CAS 2021/A/8264 Russian Anti-Doping Agency v. Denis Ogarkov; CAS 2021/A/8382 World Anti-Doping Agency v. Russian Anti-Doping Agency & Dennis Ogarkov

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: James Drake K.C., Barrister and Arbitrator, London, United Kingdom

in the arbitration between

Russian Anti-Doping Agency, Moscow, Russian Federation
Represented by Mr Graham Arthur, Solicitor, GM Arthur, Liverpool, United Kingdom

Appellant in CAS 2021/A/8264

and

Denis Ogarkov, Lipetsk, Russian Federation

Respondent in CAS 2021/A/8264

World Anti-Doping Agency, Montreal, Quebec, Canada
Represented by Messrs Nicolas Zbinden, Attorney, Kellerhals Carrard, Lausanne, Switzerland and Ross Wenzel, WADA General Counsel, Lausanne, Switzerland

Appellant in CAS 2021/A/8382

and

Russian Anti-Doping Agency, Moscow, Russian Federation
Represented by Mr Graham Arthur, Solicitor, GM Arthur, Liverpool, United Kingdom

First Respondent in CAS 2021/A/8382

Denis Ogarkov, Lipetsk, Russian Federation

Second Respondent in CAS 2021/A/8382

I. PARTIES

1. The Russian Anti-Doping Agency ("RUSADA") is the National Anti-Doping Organisation ("NADO") in the Russian Federation and a signatory to the World Anti-Doping Code ("WADC"). Its registered office is in Moscow, Russian Federation. From time to time it issued anti-doping rules in accordance with the WADC including the "All-Russian Anti-Doping Rules of June 18, 2015" (the "2015 ADR") and the "Russian Anti-Doping Rules of 24 June 2021" (the "2021 ADR").

2. The World Anti-Doping Agency ("WADA") is a Swiss private law foundation with its registered seat in Lausanne, Switzerland and its headquarters in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport. WADA publishes the WADC, which provides the framework for anti-doping policies, rules, and regulations for sports organisations and related public bodies throughout the world.

3. Mr Denis Ogarkov (the "Athlete") is a Russian track and field athlete and specialist sprinter.

II. FACTUAL BACKGROUND

4. Below is a summary of the relevant facts, matters and circumstances drawn from the Parties' evidence and written and oral submissions.

5. On 21 October 2015, the Athlete underwent an out-of-competition doping control in Sochi, Russia, during which he provided a sample of urine. The sample was separated into two separate sample bottles which were given the reference numbers A3955690 (the "A Sample") and B3955690 (the "B Sample") (collectively, the "Sample"). The Sample was transported to the WADA-accredited laboratory in Moscow, Russia (the "Moscow Laboratory"). The Moscow Laboratory analysed the A Sample, the results of which were reported as negative.

6. In April 2020, the Sample was sent to the Swiss Laboratory for Doping Analyses, a WADA-accredited laboratory in Lausanne (the "Lausanne Laboratory"), the director of which is Dr Tiia Kuuranne. The Lausanne Laboratory re-analysed the A Sample and by a report dated 7 April 2020 reported an adverse analytical finding ("AAF") by reason of the presence of a metabolite ("M3") of dehydrochloromethyltestosterone ("DHCMT").

7. DHCMT is a non-specified anabolic androgenic steroid which was prohibited at all times under S1.1 of the WADA 2015 Prohibited List. It is sometimes referred to as 'oralturinabol' and 'turinabol'. DHCMT is not a threshold substance.

8. By letter dated 21 May 2020, RUSADA notified the Athlete of the AAF and informed him that the finding represented a potential violation of Article 2.1 of the 2015 ADR. The Athlete was provisionally suspended from the date of the letter.

9. By letter dated 29 May 2020, the Athlete requested the Lausanne Laboratory to provide an estimate of the concentration of DHCMT found in the Athlete's A Sample.

10. By letter dated 9 June 2020 (to WADA), the Lausanne Laboratory informed WADA that the *"indicative estimate"* of the concentration of the DHCMT found in the Athlete's A Sample was in the region of 2-3pg/mL.

11. On 11 June 2020, RUSADA passed this information on to the Athlete.

12. On 22 June 2020, the Athlete's legal representatives informed RUSADA that they had been appointed by the Athlete to assist with the proceedings brought by RUSADA against the Athlete.

13. On 26 June 2020, the Athlete's legal representatives responded to RUSADA in a document headed "EXPLANATIONS". In this document the Athlete offered (inter alia) the following explanations:

"C. Explanations

10. The Athlete denies intentional violation of the anti-doping rules and intentional use of Prohibited Substance in 2015.

11, The Athlete believes that the traces of Prohibited Substance in his sample A3955690 are the consequences of poisoning with "Ecdysterone" product produced by Dynamic Development".

14. The Athlete did not request the analysis of the B Sample.

III. THE DECISION OF THE DADC

15. As was foreshadowed in RUSADA's notice to the Athlete of 21 May 2020, RUSADA forwarded the case file to its Disciplinary Anti-Doping Committee (the "DADC").

16. The Athlete requested a hearing before the DADC, which hearing took place on 27 May 2021 in Moscow.

17. By its decision No. 125/2021 dated 27 May 2021 (communicated to RUSADA on 10 August 2021) (the "Appealed Decision"), the DADC determined that the Athlete had not committed an anti-doping rule violation ("ADRV") pursuant to the 2015 ADR. It is sufficient for present purposes to note the following passage from the decision:

"27. Taking into account that:

• The negligible concentration of metabolite is on the verge of reliability, which significantly increases the probability of the false positive results of studying the sample;

• No information has been given to the Committee about the Limit of Detection (LOD) for initial (screening) and confirmatory analysis;

• The kinetics of the concentration of metabolite of Dehydrochlormethyltestosterone in the Athlete's samples has not been disclosed;

• The Athlete's samples preceding Sample A3916463 are 'clean';

In the initial research of sample A 3955690, presence of metabolite of Dehydrochlormethyltestosterone has not been confirmed;

• Previously, the Athlete has not committed violations of anti-doping rules and requirements;

The Committee concludes that RUSADA has not fulfilled the condition regarding the burden of proof pursuant to standard stipulated by article 3.1.1. of All-Russian Anti-Doping Rules.

28. In addition, the Committee takes into account that much time has passed from the sample collection from the Athlete, which negatively impacts the Athlete's capabilities of protecting his rights.

29. Under such circumstances, reduction of the burden of proof established by art. 3.1.1. of All-Russian Anti-Doping Rules, is even more unacceptable and would not correspond to the high standards of conducting anti-doping proceedings stipulated by the World Anti-Doping Code, and the practice of its application based on these standards.

30. The Committee decided to acknowledge Denis Ogarkov as not having committed violations of the anti-doping rules and requirements".

18. On 10 August 2021, RUSADA formally received the Appealed Decision.

19. On 16 August 2021, WADA received a copy of the Appealed Decision.

20. On 13 September 2021, following a request, WADA received elements of the case file by email from RUSADA.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

21. RUSADA and WADA challenge the Appealed Decision in these appeals.

22. On 26 August 2021, RUSADA filed its appeal with the Court of Arbitration for Sport (the "CAS") against the Appealed Decision and submitted its Statement of Appeal (in CAS 2021/A/8264) according to Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"). By its Statement of Appeal, RUSADA requested that the matter be referred to a sole arbitrator, and further requested an extension of its time-limit to file its Appeal Brief, until 30 September 2021.

23. On 30 August 2021, the CAS Court Office forwarded the Statement of Appeal to the Athlete and, amongst other things, invited the Athlete to state, no later than 2 September 2021, whether he consented to the extension sought by RUSADA.

24. On 3 September 2021, the Athlete informed the CAS Court Office by email that he did not agree to the extension requested by RUSADA to file its Appeal Brief and that he did not object to the case being submitted to a Sole Arbitrator.

25. On 9 September 2021, the CAS Court Office informed the Parties that in light of the Athlete's objection to the requested extension it would be for the President of the CAS Appeals Arbitration Division, or her deputy, to decide the matter.

26. On 14 September 2021, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had partially granted the request for extension of time by RUSADA to file its Appeal Brief, specifically until 20 September 2021.

27. On 15 September 2021, RUSADA requested a further extension to file its Appeal Brief, specifically until 30 September 2021.

28. On 16 September 2021, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had partially granted the further request for extension by RUADA, specifically until 27 September 2021.

29. On 27 September 2021, RUSADA filed its Appeal Brief in CAS 2021/A/8264, in accordance with Article R51 of the CAS Code.

30. On 4 October 2021, WADA filed its appeal with the CAS against the Appealed Decision and submitted its Statement of Appeal in CAS 2021/A/8382, in accordance with Articles R47 and R48 of the CAS Code. The respondents to this appeal are RUSADA and the Athlete. By its Statement of Appeal, WADA requested that the matter be referred to the same sole arbitrator as for the appeal in CAS 2021/A/8264 and that the two proceedings be consolidated.

31. On 8 October 2021, the CAS Court Office forwarded WADA's Statement of Appeal to RUSADA and the Athlete and, amongst other things, invited them to state whether they agreed to consolidate CAS 2021/A/8264 with the Appeal filed by WADA, and whether they agreed to submit WADA's Appeal to the same sole arbitrator as for CAS 2021/A/8264.

32. On 12 October 2021, RUSADA stated that it had no objection either to the consolidation of the two procedures or to submitting both procedures to the same sole arbitrator.

33. On 5 November 2021, following two extensions of time to file its Appeal Brief, WADA filed its Appeal Brief in CAS 2021/A/8382, in accordance with Article R51 of the CAS Code.

34. On 29 November 2021, the CAS Court Office informed the Parties that, in the absence of any response by the Athlete regarding the question of consolidation, it would be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide.

35. On 30 November 2021, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to consolidate the two sets of proceedings pursuant to Article R52 of the CAS Code.

36. On 16 December 2021, the CAS Court Office forwarded RUSADA's Answer in CAS 2021/A/8382, filed on 10 December 2021 in accordance with Article R55 of the CAS Code, to the Parties.

37. The Athlete, despite having been duly invited to do so, did not file an Answer in either proceeding.

38. On 10 May 2022, in accordance with Article R54 of the CAS Code, the CAS Court Office informed the Parties that the arbitral tribunal appointed to decide these cases was constituted as follows:

    Sole Arbitrator: James Drake K.C., Barrister and Arbitrator in London, United Kingdom.

39. On 24 May 2022, the CAS Court Office, on behalf of the Sole Arbitrator, inquired of the Parties whether they wished for a hearing to be convened.

40. On 31 May 2022, RUSADA informed the CAS Court Office that it considered a hearing in the present proceedings *"appropriate"* and WADA took the position that no hearing was necessary.

41. On 10 June 2022, the Athlete, by email (sent from the same email address as used throughout the present proceedings by the CAS Court Office) informed the CAS Court Office that given that RUSADA preferred for a hearing to be convened, he agreed to a hearing.

42. On 10 August 2022, WADA informed the CAS Court Office that all three parties (*i.e.* RUSADA, WADA and the Athlete) had liaised and had identified 24 November 2022 as suitable hearing date.

43. On 11 August 2022, the CAS Court Office confirmed that a hearing would be held on 24 November 2022, by Webex conferencing system.

44. On 10 August 2022, WADA informed the CAS Court Office that all three parties had liaised and suggested 1:00 pm (Swiss time) as the start time for the hearing on 24 November 2022.

45. On 29 September 2022, the CAS Court Office, on behalf of the Sole Arbitrator, confirmed that the hearing of 24 November 2022 would commence at 2:00pm Swiss time.

46. On 2 November 2022 and 21 November 2022, WADA and RUSADA, respectively (but not the Athlete) signed and returned the Order of Procedure, issued by the CAS Court Office on behalf of the Sole Arbitrator.

47. A hearing took place on 24 November 2022. The hearing was conducted remotely via Webex. The following persons took part in the hearing:

    a. The Sole Arbitrator:

        i. Mr James Drake K.C.

    b. RUSADA:

        i. Mr Graham Arthur, Counsel

    c. WADA:

        i. Mr Nicolas Zbinden, Counsel

        ii. Mr Ross Wenzel, General Counsel, WADA

        iii. Mr Cyril Troussard, WADA Associate Director, Results Management, Legal Affairs

        iv. Ms Lou Levadoux, WADA Legal Trainee

    d. The Athlete:

        i. There was no appearance by or for the Athlete

    e. CAS Court Office:

        i. Ms Carolin Fischer, Counsel

48. It is important to note that the invitation to attend the hearing was sent by the CAS Court Office to the Athlete both by courier and to the email address used by the Athlete throughout the proceedings. In light of the Russian-Ukraine war, delivery by courier was not possible but there is no indication that the email invitation was not received in the ordinary course of things. The Sole Arbitrator notes that Article R57 para. 4 of the CAS Code, addressing the specific question of failure by a party to attend a hearing, provides as follows:

> *"If any of the parties, or any of its witnesses, having been duly summoned, fails to appear, the Panel may nevertheless proceed with the hearing and render an award"*.

49. At the conclusion of the hearing, those parties who participated in the hearing 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.

V. THE PARTIES' SUBMISSIONS

50. In considering and deciding upon the Parties' claims in this Award, the Sole Arbitrator has taken into account and carefully considered all of the submissions made and evidence adduced by the Parties. The following represents a summary of the Parties' principal submissions.

A. RUSADA's Submissions

51. RUSADA addressed the Appealed Decision, the liability on the part of the Athlete, and the consequences or sanctions that should be imposed in the event that the Athlete was found liable.

The Appealed Decision

52. In the submission of RUSADA, the DADC was wrong to decide that the Athlete had not committed an ADRV. In doing so, the DADC misconstrued the applicable rules and instruments.

a. The principal basis on which the DADC concluded that RUSADA had not established that DHCMT was present in the Athlete's sample was because it had not explained whether or not the level of DHCMT was above the relevant Limit of Detection ("LOD"). On that basis, the DADC took the view that it could not be sure that there was enough reliable evidence for it to find that an ADRV had been committed.

b. That is a misappreciation as to what LOD is and what it is not. The International Standard for Laboratories (the "ISL") refers to the term 'Limit of Detection'. It is defined as the *"analytical parameter of assay technical performance; lowest concentration of an analyte in a sample that can be routinely detected, but not necessarily identified or quantified, under the stated test method conditions"*. The LOD is therefore a measure of the performance of the initial testing procedure. It is not a concentration beneath which a prohibited substance cannot be reliably detected. It is not, as the DADC understood it to be, a 'floor', cut-off, or some similar low threshold.

c. The DADC drew attention to an absence of information regarding LOD on the basis that, in effect, it is saying *"we have not been told what the LOD for DMT is and so we cannot know whether a concentration of 2-3 picograms/mL can be relied upon"*.

d. RUSADA submitted that the answer is that the Lausanne Laboratory identified that the sample contained DHCMT in accordance with WADA TD2015IDCR and has reported an AAF based on the presence of DHCMT in the A Sample. The result can therefore be relied upon because it is based on data acquired from the confirmation procedure of the A Sample (A3955690) together with positive and negative quality control samples in the same analytical batch.

e. The DADC was wrong to conclude that *"the negligible concentration of metabolite was on the verge of authenticity"*. DHCMT is not a threshold substance; all that is required for the purposes of an ADRV therefore is the presence of any quantity of the prohibited substance.

f. The DADC was wrong to rely on the fact that samples tested prior to the Samples were "*clean*". That is entirely irrelevant to the issue of liability for an ADRV in respect of the Samples.

g. The DADC was wrong to rely on the fact that the Athlete had been found not to have committed any ADRVs prior to the date on which the Samples were taken. That is entirely irrelevant to the issue of liability for an ADRV in respect of the A Sample.

Liability

53. As to liability, RUSADA submitted as follows:

a. The analysis undertaken by the Lausanne Laboratory shows the presence of DHCMT in the Athlete's A Sample. This presence constitutes an ADRV pursuant to Article 2.1 of the 2015 ADR which provides that the *"presence of a prohibited substance or its metabolites in an Athlete's Sample"* constitutes an ADRV.

b. Article 2.1.2 of the 2015 ADR provides that *"sufficient proof of anti-doping rule violation under Article 2.1 is established by … [the] presence of a Prohibited Substance or its Metabolites … in an Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analysed"*.

c. In this case, DHCMT has been found to be present in the Athlete's A Sample in circumstances where the Athlete waived analysis of his B Sample and the B Sample was not analysed.

d. The analysis carried out by the Lausanne laboratory was compliant with the ISL.

e. The Athlete has not disputed the positive finding, nor has he raised any issues relating to a TUE or an asserted departure from either the 2019 International Standard for Laboratories ("ISTI") or ISL that could reasonably have caused the positive finding.

f. The Athlete has committed an ADRV arising from the presence of a prohibited substance in the A Sample.

Sanctions

54. The submissions made on behalf of RUSADA in relation to sanctions may be summarised in the following way.

a. On the basis that the ADRV has been established, the mandatory sanction for the presence of the DHCMT is a period of ineligibility of four years, as provided for in Article 10.2.2 of the 2015 ADR, unless the Athlete can establish that the ADRV *"was not intentional"*.

b. If the Athlete can establish that the ADRV was not intentional then the mandatory sanction is reduced to two years. This period may be reduced further if the Athlete can establish that he acted with "No Significant Fault or Negligence" as that term is defined in the 2015 ADR.

c. In each respect, the burden is on the Athlete.

d. In order to establish that he acted unintentionally, the Athlete must show, on the balance of probabilities, that he did not know he was committing an ADRV, or did not know that there was a significant risk that his conduct might constitute or result in an ADRV or, if he was aware of such a risk, did not manifestly disregard that risk.

e. In order to establish that he acted with no significant fault or negligence the Athlete must establish how the prohibited substance entered his system. In his explanation, the Athlete suggests that the DHCMT entered his system as a result of using a contaminated product, the "Ecdysterone" product manufactured by Dynamic Development.

f. The Athlete cannot show that he acted unintentionally nor that he acted with no significant fault or negligence because he cannot establish the conduct that led to the ADRV arising or the means by which he ingested the DHCMT.

g. In this regard, the explanation offered by the Athlete (see paragraphs [13] above) that the DHCMT entered his system as a consequence of poisoning by taking a product called "Dynamic Development" does not discharge his burden of proof, on the balance of probabilities, to establish the likely source of the prohibited substance as being a "Contaminated Product" as that term is used in the 2015 ADR. The Athlete has merely asserted his innocence and speculated as to how the substance might have entered his system but he has adduced no evidence. RUSADA relied on a number of CAS authorities in this respect: see CAS 2014/A/3615; CAS 2014/A/3820; CAS 2016/A/4377; CAS 2016/A/4626; CAS 2016/A/4919; CAS 2017/A/4692; and CAS 2019/A/6541.

h. The Athlete was provisionally suspended from 21 May 2020 to 27 May 2021. Article 10.10.3.1 of the 2015 ADR permits this period to be credited against the period of ineligibility.

55. RUSADA sought the following relief:

"131. RUSADA respectfully requests that-

131.1 The Decision be set aside.

131.2 Mr. Ogarkov be found to have committed an Article 2.1 anti-doping rule violation contrary to the ADR, with the appropriate sanction being a four-year period of ineligibility, with credit being applied in respect of the provisional suspension.

131.3 The conditions applicable to the period of Ineligibility should be those specified in ADR Article 10.12.1.

131.4 Costs be awarded to RUSADA in accordance with Rule 64.4 and Rule 64.5".

B. WADA's Submissions

56. WADA's overarching submissions were:

a. The Appealed Decision *"is fundamentally flawed"* in that, for reasons that were irrelevant the DADC found that an ADRV had not been established despite the fact that DHCMT had been correctly identified in the Athlete's A Sample.

b. The ADRV has been established on the evidence.

c. The Athlete should have received a period of ineligibility of four years.

The Appealed Decision

57. WADA submitted that the decision of the DADC was flawed for the following reasons:

a. The DADC concluded that the ADRV was not established on the basis that *"no information has been given to the Committee about the Limit of Detection (LOD) for initial (screening) and confirming analysis …".*

b. This element is irrelevant. The limit of detection ("LOD") only relates to the validation of the method for the initial testing procedure (see TD2019MRPL, para. 2.0). It is irrelevant to the specific analysis of samples, and does not relate in any way to the confirmation procedure, which is concerned with the identification of the prohibited substance.

c. The ISL explicitly clarifies that *"if successfully identified, a Non-Threshold Substance can be reported at a concentration below the estimated LOD of the Initial Testing Procedure or the LOI of the Confirmation Procedure".*

d. The DADC was therefore fundamentally wrong to place any weight on the fact that the Lausanne Laboratory's LOD of the initial testing procedure was not known to it.

e. The DADC was wrong to rely on the fact that the Athlete had been found not to have committed any ADRVs prior to the date on which the Samples were taken. That is entirely irrelevant to the issue of liability for an ADRV in respect of the A Sample.

Liability

58. On liability, WADA's submissions may be summarised in the following way:

a. Pursuant to Article 2.1 of the 2015 ADR, the presence of a prohibited substance, its metabolites or markers constitutes an ADRV.

b. Article 2.1.2 of the 2015 ADR adds that *"[s]ufficient proof of anti-doping rule violation is established by […] presence of a prohibited substance or its metabolites or markers in an Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed"*.

c. Article 2.1.3 of the 2015 ADR provides that *"[e]xcepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a prohibited substance or its metabolites or markers in an Athlete's Sample shall constitute an anti-doping rule violation"*.

d. DHCMT is a non-threshold substance prohibited at all times. Therefore, any concentration of DHCMT reported constitutes an ADRV.

e. It is important to note the process by which a sample is analysed in accordance with the 2019 International Standard for Laboratories and the technical documents issued thereunder TD2015IDCR and TD2019MRPL. The analysis in two phases. The first phase is the initial testing procedure which is designed to identify whether the sample contains a prohibited substance. The second phase is the "confirmation procedure" in order to confirm the presence of a prohibited substance. In this context, where a non-threshold substance is involved, the confirmation procedure only requires identification of the prohibited substance. Indeed, non-threshold substances are substances *"for which identification, in compliance with* [TD2015IDCR], *constitutes an Adverse Analytical Finding"*; and TD2019MRPL adds that *"a confirmed identification of a Non-Threshold Substance at any concentration shall be reported as an Adverse Analytical Finding"*.

f. The Lausanne Laboratory re-analysed the A Sample in accordance with the above procedure. In a report dated 7 April 2020 and a later letter of 9 June 2020, the Lausanne Laboratory reported an AAF by reason of the presence of a metabolite of DHCMT in an estimated concentration of 2-3pg/mL.

g. In his Explanations, the Athlete did not contest the positive finding, and it appears from his submission that he accepts that the prohibited substance was identified and that a *"correct"* AAF had been established.

h. The ADRV has therefore been established.

Sanctions

59. On the consequences that should follow from this, WADA submitted as follows:

a. According to Article 10.2.1.1 of the 2015 ADR, the period of ineligibility shall be four years where the violation does not involve a specified substance, unless the athlete can establish that the violation was not intentional.

b. DHCMT is not a specified substance.

c. Article 10.2.3 of the 2015 ADR sets out that the term "intentional" requires that the Athlete *"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".

d. The Athlete bears the burden of establishing that the violation was not intentional. For this, save in exceptional cases, an athlete must establish how the substance entered his body: see e.g. CAS 2017/A/5248. This is not such an exceptional case.

e. The Athlete must therefore prove, by evidence, the origin of the DHCMT on the balance of probabilities. This he has not done. The Athlete's explanation that he was "poisoned" with DHCMT does not discharge his burden.

f. Therefore, the sanction for the Athlete's violation is four years.

60. WADA sought the following relief:

"34. WADA respectfully requests the Panel to rule as follows:

1. The appeal of WADA is admissible.

2. The decision rendered on 27 May 2021 by the Disciplinary Anti-Doping Committee of RUSADA in the matter of Denis Ogarkov is set aside.

3. Denis Ogarkov is found to have committed an anti-doping rule violation.

4. Denis Ogarkov is sanctioned with a four-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of provisional suspension or ineligibility effectively served by Denis Ogarkov before the entry into force of the CAS award shall be credited against the total period of ineligibility to be served.

5. All competitive results obtained by Denis Ogarkov from and including 21 October 2015 are disqualified, with all resulting consequences (including forfeiture of medals, points and prizes).

6. The arbitration costs shall be borne by the Respondents jointly and severally.

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

C. The Athlete's Submissions

61. The Athlete did not file an Answer in either appeal and did not participate in either appeal.

62. In the "Explanations" submitted in the first instance proceedings, the Athlete made the following submissions (in summary):

a. The Athlete denies intentional violation of the ADR and intentional use of a prohibited substance.

b. The Athlete believes that the traces of DHCMT in his A Sample are the consequences of poisoning with "Ecdysterone" product produced by Dynamic Development.

c. The Athlete analysed the circumstances preceding the collection of the A Sample. The sample was collected on 21 October 2015, after the intense summer season, during which

the Athlete regularly performed and could be called for doping control at any time. During that summer season, three in-competition samples were collected from the Athlete, they were recorded in ADAMS, and no traces of prohibited substances were found in any of them: 28 May 2015 in Sochi; 29 May 2015 in Sochi; and 13 June 2015 in Cheboksary.

d. The next testing after the A Sample for the Athlete was on 14 February 2016 at the Russian Winter competition. This sample is not present in ADAMS (at least not available to the Athlete) but no information about adverse analytical finding of sample 3959362 was received by the Athlete. The last event in which the Athlete competed in the 2015 summer season was on 3 August 2015.

e. Thus, the DHCMT entered the Athlete's body during the 78-day period between 4 August 2015 and 21 October 2015, but its traces had not been present in the body by 14 February 2016.

f. The Lausanne Laboratory found the M3 metabolite in Athlete's A Sample.

g. In their scientific research, Drs Timofei Sobolevski and Grigory Rodchenkov state that the approximate detection window of M3 is 40-50 days.

h. The A Sample was initially, in 2015, analysed by the Moscow Laboratory where Drs Sobolevski and Rodchenkov worked, and was declared clean.

i. The A Sample is not mentioned in the McLaren Reports, or in the correspondence between the employees of the Moscow Laboratory and the Ministry of Sport. There is no evidence that the sample was declared "clean" by instruction of Mr Velikodny (command "Save").

j. It is obvious that in 2015 the technological capabilities of the Moscow Laboratory did not enable the detection of M3 in the concentration of 2-3pg/mL. This is the only explanation of the fact that nothing was found in the A Sample at the time.

k. The detection of the DHCMT in the A Sample by the Lausanne Laboratory in 2020 demonstrates that: (1) the equipment of the Lausanne Laboratory in 2020 is more sensitive than the equipment of the Moscow Laboratory in 2015; and (2) the period of detection of M3 metabolite (40-50 days) specified by Drs Sobolevski and Rodchenkov are not relevant in 2020 as the equipment sensitivity which increased in nine years extended this period.

l. All this shows that, even if the Athlete had consumed the DHCMT intentionally on 4 August 2015 (the day after the Russian Cup), then by 21 September 2015 (sic October 2015), after 78 days, the concentration of M3 metabolite in sample A3955690 would have been much higher.

m. Further, if the use was intentional intake, this would have to have been "by courses", in which case the period of 78 days would be significantly reduced, and the level of metabolites after intake would have been even higher.

n. Thus, deliberate, targeted use of the DHCMT by the Athlete is impossible in terms of elementary logic.

o. Meanwhile, at the end of August–the beginning of September 2015, the Athlete consumed Ecdysterone produced by Dynamic Development. He did not specify that drug in the doping control protocol because much more than two weeks had passed since the consumption at that time.

p. In 2015, RUSADA did not do any educational work on informing athletes about the risks of consuming nutritional supplements.

q. The Athlete believes that Ecdysterone by Dynamic Development became the source of poisoning with oralturinabol in insignificant quantities. The following facts indicate this:

   i. The registration data on the packaging of the products by Dynamic Development: Port Louis, Mauritius, indicate a fake address. It is impossible to assume that products which are supplied to Russia and the countries of the Commonwealth of Independent States are produced on a small island in the Indian Ocean.

   ii. Dynamic Development has anabolic steroids in its product line, including Oralturinabol 13. Contamination of Ecdysterone could occur at the stage of manufacturing, the location of which is unknown.

   iii. RUSADA has had at least one case when the athlete in whose sample the prohibited substance (Oxandrolone) was found, indicated that he could be poisoned with products of Dynamic Development whose product line has Oxandrolone.

   iv. Despite the fact that, on the website of Dynamic Development, the Ecdysterone and Tribulus products are indicated as discontinued, they are currently being sold in large numbers in the Russian Federation.

r. Five years after the collection of the A Sample, the Athlete cannot perform an analysis of the content of the open, used packaging of Ecdysterone product, nor can the Athlete perform an analysis of the content of the sealed packaging of the same series. For the same reasons, it is impossible to determine the concentration of the prohibited substance in the product, how evenly it was spread between the pills, and thereby prove unintentional use by the Athlete.

s. The Athlete believes that in all the circumstances he undertook all possible steps to explain the reason of the M3 in the A Sample of 21 October 2015. Everything suggests that this is poisoning with Ecdysterone product produced by Dynamic Development.

t. Considering the statute of limitation of the sample, the current evidential arrangements (analysis of the used open and similar closed packaging, providing evidence of purchasing) are impossible in the case.

63. The Athlete requested the following relief:

"30. The Athlete is requesting that his provisional suspension should be cancelled based on paragraph 7.9.3 of the All-Russian Anti-Doping rules".

VI. JURISDICTION

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

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

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

65. RUSADA and WADA signed and returned the Order of Procedure, which noted, inter alia, that RUSADA and WADA rely on Rule 13.2.1 and 13.2.3 of the 2015 ADR (RUSADA) and Rule 15.2.1 and 15.2.3 of the 2021 ADR (WADA) as conferring jurisdiction on the CAS. The jurisdiction of the CAS was not contested by the Athlete.

66. The Sole Arbitrator, therefore, confirms that CAS has jurisdiction to decide these appeals.

VII. ADMISSIBILITY OF THE APPEAL

67. As to admissibility:

a. The CAS Code provides at Article R49 that *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned … the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

b. The 2021 ADR provide:

i. By Article 15.2.3.3, that the deadline for an appeal other than by WADA is 21 days from the date on which the decision being appealed is received by the appealing party.

ii. By Article 15.2.3.4, that the deadline for WADA's appeal *"shall be the later of: a) Twenty-one (21) days from the expiry of the time for filing an appeal by other parties, [and] b) Twenty-one (21) days after WADA's receipt of a complete file relating to the decision".*

c. The DADC Decision was received by RUSADA on 10 August 2021. The Statement of Appeal was filed on 26 August 2021, and therefore within the twenty-one day time period.

d. WADA received the case file (at least in part) on 13 September 2021. WADA's Statement of Appeal was filed on 4 October 2021, and therefore within the twenty-one day time period.

68. There was no objection by the Athlete as to the admissibility of either appeal.

69. These appeals are therefore admissible, as was common ground between RUSADA and WADA (as confirmed in the signed Order of Procedure).

VIII. APPLICABLE LAW

70. 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".*

71. Accordingly, the applicable regulations are the ADR and to the extent that such rules do not deal with an issue then the law of the Russian Federation as domicile of the DADC is to be applied subsidiarily.

72. The ADR in place at the time of the conduct in question are the 2015 ADR and these rules shall apply to the merits of the appeals. According to the legal principle *tempus regit actum*, procedural matters are governed by the edition of the rules applicable at the time of these appeals, namely the 2021 ADR.

IX. THE MERITS

73. The Sole Arbitrator notes that, while the entirety of the submissions made and the evidence adduced by the Parties have been carefully considered, the Sole Arbitrator sets forth below only those matters considered necessary explain the reasoning and decide the dispute.

74. The merits of the appeal shall be considered in two sections: liability and sanctions.

A. Liability

a. The Alleged ADRV

75. At the outset, it is to be noted that nothing was said by the Athlete in answer to the various criticisms made by RUSADA and WADA of the Appealed Decision, and there was no attempt by the Athlete to sustain the Appealed Decision on its own terms. In any event, the Sole Arbitrator agrees that the Appealed Decision is flawed for the very reasons put forward by RUSADA and WADA, see in particular what is said at paragraph 52 *et seq.* above.

76. The task for the Sole Arbitrator is therefore to decide, *de novo*, whether an ADRV has been committed here on the basis of the material put forward by the Parties.

77. RUSADA and WADA allege that the Athlete has committed a violation of Article 2.1 of the 2015 ADR. For the sake of good order, this rule provides as follows:

> *"II. Definition of Doping, Rule Violations*

2. Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in Article 2.1 through Article 2.10 of these Rules.

The purpose of Article II is to specify the circumstances and conduct which constitute anti-doping rule violations. Hearings in doping cases will proceed based on the assertion that one or more of these specific rules have been violated.

Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

The following constitute anti-doping rule violations:

2.1. Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1. It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. 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 under Article 2.1.

2.1.2 Sufficient proof of anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or where the Athlete's B Sample is analyzed and the analysis of the B Sample confirms the presence of the Prohibited Substances or its Metabolites or Markers found in the Athlete's Sample ...

2.1.3. Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.

2.1.4. As an exception to the general rule of Article 2.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously".

The 2015 ADR go on to provide, by Article 3, for the burden and standard of proof and for the methods of establishing facts and presumptions:

"III Proof of Doping

3.1 Burdens and Standards of Proof

The RUSADA shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the RUSADA 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 the Rules place the burden of proof upon the Athlete or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

3.2 Methods of establishing facts and presumptions.

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

3.2.1. Analytical methods or decision limits approved by WADA after consultation within the relevant scientific community and which have been the subject of peer review are presumed to be scientifically valid. Any Athlete or other Person seeking to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify WADA of the challenge and the basis of the challenge. CAS, on its own initiative, may also inform WADA of any such challenge. At WADA's request, the CAS panel shall appoint an appropriate scientific expert to assist the panel in its evaluation of the challenge. Within 10 days of WADA's receipt of such notice, and WADA's receipt of the CAS file, WADA shall also have the right to intervene as a party, appear amicus curiae or otherwise provide evidence in such proceeding.

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

If the Athlete … rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then RUSADA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

3.2.3 Departures from any other International Standard or other anti-doping rule or policy which did not cause an Adverse Analytical Finding or other rules violation shall not invalidate such results if the Athlete … establishes that a departure from another International Standard or other anti-doping rule or policy which could reasonably have caused the Adverse Analytical Finding or other Rules violation occurred, then RUSADA shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the rules violation. …".

78. The ADRV alleged in these appeals is the violation of Article 2.1 of the 2015 ADR by reason of the presence of a prohibited substance or its metabolites or markers in the Athlete's A Sample. The Athlete waived his right to have the B Sample analysed. That being so, according to Article 2.1.2 of the 2015 ADR (see above) sufficient proof of an ADRV is established by the presence of a prohibited substance or its metabolites or markers in an Athlete's A Sample.

79. In the Sole Arbitrator's view, it is clear from the evidence from the Lausanne Laboratory that the Athlete's A Sample did contain a metabolite of DHCMT in an estimated concentration of 2-3pg/mL. There is no dispute that DHCMT is a non-threshold substance prohibited at all times and that, accordingly, the presence of any concentration of DHCMT constitutes an ADRV.

80. Further, as just noted, Article 3.2.2 of the 2015 ADR provides that WADA-accredited laboratories, as the Lausanne Laboratory is here, is presumed to have analysed the A Sample in accordance with the ISL. It is open to the Athlete to rebut this presumption by establishing,

by evidence, that there has in fact been a departure from the ISL which has caused the AAF. In this case, however, the Athlete makes no such contention and adduces no such evidence.

81. Accordingly, the Sole Arbitrator is comfortably satisfied that the Athlete has committed a violation of Article 2.1 of the 2015 ADR.

B. Sanctions

82. In light of the determination on liability, it is necessary to consider sanctions. The Sole Arbitrator must consider (a) the period of ineligibility and (b) the disqualification of the Athlete's results in competition after the commission of the ADRV.

83. In this respect, the Athlete contends that the presence of the DHCMT in his A Sample was not as a result of intentional conduct on his part but rather the consequences of *"poisoning"* with a product called "Ecdysterone" manufactured by Dynamic Development.

84. This might be described as a 'rolled-up' submission, without reference to any particular article of the 2015 ADR. Moreover, the Athlete seeks relief not under Article 10 of the 2015 ADR but under Article 7.9.3 of the 2015 ADR relating to provisional suspensions which provides that: *"The Provisional Suspension may be lifted if the Athlete demonstrates to the hearing panel that the violation is likely to have involved a Contaminated Product. A hearing panel's decision not to lift a mandatory Provisional Suspension on account of that the Athlete's assertion regarding a Contaminated Product shall not be appealable".*

85. As noted above, the Athlete did not appear and was not represented at the hearing. In those circumstances, the Sole Arbitrator is content to proceed on the basis that his submission with respect to sanctions is to be understood as follows:

a. Pursuant to Article 10.2 of the 2015 ADR, the ADRV was not intentional but by accidental ingestion of DHCMT through his use of the supplement product "Ecdysterone".

b. Pursuant to Article 10.4 of the 2015, the Athlete bears No Fault or Negligence.

c. Pursuant to Article 10.5 of the 2015 ADR, the Athlete bears No Significant Fault or Negligence.

1. Period of Ineligibility

86. Article 10.2 of the 2015 ADR 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 … 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 ADA 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".

87. Articles 10.4 and 10.5 of the 2015 ADR, in relation to the reduction or elimination of the period of ineligibility, provide in relevant part as follows:

"10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If an Athlete … establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of ineligibility shall be eliminated.

10.5. Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1. Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Article 2.1, 2.2 or 2.6.

10.5.1.1. Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10.5.1.2. Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10.5.2. Application of No Significant Fault or Negligence beyond the Application of Article 10.5.1.

If an Athlete or other Person establishes in an individual case where Article 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, then, subject to further

reduction or elimination as provided in Article 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Article may be no less than eight years".

88. The relevant defined terms are (as set forth in the 2015 ADR):

a. Contaminated product: *"A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search".*

b. Fault: *"Any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Article 10.5.1 or 10.5.2".*

c. No Fault or Negligence: *"The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system".*

d. No Significant Fault or Negligence: *"The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Article 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system".*

89. In light of the provisions just rehearsed, the position for these appeals is as follows:

a. If the Athlete is adjudged to have violated Article 2.1 of the 2015 ADR by reason of the presence of DHCMT, a non-specified substance, the period of ineligibility is four years, unless the Athlete can establish that the ADRV was not intentional.

b. In this context, as articulated in Article 10.2.3 of the 2015 ADR, "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 him to the balance of probabilities per Article 3.1 of the 2015 ADR) that he did not engage in conduct which 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.

d. In this context, it is important to note that it is not expressly required in the 2015 ADR that the Athlete, in order to establish that the ADRV was not intentional, must establish how the prohibited substance entered his system. This is consistent with the position in CAS 2016/A/4534 (concerning the 2015 FINA DCR concerning the same provisions) and the Sole Arbitrator adopts what was said there (including in particular the passages at paras 35-37) and in CAS 2017/A/5016 & 5036 at paras 122-123; and see also CAS 2020/A/7579 & 2020/A/7580 at paras 109-113. (There are cases to the contrary, such as CAS 2017/A/5248 and CAS 2017/A/5295, but, with respect, in the view of the Sole Arbitrator none grapples adequately with the absence in the text of the requirement to prove the source.) Nevertheless, as was made clear in those cases, 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. The Sole Arbitrator adopts and endorses what was said by the panel in CAS 2017/A/5016 & 5036 at paras 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".

e. If the Athlete can establish that the ADRV was not intentional, then the period of ineligibility shall, subject to what follows, be two years.

f. The period of ineligibility may be eliminated if the Athlete can establish (the burden being on him under Article 10.4 of the 2015 ADR and the required standard being the balance of probabilities per Article 3.1 of the 2015 ADR) that he bears no Fault or Negligence, i.e., a showing by the Athlete that he did not know or suspect, even with the exercise of utmost caution, that he had used the DHCMT. In this context, in contrast to the position set forth above, it is an express requirement that the Athlete must establish how the DHCMT entered his system.

g. The period of ineligibility may be reduced if the Athlete can establish (the burden being on him under Article 10.5.1.2 of the 2015 ADR and the required standard being the balance of probabilities per Article 3.1 of the 2015 ADR) both of the following things:

   i. that he bears no Significant Fault or Negligence, i.e., that his Fault or Negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the ADRV. In this context, the Athlete must (once again) establish how the DHCMT entered his system; and

   ii. that the DHCMT came from a Contaminated Product, namely a product that contained DHCMT that was not disclosed on the product label or in information available in a reasonable internet search.

h. If the Athlete can establish these two things, the period of ineligibility is to be in the range between, at one end, a reprimand and, at the other end, two years ineligibility, depending on the Athlete's degree of Fault, as assessed by (here) the Sole Arbitrator.

i. Finally, if the facts do not concern a Specified Substance or a Contaminated Product, it is open to the Athlete to establish that, pursuant to the general provision of Article 10.5.2, he bears no Significant Fault or Negligence in which case the period of ineligibility may be reduced upon an assessment of the Athlete's degree of fault, but the reduced period of ineligibility may not be less than one-half of the period of ineligibility otherwise applicable.

90. It is not at all clear how and if so to what extent the element of intentionality in Article 10.2 of the 2015 WADC overlaps with the elements of fault in Articles 10.4 and 10.5 of the 2015

WADC. In this regard, however, the Sole Arbitrator gratefully adopts the approach suggested in Rigozzi, A., Haas, U., Wisnosky, E and Viret, M. (2015). Breaking down the process for determining a basic sanction under the 2015 World Anti-Doping Code. *Int Sports Law J* 15:3-48 (hereafter "Rigozzi *et al* 2015"), namely to determine the basic sanction that is to be applied according to the facts of the matter by first considering whether a fault-related reduction under Article 10.4 (No Fault or Negligence) or Article 10.5 (No Significant Fault or Negligence) is to apply and, if not, then consider whether the Athlete is able to establish that the violation is not intentional. The Sole Arbitrator agrees with Rigozzi *et al* 2015 that this represents a simple and straightforward interpretation of the sanctioning regime of the 2015 WADC, the intended operation of which is difficult to fathom. As is said in the article, if an athlete is able to establish that one of the fault-related provisions applies, that should be sufficient to establish that the violation was not intentional and there is no need to establish, separately and differently, that the violation was not intentional.

91. As to the first, it is important to note that, whether one is concerned with elimination of the period of ineligibility under Article 10.4 of the 2015 ADR on the basis of No Fault or Negligence or the reduction of the period of ineligibility under Article 10.5 of the 2015 ADR on the basis of No Significant Fault or Negligence, it is an express requirement that the Athlete must establish how the DHCMT entered his system.

92. According to the Athlete, the only explanation for the presence of the DHCMT is the accidental ingestion of it via the use of the Ecdysterone supplement. According to the Athlete's submission, as from late August/ early September 2015, he consumed Ecdysterone which he believes *"became the source of poisoning with oralturinabol in insignificant quantities"*.

93. In this respect, the Athlete contended that the *"following facts indicate this"*:

a. that the Dynamic Development address given on the label (as Port Louis, Mauritius) was fake, it being impossible for a company from Mauritius to supply products to Russia;

b. that Dynamic Development has anabolic steroids in its product line, including oralturinabol, such that it was possible that Ecdysterone could be cross-contaminated during manufacturing;

c. RUSADA has had "at least one case" when the athlete contended that he was "poisoned" with products made by Dynamic Development';

d. despite the fact that the Dynamic Development website states that Ecdysterone has been discontinued, it is still sold in large numbers in Russia; and

e. it was now not possible to analyse Ecdysterone and that, in the circumstances, the Athlete *"undertook all possible steps to explain the reason of the M3 in the A Sample of 21 October 2015"*.

94. The difficulty for the Athlete is that he has adduced no corroborative evidence to support his contentions. There is, starkly, no evidence at all other than what is asserted by the Athlete that the address of Dynamic Development is indeed fake (and more to the point, so what if it is?) or that there was, as a matter of fact, cross-contamination in the manufacturing process of Ecdysterone by oralturinabol from other products. These are just rank speculations. Nor does

it provide any assistance to the Athlete to note, without more, that there is one other contamination case involving Dynamic Development. Nor does it avail him to say that, while the Dynamic Development website says that Ecdysterone has been discontinued it is still available in large numbers in Russia. What difference does that make?

95. Indeed, there is no evidence at all, save the Athlete's bare assertion, that the "Ecdysterone" supplement did, as a matter of fact, contain DHCMT. There is, as was submitted by RUSADA, a stark absence of any persuasive analytical or other evidence that would allow a conclusion to be reached, on the balance of probabilities, that the source of the DHCMT was via that product – or indeed that the Athlete ever used that product.

96. Moreover, as just noted, the definition of "Contaminated Product" in the 2015 ADR is: *"A product that contains a Prohibited Substance that is not disclosed on the product label or in information available in a reasonable Internet search"*. There is no evidence at all one way or the other before the Sole Arbitrator as to whether (a) the "Ecdysterone" supplement manufactured by Dynamic Development did or did not disclose the DHCMT on its label or (b) what internet searches, if any, the Athlete conducted.

97. Accordingly, it must follow that, when considering whether a fault-related reduction applies, the answer is no.

98. In accordance with the approach in Rigozzi *et al* 2015, the next question to ask is whether the Athlete is in a position to establish "otherwise" that the violation was not intentional (in accordance with Article 10.2.3 of the 2015 ADR).

99. In this respect, the Athlete submits that the timeline indicates that the *"deliberate, targeted use of the DHCMT by the Athlete is impossible in terms of elementary logic"*. It is said, in essence, that the DHCMT must have found its way into his body in the 78 day period between 4 August 2015 (the day following his participation in the Russian Cup, in which he presumably tested negative) and the date on which the Sample was taken, being 21 October 2015 and that, even if the Athlete had consumed the DHCMT intentionally on 4 August 2015, then by 21 October 2015, after 78 days, the concentration of DHCMT in his Sample would have been much higher.

100. In the Sole Arbitrator's view, this just begs the question as to the dosage and timing of the ingestion of the prohibited substance and does not advance matters one way or the other; and does not, without more, discharge the Athlete's burden of showing that he did not act intentionally in the context of the present ADRV. It does not show, on the balance of probabilities, that (as described above) the Athlete did not engage in conduct which 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. It is something to be weighed in the balance, but it is insufficient in and of itself to meet that burden. As was observed in 2017/A/5016 & 5036, even though the Athlete in the context of Article 10.2.3 of the 2015 ADR is not obliged to prove the source of the prohibited substance, he nevertheless has to show, on the basis of the objective circumstances of the ADRV and his behaviour, that specific circumstances exist disproving his intent to commit an ADRV. This the Athlete has not done.

101. In these circumstances, the Sole Arbitrator is of the clear view that the Athlete has failed to discharge the burden upon him to establish what is required for the elimination or the

reduction of the period of ineligibility and/or that his conduct was not intentional with the result that, therefore, the applicable period of ineligibility remains four years.

102. As to when that period should commence, the applicable rule is Article 10.10 of the 2015 ADR, which provides (in relevant part) as follows:

"10.10 Commencement of Ineligibility Period

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.

10.10.1 Delays Not Attributable to the Athlete or other Person

Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete …, the RUSADA may start the period of Ineligibility at an earlier date commencing as early as the date of the Sample collection or the date on which another anti-doping rule violation last occurred. All competitive results achieved during the period of Ineligibility, including retroactive Ineligibility, shall be Disqualified."

…

10.10.3 Credit for Provisional Suspension or Period of Ineligibility Served

10.10.3.1 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. …".

103. The period of ineligibility should therefore commence on the date on which this Award comes into force and credit should be given for the Athlete's provisional suspension. In this case, the Athlete was provisionally suspended from 21 May 2020 to 27 May 2021.

2. Disqualification

104. WADA seeks the disqualification of all competitive results obtained by the Athlete from and including 21 October 2015 (that being the date the date of the positive sample control) to the date of the Award, with all resulting consequences (including forfeiture of medals, points and prizes). RUSADA seeks no such relief.

105. The doping control test in these appeals was conducted out of competition. It follows therefore that those provisions relating to automatic disqualification for in-competition testing do not apply and that the following provision as to disqualification in relation to out-of-competition testing are relevant:

"10.8 In addition to the automatic Disqualification of the results in the Competition which produced the positive Sample under Article IX, 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.

106. The Sample was collected on 21 October 2015.

107. According therefore to this provision, all competitive results obtained by the Athlete from that date should be disqualified *"unless fairness requires otherwise".*

108. During the course of the hearing, it was argued by WADA (but not by RUSADA) that it was a matter for the Athlete to show, by the evidence and on the balance of probabilities, that fairness required some other more lenient result and that, in the absence of such showing by the Athlete, the Sole Arbitrator enjoyed no discretion to consider whether fairness required a different period of time for the period of ineligibility. The authorities cited for this proposition included: Lewis & Taylor, *Sports Law and Practice*, 3d ed., 2014 at p. 545 and Manninen and Nowicki, *"'Unless Fairness Requires otherwise' A Review of Exceptions to Retroactive Disqualification of Competitive Results for Doping Offences"*, Bulletin TAS/ CAS Bulletin 2017/2; CAS 2021/ADD/37; and CAS 2022/ADD/44 at [116].

109. But these authorities only go so far. These authorities were not concerned with the free-standing discretion of a panel but instead with the question whether it was for the ADO or the athlete to show that fairness did or did not require a different result. They should not be read as addressing the larger issue of the general discretion of the panel. Indeed, this is made plain by the Sole Arbitrator in CAS 2021/ADD/37 at [62] where, while recognising that a panel cannot assess factors such as unaffected results or financial hardship in the absence of evidence from the athlete on these matters, a panel is nevertheless able to assess issues such as delays in results management *"and the overall length of the disqualification relevant in particular to a re-testing situation"*.

110. In this respect, the Sole Arbitrator observes as follows:

a. It is right to say that the starting position is that all competitive results from the date of the positive sample are to be disqualified. This flows from the use of the word 'shall'.

b. It is also right to say, however, that the period of disqualification is ordinarily from the date of the positive sample through the commencement of any provisional suspension or period of ineligibility. It does not mean that the disqualification should catch all competitive results up to the date of the award.

c. There is nothing in the rule either way as to who bears the burden of showing that the exception is to be applied in any given circumstances.

d. It is right that the exception will ordinarily be invoked by the athlete in an endeavour to minimise the length and breadth of the period of disqualification. If an athlete argues for a shorter period of time then the athlete will, of course, bear the burden of persuading the panel that fairness so requires.

e. It is also right to say that any consideration of fairness must include not only fairness to the athlete in question but also fairness to the other athletes who competed with that athlete and to the integrity of the sport generally.

f. None of this is to say, however, that a CAS panel (or other tribunal) is somehow precluded from bringing into account notions of fairness when assessing the period of disqualification. The rule says that all competitive results obtained from the date a positive sample was collected through the commencement of any provisional suspension or ineligibility, shall be disqualified *"unless fairness requires otherwise"*. If a panel forms the view that fairness does require otherwise then it is open to the panel to say so and there is nothing in the rule or in the CAS jurisprudence or as a matter of principle to suggest otherwise.

111. In the Sole Arbitrator's view this is of a piece with established CAS jurisprudence to the effect that the rule is subject to a 'general principle of fairness' and that, even in the absence of a showing by an athlete, a CAS panel has a discretion to modify this period of time should fairness so dictate: see, e.g., CAS 2017/O/5039; CAS 2019/O/6153. The latter case provides helpful guidance in this respect:

> *"120 In the absence of evidence by the Athlete, who carries the burden of proof in regard to the "fairness exception", the Sole Arbitrator cannot assess or assume factors such as unaffected results or financial hardship stemming from the disqualification. The Sole Arbitrator is able, however, to review the Athlete's degree of fault and issues such as delays in results management and the overall length of the disqualification relevant in particular to a re-testing situation.*
>
> *…*
>
> *127 The re-testing of the Athlete's 2011 Sample took place over five (5) years and three (3) months following the 2011 Sample collection and the re-testing of the Athlete's 2012 Sample took place over four (4) years and eight (8) months following the 2012 Sample collection. The Sole Arbitrator recognises that anti-doping organisations are entitled to re-test samples at any time within the applicable statutes of limitations, and that they tend to await a later period as retesting is typically done once and they want to benefit from the most advanced science and testing process available. Nevertheless, the Athlete should not be penalized by and disqualified for an excessive period merely as a result of a decision of the anti-doping organisations not to proceed with the re-testing at an earlier date. The Sole Arbitrator notes that once the Samples were re-tested the anti-doping organisation has acted diligently and without delay. …*
>
> *130 CAS case law confirms the broad discretion of panels in adjusting the disqualification period to the circumstances of a specific case. Taking into account, on the one hand, the seriousness of the ADRVs in the present case, the fact that multiple ADRVs occurred and the argued degree of fault by the Athlete and, on the other hand, the period of over five years of requested disqualification without evidence of use of prohibited substances (but for the two confirmed ones) when the governing body could have theoretically brought this case earlier, as well as the sanction already imposed, the Sole Arbitrator finds that the principles of proportionality and fairness in line with vast CAS jurisprudence do not support disqualification of results for such an extended period of time"*.

112. On this issue the Sole Arbitrator adopts the view taken in CAS 2020/O/6759 [89]-[90]:

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

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

113. In these appeals, the Sole Arbitrator takes the view that there are exceptional circumstances which militate against a strict application of the disqualification rule, i.e., fairness does require otherwise. First, the events in question took place in 2015, long before these arbitral proceedings. The potential period of disqualification therefore does indeed cover a long term (in the order of seven years) as a result of the re-testing program in place subsequent to the Russian doping scandal. Second, the ADRV relates solely to the doping control undertaken on 21 October 2015, and there is no suggestion, let-alone evidence to prove that the Athlete used prohibited substances during such a long period of time following the date of the doping control.

114. These circumstances do, in the Sole Arbitrator's view, set this matter apart from the ordinary and require, in the interests of fairness, a reduction of the period of disqualification. In this regard, the Sole Arbitrator takes the view that fairness requires that all competitive results for a period of four years from 21 October 2015 through to and including 20 October 2019 should be disqualified (with all attendant consequences), that being the same period of time as the period of ineligibility imposed in these appeals.

X. CONCLUSION

115. In view of all the above considerations, the Sole Arbitrator holds and determines that the appeals brought by RUSADA and WADA should succeed. In particular:

a. The Sole Arbitrator is comfortably satisfied that the Athlete's sample contained a prohibited substance in violation of Article 2.1 of the 2015 ADR.

b. The Athlete is sanctioned with a period of ineligibility of four (4) years starting from the date of this Award, but with credit to be given for the period already served in provisional suspension from 21 May 2020 to 27 May 2021.

c. All of the Athlete's competitive results from 21 October 2015 through to and including 20 October 2019 shall be disqualified, with all of the resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

XI. COSTS

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 26 August 2021 by the Russian Anti-Doping Agency against the decision of the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Agency No. 125/2021 rendered on 27 May 2021 (*CAS 2021/A/8264 Russian Anti-Doping Agency v. Denis Ogarkov*) is upheld.

2. The appeal filed on 4 October 2021 by the World Anti-Doping Agency against the decision of the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Agency No. 125/2021 rendered on 27 May 2021 (*CAS 2021/A/8382 World Anti-Doping Agency v. Russian Anti-Doping Agency & Denis Ogarkov*) is upheld.

3. The decision of the Disciplinary Anti-Doping Committee of the Russian Anti-Doping Agency No. 125/2021 rendered on 27 May 2021 is set aside.

4. Denis Ogarkov is found to have committed an anti-doping rule violation under Article 2.1 of the All-Russian Anti-Doping Rules of 2015.

5. A period of four (4) years ineligibility is imposed on Denis Ogarkov, starting on the date of the present Award. The period of provisional suspension served by Denis Ogarkov between 21 May 2020 and 27 May 2021 shall be credited against the period of ineligibility imposed.

6. All competitive results achieved by Denis Ogarkov from 21 October 2015 through to and including 20 October 2019 are disqualified, with all of the resulting consequences including the forfeiture of any titles, awards, medals, points and prize and appearance money.

7. (…).

8. (…).

9. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 13 July 2023

THE COURT OF ARBITRATION FOR SPORT

James Drake KC
Sole Arbitrator