Presumptive Adverse Analytical Finding of Trimetazidine, it was subject to a 'save' order in accordance with the Disappearing Positive Methodology, outlined in the McLaren Reports. As a result, your sample …, which was collected after you won the 1st place at the U23 Your [sic] European Championships never proceeded to a Confirmation Procedure and was reported as negative in ADAMS".*

b) Sample 2: *"collected on 7 August 2014 at the International Sports Games (Spartakiada) in Cheboksary at which you placed second, the evidence is that further to undergoing an Initial Testing Procedure which revealed a Presumptive Adverse Analytical Finding of Trimetazidine, it was subject to a 'save' order in accordance with the Disappearing Positive Methodology, outlined in the McLaren Reports. As a result, your sample … never proceeded to a Confirmation Procedure and was reported as negative in ADAMS".*

c) Sample 3: *"collected at Russia's Championship in Sochi 6th June 2015, the evidence is that further to revealing a Presumptive Adverse Analytical Finding of Trimetazidine, the Sample underwent a Confirmation Procedure which confirmed the presence of Trimetazidine. Notwithstanding the positive outcome of the Confirmation Procedure, [the sample] was also reported as negative in ADAMS further to another 'save' order".*

42. According to the ADRV Notice, the Athlete was provisionally suspended as from the date of the ADRV Notice, 7 May 2021.

43. The Athlete responded to the ADRV Notice on 13 May 2021. She said as follows:

"I confirm the receipt of your letter of May 7 […] It has been a shock as I thought this matter had been closed long ago.

At this moment, I can only say that I am unaware how any prohibited substance could have entered my body and been detected in any of the samples that you mention. Are these samples available to be retested? I cannot comment on any protection by Russian authorities that you mentioned, as I never asked for any or was aware of.

The laboratory data that you provided is too complex for me to understand and comment without professional assistance. I'm willing to cooperate with the World Triathlon and provide as much assistance as I can so that this investigation can be completed. Please let me know what I can do in this regard.

I note that I have been suspended and cannot train and complete as normal. Given the upcoming Olympic Games and other competitions scheduled this year for which I have been actively training, I would like the hearing that you mentioned in your letter to take place as soon as possible so that I can still qualify for the Olympics.

Please let me know what next steps, when and where this hearing may take place and if any additional documents will follow from World Triathlon before the hearing".

44. On 26 May 2023, World Triathlon sent a "Notice of charge and provisional suspension" to the Athlete, confirming *inter alia* that she was *"provisionally suspended as of 07 May 2021"*.

IV. PROCEEDINGS BEFORE THE ANTI-DOPING DIVISION OF THE CAS

45. On 15 June 2021, the Athlete requested an expedited hearing before the CAS ADD.

46. On 28 June 2021, World Triathlon submitted its Request for Arbitration to the CAS ADD in accordance with Article 8.1.2.1 of the WTADR 2015 and the Arbitration Rules applicable to the CAS ADD (the "CAS ADD Rules").

47. On 14 July 2021, the Athlete submitted her Answer to the Request for Arbitration to the CAS ADD which included her own witness statement.

48. On 13 August 2021, the Sole Arbitrator conducted a hearing (remotely).

49. On 17 January 2022, the Challenged Award was issued, by which the Sole Arbitrator ruled (*inter alia*) that:

    a) the Athlete was found guilty of an ADRV pursuant to Article 2.2 of the WTADR 2015 for the use of a prohibited substance;

    b) the Athlete was sanctioned with a *"4-year period of ineligibility commencing on the date of this Award"*;

    c) the *"period of ineligibility shall commence from 26 May 2021 which is the date when the provisional suspension imposed on [the Athlete] started to run"*; and

    d) all competitive results obtained by the Athlete *"from 6 June 2015 to 5 June 2019 with all resulting consequences […] are disqualified"*.

V. THE APPEAL PROCEEDINGS BEFORE THE CAS

50. By a Statement of Appeal filed with the CAS on 7 February 2022 in accordance with Article R47 of the CAS Code, the Athlete instituted this appeal against the Challenged Award. In her Statement of Appeal, the Athlete nominated Dr Georg von Segesser as arbitrator. The Statement of Appeal was filed by the Athlete's then legal representatives, Schellenberg Wittmer. In her Statement of Appeal, the Athlete sought an extension of time to file her Appeal Brief until 12 May 2022.

51. On 17 February 2022, World Triathlon objected to the request for an extension of time, agreeing to a shorter period of 10 days.

52. On 21 February 2022, the Deputy President of the CAS Appeals Arbitration Division (the "Deputy Division President"), pursuant to Article R32(2) of the CAS Code, partially granted the Athlete's request for an extension of time to file her Appeal Brief until 31 March 2022.

53. On 23 February 2022:

    a) WADA made application pursuant to Article R41.3 of the CAS Code to participate as a party in these proceedings.

    b) The CAS Court Office invited the Athlete and World Triathlon to comment on WADA's application to participate.

54. On 25 February 2022, World Triathlon stated that it was *"in favor of the intervention of WADA"* and sought an extension of time to nominate its arbitrator until after the determination of the WADA application.

55. On 2 March 2022, the Athlete (a) indicated that she did not object to WADA's intervention (subject to a valid power of attorney) and (b) did not object to an extension of time for World Triathlon to appoint its arbitrator *"provided that* [World Triathlon and WADA] … *are asked to jointly appoint a co-arbitrator within a short deadline"*.

56. On 4 March 2022, the Deputy Division President, pursuant to Article R41.4(2) of the CAS Code, granted WADA's request for intervention on that basis. The CAS Court Office invited the Respondents to nominate their joint co-arbitrator within 10 days.

57. On 14 March 2022, the Respondents appointed Prof. Luigi Fumagalli as co-arbitrator.

58. On 15 March 2022, the CAS Court Office informed the Parties that Dr von Segesser declined the appointment as co-arbitrator and requested the Athlete to nominate another arbitrator within 10 days.

59. On 25 March 2022, the Athlete appointed Prof. Christoph Müller as co-arbitrator.

60. On 31 March 2022:

    a) WADA objected to the appointment of Prof. Müller on the basis that the Athlete's legal representatives, Schellenberg Wittmer (then acting for RUSADA), had called Prof. Müller as an expert witness in CAS 2020/O/6689 and invited Prof. Müller to reconsider.

    b) The Athlete filed her Appeal Brief in accordance with Article R51 of the CAS Code.

61. On 7 April 2022:

    a) The CAS Court Office informed the Parties that Prof. Müller had reconsidered his acceptance (including taking account of the matters set forth in WADA's objection of 31 March 2022) and had confirmed his acceptance of the appointment.

b) WADA asked for further disclosure from Prof. Müller.

62. On 11 April, 2022, the Athlete's legal representatives, Schellenberg Wittmer, informed the CAS Court Office that they no longer represented the Athlete in this matter.

63. On 13 April 2022, the CAS Court Office informed the Parties that Prof. Müller had indicated that he would be happy to provide any further comments in writing for the attention of the Challenge Commission of the International Council of Arbitration for Sport in the event that a challenge was made.

64. On 21 April 2022, the Respondents requested an extension of time until 24 June 2022 to file their Answers.

65. On 27 April 2022, in the absence of objection from the Appellant within the prescribed deadline, the CAS Court Office informed the Parties that the Respondents' request for an extension of time to file their Answers was granted.

66. On 12 May 2022, the CAS Court Office, on behalf of the Deputy Division President and pursuant to Article R54 of the CAS Code, informed the Parties that the Panel in this reference would be constituted by Prof. Müller, Prof. Fumagalli and Mr James Drake KC (as president).

67. On 23 June 2022, the First Respondent filed its Answer.

68. On 24 June 2022, the Second Respondent filed its Answer.

69. On 27 June 2022, the CAS Court Office invited the Parties to say whether or not they would prefer a hearing to be held in this matter. The Athlete did so prefer, while the Respondents took the position that the matter could be determined on the papers and without a hearing.

70. On 1 July 2022, the Athlete informed the CAS Court Office that she had appointed Mr Olivier Loizon and Mr Max de Castelnau, Attorneys, Viguié Schmidt & Associés, Paris, France to represent her in these proceedings.

71. On 5 July 2022, the Parties were informed that the Panel had decided to hold a hearing in this matter. Correspondence then ensued as to a date convenient to the Panel and the Parties, with the result that the earliest available such date was 14 February 2023.

72. On 3 August 2022, the CAS Court Office confirmed to the Parties that the hearing would take place on that date (in person) at the CAS Court Offices in Lausanne.

73. On 14 November 2022, the CAS Court Office sent to the Parties an Order of Procedure for signature.

74. On 15 November 2022, the First Respondent returned the signed Order of Procedure.

75. On 17 November 2022, in an email to the CAS Court Office the Athlete acknowledged receipt of the Order of Procedure but said that she *"cannot sign it as it is"*. It was said that the Athlete

"disagrees with the terms of paragraphs 2 'Mission' and 9 'Oral presentation'" for the reasons set forth in a document entitled *"The Appellant's comments to the Order of Procedure draft in respect of case No. CAS 2022/A/8653 Elena Danilova v World Triathlon & World Anti-Doping Agency (WADA)"*. In the said document, the principal complaints were that (a) the Panel could not complete its mission unless the Respondents provided the documents and other information in relation further investigations conducted by RUSADA and any reanalysis of the Samples conducted by WADA; and (b) the Athlete reserved her right in relation to the manner in which she participated in the hearing until such time as these things had been provided.

76. On 21 November 2022, the Panel invited the Athlete *"to make the modifications she deems necessary to the Order of Procedure (or to record her objections in a separate document and to enclose it with the Order of Procedure"* to be returned to the CAS Court Office by 24 November 2022.

77. On 22 November 2022, the Second Respondent returned the signed Order of Procedure.

78. On 23 November 2022, the Appellant informed the CAS Court Office that she *"cannot and will not sign the Order of Procedure until the Panel and/or the CAS Court Office formally instructs the Respondents and RUSADA to respond on the merits to the Appellant's reasonable and legitimate requests (in letters of July 8 and August 23, 2022)"*.

79. On 25 November, the Panel (via the CAS Court Office) responded to the Athlete's preceding message as follows:

"There are two immediate difficulties with what is said on behalf of the Athlete. The first is that there was no suggestion one way or the other to that effect in the Athlete's email of 17 November 2022. The second is that at no stage has the Athlete made any application to the Panel in respect of the Athlete's requests such that it is difficult to see on what basis the Panel could make such an instruction. If the Athlete wishes to make such an application, she should do so in the proper way and it will be considered by the Panel in due course".

80. The Athlete made no such application.

81. On 19 January 2023, the Athlete requested permission, pursuant to Article R44.2 of the CAS Code, to attend the hearing remotely, which permission was granted by the Panel.

82. The hearing took place on 14 February 2023. The hearing was conducted in a hybrid fashion, with some participating in person (including the Panel) and others remotely via Webex. The following people took part in the hearing:

    a) The Panel:

        i) Prof. Müller

        ii) Prof. Fumagalli

        iii) Mr James Drake KC (President)

b) The Appellant:

i) Mr Olivier Loizon, Counsel

ii) Mr Max de Castelnau, Counsel

iii) The Athlete (remotely)

iv) Mr Kirill Kaybishev, Russian interpreter (remotely)

c) World Triathlon:

i) Ms Jeanne Courbe, Legal Counsel

ii) Mr Aaron Walker, WADA I&I (remotely)

iii) Dr Julian Broséus, WADA I&I

iv) Prof. Christiane Ayotte, Institut National de la Recherche Scientifique ("INRS") (remotely)

d) WADA:

i) Mr Nicolas Zbinden, Counsel

ii) Mr Ross Wenzel, General Counsel, WADA

iii) Mr Cyril Troussard, Associate Director, WADA Legal department (remotely)

iv) Mr Hubert Forget, WADA Legal counsel (remotely)

v) Mr Aaron Walker, WADA I&I (remotely)

vi) Dr Julian Broséus, WADA I&I

vii) Prof. Christiane Ayotte, INRS (remotely)

e) CAS Court Office:

i) Ms Delphine Deschenaux-Rochat, Counsel

83. At the outset of the hearing, the Parties each confirmed that they had no objection to the jurisdiction of CAS in this matter and no objection in respect of the Panel members.

84. At the conclusion of the hearing, the Parties each 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 had been conducted.

VI. THE PARTIES' EVIDENCE

A. The Athlete's Evidence

85. The Athlete provided a witness statement dated 13 July 2021. It may be fairly summarised in the following way.

a) The Athlete was born in 1991 and is an international class master of sports.

b) She has been competing as a triathlete since 2006 and has been a member of the Russian national team since 2007.

c) The Athlete has *"never intentionally used prohibited substances"*.

d) She has undertaken 72 doping tests in and outside of Russia.

e) In May 2013, she underwent a medical check-up at the Federal Medical-Biological Agency ("FMBA") clinic and the cardiologist recommended that she use *"cardioprotectors"*.

f) In November 2013, she was once again recommended to take cardioprotectors on a regular basis for 12 months.

g) She does not recall which medications she was prescribed in 2013. The check-up records note cardioprotectors, with no specific names. The Athlete has requested *"a full copy of my medical records from the […] clinic to get a full picture"*.

h) In September 2014, the Athlete was diagnosed with *"a chronic cardiomyopathy and prescribed Mildronat"*.

i) Before the first media reports in 2016, the Athlete had never heard about a 'doping protection scheme' *"and I have never been offered to get involved in this program. I have never met Dr Rodchenkov or anyone from the Moscow anti-doping laboratory staff"*.

86. The Athlete also adduced what are said to be three sets of records from the FMBA clinic:

a) The first is dated 15 May 2013. In relevant part it says *"Recommendations: Use cardioprotectors. Control amount of anaerobic training. ECG check-up in 2 months. Cardiologist second check-up as per check-up results"* and is signed by a DA Korovkin.

b) The second is dated 5 November 2013. In relevant part it says that an ECG was conducted and provided *"Recommendations: Cardioprotectors therapy for the whole duration of the annual cycle. ECG every 2-3 months"*. It is also signed by DA Korovkin.

c) The third is dated 19 September 2014, and it is headed "CARDIOLOGIST REPORT". It describes a diagnosis of *"abnormal results following functional testing of cardio-vascular system (miocardosis 1 degree)"* and sets forth the following recommendations as *"Diet No 15,*

polyvitamines and magnesium supplements; Mildronat 500 mg x2/day per 1 month; ECG control in 1 month". It is signed by a Dr Yurievna.

B The Respondents' Evidence

87. The evidence adduced into evidence by the Respondents included the following materials:

a) The doping control forms ("DCF") for the Samples.

b) The McLaren Reports, together with the EDP Emails released by Prof. McLaren relating to the Athlete, namely EDP 0400 and 401, EDP 0477 and 0479, and EDP 0833 and 0838.

c) A joint statement of Mr Walker and Dr Broséus, both with WADA's I&I, dated 6 May 2021, together with exhibits including what the "Danilova Data Package" made up of five files of data extracted from the 2015 LIMS.

d) A reply statement of Mr Walker and Dr Broséus dated 21 July 2021, together with exhibits.

e) A power point presentation prepared by Dr Broséus (undated).

f) A report by Prof. Ayotte, director of INRS, dated 28 April 2022.

g) A second report by Prof. Ayotte dated 22 July 2022.

The Doping Control Forms

88. The DCFs (three of them) state that the urine samples were collected as follows:

a) Sample 1: collected in-competition on 28 June 2014 at the Youth European Championships in Penza, Russia;

b) Sample 2: collected in-competition on 7 August 2014 at the International Sports Games (Spartakiada) in Cheboksary, Russia; and

c) Sample 3: collected in-competition on 6 June 2015 at the Russian Championship in Sochi, Russia.

The McLaren Reports

89. The McLaren Reports are described in general terms above. The McLaren Reports also described what was called the "disappearing positive methodology", which Prof. McLaren described as *"the failsafe, final fall back system developed by the Ministry of Sport in combination with the Moscow Laboratory"*. Its salient elements were said to be as follows:

a) The Moscow Laboratory conducted analyses on samples collected (generally by or for RUSADA) from Russian athletes.

b) The Moscow Laboratory conducted an initial testing procedure ("ITP") on a given sample.

c) If the ITP revealed a likely AAF, the laboratory stopped its analysis work. It then recorded the sample bottle number, the date of collection, the sex of the athlete, the relevant sport (this was called the "Athlete Profile"). The Moscow Laboratory then sent (usually by email) the Athlete Profile to a "liaison person", i.e., a person liaising between the Moscow Laboratory and the Russian Ministry of Sport. The liaison person for the period 2013 to 2015 was Mr Alexey Velikodniy.

d) The liaison person then obtained the identity of the athlete from RUSADA, by reference to the sample bottle number in the doping control form, and passed the Athlete Profile, now with a name, to the Deputy Director of the Russian Ministry of Sport, Mr Yury Nagornykh.

e) The Deputy Director of the Russian Ministry of Sport then issued an order for the athlete to be *"quarantine"* or *"saved"*, which order was sent to the liaison and from the liaison to the Moscow Laboratory.

f) The Moscow Laboratory then processed the sample according to the order given. If the order was *"quarantine"*, the Moscow Laboratory continued with the analysis and reporting in the conventional way, conducting a confirmation procedure and accurately recording the results in LIMS and in ADAMS.

g) If the order was *"saved"*, the Moscow Laboratory did no further analysis and did not take undertake the confirmation procedure on the sample and recorded the sample as negative in ADAMS.

h) The Moscow Laboratory then also falsified the result in its LIMS, so as to record a negative result.

The EDP Emails

90. The Respondents adduced the EDP Emails (released with the Second McLaren Report) relating to the Athlete and her Samples and the interaction between the Moscow Laboratory and the Russian Ministry of Sport. These emails were in the following terms.

91. For Sample 1 (with reference number 2916387):

a) On 1 July 2014, Dr Sobolevsky (at the Moscow Laboratory) sent an email to Mr Velikodniy and to Dr Rodchenkov). The subject was *"a result"* and the email read as follows: *"2916387, F, triathlon, international competition / 7210, RU Penza, collection 2014-06-28 trimetazidine"*.

b) On 1 July 2014, Mr Velikodniy replied. The email was in the following terms:

"Save

2916387, Danilova Elena, triathlon, international competition / 7210, RU Penza, collection 2014-06-28

Trimetazidine

Triathlon U23 and Youth European Championships. Penza, 28 June. Females. Under 23. *1st place – Elena Danilova (Russia)"* (emphasis in original).

92. For Sample 2 (with reference number 2916525):

a) On 12 August 2014, Dr Sobolevsky sent an email to Mr Velikodniy (and to Dr Rodchenkov). The subject was *"results"* and the email read in relevant part as follows: *"2916525, F, triathlon, International Sports Games (Spartakiada) / 5500/14, RU Cheboksary, collection 2014-08-07 trimetazidine"*.

b) On 12 August 2014, Mr Velikodniy replied. The email was in the following terms:

"Save

2916525, triathlon, International Sports Games (Spartakiada) / 5500/14, RU Cheboksary, collection 2014-08-07

Danilova Elena *– European youth champion 2014 (U23), Moscow coaches: Zuev, Generalova.*

Trimetazidine (2nd place)" (emphasis in original).

93. For Sample 3 (number 3880728):

a) On 10 June 2015, Dr Sobolevsky sent an email to Mr Velikodniy (and to Dr Rodchenkov). The subject was *"results"* and the email read in relevant part as follows: *"3880728, F, triathlon, Russia's Championships/ 24053/15, RU Sochi, collection 2015-06-06 trimetazidine"*.

b) On 10 June 2015, Mr Velikodniy replied. He said: *"Save triathlon"*

c) On 11 June 2015, the Moscow Laboratory reported Sample 3 as *"negative"* in ADAMS.

The Evidence of Mr Walker and Dr Broséus

94. The evidence of Mr Walker and Dr Broséus may fairly be summarised in the following fashion. As to general matters:

a) In October 2017, a whistle blower sent the 2015 LIMS to WADA (it was, as noted above, an extract of the Moscow Laboratory's LIMS relating to samples obtained in the period from January 2012 to August 2015).

b) In January 2019, WADA I&I recovered more than 23 terabytes of data from the Moscow Laboratory, including a copy of the 2019 LIMS and the Moscow Data (i.e. raw data files and related PDF documents).

c) Operation LIMS investigated the reliability and authenticity of the 2015 LIMS and the 2019 LIMS.

d) WADA I&I engaged a team of independent experts to investigate the authenticity and reliability of the Moscow Data. The experts produced a report on 15 August 2019.

e) The experts recovered a deleted version of the LIMS, which was recovered (or carved) from the free space of the data retrieved from the Moscow Laboratory in January 2019. This carved version of the LIMS (the "Carved LIMS"), which was likely deleted on or around 8 January 2019, completely matches the 2015 LIMS.

f) The Carved LIMS included the files relating to the Athlete's Samples which exactly matched the 2015 LIMS but which had been deleted from the 2019 LIMS.

g) The reliability of the 2015 LIMS is thus established by reference to the deleted data retrieved directly from the Moscow Laboratory.

h) WADA I&I concluded that the 2015 LIMS is an accurate copy of the original LIMS created contemporaneously by the Moscow Laboratory and its contents can be relied upon as being accurate and analytically valid information. This view is supported by the following matters:

   i) The 2015 LIMS contains data in relation to 63,277 samples, *"the falsification of which is all but an insurmountable task"*.

   ii) There is a 99% or more match between various values in the 2015 LIMS and ADAMS – e.g., sample and laboratory codes, specific gravity, pH, events, athlete gender.

   iii) The analytical data for the AAF legitimately reported in ADAMS by the Moscow Laboratory for all athletes between January 2012 and August 2015 matches the 2015 LIMS.

   iv) The contents and detail of the EDP Emails matches the 2015 LIMS.

   v) The 2015 LIMS and the EDP Emails did not come from the same source.

i) WADA I&I concluded that the 2019 LIMS has been manipulated – by selective manipulation and/or deletion of data prior to its provision to WADA – and its contents cannot be relied upon as being accurate and analytically valid information.

95. As to Sample 1, the 2015 LIMS data established as follows:

a) It arrived at the Moscow Laboratory on 30 June 2014 and was given the laboratory code 07923.

b) On the same day:

i) An aliquot was extracted for two procedures: P1.004 for anabolic steroids and P1.005 for stimulants.

ii) PDF files were created for each of the two procedures: a_07923 PDF for P1.004 (where 'a' denotes anabolic steroids) and s_07923 PDF (where 's' denotes stimulants).

c) These PDF files were imported into LIMS on 30 June and 1 July 2014.

d) On 1 July 2014, presumptive AAFs for TMZ at a concentration of 0.003 mcg/L (for P1.004) and 0.08 mcg/L for P1.005 were entered into LIMS.

e) On the same day, the presumptive AAFs were evaluated by the certifying scientist.

f) No confirmation procedure was undertaken.

g) On 4 July 2014, Dr Sobolevsky recorded Sample 1 as negative in ADAMS.

96. As to Sample 2, the 2015 LIMS data established as follows:

a) The sample arrived at the Moscow Laboratory on 8 August 2014 and was given the laboratory code 10247.

b) On 11 August 2014:

i) An aliquot was extracted for two procedures: P1.004 for anabolic steroids and P1.005 for stimulants.

ii) PDF files were created for each of the two procedures: a_10247 PDF for P1.004 (where 'a' denotes anabolic steroids) and s_10247 PDF (where 's' denotes stimulants).

c) These PDF files were imported into LIMS on 11 and 12 August.

d) On 12 August 2014, presumptive AAFs for TMZ for P1.004 (with no concentration noted)) and for P1.005 at a concentration of 0.282 mcg/L were entered into LIMS.

e) On the same day, the presumptive AAFs were evaluated by the certifying scientist.

f) No confirmation procedure was undertaken.

g) On 13 August 2014, Dr Sobolevsky recorded the sample as negative in ADAMS.

97. As to Sample 3, the 2015 LIMS data established as follows:

a) The sample arrived at the Moscow Laboratory on 7 June 2015 and was given the laboratory code 06435.

b) On 9 June 2015:

i) An aliquot was extracted for procedure P1.005 for stimulants.

ii) A PDF file was created for the procedure: s_06435 PDF (where 's' denotes stimulants).

iii) The PDF file was imported into LIMS.

iv) A presumptive AAF for TMZ at a concentration of 4.7 mcg/L was entered into LIMS.

v) The presumptive AAFs were evaluated by the certifying scientist.

vi) A confirmation procedure was undertaken, and the positive result for TMZ was entered into LIMS with a concentration evaluated at 3.4 mcg/L.

c) On 11 June 2015, Dr Sobolevsky recorded the sample as negative in ADAMS.

d) Further, as the investigation into the Russian Doping Scheme developed, someone (a) searched the LIMS for Sample 3 on 30 separate occasions and, ultimately, deleted what is known as the 'parent folder' relating to Sample 3 from LIMS.

The Evidence of Prof. Ayotte

98. The Respondents adduced two reports from Prof. Ayotte, one dated 28 April 2021 and the second dated 22 July 2021.

99. Prof. Ayotte was asked by World Triathlon to review the WADA I&I spreadsheets containing the information from the 2015 LIMS in relation to the Samples, together with the EDP Emails relating to the Athlete and the analytical file retrieved from the Moscow Laboratory. In her first report, Prof. Ayotte recounted the information contained in the 2015 LIMS (as has been set forth above) and then turned to the analytical data. In her second report, Prof. Ayotte analysed the raw log data that was inputted by the Moscow Laboratory at the time of the confirmation procedure for Sample 3. In her exert opinion:

a) For the 2015 LIMS:

i) For Samples 1 and 2, the analysts who performed the ITPs, P4 and P5, entered for each procedure the presence of TMZ for each sample; i.e., two different aliquots were drawn, two different procedures were undertaken, and both detected TMZ.

ii) For Sample 3, the analysts performed an ITP, P5, which detected TMZ. The confirmation procedure was undertaken and duly confirmed the result. The level of TMZ found was high (3.4 mcg/mL) which is consistent with what would be expected to be on administration of the drug.

b) For the PDFs:

i) The ITPs conducted by the Moscow Laboratory generated six PDF files, only three of which had been recovered, P4 for Sample 1, P5 for Sample 2, and P5 for Sample 3.

ii) Of the recovered PDF files, Prof. Ayotte extracted the chromatograms generated for TMZ. Of these, the P4 for Sample 1 showed a positive result for TMZ but the P5 PDF files for Samples 2 and 3 showed negative results, inconsistent with the entries in the 2015 LIMS.

c) For the raw analytical data:

i) Prof. Ayotte reviewed the raw data files for the ITP, P5, for all three Samples, which she regenerated in her laboratory. She reported that there was no detection of TMZ.

d) For the raw log data:

i) Prof. Ayotte entered the log data into her laboratory identification form (conforming to WADA technical document as to identification criteria) and reported that the identification for TMZ was met.

100. Prof. Ayotte concluded as follows:

"In conclusion, there is [sic] *numerous traces left in the LIMS of the Moscow Laboratory showing that the athlete's […] samples were indeed i) aliquoted and tested, ii) that trimetazidine was found by the initial testing procedures performed, iii) that a confirmation aliquot of lab code 6435 was taken, tested and that trimetazidine was again present, iv) that the log for the confirmation results permitted the identification of trimetazidine according to the criteria (WADA Technical Documents)".*

VII. THE PARTIES' SUBMISSIONS

A. The Athlete's Submissions

101. There were three main strands to the Athlete's submissions:

a) One, as a procedural matter, the composition of the Panel was *"incorrect"* and her right to be heard had been violated.

b) Two, as to the issue of liability, the Challenged Award should be set aside on the basis that the CAS ADD erred in concluding that World Triathlon discharged its burden of proving the ADRV.

c) Three, as to the consequences that should follow, because she committed no ADRV then no sanction should be imposed and that, even if the Panel concludes that there has been a violation, a period of ineligibility of four years would be *"disproportionate"* and that any disqualification of her results would in any event be *"unwarranted for fairness reasons"*.

Procedural Matters

102. As procedural matters, the Athlete submitted that (a) the composition of the Panel was *"incorrect"* and (b) her right to be heard had been violated by the CAS ADD.

103. In relation to the composition of the Panel, the Athlete's submissions may be summarised as follows:

a) The system of appointment of the arbitrators who sit at the CAS Appeals Arbitration Division *"is not compatible with the right to an impartial and independent tribunal"*.

b) In accordance with Article 6(1) of the European Convention on Human Rights ("ECHR") and Article 30 of the Swiss Constitution and Swiss Federal Tribunal ("SFT") case law, the Athlete has a right to have its case adjudicated by an independent and impartial tribunal.

c) The standards applicable to an arbitral tribunal are all the more rigorous where a party has no choice but to accept the rules adopted by another, dominant party. This approach has been confirmed by the European Court of Human Rights in *Mutu and Pechstein v Switzerland* where the court held that the arbitration clause contained in the statutes of an international federation providing for CAS jurisdiction was to be regarded as a form of compulsory arbitration and that therefore the safeguards of Article 6(1) of the ECHR must be respected. This was confirmed in *Ali Riza & Ors v Turkey*.

d) The Athlete therefore has the right to have her case heard by an impartial and independent tribunal in strict compliance with the guarantee of Article 6(1) of the ECHR.

e) The Athlete does not challenge the independence and impartiality of the members forming the Panel in this appeal. Instead, the Athlete contends that the system of appointment and in particular the appointment of the President of the Panel does not provide a sufficient objective appearance of impartiality and independence.

f) By Article R54 of the CAS Code, the President of the Panel is appointed by the President of the CAS Appeals Arbitration Division (the "Division President"). Neither the parties

nor the arbitrators appointed by them are permitted to appoint the president of the panel. This mechanism does not exist in the ordinary arbitration procedure at the CAS or in the procedure before the CAS ADD.

g) Such a system does not guarantee a sufficient objective appearance of impartiality and independence and therefore the CAS does not offer the guarantees of Article 6(1) of the ECHR.

h) The objective appearance of impartiality and independence of the Panel is negatively affected (a) by the fact that the arbitrators have to be appointed on the basis of a closed list, and (b) by the fact that the CAS is exclusively entitled to appoint the president of the panel.

i) For all these reasons, the Athlete submits that, by reason of the system of appointment which applies to the CAS Appeals Arbitration Division, the Panel does not have a sufficient objective appearance of impartiality and independence.

104. In relation to the second procedural objection, the Athlete submitted that her rights to be heard and to equal treatment were violated in the following ways:

a) The Athlete applied for an extension of time of 94 days to file her Appeal Brief but was granted only 42 days, which was *"too short to properly prepare the defense and present her case"*.

b) *"WT filed incomplete evidence"* in that (i) World Triathlon did not submit the *"original authentic data of the 2015 LIMS and 2019 LIMS, namely the SQL files"*; (ii) the Excel spreadsheets were not original but contained data excerpted from the LIMS; and (iii) World Triathlon did not present any forensic chain of custody forms in relation to the LIMS data.

c) By the award in CAS 2020/O/6689, RUSADA *"was notably ordered to conduct, under WADA's … supervision, 'investigations into any cases impacted by the respective alterations/deletions of the Moscow laboratory data' as a mandatory criterion to fulfil for RUSADA to be reinstated"* and yet WADA has not provided any information to the Athlete in relation to such investigations or the reanalysis of the Samples and has not provided the Samples themselves. Either no investigation was conducted by RUSADA in breach of the award in CAS 2020/O/6689 or WADA has *"purposefully concealed the outcome of such investigation"* in an effort *"to defraud the Panel by misrepresenting the matter and hiding to both the Panel and the Athlete a crucial document"*. The Samples are *"missing"* and *"there is no evidence that the Samples are not still in existence"*.

The Merits – Liability

105. The Athlete submitted that the Challenged Award should be set aside on the basis that the Sole Arbitrator erred in concluding that World Triathlon discharged its burden of proving the ADRV.

106. The Athlete submitted as follows:

a) In the absence of information relating to RUSADA's investigation relating to the Samples and in the absence of the Samples themselves, the evidentiary basis for an ADRV is *"incomplete and insufficient"*.

b) The McLaren Reports are unreliable and inconclusive.

c) The Sole Arbitrator incorrectly relied on the EDP Emails.

d) The Sole Arbitrator incorrectly relied on the LIMS data.

e) The Sole Arbitrator was wrong to place such heavy reliance on Prof. Ayotte's opinion.

Absent information as to RUSADA's investigation and the Samples, the evidentiary basis for an ADRV is incomplete

107. As just noted, the Athlete submitted, as a preliminary matter that, in the absence of any information from WADA relating to RUSADA's investigation into the Athlete and her Samples and absent any information relating to the re-analysis of the Samples – which *"could have shown that the Athlete is – and always has been – indeed clean"* the evidence relied upon by the Respondents for the ADRV was incomplete and insufficient to carry the burden.

108. In this respect, it was submitted as follows:

a) The CAS panel in CAS 2020/O/6689 ordered RUSADA *"to conduct, under WADA's […] supervision, 'investigations into any cases impacted by the respective alterations/deletions of the Moscow laboratory data' as a mandatory criterion to fulfil for RUSADA to be reinstated"*.

b) No doubt RUSADA conducted such an investigation into the Athlete and her Samples.

c) WADA has never disclosed to the Athlete any information in relation to such investigation.

d) WADA has never disclosed whether or not the Samples were re-analysed and has not disclosed the results of any such re-analysis.

e) In that case, quite apart from the breach of her procedural rights (as above) the evidence relied upon by the Respondents is not sufficient to carry the burden of establishing the elements of the ADRV.

The McLaren Reports are unreliable and inconclusive

109. According to the Athlete, the Sole Arbitrator failed to take into account a number of matters when considering the McLaren Reports:

a) The Sole Arbitrator ignored the very nature of the McLaren Reports. These reports could not be considered evidence to prove an ADRV by any individual athlete as was confirmed by Prof. McLaren himself.

b) The Sole Arbitrator ignored that previous CAS panels have found the McLaren Reports *"to be of very limited probative value"*: see CAS 2017/A/5379.

c) The Sole Arbitrator overlooked significant shortcomings in the McLaren Reports. For example, the reports are substantially based on Dr Rodchenkov's allegations *"which were found to be unreliable [...] before the CAS"*: see CAS 2017/A/5379. Other panels have considered Dr Rodchenkov's testimony to be *"of very limited probative value"*. Further, Prof. McLaren failed to verify even the most basic allegations made by Dr Rodchenkov, without trying to speak to the individuals and athletes implicated.

<u>The Sole Arbitrator incorrectly relied on the EDP Emails</u>

110. The Sole Arbitrator relied on the EDP Emails, concluding that their contents matched the data within the 2015 LIMS, which she said *"did not come from the same source"*. In this she was incorrect in that the source of the 2015 LIMS and the EDP Emails remains unknown.

111. Moreover, the Sole Arbitrator should have concluded that the EDP Emails were *"forensically insufficient"* to incriminate the Athlete because:

a) It is impossible to verify the reliability and authenticity of the emails *"in the absence of any forensic chain of custody"*.

b) The WADA I&I experts took for granted the findings in the McLaren Reports, not conducting any independent assessment.

c) World Triathlon did not adduce any evidence verifying the authenticity of the EDP Emails. It is not possible to establish the authenticity of them and as such they are of no probative value.

d) The findings of other CAS panels as to the probative value of the EDP Emails are not binding.

<u>The Sole Arbitrator incorrectly relied on the LIMS data</u>

112. The Athlete submitted that the Sole Arbitrator was incorrect in relying on the LIMS data. The following is a fair summary of her submissions.

113. The data filed by World Triathlon are *"forensically incomplete"* and *"not in compliance with basic principles of computer forensics"*.

a) The Sole Arbitrator failed to consider that World Triathlon did not submit the original authentic data of the 2015 LIMS and the 2019 LIMS. As a result, the reliability of the findings by World Triathlon cannot be proved.

b) The Sole Arbitrator failed to consider that, because the LIMS data was provided in Excel spreadsheets containing pasted excerpts from the databases, it was impossible to verify this data. There was no explanation or evidence as to when, how and by whom these spreadsheets were produced. World Triathlon did not share the LIMS data with the Athlete. Instead, World Triathlon provided the Athlete with a set of Excel files that presumably represent extracted information from the LIMS data. The Sole Arbitrator failed to consider that, from a forensic point of view, Excel extracts cannot be considered as reliable evidence because World Triathlon did not provide the chain of custody demonstrating when and how these extraction activities were performed. Absent access to the data and any chain of custody, the data sources cannot be considered reliable.

c) The Sole Arbitrator failed to consider that World Triathlon did not present any forensic chain of custody forms in relation to the LIMS data.

d) The Sole Arbitrator failed to consider that World Triathlon submitted insufficient and/or unreliable evidence that is impossible to verify, in breach of the Athlete's right to defend herself.

114. The LIMS data filed by World Triathlon *"are forensically unreliable"*:

a) The Sole Arbitrator failed to take account of the fact that the LIMS data was *"unreliable and inconclusive"*.

b) The Sole Arbitrator accepted the findings of World Triathlon's experts at face value "without giving any critical assessment of the Excel excerpts, which by themselves do not have any probative value and therefore cannot be considered as evidence*"*.

115. The Sole Arbitrator was wrong to rely on the 2015 LIMS which *"is neither reliable nor authentic"*:

a) World Triathlon did not provide any evidence that the reliability of the 2015 LIMS had been tested; and did not file any evidence to rebut the possibility that the 2015 LIMS may have been altered by the whistle-blower or anyone else, in particular those associated with Dr Rodchenkov.

b) The Sole Arbitrator overlooked that the comparison between the 2015 LIMS and the Carved LIMS was *"of no value"* because there was no evidence that either had been verified.

c) The Sole Arbitrator overlooked that World Triathlon did not provide any chain of custody evidence for the 2015 LIMS.

d) The Sole Arbitrator failed to consider that World Triathlon did not demonstrate *"forensic methods were used appropriately to collect, preserve, and handle the 2015 LIMS"*.

e) The Sole Arbitrator relied on the report by Vigiteck which concluded that the 2015 LIMS was more reliable than the 2019 LIMs but *"it is impossible to verify the work done by"* Vigiteck. In particular, the Vigiteck report states that Vigiteck received a USB stick from WADA but there is no evidence as to the chain of custody of the stick, and no evidence from Vigiteck to the effect that the integrity of the data was preserved and was not modified.

f) The Vigiteck report was not prepared for the purpose of investigating any athlete or the Athlete and the Sole Arbitrator was wrong to say that it made findings with respect to the Athlete's samples.

116. The Sole Arbitrator was wrong to rely on the 2019 LIMS as evidence of protection of the Athlete:

a) The 2019 LIMS is not reliable evidence that can be used against the Athlete.

b) World Triathlon did not provide the Athlete with access to the 2019 LIMS, such that she could not verify it.

c) The Sole Arbitrator overlooked that World Triathlon did not provide any chain of custody evidence for the 2019 LIMS.

117. The Sole Arbitrator was wrong to conclude that WADA I&I had analysed the raw data in relation to the Athlete:

a) The WADA I&I did not analyse the Athlete or her Samples.

b) The Sole Arbitrator failed to consider that World Triathlon failed to present *"the CP raw data file that is important to prove a potential ADRV"*.

c) The WADA I&I experts expressed a different view when reporting to the WADA CRC in November 2019 when they said that the absence of the raw data and PDFs *"has materially affected the ability to pursue ADRVs against select athletes"*. In other words, the WADA I&I was then of the view that the absence of raw data files would practically prevent them from pursuing any ADRV. The current case is no different.

118. The Sole Arbitrator was wrong to rely on the LIMS data as they contain *"important and unexplained discrepancies"*:

a) The Excel extracts from the 2015 LIMS and the 2019 LIMS do not match with the DCF data of the Athlete:

i) There are discrepancies in relation to gender in that for Samples 2 and 3 the LIMS records the gender as male.

ii) There are inconsistencies with respect to the reported volume of urine, the stated volumes in the DCF are 120ml, 130ml, and 140ml for Samples 1, 2 and 3, while the

volumes reported in the 2015 LIMS and the 2019 LIMS are, respectively, 112ml, 133ml, and 138ml.

iii) There is an inconsistency with respect to the reported specific gravity, with 1.015 in the DCF and 1.014 in the LIMS data.

iv) There are inconsistencies with respect to the *"test mission codes"*, with the DCF showing different codes than the 2015 LIMS and the 2019 LIMS.

v) The 2015 LIMS and the 2019 LIMS contain inconsistent data with respect to pH level and specific gravity of the Samples, unexplained by World Triathlon.

The Sole Arbitrator was wrong to place such heavy reliance on Prof. Ayotte

119. The Athlete submitted that the Sole Arbitrator was wrong to place such heavy reliance on Prof. Ayotte's opinion. According to the Athlete:

a) The reliance on Prof. Ayotte's reports was *"unwarranted and unjustified"*.

b) There was no evidence from World Triathlon that Prof. Ayotte verified the 2015 LIMS data and the EDP Emails with which she was provided.

c) The Sole Arbitrator did not question whether Prof. Ayotte verified the 2015 LIMS data and the EDP Emails with which she was provided.

120. Based on the matters outlined above, the Athlete submitted that the Challenged Award must be overturned on the basis that the Sole Arbitrator incorrectly concluded that World Triathlon discharged its burden.

The Merits – Sanctions

121. As to the *"legal consequences"* that should follow, the Athlete's primary submission was that, for all the reasons summarised above, World Triathlon and WADA have not discharged their burden of proof so that the Panel should conclude that the alleged ADRV has not been established, with the result that no sanction should be imposed.

122. The Athlete submitted that, in the alternative, if the Panel does conclude that there has been an ADRV then: (a) *"no sanction should be imposed on the Athlete or that it should at least be reduced based on the principle of proportionality"*; and (b) in any event, the Athlete's competitive results *"must not be disqualified"*.

123. As to the former, the Athlete's submissions may be summarised as follows:

a) According to Article 10.2.1 of the 2015 WTADR, the period of ineligibility shall be four years unless the Athlete can show that the ADRV was not intentional.

b) In her statement dated 13 July 2021, the Athlete explained that:

i) She never intentionally used prohibited substances and explained that, on the recommendation of her cardiologist, she used cardioprotectors for 12 months and that in September 2013 she was prescribed Mildronat.

ii) She cannot now remember what she was prescribed in 2013.

c) The Athlete therefore contends that requesting her to prove eight years later how the TMZ was detected in her Samples *"is a requirement that is de facto impossible for her to meet"* so that it is impossible for her to prove that the alleged use of the TMZ was not intentional.

d) Any ineligibility sanction would in any event be *"disproportionate"*. The principle of proportionality is a fundamental tenet of international and Swiss law and expressly recognised by CAS jurisprudence.

e) The Challenged Award is silent as to proportionality. The Sole Arbitrator did not conduct any proportionality test before sanctioning the Athlete with four years of ineligibility.

f) A sanction of four years would be *"highly disproportionate"*. The Athlete is not accused of being unclean now, such that prohibiting her to compete to guarantee the fairness of competitions is not necessary and therefore a disproportionate measure.

g) In any event, the Athlete should receive credit for the period of provisional suspension that she has served.

124. As to the disqualification, the Athlete made the following submissions:

a) If the Panel finds that the Respondents have not discharged their burden, then no disqualification should be imposed.

b) In the alternative, if the Panel does determine that there has been a violation then the disqualification of her results *"is unwarranted for fairness reasons"* pursuant to Article 10.8 of the 2015 WTADR which provides that results shall be disqualified *"unless fairness requires otherwise"*.

c) This fairness exception is recognised in CAS jurisprudence: see CAS 2020/O/6759; and according to CAS case law, the Panel has a broad discretion when applying the fairness exception and, because this appeal is a *de novo* hearing, the Panel is not bound by the findings of the Sole Arbitrator in this respect.

d) In the Challenged Award, the Sole Arbitrator exercised her discretion to order disqualification of results for the same period as the period of ineligibility, i.e., from 6 June 2015 (the date of the collection of Sample 3) until 5 June 2019.

e) The Athlete disagrees with the Sole Arbitrator's assessment of fairness for two reasons:

i) One, it was *"contradictory"* for the Sole Arbitrator to impose disqualification in respect of the period after June 2015 in circumstances where there is no evidence that the Athlete used any prohibited substance during that period and she tested negative at least 34 times since then. If the Sole Arbitrator found that the Athlete did not use any prohibited substance since that then there was no need to *"correct"* the competition results during that time.

ii) Two, if the Panel were to conclude that the Athlete committed the ADRV then only a disqualification of results between the Sample 1, 28 June 2014, and the Sample 3, 6 June 2015, would be appropriate because there is no evidence that the level playing field was impaired after June 2015.

f) Any different decision on disqualification would be unfair and disproportionate.

125. The Athlete's prayers for relief are as follows.

"(1) Set aside the award in the matter CAS 2021/ADD/23, World Triathlon v. Elena Danilova dated 17 January 2022;

(2) Declare that Ms Danilova did not commit any anti-doping rule violation in accordance with Article 2.2 of the 2015 WT ADR and declare that no period of ineligibility is imposed on Ms Danilova;

(3) Alternatively, reduce Ms Danilova's period of ineligibility and declare that none of Ms Danilova's results are disqualified;

(4) Alternatively, reduce the disqualification of Ms Danilova's results to the period from 28 June 2014 to 6 June 2015;

(5) Order World Triathlon alone or together with the World Anti-Doping Agency to bear the costs of these appeal proceedings and compensate Ms Danilova for the legal costs and other expenses incurred in the first instance and these appeal proceedings;

(6) Order and other relief that the Panel deems appropriate".

B. World Triathlon's Submissions

126. World Triathlon submitted detailed written submissions and also adopted the oral submissions made by WADA at the hearing.

Procedural Matters

127. As to the Athlete's first procedural objection, World Triathlon submitted that the composition of the Panel was not *"incorrect"* and that the CAS has been confirmed as independent and impartial. The European Court of Human Rights ("ECtHR") in *Mutu and Pechstein v Switzerland* ruled that the CAS *"is a sufficiently impartial and independent institution within the meaning of Article 6.1*

of the Convention on Human Rights". Further, the Panel has been *"rightly and properly appointed as per usual and widely accepted CAS procedure"*.

128. As to the Athlete's objection that her right to be heard had been violated, World Triathlon submitted as follows:

a) In relation to the complaint that the Respondents had submitted *"incomplete evidence"*, World Triathlon submitted that *"the SQL files, hash values and forensic chain of custody of the data referenced by [the Athlete] are raised as frivolous arguments to cast the attention away from the actual forensic evidence put forward by World Triathlon. The WADA I&I team has explained in detail why the documents relied upon by World Triathlon are reliable in their reports. In particular, the fact the carved materials could be found (in deleted state) in the data retrieved from the Moscow Laboratory in 2019 and that these materials perfectly match the 2015 LIMS makes any argument regarding the acquisition of the 2015 LIMS redundant"*.

b) In relation to the Athlete's complaint that information about the RUSADA investigation (including the Samples themselves) had been withheld from the Athlete, World Triathlon submitted that it had (and has) no knowledge of the RUSADA investigation and thus was not in a position to share the same with the Athlete.

The Merits – Liability

129. As to liability, the overarching submission on the part of World Triathlon was that, by virtue of the evidence adduced by it before the Sole Arbitrator, in particular the 2015 LIMS and the EDP Emails, it has satisfied its burden of establishing that the Athlete has committed an ADRV and that the Athlete has not adduced any evidence *"that would allow her to dispel the established ADRV to the required standard of proof"*.

130. World Triathlon's submissions may be summarised as follows:

a) The Athlete is an international level athlete. By Article 2.2 of the WTADR 2015, it was the Athlete's personal duty to ensure that no prohibited substance entered her body.

b) The International Standard on Results Management ("ISRM") and the International Standard for Testing and Investigations ("ISTI") provide the right to reopen an investigation. It is wrong to say that, because World Triathlon informed the Athlete in May 2017 that they were not proceeding with the charges, World Triathlon was somehow precluded from bringing these charges as a result of further information subsequently obtained via the McLaren Reports.

c) In contravention of Article 2.2 of the WTADR 2015, the Athlete committed an ADRV in that she used a prohibited substance on three occasions in the period 2014 through 2015. In this respect:

i) An AAF is not required in order to establish an ADRV. An ADRV may be established by *"any reliable means"*, per Article 3.2 of the WTADR 2015.

ii) The evidence in this case establishes, to the comfortable satisfaction of the Panel, that an ADRV has been committed.

131. The evidence relied upon, summarised, is as follows:

a) The Athlete provided the Samples, as is clear from the three doping control forms.

b) The McLaren Reports (including the EDP material) are reliable evidence in respect of the matters which they address. The McLaren Reports *"found that the Moscow Laboratory operated, for the protection of doped Russian athletes, within a State directed failsafe system described in the Reports as the 'Disappearing Positive Methodology'"*.

c) It is accepted that the McLaren Reports are not, of themselves, sufficient to result in an ADRV against the Athlete but they are compelling circumstantial evidence that may be relied upon to establish use of a prohibited substance on the part of the Athlete.

d) In this case, the EDP Emails demonstrate, for all three Samples, the use of TMZ by the Athlete, each of which benefited from the disappearing positive methodology.

e) The EDP files relating to the Athlete are numbered 0401, 0479 and 0383. These files clearly identify the Athlete and the Samples *"and the fact that TMZ was detected in all three, as well as the 'Save' emails related thereto"*.

f) The EDP evidence also establish that the Athlete was a *"protected"* athlete in the context of the Russian Doping Scheme. As a protected athlete, the Samples were subject to *"save"* emails and her AAFs were concealed as part of the disappearing positive methodology. The Moscow Laboratory falsely reported the Samples as negative in ADAMS in 2014 and 2015.

g) For Sample 1:

i) It was collected on 28 June 2014 at the Under 23 Youth European Championships in Penza, Russia.

ii) On 30 June 2014, the ITP was commenced, and five aliquots were extracted from Sample 1 for use in five analytical procedures.

iii) These procedures were completed, and their results evaluated by the Moscow Laboratory at various times on 30 June 2014. Of the five analytical procedures undertaken, only three would be expected to have produced PDFs, namely P1.004n P1.005 and P1.006.

iv) On 1 July 2014, the last of the PDFs was imported into LIMS.

v) On 1 July 2014, an email to the liaison regarding ITP of Sample 1. The body of the email reads: *"2916387, F, triathlon, international competition / 7210, RU Penza, collection 2014-06-28 TMZ"*.

vi) On 1 July 2014, an email under the heading *"Save"*: *"Save 2916387, Danilova Elena, triathlon, international competition / 7210, RU Penza, collection 2014-06-28. TMZ"*; *"Triathlon U23 and Youth European Championships. Penza, 28 June. Females. Under 23. 1st place – Elena Danilova (Russia)"*.

vii) As the *"Save"* email stated, the Athlete finished first in the under 23 Youth European Championships held in Penza, Russia on 28 June 2014.

viii) All of these emails were part of EDP in reference to EDP0479 – with relates to Elena Danilova.

h) For Sample 2:

i) It was collected on 7 August 2014 at the International Sports Games (Spartakiada) in Cheboksary.

ii) The ITP took place on 11 August 2014, and four aliquots were extracted for use in four analytical procedures.

iii) These procedures were completed, and their results evaluated by the Moscow Laboratory at various times on 12 August 2014. Of the four analytical procures undertaken, only three would be expected to have produced PDFs, namely P1.004, P1.005 and P1.006.

iv) On 12 August 2014, the last of the PDFs was imported into LIMS.

v) On 12 August 2014, an email circulated about the results of the ITP analysis of Sample 2 to the Ministry of Sport liaison. In the body of the email stated the following: *"2916525, F, triathlon, international Sports Games (Spartakiada) / 5500/14, RU Cheboksary, collection 2014-08-07 TMZ"*.

vi) On 12 August 2014, an email under the heading *"Save"*: *"2916525, triathlon, International Sports Games (Spartakiada) / 5500/14, RU Cheboksary, collection 2014-08-07. Danilova Elena – European youth champion 2014 (U23), Moscow coaches: Zuev, Generalova. TMZ (2nd place)"*.

vii) As the *"Save"* email stipulated, the Athlete was the 2014 Youth (U23) champion and had placed second in 2014 International Sports Games (Spartakiada), on 7 August 2014.

viii) All of these emails were also part of the EDP in reference to EDP0401 which relates to Elena Danilova.

i) For Sample 3:

i) It was collected at the Russian Championship in Sochi on 6 June 2015.

ii) On 6 June 2015, Sample 3 was collected and delivered to the Moscow Laboratory the following day (7 June 2015).

iii) On 8 June 2015, the ITP was commenced. Six aliquots were extracted from the Sample 3 for use in six analytical procedures. These procedures were completed, and their results evaluated by the Moscow Laboratory. Of the six analytical procedures undertaken, only four would be expected to have produced PDFs, namely P1.004, P1.005, P1.006 and P1.020.

iv) On 9 June 2015, the resultant PDF from the analysis for (then) stimulants (e.g., TMZ) in Sample 3 was imported into LIMS.

v) On 9 June 2015, a presumptive AAF for TMZ was reported in Sample 3.

vi) On 9 June 2015, in response to the presumptive AAF, a confirmation procedure was commenced. That same day, the presence of TMZ, at a concentration of 3.4 μg/ml, was confirmed in the Sample 3 and this result was entered in the 2015 LIMS. In other words, analysis had identified a reportable AAF for TMZ. Notably, the reported concentration was about 100 times higher than the minimum required performance level ("MRPL") of 20 ng/ml.

vii) On 10 June 2015, an email circulated about the results of the ITP analysis of Sample 3 to the to the Ministry of Sport liaison. The body of the email reads: *"3880728, F, triathlon, Russia's Championship / 24053/15, RU Sochi, collection 2015-06-06 TMZ"*.

viii) On 10 June 2015, an email sent in reply to the one above reads: *"Save triathlon"*.

ix) On 11 June 2015, Sample 3 was reported as *"negative"* in ADAMS.

x) All of these emails were also part of the EDP in relation to EDP0838 which relates to Elena Danilova.

j) The 2015 LIMS provides further evidence of use of TMZ by the Athlete. The 2015 LIMS is reliable evidence, and the Sole Arbitrator did not *"incorrectly"* rely on it. *"The 2015 LIMS is reliable and has gone through an extensive forensic analysis"*. It has been *"subject to a rigorous authentication process and was found to be reliable and valid"*.

k) This has been confirmed by Operation LIMS conducted by WADA I&I and by the extensive evidence in this case from Mr Walker and Dr Broséus from WADA I&I.

l) The data recovered from the Moscow Laboratory was sent to Prof. Ayotte for analysis and assessment. According to Prof. Ayotte, it shows as follows:

i) The ITPs conducted on each of the Samples indicated the presence of TMZ, with an indicative concentration for Sample 3 of 4.7 μg/mL.

ii) No confirmation procedure was conducted for Sample 1 and Sample 2; it is possible that none was undertaken because the estimated amounts were relatively close to the MRPL for stimulants at 100 ng/mL.

iii) A confirmation procedure was conducted for Sample 3 which confirmed the presence of TMZ at a concentration of 3.4 µg/mL and yet that negative results were reported in ADAMS.

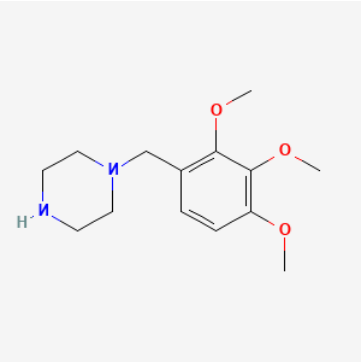
iv) The levels of TMZ in Sample 3 were greater than the MRPL for hormone and metabolic modulators of 0.02 µg/mL.

v) Relying on the raw log of data in the 2015 LIMS, the positive identification criteria for TMZ were met (in terms of retention times and relative abundances)

m) There is nothing in the objection that Prof. Ayotte took the reliability of the 2015 LIMS at face value. Prof. Ayotte was not asked to verify the forensic reliability of the data *"but to provide a scientific opinion on its contents"*, which she did.

n) The 2019 LIMS was manipulated. The evidence of Mr Walker and Dr Broséus provided *"detailed explanations of the forensic analyses that were undertaken"* to confirm this. The CAS panel in CAS 2020/O/6689 came to the same conclusion.

o) The Athlete relies on a heart condition and the use of Mildronate. The use of Mildronate does not provide an explanation for the detection of TMZ in her system. TMZ and Mildronate have very different chemical structures as per the below diagrams (TMZ on the left and Mildronate on the right):



132. In response to the Athlete's various criticisms of the doping control data, World Triathlon's submissions were as follows:

a) The alleged discrepancies are *"either nonexistent, no way abnormal, misleading or incorrectly raised"*.

b) In relation to the complaint that there are variations in the specific gravity of the Samples between the DCFs and the Moscow Laboratory, the specific gravity for Samples 1 and 2 as recorded in the DCF and in the 2015 LIMS is identical and that for Sample 3 varies by an inconsequential 0.01 mL.

c) The pH levels and the noted sex of the Athlete are recorded in a consistent manner throughout.

d) It is *"not abnormal"* for recorded volumes to vary from the time collection to the time of analysis in the laboratory, which arises from the inevitable handling of the material.

e) There are no discrepancies in the test mission codes. The DCFs indicate an internal mission code for each of the Samples (Sample 1 = 6137; Sample 2 = 6205; and Sample 3 = 7466); and while the codes for the 2015 LIMS and the emails between the Moscow Laboratory and the Russian Ministry of Sport are different, they are still referable to each of the Samples (Sample 1 = 7210; Sample 2 = 550/14; Sample 3 = 2405/15).

133. In all, the Athlete has brought forward *"no remotely compelling arguments let alone any reliable evidence to rebut the evidence […] that she was a protected athlete and that she did commit a violation of Article 2.2 by using TMZ in 2014 and 2015"*.

The Merits – Sanctions

134. World Triathlon's submissions in relation to the consequences may be summarised as follows.

135. In relation to the period of ineligibility:

a) Article 10.2 of the 2015 WTADR provides for a period of ineligibility of four years (subject to reduction or suspension pursuant to Articles 10.4, 10.5 or 10.6) unless the Athlete can establish that the ADRV was not intentional.

b) The Athlete has *"neither satisfied her burden of establishing that her ADRV was not intentional, nor established the source of the TMZ which was detected in her urine samples on various occasions, as required under the ADR"*.

136. As to disqualification:

a) Pursuant to Article 9 of the 2015 WTADR, an ADRV in individual sports in connection with an in-competition test automatically leads to disqualification of the result obtained in that competition with all resulting consequences.

b) Accordingly, the Athlete's results from her competition on 28 June 2014 at the Youth European Championships 2014, from her competition on 7 August 2014 at the International Sports Games (Spartakiada) and from her competition on 6 June 2015 at the Russian Championships *"must all be disqualified"*.

c) The first evidence of use of a prohibited substance by the Athlete was Sample 1 collected on 28 June 2014.

d) Pursuant to Article 10.8 of the 2015 WTADR, any competitive results obtained by the Athlete between that date and her provisional suspension on 28 May 2021 *"shall be disqualified with all resulting consequences"*.

e) The Sole Arbitrator took the view that disqualification for such period *"may constitute excessive punishment"* and disqualified the Athlete's results from 6 June 2015 to 5 June 2019.

f) This decision should be confirmed but corrected as follows:

i) It should be corrected to include the disqualification of the Athlete's results from her competition on 28 June 2014 at the Youth European Championships 2014 and from her competition on 7 August 2014 at the International Sports Games (Spartakiada).

ii) In accordance with Article 10.10 WTADR 2015, all of the Athlete's results from 28 June 2015 to 6 June 2015 should be disqualified as there are no reasons of fairness which justify maintaining her results in the period where the Athlete has been found to be doping. The Athlete has not made any arguments in this respect and the burden is on her to show that it would be unfair.

137. The request for relief on the part of World Triathlon was as follows:

"Based on the foregoing, World Triathlon respectfully requests that the CAS:

i. dismiss the Claimant's appeal;

ii. confirm the appealed decision;

iii. award World Triathlon a significant contribution to its legal and other costs".

C. WADA's Submissions

138. WADA adopted and relied upon the submissions and evidence put forward by World Triathlon and made a number of additional submissions in respect of the procedural objections and the merits.

Procedural Matters

139. As to the Athlete's procedural objections, WADA responded in particular to (a) the Athlete's challenge in relation to the formation of the Panel; and (b) the contention that WADA had withheld information as to the RUSADA investigation into the Athlete and the re-analysis of the Samples.

140. In relation to the former, WADA's submitted that the challenge was bound to fail for two reasons. First, the challenge was too late. If the Athlete wished to challenge the Panel, and in particular the mode of appointment of the President of the Panel, she should have objected to the appointment of the President at the time of the appointment in accordance with the CAS Code. Second, and in any event, the SFT has recently confirmed that the CAS is an independent and impartial arbitral tribunal: see SFT 4A_232/2022.

141. In relation to the latter, WADA's submissions may be summarised as follows:

a) There was no request by WADA to RUSADA for RUSADA to conduct an investigation into the Athlete and her Samples.

b) WADA did not ask RUSADA to conduct any such investigation because WADA was better placed, subsequent to Operation LIMS, to conduct the investigation.

c) There was a recommendation, on 2 February 2021, from WADA to RUSADA to conduct formal inquiries with the Moscow laboratory, the Russian Ministry of Sport and others and provide evidence to WADA of such enquiries.

d) The Samples were disposed of by the Moscow Laboratory.

e) The Samples were not re-analysed by or for the Respondents.

f) In the Reply Statement of Mr Walker and Dr Broséus dated 21 July 2021, the Athlete was told that *"None of the Athlete's Samples are* [sic] *in existence"*. This was confirmed in correspondence between counsel.

g) The Sole Arbitrator recorded in her award that *"the post-analysis Samples themselves were also no longer available"* where Samples is defined therein to mean Sample 1, Sample 2 and Sample 3.

h) In the result, there is no basis for the Athlete's submissions that WADA has concealed the outcome of the RUSADA investigation. Nor is there any basis for the submission that *"there is no evidence that the Samples are not still in existence"*; to the contrary, the evidence is clear that the Samples were not reanalysed because they no longer exist.

The Merits – Liability

142. The further submissions made by WADA on liability may be summarised as follows.

a) The relevant offence here is use under Article 2.2 of the 2015 WTADR. Use can be established *"by any reliable means"*. There is *"compelling reliable evidence showing that the Athlete used [TMZ] to the comfortable satisfaction of the Panel"*.

b) The clearest and most compelling evidence relates to Sample 3:

i) First, as per the 2015 LIMS, the ITP conducted on this sample was positive for TMZ. This is shown in the *"found"* table of the 2015 LIMS (which was exhibited to the joint statement of Mr Walker and Dr Broséus) as follows:

id	code_int	id_substa	id_met	scr_conc	DT_scr	scrin	id_user_s	do
2694	6435	trimetazidine		4.7	2015-06-09 06:29:33	5	marina.dil	0

ii) Second, the sample underwent a confirmation procedure which confirmed the presence of TMZ at a concentration of 3.4 µg/mL. This is shown in the *"confirmations"* table of the 2015 LIMS (which was exhibited to the joint statement of Mr Walker and Dr Broséus) as follows:

id	id_found	number_a	vol_aliq	proc	id_user_s	id_laborat	DT_start	AB	if_found	conf_conc
774	2694	1	0.2	5	tim.sobol	marina.dil	2015-06-0	0	1	3.4

iii) Third, this was also confirmed by the data contained in the *"log_do"* table of the 2015 LIMS (exhibited to the joint statement of Mr Walker and Dr Broséus) which, when entered into Prof Ayotte's identification matrix showed that there was a positive identification of TMZ in the sample.

c) The 2015 LIMS also shows that Sample 1 and Sample 2 were positive for TMZ. This is shown by the following extract from the 2015 LIMS (exhibited to the joint statement of Mr Walker and Dr Broséus):

id	code_int	id_substa	id_met	scr_conc	DT_scr	scrin	id_user_scr	do
1840	7923	trimetazidine		0.003	2014-07-01 08:55:28	4	grigory.dudko	0
1847	7923	trimetazidine		0.08	2014-07-01 09:14:35	5	marina.dikunets	0
2371	10247	trimetazidine		0.282	2014-08-12 08:25:14	5	marina.dikunets	0
2388	10247	trimetazidine		0	2014-08-12 14:11:18	4	grigory.dudko	0

d) This shows that Sample 1 (internal code 7923) and Sample 2 (internal code 10247) were both positive for TMZ. Moreover, it shows that to different ITP procedures were undertaken for each sample and that both returned a positive result.

e) These positive findings for the Samples were reported as negative into ADAMS as part of the Russian Doping Scheme. More specifically, all three samples were the subject of *"SAVE"* instructions from the Russian Ministry of Sport.

f) In view of the above, use of a prohibited substance by the Athlete has been established.

g) The only defence on the part of the Athlete *"is to seek to undermine the reliability of the […] 2015 LIMS data and EDP evidence"*. These arguments *"do not get off the ground, as both strands of evidence are reliable and authentic"*.

h) As to the 2015 LIMS:

i) The authenticity of the 2015 LIMS is demonstrated by referenced to the Carved LIMS. The Carved LIMS, *"fully matches the 2015 LIMS"*. The reliability of the 2015

LIMS is thus established by reference to the deleted data retrieved directly from the Moscow Laboratory.

ii) The Carved LIMS also included the files relating to the Athlete's Samples which exactly matched the 2015 LIMS but which had been deleted from the 2019 LIMS. This demonstrates that the 2015 LIMS is authentic and that the 2019 LIMS is not.

iii) The CAS Panel in CAS 2020/O/6689 determined that the 2019 LIMS had been deliberately manipulated and was not authentic.

i) As to the EDP Emails:

i) The EDP Emails have been found to be authentic and reliable by various CAS panels: see CAS 2021/A/7838; CAS 2021/A/7840; CAS 2021/A/8012; CAS 2021/A/7294; CAS 2021/O/6760; CAS 2021/O/6761; CAS 2021/O/6762; CAS 2021/A/6165; CAS 2021/A/6166; CAS 2021/A/6167; CAS 2021/A/6168; CAS 2021/O/5672; CAS 2021/O/5674; CAS 2021/O/5675; CAS 2021/O/5704; and CAS 2021/O/5039.

ii) There is no indication that the emails are *"anything but authentic"*. The dates and times correspond to what would be expected; and the factual details within the emails are accurate. The Athlete has not been able to point to any element that raises any suspicion as to their authenticity and none of the people who sent or received the EDP Emails has been called to say that they have been fabricated.

iii) The sheer volume of the EDP Emails and the inter-relatedness with proven facts make the idea that these emails are fabricated unrealistic.

The Merits – Sanctions

143. The additional submissions made by WADA in relation to sanctions may be summarised as follows.

144. In relation to the period of ineligibility:

a) Under Article 10.2.1 of the 2015 WTADR the period of ineligibility for a non-specified substance is four years, unless the Athlete can establish that the violation was not intentional.

b) TMZ is a non-specified substance.

c) It follows that the Athlete must establish a lack of intention in order to avoid the standard four-year period.

d) In order to do so, the Athlete has to demonstrate a lack of intent *"by providing concrete and persuasive evidence establishing such lack of content on a balance of probabilities"*: see CAS 2020/A/6978.

e) In all but the most exceptional circumstances, this requires an athlete to establish the source of the prohibited substance: see e.g. CAS 2016/A/4919; CAS 2016/A/4534; and CAS 2017/O/5218.

f) The Athlete has not done so. She has denied use of TMZ but has provided no credible account of how it was found in her samples.

145. In this respect, WADA endorses the conclusions of the Sole Arbitrator as follows:

"213 The Athlete has consistently denied Use of TMZ and/or involvement in the DPM or of the Russian Protection Scheme. She has provided no credible account for the TMZ that was found to be in each of her Samples. While she has raised a series of possible alternative sources for the evidence of TMZ in her Samples such as her medical use of meldonium and the unreliability of the 2015 LIMS Database from which the digital evidence of the TMZ arises, these have all been considered by the Sole Arbitrator and amount to suggestions and unsubstantiated claims without corresponding evidence that could demonstrate that the Use of TMZ by her was not intentional.

214 The Athlete provides no explanation for the fact that Trimetazidine was conclusively and consistently detected in her urine samples in 2014, 2015 – thereby attesting to her Use of the same; notably, and most importantly, her Third sample collected June 2015, which was subject to a Confirmation Procedure and detected Trimetazidine at a concentration 100 times higher than the MRPL".

146. In relation to disqualification:

a) The principle should be that all results achieved by the Athlete from the date of Sample 1, 28 June 2014, are to be disqualified.

b) The Sole Arbitrator decided to apply the fairness exception and to limit the period of disqualification to a period of four years from the last evidence of doping, i.e., from the date of Sample 3, 6 June 2015, through to 5 June 2019.

c) The Athlete does not establish that this decision should be overturned.

d) WADA understands that World Triathlon has filed a cross appeal requesting that the period of disqualification starts from 28 June 2014 rather than 6 June 2015 as was decided by the Sole Arbitrator.

e) WADA agrees. There is no reason of fairness to maintain the Athlete's results during the period of doping, i.e. between 28 June 2014 and 6 June 2015.

147. The relief sought by WADA is as follows:

"WADA respectfully requests the Panel to rule as follows:

I. The appeal filed by Elena Danilova is dismissed;

II. The arbitration costs (if any) shall be borne by Elena Danilova;

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

VIII. JURISDICTION OF THE CAS

148. 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 Appellant 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".

149. The following matters are common ground:

a) The Athlete is an International-Level Athlete as that term is defined in the 2015 WTADR (as, in essence, someone who competes in sport at the international level).

b) Article 13.2.1 of the 2015 WTADR is concerned with, *inter alia*, appeals from decisions that an ADRV has been committed and provides that *"in cases […] involving International-Level Athletes, the decision may be appealed exclusively to CAS".*

c) The Athlete relies upon Article 13.2.1 in her appeal as the foundation for the jurisdiction of CAS.

d) There is no objection to such jurisdiction by either Respondent.

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

IX. ADMISSIBILITY OF THE APPEAL

151. As to admissibility, 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. […]".

152. In this appeal:

a) Article 13.7 of the 2015 WTADR provides for a period of 21 days from the date of receipt of the decision appealed.

b) The Challenged Award is dated 17 January 2023 and was received by the Athlete on that date.

c) The Athlete filed her appeal on 7 February 2023.

d) It follows that the appeal is within time. It further complied with the requirements of Article R48 of the CAS Code.

e) There is no objection from either Respondent that the appeal is not admissible.

153. The Panel therefore concludes that this appeal is admissible.

X. APPLICABLE LAW

154. 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".

155. As to the applicable law, the Panel notes the following matters, each of which is common ground:

a) The events in question took place in 2014 and 2015.

b) It follows that the rules and regulations applicable to the substantive elements of the appeal are the 2015 WTADR unless the current rules, the 2021 WTADR, are more lenient in which case they shall apply pursuant to the principle of *lex mitior*.

c) The operative provisions of the 2015 WTADR and the 2021 WTADR as set forth in Article 2.2 are the same in each set of rules. The current rules are not more lenient and therefore do not apply to the merits.

d) The 2021 WTADR apply to the procedural aspects of the appeal.

e) The Respondents are seated in Switzerland, so that the law of Switzerland shall apply subsidiarily.

XI. THE PROCEDURAL CHALLENGES

156. According to the Athlete, there are two procedural irregularities here: the first is that the composition of the Panel was *"incorrect"*; the second that her right to be heard had been violated.

157. These procedural matters are to be determined according to Swiss law as the *lex arbitri* given that the proceedings are seated in Lausanne (per Article R28 of the CAS Code) as well as the CAS Code and the 2021 WTADR.

A. The Composition of the Panel

158. The Athlete contends that, under Article 6(1) of the ECHR, the Athlete has the right to have her case heard by an impartial and independent tribunal and that the system of appointment of the arbitrators who sit in the CAS Appeals Arbitration Division *"is not compatible"* with that right and (presumably) was an improperly constituted arbitral tribunal within the meaning of Article 190.2(a) of the Swiss Private International Law Act ("PILA").

159. It is important to note at the outset that there was no suggestion that any member of the Panel, on an individual basis, lacked impartiality or independence, whether as a matter of appearance or in fact. The challenge was to the system as a whole and in the abstract.

160. It was said, however, that because the president of the appeal panel is *"systematically appointed by the President of the CAS Appeals Arbitration Division"* and not by the parties or by the other arbitrators, the system does not provide *"a sufficient objective appearance of impartiality and independence"*.

161. The Athlete relies on the dissenting opinions in *Mutu and Pechstein v Switzerland* to the effect that it was not sufficient for the arbitrators to be able to demonstrate impartiality and independence on an individual basis if the organisation's general structure has no appearance of impartiality and independence. It was argued by the Athlete that both ICAS and CAS are under the influence of sports organisations so that, in circumstances where (a) the CAS arbitrator list is closed and appointments must be drawn from it and (b) the CAS *"is exclusively entitled to appoint the president of the panel"*, any appeals panel put in place by CAS lacks the objective appearance of impartiality and independence.

162. The first difficulty for the Athlete in invoking the minority view in *Mutu and Pechstein v Switzerland* is that it does not reflect the law in this regard. It is now well settled that CAS is, as a matter of systematic integrity, *"an independent and impartial tribunal established by law"* within the meaning of Article 6.1 of the ECHR and that the system of appointment of arbitrators (from a closed list) *"meets the constitutional requirements of independence and impartiality applicable to arbitral tribunals"*: see *Mutu and Pechstein v Switzerland* at pp 44-45; and see also the recent case of SFT 4A 232/2022 of 22 December 2022; and CAS 2020/A/7509.

163. It is correct to say that *Mutu and Pechstein v Switzerland* did not consider the particular question of the process of appointment of the president of the appeals panel but that question was squarely before the SFT in SFT 4A_232/2022, and was rejected by that court as being *"in vain"*.

It was said to be in vain because it was now well settled that the mechanism for selecting arbitrators, the system of closed lists and the influence of international federations do not render the CAS anything other than an impartial and independent arbitral tribunal and the fact that two judges of the ECtHR *"have formulated a dissenting opinion does not change anything. It is therefore in vain"*.

164. In any event, the Panel does not accept that the process of appointment of the president of the appeals panel by CAS is of such gravity that it, of itself, undoes the established independence or impartiality of the CAS. There is no right, whether under the CAS Code or the WTADR or more generally, on the part of a party to CAS arbitral proceedings to appoint, or play a role in appointing, the president of any given arbitral panel. It is, as was observed in CAS 2020/A/7509, common for an appointing authority to appoint some or all of the members of the arbitral tribunal and common for arbitration agreements to so provide. There is, in the Panel's view, nothing inherently objectionable in the process by which the president of a CAS appeals panel is appointed by the president of the relevant CAS division, and the fact that the president of a panel is chosen in this way does not depreciate or undermine the systemic impartiality and independence – and fairness – of the CAS panel.

165. Moreover, as the Respondents submitted, there is a mechanism in place in the CAS Code for challenges to arbitrators, Article R34 of the CAS Code. Pursuant to Article R34, any challenge must be brought *"within seven days after the ground for the challenge has become known"*. The Athlete made no such challenge to the appointment of the Panel within the seven day time period or at all. In the absence therefore of a timely challenge, the Athlete must be taken to have waived her right to challenge and to have accepted the constitution of the Panel. This too was the position in SFT 4A_232/2022.

B. Violation of the Right to be Heard

166. The second procedural challenge by the Athlete was that her right to be heard had been violated.

167. As a matter of Swiss law, the rights to be heard and to equal and fair treatment are provided for in the Swiss Federal Constitution (Article 29) and PILA (Article 182(3)). These rights are in place to ensure that each party is able to participate in the proceedings and to influence the process of adjudicating the dispute. According to the ECtHR in *Regner v Czech Republic* at ¶146:

"The Court reiterates that the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a "fair hearing" within the meaning of Article 6 § 1 of the Convention. They require a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent or opponents (see Avotiņš v. Latvia [GC], no. 17502/07, § 119 and other references, ECHR 2016)".

168. As the Athlete submitted, these rights have long been respected in CAS jurisprudence: see, e.g.,:

"[The Panel] observes that the CAS has always considered the right to be heard as a general legal principle which has to be respected also during internal proceedings of the federations (CAS 91/53 G. v/ FEI, award

of January 15, 1992, Digest, p. 79, 86 f). Federations have the obligation to respect the right to be heard as one of the fundamental principles of due process".

169. Three matters were identified by the Athlete.

170. The first was that the Athlete applied for an extension of time of 94 days to file her Appeal Brief but was granted – by the Deputy Division President – only 42 days, which was *"too short to properly prepare the defense and present her case"*. As to this complaint, the Panel notes as follows:

    a) Article R51 of the CAS Code provides for a period of 10 days from the expiry of the time limit to appeal, failing which the appeal is deemed withdrawn.

    b) Article R32 of the CAS Code provides that a party may apply for an extension of time *"on justified grounds"*. Where the Panel has not yet been appointed, the decision is to be made by the president of the relevant division.

    c) *"In principle, requests for extension are granted if they are not made in bad faith if they do not excessively delay the procedure and are in conformity with the principle of proportionality. In this respect, the Division President has a great margin of discretion as to the assessment of the grounds raised and the respective interests of the parties. This means that, once the Division President has decided with regard to the extension, the Panel cannot subsequently review and reconsider the decision taken"..*

    d) It is thus not open to the Panel to second guess the decision in this case taken by the Deputy Division President to afford the Athlete a six-week extension of time rather than the requested 13 weeks.

    e) In any event, the Panel is not persuaded that the Athlete was put in a position where she was unable to marshal her resources sufficiently so as to prepare her appeal in the allowed period of six weeks, and the Athlete has identified no particular prejudice beyond the generic complaint.

    f) Moreover, the Athlete expressly confirmed at the hearing of this appeal that she had been afforded a full and fair opportunity to present her case.

171. The Athlete's second complaint was that her rights to be heard and of equal treatment were violated because World Triathlon filed *"incomplete evidence"*. In this respect, it is said that that World Triathlon (i) did not submit the original authentic data of the 2015 LIMS and 2019 LIMS; (ii) the Excel spreadsheets were not original but contained data excerpted from the LIMS; and (iii) did not present any forensic chain of custody forms in relation to the LIMS data.

172. In the Panel's view, the filing of so-called *"incomplete evidence"* by one party does not, of itself, amount to the violation of the other party's rights to be heard and to equal treatment. It is, instead, a matter for the tribunal to consider the evidence as filed and to give any such *"incomplete evidence"* the appropriate weight in the circumstances.

173. In any event, while it is true that the original databases have not been provided, as explained by Mr Walker and Dr Broséus in their statement of 6 May 2021 *"all relevant LIMS data, raw data and*

PDF files associated with the Athlete's samples [have] *been provided with this statement"*. The Athlete, and the Panel, have therefore been provided with all such material, together with a long and careful explanation by Mr Walker and Dr Broséus as to the manner in which they had recreated the data.

174. The third complaint put forward by the Athlete was that the Respondents (but WADA in particular) had concealed from the Athlete information in their possession relating to RUSADA's investigation of matters relating to the Athlete and, further, had not provided either the Samples or the results of the re-analysis of the Samples to the Athlete.

175. In the Panel's view these were unfortunate allegations. As explained by WADA at the hearing of this matter and made good by the contemporaneous documents put before the Panel:

a) WADA did not direct RUSADA to conduct an investigation of the matters relating to the Athlete and her Samples in 2014 and 2015.

b) RUSADA did not, to the knowledge of the Respondents, conduct any such investigation.

c) The Samples were disposed by the Moscow Laboratory in 2014 and 2015. The Athlete was told this as long ago as 21 July 2021 and the fact that the Samples were *"no longer available"* was expressly recorded by the Sole Arbitrator at first instance.

d) The Samples were not provided to WADA for re-analysis and WADA conducted no re-analysis on the Samples.

176. In the circumstances, there is no foundation for the Athlete's complaints and they should not have been made, at least not in the manner that they were made – to be clear the Panel finds that there was no attempt by WADA to *"defraud"* the Panel or the Athlete and no basis on which that allegation should have been made.

177. In the result therefore, the Panel concludes that none of the procedural complaints contended for by the Athlete is sustained.

XII. THE MERITS

178. The Panel will, as did the Parties, consider liability and sanctions separately.

179. In doing so, the Panel notes that while it has carefully considered all of the submissions made and the evidence adduced by the Parties it only sets forth below those matters which it considers necessary to explain its reasoning and decide the appeal.

A. Liability

The Alleged ADRV

180. The Respondents allege that the Athlete has committed a violation of Article 2.2 of the 2015 WTADR. It is to be noted that there is just the one ADRV alleged against the Athlete, albeit founded upon allegations of use on three separate occasions.

181. For the sake of good order, this rule provides in relevant part as follows:

> *"**ARTICLE 2 ANTI-DOPING RULE VIOLATIONS***
>
> *The purpose of Article 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. […]*
>
> *Athletes […] 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:*
>
> *[…]*
>
> ***2.2 Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method***
>
> *2.2.1. It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. 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 or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an antidoping rule violation to be committed".* (emphasis in original)

182. It is apparent that that Article 2.2 of the 2015 WTADR includes a number of defined terms. It is common ground that Ms Danilova is an *"Athlete"* as defined therein, and that TMZ is a Prohibited Substance as defined. As for the term *"Use"*, it is defined within the rules to mean: *"the utilization, application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance […]"*.

183. It is also apparent that Article 2.2 of the 2015 WTADR expressly provides that it is not necessary for World Triathlon to demonstrate intent, fault, negligence or knowing use on the Athlete's part in order to establish an ADRV in respect of use of a prohibited substance. (That is not to say that these matters are irrelevant, only that they play no role in liability. These matters may become relevant in the context of sanctions.)

184. That then is what the Respondents must establish in this case: that there was utilisation, application, ingestion, injection or consumption by any means whatsoever of TMZ by the Athlete – and there is no requirement on the Respondents to establish intent, fault, negligence or knowing use on the Athlete's part in order to establish an ADRV in respect of use of a prohibited substance.

185. The 2015 WTADR go on to provide, by Article 3, for the burdens and standards of proof and for the methods by which the underlying facts for an ADRV are to be established.

186. Article 3 of the 2015 WTADR provides as follows:

*"**ARTICLE 3 PROOF OF DOPING***

3.1 Burdens and Standards of Proof

ITU shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether ITU 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 Anti-Doping Rules place the burden of proof on the Athlete […] to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability". (emphasis in original)

187. In this regard, the Panel respectfully adopts what was said in CAS/2020/O/6759 in 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)".

188. As was noted in CAS 2021/A/7838, it is important to understand 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)". See also CAS 2017/A/5379, at ¶¶702ff (and the cases there cited).

189. Article 3 of the 2015 WTADR also makes provision for the methods by which facts (and presumptions) may be established in relation to the alleged ADRV. For the purposes of this appeal it suffices to note just the following language:

"3.2 Methods of Establishing Facts and Presumptions

Facts related to anti-doping rule violations may be established by any reliable means, including admissions. […]".

190. As has been explained in various CAS cases (see, e.g., CAS 2021/A/7838; CAS 2017/A/5379; and CAS 2005/A/884), this rule does not relate to the reliability of the *evidence* adduced by the Parties. It relates, instead, as is plain on the face of the language, to the reliability of the *means* by which the evidence is adduced. The (or a) intention of the rule is to relax the formality by which evidence must be adduced in comparison to what is required for the proof of a violation under Article 2.1 of the 2015 WTADR for presence of a prohibited substance. It is not, as is often the case, to be confused with the weight that is to be accorded to any particular piece of evidence.

191. This was explained in CAS 2017/A/5379 at ¶734, where it was noted that the range of evidence that the Panel may examine for the purposes of considering whether the Athlete committed an ADRV under Article 2.2 of the 2015 WTADR is wider than for Article 2.1: *"Whereas the presence of a prohibited substance can and must be established exclusively by laboratory analysis, the use of a prohibited substance may be established by any reliable means, but not limited to witness evidence, documentary evidence and conclusions drawn from analytical information other than proving the actual presence of [a] prohibited substance"*.

192. As was noted in CAS 2005/A/884 at ¶8:

"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'".

193. This was explained further in CAS 2021/A/7838 (at ¶111) as follows:

"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".

Assessment of the Evidence

194. That being so, it is a matter for the Panel to assess the evidence and form a view as to whether the Respondents have discharged their burden to the required standard. The issue therefore is whether, on the material before the Panel, the Panel is comfortably satisfied that the Athlete has used – i.e., utilised, applied, ingested, injected, or consumed by any means whatsoever – TMZ on the occasions set forth in the ADRV Notice, namely: on 28 June 2014 at the Youth European Championships in Penza, Russia; on 7 August 2014 at the International Sports Games in Cheboksary, Russia; and on 6 June 2015 at Russia's Championship in Sochi, Russia.

195. In this case there is no direct evidence of use by the Athlete, all the evidence being circumstantial. The Panel must therefore assess the evidence separately and together and have regard to the 'cumulative weight' of the evidence. This is consistent with well settled CAS jurisprudence: CAS 2021/A/7840 (*"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"*); CAS 2019/A/6167 (*"It is in the face of such circumstantial evidence that the Panel should consider each element individually, but also the global weight of the evidence as a whole".*); and CAS 2018/O/5713: *"Circumstantial evidence might be compared to a rope comprised of several cords: one strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength".*).

196. The evidence adduced by the Respondents in relation to the alleged ADRV has been described in some detail above.

197. The Athlete does not call any evidence in answer to this evidence. (The evidence that the Athlete does adduce goes not to liability but to sanctions, and will be addressed below.) She does not run a positive defence; instead, she seeks to attack the integrity of the evidence arrayed by the Respondents in order to support her submission that the Respondents have not proven the allegations. The Panel will therefore address the Respondents' evidence and will measure it against the criticisms levelled against it by the Athlete.

<u>The Doping Control Forms</u>

198. The DCFs are in evidence. Each is signed by the Athlete, and there is no suggestion by the Athlete that the forms, or their contents, are not authentic and original. Indeed, the Athlete accepts that the urine samples were collected as described in the ADRV Notice, namely:

a) Sample 1: collected in-competition on 28 June 2014 at the Youth European Championships in Penza, Russia;

b) Sample 2: collected in-competition on 7 August 2014 at the International Sports Games (Spartakiada) in Cheboksary, Russia; and

c) Sample 3: collected in-competition on 6 June 2015 at the Russian Championship in Sochi, Russia.

199. The Panel therefore finds, as a matter of fact, that the Athlete underwent doping tests, and provided the Samples, on the dates and in the competitions as described therein.

The McLaren Reports

200. The Respondents relied upon the McLaren Reports as corroborative evidence of the alleged ADRVs. It was submitted by the Athlete that the McLaren Reports were unreliable and inconclusive in a number of respects.

201. It was first said that the McLaren Reports could not be considered evidence to prove an ADRV by any individual athlete. This is true as far as it goes. But it is important to note two things. First, the McLaren Reports do not, of themselves, establish that the Athlete committed an ADRV as charged. In this context the Panel agrees with what was said in CAS 2017/A/5379 at ¶727 that *"The Panel does not consider it possible to conclude that the existence of a general doping and cover-up scheme automatically and inexorably leads to a conclusion that the [a]thlete committed the ADRVs alleged"*. Second, the McLaren Reports are, however, circumstantial evidence providing relevant evidence as to the context in which the facts, matters and circumstances of this appeal arise and they may be taken into account by the Panel as important corroborative evidence for other evidentiary material. Moreover, this Panel accepts the McLaren Reports as clear and cogent evidence of the matters to which they relate.

202. It was said that the Sole Arbitrator ignored that previous CAS panels have found the McLaren Reports *"to be of very limited probative value"*: see CAS 2017/A/5379. In the Panel's reading of CAS 2017/A/5379, that is not what was said: what was said was that it was not possible *"to conclude that the existence of a general doping and cover up scheme automatically and inexorably leads to a conclusion that the [athlete] committed the ADRV"*. The Panel agrees. The Panel must assess the evidence as it relates to the Athlete and consider whether it establishes, to the comfortable satisfaction of the Panel, that there has been an ADRV by the Athlete as alleged.

203. It was said that the Sole Arbitrator overlooked significant shortcomings in the McLaren Reports, in particular that the reports are based on Dr Rodchenkov's allegations *"which were found to be unreliable"* in CAS 2017/A/5379 and *"of very limited probative value"*. Once again, these submissions mischaracterise and overstate what was said in CAS 2017/A/5379. In that case, the panel was concerned with evidence provided by Dr Rodchenkov as to what he was told by another of her wish to protect the athlete in that case. Because it was hearsay evidence, the panel considered that its probative value was *"very limited"*. One can immediately see that this was not

a determination by the panel in that case of the overall probative value of the evidence provided by Dr Rodchenkov to Prof. McLaren.

204. It was said that Prof. McLaren failed to verify even the most basic allegations made by Dr Rodchenkov, without trying to speak to the individuals and athletes implicated. But this is an arid criticism. If one reads the McLaren Reports one can readily see that Prof. McLaren formed the view that, for obvious reasons, it would be of little utility to interview witnesses who were living in Russia.

205. In all, the Panel takes the view that Athlete's criticisms of the McLaren Report are unfounded. For the purposes of this appeal, the Panel accepts the McLaren Reports as cogent evidence of the matters described therein and, in particular, the Panel finds that, as a matter of fact, the Moscow Laboratory (and others) did deploy the disappearing positives methodology in the manner described by Prof. McLaren. This was also the view taken in CAS 2020/O/6689 at ¶32:

"The "disappearing positive methodology" was described in Chapter 3 of the First McLaren Report. Relevantly, the Moscow Laboratory would conduct an initial analytical screening of samples collected from Russian athletes. If that screening revealed a likely Adverse Analytical Finding, a liaison person would obtain the identity of the athlete from RUSADA (by providing the bottle number of the sample). The athlete's identity would be provided to the Russian Deputy Minister for Sport, Deputy Minister Nagornykh, who would then issue an order that the sample be "saved" or "quarantined. Where a "save" order was given, the Moscow Laboratory would take no further steps in analysis of the sample and it would be reported as negative in WADA's Anti-Doping Administration & Management Systems ("ADAMS") (a web-based database management system for use by WADA's stakeholders). Personnel of the Moscow Laboratory would then falsify the result in the laboratory's own Laboratory Information Management System ("LIMS") (the database used by the Moscow Laboratory to store results of testing of samples) to show a negative result".

<u>The Evidence of Mr Walker and Dr Broséus</u>

206. The Respondents relied on (a) the joint statement of Mr Walker and Dr Broséus, both with WADA's I&I, dated 6 May 2021 and (b) the reply statement of Mr Walker and Dr Broséus dated 21 July 2021, together with (c) a power point presentation by Dr Broséus, as described above.

207. The Athlete levelled a number of criticisms at this evidence.

208. The Athlete challenged the veracity of the 2015 LIMS on various grounds, contending that it was forensically incomplete, inauthentic and unreliable. The criticisms put forward by the Athlete are set forth above in some detail. For the reasons set forth below, the Panel does not accept that the criticisms are sufficient, either individually or collectively, to establish that the 2015 LIMS is either inauthentic and/or not capable of being relied on by the Panel.

209. It was first said that the 2015 LIMS may have been manipulated by the whistle-blower, or anyone else in association with Dr Rodchenkov, and that the Respondents had filed no evidence to show that this had not happened. But it was not for the Respondents to do so; it was instead, if she wished to sustain this assertion, for the Athlete to adduce evidence in support – which

she did not do. On this question, the Panel unhesitatingly accepts the evidence of Mr Walker and Dr Broséus that, based upon the detailed forensic investigation conducted by or for WADA I&I, it is beyond peradventure that the 2015 LIMS is authentic and is to be relied upon as an accurate contemporaneous record of the events and matters recorded therein.

210. It was then said that, in circumstances where the Athlete and the Panel had not been provided with the original databases but only with spreadsheets containing information excerpted therefrom, it was impossible to verify the data. It is true that the original databases have not been provided but, as explained by Mr Walker and Dr Broséus in their statement of 6 May 2021, *"all relevant LIMS data, raw data and PDF files associated with the Athlete's samples [have] been provided with this statement"*. The Athlete, and the Panel, have therefore been provided with all such material, together with a long and careful explanation by Mr Walker and Dr Broséus as to the manner in which they had recreated the data.

211. It was said that WADA I&I did not analyse the Athlete or her Samples. But that was not their role and says nothing about the evidence that they did put forward in relation to the Moscow Laboratory data.

212. It was said that the 2015 LIMS contains *"important and unexplained discrepancies"* and, as a result, could not be relied upon. It is right to note that there were some discrepancies. It is, however, wrong to draw from this that the 2015 LIMS could not be relied upon. For example, the Athlete submitted that the volumes reported in the DCFs did not exactly match the volumes set forth in LIMS. But, as was submitted by World Triathlon and explained by Prof. Ayotte, that is to be expected and is perfectly normal when one is conducting analyses of a liquid and, in the process, draws off aliquots to be tested. Moreover, even on the Athlete's view there was more consistency than inconsistency between the DCFs and the LIMS; for example, the recorded numbers for specific gravity, pH and sex were all identical. In the Panel's view, none of the discrepancies was significant enough to undermine the authenticity and validity of the 2015 LIMS.

213. In all, the Panel does not accept the Athlete's criticisms of the 2015 LIMS. Moreover, the criticisms were not put to the Respondent's witnesses in cross-examination and none has been supported by any expert (or other) evidence adduced by the Athlete.

214. On balance, therefore, the Panel accepts the evidence of Mr Walker and Dr Broséus in relation to the 2015 LIMS, its authenticity, its validity, and its contents.

<u>The Evidence of Prof. Ayotte</u>

215. The Athlete was critical of the evidence of Prof. Ayotte in that, in particular, it was said that there was nothing to show that Prof. Ayotte verified the material with which she was provided – the 2015 LIMS, the EDP Emails, and the raw data.

216. But this misunderstands what Prof. Ayotte was asked to do. She was not asked to verify the veracity or authenticity of the information provided to her; she was asked to review the

information and report on what it said and she was asked to determine whether the raw log data for the confirmation procedure of Sample 3 matched the WADA identification criteria.

217. In the circumstances, the Panel is prepared to accept the evidence of Prof. Ayotte and to accept her conclusion that there were numerous traces in the 2015 LIMS to show that the Athlete's Samples were received, tested, and found to contain TMZ, all the more-so in respect of Sample 3 where not only was a positive result detected on the ITP but it was confirmed by the confirmation procedure.

218. It must be said, however, that insofar as Prof. Ayotte reported on her reading of the LIMS data that is not a matter for expert evidence inasmuch as the Panel is perfectly capable of doing that for itself. Where her evidence is of an expert nature and is therefore helpful to the Panel is where, in particular, Prof. Ayotte states that the log data entered into LIMS on the occasion of the confirmation procedure for Sample 3 does, when modelled against her laboratory's form for identification, confirm the identification of TMZ in Sample 3.

The EDP Emails

219. The Respondents relied on the email exchanges to and from the Moscow Laboratory in relation to the Athlete's Samples. As noted above, the EDP Emails were first obtained by Prof. McLaren and released as part of the Second McLaren Report.

220. The Athlete submitted that the Sole Arbitrator was wrong to rely on the EDP Emails, and that there was no evidence verifying their authenticity such that they are of no probative value.

221. It suffices to say that the Panel disagrees. As was said in CAS 2021/A/7838 and CAS 2021/A/7840, there is no reason, and none put forward by the Athlete, not to accept the EDP Emails at face value in respect of the matters set forth therein. The dates and times of the EDP Emails correspond to contemporaneous events and the factual details within the emails are accurate and, as was submitted by the Respondents, none of the people who sent or received the EDP Emails has been called to say that they have been fabricated.

222. The Panel therefore regards the EDP Emails as authentic and as clear and cogent evidence of the matters discussed therein.

Conclusions on the Evidence

223. By way of background, the Panel finds as a matter of fact that, in the manner described by Prof. McLaren in the McLaren Reports, the Moscow Laboratory did deploy a disappearing positive methodology as part of an institutional conspiracy to cheat.

224. As to the evidence of use of TMZ by the Athlete, the Panel finds as follows.

225. Sample 1:

a) The sample was collected in-competition on 28 June 2014 at the Youth European Championships in Penza, Russia.

b) It arrived at the Moscow Laboratory on 30 June 2014 and was given the laboratory code 07923.

c) On the same day, the Moscow Laboratory conducted two different ITPs, one to test for anabolic steroids (P4), the other for stimulants (P5).

d) On 1 July 2014, the Moscow Laboratory entered into LIMS a presumptive adverse analytical finding for TMZ at a concentration of 0.003 mcg/L (for P4) and 0.08 mcg/L (for P5).

e) On 1 July 2014, Dr Sobolevsky (at the Moscow Laboratory) sent an email to Mr Velikodniy and to Dr Rodchenkov). The subject was *"a result"* and the email read as follows: *"2916387, F, triathlon, international competition / 7210, RU Penza, collection 2014-06-28 trimetazidine"*.

f) On 1 July 2014, Mr Velikodniy replied. The email was in the following terms:

"Save

2916387, Danilova Elena, triathlon, international competition / 7210, RU Penza, collection 2014-06-28

Trimetazidine

Triathlon U23 and Youth European Championships. Penza, 28 June. Females. Under 23. 1st place – Elena Danilova (Russia)" (emphasis in original).

g) The Moscow Laboratory did not conduct a confirmation procedure.

h) On 4 July 2014, Dr Sobolevsky recorded Sample 1 as negative in ADAMS.

226. As to Sample 2:

a) The sample was collected in-competition on 7 August 2014 at the International Sports Games (Spartakiada) in Cheboksary, Russia.

b) The sample at the Moscow Laboratory on 8 August 2014 and was given the laboratory code 10247.

c) On 11 August 2014, the Moscow Laboratory conducted two different ITPs, one to test for anabolic steroids (P4), the other for stimulants (P5).

d) On 12 August 2014, the Moscow Laboratory entered into LIMS a presumptive adverse analytical finding for TMZ for P4 (with no concentration noted) and for P5 at a concentration of 0.282 mcg/L.

e) On 12 August 2014, Dr Sobolevsky sent an email to Mr Velikodniy (and to Dr Rodchenkov). The subject was *"results"* and the email read in relevant part as follows: *"2916525, F, triathlon, International Sports Games (Spartakiada) / 5500/14, RU Cheboksary, collection 2014-08-07 trimetazidine"*.

f) On 12 August 2014, Mr Velikodniy replied. The email was in the following terms:

"Save

2916525, triathlon, International *Sports Games (Spartakiada) / 5500/14, RU Cheboksary, collection 2014-08-07*

Danilova Elena *– European youth champion 2014 (U23), Moscow coaches: Zuev, Generalova.*

Trimetazidine (2nd place)".

g) No confirmation procedure was undertaken.

h) On 13 August 2014, Dr Sobolevsky recorded the sample as negative in ADAMS.

227. As to Sample 3:

a) Sample 3 was collected in-competition on 6 June 2015 at the Russian Championship in Sochi, Russia.

b) The sample arrived at the Moscow Laboratory on 7 June 2015 and was given the laboratory code 06435.

c) On 9 June 2015, the Moscow Laboratory conducted an ITP to test for stimulants (P5) and, on the same day, a presumptive adverse analytical finding for TMZ at a concentration of 4.7 mcg/L was entered into LIMS, and a confirmation procedure was undertaken, returning a positive result for TMZ at an estimated concentration of 3.4 mcg/L, which was entered into LIMS.

d) On 10 June 2015, Dr Sobolevsky sent an email to Mr Velikodniy (and to Dr Rodchenkov). The subject was *"results"* and the email read in relevant part as follows: *"3880728, F, triathlon, Russia's Championships/ 24053/15, RU Sochi, collection 2015-06-06 trimetazidine"*.

e) On 10 June 2015, Mr Velikodniy replied. In relevant part, the email was as follows: *"Save triathlon"*

f) On 11 June 2015, Dr Sobolevsky recorded the sample as negative in ADAMS.

228. In all, it follows that the Panel's assessment, according to the cumulative weight of the evidence as a whole as described above, the Panel is comfortably satisfied that the Athlete used – i.e., utilised, applied, ingested, injected, or consumed by any means whatsoever – a prohibited substance, namely TMZ, on 28 June 2014, 7 August 2014 and 6 June 2015 in violation of Article 2.2 of the 2015 WTADR.

229. The Panel is therefore comfortably satisfied that the Respondents have met their burden of proving the alleged ADRV.

B. Sanctions

230. In light of the determination on liability, it is necessary to consider sanctions. The Panel must consider (a) the period of ineligibility and (b) the disqualification of the Athlete's results upon the commission of the ADRV.

Ineligibility

231. In this appeal, the Athlete submits that, if the Panel decides against her on liability, then it should not sanction her because her conduct was unintentional. The Athlete relies upon Article 10.2 of the 2015 WTADR, which provides as follows:

"10.2 Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility for a violation of Article 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Articles 10.4. 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1. The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2. The anti-doping rule violation involves a Specified Substance and the ITU can establish that the anti-doping rule violation was intentional.

10.2.2. If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3. As used in Articles 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term therefore requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not intentional if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance

and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance".

232. In this appeal, the only submission made by the Athlete was that no period of ineligibility should be imposed because any intake was unintentional, and the Athlete does not rely upon Articles 10.4 and 10.5 of the 2015 WTADR. The Panel therefore does not need to address these provisions.

233. Under Article 10.2 of the 2015 WTADR, the position appears to be as follows:

a) If the Athlete is adjudged to have violated Article 2.2 of the 2015 WTADR by reason of the use of TMZ, a non-specified substance, the period of ineligibility is four years, unless the Athlete can establish that the ADRV was not intentional.

b) As set forth in Article 10.2.3 of the 2015 WTADR, *"intentional"* is meant to identify those athletes who cheat and requires that the athlete engaged in conduct which he or she knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk.

c) It follows that *"not intentional"* requires a showing by the Athlete (the burden being on her to the balance of probabilities per Article 3.1 of the 2015 WTADR) that she did <u>not</u> engage in conduct which she knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk.

d) In this context, it is important to note that it is not expressly required in the 2015 WTADR that the Athlete, in order to establish that the ADRV was not intentional, must establish how the prohibited substance entered her system. This is consistent with the position in CAS 2016/A/4534 (concerning the 2015 FINA Doping Control Rules) and the Panel adopts what was said there (including in particular the passages at ¶¶35-37) and in CAS 2017/A/5016 & 5036 at ¶¶122-123; and see also CAS 2020/A/7579 & 2020/A/7580 at ¶¶109-113. Nevertheless, while it is right to say that it is open to the athlete to prove lack of intention without proving source, it would be extremely rare for an athlete to be able to do so such that, where an athlete cannot prove source, it leaves the *"narrowest of corridors"* through which the athlete must pass in order to discharge the burden which lies upon them.

e) In this respect, the Panel adopts and endorses what was said in CAS 2017/A/5016 & 5036 at ¶¶123-124 (emphasis added):

"123. The Panel, indeed, observes that it could be de facto difficult for an athlete to establish lack of intent to commit an anti-doping rule violation demonstrated by presence of a prohibited substance in his sample if he cannot even establish the source of such substance: proof of source would be an important, even critical, first step in any exculpation of intent, because intent, or its lack, are more easily demonstrated and/or verified with respect to an identified "route of ingestion". However, the Panel can envisage the possibility that it could be persuaded by an athlete's assertion of lack of

intent, where it is sufficiently supported by all the circumstances and context of his or her case, even if, in the opinion of the majority of the Panel, such a situation may inevitably be extremely rare: where an athlete cannot prove source, it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.

124. The foregoing, in fact, does not mean that the Athlete can simply plead his lack of intent without giving any convincing explanations, to prove, by a balance of probability, that he did not engage in a conduct which he knew constituted an anti-doping rule violation or knew that there was a significant risk that said conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. The Panel repeats that the Athlete, even though he is not bound to prove the source of the prohibited substance, has to show, on the basis of the objective circumstances of the anti-doping rule violation and his behaviour, that specific circumstances exist disproving his intent to dope.

125. In this context, therefore, it is this Panel's opinion that, in order to disprove intent, an athlete may not merely speculate as to the possible existence of a number of conceivable explanations for the AAF (such as sabotage, manipulation, contamination, pollution, accidental use, etc.) and then further speculate as to which appears the most likely of those possibilities to conclude that such possibility excludes intent. There is in fact a wealth of CAS jurisprudence stating that a protestation of innocence, the lack of sporting incentive to dope, or mere speculation by an athlete as to what may have happened does not satisfy the required standard of proof (balance of probability) and that the mere allegation of a possible occurrence of a fact cannot amount to a demonstration that that fact did actually occur (CAS 2010/A/2268; CAS 2014/A/3820): unverified hypotheses are not sufficient (CAS 99/A/234-235). Instead, the CAS has been clear that an athlete has a stringent requirement to offer persuasive evidence that the explanation he offers for an AAF is more likely than not to be correct, by providing specific, objective and persuasive evidence of his submissions. In short, the Panel cannot base its decision on some speculative guess uncorroborated in any manner" (emphasis added).

234. The Panel also notes and adopts what was said in CAS 2020/A/6978 & CAS 2020/A/7068 at ¶¶132-138:

"132. The definitions of "No Fault or Negligence" and "No Significant Fault or Negligence" at Article 10.4 and 10.5 ADC explicitly require the athlete to establish the origin of the prohibited substance to benefit from an elimination or reduction of the otherwise applicable substance. By contrast, Article 10.2 ADC contains no such requirement.

133. There is thus a possibility for an athlete to avoid having his or her ADVR [sic] be held to be intentional under Article 10.2 ADC in cases where the origin of the prohibited substance cannot be established, subject to the athlete's meeting his or her burden of proof on a balance of probabilities that the ADRV was not intentional. This too is common ground between the Parties and accepted by the Panel.

134. What is more controversial is the extent of this possibility. It has until recently nevertheless been characterized by CAS awards and commentators as somewhat "theorical" or limited to "exceptional circumstances" (CAS 2016/A/4676; CAS 2017/A/5335). CAS panels have held that when the athlete is not able to establish the origin of the substance, the athlete will have to pass through the

"narrowest of corridors" to discharge the burden of proof weighing upon him (CAS 2016/A/4534). Even in such cases, it is clear that the athlete cannot rely on simple protestations of innocence or mere speculation as to what must have happened but must instead adduce concrete and persuasive evidence establishing, on a balance of probabilities, a lack of intent (see for example, CAS 2017/A/5369; CAS 2016/A/4919; CAS 2016/A/4676; CAS 2017/A/5335). Lawson and Jamnicky, the most recent cases, are outliers inasmuch as they apparently propose an enlargement of that possibility.

135. The Panel notes that CAS does not have a doctrine of binding precedent, such as it exists in common law jurisdiction, though in the interest of maintaining a consistent jurisprudence, any panel will pay respectful attention to the awards of its predecessors raising similar issues to those of the case before it. However, when an award departs from some well-established CAS case law, proper reasons for such change should be sufficiently stated. That said, failing a stare decisis effect or precedential value of CAS awards, this Panel is therefore not obliged to follow the legal analysis conducted by previous panels (CAS Code Commentary Mavromati/Reeb, Art. R46 no. 47).

136. Apart from the general difficulty in proving a negative, the Panel accepts that it is in practice challenging to establish the non-intentional character of an ADRV in the absence of a demonstration of the origin of the prohibited substance, an assessment of the corridor depends on the very specific objective and subjective circumstances of the case, especially as no one case is exactly the same as another and will present its own specific human, factual and scientific particulars. This is in line with the very text and spirit of Article 10.2 ADC, always bearing in mind the ground rules on the burden of proof, whose standard is set by Article 3.1.

137. Because of the fact specific nature of its assessment, the Panel does not need to comment on whether, and if so, to what extent the decisions of Lawson and Jamnicky represent a deviation from the path plotted by Articles 10.2 and 3.1 ADC.

138. In summary, to avoid the standard four-year period of ineligibility, Mr. Iannone has to demonstrate either a lack of intent by providing concrete and persuasive evidence establishing such lack of intent on a balance of probabilities – i.e. the test to which the Panel is bound to apply, nothing less, nothing more – or that such period should be reduced based on no significant fault or negligence (Article.10.5. ADC)".

235. The Athlete's evidence as to intention is set forth in her witness statement dated 13 July 2021. According to the Athlete, the presence of the TMZ in her urine on 28 June 2014 and 7 August 2014 is explained by the fact that she was taking cardioprotectors and on 6 June 2015 by the fact that she was taking Mildronat (i.e., meldonium). She adduced records from the Moscow clinic to support that evidence. She denied that she had ever met Dr Rodchenkov or anyone else in the Moscow Laboratory. She denied that she was a protected athlete as part of the Russian Doping Scheme or generally but was able to offer no explanation as to why her name appeared in the EDP Emails.

236. But that evidence only goes so far. There is nothing from the Athlete as to what the cardioprotectors might be and certainly nothing to suggest that they might be a source of the TMZ. Moreover, as was submitted by the Respondents, while meldonium is also a metabolic modulator, it bears a significantly different chemical structure to TMZ (see paragraph [131]

above). Even if, therefore, the Panel accepted the evidence that the Athlete was taking Mildronat that would be no evidence at all of the source of the TMZ.

237. There is nothing further from the Athlete to show by reference to concrete and persuasive evidence that, on the balance of probabilities, she did not engage in conduct which she knew constituted an ADRV or knew that there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk. On the material before the Panel, there is simply no basis on which to reach that conclusion.

238. In these circumstances, the Panel is of the clear view that the Athlete has failed to discharge the burden upon her to establish what is required for the elimination or the reduction of the period of ineligibility and/or that her conduct was not intentional with the result that, therefore, the applicable period of ineligibility remains four years.

239. The Athlete argues that, in any event, a period of four years would be disproportionate. But that period is the period set forth in the 2015 WTADR and it is not for the Panel to usurp the rule-making authority of World Triathlon (or WADA) in respect of the sanctions imposed according to the rules.

240. As to when that period of four years should commence, the applicable rule is Article 10.11 of the 2015 WTADR, which provides (in relevant part) as follows:

> *"10.11 Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date the Ineligibility is accepted or otherwise imposed.*
>
> *[…]*
>
> *10.11.3 Credit for Provisional Suspension or Period of Ineligibility Served*
>
> *10.11.3.1 If a Provisional Suspension is imposed and respected by the Athlete […], then the Athlete […] shall receive a credit for such period of Provisional Suspension against any period of Ineligibility which may ultimately be imposed. If a period of Ineligibility is served pursuant to a decision that is subsequently appealed, then the Athlete […] shall receive a credit for such a period of Ineligibility served against any period of Ineligibility which may ultimately be imposed on appeal".*

Upon the application of that provision, the Sole Arbitrator decided that the four-year period of ineligibility was to commence from the date of provisional suspension imposed on the Athlete. At ¶46 of the Challenged Award, the Sole Arbitrator noted that the Athlete was provisionally suspended on 7 May 2021. By contrast, in the operative part of the Challenged Award, this date was said to be 26 May 2021. It appears to be common ground that the Athlete was provisionally suspended on 7 May 2021 upon receipt of the ADRV Notice (see ¶¶42 and 44 above) and that the reference to 26 May 2021 in the operative part of the Challenged Award is a clerical error and should read 7 May 2021.

241. It follows therefore that the four-year period should commence as from the date of this Award (as the final decision providing for ineligibility), and that, as the Athlete rightly points out, she is entitled to credit for the period for which she has been provisionally suspended, which the Panel understands began on 7 May 2021 (but which is said by World Triathlon to be 7 April 2021 and by the Sole Arbitrator to be 26 May 2021). The Panel therefore confirms the Challenged Award, subject to the correction of this clerical error, such that the four-year period of ineligibility shall commence from 7 May 2021.

Disqualification

242. The doping control tests in this appeal were conducted in-competition (and the triathlon is an individual sport). Article 9 of the 2015 WTADR is headed *"Automatic Disqualification of Individual Results"* and provides for automatic disqualification of individual results in relation to in-competition testing:

"An [ADRV] in Individual Sports in connection with an In-Competition test automatically leads to Disqualification of the result obtained in that Competition with all resulting Consequences, including forfeiture of any medals, points and prizes".

243. Article 10 of the 2015 WTADR provides for *"Sanctions on Individuals"* which provides in relevant part as follows:

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

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

244. The Athlete contended that any disqualification of her results *"is unwarranted for fairness reasons"* pursuant to Article 10.8 of the 2015 WTADR.

a) One, it was *"contradictory"* for the Sole Arbitrator to impose disqualification in respect of the period after June 2015 in circumstances where there is no evidence that the Athlete used any prohibited substance during that period and she tested negative at least 34 times since then. If the Sole Arbitrator found that the Athlete did not use any prohibited substance since that then there was no need to *"correct"* the competition results during that time.

b) Two, if the Panel were to conclude that the Athlete committed the ADRV then only a disqualification of results between the first collection (28 June 2014) and the third collection (6 June 2015), would be appropriate because there is no evidence that the level playing field was impaired after June 2015.

c) Any different decision on disqualification would be unfair and disproportionate.

245. For their part, the Respondents took the position that, in the absence of any cross-appeal by them from the decision of the Sole Arbitrator, they were bound by the decision of the Sole Arbitrator in this respect. The Sole Arbitrator disqualified all competitive results obtained by the Athlete *"from 6 June 2015 to 5 June 2019 with all resulting consequences"*.

246. The Panel's view is that, according to the provisions cited above, there are two consequences.

a) In the first place, pursuant to Article 9 of the 2015 WTADR the Athlete's results in the three events in which here Samples were collected are automatically disqualified. To be clear, this means that the Athlete's results on 28 June 2014 at the Youth European Championships in Penza, Russia, on 7 August 2014 at the International Sports Games (Spartakiada) in Cheboksary, Russia, and on 6 June 2015 at Russia's Championship in Sochi, Russia are all automatically disqualified.

b) Second, pursuant to Article 10.8 of the 2015 WTADR, all competitive results subsequently obtained by the Athlete starting from each of the dates on which the Samples were collected through to 7 May 2021 (as the date of her provisional suspension) shall be disqualified *"unless fairness requires otherwise"*. This, of course, is the same as a disqualification from the first of the three Samples, namely 24 June 2014, through to 7 May 2021.

247. The issue arises, as it did before the Sole Arbitrator, whether, according to notions of fairness, this period of time requires adjustment in light of the particular circumstances of this case.

248. The Sole Arbitrator decided that it was appropriate to do so, limiting the disqualification period to a period of four years from the date of the last Sample, 6 June 2015. Her view was as follows at CAS 2021/ADD/23 at ¶¶218-222:

"218. The import of the retroactive Disqualification provision of competitive results, is tied to the integrity of sporting competition with a view to rectifying the record books for the sport and turning the dial back as it were as if the cheating had not occurred (cf. CAS 2016/A/4464, at para. 194 and CAS 2016/0/4469, at para. 176). But against this imperative is the corresponding injustice that could accord to the Athlete. As the CAS Panel in CAS 2020/O/6759 explained:

'…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'.

219. This fairness exception has been acknowledged by the CAS jurisprudence and applied in appropriate cases to accommodate the specific circumstances of the case and the period of time in which the sporting

results are to be disqualified. The Panel in CAS 2020/O/6759, para.91 specify that, 'the CAS panels have frequently applied the fairness exception and let results remain partly in force when the potential disqualification period extends over many years and there is no evidence that the athlete has committed ADRVs over the whole period from the ADRV to the commencement of the provisional suspension or the ineligibility period (see e.g. CAS 2016/O/4481, CAS 2017/O/4980, CAS 2017/O/5039 and CAS 2017/A/5045). The CAS case law confirms that the panels have broad discretion in adjusting the disqualification period to the circumstances of the case.'

220. Therefore, it is necessary and appropriate to consider if the particular circumstances of this case warrant an exception on fairness grounds to the mandatory Disqualification of results - as per CAS 2005/C/976 & 986 stating at para. 143: 'To find out, whether a sanction is excessive, a judge must review the type and scope of the proved rule-violation, the individual circumstances of the case, and the overall effect of the sanction on the offender.'

221. The Athlete did not specifically address the Disqualification point or argue that fairness warranted a period lesser than that sought by WT. But WTADR Article 10.10 makes specific provision for a fairness assessment and thus the Sole Arbitrator has considered its application in the circumstances of this case. The Athlete used TMZ in 2014 and 2015, this was not done by accident or on a single occasion, but rather three occasions. However, there is no evidence that the Athlete used Prohibited Substances or Methods after June 2015, notwithstanding that her ADAMS record shows that she has been tested on at least 34 times since then. WT submitted no evidence of any ADRV post the collection of Sample 3 on 6 June 2015. Consequently, the Sole Arbitrator finds that the Disqualification of all competitive results through to the start of the Ineligibility period applied, may constitute excessive punishment. Rather it is more proportionate to apply the Disqualification over a period of time of four years, i.e. the same duration as the period of Ineligibility and do so from the date of Sample 3 (6 June 2015).

222. Consequently, in accordance with WRADR [sic] Article 10.10, the Sole Arbitrator finds that all the Athlete's Competition results from 6 June 2015 to 5 June 2019 shall be disqualified with all the resulting consequences, including forfeiture of any medals, points and prizes".

249. The Panel agrees with both the reasoning and the result (and in any event the Respondents accept that, in the absence of a cross appeal, and given their stated prayers for relief, they are bound to accept the Sole Arbitrator's decision in this respect). In relation therefore to the period of time subsequent to the collection of the Samples (and in addition to the disqualification of the results pursuant to Article 9 of the 2015 WTADR), the Athlete's competition results from 6 June 2015 to 5 June 2019 shall be disqualified.

XIII. CONCLUSION

250. In view of all the above considerations, the Panel holds and determines that the appeal brought by the Athlete should be partially upheld and the Challenged Award is hereby confirmed, subject to the starting date of the period of ineligibility. In particular:

a) The Panel is comfortably satisfied that the Athlete used a prohibited substance, TMZ, in violation of Article 2.2 of the 2015 WTADR.

b) The Athlete is sanctioned with a period of ineligibility of four (4) years starting from the date of the Challenged Award, namely 17 January 2022, but with credit for her period of provisional suspension, which started on 7 May 2021.

c) All of the Athlete's competitive results from 6 June 2015 through to and including 5 June 2019 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 Elena Danilova on 7 February 2022 against the Arbitral Award rendered by the CAS Anti-Doping Division on 17 January 2022 in the matter CAS 2021/ADD/23 is partially granted.

2. The Arbitral Award rendered by the CAS Anti-Doping Division on 17 January 2022 in the matter CAS 2021/ADD/23 is confirmed, save that the period of ineligibility shall start from 7 May 2021.

3. (…).

4. (…).

5. (…).

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