CAS 2011/A/2414 Zivile Balciunaite v Lithuanian Athletics Federation & International Association of Athletics Federations

AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Professor Peter Grilc, Ljubljana, Slovenia
Arbitrators: Mr. Bernhard Welten, Attorney at law, Bern, Switzerland
Mr. Marcos de Robles, Attorney at law, Barcelona, Spain

in the arbitration between

Mrs. Zivile Balciunaite, Lithuania
represented by Mr. Aivaras Zilvinskas, Attorney at law, Lithuania and
Juan de Dios Crespo Peréz, Spain

-Appellant-

and

Lithuanian Athletics Federation (LAF), Vilnius, Lithuania,
represented by Dr Stephan Netzle, Attorney at Law, Zürich, Switzerland

- First Respondent-

International Association of Athletics Federations (IAAF), Monaco
represented by Huw Roberts, Counsel, Monaco

- Second Respondent-

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I. BACKGROUND

1. The parties

1.1 Mrs Zivile Balciunaite (hereafter the Appellant) is a long-distance, especially marathon runner and is affiliated with the Lithuanian Athletics Federation (LAF).

1.2 The Lithuanian Athletics Federation (LAF or First Respondent) is the national athletics federation, seated in Lithuania. It is a member of the International Association of Athletics Federations (IAAF).

1.3 The International Association of Athletics Federations (IAAF or Second Respondent) is the international federation governing athletics on a worldwide basis and being domiciled in Monaco.

2. Facts of the case

2.1 On 31 July 2010 the Appellant competed for Lithuania at the European Championships in Barcelona, Spain in the marathon race. She finished the female marathon race as winner.

2.2 Immediately after the marathon race the competent doping control authorities were testing her. The Appellant's urine sample (A-sample no. 2006376) was tested by the WADA-accredited laboratory in Barcelona.

2.3 On 23 August 2010 the LAF was informed that the sample indicated that the Appellant was in violation of the IAAF Anti-Doping Regulations because of the presence of Testosterone or its precursors, prohibited under the WADA Prohibited List. The IAAF referred the case to the LAF and asked the LAF to notify the Appellant (i) regarding the adverse analytical finding, (ii) the fact that the finding constituted and anti-doping violation, (iii) that the Appellant had the opportunity to provide an explanation for the adverse analytical finding, (iv) that the Appellant had the right to request promptly the analysis of her B sample and (v) that the Appellant had the right to be provided the A-sample laboratory documentation package.

2.4 On the same day the LAF notified the Appellant about her possible violation of the IAAF Anti-Doping Regulations and forwarded the analytical report of the

Barcelona laboratory to her. The Athlete was given a deadline until 27 August 2010 to provide the IAAF with a written explanation for her adverse analytical finding and request the analysis of her B sample.

2.5 By IAAF fax letter of 2 September 2010 the Appellant was provisionally suspended in accordance with the IAAF Rule 38.2 and the analysis of her B sample was scheduled for 21 September 2010.

2.6 On 21 September 2010 the B sample was opened and handled in presence of the Appellant and Dr. Dalius Barkauskas. After the opening of the sample Dr. Barkauskas left the premises of the laboratory and the Appellant was informed that she could return on 23 September 2010 for the final analysis of the B sample. She and Dr. Barkauskas were offered to stay in the laboratory until the said date; however they both left the B sample analysis procedure.

2.7 On 1 October 2010 the full documentation packaged regarding the B sample analysis, confirming the adverse analytical finding of the A sample analysis, was sent from the Second Respondent to the First Respondent.

2.8 On 22 October 2010 the Appellant sent additional requests to the European Athletic Association.

2.9 On 30 November the Athlete provided the First Respondent with detailed explanations and documents of her situation.

2.10 On 1 December 2010 and on 24 February 2011 two hearings of the LAF Disciplinary Commission were carried out in the Appellant's presence.

2.11 On 7 December 2010 the First Respondent informed the Second Respondent that *"at the moment there is lack of sufficient arguments to state that the athlete committed IAAF Anti-doping rule violation"* and requested to refer the provided documents to the IAAF Doping Review Board.

2.12 On 14 January 2011 Prof. Segura, the Director of the Barcelona laboratory sent two documents containing comments regarding the letter addressed by the First Respondent to IAAF (13 January 2011) and the alleged inaccuracies of the anti-doping analysis report (IMIM/HUM/645/1, IMIM/HUM/638/1).

2.13 On 23 January 2011 Dr. Saugy, Director of the WADA-accredited laboratory in Lausanne, sent his comments in relation to the Appellant's submission filed to the Disciplinary Commission of the First Respondent, Sample 2006376 A and B laboratory documentation packages and additional report from the Barcelona laboratory from 14 January 2011.

2.14 On 23 February 2011 the Appellant presented to the First Respondent additional explanations on her blood analysis reports and specific remarks from the IRMS experts indicating that the laboratory results were not reliable.

2.15 On 18 March 2011 the European Athletic Association informed the First Respondent that it would exceptionally agree to a second re-analysis of the Appellant's B sample in the Cologne laboratory subject to certain conditions.

2.16 On 23 March 2011 the Appellant replied to the First Respondent and refused to the second re-analysis of the B sample meanwhile the First Respondent exceptionally agreed to it (*"… at the moment I do not agree with the second re-analysis … however I reserve the right of a re-analysing my urine sample, and the re-analysis could only take place if the case is addressed to the CAS…").*

2.17 By decision of 5 April 2011 the First Respondent's Disciplinary Commission decided that the Appellant violated article 32.2. of the IAAF Anti-Doping Rules as the presence of a prohibited substance or its metabolites or markers was detected in the Appellant's samples, the use or attempted use by the Appellant of a prohibited substance or prohibited method happened. The Disciplinary Commission banned the Appellant for two years, starting from 6 September 2010.

2.18 On 6 April 2011 the Second Respondent informed the First Respondent and the European Athletic Association that in accordance with the Rule 42.3 of the IAAF Competition Rules the decision of the First Respondent's Disciplinary Commission may be appealed only to the Court of Arbitration for Sport (CAS).

II. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3. Statement of appeal and appeal brief

3.1 In accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (Code) the Appellant filed her statement of appeal on 20 April 2011.

3.2 By letter dated 6 May 2011 the IAAF requested its participation as a party in the proceedings.

3.3 By letter dated 10 May 2011 the First Respondent agreed with the IAAF's request to intervene in this procedure.

3.4 By letter dated 11 May 2011 also the Appellant agreed with the IAAF's request to intervene in this procedure.

3.5 In accordance with Article R51 of the Code the Appellant filed the appeal brief on 3 June 2011.

3.6 By letter of 7 June 2011, the CAS Court Office informed the parties, on behalf of the President of the CAS Appeals Arbitration Division, that the Panel had been constituted as follows: Prof. Peter Grilc, President of the Panel, Mr. Marcos de Robles and Mr. Bernhard Welten as co-arbitrators appointed by the parties.

3.7 On 28 July 2011 the CAS informed the parties that the Appellant is given the opportunity to reply within 30 days to the scientific and medical evidences which will be submitted by the Respondents within their answers.

3.8 By letter dated 8 August 2011, the Respondents were advised that they will have the time to reply to the Appellant's points made to the scientific and technical evidences. Further the Respondents were informed that the Panel expects them to file at least the complete reports of the A and B sample testing.

3.9 In accordance with Article R55 of the Code and pursuant to Rule 42.13 of the IAAF Rules, the First Respondent filed its answer to the CAS on 15 August 2011.

3.10 By letter dated 15 August 2011, the IAAF informed the CAS Court office that it will not submit an answer to the appeal.

3.11 By letter of 16 August 2011, the Panel gave the Appellant the opportunity to reply to the scientific and medical evidences submitted in the First Respondent's answer.

3.12 By letter of 8 September 2011, the IMIM Grup De Recerca en Bioanalisi i Serveis Analitics in Barcelona (hereafter IMIM) was informed of the Appellant's evidentiary request and invited to provide the CAS Court Office with the documentation/information requested and detailed in such letter.

3.13 By letter dated 8 September 2011, the Panel decided to authorize the Appellant to call Dr. A. Garbaras, Z. Liutkeviciute and L. Zabuliene as experts at the hearing (limited to the scientific and medical evidences submitted by the First Respondent within its answer and the documentation/information that will be provided by the Barcelona laboratory and/or the First Respondent), and the Barcelona Laboratory and the First Respondent were invited to provide the CAS with the information/documentation requested by the Appellant on page 33 of the appeal brief.

3.14 On 22 September 2011 the First Respondent filed the documentation/information requested by the Appellant, including the letter of the IMIM.

3.15 By letter dated 27 September 2011, the parties were given the opportunity to file potential observations strictly limited to the answer of 21 September 2011 sent by the Barcelona Laboratory. The Appellant was granted a deadline until 12 October 2011 to file her comments to the scientific and medical evidence submitted by the First Respondent in its answer.

3.16 On 12 October 2011 the Appellant filed her comments, including a statement written by experts.

3.17 By letter dated 14 October 2011, the Respondents were given the possibility to comment on the Appellant's additional requests for scientific and technical documentation/information of 12 October 2011.

3.18 By letter dated 19 October 2011, the Antidoping Laboratory of Barcelona was invited to provide the CAS Court Office with the following documents: (i) internal linearity test results for each metabolite at different concentration which corresponds m/z 44 intensity from 400mV to 2000mV and (ii) the acceptance form for the spectrometer Delta V Advantage.

3.19 The Appellant and both Respondents signed the Order of Procedure, the Appellant on 28 November 2011, the First Respondent on 23 November 2011 and the Second Respondent on 29 November 2011. The Second Respondent signed the Order of Procedure subject to the proposed amendment to Section 7 (Law applicable to the merits): *" In accordance with IAAF Rules, in any case involving the IAAF before CAS, the applicable rules and governing law are set out in IAAF Rules 42.22 and 42.23 as follows:*

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

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

In accordance with Article R57 of the Code, the Order of Procedure fixed the date for the hearing on 1 February 2012.

3.20 By letter dated 16 December 2011 the Panel decided in view of the preparation of the hearing, to give (i) the Appellant a deadline until 5 January 2012 to send her remarks and arguments limited to the additional documents provided from the Antidoping Laboratory of Barcelona on 3 November 2011 and consequently (ii) to give the Respondents a deadline until 25 January 2012 to file their positions to the Appellant's statement.

3.21 On 20 December 2011 the First Respondent announced the persons attending the hearing on 1 February 2012 (Mr. Srabulis, LAF President; Mrs. Medvedeva, LAF General Secretary; Mrs. Gadamaviciene, LAF Assistant to the General Secretary; Prof. Segura, Head of the WADA-accredited Barcelona Laboratory as a witness; Prof. Ayotte Head of the WADA-accredited Montreal Laboratory as expert witness; Dr. Saugy, Head of the WADA-accredited Laboratory; Dr. Netzle, counsel).

3.22 On 21 December 2011 the Appellant announced the persons attending the hearing on 1 February 2012 (Mr. Crespo Perez, counsel; Mr. Zinvinskas, counsel; Mr. Whyte, assistant to Mr. Crespo Perez; Mrs. Balciunaite; Dr. Barkauskas, Chief Doctor of the Lithuanian Olympic Team as witness; Mrs. Liutkeviciute, Research Associate Vilinius University, Dept. of Biological DNA as expert; Dr. Zabuliene, consultant in endocrinology as expert; Dr. Garbaras, researcher, Center for Physical Sciences and Technology as expert and Dr. Plukis, Center for Physical Sciences and Technology). The Panel decided to accept all persons proposed by the parties with the exception of Dr. Plukis because his nomination was belated in accordance with article R56 of the Code.

3.23 On 22 December 2011 the Second Respondent announced the person attending the hearing on 1 February 2012 (Mr. Huw Roberts, IAAF legal counsel).

3.24 By letter dated 28 December 2011 the parties were informed that there are no exceptional circumstances which would justify the late nomination of Dr. Plukis as the Appellant's expert witness; therefore the nomination was not admitted.

3.25 On 4 January 2012 the Appellant filed a letter as a document for the preparation of the hearing in reference to the CAS letter of 16 December 2011.

3.26 On 25 January 2012 the First Respondent filed his statement referring to the CAS letter of 16 December 2011. It filed the WADA Technical Document – TD2010DL as Appendix and opposed to the Appellant's document filed with letter of 4 January 2012 and the "Remarks on Zivile Balciunaite Antidoping

Analysis Results" attached to it which was signed by Prof. Remelkis, Dr. Garbaras and Dr. Plukis.

3.27 A hearing was held in Lausanne on 1 February 2012. Beside the Panel members and Mrs. Andrea Zimmermann, Counsel to the CAS the following persons were present:

- for the Appellant: Mr. Zilvinskas (legal counsel), Dr. Barkauskas (witness), Dr. Garbaras (expert), Mrs. Balciunaite (athlete), Mr. Crespo Perez (legal counsel);
- for the First Respondent: Dr. Netzle (legal counsel), Mrs. Medvedeva (LAF), Mr. Skrabulis (LAF), Mrs. Gaidamavicien (LAF), Mr. Hoffmann (legal counsel);
- for the Second Respondent: Mr. Roberts (IAAF legal counsel); and
- for both, the First and the Second Respondent: Prof. Ayotte (expert), Prof. Segura (expert witness), Dr. Saugy (expert).

3.28 At the hearing of 1 February 2012 the Panel decided upfront that the document attached to the Appellant's letter of 4 January 2012 ("Remarks on Zivile Balciunaite Antidoping Analysis Results") was not accepted. The document written and signed by experts, among others by Dr. Plukis, was filed too late and based on article R56 of the Code no exceptional circumstances were given or even pretended by the Appellant. Further Dr. Plukis was not accepted as expert witness and therefore the document could not be considered as it was co-signed by Dr. Plukis.

3.29 At the hearing of 1 February 2012, Mrs. Balciunaite made some declarations, concerning *inter alia* her background, results, career, testing history as well as the circumstances during the European Championships 2010 training period and the race itself.

3.30 Dr. Liutkeviciute did not appear to the hearing and Dr. Zabuliene was not able to be reached over the telephone.

3.31 At the conclusion of the hearing, the parties confirmed that they were given their full right to be heard and were treated equally in the arbitration proceedings.

III. LEGAL ANALYSIS

4.A CAS Jurisdiction and admissibility

4.1 The jurisdiction of the CAS, which is not disputed by the parties, derives from art. R47 of the Code and Rule 42.3, Chapter 3 of the IAAF Competition Rules which states: *"Appeals Involving International-Level Athletes: in cases involving International-Level Athletes or their Athlete Support Personnel, the decision of the relevant body of the Member may be appealed exclusively to CAS in accordance with the provisions set out below."*

4.2 The IAAF Anti-Doping Administrator confirmed in his letter of 6 April 2011 the First Respondent that based on the Rule 42.3, Chapter 3 of the IAAF Competition Rules the Athlete has the right to appeal the decision to the CAS. The CAS therefore has jurisdiction on this case.

4.3 Rule 42.13, Chapter 3 of the IAAF Competition Rules states that the statement of appeal shall be filed to the CAS within 45 days, starting from the date of communication of the written reasons of the decision to be appealed.

4.4 Based on art. R57 of the Code the Panel has full power to review the facts and the law of the case. Furthermore, the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

4.5 The appealed decision was rendered on 5 April 2011 and according to the Appellant's statement of appeal received on 6 April 2011. The statement of appeal was filed on 20 April 2011 to the CAS and therefore within the 45 days deadline. Accordingly, the appeal is admissible.

4.B Applicable law

4.6 Based on Art. R58 of the Code, the Panel is required to decide the dispute: *"according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

4.7 The First Respondent's Disciplinary Commission applied the IAAF Rules in its decision of 5 April 2011. Rule 42.22, Chapter 3 of the IAAF Competition Rules states: *"In all CAS appeals involving the IAAF, CAS and the CAS Panel shall be*

bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations). In the case of any conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence." Further Rule 42.23, Chapter 3 of the IAAF Competition Rules states: *"In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the arbitrations shall be conducted in English, unless the parties agree otherwise."*

4.8 The parties to this case did not agree on any applicable law or language for this proceedings. Therefore the Panel shall primarily apply the provisions of the IAAF Constitution, Rules and Regulations. Rule 42.23, Chapter 3 of the IAAF Competition Rules is considered as a choice of rules of law by the parties; therefore pursuant to Article R58 of the Code, the Panel shall subsidiarily apply Monegasque law.

5. IAAF Rules

In accordance with Article R58 of the CAS Code, the relevant provisions of the IAAF rules and regulations which shall apply on the merits are as follows:

5.1 IAAF COMPETITION RULES 2010-2011 (CHAPTER III)

Rule 32.2

2. 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:
(a) Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample.

(i) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his 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 Rule 32.2(a).

(ii) sufficient proof of an anti-doping rule violation under Rule 32.2(a) is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analysed; or, where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.

(iii) except those Prohibited 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.

(iv) as an exception to the general application of Rule 32.2(a), the Prohibited List

or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.
(b) Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.

(i) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti- doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

(ii) 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 anti- doping rule violation to be committed.
(c) Refusing or failing without compelling justification to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading Sample collection.
(d) Violation of applicable requirements regarding Athlete availability for Out-of-Competition Testing, including failure to file required whereabouts information and Missed Tests which are declared based on rules which comply with the International Standard for Testing. Any combination of three Missed Tests and/or Filing Failures within an eighteen-month period as determined by the IAAF and/or other Anti-Doping Organizations with jurisdiction over the Athlete shall constitute an anti-doping rule violation.
Note: If an Athlete has a recorded missed test / filing failure on file with the IAAF prior to 1 January 2009, it may be combined with post-1 January 2009 missed tests and/or filing failures for the purposes of a violation of Rule 32.2(d) provided that all three missed tests and/or filing failures that are the subject of the anti- doping rule violation have taken place within an eighteen-month period.
(e) Tampering or Attempted Tampering with any part of Doping Control.
(f) Possession of a Prohibited Substance or Prohibited Method.

(i) Possession by an Athlete In-Competition of any Prohibited Method or Prohibited Substance or Possession by an Athlete Out-of-Competition of any Prohibited Method or Prohibited Substance which is prohibited Out-of Competition unless the Athlete establishes that the Possession is pursuant to a TUE granted in accordance with Rule 34.9 (Therapeutic Use) or other acceptable justification.

(ii) Possession by an Athlete Support Personnel In-Competition of any Prohibited Method or Prohibited Substance or Possession by an Athlete Support Personnel Out-of-Competition of any Prohibited Method or Prohibited Substance which is prohibited Out-of-Competition in connection with an Athlete, Competition or training, unless the Athlete Support Personnel establishes that the Possession is pursuant to a TUE granted to an Athlete in accordance with Rule 34.9 (Therapeutic Use) or other acceptable justification.
(g) Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method.
(h) Administration or Attempted administration to any Athlete In- Competition of any Prohibited Method or Prohibited Substance, or administration or Attempted administration to any Athlete Out-of-Competition of any Prohibited Method or Prohibited Substance that is prohibited Out-of-Competition or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any Attempted anti-doping rule violation.

Rule 34.7

In-Competition Testing
7. The IAAF shall have responsibility for initiating and directing In- Competition Testing at the following International Competitions:-
(a) World Championships;
(b) World Athletics Series Competitions;
(c) International Invitation Meetings in accordance with Rule 1.1;
(d) IAAF Permit Meetings;
(e) IAAF Road Races (including IAAF Marathons); and
(f) at such other International Competitions as the Council may determine on the recommendation of the Medical and Anti- Doping Commission. The full list of International Competitions under this Rule shall be published annually on the IAAF website.

Rule 37.4

4. If the initial review of an Adverse Analytical Finding under Rule 37.3 above does not reveal an applicable TUE or a departure from the Anti-Doping Regulations or the International Standard for Laboratories that caused the Adverse Analytical Finding, the IAAF Anti-Doping Administrator shall promptly notify the Athlete of:
(a) the Adverse Analytical Finding;
(b) the Anti-Doping Rule that has been violated;
(c) the time limit within which the Athlete is to provide the IAAF, either directly or through his National Federation, with an explanation for the Adverse Analytical Finding;
(d) the Athlete's right to request promptly the analysis of the B Sample and, failing such request, that the B Sample shall be deemed to be waived. The Athlete shall be advised at the same time that, if the B Sample analysis is requested, all related laboratory costs shall be met by the Athlete, unless the B Sample fails to confirm the A, in which case the costs shall be met by the organisation responsible for initiating the test;
(e) the scheduled date, time and place for the B Sample analysis if requested by the IAAF or the Athlete which shall normally be no later than 7 days after the date of notification of the Adverse Analytical Finding to the Athlete. If the laboratory concerned cannot subsequently accommodate the B Sample analysis on the date fixed, the analysis shall take place at the earliest available date for the laboratory thereafter. No other reason shall be accepted for changing the date of the B Sample analysis;
(f) the opportunity for the Athlete and/or his representative to attend the B sample opening procedure and analysis at the scheduled date, time and place, if such analysis is requested; and
(g) the Athlete's right to request copies of the A and B Sample laboratory documentation package which includes the information required by the International Standard for Laboratories.
The IAAF Anti-Doping Administrator shall send the relevant Member and WADA a copy of the above notification to the Athlete. If the IAAF Anti-Doping Administrator decides not to bring forward the Adverse Analytical Finding as an anti-doping rule violation, it shall so notify the Athlete, Member and WADA.

Rule 38.2 Provisional Suspension

2. If no explanation, or no adequate explanation, for an Adverse Analytical Finding is received from the Athlete or his National Federation within the time limit set by the IAAF Anti-Doping Administrator in Rule 37.4(c), the Athlete, other than in the case of an Adverse Analytical Finding for a Specified Substance, shall be suspended, suspension at this time being provisional pending resolution of the Athlete's case by his National Federation. In the case of an International-Level Athlete, the Athlete shall be suspended by the IAAF Anti-Doping Administrator. In all other cases, the National Federation of the Athlete shall impose the relevant suspension by written notification to the Athlete. Alternatively, the Athlete may accept a voluntary suspension provided that this is confirmed in writing to his National Federation. In the case of an Adverse Analytical Finding for a Specified Substance, or in the case of any anti-doping rule violation other than an Adverse Analytical Finding, the IAAF Anti-Doping Administrator may provisionally suspend the Athlete pending resolution of the Athlete's case by his National Federation. A Provisional Suspension shall be effective from the date of notification to the Athlete in accordance with these Anti- Doping Rules.

Rule 38.9

9. If a hearing is requested by an Athlete, it shall be convened without delay and the hearing held within 3 months of the date of notification of the Athlete's request to the Member. Members shall keep the IAAF fully informed as to the status of all cases pending hearing and of all hearing dates as soon as they are fixed. The IAAF shall have the right to attend all hearings as an observer. However, the IAAF's attendance at a hearing, or any other involvement in a case, shall not affect its right to appeal the Member's decision to CAS pursuant to Rule 42. If the completion of the hearing process is delayed beyond 3 months, the IAAF may elect, if the Athlete is an International-Level Athlete, to bring the case directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the Member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rule 42. A failure by a Member to hold a hearing for an Athlete within 3 months under this Rule may further result in the imposition of a sanction under Rule 44.

Rule 38.13

13. If the relevant tribunal of the Member considers that an anti-doping rule violation has not been committed, this decision shall be notified to the IAAF Anti-Doping Administrator in writing within 5 working days of the decision being made (together with a copy of the written reasons for such decision). The case shall then be reviewed by the Doping Review Board which shall decide whether or not it should be referred to arbitration before CAS pursuant to Rule 42.15. If the Doping Review Board does so decide, it may at the same time re- impose, where appropriate, the Athlete's provisional suspension pending resolution of the appeal by CAS.

Rule 45.3

3. The Council may, on behalf of all Members, recognise Testing in the sport of Athletics by a body that is not a Signatory under rules and procedures different from those in the Anti-Doping Rules and Regulations, if it is satisfied that the Testing was properly carried out and that the rules of the body conducting the Testing are otherwise consistent with the Anti-Doping Rules and Regulations.

No fault or negligence / No significant fault or negligence

(a) **Definitions (IAAF COMPETITION RULES 2010-2011, Chapter III)**

No Fault or No Negligence. *The Athlete establishing in a case under Rule 38 that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had Used or been administered the Prohibited Substance or Prohibited Method.*

No Significant Fault or No Significant Negligence. *The Athlete establishing in a case under Rule 38 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 anti-doping rule violation.*

(a) **Rule 38.15 Exceptional / Special Circumstances**

15. All decisions taken under these Anti-Doping Rules regarding exceptional / special circumstances must be harmonised so that the same legal conditions can be guaranteed for all Athletes, regardless of their nationality, domicile, level or experience. Consequently, in considering the question of exceptional / special circumstances, the following principles shall be applied:
(a) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his body tissues or fluids. Athletes are warned that they shall be held responsible for any Prohibited Substance found to be present in their bodies (see Rule 32.2(a)(i)).
(b) exceptional circumstances will exist only in cases where the circumstances are truly exceptional and not in the vast majority of cases.
(c) taking into consideration the Athlete's personal duty in Rule 38.15(a), the following will not normally be regarded as cases which are truly exceptional: an allegation that the Prohibited Substance or Prohibited Method was given to an Athlete by another Person without his knowledge, an allegation that the Prohibited Substance was taken by mistake, an allegation that the Prohibited Substance was due to the taking of contaminated food supplements or an allegation that medication was prescribed by Athlete Support Personnel in ignorance of the fact that it contained a Prohibited Substance.
(d) exceptional circumstances may however exist where an Athlete or other Person has provided Substantial Assistance to the IAAF, his National Federation, an Anti-Doping Organisation, criminal authority or professional disciplinary body resulting in the IAAF, National Federation, Anti-Doping Organisation, criminal authority or professional disciplinary body discovering or establishing an anti-doping rule violation

by another Person or resulting in a criminal or disciplinary body discovering or establishing a criminal offence or breach of professional rules by another Person.
(e) special circumstances may exist in the case of an Adverse Analytical Finding for a Specified Substance where the Athlete can establish how the Specified Substance entered his body or came into his Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance enhancing substance.

5.2 **WADA Technical documents**

The Panel analyzed the following WADA technical documents:

- WADA Technical Document – TD2009LDOC – Laboratory Documentation Package,
- WADA Technical Document – TD2004EAAS – Reporting and Evaluation Guidance for Testosterone, Epitestosterone, T/E Ratio and other endogenuous steroids
- WADA Technical Document – TD2010IDCR – Identification Criteria for qualitative assays incorporating column chromatography and mass spectrometry

IV. THE MERITS OF THE DISPUTE BETWEEN THE PARTIES

The questions raised by the Athlete which have to be decided are in the dispute at hand the following:

- Was there a violation of the Athlete's fundamental rights during the B sample opening/testing?
- Is the First Respondent's letter of 7 December 2010 to be considered as decision made based on the Athlete's hearing of 1 December 2010?
- Was the Athlete's deprived of the right to a timely and fair hearing?
- Did the experts from the LAF consider all of the Athlete's arguments?
- Did the Respondent fail to prove the Athlete's doping offence?
    - Was the sample properly taken?
    - Was the test used reliable?
    - Were there inexactitudes and inaccuracies of the A an B reports which could lead to a conclusion that the results are not reliable?
    - Was there a possible impact of consumed food together with Duphaston?

  - Relevance of issues with measurement uncertainty according to ISO 17025 standard
- What were the impact of Athlete's medical situation and the special circumstances of the sample collection?
  - Marathon race as a physical stress
  - Athlete's endocrinal disorders and internal hormonal imbalance
- Is it true that testosterone does not help in long distance running?
- Existence of conditions to claim there was no fault or negligence or that there was no significant fault or negligence by the Athlete

V. POSITIONS OF THE PARTIES, WITNESSES AND EXPERTS TESTIMONIES AND CONCLUSIONS OF THE PANEL

6. Violation of the fundamental right to be present

6.1 The Appellant claims that her fundamental right to be present when the B sample was opened and analyzed was violated. She refers to Rule 37.3 of the IAAF Competition Rules 2010-2011 and claims that she was deprived the right to be present at the B sample analysis throughout the whole analysis being carried out. She quotes two CAS decisions to support her allegation: CAS 2010/A/2161 Wen Tong v. IJF (9.8) to support the importance of fundamental nature of the right to attend the opening and analysis of the B sample, pointing out that the athlete's right to be given a reasonable opportunity to observe the opening and the testing of a B sample is of sufficient importance that it needs to be enforced even in situations where all of the other evidence available indicates that the Appellant committed an anti-doping violation. In 9.9 of this award the rules establish a strict liability regime with respect to doping; the second award is CAS 2008/A/1607 Varis v. IBU (p. 29 and 30) in which case the B sample testing was carried out without the presence of the athlete. For the Appellant it is clear that her right to be present in person or by way of a representative, during the opening and analysis of the B sample was absolutely ignored and therefore the B sample test must be disregarded. As a consequence, the Appellant pretends that the analysis of her B sample cannot validly confirm the presence of any prohibited substance found in

her A sample and the Respondents have absolutely failed to establish an anti-doping violation. She claims that the interpretation of the right to be present at the opening should be wide and refers to (i) art. 6 of the Lisbon Treaty on the EU, (ii) art. 48 of Title VI of the Charter of Fundamental Rights, (iii) art. 35 and 36 of the Federal Constitution of the Swiss Confederation.

6.2 The First Respondent claims that CAS 2010/A/2161 Wen Tong v. IJF does not support the Appellant's case because it has been adjudicated on a decisively different set of facts: the athlete was even not invited to the opening and analysis of the B sample and both acts took place without the athlete's knowledge, however, in the present case the Appellant was properly and timely informed about the time and place of the B sample analysis and invited to attend; it was her decision to leave the analysis early. In CAS 2020/A/385 the athlete and her national federation were not even informed about the date of the opening and analysis of the B sample. The First Respondent concludes that no fundamental rights of the Appellant were violated in the present case and it specifically reproduces the dates and hours of the beginning of the opening, the confirmation of presence of the Appellant and her representative Dr. Barkauskas. The First Respondent further states that (i) no laboratory employee asked the Appellant and/or Dr. Barkauskas to leave, (ii) nobody told the Appellant not to return in the morning the following day, (iii) the analysis was only completed on 28 September 2010, (iv) it is disputed that the Appellant was explicitly told to come back on 22 September 2010 at 2:30 p.m. For this reasons the First Respondent states that the Appellant's right to be present in person or by way of a representative, during the opening and the analysis of the B sample, was fully respected.

6.3 Following the Answer to the Appeal the B sample analysis began on 21 September 2010 at 10:00 in the presence of the Appellant and Dr. Barkauskas. On 21 September 2010 the operational steps 1 - 58 concerning preparation of samples and control samples as well as the partition HPLC were carried out. On 22 September 2010 the extracted samples and suitable controls corresponding to Appellant's B analytical batch started to be automatically injected in the GC/MS system and the automatic sequence of analysis continued without human intervention into the instrument until 23 September 2010 at 20:25, however, the

whole sequence was still not completed then. When the Appellant returned to the laboratory on 23 September 2010 (14:30) extracts from her sample were already automatically injected into the machine, however the laboratory was prepared to show her intermediary results available at the particular moment. The analysis was not completed then. The injection of the batch in the CG/MS lasted until 20:25 on this 23 September 2010. The next day, 24 September 2010, was a bank holiday in Barcelona. The analysis was considered finished when all results were collected on the next working day which was 27 September 2010. At that day the involved scientist and the director of the laboratory signed the Authenticity Declaration (page 2 of the sample report) and the final evaluation data were introduced in the Laboratory IMS early on 28 September 2010. The date to be considered the "end of the analysis" is generally considered to be the moment when the computer system automatically shows the results. The Appellant claims that some parts of the reports (A and B sample test reports) are in Spanish and not in English, while the First Respondent relies on the WADA Technical Document TD2009LDOC allowing parts of certain documents to be in the native language of the Laboratory personnel (here Spanish).

6.4 At the Hearing the Appellant explained that she was present at the opening of the sample together with Dr. Barkauskas, because she wanted to see everything. She was present when the sample was unsealed, opened and the sample ID numbers were identified. She left the laboratory after one or two hours. She was not asked to leave and the laboratory staff assured her that everything will be in the machine until the end of the analysis. She remembers that she was told to come back the next day at 14:30. Dr. Barkauskas left Barcelona the other day and did not stay with the Appellant. She gave her mobile telephone number to the laboratory staff and expected that she will be called for the opening of the machine.

6.5 Dr. Barkauskas explained as a witness that it was his duty to accompany the Appellant to see whether everything was in order when the B sample was opened and he left the following day because of his air ticket and because he does not understand the laboratory work to be done and generally nothing unexpected is happening during the analysis itself. He confirmed that no one from the laboratory asked him to leave and during the opening they discussed only

professional aspects of the testing respectively the analysis. He signed all necessary documents without any comments and did not notice any problems. He remembers that the promise from the laboratory was that the Appellant may be present during the last stages of the testing procedure, including taking the samples out of the machine.

6.6 Prof. Segura explained that he attended the opening of the B sample on 21 September 2010 personally. As from the data from the laboratory documentation the Appellant left the laboratory at 10:47. He explained in detail (i) who were the persons from the laboratory, present at the opening of the B sample, (ii) all steps concerning the handling of the B sample from taking it out from the refrigerator, its de-freezing, unsealing, opening , selecting the tubes by the athlete, piping the samples into the tubes, resealing the rest and starting the analysis. The preparation of aliquots was in the same room as well as the computer for the protocol. After signing the protocol the Appellant was asked what she wanted to do, whether to stay in the laboratory during the analysis or to return while she was instructed that the analysis will be as long as three days and that the results will appear between noon and 2:00 p.m. on 23 September 2010, however at 2:30 p.m. the laboratory will be able to tell her in which direction the results will be. The collection of mobile telephone number is necessary in case something happens with the tested sample and the re-sealed rest needs to be opened in the presence of the Appellant. After having received such information, the Appellant decided on her own will to leave. As to the course of the analysis Dr. Segura explained that everything is automatized and that there is no possibility to touch the sample or interfere with it. He further stated that on Thursday, 23 September 2010, the Appellant got only intermediary results which cannot be considered as final results as the analysis was still going on.

CONCLUSION

The Panel reviewed the anti-doping analysis report IMIM/HUM/631/1, sample identification 2006376 from the Barcelona WADA-accredited laboratory and especially pages 3 (authenticity declaration) and 21 (sample inspection form with signatures of persons being present at the opening of the sample) and is of the opinion that it is clear (and mostly uncontested) that the Appellant and Dr. Barkauskas were present at the opening of the B sample on 21 September 2010

(time 10:01) in the Barcelona laboratory. The documents filed are clean and do not contain any remark or comment of the Appellant or Dr. Barkauskas. The only disputed fact is if the Appellant was informed that on 23 September 2010 the final results will be available and she should come for this finishing of the testing procedure around 2:30 p.m. Based on the witness statements of Dr. Barkauskas and Prof. Segura the Panel is convinced that the Appellant was not sent away from the laboratory in any moment and when the Appellant came back to get the final results on 23 September 2010 at 2:30 p.m. the analysis was still ongoing. There was possibly a misunderstanding (eventually based on language problems), however, the Panel sees no reasonable doubt that any violation of the Appellant's fundamental rights to be present at the B sample opening and analysis has occurred. The Barcelona laboratory is WADA-accredited and therefore bound to follow the standard protocols; it has experienced staff and did analyse a couple of thousand cases; this means that the procedural steps and the communication with athletes and their representatives at the opening of their respective B samples are a matter of technical routine.

6.7 As the Panel is of the opinion that in the case at hand no violation of fundamental rights did occur, there is no need to refer to general rules guaranteeing fundamental rights, such as article 6 of the Lisbon Treaty on the EU, article 48 of the Charter of Fundamental Rights and articles 35 and 36 of the Federal Constitution of the Swiss Confederation.

7. **Is the First respondent's letter of 7 December 2010 to be considered as decision made based on the athlete's hearing of 1 December 2010 and the athlete's right to a timely and fair hearing?**

7.1 The Appellant submits that the only valid decision of the First Respondent was made on 1 December 2010 and it was made in accordance with IAAF Rule 38.13:

"If the relevant tribunal of the Member considers that an anti-doping rule violation has not been committed, this decision shall be notified to the IAAF Anti-Doping Administrator in writing within 5 working days of the decision being made (together with a copy of the written reasons for such decision). The case shall then be reviewed by the Doping Review Board which shall decide whether or not it should be referred to arbitration before CAS pursuant to Rule 42.15. If the Doping Review Board does so decide, it may at the same time re- impose, where appropriate, the Athlete's provisional suspension pending resolution of the appeal by CAS."

7.2 The Appellant states that she subsequently communicated with the IAAF Doping Review Board through the First Respondent, so that Doping Review Board would

not decide to challenge the decision of LAF of 1 December 2010. Further the Appellant states that the decision of 5 April 2011was only made after more than seven months, despite the fact that the LAF had a time limit of three months to do so and this decision also contradicted the decision of 1 December 2010, because no new evidence was acquired during this period but the decision was contrary to the one of 1 December 2010. Based on the Appellant's hearing of 29 February 2012 the consequence shall be that the decision of 5 April 2011 is null and void.

7.3 The First Respondent contests in stating that the Appellant's arguments do not have any merits. It refers to the correspondence between the First and Second Respondent (LAF letter to IAAF of 7 December 2010; IAAF letter to LAF of 9 December 2010; LAF letter to IAAF of 13 December 2010; LAF letter to the IAAF from 10 January 2011), the Appellant's additional comments and evidence to the First Respondent's Disciplinary Commission of 23 February 2011 (in which the Appellant herself submitted additional comments and evidence) and the decision of the First Respondent's Disciplinary Commission of 5 April 2011 (lit. J, mentioning that the Appellant brought three representatives, Zilvinskas, Remeikis, Liutkevicuite, to the second hearing). The Second Respondent shares the position of the First Respondent that the final decision was clearly taken on 5 April 2011 and quotes the same documents.

7.4 At the hearing Mr. Skrabulis, President of the First Respondent, explained that the First Respondent considered the Appellant as the country's top athlete and that the federation offered her all information and cooperation possible, however, not to the detriment of a fair procedure. The First Respondent took into account the Appellant's desire to have sufficiently enough time for the preparation of her defence and for a maximum period of discretion. The Appellant first presented her arguments on 1 December 2010 (confirmed in the LAF letter to IAAF from 13 December 2010); obviously the hearing on 1 December 2010 could not result in a final decision (see letter of 7 December 2010).

CONCLUSIONS

7.5 The First Respondent's Disciplinary Commission held a first hearing in the matter on 1 December 2010 resulting in a preliminary finding as set out in the letter to IAAF from 7 December 2010. In accordance with the Rule 38.9 of the

IAAF Competition Rules 2010-2011 a requested hearing shall be convened without delay and held within three months of the date of notification of the Athlete's request to the Member. As the hearing was held on 1 December 2010 and the Appellant notified the request for a hearing on 9 September 2010, the hearing was made in time.

7.6 As from First Respondent's letter to the Second Respondent of 7 December 2010 no facts do show that the First Respondent took a final decision after the Appellant's first hearing of 1 December 2010. The exact wording refers to the additional documents presented by the Appellant at the hearing of 1 December 2010 to be forwarded to the IAAF Doping Review Board for interpretation. Clearly both, the Appellant and the First Respondent, intended to carry out further investigations before the next hearing date *("… Taking into account the information provided by the athlete the Federation's Disciplinary Commission decided that <u>at the moment</u> there is lack of sufficient arguments to state that the athlete committed IAAF Anti-doping rule violation and request to refer the provided documents to the IAAF Doping Review Board. …")*. The Second Respondent then denied the competence of the IAAF Doping Review Board in its letter to the First Respondent of 9 December 2010.

7.7 As from First Respondent's letter to the Second Respondent, dated 13 December 2010, the First Respondent considered itself the responsible organisation for taking any final decision: *"Referring to the IAAF Rules the Federation will have to make a decision, therefore the Federation's Commission needs more time to examine the documents provided by the athlete, which were received only on the day of the hearing."*.

7.8 As from the First Respondent's letter to the Second Respondent of 10 January 2011 no final conclusions have been adopted yet: *"This is no final conclusion of the Federation, however we tend to assume that these violations have to be taken into account while making the final decision in this case."*.

7.9 As from no. 47 of the appeal brief, the Appellant herself submitted additional comments and evidence to the First Respondent on 23 February 2011. Therefore, in the appeal procedure, she cannot bona fide pretend that she considered the letter of 7 December 2010 a final decision.

7.10 On 24 (the Appellant mentions on p. 6 of its appeal brief: 23) February 2011 the second "meeting" was held by the First Respondent's Disciplinary Commission (Decision of the LLAF Disciplinary Commission from 5 April 2011, lit. J). The Appellant considers the term "meeting" as inadequate to refer to a "hearing"; in her view only a formal use of the term "hearing" could be considered as a procedural step within the meaning of the IAAF Competition Rules. However, the Panel considers that the development of the case as described in the above mentioned letters and from the testimony of Mr. Skrabulis does clearly show that the 24 (or 23) February 2011 a formal hearing was held, even if the Appellant was not present personally. Her legal interests were actively represented by her three representatives. Additionally, the Appellant states that the First Respondent's experts did not consider all of her arguments presented. In referring to the documentations presented in January and beginning of February 2011 (see appeal brief, no.46 and seq.), she considers herself being active in the procedure in January and February 2011 and therefore she was not of the opinion that the procedure was finished with a pretended decision taken in the letter of 7 December 2010.

7.11 The Appellant relies on Rule 38.13 of the IAAF Competition Rules, however, it is Rule 38.9 IAAF Competition Rules which is relevant. It follows from the documentation above that the parties knew or should have known that the proceeding before the First Respondent's Disciplinary Commission has not shown that a breach of an anti-doping rule has been committed. All letters mentioned before (with the exception of the letter of 7 December 2010 which states: *"... at the moment there is lack of sufficient arguments ...")* show that the proceeding was not finished until the Decision of 5 April 2011 was issued. Additionally, the Appellant, at least twice actively participated in the proceeding and submitted new documents, after 7 December 2010 (23 February 2011; three representatives of the Appellant being present in the hearing of 23 February 2011).

7.12 Rule 38.9 IAAF Competition Rules states that a hearing shall be held within three months of the date of notification. It is obvious that in complex cases the hearing may be held on one or more occasions and there are no specific rules demanding that the hearing should be held and finished on one sole occasion. At hand we

have such a complex case which is confirmed by the development of the proceedings, starting with the A sample analysis and going on until 5 April 2011 when the decision was issued. Summing up, the Panel is of the opinion that in the case at hand the timeframe defined in Rule 38.9 IAAF Competition Rules was clearly respected.

7.13 Following all the above, the Panel considers that the important decision to be appealed and being the final decision of the First Respondent is clearly the decision of 5 April 2011 and the Appellant's right to a timely and fair hearing was definitely not violated.

8. **Did the experts from the LAF consider all of the athlete's arguments?**

8.1 The Appellant submits that the experts of the First Respondent did not consider all her arguments and that only a partial evaluation has been made. She refers to the documentation presented in January 2011 and beginning of February 2011 and relied on her communication with the First Respondent to be forwarded to the Second Respondent. The Appellant pretends that only a part of the several documents, explanations, blood analysis reports and remarks from IRMS experts which she filed, were forwarded by the First to the Second Respondent. Consequently, the Second Respondent and its experts were not in a position to evaluate those documents and which constitutes a violation of Rules 38.7, 33.1 and 38.14 of the IAAF Competition Rules 2010-2011.

8.2 The First Respondent is fully contesting the Appellant's statement and refers to the First Respondent's Disciplinary Commission which itself refers to the numerous submissions provided by the Appellant. There is no obligation of the First Respondent as responsible anti-doping organisation to assess an anti-doping case, to transfer documents provided by the Appellant to the Second Respondent. Further the Appellant was extraordinarily offered a second analysis of her B sample.

CONCLUSIONS

8.3 The Panel has the full authority to hear the case at hand "de novo", based on article R57 of the Code. Since the documents, explanations, blood analysis

reports and remarks from IRMS experts were - following the reasoning of the Appellant - not forwarded by the First to the Second Respondent and having in mind that those documents deal with the next set of the dispute ("The Respondent's fail in the determination of doping offence"), the Appellant's submissions are dealt with in the next chapter.

9. The Respondent's failure to prove the athlete's doping offence

9.1 In the hearing of 29 February 2012 the Panel was carefully leading through a detailed discussion among the experts (Dr. Garbaras, Prof. Ayotte, Prof. Segura, Dr. Saugy) invited by the Appellant and the First Respondent. The expert discussion followed the methodology of the appeal brief (no. 53 to 107 of the appeal brief):

- Is it correct that the sample was not properly taken as there were no sterile conditions and a contamination with microbes possibly happened?
- Is it correct that the test used by the laboratory was not reliable for the reasons mentioned under point 5.2 appeal brief of 3 June 2011?
- Is it correct that the A- and B-sample reports are inexact and inaccurate which leads to the conclusion that the laboratory results are not reliable?
- Is there an impact possible in relation to food consumed with Duphaston?
- Does a marathon race and similar physical stress may lead to a hormonal imbalance and severe damages?
- Does the Appellant's endocrinal disorder and internal hormonal imbalance have any influence on the testosterone value?
- Is it correct that the single use of testosterone does not enhance the performance?

9.2 The Panel based the assessment of the experts' testimonies and their answers also on their experience and credibility. To sum up these factors, Prof. Ayotte, Dr. Saugy and Prof. Segura are experts in the area of anti-doping and on analyzing of samples and interpretation of results with a long experience of experimental data accumulated by the anti-doping laboratories they are in charge of. Dr. Garbaras is an expert in the field of mass spectrometry, techniques, instruments and interpretation, however, he has – up to now – no experience in the area of anti-doping. In the case at hand the measurement methods, techniques and evaluations of results are an important part of the dispute. However, the case at hand is not exclusively based and cannot be reduced to the method of mass spectrometry alone.

9.3 **Is it correct that the sample was not properly taken as there were no sterile conditions and a contamination with microbes possibly happened (point 5.1 appeal brief of 3 June 2011)?**

9.3.1 The Appellant claims she started menstruating during the competition, confirmed by three witnesses, she was not allowed to wash and clean up the biological fluids after the race and before giving the urine sample in the conditions when the temperature was over 30 degrees C. Therefore she states that her urine sample was given under non-sterile conditions and must be contaminated with microbes. She pretends that the microbes present in a sample can cause changes to the profile of the urinary steroids following WADA Technical Document TD2004EAAS. Further, bacterial activities in urine may cause significant changes in measured steroid profiles as brought up in the 1994 Diane Modahl case. The growth of microorganisms like Staphylococcus and Enterococcus cause trinary alteration by oxidoreduction reactions of endogenous steroids and an increased T/E from 5.3 to 9.8 is reported in a combined fraction of conjugated and non-conjugated steroids. This increase was caused by an increased concentration of T in the fraction of non-conjugated steroids compared to E as supported by Van de Kerkhof and Henri in "Steroid profiling in doping analysis" (Faculteit Farmacine Proefschrift Universiteit Utrecht ISBN 90-393-2918-4, p. 17). The First Respondent opposes and gives several arguments (answer to the appeal points 59 to 65).

9.3.2 Prof. Ayotte explained that for doping tests the sample providing is never done in sterile conditions. It definitely is possible that bacteria and microbes are contained in the doping sample. The laboratory is able to measure if a sample was degraded with microbes/bacteria. In the case at hand the laboratory did not see any degradation. With microbes/bacteria in urine samples testosterone may grow; however, all other parameters will grow accordingly and most importantly the IRMS confirmation will still show a result for endogenous testosterone and not exogenous as in the case at hand. She explained

that the degradation is possible however, no false positive result will be received. The laboratory is always checking if bacteria/microbes are present in the sample and further it is not possible for any athlete to wash or take a shower before the doping test, to exclude any possible manipulation. Dr. Saugy added that menstruations as well as (heavy) activities before a doping test do not have any influence on the values of testosterone, epitestosterone and the ratio T/E.

CONCLUSIONS

9.3.3 After having reviewed exhibits like the A and B sample reports, the relevant WADA technical documents, scientific articles as quoted by the parties, Dr. Saugy's report of 4 February 2011 and listening to the experts testimonies, the Panel is of the opinion that the Appellant's sample was properly taken (no deficient conditions under which the sample was taken are mentioned on the Doping Control Form), the Chain of Custody Forms do not show any irregularities regarding the sample storage and transport and no contamination of the sample with microbes was established or reported by the Barcelona laboratory. It is obvious that samples for doping controls are always collected under non-sterile conditions. Further the report of Dr. Saugy from 4 February 2011 states that it is unlikely that bacteriological degradation could have occurred considering that only two hours elapsed between the collection and the delivery of samples to the laboratory, the sample being transported at all times in a refrigerated package and received intact by the laboratory. He further states that even if bacterial activity had occurred with significant changes in measured steroid profiles, this would be irrelevant and in this respect the Panel follows the argumentation in CAS 2005 WADA v. Wium (art. 6.11, 6.12) where the expert stated that when the sample is analysed through the IRMS and the result demonstrated the exogenous origin of the substance contained in the sample it is scientifically not possible that the bacterial contamination and activity could have transformed the origin of the endogenous substance to an exogenous substance.

9.4 **Is it correct that the test used by the laboratory was not reliable for the reasons mentioned under point 5.2 appeal brief of 3 June 2011?**

9.4.1 The Appellant claims that the most recent studies show, current steroid (testosterone) doping tests should be scrapped for international sports, because they ignore vital ethnic differences in hormone activity as suggested in a research of steroid profiles of professional soccer players (An international comparative study, published in the British Journal of Sports Medicine). The evidence of a doping abuse is determined by the testosterone/epitestosterone ratio (T/E ratio). The Appellant summarizes the data and the results of the survey: genetic variation were shown in 22% of the African players, in 81% of the Asian players, in 10% of Caucasian players and in 7% of the Hispanic players) on which basis the authors of the article came up with new thresholds for T/E ratios as follows: 5.6 for men of African origin, 5.7 for white men, 5.8 for men of Hispanic origin and 3.8 for men of Asian origin. The authors suggested that the reference ranges for T/E should be tailored to an athlete's individual endocrinological (hormonal) passport. The Appellant is citing other studies with a similar conclusion, like Heald, Ivison, Anderson, Cruickshank, Significant ethnic variation in total and free testosterone concentration, Laing, JM Clin Endocrinol (Oxf) 2003; 58(3): 262-6).

9.4.2 The First Respondent opposes: (i) CAS has to apply the existing standards and the Barcelona laboratory strictly followed the WADA standards for IRMS analysis within the rules of TD2004EAAS. The identification of the substances, for which the delta value is measured, was made according to the WADA Identification Criteria for Qualitative Assays (TD2010IDCR) and the reliability of the IRMS analysis method was confirmed repeatedly and consistently in CAS jurisprudence (e.g. CAS 2002/A/383 IAAF v/ Dos Santos; CAS 2007/A/1348 IAAF v/ Bulgarian Athletic Federation & Vania Stambolova & Vebelina Veneva); (ii) the speculation on the T/E ratio threshold in various ethnic groups is completely irrelevant in the

present case and the T/E ratio has been the only standard before about 1996; (iii) the positive result of the Appellant is mainly based on the IRMS analysis result and in addition, her other steroid profiles from 2005, 2007 and 2008 appeared to be normal (low T and E concentrations and T/E ratio around 1.0). The Appellant's A and B sample results from 2010 are well above the T/E ratios and the T and E concentrations found in the female population as well as above her own values from previous tests; (iv) the Appellant's T/E profiles filed do clearly constitute a proof of the administration of a source of testosterone (see WADA TD2004EAAS, point 5, page 4) and (v) the study quoted by the Appellant refers to men and she does not demonstrate how she would benefit from its conclusions as a Caucasian female.

9.4.3 The expert Prof. Ayotte explained that based on the blood sample values provided by the Appellant no conclusion is possible to state that the Appellant did not use testosterone over a long period. In general urine samples are more suitable for testosterone testing than blood samples. Dr. Saugy stated that Asians do generally have lower testosterone production, however, this does not change anything for the ratio T/E. Further the Appellant is a Caucasian and in referring to the steroid profiles filed as proofs R-13.1 to R-13.4 and looking at the stated T/E ratios, the values of the Barcelona laboratory do clearly show a much higher value. Bottom line is that the ethnic roots are not of importance for the test to be decided in the case at hand. Prof. Ayotte repeated that the IRMS confirmation test has clearly shown the existence of exogenous testosterone in the Appellant's urine sample. The T/E ratio for a person stays pretty stable; in other words every person has its own T/E value, which will not change dramatically unless it is manipulated with the application of exogenous testosterone. She confirmed that there is no information (publications) available regarding the testosterone production for a person being diagnosed with an endocrinal disorder. Prof. Segura confirmed that the testing procedure for T/E ratio is optimized today

and the results received in this case are a clear positive test result, especially as the values are clearly above the regular values shown in the steroid profiles provided by the Appellant as proofs.

CONCLUSIONS

9.4.4 The Panel is of the opinion that the proofs offered do clearly show that the doping analysis test used by the laboratory in Barcelona is reliable and the doubts raised by the Appellant do not have any stand. The Appellant did in no way prove why and how she should benefit from the results of studies she relies on. The WADA standards were undoubtedly observed in the present case. The Appellant's longitudinal profile clearly demonstrates that her A and B sample results from 2010 are well above her previous test results provided.

9.5 **Is it correct that the A and B sample reports are inexact and inaccurate which leads to the conclusion that the laboratory results are not reliable?**

9.5.1 The Appellant pretends that the main purpose of the International Standard for Laboratories (ISL) has not been achieved in the present case and CAS determined that such doping tests are invalid when the ISL was not respected. She considers that several violations to the ISL are established:

(a) it is not correct to compare two peaks with absolutely different heights (p. 95 of the A Report), i.e. very high peaks of etiocholanone and androsterone with very low peak of pregnandiol;

(b) the peak height of pregnandiol was lower than 100 mV and therefore not providing reliable results and in addition, in the sample A and sample B, the measurement value and the average standard deviation is presented rather than the uncertainty with coverage factor;

(c) the five testing measurements of CO_2 (before and after the sample analysis) produced different results and significant inexactitutes of C_{13}/C_{12} values which clearly indicated that the system was unstable.

Further the delta value on which the whole prosecution is based, is on the limit, i.e. 3.9 +/ - 0.8;

(d) the Appellant states that the RRT of analytes in GC/MSD do not correspond in the case at hand and according to WADA TD2010IDICR, the RRT shall not differ by more than +/-1%, while in the present case it is more than 2% for all of the compounds thus clearly showing that steroids could have been identified incorrectly and the isotope composition of carbon could have been determined for wrong steroids;

(e) there are discrepancies in retention time of steroids while comparing Reference Sample and the Sample of Interest (D1002358). E.g. the etiocholanolone retention time in the sample ORE L25 F34 3/3 is 906.2s, while in the sample D1002358 F34 3/3 eticholanolone assigned to peak with a retention time of 911.7s. The Appellant believes that the difference of 5.5s is a reason to doubt the correct attribution of peaks, because retention times of other peaks (such as an internal standard) differ less than 0.5s. She pretends that the ISL clearly establishes that the ISL, including all Annexes and TD's, is mandatory for all signatories to the WADA Code and therefore a non-compliance with the abovementioned TD makes the laboratory results invalid.

9.5.2 The First Respondent states there is no doubt that the doping offence has been established at the necessary standard of proof. According to page 13 of the A Sample Report, the Appellant's T/E ratio was measured at 16.0 which is well above the threshold established by WADA of 4.0 (WADA TD2004EAAS, p. 2). The concentration of testosterone glucuronide, adjusted for the specific gravity of the sample (1.014), was measured at the very high level of 91.8 ng/mL. This value is clearly abnormal for female athletes. The First Respondent opposes and contests arguments given by the Appellant as follows:

(a) re the Appellant's statements under 9.5.1(a) and 9.5.1(b): The peak heights do not impact the results received as long as the abundance of the peaks was within the range of linearity of the method, therefore, whether a peak is smaller or bigger, its delta value remains the same within that range and the absolute values are then compared with each others. The instruments used by the Barcelona laboratory provide for reliable results in all ranges and peak heights measured in the present case. As the WADA TD2004EAAS does not contain any limitations regarding the different height of peaks, the issue does not merit any comment in the technical documents.

(b) re the Appellant's statement under 9.5.1(c): The so called "testing measurements" are pulses of calibrated CO_2 and the CO_2 values for the sample A confirmation were reviewed by Prof. Ayotte, confirming the stability of the system. Further the standard deviation of all CO_2 pulses is well within the acceptable standard deviations. The delta value stated in the Appeal Brief (3.9 +/ - 0.8.) is a mixture of the results for A and B samples being therefore without mathematical basis, because these two values must be handled independently. The correct data are on p. 107 of the A sample report (-3.965) respectively p. 45 of the B sample report (-4.298) and they are consistent with the administration of testosterone (see TD2004EAAS: administration of a steroid when C_{13}/C_{12} value measured for the metabolite(s) differs significantly, i.e. by 3 delta units or more from that of the urinary reference chosen). Further, the Appellant's submission that the delta value is on the limit, is of no avail as the delta unit value of 3.9 includes already sufficient safety margin to which tolerance of +/- 0.8 is added. In addition, the delta value of etiocholanolone is below -28 in both samples, which is already enough to be considered as an adverse analytical finding (TD2004EAAS, p. 3);

(c) re the Appellant's statement under (d): It is the First Respondent's view, that (i) the Appellant asserts that the RRT of the analytes in GC/MSD analyses do not match to those of GC/C/IRMS and (ii)

the RRT should not differ by more than +/- 1%. This is a wrong interpretation of the TD2010IDCR as confirmed by comments of Prof. Segura of 14 January 2011 (p.1) and of Dr. Saugy of 4 February 2011 (p. 3). The identification criteria are applied within the assay, not between the assays and therefore the comparison of retention times and mass spectra is made for the GC/MSD assay between the analytes androsterone, etiocholanolone and pregnandiol in the Athlete's sample versus the reference material PADE (p. 46 of the B Sample Report, the sequence of analysis "Diagrama de Flujo" indicates that the etiocholanolone and identification was "OK" when compared to the "mostra de referencia", i.e. échantillon de référence). Further one cannot expect the retention times of the GC/C/IRMS) instrument to match exactly that of the GC/MSD which is an instrument with a different configuration. The etiocholanolone, the most intense peak in the fraction analyzed by GC/C/IRMS, was still the most intense peak when the same fraction was analyzed by GC/MSD and in both instances, the laboratory concluded that it matched the retention time of the reference material etiocholanolone;

(d) re the Appellant's statement under 9.5.1(e): The First Respondent rejects such allegation of discrepancies in retention times of etiocholanolone because all requirements of the quoted TD2010IDCR were met. There is no confusion possible between the peaks since in both samples, etiocholanolone is the most abundant peak. Secondly, 5s to 911s is 0.5%, which is well within any tolerance (TD2010IDCR). The retention times of etiocholanolone in the reference sample and the Appellant's samples are clearly within the acceptable limits and indicate the same substance. The difference in 3 delta units as one of the WADA criteria for considering an adverse analytical finding is based on a long experience of experimental data accumulated by laboratories and reference population statistics, therefore this

difference includes already the measurement uncertainty in the data considered.

9.5.3 In relation to the core question if the A and B sample reports are inexact and inaccurate the experts made the following statements:

(a) Dr. Garbaras states that he has clear doubts about the reliability of the laboratory results due to inexactitudes and inaccuracies of the A and B sample reports.

(b) Prof. Ayotte is convinced about the reliability of the laboratory results.

(c) Dr. Saugy states that the T/E ratio is clear and reliable and with the IRMS confirmation he has absolutely no doubt about the reliability of this positive test result.

(d) Prof. Segura is convinced about the reliability of the results as well.

More specifically Dr. Garbaras explained that when testing for pregnandiol e.g. it is important to be within the linear mode of the machine. He refers to proof R-20, a fax letter from the laboratory of Barcelona of 4 November 2011, and states that the big peaks are below the range of 9000 to 12000 mV and therefore made at low intensity respectively under the linearity mode of the machine. He is of the opinion that testing below the linearity mode will lead to non-reliable results as the method is only working properly within the linearity mode of the machine. For this reason the results received are not accurate which was stated in his report sent on 24 January 2012. In other words pregnandiol could not have been measured properly in the Appellant's sample as it was below the linearity mode of the machine. Prof. Segura disagreed and referred to the WADA document regarding mass spectrometry where one can find statements regarding low and high intensity; however, in these documents nothing is stated that e.g. the testing - as made in this case - shall not be possible with low or high intensity. All documents regarding the machine where sent to the CAS on the Appellant's request. The test of linearity was made by the producer of the machine in the range of 600

to 6'000 mV. A producer will certainly not check the whole range of the linearity; this is similar to a TV installation where three or four channels will be tested out of a total of maybe 200 (or more) programs received. Based on the laboratory's experience and multiple tests made, the machine is certainly working in linearity mode between 500 to 13'000 mV. The delta (probability if result is ok) was checked for low and high intensity. Therefore the measurement was done in a correct way and ended in an absolutely reliable result. Dr. Garbaras referred to a FINA decision of 2007 where it is stated that a new validation is needed in case the machine was operating outside the linearity mode. Prof. Segura replied that today (five years after this FINA decision) there are enough reliable results available for clarifying the linearity mode of the machine.

Concerning the Appellant's statement that the reports were not done in accordance to the ISL, Dr. Garbaras supports this statement quoting the rule demanding that the measurement uncertainty, the coverage factor, k, and a level of confidence of 95% are given and such was not done in the test at hand. Prof. Ayotte contradicted that the comparison of the small and big peaks related to the intensity does not show a significant difference based on the documents from the laboratory in Barcelona. In the test at hand there was absolutely no bias recognized. The laboratory in Barcelona has a lot of experience for such tests and therefore belongs to one of the world's best laboratories for detecting testosterone. Page 107 of 112 of the A sample results package shows that with the same intensity always the same results were reached; negative stayed negative and positive stayed positive. If the laboratory would not comply with the different standards, the ISO accreditation would be deprived. Further there is no obvious bias in the interpretation of the results to be seen. It is of importance to know for the expert Garbaras that testosterone and the ratio T/E is not a threshold substance. For sure the uncertainty and the standard deviation are important for test results. She is absolutely convinced that based on the documents the A and B sample tests are fully accurate and reliable. Dr. Saugy added that based on their experience the machine is working in linearity mode even between 500 to 25'000 mV.

The laboratory in Lausanne often compares the results with the laboratory in Barcelona and like this they gain more experiences about the machines used. Even if the producer of the machines states that the linearity mode is given starting from 1'000 mV, the linearity may be expanded without any problem down to 500/600 mV with the experience of many tests made. The value delta-delta is in the case at hand bigger than three. The results received with the IRMS of less than -28 show clearly that exogenous testosterone was in the urine sample of the Appellant.

Prof. Segura confirmed that once a year the machines are tested; for the linearity the tests are made every three to six months when the standard operating method is applied. He explained the definition of the standard deviation and uncertainty and confirmed the statement of Prof. Ayotte that Dr. Garbaras applied the wrong concept since testosterone is definitely not a threshold substance. Speaking about the ISL and the threshold section is wrong since, as agreed by the experts Segura, Ayotte and Saugy, testosterone is not a threshold substance. He refers to the appropriate WADA documents.

Concerning the delta value, Dr. Garbaras explained that in the case at hand the delta value is not reaching the limit of 3‰ which it has to reach based on the ISO standard 17025. Prof. Ayotte replied that even Dr. Garbaras does not know the uncertainty in this case and he therefore just calculated this uncertainty based on a formula he thinks is right. She confirmed that the delta value is certainly reaching the necessary 3‰; the same is confirmed by Dr. Saugy, stating that in the case at hand the delta value of 3‰ is clearly reached.

Dr. Garbaras stated that the repeated measurements of etiocholanolone do all show the same retention time. However, when the sample of the Appellant was tested, there was suddenly a much bigger retention time of 4.1 seconds. This means that it cannot be excluded that two compounds were measured at the same time which would lead to an incorrect measurement and result. This is contradicted by Prof. Ayotte stating that

Dr. Garbaras' statement is completely wrong. The whole test in the case at hand was made in full accordance to the technical documents and the test result is absolutely correct. Dr. Saugy agreed with Prof. Ayotte and Prof. Segura had absolutely no doubts about the reliability of the test made by his laboratory. On the First Respondent's request Dr. Garbaras explained that he never worked in the field of anti-doping testing, he never published in relation to anti-doping testing and he was never present or did run a test in accordance to WADA rules.

CONCLUSIONS

9.5.1 The Panel considers the discussion about the inexactitudes and inaccuracies of the A and B sample reports as a pure technical question. Therefore the authenticity of documentation, correctness of analytical methods applied, reliability of instruments and interpretation of the results are of prerequisite. The Panel assessed the commentaries, evaluation of documentations and statements of the parties as well as of the experts and is convinced that the tests were made in an exact and accurate way, complying with the relevant standards and therefore the test results shown in the A and B sample test results are fully reliable. Further:

- testosterone is not a threshold substance;
- the method applied was relevant, the instruments used provided for reliable results in all ranges, the peak heights did not impact the results and the delta values were correct;
- the Appellant did not prove that the system was unstable; to the contrary, it was established that the system was stable and that the standard deviation of all CO_2 pulses was within the acceptable standard deviations;
- the Appellant did not prove that the delta value was on the limit, i.e. 3.9 +/ - 0.8. Following the evaluation of the experts' testimonies the Panel considers the argumentation of the First Respondent convincing; as the burden of proof lays on the Appellant her argument has therefore not been proven;
- the Appellant did not convince the Panel that steroids could have been identified incorrectly and the isotope composition of carbon could have been determined for wrong steroids in the case at hand. Following the evaluation of

the experts' testimonies the Panel considers the argumentation of the First Respondent as founded;

- the Appellant did not prove that there was a confusion between the peaks and that the retention times of etiocholanolone in the reference sample and the Appellant's samples were not within the acceptable limits. In this respect the Panel follows the testimony of the expert, Prof. Ayotte.

9.6 Measurements uncertainty according to ISO 17025

9.6.1 The issue concerning measurements uncertainty according to ISO 17025, mentioned in the appeal brief (no. 85 to 88) and the First Respondent's answer (no. 92 to 94) is already dealt with in the reasoning above.

10. Medical situation of the Appellant and special circumstances of the sample collection

10.1 The Appellant offers additional explanations as to why the Appellant failed in her doping examination as follows:

- a marathon race and similar physical stress may lead to a hormonal imbalance and severe cellular damages;

- endocrinal disorders and internal hormonal imbalance;

- possible impact in relation to food consumed with Duphaston

10.2 Does a marathon race and similar physical stress may lead to a hormonal imbalance and severe cellular damages?

10.2.1 The Appellant pretends that as the samples were obtained immediately after her marathon race, based on a study (*Hale, Kosasa, Pepper, A marathon: the immediate effect on female runners' luteinizing hormone follicle-stimulating hormone, prolactin, testosterone and cortisol levels*), revealing that in the post-marathon female group cortisol levels showed a mean increase of 211% (p=less than 0.005), FSH levels remained unchanged, LH levels were reduced by 36% (p=less than 0.005), prolactin levels showed a mean

increase of 327% (p=less than 0.005), her hormone profile was altered.

10.2.2 The First Respondent points to Dr. Saugy's report of 4 February 2011, showing that physical activity does not explain the variation of more than 60% of the athlete's basal profile. The study quoted by the Appellant only deals with changes in hormone concentrations but did not investigate carbon isotope ratios (CIR=IRMS). Further there is no literature showing any influence on IRMS by physical activity, however, there is one investigation showing that no significant difference can be found in IRMS between in-competition and out-of competition samples (Piper, Flenker Mareck, Schänzer (C_{13}/C_{12} ratios of endogenous urinary steroids investigated for doping control purposes, Drug Test. Analysis, 2009, 1, 65-72).

10.2.3 Prof. Ayotte clearly stated that even severe physical training does not have any influence on testosterone.

CONCLUSIONS

10.2.4 The question to be answered is a scientific, technical question and as two studies are confronted the experts' testimonies are of importance. Two expert statements supported the First Respondent's arguments and there was no expert statement in favour of the Appellant's arguments. The study quoted by the Appellant is much more general in comparison with the study quoted in support for Dr. Saugy's argumentation. The Panel concludes that the Appellant did not bring persuasive arguments in support of her pretentions, especially when confronted with the arguments brought up by the First Respondent. Considering that the Appellant has the burden of proof, the Panel holds that a marathon race and similar physical stress may not lead to a hormonal imbalance and severe cellular damages in an athlete's body respectively in the Appellant's body.

10.3 **Does the Appellant's endocrinal disorder and internal hormonal imbalance have any influence on the testosterone value and is there an impact possible in relation to food consumed with Duphaston?**

10.3.1 The Appellant claims that she was diagnosed with non-classic adrenal cortical hyperplasia of central origin and that the disorders of functioning of her adrenal glands, hypothalamus and hypophisis determined the current hormonal changes and caused an internal hormonal imbalance. She had to cyclically use Duphaston to regulate the menstrual cycle and prevent endometrial proliferation. She pretends that Duphaston as synthetic substance *"stimulates exogenous steroid in the testing"*. The blood analysis results of the Gemeinschaftslabor in Cottbus (3.11.2011 by UAB "SK Impeks Medicinos diagnostikos centras" and 22.11.2011 by "Medicina practica laboratorija") indicate that even two months after the competition when the Appellant was not training actively, the level of DHEA in her sample was 6.71 at non-menstruating days and 12.98 on menstruating days. Such fluctuations are even bigger under mental and physical stress conditions during the competition. Different studies show that these particular blood parameters are very important for doping controls and may clearly indicate the misuse of androgenic steroids. In the Appellant's blood analysis results of December 2009, April 2010, August 2010 and November 2010 all important parameters were normal. Further the Appellant quotes another study showing a significant decrease of SHBG, LH and other parameters in doping users even after 3, 6 or 9 months after the administration of prohibited substances; this decrease is not observed in the Appellant's case. She points out that attention has to be paid to the androsterone and etiocholanolone ratios which are normal in the Appellant's case and contradicts Dr. Saugy's comments. Further a recent study referring to women with menstrual disturbances and with low estradiol and progesterone serum levels concludes that they have an attenuated anabolic hormone response to acute resistance exercise, suggesting menstrual disorders

accompanying low ovarian hormone levels may affect exercise-induced change in anabolic hormones in women.

10.3.2 The First Respondent points out that the diagnosis is dated 29 November 2010 and therefore made only after the adverse analytical finding. The use of Duphastone was the first time revealed in the Appellant's letter to the First Respondent on 30 November 2010. In her explanation to the Second Respondent of 27 August 2010 the Appellant said that she sometimes had to take it but did not state that she had taken Duphastone shortly before the competition respectively the doping test in discussion here. All her blood tests were made after the adverse analytical finding and they do not discharge her but rather exclude any genetic endogenous irregularity. It is scientifically wrong to draw the Appellant's converse conclusion that a stable ratio can provide any evidence for not having misused anabolic steroids. The study quoted by the Appellant did not investigate the IRMS and there is also no literature showing any influence on IRMS by the menstrual cycle; to the contrary, a survey shows that IRMS results do not change over the course of menstrual cycle (Piper, Emery, Saugy, Recent developments in use of isotope ratio mass spectrometry in sports drug testing, Anal. Bioanal. Chem 2011, DOI 10.007/s00216-011-4886-6). Finally, the IRMS analysis of the urinary testosterone metabolites performed by the Barcelona laboratory provided conclusive evidence in support of the application of a steroid related to testosterone by establishing the exogenous basis of the testosterone metabolites found in the Appellant's urine sample.

10.3.3 Dr. Garbaras stated that the structure of Duphaston is similar to testosterone. There is not a lot known about its reaction and in the urine sample there should be the derivative of Duphaston traceable. He thinks that the chances are bigger than 10% that one compound was missed in the testing. Prof. Ayotte clearly contradicted Dr. Garbaras' statement and insisted that there is absolutely no similarity between Duphaston and testosterone. She further excluded the possibility that Duphaston will change into a structure like

testosterone. Dr. Saugy confirmed that a change from Duphaston into etiocholanolone is not possible. Consequently Dr. Garbaras corrected his statement saying that as an expert of mass spectrometry he is mainly talking about the isotopic ratio and not the chemical structure.

10.3.4 The Appellant explained that she was taking Duphaston from time to time (supported by her explanation to the Respondents dated 27 August 2010 where she explained that she had *"… to take Duphaston in order to normalize the balance of progesterone and have my menstrual flow."*). Contrary to that explanation the Appellant was very precise when she delivered a list of substances taken in the preparation of the marathon race of 31 July 2010 and explicitly informed the First Respondent that at the beginning of the diet she *"... started to take Duphaston, which I took last time before the warm up before the race day"*. She testified that she did not explicitly mention Duphaston on the doping form because taking the medicine was very personal and intimate therefore it was painful and difficult to speak about it.

CONCLUSIONS

10.4 The diagnosis of the Appellant's endocrinal disorder and internal hormonal imbalance was made only after the adverse analytical finding; the use of Duphastone is evidenced, but the Appellant did not report it until after the adverse analytical finding. Prof. Ayotte explained in her expert statement that nothing related to endocrinal disorders/internal hormonal imbalance and any possible influence on testosterone is found in the literature. Important to know is, however, that even if an increase in the production of testosterone would result from an internal hormonal imbalance, this would be without any influence on the IRMS test result as this clearly shows the presence of exogenous testosterone. Further Dr. Saugy stated that he has never seen in female athletes in sports any influence of their endocrinal disorders/internal hormonal imbalance on testosterone values.

10.5 The question whether there is an impact possible in relation to food consumed with Duphaston is of hypothetical nature. Fact is, that the Appellant did not report the use of Duphaston on the doping control form; the reasons stated by the Appellant, why she did not report it, do not matter here as they are not designated to relieve her. For the Panel the expert opinions of Prof. Ayotte and Dr. Saugy are convincing and there was no expert opinion in favour of the Appellant. The Appellant did not bring any scientific evidence to show that there is an impact possible in relation to food consumed together with Duphaston and what sort of impact this could or should be. Based on the Appellant's burden of proof the Panel is of the opinion, based on the expert witnesses heard, that there is no impact possible in relation of food consumed together with Duphaston.

11. **Is it correct that the single use of testosterone does not enhance the performance?**

11.1 The Appellant states that middle and long distance runners do not need higher levels of testosterone and therefore the administration of testosterone is not performance enhancing. Based on this the Appellant does not have any significant fault. The First Respondent disagrees.

11.2 Following Prof. Ayotte there are no results known regarding a single use of testosterone. However, the history of doping offenders in sports and the experience of endurance athletes taking doping are rather long and it starts with e.g. Mary Slaney Decker and continues with long distance swimmers being tested positive. Testosterone is mainly taken to increase the recovery between trainings and races as well as to increase the stamina and energy for races. Dr. Saugy stated that in endurance sports like cycling and track & field testosterone is the no. 1 of forbidden substances taken. This is mainly due to the hard trainings done before a race and testosterone helping to recover faster and better. He explained that testosterone stabilizes the haematocrit, as well.

CONCLUSIONS

11.3 It is irrelevant whether the prohibited substance identified and resulted in adverse analytical finding enhanced or was capable to enhance the performance. Testosterone is not a specified substance within the meaning of IAAF

Competition Rule 40.4 and Article 10.4 of the WADC. Exogenous testosterone is a forbidden substance. Prof. Ayotte and Dr. Saugy clearly explained in a convincing way for the Panel, that the use of testosterone results in helping to recover faster and better and stabilizing the haematocrit; therefore, at least indirectly, testosterone enhances the performance.

12. **No fault, no negligence / No significant fault or negligence**

12.1 The Appellant pretends without giving any details that she bears no fault or negligence. She relies on Article 10.5 of the WADA code 2009 (No fault or negligence), on the Rule 38.15 of the IAAF Competition Rules 2010-2011 and consequently on the IAAF Rule 40 concerning the elimination or reduction of the period of ineligibility.

12.2 The Appellant subsidiarily claims that she has no significant fault or negligence and relies on (i) the fact that the substance in her system did not enhance her performance as a long distance runner, (ii) her age can alter the test results contrary to her interests and (iii) that she ingested Duphaston along with the certain foods which certainly would have affected her test results. She relies on Article 10.5.2 of the WADA 2009 Code.

12.3 The First Respondent opposes the Appellant's request that she does not bear any fault or negligence respectively subsidiarily no significant fault or negligence as she did not establish how the prohibited substance entered her body.

CONCLUSIONS

12.4 The Appellant claims that she did not administer or use a prohibited substance, however, she mainly argues with not directly related statements, namely the violation of the fundamental right, validity of the decision of national federation, deprivation of the right to a timely and fair hearing, the Respondents fail in the determination of doping offence (split into reliability of the test analysis, inexactitudes and inaccuracies of the A an B test reports which could lead to the conclusion that the results are not reliable, relevance of issues with measurement uncertainty according to ISO 17025 standard, testosterone not helping in long

distance running). She further calls upon special circumstances (the impact of her medical situation, special circumstances of the sample collection, marathon race as a stress and endocrinal disorders and internal hormonal imbalance).

12.5 In order to benefit from the institute of no fault or negligence, the Appellant must establish how the prohibited substance entered her system. The Appellant did not give any realistic explanation how the exogenous testosterone entered her system. It is not possible for the Panel, after reviewing the documentation and assisting to the Appellant's hearing, to state that the Appellant exercised with "utmost caution". The Panel follows the standards developed in the CAS jurisprudence and understands the "*utmost caution*" as in CAS 2006/A/1025 M. Puerta v/ITF at 11.4.3.: the athlete must establish, to the satisfaction of the Panel, that the athlete took all of the steps that could reasonably be expected of him to avoid ingesting prohibited substance and it would be unreasonable to require the athlete to take any other steps. The athlete is responsible for the presence of a prohibited substance in her bodily specimen. The Appellant is an experienced athlete and even if it would be true – what was never proven in this case – that the prohibited (exogenous!) substance suddenly appeared in her body by taking Duphaston, it already is negligent by the Appellant willing to compete in a continental or world championship, to use a medical product "*not leaving no reasonable stone unturned*" (standard from CAS 2009/A/1870 WADA v. Hardy & USADA at 120) in researching whether such a substance might cause effects prohibited by anti-doping rules. Therefore the Panel considers that the Appellant acted at least in a negligent way and she is fully responsible for what happened. The Panel does not see any argument why the Appellant does not bear *no fault or negligence* in the sense of Rule 38.15 of the IAAF Competition Rules 2010-2011 and consequently on the IAAF Rule 40. Therefore, the Panel decides that the elimination of the Period of Ineligibility is not possible in the case at hand.

12.6 To get a reduction of the period of ineligibility the Appellant must establish (i) how the prohibited substance entered into her system and (ii) that she bears no significant fault or negligence. In referring to the arguments above, the Panel notes that the Appellant did not establish how the exogenous testosterone entered her body. However, despite this fact that the Appellant did not establish how the prohibited substance entered into her system, the Panel examines also the second

condition (no significant fault or negligence). The issue whether an athlete's negligence is "significant" or not has been much discussed in the CAS jurisprudence (e.g., CAS 2005/A/847 *Knauss v/ FIS*; CAS 2008/A/1489 *Despres v/ CCES* & CAS 2008/A/1510 *WADA v/ Despres, CCES and Bobsleigh Canada Skeleton*; CAS 2006/A/1025 *Puerta v/ ITF*; CAS 2005/A/830 *Squizzato v/ FINA*; CAS 2005/A/951 *Cañas v/ ATP Tour, Inc.*; CAS 2004/A/690 *Hipperdinger v/ ATP Tour, Inc.*; CAS OG 04/003 *Edwards v/ IAAF*). A period of ineligibility can only be reduced based on non significant fault or negligence in cases where the circumstances are truly exceptional and not in the vast majority of cases (Within the above quoted CAS award in the Hardy case at para. 117: for instance, a reduced sanction based on no significant fault or negligence can be applied where the athlete establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to prohibited substances and the athlete exercised care in not taking other nutritional supplements; *cf.* Despres Award, at § 7.4, quoting from the official commentary of the WADC). After examining all circumstances of the present case the Panel considers that it is not possible to define any of the circumstances pretended by the Appellant to be truly exceptional. Therefore the Appellant cannot benefit from a reduction of her sanction based on her allegation that she bears no significant fault or negligence.

In rejecting all other allegations of the Appellant, the Panel hereby confirms the Appellant's positive doping test result and her anti-doping rule violation under Rule 32.2, Chapter 3 (Anti-Doping) of the IAAF Competition Rules 2010-2011 and consequently a ban of two years.

* * *

13. COSTS

13.1 Pursuant to Article R65.2 of the Code, disciplinary cases of an international nature shall be free of charge, except for the Court Office fee to be paid by the Appellant and retained by the CAS.

13.2 Article R65.3 of the Code states: "[*t*]*he costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties*".

13.3 As this is a disciplinary case of an international nature, which was brought to CAS by the Appellant as international level athlete in appealing a decision issued by the First Respondent, the proceedings will be free of charge, except for the minimum Court Office fee of CHF 500, already paid by the Appellant, which is retained by the CAS (art. 65.2 of the Code).

13.4 As the Appellant's appeal is fully rejected the Respondents must be considered the prevailing parties, thus, being entitled – in principle – to recover the costs incurred by them. In further considering the financial resources of the parties, the Panel deems it appropriate that the Parties bear their own costs, including costs and expenses for its witnesses and experts, incurred in connection with these arbitration proceedings.

* * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Mrs. Zivile Balciunaite against the decision no. 3 of the Disciplinary Commission of the Athletic Federation of Lithuania, dated 5 April 2011, is dismissed.

2. The decision no. 3 rendered on 5 April 2011 of the Disciplinary Commission of the Athletic Federation of Lithuania is confirmed, including the ban of two years, starting on 6 September 2010.

3. This award is pronounced without costs, except for the Court Office fee of CHF 500 (five hundred Swiss Francs) already paid by Mrs. Zivile Balciunaite which is retained by the CAS.

4. Each party shall bear its own costs and expenses incurred by this procedure.

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

Done in Lausanne, 30 March 2012

THE COURT OF ARBITRATION FOR SPORT

Peter **Grilc**
President of the Panel

Bernhard **Welten**
Arbitrator

Marcos **de Robles**
Arbitrator